Deliverable 1

The Protection of EU Financial Interests across Four National Legal Systems: a Comparative Perspective

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The Protection of EU Financial Interests across Four National Legal Systems: a Comparative Perspective

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INTRODUCTION

Deliverable No 1 (D.1) aims to study four national frameworks regarding the measures designed to protect the EU's financial interests, also taking into account the supranational level presented in Deliverable No 2 (D.2). The analytical tools adopted belong to the legal disciplines; in particular, of EU law, criminal law, administrative law, constitutional law, and comparative law.

In order to help comparison among countries, the same outline has been followed by all four national research groups: Task 1, Task 2, Task 3, and Task 4. The leading idea is to prepare the reasoning in Task 4 through the information made available in the previous tasks.

Task No 1 aims to present the National institutional governance for the management of ESI funds (mainly the ERDF and the ESF), considering the incidence of these European resources on the legal system and the adoption of the shared administration model. For this purpose, a section has also been dedicated to a brief clarification of the national territorial system. At the same time, the task introduces, where relevant, the alternative national system for the management of other European resources (such as the programmes under the NGEU).

Task No 2 serves to introduce, where available, data on the incidence of criminal offences in EU resource management at the national level. Then, the section introduces the main kind of crimes that the legal order provides for in order to address fraud in the sector in question. When useful to clarify the context, the task also presents in advance the implementation of the PIF Directive in the national context.

Task No 3. provides information about other relevant constitutional aspects, mainly on the access to justice and the political control over the protection of the EU's financial interest. The main goal is to complete the context with the presentation of the concrete rights and interests involved in the management of European funds, with all the specificities of the national systems – such as those relating to jurisdiction or the constitutional balance between powers and institutions (i.e., Parliament and Government).

Task No 4, to conclude, presents the system of administrative and criminal controls over the management of public resources. Hence, after offering an overview of institutional governance for the managing the main forms of European funds and relevant issues by the Criminal and Constitutional Law systems, the closing section examines the core of the national activities and tools supporting the mission to protect the EU's financial system and the implementation of the European normative framework, as specified in D.2.

In addition to the general part, comprising the four tasks, a special part is dedicated to the national specificities of three case studies, where the European contextualisation is provided, again, in D.2. These regard the European funds that have been relevant of late, given the economic and the pandemic crises: RescEU, SURE, ESIF.

Obviously, this common plan was discussed in advance with all the participants, with the possibility of adapting it according to the specificities of each national legal system. In addition, since the first legal system to be presented is that of Italy, the specific national section provides, at the beginning of each task, some general elements that can be useful for the other countries as well (i.e. general information regarding the EU budget, the PIF Directive, relevant European Jurisprudence, or pieces of legislation). The results for the single research are summed up at the end of each national section, while the overall conclusions of the comparison can be found at the end of the deliverable, presented with the help of a table.

The main questions that can be taken into account regarding D.1. are the following: are National territorial systems (centralised, decentralised, regional/federal) significant variables for performance in EU funds management? If so, what kinds of systems perform better in protecting the EU's financial interest? Why? How do they influence governance for EU resource management (Task 1)? Are there any significant differences between the protection of the National and the EU's financial interests? How much has the PIF Directive influenced the national system (Task 2)? Is there any specificity in the

access to justice regarding the protection of the EU's financial interests? How does jurisdiction work in this field? How is the interest effectively protected? Is there any space for political/parliamentary control (Task 3)? What kind of administrative controls are carried out? Is better performance in resource management related to more efficient administrative controls (*ex ante*, *in itinere*, *ex post*)? What is the role of criminal law? How does co-ordination between different administrations work? How does co-ordination between administrative and criminal controls work? How does co-ordination with EU institutions work (Task 4)?

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ITALY - SECTION I

TASK 1, D1, ITALY

Dr. Elisabetta Tatì

Summary: 1. Introduction; 2. The Italian territorial system in brief; 3. The Italian EU structural and investment fund management system during the last MFF; 4. Performances and new scenarios.

1. Introduction

The lion's share of the European Union (EU) budget (around 75%) goes to regional development, agriculture, and fighting against climate change. In addition, only 18% of the EU budget is directly managed by the Commission. 8% of the EU budget is managed indirectly by international organisations, decentralised agencies, third countries, etc., while the major share of the EU funds (74%) is spent together with Member States under what is known as shared management. Under the programmes of the 2014–2020 Multiannual Financial Framework (MFF), the cohesion policy received 350 billion euros, 36% of the EU long-term budget, as also specified in the Common strategic framework (see D.2. and, for a short view, The EU budget at a glance, 2019).

At the beginning of the 2014-2020 period, Italy invested 71 billion euros in this policy, 42 coming from the EU budget – 2% of the Italian GDP, 24 from national resources – the *fondi di rotazione* – and 4.5 from regional resources (updates available here, 5). The country has 75 operational programmes active across 4 funds, part of the SIF system, as specified in the 2014 Partnership Agreement (PA) with the European Commission (EC), updated in 2018. There are 39 regional operational programmes, and 12 national operational ones have been allocated to the European Fund for Regional development (THE ERDF) and the European Social Fund (ESF). These are the *Programmi operativi nazionali* and *regionali* (PON and POR). In addition, there have been 21 rural development plans and 2 other PONs financed by the EFRD and one PON by the European Maritime and Fisheries Fund (EMFF). Of the 24 billion euros coming from the twinEu budget, 30 billion euros have been managed through PORs while 12 billion euros have been administered through PONs (see the European Planning Guide, 2014).

For all these reasons, the choice has been to focus mainly on the Cohesion Policy (CP) for the task, even though another important policy sector in terms of funding through shared management, especially for Italy, has always been the Common Agricultural Policy (CAP) (Dossier Senato 2017, 19). The majority of the resources, as seen, have been allocated through the ESF and the ERDF. Hence, the governance systems for both these funds are well worth analysing in terms of protecting the EU's financial interests, also at the decentralised territorial level (Notarmurzi, 2014, 567 ff.; Manzella, 2011). In fact, above all the implementation of the ERDF reflects the idea of European multilevel governance, directly involving regional, urban and, most in general, territorial authorities according to the specificities of each country (Ekaterina, 2014, 566 ff.). For example, the most distinctive feature of EU regional policy in Italy consists in the fact that many regions in the south were included in the Convergence Objective as "less developed regions'' in 2014-2020. In the first category are Sicily, Calabria, Puglia, Campania and Basilicata, while the regions in the second are Molise, Abruzzo and Sardegna. These regions have received more than double per capita resources from structural funds compared with the rest of the country; funds that have partially protected them from a strong reduction in transfers from the central government (Dossier Senato 2018, 67).

With multi-level governance of EU funds, introduced by the partnership principle, the quality of national or regional institutions has become a significant factor in the debate on the influence that this performance can have on the impact of the funds (evidence of a direct correlation can be found in many works quoted in the Dossier Senato 2018, 67; see also Domorenok, Graziano, Polverari, 2021; Casula, 2020; Matteucci, 2020; Terracciano, Graziano, 2016).

2. The Italian territorial system in brief

In 1948, the Constitution established local autonomy as a fundamental constitutional principle (Article 5). The Constitution also granted legislative powers to the regions (Article 20), but these authorities did not come into operation until 1970. Legislation on the local authorities was renewed under Law No 142/1990, and the first general law on local authorities passed during the Republic. Few years later, Law No 81/1993 introduced the direct election of the mayors and the presidents of the provinces. In 2000, these reforms were consolidated in a new act, No 267. This event was followed by the amendment of Title V of the Constitution (2001). Since the summer of 2011, several legislative proposals for the reorganisation and reduction in number of municipalities and provinces took place, following the *spending review* agenda, together with a reform of the urban authorities. Article 5 of Italy's present Constitution (1948) establishes the principles of autonomy and decentralisation (devolution), stating that: "The Republic, one and indivisible, recognises and promotes local autonomy; it fully applies administrative decentralisation of state services and adopts principles and methods of legislation meeting the requirements of autonomy and decentralisation". The Constitution declares that municipalities, provinces, and metropolitan towns, as well as regions and the State, constitute the basic elements of the Republic (Article 114.1). They all enjoy autonomy (Article 114.2) and regulatory powers (Article 117.6). Under the present constitutional arrangements, regional legislation has become extremely important and complex (the Constitutional Court having an important role in the State-regions conflict of competences). The Constitution establishes that "regions generally have legislative power regarding subjects not expressly reserved to State legislation", such as those in Article 117.2 (Article 117.4). Article 117.3 states that concurring legislation applies to a fixed list of subjects. Apart from having specific administrative functions, local authorities also have the power to organise and develop them (Article 117.6). Moreover, the Constitution declares that "Administrative functions belong to the municipalities except when they are conferred to provinces, metropolitan cities, regions, or the state in order to guarantee uniform practice; the assignment is based on the principles of subsidiarity, differentiation and adequacy" (Article 118.1). On the other hand, the Constitution allows municipalities, provinces, metropolitan towns, and regions (Article 119) to have financial autonomy in the area of revenue and expenditures (see presentations of the Italian territorial system in English from a comparative perspective Villamena in Panara, Varney, 2013; Vandelli in Moreno, 2012; for a broader presentation of the Italian Constitutional framework see below, Task 3).

3. The Italian management system of EU structural and investment funds during the last MFF

The Italian legislator reformed the institutional architecture in support of the CP at the beginning of the MFF 2014-2020. Article 10, Decree Law No 101/2013 provides that the administrative functions of the CP are allocated between the Presidency of the Council of Ministers (*Presidenza del Consiglio dei Ministri*, PCdM) and the Agency for territorial cohesion (*Agenzia per la coesione territoriale*, ACT). The latter is under the vigilance of the PCdM, despite having its own statute and organisational, accounting and budget autonomy. Its governance is based on a Director General, an executive committee and a board of auditors (Article 10.1-4, Decree Law No 101/2013). It has an internal organisation based on the area "Programmes and procedures" area, in support of planning instruments, and on the area "Projects and instruments" area, supporting the implementation of strategic objectives. Co-ordination offices have also been established for the audit activities, first level control, public procurement and innovative financial instruments. The PCdM as a specific Department is working for the CP (hereafter the DPC). It is led by a special minister, a *Ministro senza portafoglio*, normally appointed also for national policies that address the development of South Italy, or by an undersecretary. Both these institutions can be considered the evolution of the old Department for Development and Cohesion (*Dipartimento per le politiche di sviluppo e di coesione*, 1998), under the supervision of the Ministry for economic development. To sum up, the institutional model is now a dualistic one: on the functional side, it is possible to affirm that the DPC coordinates, plans, and implements political directives, while the ACT has the role of guaranteeing and coordinating programmes, projects, and instruments from a more technical-operational point of view (it must be observed that the Ministry of Labour and Social Policies have a coordinating role for the ESF). This

division of tasks is confirmed, for example, by the decision to split the original investment evaluation system into different parts, as provided for by Article 10, Decree Law No 101/2013 and enforced by the PCdM's Decree of 19 November 2014. On the one hand, there is the *Nucleo di valutazione e analisi per la programmazione* (NUVAP) within the DPC – where its "twin brother" also works for national resources under the Department for Political Economics Planning and Co-ordination – and, on the other, the *Nucleo di verifica e controllo* (NUVEC), within the ACT. This kind of division is also clarified and probably reinforced by the last legislative intervention of 2018 (Article 4-*ter*, Decree Law No 86/2018) (Agrelli 2019, Tatì, 2018; Boscariol, 2015; Bellomo, 2014; Baldi, 2014; Di Sciascio 2014; Ekaterina, 2014; Lepore, 2014).

Along the institutional chain, according to the kind of operational programmes and/or projects, different actors are involved in the shared scheme required by EU regulations: the managing, certifying, and audit authorities. Taking, for example, the Lazio POR, the Region is the management authority, in the concrete work of three different departments respectively under regional ESF and ERDF management (*Direzione Regionale Formazione, Ricerca e Innovazione, Scuola e Università, Diritto allo Studio*; *Assessorato Sviluppo Economico – Direzione Regionale per lo Sviluppo Economico e le Attività Produttive*). The certifying authority for the two funds is the regional department called *Direzione Regionale Programmazione Economica, Bilancio, Demanio e Patrimonio*, while the audit authority is the Secretary General of the Regional executive (*Segretariato Generale della Giunta della Regione Lazio*). A monitoring committee (*Comitato di sorveglianza*) has also been appointed, made up of a high number of representatives for different authorities: the regional executive, the regional management authority, various regional director generals, the person in charge of the Plan for Administrative Reinforcement, the DPC, the ACT, the Ministry of Economy and Finance (the *Ministero dell'economia e delle finanze,* MEF), especially the *Ispettorato Generale per i rapporti con l'Unione Europea* – IGRUE, the National Association of Municipalities (ANCI), and other associations representing civil society.

On the other hand, in the *Governance e capacità istituzionali* PON thematic objective (TO) No 11 of the Partnership Agreement, the management and certifying authorities are internal to the ACT, in the persons of two public managers appointed to specific offices (the Audit authority is IGRUE). It is financed by both the ESF and the EFRD. The programme also has two intermediate authorities: the Ministry of Justice and the Department for Public Functions (*Dipartimento per la funzione pubblica*) within the PCdM. The latter hosts the steering group for the programme (*Comitato di pilotagio*), made up of all the national administrations involved in implementing TO No 11, the lead administrations for the ESF and EFRD (DPC, ACT, the Ministry of Labour and Social Policies), a representative group of the Regions as appointed by the State-Regions Conference (*Conferenza Stato-regioni*), a specific institute created after the 2001 Constitutional Reform to enable normative dialogue among different territorial levels, and the DG REGIO and the DG EMPL of the EC. One of the most innovative instruments created to achieve TO No 11, in part under the responsibility and co-ordination of the ACT and in the light of *Governance e capacità istituzionali* PON, is the Plan for Administrative Reinforcement (*Piano di rafforzamento amministrativo,* PRA; see Tatì, 2018; Centurelli, 2017; Centurelli, 2015). The latter is a plan to be adopted together with the operative programme by each management authority – at the highest political level – with the state of the art for administrative capacities in terms of fund management, together with a working programme for skills improvement. For example, PRAs are signed by the Presidents of the Italian Regions or by Ministers. There is also a Network of PRA technical officers, a steering Committee under the co-ordination of the Secretary-General of the PCdM, including representatives of the European Commission, and a technical secretariat**,** coordinated by the ACT. In the Position Paper for Italy, November 2012, the European Commission indicated as a priority a set of direct actions for administrative reinforcement. Ares Note No 969811, March 2014, provided that specific plans addressing these tasks should be adopted at the highest political and administrative level, as, in July 2014, the Country Specific Recommendations highlighted the importance of improving EU funds management and skills building. In fact, results from the 2007-2013 Programme showed the need to improve planning and programming skills, to increase the level of organisation for the management and implementation of PONs and PORs, to increase the connection between responsibilities and results, and to improve civil servants' skills (Italian experience with Plans for Administrative Reinforcement, 2018). At the moment, the results from the second phase

of PARs monitoring are available, as well as the indications for the new funding period 2021-2027. A similar administrative chain to that of the last programme presented is available for the *Città metropolitane* PON (PON METRO), under the responsibility of ACT and IGRUE – the latter for the audit phase. The intermediate authorities are all the 14 urban authorities, in the person of the mayor of the core municipality of a metropolitan city. In fact, apart from the OT relating to the Digital Agenda and the FSE, the resources mainly regard the central rather than the peripheral municipalities.

Some other actors must be mentioned to complete this presentation of the Institutional framework for the 2014-2020 Italian Cohesion policy, namely the Interministerial Economic Programming Committee (*Comitato interministeriale per la programmazione economica* CIPE, now CIPESS but see para. 4), IGRUE, and the Department for European affairs within the PCdM. The role of the latter will be analysed in greater detail in Task No 4, especially in the role of the Italian Anti-fraud Committee (*Comitato per la lotta contro le frodi nei confronti dell'Unione europea*, COLAF). Here it is important to point out that also the National resources contribute to European investments through National complementary funds (*Fondi di rotazione*, Article 5, Law No 183/198 now *Fondi complementari* ex Article 1.242, Law No 147/2013) and the National cohesion and Development Fund (*Fondo per lo sviluppo e la coesione*, FSC). The latter stems from the old funds addressing the under-development of Southern Italy (Articles 60 and 61, Law No 289/2002). Legislative Decree No 88/2011 transformed these funds into a new one, named FSC, the main financial instrument through which development and social, economic, and territorial cohesion policies are implemented, with the specific objective of balancing territorial diversities and gaps (Article 119.5, Const. together with Article 174, TFEU). The CIPE has played a key role in planning and implementing the main objectives of the national economic policy, especially in co-ordination with the European ones (Law No 430/1997). Article 1. 703-706, of Law No 190/2014 confirmed the role of the CIPE in FSC management, through the adoption of specific resolutions for planning and allocating resources among the different national thematic areas and with the co-ordination of the *ad hoc* steering committee (*Cabina di Regia*) for the approval of the operative programmes linked to political indications from the competent minister for cohesion policies. The *Cabina di regia*, under the PCdM, was created in 2016 through a Decree of the PCdM. It is made up of representatives of all the central administrations involved and the regions, the metropolitan cities, and the autonomous provinces of Trento and Bolzano. On the other hand, IGRUE has the task of guaranteeing the effectiveness and uniqueness of the actions of the audit authorities, in addition to being the audit authority for some PONs. In terms of public accounting, considering that IGRUE is internal to the Italian General Accounting Office in MEF – it must be observed that Law No 190/2014, mentioned above, provides for a special accounting management system for the *Fondo di rotazione*, where the FSC is hosted together with SIF Funds and complementary national funds. The entire accounting system for cohesion policies is managed by the same IGRUE, through dedicated banking accounts. Another body involved in the national cohesion policy, again under MEF control, is Invitalia S.p.a., an agency with supporting functions and technical expertise sustaining national investments (Agrelli, 2019; Boscariol, 2015).

4. Performance and new scenarios

Evidence broadly indicates that the effects of EU investment policies, specifically those fostering cohesion, are not the same everywhere. This is particularly so in countries such as Italy, characterised by clear regional heterogeneity, including the ability to use structural funds. Another recurrent aspect in the literature concerns institutional conditions and the quality of governance where the policies are to be implemented. This means that an evaluation of the impact of EU investments is necessary to consider institutional characteristics, macroeconomic conditions, and development objectives all at the same time. Thus, the north-south boundary line in Italy still represents an unenviable record in the scenario. The South of Italy suffers from unfavourable national and supranational macroeconomic conditions to which it adds its own endogenous structural difficulties. Institutional quality at the local level seems to be one of the main drivers of the effectiveness of territorial policies – namely the planning phase, tardiness in execution, excessive emphasis on transfer and incentives, and a high level of fragmentation in objectives and interventions (Dossier Senato, 2018, 1 ff.).

With the Covid-19 emergency, the social and economic divide among territories will probably increase. The fruitfulness of the extra investments provided by the EU will mainly depend on planning and spending skills at the national and territorial levels. The Next Generation EU programmes and funds (see D.2.), together with the MFF, will be more intensely connected with the European semester process (in terms of timing and processing). However, the rules for adopting the PAR are similar to the previous period (2014-2020), apart from the addition of some more conditions and simplifications. It has been confirmed that PA will be compulsory for all Member States and that it should be adopted before or together with the first operative programme, indicating strategic objectives and mechanisms for the effectiveness and efficacy of funds management. Italy started its preliminary negotiation with the EC in 2019, proposing an overlapping of the five European thematic areas (Smarter Europe, Greener Europe, More Connected Europe, More Social Europe, and Europe Closer to Citizens) together with four national priority sectors (work quality, natural resources for future generations, standardisation and quality in services for citizens, culture as a vehicle for economic and social cohesion). At the very end of the document prepared for the preliminary negotiation, the importance of some cross-cutting conditions for effectiveness of the programmatic and implementation choices is highlighted. These are awareness and quantification of the investment framework and its timing of implementation; the anticipation of planning schedules for public works financed through the ERDF; strengthening ordinary programming in the direction of providing certainty of resources in order to safeguard the effective additionality of cohesion interventions, and a set of objectives consistent with the action that can be pursued via cohesion policies. Further conditions are planning of interventions based on "needs", such as different territorial necessities, and the continuity of strategies, operational tools and administrative processes that represent an undisputed added value also to address the issue of funds management (See Documento preparatorio per il confronto partenariale, 2019). Thus, a TO similar to the previous 2014-2020 No 11, on governance and administrative capacity, was expected. In reality, such a TO had not been planned but, during one of the last informal meetings with the EC (December 2020), it was stated that administrative skills should be further improved by means of an integrated strategy based on the following elements: human resources, simplification, and institutional reforms in sectors crucial for investments and digitisation (Recommendation to the country, Annex D, 2020). Good starting points will be: a plan for the development in the south, a plan for renewal of public administration bodies, an HR recruitment plan in the public sector, and co-ordination with the reforms planned in view of Next Generation EU expenditures. The instruments available under EU Law are: traditional technical assistance (Article 30, Common Provisions Regulation, CPR), investments in administrative skills linked to specific sectors (Article 2 (3), EFRD and FC Regulations), and investments in administrative skills not linked to costs (Article 32, CPR). An example of the Italian efforts to improve its administrative capacity, in relation to the CP, is the already mentioned experience with PARs, that will continue in the future (Agrelli, 2019).

In the end, given the importance of the additional funds relating to the Next Generation EU programmes, there will probably be space for a more centralised governing processes, considering the short time for spending and the wide-ranging consequences of the pandemic across the national territory. This could create two conditions, partly contrasting and partly overlapping: on the one hand, central control might reduce, *de facto*, regional and territorial autonomy in the management of EU funds; on the other , the extra effort required of central policy makers and administrations could improve the institutional structure currently responsible for national economic planning and funding, also with positive results for implementing a multilevel cohesion policy (i.e. in terms of real addition to European resources, or improved coherence in the sphere of investment and development projects especially for public works). For example, recently (1st January 2021) the above-mentioned CIPE has been transformed into CIPESS, where the last two letters stand for sustainable development – *sviluppo sostenibile* – (Article 1-*bis* Decree Law No 111/2019). CIPESS will have a key role for the national implementation of the EU Green Deal, in co-ordination not only with the entire institutional structure in support of the CP but also with the ongoing institutional tool box supporting the Next Generation EU programme, specifically with the new Ministry for Ecological Transition and the new Interministerial Committee for ecological transition (Dossier Senato, 2021, 30-35). In fact, to have access to the Recovery and Resilience Facility, with a total budget of 209 billion euros for Italy, Member States have to adopt a National Recovery and Resilience Plan (NRRP) for reforms and investments following EC

recommendations as well as the Annual Strategy for sustainable growth, within which the Italian CIPESS has new and specific tasks (see Section III, Italian conclusions, for the last updates).

TASK 2, D1, ITALY

Dr. Rossella Sabia

Summary: 1. The protection of the Union's financial interests by means of criminal law. An introduction; 2. The PIF Convention and the Commission proposal for the 2012 Directive; 3. The Directive (EU) 2017/1371 ('PIF'); 4. Crimes affecting the EU's financial interests in the Italian context.

1. The protection of the Union's financial interests by means of criminal law. An introduction

A discussion on the protection of the financial interests of the European Union by means of criminal law from a national perspective requires an initial outline of the legal interests at stake.

Between the 1990s and the early 2000s, the subject of the criminal protection of the (Community, now) Union's financial interests has received a good deal of attention – at both the academic and institutional levels. Sound financial management is essential for the very existence of EU structures and the implementation of EU objectives; but it is also essential to support and strengthen the development of the economic policies of Member States (and thus of the European economy as a whole), a key feature of the plan for a united Europe since its birth (Spena, 2018, 28).

For this reason, the integrity of the EU budget has undoubtedly established itself as an interest worthy of criminal protection (see Sicurella, 2005). This protection was originally entrusted to the 'sanctioning resources' of the Member States, as stated – before the European legislator – by the Court of Justice in the *Greek Maise* case (Judgment of 21 September 1989, *Commission of the European Communities v Hellenic Republic*), given that it is a common feature of the Member States that they have always provided for a rigorous, effective criminal law response to similar offences against their national public administrations (Picotti, 2013, 3).

It can be said that the obligation of criminal protection of EU financial interests has found its legal basis in the principle of loyal co-operation of the Member States with the Community. In this context, a decisive contribution has also been made by the *Corpus Juris* (see Delmas-Marty, 1997; Grasso and Sicurella, 1997), a study promoted by the Commission, which outlined a 'micro-system' of supranational criminal law protection (Picotti, 2018, 23), with a focus on EU financial interests, concerning both substantive and procedural law.

This is the historical background in which the most recent adoption of the Directive (EU) 2017/1371 ("PIF Directive") and the Regulation (EU) 2017/1939 establishing the European Public Prosecutor's Office ("EPPO Regulation"; see D.2, Task 2) must be put in place, marking the last and most significant stage of the long (and controversial) evolution of the criminal protection of the Union's financial interests, on the new legal basis provided by the Treaty of Lisbon (see Sicurella, 2018, 5 ff.).

The PIF Directive, in particular, represents the final outcome of more than twenty years of legislative and jurisprudential debates. It is a comprehensive text, collecting in one place provisions previously only found in different documents, namely the Convention on the Protection of the European Communities' Financial Interests of 1995 (so-called "PIF Convention") and its (additional) Protocols of 1996 and 1997.

Therefore, in order to better understand and frame the legal interests subject to criminal protection, it may be appropriate to spend dedicate a few words on the system of protection set up before the PIF Directive.

2. The PIF Convention and the Commission proposal for the 2012 Directive

The system of protection provided for under the PIF Convention and its Protocols was considered unsatisfactory. The Convention does not contain a specific list of offences affecting the Union's interests but rather "a catch-all definition" of fraud, and it does not lay down a common term of imprisonment, nor minimum or maximum terms; the result is that it has been implemented domestically by the Member States "in a very slowly and unconvinced way" (Vervaele, 2014, 93 f.).

The decision to pursue an approximation of Member States' laws through the path of 'horizontal harmonisation' – with a legal basis under the third pillar, i.e. Title VI on Justice and Home Affairs of the Maastricht Treaty – was criticised, as this form of harmonisation lacked the binding force of first-pillar instruments such as regulations and directives. Consequently, to overcome these limitations, as early as 2001 the European institutions began to consider *vertical* harmonisation based on instruments with binding force towards the Member States (Spena, 2018, 31 ff.; for a broader take on the issue of EU competence in criminal matters, see Sicurella 2016).

Against this background, and inspired by the *Corpus Juris* project, the Commission launched a first proposal in May 2001 (COM 2001[272] FINAL) which provided more specific definitions of fraud, corruption and related money laundering. As for the legal basis chosen, it is important to stress that this was a proposal for a Directive to be adopted under Article 280(4) of the Treaty of Amsterdam (replacing the Maastricht Treaty in 1997); a provision – now corresponding to Article 325(4) TFEU – setting forth the obligation to afford "effective" and "equivalent" protection to the Community's financial interests in all the Member States.

Although this Commission proposal, for the most part, simply established the uncontroversial contents of the PIF Convention, both the Member States and the European Parliament objected strongly (Miettinen, 2013, 212), and it was never adopted.

The Commission submitted a new proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law (COM[2012] 363 FINAL; see Kuhl, 2012; Kaiafa Gbandi, 2012) under the Lisbon Treaty. The 2012 Commission proposal was issued under Article 325(4) TFEU, to clarify that in the fight against EU fraud – to which Article 325 is explicitly devoted – measures concerning both substantive and procedural criminal law could be envisaged.

The 2012 proposal was also very innovative in terms of contents – according to many, even more than the PIF Directive of 2017. In fact, the 2012 draft Directive included, for the first time, in the list of EU financial interests considered relevant, revenue resulting from VAT receipts in the Member States; it provided definitions of "fraud affecting the Union's financial interests" (Article 3) and fraud-related offences (Article 4), in line with those of the PIF Convention but adding to corruption and money laundering the offences of bid-rigging between tenderers and misappropriation of funds. It also outlined the requirements for the liability of legal persons (Article 6) as well as laying down stringent rules on criminal sanctions for natural persons (Articles 7 and 8) (Spena, 2018, 35).

The 2012 proposal for a Directive opened a phase of discussion, which culminated, five years later, in the issuance of Directive 2017/1371, to which it is therefore appropriate to devote some systemic and more in-depth considerations.

3. The Directive (EU) 2017/1371 ('PIF')

According to some, PIF Directive 2017/1371 adopts a cautious approach, in this sense, being a mixture of 'light' and 'shade' (Basile, 2017; Parisi, 2017). At the root of this is the search for a balance that characterised the discussion on the text, largely based on that already presented by the Commission nine years earlier when it had tried to resume the question of the legitimacy of Directives containing criminalisation obligations; the impact of such a competence of the Union on the choices made by the States in key areas of national criminal law policies (including the powers and prerogatives of the respective tax authorities) explains the resistance by the States during the negotiations (where the

question of including VAT fraud among those covered by the Directive was the most debated point, later resolved by the Court of Justice in the *Taricco* case) (Sicurella, 2018, 7; on this last point, see Task 3).

Despite the ambitious objective of laying the foundations for stronger protection of the Union's financial interests through criminal law, the new Directive is based on a different legal basis, identified (no longer in Article 325 TFEU, but) in Article 83(2) TFEU, and criticised by many (see Picotti, 2018, 18 ff.) as a factor that has undermined its impact.

In terms of content, starting from the definition of the scope of application – and therefore of the notion of "financial interests" for criminal law purposes (Article 2, on which see below, section 4) – it must be said that the presence of a definition is a substantial innovation compared with the PIF Convention instruments. However, this could be seen only as a partial advancement because, compared with the Commission's 2012 proposal – which also covered EU resources coming from VAT collection without limitation – the 2017 Directive clearly states that it "shall apply only in cases of serious offences against the common VAT system", i.e. VAT fraud of a transnational character connected with the territory of two or more Member States and involving a total damage of at least €10,000,000 (Spena, 2018, 38).

From the point of view of offences affecting the Union's financial interests, the Directive provides for definitions and makes a distinction between fraud (Article 3) and other 'ancillary' offences (Article 4).

With reference to the criminal offence of "fraud affecting the Union's financial interests", it is a fairly consolidated concept, although there are some innovations with respect to the PIF Convention of 1995. The concept of "fraud" (Article 3) is understood in broad terms, also covering other offences not fraudulent in nature, but usually connected with the framework of fraud. The provision describes four cases of fraud, on the basis of whether it relates to expenditure (letters *a* and *b*), concerning non-procurement and procurement-related expenditure respectively, or to revenue, concerning revenue other than that arising from VAT (letter *c*) and revenue arising from VAT own resources (letter *d*). In this respect, it is worth noting that the provision recognises two new particular categories of 'fraud', i.e. procurement-related fraud and VAT fraud.

As regards the other offences referred to by Article 4 of the Directive, the broad approach already embraced by the PIF Convention, accompanied by the two Protocols, is confirmed: the reference to money laundering, as defined in Article 1(3) of Directive (EU) 2015/849, remains unchanged, as well as the reference to active and passive corruption affecting the Union's financial interests (even if in this case the relevant notion is broader than the one provided for in the first PIF Protocol).

Lastly, among the offences 'ancillary' to fraud, the Directive includes misappropriation, defined in Article 4(3) as "the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union's financial interests". This is a significant innovation compared with the PIF Convention, where there was no reference to such an offence.

Article 4(4) of the 2017 Directive defines the notion of public official which, while still cautiously referring to the applicable law of the Member States, also adopts a non-formalistic approach in determining the subjective qualification for the purposes of criminal law, for example by providing that "any other person assigned and exercising a public service involving the management of or decision concerning the Union's financial interests in Member States or third countries" may also be considered a public official (letter *b*; on this point see also Task 4).

Article 5, on the other hand, expands the scope of the criminal law provisions aimed at criminalising conducts against the Union's financial interests, requiring incitement, aiding and abetting, and attempt with reference to the offences listed and referred to in Articles 3 and 4 to be punished as

criminal offences. It provides for stronger penalties (aggravating circumstances) when these offences are committed within a criminal organisation, under framework decision 2008/841/HA (Article 8).

The 2017 Directive also gives guidance (Article 7) on the (criminal) nature of the sanctions applicable to natural persons, in some cases expressly requiring imprisonment or the provision of a maximum penalty of at least four years in the case of considerable damage or advantage (further defined in the provision).

On the other hand, the approach to legal persons is softer (Articles 6 and 9), as the Directive does not take a position on the nature of such liability (nor does it require legal persons to be subject to criminal sanctions), only requiring effective, proportionate, and dissuasive sanctions, including fines (criminal or non-criminal) and other sanctions, ranging from exclusion from entitlement to public benefits, to judicial supervision or forms of exclusion and disqualification, or the closure of establishments, where the offences referred to in Articles 3, 4, and 5 are committed for their benefit by their members. It has been noted that, especially in terms of corporate liability, there has been a lack of harmonisation and this has been a missed opportunity to advance European criminal law (also) in the increasingly important area of the *ex crimine* liability of legal persons (Picotti, 2018, 34 f.).

Another important provision is Article 12 regarding the limitation period for PIF crimes, requiring the establishment of a "sufficient period of time" to investigate and prosecute such offences. This was a very sensitive decision, especially in the light of the *Taricco saga*, even if also, in this respect, greater harmonisation would probably have been desirable – despite the fact that, for instance, some countries whose legislation had been criticised on this point in the past, like Italy, have adopted very significant measures (see Task 4 for details).

In conclusion, other very important provisions relate to freezing and confiscation (Article 10), recovery (Article 13), jurisdiction (Article 11), and co-operation between institutions, such as OLAF and other competent authorities (Article 15; on this last point, see the comprehensive analysis on the new role of the EPPO in D.2, Task 2).

4. Crimes affecting the EU's financial interests in the Italian context

Given this overview and taking into account the evolution, at the supranational level, of the framework for the criminal protection of the Union's financial interests, it is now time to focus on the criminal law dimension at the national level, examining the Italian context.

The starting point of this analysis is the legal definition of "financial interests of the Union" (on this topic see Venegoni, 2018), a concept that, as seen above, has come to be defined in legislation, most recently, with the PIF Directive. However, it must be mentioned that, in temporal terms, Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) comes first. Article 2(1) refers to the concept as including "revenues, expenditures and assets covered by the budget of the European Union and those covered by the budgets of the institutions, bodies, offices and agencies and the budgets managed and monitored by them". It is worth emphasising that, being a provision of a Regulation, it is directly applicable in national legal systems.

The other main legal reference is the one already mentioned, provided for by Article 2(1)(a) of the PIF Directive, where "Union's financial interests" means all revenues, expenditure and assets covered by, acquired through, or due to (i) the Union budget, and (ii) the budgets of the Union institutions, bodies, offices, and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them.

The two definitions substantially overlap, highlighting, in the notion of financial interests of the Union, the crucial importance of the "Union budget" – in terms of both revenue and expenditure – as well as of the budgets of Union institutions etc., or of budgets directly or indirectly managed and monitored by them. Consequently, conduct that undermines the integrity of such economic interests – i.e. which, first and foremost, results in the Union receiving less in its budget (or other funds) than it should, or which causes the sums distributed not to achieve the purposes for which they are intended – may be a criminal offence.

In the Italian system, PIF crimes are generally included in the classification of "common offences". Indeed, it can be said that Italy is well equipped in this respect, being in place a strong and comprehensive set of criminal provisions and sanctions – mainly provided for in the Italian Criminal Code – able to offer adequate protection against conducts affecting the Union's financial interests, with reference to all the areas of crime expressly mentioned by the PIF Directive.

Considering the 'classification' now provided for in the Directive, it is possible to note that under Italian law, PIF crimes include the cases summarised as follows: misappropriation and misapplication of public funds of the Italian State and the European Union; tax crimes and smuggling offences; corruption in the broad sense; money laundering and offences relating to the proceedings of crimes affecting EU financial interests, and conspiracy (criminal association) in committing the aforementioned criminal offences.

Looking at these offences from the point of view of protected interests (and so of the budget), as regards expenditure, reference is essentially made to fraud and misappropriation but also corruption when, for example, EU funds are distributed through tenders; as regards revenue, reference is made to cases of smuggling and VAT fraud being committed to the detriment of these specific interests of the European Union (Venegoni, 2018, 4394).

The features of these offences will be discussed in greater detail below (see Task 4), but at this stage it may be appropriate to provide an initial overview of the impact of the PIF Directive in Italy, underlining that the implementation of the new EU legislation did not have disruptive effects – with the important exception of the introduction of new predicate crimes within the Legislative Decree No. 231/2001 concerning the *ex crimine* liability of legal persons.

In fact, the Italian system was substantially already in line with EU requirements, and the national transposing legislation (Legislative Decree No 75/2020; see Mazzanti, 2020) has amended the following aspects:

- as regards the Criminal Code, it provides for greater sanctions for a series of crimes (Articles 316, 316-*ter*, 319-*quater*) when they affect the Union's financial interests; for other crimes (Articles 322-*bis*, 640), the area of punishability is extended so as to include offences against the same interests;

- for specific tax offences (provided for by Articles 2, 3 and 4 of Legislative Decree No 74/2000), it provides for stronger sanctions and the punishability of an attempted crime – previously excluded – if such offences are also carried out in the territory of another Member State within the European Union and aimed at evading VAT to a value not less than ten million euros;

- on the subject of evasion of customs duties, (i) criminal sanctions are again put in place for the offence of smuggling (after previous decriminalisation) when the amounts evaded are above ten thousand euro, and *(ii)* an aggravating circumstance of the offence of smuggling has been introduced if the amount of unpaid duties is higher than one hundred thousand euro;

- with reference to Legislative Decree No 231/2001, the list of predicate offences has been significantly extended, including several cases of fraud, new offences against the public administration (Articles 314, 316, 323) in cases where they affect the financial interests of the European Union, as well as – thus completing a previous reform – other tax offences, provided that they fall within the scope of the Directive.

In more general terms, the task of adapting domestic criminal law to the PIF Directive could have been the occasion – but it was not – for rethinking some controversial criminal policy choices made by the Italian legislator in the past, such as when transposing the PIF Convention (Basile, 2017, 72): for instance, with reference to the inclusion of the criminal offence of 'undue receipt of funds to the detriment of the State' (Article 316-*ter* of the Criminal Code) and to the consequent, complicated relationships with fraud (see Romano, 2019, 94 ff.)

In a broader sense, in order to effectively tackle – from the criminal law perspective – conduct affecting the financial interests of the European Union, the possibility of being able to analyse reliable data relating to the underlying phenomena is fundamental.

In Italy, a structured data collection activity is carried out by the Special Committee *Comitato per la lotta contro le frodi nei confronti dell'Unione europea* (COLAF), and a detailed overview can also be found in the Annual Report of the National Court of Auditors (NCA, *Corte dei Conti*).

As discussed more extensively below, fraud emerges in this context as one of the most significant forms of misconduct, although the latest available report highlights a further decline in the levels of irregularities/fraud reported by COLAF, confirming the ongoing downward trend from -2,4% in 2018 (in absolute terms equal to -2.2 million euros compared with 2017) to a further -59.91% in 2019 (in absolute terms equal to -53.8 million euros compared with 2018; see COLAF, 2019, 2; the topic is addressed in Task 4).

However, as noted in the latest COLAF report, "over the past years an image of uneven behaviours by the Member States has emerged, specifically with regards to the different application of the so-called 'PACA' (*primary administrative or judicial finding*)". The different approaches in the concrete application of the PACA "produces notable differences in the input of data into the Commission's IMS system" – which is the informatic system through which Member States are required to inform OLAF about cases of irregularity and fraud that affect the EU budget – and, therefore, "a clear impossibility of comparing the statistical data" (COLAF, 2019, 43-44).

Moreover, it is important to underline, in terms of statistical data, that Italy is the European country with the highest amount of evaded VAT (33.6 billion); and the propensity for evasion remains quite high if compared with the European average (NCA, 2019, 80).

The data collection and reports mentioned so far consider the phenomena at stake as a whole, and not in terms of the technical, specific criminal law dimension of 'Union's financial interests' referred above. Mentioning again the case of COLAF, it is necessary to report not only fraud *stricto sensu*, but also mere irregularities. From the point of view of judicial proceedings and in particular those of a criminal nature, there is currently no structured data collection or survey aimed at analysing the incidence in Italy of offences affecting the financial interests of the European Union. There are judicial statistics of various kinds, drawn up by the Ministry of Justice and the National Institute of Statistics (ISTAT), e.g. regarding offences committed by type, on proceedings at the different stages, on prisons etc., but none addresses expressly, and in this analytical perspective, the subject of PIF crimes.

Thus, given the lack of data, it is difficult to draw reasoned conclusions on this point. It is no coincidence that the already mentioned Legislative Decree No 75/2020 implementing the PIF Directive (Article 8) requires, in the future, the Italian Ministry of Justice to be chargedwith annual transmission of data on PIF crimes to the European Commission, concerning a detailed analysis of proceedings relating to offences affecting the financial interests of the European Union, the amounts of the sums subject to confiscation in trials relating to such offences, and the estimated damage to the budget of the European Union or to the budget of institutions, bodies, offices, and agencies of the Union pursuant to the Treaties or budgets directly or indirectly managed and monitored by them.

TASK 3, D1, ITALY

Prof. Cristina Fasone

Summary: 1. The protection of the EU's financial interests at constitutional level: a primer; 2. The Italian judicial system; 2.1. The jurisdiction of ordinary and administrative courts and their boundaries; 2.2. The Court of Auditors; 2.3. Criminal courts; 3. The involvement of the Constitutional Court: access to constitutional justice; 4. The "Taricco saga": a case of multilevel constitutional protection of the EU's financial interests?; 5. Which space for political (parliamentary) control?

1. The protection of the EU's financial interests at constitutional level: a primer

The protection of the EU's financial interests can only be indirectly inferred from the text of the Constitution, which – like most Constitutions of EU Member States – lacks ad hoc and tailored provisions to this end. Relevant to the issue are, however, a number of constitutional clauses. For example, Article 11, second section, which for decades has represented the only bulwark for Italian participation in the EU integration process (also in light of the interpretation provided by the Italian Constitutional Court in judgment No 183/1973, on which see Barile, 1973), states that not only must Italy accept, on an equal footing with other States, a limitation of its sovereignty "to ensure peace and justice amongst the Nations", but that it "promotes and encourages" international organisations pursuing such ends, like the EU. The strong international openness this clause injects into the Italian Constitution has translated into a clear Europhile commitment to fulfil EU objectives (up to the point that, according to some – (Lupo, 2020) – it could be questionable whether Italy can withdraw from the EU without betraying one of the supreme principles of its Constitution and the essence of the Constitution itself): it follows, as a matter of interpretation, that there is an inherent and implicit constitutional obligation of the Republic as a whole, from municipalities up to the State, to protect the EU's financial interests, its resources and budget, as a way to "promote and encourage" the good functioning of the EU, although tensions may arise between the fulfilment of EU obligations and the protection of other fundamental values and principles enshrined in the Constitution (see section 4, of this Task).

Further constitutional provisions have been added to clarify what this constitutional commitment to the EU entails. Article 117, first section, as revised in 2001 (Const. Law No 3/2001), affirms that the legislative powers of the State and the Regions must be exercised in compliance (also) with "the constraints deriving from EU legislation", in light with the aim of the reform to strengthen regional autonomy. Although this provision has been mainly interpreted as a point of reference to equalize the responsibilities of the State and regional legislatures in the fulfilment of the EU obligations (Pinelli, 2001; Serges, 2006), it has also paved the way to the first textual acknowledgment of EU law in the Italian Constitution. Since the entry into force of Const. Law No. 1/2012), more detailed references have followed, for example with regard to the duty of the public administrations to "ensure that their budgets are balanced and that public debt be sustainable", "(i)n accordance with European Union law" (Article 97 Const, first section,as revised) and of regional andlocal authorities "to ensuring compliance with the economic and financial constraints imposed under European Union legislation" (Article 119, first section, as revised).

However, when it comes to the implementation of the EU Financial Regulation and of the European Structural Investment Fund Regulations, the State has the largest share of responsibility in this respect by virtue of the exclusive legislative competence it has in the field of harmonisation of public accounts (since 2012, Const. Law No 1/2012) and the equalisation of financial resources, which also relates to indirect EU funding managed by the State. Although Regions and autonomous provinces are in charge of the implementation of EU measures falling under their domains (Cartabia and Violini, 2005), as the State bears the ultimate responsibility for the execution of EU law, the State can "take over in case of failure to act by Regions or autonomous provinces" (Article 117, fifth section Const.),

according to procedural rules set in national legislation (Law No 234/2012). The possibility of the substitution of a non-complying Region by the State also applies to the case of lack of fulfilment of regional duties that may hurt the EU's financial interests and involve the inability to manage EU funds granted to the Regions. Article 120, second section, of the Italian Constitution – though it has never been used to this end to date – further specifies that, in accordance with the principle of subsidiarity and sincere co-operation, the national Government "can subsume the authority of a Region, metropolitan city, province or municipality if it fails to comply with (…) EU legislation, or in case of grave danger for public safety and security, or whenever such action is necessary in order to preserve legal or economic unity and in particular to ensure the minimum level of benefits relating to civil and social entitlements, regardless of the geographic borders of a local authority".

Following the constitutional reform of 2012, during the Eurozone crisis, more references to the EU were included in the Italian Constitution (see Lippolis, Lupo, Salerno and Scaccia, eds., 2012). All of them relate to the spending power of the various levels of government. For example, at State level, Government agencies have to make sure that their budgets are balanced and the debt sustainable "*in accordance with European Union Law* (emphasis added)" (Article 97, first section). By the same token, regional and local authorities enjoy (revenue and) spending autonomy, so also in the use of EU funds allotted to them, but subject to the respect of the balanced budget rule and of "*the economic and financial constraints imposed under European Union legislation* (emphasis added)" (Article 119, first section).

Lastly, as a great deal of EU resources granted to Italy are managed by the public administration, it is worth recalling that the Constitution sets the principles of impartiality and smooth operation of public offices, organised by law, and recalls that civil service rules must define the "jurisdiction, duties and responsibilities of civil servants" (Article 97, second and third section; see Caranta, 2006). Moreover, in relation to the beneficiaries of EU funds whose enjoyment has been illegitimately prevented their enjoyment, as happens for national funds, Article 28 of the Constitution confirms that "Officials of the State or public agencies shall be directly responsible under criminal, civil, and administrative law for acts committed in violation of rights" and that in such cases, civil liability extends to State and public agencies.

To see how access to justice works in the particular case of encroachment of EU financial interests, we now turn to the Italian judicial system, as framed by the Constitution, and to the boundaries amongst jurisdictions.

2. The Italian judicial system

Article 24 of the Italian Constitution ensures access to justice to anyone to protect his or her rights under civil and administrative law before the courts and depicts the right to defence as an inviolable right "at every stage and instance of legal proceedings", an interpretation decisively seconded by the Italian Constitutional Court (Judgments No 18/1982 and 232/1989 and, more recently, Judgment No 238/2014, among many). Moreover, as a further guarantee, cases cannot be removed from the natural judge established by law (Article 25), to prevent an arbitrary use of justice.

Judges are subject to the law, and they act as ordinary magistrates within the Judiciary (Article 101). By contrast, the possibility of establishing extraordinary or special judges is banned apart from administrative courts, the Court of Auditors and military courts (Article 103 Const., see below), while specialised sections within ordinary courts can be set up (Article 102). In Italy, ordinary judges are recruited through a public process of competitive examinations (though honorary judges may be appointed to fulfil the tasks of individual judges) and specific qualifications need to be held to be appointed as judges of the Court of Cassation (Article 106, the highest judicial authority in civil and criminal matters).

The Judiciary, comprising ordinary courts, is organised according to the law and is independent and autonomous from the other branches of government (Article 104). It is self-governed by the High Council of the Judiciary, presided over by the President of the Republic, with the other two-thirds of the members appointed by all the ordinary magistrates of the various categories and one third elected

by Parliament in joint session from university full professors in legal matters and lawyers with no fewer than 15 years of practice. Strict conditions are posed on the term of office, the re-election and the incompatibility of the members of the High Council of the Judiciary with other professions and public mandates. Indeed, it is the High Council of the Judiciary that decides "on recruitment, posting and transfer, promotion, and disciplinary measures of member of the Judiciary" (Article 105), with the Minister of Justice who can just take the initiative to propose disciplinary measures (Article 107). Overall the system has proved to work well throughout the decades and to protect the immovability of judges (Bartole, 1964; Verde, 1990). Over the last couple of years, however, there have been allegations concerning the possible politicisation of the judiciary, which has triggered endless discussion – not yet concluded – on the desirability of judicial reforms, including the method of selection and appointment of the members of the High Council of the Judiciary (Biondi, 2021; Giupponi, 2021), its independence being a precondition for ensuring the judicial protection of fundamental rights, access to justice, and legal remedies.

Besides ordinary courts, addressing civil and criminal matters, the Constitution also acknowledges the system of administrative courts, with the Council of State as the ultimate appellate court and regional administrative tribunals (Article 125 Const.), having jurisdiction on the "protection of legitimate interests before public agencies and, in particular matters laid down by the law, also of subjective rights" (Article 103, second section) and the Court of Auditors, also divided into regional sections, addressing matters relating to public accounts and damage to national and EU financial interests (Article 103, third section). Both the Council of State and the Court of Auditors also fulfil non-judicial tasks (Article 100). The Council of State additionally acts as a consultative body in administrative matters, in particular vis-à-vis the Government, who also appoints some of the councillors (without this being considered in breach of the principle of judicial independence: Travi, 2021, 100). The Court of Auditors carries out an *ex-ante* check on the acts of the Government and an *ex-post* review on how the State budget is spent and on the financial management of the agencies and public bodies funded by the State (on this control function of the Court of Auditors, see in detail Task 4).

When exercising judicial functions, the administrative courts and the Court of Auditors are bound to comply with the same guarantees of independence, impartiality, and third-party stance and to ensure an adversary proceeding in relation to ordinary courts: the right to a fair trial must be ensured in before every court almost under the same conditions (Article 111: see, for example, Corso, 2003 and the adoption of a Code for proceedings before administrative judges, Legislative Decree No 104/2010). Special requirements are set for criminal law trials, in particular to protect the right to defence of the accused, the formation of evidence, and the presumption of innocence (see, for details, Task 2). Appeals before the Court of Cassation against decisions of ordinary courts is always allowed for alleged violations of law (Article 111, seventh section; see Barbera and Fusaro, 2018, 511).

In addition to guaranteeing the "precise compliance with the law, the uniform interpretation of the law and the unity in the development of national law" (own translation of Article 65, Law No 12/1941), the Court of Cassation is also in charge of ensuring that the different systems of courts are acting within their jurisdictions (Article 111, eight section). Only to this end, appeals to the Court of Cassation are allowed against decisions of the Council of State and the Court of Auditors. Indeed, this path has been followed also in relation to the problematic setting of the boundaries of the jurisdiction on the case law involving the use of EU funds.

2.1. The jurisdiction of ordinary and administrative courts and their boundaries

As recalled (in section 2), "Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law" (Article 24, first section Const.). This judicial protection is ensured also in relation to legitimate interests against acts of the public administration before ordinary and administrative courts (Article 113, first section Const.: Pajno, 1994; Saitta, 2006). Which is the competent system of courts to know of actions addressing the management or the mismanagement in the use of EU funds (and besides criminal offences and revenue damages, on which criminal courts and the Court of Auditors, respectively, are called to rule: see sections 2.3. and 2.2.)?

There is now a consolidated body of case law of both the Court of Cassation and the Council of State on this point, applying to EU funds the same standards set for public grants and subsidies conferred by the domestic authorities (e.g. Court of Cassation, Cass. Sez. Un, No 150/2013, Court of Cassation, Sez. Un., No 1710/2013, Court of Cassation, Sez. Un., No 16602/2016; Council of State, Ad. Pl., No 17/2013, Council of State, Ad. Pl., No 6/2014; Council of State, No 4931/2015), in line with the principle of equivalence enshrined in EU law (Article 325, second section TFEU). This jurisprudence follows, and further elaborates on the traditional divide in Italian administrative law between subjective rights and legitimate interests. The latter identify the legal position of advantage held "vis-à-vis a certain good that is the object of an administrative measure and enabling the holder to influence the exercise of the public power in such a way as to make it possible to fulfil the interest of this good" (Court of Cass., Sezioni Unite, No 500/1999, own translation).

As there is no exclusive jurisdiction on this subject matter, the boundary between the jurisdiction of ordinary and administrative judges on the granting and revocation of public subsidies – and EU funds – is set by the subjective legal position at stake (see, e.g. Zito, 2013). In particular, ordinary judges are competent: 1) within controversies where the funds are directly acknowledged by law and the public administration limits itself to ascertaining the existence of the preconditions to grant such a fund without any discretionary evaluation as to the *if*, *what* and *how* of the dispensing of the funds: for example, a controversy of this kind may arise when a third party, counter-interested in the procedure of conferral of an EU fund, considers that the assessment of the eligibility criteria presents flaws; 2) in the framework of controversies linked to the supply of the funds or to the action to obtain the restitution of the funds (*azione di ripetizione*) due to the non-fulfilment of the project financed by the beneficiary according to the conditions agreed or to the diversion of the funds from the original target and destination. The jurisdiction of the ordinary judge is confirmed even if acts of revocation, resolution of the contractual relationship, or the relinquishment (*decadenza*) of the use of the funds have been issued, provided that they are grounded in the alleged non-execution of the contractual obligations by the beneficiaries. For the ordinary judge to be involved, the controversy has to take place while the contractual relationship is already ongoing (Dipace, 2015). These cases may arise with regard to EU indirect funds for which irregularities in the spending in relation to the targeted objectives have been detected and when the determination by the public authority in reaction to it has been contested by the beneficiary of the fund (e.g. Court of Cassation, Sez. Un., No 16602/2016).

By contrast, the jurisdiction of the administrative judge is relevant when the controversy predates the granting of the fund or when, following attribution, the act by which it was conferred is annulled or revoked for vices of legitimacy or for clashes with the public interest. In these circumstances, the lack of compliance by the beneficiary with her obligations is not at stake. Cases falling within this description can be filed before administrative courts, for instance, by potential beneficiaries of EU indirect funds arguing that they have been illegitimately excluded from the competitive bidding process or from the tender to obtain the funds (see, *ex multis*, T.A.R. Piemonte Torino, sez. I, No359/2011).

In addition to this, administrative courts can also be involved in disputes between public authorities concerning the conferral and management of EU funds. For example, it is quite frequent that regional administrative tribunals have to settle controversies between Regions and their municipalities concerning the implementation of local projects financed through the European Regional Development Fund. Detecting irregularities in the use of the funds conferred to municipalities by the relevant Region may entail substantial modification of the contractual arrangements, the revocation of the funds, or their curtailment (see, for example, TAR Campania, Sez. Salerno, I, Judgment No 02662/2015 and Council of State, V. Sez., Judgment No 3051/2016). Occasionally, the adjudication of disputes between public authorities has also given rise to questions for preliminary reference issued by regional administrative tribunals to the CJEU, for example, as to the enforcement of the principle of durability of the operation and the requirements under which the award of a concession contract can take place without advertisement or lacking a competitive tendering procedure for projects financed through the European Regional Development Fund (CJEU, Case C- 388/12, *Comune di Ancona v. Regione Marche*, 14 November 2013).

There is at least one last issue in which the boundaries between the jurisdiction of ordinary and administrative courts may come into play in relation to EU funds, namely the civil liability of public officials and of the relevant administration for damages caused by acts concerning the concession, modification or withdrawal of EU funds. The Constitutional Court has acknowledged the constitutional legitimacy of the jurisdiction of administrative courts with regard to actions for damages (Judgment No204/2004). Ordinary judges have jurisdiction over litigations concerning the alleged violations of subjective rights as a consequence of material conducts of civil servants and, through them, of public administration bodies, while the administrative jurisdiction, which remains the exception (Court of Cass., Sez. Un., no10979/2001), is relevant in actions contesting the adoption of an administrative act or the failure of an administrative body to act. The Court of Cassation has clarified that, following the entry into force of Article 6, Law No 205/2000 (confirmed by Article 244 of Legislative Decree No 163/2006), administrative courts hold exclusive jurisdiction in the action for damages challenging the pre-contractual responsibility of the administrations bound to apply EU law or to comply with public evidence procedures in awarding contracts for works, services, or supplies (Court of Cass., Sez. Un., No 20116/2005 and No 11656/2008; see Tenore, 2015).

2.2. The Court of Auditors

As anticipated (section 2), the Court of Auditors fulfils both a control and a judicial function. Under the former, envisaged in Article 100 Const. and further detailed in the legislation (e.g. Law No 20/1994), the Court checks *ex ante* the compliance of acts, in particular those of the national Government, with the law in force. It carries out an *ex post* performance audit of the effectiveness, efficiency and economicity of the administrative action – and it is in this framework that it assesses the management of EU funds (see, in detail, Task 4) – and the economic-financial audit, reporting the outcomes to legislatures. In this activity the Court of Auditors makes use of a "decentralised structure", through regional control sections. On the other hand, under Article 103 Const., the Court of Auditors exercises exclusive jurisdiction in matters of public accounting, adjudicating on administrators and civil servants regarding facts concerning the management of public resources. In this framework, a great deal of the Court of Auditors' activity concerns the administrative-accounting liability of public officials for damage to revenue incurred as a consequence, or in the exercise, of their functions (Attanasio, 2018), which is crucial to combat fraud against the EU's financial interests. To carry out its judicial function, the Court's activity is divided into 21 regional jurisdictional chambers, 3 central appeal chamber plus an appeal chamber in Sicily, and the joint divisions. Moreover, the investigative function is carried out by 21 Regional érosecutor's Offices and, at the central level, by the General Prosecutor's Office (plus the General Prosecutor's Office for appeal in Sicily). Both functions have evolved significantly over the last two decades, and a Code to regulate the judicial accounting proceedings has been adopted (*Codice della giustizia contabile*, Legislative Decree No 174/2016).

Developments in the control and the judicial functions of the Court have moved in the direction of expanding the jurisdiction of this institution, strengthening their mutual interplay, and in favour of a "unitary" and integrated reading of their fulfilment (see Sucameli, 2020). This process has been favoured by the legislation and constitutional case law, as well as by the Court of Auditors itself. For example, in the aftermath of the financial crisis, Decree Law No 174/2012 introduced a new form of audit by the Court, taking the form of a sort of "sanctioning audit" (Guella, 2014) that, to some extent, would mix the control and the adjudicatory activity of the Court. Though the Decree Law was deemed partly unconstitutional insofar as such a pervasive control targeted the Regions, in Judgment No 39/2014, the Constitutional Court supported a more coordinated reading of the control activity of the Court of Auditors as instrumental and running parallel to its judicial function (Caravita and Jorio, 2014). This approach has been further expounded by the Court of Auditors itself, sitting in joint divisions, both in Judgment No 32/2020EL and in Judgment No 5/2021 EL. In the latter the Court argued that "the joint reading of Articles 100, 103 and 25 Const. and the principle of specialty of the jurisdiction, implies a necessary parallelism between the functions of this Court, and this explains why there cannot be a different authority other than this Court on the subject-matters for which the law envisages the control of legitimacy/conformity by the Court of Auditors" (§1.2., own translation). For the Court, review of the decisions taken by the regional control sections certainly falls within its jurisdiction whenever they are deemed to affect the interests of the subject of the control or third parties. By the same token, for

the Court, its jurisdiction also extends to all the competences of the control sections, regardless of whether a decision has been taken by any of them.

Also other developments have highlighted the integrated reading of the two functions. In Judgment No 18/2019, the Constitutional Court has acknowledged the regional control sections, when exercising control powers as referring courts in the framework of a preliminary reference of constitutionality, thereby considering them as fulfilling, a judicial function under certain conditions (among many, see Cavasino, 2019, 12-14, Santoro, 2019). More recently, the Campania regional control section has issued its first preliminary reference to the CJEU – hence, placing itself as an adjudicating body under Article 267 TFEU and awaiting the admissibility assessment of the CJEU – asking, amongst other things, whether the new EU Regulation 2092/2020 (Article 3), together with Articles 2 and 19 TEU and 47 of the EU Charter of fundamental rights, would oppose a measure that limits the availability and the effectiveness of judicial remedies like Article 53 of Decree Law No 104/2020, insofar as it suspends the fact-finding powers of the Court of Auditors (Order No 37/2021).

Even though these cases do not directly deal with EU funds, such an integrated and coordinated approach by the Court of Auditors to fulfilling its functions will be fundamental in ensuring, on the one hand, the effectiveness of the monitoring process on how the EU inflow of resources coming from the new Multiannual financial framework and the Recovery and Resilience Facility is spent, and, on the other, that, as expressly requested by EU Regulation 2092/2020, any mismanagement of EU funds affecting supranational financial interests, finds in the Court of Auditors (as well as in the various other courts involved with fraud on EU funds) a judicial bulwark relying on the control activities initially carried out (Canale, 2021).

The jurisdiction of the Court of Auditors has been expanded greatly with regard to the mismanagement of EU funds. At least since 2006, the Court of Cassation has confirmed the Court of Auditor's exclusive jurisdiction over controversies surrounding the use of EU direct funds (Court of Cass., Sez. Un. Civili, ord. No 4511/2006; No 20701/13; No 26935/13 among many). The Regional Prosecutor's offices of the Court of Auditors brings actions of administrative responsibility against administrators and civil servants and also to the direct beneficiaries of the EU (and national) funds, thereby triggering decisions of first instance and, if appropriate, at appeal (Chiarenza and Evangelista, 2018). The action concerns the financial liability of natural and legal persons in a contractual relationship (*rapporto di servizio*) with public administration bodies for revenue damage relating to the management of EU funds and incurred when carrying out administrative activities. Regarding EU funds, revenue damage can include both revenues *stricto sensu*, for failure to receive the resources due, and expenditures. In the latter case, damage can be caused by the improper disbursement of sums, the way they have been used (diverted from objectives and the correct recipient), and the failure to duly and promptly act to retrieve resources illicitly spent (Court of Auditors, General Prosecutor's Office, 2017).

Since 2002 the Court of Cassation has clarified – in what is now a consolidated body of case law – that the jurisdiction of the Court of Auditors is not limited to the involvement of administrators and civil servants but also private citizens and companies who perform a role of "agent of the administration" in so far as they manage public funds (Court of Cass., Sez. Un. Civili, No 8143/2002 and No 14473/02). Through this jurisprudential shift, the focus to ascertain whether the competence lies in ordinary judges or in the Court of Auditors has switched from the quality of the agent and the subject at stake (public or private) to the nature of the damage and the aims fulfilled (Court of Cass., Sez. Un. Civili No 4511/06). Thus, regardless of the type of contract in place with the public administration, a company or a private citizen can be held liable for revenue damage if they negatively affect implementation of the programme set by the public administration and to which it/she has been called to contribute through the granting of EU funds in such a way as to undermine the objective to be pursued (see, for example, Court of Cass., Sez. Un. Civili No 18991/2017). Thus, also false declarations by a beneficiary of EU funds – such as CAP resources for zootechnic, and fulfilment of the requirements set by EU law to obtain the grant can trigger revenue damage (Court of Cass., Sez. Un., No 1515/2016).

As a consequence of the expanded scope of the jurisdiction of the Court of Auditors, numerous decisions have been issued each year. In 2019 there were 81, with convictions amounting to over 56 million euro,

most of which concerned funds for the development of infrastructures. There were also 16 rulings on appeal, with convictions worth over 183 million euro (Rebecchi and Pomponio, 2020, 321-322). In 2020, there were 66 decisions at first instance, with convictions worth more than 25 million euros, half of which concerned agricultural funds and the European Social Fund, while 48 were appeal decisions, with convictions worth more than 43 million euros (Dammicco and Pomponio, 2021, 169).

Often, the same alleged improprieties triggered a proceeding before the Court of Auditors and proceedings before criminal courts. There have been convictions of beneficiaries of EU funds – as well as public officials for serious shortfalls in the control system – for their collusion in the disbursement of illegitimately granted funds and for concussion (Rebecchi and Pomponio, 2020, 318). The outcome of the two types of proceedings, however, may be divergent, creating some uncertainty. For instance, some farms and their administrators, accused of unlawfully benefiting from EU agricultural funds, had been acquitted by the criminal court in Treviso, following a preliminary ruling of the CJEU. As a consequence, the claimants contested that, due to the acquittal, the Court of Auditors no longer had jurisdiction to ascertain their administrative liability. The Court of Cassation rejected this claim on the ground of the principle of the autonomy of the judicial proceedings and arguing that the inconsistency between the criminal ruling and the decision of the Court of Auditors – also in relation to the reception of the CJEU preliminary ruling – does not impinge upon the remit of the Court of Auditors (Court of Cass., Sez. Un. civ. No1515/16).

Addressing the relationship with criminal law, some concerns have recently been raised by the entry into force of Article 21, Decree Law No 76/2020 (the so-called *Decreto semplificazioni*), which makes it more difficult to prosecute cases of administrative liability, normally requiring proof of malicious intent (*dolo*) or gross negligence (*colpa grave*). Until 31 December 2021, cases of gross negligence cannot be ordinarily prosecuted, and malicious intent needs to be proven in a way similar to the field of criminal law (even though the prosecutors of the Court of Auditors do not have the same investigative powers as criminal prosecutors), i.e. demonstrating the intent to cause a harmful event. The limits of administrative liability at the time when EU Regulation No 241/2021 enters into force, requiring strict procedures for the control and the management of misappropriation of funds coming from the Recovery and Resilience Facility, seems to challenge compliance of the norm with EU law (Canale, 2021).

2.3. Criminal courts

This section is meant to provide a short overview of the relevant circumstances when criminal courts are involved in the Italian judicial system to tackle frauds against the EU financial interests, while a more detailed analysis on the criminal offences involved and of criminal proceedings is offered in Tasks 2 and 4.

The reception of the supranational criminal norms in the Italian legal system from the PIF Convention (Law No. 300/200 and Legislative Decree No. 231/2001) to the PIF Directive, Directive (EU) 2017/1371 (Law No. 157/2019 and Legislative Decree No. 75/2020; Mazzanti, 2020) has profoundly shaped domestic criminal law gradually defining a more effective and stricter system for combating frauds and indirectly triggering increased penalties (Lanotte, 2021; see also Task 4 below).

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The jurisdiction of the criminal judge is necessary when four main categories of criminal offences are involved (Venegoni, 2015; Senate of the Italian Republic, Impact Assessment Office, 2018; Lanotte, 2021; see, for more details, Task 4). The first regards misappropriation (Article 316-bis criminal code), fraud and aggravated fraud for obtaining public funds (Articles 640 and 640-bis of the

Criminal Code), aggravated information fraud (Article 640-ter criminal code), fraud in public supplies (Article 356 of the Criminal Code), undue obtaining of disbursements at the full or partial expense of the European Agricultural Guarantee Fund and the European Development Fund (Law No 898/1986), and smuggling offenses (D.P.R. No 43/1973). A second category of crimes concerns – provided they affect the EU's financial interests –money laundering, self-laundering, use of money, goods and other utilities of illicit origin (Articles 648, 648-bis, 648-ter of the Criminal Code) and the fraudulent transfer of valuable assets (Article 512-bis criminal code).

A third category concerns frequent VAT fraud amounting to a series of tax offences envisaged by Legislative Decree No 74/2000, such as fraudulent declarations using invoices or other documents for non-existent transactions, fraudulent declarations via other tricks, false and omitted declarations, issuing invoices or other documents for non-existent transactions, the concealment or destruction of accounting documents, undue compensation and fraudulent evasion of taxes. In several cases, VAT fraud may also trigger the jurisdiction of the Court of Auditors when administrative liability – toward the State – is at stake, i.e. when, as a consequence of the fraud, damage to the public finances has occurred (see section 2.2 above).

A further category concerns crimes against the public administration, including embezzlement (Article 314 of the Criminal Code), extorsion (Article 317 of the Criminal Code), corruption offences (Articles 318, 319, 320, 322 of the Criminal Code), corruption in judicial acts (Article 319-ter of the Criminal Code), undue inducement (Article 319-quarter of the Criminal Code), abuse of office (Article 323 of the Criminal Code) and, more recently, inducing the passive corruption of public officials in charge of public services in foreign states and public international organisations (Article 322-bis criminal code). It is worth mentioning that in the circumstances where the offence is committed by a civil servant s/he can also be involved in proceedings before other courts. For example, as a consequence of extorsion, the corporate criminal liability can be triggered before ordinary courts seeking compensation for damages from the natural or legal person affected by the illicit conduct (Cass. Sez. Un., No 66909, 9 March 2020 and Council of State, decision No 2650 of 24 April 2020) – for instance, when the civil servant manages to keep for him/herself part of the EU fund by abusing his or her position – while the relevant public administration body may be asked to respond before the administrative court for the violation of legitimate interests caused by one of its civil servants. By the same token, the civil servant can also face a proceeding before the Court of Auditors for financial loss (*danno erariale*: see *Codice della giustizia contabile*, Legislative Decree No 174/2016 and section 2.2. above).

As we have briefly pointed out, several criminal offences relating to EU financial interests may – at the same time – trigger other types of judicial proceedings before civil and administrative courts and before the Court of Auditors. For some offences, the criminal nature of the illicit conduct is evidenced only if a specific punishment threshold is met: below this threshold, the case is considered to be of only administrative nature (Senate, Impact assessment Office, 2018). This applies, for example, under Article 316-ter, para. 1 of the Criminal Code, in the case of undue receipt of funds to the detriment of the State for an amount below 3,996.96 euros or the undue receipt of CAP funds below 5,000 euros through false information and date (Article 3, Law No 898/1986).

3. Involvement of the Constitutional Court: access to constitutional justice

The Italian Constitutional Court has not been frequently involved in cases regarding the management of EU funds, mainly due to the narrow availability of access to this Court, also compared with similar Courts in Europe (De Visser, 2013), whereby neither individuals nor minorities get direct access to constitutional adjudication in Italy.

The Court is not part of the judiciary, yet the guarantees of the independence of Constitutional judges are similar to those of other national judges of the supreme jurisdictions, and constitutional proceedings aim to follow the basic tenets of due process (Law No 87/1953; Zagrebelsky and Marcenò, 2018, 23 ff.). One third of the fifteen judges are appointed by the President of the Republic, one third by Parliament in joint session with a qualified majority, and one third by the supreme ordinary and administrative courts (Article 135 Const.). They are appointed for a non-renewable term of nine years

and are chosen from current and retired magistrates of the highest courts, full professors in legal matters, or lawyers with at least 20 years of practice.

Most of the cases decided by the Italian Constitutional Court on this matter have been introduced via *principaliter* proceeding (Article 127 It. Const.), that is to say through actions brought by the national Government against regional legislation for violation of any clause of the Constitution or, vice versa, by regional government(s) against State legislation for alleged violations of regional competences. In particular, over the last few years, regional authorities have frequently challenged State legislation for "pre-empting" them from the use of EU funds allotted and for the alleged illegitimate diversion of those funds from the regional level of government to State purposes. Most of the questions concerned the so-called Plan of Action Cohesion (*Piano di Azione Coesione*), which allows the State to reorganise the use of EU structural funds available to Italy and already targeted to financing regional operative programmes (POR) from the European Fund for regional development (POR-FESR 2007-2013), to be agreed with the regions with the green light of the European Commission on reduced national co-financing of projects (Buzzacchi, 2018).

In the framework of a national consolidated trend towards fiscal and financial centralisation, EU resources originally allocated to fund PORs were converted by the State (Law No 183/2014, *Jobs Act*) to finance active labour market policies in favour of women's employment in the southern regions of Italy thereby cutting national co-financing of regional policies. However, this modification to EU resources for the regions occurred without involving the regional authorities in co-operative procedures – but as the State's unilateral decisions – although the programmed use of these funds is normally activated upon the initiative of the Regions and may fall within regional competences (Rivosecchi, 2019). The Regions affected have challenged the constitutionality of the national legislation contesting the violation of their political autonomy, the principle of sincere co-operation, and Article 117, first section, regarding Article 33 of EU Regulation No 1083/2006, which requires the participation of the regional authorities in the programming process.

The Constitutional Court, however, has systematically rejected these constitutional challenges (see, among many, Judgments No 196/2015, 155/2016, 143/2017) affirming the State's exclusive competence to regulate such funds: according to the Court, the EU resources, once allotted to the Plan of Action Cohesion, are to be directed by the State without the obligation set out in the EU legislation – in terms of participation of the Regions – to change the terms of co-financed projects. The principle of sincere co-operation cannot be invoked as the regional competences remain untouched for the Court. The EU resources redirected towards State objectives are regulated in the framework governing the programmed use of the 2007-2013 structural funds, but there is no obligation to spend them within the regional territories originally entitled to them (*vincolo giuridico di territorialità*). Nonetheless, this line of constitutional case law has been criticised for downsizing the regional competences in the programming process, which EU law expressly protects (Rivosecchi 2019).

The main exception to this consistent jurisprudence is Judgment No 13/2017. The Court annulled, declaring unreasonable and thus unconstitutional Article 7, section 9-*sexies*, of Decree Law No 78/2015, in relation to Umbria (a small region in central Italy), insofar as it postponed for this Region the deadline (from 30 September 2014 to 1 January 2015) for the regional commitment on the EU funds that otherwise would have been re-directed to the Plan of Action Cohesion, at the disposal of the State. Indeed, the Region had already presented its parallel plan for commitment that had been approved by the national Government, assigning the resources requested by the regional administration. As a consequence of the extension of the deadline, the Region would have lost those resources already committed, illegitimately pre-empted by the State, which had previously authorised its use by the Region.

Occasionally, conflicts of attribution of authority between the State and the Regions – not affecting the exercise of legislative power – have come under the radar of the Constitutional Court with regard to the way EU funds have been used or not (Article 135, first section). For example, addressing the follow-up of Constitutional Court Judgment No 13/2017, the Government of Umbria requested the restitution of the EU funds appropriated by the State. Given the lack of response by the national

Government, thereby creating a stalemate and preventing Umbria from spending the EU resources it had been unconstitutionally deprived of, the Constitutional Court declared the principle of sincere co-operation violated by the persistent silence of the national authorities and the legislative and fiscal autonomy of the Region impaired, being *de facto* prohibited from using the funds allocated (Judgment No 57/2019): an interesting case of unconstitutionality by omission.

Disputes over the use of EU funds have seldom been (indirectly) reviewed by the Constitutional Court in the framework of the *incidenter* proceeding, i.e. when a preliminary referral is issued by a court regarding a law or an act having the same force as the law or part thereof to check the constitutionality of the contested legislative provision(s) instrumental and prior to solving the main proceeding (Const. Law No 1/1948). However, at least in one case addressing the protection of the EU's financial interests and reaching the Constitutional Court through an *incidenter* proceeding, the controversy, in the so-called Taricco saga, has taken on the features of an unprecedented constitutional conflict between EU law and constitutional law, ultimately settled in a collaborative way between the Italian Constitutional Court and the CJEU involved in a series of preliminary reference procedures begun by Italian courts, including the Constitutional Court.

4. The "Taricco saga": a case of multilevel constitutional protection of the EU's financial interests?

The "Taricco saga", in its various stages, is crucial to understanding how the multilevel system of judicial protection of the EU's financial interests is deployed and what its limits can be when other significant constitutional principles, potentially clashing with the preservation of the EU budget, come into play.

The saga started before the *Tribunale di Cuneo*, addressing criminal proceedings against Mr Ivo Taricco and other suspect tax evaders prosecuted for VAT-"carousel" fraud, undermining (national and) EU financial interests. Indeed, given the difficulty in carrying out criminal investigations on these types of fraud, involving the falsification of documents by cross-border organised groups arranged through shell companies and illicitly taking advantage of VAT exemptions on the intra-EU supply of goods, Italian legislation, as amended in 2005 (Articles 160 and 161 of the Criminal Code, as modified by Law No 251/2005), would have indirectly granted impunity to such tax evaders by reducing the absolute limitation period and affecting the time available for prosecution. The judge at the *Tribunale di Cuneo*, doubting the compliance of such legislation with EU secondary law, and especially with Council Directive 2006/112/EC of 28 November 2006 on the shared system of value-added tax, issued a preliminary reference to the CJEU asking to clarify the interpretation of the national obligations to counter VAT fraud under EU law, aiming to understand whether the domestic norms should have been disapplied. The answer of the CJEU (Grand Chamber) on 8 September 2015, Case C- 105/14, was quite straightforward, yet controversial, establishing the so-called Taricco rule.

First of all, as widely known, the CJEU raised the tone of the controversy by placing it in the context of the enforcement of EU primary law, notably Article 325, paras 1 and 2 TFEU – rather than the Directive – that was not even cited in the national referral order (Amalfitano, 2018; Piccirilli, 2018). This Article refers to the duty of the Union and the Member States to counter fraud and other illegal activities to act as a deterrent and to ensure effective protection of the European financial interests (para.1) and to the obligation for the Member States to adopt equivalent measures as those put forward to secure the national financial interests vis-à-vis EU fraud (para.2). The CJEU acknowledged direct effects to the somewhat vague wording of Article 325 TFEU (Gallo, 2017), thereby prompting the national judge to disapply the contested domestic norms if: i) the VAT evasion is serious and is used in a significant number of cases, thereby preventing "the imposition of effective and dissuasive penalties"; or ii) if the national norms provide "for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, which it is for the national court to verify" (para.58).

This EU judgment sparked a lively debate, especially in Italy, questioning the clarity, precision, and the non-conditional nature of Article 325 TFEU triggering its supposed direct effects as well as its impact on the status of the persons convicted, who would have been retroactively subject to a worse

and non-foreseeable treatment compared with the moment when the crime was committed (among many, see Bin, 2016). The CJEU did not consider the protection of fundamental rights and the principle of legality under Article 49 of the EU Charter of fundamental rights violated. The reception of this ruling at domestic level proved to be equally controversial. For example, the Third Criminal Section of the Court of Cassation disapplied the national law and kept the criminal proceeding in place (Judgment No 2210, 17 September 2015, published on 26 January 2016), while it would have been otherwise quashed due to the expiration of the statute of limitation. By contrast, just a few months later, the Fourth Criminal Section of the Court of Cassation did apply the national provisions on the absolute statute of limitation as it did not consider the conditions set under the "Taricco rule" to have been met (Judgment No 7914, 25 January 2016, published on 26 February 2016). Instead, the Court of Appeal of Milan (Order of 18 September 2015, No 6421/14 RG A) decided, considering that the allegations of tax fraud it was addressing were serious and affected a significant number of cases, to raise a question of constitutionality (*incidenter* proceeding) before the Constitutional Court as to whether the interpretation of the CJEU of Article 325 TFEU could be deemed compatible with Article 25, second section It. Const. according to which, "No punishment may be inflicted except by virtue of a law in force at the time the offence was committed." The Third Criminal Section of the Court of Cassation and the *Tribunale di Siracusa* followed with other questions regarding constitutionality referred to the Constitutional Court (Order of 30 March 2016, No 28346/16 and Order 25 May 2016, R.G. 2211/14, respectively).

Various constitutional standards of review were invoked besides Article 25, second section Const. and were not exactly the same for the three courts (Articles 3, 11, 24, 27, third section, 101, second section, and 111 Const.), but all the orders challenged the constitutionality of the law that had authorised the ratification and the execution of the Treaty of Lisbon (Law No 130/2008) allowing the entry of the CJEU's interpretation of Article 325 TFEU in the Italian legal system. In other words, it was claimed that the reading of Article 325 TFEU by the CJEU's Judgment of 2015 in *Taricco* would trigger a violation of several constitutional clauses and, in particular, the principle of legality in criminal matters amounting to a supreme principle of the Italian Constitution and regulating the limitation period, to be considered an integral part of substantive criminal law in Italy. According to the Constitutional Court, the "supremacy" of the principle of legality in criminal matters is a guarantee of the inviolable rights of the individual and requires criminal norms to be well-determined and precise. By no means can they have retroactive effects, as may be if national courts are obliged to strictly follow the "Taricco rule" without exception. The Italian Constitutional Court could not endorse such an interpretation and would prevent ordinary courts from doing so, thereby resorting to 'counter-limits' – an expression coined by legal scholar Barile (1973) in the aftermath of the Constitutional Court's decision No 183/1973 (see also Cartabia 1990-1991) and used only once in relation to international law (judgment No 238/2014, see, for example, Lamarque, 2015) but only threatened in relation to EU law.

In order to avoid such a patent conflict, the Constitutional Court decided to issue its third preliminary reference to the CJEU (Order No 24/2017) in an attempt to find a negotiated solution in compliance with the principle of sincere co-operation (on various positions, see Mastroianni, 2017; Viganò, 2017). At stake was the complex relationship between the principle of the primacy of EU law and the constitutional identity of a Member State as derived from the supreme principles of its Constitution. The Constitutional Court did not directly contest the primacy of EU law, which is for the CJEU to delimit by interpreting and defining the scope of application of EU law; it is the Constitutional Court, on the other hand, which gives content and substance to national constitutional identity. As national courts have to abide by the principle of primacy, the CJEU has to respect the national identity of the Member States.

Indeed, the limitation period does not fall within the remit of EU law (a partial harmonisation of the rules on the fight against fraud to the Union's financial interests by means of criminal law was only pursued later on, by means of Directive (EU) 2017/1371, on which see Tasks 2 and 4) and, thus, according to the Constitutional Court, it would be possible for domestic authorities to invoke a higher level of protection of fundamental rights compared with what Article 53 of the EU Charter sets out.

The Constitutional Court, in fact, asked the CJEU whether a more flexible interpretation of the "Taricco rule" might be possible, *de facto* softening certain statements of the 2015 EU Judgment and

avoiding enforcement of the counter-limit doctrine. What the Constitutional Court ultimately argued for in the referral order – to a large extent successfully – was to strike a different balancing between the protection of the EU's financial interests, fulfilled through the rigid enforcement of Article 325 TFEU, and the principle of legality in criminal matters, making the latter prevail when the rights and guarantees of the persons convicted would be undermined. There were three preliminary questions referred by the Constitutional Court: 1) whether Article 325, paras 1 and 2 TFEU compels the national courts to disapply a national provision on the limitation period that prevents, in a significant number of cases, the repression of serious fraud against the EU's financial interests even though the disapplication lacks a sufficiently clear legislative basis and/or; 2) when, in the Member State concerned, the limitation period is part of substantive criminal law and is subject to the principle of legality; 3) whether the first Taricco ruling is to be interpreted in such a way as to oblige a criminal court not to apply the domestic norms on the limitation period like those in force in Italy, despite the disapplication being in conflict with the supreme principles of the national constitutional system or with the inalienable rights granted under the national Constitution.

The CJEU did not follow the conclusions of Advocate General Bot that would have probably exacerbated the already strict approach of the 2015 EU judgment and, thus, the conflict between EU law and constitutional law as he tried to elaborate on what is to be included within the Italian constitutional identity (Rauchegger, 2018). Possibly, instead, the conclusions of Advocate General Bobek in another case addressing VAT fraud in Italy (*Scialdone*, C-574/15) were of guidance here (Amalfitano, 2018). Addressing the retroactivity of a more favourable criminal norm and with its compatibility with Article 325 TFEU, AG Bobek highlights the importance of balancing the protection of the EU's financial interests with the guarantee of the legitimate expectations of the person convicted, with the certainty of the law, and with the predictability of the criminal norm to be applied: all these principles would have prohibited, according to Bobek, the retroactivity of the criminal provisions *in malam partem* and could have justified a temporal limitation of the effects of the CJEU's decision.

Trying to make its reasoning non-context-dependent on the Italian situation and to fine-tune its previous judgment, the CJEU affirmed that, in light of the principle of non-retroactivity, the disapplication of the Italian legislation in conflict with Article TFEU could be limited only to cases after its 2015 decision and that, as argued by the Constitutional Court, the subject matter was only partially harmonised by EU Directive 2017/1371 (C-42/17, M.A.S. and M.B. (Taricco II)). The CJEU also acknowledges – unlike in its previous decision – that the principle of legality in criminal matters is part of the constitutional traditions common to the Member States, to be guaranteed also by Article 49 of the EU Charter, and perhaps the consideration that it is part of substantive criminal law also in other Member States (e.g. Romania, Spain, Sweden) may have played a role. The Court of Justice confirms the direct effect of Article 325 TFEU and the mandatory disapplication of the conflicting national law, but, on the one hand, it recalls that the disapplication may not jeopardise the position of convicted persons. On the other hand, it takes stock of the specificities of Italian law on the limitation period, now spelled out clearly by the Italian Constitutional Court, which, if disapplied, would create a situation of uncertainty leaving the courts alone to decide which rules and conditions to enforce in criminal proceedings in breach of the principle of legality.

To avoid any direct clash between Article 325 TFEU and national constitutional law, the CJEU authorises national courts (without clarifying which ones: criminal courts? The Constitutional Court itself?) to assess, on a case by case basis, the sufficient level of determination of the penalties and, thus, to ensure a higher level of protection, according to the constitutional protection of the principle of legality in criminal matters, thus deciding whether the "Taricco rule" should prevail or not.

Given the accommodating position of the CJEU, the Constitutional Court, in the last step of the saga, abandoned the discourse on counter-limits without giving up the rhetoric of constitutional identity (on which the CJEU had not elaborated) and decided to reaffirm its central role vis-à-vis ordinary judges (Decision No 115/2018). Instead of declaring the inadmissibility of the questions of constitutionality or sending the questions back to the referring court to check whether they were still meaningful and relevant after the 2017 CJEU judgment, the Constitutional Court went on to reject the doubts as to constitutionality, providing clear contextualisation for the enforcement of a new, milder "Taricco rule"

in the domestic constitutional system (Cupelli, 2018; Manes, 2018). First of all, the Court reaffirmed that time matters: "Regardless of whether the facts occurred before or after 8 September 2015, the referring ordinary courts cannot apply the 'Taricco rule' to them because it contradicts the principle of legal certainty in criminal matters enshrined in Article 25(2) of the Constitution" (para.10).The absolute limitation period, according to Articles 160 and 161 of the Criminal Code, applies to the cases at hand. Second, the principle of determination of the criminal charge cannot be applied *à la carte*, depending on the discretion of the judge of the case. The clear determination of the penalties for the criminal offences falls within the principle of legality in criminal matters, which being one of the supreme principles of the Italian Constitution sees the Constitutional Court as the "natural judge". In other words, the Constitutional Court reaffirms its monopoly in ruling on these supreme principles, without any interference by ordinary courts, not even the courts who made the constitutional referrals (Piccirilli, 2018). The Constitutional Court considered itself "the competent authority to carry out the verification described by the Court of Justice, since it alone is entitled to ascertain whether EU law contrasts with the supreme principles of the constitutional system and, in particular, with the inalienable rights of the person" (para.8, Judgment No 115/2018).

Ultimately, the "Taricco saga" has not shed doubt on the direct effect of Article 325 TFEU nor the primacy of EU law but has imposed a more nuanced balancing between the protection of the EU's financial interests and domestic constitutional principles: in particular, "The obligation to ensure the effective collection of the Union's resources cannot therefore run counter to that principle" (CJEU, case C-42/17, para.52), namely the principle of legality in criminal matters under Italian constitutional law.

5. What room for political (parliamentary) control?

One of the problematic issues highlighted by the "Taricco saga" with regard to the Italian legal system is that the domestic legislator had not adopted the required measures to promptly and correctly implement Article 325 TFEU at national level: an issue eventually tackled toward the end of the saga and after the Constitutional Court's Judgment No 115/2018 with the approval of Law No 103/2017 and Law No 3/2019 (Zirulia, 2017; Gatta, 2019). In turn, this triggered a situation of legal uncertainty in criminal proceedings, should the "Taricco rule" be interpreted, as the CJEU initially envisaged, in a strict manner. The lack of a clear normative framework depicting with sufficient determination the penalties for criminal offences in the event of fraud against the EU budget, if the Italian rule on the statute of limitation were disapplied, would potentially lead criminal courts to exercise their discretion beyond the principle of separation of powers and the principle of legality.

It follows that, besides the role of courts, it is also the responsibility of representative institutions to make sure that the EU's financial interests are protected without undermining potentially competing domestic constitutional principles. Is there political (parliamentary) control over how EU resources are spent? The issue is set to become even more significant now with the prospective flow of EU resources pooled within Next Generation EU in favour of Member States and with Italy being one of the major beneficiaries of the Recovery and Resilience Facility (210 billion euro).

Also due to the traditional and convinced Europhile position of the country, the attention paid by the Italian Parliament to control EU affairs and the activity of the Government in relation to that and to budgetary issues has been quite marginal (Griglio, 2020): the last proof of this is parliamentary approval of the EU Decision on Own Resources 2020/2053 through Decree Law No 183/2021 with almost no discussion (unlike the discussion that took place in Germany and Poland), a tool to be used in extraordinary cases of urgency under Article 77 Const. Suffice it to say that all the reports tabled by the Italian Court of Auditors regarding the execution of the national budget and the state of play in the management of the budget of local and regional authorities, as well as the annual reports of the Committee to combat fraud against the EU (doc. CCVVIII) – submitted under Article 54, Law No 234/2012 – are only assigned to parliamentary committees and never examined. The same applies to the Governmental quarterly reports to the Parliament on the financial flow with the European Union (Article 1, section 4, Law No 194/1998 and now Article 16, Law No 234/2012). According to Article 16 of Law No 234/2012 this report must indicate the financial flow between the EU and Italy organised by the rubrics envisaged within the EU Multiannual Financial Framework (MFF) to check the

correspondence between the estimates and what has been spent. Moreover, with each rubric, the report specifies the distribution and state of te spending of the resources transferred from the EU budget, according to the relevant public body and entity responsible, and by geographic area. However, the latest report transmitted to Parliament was that of the Spring trimester April-June 2013 (Doc. LXXII, No 3).

Since then, and with a questionable enforcement of the law, the information about the financial flow between the EU and Italy is included in the annual Governmental Report to the Parliament on Italian participation in the EU, to be presented on 31 December every year. Article 13, letter c, Law No 234/2012, however, does not require the same level of detail set out for the quarterly report. The Annual Report, typically presented by the Government with a delay of some months, refers to the use of EU resources in the country, also regarding the reports of the European Court of Auditors concerning Italy, and the implementation of EU cohesion policy. It highlights the main results and milestones, if reached, and the fulfilment of the objectives set for the relevant programming period of seven years, in accordance with the MFF. The Annual Report and its relevant section on the use of cohesion funds are regularly scrutinised by the Parliament at committee level, together with the Governmental Report programming Italian participation in the EU for the following year. The scrutiny, however, takes place with a significant delay so that Parliament can exert a meaningful influence and give political direction on how to address potential weaknesses and flaws in the use of EU funds, and it does not specifically focus on the spending of EU resources, which are just one item amongst the several EU policies in which Italy is involved. Nor does Parliament engage with the scrutiny of the tools and measures to combat fraud against the EU's financial interests.

The difficulty of the Italian Parliament in monitoring fiscal procedures between the EU and the national level is also confirmed by the marginal role played in the European and the National Semesters within the EU common budgetary timeline, given the compelling deadlines to send the relevant documents – National Stability programmes, National Reform programmes, and the draft budgetary plan – to the European Commission, and the pace of implementation of the country-specific recommendations and the opinion on the draft budget (Fasone 2020). The relevant programmes, plans and recommendations are sent too late for the Parliament to carefully scrutinise them and try to turn them into policy outputs. This dysfunctional timing is also problematic in relation to the design and implementation of the National Plan of Recovery and Resilience (NPRR) due by 30 April 2021. Following the adoption of general political directions to the Government in the autumn of 2020, the two Chambers of the Italian Parliament reviewed the draft NPRR in February, prior to the appointment of the Draghi Government on 13 February 2021 (see *Osservatorio sulle fonti, Rubrica interna corporis organi costituzionali*, 2021, see here). However, with the alternation of the Governments in office, the original plan was completely changed, and the final one, transmitted to the Commission, was only tabled by the Government in the Chamber of Deputies and the Senate on 26 April, and the resolutions were approved the day after. It would be desirable, however, for new procedures to be designed to allow proper parliamentary scrutiny of the NPRR, as well as its revision and implementation regarding the use of EU resources. This would ensure sufficient time for discussion and deliberation in the two Chambers and greater co-ordination with the timeline of the European Semester. For the time being, the National Budget Law for 2021 (Article 1, section 1045, Law No 178/2020, has simply envisaged new obligations for the Government to provide Parliament with information in the form of an annual report on the implementation of Next Generation EU.

Lastly, a tool to be further exploited and whose use was been significantly expanded by the Parliament during the pandemic is (virtual) committee hearings. For example, even though the reports of the Court of Auditors are not examined, representatives of the Court of Auditors have been regularly invited by the Committee on EU Policies for hearings to illustrate the main findings of the yearly review on the financial relationship with the EU and the use of the EU funds carried out by the control section on EU and international affairs of the Court of Auditors. A series of hearings were organised in the two chambers to set general guidelines for drafting the NPRR.

TASK 4, D1, ITALY

Dr Elisabetta Tatì and Emanuele Birritteri

Summary: 1. Introduction. 2. The administrative system of controls and sanctions for the protection of the EU's financial interests, especially in the light of the European structural and investment funds; 2.1. The internal system of controls and overlap with Si.Ge.Co.; 2.2. The importance of the public procurement sector and the role of the Anti-corruption Authority; 2.3. The importance of transparency and anti-corruption actions, together with the performance cycle and civil-servants/public managers conduct (deontological codes); 2.4. The recovery phase and the relevant administrative sanctions for the protection of the European financial interest; 2.5. The external – mainly *in itinere* and *ex post* – system of controls: the Anti-fraud Committee in the Department for European affairs and the role of the Financial Police; 3. The Italian criminal law system in the field of protection of EU financial interests: an overview outlining in greater detail the 'national catalogue' of crimes aimed at protecting the EU's financial interests, as well as sanctions; 4. A critical assessment of the impact of PIF Directive on the Italian criminal framework: summarising strengths and pitfalls relating to the implementation of PIF Directive in the Italian context; 5. Corporate criminal liability and the protection of financial interests of the EU: introducing the topic of corporate criminal liability for EU financial interests-related offences under the national regime – Legislative Decree No 231 of 2001.

1. Introduction

Among the different powers presented in Task 1, IGRUE also manages the Cohesion Policy's Monitoring National System (*Sistema nazionale di monitoraggio*, SMN, *ex* Article 1, para. 245, Law No 147/2013 and Article 1, para. 703, letter l, Law No 190/2014 - 2015 Annual Budget Law). SMN is a fundamental element in ensuring equal treatment among programmes and consistency with the Performance Framework (PF) provided by Articles 20-22, Regulation (EU) No 1303/2013. The System is powered by the information that, at predefined deadlines – and as specified by Document No 10/2017, MEF-IGRUE – the managing authorities transfer through their own information systems, according to common and shared rules appointed in IGRUE's *ad hoc* technical document. This data flow is also integrated with other external sources, such as the Public Administrations database (*Banca dati della Pubblica Amministrazione*), the national anti-corruption Agency's database, the Tax Register and the Projects Register obtained through the assignment of a unique project code (*Codice unico di progetto*, CUP) to all financial and administrative operations that involve public investments (both national or European resources). Interestingly enough, the latter has been in the pipeline since the nineties and is managed by the above-mentioned Department for Political economics planning and co-ordination, with the involvement of CIPE, now CIPESS (see Task 1).

According to the last IGRUE report of December 2020, there has been an advancement of 70.08% in terms of commitments and 48.75% in terms of payments for the overall resources programmed under the ESI Funds, including both the EU and national shares as well as commitments and payments relating to financial instruments. Regarding POR EFRD and ESF, less developed regions seem to have returned better performance than the more developed ones and those in transition. In a previous phase, the National Court of Auditors (NCA) reported a different trend, affirming that more developed regions were showing better performance than the less developed ones (NCA, Annual Report 2019, *I rapporti finanziari con l'Unione europea e l'utilizzazione dei Fondi europei*, 10-11). This can be explained with the extra effort in the implementation of the CP, particularly in 2019. Thus, after a year, the MEF-IGRUE Report 2020 has been able to obtain a different picture of the context.

In fact, as observed by the same NCA Report in 2019, after a first phase seeing many delays and difficulties, in 2019 was a certain acceleration, both in terms of commitments and payments, which have not only allowed a recovery of the degree of financial implementation but also to emerge almost unscathed from the first automatic decommitment with the EC at the end of 2018 (NCA, Annual Report 2019, 10). However, as seen in Task 1, the effects of implementing programmes and projects under the

SIF system are not always a guarantee of real or significant impact on the economy, society, and the environment. Despite the stricter regulation of current programming, the Italian habit of concentrating expenditure certifications near the deadlines and, above all, of spending without effective planning in order to use the resources anyway, still remains a weak point (NCA, Annual Report 2019, 11).

In terms of fraud and irregularities on the revenue side, according to the EC – and as reported by the NCA – Italy's irregularity rate in the collection of traditional own resources remains below average, while the recovery rate of financial volumes is improving despite remaining below average. Italy is in fact in ninth position in terms of the number of irregularities reported (104 reports 2018; 145 in 2017) and in seventh position in terms of the amounts communicated, with approximately 9.8 million euros worth of total irregularities recorded in the system, which represent 0.43% of the total traditional own resources paid to the EU budget (an improvement compared with 2017, the year in which the same index was equal to 0.57%). As regards the cases reported as potentially fraudulent, Italy – in sixth position – reported 38 cases of suspected fraud. In terms of the financial volume of non-fraudulent irregularities, Italy ranks in twelfth position, at about 4 million euros. Lastly, as regards recovery percentages, Italy, with 35%, has a percentage below the European average of 55%. However, this percentage is increasing, comparing 2018 to the data collected for 2017 (21% of recoveries in 2018 compared with a European average of 47% in 2017). It should also be said that, despite the measures taken to combat tax evasion, the VAT gap (which gives the measure of the tax lost due to tax evasion and avoidance) for Italy is still very high. In absolute value, the country has the primacy of evaded VAT (33.6 billion). However, Italy is witnessing a reduction in the propensity to evade compared with the past (from 26.6% in 2017 to 23.8% in 2018 of potential revenue). However, the European average is attested at much lower values (11%) (NCA, Annual Report 2019, 9 ff. and 24-25).

In terms of fraud and irregularities on the expenditure side, the trend is positive, since it can be observed that in 2018 there was an overall decrease in irregularities, with a total of reports from OLAF falling from 1227 to 779. The partial results for 2019 can be considered even more significant (487). The decrease is entirely attributable to the reports in the context of the Structural Funds, while they are substantially constant for the agriculture sector. Disaggregating the data from the reports highlighting the closed ones, it emerges that for the agricultural funds the open reports are in a clear majority but for the Structural Funds, the closed ones prevail. Taking into consideration the closed reports (mainly decertified for the Structural Funds) of the 2018 reporting year, the recovery activity carried out by the Structural Funds managing authorities is good, at 66.6% of the total irregular amount while the amount recovered in the agricultural policy sector is excellent at 100%. Considering the amounts still to be recovered, with reference to open cases, the total for 2018 significantly decreased from 143.4 million euros in the first half to 87.9 million euros at 31.12.2018, with a sharp decline in the ERDF and an average and constant value (42 million) for the two agricultural funds. Regarding the managing authorities most affected by irregularities still open in the context of SIF, it should be noted that the phenomenon is observed mainly in the Calabria Region and in the Ministry of University and Research for pending judicial proceedings. Among the permanently significant areas in terms of irregularities and fraud is the procurement sector, especially for violation of procurement regulations (NCA, Annual Report 2019, 9 ff. and 26 ff.).

To sum up, the NCA expresses the necessity to exercise, in any case – even in the comparison of data from different territories and different states – a prudent assessment in assigning a unique meaning to high data for irregularities or fraud. In fact, greater diligence or effectiveness in detecting and reporting them cannot be ignored among the relevant factors. The NCA, in its special composition for European affairs, continued to carry out, on the matter of irregularities and fraud, a specific monitoring programme, using its own database (SIDIF-ConosCO). This uses information entered in the Community database, in view of a direct relation between the systems through the B2B (business-to-business) connection and has started a collaborative partnership with the special Committee or *Comitato per la lotta contro le frodi nei confronti dell'Unione europea* (COLAF) to create the Integrated Anti-Fraud Platform. According to the NCA, there is an urgent need to become fully aware, on the part of all the bodies concerned, of the importance of combating irregularities and fraud to the detriment of the EU's financial interest and concurring national resources, both in terms of prevention and repression, making use of analysis and mechanisms underlying the irregularities, particularly in severe cases. The

close attention of the NCA is especially confirmed with regard to the recovery phase, which has been more widely analysed and evaluated in other reports (NCA, Report No 14/2018 and No 6/2019; see). It is important to highlight how financial relations with the EU constitute an important area of activity for the NCA, both regarding the exercise of its "control" function and with reference to "jurisdictional powers" (for the latter, see Task 3). Regarding the former, the functions of the NCA are based on Article 100, Const. and on Law No 20/1994, which expressly provides for providing feedback on public management performance in relation to funds of European origin (Article 3.4). Hence, the Court is responsible for the unitary examination of the phenomenon of irregularities and fraud, monitoring trends over time, and assessing the management of underlying proceedings, with the aim of identifying critical and risk situations so that the administrations can autonomously implement self-correction procedures. Obviously, the control function, unlike the jurisdictional one, which intervenes in the repressive phase of unlawfulness, operates with regard to the examination of the phenomenon as a whole and thus involves prevention, verification and contrast. With specific reference to European funds, the function is specifically entrusted to the Control Section for Community and International Affairs, which, as seen, reports to the Parliament, at least annually. It carries out specific inquiries on the management of European funds and has a function of collaboration with the European Court of Auditors and with other EU institutions in the implementation of international treaties and agreements (Dossier Senato, 2017, 57 ff.).

In the end, and in view of the future, none of the actors mentioned can fail to take into account the renewed global socio/economic scenario resulting from the COVID-19 pandemic. It is no coincidence that the European Union has already adopted a series of extraordinary emergency measures (i.e. the Member States are allowed to use European SIF Funds with an exceptional additional flexibility), and there is a range of new interventions and different implementations of existing European programmes (in particular, the RRF). Through its role as co-ordinator of the relevant administrations in the National anti-fraud policy and as a fundamental liaison with the European institutions, COLAF, for example, will provide an extraordinary input of ideas that must take into account two important and concomitant factors: the conclusion of the 2014/2020 programming period of SIF Funds, and the simultaneous launch of the above-mentioned extraordinary financial programmes. The implementation of these latter, despite the exceptional nature of the instruments, must not lack adequate mechanisms for the functioning of the management and control system, which must remain an important and irreplaceable safeguard of the legality and regularity of the operations to be financed (COLAF Annual report 2019, 3).

2. The administrative system of controls and sanctions for the protection of the EU's financial interests, especially in the light of the European structural and investment funds

The NCA's control activity seeks to assess which are the organisational tools that the administrations competent for the management of Union resources – both central, regional and local – use to monitor irregularities, how the management and payment functions are structured and controlled, which are the procedural phases most affected by the phenomenon, what actions are taken after the events, the length of the investigations, the bodies responsible for this function, the consequent systemic checks and the precautionary actions undertaken, as well as the recovery of sums unduly paid out.

Hence, also considering the above rebuilt context, the next section will present a sketch of all the relevant actors and tools (mainly controls and sanctions) involved in the fight against irregularities and fraud to the detriment of public resources involved in the management of EU indirect funds (especially SIF Funds). The perspective will mainly be that of Administrative Law and expenditure.

2.1 The internal system of controls and overlap with Si.Ge.Co

The Italian system of administrative controls is characterised by many interposed layers, considering also its historical evolution from an external to an internal/self-control approach, from an "in merit" control (political opportunity) to a more "legality-based" one, and from a mixture of these developments (i.e. from an *ex-ante* external control of the legality of the administrative act to an *in-*

itinere internal control, and *ex-post* external control over the legality and performance of an administrative action). The reasons for this complexity can be found mainly in the continuing existence of a certain number of external controls overlapping with internal ones – with a lack of co-ordination and sometimes an excess of supervision (i.e., in terms of the detection of administrative responsibility based on the NCA's external control activity) – the evolution of the same internal system of controls, with numerous reforms over the last few years (i.e., towards a system even more based on performances), the specificity of some sectors (i.e., local authorities or independent ones for strategic sectors such as the energy or the financial markets), and the often chaotic features of administrative organisation and activity that, in themselves, cause the inefficiency and ineffectiveness of the control process (i.e. in terms of accounting rules, especially for local authorities). In other words, this is an area of Italian Administrative Law that is still growing, especially with regard to the supervision of budgets and expenditures (De Benedetto, 2017; D'Alerio, 2015; Della Cananea, 1996; Cassese, 1993, 19; Sandulli A.M., 1984, 571; Giannini M.S., 1970, 308).

The Constitutional basis for the development of administrative control functions can be found in Art 97.1, Cost., one of the few articles expressly dedicated to the role of the public administrations. It lays down that public offices are organised according to the provisions of law so as to ensure the efficiency and impartiality of administration. Hence, this general provision can be considered the general starting benchmark according to which administrative control activity should be run, considering that Article 100, Cost. only details the NCA's control function (Clarich, 2013, 282 ff.; D'Auria, 2006; Giannini, 1974, 1264) and that also Articles 13-15, Const. are important for the limitation on State control over private persons (De Benedetto, 2019, 855 ff.). The normative evolution for administrative controls began after the Second World War, but it received new impetus in the nineties, a decade of great reforms in the field of administrative law thanks to the adoption of the general Administrative Procedure Act – APA, Law No 241/1990 – (Della Cananea, 2011, *passim*; Sandulli A., 2010, 202) and a shift towards the logic of New Public Management, together with liberalisation and privatisation processes (Hinna, Ceschel, 2021; Cepiku, 2018, 488 ff.; Cepiku, 2011; Ongaro, 2010, 174-190; Kickert, 2007, 26 ff.). Three sectors to experience many changes, with consequences for the internal control system as well, were: the local system (Law No 142/1990, with the affirmation for the first time of the principle of separation between political and administrative powers), the Public Labour regime (Legislative Decree No 29/1993, the so-called privatisation of the public labour sector) and the functions of the NCA (Law No 20/1994). At the end of this period, a new Legislative Decree was adopted with the goal of systematising the regime of internal administrative controls towards a more managerial paradigm (Legislative Decree No 296/1999, still applicable). Then, the Constitutional Reform of 2001 was approved, and a new Local Government Code (Legislative Decree No 267/2001), together with an updated Public Labour Code (Legislative Decree No 165/2001), were adopted, transposing the changes that were approved two years before for the general discipline of administrative internal controls. The l999 legal text was later supplemented in 2009 through the adoption of Legislative Decree No 150, the so-called *Riforma Brunetta*, that established the performance cycle (Lacava, 2008; Battini, 2004, 1253; Cassese, 2004; Perez, 2002; D'Auria, 2000, 1217 ff.; Cassese, 1993b).

Hence, since the end of nineties, there have been four main kinds of control over the internal structure of public organisations, emphasising the principle of autonomy – meaning through processes specifically set up by each administration: the evaluation of administrative and financial lawfulness – based on the respect of all the relevant rules in the adoption of the act and the way in which the administrative action is led, more in general, under the *in-itinere* responsibility of the person in charge of the single process/the public manager/or the accounting office and the *ex post* control of a Board of auditors (lastly updated by Legislative Decree No 123/2011, that implements the new Law of public accountability No 196/2009); the *ex-post* internal management control, mainly under the principle of efficacy – in terms of means employed to achieve planned goals; the control and evaluation of public managers; and the strategic control, under the principle of effectiveness – which means the objectives established by political subjects have been achieved (Mastroianni, 2010; Monda, 2010; D'Orsogna, 2008; De Martin G. C. 2007; Cerulli-Irelli, Luciani, 2002; Borrello, 2000). The NCA has the mission to monitor and evaluate the entire system of internal controls planned and fulfilled by each public administration as an external and *ex post* control. Over the years, specific bodies have been created or appointed by the national legislator for specific purposes. For example, the internal evaluation body –

Organismo interno di valutazione, OIV – was introduced by the *Riforma Brunetta* (2009) with the goal of internally monitoring n the system of controls and the implementation of the performance cycle (representing an evolution in the previous self-evaluation bodies, known as *nuclei di valutazione interna*). The performance cycle represented one of the main innovations in the general discipline on internal controls since 1999 and – with regard to public employment since 2001, highlighting the connections among the concepts of performance, evaluation, merit, and transparency in administrative actions and organisation (see the transparency and anti-corruption system; Hinna, 2010).

The internal control system is also important for indirect funds, and it contributes to the protection of (European) financial interest as well, considering the phenomenon from a bottom-up point of view. This happens because the SIF Funds management system is based on the idea of a shared administration (see Task 1, D.1 for Italy). Hence, considering the requirements of European regulations in terms of monitoring expenditure and the management systems for implementing the programmes, the Italian administrations use the instruments available at national level (Porras-Gómez, 2020, 145 ff.). Thus, if one imagines a paradigm to recognise the specific kind of internal control – subject, object, benchmark, measure, consequences – it is possible to affirm that, for SIF Funds, the controlling subject is first of all the administration with its personnel internal organisation (management/certifying authority); the subjects under control are the administrations themselves and the groups of beneficiaries that receive benefits; the object is administrative action (each process, each act, etc.) and the management system in its entirety. The benchmark is the legality principle, both in terms of general procedural rules (i.e. the *ex-ante* authorisation of expenditure or the respect for internal regulations, such as in terms of publicity or transparency), or technical rules (i.e. regarding the specific procedures under the SIF system in terms of accounting or reporting rules); the measures to be adopted to avoid irregularities or fraud are those that prevent *ex-ante* the act from producing effects (i.e. the decision of the person in charge of the financial office not to sign the act, hence precluding its effects), or solutions that always work internally but after the adoption of the act, such as in cases of self-protection (fixing the act or recovering unduly paid sums) and repression (for example through sanctions).

Now, taking as an example the role of the managing authority in the field of the EFRD, the task seeks to present the system of management and control known as Si.Ge.Co. (*Sistema di gestione e controllo*), which, under the EU regulation is considered a "first level" control (*ex* Article 122 and Article 125.3-7, Regulation (EU) No 1303/2013, both as systematic controls on administrative documentation or as samples for *in loco* inspections). In other words, Si.ge.co. systems adapt the national system of internal controls to the requirements of EU regulations in terms of "first level" control (Annex XIII, Regulation (EU) No 1303/2013), in order to guarantee efficient governance of programmes and projects (i.e. respecting the principle of sound financial management). "Second level" internal controls under the responsibility of the Audit authorities were introduced in Task 1, while what can be called "second level" but "external" controls by IGRUE-MEF and the NCA have been mentioned at the beginning of this Task. Regarding other external administrative controls, especially by bodies with functions of co-ordination in the field of EU resources at a national level, see section 2.5.

In 2018, the National Agency for Territorial cohesion (ACT) published a document with guidelines for the effective performance of first level controls of the ESI Funds for the 2014-2020 Programming (*Linee guida per l'efficace espletamento dei controlli di I livello dei Fondi SIE per la Programmazione 2014-2020*, 2018). It followed the indications provided by the European Commission Guidance on a common methodology for the assessment of management and control systems in the Member States (EGESIF_14-0010-final 18/12/2014). ACT proposes two systems of first level controls: a centralised model and a decentralised one. In the first case, controls are performed by the staff of a specific Control Office within the management structure, responsible for carrying out administrative and *in loco* checks. It is independent of the other bodies of the management authority. In the second case, the staff who carry out first level controls are selected from within the offices and bodies competent for the individual operations. This division does not mean that, in concrete terms, a combination of the two models cannot be adopted. Normally, "first level" and "internal" administrative controls envisaged by Si.Ge.Co. systems take into account two main kinds of procedures: on the one hand, the adjudication of services, works or goods and the implementation of the respective contracts or financial services, on the base of which funds are then released (i.e. to realise infrastructures in the

field of development projects); and, on the other, the direct issuance of in-cash or in-kind benefits or tax credits to a list of potential beneficiaries by the managing authority/intermediate authorities.

Especially for the latter, the controls on general administrative aspects are those provided for by Presidential Decree No 22/2018, the regulation laying down the criteria on the eligibility of expenditure for programmes co-financed by the European Structural Investment Funds (ESI) for the 2014/2020 programming period, namely respecting the admissibility period, checking that the beneficiaries receiving funds have declared their expenditures fairly and respecting all relevant European, National, and Regional regulations (i.e. in terms of public procurement, State aid or anti-money laundering), that the administrative and accounting regularity "visa" (*visto di regolarità amministrativa e contabile*) has been issued, that the documents provided are suitable to support the procedure, that the latter respect the non-discrimination and pro-transparency rules in the selection of contractors, that fair and gender opportunities or the sustainable development parameters are guaranteed, that the administration respects the established deadlines for reimbursements or payments, etc. Si.Ge.Co. should guarantee that all checks carried out are documented and that they follow the conventional steps envisaged (the *piste di controllo*). Attention must also be paid for the potential recovery phase and for compliance with the maximum period of time for payments and/or reimbursements by the public administrations.

A concrete example of a kind of *ex ante* control over administrative documents, namely one considered worthy of special attention by the managing authority Regione Basilicata in its EFRD Si.Ge.Co., thus valorising the principle of autonomy but considering also that preliminary checks on information provided by beneficiaries are mentioned in Annex XII, Regulation (EU) No 1303/2013, is the one on self-declarations. The latter is an administrative instrument employed by the Italian legal order to simplify administrative activity, avoiding expressing authorisations by public administrations (Articles 46 and 47, Presidential Decree No 445/2000). However, from its adoption, also a function of control of the declarations provided by private persons is expected (Articles 43 and 71, Presidential Decree No 445/2000). Regione Basilicata considers this a critical element in the management of the European programme, especially with regard to the list of beneficiaries of funds. For this reason, the Si.Ge.Co. explicitly mentions it. This example makes clear how important it is to concentrate the control activity, generally speaking, where the criticalities are. In fact, as already mentioned, systems of controls can be really complex and expensive. and it is a priority to understand how to make it the most efficient and simplest is possible.

Another example of personalisation of the general control function comes from the EFRD managing authority Regione Toscana's Si.Ge.Co, even though the *sui generis* solution adopted in this case derived from a COLAF initiative. In order to implement an effective anti-fraud prevention strategy and to assure a reasonable time for beneficiaries for reimbursements, Regione Toscana promotes the involvement of accountants with specific skills in the "first level" control system (Regione Toscana, EFRD Si.Ge.Co., Annex 5, 14; see also COLAF Annual Report, 2019, 27).

2.2. The importance of the public procurement sector and the role of the Anti-corruption Authority

In the case of European resources managed through public competition and financial instruments, what stands out is the special discipline on public procurement, both for the adjudication phase and the execution of the contract (i.e. the control that the products and services planned will be effectively provided or that they respect the agreed quality parameters, checks that, for example, can be carried out only *in loco*). Considering the importance of the Public Procurement Sector in the realisation of programmes and projects under EU funding, both in terms of spending capacity of – and incidence of – irregularities and fraud, it is important to introduce the role of the National Anti-corruption Authority (*Autorità anti corruzione*, ANAC). In fact, the 2019 COLAF Annual Report, based on data from the IMS system (see section 2.5), observes a decrease in "Violation of public procurement rules" (21% of the total communication of irregularities/fraud) compared with the previous year; nonetheless, this category highlights the high level of criticality in this field, as reported by many administrations, especially at regional level. This is inevitably connected to a higher risk of error resulting from particularly complex legislation (COLAF Annual Report, 2019, 60). Also from the special report of the

European Court of Auditors (ECA) of 15 July 2015 on the subject of procurement, carried out precisely in the context of the Cohesion Policy, it emerged that failure to comply with public procurement rules constitutes a constant and significant source of criticality (Special Report, *Efforts to address problems with public procurement in EU cohesion expenditure should be intensified*, No 10, 2015, 18 ff.). Later, the EC also adopted Public Procurement Guidance for practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds (2018).

For reasons of brevity, presentation of the relevant legal framework for the context mentioned above will start from the recent collaboration between the ANAC, IGRUE-MEF and ATC (2018) and the decision, in view of the 2021-2027 cycle, to appoint the ANAC, as 1st of January 2021, as the lead administration in charge of drafting the final report to be presented to the European Commission on the subject of control mechanisms for the public procurement market. In fact, in order to access EU funds, there are stringent conditions that Member States must be seen to respect. Already in 2018, the possibility of setting up a collaboration among these institutional subjects was explored, in view of strengthening supervision of the correct functioning of the management and control systems under the 2014/2020 EU programming. At that time, there was already a collaboration in place between the ANAC and the State General Accounting Office in the sector of public contracts by virtue of the Memoranda of Understanding of 2 August 2013 and 11 February 2015, concerning, respectively, the exchange of information relating to the life cycle of public works and collaboration in the inspections under the responsibility of the ANAC.

The 2018 three-year agreement, concerns collaboration among the above mentioned national institutions in order to ensure the correct and uniform application of national and community legislation in the field of public procurement and concessions by the managing authorities, the audit authorities and all the other subjects involved in the operational programmes, especially in order to improve the management and control systems in the field of interventions financed using the SIF Funds and to strengthen fairness and transparency of operations carried out through public tenders and concessions of works and services. In particular, the areas of the aforementioned collaboration will concern the analysis and sharing of tools to support the control of expenditure relating to operations for the management of public contracts, incurred in implementing interventions cofinanced by the FIS fund, such as checklists for audits and first level controls on operations involving the construction of public works and the acquisition of goods and services. The ANAC has asked ACT and IGRUE to identify criticalities or specific recurring problems of particular importance regarding compliance with the legislation on public contracts, for the possible adoption of guidelines to be shared between the parties, aimed at orienting contracting authorities in the correct application of the legislation on public contracts.

In carrying out this activity, ACT and IGRUE undertake to raise awareness among contracting authorities on the exercise of collaborative supervision, including preventive ones, pursuant to Article 213, paragraph 3, *lett*. h), Legislative Decree No 50/2016 (Public Procurement Code) and the ANAC's relevant regulation of 28 June 2017 (having regard in particular to the conditions set out in its Article 4, paragraph 1, *lett. d)*). The first legal source provides that the ANAC – through a set of flexible regulation tools – guarantees the promotion of efficiency in the activity of the contracting authorities, to which it also provides support, facilitating the exchange of information and the homogeneity of administrative procedures. Hence, among all its specific tasks, the independent authority supervises public contracts of works, services, and supplies in the ordinary and special sectors, including those of regional interest; it ensures that the principle of fair financial management in contractual execution is guaranteed and that no prejudice to the public financial interest can derive from it. It reports to the Government and the Parliament on its activity and on the results of its surveys and analysis; it formulates proposals to the Government regarding changes in the current sector legislation; it supervises the qualification system of the executors of the public works contracts and exercises sanctioning powers. Again in order to guarantee the principle of fair financial management in public contracts, together with the transparency of the purchase conditions, ANAC provides specific guidelines for processing the standard costs of the works and the reference prices of goods and services. The Authority also manages the qualification system for centralised purchasing authorities (the *stazioni appaltanti*); it may order inspections, also upon receiving a reasoned request from anyone who has an interest, in collaboration

with other national administration and Police corps, such as the financial politic (Parisi, 2020; Gaspare, 2020).

Many examples of the difficulties that managing authorities, especially regional ones, can meet in the sector of public procurement, and mainly with respect to complex operations, can be found in their presentations of Si.Ge.Co (see also, for a more general perspective, Giorgiantonio, Decarolis, 2020: Torricelli, 2018). For example, Regione Basilicata was the responsible authority for the first-level controls of ultra-broadband, to be implement with regard to EFRD, Pillar 2, and "Digital Agenda". The main beneficiary was the Ministry of Economic Development, which normally operates through the *in house* company INFRATEL. The concessionaire of public services selected under a competitive procedure was "Open Fiber". The regional managing authority delegated the control function on the fairness of the tender procedure to the Ministry, considering that the EU allows the managing authority to exploit the beneficiaries' control procedures and expertise (EC, *Guidance for Member States on Management verifications*, EGESIF_14-0012_02 final 17/09/2015, 19).

2.3. The importance of transparency and anti-corruption actions, together with the performance cycle and civil-servants/public managers' conduct (deontological codes)

As seen, the ANAC's supervision and control of public contracts and activities are specified by Article 213 of the Public Procurement Code. However, the independent authority was created, with its current features, by Article 19, Decree Law No 90/2014, which integrates the old independent Commission for the evaluation, transparency, and integrity of public administrations (established in 2009 by the *Riforma Brunetta* and reformed in 2012 by Law No 190/2012, the national anti-corruption law) with the Authority for the supervision of public works contracts, services, and supplies (established by Law No 109/1994). Hence, the ANAC plays a key role also in regard to the co-ordination, rule-making and supervision of transparency, and anti-corruption measures at all administrative levels, also in co-ordination with other national actors, such as the NCA (Felden, 2020; Di Mascio F., Maggetti M., Natalini A., 2018; De Benedetto, 2015, 479; Sargiacomo, Ianni, D'Andreamatteo, Servalli, 2015; Neu D., Everett J., Rahaman A. S. 2014).

Nowadays, anti-corruption instruments constitute an important part of the internal controls system and, thus, also of the first-level controls for the implementation of PORs and PONs. For example, the Regione Toscana's managing authority for EFRD has produced an "anti-corruption kit" annexed to its Si.Ge.Co., following the EC Delegated Regulation (EU) No 2015/1970 that, supplementing Regulation (EU) No 1303/2013, provides further specific provisions on the reporting of irregularities concerning SIF Funds. There is also a manual for the prevention, detection, management and reporting of irregularities, including cases of fraud. Furthermore, the anti-fraud working group created by the managing authority itself works especially on the self-evaluation processes and on the fight against corruption through the diffusion of ethical codes and the declarations of incompatibility in the exercise of public functions (for a European overview see Pantiru M. C., 2019). In the light of the implementation of the NRRP, however, it is foreseen a certain reduction of the role of ANAC in favour of the central government (see Section III, Italian conclusions for the last updates).

The ethical code is an instrument already adopted by the National Public Labour discipline (Article 54, Public Labour Code, as modified by Article 1.44, National anti-corruption Law) and, as the Regione Toscana example demonstrates, it can be specified regarding deontological behaviours in the management of European programmes. The general legal framework is better specified by the regulation adopted with the Presidential Decree No 62/2013. The latter reports the ideal type of an ethical code, on the basis of which each administration should personalise its own document to the benefit of its public civil servants and managers. Also the discipline of incompatibilities has been planned by the same 2012 national anti-corruption reform and implemented through Legislative Decree No 39/2013 together with the modification of the Public Labour Code. The aim of the reform is to guarantee a fair public management and to avoid conflicts of interest between politics and administration, public and private and legal and illegal. For the latter aspect, for example, it is impossible to be appointed to public offices if a person has been convicted of crimes against the public

administration (see the Criminal Code and the last modifications, in 2012, 2015, 2017 and 2019 for a repressive approach towards the criminal activity in the exercise of public powers). Great efforts have also been made regarding the contrast of irregularities perpetrated by civil servants, through the increased role of disciplinary administrative sanctions (Article 55 ff. Public Labour Code, also regarding co-ordination with parallel criminal proceedings) (Venanzoni, 2017; Caridà, 2016; Gola; 2016; Mattarella, 2013; D'Alterio E. 2013; Buzacchi, 2013; Cerulli Irelli, 2010).

Although these specific disciplines, the internal efforts made by each public administration in the contrast to corruption and in favour of transparency and good performances are programmed and synthesised by two three-yearly plans to be updated annually: the anti-corruption and transparency plan (*Piano triennale per la trasparenza e anti corruzione*) and the performance plan (*Piano della performance*) – considering that the latter is also coordinated with the management and strategic controls mentioned above, especially for the evaluation of public managers. The two plans work together, considering that the fight against risks of corruption and non-transparency depend on the efforts made by the administration itself (primarily to the external kind of control) (critically, Delsignore M., Ramajoli M., 2019). The idea of asking administrations to include in the anti-corruption plan a risk assessment and management activity, a measure introduced by the so-called Severino Law (No 190/2012), is based on the intention to introduce also in the public sphere, while taking into account the specific features of the sector, the experience of corporate compliance programmes in the private sphere referred to in Legislative Decree No 231/2001, in the belief that the entity (public or private) should play a proactive role in the prevention of economic crime and corruption (see Severino, 2019).

All these aspects are relevant for the management of EU resources as well, and they can be taken into consideration in the Si.Ge.Co. by the managing authority (Domorenok, 2020, 160 ff.). For example, considering the importance of reporting irregularities or suspected fraud against the European financial interest at all administrative levels, of especial relevance is the new discipline for whistle-blower protection against discrimination (Article 54-*bis*, Public Labour Law) also in the light of the provisions, regarding WB in the public and private sectors, of Law No 179/2017 and the EU Directive 1937/2019. Reports have to be addressed directly to the person in charge for the anti-corruption action or to ANAC. The name of those persons remains confidential and it can be divulged only after an opinion of the specific Authority in charge for the protection of privacy.

Lastly, it is important to remember that the European Commission has requested some measures aimed at the adoption of calculation methods that can give awareness of the anti-fraud activities developed by the Member States and the connected results. For example, a new index – the Fraud detection rate (FDR) – has been created, whose percentage is the ratio between the number of irregularities/fraud discovered and the total of payments made by the individual Member State. Thus, each administration is meant to make the FDR a living instrument in its organisation, in order to evaluate coherently its detection activity and efforts. It can be considered as a further step in improving performance analysis of the Member States in the fight against fraud against the EU's financial interests. This also means that the index is today – and it will be even more in the future a parameter – to consider in the performance evaluation of administrations and administrators.

2.4 The recovery phase and the relevant administrative sanctions for the protection of European financial interests

With regard to the *in extremis* tools that can follow the control process, two elements must be mentioned: recoveries and sanctions.

Regarding the first aspect, as observed in the 2019 COLAF Annual Report, it is undeniable that the phase of recovery of unduly paid amounts is a real critical issue in Italy. Through the IMS database, three main categories have been recognised: administrative/civil – concerning all those cases for which, through administrative/judicial proceedings (administrative recovery actions, Regional Administrative Courts, Council of State, Civil Courts) the sums involved in irregularities/fraud could be recovered; Criminal, i.e. cases involved in judicial criminal proceedings that ended successfully for the purposes

of recovery (see in detail paragraph 3)); NCA, concerning those cases for which the Accounting Judiciary issued a judgment.

As already observed by the NCA in its special report on the recovery phase dedicated to EFRD 2007-2013 (No 14/2018, 1), it is a question of examining the procedure that follows the reporting of the irregularity to OLAF by the competent bodies. In particular, the "decertification" (*decertificazione*, as amounts withdrawn) procedure that can follow this communication has the aim to replenish the Treasury of the amounts assessed as irregular. Recourse to decertification is quite common in Italy. This method is recognised by the Commission and consists in the elimination of the amounts deemed irregular from the subsequent EU payment application. These amounts, deducted from the EU accounts, fall exclusively on the national or regional budgets, depending on whether it is a PON or POR. This mechanism causes financial loss on national finances, with obvious damage to them, from the very moment that nothing is due to the Union budget. In this way it is the Member State that will have to activate its own internal mechanisms for the recovery of irregular sums. This also means that it is extremely urgent to create and incentive effective "early warning" mechanisms of irregularity and fraud, in terms of an efficient prevention strategy, as well as functioning recovery systems (as an historical problem in the management of EU funds see White, 1997, 175 ff.).

With regard to internal administrative actions, each managing authority is called to specify in its Si.Ge.Co. the way in which it will operate regarding the recovery phase, while the certifying authority should keep a register of the sums recovered or to recover because of irregularities. Hence, two situations must be distinguished: *ex-ante* and *ex-post* the certification of the expenditures to the EC (this will depend on the moment in which the irregularity/fraud is detected, despite it should be always communicated through the IMS system). In any case, each administration can personalise its recovery phase and implement different tools. For example, for the Regione Basilicata EFRD Si.Ge.Co., the document affirms that for payments/reimbursements by public beneficiaries, the system of "compensation" will generally be adopted. Conversely, for private beneficiaries, a formal communication for the opening of an administrative revocation procedure (*ex* Article 7, APA) will be sent to the interested person, specifying the deadline to present counter observations (*ex* Article 10, APA). The procedure will end with the adoption of an act of revocation and recovery that will be formally notified. The invitation to spontaneously give back the sum will be followed eventually by a coercive recovery. In general, recovery activities can be entrusted to bodies external to the administrations in addition to be carried out within the same managing authorities. The NCA commented on the small number of employees assigned to the recovery activity, a situation that highlights an underestimation of the relative function, even in cases where the amounts to be recovered are significant and the number of cases is particularly high (NCA, Special Report, No 14/2018, 23).

Regarding the system of administrative sanctions, particularly interesting is Article 9 of the PIF Directive which provides that Member States must take the necessary measures to ensure that a legal person is held liable pursuant to Article 6. On the contrary, Article 7, on natural persons, mentions only criminal sanctions (however for more details on the point see D.2 and below in the following paragraphs).

It is important to point out that the national legal framework on the topic of sanctions is complex within the Administrative Law discipline, similarly to what happens for the system of controls. To the complexity that derives from the co-ordination between the general discipline (Law. No 689/1981) and the sectorial ones (taxation, traffic, independent authorities), or among different kinds of sanctions – i.e. monetary, disciplinary, interdiction or confiscatory ones – (Cerbo, 2016; Sandulli M. A., 2012; Fratini, 2008; Cerbo, 2003), the further issue of overlapping with criminal sanctions (Arslan, 2019; Travi, 2014; Provenzano, 2012; Sandulli M. A., 1983) and the problem of *ne bis in idem* (see the Grande Stevens and Others *v.* Italy case before the ECHR; Vitale, 2018; Goisis, 2018 and 2016) must be added too. The aspect of co-ordination between two legal regimes is present also for the specific field of the management of European funds and the protection of the public (also EU) financial interest (with respect to the links between administrative controls and criminal proceedings see the next paragraph 3).). The Italian Criminal Code provides administrative sanctions applicable to the matter of undue receipt of European funds, for example enforcing Article 316-*ter*.2 for cases to the detriment of the

State interest – when the unduly received sum is equal to or less than €3,999.96, only the administrative sanction of payment of a sum of money from €5,164 to € 25,822 is applied, considering that this penalty cannot exceed three times the benefit achieved. Secondly, there is the administrative sanction system relating to the EU's aid to the agricultural sector (Article 3, Law No 898/1986). This special discipline contemplates, for cases of undue receipt of all kinds of disbursements at full or partial expense of the financial instrument of CAP and regardless of the possible subsumability of a specific case of a criminal nature, a particular administrative sanction regime, which involves the application – together with any criminal sanction, where applicable – of a pecuniary sanction commensurate with the undue amount.

2.5 The external, mainly in itinere and ex post, system of controls: the Anti-fraud Committee in the Department for European affairs and the role of the Financial Police

The Italian Anti-fraud Committee (*Comitato per la lotta contro le frodi nei confronti dell'Unione europea*, COLAF) was established by Article 76, Law No 142/1992 and confirmed by Article 54, Law No 234/2012. According to Article 3.4 of Reg. (EU) No 883/2013 concerning investigations conducted by OLAF, the COLAF has been designated as the central anti-fraud Co-ordination service for Italy. The COLAF operates at the Department for European Policies, inside the Presidency of the Council of Ministers, but it has no direct operational authority (Article 3, Presidential Decree No 91/2007 and Article 54, Law No 234/2012). In fact, it is chaired by the political authority responsible for European Affairs (the Minister or Secretary of State) or by his/her delegate. It is not a coincidence that the 2012 Law mentioned above provides the general discipline regarding the Italian participation in the formation and implementation of the EU legal system and policies (Allegrezza, 2017, 129 ff.).

The mixed composition of the Committee reflects the involvement of different agencies, bodies and police corps cooperating to support OLAF at the national level. Thus, in addition to the Head of Department for European Policies, it is composed of the Chief of the Financial Police Anti-fraud Unit (*Guardia di Finanza, Nucleo per la repressione delle frodi nei confronti dell'UE*, created by Article 55, Law No 52/1996), the Directors General of the Department for European Policies, the Directors General of the Ministries responsible for combating tax and agricultural fraud and the misuse of European funds, who are appointed by the Chair, and Members appointed by the national Conference of Regions, Cities and Local Authorities. As COLAF is a composite puzzle of different authorities, it is not possible to describe a common legal framework for judicial review. When it comes to fiscal breaches, the appeal should be lodged before the Territorial Tax Commissions and up to the NCA (see Task 3). When it is a criminal matter, ordinary appeals on criminal matters will apply (see in Task 4).

Among its several tasks, COLAF provides advice and co-ordination at national level against fraud and irregularities in the fields of taxation, the Common Agricultural Policy and structural funds; it monitors the data flow on irregularities and fraud concerning European funds and on their recovery in case of misuse; it reports to the European Commission according to Article 325 TFEU. In addition to them, the national legislation provides that COLAF prepares, pursuant to Article 54 of the aforementioned Law No 234/2012, a specific annual report for the Italian Parliament in which it illustrates the initiatives taken, the measures adopted, the results achieved ,and the national strategy to protect the EU's economic and financial interests. Moreover, through COLAF's technical Secretariat, the authority facilitates the closure of dossiers relating to cases of irregularity/fraud, even suspected, opened with the European Commission, and ensures the updating of the list of beneficiaries of European funding published on the website of the Department for European affairs, in the spirit of the European transparency initiative (Allegrezza, 2017, 130; Dossier Senato, 2017, 55). The committee has also an important role in the professional training for all the administrations involved in the management of EU resources. Moreover, considering that the fight against fraud and irregularities presumes a strong awareness and stimulus of all the institutional actors and the public opinion through the most detailed diffusion of data, news and elements of possible interest, COLAF has implemented a series of actions to inform both qualified and interested users, as well as citizens, of anti-fraud issues (i.e., through the implementation of suitable links on the website of the Presidency of the Council – Department for

European Policies, among them the lists of European financing "beneficiaries", for the so-called "transparency initiative") (see COLAF Annual Report, 2019, 22-23).

Reporting (suspected) irregularities or fraud to the European Commission finds a legal basis, regarding the financial planning of the European Union 2007-2013, in Regulation (EC) No 1848/2006 (on the common agricultural policy) and in Regulation (EC) No 1828/2006 (for the Structural Funds). In relation to the 2014-2020 financial cycle, the regulatory basis can be identified, however, in the Commission Delegated Regulations (EU) of 8 July 2015, No 1971/2015 and No 1975/2015, in the matter of Common Agricultural Policy and No 1970/2015 and No 1974/2015 (for the ESI Funds). This communication constitutes an obligation for each Member State, to be fulfilled – electronically – within two months following the end of each quarter in relation to the cases subject to "first administrative or judicial report" (so-called PACA49, *Premier Acte de Constat Administratif ou judiciaire*) for an amount greater than 10,000 euros. However, there is no one-size-fits-all interpretation of the PACA concept by the Member States. Thus, over time, a pattern of inhomogeneous behaviours has arisen due precisely to the different interpretations of the moment in which cases of suspected irregularity or fraud can be considered detected, with consequent discrepancies in the timing of communication to OLAF. As the 2015 Annual Report to the Parliament of COLAF noted, the different approach in the practical application of PACA generates considerable differences in data entry into the Irregularity Management System (IMS) of the Commission and, therefore, an evident impossibility of comparing statistical data. In Italy, the rules of PACA are currently contained in the inter-ministerial circular of 12 October 2007 (*Modalità di comunicazione alla Commissione europea delle irregolarità e frodi a danno del bilancio comunitario*, Official Bulletin No 240, 15 October 2007) and in its related explanatory notes, both issued in relation to the 2007-2013 financial programming and of which updating by a special working group promoted by COLAF was envisaged. In 2019, the Minister for European Affairs signed COLAF Resolution No 20, specifically regarding the approval of the Guidelines on the methods of communicating irregularities and fraud to the detriment of the European budget to the European Commission (*Linee Guida sulle modalità di comunicazione alla Commissione europea delle irregolarità e frodi a danno del bilancio europeo*). The Guidelines represent the completion of the sector provisions mentioned above. The document is the result of a working group set up *ad hoc* within the COLAF that had the goal to collect the possible critical elements in the data flow with the European Anti-Fraud Office (OLAF) of the data concerning cases of irregularities/fraud against the EU budget (Dossier Senato, 2017, 51-54). According to the current regulations, the moment in which the obligation to notify the European Commission arises must be traced back to the first administrative or judicial report, that is the first written evaluation drawn up by a competent administrative or judicial authority – a so-called decision-making body – which, albeit not definitively, ascertains, on the basis of concrete facts, the existence of an irregularity or fraud to the detriment of the Union. Hence, to sum up, in Italy, due to the effect of the Inter-ministerial Circular of 2007 (and connected COLAF explanatory notes) the PACA has been distinguished by two levels: administrative - in which context is to be found in the first act drawn up at the end of the evaluation, by the decision-making bodies, on the data and information contained in the first report of challenge (also drafted by the so-called "External Control bodies" which are, for example, the police forces); the judiciary – where it coincides in the ordinary proceeding with the request for prosecution or alternative proceedings, pursuant to Article 405 of the Criminal Procedural Code (C.P.C), in proceedings before a monocratic Court (in which the Public Prosecutor proceeds to summon to the court) with the issuance of a summons, pursuant to Articles 550 and 552 C.C.C. – (COLAF Annual Report, 2019, 44; with respect to the links between administrative controls and criminal proceedings see the next paragraph 3).

Hence, COLAF has no direct investigative authority, its function being limited to co-ordination. However, COLAF is the subject responsible for the final communication to the EC through the IMS system, at least for SIF funds. At national level, the platform is managed through a system of differentiated keys of access. At the first step of the process there are the managing authorities, with two different kinds of access: as "creator" of the communication, under the responsibility of appointed civil servants in the managing or certifying authority; and as "sub-manager", under the responsibility of the public manager of the managing or certifying authority that has the power to give a first feedback on the communications inserted. At the second level, "manager" access can be found, under the

responsibility of the national authority competent for the final communication to OLAF (COLAF for SIF funds and the Ministry of Agriculture for CAP, for the expenditure side). At the third level, there is "observer" status that makes it possible to the NCA, for example, to monitor data. According to the last annual report by COLAF, there was a further decline in the levels of irregularities/fraud in 2019: in fact, the ongoing downward trend from -2.4% in 2018 has been confirmed (in absolute terms equal to -2.2 million euros compared with 2017) to a further -59.91% in 2019 (in absolute terms equal to -53.8 million euros compared with 2018). In addition, the meticulous and prompt co-ordination by the Anti-Fraud Unit of the *Guardia di Finanza* – the COLAF Technical Secretariat – allowed to close, in agreement with the European Commission, the considerable number of 583 files concerning old cases of irregularities/fraud. This effort avoids a financial correction to the national budget of about €133 million (COLAF Annual Report, 2019, 2).

Generally speaking, the distribution of competences for administrative investigations in fraud cases depends on the specific case and on the complex division of competences between actors, such as the managing authorities of SIF funds *ex ante* the communication to COLAF through the IMS system or the different police corps in Italy, *in itinere* (hence, in support of) or *ex post* to the activity of the managing authorities. Specifically, under the co-ordination role of COLAF at national level, administrative investigative powers are conferred mainly on the above mentioned *Nucleo per la repressione delle frodi nei confronti dell'UE*, a special Unit of the Italian Financial Police that operates at the Department for European Policies to counter fraud against the European Union's budget (Article 54, Law No 234/2012). However, COLAF can also rely on the tax police or on the customs police.

After the creation of the special Unit of the Italian Financial Police in 1996, Article 30, Law No 526/1999 formally recognised the *Guardia di Finanza* a central role in the protection of Community financial interests, extending to its members the investigative powers used on the tax side also for ascertaining and repressing violations to the detriment of the European Union and those detrimental to the national budget connected to the former. This role was therefore confirmed by Legislative Decree No 68/2001, with which the institutional mission of the *Guardia di Finanza* was reorganised. Article 2 of this Decree, in fact, has entrusted to the Financial Police a competence for the purposes of protecting the integrity of public budgets, including that of the European Union, together with specific tasks of prevention, research and repression of violations that can affect the correlated financial flows, not only on the income side but also on the expenditure side. By extending the intervention model already identified by the aforementioned Law No 526/1999, Article 2.4, Legislative Decree No 68/200 has attributed to the Corps the possibility of having recourse, in carrying out all the tasks envisaged by the law, to the penetrating powers of control that can be exercised in the fiscal sector (Dossier Senato, 2017).

According to Article 32, Presidential Decree No 600/73 and Article 51, Presidential Decree No 633/72 (respectively, the code on the powers of investigation in the field of income taxes and the code relating to the VAT), the financial police may invite taxpayers, company managers or any person exercising a business to attend an interview. The previous legal sources allow the financial police to request the disclosure of relevant data or documents. In principle, it is not mandatory for the invited person to cooperate in the interview or to submit the documents required, and if that person does not cooperate the relevant documents or data cannot be evaluated *pro reo* in the case of an administrative one. When the level of suspicion suggests that a criminal investigation should be commenced, the relevant rules of the Code of Criminal Procedure will apply, and co-operation with the investigative authorities (in several cases the same authorities that were in charge of the administrative investigation) then becomes an obligation (Article 371-bis Criminal Code; see Allegrezza, 2017, 139).

The legal framework for institutional competences in the sector of the control of the expenditure side, including those of supranational origin, has recently been strengthened by Article 29, Law No 161/2014 which, by inserting paragraph 1-*bis* in Article 25 of Decree Law No 83/2012, granted the Special Unit, with an updated name (*Nucleo Speciale Spesa Pubblica e Repressione Frodi Comunitarie*) the faculty to carry out analysis, inspections, and controls on the use of the resources of the State budget, regions, local authorities, and the European Union. For these activities, the same Article 25, in addition to allowing access (also electronically) to the information held in the databases used by the Ministry of

Economic Development, to social security and welfare bodies, and to public and private entities that instruct and disburse public funds, has extended to the members of the aforementioned Department the powers and faculties envisaged in the area of anti-money laundering (Article 9.4, *lett. a)* and 9.6, *lett. b)*, Legislative Decree No 231/2007).

3. The Italian criminal law system in the field of protection of the EU's financial interests: an overview outlining in greater detail the 'national catalogue' of crimes aimed at protecting the EU's financial interests, together with sanctions

As now widely recognised – in Italian criminal law and literature – that the protection of the European Union's financial interests constitutes a legal asset that deserves criminal protection.

This is because this legal asset does not only express a 'need for self-protection' of the EU institution, but also the common interest of European citizens in the proper and efficient acquisition, management, and spending of resources whose proper allocation and availability is a key factor for the growth and protection of fundamental social interests affected by EU action (see Sicurella, 2018; Venegoni, 2018; for an analysis of this topic see also Delmas-Marty, 2000; Mezzetti, 1994; Parlato, 2007; Vervaele, 1992).

From the Italian perspective, moreover, it is worth noting that in Italy the need to adapt the domestic legal system in order to fulfil the obligations to protect the European Union's financial interests has made it possible to overcome some traditional resistances – linked to dogmatic and criminal policy reasons – to the modernisation of criminal enforcement mechanisms as to effectively tackle the new criminological scenario of illegal conduct in the economic system, especially with respect to the primary role in this area of corporations.

In fact, just to cite a clear example, it is precisely in order to comply with such EU obligations that Italy introduced for the first time a system of corporate criminal liability (Legislative Decree No 231 of 2001 implementing Law No 300 of 2000 for ratification and execution, *inter alia*, of the Convention on the protection of the financial interests of the European Communities – Brussels, 26 July 1995 –) and, after a long debate, included tax crimes within the list of predicate crimes that can trigger corporate criminal liability (this integration was initially provided for by Decree Law No 1247/2019 and Law No 159/2019, and then by Legislative Decree No 75/2020, implementing EU Directive 2017/1731 on the fight against fraud affecting the financial interests of the Union through criminal law).

Therefore, this testifies how the fulfilment of these obligations was not only a way to ensure the effective protection of the legal framework of the financial interests of the European Union, but also a fundamental driver for the modernisation of the Italian system of preventing and combating crime in the economic-financial sphere (see Gullo, 2020).

Even before the enactment of EU Directive 2017/1731, moreover, and despite what will be seen in the next paragraph, the obligation to criminalise imposed by that harmonisation provision and, before that, the aforementioned so-called PIF Convention were, in principle, already met in the Italian criminal law system, since, moreover, in Italy there are offences which, as we shall see now more clearly, in some cases have a broader scope than that defined by the minimum rules of Directive No 1731, thus ensuring enhanced protection of the interests at stake.

Indeed, in the Italian legal system, crimes regarding fraud and other offences affecting the financial interests of the Union referred to in Articles 3 and 4 of Directive 2017/1731 can be found in a 'vast constellation' consisting of several groups of criminal offences contained both within and outside the Criminal Code, which can be divided into four macro-areas (for an overview of these offences see also Reale, 2018 and the Dossier of the Italian Senate available here).

First of all, there are offences relating to the misappropriation and misapplication of public funds of the Member States and the European Union (see, for an overview of these offences, Romano, 2019).

In this area, under Article 314 of the Italian Criminal Code, the conduct of a public official who appropriates money or other movable property belonging to another person, in his possession or at his disposal due to his office, or makes temporary use of the property he appropriates, is criminalised, as well as that of the public official who, taking advantage of the error of others in the exercise of his duties or service, unduly receives or retains, for himself or for a third party, money or other benefits (Article 316 of the Criminal Code). Under Article 322-*bis* of the Italian Criminal Code these conducts are criminalised even when committed by a member of the European Institutions or other foreign bodies mentioned by the same provision.

Similarly, anyone who, by means of artifice or deception, misleads others and procures for himself or others an undue advantage and causes a loss to the Italian State or the European Union is punished, also taking into consideration a specific aggravating circumstance (Article 640-*bis* of the Criminal Code) when the act relates to funds, going by any name, granted or disbursed by the Italian State or the European Union, which is also applicable for IT fraud where the undue advantage – causing loss to the Italian State or the European Union – is obtained by altering a computer system or by intervening without the right to do so on the data of a computer system (Article 640-*ter* of the Criminal Code). This area of crimes also includes fraud in public procurement under Article 356 of the Criminal Code.

Moreover, the Italian criminal system, in order to fully cover all possible cases of fraud and crimes aimed at illegally obtaining national and EU funds, also provides for a subsidiary criminal offence – applicable when the conditions of Articles 640 and 640-*bis* of the Criminal Code are not met (i.e., when the fraud has not reached a level of deception such as to produce a misleading effect) – which punishes the mere fact of obtaining any disbursement, by whatever name, granted by the State or by the European Union, through the use or presentation of false documents or non-disclosure of information which it is mandatory to disclose. This offence largely corresponds to the offence referred to in Article 2 of Law No 898/1986, which is still in force and concerns the fact of obtaining undue disbursement of any kind paid out in whole or in part by the European Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development (see also above para. 2.4).

In addition, unlawful conducts carried out after the funds have been obtained are also criminalised under Article 316-*bis* of the Criminal Code, which punishes anyone who, having obtained the aforementioned disbursements from the Italian State or the European Union, does not use them for the intended purposes. This conduct is similar to that of "misapplication of funds" as defined in Article 3 of the 2017 Directive, but the former seems to be broader as it may also cover the mere passive failure to use the funds (see Mezzetti, 2010). This offence (Article 316-*bis*) and the related sanction, moreover, will be in addition to the aforementioned offences applicable to a person in the event of illegal conduct or fraud in obtaining funds (see Italian Court of Cassation, SS.UU., Judgment No 20664/2017). Scholars have correctly pointed out that such offences of misappropriation and misapplication of public funds cannot apply in respect of funds provided by a private entity and guaranteed by public bodies, insofar as these particular funds are not referred to in the criminal provisions in question. With respect to such funds, the normal offences of misrepresentation and against property become applicable (see Bell and Valsecchi, 2020).

A second group of offences, which can be traced back to those described in letters c) and d) of Article 3 of EU Directive 2017/1371 on revenues contributing to the Union's budget, including with respect to revenues deriving from VAT, concerns the tax offences set out in Legislative Decree No 74/2000, which seems to ensure adequate criminalisation of the various fraudulent and illegal conducts that may occur in the tax sphere, with negative effects on the Union's finances (for an overview see Bellacosa, 2016 and Fimiani, 2020).

Indeed, in this Legislative Decree there is a long list of criminalised conducts, made with the aim of evading income tax or value added tax such as: fraudulent tax declarations by means of invoices or other documents for non-existent transactions (Article 2), or by carrying out simulated transactions or by using false documents or other fraudulent means likely to hinder the assessment and mislead the tax authorities (Article 3), indicating (Article 4) in the tax declaration assets lower than the actual

amount or fictitious liabilities (with respect to the criminalisation of the attempt to commit the offences referred to in Article 2, 3 and 4, see the next section); failure to submit a tax declaration, where mandatory (Article 5). In the latter cases (Articles 3, 4, and 5), however, specific quantitative thresholds of evasion – below which the fact is not criminally punishable – are provided for.

Legislative Decree No 74 of 2000 also criminalises further unlawful conduct in the field of taxes, such as the issue of invoices or other documents for non-existent transactions, carried out in order to allow third parties to evade income tax or value added tax (Article 8); the total or partial concealment or destruction, with the aim of evading income tax or value added tax or of allowing third parties to evade them, of accounting records or documents whose conservation is mandatory, so as not to allow the reconstruction of income or turnover (Article 10); the failure to pay withholding taxes (Article 10-*bis*); the failure to pay VAT, within the prescribed period, for an amount exceeding € 250,000 for each tax period (Article 10-*ter*); undue compensation (Article 10-*quater*); simulated sales or the commission of other fraudulent acts on one's own or other assets that is likely to render ineffective the enforced recovery procedure in whole or in part, with the aim of avoiding payment of income tax or value added tax or interests or administrative sanctions for a value higher than € 50,000 (Article 11, first paragraph); the indication in the documentation submitted for the tax settlement procedure of assets for an amount lower than the actual amount or fictitious liabilities for a total amount higher than € 50,000 (Article 11, second paragraph).

In this area we can also mention the offence of smuggling, as provided for in Articles 282 ff., Decree of the President of the Republic No 43/1973, with respect to the legislative provisions on customs. This is a sector, however, in which the overlapping of interventions of decriminalisation and then the reintroduction of the criminal importance of various conducts (see also the next paragraph on this point) has made the reconstruction of the criminal offences still in force very difficult (see Bellacosa, 2020).

A third group of offences concerns bribery (in the "broad sense") of Articles 317 ff. of the Italian Criminal Code. The criminalisation here concerns various types of conduct, starting from the abuse by the public agent of forcing (Article 317) or simply inducing (Article 319-*quater*) a private individual to give or promise him or a third-party money or other benefits unduly. It must be noted, then, that under Article 319-*quarter*, unlike the former (Article 318), the private individual not forced but simply induced to pay the bribe is liable for punishment (for a complete overview of these offences and the different reforms made in Italy with respect to these sectors, see Mongillo, 2019 and Romano, 2019).

Therefore, the conduct of a public official who unduly receives or accepts the promise, for himself or for a third party, of money or other benefits for the exercise of his functions or powers (so-called improper bribery under Article 318 of the Italian Criminal Code) is also, of course, criminalised, as well as that of the public agent who, in order to omit or delay or to have omitted or delayed an act of his office, or to perform or to have performed an act contrary to the duties of his office, receives or accepts the promise, for himself or for a third party, of money or another benefit. There is also an autonomous type of offence (see, *ex multis*, Italian Court of Cassation No 24349/2012) where such conduct is committed to favour or damage a party in a trial (Article 319-*ter* of the Italian Criminal Code).

In this context, however, the conducts punished concern both public officials and individuals exercising a public service (even with reference to agents from European institutions and other international bodies listed in the Article 322-*bis*), and active bribery is obviously also criminalised (Article 321), as well as active and passive incitement (Article 322) and trading in influence (Article 346-*bis*). The scope of application of the latter offence, introduced by the so-called "Severino-Law" (Law No 190/2012), has moreover recently been extended by Law No 3/2019 (the so-called "bribe-destroyer" bill), as to tackle the exploitation of a real or supposed influence which takes the form of receiving or accepting the promise of money or other benefits as the price of a mediation aimed, in substance, to conclude an illicit agreement that can fall under the scope of application of the above-mentioned corruption offences.

With respect to corruption offences *stricto sensu* it has been noted (see Picotti, 2018) that the offences provided for by Articles 318 ff. of the Italian Criminal Code have a broader scope of application than those of the EU Directive 2017/1731, which in fact in its Italian translation seems to require that the illicit agreement must necessarily relate to a specific act of the public agent, thus not considering the hypothesis of corruption for the (mere) exercise of a function, which are instead covered by the Italian legislation. But the English text of the Directive actually uses the more general phrase "to act or to refrain from acting", so that, at least according to the letter of the law, it seems to cover also cases of corruption for the exercise of function.

The regulation of the subjective qualifications of public servants for the purposes of criminal law as defined by Articles 357 ff. of the Italian Criminal Code, then, is also in line with the EU Directive 2017/1731, as (in short) what matters in Italian Law is not the existence of an employment relationship with a public body but the exercise, in the specific case, of an activity whose regulation can be considered to be of a public nature – as it is in many cases with respect to the management of State or EU funds (on these issues see Severino, 1995; Severino, 1983).

Ultimately, this area of crimes ensures full transposition of the indications contained most recently in Article 4(2) of the EU Directive 2017/1731. Italy, moreover, has also greatly enhanced the preventive side of the fight against corruption since the aforementioned "Severino-Law", introducing key measures such as, among many others, the creation of an anti-corruption authority with enforcement powers especially in the area of public procurement, the obligation for public bodies to build an anti-corruption plan, the protection of whistleblowers in the public and private sectors (Law No 179/2017), and the regulation of the transparency of public administrations, etc. (for some of these aspects under an administrative point of view see the previous sections; see also Severino, 2019).

The fourth and last area of offences, also taking into account the indications of Article 4(1) of the EU Directive 2017/1731, relates to offences concerning money laundering or self-laundering (see Gullo, 2015) or the putting into circulation of proceeds deriving from the aforementioned offences against the Union's financial interests and offences with respect to conspiracy (criminal association) in committing the same criminal offences against the Union's financial interests (especially Articles 416 and 416-*bis* of the Criminal Code).

In this respect, the following offences of the Italian Criminal Code are particularly relevant: the acquisition, receipt, or concealment (or intermediation in such activities) of things deriving from any offence (with the exclusion of misdemeanour) with the aim of procuring an advantage for oneself or others and outside cases of complicity in the aforementioned crime (Article 648) and the re-use of such proceeds (Article 648-*ter*); money-laundering (Article 648-*bis*) and self-laundering (Article 648-*ter*1) of proceeds deriving from any offence (with the exclusion of misdemeanour and culpable crimes); helping someone to secure proceeds of crimes (Article 379 of the Criminal Code): an offence subsidiary to those listed above and applicable only where the aim of the agent is merely to help the perpetrator of the predicate offence. The offence of fraudulent transfer of assets (Article 512-*bis* of the Criminal Code.) can also be framed in this area.

For all four groups of offences analysed here, there are criminal penalties ranging from imprisonment to fines (naturally to different extents depending on the seriousness of the offence), as well as other sanctions for individuals such as the inability to contract with the public administration or disqualification from holding public office (in some cases they can be permanent bans: this is, for example, the case of Article 317-*bis* of the Italian Criminal Code in case of conviction for more than two years of imprisonment under the aforementioned Articles 314, 317, 318, 319, 319-*bis*, 319-*ter*, 319-*quater - para. 1***,*** 320, 321, 322-*bis*, 346-*bis*).

It must be noted also that with the aforementioned Law No 3/2019 (the so-called "bribe-destroyer" bill) Italy has reformed its statute of limitations system for criminal offences (of all types, including the so called PIF crimes), essentially providing for a cancellation of the statute of limitations after the judgment of first instance (although the law actually speaks of a "suspension" of the statute of limitations from the judgment of first instance until the date of enforceability of the final judgment). This is of course a very important provision in the light of the provision of Article 12 of the 2017

Directive, which obliged States to provide for an appropriate limitation period for PIF crimes, as well as with respect to the issues that emerged on this point during the "Taricco saga" (see in this respect Task 3).

Then, in line with the provision of Article 10 of the EU Directive 2017/1731, for all the four groups of offences we have mentioned, the Italian legislation provides for asset recovery measures (see for example, for corruption offences, Articles 322-*ter* and 322-*quater* of the Italian Criminal Code) such as seizure and confiscation of proceeds of crimes, and in some cases (for example tax crimes, corruption offences, money-laundering etc.), and under certain conditions, also of assets of equivalent value in the event of the impossibility of direct confiscation of the proceeds deriving from the predicate crime, as well as of money, goods or other benefit under the availability of the convicted agent and with respect to which he/she cannot justify their legitimate acquisition, if these assets are out of proportion considering the income declared by the individual for tax purposes or his/her business.

This provision, under certain conditions, can be applied also as a non-conviction-based confiscation, especially (but not only) with reference to individuals suspected of being part of a Mafia-type association under Articles 20 and 24 of the Anti-Mafia Code (Legislative Decree No 159/2011), in an enforcement proceeding independent of the criminal one (see Article 29 of Antimafia Code).

In addition, Articles 82 ff. of the Anti-Mafia Code also regulate the system of anti-Mafia certifications, which aims to prevent access to the public procurement sector for companies that have been subject to certain measures (indicated in Article 67 of the Anti-Mafia Code) or for companies in respect of which it can be demonstrated that the Mafia is attempting to infiltrate them in order to influence their operational choices.

The Anti-Mafia Code (see Articles 34 and 34-*bis*) also allows the application of other preventive measures – not linked to the commission of a crime, but to the facilitation of the activities of dangerous individuals by certain entities – such as the judicial administration or control of economic activities. The latter measure may also be requested by a company subject to a disqualification measure pursuant to Articles 82 ff. of the Anti-Mafia Code. In general, Articles 34 and 34-*bis* can be applied with respect to economic activities not under the direct control of the Mafia (otherwise, they would be confiscated under the aforementioned Article 24) and have the scope of preserving economic activities which are not totally hetero-directed by the mafia or dangerous individuals, while eliminating the criminal infiltration in place and equipping them with the control systems necessary to prevent new forms of criminal influences.

All these innovative tools of the Anti-Mafia Code have made the Italian legal system an international "gold standard" in the fight against organised crime, making it possible to prevent the penetration of illegal capital into the legal economy and the procurement sector, (even) irrespective of whether the economic activity is directly linked to the mafia.

Then, ensuring a holistic approach in the fight against economic crime, these instruments, albeit indirectly, become useful tools to protect (also) the financial interests of the State and the Union, insofar as they strike at the economic interests of one of the main actors (Mafia-type organisations) which, in the Italian scenario, are among the main protagonists of fraud and acts of corruption of this kind (on this issue and the importance of these tools see Balsamo, 2016; on this legislative tool see also the UNODC Italy Country Report available here).

The enforcement of the PIF offences we have analysed has so far fallen under the responsibility of the territorially competent national public prosecutor, who in the immediate future will have to coordinate with the EPPO for the investigation activities of their respective competences (see D2, Task 2 for a detailed analysis of the role of the EPPO and on the relationship between this and the national public prosecutors; see also Sicurella, 2019 and Grasso *et. al*., 2020).

In general, Italian prosecutors may use as evidence the results of the administrative control activity previously carried out by the competent bodies (see the previous sections) and, to carry out further investigative acts, they can rely on the judicial police whose activity they coordinate in the framework of the criminal proceedings: it should also be noted that in Italy there is a police force

specialised in financial matters (*Guardia di Finanza*), which, in addition to acting as a judicial police authority in the context of criminal proceedings on the basis of the directives of the public prosecutor, can also act as a public security authority by carrying out the ordinary preventive and periodic controls provided for by law as normal administrative controls also with reference to economic activities even in the absence of a specific report of a crime. Administrative controls which, therefore, should be placed within the framework of those already analysed in the previous paragraphs and which, therefore, pose a need for co-ordination between administrative police activities and the supervisory role played by other bodies responsible for administrative control.

In this respect, there are no specific problems of overlap between administrative controls and criminal proceedings insofar as criminal proceedings are a possible subsequent phase of the administrative control. Indeed, if the checks carried out by public administrations or administrative enforcement authorities reveal conduct that may constitute a criminal offence, those public officials are obliged to report it to the competent judicial authorities (an obligation whose violation constitutes a criminal offence under Article 361 and 362 of the Italian Criminal Code). Only at this point can criminal proceedings begin. It should also be borne in mind that it is quite normal, in practice, for the public prosecutor to receive reports of offences (even against the Union's financial interests) from different administrative authorities and control bodies, even those not specifically assigned to carry out enforcement activities with respect to the criminal behaviour that they report in the concrete case.

In fact, it can often happen that, for example, fraud against the Union's financial interests is discovered in the course of a control activity (or a criminal procedure) not concerning the use of European or public funds.

Criminal proceedings, in short, only intervene as a phase at the end of the administrative control, so that the relationship between administrative and criminal proceedings in this context must be analysed according to the general principles of the legal order and do not pose specific problems regarding the protection of the financial interests of the Union.

4. A critical assessment of the impact of PIF Directive on the Italian criminal framework: summarising strengths and pitfalls relating to the implementation of PIF Directive in the Italian context

We have already noted that the Italian legislation with respect to crimes against the Union's financial interests were as a whole in line with European standards even before the enactment of the EU Directive 2017/1731 (see also the explanatory memorandum on Legislative Decree No 75/2020, available here), although the absence of consolidated data on the number and outcome of criminal proceedings concerning such offences against the Union's financial interests renders it difficult to make broader assessments of the concrete capacity of the criminal justice system – from a law in action perspective – to effectively combat the criminal phenomenon in question (with reference to this issue see D1, Task 2).

After the entry into force of the 2017 Directive, the Italian legislator, in particular by means of Legislative Decree No 75/2020, made – with just 9 Articles – only a few specific changes to correct a legislative framework which already complied with the obligations to criminalise imposed by the Directive, for example, by providing that legislative references to the "European Community" be replaced by references to the "European Union" (Article 7) and that the Ministry of Justice would send the European Commission certain statistical data on crimes against the financial interests of the Union (Article 7).

However, it must be pointed out that the Italian legislator has taken, in some respects, a mechanical approach to transposing the Directive (see Mazzanti, 2020), for example – in order to comply with the criteria laid down in its Article 7 – by increasing the penalties laid down for some of the aforementioned offences (see Articles 1 and 6 of the Decree No 75/2020) or by establishing the possibility of criminalising the attempt to commit certain tax offences (see Article 2) only where these crimes can be considered (having regard to the characteristics of the fact) to go against the Union's

financial interests, or some other elements required by the Directive are met (for example the amount of the loss or advantage or the cross-border dimension of the offence).

The same approach has led to the reintroduction of the criminal importance of various smuggling offences (see Articles 3 and 4) exceeding certain quantitative thresholds (see Bellacosa, 2020), and, as we will see in the next section, some legislative changes with respect to Legislative Decree No 231/2001 concerning corporate criminal liability for offences against the Union's financial interests.

The evaluation of this reform must obviously take into account that, as we have pointed out, the Italian legal system was already in line with the aforementioned obligations to criminalise and that it was therefore only a matter of making some simple corrections.

The overall assessment of the Italian system in terms of adequate protection of the financial interests of the Union is therefore positive, and indeed it should be pointed out once again that in many respects Italy protects such interests with a higher level of protection than the minimum required by the Directive to the point that is not a matter of introducing new crimes, but in some way of rationalising the existing framework with better co-ordination between some overlapping figures. The reference is made here especially with respect to the aforementioned issue of the difference between Articles 640-*bis* and 316-*ter* of the Italian Criminal Code or to the possibility to apply, at the same time, one of these offences and the Article 316-*bis* of the Criminal Code when a fund illegally obtained it is not used for the intended purpose, thus justifying a possible violation of the substantial *ne bis in idem* principle (see these issues Finocchiaro, 2017).

However, it should be noted that, with this latest reform, the Italian legislator has done no more than the minimum necessary to complete the aforementioned framework of protection of European financial interests (for an overview of the changes see also Ballini, 2020).

Therefore, despite the fact that these were mere complementary interventions to complete a framework already defined, it is necessary to reflect on whether it is acceptable that, for example, the aforementioned increases in penalties or the integration of the list of predicate crimes that can trigger corporate criminal liability refer only to acts against the Union's financial interests and not also, at the same time, to the same conduct against national financial interests.

In this sense, indeed, there could be a risk of legitimising, in some ways and at least in some cases, a "reverse" violation of the assimilation principle, ensuring greater protection of EU interests than national ones without a justification in line with the principle of equality (see in general, with respect to the problematic practices in the harmonisation process: Basile, 2020; Bernardi, 2012; Foffani, 2010; Grasso, 1989; Gullo, 2016; Manacorda, 2014; Manes, Caianiello 2020; Salcuni, 2011; Satzger, 2019; Sicurella, 2016; Sicurella, 2005; Sotis, 2007).

5. Corporate criminal liability and the protection of financial interests of the EU: introducing the topic of corporate criminal liability for EU financial interests-related offences under the national regime – Legislative Decree No 231 of 2001

As we noted in the previous paragraphs (see especially para. 3), it is precisely in order to comply with EU obligations concerning crimes affecting Union's financial interests that Italy introduced for the first time a system of corporate criminal liability.

According to Legislative Decree No 231/2001, indeed – despite some difference on whether the offence is committed by managers (Article 6) or a person under their supervision (Article 7) – a legal person can be held liable for committing a crime committed in its interest or for its benefit and if the legal person has not put in place, prior to the commission of the crime, a compliance program suitable to prevent that crime from occurring (see, *ex multis*, De Maglie, 2011).

As anticipated, only crimes listed in Decree No 231 can trigger corporate criminal liability, and, in this respect, it should be stressed that, especially after the aforementioned Legislative Decree No

75/2020, all the analysed crimes affecting the European Union's financial interests are now predicate crimes of corporate criminal liability: the only exceptions are Articles 379 and 512-*bis* of the Italian Criminal Code and Articles 10-*bis* and 10-*ter*, Legislative Decree No 74/2000 (see Bellacosa, 2020), but they fall outside the scope of application of EU Directive 2017/1731. Under Articles 19 and 53 ff. of Legislative Decree No 231/2001, moreover, it is possible to issue seizure and confiscation orders against the legal person with respect to the proceeds of crime, also of assets of equivalent value if direct confiscation of the proceeds deriving from the crime is impossible.

Therefore, on this point too, the Italian legal system has fully complied with its obligations under the Directive, and in particular with its Articles 6 and 9, also considering that for these crimes the corporation is subject to fines and, in many cases, also other sanctions such as exclusion from entitlement to public benefit or exclusion from tender procedures, as well as temporary or permanent disqualification from practising the activity or placing under judicial supervision (see especially Articles 9 and 15, Legislative Decree No 231/2001). In this case too (see the previous paragraph), the problem may be to rationalise the existing system of offences, also considering that, for example, with respect to corporate criminal liability for tax offences, the issue of the potential risk of violation of the *ne bis in idem* principle has been raised with respect to the concurrent administrative sanctions to which legal entities are subject for tax violations (see Bellacosa, 2020).

On the other hand, as noted in the previous paragraph, after the changes made by Legislative Decree No 75/2020, certain predicate crimes (for examples Article 314 of Italian Criminal Code or Articles 4, 5 and 10-*quater* of Legislative Decree No 74/2000) can trigger corporate criminal liability only if they can be considered against the European Union's financial interests, or if specific conditions established in the Directive are met (such as the amount of evasion and the cross-border dimension of the crime). This also increases (see the previous section) the risk of legitimising, in some ways and at least in some cases, a "reverse" violation of the assimilation principle, ensuring greater protection of EU interests than national ones without a justification that could be in line with the principle of equality.

In any case, this system ensures the appropriate involvement of legal persons in the fight against crimes affecting EU financial interests, requiring entities to play a proactive role in the prevention of crime through the implementation of compliance programs and internal control systems that nowadays make corporations key players in the public activities to combat crime in the economic and financial sphere.

The enhancement of organisational guilt as a prerequisite for attributing the crime to the legal entity, then, unlike other regimes of corporate criminal liability (e.g. the so-called derivative models such as vicarious liability of identification doctrine), ensures the reward of virtuous entities, without putting on the same level companies that have done nothing to prevent crime and companies that have seriously invested significant resources in prevention activities, although on these aspects there is still much to be done also to further stimulate the preventive compliance of legal persons in the Italian system (see, among many, Mongillo, 2018; Piergallini, 2019).

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ITALY - SECTION II

I. *Stockpile capacities in RescEU framework: the Italian case*

Dr. Alessandro Nato

1. National procedures for the implementation of national stockpile capacities: the role of the *Protezione Civile*

Italy does not host RescEU medical supplies. However, it was among the Member States that benefited from sending European resources and funds to support their medical supplies needs.

During the emergency, the Italian institutions worked hard to find the equipment necessary for the national health system. In situations of national emergency, the Italian government is called upon to indicate which measures and which State bodies are most suitable for managing the crisis that must be addressed. These systems change according to the functions they are assigned, their internal organisational structure, and the rapid ability to intervene. During the pandemic, the Italian executive entrusted the management of the crisis to the Civil Protection service (Credi O., 2021, 2).

In the Italian legal system, emergency management is focused on the work of the Civil Protection service. The Italian Civil Protection was established with law No 225/1992. Subsequently, DPCM No 139 of 5 May 2010 modified the composition and powers of some existing actors and introduced new ones. Together with the Armed Police Forces and Civil Defence, it is part of the bodies responsible for the country's internal security. Civil Protection generally intervenes in national emergency scenarios. It has an open, horizontal, and decentralised structure, with concurrent legislation between the State and the Regions, coordinated by the Civil Protection Department within the Presidency of the Council of Ministers.

The President of the Council of Ministers is responsible for coordinating the national service and promoting civil protection activities through the Department of Civil Protection. In particular, the Department plays a leading role, in co-operation with regional and local authorities, for the implementation of projects and activities for the prevention, forecasting, and monitoring of intervention risks. The intervention procedures are conducted through the Italy Situation Room, which acts as a national operations room within the Department of Civil Protection. In emergencies, the Room becomes essential to provide support for the Civil Protection Operational Committee and ensures the implementation of the Committee's provisions through the operational structures of the National Civil Protection Service. In a crisis, the Government is the main actor and acts by consulting Parliament. The President of the Council of Ministers acts through the Department of Civil Protection, in agreement with the local authorities. The Prefect is the representative of the Government in each province. It is responsible for the implementation of ministerial directives and protection at the provincial level. The Prefect supervises the co-ordination of response activities with the regional authorities and the mayors of the municipalities affected by the crisis, but it is important to underline that the Perfect acts as a delegate of the President of the Council of Ministers only when a state of emergency is declared (Di Camillo F. et al., 2014, 38).

The reform of Title V has also transferred some important functions to local authorities and introduced a profound restructuring also regarding other State entities (Decree Law No 112/1998; Law 3/2001). The regions are responsible for civil protection activities, risk assessment, and prevention programmes on their territory. However, they must follow national directives.

In addition, the mayors play an important role at the local level (Law No 100/2012, 16 July 2012). They are responsible for the management of civil protection, volunteers, local police, and other resources within the municipal area, although they have no power over State structures. A mayor can activate the Municipal Operations Centre in case of emergency. This Centre has the role of coordinating the rescue services and operational forces. In addition, the municipalities play a forecasting and risk prevention role established under regional programmes and plans. They make decisions, including those relating to emergency preparedness, necessary to ensure first aid in the event of a disaster at the municipal level. In addition, they must develop municipal and inter-municipal emergency plans through associations to ensure that these are implemented in accordance with regional guidelines (Di Camillo F. et al., 2014, 39). In Italy, the effects of the pandemic caused by Covid-19 have brought about a health emergency to which the Government has responded with a series of urgent measures. On January 31, 2020, the Council of Ministers approved a state of emergency as a result of the health risk granted to the onset of pathologies deriving from transmissible viral agents via a provision based on the exercise of powers in the field of civil protection provided for by the Civil Protection Code, whose Article 24 governs states of emergency of national importance (Legislative Decree No 1/2018, 2 January 2018).

During a national emergency, the Council of Ministers may declare a state of emergency in the event of natural disasters, catastrophes, or other events whose intensity and extent require extraordinary means and powers. The head of the Civil Protection Department assumes extraordinary powers. In this context, it can adopt measures in derogation from the provisions in force. In addition, the declaration of a state of emergency allows the Department of Civil Protection to use funds rapidly. In emergencies, the definition of the chain of command and co-ordination takes place in a flexible manner. For example, the Italian government can appoint an extraordinary Commissioner through ad hoc legislation or a Decree Law. The figure of the extraordinary commissioner often coincides with that of the Head of the Civil Protection Department.

The extreme emergency scenario caused by the pandemic forced the Government to appoint an extraordinary Commissioner. The Prime Ministerial Decree of 18 March 2020 contains the appointment of the Extraordinary Commissioner for the health emergency from Covid-19. This Commissioner was appointed to carry out the tasks provided for under Article 122, Decree Law No 18/2020, of March 17, 2020. In particular, the Commissioner can implement and supervise any actions to deal with a health emergency (Cusumano N. et al, 2020). It must organise, acquire and support the production of all kinds of instrumental goods useful to contain and counter the outbreak itself, or in any case necessary for the measures adopted to counter it. Furthermore, the Commissioner is responsible for planning and organising all related activities, identifying and directing the procurement of the necessary human and instrumental resources, identifying needs, and proceeding with the acquisition and distribution of medicines, equipment, medical devices, and individual protection. To carry out these activities, it may use in-house companies and purchasing centres (Giambelluca A., 2021).

In liaising with the regions, the autonomous provinces, and the health authorities, the Commissioner must also strengthen the capacity of hospital structures through the allocation of infrastructural equipment, especially intensive and sub-intensive care units. The Commissioner is also responsible for organising and carrying out the preparatory activities for the granting of aid to cope with the outbreak through the competent national and European authorities, namely all the control and monitoring operations regarding implementation of the measures. It also provides for the coordinated management of the European Union Solidarity Fund (EUSF), referred to in Regulation (EC) 2012/2002, and the resources of the development and cohesion fund intended for emergency situations. The rules governing the accounting autonomy of the Civil Protection Department do not apply to contracts relating to the purchase of goods to combat the epidemic or any other negotiation act resulting from the urgent need to deal with the health emergency put in place by the Commissioner and the implementing bodies. Furthermore, these expenses are not subject to the control of the Court of Auditors, albeit without prejudice to reporting obligations (Article 29 DPCM 22 November 2010). For the same acts, accounting and administrative responsibility is limited only to cases in which the intent of the official or agent who carried them out is in question. The same limitation of liability applies to the deeds, opinions, and technical-scientific evaluations made by the Technical-Scientific Committee, functional to the negotiation operations referred to in this section (Article 122(8), Decree Law No 18/2020, 17 March 2020). The Commissioner can purchase medical supplies using the National Emergency Fund (Article 44, Decree Law No 1/2018, 2 January 2018). The resources are paid into special accounts in the name of the Commissioner. It is also possible to open a specific bank account to allow the rapid settlement of transactions that require immediate or advance payment for supplies, even without guarantee –Article 122(9), Decree Law, No 18/2020, 17 March 2020 (Vecchi V., Cusumano N., Boyer E. J., 2020).

In summary, the Commissioner has special powers to acquire the health materials necessary to combat the epidemic. These skills allow him or her to act quickly and purchase medical supplies to be distributed throughout the country. In this way, the Italian medical stockpile was created.

2. National procedure/RescEU procedure relationship

Italy was the first Member State to be violently hit by the spread of covid-19. During the first wave of the epidemic, the EU implemented a series of actions to support the purchase of medical equipment in Italy and provide help in building up stocks of the Italian national health system. The data collected by the European Solidarity Tracker makes it possible to follow the progress of these acquisitions. Using public sources, the European Solidarity Tracker documents a dense network of mutual assistance and co-operation across the EU and illustrates the role played by European institutions throughout the coronavirus crisis.

The first European action to support medical expenses, the purchase of materials, and the economic sectors was financed through the Coronavirus Response Investment Initiative. With this tool, the European Commission proposed mobilising all existing EU budget resources cohesively to support Member States in their fight against the COVID-19 pandemic. Through this instrument, Italy received 2,318 billion euros (See here), *The European Solidarity Tracker* that collects and displays instances of pan-European solidarity throughout the first wave of the coronavirus crisis. It was updated and expanded continuously throughout the summer of 2020. Data collection concluded on 30 September 2020). These are resources derived from a substantial reorganisation of existing programmes under the cohesion policy.

In particular, Italy was able to use the European Regional Development Fund (the ERDF) and the European Social Fund (ESF) to purchase health and protective devices, disease prevention, e-health, and medical devices (including respirators, masks, and similar), the safety of the working environment in the health care sector, and ensuring access to health care for vulnerable groups. To these must be added 8 billion and 945 million unused cohesion resources, including national co-financing. Italy had large uncommitted amounts which it could rely on in these exceptional circumstances. In addition, it drew on the European Solidarity Fund, until 2020 reserved only for natural disasters, from earthquakes to floods. By 2020, over 800 million had been made available. Italy benefited from close to 70 million euros.

The second support concerns the delivery of masks and medical material through the RescEU supplies. For example, in May 2020, this instrument delivered 330,000 masks to Italy, fully funded by the European Commission.

Beyond direct assistance from the European Union through European funds and RescEU, Italy received medical equipment from several other Member States. For example, on March 19, 2020, Germany sent 7.5 tons of medical supplies to Italy, including ventilators, anaesthetics, and protective material (see here). Another example concerns the donation by Austria of 3,360 litres of disinfectant delivered through the EU civil protection mechanism. The delivery of medical supplies continued throughout the first wave.

Part of the European funding and the stocks of medical material received has supported the needs of the Italian health system to deal with the health emergency. Up to 30 December 2020, spending on medical equipment and materials indispensable in the fight against the pandemic amounted to 5.5 billion. This expenditure was divided up as follows: purchases by the regions amounted to 2 billion, those by Consip 400 million, those by the Civil Protection service 300, those of the Commissioner 2.8 billion, of which 1.8 billion – 65% of the requirements – went on surgical masks, Ffp2, and Ffp3. In greater detail, the Commission spent 65.4 million on vinyl and nitrile gloves, while the regions had to make up with 138 million. The Commissioner also spent 197 million on respirators, monitors, and beds, equal to 57% of the total, while the regions spent 81 million (23%), and Consip 71, amounting to 20%. 338 million were spent on gowns, shoes, caps, and visors, the regions spending 1.4 billion. 110 million (49%) went on buffers and reagents, while the regions spent 113 million, or 51% (Gabanelli, 2021).

This analysis demonstrates how European resources covered only a part of Italy's health material needs, which had to find most of the material needs by itself and at its own expense (Cusumano et al., 2020; Vecchi, Callea, Cusumano, 2020). Furthermore, the RescEU stocks arrived late compared with Italy's needs. In essence, Italy faced the first weeks of the fight against Covid-19 alone.

3. Criminal offences, control procedures, and the risk of fraud affecting the EU's financial interest in this sector at national level

Decree Law No 18/2020, of March 17, 2020 entrusted the Commissioner with the task of purchasing all the essential goods to contain the spread of the virus, also in derogation of the rules. It should be emphasised that all acts are not subject to the control of the Court of Auditors, without prejudice to reporting obligations. For the same acts, accounting and administrative liability is limited only to cases in which the intent of the official or agent put them in place (Article 122(8) Decree Law No 18/2020, 17 March 2020).

Italy has experienced much fraud in the procurement process of essential medical equipment and supplies.

Over recent weeks, the press has reported several cases of fraud linked to the supply of face masks without CE marking and not meeting the legal requirements to be placed on the EU market. Indeed, three people were arrested and a preventive seizure of assets amounting to €22 million was carried out by the Italian Finance Police as part of an investigation for fraud in public procurement and aggravated fraud in connection with the supply of 5 million FFP2 masks and 430,000 medical gowns to the Lazio Region. The signed contracts provided for the supply of CE certified masks, but the businessmen now under investigation are accused of having provided illegitimate and fake certificates, e.g. not issued by the competent bodies, or falsely stating the conformity of the products, or not relating to the goods actually sold (see here).

Similarly, a few weeks ago, newspapers reported the arrest of six people suspected of having carried out a fraud concerning the supply of several million euros' worth of personal protective equipment (PPE) for the Civil Protection Agency of Lazio, including FFP2 and FFP3 masks and gowns. Also in this case, the personal protective equipment, coming from Turkey and China, did not comply with safety standards. The company involved apparently promised the immediate delivery of the expected supply, but the goods were delivered late and only partially, despite the payment of a deposit of 20%. The suspects also allegedly carried out money laundering activities to clean up part of the illicit profit. The Italian police seized approximately four million euros of proceeds from the supplies (see here).

In both cases, the facts occurred in the first phase of the health emergency (between March and April 2020), when Italy was struggling to find masks on the market.

This is just an example of the countless scams in medical equipment procurement brought to light on a European and global level, also considering the 'grey zone' created in some cases by the response to this public health emergency. As the EU Chief Prosecutor Laura Kovesi noted even during the first wave of the pandemic, "the response to COVID-19 is inviting less-than-transparent practices, including the award of procurement contracts without open bids, or the use of fake documents to buy medical equipment or drugs at artificially inflated prices" (see here).

II. *Italian Case Study: "Cassa integrazione" and SURE*

Dr. Alessandro Nato

1. National schemes for temporary support to mitigate unemployment risks in an emergency

In the Italian legal system, the *Cassa Integrazione Guadagni* is a social benefit that can be used in the context of employment relationships and aims to economically supplement the wages of workers in difficult situations for which a reduction or suspension of the employment relationship is required. In practice, the *Cassa Integrazione Guadagni* allows companies, at times of temporary production difficulties, to lighten the labour cost of temporarily unused labour, allowing workers to resume work once this difficulty has been overcome (Renga, 2017, 218).

The most widely used institution is the *Cassa Integrazione Ordinaria*. This tool can be used by companies in the industrial sector who are in a situation of reduced or suspended production depending on two factors: transient events not attributable to the entrepreneur, and market situations that do not put in doubt the resumption of traditional production activity. To access the ordinary redundancy fund, the entrepreneur must initiate the procedure provided for in Article 7 of Law 164/1975. The *Cassa Integrazione Straordinaria* differs from the *Cassa Integrazione Ordinaria* because it aims to address serious situations of employment surplus and operates in the event of suspension or reduction of the activity caused by a change of technologies, company organisation, corporate transformation, business crisis, and insolvency procedures. Furthermore, the *Cassa Integrazione Straordinaria* applies to industrial companies that employ more than 15 employees or commercial companies with more than 50 employees.

The *Cassa Integrazione Guadagni* was established by Legislative Decree No 788/1945. To manage the problems of unmanageable companies by activating the ordinary redundancy fund, the *Cassa Integrazione Straordinaria* was established with Law No 1115. In general, the *Cassa Integrazione Guadagni* was born as an instrument to guarantee the workers' income in the presence of events of temporary suspension or reduction of the company's activities not attributable to the entrepreneur or workers (Cinelli, 1994, 14). On the one hand, the administrative practice has always granted *Cassa integrazione Guadagni* even in the face of situations of mere difficulty not attributable to arbitrary choices by the entrepreneur. On the other hand, with the introduction of the *Cassa Integrazione Straordinaria*, the *Cassa Integrazione* was granted even in the presence of general cyclical economic crises (Renga, 2017, 218). Over the decades, there have been various legislative interventions leading to a fragmented system, leading to inequity of access among workers. Faced with the need for universalisation of the protection provided by the redundancy fund, the Italian legislator has always responded with sectoral and heterogeneous interventions, inspired by the context.

The reform carried out by Legislative Decree No148/2015 rationalised the legislation on *Cassa Integrazione Guadagni* and widened the number of beneficiaries, standardising maximum duration periods and commensurate with the additional contribution according to the actual use of wage supplement treatment (Nicolini, 2016, 381; Bozzao, 2015). The 2015 reform restores the temporary nature of the intervention and rationalises the legislation on wage supplements. This legislation provides, in a single text, the rules of the ordinary and extraordinary redundancy fund, wage supplements for construction, solidarity funds, and solidarity contracts. However, the objective scope of the *Cassa Integrazione Guadagni* is substantially unchanged by the reform. The legislator carries out a work of reorganising the area of application of wage supplements. In particular, benefits for companies in the industrial, construction, agriculture, and publishing sectors are now included in the *Cassa Integrazione Ordinaria*. The social benefits for industrial and construction companies, companies in the railway sector, agricultural co-operatives, travel agencies, tourism companies, airlines or airports, are now supported by the *Cassa Integrazione Straordinaria*. On the other hand, the 2015 Decree brought

some changes. Article 1 establishes that workers hired through an employment contract, including apprentices, can benefit from the fund, but managers and home workers are excluded (Renga, 2017, 222; Sandulli G., 2017, 27). Furthermore, Law No 205/2017 provided the possibility of requesting a relocation allowance for workers affected by reorganisation processes or company crises following which complete recovery of employment levels is not expected.

The amount of indemnity paid by the *Istituto Nazionale Previdenza Sociale* - INPS provides different duration times depending on whether the company has requested the ordinary or extraordinary fund. The *Cassa Integrazione Oridinaria* is a tool supporting workers in the industrial sector, which can be requested in transitory and temporary periods of particular contraction or suspension of production activity caused by events not attributable to the employer (Occhino, 2016). The *Cassa Integrazione Speciale*, on the other hand, can be requested as an aid in times of structural corporate circumstances that do not compromise the continuation of business activity. However, INPS pays the beneficiary workers directly according to a decision of the Ministry of Employment when the company has proven financial difficulties ascertained by the *Ispettorato Territoriale del Lavoro* inspection service. The amount paid is 80% of the total remuneration that would have been due for the hours of work not performed, within a maximum monthly limit established from year to year (Renga, 2017, 226). The standard benefit period remains 13 weeks, with an extension every three months to 52 weeks. However, to obtain a new intervention, the 2015 reform established that a period of at least 52 weeks of working activity must pass. Another innovation is that the salary supplement relating to several non-consecutive periods cannot exceed a total duration of 52 weeks in two years. The period of extraordinary intervention is 24 months, even if not continuous in the mobile five-year period for corporate reorganisation and the solidarity contract, and 12 months, even if not continuous, for cases of corporate crisis (Renga, 2017, 228).

The Covid-19 crisis has brought changes to the redundancy fund system. The pandemic has generated an intersectoral and nationwide crisis that cannot be controlled. Indeed, it has been amplified due to a number of factors. This is the problem addressed by urgent legislation on supporting workers' incomes (Faioli, 2020, 168). In Italy, the covid-19 crisis has caused a worse situation than in the other Member States. In the first phase of the pandemic, the data reported by INPS showed that the set of beneficiaries of *Cassa Integrazione Ordinaria* amounted to 7,139,048, of which 4,558,355 had been advanced by companies with subsequent adjustment by INPS, while 2,580,693 had been paid directly by the Institute (see here). This forced the authorities to intervene with Decree Law No 18 of 17 March 2020, which enlarged the range of income support beneficiaries. The growing demand for temporary subsidies to support workers has caused a notable increase in Italian public spending. In the period of the health emergency, from March 2020 to January 2021, based on government provisions, INPS disbursed 33.5 billion in 10 months to support economic activities and families, with support going to about 15 million beneficiaries. In particular, with regard to the *Cassa Integrazione Guadagni*, the Institute authorised over 4 billion *Cassa Integrazione Guadagni* hours totalling over 19 billion euros for 3.5 million beneficiaries with an INPS direct payment, and 3.4 million with advance payment by the company (see here). This public expenditure was largely supported by SURE funds.

2. The relationship between the national schemes and the SURE mechanism

In Italy, the *Cassa Integrazione Guadagni* and the blocking of layoffs have made it possible to support permanent employment (Saraceno, 2021, 2). Public expenditure for the *Cassa Integrazione* benefited from the support of European funds. Up to March 2021, Italy received 24.82 billion out of the 27.4 billion euros allocated to it under the SURE programme. From March 2020 onwards, the European Commission states that the SURE has been used in Italy to finance the *Cassa Integrazione*, bonuses for the self-employed, entertainment workers, farmers, and other categories, as well as non-repayable contributions for the self-employed and money for parental leave and babysitter vouchers.

In particular, Italy has used most of its SURE funds to finance short-time work programmes. These are social benefits that allow companies in economic difficulty to temporarily reduce the hours

worked by their employees, who are provided with public income support for the hours not worked. The Italian scheme supported by SURE already existed before the COVID-19 outbreak. Italian authorities had to adapt it in response to the pandemic. The changes introduced mainly concern the temporary simplification of administrative procedures, an extension of coverage, a relaxation of eligibility conditions, greater generosity towards employees and/or employers, and longer duration.

The reform was adopted in March 2020. To cope with the epidemiological emergency arising from Covid-19, Legislative Decree No 18/2020, of March 17, 2020, had to modify the income support institutions already provided for by Legislative Decree No 148/2015. The new measures accelerate the administrative process thanks to a simpler procedural and causal structure. Furthermore, these measures are financed by general taxation and not by the contribution ratio. In particular, it is a general dispensation from trade-union information and consultation procedures (Article 14 Legislative Decree No 148/2015), the administrative procedure relating to the presentation of the *Cassa Integrazione Ordinaria* application (Article 15, para. 2, Legislative Decree No 148/2015), and the application for an ordinary allowance (Article 30, para. 2, Legislative Decree No 148/2015). In other words, the application for access to the ordinary allowance must be submitted no earlier than thirty days before the start of the suspension or reduction and no later than fifteen days from the start of the suspension or reduction. On the one hand, it broadens the audience of beneficiaries of wage supplementation treatments. On the other hand, the benefits are paid according to an integration treatment strictly related to the Covid-19 emergency for a maximum period of 9 weeks through existing institutions, such as the *Cassa Integrazione Guadagni* and those in *Deroga* (Faioli, 2020, 168; Cafalà, 2020).

In other words, employers who were covered by Article 10, Legislative Decree No 148/2015. According to Article 19 d.l. No 18/2020, employers and workers in the industry, transport, agriculture, and the movie sector can access the Covid-19 supplement. These subjects are exempted from carrying out the administrative procedure. Also, the Decree of March 2020 simplifies the union information and consultation procedure; the joint examination must take place within three days of the prior communication. This union procedure is carried out electronically. The deadline for applications coincides with the end of the fourth month following the beginning of the suspension and reduction period. These periods of *Cassa Integrazione Oridinaria* are not counted for the duration. Workers must be employed by the employer as early as 23 March 2020, but resources are limited and managed by INPS (Faioli, 2020, 169; Cafalà, 2020). According to Article 20, d.l. No 18/2020, employers belonging to the construction sector, crafts, restaurateurs, cleaning services, security companies, and auxiliaries of the railway service can access the *Cassa Integrazione Straordianria* (Article 20 Legislative Decree No 148/2015). Besides, employers who have *Cassa Integrazione Straordianaria* can apply for *Cassa Integrazione Ordianaria Covid-19*, according to Article 19, d.l. No 18/2020. This benefit suspends and replaces the *Cassa Integrazione Straordinaria*. Also in this case, administrative simplifications are envisaged, and the trade union procedure may not be carried out. However, INPS can accept applications within the limits of its resources (Faioli, 2020, 170; Cafalà, 2020).

Furthermore, regarding the employer/workers subject to bilateral solidarity funds, according to Article 19 d.l. No 18/2020, these are employers who were covered by Article 26 ff. Legislative Decree No 148/2015. In other words, this category includes subjects who do not fall within the scope of the *Cassa Integrazione Ordinaria* and *Straordinaria*. The bilateral solidarity funds are INPS funds, pre-existing funds, alternative bilateral funds for the craft sector, and territorial funds. Employers are also exempted from carrying out the administrative procedure. The trade-union information and consultation procedure, of the joint examination, must take place within three days of the prior communication. The trade-union procedure must be carried out electronically. Besides, in the context of emergency legislation, the ordinary allowance can be paid, even to employers who have more than five employees, but, also in this case, resources are limited and managed by INPS (Faioli, 2020, 170; Cafalà, 2020).

Employers who do not belong to any of the categories mentioned above can apply for the *Cassa Integrazione Guadagni* according to Article 22 d.l. No 18/2020 (Tiraboschi, 2010, 331; Ferrante, 2009, 918). Employers who can access the *Cassa in Deroga* also include commercial employers with more than fifty employees who can apply for *Cassa Integrazione Straordinaria*, under Article 20 (2), Legislative Decree 148/2015. The employers enter into an agreement, which can also be negotiated

online, with the most representative trade union organisations, and subsequently apply to the redundancy fund in derogation. It should be emphasised that employers who have at least one employee can access the redundancy fund by way of derogation (Faioli, 2020, 172; Cafalà, 2020).

Subsequent legislation in 2020 extended these measures without making substantial changes (Decree Law No 104/2020, known as the *Decreto Agosto*; Decree Law No 137/2020, the so-called *Decreto Ristori*).

On the other hand, Article 8 of Decree Law No 41 of 22 March 2021 introduced new provisions on wage integration applications. In particular, it re-calculated the maximum number of weeks that can be requested by companies that suspend or reduce their working activity as a result of the Covid-19 emergency and differentiate the time frame in which it is possible to place the new treatments. Furthermore, Article 8(1) provides that private employers who suspend or reduce their work activity due to events attributable to the epidemiological emergency from COVID-19 may request *Cassa Integrazione Ordinaria*, referred to in Article 19 and Article 20 of the Decree Law No 18 of 17 March 2020, converted, with amendments, by law No 27 of 24 April 2020, for a maximum duration of 13 weeks in the period between 1 April 2021 and 30 June 2021. Instead, Article 8(2) establishes that for *Cassa Integrazione Ordinaria* and in *Deroga* – referred to in Articles 19, 21, 22, and 22-*quater* of Decree Law No 18/2020 – employers can apply for a maximum duration of 28 weeks between 1 April 2021 and 31 December 2021.

Furthemore, Italy has requested SURE support to finance measures similar to short-time work programmes. Indeed, these are measures that aim to protect employed and self-employed workers, reducing the incidence of unemployment and loss of income in the context of the pandemic crisis, but which do not strictly fall within the definition of a short-time work regime. Besides, funding from the EU instrument supported measures to help the self-employed. These actions include one-time income benefits, granted as a lump sum or based on previously realised losses; and other support measures that reduce the operating costs of businesses, to the extent that these benefit the self-employed. The fundamental requirement is that the beneficiaries of the support must continue to pursue their profession as self-employed or entrepreneurial activity (Commission SURE, 2021, 27). Also, as has already been analysed in this paragraph, Italy has used SURE funds to finance special allowances for parental leave, providing income support to employees and/or self-employed workers with children during school closures. In Italy, SURE also funded instruments to support seasonal workers with suspended employment contracts due to the pandemic, mainly in the tourism and/or agriculture sector (Commission SURE, 2021, 27). These are “regular” seasonal workers who were supposed to resume work for the spring/summer 2020 season but were unable to do so due to the health crisis. Besides, the Italian authorities have requested financial assistance under the SURE to finance the health expenditure directly linked to the health emergency. In particular, these measures serve to lower the costs of increasing occupational health and safety requirements for the private sector (Commission SURE, 2021, 27).

The SURE funds covered only a part of the measures indicated. However, the estimates reported by the European Commission state that thanks to SURE, Italy has so far saved – in terms of interest – 2.835 billion euros of the 21 billion received as of 2 February 2021, so 13.5% of the amount received (Commission SURE, 2021, 27). Despite this, the literature has debated the usefulness of maintaining layoffs and redundancies as a prevalent form of employment support. Controversial opinions exist even among experts. Some argue that it would be more appropriate to use SURE for other social tools that help people find job instead of producing an explosion of unemployed when those two measures cease. These measures may not prevent many companies from going bankrupt by increasing the number of unemployed (Saraceno, 2021, 7).

3. Criminal offences, control procedures, and the risk of fraud affecting the EU’s financial interest in this sector at national level

The health crisis contributed to the large increase in requests for access to the *Cassa Integrazione Guadagni* in the first half of 2020. In this regard, through *Circolare No 532/2020* of 10

June 2020, the *Istituto Nazionale del Lavoro* started to monitor the correct use of public resources for social safety nets related to Covid-19. These controls are also aimed at countering any elusive and fraudulent phenomena. In addition, the National Labour Inspectorate received from INPS some reports to start investigations to avoid fraud. It should be noted that according to Article 2 (2) of Legislative Decree No 149/2015, the National Labour Inspectorate carries out supervisory functions in the field of labour, contributions, and compulsory insurance, social legislation, including the supervision of health and safety in the workplace, the latter within the limits of the competences already attributed to the inspection staff of the Ministry of Labour and Social Policies under Legislative Decree No 81 (letter a) of 9.4.2008 (Lazzari, 2016; Caiazza, 2015).

Circolare No 532/2020 states that the checks will concern the companies that have applied for ordinary layoffs, wage integration funds, and exemption layoffs. The National Labour Inspectorate will also verify applications for income support allowances presented by seasonal workers in tourism and spas, by agricultural workers, and by self-employed persons enrolled in special management by compulsory general insurance, such as artisans. The lists of companies have been provided by INPS. In the planning phase, the National Labour Inspectorate will pay particular attention – in addition to requests for intervention and the reports received on the matter – towards companies operating in sectors that have not suffered interruptions in activities. Also, the inspectorate will examine in depth the requests received from companies operating in derogation of the restrictive measures provided for by the legislation issued to the epidemiological emergency. The subject of examination will also include requests for access to the *Cassa Integrazione Guadagni* presented by companies that have submitted applications for registration, resumption of activity, changes to classification with retroactive effect, in the periods immediately preceding the requests for treatment of the various forms of layoffs. Labour inspectors will also have to analyse the hiring, transformations, and requalification of employment relationships carried out in the periods immediately preceding the requests for the treatment of the various forms of layoffs. Lastly, the inspectorate will have to check the number of workers affected by social safety nets and any outsourcing; companies/employers who have placed their staff in smart working and requested the provision of social safety nets and companies that have not informed INPS of even partial resumption of work. The aforementioned control activities have been included in the 2020 and 2021 Supervisory Planning Document. It aims to intensify the administrative-accounting verification activities relating to the competencies of the Inspectorate and INPS, also through the development of operational synergies and the sharing of elements and data of interest.

Therefore, companies and workers who have unduly received the *Cassa Integrazione Guadagni* and continue to do so risk sanctions for committing fraud to the detriment of INPS and consequently of the Italian State. It should be emphasised that in addition to having to return the sums received to INPS, they risk consequences of a criminal nature. The INPS, due to its institutional role as a provider of social benefits of various types, is often among the passive subjects of the crime referred to in Article 640bis of the Criminal Code. Especially, it occurs in the context of the so-called services in support of income, but there are also effects on the overall position of the parties concerned for pension requirements.

According to Article 640-*bis* of the Criminal Code. a fraud is committed by those who, with artifice and deception, by misleading someone, procures an unfair profit for himself or others to the detriment of others. The purpose of the rule is to protect the free expression of consent in the context of patrimonial transactions. The elements of the crime are as follows: specific fraudulent conduct carried out by the agent, consisting of “tricks and deception”; misleading the victim as a result of tricks and deception; the fulfilment by the victim of an act of disposition of property following said induction into error; and financial damage caused to the taxable person with consequent unfair profit for the agent or others. An adequate interpretation of Article 640-*bis* can only be obtained from simultaneous analysis of Article 316-*bis* of the Criminal Code, introduced with Law 86/1990, which modifies the body of crimes against public administration bodies. According to this rule, any subject, unrelated to the PA, that has obtained from the State, or another public body or from the European Community, contributions, grants or loans intended to favour initiatives for the realisation of works or the performance of activities of public interest, does not assign them to the aforementioned purposes, can be punished with imprisonment from 6 months to 4 years.

At first glance, Article 316-*bis* seems incompatible with Article 640bis. The first offence consists of lawfully obtaining concessions, subsequently used for purposes other than those for which they were provided. Article 640-*bis*, on the other hand, punishes obtaining subsidies fraudulently and consequent prejudice. Both rules envisage the necessary occurrence of a similar prejudicial result. In Article 316-*bis*, this is represented by the depletion of public assets, while in Article 640-*bis* it is represented by damage to the capital plan of the public body. From this, it follows that the two indictments do not seem to be able to concur, as only the special hypothesis of Article 640-*bis* of the Criminal Code applies. This arrangement of the relations between the two cases would seem to justify the heavier sanctions envisaged for the hypothesis of fraud. However, considering the nature of Article 640-*bis*, the consistency between the sanctioning treatment and the structure of the case appears doubtful.

In April 2021, the National Labour Inspectorate processed the first data obtained from the checks on social welfare benefits for the first two months of 2021. The checks involved a total of 1,989 companies representing 29,244 workers. During the period under review, 1,138 investigations were concluded, of which 193 were carried out jointly with INPS inspection staff. They highlighted 433 irregular employment positions. The checks mainly concerned the more common types of social welfare such as the Covid-19 redundancy fund, solidarity funds, the Covid-19 redundancy fund, and others, such as the bilateral solidarity fund for crafts. For example, the most frequently encountered irregularities concerned fraud, the improper use of benefits, and the use of more hours of *Cassa Integrazione Guadagni* than those authorised. Upon completion of the checks, 19 notices of crime were forwarded to the Italian Public Prosecutor's Office for criminal offences and recoveries amounting to 253,254 euros (see here). Controls seek to combat fraudulent behaviour and guarantee the substantial protection of relationships and working conditions. As required by the Supervisory Planning Document, controls regarding the matter will continue throughout 2021 as part of the process of legally adapting the role of the National Labour Inspectorate to support economic and social recovery.

III. *European resources for strategic investments supporting small and medium enterprises: the green sector, innovation and performance*

Dr. Elisabetta Tatì

At the end of the presentation of the European level for this third case-study, what emerged was the complexity the European and National institutions have to face once engaged in the fight against fraud and the protection of their public financial interest in the sectors under scrutiny. Thus, concerning financing for SMEs by European institutions (such as the EIB, considering its key role in the future) and national authorities (in or outside a European shared administration framework), the number of actors and the sectors involved complicate the picture even more. For example, one has to consider that European and national (private and public) credit and bank sectors are involved, hence with possible financial irregularities or offences perpetrated by intermediaries. The perspective is probably even riskier if one imagines that resources will be invested in innovative and non-traditional sectors for many national banking systems and promotional authorities, such as the world of environmental sustainability. For this reason, the expertise of some banking institutions (such as the EIB, together with its agreements with national authorities) will be even more crucial, also in terms of fighting irregularities and fraud. Another area requiring special attention will be that of beneficiaries, considering that in the field of this case-study there are locally rooted SMEs, with all their cultural specificities – such as a high propensity for criminal activities. These two perspectives – financial intermediaries and beneficiaries' behaviour (especially in the light of EIB projects) will be the specific object of observations for the national focus of this third case study.

On these assumptions, the national case study will present, first of all, the Italian context regarding the superimposition of these sectors highlighted for the European level: industrial policy, mainly supporting SMEs and innovation policy, mainly in the light of the new Green Deal. Another element of the puzzle to take into consideration will be that of the R&D sector, with its specific policy and European and national levels of governance. This analysis will also take into account the variables of the last economic crisis and the new health threat, considering how they have represented drivers of changes for the Italian context.

In the second place, considering the ultimate goal of the BETKOSOL project (namely the protection of the EU's financial interest), the case-study will mainly follow European projects and resources, especially the implementation, at the national level, of the fund for strategic investments – also in the light of the new *InvestEu* programme. Hence, of all the different national tools available to support SMEs, the main focus will be on the concession of banking credit and guarantees and, more specifically, instruments to facilitate access to financing for investments in innovation. The BEI, national development banks, and promotional institutions, as well as ministries, regional authorities, and research entities (considering also their importance and overlapping with structural funds and direct funds in innovation) will play an important role in re-building the institutional and governance system (see access to finance).

Lastly, the case study will highlight the risks of irregularities and fraud in the sector, both at the level of public intermediaries and that of the final beneficiaries, following the results of the anti-fraud policy of the EIB (already presented in D.2). The role of the ANAC (see Task 4, D.1, Italy) will also be discussed, considering the ongoing co-operation between the national anti-corruption authority and the European Investment Bank.

1. National support schemes for small and medium enterprises (how are these schemes structured at national level?/What is the regulatory framework in this sector at national level?)

Over the last ten years, Italy has adopted a pool of different instruments to support enterprises, especially those that best characterise its national system: SMEs – the aim being to foster innovation and growth after the economic crises. In the more recent context of the Covid-19 crisis, some instruments have been strengthened, and some new ones have been planned. In any case, it is important to stress the fact that Italy did not excel in performance, either with regard to industrial policy or to innovation (see Bassanini, Napolitano, Torchia, 2021; Averardi, 2018).

There are three categories into which the instruments can be divided: tax benefits, of national competence alone; public contributions and aid – of a national, European, or mixed nature and with different procedures but normally under programmes or procedures with a more or less discretional selection phase (i.e. the Italian system of *plafonds*, under the so-called *Nuova Sabatini* reform, see below); the concession of banking credit and guarantees, i.e., instruments to facilitate access to financing for investment in innovation, again through national or European resources and under direct/indirect/mixed administration.

During the last year of the pandemic, different interventions have been approved by various Decree Laws in order to address the economic shock. For example, Decree Law No 18/2020 (the so-called *CuraItalia*, meaning "take care of Italy" in the medical sense) adopted measures to support enterprises' financial equity through the banking system. In particular, one of the provisions reinforced the already existing fund in favour of SMEs managed by the Ministry of Economic Development (*Fondo centrale di garanzia per le PMI* managed by the *Ministero per lo sviluppo economico*, MISE, established in 1996, and operative since the 2000s). Since then, new provisions have constantly updated this economic policy, also in view of the long-term scenario (such as Decree Law No 23/2020, the so-called *Decreto liquidità* and Decree Law No 34/2020, *Decreto Rilancio*). For example, a new fund called *Fondo Patrimonio PMI* has been created under the supervision of INVITALIA (see Task 1, D.1, Italy), with the mission of further facilitating access to credit by SMEs. Together with the latter, the so-called *Patrimonio Rilancio* was introduced to offer public guarantees to enterprises in their relationships with the banking system, under the management of the main national institution for economic promotion, the *Cassa depositi e prestiti* (CDP).

To sum up, the system can currently count on traditional but enhanced tools; on partially innovative instruments in the sense that there are new funds financed using public resources (by public companies and entities) that intervene regarding the capital of enterprises; and another important pillar, the updated system of State aid under European Law. All these instruments and resources can address enterprises of all sizes in different ways. However, there has been a particular support for SMEs and innovative/women/young startups, both at the European (as seen in D.2) and Italian levels.

It is important to highlight exactly the goals towards which the above-mentioned public efforts have been redirected. This is a key passage because it gives the opportunity to link industrial policy, and – within this – support to enterprises through access to credit, with innovation and R&D policies, taking into account the long-term view.

Over the last few years, Italy has tried to move according to three pillars, following European lines but also considering its own weaknesses: innovation, internationalisation, and productivity. The first point, innovation, is at the very core of the present case study, and Italy has worked to facilitate investments in research that can boost innovation in the protection of the environment and digitisation. This is also an area of overlap between the national and European strategic investment plans, such as the Juncker plan – or the role of the EC and its DGs for the European Innovation policy – and the *Industria 4.0* for Italy. Thus, before presenting the EFSI at the national level, this section will refer to recent European innovation policy and will present the ongoing steps and difficulties of the National Plan to drive the fourth industrial revolution, also taking into account the new objectives expressed in this regard in the National Recovery and Resilience Plan regarding the use of resources under the NGEU package and the Green Deal. In fact, what is of interest to this case study, at least regarding the Italian

situation, is the entire process chain that involves the kind of resources specified above: from the (European-National) planning phase to implementation, with all the issues relating to *ex ante*, *in itinere* and *ex post* monitoring of irregularities and fraud.

The European Innovation Policy (EIP) is at the crossroads between the Industrial Policy (Article 173, TFEU) and R&D policy (Articles 179-190, TFEU), and it started its own path with the Lisbon Strategy in 2020 and the creation of the Open Method of Co-ordination (OMC), receiving new impetus after the financial-economic crisis with the Juncker Investment Plan (see D.2; see also Bassanini, Napolitano, Torchia, 2021). The actors involved in EIP governance are: the EC (DG Growth, DG Regio, DG Comp, DG RTD and its different expert groups), co-ordination between member States regarding the topic under the European Semester by the EC's Secretary General, the subjects involved in the Better Regulation Agenda, the newly created European Council of Innovation (2019) and the EIB. Apart for the general functioning of the OMC, the more recent instruments adopted to plan and implement the EIP have been: Horizon 2020 (with specific financial tools for converging resources in research, innovation and technological development); research initiatives under the European SIF; the Juncker Plan with initiatives such as VentureEU; action to improve innovation skills in the framework of the Agenda for Better Regulation (Mentens, Thiemann, 2019; Borras 2015; De Ruiter, 2010; Kaiser, 2004). The OMC, the number of instruments, and that of the actors and objectives can all be considered elements of weakness for the EIP's success. The new EC, under the Presidency of Mrs. Von der Leyen, is steering towards two main goals in order to valorise the resources available for the future: the Green Deal and the digital transition (ESIR, 2018; EC, 2020; EC, 2020b).

The *Industria 4.0* strategy, the main element in the most recent Italian innovation policy (IIP), took into consideration the European puzzle presented above. It can be anticipated that implementation has felt the effects of the political instability of the country, the tendencies – since the nineties – to delegate to private investment, reducing the role of public institutions in the sector (considering that, in general, in the two decades 1999-2019, total investments in Italy grew by only 66 per cent compared with 118 per cent in the euro area. In particular, while the share of private investment has increased, that of public investment has decreased, falling from 14.6 percent of total investments in 1999 to 12.7 per cent in 2019, with consequences on the necessary modernisation processes of the public administration bodies, infrastructures, and production chains. The *National recovery and resilience plan*, NRRP, 3; see here the presentation by Carparelli), fragmentation of objectives, actors and instruments, the presence of excessive administrative automatisms and, lastly, a certain technological neutrality are critical elements. The last point seems to have characterised the EIP as well – at least until the Von der Leyen administration – as it has not been clear how "Research" is something different from guided "Innovation" with its economic strategic role. With regard to governance, there is an extreme form of organisational pluralism, favouring ministries – mainly the Ministry of Universities and Research, the Ministry of the Economy and Finance and the Ministry of Economic Development – with the further involvement of research and promotional entities or public enterprises under the supervision of the same ministries, together with partial involvement of the regions. This *top-down* approach has been adopted in the almost complete absence of independent *bottom-up* subjects, such as the German *Fraunhofer*, despite the attempt of the *Industria 4.0* strategy to create "competence centres" and to involve, with a more proactive role, public universities. With regard to the instruments, *Industria 4.0* is based on a patchwork of tools, in part overlapping with Industrial policy: tax credits for investments in innovative goods and in R&D – such as ecological transition or design – (Article 1, para. 184 ff. and 198 ff., Law No 160/2019 – Annual Budget Law 2020) and the system of the so-called patent boxes, based on partial detractions of some incomes from tax levies (MISE Decree 28 November 2017, in accordance with MEF and on the basis of Article 1, para. 37-43, Law No 190/2014 – Annual Budget Law 2015 – and further modifications, such as Decree Law No 34/2019). The *Nuova Sabatini* reform provides a mechanism to support SMEs that purchase new capital goods in all production sectors, as well as investing in digital technologies and tracking and weighing systems (so-called investments 4.0), according to which they receive a contribution from MISE in relation to the interest on the loans granted by banks and financial intermediaries to support the investments (first introduced with Decree Law No 69/2013 and recently refinanced until 2025 by Article 1, para. 226, Annual Budget Law 2020, mechanism compatible with access to the *Fondo centrale di garanzia per le PMI*). There is also

provision for direct grants or subsidised loans, such as in the field of "agreements for innovation" that involve the MISE, the regions/provinces, and the company, if the latter carries out industrial, agro-industrial, artisan activities, services to industry, research activities, or finances projects concerning industrial research and experimental development aiming to create or significantly improve products, processes or services – and the legal sources are normally Ministerial Decrees – (another example of direct grants consists in the *Smart&Start* initiative or the experience of *contratti di sviluppo*, both managed by INVITALIA). Other actions in different sectors must be taken into consideration to have a complete idea of the Italian efforts to foster innovation and overlapping with the industrial sector. Also included is the already mentioned role of public procurement (i.e. Article 65, Legislative Decree No 5072016, Code of Public Procurement, rules for the instrument known as "partnership for innovation). Further provisions are as follows: the partially new steering strategy of public participation and the holding role of the State (i.e. through the role of CDP and other promotional entities fostering strategic innovation and research, especially for SMEs and Innovative Startups); the role of the regions and local autonomy in the broader galaxy of ESI funds and complementary national resources to foster innovation, research and technological transformation of the productive sectors and local economies (Bassanini, Napolitano, Torchia, 2021; Fuggeta, 2019; Averardi, 2017; Bigazzi, 2017; Torchia, 2016; Onida, Viesti, 2016; Fantini, 2016; Borras, 2015; Colaccino, 2015; De Ruiter, 2010; Izzo, 2009; Brunazzo, 2007; Howells, 1999).

For some time now, Italy has been experiencing output and productivity growth rates significantly lower than those of other major advanced economies. The modernisation of the economy entails complete relinquishment of outdated production paradigms and a shift towards a knowledge-based economy. At the same time, Italy has to achieve the transition towards an environmentally friendly economy. The National Recovery and Resilience Plan (NRRP) was sent to the EC at the end of April. The extraordinary financial plan approved last July by the European Council will provide resources worth €750 billion, of which €380 billion consist of grants. The money will be raised by issuing European securities, of which 30% will consist of "green bonds". Italy will be the first beneficiary of the plan, with approximately € 209 billion in loans and subsidies (at 2018 values) and the RRP will serve as the cornerstone of this project in conjunction with the other economic planning tools available to us, starting with the European funds available within the MFF. This means closer co-ordination between the EU and countries, and among countries, starting with the European Semester. The huge resources allocated to this end are an opportunity and – at the same time – a great responsibility. The National plan is structured along three strategic axes: digitisation and innovation, ecological transition, and social inclusion. Its six missions unfold within this rationale (see D.2., Task 1 and D.1., Task 1 for more details). Among them, and relevant to this case-study, are digitisation, innovation, competitiveness (M1), the green revolution-ecological transition (M.2), and Education and Research (M4).

Regarding SMEs, the NRRP refers to them especially in M1, component No 2, which addresses the productive system from the point of view of innovation, digitisation, and competitiveness. The fifth pillar of this group of investments consists in the support of industrial sector policies and internationalisation, i.e. refinancing Fund Law No 394/81 managed by SIMEST, which supports the internationalisation of SMEs through grants and loans to Italian companies operating on foreign markets. In addition, it envisages supporting SMEs dedicated to production chains, considering that the Italian production system is characterised by a serious fragmentation and the small size of its companies compared with the European average (this intervention aims to provide financial support for investments through the above-mentioned Development Contracts). A reform specifically concerning industrial property is already expected. However, it is important to point out that a key role for supporting national strategic investments in the sector is played by the implementation of the EFSI - now in the light of the *InvestEU* programme (but the *Just Transition Fund* will also play a key role).

It should be noted that fraud concerns the obtaining of funds coming from the general budget of the EU, but also from budgets managed by the EU or on behalf of it. This clarification is extremely timely and is based on the whole financial system of the EU, for which there is not only a general budget, but financial statements of non-EU origin albeit managed by the EU, just as there are budgets managed on behalf of the EU (Venegoni, 2016). In particular, EFSI is not a "fund" in the traditional

sense. It is a form of guarantee that enables the EIB Group to accelerate projects and take more risks when investing in them. EFSI beneficiaries follow the same procedures in place for a traditional EIB loan or for lending organised via an EIB partner. If the project meets the EFSI criteria, it is presented to a group of eight independent experts called the Investment Committee. This group decides if the project qualifies for backing by the EU guarantee. Since the EIB Group is never the only investor in a project, each euro of EIB financing will generate third-party investment worth several times this amount. This process of attracting co-investment is called "crowding in" (EIF, 2018).

2. National schemes and their relationship with EU funds in the area of access to credit for SMEs in the light of investments in the main drivers of innovation: the case of the EFSI throughout the multilevel system and green investments in Italy

As the EIB gained visibility in Europe, the same happened with CDP and INVITALIA for Italy. However, for Member States that are weaker in terms of economic performances that others, such as Italy, the complementary role of the European Union can be considered essential. In fact, the availability of national public resources for investments and innovation can be poor in a country that has to respect financial and spending restraints or that has to face more impellent consequences of economic crises and shocks.

The resources under the EFSI have enabled the EIF to deploy its existing support for SMEs and to increase its response to a very strong market demand. Initial EFSI resources under the SME Window have been used to accelerate and enhance the deployment of existing EU flagship programmes, i.e. COSME and InnovFin, which the EIF has managed on behalf of the EC. They have also been used to significantly increase the Risk Capital Resources (RCR) mandate for equity investments by €2.5bn, which the EIB has entrusted to the EIF (for more details see ECA Report No 3, 2019). Through the EIF-NPI Equity Investment Platform – a non-binding governance framework – EIF offers the possibility for National Promotional Institutions (NPIs) to match the total investment budget under the EFSI SME Window on a 1:1 basis. In addition, through the EIF-NPI Securitisation Initiative (ENSI) – a co-operation and risk sharing platform with several NPIs – the EIF aims to provide more funding for SMEs by revitalising the SME Securitisation market while catalysing resources from the private sector. These initiatives are an opportunity for the EIF and NPIs to establish a closer, more co-ordinated operational interaction, reflecting the spirit of EFSI aiming to achieve a much wider outreach in support of SMEs (see here). As explained here, in the light of Covid-19, financial backing for development from the European Union is more important than ever, especially for businesses in trouble. However, in the following paragraphs, what has to be evaluated and taken into consideration for the risk of fraud and irregularities affecting the EU's financial interest is not the recent *InvestEU* programme – for which it is impossible to evaluate performance at the moment – but, on the contrary, the original functioning of the EFSI.

It should be remembered that the Juncker Plan and the ESI Funds are two tools that can be integrated for the realisation of projects also through the use of financial instruments and with the possibility for Member States to contribute to increase the EFSI, to co-finance strategic projects, both directly and through the intervention of banks. Moreover, this synergy has often been advocated by the EC, especially regarding infrastructures (typically through forms of public-private partnership), a macro-sector which requires particular attention regarding the quality of the proposed projects and the transparency of the procedures. In terms of implementation in Italy, in October 2018, projects under the EFSI amounting to 8.8 billion euros were approved: €6.5 billion for infrastructure and innovation projects and €2.3 billion for loans to SMEs, with an overall expected effect of investments equal to 50.1 billion euros (See NCA, 2018 Report, 77; see also ECA, 2019 Report, 9). In addition to these two instruments (EFSI and EIS Funds), it will be necessary, in future, to take into consideration the Recovery and Resilience Facility – as well as the Just Transition Fund – as the paragraph above has already tried to do.

To respond to the Covid-19 pandemic and its economic consequences in 2020, the EIB group deployed 76.8 billion euros, of which 30.6 billion were dedicated to supporting businesses and jobs in the crisis phase, especially in countries that did not have the budgetary means to finance massive

national bailout packages. These include Italy, which confirmed its primacy at EU level – already achieved in 2019 – but with a total amount of operations in its favour that has risen further compared with the 11 billion of two years ago. In fact, with a total of €11.9 billion granted, including loans and guarantees, Italy won most of the resources mobilised by the EIB in 2020, surpassing all other EU countries. The €11.9 billion granted to Italy are mostly made up of loans (€10.9 billion) and made it possible to support investments to a total of 32.4 billion euros. More than half of the cake went to cover the response to the Covid crisis, with interventions approved for €6.6 billion: 30 percent of the total amount authorised at EU level. Of these 6.6 billion, over 4.4 billion were allocated to support small and medium-sized enterprises, through loans in partnership with Italian banks and with the CDP. Two billion, one of which has already been disbursed, went to health care, to finance the increase in intensive and sub-intensive care places, investments in first aid points, and around 9,600 hires. The interventions financed with the remaining resources include regional policies, the moratorium on financing in favour of Municipalities and Provinces, and the Enterprise Emergency Fund. As for EIF support, Italy received about 1.4 billion euros in 2020, of which over 1.1 billion were in the form of guarantees, and 216 million in equity. 2020 also saw the completion of the work of the EFSI. As of 31 December 2020, the Fund has broadly exceeded the target of mobilising 500 billion, with 547 billion euros' worth of investments. Of these, 13.3 billion went to Italy, the second beneficiary after France, which is in the lead with 18 billion, and just above Spain, at 13.2 billion (for these data see the article here).

Hence, in Italy, the actors directly involved are both large companies and SMEs (through specific applications and projects), as well as public and private entities (such as intermediaries or promotional institutions, mainly the CDP).

For example, for the first case and as reported here (p. 14), while there is such a great need for water, an average 35 percent of water in pipes in Italy is lost because of antiquated water networks. Upgrades are urgently needed, but small Italian water companies struggle to obtain financing. By now the investment gap between the work needed and the work being done is around 3 billion euros a year. An EIB loan of 200 million under the EFSI offered support to smaller water utilities in a direct, flexible and fast way, allowing them to improve waterworks, sewage systems, and wastewater treatment. 36 projects for innovation and infrastructures have been financed for Italy by the EFSI, worth 3.4 billion euros, and these are expected to generate a total 10.4 billion in investments.

For the second case, again in the framework of the EFSI, 46 agreements have been stipulated with intermediaries (banks, funds, etc.) in favour of SMEs. Almost 200,000 SMEs and startups are expected to benefit from the initial 1.6 billion invested by the EIB group, with the capacity of generating 21-7 billion of investments in total. An important role is played by the CDP, the National Promotion Institute for Italy, which has developed – in collaboration with the EIB Group – various investment platforms to support both SMEs and infrastructural and innovation projects (for these data see here, the presentation by Carparelli, 2017). More in detail, in 2015, *Cassa Depositi e Prestiti S.p.A.* was recognised as a national promotional institution pursuant to European legislation on strategic investments and as a possible executor of the financial instruments recipients of the structural funds and any funds contributed by public or private administrations and bodies, enabling it to carry out the activities envisaged by the legislator (Law No 208/2015, 2016 Annual Budget Law). The law establishes that, in order to pursue the objective of supporting the establishment of investment platforms provided for by Regulation (EU) No 2015/1017, the financial operations of investment platforms eligible for the EFSI promoted by the CDP can be backed by State guarantee. This State guarantee is qualified as burdensome, on first demand, explicit, unconditional and irrevocable. National promotional banks or institutions are, in fact, legal entities that carry out financial activities on a professional basis – mandated by a Member State or an entity of a Member State at central, regional, or local level – to carry out development or promotional activities as defined in Article 2, para. 3, Regulation (EU) No 2015/1017. According to Communication COM (2015)361, the main economic rationale for setting up a promotional bank lies in the fact that market failures can reduce investments and, consequently, slow future growth to inefficient levels. In addition to this, institutions with a public mandate are in a better position than private operators to remedy market failures. The document foreshadows the co-operation between national promotional banks and the EIB through co-investment agreements (investment platforms) structured in order to aggregate investment projects, reduce the costs of operations and

information and more effectively distribute the risk between the various investors. Investment platforms can be special purpose vehicles, managed accounts, or co-financing/risk-sharing agreements based on contracts or agreements established by other means through which entities channel a financial contribution in order to finance a range of investment projects.

In the past, the EC itself recognised the need for effective involvement on the part of national promotional banks and institutions in order to enhance the impact of the Juncker Plan and the EFSI on investment, growth and employment. In fact, by July 2015, eight NPIs had committed to provide co-financing for projects and investment platforms to a total financing volume of up to €34 billion (among them, the Italian CDP). The EFSI Regulation lays down several ways in which NPIs can contribute to the EFSI, including participation in investment platforms or in individual EFSI projects as co-financiers (see ECA, 2019 Report, 9).

3. Criminal offences, controls procedures and the risk of fraud affecting the EU's financial interest in this sector at national level

Risks of irregularities and/or fraud are at both these above-mentioned levels.

At this point, it is also important to remember that the EFSI was established outside the Financial Regulation; hence, its specific regulation appoints a special discipline. This exception made it possible to set up the tool within a short timeframe, without an *ex ante* evaluation or impact assessment. The inherent flexibility of the EFSI to fund a wide range of projects, through many types of financial products and with few sectors or geographical constraints, allowed for a large number and volume of potential financial operations. In particular, interventions financed from the EIB's own resources are not subject to State aid assessment. This makes the EFSI approval process swifter and more flexible than the approval processes of EU financial instruments under shared management (see ECA, Report 2019, 14). The latter report quoted, however, is centred more on the tool's policy-related performance. The ECA made recommendations to promote the justified use of higher-risk EIB products under the EFSI, encouraging complementarity between EU financial instruments and EU budgetary guarantees, thus improving the assessment of whether potential EFSI projects could be financed from other sources, better estimating the investment mobilised, and improving the geographical distribution of EFSI supported investment. No observations are yet reported on the incidence of fraud and irregularities.

Thus, at the national level, it is difficult to distinguish kinds of irregularities/fraud (and the linked remedies) on the basis of negative effects on the EU's financial interest, especially because most of these resources are "only" based on European guarantees (the EFSI is a *sui generis* fund) and they often transit through the private sector, despite the "public" origin of the funds at the very beginning of the chain. This issue of the protection of the public financial interest is also a problem that exists for the same kind of funds at the national level (see Task 4).

For example, concerning beneficiaries, the framework that can be presented is that of the opportunity to introduce criminal measures with respect to the conduct of presentation of false documents (or ideologically false due to the omission of relevant information) to unduly obtain the new loans guaranteed by the State in order to allow companies to cope with exceptional situations (such as economic or health crisis), as well as the embezzlement of these funds consisting in their destination for different purposes or in any case in conflict with the constraint imposed by the law (which provides, among other things, that they are addressed only to the remuneration of personnel and productive investments). This line of reasoning opens the discussion for analysing the misuse of these kinds of funds also of a European origin. Do these conducts have criminal significance under current legislation? Can loans guaranteed by the State (or the EU), but disbursed by a private lender, be attributable to the concept of contributions or disbursements, by whatever name – "granted or disbursed by the State", this being the terminology used in the crimes of undue perception, aggravated fraud and embezzlement to the detriment of the State, as per Articles 316-*ter*, 640-*bis* and 316-*bis* of the Criminal Code? In fact, it must be considered that – except for the "ordinary" hypothesis of fraud referred to in Article 640 of the Criminal Code – the cases just mentioned are the only ones able to trigger sanctions on the criminal

side with respect to the hypotheses under consideration, as no other criminal provisions are mentioned (especially regarding embezzlement). *Prima facie*, it could be said that the aforementioned conducts of undue gain and embezzlement do not fall within the scope of the crimes just mentioned, since these are hypotheses that refer only to contributions, loans etc. directly disbursed or granted by the State (or the EU). In this case, however, the resources involved are granted by a private lender, although the State (or EU) guarantees repayment of the sum to the provider in the event that the beneficiary company is unable to repay the amount (see Orsi, 2020). However, in the current State legislation on business support measures there is a regulatory index that would allow an extensive interpretation with reference to the concept of grants "granted or disbursed by the State or by another public body", so as to include them in the framework of operation of the aforementioned crimes, through a systematic reading of the extra-criminal regulatory framework that regulates such state loans. The reference is to Legislative Decree No 123/1998 governing public support interventions for businesses. The combined provisions of Articles 1 and 7 of this Decree, in fact, expressly include the "granting of guarantees" in the category of public support interventions for the development of productive activities "granted by public administrations, including through third parties". This source of law, therefore, includes in the concept of public funding also the case of loans granted by third parties (apparently, therefore, including private lenders) with the granting of a public guarantee. Hence, moving in this interpretative direction, the conduct in question could be considered criminal both with respect to false information being given in order to obtain loans to which the company has no right, and in the event of subsequent embezzlement of these funds (not considering the civil remedy of the revocation of the loan). Nonetheless, it must be emphasised that this is an interpretative and applicative hypothesis that can be practiced not without some obstacles, especially in the absence of a specific regulatory intervention and possible controversial jurisprudence. On the subject of controls, the current regulations on the prevention of money laundering pursuant to Legislative Decree No 231/2007 already offer sufficient guarantees and tools to allow banks to carry out the necessary checks on the companies requesting loans. In terms of combating Mafia infiltration, then, even with respect to these disbursement procedures, the property investigations and confiscation measures without conviction pursuant to the Anti-Mafia Code give the possibility to intervene preventively to oppose the entry of Mafias in these forms of legal economy. And not to mention the corporate remediation tools, again provided for in the Anti-Mafia Code, which allow the State to administer or judicially control, with measures of managerial dispossession or mere public protection through the imposition of certain compliance measures on the body, all companies that are still healthy and not directly associated with Mafia activities, but which they can use to penetrate market sectors.

As a consequence, the kind of criminal offences that *can* be recalled are part of the general system of Italian Criminal Law, as well as the preventive measures mentioned in Task 4, D.1 for Italy (i.e. anti-laundering and anti-mafia infiltration ones). A means of administrative simplification that was considered of special note in the regional Si.Ge.Co. systems in Task 4, and self-declaration by beneficiaries, are also an object of concern in the sector of national loans to SMEs managed by MISE (Orsi, 2020, 62). Thus, it will probably be a weak point in the national system also in the event of loans guaranteed by the EIB group through national public and private intermediaries. Lastly, in order to distinguish, at national level, a protection specifically dedicated to the EU's financial interest in this special area of European investments, a good route could be to look to the administrative actors involved in the national mission against corruption. For example, in 2016, the ANAC – the National Anti-Corruption Authority – and the EIB finalised an agreement aimed at combating corruption through mutual collaboration in terms of exchanging information and technical and operating assistance on the methods for preventing, identifying, and combating cases of corruption and associated crimes. Both institutions consider exchanging information to be one of the most effective means of preventing and combating fraud and corruption-related phenomena (MoU, ANAC-BEI, 2016 available here).

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ITALY - SECTION III

CONCLUSIONS

A report of the Court of Auditors (2017, 2, see Task 3) has shown that Italy is one of the EU countries with the highest number of judgments linked to suspect fraud or irregularities on EU funds in relation to the number of notifications sent to OLAF (the one with the highest record in 2016). The data hint to the fact that the domestic judicial system is well reactive to the target of protecting the EU's financial interests.

Yet, as seen again in Task 3, there are a series of critical aspects to point out. Recently, warnings of a prospective violation of the principle of the *ne bis in idem* principle have been sent concerning the multiplication of sanctions of different natures (criminal, tax, administrative) issued by courts for the same offence (see section 2.3, Task 3). Moreover, even though the Court of Cassation has come to clarify important aspects of the boundaries amongst jurisdictions when it comes to EU funds, for example regarding the role of ordinary judges vis-à-vis administrative courts, and has seconded a gradual expansion of the Court of Auditors' action, overlappings in the adjudication of the same case by different types of courts still exist – for example regarding criminal courts and the Court of Auditors – and the different outcomes they may bring about undermine the certainty of the law (see section 2.2, Task 3 above). Indeed, the issue of the jurisdiction of the various courts in relation to EU law is less settled in Italy than it may appear at first sight as also proved by a recent preliminary reference procedure initiated by the Court of Cassation (Court of Cass., Sez. Un. No 19598/2020) before the CJEU and stemming from an interpretative contrast with the Constitutional Court (Judgment No 6/2018) as to whether the Court of Cassation, when acting as a court of the jurisdiction, can review the decision of the Council of State for violation of the obligations under Article 267 TFEU: an issue that is of significant importance for the Court of Auditors, too (Dammicco and Pomponio, 2021, 163). While the tone of the controversies surrounding the case law on EU fraud traditionally has not been constitutional in Italy, the Taricco saga has entailed a shift paving the way for a more nuanced balancing between the protection of the EU's financial interests and other constitutional principles – namely the principle of legality in criminal matters as part of substantive criminal law. As a consequence of this and the breakthrough recovery plan launched by the EU, with more resources to be managed and new procedures to be set in motion at the supranational and domestic levels, one can expect more cases triggering the jurisdiction of the Constitutional Court, more preliminary reference procedures before the CJEU, and more potential constitutional conflicts between national constitutional law and EU law over the EU resources and their appropriate use. In this scenario, democratic politics can hardly remain sidelined as has been the case of the Italian Parliament, which to date has not engaged in any meaningful scrutiny of the financial flow between the EU and Italy, or its management of fraud (suspected and detected) despite the number of reports it receives on the matter. To set up effective procedures of co-ordination between the legislator and the executive and between national and traditionally weak sub-national institutions on the use of EU resources, particularly in the aftermath of the launch of NGEU, is it is necessary to ensure that the Italy can guarantee both national and EU financial interests.

As envisaged in Task 1, the recent adoption of the NRRP (end of April 2021) assigns a key co-ordinating role to the "centre" for the resources under NGEU, despite the regional governance system that characterises the country. The Government has prepared a governance scheme which provides for a structure of central co-ordination at the Ministry of the Economy and Finance. The latter will supervise the implementation of the plan and will be responsible for sending payment requests to the EC, on the basis of the achievement of the expected objectives. Alongside this co-ordination structure, there are also evaluation and control structures. Single administrations, on the other hand, will be responsible for specific investments and reforms, and they will send their reports to the central co-ordination structure. Furthermore, the Government will set up local task forces to help local administrations improve their investment capacity and simplify procedures. At the time of the NRRP adoption, discussion with the offices of the EC on the definition of the partnership agreement EIS Funds 2021-2027 is at an advanced stage. The overall availability of resources amounts to approximately 83 billion (including co-financing). FSC 2021-2027 (with a budget of 50 billion euros assigned by Budget Law 2021, to which a further 23 billion will be added with Budget Law 2022) must be used in line with the sectoral investment and reform policies envisaged in the NRRP according to a principle of complementarity and

additionality of resources. In order to meet this goal, the government has decided to anticipate the national programming of the FSC 2021-2027 in the NRRP to a value of approximately 15.5 billion.

Thus, the European resources available are very substantial, and they fall under different umbrellas, each with their *ad hoc* function. The challenge of the protection of the EU's financial interest appears now even more complex throughout the Italian multilevel governance. However, the adoption of a centralised model for the NPRR could create two conditions, partly contrasting and partly overlapping with ESI Funds: on the one hand, central management could decrease, *de facto*, the regional and territorial autonomy in the management of European funds; on the other side, an extra effort required in central politics and administrations could improve the institutional structure that is competent, at the moment, for national economic planning and funding, with positive feedbacks for the implementation of the multilevel cohesion policy as well.

Even more recently, the end of May 2021, the Government adopted a new Decree Law No. 77/2021, known as *Decreto semplificazioni* - "Simplification Decree", since it has the mission to simplify the administrative processes in view of the NRRP implementation (see for example Articles 10-11 on public investments and the administrative reinforcement, objectives not too distant from the mission of PRAs for the cohesion policy, especially for the public procurement sector). Considering that the decree has to be converted in Law in 60 days, with the possibility to be modified, at the moment it specifies the governance for the NRRP. The institutional structure is not too distant from that provided for the cohesion policy starting from 2014, notwithstanding certain specificities. First of all, it is clarified the normative framework (Article 1) with reference, for example, to the Regulation (EU) No. 241/2021 (see D.2), the National complementary investment plan to the NRRP (Decree Law No. 59/2021), the National integrated plan for energy and climate 2030 (as indicated by Regulation (EU) No. 1958/2018) and the *Fondo di rotazione NGUE-Italia* - the national anticipation for the implementation, more in general, of the NGEU programmes - (Article 1.1037 ff., Law No. 178/2020, Annual Budget Law 2021, that for example financed the national FSC 2021-2027, then reinforced by the same Decree Law No. 59 in May 2021). Secondly, the steering body and the technical support are better specified. The first entity to be mentioned is the so called *Cabina di Regia*, internal to the PCdM and chaired by the same President of the Council of Ministers, with functions of political steering and powers of initiative and vertical and horizontal coordination, hence among central administrations and also among and with territorial entities (Article 2). Its composition is variable and, for example, not all the ministers that are normally part of the Council of Ministers are involved at the same time but only those that are interested specifically from the discussion at stake in that specific moment. The same process is valid for the involvement of the representatives from regional and other territorial entities but also for the relevant associations from the civil society. Then, there are some articles dedicated to the technical support for the *Cabina di Regia*, consisting of the following structures: two inter ministerial committees (Article 2.5) - one for the digital transition (*ex* Article 8.2, Decree Law No. 22/2021) and one for the ecological transition (*ex* Article 57-*bis*, Legislative Decree No. 152/2006, the so called Environmental Code, as modified recently by the Decree Law No. 22/2021) - , a permanent table for the economic, social and territorial partnership (*Tavolo permanente per il partenariato economico, sociale e territoriale*, Article 3) and a Technical Secretariat, always internal to the PCdM, at the disposal of the *Cabina di Regia* (Article 4), the latter's work to be provided in coordination with a specific office dedicated to the razionaliation and improvement of the regulation around the implementation of the programme (*Struttura di missione per la razionalizzazione e il miglioramento della regolazione*, internal to the PCdM's Department of legal and legislative affairs, Article 5). Thirdly, the following articles are dedicated to the concrete implementation and the controlling and audit processes but these provisions are recalled in the next paragraphs. To sum up, for the moment it is evident the choice of the government to centralize the decision-making process, especially in the sense to avoid administrative *impasse*, such as contrasting opinions among administrations, non compliance of territorial administrations, etc. (see Articles 12-13, Decree Law No. 77/2021). It is also significant the choice in favour of institutional mechanisms able to survive the political instability, considering for example the duration of some of the bodies appointed – in line with the duration of the NRRP and not with the government in charge (as in the case of the *Cabina di regia*).

Referring to the administrative system in Task 4 – sections 2.1, 2.2, 2.3, 2.5 (controls) and section 2.4 (recoveries and sanctions) – three main patterns have emerged.

First of all, there is the "*ex ante-in itinere-ex post*" paradigm regarding the system of controls. In particular, the complex national control system internal to the administrations is relevant also for indirect funds and it contributes to the protection of the (European) financial interest as well, considering the phenomenon from a bottom-up point of view. In fact, there is an overlap with the *Sistemi di gestione e controllo*, the so-called Si.Ge.Co., especially for the *ex-ante* and *in-itinere* phases of the control process (less for the *ex post* one under the system of audit authorities). It seems that most of the tools employed in the internal control system can be useful for the Si.Ge.Co. and, sometimes, *vice versa*, some innovations introduced to fulfil the high levels of performance requested by the EU in the management of European funds can be useful for the improvement of national administrative reforms. This "exchange flow" can probably be observed since the SIF Funds management system is based on a shared administration model (see Task 1) but the same phenomenon can be observed for other kinds of funds – as case-study No 3 in part demonstrates for the EFSI, managed by the EIB. It is also important to underline the fact that the decision to approach the topic of the protection of the EU's financial interest by focusing on the general discipline of internal controls in the country has led to other important legal areas, such as the public-procurement and anti-corruption sectors, or the strategy against Mafia-infiltration, or the preference for deontological codes. These are all areas of interventions by past and for future administrative reforms and best practices, also outside the limits of the protection of the EU's financial interest. Looking at the anti-corruption and transparency agenda, for example, the abovementioned decree law adopted at the end of May 2021, with regard to the implementation of the NRRP, dedicates part of the Article 7 to this area of intervention. In particular, what emerges is that for the NRRP working area, the role of ANAC will decrease, in favour of a stronger role of the already mentioned, with regard to the cohesion policy in Task 1 and 4, ministerial structure known as IGRUE (MEF-RGS). The decree establishes that IGRUE should coordinate its tasks in the area with the Financial Police and the NCA – hence controls, contrast to corruption, conflict of interests, irregularities and frauds and promotional activities for the transparency towards institutions and citizens -. This probably demonstrates the intention of the Government to maintain a stronger political control on the NRRP implementation but, also, to let ANAC be more concentrated on the public procurement area. In addition to this example, what emerges more in general from the new decree is the attention for the functioning of the internal control system for the implementation of the NPPR as well, both at the centralized and decentralized levels. First of all, the Article 6, Decree Law No. 77/2021 indicates the *Servizio centrale per il PNRR* - internal declination of the MEF-RGS - as the national reference point for the monitoring and audit tasks of the NRRP, considering also the National complementary investment plan (as requested by Article 22, Regulation (EU) No. 241/2021). In particular, Article 6.2 specifies that this structure of the Ministry of the Economic and Finance has to coordinate its activity with the competent central inspectors of the RGS (hence, the national accounting office) and their territorial declinations. Then, Article 7 mentions IGRUE has the Audit authority for the NRRP (*ex* Article 22.2, Regulation (EU) No. 241/2021). For what concerns specifically the implementation phase, Articles 8 and 9 are dedicated respectively to the management central and territorial authorities. In these articles are explicitly mentioned the internal controls on the administrative and spending processes, in order to avoid irregularities, frauds and conflicts of interests.

Secondly, there is the "internal-external" dichotomy that synthesises the complexity of the actors involved in the relevant administrative governance for the protection of the EU's financial interest. Not only are the structures that participate internally in the process many and diverse, considering the heterogeneity of the managing and certifying authorities, but also externally, the subjects active in the process go from the National Court of Auditors, in its controlling function, to co-ordination schemes, as in the case of COLAF, or to police forces, like the *Guardia di Finanza* with its special unit. This also means that the sources of fraud/irregularities or the paths that can be followed to bring them about are a large number as well. This is an element that instils a certain confusion and a more complex balance with the activity of the relevant European actors (such as OLAF) but also with national ones on the criminal front, such as prosecutors. Nevertheless, in this case it must be observed that it is more than normal that criminal cases come before a court through the most varied inspection paths and control tracks. The problem, if it can be defined as such, lies more in the difficulty of administrative co-

ordination. The dichotomy "internal-external" is also evident in the new Decree Law No. 77/2021 concerning the governance of the NRRP, for example when the Government refers to the role of the Financial Police or to that to the NCA (Article 7). In addition to this aspect, it is also strong the perception of the coordination with the European institutions, but not only at a more political or strategical level – as with the EC in the negotiation and certifying phases – but also with different entities directly involved in the protection of the European financial interest, as the ECA – explicitly mentioned at Article 7.7. An involvement of COLAF does not appear in the new decree, even though the actor works inside the PCdM where also the *Cabina di regia* for the NRRP is active – hence a future internal coordination can be possible in abstract -. However, since the recent entry into activity of the EPPO and the news that the latter will be competent for the proceedings under the Recovery and resilience facility – in the necessary coordination with national prosecutors – a clarification on the role of the national contact points of OLAF and on the involvement of the latter itself still lacks (see D.2.).

Lastly, the third element that emerged from Task 4 is the necessary "administrative-criminal" co-ordination, especially in the *ex-post* and *in-itinere* phases of the control process (in other words, in terms of repression-prevention). Thus, the last "pattern" has opened up to the following sections No 3, 4, and 5, mainly dedicated to criminal enforcement procedures, also in the light of the interplay between administrative controls and criminal proceedings, as well as with respect to the preventive measures of the Anti-mafia Code, in the Public Procurement Sector, and in that of the fight against corruption.

With special attention to purely criminal aspects, on the basis of Task 2 and 4, two observations can be made. First of all, the Italian criminal legislation with respect to crimes against the Union's financial interests was, as a whole, in line with European standards even before the enactment of the EU Directive 2017/1731, and in some cases Italy protects such interests to a higher level than the minimum required by the Directive, so the point is that it is not a matter of introducing new crimes but in some way to rationalise the existing framework with greater co-ordination between some overlapping criminal figures. Secondly, it should also be noted that, with this latest reform (Legislative Decree No 75/ 2020), the Italian legislator has done no more than the minimum necessary to complete the aforementioned framework of protection of European financial interests. Therefore, despite the fact that these were mere complementary interventions to complete a framework already defined, it is necessary to reflect on whether it is acceptable that, for example, in some cases the increases in penalties or the integration of the list of predicate crimes that can trigger corporate criminal liability refer only to acts against the Union's financial interests and not, at the same time, to the same conduct against national financial interests. In this sense, indeed, there could be a risk of legitimising, in some ways and at least in some cases, a "reverse" violation of the assimilation principle, ensuring greater protection of EU interests than national ones without a justification that could be in line with the principle of equality (again Task 4, sections 3, 4, 5)?

In a general sense, it should be also noted that, from the criminal law perspective, in order to effectively tackle conduct affecting the financial interests of the European Union, the possibility of analysing and building upon reliable data is key. However, although judicial statistics of various kind concerning criminal matters exist at the national level, there is no structured collection nor survey aimed at examining the incidence in Italy of offences affecting the Union's financial interests. This limitation – which clearly has an impact on the possibility of drawing reasoned conclusions on this point – will be overcome in the near future, as Legislative Decree No 75 of 2020 implementing the PIF Directive (Article 8) requires that Italian Ministry of Justice to be in charge of the annual transmission of data on PIF crimes to the European Commission.

Lastly, for Italy, the topic of protecting the EU's financial interest is a combination of constitutional, administrative, and criminal aspects. As has already been highlighted in D.2, this consideration is true also at the EU level, especially from now on with the introduction of the EPPO or with recent case law from the Court of Justice (see the *Taricco saga* in the Italian Task 3, D.1). All these elements have a special resonance also for the protection of resources coming from the EU, considering the amounts that the country will receive through the NGEU programmes in addition to the MFF.

The specificity of each kind of fund, regarding the EU's protection of financial interest, is evident in the case-studies proposed. There are four elements that can be proposed as final remarks for this national special section.

First of all, the relevant role played by the "emergency" factor, not only in the management of more traditional funds but especially for new kinds, with consequences for the protection of the EU's financial interest as well. On the one hand, as observed also regarding the Cohesion Policy and now for the additional resources under NGEU, there is a tendency to centralise also with regard to *ad hoc* funds – as the RescUE case demonstrates for Italy, if one thinks about the role of the *Protezione civile* with the special commissioner and the tensions with regions and local authorities. However, this organisational centralisation does not guarantee fewer irregularities and fraud, given that the administrative action is based on *sui generis* procedures (especially to speed the implementation of the measures, such as in the procurement sector).

Secondly, all the case studies show the importance of administrative efficiency in preventing irregularities/fraud. This is evident not only transversally (as Task 4 has proved by adopting an approach based on the general system of internal controls for ESI Funds), but also sectorially, hence: for public procurement – especially in the health sector – in case-study No 1; for the functioning of labour inspections – especially regarding the *Cassa integrazione* – in case-study No 2; and for the role of controls, by private or public intermediaries, over the possession of the requisites in access to guaranteed credit by SMEs under the EFSI conditions and complementary/parallel national schemes, in case study No 3. Considering the growing influence of European resources on quite new sectors, in the aftermath of the pandemic, a rethinking of the co-ordinating role of COLAF can be taken into consideration, also in relation to the activity of criminal and accounting courts (prosecutors and the NCA).

Thirdly, there is an observation that is closely linked to the previous ones. It concerns, again, the specificity of these funds. This element raises the complexity of the new EU budget and, at the same time, the limiting perspective to only look at it today, if one wants to protect the EU's financial interest in the most extensive way. New kinds of emergency grants or funds managed on behalf of the EU, also outside of pre-established schemes – such as a partnership agreement – mean that the EU needs: on the one hand, regulations and administrative capacity to support its response to emergencies; and, on the other, better knowledge of the national functioning of entire specific new sectors (such as labour inspections, in the case of SURE, or industrial-innovation policies, in the case of future investments by the EIB and the EIF).

Lastly, what emerges with regard to criminal law is the greater or lesser capacity of the country to specify, in terms of regulations, its general legal order with respect to the protection of EU financial interest alongside the protection of national interests in all the relevant sectors. In some cases, what lacks is the importance of protecting the "public" financial interest, whatever National or European. For example, case study No 3 highlights a legislative vacuum concerning Italy's ability to consider a financial aid to enterprises as a public grant, formally guaranteed by a private entity but intrinsically public in nature.

POLAND - SECTION I

TASK 1, D1, POLAND

Prof. Maciej Serowaniec

Summary: 1. The Polish territorial system in brief; 2. The Polish management system of EU structural and investment funds during the last MFF; 2.1. The Partnership Agreement with the EU Commission from the 2007-2013 cycle to the 2014-2020: towards a stronger or less centralization?; 2.2. The National level: Minister for Funds and Regional Policy; 2.3. The regional levels: the regional programs; 3. Administrative system for managing EU programmes in Poland; 4. The ongoing debate on the new MFF.

1. The Polish territorial system in brief

The Constitution of the Republic of Poland of 2nd April 1997 does not contain a legal definition of territorial self-government, but it does provide a number of structural elements for the formulation of such a definition. The essence of territorial self-government is laid down in Article 16 of the Constitution, indicating that all inhabitants of the units of the fundamental territorial division constitute, by virtue of law, a self-governing community. The same provision also stipulates that territorial self-government participates in the exercise of public authority, performing a significant part of the public tasks vested in it by statute in its own name and under its own responsibility. It follows from the provision in question that the State, and thus its competent bodies, is obliged to create legal conditions for the participation of the local government in the exercise of State authority. By guaranteeing local government participation in the exercise of power and implicitly entrusting the organs of State with the determination of the extent and forms of this participation, the Polish constitutional legislator has established the legal and positive basis for the operation of the local government and included it in the structures of the exercise of power in a democratic legal State. The scope of tasks granted to local government is determined primarily by Article 163 of the Constitution, according to which the local government performs public tasks not reserved by the Constitution or statutes for the organs of other public authorities, thus establishing the principle of a presumption of competence of local government. It implies the obligation of the State, and thus its competent bodies, to create the legal conditions for the participation of territorial self-government in the exercise of State authority. Under Article 165(1) of the Constitution, territorial self-government units have legal personality. The adoption of this legal construction constitutes the starting point for granting self-government units independence. Thanks to being granted legal personality, local government units are both the subject of rights and have the capacity to perform legal acts.

Local self-government in Poland has a three-tier structure and consists of: municipality (Polish: gmina), distract (Polish: powiat) and voivodeship (Polish: województwo).

Under Article 164(1) of the Constitution, the basic unit of local government is the municipality. With regard to the division of tasks between individual local government units, the legislator has established a general presumption of competence in favour of the municipality. In accordance with Article 164 Paragraph 3 of the Constitution, the municipality performs all tasks of the local government not reserved for other units of the local government. At present, there are 2477 municipalities in Poland.

The issues relating to the organisation of municipal self-government are regulated in detail by the Act of 8 March 1990 on Municipal Self-Government. According to Article 1 of the Act, a self-government community at the municipality level is created by the inhabitants of a commune by virtue of the law. The regime of a *gmina* is laid down in its statutes. Under Article 6 of the Act on Municipal Self-Government, the scope of activities of the municipality includes all public matters of local importance not reserved by the Act for other entities. The Act on Municipal Self-Government further stipulates that the *gmina's* own tasks include satisfying the collective needs of the municipality. The Act on Municipal Self-Government further stipulates that the municipality's own tasks include, in particular,

the following issues: spatial order, real estate management, environmental and nature protection and water management; municipal roads, streets, bridges, squares and road traffic organisation; water supply and water supply, sewage systems, municipal sewage disposal and treatment, maintenance of cleanliness and order and sanitary facilities, dumping grounds and municipal waste disposal, power and heat supply, as well as gas supply; activities in the field of telecommunications, local collective transport; health protection; social welfare, including care centres and institutions, as well as public education.

Issues connected with the organisation and functioning of the district are regulated by the Act of 5 June 1998 on district self-government. According to Article 1 of the Act, at district level a local self-governing community is formed by the inhabitants of the district by law.

The *powiats* comprise areas of bordering communes. The creation, merger, division and abolition of *powiats* and the establishment of their boundaries are carried out by means of a regulation issued by the Council of Ministers. The boundaries of the district are established by indicating the communes that are part of the district, and any changes to the boundaries are made in such a way as to ensure that the district has a territory that is as homogeneous as possible regarding settlement and spatial arrangements, taking into account social, economic and cultural bonds, and is capable of performing its public tasks. Similarly, a regulation issued by the Council of Ministers establishes and changes the names of *powiats* and the seat of their authorities (Article 3 of the Act). Currently, the territorial division provides for the existence of 380 *powiats*.

Like in the case of communes, the district's system is defined by statute. According to article 4 of the Act on district government, the district's tasks include public tasks of an extra-communal nature in the field of, inter alia, public education; health promotion and protection; social assistance; supporting the disabled; public transport and roads; water management; environmental and nature protection. In addition, paragraph 2 of Article 4 of the Act states that the scope of a district's activities also includes ensuring the execution of tasks and competencies of district managers of services, inspections and guards, as specified in laws.

The highest level of territorial self-government in Poland is voivodeship self-government. Issues connected with its functioning are regulated by the Act of 5th June 1998 on the self-government of the voivodeship. In accordance with its provisions, a regional self-governing community on the voivodeship level is created by law by the inhabitants of the voivodeship (article 1 paragraph 1 of the Act). The system of this unit of local self-government is determined by the statute of the voivodeship adopted after consultation with the Prime Minister (Serowaniec, 2015, 556-573).

Under Article 2 of the Act of 24 July 1998 on the introduction of the basic three-tier territorial division of the State, 16 provinces were established: Dolnośląskie, Kujawsko-Pomorskie, Lubelskie, Lubuskie, Łódzkie, Małopolskie, Mazowieckie, Opolskie, Podkarpackie, Podlaskie, Pomorskie, Śląskie, Świętokrzyskie, Warmińsko-Mazurskie, Wielkopolskie and Zachodniopomorskie.

The scope of activity of voivodeship self-government includes the performance of public tasks regarding voivodeship, not reserved by the law to government administration bodies, e.g. in the scope of public education, including higher education; health promotion and protection; culture and protection and care of historical monuments; support for the family and the system of foster care; modernisation of rural areas; spatial management; water management; collective transport and public roads; protection of consumer rights; defence; counteracting unemployment and activation of the local labour market; activity in the field of telecommunications and protection of employee claims in the event of the employer's insolvency. At the same time, the scope of activity of voivodeship self-government cannot infringe upon the independence of the *poviat* and *gmina* (Article 4 of the Act).

2. The Polish management system of EU structural and investment funds during the last MFF

2.1 The Partnership Agreement with the EU Commission from the 2007-2013 cycle to the 2014-2020: towards a stronger or less centralisation?

In the financial perspective for 2007-2013 Poland for the first time participated in a full period of programming. The most important national document in this regard was the National Strategic Reference Framework (hereafter NSRF), which presented the socio-economic development strategy of the country, including the objectives of the cohesion policy in Poland in 2007-2013, defining the implementation system of the EU funds for the years 2007-2013. The document was prepared in the Ministry of Regional Development and approved by the European Commission on 9 May 2007. Each financial perspective has a strategic document defining priorities of its activities. For the perspective implemented in the years 2007-2013 it was the "Lisbon Strategy". Therefore, the main objective of the NSRF was to create conditions for the growth of competitiveness of the Polish economy based on knowledge and entrepreneurship that would ensure an increase in employment and the level of social, economic and spatial cohesion. The NSRF also presented the following specific objectives: 1) improvement of the quality of functioning of public institutions and the development of partnership mechanisms; 2) improvement of the quality of human capital and increased social cohesion; 3) the construction and modernisation of technical and social infrastructure of fundamental importance for the growth of competitiveness of Poland; 4) the improved competitiveness and innovativeness of enterprises, including in particular the manufacturing sector with high added value and development of the service sector; 5) the growth of competitiveness of the Polish regions and counteracting their social, economic and spatial marginalisation; 6) the equalisation of development opportunities and supporting structural changes in rural areas. To implement the cohesion policy, five national programmes have been established, managed by the Ministry of Regional Development (from 27 November 2013 - Ministry of Infrastructure and Development): 1) the Operational Programme for Infrastructure and the Environment; 2) the Operational Programme for Innovative Economy 2007-2013; 3) the Operational Programme for the Development of Eastern Poland 2007-2013; 4) the Operational Programme for Human Capital; 5) the Operational Programme for Technical Assistance. The funds transferred to Poland from the EU in the 2007-2013 financial perspective also included Regional Operational Programmes (ROP). They were drawn up for each voivodeship, so there were sixteen of them. This division allowed a better understanding and identification of the needs of the local community at the lowest possible level of self-government, so that the measures described in the Regional Operational Programmes corresponded to the development plans of each voivodeship. There were also 12 European Territorial Co-operation programmes established, in which the Ministry of Regional Development was also the Managing Authority. For the implementation of their operational programmes in 2007-2013, Poland received nearly 67 billion euros.

In the 2014-2020 financial perspective, the allocation envisaged for Poland for the implementation of national and regional programmes amounted to almost 77 billion euros. The most important national document of the 2014-2020 financial perspective was the Partnership Agreement, which translated the objectives of the Europe 2020 Strategy into Polish conditions. Its provisions coordinate the three EU policies in Poland (cohesion policy, common agricultural policy and common fisheries policy). The objectives and priorities of Europe 2020 have been transformed into 11 thematic objectives, which are important for the functioning of the operational programmes. Each of them is obliged to implement selected objectives, which at the same time specify the scope of its intervention. The thematic objectives valid for the period 2014-2020 are as follows: 1) strengthening scientific research, technological development and innovation; 2) increasing the availability, use and quality of information and communication technologies; 3) strengthening the competitiveness of SMEs, the agricultural sector and the fisheries and aquaculture sector; 4) supporting the transition to a low-carbon economy in all sectors; 5) promoting climate change adaptation, risk prevention and management, 6) preserving and protecting the environment and promoting resource efficiency 7) promoting sustainable transport and removing bottlenecks in key network infrastructures; 8) promoting sustainable and quality employment and supporting labour mobility; 9) promoting social inclusion, combating poverty and discrimination of all kinds; 10) investing in education, training and vocational training for skills and lifelong learning; 11) enhancing the institutional capacity of public institutions and stakeholders and the efficiency of public administration. An important part of the Partnership Agreement is the areas of strategic state intervention. They include Eastern Poland, voivodeship towns and their functional areas, towns and districts in need of revitalisation, rural areas and border areas. Six national operational programmes have been established to implement the cohesion policy: 1) Intelligent Development, 2)

Infrastructure and Environment, 3) Knowledge Education Development, 4) Digital Poland, 5) Eastern Poland, 6) European Territorial Co-operation, 8) Technical Assistance, and 16 regional operational programmes.

Table 1: Comparison of national and regional programmes and EU funding in the 2007-2013 and 2014-2020 perspectives.

Perspective 2007-2013		Perspective 2014-2020		
Programme	Funding (in billion euro)	Programme	Funding (billion euro)	Increase/decrease in co-financing (%)
Innovative Economy	8.7	Smart Growth	8.6	24
		Digital Poland	2.2	
Infrastructure and Environment	28.3	Infrastructure and Environment	27.4	-3
Human Capital	10.0	Knowledge Education Development	4.7	-53
Technical Assistance	0.5	Technical Assistance	0.7	40
Development of Eastern Poland	2.4	Eastern Poland	2.0	-17
16 Regional Operational Programmes	17.3	16 Regional Operational Programmes	31.2	80
TOTAL	67.2	TOTAL	76.8	14

Source: Own study based on European Funds Portal (2020).

Comparing the amount of EU funding for the implementation of individual national and regional programmes (Table 1) in the years 2007-2013 and 2014 and 2020, it is worth noting that the volume of EU funds to be distributed by the regions in 2014-2020 is almost twice as high. This is due to an increase in funds available of about 15% – it currently amounts to 40% of the total pool. As a result, local authorities are more independent in achieving their development goals. Such a significant increase in funds for Regional Operational Programmes in the 2014-2020 perspective was also possible due to the adoption of the concept of the "two-funding" of regional programmes. This means that they are financed by the European Regional Development Fund and the European Social Fund.

2.2 The National level: The Minister for Funds and Regional Policy

The Minister for Funds and Regional Policy is responsible for the implementation of European Funds in Poland. It is his task to coordinate the implementation of assumptions arising from the Partnership Agreement. The Minister of Funds and Regional Policy therefore performs the tasks of the Member State specified in the provisions of Regulation No 1303/2013. He also issues horizontal guidelines on the conduct of bodies responsible for the implementation of operational programmes with regard to: 1) a detailed description of the priorities of the operational programme, 2) the conduct of negotiations with the European Commission of the operational programmes and their amendments, 3) the method of project selection, 4) the qualifications of persons participating in the selection of projects, 5) the method of making payments and settlements, 6) the eligibility of expenditure under the operational programmes. Horizontal guidelines may be detailed and adjusted to the specificity of individual programmes through programme guidelines. In the 2014-2020, financial perspective the Minister of Funds and Regional Policy has also obtained the authority to grant, suspend or withdraw the designation. Designation is nothing more than the need for a designated institution to obtain certification that it is competent to perform the functions and tasks assigned to it by law. In accordance with the Act, the Minister therefore performs the functions of the Managing Authority and the Certifying Authority (for national operational programmes), which will be subject to designation. The Minister for Funds and Regional Policy also retained the right to issue guidelines in order to ensure compliance of the manner of implementation of operational programmes with European Union law and the fulfilment of the requirements set out by the European Commission, as well as to maintain the uniformity of the principles of implementation of operational programmes. These documents serve to additionally ensure the correctness of the tasks and obligations defined in the Implementation Act.

An important role is also played by the Committee for the Partnership Agreement, which is the main body supporting the Minister of Funds and Regional Policy in the process of co-ordinating the use of the European Union resources, in accordance with the commitments adopted by Poland. The legal basis for the Committee's operation is Article 14l of the amended act on the principles of the development policy. The most important tasks of the Committee for the Partnership Agreement include reviewing the implementation of the Partnership Agreement and programmes serving its implementation, formulating proposals for changes to the Partnership Agreement, analysing issues of a horizontal character, having impact on the implementation of the Partnership Agreement, in case of stating delays or systemic problems relating to the implementation of the Partnership Agreement, issuing recommendations to the managing institutions, evaluation of the implementation of 11 thematic objectives assessing the implementation of the 11 thematic objectives, concerning European Funds, assessing the implementation of the objectives of Europe 2020 Strategy and Recommendations of the Council within the intervention of the cohesion policy, monitoring the complementarity of the support of programmes implemented in Poland co-financed by European Union funds, assessing the coherence of the implemented measures, both in the context of the implementation of European Funds in Poland and other initiatives created at European Union level (e.g. ERASMUS+, Strategy for the Development of Eastern Europe and Cohesion Policy). The Committee meets at least once a year. The Committee meets at least once a year to sum up the implementation of the Partnership Agreement. There is also a possibility to convene more frequent so-called thematic meetings, if necessary. The Committee takes decisions by way of resolutions, including by circular voting, which the members adopt by a simple majority. The committee is composed of representatives of all programme management institutions and socio-economic partners, as well as representatives of local governments (Szymański, 214a, 8-21).

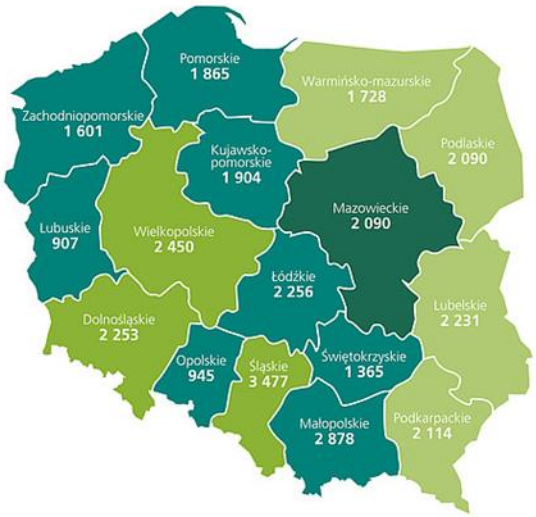
2.3 The regional levels: the regional programmes

Thanks to the constitutional principle of the decentralisation of power, each voivodeship self-government obtained the right to prepare its own regional operational programme, financed mainly through the European Regional Development Fund.

Each voivodeship therefore has a separate regional operational programme (ROP), which the voivodeship marshals are obliged to prepare. Freedom in this task is limited only by the European Commission guidelines on the amount of funds for the implementation of individual thematic objectives (so-called ring-fencing). The managing authority for regional programmes in Poland are voivodeship boards.

The areas supported by ROPs in the individual voivodeships overlap to a large extent. The differences between them relate to the amount of money allocated to individual thematic objectives and the adoption of various regional smart specialisations (RIS). RIS designates strategic areas from the point of view of the functioning of the voivodeship, which are to be particularly supported and developed from European Funds in the years 2014-2020. These areas were determined on the basis of research conducted by the authors on regional innovation strategies analysing the resources of the voivodeships and their potential.

Allocation under Regional Operational Programmes (in thousands of euros) by region is shown on Map 1:



It is worth noting that Mazovia was the first Polish voivodeship to leave the category of the least developed regions according to the EU classification (the level of 75% of the EU GDP per capita was exceeded). Therefore, the budget for Mazovia was constructed slightly differently from that of the other voivodeships. However, due to the fact that the Mazowieckie Voivodeship is at the same time a very diversified region in terms of the level of development, the manner of fund allocation was adjusted to the existing disproportions within Mazovia and took into account the specific needs of its individual sub-regions. Some measures for the Mazowieckie Voivodeship were therefore implemented within national programmes or separate investment priorities.

Within specially assigned allocations in each of the 16 regional programmes and indirectly within the framework of national programmes (complementary projects financed from the Infrastructure and Environment Programme and Eastern Poland Programme) Integrated Territorial Investments (ZIT) are also implemented. In accordance with the Partnership Agreement, a ZIT is obligatorily realised in the voivodeship cities and their functional areas, which are the most important urban centres in the country. Additionally, in the Partnership Agreement there is a possibility of realising ZITs in the cities of a regional/subregional character and in the areas functionally connected with them. Implementation of the ZITs in those urban areas results from decisions of voivodeship self-governments that decided to support those centres through ZITs (which was determined in the last stage of ROP negotiations with the European Commission). In total, ZITs are implemented in 24 functional areas, including 17 functional areas of voivodeship cities (due to strong functional links, a joint ZIT was created for Bydgoszcz and Toruń) and seven in functional areas of subregional/regional cities in four voivodeships: Śląskie (Częstochowa, Rybnik, Bielsko-Biała), Dolnośląskie (Jelenia Góra, Wałbrzych), Wielkopolskie (Kalisz-Ostrów) and Zachodniopomorskie (Koszalin-Kołobrzeg-Białogard).

Table 2: Comparison of EU financial assistance under Regional Operational Programmes in the 2007-2013 and 2014-2020 perspectives.

Province	Perspective 2007-2013 Funding (billion euro)	Perspective 2014-2020 Funding (billion euro)	Increase/decrease of funding (in %)
Lower Silesia	1.24	2.5	80
kujawsko-pomorskie	0.95	1.90	100
Lubelskie	1.16	2.23	92
Lubuskie	0.44	0.90	104
Łódzkie	1.01	2.25	123
Małopolskie	1.29	2.87	122
Mazowieckie	1.83	2.08	114
Opolskie	0.43	0.90	109
Podkarpackie	1.13	2.10	86
Podlaskie	0.64	1.21	89
Pomeranian	0.89	1.86	109
Silesia	1.71	3.47	103
Świętokrzyskie	0.73	1.36	86
Warminsko-mazurskie	1.03	1.72	67
Wielkopolskie	1.27	2.45	93
Zachodniopomorskie	0.84	1.60	90

Source: Own study based on European Funds Portal (2020).

3. Administrative system for managing EU programmes in Poland

For efficient and effective implementation of the programmes, a management system has been built up which consists of managing and intermediate bodies. Managing authorities have been designated for each programme. They are responsible for the preparation and management of the programmes. The Managing Authority for the national and territorial co-operation programmes is the Minister of Funds and Regional Policy, whereas for each of the regional programmes the authority is the voivodeship board (Article 25 point 1 of the Act). The managing authorities lay down detailed rules for programme operations, and in particular they ensure that projects are properly implemented from the relevant fund; they prepare procedures and criteria for selection of projects, and check if the co-financed projects meet the requirements set before them and if the expenditures declared by the beneficiaries have been properly realised and paid. They evaluate and monitor progress in programme implementation and certify the expenditures incurred by the beneficiaries, i.e. they confirm their correctness and compliance with the national and EU law to the European Commission, and support and organise the work of the programme monitoring committee. Managing authorities are responsible for the implementation of the entire programme, including checking all projects implemented under it.

Due to the multitude of areas covered by the programmes, the Managing Authority can set up an Intermediate Body (IB) whose task is to evaluate projects, sign grant agreements with beneficiaries, make payments and carry out evaluations. The MA usually delegates to the IB, by agreement, a selected programme axis, which corresponds to the competences of the IB, for co-ordination. The Managing Authority of the operational programme bears full responsibility for the effectiveness and correctness of programme management in the event of delegation of tasks to Intermediate Bodies. Intermediate Bodies perform control and co-ordination tasks consisting in aggregating information/data on the Priority or Measure level. In this respect their tasks include, in particular: collecting information on detected irregularities, controlling the implemented projects and transmitting the control results to the programme managing authority as well as drawing up annual and multiannual expenditure forecasts. It is also possible to transfer a part of the IB's responsibilities to a second Level Intermediate Body, with the reservation, however, that the responsibility for the activities performed by second Level Intermediate Body is borne by the IB.

For example, it is worthwhile outlining the management structure of the Infrastructure and Environment Programme. It is supervised by the Ministry of Infrastructure, which has established four intermediary institutions: the Ministry of Economy (responsible for reducing the carbon intensity of the economy and improving energy security); the Ministry of the Environment (responsible for environmental protection, including adaptation to climate change); the Ministry of Culture and National

Heritage (responsible for the protection and development of cultural heritage); the Ministry of Health (responsible for strengthening strategic health care infrastructures).

Just as a managing authority may delegate part of its powers to an intermediate body, an intermediate body may delegate its powers to another body. It is called the Implementing Authority. Implementing authorities are the institutions which often co-operate most closely with beneficiaries, accepting applications for co-financing and signing contracts for project implementation. Thus, they are institutions responsible for concluding and settling contracts with beneficiaries, having competences and experience in the implementation of relevant undertakings in the area entrusted to them by the Managing Authority or Intermediate Body. They are responsible for, inter alia, accepting and formal control of compliance of submitted applications for project financing through established procedures, the selection of projects for co-financing, and signing agreements with project providers, as well as monitoring the implementation of individual projects, and verifying the use of resources by project providers, including on-the-spot checks at the beneficiary's premises.

To ensure that all the activities relating to the distribution of European Funds in Poland are carried out in accordance with the law and procedures, an audit institution was established. It is responsible for conducting audits of the functioning of the entire system of management and controlling the use of EU funds. The audit institution is the General Inspectorate of Fiscal Control, which performs its tasks with the participation of the Ministry of Finance, and fiscal control offices in 16 voivodeships.

A monitoring committee is also appointed for each programme. The task of this committee is first of all to systematically check the progress of the implementation of the programme, to analyse issues that may affect the fulfilment of the objectives set out in the programme, to consult and approve changes to the programme, and to adopt criteria for evaluating projects. The Monitoring Committee appointed for each programme consists of representatives of Government, self-governments, and social and economic partners.

4. The ongoing debate on the new MFF

At the end of January 2021, a new government draft of the Partnership Agreement for 2021-2027 was put up for consultation. As a rule, the proportions will not change, i.e. the Government will still be responsible for the implementation of 60 per cent of all cohesion policy funds (under national programmes), and 40 per cent will be distributed by voivodeship marshals in regional programmes. The breakdown of funds for individual national programmes is also already known: Infrastructure and Environment – €25.1 billion; Intelligent Development – €8 billion; Knowledge, Education, Development – €4.3 billion; Digital Poland – €2 billion; Eastern Poland – €2.5 billion; Technical Assistance; the Fair Transition Programme – €4.4 billion (transition assistance for mining regions: Śląskie, Małopolskie, Dolnośląskie, Wielkopolskie, Łódzkie and Lubelskie); the Food Aid Programme – €0.2 billion; the Fish Programme – €0.5 billion; European Territorial Co-operation programmes – €0.56 billion. The names of the national programmes have not yet been determined. The programmes will be similar in scope to those we know from the 2014-2020 perspective, which is why the names of the existing programmes have been used in the above list. As far as the budgets for individual voivodeships (ROPs) are concerned, the clear leader will be Silesia, which in the years 2021-2027 is to receive nearly €2.4bn in money from the regional operational programme, but almost as much (€2bn) – from the Fair Transformation Fund. At the regional level, the biggest changes concern Mazovia. Firstly, the Eastern Poland programme will also cover the less developed Mazovian region (outside Warsaw and nine *poviats*). Additionally, six regions (Śląskie, Łódzkie, Małopolskie, Lubelskie, Dolnośląskie and Wielkopolskie) will receive €4.4 billion from the equitable transformation fund and cohesion policy.

In early February 2021, a debate was also initiated in Poland on the need to change the management system for EU funds. On the initiative of the Senate of the Republic of Poland, a draft bill on the Cohesion and Development Agency was submitted (Printing No 320). In the light of the submitted draft, the Cohesion and Development Agency is to be an executive agency that will perform the tasks of a managing authority referred to in the provisions of the general regulation on European Union funds regarding a national operational programme. Its tasks will include, inter alia, preparing proposals for

criteria for project selection; selecting projects for funding; concluding project funding agreements with applicants or taking decisions on funding a project; ordering payments; ensuring the timeliness and correctness of data used for monitoring the implementation of the operational programme; performing the function of a certifying authority; carrying out inspections of the implementation of the operational programme or imposing financial corrections. The bill will be considered in the near future by the Sejm.

TASK 2, D1, POLAND

Dr. Natalia Dasko

Summary: 1. Introduction; 2. Fraud; 3. Crimes against documents; 4. Administrative offences; 5. Bid-rigging; 6. Fiscal offences; 7. Organized group or association with the intent to commit a crime; 8. Criminal sanctions; 9. Scale and dynamics of the phenomenon based on available data.

1. Introduction

In Polish criminal law there is no separate type of offence against the financial interests of the European Union, however, it is possible to indicate particular types of offences, including fiscal ones, which may be applicable to combating infringements of the financial interests of the European Union. These can be divided into five groups: fraud, offences against documents, official offences, and collusion in tenders and fiscal offences. Since defrauding EU funds may take place within an organised group or association aimed at committing crimes, it is worth pointing to the provision penalising the leadership of, or participation in, such a group or association. It cannot be ruled out that in the area of infringements of the financial interests of the European Union other crimes may also be committed, e.g. crimes against property, such as misappropriation of property or computer fraud, or other crimes against economic turnover and property interests in civil law transactions such as money laundering, but their analysis is beyond the scope of this study.

2. Fraud

The key provision applicable to the protection of financial interests of the EU is Article 297 of the Criminal Code (hereinafter: CC), which penalises so-called credit/subsidy fraud. The legal goods protected under Article 297 of the Criminal Code include, inter alia, the regularity of economic transactions, fair access to public financing and bank financing and, in a situation where a specific project is financed with EU funds, the financial interests of the EU (Potulski, 2021, Article 297, ¶ 2). The criminalised conduct under Article 297(1) consists in submitting, in order to obtain for oneself 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, credit, a cash loan, surety, guarantees, letters of credit, grants, subsidy confirmation from a bank regarding a liability resulting from a surety or guarantee or similar pecuniary benefit for a specific economic purpose, a payment instrument or public procurement, a forged, counterfeited, false or untrue document or an unreliable written statement concerning circumstances of material significance for obtaining the aforementioned financial support, payment instrument, or procurement.

The elements of this offence do not include obtaining monetary benefit, so it can be said that a preparatory activity to traditionally perceived fraud is penalised. The crime is committed when false or dishonest documents or unreliable written statements are submitted (Marek, 2010, 635), e.g. a VAT invoice that does not document a real economic event, an unreliable statement regarding the purchase of a fixed asset from a third party with no capital or personal relations, etc.

The offence under Article 297(1) of the Criminal Code may only be committed intentionally, with a direct, directed intention. Its perpetrator may be anyone: it is a common offence.

Article 297(2) of the Criminal Code provides for the liability of a person who, despite the obligation to do so, fails to notify the relevant entity of the occurrence of a situation which may have an impact on the withholding or limitation of the amount of financial support provided, referred to in Article 297(1), or a public contract or on the possibility of further use of the payment instrument. This is an individual offence, the perpetrator of which can only be the person who was under the obligation, e.g.

an entity who applies to obtain financial benefit or, for example, an employee of the institutions mentioned in the provision. This offence may only be committed intentionally, in both forms of intent (Marek, 2010, 637).

Offences under Article 297(1) and (2) of the Criminal Code are punishable by imprisonment from three months to five years.

Article 297(3) of the Criminal Code, on the other hand, provides for a non-punishment clause for the perpetrator who, prior to the initiation of criminal proceedings, voluntarily prevented the use of financial support or a payment instrument referred to in Article 297(1), renounced a grant or a public contract, or satisfied the claims of the injured party. The perpetrator must take certain actions voluntarily, i.e. without any coercion, but the reasons why he/she does so are of no importance, especially not necessarily feelings of remorse etc. The cut-off date for the manifestation of active contrition is "before the initiation of criminal proceedings", understood as the initiation of proceedings in the case (*in rem*) and not as the "initiation of proceedings against the person" (*in personam*), which begins when the charges are brought (Potulski, 2021, Article 297, ¶ 46-48).

As mentioned above, the elements of Article 297 of the Criminal Code do not include the perpetrator gaining financial benefit. Therefore, in a situation where, as a result of fraudulent acts of the perpetrator, there is an unfavourable disposal of EU funds, Article 286(1) of the Criminal Code typifying a classic fraud apply. Fraud is motivated by the aim of financial gain, namely leading another person (entity) to the disadvantageous disposal of one's own or someone else's property by means of three fraudulent ways, i.e. deception, exploitation of a mistake, or incapacity to grasp the intended action.

Misrepresentation is sometimes referred to as "active fraud" and consists in the fact that the perpetrator, through his/her own deceitful actions, causes another person to err (Marek, 2010, 608). The manner of deception is irrelevant, as a whole range of behaviours may be involved. On the other hand, exploitation of a mistake is a conscious use of the fact that the victim is already in error about certain circumstances: this is called passive fraud. On the other hand, exploitation of incapacity to grasp the action taken is taking advantage of the fact that the victim is in such a state, resulting from various reasons (age, mental illness), that he has no idea about the transaction s/he undertakes (Pływaczewski, Guzik-Makaruk, 2012, 1246-1247).

The offence of fraud is an intentional offence that can only be committed with direct intent.

There is the basic type of fraud, punishable by imprisonment from six months to eight years, the privileged type punishable by a fine, restriction of liberty or imprisonment for up to two years, and the qualified type punishable by imprisonment for a term of between one and ten years. 286(3) of the Criminal Code) may concern, for example, a small value of property which has been disposed of unfavourably, while the qualified type concerns fraud against property of significant value, i.e. property the value of which at the time of committing the offence exceeds PLN 200,000 (Article 294 of the Criminal Code).

3. Offences concerning documents

Fraud against the EU funds are often connected with crimes concerning documents, e.g. counterfeiting, falsification, false statements, etc. The Polish Criminal Code specifies six crimes against document credibility that are important from this point of view. The specific subject of protection of these provisions is the authenticity and reliability of documents, as well as the rights and legal relationships the existence or not of which is stated by a given document (Marek, 2010, 577).

In accordance with the Code's definition, a document is any object or other recorded carrier of information to which a specific right is attached or which, because of its content, constitutes evidence of a right, a legal relationship, or a circumstance of legal significance (Article 115(14) of the Criminal Code). It does not matter whether it is an official or private document, as long as it meets the above definition, nor is it relevant whether it comes from a domestic or foreign person (entity) (Marek, 2010, 577).

Article 270(1) of the Criminal Code penalises the so-called material forgery of a document, i.e. counterfeiting or alteration of a document in order to use it as authentic – or the use of such a counterfeit or altered document as authentic. It is an intentional offence which, as far as counterfeiting and alteration are concerned, may only be committed with direct intent, since the perpetrator acts with a specific aim in mind, whereas regarding the causative act consisting in using a counterfeit or forged document as an authentic one, also an alternative intention is involved (Gałązka, 2021, Article 270, ¶ 12). Anyone can be the perpetrator of this offence. Preparing for this offence is punishable in law (Article 270(3)).

In turn, pursuant to Article 270(2) of the Criminal Code, criminal liability is imposed on anyone who fills in a blank document bearing another person's signature contrary to the will of the signed person and to his/her detriment, or uses such a document. This is a general offence which may only be committed intentionally, in both forms of intent.

Offences under Article 270(1) and (2) of the Criminal Code are alternatively punished with a fine, restriction of freedom, or imprisonment from three months to five years. Article 270(3) of the Criminal Code defines the privileged type of these offences in the form of a minor case, threatened with a fine, restriction of freedom or imprisonment for up to two years.

The second of the crimes against the credibility of documents, called intellectual falsification of a document, is specified in Article 271(1) of the Criminal Code. It provides for the responsibility of a public official or another person authorised to issue a document, who certifies untruth in it about a circumstance which has a legal significance. The behaviour of the perpetrator constitutes an attack on the credibility of documents issued by authorised persons, thus threatening the certainty of legal transactions (Marek, 2010, 581). It is an individual offence that can only be committed by a public official or a person authorised to issue a document. As far as the subjective side is concerned, it is an intentional offence that may be committed in both forms of intent (Galązka, 2021, Article 271, ¶ 10).

An offence under Article 271(1) of the Criminal Code has a privileged type as a minor case (Article 271(2) of the Criminal Code) as well as a qualified type, where the qualifying circumstance is the certification of an untruth in a document in order to achieve financial or personal gain (Article 271(3) of the Criminal Code). A qualified offence may be committed only with a direct intent. The basic type is punishable by imprisonment from three months to five years, the privileged type by a fine or restriction of liberty and the qualified type by imprisonment from six months to eight years.

It is worth mentioning that deceitfully obtaining an attestation of an untruth by misleading a public official or other person authorised to issue a document is also prohibited (Article 272 of the Criminal Code). This offence is punishable by imprisonment of up to three years.

The use of documents as defined in Article 271 or 272 of the Criminal Code, e.g., when the perpetrator attaches them to a payment application, is relevant from the perspective of EU funds fraud. This is an offence defined in Article 273 of the Criminal Code, which can only be committed intentionally, with a direct or an alternative intention (Gałązka, 2021, Article 273, ¶ 6). Its perpetrator may be anyone who knows that s/he is using a document containing false information. An offence under Article 273 of the Criminal Code is punishable by a fine, restriction of liberty, or imprisonment of up to two years.

In 2017, specific provisions on the protection of the authenticity of invoices were introduced into the Polish Criminal Code. Thus, material falsification of an invoice has been typified in Article 270a(1) of the Criminal Code, according to which whoever, in order to use it as authentic, falsifies or modifies an invoice regarding factual circumstances which may be of significance for the determination of the amount of a public and legal receivable or its reimbursement or reimbursement of another receivable of a fiscal nature, or uses such invoice as authentic, is subject to the penalty of deprivation of liberty from six months to eight years. If the perpetrator commits the act specified in Article 270a(1) regarding an invoice or invoices containing a total amount of receivables whose value or total value is greater than five times the amount defining property of great value, or has made a regular source of income out of committing the offence, he shall be subject to the penalty of deprivation of liberty for a term no less than three years (Article 270a(2) of the Criminal Code). In the event of lesser gravity, the

perpetrator of an act specified in Article 270a(1) or (2) is subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to two years (Article 270a(3) of the Criminal Code).

In turn, intellectual falsification of an invoice is defined in Article 271a(1) of the Criminal Code, in the light of which anyone who issues an invoice or invoices containing a total amount of receivables whose value or total value is considerable, by certifying an untruth in relation to facts which could be significant for the determination of the amount of a public receivable or its refund or refund of other receivables of a tax nature, or uses such an invoice or invoices, is subject to the penalty of deprivation of liberty for a term of between six months and eight years. If the perpetrator commits the act specified in Article 271a(1) in relation to an invoice or invoices containing a total amount of receivables whose value or total value is greater than five times the amount defining property of great value, or has made a regular source of income out of committing the offence, s/he is subject to the penalty of deprivation of liberty for a term not shorter than three years (Article 271a (2) of the Criminal Code). In the event of lesser gravity, the perpetrator of an act specified in Article 271a(1) or (2) shall be subject to the penalty of deprivation of liberty for a term up to three years (Article 271a(3) of the Criminal Code).

If the perpetrator commits the offence under Article 270a(1) or Article 271a(1) against an invoice or invoices containing a total amount due the value, or the total value of which, is greater than ten times the amount defining great value property, s/he is subject to the penalty of deprivation of liberty for a term of not less than five years or the penalty of twenty-five years of imprisonment (Article 277a(1) of the Criminal Code). In the event of lesser gravity, the perpetrator of the act specified above is subject to imprisonment for a term of up to five years.

4. Officials' offences

Crimes against the EU's financial interests also include so-called official offences. For example, an official handling the application process for financial support may be complicit in committing a prohibited act, e.g. by failing to fulfil obligations relating to the granting or settlement of support.

Official offences are categorised in the Criminal Code in Articles 228-231. These are: selling out a public function, bribery, paid patronage and abuse of power by a public official.

Selling, also known as "passive bribery", is regulated in Article 228 of the Criminal Code. Pursuant to Article 228(1), whoever, in connection with the performance of a public function, accepts a material or personal benefit or a promise of one will be subject to the penalty of deprivation of liberty for a term of between six months and eight years. In cases of lesser gravity, the perpetrator will be subject to a fine, restriction of liberty, or the deprivation of liberty for up to two years (2). If a perpetrator, in connection with the performance of a public function, accepts material or personal benefit or a promise of one for behaviour in breach of the law, s/he will be subject to the penalty of deprivation of liberty for a term of between one and ten years (3). The same punishment is also imposed on anyone who, in connection with the performance of a public function, makes the performance of an official act conditional upon receiving a material or personal benefit or a promise of one, or demands such a benefit (4). On the other hand, a person who, in connection with the performance of a public function, accepts a material benefit of significant value or a promise thereof, is subject to more severe liability, from two to twelve years' imprisonment (5). The penalties specified in Article 288(1-5) will also be imposed, respectively, on anyone who, in connection with the performance of a public function in a foreign state or in an international organisation, accepts a material or personal benefit or the promise thereof, or demands such a benefit, or makes the performance of an official act conditional upon receiving such a benefit. Offences under Article 228 of the Criminal Code may only be committed intentionally, and regarding acts consisting in demanding or promising a benefit or making an official act dependent on such a benefit, direct intent is required (Hałas, 2021, Article 228, ¶ 8).

Bribery, known as "active bribery", is described in Article 229 of the Criminal Code. Pursuant to Article 229(1) whoever gives or promises to give a material or personal benefit to a person performing a public function in connection with the performance of such function is subject to the penalty of deprivation of liberty for a term of between six months and eight years. For cases of lesser gravity, the perpetrator is subject to a fine, restriction of liberty, or deprivation of liberty for up to two years (2). If the perpetrator of the act specified in Article 229(1) of the Criminal Code acts in order to induce a person

performing a public function to break the law, or gives or promises to give a material or personal benefit to such a person for a breach of the law, s/he is subject to the penalty of deprivation of liberty for a term of between one and ten years (3). Anyone who grants or promises to grant a material benefit of significant value to a person performing a public function, in connection with the performance of this function, will be subject to the penalty of deprivation of liberty for a term of between two to twelve years (4). The penalties specified in Article 229(1-4) are also imposed on anyone who gives or promises to give a material or personal benefit to a person performing a public function in a foreign state or in an international organisation in connection with the performance of their function. On the other hand, a perpetrator of the offence specified in Article 229(1-5) will not be subject to punishment if a material or personal benefit or a promise of one has been accepted by a person performing a public function, and the perpetrator has notified the authority responsible for prosecuting the offence and disclosed all the material circumstances of the offence before the authority learned about it. Offences under Article 229 of the CC can only be committed with intent, in both forms (Noise, 2021, Article 229, ¶ 6).

Paid protection is defined in Article 230 of the Criminal Code. According to this provision, anyone who, claiming to have influence on a state or local government institution, international or domestic organisation or a foreign organisational unit which has public funds at its disposal or by inducing another person to believe or confirming him/her in belief of the existence of such influence, undertakes to intercede in settling a matter in exchange for material or personal benefit or a promise of one, will be subject to deprivation of liberty for a term of between six months and eight years. In cases of lesser gravity, the perpetrator will be subject to a fine, restriction of liberty, or the penalty of deprivation of liberty for up to two years. The offence under Article 230 of the Criminal Code may only be committed intentionally with a direct intent (Halas, 2021, Article 230, ¶ 7).

The reverse of paid patronage is established by Article 230a of the Criminal Code, which regulates criminal liability for so-called “active paid patronage”, i.e. granting material or personal benefit in exchange for intermediation in settling an issue in a public institution. This offence can only be committed with intentional guilt, and direct intention is required (Halas, 2021, Article 230a, ¶ 4). The offence under Article 230a is punishable by imprisonment from six months to eight years. In a minor case, the perpetrator is subject to a fine, restriction of liberty or imprisonment for up to two years (Article 230a(2) CC). Article 230a(3) of the Criminal Code regulates the non-punishment clause for disclosure of the offence.

Abuse of power by a public official is regulated by Article 231 of the Criminal Code. Pursuant to Article 231(1) of the Criminal Code, a public official who, exceeding his/her authority or failing to perform his/her duty, acts to the detriment of a public or private interest and will be subject to deprivation of liberty for up to three years. If the perpetrator of the act specified in Article 231(1) of the Criminal Code commits it in order to achieve material or personal gain, he/she shall be subject to the penalty of deprivation of liberty for a term of between one and ten years (2), provided, however, that this provision does not apply if the act exhausts the elements of a sell-out specified in Article 228(4) of the Criminal Code, so this provision is of a subsidiary nature. If the perpetrator of the act specified in Article 231(1) of the Criminal Code acts unintentionally and causes significant damage, he/she will be subject to a fine, restriction of liberty, or deprivation of liberty for up to two years (3). For offences under Article 231(1) CC, the subjective side consists of intentionality, whereby both forms of intent are permissible, while in the qualified type (2), direct intent is required (Noise, 2021, Article 231, ¶ 5).

5. Bid rigging

From the perspective of this issue, Article 305 of the Criminal Code regulating criminal liability for interfering with a public tender is also relevant. This provision protects the property interests of the owner of the tendered object or the entity for which the tender is conducted, as well as the integrity of the public tender institution (Marek, 2010, 655).

Pursuant to Article 305(1) of the Criminal Code, anyone who, in order to gain a material profit, frustrates or obstructs a public tender or enters into an agreement with another person to the detriment of the owner of property or a person or institution for which the tender is to be held, will be subject to the penalty of deprivation of liberty for up to three years. The same penalty will be imposed on anyone who, in connection with a public tender, disseminates information or conceals circumstances of

significance for the conclusion of a tender agreement or enters into an agreement with another person to the detriment of the owner of property or a person or institution for which the tender is to be held.

The offence under Article 305 of the Criminal Code may be committed by anyone, with the exception of "concealment of circumstances which are material to the conclusion of the agreement", as the offence may be committed only by a person under obligation to disclose such information. Offences under Article 305 of the Criminal Code are intentional, but in the case of Article 305(1) of the Criminal Code only direct intent comes into play, as the offender must act with the aim of gaining a financial benefit (Gałązka, 2021, Article 305, ¶ 3, 6).

6. Tax offences

Fiscal offences defined in the Fiscal Criminal Code (hereinafter: the PPC) may also be committed in connection with extortion of EU funds. Particular attention should be paid to fiscal offences against tax obligations and settlements of subsidies and grants regulated in Section II, Chapter 6. These include, inter alia, failure to disclose the taxable object or basis (Article 54 of the Criminal Code), concealment of economic activity (Article 56 of the Criminal Code), tax fraud (Article 56 of the Criminal Code), exposure to an unjustified tax refund (Article 76 of the Criminal Code) or violation of the principles of subsidies or grants (Article 82 of the Criminal Code)

The first offence which should be mentioned in more detail is tax fraud, regulated by Article 56(1-3) of the Criminal Code, involving the submission by a taxpayer to a tax authority, other authorised entity or payer of a declaration or statement in which he or she presents an untruth or conceals the truth or fails to fulfil the obligation to notify changes in the data included in the declaration or statement, thereby exposing the taxpayer to a loss. Tax fraud occurs as a basic tax offence punishable by a fine of up to 720 times a daily fine or imprisonment or both (Article 56(1) of the Criminal Code) or as a privileged offence punishable by a fine of up to 720 times a daily fine (Article 56(2) of the Criminal Code). If the amount of tax liable to loss exceeds the statutory threshold, the perpetrator of the offence defined in Article 56(1) of the Code of Criminal Taxes will be subject to a fine for a fiscal offence (Article 56(3) of the Code of Criminal Taxes). The tax offence in question may be committed only intentionally, in both forms of intent (Skowronek, 2020, Article 56, ¶ 5).

The second of the fiscal offences to which attention should be drawn is the offence stipulated in Article 76(1) of the Criminal Code. Pursuant to this provision, a person who, by providing data inconsistent with the actual state of affairs or by concealing the actual state of affairs, misleads a competent authority and exposes himself to an undue return of a tax liability, in particular input tax within the meaning of the provisions on value added tax, excise duty, refund of an overpayment or its crediting to tax arrears or current or future tax liabilities, is subject to a fine of up to 720 daily rates or imprisonment, or both. This offence may also be committed as a privileged type (2) and as a fiscal offence (3). The subjective side is identical to that of Article 56 of the Criminal Code (Skowronek, 2020, Article 76, ¶ 5).

The last significant provision in the context of the financial interests of the European Union is Article 82 of the Criminal Code, which penalises the exposure of public finances to depletion through the improper payment, collection, or misuse of a subsidy or subvention. This offence is punishable by a fine of up to 240 daily rates, and in a situation where the payment or collection of an improper, excessive or misused subsidy or subvention does not exceed the statutory threshold, the perpetrator of the prohibited act specified in Article 82(1) of the Criminal Code is subject to a fine for a fiscal offence. Anyone who has taken an improper subsidy or subvention or has used it contrary to its intended purpose may be deemed to have committed the prohibited act. Also in relation to the causative act consisting of improper payment of a grant or subsidy, the act is of a universal nature, because although most often its perpetrators will be employees of a certain state or local government bodies, it cannot be excluded that the payment will be made by an unauthorised person (Wilk, 2021, Article 82, ¶ 4). An offence under Article 82 of the Criminal Code may only be committed intentionally, in both forms of intent (Skowronek, 2020, Article 82, ¶ 5).

Prohibited acts that can be considered in the context of infringements of the EU's financial interests also include fiscal offences against customs obligations and rules on foreign trade in goods and services, including: customs smuggling (Article 86 of the Criminal Code), customs fraud (Article 87 of

the Criminal Code) and exposing the authority to undue repayment or remission of customs duties (Article 92 of the Criminal Code).

7. Organised groups or associations with the intent to commit a criminal offence

Extortion of EU funds may be carried out within an organised group or association whose aim is to commit a crime. According to the Polish Criminal Code, mere participation in an organised group or association aimed at committing a crime or fiscal offence is punishable by imprisonment from three months to five years (Article 258(1) of the Criminal Code). The responsibility for establishing or directing such a group or association is more severe, as it is punishable by imprisonment from one to ten years (Article 258(3) of the Criminal Code). Higher sanctions are also applicable if the group or association is of an armed nature (Article 258(2) CC).

8. Criminal sanctions

For offences against the EU's financial interests, the Polish Penal Code and the Fiscal Penal Code provide for the following types of criminal sanctions: fine, restriction of freedom, deprivation of freedom. The level of sanctions for particular types of offences and fiscal offences against the EU's financial interests is discussed above. At this point, however, certain general limits of penalties should be given.

Pursuant to Article 33 of the Penal Code, a fine is imposed in daily rates, specifying the number of rates and the amount of one rate; if the act does not provide otherwise, the lowest number of rates is 10, while the highest is 540. In determining the daily rate, the court takes into account the offender's income, personal and family conditions, property relations and earning capacity; a daily rate may not be lower than PLN 10, nor may it exceed PLN 2,000. The court may impose a fine also in addition to imprisonment, if the perpetrator committed the act in order to achieve a financial gain or if he/she achieved the financial gain. In the light of Art. 34 of the Penal Code the penalty of restriction of liberty shall be a minimum of one month and a maximum of two years; it shall be served in months and years. The penalty of restriction of liberty consists in the obligation to perform unpaid, controlled work for social purposes or the deduction of 10% to 25% of the remuneration for work per month for a social purpose designated by the court. These obligations may be imposed together or separately (Art. 35 PC). Imprisonment is imposed for a minimum of one month and a maximum of 15 years; it is measured in months and years (Art. 37 PC). The Code provides for extraordinary aggravation or mitigation of the statutory threat limit, as well as various modifications of the statutory threat.

As regards the Fiscal Penal Code, it should be noted that a fine for fiscal offences is imposed, as in the case of the Penal Code, in daily rates (this is different in the case of fiscal misdemeanours). When imposing a fine, the court specifies the number of fine units and the amount of one daily rate. Unless the Fiscal Penal Code provides otherwise, the lowest number of daily rates is 10 and the highest is 720. In determining the daily rate, the court takes into account the offender's income, personal and family conditions, property relations and earning capacity; a daily rate may not be lower than one thirtieth of the minimum wage or exceed four hundredths thereof (Article 23 of the Fiscal Penal Code). As regards the assessment of the penalty of restriction of liberty under the Fiscal Penal Code, the provisions of the Penal Code apply accordingly. As for the penalty of deprivation of liberty, if the Fiscal Penal Code does not provide otherwise, the penalty of deprivation of liberty shall be a minimum of 5 days and a maximum of 5 years; it shall be measured in days, months and years (Article 27 of Fiscal Penal Code). The Fiscal Penal Code also provides for a reduction or extraordinary aggravation of the statutory threat limit.

9. The scale and dynamics of the phenomenon based on available data

In terms of data on the scale of offences against the EU’s financial interests in Poland, the only publicly available data that we have been able to find includes information collected by the Police Headquarters for the period 2010-2016 in terms of recorded and detected offences. These are therefore

relatively old data that do not reflect the current state of affairs. Nevertheless, it is worth quoting some information to illustrate trends in the most frequently committed crimes in this area.

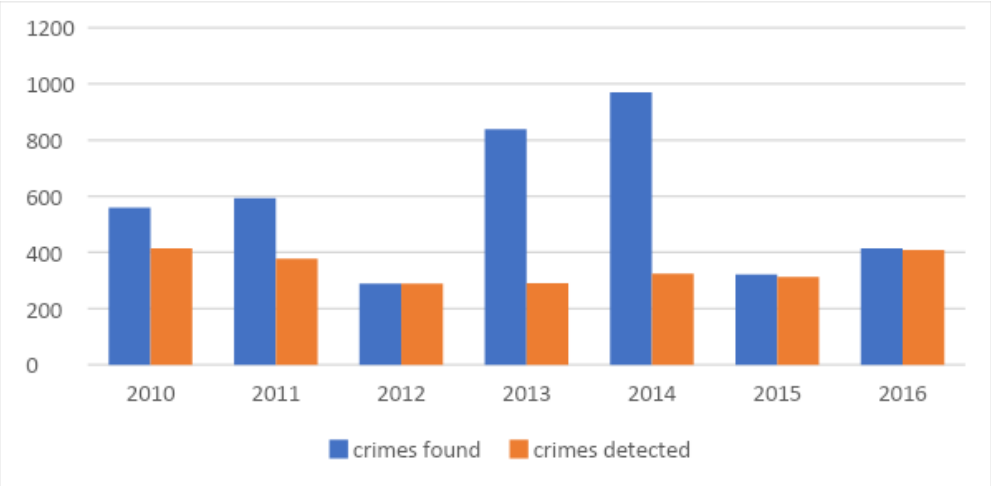
In terms of offences recorded, the largest number of offences against the EU's financial interests are offences against document reliability, the offence of credit/subvention fraud under Article 297 of the Criminal Code, and offences against property, i.e. classic fraud (Article 286 of the Criminal Code), misappropriation of property (Article 284 of the Criminal Code) and computer fraud (Article 287 of the Criminal Code).

Table 1. Number of offences against the EU's financial interests by category between 2010 and 2016

	2010	2011	2012	2013	2014	2015	2016
Articles 228-230a of the Criminal Code. (bribery and paid patronage)	11	11	11	1	4	4	9
Articles 270-273 of the Criminal Code. (offences against the reliability of documents)	197	266	89	623	711	18	180
Articles 284, 286 and 287 of the Criminal Code. (offences against property)	131	128	66	66	84	80	100
Article 296 of the Criminal Code. (abuse of trust)	0	1	0	1	0	0	0
Article 296a of the Criminal Code. (economic corruption)	0	0	1	0	1	0	0
Article 297 of the Criminal Code. (credit fraud)	218	185	121	144	165	188	120
Article 299 of the Code of Criminal Procedure. (money laundering)	2	2	0	2	2	6	0
Article 305 of the Criminal Code. (thwarted tender)	0	0	0	0	0	0	0
Articles 54-92 of the Code of Criminal Procedure. (offences against tax and customs obligations)	1	0	1	2	4	25	6
TOTAL	560	593	289	839	971	321	415

Source: MSWiA, Report on the state of security in Poland in 2016, 199.

Figure 1 Number of crimes recorded and detected by the police in 2010-2016



Source: MSWiA, Report on the state of security in Poland in 2016, 199.

TASK 3, D1, POLAND

Prof. Maciej Serowaniec and Prof. Zbigniew Witkowski

Summary: 1. The protection of the EU's financial interests at constitutional and statutory level: a primer; 2. The judicial architecture; 2.1. The role of administrative courts and the cases triggering their jurisdiction; 2.2. Criminal courts; 2.3. Common courts and the Supreme Court; 3. Involvement of the Constitutional Tribunal: access to constitutional justice; 4. What room is there for political control?; 5. Institutional crisis in Poland – a threat to EU programmes?

1. The protection of the EU's financial interests at constitutional and statutory level: a primer

The Constitution of the Republic of Poland of 2 April 1997 does not explicitly lay down in its provisions any norms relating to the protection of financial interests. However, the Act of 27 August 2009 on public finances does so. It explicitly indicates that funds coming from the European Union budget and non-refundable funds from aid granted by Member States of the European Free Trade Agreement EFTA have the status of public funds (Article 5 of the Act). Pursuant to Article 44 of the Act, public expenditure, including EU funds, should be made: 1) in a purposeful and cost-effective manner, observing the principles of: a) achieving the best effects from given inputs, b) the optimum selection of methods and means to achieve the assumed objectives; 2) enabling the timely performance of tasks; 3) in terms of the amount and times resulting from previously incurred liabilities. However, violation of the rules of the Public Finance Act does not automatically translate into criminal liability as, in order to recognise the commission of a crime or fiscal offence, it is still necessary to fulfil the characteristics of a specific criminal act and to prove guilt, which has already been mentioned in Task 2.

2. The judicial architecture

In its Article 175, the Constitution establishes a closed circle of courts exercising the administration of justice in Poland. It consists of the Supreme Court, common courts, administrative courts and military courts. In addition to common courts and the Supreme Court, the Constitution thus lists two types of special courts: administrative and military. These courts are located outside the system of common courts, and their jurisdiction covers certain clearly defined groups of cases. The same constitutional principles apply to their functioning as in the case of common courts.

Pursuant to Article 183(1) of the Constitution, the Supreme Court exercises supervision over the activities of common and military courts in the area of adjudication (so-called judicial supervision). In exercising judicial supervision, the Supreme Court recognises appeals against final second instance court decisions (cassation appeals against decisions of the common courts and cassations and appeals against decisions of military courts). Unlike common courts, the Supreme Court does not therefore hear the case. As part of its supervision over the activities of common and military courts, the Supreme Court also adopts resolutions resolving discrepancies in the interpretation of the law revealed in the case law of the common courts, military courts, or the Supreme Court.

Pursuant to Article 177 of the Constitution, ordinary courts exercise the administration of justice in all matters, with the exception of matters statutorily reserved for the jurisdiction of other courts. In this provision, the legislator has determined that the common courts bear the primary burden of administering justice on behalf of the Republic, and their jurisdiction is somewhat presumed, meaning that in the absence of a clear statutory reservation, the common courts are competent to hear the case. The structure of common courts consists of district courts (Polish: sąd rejonowy), circuit courts (Polish: sąd okręgowy) and courts of appeal (Polish: sąd apelacyjny).

A circuit court has been established for one or more municipalities. In justified cases, more than one district court may be established within the same municipality. A district court is established for the area of jurisdiction of at least two district courts, from now on referred to as a 'judicial circuit'. Similarly, an appellate court is established for the area of jurisdiction of at least two court circuit, hereafter referred to as the 'appellate area' (Article 10 of the Act of 27 July 2001 – Law on the Common Court System). Courts are created, abolished, and their seats fixed, by the Minister of Justice by way of a regulation after consultation with the National Council of the Judiciary.

The district courts have jurisdiction to hear and determine in the first instance all cases in which the law does not reserve the jurisdiction of the circuit courts. Circuit courts adjudicate appeals against judgments of district courts and cases transferred to them by law to be adjudicated in the first instance. The courts of appeal adjudicate appeals against judgments of the circuit courts. The courts in their internal structure are divided into divisions. In district courts, the following divisions may be established: civil; criminal; family and juvenile labour; social insurance or labour and social insurance; commercial; land and mortgage registers; and enforcement (Article12 §1 of the Act). The following divisions may be established at thecircuit court: civil; criminal; labour, social insurance or labour and social insurance; commercial; and control of telecommunications, postal and Internet data (Article 16(1) of the Act).

In turn, the Supreme Administrative Court and other administrative courts exercise, to the extent defined by statute, control over public administration activities. This control also includes adjudication on compliance with the statutes of resolutions of local government bodies and normative acts of local government administration bodies (Article 184 of the Constitution of the Republic of Poland). In the light of the Act of 30 August 2002, the law on proceedings before administrative courts, this control includes adjudication in cases of complaints against: 1) administrative decisions, 2) decisions issued in administrative proceedings which may be appealed against or which end the proceedings, as well as decisions deciding the case on the merits and decisions issued in enforcement and security proceedings which may be appealed against, 3) other than those specified above, acts or actions in the field of public administration concerning rights or obligations arising from the provisions of law, 4) written interpretations of tax law provisions issued in individual cases, 5) inactivity or protraction of proceedings in cases specified above, 6) acts of local law of local self-government bodies and territorial government administration bodies and other acts of these bodies undertaken in matters of public administration, 7) acts of supervision over the activities of local self-government bodies (Article 3 § 2 of the Act).

The structure of administrative courts consists of the Supreme Administrative Court with its seat in Warsaw and voivodeship administrative courts established for one or more voivodeships. The President of the Republic of Poland, at the request of the President of the Supreme Administrative Court, through emanation of a regulation, creates and abolishes voivodeship administrative courts and determines their seats and area of jurisdiction, and may create, outside the seat of the court – and abolish – local divisions of those courts. Cases falling within the competence of administrative courts are heard by voivodeship administrative courts in the first instance. The Supreme Administrative Court, on the other hand, exercises supervision over the activities of the voivodeship administrative courts in terms of adjudication and, in particular, recognises appeals against the decisions of these courts and adopts resolutions clarifying legal issues and recognises other cases belonging to its jurisdiction under other acts (Serowaniec, 2021, 456-468).

In turn, military courts exercise justice in the Armed Forces of the Republic of Poland in criminal matters and rule on other matters if they have been transferred to their jurisdiction by separate acts. The structure of military courts consists of military circuit courts and military garrison courts.

Article 45 of the Constitution of the Republic of Poland of 2 April 1997 guarantees everyone the right to access a court. For this reason, statutory solutions adopted in Poland provide for the possibility of taking legal action also for beneficiaries of EU funds. Despite the fact that the majority of cases involving EU funding are resolved by way of court-administrative proceedings, both common courts and the Supreme Court have had many occasions to express their opinions on the implementation of projects that draw on EU funding. In practice, administrative courts are involved in proceedings at the financing stage, whereas common courts are involved in project implementation.

2.1 The role of administrative courts and the cases triggering their jurisdiction

In the light of Article 30c(2) of the Act of 6 December 2006 on the principles of the development policy, the control of voivodeship administrative courts is subject to the entire information of the managing authority or intermediate body on the negative evaluation of the project, which must be supplemented at the same time by complete documentation in the case, consisting of the application for co-financing with the information on the evaluation of the project, copies of the appeals filed, and information on the results of the appeal procedure.

A clear standpoint concerning the determination of which borderline situations the administrative court is competent was included in a resolution of seven judges of the Supreme Administrative Court of 29 March 2006 (ref. No II GPS 1/06 ONSAiWSA 2006/4/95), which is still valid. This judgment underlines the two-stage nature of proceedings relating to the implementation of the indicated sectoral operational programmes. The first stage, relating to the assessment of submitted applications for co-financing, is an administrative procedure and should end with a decision being issued, the consequence of which is that in the case of disputes arising in this context, those interested in co-financing may file a complaint to the administrative court. The second stage of proceedings, which is the result of concluding an agreement, means that disputes arising in connection with the performance of the agreement, which is a civil agreement, are subject to the civil court. Simplifying, the role of the administrative court, from the will of the legislator itself, is to determine whether a given project at the authoritative stage of the competition procedure was assessed in a manner that violates the law. This follows from the content of Article 30c sec. 3 item 1-3 of the Act, containing a catalogue of ways in which a complaint may be examined by an administrative court. The subject of the proceedings before the administrative court is not the ruling issued in connection with the lodged appeal, or the mere information about the rejection of the protest, or the first negative evaluation of the project covered by the application for co-financing, but full information about the negative evaluation of the project and the appeal procedure conducted. The appeal procedure may provide for more than one means of appeal, so that in such a situation it is necessary to submit all the appeals brought in the case and all the decisions issued in this respect by the administration bodies, which mean the exhaustion of the modes of appeal and enable effective court action. The first assessment of a grant application may be carried out by both the managing authority and the intermediate body or the implementing body.

Administrative courts may directly point to defects in the procedure for granting EU funds, which in a given case had an impact on the outcome of the case. Such defects may even take the form of incorrectly constructed documents adopted within the system of implementation of a given operational programme. Additionally, administrative courts may inform administrative bodies about irregularities discovered in the course of court proceedings in connection with a given case, which, however, did not influence its resolution. The subject of such court signalling is the protection of public interest and the improvement of the functioning of administration. In this respect, such signalling provisions, by virtue of the act, serve mainly informational ends by providing public administration bodies with knowledge about irregularities in their functioning that may be the cause of complaints about their activities. This is important at the stage of evaluation of the project/programme cycle and cohesion policy management systems.

2.2 Criminal courts

The criminal divisions within the circuit and regional courts are responsible for handling criminal cases involving offences against the European Union’s financial interests.

Any person who is suspected or accused of having committed a criminal offence, including a fiscal offence, has the right to defence, including the right to be assisted by a defence counsel. A defence counsel in a criminal case may be an advocate or a legal adviser.

In accordance with Article 24. §1 of the Code of Criminal Procedure, the district court rules in the first instance in all cases, with the exception of cases transferred by law to the jurisdiction of another

court. In the light of Article 25(1) of the Code of Criminal Procedure, the circuit court rules in the first instance in cases involving the following offences characterised in Task 2: participation in an organised criminal group (Article 258 of the Criminal Code), misappropriation of property of significant value (Article 285(1) of the Criminal Code), fraud of significant value (Article 286(1) of the Criminal Code), computer fraud of significant value (287 of the Criminal Code). Pursuant to Article 115(5) of the Criminal Code, property of significant value is property whose value at the time of committing the offence exceeds PLN 200,000.

2.3 Common courts and the Supreme Court

Article 177 of the Constitution of the Republic of Poland of 2 April 1997 provides for a presumption of competence of an ordinary court in all cases, except for cases reserved for the competence of other courts. A broad understanding of a civil case and admissibility of the court route leads to the conclusion that, in principle, any procedural claim formulated as a demand to adjudicate, establish or shape a legal relationship, regardless of its substantive validity, may be subject to the court route, provided that it concerns entities of the same level (Poździk & Brysiewicz, 2010, 48-50).

Possible subsequent civil proceedings (conducted after the authoritative definition of the project) may generally concern three types of issues: firstly, the establishment of a grant agreement and disputes arising from the potential request for its establishment (after passing the stage(s) of project appraisal); secondly, issues relating to claiming compensation if, as a result of incorrect project appraisal, damage was caused to the beneficiary; thirdly, disputes arising from the correct implementation of the project. These issues are not directly regulated in any provisions of the law; they should be derived from individual institutions of civil law, e.g. defining the principles of liability for damages or contractual liability (Sawczuk, 2010, 82-84). This position was also presented by the Civil Chamber of the Supreme Court in its Judgment of 6 April 2017. The Supreme Court, after recognising a legal issue in the case ref. III CZP 117/16, allowed a two-track (administrative and civil law) possibility to claim the return of funds intended for the implementation of programmes financed by European funds. In the analysed case, in the opinion of the Supreme Court, the administrative procedure for the reimbursement of funds intended for the implementation of programmes financed by European funds – as provided for in the Public Finance Act – does not exclude the possibility of securing a claim for the reimbursement of such funds with a promissory note and a court procedure for seeking payment of the promissory note issued to secure the claim.

It is worth noting at this point that the ordinary courts and the Supreme Court, in contrast to administrative courts, are shaping a line of jurisprudence that pays particular attention to the proportionality of sanctions relating to the return of co-financing in the case of certain shortcomings in the implementation of the agreement. This issue was addressed by the Supreme Court, among others, in its Judgment of 7 October 2015 (ref. No I CSK 878/14). The case concerned the beneficiary's failure to achieve one of the objectives of the project, i.e. to increase employment, which was the direct cause of termination of the grant agreement and the institution's pursuit of full reimbursement. The beneficiary undertook to increase employment by introducing 27 new jobs in relation to the already existing 453 jobs. The Supreme Court deemed the findings of the institution and lower courts to be correct as far as the lack of increase in employment was concerned and concluded that the beneficiary had not in fact increased employment. However, in the opinion of the Supreme Court, the mere failure to achieve this goal did not justify withdrawal of the entire subsidy, as the project also envisaged other goals, which were achieved by the beneficiary. For this reason, the Supreme Court agreed with the allegations in the cassation appeal, which claim that despite the fact that the material side of the investment has been realised, i.e. the purchase and implementation of the production of the modern heating device, which was accepted by the conducted inspections, the defendant is required to return the whole of the granted aid, also in this properly realised scope. In the opinion of the Supreme Court, the complainant's doubts should be shared, and it should be recognised that the purpose of the aid covered by the provision of financial support from EU funds cannot be reduced to results consisting only in an increase in employment, if, moreover, the issue of employment was not the only reason for concluding the agreement on providing financial support, and it constituted, in view of the subject matter of the financial support, a significant, but additional problem, contrary to their intended use. The cited findings indicate

a different conclusion, i.e. that the basic purpose of the agreement had been fulfilled, and it would be deeply unfair to interpret the provisions of the European Union law and harmonised provisions of Polish law with them, as well as the *ratio legis* of the solutions they contain in such a way as to drastically burden the respondent Company with the obligation to return the entire subsidy, i.e. also the part of it that was used effectively and correctly to benefit the economy.

The main problem in Poland is therefore the competitiveness of the judicial route: the same case can often be heard in parallel by both civil and administrative courts; the length of proceedings (proceedings before administrative courts often last several years); complicated procedures and therefore numerous mistakes made by beneficiaries and officials; lack of mitigating mechanisms, as institutions in disputes with beneficiaries very rarely use the possibility to mitigate sanctions or conclude settlements. Low effectiveness of enforcement actions due to the passage of time and lack of effective safeguards.

3. Involvement of the Constitutional Tribunal: access to constitutional justice

From the outset it should be emphasised that in the light of the provisions of the Constitution of the Republic of Poland of 2 April 1997, the Constitutional Tribunal is one of the organs of judicial power in Poland, but it is not included in the group of organs exercising the administration of justice. As already mentioned, the administration of justice in Poland is exercised exclusively by the Supreme Court, ordinary courts, administrative courts, and military courts.

Undoubtedly, the most important competence of the Polish Constitutional Tribunal is the control of constitutionality of law, or more broadly, the hierarchical compliance of normative acts. In accordance with Article 188, points 1-3 of the Constitution, the Constitutional Tribunal adjudicates in cases concerning compliance of laws and international agreements with the Constitution, compliance of laws with ratified international agreements, the ratification of which required the prior consent expressed in a statute, and compliance of legal regulations issued by central state bodies with the Constitution and ratified international agreements and statutes. The principle is that the Constitutional Tribunal acts upon request (the principle of complaint). Furthermore, pursuant to Article 193 of the Constitution, any court may submit a legal question to the Constitutional Tribunal concerning the compliance of a normative act with the Constitution, ratified international agreement, or statute if the outcome of the case pending before the court depends on the answer to the legal question.

So far, the Constitutional Tribunal has addressed the issue of management of EU funds in Poland only four times. In only one case did the Court state that the provisions defining the rules for implementation of EU funds were unconstitutional. In its Judgment of 12 December 2011 (ref. No P 1/1) the Constitutional Tribunal referred to the legal question submitted by the Voivodeship Administrative Court in Łódź. The legal question concerned the legality of the decision of the managing institution (resolution of the voivodeship board), issued on the basis of, among others, Article 30b sec. 1 and 2 of the act on development policy, rejecting the application for project financing from the regional operational programme due to the fact that the applicant (competition participant) exceeded the deadline for completing formal deficiencies of the application. The Voivodeship Administrative Court in Łódź stated that should the Constitutional Tribunal rule that the challenged regulations are unconstitutional, the inquiring court will be obliged to consider whether and according to what principles to assess the legality of the decision challenged by the complaint. On the other hand, if its doubts are not confirmed, it will assess the legitimacy of the complaint's allegations by verifying the competition procedure and the decisions made in terms of their compliance with the competition rules.

The Constitutional Tribunal shared the reservations regarding the possibility of regulating within the implementation system (in acts that are not the acts of universally binding law) the rights and obligations of project applicants, especially those concerning the appeal procedure. In the opinion of the Constitutional Tribunal, neither uniform practice of administrative bodies, nor consistent jurisprudence of administrative courts can replace direct regulation of the legal form of the implementation systems in the contested Act. The question of which entities and in what manner they have the right to standardise

the situation of participants in competitions organised within the framework of regional operational programmes is of significant and not only practical, but also legal importance. The omission of this issue in the Development Policy Act may be assessed from the perspective of the principle of citizens' trust in the state and the law it creates, and subsequently also the principle of correct legislation.

The Constitutional Tribunal stated that the challenged regulations are inconsistent with Article 87 of the Constitution, and decided to postpone the loss of their binding force by eighteen months. The implementation of this judgment required a systemic intervention of the legislator, consisting in standardising in acts of universally binding law all the existing elements of the implementation systems, which directly concern the rights and obligations of the participants of competitions conducted within the framework of the regional operational programmes.

At the same time, the Constitutional Tribunal shares the view (presented in the course of the proceedings by the Minister of Regional Development), that regional operational programmes should be implemented by means of possibly effective and flexible instruments. This judgment should not therefore be understood as an order to 'stiffen' regulations in this area, or a ban on introducing any derogations from the general principles of administrative proceedings. It merely expresses the principle that even economically or politically justified solutions must be consistent with the Constitution. It is the legislator's right and obligation to choose such a method of standardising regional operational programmes, which will enable optimum use of EU funds, but in compliance with the Constitution.

4. What room is there for political control?

Pursuant to Article 95, clause 2, of the Constitution of the Republic of Poland, only the *Sejm* exercises control over the activities of the Council of Ministers, within the scope specified by the Constitution and laws. The powers of scrutiny may be exercised *in pleno*, by *Sejm* committees, or with the use of individual means of parliamentary control.

In practice, the issues relating to the use of EU funds are primarily subject to individual means of parliamentary control. Pursuant to the provisions of the Sejm's Rules of Procedure, MPs have the right to submit interpellations to members of the Council of Ministers on matters of fundamental nature and relating to state policy problems. Parliamentary questions, on the other hand, are submitted in matters of an individual character, relating to internal and foreign policy pursued by the Council of Ministers and public tasks performed by government administration. Parliamentary questions and interrogatories must be submitted in writing and must be answered within 21 days. Questions on current affairs, on the other hand, are oral and may be tabled at any sitting of the *Sejm*. Members must inform the Speaker of the *Sejm* of the general topic of their questions on current business in writing by 9 p.m. on the day preceding the beginning of the session of the *Sejm*. MPs actively use individual means of parliamentary control in the area of monitoring the spending of EU funds by formulating several dozen interpellations, parliamentary questions, and questions on current affairs devoted to this issue during the year.

A parliamentary club and a group of at least 15 MPs are also entitled to request a member of the Council of Ministers to present current information at a sitting of the *Sejm*.

Parliamentary committees may also request an audit tobe carried out by the Supreme Audit Office. Such a request should include the purpose and scope of the audit to be commissioned and indicate the entity subject to the audit. In the parliamentary practice so far (in the years 2004-2020) the parliamentary committees have initiated only a few audits relating directly to the issue of spending EU funds. Detailed activity of the Supreme Audit Office in the area of EU spending is discussed in Task 4.

5. Institutional crisis in Poland – a threat to EU programmes?

The phenomenon of institutional crisis in Poland emerged in 2015 and is associated not only with the degradation of state institutions and non-compliance with the Constitution by State bodies particularly obliged to respect its provisions, but also with often unlawful political practices. It also

results in a marked weakening of Poland's position in the international arena, including the forum of the European Union. It is also to a large extent related to changes in the system of the Polish judiciary introduced in 2015-2019. In the accession negotiations, as well as during the first years of membership of the European Union, Poland was a kind of 'primus' in the group of then newly admitted States. This has not been without its difficulties, but these phenomena were included in the canon of possibilities to adjust the pace of integration to one's own individual needs and, in principle, provided for by EU law. Examples of such situations include the lack of sufficient enthusiasm on the part of successive Polish governments to undertake the genuine efforts needed to join the eurozone in a foreseeable time perspective, or Poland's accession to the so-called Polish-British Protocol on the Charter of Fundamental Rights of the European Union. However, they have not been of much significance for the perception of Poland as a reliable and predictable partner in the European Union so far.

Problems regarding the current position of the Constitutional Tribunal, as well as the amendment of statutory provisions concerning the National Council of the Judiciary, the Supreme Court, and the common courts in general (including the so-called 'muzzling' act) have met with a reaction from the European Commission in the form of launching the procedure under Article 7 TEU against Poland. For the time being, the decisions of the EU bodies are not connected with direct limitation of financial resources allocated for the implementation of national and regional operational programmes. Further actions of the parliamentary majority violating the rule of law may, however, lead to more radical decisions on the part of EU bodies, including restrictions on the transfer of EU funds (Witkowska-Chrzczonowicz, 2021, 606-610).

TASK 4, D1, POLAND

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Summary: 1. Control procedures for the disbursement of EU funds 2. Accounting and administrative responsibility for public managers and the role of the Supreme Audit Office; 3. Administrative system of controls and sanctions in the light of the European structural and investment funds; 3.1. Financial correction – a punitive administrative sanction of a financial nature against a public finance sector entity; 3.2. Individual responsibility of persons who commit irregularities in the handling of EU funds; 2.3. Liability under public procurement law – financial liability of an administrative nature; 4. Employee liability; 5. Alignment of Polish criminal law with EU law on the protection of EU financial interests; 6. Liability of collective entities for offences against the EU financial interest; 7. The forfeiture, phenomenal and staged forms; 8. The Central Anti-Corruption Bureau.

1. Control procedures for the disbursement of EU funds

The Act of 11 July 2014 on the rules for the implementation of cohesion policy programmes financed in the financial perspective 2014-2020 provides for two forms of expenditure control aimed at obtaining assurance that expenditure is incurred in accordance with the law and EU and national rules. These are obligatory controls, which apply to all projects, and optional controls, which can be carried out on a sample of projects. As a rule, the Managing Authority is responsible for the implementation of all controls.

Within the compulsory controls we distinguish:

1) checks on each application for payment submitted by the beneficiary, which may be carried out on a sample of documents in accordance with a methodology adopted by the managing authority. The managing authority shall lay down the list of documents that must be attached to the payment claim and the rules for their verification. checks on payment claims are the basic type of checks also explicitly provided for in Article 125(5)(a) of Regulation No. 1303/2013, on the basis of which they are called administrative verifications of each application for reimbursement submitted by the beneficiaries.
2) controls at the end of project implementation, aimed at checking the completeness of documents confirming the correct audit trail for the given project. This is a special type of control carried out on the occasion of verifying the last application for payment. Positive result of the control should be a condition for the final project settlement and transfer of the final payment to the beneficiary. These controls should also confirm material implementation of the project and achievement of indicators and results assumed in the co-financing agreement.

Optional controls that may be carried out on a sample of projects include:

1) on-the-spot checks of the project to verify the delivery of goods and services under the co-financed projects; they may also take place after completion of the project. This type of control is also explicitly provided for in Article 125(5)(b) of Regulation No. 1303/2013, which at the same time indicates that the frequency and scope of controls shall be proportionate to the amount of support and to the level of risk identified during them and during the audits carried out by the audit authority. These controls allow for verification of the actual implementation of the project and for confirmation of the veracity of the data presented in the payment claims.
2) Cross-checks, on the other hand, are aimed at ensuring that expenditures incurred in projects are not double-financed within a given programme or various operational programmes, or several different funds or support instruments of the European Union. Controls aimed at preventing and detecting double financing of expenditures may be performed on a

sample of documents, although, as a rule, they will take into account the data recorded in the information and communication system, in which information about the expenditures incurred is recorded, and may take place during the verification of the beneficiary's application for payment.

3) checks on the sustainability of projects referred to in Article 71 of Regulation No. 1303/2013. They are aimed at verifying whether, after the final payment to the beneficiary, one of the circumstances giving rise to the need to recover funds has occurred. These checks are usually conducted already after the project implementation has been completed, and they should also focus on checking the following issues: whether the project objective has been maintained; whether the beneficiary has stored the documentation related to the project in an appropriate way; whether the project has not generated income not taken into account before; whether there has been no change in the circumstances causing the possibility of recovering VAT by the beneficiary, which was an eligible expenditure in the project implementation period.

The Act on the principles of the implementation of programmes in the area of cohesion policy financed in the financial perspective 2014-2020, in addition to the above-mentioned types of control, also indicates the possibility of expenditure control in the form of verification of documents in terms of correctness of the implementation of appropriate procedures for: granting public aid, environmental impact assessment, public procurement. It also indicates that these controls can take place before the day of receiving by the applicant the information about the selection of the project for co-financing. It is justified by the particular subject of the control, since meeting the environmental requirements and regulations in the scope of public aid condition the possibility of obtaining support. Usually the verification of these areas takes place at the stage of the evaluation of the applications for project financing. It should be noted that in the financial perspective 2014-2020 the participation of the President of the Public Procurement Office in prior control of the largest contracts co-financed from EU funds is still envisaged.

In addition, the analysed Act, in Article 22, paragraph 3, introduced a significant novelty in the form of control of the ability of applicants for project financing under the non-competitive procedure and beneficiaries implementing projects selected for co-financing under such a procedure to implement them correctly and effectively. They may be in the form of prior checks, taking place before the date of receipt by the applicant of the information on the selection of the project for co-financing and serve to check the applicant's administrative potential to implement the project. This provision gives the possibility to carry out a kind of systemic control at beneficiaries, which do not have to refer to a specific project and expenses related to it, but will check the actual readiness and ability of the applicant or beneficiary to correctly and effectively achieve the objectives. It should be noted, however, that a similar mechanism was introduced in connection with the implementation of one of the operational programmes in the 2007-2013 financial perspective, namely "Infrastructure and Environment". This is because the possibility of systemic control was provided for at beneficiaries, aimed at verifying the correctness, effectiveness and compliance with law of the procedures applied by them in pursuit of correct implementation of projects. In practice, the mechanism of this control should be limited to the verification of entities implementing the main, strategic projects under a given operational programme, for example the General Directorate for National Roads and Motorways, which has the largest pool of funds for large infrastructure projects (Szymański, 2014b, pp. 28-34).

2. Accounting and administrative responsibility for public managers and the role of the Supreme Audit Office

The Supreme Audit Office (NIK) performs control activities over public funds, which include funds from the European Union budget. The NIK is the supreme body of state control, is subject to the *Sejm* of the Republic of Poland, and acts on the basis of collegiality. It is a functionally separate State body within the scope of implementing control tasks in the State. The NIK controls and evaluates the activities of the government administration, local government administration, and other organisational units. Bodies of control, revision, and inspection operating in government administration and local self-governments cooperate with the NIK and are obliged to make available the results of audits, to carry out specific audits jointly under the direction of the NIK, and to carry out ad hoc audits at its request.

The use of funds from the European Union budget, which are managed and controlled by Polish authorities, legal persons and organisational units, is subject to control by the NIK. The results of audits of national entities implementing Community funds are presented to the *Sejm* of the Republic of Poland, the Government and other interested entities. The results of these audits are published on the NIK website. Acquisition and use of structural funds and the Cohesion Fund, as well as management of operational programmes financed through European funds and implementation by public administration entities of tasks relating to Poland's membership of the European Union are among the main areas of audit research conducted by the Supreme Audit Office. In accordance with its powers, the NIK controls the spending of public funds in terms of NIK control criteria (legality, economy, purposefulness and reliability), as well as examining management and control systems at various levels. The NIK's control activities in this regard allow strengthening of the mechanism for improving the public administration's management and control of EU funds in Poland, but do not replace internal control (Serowaniec, 2018, 242-244). Controls by the NIK make it possible to increase the accountability of public administration bodies to citizens, as well as the accountability of the European Commission to the European Parliament. In addition to the annual audit of the execution of the State budget, during which certain issues concerning the implementation and use of European funds are examined, in separate audits the NIK also examines such issues as:

1. the correct establishment and functioning of the management and control systems set up for each operational programme,
2. the results of the implementation of projects carried out under these programmes,
3. the institutional capacity of the administration for Poland's effective participation in the EU

The growing requirements for the accountability and transparency of Member States in the use of EU funds have also led to a change in the approach of the Supreme Audit Office to audits of projects co-financed by the EU budget. Originally, even before Poland's accession to the EU, the NIK's audits of the spending of pre-accession funds were limited solely to examining the compliance of project implementation, including the award of public procurement contracts and the use of funds by beneficiaries for their intended purposes. In the current financial perspective, the audit has already covered not only the implementation of projects, but also the preparation of public administration entities for the use of funds from the EU budget and the functioning of management and control systems in units involved in the management of individual operational programmes. In relation to the 2013-2020 financial perspective, the NIK examines not only the suitability of public administration bodies for the use of aid and the functioning of management and control systems, but also, among other things, the implementation of recommendations of the Audit Authority. It also performs a task performance audit, by examining, for example, the results achieved by implementing the project in the context of the principles of proper public finance management (i.e. economical, efficient, and effective spending of public funds). In his circular letter, the President of the Supreme Audit Office defined in detail the rules of proceeding during the audit of projects co-financed with structural funds, the Cohesion Fund, and other EU funds, including the presentation of findings concerning irregularities and their financial value. In a situation where an irregularity concerns undertakings co-financed using structural funds, an evaluation is made as to whether there are grounds to consider it an irregularity in the understanding of the EU or national regulations, and this is recorded in the control protocol. In accordance with the circular letter, the post-control application addressed to the manager of the controlled unit should include:

1. a description of the irregularities established, indicating the provisions of Community or national law infringed and their financial value
2. indicate whether the infringement of Community or national law involves an act or omission, and whether it results in damage or potential damage to the general budget of the EU
3. any information about the suspected fraud and the action taken concerning it.

In addition, an additional post-audit notice may be addressed to the head of the unit that granted the EU funding to the beneficiary, indicating the irregularity found that constitutes or may constitute a potential loss to the EU budget arising from financing unjustified expenditure (Mazur & Jurczyk, 2011, 45-57).

Other national entities entitled to control EU funds are the President of the Public Procurement Office (regarding the application of Public Procurement Law) and the Regional Chamber of Audit (regarding the management of EU funds by local governments).

3. The system of administrative controls and sanctions in the light of the European structural and investment funds

3.1 Financial correction – a punitive administrative sanction of a financial nature against a public finance sector entity

It follows from 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, 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 Council Regulation (EC) No 1083/2006 (OJ L 347/320), that the responsibility for investigating irregularities and making the required financial corrections and recovering amounts lies in the first instance with the Member States. It follows (Article 143) that responsibility for investigating irregularities, making the required financial corrections and recovering amounts also lies, in the first instance, with the Member States. Member States have to make the financial corrections required in connection with the individual or systemic irregularities detected in operations or operational programmes. Financial corrections consist of cancelling all or part of the public contribution to an operation or operational programme.

In order to implement the requirement under Article 143 of Regulation No 1303/2013, appropriate legal regulations were introduced in Poland through the Act of 11 July 2014 on the principles for the implementation of programmes in the area of cohesion policy financed in the financial perspective 2014-2020 (consolidated text: Journal of Laws of 2020, item 818). Financial correction refers (Article 2(12)) to the amount by which EU co-financing for projects or the operational programme is reduced due to an individual or systemic irregularity. This is regulated in detail by Articles 24 and 25. It follows from these provisions, inter alia, that:

1. Where an individual or systemic irregularity is discovered, the competent institution must take appropriate action
2. the imposition of a financial correction must be preceded by investigative action
3. the amount of financial correction resulting from the individual irregularity is equal to the amount of expenditure incurred in an irregular manner in the part corresponding to the EU co-financing.

Implementing regulations were issued on the basis of the Act of 11 July 2014. First of all, it is necessary to point to the Regulation of the Minister of Development of 29 January 2016 on the conditions for reducing the value of financial corrections and expenditure improperly incurred in relation to the award of contracts (consolidated text: Journal of Laws of 2018, item 971 as amended). It regulates, among others, the conditions for reducing the value of financial corrections.

An important supplementation of the procedures relating to the protection of the correctness of EU funds spending are the provisions of the Act of 27 August 2009 on public finance (consolidated text: Journal of Laws of 2021, item 305). It results from Article 60 item 6 of this Act that public funds constituting untaxed budgetary receivables of public and legal nature are, among other things, receivables from the return of funds intended for the implementation of programmes financed with the participation of European funds and other receivables relating to the implementation of projects financed

with the participation of these funds in addition to interest on these funds and on these receivables. Article 61 sect. 1 item 2 directly indicates that the authorities of first instance competent to issue decisions regarding these receivables are:

1. managing authorities, the body responsible for the implementation of the Connecting Europe Facility, the body acting as National Contact Point or National Co-ordination Body, as appropriate
2. entities belonging to the public finance sector: programme operators, intermediate bodies, implementing bodies or bodies that signed the co-financing agreement with the beneficiary, and, if they are authorised by the managing authority, the body responsible for the implementation of the Connecting Europe Facility, the body acting as National Contact Point or National Co-ordination Body respectively, and the implementing body or the body that signed the co-financing agreement with the beneficiary.

The decision issued in the first instance may be appealed against to the appeal body, and the decision may be appealed against to the voivodeship administrative court.

It follows from Article 207 of the Public Finance Act that the imposition of financial correction results in the necessity not only of its repayment, but also of the payment of interest at the rate specified for tax arrears, calculated from the date of transfer of funds within 14 days from the date of delivery of the final decision.

Analysis of the jurisprudence of administrative courts (examining appeals against decisions on financial corrections) indicates that courts attach great importance to the correctness of spending funds from the European Union budget, considering irregularities in their spending as having a harmful effect on the European Union budget by charging this budget with unjustified expenditure.

Treating the returned amounts of misused public funds on the same basis as tax debts is a solution that strongly disciplines entities using these funds. This is because quite severe tax regulations will apply. For example, so-called third parties will be responsible for the return of a subsidy by a capital company, i.e. for example: members of the management body of this company (Article 116 of the Tax Ordinance Act of 29 August 1997), a divorced spouse of an individual who received a subsidy (Article 110 of the Tax Ordinance) or another family member of the entity that received such a subsidy. The catalogue of these persons in the Tax Ordinance is quite broad. What is important is that in practice it is very difficult to free them from this responsibility.

Applying tax regulations to the obligation to reimburse subsidies also raises numerous practical problems. It is not always clear what the relationship between EU and national regulations is. Such disputes concern, for example, the issue of the statute of limitations of the obligation to return a subsidy (Judgment of the Supreme Administrative Court of 26 November 2020, I GSK 379/18).

3.2 Individual responsibility of persons who commit irregularities in the handling of EU funds

Irregularities in the spending of funds from the European Union budget also give rise to individual responsibility of a specific natural person, who may be blamed for the irregularity. This is a specific type of responsibility, which is not a criminal responsibility (although the regulation sometimes resembles criminal regulations); it is a type of official, administrative responsibility. The legal basis is the Act of 17 December 2004 on liability for violation of public finance discipline (consolidated text: Journal of Laws of 2021, item 289). Responsibility lies with the head of the organisational unit in which the irregularity occurred. It is also possible to hold liable the employee who performed specific actions that led to the irregularity.

This liability does not apply to legal persons, in which case persons who, for example, were employed by such legal persons and broke the law by their actions are liable. In principle, this responsibility is of a clerical, so to speak intra-administrative nature, however – and this may be quite controversial from the point of view of constitutional standards – it goes beyond the sphere of public

administration. Pursuant to Article 4 of the above Act, persons who are members of the managing body of an entity that is not included in the public finance sector to which public funds have been transferred for use or disposal, or who manage the property of such entities or entities, as well as persons who perform, on behalf of an entity that is not included in the public finance sector, to which public funds have been transferred for use or disposal, actions connected with the use or disposal of such funds, are also subject to liability for infringement of the public finance regulations (Winiarz, 2019, 940-954). Theoretically, "official" liability extends, therefore, to all situations in which public funds are transferred outside the public finance sector to entities that undoubtedly do not belong to the public administration. The question then arises as to how this responsibility differs from criminal responsibility. In Poland's constitutional purview, this is a very serious question, since disciplinary liability is decided by administrative bodies, whereas criminal liability can only be decided by the courts.

The penalties that may be imposed are: admonishment, reprimand, fine (between 0.25 and five times the average wage), prohibition from carrying out functions relating to the management of public funds (for a period of one to five years). Compared with criminal sanctions, they are quite severe. In fact, they are sometimes *more* severe than criminal sanctions. In particular, white collar criminal sanctions can more often be imposed in the form of suspended sentences. Meanwhile, the "non-criminal" sanctions described above cannot be suspended, sometimes depriving the individual of the possibility to continue exercising his/her profession. In addition, the imposition of these sanctions can mean the loss of employment, since even the imposition of a seemingly mild reprimand or fine triggers the consequences of a negative qualification assessment, as defined by separate regulations. This may mean (also for a university researcher!) the risk of dismissal (Gonet, 2019, 78-87).

Doubts also concern the concurrence of disciplinary and criminal liability. Pursuant to Article 25 of the Act, liability for violation of the public finance regulations is, as a rule, independent of liability defined by other provisions of the law. Exceptionally, in the event of instituting criminal proceedings for an act constituting at the same time a breach of public finance discipline, the proceedings for a breach of public finance rules will be suspended until criminal proceedings are completed. If a person is validly sentenced for an act that is at the same time a breach of the public finance discipline, the initiated proceedings for a breach of the public finance rules will be discontinued. It follows from this that the legislator treats criminal liability as a more severe liability, which "absorbs" disciplinary liability. However, if a person is first punished with a disciplinary offence, a subsequent conviction in a criminal trial does not abrogate the disciplinary liability. We very much doubt that the protection of the financial interests of the state and the EU is not excessive here. The Polish legislator prefers liability regimes rather than criminal liability, following the principle of efficiency. Indeed, the criminal procedure is long, but at the same time it ensures the protection of individual rights. Criticism of the Polish solutions is mitigated to some extent by the fact that the imposition of disciplinary sanctions is subject to the control of an administrative court.

Article 13 of this law indicates in an enumerative manner what acts (omissions) constitute torts that form the basis for the liability of a specific individual. These are:

1. granting or transferring funds relating to the implementation of programmes or projects financed with the participation of the Union or foreign funds without respecting or violating the procedures which apply to their granting or transfer
2. failure by the grantor or the transferor to clear funds relating to the implementation of programmes or projects financed with the participation of the Union or foreign funds in a timely manner
3. failure to determine the amount of funds relating to the implementation of programmes or projects financed by Union or foreign funds to be recovered, or determination of such an amount at less than that resulting from a correct calculation,
4. failure to recover the recoverable amount of funds relating to the implementation of programmes or projects financed by Union or foreign funds, or recovering a lower value than that resulting from a correct calculation

5. the unlawful cancellation, deferral, division into instalments, or limitation of the amount of recoverable funds relating to the implementation of programmes or projects financed with Union or foreign funds,
6. the use of public funds or funds transferred from public resources, connected with the implementation of programmes or projects financed with the participation of Union or foreign funds, contrary to their purpose or in violation of the procedures in force during their use Bielikow-Kucharska, 2016),
7. failure by the recipient or the beneficiary to account for the receipt or utilisation of public funds or funds transferred from public resources, relating to the implementation of programmes or projects financed with Union or foreign funds, within a specified period of time,
8. failure to reimburse, in due time or in due measure, the amount of public funds or funds transferred from public sources, relating to the implementation of programmes or projects financed with the participation of Union or foreign funds,
9. failure to transfer within the prescribed period or in the prescribed amount the reimbursed amount of public funds or funds transferred from public funds relating to the implementation of programmes or projects financed with the participation of Union or foreign funds, by the entity through which these funds are reimbursed.

The decision as to whether a tort has been committed is made by adjudicating commissions, which are independent of the executive power, acting on the basis of the regulations in force. The decision of the adjudicating commission may be appealed against to the Main Adjudicating Commission, and the decision of the latter may be appealed against to the administrative court.

3.3 Liability under public procurement law – financial liability of an administrative nature

Public funds, which include funds from the European Union budget, should be spent in accordance with the principles of fair competition, equal treatment of contractors, transparency, and proportionality. These principles are realised if the entities disposing of public funds implement the provisions of the Act of 11 September 2019. - Public Procurement Law (Journal of Laws of 2019, item 2019).

Spending public funds, including funds from the budget of the European Union, may be carried out with apparent or incorrect application of the Public Procurement Act. In order to avoid the effects of irregularities, the Act provides (Article 596) for the control of public procurement. The controlling bodies and the procedure and scope of their activities are specified in the Act. The inspection authorities plan and carry out the inspection after a prior analysis of the likelihood of an infringement of the law in the framework of the award of the contract. This analysis includes identification of subject and object areas in which the risk of violation of the law is the greatest.

In the case of spending funds from the budget of the European Union, prior control is also provided for. It will be carried out by the President of the Public Procurement Office before the conclusion of a contract, if the value of the contract for:

1. construction works is equal to or exceeds the PLN equivalent of €20,000,000,
2. supplies or services is equal to or exceeds the PLN equivalent of €10,000,000.

In the event of irregularities in the application of the Public Procurement Act, a financial penalty may be imposed on the contracting authority. Its amount depends on the value of the procurement. The maximum penalty amounts to PLN 150,000, i.e. approximately €35,000. The fine is imposed by the President of the Public Procurement Office through an administrative decision. The proceeds constitute income from the State budget.

In the event of a breach of Public Procurement Law, the provisions of the aforementioned Act on Liability for Breach of Public Finance Discipline shall also apply. Obviously, if a breach of criminal law occurs, the perpetrator may be held criminally liable. However, the latter two types of liability will relate to a specific individual who has breached the law.

4. Employee liability

An employee hired under an employment agreement, is obliged to diligently and conscientiously perform his or her duties (Article 100 of the Act of 26 June 1974 – the Labour Code, hereafter: the Labour Code). Negligence in this area may result in being held responsible for order, material liability, and disciplinary liability (certain professional groups), and in some cases can even lead to termination of the employment relationship (see: Staszewska, 2013; Piszczek, Stefański, 2017; Mitrus, 2018).

An employee who breaches his/her duties relating to the implementation of a project financed by European funds must take into account the possibility of being held materially liable if, as a result of his/her behaviour, the employer suffers damage (Article 114 of the Labour Code). This applies in particular to employees involved in the implementation of the project on the side of the beneficiary, e.g. those entrusted with keeping documentation and accounting (as adopted by the Supreme Court in its Judgment of 21 November 2018, I PK 167/17, a chief accountant may be held materially liable for errors in keeping accounting records). Irregularities occurring in this area may even lead to a situation in which the beneficiary will have to return the received funds, or they will be reduced. An employee who damages an employer through his or her fault will be obliged to pay compensation to the employer, to an amount that cannot exceed three months' remuneration for that employee's work. However, if the employee has caused the damage intentionally, he/she will be obliged to compensate the employer for the full amount of the damage.

However, there is a particular risk of abuse to the detriment of the EU's financial interest among employees working in positions relating to the handling of the call for applications for funding and the selection of projects for funding, conclusion of grant agreements, handling of the appeal procedure, handling of applications for payment, and carrying out the control of project implementation, also in managerial and director positions. Abuse committed by an employee in this area (such as accepting financial benefits) may become a reason justifying the termination of his/her employment contract, or even lead to its termination without notice, in accordance with the procedure provided for in Article 52 of the Code of Commercial Partnerships and Companies (due to a serious breach of basic employment duties or committing a crime, which makes it impossible to continue the employment relationship if the crime is evident or was confirmed by a final court judgment, with loss of the entitlements necessary to perform work in a given position, attributable to the employee).

5. Alignment of Polish criminal law with EU law on the protection of EU financial interests

The provisions of Polish criminal law overwhelmingly correspond to the requirements of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on combating by means of criminal law abuse of the Union's financial interests. The first major amendment of the legislation in this area concerned the Fiscal Criminal Code (hereinafter the CC) and took place in 2003. At that time, a provision was added to the Polish Criminal Code (Article 3(3a) of the Code), under which, regardless of the provisions in force at the place where the fiscal offence was committed, the provisions of the Code also apply to a Polish citizen when a fiscal offence defined in Chapter 6 (fiscal offences and fiscal transgressions against tax obligations and settlements of subsidies or grants) and Chapter 7 (fiscal offences and fiscal transgressions against customs obligations and rules of foreign trade in goods and services), directed against the financial interests of the European Communities, is committed abroad. In addition, a provision has been introduced under which the provisions of the Fiscal Criminal Code apply also to Polish citizens and foreigners who, while residing on the territory of the Republic of Poland, induce or provide assistance to commit abroad a fiscal offence directed against the

financial interests of the European Communities, as defined in Chapters 6 and 7 of the Criminal Code (Article 3(5) of the Criminal Code). It has also been decreed that, within the meaning of the Code, a public-law receivable, including a tax, is also a receivable constituting revenue from the general budget of the European Communities or a budget managed by or on behalf of the European Communities, which is the subject of a fiscal offence or fiscal transgression (Article 53(26a) of the Code), and the term "taxpayer" used in Chapter 6 of the Code also means an entity obliged to pay the above-described receivables (Article 56 (30a) of the Code). As a result of the changes made, the financial interests of the European Communities have been included among the objects of protection of criminal fiscal legislation (Sepioło-Jankowska, 2020, 156-157). The types of offences discussed in Task 2 found in the Criminal Code and the Fiscal Criminal Code provide comprehensive protection of the financial interests of the EU.

However, reservations may be aroused by the fact that Criminal sanctions have not been adjusted to the EU requirements in the case of one of the important fiscal offences, i.e. Article 82 of the Criminal Code, which penalises the exposure of public finance to depletion by improper payment, collection or misuse of subsidies or subventions, which is only punishable by a fine of up to 240 daily rates.

6. The liability of collective entities for offences against the EU's financial interest

The liability of collective entities for offences against the EU's financial interests is governed by the Act of 28 October 2002 on the Liability of Collective Entities for Acts Prohibited under Penalty (hereinafter the "CISA"). A collective entity within the meaning of the Act is a legal person and an organisational unit without legal personality to which separate regulations grant legal capacity, excluding the State Treasury, local government units and their associations. A collective entity is also a commercial company with the participation of the State Treasury, a local government unit or an association of such units, a capital company in organisation, an entity in liquidation and an entrepreneur who is not a natural person, or a foreign organisational unit (Article 2 of the Acts). A collective entity is subject to liability for a prohibited act where a natural person acts on behalf of, or in the interest of, the collective entity under a power or obligation to represent the collective entity, make decisions on its behalf, exercise internal control, either in the event of exceeding such power or failing to fulfil such obligation, or being in any other personal relationship with the collective entity as defined by law (Article 3 of the Acts). The fact of having committed a prohibited act by such a person must be confirmed by a legally valid conviction or a verdict conditionally discontinuing criminal proceedings or proceedings for a fiscal offence against such a person, a decision to grant such a person a permit for voluntary submission to accountability or a court decision to discontinue proceedings against such a person due to circumstances excluding prosecution of the perpetrator (Article 4 of the Acts of Criminal Procedure).

The Act on Liability of Collective Entities applies to almost all crimes and fiscal offences discussed in Task 2. Misappropriation of property stipulated in Article 284 of the Criminal Code and abuse of office stipulated in Article 231 of the Criminal Code remain outside the scope of regulation.

A collective entity may be subject to a fine in the amount of PLN 1,000 to PLN 5,000,000, however, not higher than 3% of the revenue earned in the financial year in which the offence giving rise to the collective entity's liability was committed, as well as a number of prohibitions set forth in Article 9 of the APSI, such as the prohibition to receive grants, subsidies or other forms of financial support from public funds or, for example, exclusion from competing for public contracts.

7. The forfeiture, phenomenal and staged forms

Polish criminal law provides for regulations concerning the forfeiture of instruments used to commit offences, as well as proceeds from offences (Articles 44-45a of the Penal Code and 22 of the Fiscal Penal Code). As regards inciting and aiding and abetting, this is also punishable under both the Penal Code and the Fiscal Penal Code (Article 18 of the Penal Code and Article 20 § 2 of the Fiscal Penal Code). However, liability for attempt is regulated slightly differently under both these acts. Attempts to commit offences set out in the Penal Code are punishable and the perpetrator is liable for

them within the limits of the threat stipulated for the offence they attempted to commit (Articles 13 and 14 of the Penal Code). As regards fiscal offences, however, attempting a fiscal offence punishable by up to one year of imprisonment or a lesser penalty is punishable only if the Code so provides. The penalty is also different in that an attempt to commit a fiscal offence may be punished by a penalty not exceeding two-thirds of the upper limit of the statutory threat provided for the fiscal offence (Article 21 of the Fiscal Penal Code).

8. The Central Anti-Corruption Bureau

The Central Anti-Corruption Bureau (CBA) was established in 2006. It is a special service for combating corruption in public and economic life, in particular in state and local government institutions, as well as for combating activities detrimental to the economic interests of the state (Article 1(1) of the Act of 9 June 2006 on the Central Anti-Corruption Bureau, i.e. Journal of Laws of 2019, item 1921, hereinafter: "the Act on the CBA"). The tasks of the CBA can be divided into three areas. The first includes activities involving the identification, prevention and detection of offences specified in the Act and the prosecution of their perpetrators. The catalogue of these offences is very broad and includes, inter alia, the following offences described in TASK 2: fraud, bid rigging, offences against documents, as well as offences against tax obligations and settlements of subsidies and subventions, set forth in Chapter 6 of the Fiscal Penal Code, if they remain in connection with corruption or activities detrimental to the State "s economic interests, as well as official offences. The second area of the CBA's tasks comprises control activities, inter alia, within the scope of the observance of procedures stipulated by the law, the correctness of performance of agreements on public-private partnership, or the truthfulness of asset declarations or declarations on the conduct of business activities by persons performing public functions. The last area of the tasks of the CBA concerns, in turn, conducting analytical activities concerning phenomena occurring in the area of its competence (Art. 2 of the Act on the CBA). The CBA is headed by the Head of the Central Anti-Corruption Bureau, who is a central organ of the government administration supervised by the Prime Minister. The activity of the Head of the CBA is subject to control by the Sejm (Art. 5 sections 2 and 2a of the Act on the CBA).

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POLAND - SECTION II

I. *Stockpile capacities in the RescEU framework*

Dr. Jagoda Jaskulska

Summary: RescEU is a support mechanism currently playing an important role in the fight against the Covid-19 pandemic. It gathers strategic stocks of medical supplies ready to support the neediest Member States in an emergency situation. Poland is not among the countries in which these stocks are located. However, the increased demand for medical supplies, especially personal protective equipment in the time of a pandemic, makes it necessary to analyse the accumulation of medical stocks in Poland, the procedures according to which purchases of medical supplies are made at the national level, and whether and how activities undertaken in this area are financed using EU funds. The study also considers the potential for fraud in this area, threatening the financial interests of the EU, and the mechanisms undertaken to counteract possible fraud in the area of health care.

1. Introduction

RescEU is a complementary system from the 2019 EU Mechanism for Civil Protection. It assumes the creation of a reserve that pools resources (such as firefighting aircraft, water pumps, urban search and rescue teams, field hospitals, medical emergency teams) to respond more quickly to disasters and assist Member States affected by them.

2. National procedures for the implementation of national stockpile capacities

On 19 March 2020. The European Commission decided to set up a strategic stockpile of medical supplies (respirators, protective masks, vaccines, therapeutic agents, laboratory stocks) under the RescEU mechanism to assist EU Member States in the fight against the Covid-19 pandemic. The distribution of equipment collected under the RescEU is managed by the Emergency Response Co-ordination Centre (ERCC). The Czech Republic, Croatia, Montenegro, Italy, Lithuania, Northern Macedonia, Serbia and Spain, among others, have so far benefited from this assistance. Common European stocks of medical equipment collected under RescuEU are currently stored in 9 Member States: Belgium, Denmark, Germany, Greece, Hungary, Romania, Slovenia, Sweden and the Netherlands. So far, no RescuEU stockpiles have been located in Poland.

Meanwhile, Poland joined in the provision of humanitarian aid under EU Mechanism for Civil Protection, for example by organising the transport of medical aid to Belarus in June 2020: 1 million medical masks, 4 million protective masks, 250,000 litres of disinfectant liquid, 50,000 aprons and overalls, 20,000 visors as well as 30 respirators and 21,000 packs of medicines were delivered. As part of European solidarity in treating patients and sharing medical equipment and personal protective equipment, Poland also sent medical teams and 20,000 litres of disinfectant to Italy to help fight the pandemic.

In Poland, the entity responsible for maintaining and storing medical reserves is the Governmental Agency for Strategic Reserves, subordinate to the Prime Minister, which operates on the basis of the Act of 17 December 2020 on strategic reserves. The following make up the medical reserves: medicines, serums and vaccines, disinfectants, dressings, protective clothing, disposable medical devices, medical equipment, accommodation equipment. The procedure for the purchase of goods and services within the strategic reserves is conducted by means of a two-stage, closed tender in compliance with the provisions of the Act of 5 August 2010 on the protection of classified information. In cases where the provisions on public procurement do not apply, the Agency will purchase medical supplies in accordance with the procedure set out in Article 13(4) and (5) of the Strategic Reserves Act, applying transparent, non-discriminatory and competitive conditions for vendor selection in this regard.

Funds from the EU budget are public funds within the meaning of the Polish Public Finance Act (Szpringer, 2012). Their disbursement for medical supplies by entities which are also contracting authorities within the meaning of the Act of 11 September 2019 on public procurement, including by State authorities or independent public health care institutions, requires consideration of certain rules and regulations applicable in this area. These funds should be spent in a purposeful and economical manner, ensuring the best results from given outlays and, moreover, in a transparent, effective, rational manner, observing the principle of equal treatment and fair competition. As of 1 January 2021, new legal regulations in the area of public procurement are in force in Poland. Among other things, the threshold for public procurement has changed. Previously, the use of public procurement procedures was mandatory from a threshold of €30,000 net upwards. Currently, it is a fixed amount of PLN 130,000 net. Since 2018, there has been full electronification for procurement above the EU threshold in Poland. Such contract award notices are published on the TED (Tenders Electronic Diary), a supplement to the Official Journal of the EU. The new law introduces mandatory electronification also for procurement below the thresholds.

An additional obligation on the part of entities obliged to apply public procurement procedures is the preparation (and updating) by contracting authorities of a plan of procurement procedures which they intend to carry out in a given financial year and its announcement in the Public Procurement Bulletin. Launching larger procurement procedures (with a value equal to or exceeding the EU threshold) also requires the contracting authority to conduct a prior analysis of needs and requirements. The new legal regulations also place greater emphasis on the negotiating elements of public procurement procedures.

The new Polish public procurement law clearly distinguishes between procedures for contracts whose value exceeds the EU thresholds and contracts of lower values. On the grounds of procurement below the EU thresholds, the main type of procedure leading to the selection of the most advantageous offer and conclusion of the procurement agreement is the basic procedure which exists in three variants: no negotiations, possible negotiations, and mandatory negotiations. In the simplest, first variant, a contract encompasses the following stages: announcement of a contract together with determination of the CSG, submission of offers, evaluation and selection of the best offer. In the case of contracts with a value equal to or exceeding the EU thresholds, procurement procedures are most often conducted under the open tender procedure, in which all interested contractors may submit tenders in response to a contract notice. The Public Procurement Law also provides for other modes of procedures for the award of national and EU contracts, including, among others, the mode of negotiations without an announcement or sole-source procurement, which, due to the negative impact on competition, may be used only in special situations (Kola ed., 2020).

Procurement of medical supplies is of a specific nature. Contracting authorities may have problems with balancing the line between describing the subject of the contract and not impeding fair competition as one of the basic principles of public procurement law. If the hospital formulates special requirements as to the quality of the goods to be procured, this may be associated with elimination of some of the contractors operating in a given segment of the medical market and may narrow the circle of potential contractors. However, this will be permissible if objective circumstances support it (Gawrońska-Baran, 2018; Wojtczyk, 2018). According to the National Board of Appeal:

“The contracting authority has the right to define the subject matter of the contract so as to achieve the expected effect, even if this excludes the possibility of admitting all contractors operating on the market to perform the contract. It is the contracting authority’s right to describe the subject matter of the contract in such a way that its performance will satisfy certain needs in the broadest context. However, the contracting authority must each time demonstrate its legitimate needs, if not in the individual provisions, then during the review of its decision, e.g. when considering an appeal filed. At the same time, he should take care to ensure rational expenditure of funds, and above all to ensure proper performance of the future contract”.

The disbursement of EU funds for contracts with a value lower than that specified for public contracts or by entities not covered by the Public Procurement Law requires the application of the principle of competitiveness (for contracts with an estimated value exceeding PLN 50,000 net) or market

discernment (for contracts with an estimated value from PLN 20,000 net to PLN 50,000 net inclusive) (Guidelines on the eligibility of expenditure under the European Regional Development Fund, the European Social Fund and the Cohesion Fund for 2014-2020; M. Tomczak, P. Myszczyńska, 2020).

The outbreak of the Covid-19 pandemic has presented Member States with a new challenge: that of providing medical personnel (and others involved in combating the virus) with personal protective equipment, including face masks. The sudden global increase in demand for personal protective equipment and medical devices has made them a scarce and desirable commodity, and protracted delivery times have only impeded the fight against the pandemic. Council recommendation of 20 July 2020 on Poland's 2020 national reform programme, which contains the Council's opinion on Poland's 2020 convergence programme (2020/C 282/21), underlines in point 7 the importance of adequate preparedness of the health sector in case of an emergency. Improved purchasing strategies, diversified supply chains and strategic reserves of essential products and materials were identified as key elements of the health sector's preparedness plan for such situations.

Poland decided to facilitate the procedure for procurement of services or supplies necessary to counter Covid-19, exempting in this respect the application of public procurement rules if there is a high probability of rapid and uncontrolled spread of the disease or if the protection of public health requires it. The contracting authority is then obliged to publish basic information about the contract in the Public Procurement Bulletin, including among others indicating the factual circumstances justifying the award of the contract without applying the provisions on public procurement.

A similar solution is also provided for in Article 46c of the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans according to which: "The provisions on public procurement shall not apply to contracts for services, supplies or works awarded in connection with preventing or combating an epidemic in an area where an epidemic emergency or a state of epidemic has been declared."

According to the Communication from the Commission Guidance from the European Commission on using the public procurement framework in the emergency situation relating to the COVID-19 crisis 2020/C 108 I/01, Member States may introduce certain relaxations of the rigours of public procurement in connection with a pandemic (e.g. direct procurement instead of competitive tendering) for this period. Exclusion of application of public procurement rules in this situation, although justified in many aspects, may nevertheless raise concerns about respect for principles such as equal treatment of contractors or rational spending of public funds.

In addition, medical supplies are a specialised type of product, and their introduction on the market requires a detailed conformity assessment to ensure their safe use. Currently, issues concerning medical devices are still regulated by Directive 90/385/EEC and Directive 93/42/EEC, and at the national level by the Act of 20 May 2010 on medical devices. The outbreak of the pandemic and the increase in demand for medical devices and personal protective equipment prompted the European Commission to undertake a recommendation of 13 March 2020 introducing certain relaxations and derogations for the assessment of the conformity of these goods with EU requirements. Regarding medical devices, the European Commission has issued a Communication: Guidelines on the adoption of Union-wide derogations for medical devices in accordance with Article 59 of Regulation. The 23 April 2020 amendment to the MDR Regulation delayed the entry into force of the Regulation (until May 2021.) and further provides that, by way of derogation, the competent authority may, upon a duly justified request, allow the placing on the market or putting into service on the territory of the Member State concerned of a specific device for which the relevant procedures have not been carried out, but the use of which is in the interest of public health, safety, or patients' health.

Referring to the European Commission Recommendation of 13 March 2020 (2020/403), the Council of Ministers in Poland adopted Resolution No 33/2020 on specific arrangements for the supply of personal protective equipment necessary to counter the spread of the SARS-CoV-2 virus. Based on its recommendations, the Council of Ministers authorised the Minister of Health to purchase:

- personal protective equipment that:

- meets the guidelines of the national consultant in infectious diseases published in the Public Information Bulletin on the website of the Minister of Health (see here);

- may be purchased before the completion of the assessment of their conformity and without the CE mark no more than 30 days from the date of the end of the epidemic situation in relation to SARS-CoVid- infections

- may be used only by health-care personnel, including sanitary transport, services, and other persons involved in the efforts to control the SARS-CoV-2 virus and the Covid-19 disease caused by it and to avoid further spread of this virus and the disease caused by it.

- Medical devices:

- if they are authorised in countries other than the Member States of the European Union and the Member States of the European Free Trade Association (EFTA) - parties to the Agreement on the European Economic Area.

Attention is drawn to the different formulation of the exemption in relation to medical devices, which is more general and broader than in points 5, 7, and 8 of the European Commission Recommendation (see Łojko, 2020).

The European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardisation (CENELEC), followed by the Polish Committee for Standardisation, have made a list of standards available for free distribution for certain medical devices and personal protective equipment, including masks, in time to combat the Covid-19 outbreak.

In addition, on 6 March 2020. Poland joined the Joint Procurement Agreement (JPA). Previously, Poland's decision not to join this EU mechanism was taken due to concerns about producer liability (based on the experience of Member States that decided to purchase A/H1N1 flu vaccines in the past). For this reason, Poland did not participate in tenders launched under the joint procurement procedure launched before 6 March 2020, including not participating in the first tender for the joint procurement of medical countermeasures in connection with Covid-19 (Poland has not joined the Agreement on the Joint Procurement of Medical Countermeasures). The purchase of vaccines for Covid-19 is also carried out through joint procurement. In June 2020, 27 Member States authorised the European Commission to negotiate the purchase of vaccines on their behalf (the EU is to secure the supply of up to 2.5 billion doses of vaccine). Member States should not make arrangements for contracted vaccines or European Commission negotiations on their own, but they can set pools for possible vaccine supply with manufacturers not covered by the joint procurement strategy.

3. The national procedure/RescEU procedure relationship

Under the 2016-2020 Cohesion Policy, Poland has been allocated over €82.5 billion. In the Partnership Agreement it committed to achieve 11 thematic objectives in these years, implemented through operational programmes, managed by the ministry responsible for regional development, and regional programmes, managed by the boards of voivodeships.

The general framework for the allocation of EU funds in the health sector is defined by:

- The Europe 2020 Strategy, which assumes the evaluation of programmes implemented with the participation of EU funds for compliance with the principles of: sustainable development, equal opportunities, information society.

- The Third Health Programme. The general objectives of the Programme are to complement, support, and add value to the policies of the Member States in order to improve the health of Union citizens and reduce health inequalities by promoting health, encouraging innovation in health, increasing the sustainability of health systems and protecting Union citizens from serious cross-border health threats.

In addition, the strategic documents in the health sector are:

- The Partnership Agreement defining the directions of investments in 2014-2020 of three EU policies in Poland: the Cohesion Policy, the Common Agricultural Policy, and the Common Fisheries Policy

- The Policy Paper for Health Care 2014-2020. The National Strategic Framework, a basic strategic and implementation document defining the health priorities of the State with objectives, directions of intervention, the projected actions for 2014-2020, and their implementation framework, including four operational objectives:

- Development of health prevention, diagnostics and corrective medicine targeting the main epidemiological problems in Poland.

- Counteracting negative demographic trends by developing care for mothers and children and the elderly.

- Improving the effectiveness and organisation of the health care system in the context of changing demographic and epidemiological situation and support of scientific research, technological development, and innovations in health care.

- Supporting the system of educating medical personnel in the context of adapting resources to changing social needs.

Based on the above assumptions, the funds in the health sector at the national level are divided into:

1. National Operational Programmes:

a) Operational Programme Infrastructure and Environment

Priority axis IX, measures within the health sector:

- Measures and infrastructures of medical rescue

- Operations and infrastructures of supra-regional medical entities and diagnostic units co-operating with them in the field of "activity" diseases and mother and child care.

The allocation for OP IX of the I&E OP amounts to €440,178,525 plus 6% of the performance reserve (i.e. €28,096,502).

b) Operational Programme Knowledge-Education-Development

Priority axis V: Support for health protection, covering:

- implementation and development of prophylactic programmes in the field of diseases negatively affecting labour resources dedicated to persons of working age

- implementation of pro-quality measures and organisational solutions in the healthcare system facilitating access to affordable, sustainable and high-quality healthcare services

- improving the quality of higher education on medical faculties

- development of professional competencies and qualifications of medical personnel responding to epidemiological and demographic needs of the country.

The allocation for priority axis V of the Programme Knowledge-Education-Development is over €357 million.

2 Regional Operational Programmes:

Sixteen Regional Health Programmes managed by self-governmental institutions – health policy programmes developed by voivodeship self-governments for a given self-governmental community (voivodeship, group of *poviats*).

The already referred to Council Recommendation of 20 July 2020 (2020/C 282/21), in point 8, it was recalled that the EU legislator enabled Member States to mobilise all hitherto unused resources from the European structural and investment funds to counter the extraordinary effects of the Covid-19 pandemic. Poland took advantage of this solution by introducing, among others, changes to the Operational Programme Infrastructure and Environment 2014-2020, providing for the use of EU funds to purchase personal protective equipment (including protective masks). The scope of activities financed under the programme and the list of entities eligible for co-financing were supplemented. The so-called fast-track procedure was introduced (approved by the European Commission, assuming no need for a positive opinion on the advisability of the investment, resignation from arrangements within the Steering Committee and examination of compliance with the maps of health needs). These measures enabled fast use of additional resources from the cohesion policy funds: the European Social Fund, European Regional Development Fund, the Cohesion Fund for the health sector.

Examples of projects implemented at the national level relating to the purchase of individual protection measures to combat COVID-19 co-financed using the funds of the I&E OP:

"Purchase of individual protection measures as a necessary action to prevent, counteract and combat COVID-19 - stage I" (EU co-financing: PLN 182,078,125.00)

"Purchase of personal protection equipment as a necessary measure to prevent, counteract and combat COVID-19 - phase II" (EU co-financing value: 36,161,562.50 PLN)

"Purchase of personal protection equipment and disinfectants as a necessary measure to prevent, counteract and combat COVID-19 in Mazovia" (EU funding value: 18,400,000.00 PLN).

From the beginning of 2021 until the end of March, a further 7 agreements were concluded for the co-financing of projects to a total value exceeding PLN 30 million (PLN 25 million in EU co-financing).

To fight the Covid-19 pandemic, changes were also made to the Knowledge, Education, Development operational programme. For example: with EU funds for 2014-2020, medical universities created medical simulation centres (places where students could develop practical skills), equipped with modern medical equipment. The Minister of Funds and Regional Policy and the Minister of Health agreed that this equipment would be used to save the lives and health of patients at Covid-19.

It was also decided to reallocate funds from the regional operational programmes for pandemic-related purposes, including the purchase of personal protective equipment and medical equipment (PPE) for health sector entities.

4. Criminal offences, controls procedures and risk of fraud affecting the EU's financial interest in this sector at national level.

Fraud is any intentional act or omission affecting the EU's financial interests which consists of: the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the EU's budget; non-disclosure of information in violation of a specific obligation, with the same effect; misapplication of such funds for purposes other than those for which they were intended. The perpetration of fraud has the most serious consequences, not excluding criminal liability.

The most commonly identified fraud regarding the use of EU funds are corruption, forgery, collusion and conflict of interest. Institutions specialising in combating fraud in Poland are: the Internal Security Agency (in particularly sensitive spheres of the functioning of the state and the economy), the Central Anti-Corruption Bureau (regarding combating corruption in public and economic life), the Police and Prosecutor's Office (bodies responsible for the prosecution of crimes), the Office of Competition and Consumer Protection (responsible for conducting antimonopoly proceedings in cases of practices restricting competition), and the Public Procurement Office (responsible for combating and counteracting crime in the public procurement process). Furthermore, by the Ordinance of the Council of Ministers of 1 July 2003, the Government Plenipotentiary for Combating Financial Irregularities to the Detriment of the Republic of Poland or the EU was appointed within the Ministry of Finance,

responsible, inter alia, for initiating, co-ordinating and implementing measures to secure the financial interests of the EU.

The Infrastructure and Environment Operational Programme, which is also relevant to the health sector, has developed guidelines for addressing suspected fraud. Among the measures aimed at preventing the occurrence of fraud are:

- establishment of an anti-fraud culture (culture of ethics), addressed primarily to the employees of all the institutions in the operational programme implementation system

- clear division of responsibilities in the implementation of management and control systems in line with EU requirements and in verifying that these systems are effective in preventing, detecting, and correcting fraud

- providing training and raising awareness on fraud issues

- the design of an effective internal control system

- specific actions to counter the most commonly identified fraud (such as conflict of interest, corruption, and document crime)

- proper identification of fraud (creation of mechanisms enabling the detection of fraud, including an effective control system, carrying out an analysis of the risk of fraud and its use in the preparation of annual control plans, and measures to detect collusive tendering).

The Guidelines also clarify the course of action in relation to suspected fraud, as well as issues relating to reporting it.

Additionally, in the health sector, the Ministry of Health developed a policy addressed to Intermediary Institutions on introducing mechanisms for preventing and combating fraud for priority axis V of the Operational Programme Knowledge-Education-Development and priority axis IX of the Operational Programme Infrastructure and Environment, which includes a description of activities on three levels:

- methods for counteracting fraud

including preventive measures (ethical culture, management and control system, counteracting conflict of interest, training and raising awareness of employees), identification and reporting of fraud, information, reporting and correction

- fraud risk management

- analysis of the risk of occurrence of fraud in these areas

Similar mechanisms are developed within Regional Operational Programmes in the individual provinces.

It is worth pointing out that "Special Report 6/2019 of the European Court of Auditors: Tackling fraud in EU cohesion spending: managing authorities need to strengthen detection, response and co-ordination" made some recommendations for the future. The report recommended that during the negotiation and adoption process of the CPR for the 2021-2027 programming period, the co-legislators should consider issues such as:

- making compulsory the adoption of national strategies or anti-fraud policies and the use of proper data analytics tools (e.g. Arachne)

- introducing sanctions and penalties for those responsible for fraud against the EU's financial interests.

The issue of control of the implementation of measures financed by EU funds in 2014-2020 (including measures implemented in the health sector) is regulated at the statutory level. In accordance

with Article 22 of the Act of 11 July 2014 on the principles of implementation of programmes in the area of cohesion policy financed in the financial 2014-2020 perspective, the operational programme implementation controls include:

- verifications of expenditure aimed at checking the correctness and eligibility of the expenditure incurred (including: payment application checks; on-the-spot project checks, which may also be carried out after the completion of project implementation; cross-checks to ensure that expenditure incurred in projects is not double-financed, when a beneficiary implements more than one project or when the beneficiary implemented projects in the years 2007-2013);

- controls at the end of the project, which serve to check completeness and compliance of documentation procedures relating to the project;

- durability checks, conducted after completion of project implementation in order to verify whether any unauthorised modifications have taken place.

Circumstances relating to the Covid-19 pandemic may be the basis for suspending the control, if its performance is due to the pandemic impossible or significantly hindered, unless it is possible to conduct them by remote work or with the use of electronic means of communication.

The area of spending and use of EU funds is also subject to controls carried out under separate regulations at the EU level directly by the European Commission, the European Court of Auditors, and at the national level additionally by the President of the Public Procurement Office, the Audit Institution (Ministry of Finance) or the Supreme Chamber of Control.

It would appear that the greatest problem in the health sector in recent times concerning the purchase of medical supplies, which may threaten the financial interests of the EU, is the presence on the market of products which do not meet the required standards and are unsafe. This has to do with the fact that during the pandemic, demand for medical supplies increased significantly, including personal protective equipment and medical devices, and it became crucial for Member States to obtain them quickly.

As part of the support mechanism (EU Emergency Support Instrument), the EU provided 1.5 million medical masks for healthcare workers to 17 EU countries and the UK, of which over 600,000 masks went to Poland. The masks provided by the EU were not marked with the CE mark but were supposed to meet the standards provided for FFP2 type masks. However, the Central Institute for Labour Protection in Poland raised objections to the tests performed by the manufacturer and took action to verify their quality. As a result of the inspection, it was established that the masks do not meet FFP1, FFP2 or FFP3 standards (similar findings were made in the Netherlands or Belgium). The Minister of Health of Poland initially informed the European Commission about the referral of masks for verification by the national institution and then about the results of the quality control tests. While waiting for CIOP to verify the quality of the masks, Poland did not request a second tranche of masks. The European Commission ordered similar tests in other Member States, which also turned out to be negative. As a result, the European Commission stopped further orders and deliveries of the masks in question.

In addition, appropriate actions to eliminate non-compliant Covid-19 protection measures from the market were taken by the Polish Office of Competition and Consumer Protection. Non-compliant products are not placed on the Polish market, but are removed from e-stores and auction portals, and the dangerous ones go onto the EU RAPEX database (by the end of July 2020, the Office of Competition and Consumer Protection submitted 24 notifications concerning protective masks to the database).

II. *The Sure Mechanism: short-time work schemes*

Dr. Jagoda Jaskulska

Summary: The outbreak of the COVID-19 pandemic and the economic crisis it triggered have significantly affected the condition of the labour market, forcing Member States to take appropriate measures to protect jobs. Member States are supported in this struggle by the EU, which offers the possibility of financial assistance for public spending, which has increased significantly due to the introduction of certain legal instruments, such as short-term employment schemes, in order to minimise its effects on employment (SURE). Poland has also benefited from this assistance. This paper presents measures adopted in the Polish legal system to protect jobs offered to entrepreneurs (including the so-called self-employed) in the time of the pandemic, specifying forms of support co-financed from EU funds.

1. Introduction

SURE (Support to mitigate Unemployment Risks in an Emergency) an EU programme to support short-term work schemes and other similar measures taken by Member States to protect the jobs of workers and the self-employed (Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak). Financial assistance is provided in the form of loans granted to Member States on favourable terms. According to Article 3 of Regulation 2020/672 on the establishment of a European temporary support facility for reducing the risks of unemployment in the event of a Covid-19 pandemic (SURE) emergency, a Member State may apply for EU financial assistance where its actual and possibly also planned public expenditure has suddenly and significantly increased after 01.02.2020 due to the introduction of national measures directly relating to reduced working hours mechanisms and similar arrangements to cope with the economic and social impact of the Covid-19 pandemic emergency event.

Poland was among the countries that decided to apply for a loan under SURE Facility on 6 August 2020. The maximum amount of the loan made available to Poland under the Council Decision is €11,236,693,087 (reduced in accordance with, inter alia, the concentration limit provided for in the SURE Regulation; this is one of the three highest amounts of financial assistance granted under SURE, along with Italy and Spain). On 15 October, the SURE loan agreement between Poland and the EU was signed.

- 27 October 2020 - disbursement of the first tranche: €1 billion

- 2 February 2021 - disbursement of the 2nd tranche: €4.3 billion

- 30 March 2021 - disbursement of the 3rd tranche: €1.4 billion

The European Commission defines short-term work schemes as: ‘public programmes that allow firms experiencing economic difficulties to temporarily reduce the hours worked while providing their employees with income support from the State for the hours not worked’. The essence of short-time schemes is therefore the partial or total suspension of an employment contract for a period of economic crisis.

Most EU Member States have implemented measures to protect jobs during the pandemic. Many of them have decided to implement short-term work schemes promoted by the EU, involving reductions in working hours of up to 100%. However, this is not a new solution. Short-term work schemes have been used before, especially during the economic crisis of 2008-2010, mainly in Germany and Italy. Research conducted in 2009 shows that 55% of all employees declaring a reduction in working hours due to technical and economic problems came from these countries. The literature emphasises that short-

term work programmes allow entrepreneurs facing economic difficulties to reduce the working hours of employed workers who receive financial support from the state for hours not worked (Boeri, Bruecker, 2011; Brenke, Rinne, Zimmerman, 2013; Budnikowski, 2014). In Poland there is no equivalent of the concept of short-time work (English) or Kurzarbeit (German). However, national legal regulations provide various legal solutions in the sphere of employment, which aim to support employers in maintaining jobs in times of crisis (currently a pandemic), based on the assumptions of short-term work.

2. National schemes for temporary support to mitigate unemployment risks in an emergency

In Poland, even before the outbreak of the pandemic, in response to the economic crisis in 2009, legal provisions were introduced into the legal order (in the Act of 11 October 2013 on Special Arrangements for the Protection of Workplaces) providing for short-term work mechanisms in case of financial difficulties of entrepreneurs (in a situation of a decrease in economic turnover), such as:

1) economic downtime – a period of non-performance of work by an employee for reasons not relating to the employee remaining on standby to work

2) reduced working time – reduced working time of an employee by the entrepreneur for reasons not relating to the employee, but not more than half of the working time

under which entrepreneurs could apply to obtain benefits for partial coverage of salaries due to employees (see: Świątkowski, Wujczyk, 2017). As a result of this solution, the employees, despite the difficult economic situation of the employer, kept their jobs and, moreover, despite the reduction in working hours or even the downtime, they continued to receive their salaries, which put them in a much better position than unemployed people collecting unemployment benefits (Hijzen, Venn, 2011).

According to the provisions of the Act on Special Arrangements for the Protection of Workplaces, the terms and conditions of work during a period of economic downtime or reduced working hours are determined in a collective bargaining agreement or in a collective agreement with trade unions, and if the employer is not covered by company trade unions – in an agreement with employee representatives selected in accordance with a procedure adopted by the employer. The maximum period of eligibility for benefits on account of economic downtime or reduced working hours is 6 months. Importantly, entrepreneurs (being the employer) who take advantage of the support provided for in the Act on Special Solutions for the Protection of Workplaces cannot terminate the employment contract of an employee for reasons not relating to him/her during the period of receiving benefits as well as during the 3-month period immediately following the period of receiving benefits.

3. The relationship between national schemes and the SURE mechanism

Economic downtime and reduced working hours can also be used by employers (who employ workers under an employment relationship) nowadays, in a time of pandemic. This issue is regulated by the provisions of the Act of March 2, 2020 on special solutions relating to preventing, counteracting and combating Covid-19, other infectious diseases and crisis situations caused by them (the so-called anti-crisis shield). However, an employer wishing to take advantage of these regulations must meet certain conditions, such as: a decrease in revenue from the sale of goods or services as a result of Covid-19 and a related significant increase in the burden on the salary fund (Czapski, Janczu, 2020).

The employer may then:

1) reduce the employee's working hours by a maximum of 20% but no more than 0.5 FTE, with the proviso that the remuneration cannot be lower than the minimum wage determined under the minimum wage regulations, taking into account the employee's working hours before the reduction;

2) cover the employee with economic downtime, provided that the employer pays the employee covered with economic downtime the remuneration reduced by no more than 50%, however not less than in the amount of the minimum remuneration for work established pursuant to the provisions on the minimum remuneration for work, taking into account the dimension of working time of the employee.

The introduction of the above solutions is limited in time (up to 6 months), and the conditions and manner of performing work in the period of economic downtime or reduced working hours is determined in agreement with the trade unions operating at the employer's premises or with the employees' representation. The State Labour Inspectorate is the body competent to control the compliance of employers with the legal regulations on economic downtime and reduced working hours (competent district labour inspectors receive from the employer a copy of agreements on the conditions and procedure of performing work in the period of economic downtime and reduced working hours). As of 5 February 2021, more than 22,000 Agreements on the conditions and procedure of performance of work in the period of reduced working hours and 7,608 Agreements on the conditions and procedure of performance of work in the period of economic downtime have been registered in the District Labour Inspectorates. Significantly, among the inspections during which violations of the labour Code provisions regulating remuneration issues were found, 566 concerned entities that had previously concluded agreements in this respect (as of 11 February 2021).

In addition, the legislator has provided for the possibility of obtaining financial support in the event of economic downtime or reduced working hours. The subsidies to employees' salaries may be used by entrepreneurs in the following situations:

1) reducing the working time of the employee by a maximum of 20%, not more than to 0.5 full-time, provided that the salary cannot be lower than the minimum wage (determined under the provisions on the minimum wage for work), taking into account the working time of the employee before its reduction;

2) economic downtime, provided that the employer pays the employee who is subject to economic downtime reduced salary of not more than 50%, but not lower than the minimum wage, taking into account working time.

The support is financed by the Guaranteed Employee Benefits Fund. This regulation, however, should not be equated with the above-described entitlement to introduce the economic downtime and reduced working hours by employers (due to differences in the scope of eligible entities, conditions which must be fulfilled, or entitlement to benefit from financing).

The condition for receiving support is the conclusion of an agreement with trade unions/employee representation, specifying the conditions and procedure for performing work during the period of economic downtime or reduced working hours.

Support may be applied for, first of all, by entrepreneurs being employers/employers (employing staff within the framework of employment relationship within the meaning of provisions of the Labour Code). The catalogue of entrepreneurs who can apply for co-financing has been extended in this case to also include entities employing people on the basis of civil law (contract of mandate, contract of mandate within the meaning of the Civil Code or contract for provision of services to which the provisions on contract of mandate apply), as well as non-governmental organisations, public benefit units, State or local government cultural institutions, and ecclesiastical legal persons. In addition, the entity applying for a grant cannot be in arrears with tax liabilities, social security, health insurance, FGSP, FP or Solidarity Fund contributions until the end of Q3 2019. There must also be no grounds for declaring bankruptcy. The most important condition for obtaining support is a decrease in economic turnover (decrease in sales of goods or services in terms of quantity or quality) by:

- not less than 15%, calculated as the ratio of the total turnover in two consecutive months in the period after 01.01.2020 to the total turnover in the corresponding two months of the previous year

or

- not less than 25%, calculated as the ratio of the turnover in any given month in the period after 01.01.2020, compared with the turnover in the previous month.

The construction of reduced working hours or economic downtime is closely associated with the employment relationship. Hence, among employment law scholars there have been doubts as to whether and to what extent these institutions may be applied to persons who are not employees within

the meaning of the Polish Labour Code (e.g. to persons working under a civil law contract of mandate) (Pisarczyk, Boguska, 2020).

The amount of funding varies depending on the type of mechanism put in place:

- with the introduction of economic downtime, support of 50% of the minimum wage set on the basis of the minimum wage provisions, taking into account working time

- when reducing working time, support up to half of the salary due for reduced work, but not more than 40% of the average monthly salary from the previous quarter announced by the President of the Central Statistical Office on the basis of the provisions on pensions from the Social Insurance Fund in force on the date of application.

The subsidy is not payable to employees whose remuneration received in the month preceding the one in which the application was submitted was more than 300% of the average monthly salary in the preceding quarter announced by the President of the Central Statistical Office on the basis of the provisions on pensions from the Social Insurance Fund in force on the date of application. The grant period covers three months.

By March 3, 2021, 27,892 entrepreneurs (1,377,415 jobs) had benefited from the reduction in working hours' assistance. 27,892 entrepreneurs (1,377,415 jobs) received the total amount of support, i.e., PLN 5,894,107,330, while economic standstill assistance benefited 11,625 entrepreneurs (333,369 jobs) for a total amount of support of PLN 907,730,272.

Other forms of support in the area of job protection financed by the Guaranteed Employee Benefits Fund include funding of salaries for employees not covered by downtime, economic downtime, or reduced working time following Covid-19, i.e. without changing the rules on the employment of employees.

The main condition to obtain support in this case is a decrease in economic turnover. Co-financing is granted for payment of employer's social insurance premiums for employees and for remuneration of employees up to the amount of half of their remuneration, however, not more than 40% of the average monthly remuneration from the previous quarter announced by the President of the Central Statistical Office on the basis of regulations on pensions from the Social Insurance Fund, valid as of the date of application. However, co-financing is not available for salaries of employees whose remuneration obtained in the month preceding the month in which the application for support was filed was higher than 300% of the average monthly salary from the previous quarter announced by the President of the Central Statistical Office based on provisions on pensions from the Social Insurance Fund, valid as of the date of filing the application. The period of subsidy in this case is also max. three months.

One of the latest support instruments provided for in the anti-crisis shield is co-financing from the Guaranteed Employee Benefits Fund; funds for salaries of employees working in specific industries. This aid is already provided for specific industries marked with PKD codes (the Polish Classification of Activities), and the main condition to obtain it is a lower income from the activity obtained in one of the three months preceding the month of application as a result of the occurrence of Covid-19, reduced by at least 40% in relation to income obtained in the previous month or in the corresponding month of the previous year.

The amount of subsidy is PLN 2,000 per month to the salary of one employee, taking into account working time. Due to its selective character, the support constitutes state aid.

An employer who has received a subsidy from a Guaranteed Employee Benefits Fund cannot terminate the employment contract of the employees for whom s/he is receiving the subsidy during the period of the grant.

Support will be implemented until the end of June 2021, and applications may be submitted no later than June 10, 2021.

The units handling support from the Guaranteed Employee Benefits Fund are Voivodeship Labour Offices.

Apart from instruments supporting workplaces financed by the Guaranteed Employment Benefits Fund, the Polish legislator has also provided (in the anti-crisis shield) forms of support co-financed by the European Social Fund and/or the Labour Fund. This support is dedicated to micro, small and medium entrepreneurs and includes co-financing of salaries (and the social insurance premiums due on these salaries), employment contracts, contracts of mandate work, or other contracts for provision of services to which provisions on the contract of mandate apply respectively, and further contracts other than a contract of employment on the basis of which persons provide work for the benefit of an agricultural production co-operative or other co-operative addressing agricultural production but under the condition that the contract is subject to pension insurance. Support is provided under Section 3.10 of the Communication from the Commission - Temporary framework for State aid measures to support the economy in the context of the ongoing Covid-19 epidemic (2020/C 91 I/01) - 'Aid in the form of wage subsidies to avoid redundancies during the COVID-19 epidemic'. The aid scheme number for this form of support is SA.56922(2020/N).

The basic condition to obtain support is a decrease in turnover, understood as a decrease in sales of goods or services in terms of quantity or value calculated as a ratio of total turnover in any two consecutive calendar months, falling in the period after 31 December 2019 until the day preceding the date of filing a grant application, compared with the total turnover in the analogous two consecutive calendar months of the previous year (which, in practice, means that entrepreneurs running their business for at least 14 months, counting from the date of filing the application, can apply for a grant):

1) by at least 30%

Co-financing can be granted for an amount not exceeding 50% of the salaries of individual employees included in the application for co-financing together with social insurance contributions due from these salaries, but no more than 50% of the amount of minimum remuneration for work plus social insurance contributions from the employer in relation to each employee.

2) by at least 50%

Co-financing may be granted for an amount not exceeding 70% of the salaries of individual employees covered by the application for co-financing, together with social insurance contributions due from these salaries, but no more than 70% of the amount of minimum remuneration, increased by social insurance contributions from the employer in relation to employee.

3) by at least 80%

Co-financing may be granted for an amount not exceeding 90% of the salaries of individual employees covered by the application for co-financing, together with social insurance contributions due on these salaries, but no more than 90% of the amount of minimum salary, increased by social insurance contributions from the employer in relation to employee.

The entrepreneur is obliged to keep the employees covered by the subsidy agreement in employment for the period for which the subsidy was granted (the restriction does not apply if the employment relationship expires or is terminated without notice due to the fault of the employee, or if the employee ends the relationship). If this condition is not met, the entrepreneur must return the grant without interest, in proportion to the period of failure to keep the employee in employment.

The support covers co-financing of remuneration (and social security contributions due from such remuneration) for employment contracts, outwork contracts, mandate contracts or other contracts for the provision of services, to which the provisions on mandate work, on the basis of which persons provide work for a company which is an agricultural production co-operative or other co-operative engaged in agricultural production, however, on condition that the contract is covered by pension insurance.

The period of co-financing, as in other cases, covers max. three months (support is paid in monthly tranches).

The unit handling the support is the District Labour Offices, and the contract in this respect is concluded with the *starost*.

A decrease in economic turnover of at least 30/50/80% due to the occurrence of Covid-19 makes it possible to obtain support also for entrepreneurs who are natural persons and do not employ employees. The subsidy covers part of the costs of running a business. The entrepreneur is then obliged to conduct business activity for the period for which the subsidy was granted.

Other forms of support for the self-employed:

- standstill benefit (for persons conducting economic activity whose income in the month preceding the month in which the application for standstill benefit is submitted was at least 15% lower than the income which they obtained in the preceding month or who suspended their activity due to a pandemic)

- standstill benefit for entrepreneurs from specific industries (according to the prevailing PKD, one, two, or three times)

- additional standstill benefit for entrepreneurs from specific industries.

The standstill benefit amounts to 80% of the minimum remuneration for work in Poland, it is not deposited and it is not subject to taxation.

A standstill benefit is also provided for persons with civil law contracts, where the contract has failed or has been curtailed due to a business interruption as a result of Covid-19. Some abuses have been identified in this area that could affect the financial interest of the State: a parking allowance for persons employed under civil law contracts (where the contract has failed or has been curtailed due to a business interruption as a result of Covid-19). The mechanism of defrauding benefits in this case consisted in an entrepreneur posting a job advertisement addressed to students on a local forum and then fictitiously employing several hundred people on the basis of a civil law contract of mandate and submitting applications for payment standstill benefit for all of them. The entrepreneur collected his share from each transfer to the contractors.

In addition, as part of regional operational programmes of individual voivodeships, support is organised for the unemployed, the purpose of which is their insertion in the world of work and counteracting the effects of the COVID-19 pandemic, e.g. organised by the Voivodeship Labour Office in Warsaw at the beginning of 2021 as part of priority axis VIII of the Masovian Regional Operational Programme for 2014-2020, together with the call for applications for funding from the European Social Fund for projects implemented by District labour Offices covering services and instruments of the labour market specified in the Act on employment promotion and labour market institutions, excluding public works.

4. Criminal offences, control procedures and risk of fraud affecting the EU's financial interest in this sector at national level

Control over the disbursement of funds obtained from subsidies from the Guaranteed Employment Benefits Fund is based on rules specified in the regulations of the anti-crisis shield and in the subsidy agreement (concluded with the director of the Voivodeship Labour Office). It includes an initial verification, carried out by the Voivodeship Labour Office within 60 days from the deadline for submission of the settlement and documentation confirming the data contained in the settlement, and a final verification, which involves a more thorough analysis of documents relating to the subsidy. This verification can be carried out within three years from the date of expiry of the deadline for submission of the statement, and within its framework verification is also carried out whether or not the turnover decline declared by the entrepreneur, entitling to funding, actually occurred.

What is important is that submitting a declaration of intent inconsistent with the actual state of affairs, failure to submit to control, violation of the ban on termination of employment contracts with employees for reasons not relating to them is connected with the obligation to return the funds received (in whole or in part).

In turn, verification of the use of funds received from the ESF and/or the Labour Fund for subsidising entrepreneurs during the pandemic or in the area of labour market support takes place on the basis of the rules resulting from the subsidy agreement concluded with the *starost* (according to the template available on government websites).

Within 30 days after the end of the subsidy period the entrepreneur will submit to the Labour Office documents confirming the lawfulness of the use of the funds granted under the support; documents confirming the employment of employees for whom the subsidy was granted for the required period.

The Labour Office reserves the right to inspect an entrepreneur to verify compliance with the provisions of the agreement, the use of support funds in accordance with the conditions specified in the agreement or application, and the proper documentation and use of these funds. The inspection may be carried out during the grant period as well as for three years after this period. In the event of the entrepreneur's refusal or inability to undergo an inspection, the entrepreneur is obliged to return all of the funds to the bank account of the relevant labour Office within 30 days of receiving the *starost's* summons.

It is worth noting that the current provisions of the anti-crisis shield do not set out any mechanisms to be followed by the *starost* when selecting entities to receive co-financing (apart from indicating the legal criteria these entities should meet). Moreover, the subsidy agreement is not subject to appeal under the procedure provided for in the Code of Administrative Procedure. This position was taken by the Voivodeship Administrative Court (WSA) in Rzeszów in its decision of 19 January 2021, II SA/Rz 1035/20.

"The lack of an obligation to grant a subsidy, even if the basic conditions for granting aid are met, means that the regulations contained in Articles 15zzb and 15zzc of the Act on Special Solutions do not contain legal criteria according to which it would be possible to control the legality of a refusal to grant this type of aid. Moreover, the very form in which the financing is granted, i.e. the contract, indicates the voluntary nature of the granting of the financing".

The consequence of irregularities found in the course of inspections (in terms of meeting the criteria for granting subsidies and in terms of spending the funds obtained in this way) will be the necessity of returning the funds granted in part or in whole.

In addition, in cases in which co-financing constitutes State aid the current rules for State aid should be applied, especially in the context of the reporting obligation (new codes have been introduced both for acts and for aid purposes). In Poland the rules for cumulation of aid from particular sections of the commission's communication have been clarified by the Competition and Consumer Protection Office (OCCP).

Importantly, an entrepreneur cannot receive a subsidy insofar as the same costs of business activity have been or will be financed from other public funds. Therefore, if an entrepreneur uses the instrument under Article 15zzb, s/he cannot use the instrument financed from FGŚP funds for the same employee (moreover, in a situation where an entrepreneur used the exemption, in whole or in part, from the obligation to pay contributions to the Social Insurance Institution (ZUS), he cannot at the same time receive co-financing in the part concerning social and health insurance contributions).

So far, there are no reports that would reflect the number of abuses found in this area. It is probably a result of the fact that the mechanisms for controlling the implementation of contracts for co-financing have not been fully implemented yet.

However, a certain guideline may be the fact that similar solutions (making support for entrepreneurs dependent on the criterion of a decrease in economic turnover) were envisaged in the Act

on mitigating the effects of the economic crisis for employees and entrepreneurs. At that time, it was argued that a source of potential abuse could be the documentation of a decline in turnover on the basis of a decline in orders (in quantitative terms). At that time, it was recommended to assess the decline in economic turnover on the basis of the decline in sales in value terms.

III. *Strategic investments supporting small and medium enterprises: green sector*

Prof. Wojciech Morawski and Prof. Jacek Wantoch-Rekowski

Summary: 1. EIB as an SME promoter - general information 2. What kind of checks are carried out? 3. Criminal offence, controls procedures and risk of fraud affecting the EU's financial interest in the sector at national level.

1. EIB as an SME promoter - general information

In the course of our research we focused on the problem of financial support for small and medium-sized enterprises from the resources of the European Investment Bank. It would be a difficult task to identify and analyse all forms of support for this type of enterprises operating in Poland. However, the analysis of the mechanism of using EIB funds itself is very interesting, because the legal situation is diametrically different here than in the case of typical support for entrepreneurs using EU funds.

Unfortunately, it is difficult to identify exactly all the actions financed by the EIB because of the intersection of two criteria, i.e. the environmental objective and the financing of small and medium-sized enterprises. In addition, the information available sometimes does not indicate the size of the enterprise that benefits from EIB support.

According to information provided by the EIB (see here) in 2019. EIB Group invested €5.4 billion in Poland, of which €4.3 billion were European Investment Bank (EIB) loans and €1.1 billion were funds provided to small and medium-sized enterprises and mid-cap companies from the European Investment Fund (EIF) under its portfolio of guarantees and equity investments. This means that Poland was the fifth largest recipient of EIB Group financing granted to EU countries, which is also in line with the size of the country. Poland also ranked fifth in terms of the volume of loans approved under the Investment Plan for Europe ('Juncker Plan'). However, the EIB Group's disclosure material highlighted that its financing exceeds 1% of Poland's GDP and is higher than the EU average of 0.35%.

The combined financing of the EIB and EIF side meant support of nearly €2 billion for Polish SMEs in 2019. A high share of this was for projects directly relating to climate and environment (€1.05 billion). Climate action together accounted for around 31% of EIB Group financing.

In 2020, out of a total of €5.2 billion, Polish SMEs received €1.527 billion in funding, €1.225 billion for innovation, €1.086 billion for the environment and €1.374 billion for infrastructure (see here). In 2020, the need for the EIB to become involved in combating the economic impact of the pandemic was increasingly emphasised by the Polish authorities (see, statement by the Minister of Finance Tadeusz Kościński: see here). This support also applies to small and medium-sized enterprises (see here).

The Bank has responded to these needs adequately. Already in 2020. approx. 1/3 of the funds were allocated to the fight against the Covid-19 pandemic, and green financing reached 41% of the total EIB financing in Poland, compared with 31% in 2019 and 22% in 2018. According to EIB Deputy Director Professor Teresa Czewnińska, the European Investment Bank wants to provide at least €5.2 billion in financing for Poland in 2021, the same amount as in 2020. EIB financing for "green" projects in Poland should be higher than 41% of the total allocated funds in 2021 (see here).

The EIB Group's mode of operation varies. It generally provides loans to SMEs in co-operation with Polish banks, leasing companies and other financial institutions such as Bank Gospodarstwa Krajowego. The EIB lends to financial intermediaries, who then provide their clients with loans at attractive interest rates and with attractive repayment periods. The EIB co-operates not only with Bank Gospodarstwa Krajowego (the only state-owned bank in Poland, which cooperates closely with the

Government), but also with typical banks operating on market principles. Among them, several have concluded loan agreements that support special energy efficiency programmes implemented by SMEs.

The EIB also finances SMEs directly. An example of this is the EIB's 50 million euro loan to the dairy company Mlekpol.

We only have general information on funds going to SMEs without specific examples of investments.

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In 2020, out of a total of €5.2 billion, Polish SMEs received €1.527 billion in funding, with €1.225 billion for innovation, €1.086 billion for the environment and €1.374 billion for infrastructure. (see here). In 2020, the need for the EIB to get involved in combating the economic impact of the pandemic was increasingly emphasised by the Polish authorities (see the statement by the Minister of Finance Tadeusz Kościński: see here). This support also applies to small and medium-sized enterprises (see here).

2. What kind of checks are carried out?

From the perspective of Polish law, the activities of the European Investment Bank are essentially business activities, which are outside the scope of public law regulation. As a result, the management of these funds will not be subject to public law regulations related, for example, to the regulations of the Act on Liability for Breach of Public Finance Discipline. Spending and distribution of funds is also not subject to control analogous to control of funds coming from, for example, grants. This means a mitigation of the legal regulations which prevent the misuse of EU funds which come from the EIB in relation to those which are typical "public funds". From a strictly legal point of view, the demarcation criterion here is quite clear: the EIB operates using typical private law instruments. However, from the point of view of the effectiveness of the protection of EU resources, this raises some questions. The situation only changes when the EIB makes loans to governments or public finance entities. In such a case, making expenditures financed from the EIB loan is already subject to control appropriate to the spending of public funds. This will happen, for example, within the framework of the implementation of the credit line for financing the fight against Covid-19 recently obtained by the Polish government (see here). However, this is analogous to the situation if an 'ordinary' bank would grant a loan to an institution included in the public finance sector.

3. Criminal offences, control procedures and risk of fraud affecting the EU's financial interest in this sector at national level

Misuse of EIB funds has not been the focus of media attention. Of course, it is impossible for such abuses not to exist, but they are not "high-profile". One may suspect that this is partly due to the fact that the EIB acts like a business entity. The EIB does not give grants, but it does give loans and guarantees, partly on market terms.

Since the activities of the EIB are treated like those of an "ordinary" bank also from a criminal law point of view, a breach of law in dealings with the EIB will be treated in the same way as a similar

act in dealings with a private bank. In addition, due to the model of EIB operation in Poland (i.e. existence of intermediaries who conclude contracts with beneficiaries), possible offences will be "ordinary" economic crimes.

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POLAND - SECTION III

CONCLUSIONS

The analysis shows that in Poland we can point to three basic problems relating to the effectiveness of control over the spending of EU funds:

1) Systems for controlling the spending of EU funds have been regulated by several legal acts. Their provisions often lead to discrepancies and difficulties in establishing, among others, project eligibility criteria. The problem of ascertaining irregularities in the scope of implementation of projects co-financed using EU funds is a very complicated subject, causing far-reaching doubts in the area of applying the law. It seems that the main reason for this state of affairs is the incomprehensible and constantly changing provisions regulating material and legal grounds, as well as procedures of corrective actions taken by authorised institutions. The imposition by public finance sector units of a public obligation of a fiscal nature in the form of the reimbursement of public funds such as those granted as EU subsidies or the unilateral reduction of qualified expenditure on the basis of ministerial guidelines or other documents is not included in the catalogue of sources of universally binding law.

2) In the area of judicial control over the use of EU funds, the main problem in Poland is the competitiveness of the judicial route: the same case may often be examined in parallel by both the civil and administrative courts. Other problems are the length of proceedings (proceedings before administrative courts often last several years), complicated procedures, hence numerous mistakes by beneficiaries and officials, and the lack of mitigating mechanisms, as institutions in disputes with beneficiaries very rarely avail themselves of the possibility of mitigating sanctions or concluding settlements. In addition, low levels of effectiveness of enforcement actions result from the passage of time and lack of effective safeguards. It is worth noting that, in particular, the issues of jurisdiction of common courts in cases relating to the spending of EU funds are not directly regulated in any provisions of law and should be derived from individual institutions of civil law, e.g. defining the principles of liability for damages or contractual liability. This position was also presented by the Civil Chamber of the Supreme Court, which in its Judgment of 6 April 2017, after recognising a legal issue in case ref. III CZP 117/16, allowed for a two-track (administrative and civil law) route to claiming the return of funds intended for the implementation of programmes financed by European funds. In the case at hand, in the opinion of the Supreme Court, the administrative procedure for the reimbursement of funds intended for the implementation of programmes financed using European funds, as provided for in the Public Finance Act, does not exclude the possibility of securing a claim for the reimbursement of such funds with a promissory note and a court procedure for seeking payment of the promissory note issued to secure the claim.

3) The weakness of the solutions adopted in Poland is also the lack of procedures obliging the entities involved in control procedures to co-operate. In Poland's financial 2014-2020 perspective one can distinguish three independently functioning control systems for EU funds: a) Controls constituting the competence of the managing authority, b) random controls – to check activities carried out by the control body, which does not participate in the implementation system of operational programmes and is functionally independent of the managing, intermediate, or implementing authority. The body executing the aforementioned controls in Poland is the Head of the National Fiscal Administration (KAS), which executes controls with the help of Fiscal Administration Chambers. The Head of the KAS performs the function of an audit authority, c) controls are performed by authorised EU and national institutions that do not participate directly in the implementation of the structural funds (European Commission, European Anti-Fraud Office and European Court of Auditors). However, the national entities entitled to control EU funds are: the President of the Public Procurement Office (regarding the application of the provisions of the Public Procurement Law) and the Supreme Audit Office (inter alia regarding the management of EU funds constituting public funds), the Regional Chamber of Auditors (regarding the management of EU funds by local governments). In the light of the research carried out, more than 80% of cases of improper spending of the EU funds are detected by institutions participating

in the implementation of the operational programmes, i.e. managing authorities, intermediate bodies and implementing bodies. The State control system is not very effective in this respect, as the State control bodies (the Fiscal Control, the Supreme Audit Office, the Regional Chamber of Audit, the President of the Public Procurement Office) detect only 4% of irregularities. The adopted dispersed model of controlling the spending of the EU funds with the involvement of such a significant number of different bodies is not fully effective. The lack of exchange of information on the results of controls carried out by particular bodies, among other things, significantly reduces the effectiveness of the whole process of monitoring the spending of the EU funds.

BELGIUM - SECTION I

TASK 1, D.1, BELGIUM

Prof. Alexander De Becker and Mattijs Vanmarcke

Summary: 1. Belgium: the territorial system in brief; 1.1. Brief historical overview; 1.2. Brief overview of the functioning of the federal State; 1.2.1. The division of competences; 1.2.2. The principle of verticality; 1.2.3. Fiscal legislation; 1.2.4. Asymmetrical structure and consultation between regions; 2. The Partnership Agreement 2014-2020 with the EU Commission; 3. Management and control of EU structural and investment funds during the last MFF in Flanders; 3.1. Management and control of the EU structural and investment funds; 3.2. Auditing of the EU structural and Investment Funds in Flanders: The Audit Authority.

1. Belgium: the territorial system in brief

1.1. Brief historical overview

On February 7th, 1831, the Belgian Constitution[1] was announced, which was mainly based on the principles from the French Revolution, but at the same time was a reaction against the practices during the preceding French (1795-1814) and Dutch (1815-1830) regimes (J. Vandelanotte en G. Goedertier, 2010, 5-6). At this time, the Belgian State was a unitarian State, with the Federal Government being fully competent for all matters.

The Belgian State gradually evolved from a unitarian into a federal State. After World War II, the reform of the unitarian State became a more pressing issue on the political agenda, mainly because of drastic changes within the structures of political parties, which felt strong pressures to take stances defending a federal structure.

The first major constitutional reform took place in 1970 as a consequence of the opposing views in Flanders and the Walloon Region. The reform was stirred up by student protests in the Catholic University of Leuven, which was at the time bilingual. The constitutional reform spread between 1968 and 1971 when former Prime Minister Eyskens declared in 1970 that the former unitarian State was obsolete (A. Alen and J. Dujardin, 1986). This first major constitutional reform meant the birth of the three cultural communities and three regions (Flanders, Brussels and Wallonia) and also the constitutional anchoring of the linguistic areas in Belgium. Furthermore, the Constitution since then obliges the federal legislator to pass Acts with a special majority concerning the competences of the regions.

The second major constitutional reform in 1980 was a second step in the direction of a federal State: the competences of the Dutch and French speaking cultural Communities were expanded with person-related competences. The cultural communities were renamed as Communities, the *Gemeenschappen* as we know them today. Also, the second major reform meant the establishment of a Court of Arbitration, *Arbitragehof*[2], (Later renamed the Constitutional Court[3]) that had the task of resolvign conflicts between Acts and Regional Decrees and between Regional Decrees among themselves.

The third major constitutional reform extended the competences of the Court of Arbitration, as a consequence of the new competences of the Communities: education. The Brussels territorial area

[1] Current version: The Coordinated Constitution of 17 February 1994, Belgian Official Gazette, 17 February 1994.

[2] Act of parliament of 28 June 1983 concerning the establishment, the competences, and the functioning of the Court of Arbitration, Belgian Official Gazette, July 8, 1983.

[3] Special Act of 9 March 2003 handling the amendment of the Special Act of 6 January 1989 on the Court of Arbitration, Belgian Official Gazette, 11 April 2003.

was, after the third reform, definitively laid down and renamed the Brussels Capital Region, which included the 19 municipalities as we know them today.

Ever since the fourth constitutional reform in 1991-1992, Article 1 of the Coordinated Constitution of 17 February 1994 now states that Belgium is a federal State, composed of the Communities and the Regions. The three Communities are: the Flemish Community, the French Community, and the German speaking Community.[4] The three Regions are: the Flemish Region, the Walloon Region and the Brussels Region.[5]

During the last constitutional reforms (2001-present), the regional competences were expanded, to the level that the federal competences are merely residuary to the regions and communities. Furthermore, the Court of Arbitration is now called the Constitutional Court, and its competences have also been expanded in order to meet the requirements of the new federal structure of the country (J. Vande Lanotte, J. Goossens and P. Cannoot, 2015).

According to Article 35 of the Coordinated Constitution of 17 February 1994, the federal State is at this point only competent for the competences listed in the Constitution and the Acts issued by virtue of the Constitution. According to the second paragraph, the Communities and the Regions are competent for the other competences. However, Article 35 of the Constitution has not yet entered into force, which means the federal level still exercises residual competences and the Communities and Regions only exercise competences as specifically provided for by Act or Decree. As long as Article 35 has not entered into force, the Constitutional Court cannot measure legislation against Article 35 of the Constitution.

1.2. Brief overview of the functioning of the federal state

1.2.1. The division of competences

As stated above, because of the cultural differences between the north and the south of the Country, the constitutional reforms have led to the creation of communities with authority for person-related competences, such as education, sports and culture, health and some issues concerning justice. But, as there are also economic discrepancies between north and south, the constitutional legislator decided to create three Regions, which have location-related competences, such as economy, transportation, energy, environment and urban planning.

Both the Communities and the Regions can issue legislative acts called Decrees which are considered to be equal in the hierarchy of Acts to the federal Acts. This follows Articles 127(2), 128(2), 129(2) and 130(2) of the Coordinated Constitution of 17 February 1994. The Parliament of the Brussels Capital Region can issue *Ordonnances*, which can be compared with Decrees, but are slightly lower in the hierarchy of norms.

A detailed description of all competences is beyond the scope of this research, so only the main principles concerning the functioning of the federal state will be provided.

The competences of each region and of the federal level are described in detail in the Special Act concerning the Reformation of the Institutions[6] (*Bijzondere Wet tot Hervorming van de Instellingen*) and the Constitution. Despite the attempt of a division of competences between the regions, communities and federal levels, conflicts may arise because of the very complex nature of this arrangement. The Constitutional Court can intervene in litigations concerning the division of the competences, and the Court made clear that within a comparable set of competences, either a community or a region can be

[4] Article 2 of the Coordinated Constitution, 17 February 1994.

[5] Article 3 of the Coordinated Constitution, 17 February 1994.

[6] Special Act of parliament of 8 August 1980 concerning the Reformation of the Institutions, Belgian Official Gazette, 15 August 15 1980.

competent, not both at the same time.[7] In brief, this means that only one legislator is competent for a specific competence, either territorial or material when exclusivity has been provided for by legal Act (J. Velaers, 1985, 97).[8]

1.2.2. The principle of verticality

Furthermore, the so-called principle of verticality ensures that either the Community, Region or State with the competence to issue a legislative act in a certain area is also competent to execute these legislative norms (P. Peeters, 1988, 71).[9] Of course, exceptions on this general principle exist as well, but the discussion of these reach too far.

1.2.3. Fiscal legislation

Ever since the most recent sixth constitutional reform[10], the Communities' and the Regions' fiscal competences have expanded, allowing both the Communities and Regions to levy and manage taxes. The main goal was threefold: first, the Communities and Regions were granted partial fiscal autonomy; second, the funding of the competences was adapted; third, the public finances and the cost of the ageing population were calculated, and funding was envisaged by the Communities and Regions. After the reform, the Regions gained exclusive competence for fiscal deductions and credits, such as, for example, the fiscal advantages for owning a house (J. Goossens and S. Van Belle, 2014, 1373 and M. Van Damme, 2015).

1.2.4. Asymmetrical structure and consultation between regions

As stated before, Belgium consists of three Communities and three Regions. However, in Flanders, the institutional organs are organised differently than in the Walloon and Brussels area. In Flanders, all competences, both those of the Flemish Community and the Flemish Region, are exercised by the same institutional organs: the Flemish Parliament and the Flemish Government.[11]

In Wallonia, the competences of the French Community are exercised by the Parliament of the French Community and its Government. The Walloon regional competences are exercised by the Parliament of Wallonia and its Government. To complicate matters, it follows Article 138 of the Constitution that the French Community has the possibility to transfer competences to the Parliament of Wallonia and the French Community committee in Brussels.

Because of the complex nature of the Belgian political system and the asymmetrical structure between the different Communities and Regions, the different constitutional reforms have envisaged an extended system of consultation and co-operation between the different institutions (R. Moerenhout, 1994, 271). Mainly, there are four forms of co-operation between the institutions: i) voluntary consultation within the Consultation Committee and the inter-ministerial conferences, ii) representation within managing- and decision-making organs of the institution of a different government, iii) mandatory forms of co-operation, such as advice and consultation, iv) the co-operation agreement. The

[7] Belgian Constitutional Court Ruling of 25 February 1986, n° 11 and Ruling of 28 May 2009, n° 87/2009.

[8] A minority of competences are 'shared exclusive competences', but they are no exception to the exclusivity of competences.

[9] See also Advice of the Belgian Council of State, 20 November 1986, *Parl. St.* Kamer 1985-86, n°, 287/2, 2.

[10] See the Special Act of parliament of 6 January 2014 concerning the reform of the finance of the communities and the regions, concerning the expansion of the fiscal autonomy of the regions and financing the new competences, Belgian Official Gazette, January 31, 2014, 8594.

[11] Article 137 of the Co-ordinated Constitution, 17 February 1994.

Constitutional Court can intervene when competences are exceeded[12], the Council of State, division of Jurisdiction, can annul the co-operation when they have not been respected[13], the ordinary Courts and Tribunals can control the legality of these agreements[14]. However, the Constitutional Court does not have an active role: it only intervenes when a procedure has been initiated.

2. The 2014-2020 Partnership Agreement with the EU Commission

Belgium concluded a partnership agreement with the European Commission on 24th October 2014 concerning the 2014-2020budgeting period. The objective of the partnership agreement was to align the strategies concerning the funds between the regions, Belgium, and the EU Commission. The main goal was to comply with strategy 'Europe 2020' and thus to focus on intelligent growth, sustainability and inclusivity and to aim for higher levels of employment, productivity and social cohesion in all regions.

As stated before, the Regions have shared competences with the federal levels in the field of employment, social cohesion, and economy, so the Partnership Agreement for Belgium anticipates the different economic and social positions of the different regions and presents the different priorities for each region. For example: the economic situation in Flanders, Brussels, and Wallonia is very different: all the provinces considered 'in transition' are located in the Walloon Region.

Concerning Flanders, the Partnership Agreement states that all funding programmes focus on specific topics, so limited resources can be targeted on specific issues. From this point of view, the Flemish government prepared a strategic framework in June 2012 to align all the operational programmes, such as EFRO (European Fund for Regional Development), ETS (Emission Trade System), ESF (European Social Funds), ELFPO (European Agricultural Fund for Rural Development) and EFZMV (European Fund for Maritime Affairs and Fisheries).

The co-ordination of the different funds concerning the 2014-2020 period is a competence of the Flemish Minister-President; the Flemish Government is responsible for the definitive approval of the Flemish partnership agreement and the Flemish operational programmes.

3. Management and control of EU structural and investment funds during the last MFF in Flanders

Article 123 of Regulation (EU) 1303/2013[15] imposes on Member States the obligation to designate a number of authorities competent to manage and control European Structural Funds. Member States can choose whether this will be a national, regional, or local public authority or body.

3.1. Management and control of EU structural and investment funds

[12] Article 30-*bis* of the Special Act of Parliament of 6 January 1989 on the Constitutional Court, Belgian Official Gazette, 7 January 1989.
[13] Article 14-*bis* of the Co-ordinated Act of Parliament of 12 January 1973 on the Council of State, Belgian Official Gazette, 12 January 1973.
[14] Article 159 of the Co-ordinated Constitution, 17 February 1994.
[15] Regulation (EU) 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, also laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, and the European Maritime and Fisheries Fund, repealing Council Regulation (EC) No 1083/2006.

According to the Partnership Agreement, for each structural Fund, a so-called *Comité van Toezicht (*Committee of Supervision) will be installed whose task is to manage, co-ordinate and communicate with other Funds. Furthermore, the co-ordination between funds is put in place by the different management authorities. Every year, a high-level co-ordination meeting is held.

For example, concerning the 2014-2020 European Social Fund, the Flemish Government installed a Supervision Committee in 2014. It is composed of representatives of members of the Flemish Government[16] and is presided over by the Flemish Minister-President. Its main duties are the functioning and execution of the European Social Fund in view of its goal as well as investment in growth and employment.[17] More specifically, the Flemish Government states that the Supervision Committee will monitor the progress of the accomplishments made in the operational programmes; it will examine the results concerning the execution of the goals, examine the year-end report and the final report of the programme, and study the European Commission control report, and so on.[18]

Like the management authority for the ESF and the ESF certifying authority, also a Flanders ESF Agency was set up and worked until the end of 2015. Since 2016, the ESF division and 'Durable Entrepreneurship' are the management and certifying authorities for the ESF, which is a division of the Department of Work and Social Economy falling under the competence of the Flemish Minister of Work and Social Economy.

A different management and certifying authority has been put in place for the European Fund for Regional Development (EFRO),

3.2. Auditing of the EU structural and Investment Funds in Flanders: the Audit Authority

Article 124 of Regulation (EU) 1303/2013 obliges Member States to create an audit authority functionally independent of the management and certifying authority.

The Flemish Audit Authority has been installed since 2007 in accordance with the Regulations concerning the European Structural Funds in the era of 2007-2013. The Authority was installed by a Decision of the Flemish Government of 30 November 2007[19]. The Decision, remarkably, entered into force retroactively on January 1st of 2007. The Audit Authority is competent to audit the working of the European Social Fund (ESF), the European Fund for Regional Development (EFRO), the European Fund for Asylum, Migration and Integration (AMIF), and the interregional Flanders – The Netherlands programme.[20]

According to this Decision[21], two Inspectors of the Finance Department of the Flemish Community are (or should be) appointed as the Audit Authority. Only one inspector has been appointed so far, however.

The Audit Department (*Auditcel)* consists of five auditors who work full time as auditors for the Flemish Audit Authority. They are linked to the Flemish Department of Finance and Budget.

[16] Article 2, Decision of 13 November 2014 of the Government to install a Supervision Committee and a Selection Committee for the 2014-2020European Social Fund, Belgian Official Gazette, 18 December 2014.

[17] Article 1, Decision of 13 November 2014.

[18] Article 2, Decision of 13 November 2014.

[19] Decision of the Flemish Government of 30 November 2007 concerning the appointment of the Flemish Audit Authority for European Structural Funds, concerning the appointment of the Flemish Audit Authority of European Funds for the integration of citizens of third countries and concerning the appointment of an Audit Division of the Audit Authority, Belgian Official Gazette.

[20] Article 1, Decision of the Flemish Government of 30 November 2007.

[21] Article 1, Decision of the Flemish Government of 30 November 2007.

According to Article 3 of the Decree, the Inspectors have full authority over the competences mentioned in Regulation (EC)1083/2006 and Council Decision (EU) 2007/435/EC [22]. The Audit Authority has been updated in order to comply with Regulation (EU) 1303/2013, which also requires Member States to establish an audit authority.

The main tasks of the Audit Authority are to ensure the Commission a reasonable amount of certainty on:

- the functioning of the Management and Certifying Bodies of the European Structural Funds
- the correctness of the statements of expenditure that were delivered to the Commission in order to ensure a reasonable amount of certainty concerning the legality and regularity of the underlying transactions.

A more detailed overview of the tasks of the Audit authority can be found on its website: see here.

Furthermore, the Audit Authority co-operates with the Commission to co-ordinate audit plans.

Article 128 of Regulation (EU) 1303/2013 states that if a Member State has designated more than one audit authority, Member States may designate a co-ordination body.

The Interfederal Corps of the Finance Inspection (See Task 4) closely works together with the Flemish Audit Authority and with the other regional bodies, such as SAPE (Service Audit des Projects Européens, the Walloon and Brussels audit authority for the European Structural Funds).

[22] Decision (EU) of the Council of the European Union of 25 June 2007 establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the General 'Solidarity and Management of Migration Flows' programme (2007/435/EC), L168/18. This Council Decision has been replaced by EU Regulation No 516/2014 of the European Parliament and the Council of 16 April 2014 establishing the Asylum, Migration, and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council, as well as Council Decision 2007/435/EC.

TASK 2, D.1, BELGIUM

Prof. Alexander De Becker and Mattijs Vanmarcke

Summary: 1. Introduction to Belgian Criminal Law on the EU's financial interests; 2. The Belgian Criminal Code; 2.1. Forgery of documents; 2.2. Extortion and attempted extortion; 2.3. Abuse of trust; 2.4. Passive and active corruption; 3. Fraud with subsidies, compensations, and allowances, financed by public means; 3.1. In general; 3.2. The PIF Directive; 3.3. Penalties; 3.4. Reimbursement, confiscation, and recidivism; 3.5. Comparison with the provisions of the Criminal Code.

1. Introduction to Belgian Criminal Law on the EU's financial interests

In order to combat fraud with subsidies, the federal level remains competent for most of the legislation and legal enforcement, as the two most important Codes (the Criminal Code and the Code of Criminal Procedure) are federal competences (F. De Ruyck and Y. Van Landeghem, 2021).

The Criminal Code[23] criminalises general offences, such as counterfeiting, abuse of trust, and extortion. A Royal Decree of 1933 provides for the separate criminalisation of fraud with subsidies and provides specific measures to combat fraud regarding subsidies. Both instruments guarantee a wide array of measures to persecute fraud with EU funds. Furthermore, both instruments have been adjusted in order to be compliant with the PIF Directive. Below, an overview is given of the most important legislative instruments and their recent adaptations to the PIF Directive, when applicable.

For a good understanding, we remark that all fines and penalties have already been multiplied by a factor of 8, because of the current multiplicators (opdeciemen). Some penalties were still noted in Belgian francs, which had to be multiplicated by 40 (valuta) and then by 8.

2. The Belgian Criminal Code

2.1. Forgery of documents

Forgery in general

The Criminal Code[24] defines the offence of forgery as the act with fraudulent intent or as the act with the intent to harm by disguising a legal document in a manner determined by the Act, while this may result in potential disadvantage.

Four main elements form the offence of forgery: a document as protected by law, the falsification of the truth in a way determined by an action, a fraudulent intent or intent to harm, and the possibility of a disadvantage (F. Deruyck, A. De Nauw, 2019, 31-53).

Forgery by public servants

Forgery by a public servant, as mentioned in Article 194-196 of the Criminal Code is the same offence as mentioned in Article 193-212 of the Criminal Code. However, the capacity of the perpetrator, a public servant who commits counterfeiting during the execution of his or her duty, gives rise to a more severe punishment: a jail sentence of from ten to fifteen years.

[23] Criminal Code, 8 June 1867, Belgian Official Gazette, 9 June 1867.
[24] Article 193-212 Criminal Code, 8 June 1867.

2.2. Extortion and attempted extortion

Extortion

Extortion in the Belgian Criminal Code[25] is defined as an act to deceitfully appropriate goods that belong to another either by the use of false names or false capacities, or by deceitful ruse.

The offence is composed of three essential elements that must be present for a court to legally confirm the presence of the offence extortion:[26]

- the will to wrongfully appropriate someone else's goods;
- the use of deceitful means;
- the issuance of the goods in question.

The goods referred to in Article 496 of the Criminal Code can be either funds, movable property, obligations, discharges, or debt discharges.

The Court must have full cognizance of the fulfilment of all the elements in the definition (L. Huybrechts, 2015, 215).

Extortion is punished by a jail sentence from one month up to a maximum of five years and a fine varying from €208 to €24.000.

Attempted extortion

Attempted extortion, the attempt to commit the offence as described above, was only criminalised after the intervention of the federal legislator in 1993[27]. Before then, many cases that concerned subsidy fraud that were considered as attempted extortion, could not be handled because the act did not provide an explicit provision for an attempted extortion (C. Van Den Wyngaert, 2008, 326).

Attempted extortion is punished with a jail sentence from eight days to a maximum of three years and a fine varying from €208 to €16,000.

2.3. Abuse of trust

Abuse of trust in general

In the Belgian Criminal Code, abuse of trust[28] is defined as an act in which the perpetrator, to the detriment of another, has misappropriated goods delivered to him under the obligation to return them or use them for a specific goal. The goods in the aforementioned article can be either assets, funds, merchandise, notes, discharges, writings of any kind that express an obligation, or a discharge of debt.

Three main components are needed to qualify a crime as an abuse of trust (L. Huybrechts, 2013, 186):

- embezzlement or waste of goods;
- a possible disadvantage;
- a form of deceptive intent.

[25] Article 496 Criminal Code, 8 June 1867.

[26] Belgian Court of Cassation ruling of 17 March 1987.

[27] Act of parliament of 16 June 1993 concerning the amendment of article 496 of the Criminal Code, Belgian Official Gazette, 24 July 1993.

[28] Article 491 Criminal Code, 8 June 1867.

Abuse of trust presupposes an underlying agreement between the victim and the perpetrator that serves to entrust a good to another in order to use the good for a specific goal, that can either be the return of the good to the victim or use of the good for a specific goal.

Abuse of trust is punished by a jail sentence from one month to a maximum of five years and a fine varying from €208 to €4,000. Persons found guilty of abuse of trust can be deprived of some civil rights, such as the right to be elected or the right to hold a position as a civil servant.[29]

There is no attempted abuse of trust in the Belgian Criminal Code.

Abuse of trust by a public servant

Abuse of trust by a public servant, as mentioned in Article 240 of the Criminal Code, is the same offence as mentioned in Article 491 of the Criminal Code. However, the capacity of the perpetrator, a public servant who manages public funds or valuable titles, gives rise to a more severe penalty: a jail sentence of between five to ten years and a fine varying from €4,000 and €800,000.

2.4. Passive and active corruption

In order to combat bribery and thus corruption of public servants, articles 246-252 of the Criminal Code make provision for some specific misdemeanours.

First, article 246(1) of the Criminal Code criminalises passive corruption, defined as the circumstance in which a public servant asks for, takes, or receives an offer, promise or advantage, either directly or indirectly, or for himself or others in order to adopt a certain behaviour, as described in Article 247 of the Criminal Code.

Second, active corruption, as mentioned in article 246(2) of the Criminal Code, is described as an act in which the public servant has more bargaining power and may initiate an act him/herself as described in article 247 of the Criminal Code: it consists in proposing an offer, or benefit of any kind, directly or through intermediaries, to a person exercising public office for himself or a third party to engage in any of the conduct referred to in article 274 of the Criminal Code.

The penalties are applicable to all public servants but also to others who induce others to believe that they are public servants or even to persons who have merely announced their candidacy for such a position.

Offences and their penalties

First, when the attempted bribery consists of persuading a public servant to commit a legal action, albeit not subject to payment, a jail sentence of at least six months to a maximum of four years, and a fine of €800 to €80,000 can be imposed.[30]

Second, when the attempted bribery consists of persuading a public servant to commit an illegal action or persuading a public servant not to undertake action when required, albeit not subject to payment, a jail sentence from one to four years and a fine of €800 to €400,000 can be imposed.[31] A public servant who agrees to commit an illegal action or omits an action he or she is obliged to undertake is punishable with a jail sentence of between three and five years and a fine ranging from €800 to €600,000.

Third, when the attempted bribery implies a public servant committing a crime in carrying out his or her duties, the jail sentence is raised to a minimum of one to four years and a fine ranging from

[29] Article 33 Criminal Code, 8 June 1867.
[30] Article 247, §1 Criminal Code, 8 June 1867.
[31] Article 247, §2 Criminal Code, 8 June 1867.

€800 to €600,000. Successful bribery in this case is punishable with a jail sentence of between two and five years and a fine ranging from €4,000 to €800,000. [32]

Lastly, when the bribery seeks use the influence of a public servant with regard to a public government or administration body in order to pursue or avoid an action, jail sentences of between six months and four years may be handed down, combined with a fine ranging between €800 to €80,000. If a public servant accepts this kind of bribery, he or she is liable to a jail sentence of from three to five years and a fine ranging from €800 to €600,000.[33]

All penalties are higher if the attempted bribery is successful, e.g., when proposals to bribe a public servant are accepted.

Bribing judges is very severely punished, with jail sentences ranging from five to ten years and fines ranging from €4,000 to €800,000. If the bribery has been successful, the jail sentence is from ten to fifteen years, and the fine ranges from €4,000 to €800,000.[34]

The PIF Directive

The above-mentioned penalties concerning the bribery of public servants have recently been raised [35] to the current levels in accordance with the PIF-Directive[36].

The Directive[37] defines passive corruption as the action a public official who – directly or through an intermediary – requests or receives advantages of any kind for himself or for a third party or accepts a promise of such an advantage, to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way that damages or is likely to damage the Union's financial interests. This definition is almost identical to Article 246 and Article 247(61-3) of the Criminal Code, although the Criminal Code does not provide any distinction regarding bribery that can cause damage to either the national or the EU's financial interests.

Article 4, 2(b) of the Directive defines active corruption as the action of a person who promises, offers, or gives – directly or through an intermediary – an advantage of any kind to a public official for himself or for a third party for him or her to act or to refrain from acting in accordance with his or her duty or in the exercise of his functions in a way that damages or is likely to damage the European Union's financial interests.

The federal legislator argued in the preparatory works that the idea of increasing the penalties is a direct consequence of Article 7(3) of the Directive,[38] which requires Member States to increase maximum penalties to at least four years' incarceration.

The Belgian Criminal Code[39] makes no distinction between ordinary bribery and bribery concerning public servants who handle EU funds. The implementation of the PIF Directive has thus led to increasing all penalties regarding briberies in order to be compliant.

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[32] Article 247, §3 Criminal Code, 8 June 1867.

[33] Article 247, §4 Criminal Code, 8 June 1867.

[34] Article 249, §3 Criminal Code, 8 June 1867.

[35] Article 25 and 26 of the Act of Parliament of 27 February 2021 concerning various provisions regarding the Justice Department, Belgian Official Gazette, 24 February 2021.

[36] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the detriment of the Union's Financial Interests by means of criminal law.

[37] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the detriment of the Union's financial interests by means of criminal law, Article 4(2)(c).

[38] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the detriment of the Union's financial interests by means of criminal law.

[39] Criminal Code, 8 June 1867, Belgian Official Gazette, 9 June 1867.

As a critical side-note, the Belgian Council of State, the competent organ for legislative technique, mentions that the raised penalties go further than required by the PIF Directive, as only crimes that have an impact on the EU's financial interests fall under its scope.[40]

3. Fraud regarding subsidies, compensation, and allowances financed by public means

3.1. In general

As mentioned before, the Belgian Criminal Code does not provide for specific criminal offences concerning fraud regarding subsidies, let alone fraud relating to European Funds. Only the general provisions of the Criminal Code can be deployed to combat such fraud. Therefore, a specific Royal Decree[41] was introduced in 1933 to combat these specific forms of crime; these were later amended to ensure the EU's financial interests are also protected by this legislation.

Article 1 of the Royal Decree states that all declarations concerning the request or continuation of subsidies, compensation, and allowances financed by public funds should be truthful and complete. Furthermore, any applicant who knows that s/he is no longer entitled to a specific subsidy or allowance has the obligation to declare it.

In 1994, the Federal legislator added a new definition of the criminal offence to the aforementioned Royal Decree by Act of 7 June 1994[42] in order to be able to combat fraud with funds and subsidies coming from the European Union.

According to several authors at that time, the decision to amend a Royal Decree by Act was not considered particularly good legislative engineering, but the sense of urgency was quite high at the time. According to the preparatory works[43], the former Belgian Minister of Justice, who provided the draft of the Act, found that the rising numbers of criminal cases concerning fraud with EU funds required swift action. The fraud concerning the EU budget was estimated at between 274 and 548 billion Belgian francs, which corresponds to 7 and 14 billion euros today respectively (D. Coeckelbergh, 1994, 553-554).

The aim of the amendment by Act was to ensure that the existing mechanism to combat fraud with public funds (subsidies) would also be applicable to cases in which fraud regarding EU funds was established, as this would not have been the case before then. At the time, the Court of Justice of the EU[44] had already stated that Member States are obliged on the basis of the EC Treaty[45] to take all necessary measures to ensure that breaches of EU law that include fraud-related EU funds are fought on an equal footing as national legislation (D. De Keuster, 2009, 131-142).

3.2. The PIF Directive

[40] Belgian Chamber of Representatives preparatory works, 2020-21, *Parl.St.* 1969/001, 71.

[41] Royal Decree of 31 May 1933 regarding the declarations concerning subsidies, compensations and allowances, Belgian Official Gazette 1 June 1933.

[42] Act of Parliament of 7 June 1994 amending the Royal Decree of 31 May 1933 regarding declarations concerning. subsidies, compensation, and allowances, Belgian Official Gazette 8 April 1994.

[43] Belgian Chamber of Representatives preparatory works, 1993-94, *Parl.St.* 1206/3, 7.

[44] Case C-68/88 Commission v. Greece, ECLI:EU:C:1989:339.

[45] Treaty establishing the European Community, Nice consolidated version, Article 5

In order to meet the requirements of the PIF Directive[46] and in order protect the EU's financial interests, the federal legislator raised the penalties for fraud regarding subsidies.

Article 27 of the Act of 17 February 2021 concerning various provisions regarding the Justice Department[47] raised the penalties to the current amounts. Before the amendment, the penalties were much less severe: for fraud using false declarations, the minimum jail sentence was eight days and the maximum was one year, while the minimum today is set as high as six months, reaching a maximum of four years.

Furthermore, the use of false documents was previously punishable with a jail sentence from six months to three years, compared with the minimum six months to four years today.

This provision is a direct implementation of Article 1 *juncto* Article 2(b)(i) of the PIF Directive, which demands all Member States to take the necessary measures to ensure that fraud affecting the Union's financial interests constitutes a criminal offence when committed intentionally.

Fraud in the sense of the PIF Directive involves, among other things, procurement-related expenditure, at least when committed in order to produce unlawful gain for the perpetrator or someone else by causing a loss to the Union's financial interests, namely any act or omission relating to: i) the use or presentation of false, incorrect, or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, ii) non-disclosure of information in breach of a specific obligation, with the same effect; or iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted.

The scope of this definition coincides with the scope of the offences mentioned in Articles 1 and 2 of the Royal Decree, which was – according to the preparatory works – the main reason for the intervention of the federal legislator.[48]

3.3. Penalties

Attempted fraud regarding subsidies was also provided for by the legislator. Failure to comply with the obligation to make a declaration may be punished[49] with sentences ranging from eight days to four years of imprisonment and fines varying from 26 to 15,000 Belgian francs (between 5,20 euro and 3,000 euros).

Furthermore, the use of false or incomplete declarations may be punished with sentences ranging from between six months and four years of imprisonment[50] and fines varying from 26 francs euro to 50,000 Belgian francs (between 5,20 euro and 10,000 euro). When subsidies are granted on the basis of false documents and the guarantor decides to preserve these funds, the jail sentence is raised by at least one year up to a maximum five years, combined with a fine, varying from 26 to 100,000 Belgian francs (between 5,20 euro and 20,000 euros).[51]

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[46] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud against the Union's financial interests by means of criminal law.

[47] Act of Parliament of 27 February 2021 concerning diverse provisions regarding the Justice Department, Belgian Offical Gazette, 24 February 2021.

[48] Belgian Chamber of Representatives preparatory works, 2020-21, *Parl.St.* 1696/001, 35.

[49] Article 2(1) of the Royal Decree regarding the declarations concerning subsidies, compensation and allowances, Belgian Official Gazette 1 June 1933.

[50] Article 2(2) of the Royal Decree regarding declarations concerning subsidies, compensation and allowances, Belgian Official Gazette 1 June 1933.

[51] Article 2(4) of the Royal Decree regarding declarations concerning subsidies, compensation and allowances, Belgian Official Gazette 1 June 1933.

If subsidies, compensation, and allowances are used in a different context from those for which they were granted, the perpetrator risks a jail sentence ranging from six months and five years and also risks a fine from 26 to 75,000 Belgian francs (between 5,20 euro and 15.000 euro).

3.4. Reimbursement, confiscation, and recidivism

The Court that handles the criminal proceedings automatically sentences the offender to full reimbursement of all sums received.[52]

Furthermore, all the offender's assets that have been obtained through the use of the wrongfully obtained subsidies will be confiscated.[53] The reasoning behind automatic confiscation is that all wrongfully obtained public funds should be maximised, as this, according to the former legislators, is a very efficient means of combatting fraud (D. Coeckelbergh, 1994, 557-558).

The recurrence of any violation on the Royal Decree within five years from the last adjudication will result in a duplication of all penalties. This sanction is more severe than the prescriptions of the Criminal Code concerning recidivism and was again envisaged as a deterrent against fraud using public funds.

3.5. Comparison with the provisions of the Criminal Code

As mentioned before, the Criminal Code provides several general provisions concerning white collar crime and fraud, such as those concerning fraud and counterfeiting. Most of these overlap with the more specific provisions of the Royal Decree of 31 May 1933. The general provisions remain relevant, because in most cases, the Prosecutors are free in their choice of the legal qualification of the offences: the existence of a more specific legislation does not prohibit the usage of the more general legislation and a combination of both is also possible.

[52] Article 3 of the Royal Decree regarding declarations concerning subsidies, compensation and allowances, Belgian Official Gazette 1 June 1933.
[53] Article 4 of the Royal Decree regarding declarations concerning subsidies, compensation and allowances, Belgian Official Gazette 1 June 1933.

TASK 3, D.1, BELGIUM

Prof. Alexander De Becker and Mattijs Vanmarcke

Summary: 1. The protection of the EU's financial interests at constitutional and statutory level: a primer; 2. The Judicial architecture; 3. The Tribunal of First Instance and Courts of Appeal; 4. The Court of Assizes; 5. Involvement of the Constitutional Court: access to constitutional justice; 6. The role of the Administrative Courts and the Council of State and the cases triggering their jurisdiction; 7. The role of the Federal and Regional parliaments: political control.

1. The protection of the EU's financial interests at constitutional and statutory level: a primer

The Belgian Constitution does not provide specific clauses that foresee a specific mechanism in order to protect the financial interests of the European Union. Mostly, these crimes are tried according to the existing criminal law, as mentioned in Task 2. Belgian law does not usually make any distinction between cases concerning the financial interests of the European Union and other, national cases. However, as mentioned before, the existing federal legislation has been adapted in order to be compliant with the PIF Directive.

The Tribunals of First Instance and Courts of Appeal (see 3.) handle the lion's share of cases concerning fraud with EU funds or concerning the protection of the financial interests of the European Union. Nevertheless, an overview of the Belgian Judiciary is provided below, because, by implication, the extraordinary courts can also adjudicate, taking the EU's financial interests into account, when their competence is triggered.

2. The Judicial architecture

The Belgian Constitution establishes the competences and functioning of the Judiciary under Title III, Chapter IV; however, the division of competences – and the functioning – of each court or tribunal is mostly determined by law, notably by the Judiciary Code[54] and the Code of Criminal Procedure.[55]

The Belgian Constitution states that litigation concerning civil rights is to be exclusively handled by the courts. However, an Act of Parliament can authorise the Council of State or the federal administrative tribunals to decide over the consequences of their decisions according to civil law.[56]

According to Article 147 of the Belgian Constitution, only one Court of Cassation (Supreme Court) exists for the entire Belgian Kingdom. Furthermore, according to Article 150 of the Belgian Constitution, a Jury is required for trials concerning criminal cases, political crimes, and press offences, which come under the purview of the Court of Assizes (see 4.) The Constitution[57] states that there are five Courts of Appeal, each with its own territorial competence. Lastly, it[58] states that a military court will be set up in times of war. It also states that specific tribunals will be installed for specific matters, such as tribunals for commerce, tribunals for employment law, and a tribunal concerning the execution of criminal penalties.

[54] The Judiciary Code of 10 October 1967, Belgian Official Gazette, 31 October 1967.
[55] The Belgian Code of Criminal Procedure.
[56] Article 144, Belgian Constitution.
[57] Article 156, Co-ordinated Constitution of 17 February 1994.
[58] Article 157, Co-ordinated Constitution of 17 February 1994.

The Council of State and the Constitutional Court are not mentioned under Title III, Chapter IV of the Constitution, which indicates that they do not belong to the Judiciary and that both Courts fulfil specific roles (see 5 and 6).

3. The Tribunal of First Instance and Courts of Appeal

There are 13 Courts of First Instance, divided into chambers with specific competences. The relevant chambers for the purpose of this research, are the so-called *correctional tribunals*.

The correctional tribunals handle cases concerning malpractice, namely crimes punishable with a correctional punishment, namely jail sentences between eight days and five years, and/or fines exceeding 25 euros.[59] Furthermore, correctional tribunals also handle cases that are subject to *correctionalisation*, which means the penalty for the crime in question exceeds five years, but the law nevertheless requires the correctional tribunal to handle the case. In general, crimes punishable with a jail sentence of a up to 20 years can be *correctionalised*, but this rule has numerous exceptions, which means that the correctional division of the Tribunal of First Instance hands most criminal cases.[60] The Tribunal of First Instance also handles appeals against rulings of the Police Tribunals, which handle cases concerning traffic[61].

The Public Prosecutor's office or the investigating judge, depending on the case, is responsible for criminal investigation and referral of the case to the Tribunal of First Instance. Discussion of the role of the Public Prosecutor or the investigating judge is beyond the scope of the current research project.

For these reasons, the Tribunal of First Instance will be the most important judicial college to handle cases concerning the crimes concerning fraud regarding European Funds mentioned in Task 2.

The Court of Appeal decides on the requests of appeal against judgements of the Tribunal of First Instance.

4. The Court of Assizes

As mentioned before, the competence of the criminal Courts and Tribunals depends on the legal classification of the crimes committed and their penalties, as determined by Law.

According to Article 150 of the Belgian Constitution, a Jury is required for the trials of criminal cases, political crimes, and press offences, which come under the purview of the Court of Assizes. A Court of Assizes is installed in every province and in the administrative district of Brussels-Capital.[62]

Criminal cases, as mentioned in Article 150 of the Belgian Constitution, are crimes punished with a jail sentence exceeding 20 years; these are offences that are not subject to '*correctionalisation*', which means the crimes cannot be tried before the ordinary Court of First Instance (C. Van den Wyngaert and B. De Smet, 2014, 660 and C. Van den Wyngaert, Steven Vandromme and T. Philip, 2019).

For the abovementioned reasons, charges of fraud relating to European Union funds do not fall under the jurisdiction of the Court of Assizes, which is why this Court will not be discussed any further.

5. Involvement of the Constitutional Court: access to constitutional justice

[59] Article 1, Criminal Code.

[60] Article 2, Act of Parliament of 4 October 1867 on mitigating circumstances, Belgian Official Gazette, 5 October 1867.

[61] Article 668, Judiciary Code.

[62] Article 114, Judiciary Code.

As mentioned before in Task 1, because of consecutive constitutional reform, the Communities and Regions began to take shape, and their competences grew. This required the establishment of a fully capable Constitutional Court.

The Belgian Constitution provides a separate chapter concerning the Constitutional Court, which does not come under the general chapter VI concerning the Judiciary. This does not mean that the Constitutional Court is not a fully-fledged court: the constitutional legislator merely intended to express the distinction between the Constitutional Court, the ordinary Courts, the Administrative Courts, and the Council of State (J. Vande Lanotte and G. Goedertier, 2010, 1415).

The competences of the Constitutional Court are both limited and exclusive. According to the Belgian Constitution, the Constitutional Court is competent for cases concerning the conflicts of competences of all legislators: the Court decides on conflicts of competence between federal Acts of Parliament, Regional Decrees, and Brussels *ordonnances*.[63] Furthermore, the Constitution states that the Court is competent to rule over breaches of all legislative acts infringing Articles 10, 11, and 24 of the Constitution, which safeguard the principle of equality, non-discrimination, and the freedom of education.[64] Any other competences have to be explicitly envisaged by Act of Parliament[65].

The Special Act[66] concerning the Constitutional Court further elaborates the competences and functioning of the Constitutional Court. The Court has two main duties. First, it receives requests to annul legislative acts in breach of the provisions the Court uses as parameters, as envisaged by the Constitution or by An act of Parliament.[67] Second, the Court answers prejudicial questions, posed by the competent Courts or Tribunals.[68]

As already mentioned, the Constitution Court can only decide in relation to the norms envisaged by the Constitution or an Act of parliament. According to Article 1 of the Special Act of parliament of 6 January 1989, these norms are: i) ones that determine the competences of the federal State, the Communities and the Regions, ii) those mentioned in Title II of the Belgian Constitution: the Belgian citizens and their rights, iii) Articles 170,172 and 192 of the Constitution, regarding fiscal provisions, and iv) the previously mentioned Articles 10, 11, and 24 of the Constitution[69].

Access to the Constitutional Court is limited to requests for annulment and prejudicial questions. A request for annulment can be introduced by i) one of the Governments, ii) the Presidents of the legislative organs, or iii) any natural or legal person able to demonstrate an interest to do so.[70] The condition for a person or legal entity to demonstrate an interest is not applicable to the other aforementioned entities. However, there is no definition of the concept of 'interest', so the Court has a margin of interpretation. The concept is defined by the Constitutional Court as follows: 'the required interest is provided when a person or legal entity can demonstrate that his legal situation can be directly and unfavuorably harmed by the contested norm'.[71]

Access to the Constitutional Court is therefore quite restricted. Thus, the role of the Constitutional Court in the protection of the financial interests of the European Union is marginal, which also appears to be the case in Poland (see Task 3 of D.1. Poland).

[63] Article 142, 1°, Co-ordinated Constitution of 17 February 1994.
[64] Article 142, 2°, Co-ordinated Constitution of 17 February 1994.
[65] Article 142, 3°, Co-ordinated Constitution of 17 February 1994.
[66] Special Act of Parliament of 6 January 1989 on the Constitutional Court, Belgian Official Gazette, 7 January 1989.
[67] Article 1 of the Special Act of Parliament of 6 January 1989.
[68] Article 26 of the Special Act of Parliament of 6 January 1989.
[69] Article 142, 2°, Coordinated Constitution of 17 February 1994.
[70] Article 2 of the Special Act of Parliament of 6 January 1989.
[71] Belgian Constitutional Court, 21 June 2006, n° 104/2006 and others.

To our knowledge, The Constitutional Court has only ruled on the topic of the protection of the EU's financial interests once[72]. The Court received a prejudicial question concerning the conformity of article 84-*ter* of the Code on Value Added Tax[73] with Articles 10 and 11 of the Belgian Constitution on the principles of equality and non-discrimination. The Court of Cassation introduced the question to the Constitutional Court in order to verify the legality of the aforementioned article of the VAT Code with Articles 10 and 11 of the Constitution because taxpayers may be treated differently when they are subject of a fiscal enquiry on the basis of the VAT Code than when they are subject of a fiscal enquiry on the basis of the Code of Personal Income Tax. More specifically, the limitation period for a fiscal enquiry in both cases was considered different and more severe for taxpayers in the provisions of the VAT Code, because it does not specify a Directive regulating the limitation period and thus gives the VAT administration more freedom. The Constitutional Court ruled that the aforementioned provisions do not breach Articles 10 and 11 of the Constitution. The motivation of the Constitutional Court to reach that conclusion is relevant to the present research project and reads as follows:

"In the absence of Union legislation, it is a matter for each Member State to lay down rules aimed at protecting, on the one hand, the rights that individuals derive from EU law (CJEU, 19 November 1998, C-85/97, SFI, points 25-26) and, on the other hand, to safeguard the financial interests of the European Union by, in particular, combating tax fraud and thus fully collecting VAT on the territory (CJEU, 8 September 2015, C-105/14, Taricco and others, points 36-40)".[74]

And also:

"The provision at issue must, even in the absence of specific provisions relating to the procedure and limitation periods regarding VAT in EU law, respect the fundamental rights and general principles of law guaranteed by the Union (CJEU, 17 December 2015, C -419/14, WebMindLicenses Kft, points 66-67)".[75]

"The extension of the normal limitation period for the recovery of VAT in the event of fraud and the investigative measures that can still be taken in the context of the tax procedure during that extended limitation period to claim taxes, pursue an objective in the public interest".[76]

6. The role of the Administrative Courts and the Council of State, and the cases triggering its jurisdiction

According to the Belgian Constitution, one Council of State will exist for the whole of Belgium. The composition, competence and functioning have to be determined by Act of Parliament. The Belgian Constitution prohibits any instalment of any administrative court, other than by law.[77]

Under Articles 145, 146, 161 of the Belgian Constitution, the legislator can initiate proceedings concerning diverse political and objective rights before administrative courts. Proceedings may concern objective rights, the legality of government operations – which can be distinguished from those concerning subjective rights – mainly the competence of the ordinary courts and tribunals (W. Pas, 2004).

The constitutional legislator originally considered that only cases concerning fiscal matters could be brought to these administrative jurisdictions, but with time, several different administrative jurisdictions with diverse competences were installed (J. Vande Lanotte, M. Cromheecke en P. Lefranc,

[72] Belgian Constitutional Court, 19 January 2017, n° 5/2017.
[73] Act of Parliament of 3 July 1969 introducing the Code on Value Added Tax, Belgian Official Gazette 17 July 1969, 7046.
[74] Belgian Constitutional Court, 19 January 2017, n° 5/2017, B.9.2.
[75] Belgian Constitutional Court, 19 January 2017, n° 5/2017, B.9.3.
[76] Belgian Constitutional Court, 19 January 2017, n° 5/2017, B.10.2.
[77] Article 161, Article 160, Co-ordinated Constitution of 17 February 1994.

1997, 18). A discussion of all the administrative courts would go beyond the scope of this research project.

The Council of State is not part of the Judiciary, as can be deduced from the position of the Provisions concerning the Council of State in the Constitution: the Judiciary is found in chapter VI, but the Provisions of the Council of State are found in chapter VII, which means the Council of State is a *sui generis* court (S. Lust, 2014, 83). The current legal basis of the Council of State is found in the Co-ordinated Act of parliaments on the Council of State.[78]

The Council of State is competent over administrative *contentieux* and also has to provide the federal and regional parliaments with advice on legislative technique, which is why the Council of State has two divisions.[79] Only the competences of the Council of State concerning the administrative *contentieux* will be discussed here.

According to article 14(2) of the Co-ordinated Act of Parliament, the Council of State also acts as a court of appeal for rulings of the administrative jurisdictions and as a court of last instance in some circumstances[80]; it handles cases concerning exceptional damages[81] and conflicts of attribution of administrative jurisdictions within the Courts' competences[82].

However, by far its most important role is found in Article 14(1) of the Co-ordinated Acts. The Council of State hears appeals concerning excess of Government power, the aversion of power, or the breach of norms that are substantive or prescribed under the penalty of nullity. Competence has been extended to all acts of the legislative assemblies or their bodies, including the mediators set up in the assemblies, of the Court of Auditors and of the Constitutional Court of the Council of State and administrative courts, as well as bodies of the Judiciary and the High Council of Justice and members of their staff, with regard to public contracts, as well as the recruitment, selection, and appointment to public office, or measures of a disciplinary nature[83].

On the grounds of this authority, the Council of State can annul any unilateral Governmental regulatory or individual action by investigating the legality of the norm but not by investigating the violation of any subjective right[84]. The procedure before the Council of State follows the provisions of the Co-ordinated Acts rather than the provisions of the Judicial Code. Most of the proceedings are in writing, so the debates at the end of the proceedings are usually very short. The consequences of an annulment are valid *erga omnes*, and the challenged Act or measure of the Government or administration is deemed to never have existed, and no further consequences will be attached to it, implying a form of restoration of rights.

In order to file an admissible request, the applicant must have exhausted all other possibilities for appeal within the administrative court system. If not, the Council of State usually rejects the appeal.[8586]

In an exemplary case, the Council of State received a request for the annulment of a decision by a Governor of a province deciding to relieve a mayor of his duties because of fraud and the use of false documents and the forgery of invoices concerning European Union funds. The annulment was

[78] Co-ordinated Acts of Parliament of 12 January 1973 on the Council of State, Belgian Official Gazette, 21 March 1973.
[79] Article 160, Co-ordinated Constitution of 17 February 1994.
[80] Article 16, Co-ordinated Acts of Parliament of 12 January 1973.
[81] Article 11, Co-ordinated Acts of Parliament of 12 January 1973.
[82] Article 13, Co-ordinated Acts of Parliament of 12 January 1973.
[83] Article 14, §2, first paragraph, 2°, Co-ordinated Acts of Parliament of 12 January 1973.
[84] Belgian Constitutional Court, 20 March 2002, n° 66/2002.
[85] Belgian Council of State, 11 January 2018, n° 240.395.
[86] Belgian Council of State, 28 March 2006, n° 58.926.

successful; however, the Council of State took the interests of the EU into account when making its decision.[87]

7. The role of the Federal and Flemish Parliament: political control

7.1. Political control by the Federal Government

According to Article 96 of the Constitution, the federal ministers are politically answerable vis-à-vis the members of the Chamber of Representatives. The Senate is not mentioned. The Constitution does not provide for any other mechanisms for the appointment of Ministers or the entire Government: only the King can appoint and dismiss the ministers of the federal government.[88]

However, constitutional custom provides that a newly formed government must read the governmental declaration to the Chamber of Representatives before starting a new term (K. Leus and L. Veny, 1996, 13-59). Afterwards, a vote of confidence has to be cast in the Chamber of Representatives. So, although the Constitution itself does not allow for the possibility of stopping a government beginning its term, the newly formed government should only cautiously exercise its competences before the vote of confidence was cast.

After the constitutional reforms of 1993, the Belgian Constitution[89] requires the federal Government to offer its resignation to the King in two specific cases: i) when the Chamber of Representatives votes a motion of no confidence by a qualified majority of its members and at the same time nominates a new candidate for the vacant position of Prime Minister, and ii) when the Chamber of Representatives dismisses a vote of confidence and, at the same time, within three days after the vote, nominates a new candidate Prime Minister.

Furthermore, the Belgian Constitution requires that, although they cannot be members of the Chamber of Representatives or Senate[90], ministers may be present at every hearing of the Chamber or Senate and also that they be granted the right to speak before the Chamber or Senate, whenever asked.[91] This principle goes both ways: as a means of political control, the Chamber or Senate can commandeer the presence of a minister or the Government in order to be able to make an individual minster or the entire federal Government politically accountable.[92]

Moreover, an important mechanism of political control for both the Chamber of Representatives and the Senate is the so-called right of inquiry, as envisaged in article 56 of the Belgian Constitution, which has been further developed by legal Act.[93] The designated Members of the Chamber have very special authority: they can undertake all the investigative measures envisaged in the Code of Criminal Procedure (such as home search, eavesdropping, recording of private conversations, foreclosure of goods,…).[94] In order to do so, the designated Member submits an application to the First President of the Court of Appeal, which has territorially authority. The inquiry of the Members of the Chamber does not inhibit any other investigations by the Public Prosecutor. Since the sixth constitutional reform, the Members of the Senate no longer have a right of inquiry, but they may demand an informative report.

7.2. Political control of the Flemish Government

[87] Belgian Council of State, 14 July 2008, n° 185.384.
[88] Article 96 Co-ordinated Constitution of 17 February 1994.
[89] Article 96 Co-ordinated Constitution of 17 February 1994.
[90] Article 50, Co-ordinated Constitution of 17 February 1994.
[91] Article 100, Co-ordinated Constitution of 17 February 1994.
[92] Article 100, second paragraph Co-ordinated Constitution of 17 February 1994.
[93] Act of Parliament of 3 May 1880 concerning Parliamentary Enquiries, as amended by the Act of Parliament of 30 June 1996, Belgian Official Gazette, 3 May 1880.
[94] Article 4(1) of the Code of Criminal Procedure.

The political control mechanisms for the Parliaments of the Communities and the Regions are comparable to the federal level, although it can be said that the political control in Flanders is better developed. The aforementioned Special Act[95] and a Special Decree[96] provide for a similar mechanism of motion of distrust and trust.

Concerning Flanders, the right of the Flemish Parliament to hold an investigate enquiry is envisaged by Decree[97] and is similar to the enquiry on the federal level.

[95] Special Act of Parliament of 8 August 1980.

[96] Special Decree of the Flemish Parliament of 7 July 2006 concerning the Flemish Institution, Belgian Official Gazette, 17 October 2006.

[97] Decree of 1 March 2002 concerning the organisation of parliamentary enquiry, Belgian Official Gazette, 7 May 2002.

TASK 4, D.1, BELGIUM

Prof. Alexander De Becker and Mattijs Vanmarcke

Summary: 1. The Central Office for the Repression of Corruption (CDBC-OCRC); 2. The Court of Audit; 3. The Interfederal Corps of the Inspectorate of Finance; 4. The protection of the integrity of federal civil servants; 5. Other implementations of Directive (EU) 2017/1371[98] in Belgium.

1. The Central Service for the Repression of Corruption (CDBC-OCRC)

The Central Service was installed on 1 January 1998 by Royal Decree[99] as part of the commissariat-general of the federal judiciary police. The main tasks of the Central Office at the time were: i) to detect serious and complex crimes and offences against the material interests of the public services, and more particularly in the preparation, awarding, and execution of public contracts, the preparation, creation, and use of public subsidies, and the right to detect or assist in the detection of authorisations, permits, approvals, and recognitions, ii) the dynamic management and exploitation of an advanced operational and specialised documentation for the benefit of all police forces.[100]

The legal tasks and position of the officers that are part of the Office were quite unclear until recently. Following several police reforms, the legal basis of the CDBC was absent (Federal Prosecutor's Office, 2018). The police reform in 1998[101] envisaged that the research tasks of the different central services were to be specified by Royal Decree, but until 2019, the federal government took no initiative in order to do so.

Since 2019[102], the duties of the service are to seek out serious forms of corruption; in particular public bribery, illegal interest, trespassing, and embezzlement by a person in public office or involved in public procurement fraud and subsidy fraud. These tasks are not envisaged exclusively for the members of the service: other judicial actors anyway remain competent.

The report of the Federal Prosecutors Office concerning the functioning of this service had a very dismal outcome for the Service. The Office states that, due to a shortage of personnel, the effectiveness of the service is below par. A mere 60,600 working hours were spent on research and/or criminal investigations, and 67 new investigative files were added in 2018, while 143 were still open.

Of particular note is that in 2016, zero files were opened, and in 2017, only two files concerning fraud regarding European Union funds were opened, which was a similar result compared with past years. The Federal Prosecutor's Office states that this disappointing result is due to the fact that OLAF filed fewer complaints concerning the European issue in relation to the Belgian authorities. The total working hours on the files concerning EU fund fraud fell to a dramatic 1,447 hours. However, the CDBC expects these figures to rise because of the institution of a European Prosecutor's Office[103], which has

[98] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.
[99] Article 1(4) 2°, Royal Decree of 17 February 1998 concerning the Commissariat-General, the Board of Consultation of the Judicial Police to the Prosecutor's Office, Belgian Official Gazette, 19 February 1998.
[100] Article 9(3), Royal Decree of 17 February 1998.
[101] Act of Parliament of 7 December 1998 concerning the organisation of an integrated police force, structured at two levels.
[102] Article 1(3), Royal Decree of 23 June 2019 holding the execution of Article 10(2)4° of the Act of Parliament of 7 December 1998 concerning the organisation of an integrated police force, structured at two levels.
[103] Article 47-14 Code of Criminal Procedure.

been envisaged for Belgium since this year[104]. Since then, no new statistics have been provided (Federal Prosecutor's Office, 2018). The conclusion remains that the battle against fraud – certainly against fraud using European funds – seems not to be a priority.

2. The Court of Auditors

According to the Belgian Constitution[105], the Court of Auditors is responsible with the supervision and the accounts of the general administrations and all those who are accountable to the Treasury. Furthermore, the Court ensures that no article of the expenditure of the budget is exceeded and that no transfer is made; the Court also exercises general control over revenue relating to the determination and recovery of rights acquired by the State. The Court is responsible for collecting all necessary information and supporting documents concerning the accounts of the various administration of the State. The Constitution states that the Act can determine that the Court of Auditors can also be appointed for the control of the accounts of the Communities and Regions.

On an irregular basis, the Court of Auditors reports concerning the budgetary management of European Funds in the different Regions of Communities. The most recent report was published in April 2020 (The Court of Audit, 2020) and handles the management of European Funds concerning the agricultural sector in the Walloon Region.

For Flanders, the last published report concerns European Funds from 2010 (The Court of Audit, 2010) and discusses the organisation and management of the means of the European Social Fund in Flanders. It concluded that Flanders complied with the financial standards of the European requirement of additionality. It noted that, at the time, a risk of double subsidies existed, because of the lack of an adequate system of registration and knowledge exchange.

3. Interfederal Corps of the Inspectorate of Finance

As mentioned before, Belgium has a federal structure, with a large majority of government competences in the hands of the regions.

This is also the case for the management and auditing of the European Structural Funds – tasks mainly managed by the Regions, as the Regions are usually the main benefiters of such Funds.

Nevertheless, a national Audit authority co-exists with the regional Audit authorities. At the national level there is the Interfederal Corps of Finance Inspection, set up in 1998 by Royal Decree[106], with the role of Audit authority.

The Interfederal Corps of the Finance Inspection works closely with the Flemish Audit authority and the other regional bodies, such as SAPE (Service Audit des Projects Européens, the Walloon and Brussels audit authority for European Structural Funds).

4. The protection of the integrity of federal and Flemish civil servants – whistle-blowers

In 2013, a federal mechanism was created in order to protect the integrity of federal civil servants, a so-called whistle blower mechanism, which follows the earlier Flemish initiative (see

[104] Introduced by Act of Parliament of 17 February 2021 concerning diverse provisions of the Justice Department, Belgian Official Gazette, 24 February 2021.
[105] Article 180, Coordinated Constitution of 17 February 1994.
[106] Royal Decree of 28 April 1998 concerning the organisation of the interfederal Corps of the Finance Inspection, Belgian Official Gazette, 5 August 1998.

below).[107] The mechanism provides for the installation of a Central Reporting Point for Assumed Integrity Violations, which is accessible for federal mediators.

A suspected breach of integrity is described as: i) an act – or omission of an act – by a staff member who is alleged to commit a violation of the Acts, Decrees, circulars, internal rules, and internal procedures applicable to federal administrative authorities and their employees; ii) poses an unacceptable risk to the life, health, or safety of persons or the environment; iii) manifestly testifies to a serious deficiency in the professional obligations or management of a federal administrative government; and iv) knowingly orders or advises a member of staff to commit an violation as referred to in the previous points.[108]

A civil servant can inform his/her superior or a confidant about the alleged violation of integrity. Both have the responsibility of protecting the identity and legal status of the whistle-blower also seeking to prevent any negative consequences for him or her. Furthermore, the Act of 15 September 2013 provides for a (temporary) protection mechanism for whistleblowers that starts a soon as the whistle-blower begins the procedure or asks for preliminary advice, for at least after years after the end of the enquiry[109]. The mechanism stops the Government or administrative body undertaking actions against the whistle-blower, such as the termination of the contract or term, disciplinary sanctions, salary cuts, denial of promotion or increased salary …

In Flanders, an identical whistle-blower mechanism was already set in place in 2006[110] and was further developed in 2014[111].

Another noteworthy instrument concerning the protection of national integrity is the Bureau of Administrative Ethics and Deontology.[112] The Bureau is responsible for the development of federal integrity policy. The task of the bureau is: i) federal government recommendations concerning the implementation of a federal integrity policy, ii) monitoring the evolution of the integrity policy and its management at the national and international levels. It has no authority to issue binding advice, impose penalties, or resolve personal conflicts that may arise within a particular administration.

5. Other implementations of the Directive (EU) 2017/1371 in Belgium

As mentioned in Task 2, the most important legal instruments in Belgium (the Criminal Code and the Royal Decree of 1933 concerning declarations regarding subsidies, compensations, and allowances) have been adapted to the provisions of the Directive (EU) 2017/1371**[113]**. Discussion of these adaptations will not be repeated below, but an overview of other implementations of the Directive (EU) 2017/1371 will be described in the following sections.

One of the first legislative acts initiated by the federal legislator was the adaptation of Customs and VAT legislation, which is still a federal competence. With an Act of 9 December, 2019, the Customs

[107] Established by the Act of Parliament of 15 September 2013 concerning the report of a supposed violation of integrity in the federal administrations by its members of staff, Belgian Official Gazette, 4 October 2013.
[108] Article 2, 3°, Act of Parliament of 15 September 2013.
[109] Article 15(1), Act of Parliament of 15 September 2013.
[110] Decree of 7 July 1998 concerning the introduction of the Flemish mediator.
[111] Protocol of 9 May 2014 concerning the protection of whistle-blowers.
[112] See Circular Letter n° 573 of 17 August 2007 concerning the deontological framework for public servants of the federal administrative public services, Belgian Official Gazette 27 August 2007.
[113] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud against the Union's financial interests by means of criminal law.

and VAT legislation and its specific criminal aspects were amended in order to comply with the provisions of the PIF Directive.[114]

Following the preparatory works[115], the main goal of the federal legislator was to ensure that the EU's interests concerning the income from customs and VAT are protected. This follows Article 3, 1 of the PIF Directive that states that all Member States must take the necessary measures to ensure that fraud affecting the Union's financial interests constitutes a criminal offence when committed intentionally.

5.1. Customs

To this purpose, an inquiry was carried out as to whether the General Act[116] complied with the provisions of the PIF Directive. With regard to customs, the legislator noted that Belgium already envisages penalties for non-compliance with the obligations affecting traditional own resources, e.g., actions that can lead to a customs debt following the EU's Customs Code under the General Act. These include the following crimes: the declaration of incorrect transit[117], the establishment, after the certificate of inspection, of a customs debt as a result of a prosecutable act[118], misnomer[119], incomplete declaration[120], false, incomplete, or incorrect documents[121], import and export without declaration[122], and so on. The discussion of all customs-related crimes falls outside the scope of this research.

As fraud concerning the latter-named resources of the Union should be considered[123]: any act or omission relating to: (i) the use or presentation of false, incorrect or incomplete statements or documents, resulting in the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf, (ii) the non-disclosure of information in breach of a specific obligation, with the same effect, or (iii) misapplication of a legally obtained benefit, with the same effect.

However, the legislator adapted the General Act in a manner that explicitly aims to combat crimes intended to harm the EU's financial interests: Article 202 of the General Act was extended by means of a third paragraph, stating that a customs violation committed with deceitful intent and severely damaging the EU's financial interests, will be punished with a jail sentence ranging from four months to five years. The legislators explicitly stated that whenever damages reach more than 100,000 euros, the EU's financial interests are deemed to have been harmed. These penalties are implemented in a comparable manner throughout the entire General Act and are being used in order to safeguard the EU's financial interests, so that Belgian Law complies with the PIF Directive.

Article 281(1) of the General Act provides that all claims for violations, fraud and crime, punishable by the Customs and Excise Acts must be brought in first instance before the Correctional

[114] Act of Parliament of 9 December 2019 concerning the amendment of the general Act of Parliament concerning customs and excise duties of 18 July 1977 and the Code on Value Added Tax implementing the Directive (EU) 2017/1371, Belgian Official Gazette, December 18, 2019.
[115] Belgian Chamber of Representatives preparatory works, *Parl. St.* 2019-20, 0706/001, 6.
[116] General Act of Parliament of 18 July 1977 concerning customs and excise duties, Belgian Official Gazette, 21 September 1977
[117] Article 115 General Act of Parliament of 18 July 1977 concerning customs and excise duties, Belgian Official Gazette, 21 September 1977.
[118] Article 202 General Act of Parliament of 18 July 1977.
[119] Article 236 General Act of Parliament of 18 July 1977.
[120] Article 237 General Act of Parliament of 18 July 1977.
[121] Article 259 General Act of Parliament of 18 July 1977.
[122] Article 220 General Act of Parliament of 18 July 1977.
[123] Directive (EU) 2017/1371, article 3, c).

Tribunals, and on appeal, before the Court of Appeal, in order to be tried in accordance with the Code of Criminal Procedure.

5.2. Value Added Tax

Criminal offences that constitute a breach of the common VAT system are to be regarded as serious under the PIF Directive if they relate to the territory of two or more Member States, or the result of a fraudulent construction involving offences committed in a structured manner in order to abuse the common VAT system causing losses of least 10,000,000 EUR.

Only for the above-mentioned offences concerning VAT does the PIF Directive[124] prescribe that Member States must undertake the necessary action to criminalise these offences with a maximum punishment of at least four years in prison.

The Code on Value Added Tax[125] already established criminal sanctions with prison sentences ranging from eight days to five years and fines ranging from 250 to 500,000 euros for fraud concerning VAT and VAT carousels. Before adoption, no definition was envisaged to define a crime as 'serious', which is why the legislation was adapted.

Article 73 of the Code on Value Added Tax was adapted in order to provide a definition of what is considered a serious case of fraud:

"Tax fraud is in any case considered serious when the infringements referred to in paragraph 1 are linked to the territory of at least two Member States and cause loss to the value of at least €10,000,000".

Since the implementation of the new provisions, VAT fraud is punishable with jail sentences ranging from eight days to three years, and with a fine ranging from 26 to 50,000 euros, or either one of these punishments. When the same crime is committed by a criminal organisation, the crime is punishable by a prison sentence ranging from one to five years and with a fine ranging from 5,000 to 500,000 euros. The attempted crime is also punishable.[126]

[124] Directive (EU) 2017/1371, article 7.

[125] Act of Parliament of 3 July 1969 introducing the Code on Value Added Tax, Belgian Official Gazette 17 July 1969, 7046.

[126] Article 73 nonies-decies, Act of Parliament of 3 July 1969 introducing the Code on Value Added Tax.

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BELGIUM - SECTION II

I. EU Civil Protection Mechanism: RescEU Belgium – stockpile capacity

Dr. Alessandro Nato and Mattijs Vanmarcke

1. National procedures for the implementation of national stockpile capacities

RescEU is a part of the European Union's Civil Protection Mechanism, which was established in October 2001 by the European Council[127]. The Mechanism aims to strengthen the cooperation between EU Member States to improve prevention, preparedness and response to disasters.

RescEU was announced by the Commission on 23 November 2017 [128]. The need for a more robust and comprehensive EU disaster management capacity was, according to the Commission, a precondition for offering better protection to people, communities, economic interests and the environment. By Decision of the European Parliament and Council[129], important changes were made to the then current civil protection legislation, which would i) reinforce the Member States' collective ability to respond to disasters, and address recurrent and emerging capacity gaps, ii) strengthen the focus on prevention as a part of disaster risk management, iii) ensure the Union's Civil Protection Mechanism is agile and effective in its support of emergency operations.

The main goal of RescEU is to enhance the protection of citizens from disasters and the management of emerging risks. It is to provide assistance in overwhelming situations where overall existing capacities at national level and those pre-committed by Member States to the European Civil Protection Pool are not able to ensure an effective response to the various kinds of disasters mentioned in the Decision. [130]

1.1 Disaster management in Belgium

The disaster management in Belgium follows the territorial structure of the country, depending on the scale of the disaster, other territorial governments can be competent. The first level is the municipal phase, during which the mayor is competent when the emergency requires management at the municipal level, the second level is the provincial phase, during which the provincial governor is competent because the emergency requires a wider spread approach. The last, national Phase is led by the Minister of Internal Affairs, this is the case when two or more provinces are covered by the disaster, a vast logistical support is necessary.

Five disciplines of disaster management are known in Belgium: i) the relief operation, ii) medical, sanitary and psychosocial assistance, iii) piecework at the scene of the emergency, iv) logistical support and v) information. (see here).

[127] Council Decision 2001/792/EC, 23 October 2001 establishing a community mechanism to facilitate reinforced cooperation in civil protection assistance interventions, OJ L 297.

[128] Communication from the Commission, Strengthening EU Disaster Management: rescEU Solidarity with Responsibility, 23 November 2017, COM 2017, 773.

[129] Article 12 of the Decision 2019/420 of the European Parliament and of the Council of 13 March 2019 amending Decision No 1313/2013/EU on a Union Civil Protection Mechanism, LI 77/1.

[130] Article 12 Council Decision of 13 March 2019.

Hereby an overview is provided of two services that play an important role in the chain of the disaster management in Belgium, relevant also to the RescEU initiative.

1.2. The Civil Service

In Belgium, the General Direction of the Civil Protection is the competent organ for disaster management. Its duties and functioning were laid out in detail by the federal legislator in 2007.[131] The service is a part of the Federal Minister of Internal Affairs, but also the Federal Minister of Health has certain competences concerning the working of the Civil Protection Service.[132] The main duties of the Civil Protection Service are: i) the rescue and assistance to persons in threatening circumstances and the protection of their property, ii) emergency medical assistance as defined in Article 1 of the law of 8 July 1964 on urgent medical assistance, iii) combating pollution and the release of hazardous substances, including radioactive substances and ionizing radiation, iv) fighting fire and explosion and their consequences, v) providing logistical support.[133]

The duties of the Civil Protection Service have been further elaborated by several Royal Decrees and circular letters. One noteworthy example is the circular letter concerning the continuance of the competences concerning urgent medical assistance.[134]

During the pandemic, the Civil Protection Service has shown to be a key player in the fight against COVID-19. Following the above mentioned competences, the Civil Protection Service has contributed to the provincial and federal coordination of actions taken in the fight against the COVID-19 pandemic. It has provided its expertise during several interdepartmental and multidisciplinary coordination meetings of the Federal Coordination Committee that implements strategic decisions for crisis management, and also of the provincial coordination committees. Furthermore, the Civil Protection Service has provided assistance to residential care centers, hospitals and pre-triage centers, at the request of the provincial governors, since mid-April 2020. Finally, the Civil Protection Service has provided transport of protective equipment, such as protective masks and others, not only for national purposes, but also in light of the European Union's initiative RescEU (see 3, see here).

The Civil Protection Service closely works together with the Defense Department and the Fire Brigade Networks and have set op a National Logistics Hub in October 2020 in order to centralize the logistical support (see here).

2. National procedure/RescEU procedure relationship

2.1. The disaster fund in Flanders

[131] Act of Parliament of 15 May 2007 concerning the civil Protection, Belgian Official Gazette, 31 Juli 2007.
[132] Article 2, §§1-2 Act of Parliament of 15 May 2007.
[133] Article 11, §1 of the Act of Parliament of 15 May 2007.
[134] Ministerial Circular Letter of 1 October 2004 concerning the continuance of the competences concerning urgent medical assistance within the zones of assistance, not published.

In Flanders, a specific fund has been installed in 2019 that foresees a compensation for damages caused by certain disasters.[135] Previously, this was a federal competence, but due to the constitutional reforms, the regions became competent (see Deliverable 1, task 1).

The disasters under the scope of the Decree are: i) the disasters that have been recognized by the Flemish Government, ii) disasters caused by exceptional natural causes, iii) dismal weather conditions, such as a drought or severe rain.[136] The application must be done before the Disaster Fund itself, by providing all the necessary evidence, however the Flemish Government is competent for the analysis of the request and the payment of the compensation for the damages.[137] When compensations should be paid without a valid reason, the Decree foresees that the Government will implement certain norms in order to be able to reclaims those funds[138], but as of today, no such norms have been created.

2.2 RescEU in Belgium during the COVID-19 pandemic

The European Commission announced to set up a strategic stockpile of medical supplies under the RescEU mechanism in order to assist EU Member States in the fight against the pandemic.[139]

As a second wave of the pandemic was imminent, Belgium, along with the Netherlands and Slovenia, announced to be a candidate to be one of the new host countries for storing RescEU medical supplies, including 65 million medical masks and 15 million FFP2 and FFP3 masks, 280 million pairs of medical gloves, 20 million medical gowns and aprons and several thousand oxygen concentrators and ventilators. (see here). This common stock of lifesaving medical equipment is stored across Europe in order to help Member States in times of urgency. The Member States hosting the equipment, of which Belgium, are responsible for the procurement, although the European Commission finances 100% of the assets, including storage and transportation of the goods, as coordinated by the Emergency Response Coordination Centre.

Recently, on 9 April 2021, the Civil Protection Service in Belgium, transported medical material from the RescEU stockpile to Serbia. The transport was composed out of 730.000 surgical masks and 730.000 protective gloves, of which Serbia had a shortage (see here)[140]

3. Criminal offences, control procedures, and the risk of fraud affecting the EU's financial interest in this sector at national level

As has happened in the other Member States, Belgium has also been subject to scams regarding the purchase and procurement of medical supplies (see here).

[135] Decree of 5 April 2019 concerning the compensation of damages caused by disaster in the Flemish Region, Belgian Official Gazette, 3 May 2019.

[136] Article 2, Decree of 5 April 2019.

[137] Article 11, §1 Decree of 5 April 2019.

[138] Article 21, Decree of 21 April 2019.

[139] Commission Implementing Decision (EU) 2020/414 of 19 March 2020 amending Implementing Decision (EU) 2019/570 as regards medical stockpiling rescEU capacities (notified under document C(2020) 1827), OJ L 82I.

[140] Civil Protection Service, 22 April 2021, Civiele bescherming vervoert medisch material uit de Europese strategische stock naar Servië.

In May 2020, a Europol-coordinated investigation enabled search warrants to be issued in connection with an investigation into the company that provided 15 million masks 2020 for free distribution to the population in Belgium.

In the first wave of the Covid-19 pandemic in Belgium, the government has decided to introduce a requirement to wear a face mask in public. To provide all Belgian citizens with at least one face mask, the Ministry of Defense was commissioned to contract out the supply and two companies were employed. The first was the Ghent-based textile company Tweed & Cotton, which would supply three million masks. The second was Avrox from Luxembourg, which was to supply 15 million.

However, the award of the contracts immediately gave rise to concern. Tweed & Cotton was an established fabric manufacturer. While Avrox appeared to have no presence in the industry and, in fact, was nothing more than a company registered in an office in Luxembourg that existed solely to serve as an address for hundreds of similar shell companies. This raised questions about how such a company could have won a contract before established textile suppliers. The questions increased as the masks were first delivered late, and then it emerged that the finished product did not match the original announcement. The fabric used was unsuitable and did not meet normal safety standards (see here).

The investigation was launched after a complaint from the Central Anti-Corruption Service, which led to the execution of search warrants in the several Member States of the European Union. The allegations made for the fraud crimes committed in this medical device fraud case involve money laundering, scamming, forgery and use of false documents (see here).

In addition, in March 2021, former Defense Minister Philippe Goffin (MR) told parliament that the federal health ministry had approved the masks for distribution to the public. Indeed, millions of face masks remain on pharmacists' premises from where they should have been distributed to the public. As the delivery came too late to meet the introduction of the mandatory use of face masks on public transport and in shops, Belgian citizens had already geared up when the government masks arrived.

Notwithstanding, former Belgian Defense Minister Goffin had told parliament that the contract had been fulfilled to the best of everyone’s knowledge at the time, Europol's investigation found that the masks may contain harmful particles and the Federal Health Institute Sciensano advised the public to stop using Avrox masks (see here) . The investigation into scams of medical materials acquired for the pandemic will continue in the coming months in Belgium.

II. SURE: Temporary Support to mitigate Unemployment Risks in an Emergency (SURE) following the COVID-19 outbreak

Mattijs Vanmarcke and Dr. Alessandro Nato

1. Introduction

By 30 March 2020, Belgium had adapted the temporary unemployment scheme to COVID-19, which provides compensation for employees whose work is reduced or suspended because of a decreased workload or the social distancing measures imposed by the Government. Before 30 March 2020, the unemployment scheme was not adapted to the COVID-19 circumstances, whereas afterwards, the requirements to access the scheme had been eased.

Furthermore, Belgium extended the replacement income for the self-employed (*overbruggingsrecht)* by introducing a specific COVID-19 bridging right, for companies that had to interrupt their business fully or partially due to the COVID-19 social distancing measures. Also in Flanders, several premiums were established in order to sustain self-employed workers who had to close business entirely or partially.

The COVID-19 outbreak has immobilized a substantial part of the labor force in Belgium, which led to a severe increase in public expenditure. According to the Commission's 2020 Spring forecast, Belgium was expected to have a general government deficit and debt of 8.9% and 113,9% of the GDP by the end of 2020.

According to consideration 1 of the Council Implementing Decision of 25 September 2020[141], Belgium requested financial assistance from the Union on 7 August 2020 with a view to complementing its national efforts to address the impact of the COVID-19 outbreak and respond to the socioeconomic consequences of the outbreak for workers and the self-employed.

2. Allocation of Funds

In September 2020, a total of 7.8 billion EUR was granted to Belgium. The first SURE transaction was executed successfully on 20 October 2020, the second on 10 November 2020, the third on 24 November 2020, of which the funds were disbursed to Belgium on 1 December 2020, the fourth transaction was completed on 26 of January 2021, of which Belgium received the funds on 2 February 2021.

Following article 3 of the Council Implementing Decision of 25 September 2020, Belgium may receive financing for the so-called temporary unemployment scheme (see 2.4), the bridging right for self-employed workers, parental leave, and the regional support schemes. For Flanders, this concerns a nuisance premium for self-employed and one-person companies, a compensation premium and a support premium (see 2.5).

The Commission has proposed to the Council to grant an additional 394 million EUR to Belgium, as a part of an additional support package of 3.7 billion EUR to six (including Belgium, Malta, Lithuania, Cyprus, Greece and Latvia) Member States to protect jobs and incomes throughout the European Union. The additional support will assist the aforementioned Member States in tackling the

[141] Council Implementing Decision (EU) 2020/1342 of 25 September 2020 granting temporary support under Regulation (EU) to the Kingdom of Belgium to mitigate unemployment risks in the emergency following the COVID-19 outbreak, L 314/4.

continued impact of COVID-19 in the socio-economic fabric. According to the Commission, the evolution of the health and economic situation has resulted in a further increase of public expenditure related to measures designed protect workers and public health (see here). By Council Decision of 23 April 2021, the additional support was definitively granted to Belgium[142] As of 25 May 2021, all Members States, including Belgium, have received the total sum of the back-to-back loans, for Belgium totaling 8.197 billion EUR, completely disbursed.

2.1 Effectiveness of SURE in Belgium

The European Commission has published a first report after six months concerning the implementation of the SURE instrument, on 22 March 2021[143]. This report has been written with the input received by the Member States. According to the Report, the demand for financial assistance under SURE, had been strong. Belgium had received the total asked amount. SURE is estimated to have covered 25% of all workers in Belgium. Also, all of the financial assistance under SURE has been used by Belgium in support of labor market measures, with a 0% percentage of usage for health-related measures. In some Member States, such as Hungary, the percentage runs up as high as 50% for health-related measures. Furthermore, in Belgium, the financial assistance under SURE has been equal to 2.8% of the wages of employees and self-employed.[144] As Belgium, as one of five Member States, already had a specific short-time work scheme in place, merely an adaptation in response to the pandemic, was necessary. According to the report, SURE helped to slow down the increase in unemployment rates in Belgium drastically.

2.2 Temporary unemployment – Tijdelijke werkloosheid

According to article 3 of the Council Implementing Decision of 25 September 2020, one of the measures that may be financed by the SURE programme is the temporary unemployment scheme, which had been adapted because of the COVID-19 crisis. The Decision refers as a legal basis for the temporary unemployment scheme to the (federal) Royal Decree of 30 March 2020[145].

As Belgium, as one of five Member States, already had a specific short-time work scheme in place, only an adaptation in response to the pandemic, was necessary. These adaptations are in general the i) simplification of administrative procedures, ii) a broadening of the coverage, iii) a relaxation of eligibility conditions and iv) higher generosity and increased duration.

Due to the changes brought by Royal Decree, Belgian employers could more easily apply for temporary unemployment measures for their employees. In case employers have to close down completely or partially, or when dealing with decreased workloads, temporary unemployment due to force majeure (COVID-19) can be requested by filing an electronic declaration with the National Employment Office. After doing so, the employees are granted unemployment allowances, provided by the National Employment Office, instead of their normal salary, corresponding to 70% of the average salary, with a maximum set at 2.754,76 EUR per month. The gap of 30% between the allowance and the average salary, however, can be closed by the employer by providing a supplement, which is free of social contributions if i) the supplement itself does not exceed the unemployment benefit itself, and ii)

[142] Council Implementing Decision (EU) 2021/681 of 23 April 2021, amending Implementing Decision (EU) 2020/1342 granting temporary support under Regulation (EU) 2020/672 to the Kingdom of Belgium to mitigate unemployment risks in the emergency following the COVID-19 outbreak.

[143] Report from the Commission to the European Parliament, the Council, the Economic and Financial Committee and the Employment Committee, 22 March 2021, Brussels, the European Commission.

[144] Graph 6 of the Report of 22 March 2021.

[145] Royal Decree of 30 March 2020 concerning the adaptation of the procedures concerning the temporary unemployment caused by the COVID-19 virus and concerning the altering of article 10 of the Royal Decree of 25 November 1991 concerning the unemployment legislation and introducing articles 36sexies, 36bis and 124bis in the same Royal Decree, *Belgian Official Gazette*, 2 April 2021.

the sum of both parts does not result in a higher net amount that when the employee is actually working (see here)[146].

Temporary unemployment is also possible for employees who have to be quarantined mandatorily, but who are not ill and when not possible to perform teleworking. Furthermore, a system was installed, based on force majeure, for employees who had to take care of child as a result of the closure of the school, nursery or institution for people with disabilities. As soon as the employee provided the employer with a certificate proving his reason of force majeure, unemployment benefits can be requested.

2.3 Reported fraud concerning temporary unemployment benefits

The National Employment Office, responsible for the applications and payment of the temporary unemployment benefits, is also responsible for the control and enforcement of the legislation concerning temporary unemployment.[147] The Royal Decree of 30 March 2020 did not amend the competences of the National Employment Office, nor of its inspectorate services.

In Belgium, fraud committed with social benefits, more specifically fraud with (temporary) unemployment benefits, is a crime, that can be punished with either a criminal punishment ranging from 400 euro to 4.000 euro, or an administrative punishment of 200 euro to 2.000 euro.[148] All punishments are to be multiplied by the number of employees involved.[149] The inspectorate of the National Employment Office often collaborates with the federal judicial instances as discussed in Deliverable 1, Task 2 and 3, in order to be able to start criminal proceedings. During 2020, a total of 2.600 police reports were recorded, which may initiate further criminal proceedings (see here)[150].

The National Employment Office reported that over 1.200.000 Belgians were temporary unemployed during the COVID-19 crisis, whereas a mere 1.692 verifications were initiated by the inspectorate services of the National Employment Office. (see here). On a total of 1,26 million temporary unemployed, with 140.000 employers concerned, the effectiveness of the inspectorate was questioned in the federal Chamber of Representatives, but the federal Minister of Work, replied that the National Employment Office is aware of the issue and points out that, in order to combat fraud with unemployment benefits, a competent system is set in place. First, the Minister refers to the administrative and systematic checks of the files kept the instances who are responsible for the payment of the benefits: the National Employment Office systematically verifies the eligibility of all most payments and keeps track of them. Second, a system of internal checks is put in place in the databases of the National Employment Office, in which employees and employers have to enter their data, which may prevent certain breaches of the legislation. When not eligible for certain unemployment benefits, an employer may not be able to fulfill his request, based on the data entered by the employer. [151] Last, the Minister refers to the checks issued by the inspectorate of the National Employment Office, which are currently being redirected in order to be as efficient as possible. According to the Minister, the majority of the data that leads to further inquiries, originates from datamining and data matching of internal and external databases, which may trigger an investigation because of possible fraud detection. Also, complaints of third parties are an important source of data for further investigations: every citizen can report fraud on a certain website, called *Meldpunt Eerlijke Concurrentie* (Fair Competition Hotline). In order to obtain more information and broaden the reach of the inspectorate services of the National Employment Office, data is also gathered from other institutions, such as the federal judiciary actors, the National Social Security Services and its inspectorate service, other labor inspectorate services and so on. At the time of the written question, the Minister informed that the number of research had increased to 32.274, of which 8.510 investigations took place on the field. Of the total number of investigations, 9.222 breaches have

[146]RSZ (National Social Security Service), Administratieve instructies 2021/2.

[147] Article 17, §2 of the Social Criminal Code, 17 June 2010, *Belgian Official Gazette*, 1 July 2010.

[148] Article 226, 1° of the Social Criminal Code.

[149] Article 226, last paragraph of the Social Criminal Code.

[150]The National Employment Office, activity Report 2020, p. 57.

[151] B. ANSEEUW, Chamber of Representatives, written questions and answers, 18 February 2021, n° 55-190.

been established. Currently, the National Employment Office cannot provide any statistics concerning the administrative sanctions that have been issued or the total amount of unemployment benefits that have been recovered.

Furthermore, a number of judicial (criminal) investigations are ongoing concerning fraud with temporary unemployment benefits. Journalists have reported a case in which an estimated number of 25 persons have, by committing fraud with false documents and extortion, wrongfully obtained temporary unemployment benefits. The inspectorate of the National Employment Office has discovered that the accused have stolen the identity of several hundreds of benefiters. By order of the Investigative Judge, house searches have been held. The Social Security estimates a loss of 2 million EUR. (see here).

2.4 Premiums for self-employed workers and one-person companies in Flanders

The Flemish Government issued several measures in order to support business during the COVID-19 crisis, among others also different kinds of 'premiums', lump sum allowances. As states before, these premiums were eligible for financing by the SURE programme. Article 3, (d), ii) of the Council Implementing Decision of 25 September 2020 specifies for the Flemish Region that the following premiums are eligible for financing: i) nuisance premiums[152], ii) compensation premiums[153], iii) support premiums[154].

The scope of the premiums is set for the expenditure related to the support of the self-employed and one-person companies.

The nuisance premiums consist of a lump sum allowance of 4.000 EUR[155], which is granted to enterprises who are obligated to close down because of the corona virus measures, and of which, their location is closed. For enterprises in the catering, food and beverage sector, the lump sum is granted when the bar room is closed, making sure that 'take away options' are still possible. For enterprises who have to close during weekends, a lump sum allowance of 2.000 EUR was foreseen.[156] From 6 April 2020 onwards, an additional 'closing premium' was foreseen, which consists of a lump sum of 160 EUR pro diem when the enterprise had to close mandatorily. As of 30 September 2020, this additional premium is no longer available.[157]

The support premiums consist of a lump sum allowance of 2.000 EUR, or a one-time lump sum of 1.000 EUR.[158] Only enterprises who have known a decrease of their revenue, caused by the corona virus measures, are eligible for the premium.[159] The corona virus measures are defined as the measures taken by the National Security Council as of 12 March 2020 concerning the coronavirus and the resulting actions of the competent authorities on civil security.[160]

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[152] Decision of the Flemish Government of 20 March 2020 granting support to enterprises who have to close down mandatorily as a consequence of the measures taken by the National Security Council as from 12 March 2020 concerning the coronavirus, *Belgian Official Gazette*, 30 March 2020.

[153] Decision of the Flemish Government of 10 April 2020 granting support to enterprises who experience a decrease in turnover caused by the limitations in exploitation taken by the National Security Council as from 12 March 2020 concerning the coronavirus, *Belgian Official Gazette*, 17 April 2020.

[154] Decision of the Flemish Government of 12 June 2020 granting support to enterprises who experience a decrease in turnover, despite the ease in corona virus limitation, amending articles 1, 9 and 11 of the Decision of the Flemish Government of 10 April 2020 granting support to enterprises who experience a decrease in turnover caused by the limitations in exploitation taken by the National Security Council as from 12 March 2020 concerning the coronavirus and amending articles 1, 6, 9 and 12 of the Decision of the Flemish Government of 20 March 2020 granting support to enterprises who have to close down mandatorily as a consequence of the measures taken by the National Security Council as from 12 March 2020 concerning the coronavirus, *Belgian Official Gazette* 22 June 2020.

[155] Article 4 of the Decision of the Flemish Government of 20 March 2020.

[156] Article 5 of the Decision of the Flemish Government of 20 March 2020.

[157] Article 6 of the Decision of the Flemish Government of 20 March 2020.

[158] Article 3 of the Decision of the Flemish Government of 12 June 2020.

[159] Article 4 of the Decision of the Flemish Government of 12 June 2020.

[160] Article 1, 2° of the Decision of the Flemish Government of 12 June 2020.

VLAIO (Vlaams Agentschap Ondernemen en Innovatie, VLAIO, (see also Deliverable 1, Task 1), is responsible for the applications of the premium, as well for the verifications[161].

3. Reported fraud concerning the different premiums in Flanders

Belgian experts and journalists reported recently that a lot of self-employed persons and entrepreneurs wrongfully obtained the economic support measures as provided by the Flemish Government, of which also the different premiums in Flanders. According to *De Tijd (*De Tijd, 9 May 2020, Experts luiden noodklok over misbruik coronasteun), data specialist Graydon reported that there is a substantial abuse of subsidies, both on the national and regional level. Some forms of abuse are very hard to detect and to pursue, such as the self-employed workers claiming that they had to interrupt their businesses, thus obtaining a premium, but in reality, kept working behind closed doors. According to the accountants who were interviewed by *De Tijd,* no less than 43% of the companies wrongfully obtained subsidies and thus are harming the financial interests of the European Union, as the subsidies are of course partially financed by funds of the European Union, as in this case the SURE mechanism.

The competent managing institution for the COVID-19 premiums in Flanders (Vlaams Agentschap Ondernemen en Innovatie, VLAIO, (see also Deliverable 1, Task 1), has reported that it wants to reclaim an amount of 63,5 million EUR of unlawfully obtained premiums, of which a total of 36 million EUR is already reimbursed (DE TIJD, 20 May 2021, Vlaanderen vordert 63,5 miljoen euro aan coronasteun terug, digitally obtained).

VLAIO actively researches abuse with these premiums. According to VLAIO, a specific fraud detection tool has been created in order to classify certain files as a risk hazard, of which half of these files have been subject to a revision of the premiums.

According to the competent Flemish Minister of Economy, Innovation, Work, Social Economy and agriculture[162], VLAIO effectively handles these cases and furthermore, when during an audit it becomes clear there is an evident case fraud with subsidies (See also Deliverable 1, Belgium, Task 2, 3), the Central Service for the Repression of Corruption will be systematically informed (see also Deliverable 1, Task 4, 1.) because VLAIO is not competent to undertake the necessary investigative actions on its own.

Furthermore, the Minister reported that the Flemish Government will also file a complaint as victim before the competent investigating judge, opening the necessary criminal proceedings because of the criminal offences, such as: extortion, forgery with documents and abuse of trust (see also Deliverable 1, Task 4, 2.1-2.3.). According to the Minister, in the period 2010-2021, 18 files concerning fraud with subsidies were opened, mainly dating before the COVID-19 crisis, reason why these numbers are outdated.

The Brussels Prosecutor's office reported on 2 June 2021 that it will commence the criminal proceedings concerning fraud with the Flemish premiums for the first time since the start of the COVID-19 pandemic. One of the concerned individual files reportedly mentions the abuse of fraud of Flemish premiums of no less than 308.000 EUR. During the first hearing concerning fraud with subsidies before the Tribunal of First Instance (See also Deliverable 1, Task 3, 3), the spokesperson of the competent Flemish Minister stated that different files have already been transferred by VLAIO to the Central Service for the Repression of Corruption (DE TIJD, 2 June 2021, Parket vervolgt voor het eerst fraude met Vlaamse coronapremies).

The Flemish Government not only focusses on repression of fraud with subsidies: the competent Minister announced that the Flemish Government is working on a Government Decision[163] that will

[161] Article 9/1 of the Decision of the Flemish Government of 20 March 2020.
[162] Written question and answer by MP Maurtis Vande Reyde, 1 September 2020, Flemish Parliament
[163] Draft Decision of the Flemish Government amending several Decisions concerning support measures of the Agency for innovation and Enterpreneurship (Vlaio), pending.

exclude fraudulent self-employed workers or companies from the support mechanisms that are provided by VLAIO. The draft decision amends current legislation in such a manner that applicants who have filed for subsidies using false statements or incorrect information, without amending the information, will not be able to benefit of any kind of subsidy mentioned in the draft Decision. The draft Government Decision provides a time limitation of 5 years, meaning that when fraud was established in the 5 years prior the new application, the application will be denied. The scope of the draft Decision is wide: all VLAIO subsidies, including those concerning COVID-19, but also others, are covered. The status of the draft Government Decision is still pending at this time, awaiting the advice from the Council of State, which is competent to provide advice concerning legislative technique.

4 Conclusion

The COVID-19 support measures, both on the national and the regional level were granted quite liberally and with a certain kind of generosity. Already after a few months in this crisis, it became clear that this generosity evidently also had led to a certain amount of fraud concerning these measures. The Belgian judicial system and administrative system consists of effective means to combat fraud with subsidies, but the main issue is the data collection and research of the fraud: the scope of the measures has never been seen before and the institutions that are competent to research the fraud, do not have enough manpower to research all fraudulent applications and payments. Because of the fact that the conditions that are easily met, a lot of applicants received support, although they were not always eligible according to the legislation. It is far harder to control and enforce the legislation once the payment was already effectuated., which has led to a certain amount of criticism. However, the competent governments, either regional or federal, took certain measures in order to i) prevent fraud with support measures, ii) to punish the illegitimate users of certain benefits, iii) to recover benefits that were wrongfully granted or obtained. Despite all measures, not all wrongfully obtained measures will be refundable and thus will be deemed lost.

III. Strategic investments supporting small and medium enterprises in Belgium

Dr. Alessandro Nato and Mattijs Vanmarcke

1. National support schemes for small and medium enterprises in Belgium

SMEs play an important role in the Belgian economic system. Indeed, in 2016, SMEs dominated the business landscape in Belgium, accounting for 99.85% of all businesses. Micro enterprises with up to 9 employees made up 94.73% of all enterprises, while large enterprises with more than 250 employees represented only 0.15% of Belgian enterprises (see here). In 2014-2018, SME value added in the information and communication sector increased by 28.5%, and SME employment in the same sector rose by 6.8%. Predictions for 2018-2020 are 6.4% growth in SME value added and 1.8% growth in SME employment (see here).

In Belgium, the success of SMEs is favored by their proximity to many major markets such as the UK, France and Germany, Belgium unsurprisingly created an export-oriented economy. This is further proof by the ease of conducting cross-border trade, compared to other countries. Export opportunities are sufficient, and the cost of exporting is unneglectable. The fact that Belgium has an export agency in all its three main regions is probably a helpful factor. The result is a high share of export focused SME's in Belgium: 7.1% of total SMEs against 5.5% on average for peers (see here) .

In addition, Belgian SMEs enjoy a favourable rate, which has been reduced in corporate tax by 20% since 2018 - compared to the normal rate of 29%. Belgian SMEs already have higher margins than those of other Member States. In 2017, the EBITDA/turnover ratio stood at 13%, + 2pp above the European average. This should ease the burden of rising costs such as wages and import prices (see here). However, there are some downsides. The corporate tax rate itself is high compared to peers - i.e. +5 percentage points more than in France. Furthermore, strong competition, administrative or regulatory burdens and inflexibility in the labor market appear to exert downward pressure on the business climate of SMEs (see here). In addition, the Belgian SMEs have faced some problems over the past few years. Indeed, rising fixed costs and stable cash flow appear to be major challenges for the Belgian SME climate. According to statistics, 43% of SMEs have hurt profit margins due to bad loans, which means that compared to their European counterparts. this is why Belgian SMEs suffer more from bad debt outstanding bills. Indeed, the biggest concern of Belgian SMEs is the timely collection of invoices. Just over a third of the SMEs list this as their main problem with cash flow stability. Invoices paid too late or not at all are a direct attack on a company's liquidity (see here).

The governments of the Belgian communities have recently promoted various programs in support of SMEs. For example, the IraSME Program develops actions to support projects that play a key role in building a business case that has the potential to strengthen SMEs. This type of project includes the development of a completely new or significantly innovative product, process, service or concept, and the result has a significant impact on the company's performance. This impact is rather short-term. The loan granted starts from a minimum of 25, 000 euros up to a maximum of 500, 000 euros (see here).

2. National schemes and their relationship with EU funds in the area of access to credit for SMEs in the light of investments in the main drivers of innovation: the case of the EFSI throughout the multilevel system and green investments

2.1 Strategic investments in Belgium and European Found of Strategic Investment: National Pact for Strategic Investments

Prime Minister Charles Michel announced the development of a National Pact for Strategic Investments in March 2017, because Belgium urgently needed investments, intending to lead to more growth and jobs. The aim of the Pact is to ensure the Belgian economy and social modal is prepared for the coming decades (see here)[164] a Strategic Committee would be set in place to provide concrete advice.

In 2018, the Belgian Strategic Committee, an independent organ that was created in March 2017 composed of several important business leaders, launched the aforementioned National Pact for Strategic Investments, in which several economic players have contributed to writing down several recommendations. The Pact contains no less than between 144 and 155 billion EUR worth of investment and support measures, of which approximately 45% originates from public funds. It is expected that the economy will grow by 1,5-2% per year to 2030, counting on the investments in transition to digitalization and training.

The Interministerial Conference for Strategic Investments (ICSI) is responsible for the concrete implementation of the Pact. The pact is thematically divided in i) digital working groups, ii) cybersecurity and digital confidence, iii) education working group, iv) health care, v) energy, vi) mobility, vii) authorizations and regulations, viii) mobilization of Capital and Public-Private partnerships. Concerning the transition to digitalization, Belgium aims to build an inclusive and prosperous society, by training and retraining employees and students in digital skills, developing ecosystems of companies and research institutions.

An important source for the financing of the investments in the National Pact is of course the European Union and its European Found of Strategic Investment (EFSI). As stated before, all EU domestic safeguard instruments will be brought together in one program called InvestEU. Also, the investments of the EIB in Belgium have contributed to a financing a broad spectrum of projects. The Strategic Committee remarks however that the draft and filing of an application within the EIB should be eased in order to increase the investments.

2.2. EIB investments and EFSI in Belgium during Covid-19 crisis.

The EIB knows a long collaboration with Belgium. Ever since 1962, the EIB has provided financing and expertise for what are considered to be sustainable projects. Since 1962, a total of 32,98 billion EUR has been invested in Belgium (see here)

Outside the scope of public funding, the EIB is the European Union's investment bank, owned by the EU's Member States. The funding of the EIB is usually raised through international capital markets, by issuing bonds, which has as a consequence that most of the fraud combatting mechanisms as discussed in Deliverable I, Task 2, 3 and 4, do not apply to the investment programmes of the EIB, as most apply to subsidies, which have an origin from public funding by the EU or any of the Belgian governments.

According to the annual report the impact of COVID-19 on investments in Belgium, has been severe: half of the firms (46%) were expecting to invest less due to the pandemic, which is in line with

[164] The National Pact for Strategic Investments, annual report, September 2018.

the EU average of (45% expecting less and 6% more). Also, 39% of firms in Belgium with investment plan will expect delay caused by COVID-19. [165] As of 2020, the EIB Group has ongoing investments exceeding 1.33 billion EUR, or 0,30% of the GDP in Belgium. [166]

As a response to the COVID-19 crisis, the European Investment Bank issued an emergency response, alongside the investments in climate, environment and development, the so-called European Guarantee Fund, approved by the European Council on 23 April 2020. The fund is designed for European Union businesses that are having economic hardship because of the pandemic, but are strong enough to receive loans, even without considering the COVID-19 context. The key investments focus also support a range of biotechnology and medical responses, covering vaccines, therapies and diagnostics.

As of today, according to the statistics issued by the EIB, four Belgian companies have applied for support, of which 2 companies was granted the status 'approved', totaling a financing of 480 million EUR. (see here) A noteworthy example of an individual project was announced on 22 April 2020, concerning steel forger Arcelor Mittal: the EIB aims to support the development of more sustainable iron and steelmaking processes and to support the development of high-tech high value-added steel products. The project was approved on 17 September 2020 (see here).

Next to the investments made by the EIB, the European Commission also announced aid measures under EU State aid rules: on 19 March 2020 the Commission adopted a Temporary Framework[167] to enable Member States to implement a full flexibility under State aid rules (see here).

In addition, Belgium has received other funds from the Commission to support small and medium-sized enterprises in December 2020. Specifically, 20 approved agreements were signed with intermediary banks financed by the European Investment Fund (EIF) with the support of the EFSI. These agreements made it possible to disburse € 401 million of total funding. The loan is intended to trigger around 2.8 billion euros of investments with around 15,830 SMEs and mid-cap companies that should benefit from better access to finance (see here).

In May 2021, the Flanders region obtained a € 100 million loan agreement with the European Investment Bank, supported by the European Commission's Investment Plan for Europe to support SMEs modernization plans. The € 100 million funding will be used to enhance its research, development and innovation (RDI) to maintain its competitive edge, as well as investments in environmental sustainability. The funds will support ongoing digitization as well as the development of innovative products. At the same time, the recipient companies will have to target their environmental impact by reducing energy consumption, waste production and the use of raw materials, which will also be part of the activities financed under this operation (see here).

3. Criminal offences, controls procedures and the risk of fraud affecting the EU's financial interest in this sector at national level

At the moment, no fraud has been detected in the EU funds allocated to the Belgian SMEs during the pandemic crisis.

However, in November 2020, the Belgian Minister of Finance, who is also responsible for coordinating the fight against fraud, presented his policy note to the Belgian parliament and worked out the key pillars of future tax policy work (see here). The main theme is the goal of achieving a modern and fair tax regime that limits fraud.

[165] European Investment Bank, 2020, EIB Group survey on investment and investment finance 2020 country overview Belgium, European Investment Bank, November 2020.

[166] European Investment Bank, 2021, European Investment Bank Activity Report 2020, Luxembourg.

[167] Communication from the Commission, 20 March 2020, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, C91/1.

The proposed measures concern: actions to reduce the Belgian VAT gap to the level of neighbouring countries. The VAT gap is the difference between the expected VAT revenue and the actual VAT revenue collected. This difference is not only caused by lost revenue due to tax fraud or tax evasion, it is also the result of bankruptcies, administrative errors or tax collection malfunctions, to name a few. Therefore, the likelihood of tax audits will be increased in the field of indirect taxes by improving the tools and processes available.

In addition, for customs and excise duties, the Minister proposes to participate in a greater number of EMPACT (European Multidisciplinary Platform Against Criminal Threats) projects with Europol and OLAF. Also, it proposes a vision towards a horizontal monitoring system for SMEs.

To optimize the timely and correct collection and recovery of taxes, the Minister of Finance does not hesitate to express a clear intention to raise the level of international cooperation and to leverage the administration's skills to carry out more targeted checks. The actions are part of wider proposals at the EU level to increase administrative cooperation - i.e. through a further extension of the Administrative Cooperation Directive. Given the RFF, the Minister plans to allocate more time and significant resources to the expansion and rationalization of tax enforcement activities. Certainly, the Minister proposes deeper audit actions. Indeed, there may be an evolution towards real-time audits compared to past audits, taxpayers - including SMEs - should be able to explain their positions and non-conformities will not be tolerated.

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BELGIUM - SECTION III

CONCLUSIONS

The analysis first elaborates that Belgium knows a complex constitutional landscape, which of course has also consequences concerning the management and control of the EU structural and investment funds. For third parties, it may not always be clear what institution or administration is either managing or auditing a certain European Structural Fund. This uncertainty is furthermore enforced by the fact that Belgium also knows a supervising body, The Interfederal Corps of the Finance Inspection, which may have confluent competences concerning the auditing of the European Structural Funds. Also, the territorial system in Belgium is subject to periodic constitutional reforms, which may have an important impact on the managing authorities of the diverse European Structural Funds.

Secondly, task 2 demonstrates that Belgium knows a wide variety of instruments able to tackle fraud with European Structural Funds, such as the Belgian Criminal Code including the criminal offences such as forgery, extortion and abuse of trust. Furthermore, the combat against passive and active corruption has been a priority for the federal legislator since several years. It is remarkable however, that the more specific offence, fraud with subsidies, compensations and allowances, was not integrated in the Belgian Criminal Code, but instead was introduced by Royal Decree in 1933, which was amended by a federal Law instead of integrating the offence in the Criminal Code. This particular legislative technique was subject to criticism and may demonstrate that the fraud with subsidies does is not particularly granted a high priority by either the federal or the regional governments, despite the several legislative initiatives.

At last, tasks 3 and 4 actually demonstrate that the seemingly low priority concerning the combat against fraud with subsidies, more specifically fraud with European Structural Funds, has as a consequence that the judicial architecture in Belgium handles very little cases concerning fraud with subsidies. It is shown that, despite the legal initiatives taken in order to be compliant with the PIF Directive, only very little cases demonstrate that the EU's financial interests are taken into account. As it seems to be the case in Poland, the judicial criminal architecture does not seem to be able to detect fraud with subsidies or only on a marginal basis. As pointed out by the Federal Prosecutors Office, the effectiveness of the CDBC, the competent police unit in order to research fraud with subsidies, only accounts for 1.447 working hours on files concerning fraud with means of the European Union. However, it is expected to see a rise of these numbers when the European Prosecutor's Office will be set in place and fully functional.

GERMANY - SECTION I

Task 1: D.1, GERMANY

Prof. Alexander De Becker, Dr. Elisabetta Tatì and Dr. Alessandro Nato

Summary: 1. Germany: the territorial system in brief; 1.1. Brief historical overview; 1.2. Brief overview of the functioning of the federal State; 1.2.1. The division of competences; 1.2.2. The principle of verticality; 1.2.3. Fiscal legislation; 1.2.4. Asymmetrical structure and consultation between regions; 2. The Partnership Agreement 2014-2020 with the EU Commission; 3. Management and control of EU structural and investment funds during the last MFF in Germany: the case of Lower Saxony 3.1. Management and control of the EU structural and investment fund in Lower Saxony; 3.2. Auditing in Lower Saxony.

1. Germany: the territorial system in brief

1.1. Brief historical overview

Federalism may be described as a long-lasting part of German constitutional history. After the German-French war of 1871 and under the auspices of Wilhelm von Bismarck, the German States (later Länder) unified into German Empire. Since the second World War, the German Basic Law clearly expresses the *Bundesstaatprinzip*. Article 20 (1), of the German Basic Law formulates the principle of the federal State as democratic and social (Ziblatt, 2006; Gunlicks, 2003; Umbach, 2002; Stammen, 1999). Germany contains sixteen different Länder. They are listed in the preamble to the Basic Law: Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hessen, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein, and Thuringia. Article 30 of the Basic Law lays down the general rule that the *Länder* have the right to legislate insofar as the Basic law does not confer legislative power on the Federation, meaning that residuary power belongs with the *Länder*. The exclusive powers are listed in Article 73, and the list of concurrent powers is stipulated in Article 74. The long list of competences envisaged as competences of the federal State or as concurrent competences influences our research.

1.2. Brief overview of the functioning of the federal State

1.2.1. The division of competences

As stated before, because of the centripetal evolution of the German State means that many powers are currently exercised at federal level (Behnke, Kropp, 2018; Schnellenbach, 2017; Rowe, Jacoby 2016). The list of powers at national level was shortened in 2010, but central powers remain important. The following are still exclusive to the federal powers:

1. foreign affairs and defence, including protection of the civilian population;

2. citizenship in the Federation;

3. freedom of movement, passports, residency registration and identity cards, immigration, emigration and extradition;

4. currency, money and coinage, weights and measures, and the determination of standards of time;

5. the unity of the customs and trading area, treaties regarding commerce and navigation, the free movement of goods, and the exchange of goods and payments with foreign countries, including customs and border protection;

5a. safeguarding German cultural assets against removal from the country;

6. air transport;

6a. the operation of railways wholly or predominantly owned by the Federation (federal railways), the construction, maintenance and operation of railway lines belonging to federal railways and the levying of charges for the use of these lines;

7. postal and telecommunications services;

8. the legal relations of persons employed by the Federation and by federal corporations under public law;

9. industrial property rights, copyrights and publishing;

9a. protection by the Federal Criminal Police Office against the dangers of international terrorism when a threat transcends the boundary of one Land, when responsibility is not clearly assignable to the police authorities of any particular Land or when the highest authority of an individual Land requests the assumption of federal responsibility;

10. cooperation between the Federation and the Länder concerning

(a) criminal police work,

(b) protection of the free democratic basic order, existence and security of the Federation or of a Land (protection of the constitution), and

(c) protection against activities within the federal territory which, by the use of force or preparations for the use of force, endanger the external interests of the Federal Republic of Germany,

as well as the establishment of a Federal Criminal Police Office and international action to combat crime;

11. statistics for federal purposes;

12. the law on weapons and explosives;

13. benefits for persons disabled by war and for dependents of deceased war victims as well as assistance to former prisoners of war;

14. the production and utilisation of nuclear energy for peaceful purposes, the construction and operation of facilities serving such purposes, protection against hazards arising from the release of nuclear energy or from ionising radiation, and the disposal of radioactive substances.

With regard to this research topic, it is of particularly importan to underline that foreign affairs and defence remain exclusive competences of the Federation. Furthermore, the cooperation between the

Federation and the *Länder* with regard to criminal police work and the establisment of a federal Criminal Police Office, it is obvious that collaboration plays a key role.

Article 74 provides the list of concurrent powers:

1. civil law, criminal law, court organisation and procedure (except for the law governing pre-trial detention), the legal profession, notaries and the provision of legal advice;

2. registration of births, deaths and marriages;

3. the law of association;

4. the law relating to residence and establishment of foreign nationals;

4a. (repealed)

5. (repealed)

6. matters concerning refugees and expellees;

7. public welfare (except for the law on social care homes);

8. (repealed)

9. war damage and reparations;

10. war graves and graves of other victims of war or despotism;

11. the law relating to economic matters (mining, industry, energy, crafts, trades, commerce, banking, stock exchanges and private insurance), except for the law on shop closing hours, restaurants, amusement arcades, display of persons, trade fairs, exhibitions and markets;

12. labour law, including the organisation of enterprises, occupational health and safety and employment agencies, as well as social security, including unemployment insurance;

13. the regulation of educational and training grants and the promotion of research;

14. the law regarding expropriation, to the extent relevant to matters enumerated in Articles 73 and 74;

15. the transfer of land, natural resources and means of production to public ownership or other forms of public enterprise;

16. prevention of the abuse of economic power;

17. the promotion of agricultural production and forestry (except for the law on land consolidation), ensuring the adequacy of food supply, the importation and exportation of agricultural and forestry products, deep-sea and coastal fishing and coastal preservation;

18. urban real estate transactions, land law (except for laws regarding development fees), and the law on rental subsidies, subsidies for old debts, homebuilding loan premiums, miners' homebuilding and pit villages;

19. measures to combat human and animal diseases which pose a danger to the public or are communicable, admission to the medical profession and to ancillary professions or occupations, as well as the law on pharmacies, medicines, medical products, drugs, narcotics and poisons;

19a. the economic viability of hospitals and the regulation of hospital charges;

20. the law on food products including animals used in their production, the law on alcohol and tobacco, essential commodities and feedstuffs as well as protective measures in connection with the marketing of agricultural and forest seeds and seedlings, the protection of plants against diseases and pests, as well as the protection of animals;

21. maritime and coastal shipping, as well as navigational aids, inland navigation, meteorological services, sea routes and inland waterways used for general traffic;

22. road traffic, motor transport, construction and maintenance of long-distance highways, as well as the collection of tolls for the use of public highways by vehicles and the allocation of the revenue;

23. non-federal railways, except mountain railways;

24. waste disposal, air pollution control, and noise abatement (except for the protection from noise associated with human activity);

25. state liability;

26. medically assisted generation of human life, analysis and modification of genetic information as well as the regulation of organ, tissue and cell transplantation;

27. the statutory rights and duties of civil servants of the Länder, the municipalities and other corporations established under public law as well as of the judges in the Länder, except for their career regulations, remuneration and pensions;

28. hunting;

29. protection of nature and landscape management;

30. land distribution;

31. regional planning;

32. management of water resources;

33. admission to institutions of higher education and requirements for graduation in such institutions.

For concurrent powers, Article 83 of the German Basic Law stipulates that the *Länder* execute federal laws in their own right insofar as the Basic law does not provide or allow otherwise. With regard to the division of competences, it often said that the German model remains rather centralised (Panara, 2010, 135).

1.2.2. The principle of cooperative Föderalismus

Furthermore, the Bundesrat plays an important role in the safeguard of the competences of the *Länder*. At national level, the *Bundestag* votes on legislation while the *Bundesrat* is involved to ensure the competences of the *Länder*. (Börzel, 2001, 45 ff.)

1.2.3. Fiscal legislation

According to Article 105 of the German Basic Law, the Federation has exclusive power to legislate on customs duties and fiscal monopolies, while it has concurrent authority to legislate on all other taxes, whose revenue accrues to it wholly or in part (Scholta, Niemann, Halsbenning, Räckers, Becker, 2019; Hepp, Von Hagen, 2012; Jochimsen, 2008, 234 ff.). The *Länder* can legislate with regard to local taxes on consumption and expenditures as long - and insofar - as they are not substantially similar to taxes regulated by federal law. They are empowered to determine the rate of tax on the acquisition of real estate. Federal laws on taxes whose revenue accrues wholly or in part to the *Länder* or the municipalities (associations of municipalities) require the consent of the Bundesrat. In the 2009 reform, the system of intergovernmental finances changed, and important *Lände*r initiatives were undertaken to establish tax law initiatives. Many competences are shared, such as civil and criminal issues, public welfare, economic legislation, energy, commerce, banking and insurance, labour issues, social security, unemployment insurance, educational grants and the promotion of research, as well as urban real estate matters, hospitals, roads, environmental protection, and regional planning.

1.2.4. Symmetrical structure between the Länder

The German federal model is often cited as a symmetrical one. The same competences are endowed upon the *Länder* (Reutter, 2021), and they all possess the same powers. However, regulations in the different *Länder* differ with regard to substance. As stated above, the *Länder* can enact legislation with regard to their own competences, which leads to a major asymmetrical structure concerning the substance of the law. Each of the German *Länder* has the same institutional framework. Each of the German *Länder* has the same institutional framework and its own Parliament and Government. The German political system and symmetrical structure between the different Communities and Regions, along with the different constitutional reforms, envisage an extended system of cooperation between the different institutions. Mainly, there are two forms of co-operation between the institutions that need to be stressed: i) their role in the adoption of *Bundesrat* legislation at federal level, and ii) the role of the different *Länder* in executing federal legislation. The Constitutional Court *(Bundesverfassungsgericht*) can also intervene when competences are exceeded, as this can be done by each S*taatsgerichtshof* at *Land* level. *Verwaltungsgerichten* (Administrative Courts) can adjudicate on the legality of administrative decisions, and the *Bundesverwaltungsgericht* expresses final judgment in order to maintain a certain uniformity (Bumke, Voßkuhle, 2019).

2. The 2014-2020 Partnership Agreement with the EU Commission

Germany concluded a partnership agreement concerning the 2014-2020 budgeting period with the European Commission on 15th September 2014. The objective of the partnership agreement was to align the strategies concerning the funds between the regions, Germany itself, and the EU Commission (Busch, Strehl, 2019, 71 ff.). The objective of the partnership agreement was to align the strategies concerning the funds between the regions, Germany and the EU Commission (Busch, Strehl, 2019, 71 ff.). The main goal was to comply with the 'Europe 2020' strategy, focusing on the competitiveness of certain regions, targeting research, technological development, and innovation in all regions. All the *Länder* and the *Bund* obtained support from the European Social Fund and a lot of support from different bodies. The most important financial instruments were the European Regional Development Fund (ERDF), the European Social Fund (ESF), the European Agricultural Fund for Rural Development (EAFRD) and the European Maritime and Fisheries Fund (EMFF). With regard to the use of these funds,

48 projects involve key level participation of one or more *Länder*. As stated above, the regions share competences with the federal authorities in employment, social cohesion, and the economy. The ESF funds one national project, and the ESF/ERDF finances one common project. As for Germany, the ESF-programmes in all the *Länder* focus on the promotion of sustainable and quality employment and on supporting labour mobility, the promotion of social inclusion, the fight against poverty and discrimination, investment in education, training, and vocational training for skills and lifelong learning. The co-ordination of the different funds for the period from 2014 to 2020 is the responsibility of the *Länder* and – if of concern to the whole of Germany – the *Bundesregierung* (Selle, 2017).

3. Management and control of EU structural and investment funds during the last MFF in Germany: the case of Lower Saxony

Article 123 of Regulation (EU) 1303/2013 imposes Member States the obligation to designate a number of authorities that are competent to manage and control the European Structural Funds.

Member States can choose whether this will be a national, regional or local public authority or body. What receives financial support constitutes part of the funding programmes (operational programmes or development programmes) that vary from one German *land* to another. These programmes must be in harmony with the strategic guideline, namely the Partnership Agreement above mentioned.

In Germany, it is predominantly the individual *Land* that decides who benefits from ESI funds. Usually they are the ones determining the guidelines for financial assistance and that set up the funding programmes. The system of lower Saxony, for example, is presented further.

There are also some exceptions, for example one that applies to the ESF. In fact, in this context there is a programme of federal funding. It was developed jointly by the Federal Ministry of Labour and Social Affairs, with the Federal Ministries of Economic Affairs, Education, the Environment, and Family Affairs. Respectively. 2.7 billion Euro of the total funds provided to Germany are directed into the ESF federal programme. Each individual *Land* has set up programmes of their own, coordinated with the ESF federal programme in terms of their content, not least to avoid duplication of funding.

BMWi is the German federal ministry in charge, more in general, of coordinating EU affairs. The ministry deliberates and agrees on a national position in the case of structural funding issues concerning both the Federal Government and the *Länder*, bundles these interests, and represents them in Brussels before the bodies of the European Council and the European Commission responsible for EU structural policy. In relation to the ERDF, the Federal Ministry for Economic Affairs and Energy functions as the coordinator of all issues concerning the ERDF and is the point of contact at the national level for the *Länder* and for the Commission.

For the EAFRD and the EMFF the power is held by the Federal Ministry of Food and Agriculture (BMEL).

It is important to remember, again, that these funds have also funded a limited number of national operative programmes.

Because of Germany's strong economic development and performance capacity, it has received no financial resources from the cohesion fund (CF).

Altogether, there are 24 ESI Funds managing authorities in Germany, more than the number of the *Länder*, for the very reason that eight authorities also deal with Interreg programmes developed by several institutions with neighbouring countries: with Poland (Mecklenburg-Vorpommern and Brandenburg), AustriaSwitzerland-Liechtenstein (Alpenrhein-Bodensee-Hochrhein), Denmark (Investitionsbank SchleswigHolstein), Netherlands (Rhein-Waal), Czech Republic (Bavaria and Saxony), Baltic Sea (Investitionsbank Schleswig-Holstein).

It is common to all ESI funds that nothing goes ahead without co-financing at national level. In fact, it is generally accepted that those who contribute money themselves feel particularly responsible for the individual projects. In Germany, national co-financing usually means the following: the individual *Land* makes its own investment in the projects that are co-funded from the ESI funds. The level of national co-financing depends on the relevant region's economic development. As a result, the national contribution to financing the project ranges from 15 per cent in less-developed regions to 50 per cent in more strongly-developed regions (see Federal Ministry for Economic Affairs and Energy (BMWi) Report, 2017, available here).

3.1. Management and control of the EU structural and investment fund in Lower Saxony

Within the *Land* of Lower Saxony, the regional Government (*Bundeskanzlei*) is responsible for the execution of the Partnership Agreement. For example, concerning the European Social Fund 2014-2020, the Government of Lower Saxony installed 4 *Ämter für regionale Landesentwicklung* (services for regional development of the *Land*). These four different entities collaborate in the regional development strategy (RHS). Within the government of Lower Saxony a large number of Ministries are involved in monitoring the ESF. There are the Ministry for Federal and European matters and the Ministry for Economy, Labour, Traffic and Digitalisation. The Ministry for Federal and European matters takes responsibility for putting the ESF into practice. It coordinates the alignment of the nationwide strategy and agrees on planning with the European Union, and the Specialist departments in Lower Saxony as well as the relevant economic, environmental and Social partners or associations. The state government of Lower Saxony attaches great importance to the partnership principle. Therefore, during the 2014-2020 funding period, and based on the recommendations of the European Union, a partnership process was organised with the regional and local representatives of the associations and economic, environmental and social partners. The Ministry was the central organ of an intense professional exchange of ideas and experience between the administrative authority and the working group with economic, environmental and social partners as well as other associations. Members of this working group are representatives of the line ministries, the ESF and ERDF central authority, and - at the municipal level - numerous representatives from the economic sector, such as commercial associations and the chambers, as well as partners from the social and humanitarian field. The European Commission is also an advisory member (Florio, Moretti, 2014, 1802 ff.; Bauer, 2001).

3.2. Auditing in Lower Saxony

Article 124 of Regulation (EU) 1303/2013 obliges Member States to set up an audit authority, functionally independent of the management and certifying authority (Florio, Moretti, 2014, 1802 ff.). In Lower Saxony, the Audit authority for the ESF has been installed in accordance with its specific regulations. The Authority falls under the scope of the Ministry for Economy, Labour, Traffic and Digitalisation which includes an independent organism named *Haushalt, EU- Finanzkontrolle*. The Audit Authority is competent in the auditing of the working of the ESF and the EFRD and it was installed with a decision of the Cabinet of 16 April 2015 (Mussari, Tranfaglia, Reichard, Bjørnå, Nakrošis, Bankauskaitė-Grigaliūnienė, 2016, 101 ff.).

Task 2, D.1, GERMANY

Prof. Alexander De Becker, Dr. Elisabetta Tatì and Dr. Alessandro Nato

Summary: 1. The German Criminal Code and relevant crimes definitions for the protection of the EU financial interest; 1.1. Forgery of documents; 1.2. Extortion and attempted extortion; 1.3. Abuse of trust; 1.4. Passive and active corruption; 1.5. Fraud with subsidies, compensations and allowances financed by public means; 2. Some data on the incidence of crimes: a lack of specification for European funds and related frauds.

1. The German Criminal Code and relevant crimes definitions for the protection of the EU financial interest

In order to combat subsidy fraud, the federal Government remains competent for most of the legislation and legal enforcement, as the most important Code (the Criminal Code) is that of federal legislation (Wetzell, 2014; Bohlander, 2009; Bohlander, 2008). Chapter 30 of the Criminal Code[168] incriminates offences committed by public offices, such as accepting benefits (Article 331), taking bribes (Article 332), granting benefits (Article 333) and giving bribes (Article 334). Article 264 deals with subsidy fraud.

1.1. Forgery of documents

The Criminal Code defines the offence of forgery as the act of forging documents with the purpose of deception in lawful commerce, the production of a counterfeit document, the falsification of a genuine document, or the use of a counterfeit or falsified document. This action incurs either a fine or a penalty of imprisonment for a term not exceeding five years. Attempted fraud is also punishable. Article 267 provides even more stringent sanctions in especially serious cases; the penalty is imprisonment for a term of between six months and ten years. Particularly serious cases are those where the offender acts on a commercial basis or as a member of a gang whose purpose is 1) the continued commission of fraud or forgery of documents; 2) to cause major financial loss; 3) to substantially endanger the security of legal commerce through a large number of counterfeit or falsified documents or by abusing his or her powers or position as a public or European official. Furthermore, forgery by members of a gang leads to more severe sanctions. Whoever commits forgery of documents on a commercial basis as a member of a gang whose purpose is the continued commission of offences under sections 263 to 264 or sections 267 to 269 incurs a imprisonment term of between one and ten years; in less serious cases, the prison sentence will be between six months and five years. Article 267 of the Criminal Code clearly states that forgery by a public servant implies more severe punishment. The function of the perpetrator, such as a public servant who commits counterfeiting in the course of duty, gives rise to a more severe punishment: a prison sentence of up to ten years.

1.2. Extortion and attempted extortion

Extortion in the German Criminal Code is defined as follows:

(1) Whoever unlawfully, by force or threat of serious harm, coerces a person to do, acquiesce to, or refrain from an act and thereby damages that person's or another's assets for the purpose of wrongful personal enrichment or enrichment of a third party, incurs a penalty of imprisonment for a term not exceeding five years or a fine.

[168] Criminal Code, 13 November 1998, Federal Law Gazette, 9 June 1867.

(2) The act is unlawful if the use of force or the threat of harm is deemed reprehensible in respect of the desired objective.

(3) The attempt is punishable.

(4) In especially serious cases, the penalty is imprisonment for at least one year. An especially serious case typically occurs when the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of extortion.

Extortion is punished by a minimum jail sentence of one month up to a maximum of five years and/or a fine. Attempted extortion is also punished.

1.3. Abuse of trust

Abuse of trust in the German Criminal Code is defined as follows: whoever abuses the power conferred on them by law, by commission of an authority or legal transaction to dispose of the assets of another or to make binding agreements for another, or whoever breaches their duty to safeguard the pecuniary interests of another which are incumbent upon them by reason of law, by commission of an authority, legal transaction or fiduciary relationship, and thereby adversely affects the person for whose pecuniary interests they are responsible, incurs a fine or imprisonment for a term not exceeding five years. Abuse of trust presupposes an underlying agreement between the victim and the perpetrator that aims to entrust a good to another in order to apply it for a specific goal, which can either be the return of the good to the victim or its use for a specific goal. Abuse of trust is punished by a jail sentence ranging from between one month to a maximum of five years and/or a fine. Abuse of trust obviously arises in the situations provided for in Article 266 of the Criminal Code. It focuses on the specific situation of a person (including a public servant) abusing his or her power in the execution of their tasks.

1.4. Passive and active corruption

In order to combat bribery and thus corruption among public servants, Articles 331-338 of the Criminal Code provide for specific misdemeanors. First, Article 332 of the Criminal Code criminalizes taking bribes, as follows:

(1) A penalty of imprisonment for a term of between six months and five years is reserved to public officials, European officials, or persons entrusted with special public service functions who demand, allow themselves to be promised, or accept a benefit for themselves or for a third party in return for the fact that they performed – or will perform in the future – an official act and thereby breached or may breach their official duties. In less serious cases, the penalty is imprisonment for a term not exceeding three years or a fine. Attempted corruption is punishable.

(2) Judges, members of a court of the European Union, or arbitrators who demand, allow themselves to be promised, or accept a benefit for themselves or for a third party in return for the fact that they performed or will perform a judicial act in the future and thereby breached or will breach their judicial duties, incur a penalty of imprisonment for a term of between one and ten years. In less serious cases, the penalty is imprisonment for a term of between six months and five years.

(3) If offenders demand, allow themselves to be promised, or accept a benefit in return for a future act, then subsections (1) and (2) already apply if they have indicated to the other person that they are willing

1. to breach their duties by doing the act or

2. to allow themselves – to the extent that the act is within their discretion – to be influenced by the benefit when exercising their discretion.

Second, granting benefits, as mentioned in article 333 of the Criminal Code, is described as the action of a person

(1) who offers, promises or grants a public official, a European official, a person entrusted with special public service functions, or a soldier in the Federal Armed Forces a benefit for that person or a third party in return for the discharge of a duty and incurs a fine or imprisonment for a term not exceeding three years.

(2) Whoever offers, promises or grants a judge, a member of a court of the European Union, or an arbitrator a benefit for that person or a third party in return for the fact that they performed or will in future perform a judicial act incurs a fine or a penalty of imprisonment for a term not exceeding five years.

(3) The offence does not entail criminal liability pursuant to subsection 1 if the competent authority, within the scope of its powers, either previously authorised the recipient's acceptance of the benefit or authorises it upon prompt reporting by the recipient.

Third, the offence of giving bribes is describes as follows:

1) Whoever offers, promises, or grants a public official, a European official, a person entrusted with special public service functions, or a soldier in the Federal Armed Forces, a benefit for that person or a third party in return for the fact that they have performed or would in future perform an official act, and thereby breached or may breach their official duties, incurs a penalty of imprisonment for a term of between three months and five years. In less serious cases, the penalty is a fine or imprisonment for a term not exceeding two years.

(2) Whoever offers, promises, or grants a judge, a member of a court of the European Union, or an arbitrator, a benefit for that person or a third party in return for the fact that they

1. performed a judicial act and thereby breached their judicial duties or

2. will perform a judicial act and would thereby breach their judicial duties

incurs a penalty of imprisonment for a term of between three months and five years in the cases mentioned in no. 1, and imprisonment for a term of between six months and five years in the cases under no. 2. The attempted offence may be punished.

(3) If offenders offer, promise, or grant the benefit in return for a future act, then subsections (1) and (2) already apply if they attempt to induce others:

1. to breach their duties by doing the act or

2. to allow themselves – to the extent that the act is within their discretion – to be influenced by the benefit when exercising their discretion.

1.5. Fraud with subsidies, compensations and allowances financed by public means

As mentioned before, the German Criminal Code does not provide specific criminal offences concerning fraud with subsidies, let alone fraud regarding European Funds. It only includes a specific prohibition of fraud relating to subsidies in Article 264. The general criminalisations in the Criminal

Code can be deployed to combat such fraud. The Act of 19 June 2019 made some minimal changes to comply with the PIF Directive. The aim of the amendment was to ensure that the existing mechanism to combat fraud with public funds (subsidies) would also be applicable in cases where fraud relating to EU funds was established. As before, this would not be implemented. At the time, the Court of Justice of the EU had already stated that, on the basis of the EC Treaty , Member States are obliged to take all necessary measures to ensure that violations of EU law, which include fraud relating to EU funds, are combatted as equal and equally grave violatiosn, as they would be under national legislation (De Keuster, 2009, p. 131 ff.).

2. Some data on the incidence of crimes: a lack of specification for European funds and related frauds

According to the EU Court of Auditors (see here), fraud against the EU constitutes a hidden crime, in the sense that it cannot be discovered without *ex-ante* or *ex-post* controls specifically carried out for this purpose. Since such checks cannot be exhaustive and are not always productive, some cases remain undetected. Added to this is the fact that the victims of fraud against funds managed by organizations are not individuals who can report such crimes and bring them to the attention of the competent authorities. Measuring fraud is the first step in a properly designed and applied anti-fraud methodology. Without good background data on fraud, it is more difficult to plan and monitor anti-fraud actions.

Unfortunately, the data on the level of EU fraud detected is incomplete. The European Commission believes that the significant differences between the Member States in reporting fraud and irregularities could be related to the national system set up to combat fraud, rather than just non-harmonized reporting (see here). For this reason, it is interesting to see how Member States collect data on fraud within their own legal systems.

In Germany, for example, the data about financial fraud are collected by the Financial Intelligence Unit (hereinafter FIU) (see here). In 2019, a record of 114,914 suspected cases of money laundering and terrorist financing were recorded. This number represents a jump of almost 50% compared to 2018. According to the Financial Intelligence Unit report, most of these cases were reported by German banks and other financial institutions, as well as by notaries and real estate agents. The cases have been linked to a total of 355,000 suspicious transactions (see here). In the 2018 Report, the financial Unit had registered just over 77,000 cases of money laundering. In addition, it found an extreme vulnerability in the German real estate market when it came to dubious business. German Parliament passed a series of anti-money laundering measures in November 2020 to address the problem and align the country with EU directives. Among other innovations, the legislation has imposed stricter rules that oblige real estate agents, notaries, precious metal dealers and auction houses to declare suspicious transactions (see here).

In essence, this Unit collects data on anti-money laundering, on financed crimes connected to the internet, on financial fraud against banking institutions, and data related to fraud on the financial interest of the German federal state. However, the reports of the Unit analyzed do not show a clear division between data concerning traditional financial crimes and those concerning the EU's financial interest.

Task 3, D.1, GERMANY

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Summary: 1. The protection of the EU financial interests at constitutional and statutory level: a primer; 2. The Judicial architecture and the spaces of protection for the financial interest; 3. The involvement of the Constitutional Court: cases with a European financial relevance; 4. The role of the Bundestag: political control.

1. The protection of the EU's financial interests at constitutional and statutory level: a primer

The German Constitution does not provide specific clauses for a specific mechanism protecting the financial interests of the European Union. Mostly, these crimes are tried according to existing criminal law, as mentioned above in task 2. German law does not usually make a distinction between cases concerning the financial interests of the European Union and other, national cases. Some elements have been added, but in general also as mentioned before, existing federal legislation has been adapted in order to be compliant with the PIF Directive. The Constitutional Court has the power to check to what extent the transfer of power to the EU impacts on the basic rights of German citizens and the German Federation (Farkas, Dannecker, Jacsó, 2019). The German Constitutional Court bases this verification on the degree to which EU-treaties comply with German law in Article 23 of the Basic Law (the so-called Europa-artikel), Article 45 of the Basic law (with regard to the signing of treaties) and Article 93 of the Basic Law (on the competences of the German Constitutional Court). It is widely known that ordinary tribunals (*Amtsgerichte* and *Landgercihte*) and Courts of Appeal (see point 3.) handle the lion's share of cases concerning fraud with EU funds or concerning the protection of the financial interests of the European Union. Below is an overview of the German Judiciary, for, by implication, the extraordinary courts can also decide - taking the EU's financial interests into account - when their competence to be triggered.

2. The Judicial architecture and the spaces of protection for the financial interest

The German Basic Law sets out the functioning of the Judiciary under Chapter IX. Article 92 establishes the following: judicial power is vested in the judges; it is exercised by the Federal Constitutional Court, by the federal courts provided for in the Basic Law, and by the courts of the *Länder*. However, the division of competences for – and the functioning of – each court or tribunal is mostly established by law, notably by the Code of Civil Procedure[169] and the Code of Criminal Procedure[170]. The German Basic Law states that the Federation sets up the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court, and the Federal Social Court as supreme courts of ordinary, administrative, financial, labour, and social jurisdiction[171]. The judges of each of these courts are chosen jointly by the competent Federal Minister and a committee for the selection of judges consisting of the competent *Land* ministers and an equal number of members elected by the *Bundestag*. This implies that numerous supreme courts exist at different levels (Bumke, Voßkuhle, 2019; Foster, 2002).

With regard to Criminal Law, the *Amtsgerichte* (Tribunals of First Instance) are competent to judge criminal offences where a minor penalty is expected (less than two years' imprisonment decided by one judge, and from two to four years decided by one or two judges). The *Landgerichte* can hear cases where the sentence is expected to exceed four years, cases where the prosecutor decides not to

[169] The Code of Civil Procedure Code of 5 December 2005.
[170] The Code of Criminal Procedure of 7 April 1987.
[171] Article 95 of the German Basic Law.

bring the case before the *Amtsgerichte*, and minor political crimes. The police play an important role in the resolution of criminal cases. The Public Prosecutor's office can take a role in the criminal investigation and the referral of the case to the Court of First Instance. The discussion of the role of the Public Prosecutor or the investigating judge falls beyond the scope of the current research project. For the reasons mentioned above, the Court of First Instance will be the principal judicial college to handle cases concerning the crimes as mentioned in task 2, concerning fraud with European Funds.

The German Judiciary system includes Financial Tribunals under Article 107 of the Basic Law. These Courts and Tribunals are only competent to decide tax issues. They are not competent to deal with specific corruption issues. However, some forms of corruption might be linked to VAT evasion; the Financial Courts and Tribunals can deal with these issues under Article 33 of the *Finanzordnung* of 6 October 1965.

At all levels—the federal (*Bund*), the state (*Länder*) and the local level—the respective administration is a potential object of control by administrative courts and by audit offices.

The administrative courts form—by and large—a joint system. As one of the characteristics of this joint system, cases are generally decided by courts established by the *Länder*, even when they invoke questions regulated by federal law, while the highest court of appeal in all matters regarding the application of federal law is a federal court.

In contrast to this, there are no formal links between the different courts of audits in Germany (see Task No 4 for more details).

Unlike the courts of justice, the courts of audit can decide themselves if and when to look into a certain matter. In general, the scope of their control is restricted to questions of financial propriety and efficiency and, thus, also with regard to funds management with EU origins. In accordance with the provisions of Article 114 (2), sentence 1 of the Basic Law, the court of audit controls the respective administration, which includes all transactions of any financial relevance (see Veith Mehden in Kuhlmann, Proeller, Schimanke, Ziekow, 2021, 185 ff.; Wedel, 2001, 587 ff.).

In federal law, the legal base can be found in Article 114 (2), first and second sentences of the Basic Law: «The Federal Court of Audit, whose members shall enjoy judicial independence, shall audit the account and determine whether public finances have been properly and efficiently administered. It shall submit an annual report directly to the *Bundestag* and the *Bundesrat* as well as to the Federal Government». The provisions determine the basic organisational structure as well as the scope of review and the manner in which its work can gain effect. It should be noted that this is only a minimal requirement. Article 114 (2), sentence 3, determines that further powers can be transferred to the court by federal law. In fact, the role of the federal court and its president has been extended and organisational features further developed in statutes, namely the *Bundesrechnungshof* Act (BA).

In the *Länder*, the respective constitutions contain equivalent provisions. Therefore, there is a total of seventeen courts of audit in Germany, one at the federal level and one in each one of the sixteen *länder*—all with "similar institutional design". At the local level, similar institutional arrangements have been established in the local government laws of the *länder* (Seyfried, 2016, 494).

The courts of audit have no executive powers and perform no judicial functions (von Wedel, 2001, 593). The above-mentioned Article 114 of the Basic Law mentions the audit and the annual publication of findings as the only activity by the *Bundesrechnungshof*. In fact, courts of audit act by informing the relevant administrative entities as well as the respective parliaments and/or the relevant parliamentary committees. In particular, relevant findings have to be published (see Kempny, 2017, 241ff.). Before the publication, the findings are normally discussed with the respective administrations and, if relevant, existing supervisory bodies (von Wedel, 2001, 590). In reality, reports by the courts of audit only become part of the political debate when 'wasteful' spending is denounced—typically in the annual reports, less frequently when the courts of audit are commissioned to fle special reports (Veith Mehden in Kuhlmann, Proeller, Schimanke, Ziekow, 2021, 199).

3. The involvement of the Constitutional Court: cases with a European financial relevance

As mentioned before in task 1, the federation and the *Länder* can start a procedure against an illegal act of the Federation or a *Land*. The German Basic Law provides a separate article concerning the Constitutional Court as part of the general Chapter IX concerning the Judiciary. The competences of the Constitutional Court are both limited and exclusive. The Federal Constitutional Court rules:

1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body;

2. in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or *Land* law with this Basic Law or the compatibility of *Land* law with other federal law on application of the Federal Government, of a *Land* government or of one fourth of the Members of the Bundestag;

2a. in the event of disagreements as to whether a law meets the conditions set out in paragraph (2) of Article 72, on application of the Bundesrat or of the government or legislature of a *Land*;

3. in the event of disagreements concerning the rights and duties of the Federation and the *Länder*, especially in the execution of federal law by the *Länder* and in the exercise of federal oversight;

4. on other disputes involving public law between the Federation and the *Länder*, between different *Länder* or within a *Land*, unless there is recourse to another court;

4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority;

4b. on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government under Article 28 has been infringed by a law; in the case of infringement by a *Land* law, however, only if the law cannot be challenged in the constitutional court of the *Land*;

4c. on constitutional complaints filed by associations concerning their non-recognition as political parties for an election to the Bundestag;

5. in the other instances provided for in this Basic Law.

To our knowledge, the German Constitutional Court has ruled on numerous occasions on the topic of the EU's financial interests (Mickler, 2018, p. 517 ff.; Payandeh, 2017, p. 400 ff.; Goldmann, 2016, p. 119 ff.; Murswiek, 2014, p. 147 ff.; Schuster, 2014, p. 281 ff.; Siekmann, Wieland, 2013; Gerner-Beuerle, Küçük, Calliess, 2012, p. 402 ff.). However, the Court focused more on the implementation of the European Monetary and Fiscal policies, especially after the outbreak of the Economic crisis following the 2008 financial one.

Constitutional Court decisions started in 2011, ruling on the financial support of Greece, when the Constitutional Court decided that this system did not violate basic rights and democracy in the German Federation. The Court made the following assessment:

"The Euro Stabilisation Mechanism Act lays down not only the objective and the fundamental modalities but also the amount of possible guarantees. The giving of guarantees is only possible during a certain period of time, and it is made contingent on agreeing an economic-policy and finance-policy programme with the Member State affected. The programme requires mutual agreement of the euro currency area states, which secures a determining influence to the Federal Government."

On 19 June 2012, the Court decided that the Federal Government had infringed the German Basic Law stating the following:

"The Federal Government infringed the rights of the German Bundestag *under Article 23.2 sentence 2 GG by omitting to submit to the German* Bundestag *a text of the European Commission on the establishment of the European Stability Mechanism, which was available to the Federal Government on 21 February 2011 at the latest, and the Draft Treaty Establishing the European Stability Mechanism (ESM) of 6 April 2011. Oral and written information, in particular sending the Draft Treaty Establishing the European Stability Mechanism, which had already been discussed in the extended Eurogroup on 17 or 18 May 2011 came too late and do therefore not compensate the infringement of Article 23.2 sentence 2 GG. As results from the cumulative requirement of early and comprehensive information, the duty to inform cannot be exercised "in an overall package" with regard to processes of the nature existing here. The Federal Government is obliged to supply the* Bundestag *not merely with the text of a treaty when deliberations have already been concluded, or after the treaty has been adopted, but must at the earliest possible time submit interim results and interim versions of the text that are available to the Federal Government.*

2. The Federal Government also infringed the Bundestag*'s rights under Article 23.2 sentence 2 GG by not informing it comprehensively and at the earliest possible time on the Euro Plus Pact.*

a) Due to its specific orientation towards the integration programme of the European Union, the agreement on the Euro Plus Pact is a matter concerning the European Union within the meaning of Article 23.2 sentence 1 GG. The Euro Plus Pact is directed towards the European Union Member States; in view to its objectives of achieving a qualitative improvement of the economic policy and of the public budget situation and of strengthening financial stability, it is, with regard to its contents, oriented towards a policy area of the European Union which is laid down in the Treaties. European institutions participate in the realisation of the objectives of the Pact. The fact that the Euro Plus Pact operates for the most part with self-commitments of the participating Member States does not call into question its classification as a matter concerning the European Union.

The Euro Plus Pact affects important functions of the German Bundestag*. In particular, the self-commitments in areas which fall within the legislative competence of the Member States, such as for instance tax law and social law, and in which the legislature will in future be subjected to monitoring by institutions of the European Union, concern parliamentary responsibility and are liable to restrict the legislature's freedom of drafting. It was therefore required to inform the legislature early and comprehensively.*

b) The Federal Government did not comply with this obligation. Firstly, it did not inform the German Bundestag *in advance about the initiative for the adoption of "Pakt für Wettbewerbsfähigkeit" - later referred to as Euro Plus Pact - which was jointly presented by the Federal Chancellor and the President of the French Republic at the meeting of the European Council on 4 February 2011. The respondent would have had to inform the German* Bundestag *about this plan on 2 February 2011 at the latest. At that date, it was certain that a discussion proposal for enhanced economic policy coordination in the euro area to improve competitiveness would be submitted to the heads of state and government at the forthcoming meeting.*

Furthermore, the Federal Government did not submit to the German Bundestag *an unofficial document prepared by the Presidents of the European Commission and of the European Council meeting of 25 February 2011 with the title "Enhanced Economic Policy Coordination in the Euro Area - Main Features and Concepts", which described essential features of the Pact - later referred to as Euro Plus Pact. The official draft of a "Euro Plus Pact" was handed over to the* Bundestag *on 11 March 2011. At that time, it was no longer possible for the German* Bundestag *to discuss its contents and to exert an influence on the Federal Government by giving an opinion because the heads of state and government already agreed on the Pact on 11 March 2011 already, i.e. on the same day."*[172]

With regard to the EU Stability Mechanism, the German Constitutional Court decided that the budgetary autonomy of the Bundestag was sufficiently safeguarded. The Constitutional Court decided as follows:

"Finally, the ESM Treaty does not establish an indissoluble commitment of Germany.

cc) Ultimately, the provisions on the integration of the German Bundestag *in the decision processes of the ESM are also compatible with the constitutional requirements. The* Bundestag*'s rights of participation are sufficient - at least when interpreted in conformity with the Constitution with regard to the national procedure before decisions pursuant to Art. 8 sec. 2 sentence 4 TESM. The rights of information of the German* Bundestag *satisfy the requirements of Art. 23 sec. 2 sentence 2 GG. Under the point of view of democratic legitimation of the ESM, which Art. 20 sec. 1 and sec. 2 GG requires, there are no concerns against Germany's representation in these bodies either.*

dd) Finally, the Act of Assent to the Fiscal Compact does not violate Art. 38 sec. 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG either. Its essential content goes along with the requirements of constitutional law and of European Union law. The Treaty grants the bodies of the European Union no powers which affect the overall budgetary responsibility of the German Bundestag *and does not force the Federal Republic of Germany to make a permanent commitment regarding its economic policy that can no longer be reversed".*[173]

Similarly, the Constitutional Court decided on 21 June 2016 that the OMT programme does not infringe the competences of the *Bundestag* on the budgetary level.[174] The biggest difficulty arose when the Public Sector Purchase Programme was set up and the German Constitutional Court referred a prejudiciary question to the ECJ on the compatibility of the existing possibilities to purchase public sector securities with the safeguard of the German Constitutional interests. The Constitutional Court finally decided that a limited interpretation of the European Public Sector Purchase Plan does not exceed the competences of the EU:

"*Based on the Senate's interpretation, the adoption of the SSM Regulation does not exceed the competences conferred on the European Union by the Treaties in a sufficiently qualified manner. The SSM Regulation does not confer full banking supervision on the ECB.*

a) Therefore, the transfer of supervisory powers to the ECB does not manifestly exceed the competences conferred by Art. 127(6) TFEU. According to this provision, specific tasks relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings may be conferred on the ECB.

aa) The SSM Regulation provides for a division of banking supervision between the ECB and national authorities. Essentially, national authorities retain their competences; only specific supervisory powers which are crucial to ensure a coherent and effective implementation of the European

[172] German Constitutional Court, 19 June 2012, n° 4/11.
[173] German Constitutional Court, 18 March 2014, n° 23/2014.
[174] German Constitutional Court, 21 June 2016, n° 34/2016.

Union's policy in this domain are conferred on the ECB. To this end, certain tasks are conferred on the ECB that it must perform for all credit institutions in the euro area. In principle, the ECB is competent only for supervising significant credit institutions, while the national supervisory authorities generally remain competent for supervising less significant credit institutions in accordance with the regulations, guidelines and general instructions adopted by the ECB. In areas of banking supervision that are not subject to the SSM Regulation, national supervisory authorities retain their competences.

bb) The national supervisory authorities exercise their powers on the basis of their primary competences, not on the basis of powers conferred by the ECB. Such a re-delegation of powers by the ECB would entail that all supervisory tasks had fully been conferred on the ECB, which is specifically not what Art. 127(6) TFEU allows and what the SSM Regulation provides. A full conferral of all tasks would exceed the limits of the European integration agenda in an evident and structurally significant manner and would deprive Member States of a central part of their economic governance. Such an interpretation of the SSM Regulation is neither compatible with the wording of Art. 127(6) TFEU nor tenable in light of a systematic analysis.

The decision of the Court of Justice of the European Union (CJEU) of 8 May 2019 (C-450/17 P Landeskreditbank Baden-Württemberg v European Central Bank) does not merit a different conclusion. In this decision, the CJEU confirms the view taken by the General Court of the European Union (GCEU) that, with regard to the tasks laid down in Art. 4(1) SSM Regulation, an exclusive competence was conferred on the ECB, the decentralised implementation of which by the national authorities is enabled by Art. 6 of the Regulation, under the SSM and under the control of the ECB, in relation to less significant credit institutions within the meaning of Art. 6(4) subsection 1 SSM Regulation, and in respect of some of the tasks. The CJEU has held that in addition, exclusive competence is conferred on the ECB for determining the content of the definition of "particular circumstances" within the meaning of Article 6(4) subsection 2 SSM Regulation, granting the ECB exclusive supervisory powers in relation to all institutions that are generally considered significant according to the criteria laid down in Art. 6(4) subsection 2 SSM Regulation. This, however, does not amount to a conferral of comprehensive supervisory powers on the ECB also for the far larger number of less significant credit institutions, the ECB's right to act on its own initiative pursuant to Art. 6(5) SSM Regulation notwithstanding. Current practice regarding banking supervision confirms the interpretation by the Senate.

A manifest violation of the principle of subsidiarity cannot be found, given that the SSM Regulation only conferred tasks and powers on the ECB which are indispensable for effective supervision, and that national authorities still retain extensive powers"[175].

However, the German Constitutional Court continued to controll the decisions of the ECB. On 5 May 2020, the Constitutional Court decided that by supporting the decisions of the ECB on the Public Sector Purchase Programme, the Federal Government and the German *Bundestag* violated the complainants' rights under Art. 38(1) first sentence in conjunction with Art. 20(1) and (2), and Art. 79(3) of the Basic Law (*Grundgesetz* – GG), failing to take steps challenging that the ECB, in its decisions on the adoption and implementation of the PSPP, neither assessed nor substantiated that the measures provided for in these decisions satisfy the principle of proportionality.[176]

4. The role of the Bundestag: political control

In general, political controls are very important for the protection of the public interest and, especially, the national financial interest. According to article 63 of the Basic Law, the federal chancellor is chosen by the Bundestag without intervention of the President. The federal government consists of a federal chancellor and federal ministers according to article 62 of the Basic Law. Article 69 combines

[175] German Constitutional Court, 30 July 2019, n° 52/2019.

[176] German Constitutional Court, 5 May 2020, n° 32/2020.

the fate of the Ministers. Furthermore, in Article 67, the German Basic Law indicates the modalities of constructive distrust: «The *Bundestag* can express distrust to the Federal Chancellor only when it elects a successor by a majority of its members and asks the Federal President to dismiss the Federal Chancellor. The Federal President must adhere to the request and appoint the one elected». Moreover, article 69 clearly states that the tenure of office of the Federal Chancellor or of a Federal Minister shall end in any event when a new *Bundestag* convenes; the tenure of office of a Federal Minister shall also end on any other occasion on which the Federal Chancellor ceases to hold office (Mickler, 2018, p. 517 ff.).

The role of parliamentary control over the government is exercised above all by opposition parliamentary groups that do not have a majority in the *Bundestag*. But even the deputies of the coalition parliamentary groups control the federal government by being involved in parliamentary processes. The German government must periodically inform the *Bundestag* about its plans and intentions. A central moment of control is represented by the budget law of the Bundestag. In the budget law, which is approved every year, the Bundestag determines the income and expenditure of the state, and the Federal Finance Minister must present the accounts to Parliament. The debates on the state budget are undoubtedly a highlight of the parliamentary work of the respective year (Bumke, Voßkuhle, 2019).

The *Bundestag* has countless tools to monitor the work of the government. The individual deputy can put his questions to the Government in writing. During the interpellations and in the question time of the Bundestag, the representatives of the Government have to answer directly to the questions posed by the deputies. In addition, the parliamentary groups of the *Bundestag* can request written information from the government on certain issues through written questions and interpellations. The answers to the interpellations not infrequently lead to parliamentary debates in which the Government must provide explanations. In addition, the committees of inquiry have proved to be a strict control tool of the government. They can be set up at the request of at least one-quarter of the members of the *Bundestag*. Here the deputies can demand the presentation of government documents, invite government representatives to question them on the subject of the investigation, sometimes even in front of television cameras (Bumke, Voßkuhle, 2019).

Finally, the political control mechanisms for the Parliaments of the *Länder* is comparable to the federal level.

In the field of the EU funds management and protection of the EU financial interest, it is important to remember the role of the Federal Court of Auditors of Germany. Considering that *Bundesrechnungshof* is fully independent and does not take instructions to perform specific audit work, Parliament may propose certain reports or audits to the Federal Court of Auditors of Germany - however, the latter is free to decide on audit requests from Parliament or parliamentary committees - (ECA Report, 2019, available here). For example, the Federal Court of Auditors of Germany reported to the Parliament in March 2021 on the risks linked to the Recovery Plan, especially for the consequences on the proportionality principle and the future of the EU monetary and fiscal policies.

Normally the *Bundesrechnungshof* reports to the parliamentary Public Accounts Committee (PAC) also on EU funds management, considering the relevance of this topic for the German federal budget cycle (EU Report of German Audit Institutions, 2012, 74 ff.).

Task 4, D.1, GERMANY

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Summary: 1. Internal administrative and financial controls: German administrative tradition in the field and the regional variance; 1.1. The civil servant performances and the integrity principle: the case of whistleblower; 2. External controls and other tools for prevention strategies; 2.1. The *Bundesrechnungshof* and the State Courts of Auditors; 2.2. The National contact point with OLAF and the role of the Stability Council; 2.3. No independent authorities for the repression of corruption: the ministerial Central Service for the Repression of Corruption (CDBC-OCRC) and its relevance in the field of the protection of the EU financial interest; 3. The (criminal) law protection of the financial interests of the European Union: PIF Directive; 3.1. A Special issue on the revenue side: VAT fraud in Germany.

1. Internal administrative and financial controls: German administrative tradition in the field and the regional variance

The reforms of the thirty years since German reunification have not altered the basic bureaucratic and legalistic characteristics of German public administration. Control and accountability mechanisms in Germany are still primarily based on inputs and due process, and there has been no substantial increase in the capacities for strategic management. There continues to be a rather self-confident stance towards the functioning and control mechanisms of the bureaucratic system in Germany. The German pattern of accommodating management-oriented reforms into the prevailing legalistic administrative structure and culture has been referred to as 'neo-Weberian' (Pollitt, Bouckaert, 2017), even though 'neo-bureaucratic' would be the more appropriate term. In addtion to it, German public management reform trajectories show an enormous degree of heterogeneity (Proeller, Siege in Kuhlmann, Proeller, Schimanke, Ziekow, 2021, 593 ff. See also, in the same work, the contribution of Reichard, Schröter, 211 ff.).

The New Steering Model (NSM) is the starting point and reference model for management-oriented reforms in Germany (starting from 1993). Its core elements include typical New Public Management (NPM) elements such as contract management, the decentralisation of responsibility for resources, performance measurement and customer orientation. The NSM was driven as a reform to reduce an excessive public sector. The central reform elements to advance the internal modernisation of local public administrations included the following: output orientation, decentralisation and performance agreements.

The NSM has shown its greatest effects at the local government level, while the federal and *Länder* governments have been reluctant to undertake major reforms following the ideas of NSM (Reichard, 2001, 551).

Not all the reforms taken at the local level were NSM reforms and a closer look reveals the selective reform strategies (Kuhlmann et al., 2008). A large majority (66 per cent) of local governments had never aimed for a comprehensive redesign of their control mechanisms and began by simply picking out individual instruments and elements from the NSM 'toolbox' based on their perceptions of their organisation's problems (Kuhlmann and Wollmann, 2019). In sum, the actual implementation shows preference for customer-oriented and structural reform elements at the expense of results-oriented approaches. One of the most implemented NSM elements was the introduction of a new budgeting system, in particular lump sum budgeting.

The fact that the local management, leadership and control practices have changed during the past twenty years, and that NSM has provided a crucial impetus and conceptual framework for this

transformation is not questioned, not even by critics. However, the approaches to reform have varied significantly across local governments. Therefore, heterogeneity and deviation from the model is neither surprising nor problematic, but should be expected and considered legitimate.

Also some *Länder* launched reform projects along the lines of NSM. The 'NSI' reforms (New Steering Instruments), aimed at improving the efficiency and effectiveness of the administration and results orientation in planning and control. The NSI reforms focussed on a technically widely automated budget management system, but also including decentralised budget responsibility, cost and performance accounting, and greater emphasis on executive training.

After some delay, the NSM discourse also splits over to the federal level. However, it was only in exceptional cases that reform proposals translated into concrete reform measures, such as the introduction of performance-related pay and shared service centres. Separately from this, the federal government started several new initiatives to downsize administrative entities and privatise various publicly owned corporations. The most recent study on reform trajectories at the federal level confirmed the conception of the German federal government as being a highly legalistic administrative system, and showed that management-oriented tools are less frequently used than in most other European countries (Hammerschmid, Oprisor 2016, 69).

A second phase of administrative reforms emerged around 2003 with amendments to the regulatory framework for local financial management. The reform has combined and underpinned two ambitions. First, the accounting concept should be changed to accruals in order to provide more realistic and transparent financial information. Second, output-oriented control of public administration should be strengthened by product budgets with performance objectives and indicators. A formal adoption of the new accounting method was completed within the set time frames. However, the impact of the reforms on management and control behaviour is less visible. Regarding the use of performance information and more results oriented management, several studies substantiate the claim that control or deliberation over performance objectives and indicators is still of negligible relevance in the budgeting decision and control mechanisms. Performance indicators in German product budgets usually only refer to quantitative (often not transparently) selected aspects of single products within a product group. They are therefore by no means comprehensive or designed to satisfy an organisational control ambition and are purely informational in character (Weiss, Schubert, 2020, 16–18; Bogumil, 2017, 25–27; Burth, Hilgers, 2014; Kroll, Proeller, 2012).

Since the seminal decision in 2003, the governments of the thirteen territorial *Länder* have legislated on the introduction of accrual accounting and performance budgeting for local government. While nine *Länder* have prescribed by law a shift to accrual accounting, four *Länder* have given local governments the opportunity to choose whether they want to change to accruals or keep a (modified) cash-based system.

Since 2009 and based on new legislation, the federal level and the *Länder* have also had the option to use the accrual accounting method. To date, only two out of thirteen territorial *Länder* - Hesse, and more recently North Rhine-Westphalia - have opted to shift to accrual accounting in budgeting and reporting and to performance-oriented budgeting. The federal level government still uses a cash-based accounting system. A shift to accrual accounting has never been an issue.

The still legalist, merit-based career system of government employment comes with a series of advantages. Civil service members tend to be well trained for the functions they have to perform. In addition, training programmes and qualifications are also tailored to the specific needs of the public sector. Given the high level of strongly entrenched professional standards (underpinned by legal controls), the civil service system is geared to produce procedural fairness and low levels of corruption or cronyism and nepotism. However, the civil service also suffers from rigidity and inefficiencies that tend to stifle motivation and breed frustration among civil service members and clients of public services alike. In addition, its barriers to entry and exit work against intersectoral mobility and limit the access of public employers to sources of future knowledge and innovative ideas (Reichard, Schröter, in Kuhlmann, Proeller, Schimanke, Ziekow, 2021, 221; see also Reichard, Schröter, in Ongaro, Thiel, 2018; Demmke, Moilanen, 2010).

These are all elements, together with the issue of transparency and anti-corruption, that can influence transversally, in positive or in negative, the share administration for the management of the EU funds.

1.1. The civil servant performances and the integrity principle: the case of whistleblower

As seen, the system of civil servants and public employees plays a crucial role with regard to integrity and know-how in the public sector and, hence, also in the protection of the public financial interest.

In Germany, Human Resource Management (HRM) is strongly influenced by the "traditional principles of civil service" and "selection of the best", placing emphasis on formal qualifications, aptitude and merit, as well as seniority, experience and the privileged status of civil servants. Divergent strategies such as abolishing the traditional civil servant status or, at least, harmonising HRM practices in the public and private sectors have never been seriously considered (Proeller, Siege in Kuhlmann, Proeller, Schimanke, Ziekow, 2021, 375 ff).

However, performance-related pay (PRP) has been on the reform agenda for years. In 1997, civil service laws were changed to create the option of bonuses based on performance. Pay for performance elements for public employees were introduced as part of a major overhaul of the labour agreements, becoming effective ten years later in 2007. Meier (2013) surveyed twenty-one German counties and cities to analyse whether the introduction of PRP in the public service caused any crowding-out effects on intrinsic motivation and PSM. The design of the performance appraisal schemes proved to be the dominant factor influencing the perception of PRP, in particular the perceived fairness and transparency of the PRP concept. The study suggests that more than ninety per cent of employees receive at least some performance pay and that the percentage of those who receive the best performance ratings is very high (as reported in Proeller, Siege in Kuhlmann, Proeller, Schimanke, Ziekow, 2021, 386 ff.; further results also in Wenzel et al. 2019).

Alongside with performances, integrity constitutes another important element of HR system, together with its linkage to the issue of corruption prevention (Hunt, 2013, 45 ff.; Schubert, 2011, p. 753 ff.).

The Federal Civil Service Act does not lay down explicit regulations regarding whistleblowers. However, it is the duty of civil servants (according to Article 67 of the Federal Civil Service Act) to speak out if an illegal act has been asked for or performed by one of their colleagues when they receive an order to do so. The Article states that, in general, civil servants must maintain secrecy about official matters that become known to them during, or on the occasion of, their official activity. This also applies beyond the physical area of employment and after termination of civil servant status. This does not apply however in the case of fact-based suspicion of a corruption offence under Sections 331 to 337 of the Criminal Code (cases of bribery) which must be reported to the competent highest service authority, a criminal prosecution authority, or another authority or external agency determined by state law. Similarly, Article 37 of the Act with regard to civil servants in the *Länder* provides the same regulation. Obviously, German civil servants enjoy freedom of expression under the German Basic Law.

In practice, cases regarding whistleblowing are limited since internal solutions are encouraged. German Administrative Courts have stated that whistleblowing should only be used as a final resort.

2. External controls and other tools for prevention strategies

The external audit bodies are not part of the internal control framework of the EU funds. There is a clear delimitation of tasks between the internal control and external audit functions.

2.1 The Bundesrechnungshof and the State Courts of Auditors

The Federal Court of Audit dedicates its activity to the federal public audit field and it is responsible for examining government operations and transactions, for reporting on its findings advisory entities audited based on experience gained, and as an independent institution, in relation legislative, executive and judicial powers, subjected only to the law (Aden, 2015, p. 313 ff.; Cornelia, 2012, p. 689 ff)[177]. The Statute of this Court and the judicial independence of members in the exercise of its essential functions are set by art. 114 (2) of Basic Law. The German Federal Court of Audit has an administrative leadership, considering that its role is to examine the accounts from the federal government that includes: all government agencies, special governmental funds, federal government enterprises and private law enterprises accounts that manage federal governmental funds (but are not part of the inside federal administration). In particular, the Court produces an ex-post audit of the entire financial management of the public federal State.

Nevertheless, it is not possible a full examination of the entire German annual budget, due to its size. For this reason, the Court uses sample techniques, it would not cover the whole sector of the various fields to be audited, and also not audited certain accounts. To avoid the issues which may occur due to exclusion of certain entities auditing, the German Federal Court of Audit appeals to the preventive control. This Court requires both periodic audits of compliance and financial management and management audits[178]. In addition, it can assist both the parliament and the federal government. During the compliance and regular controls, the Federal Court checks whether the receipts and payments have been adequately justified and documented or if the balance sheet and capital accounts have been adequately prepared, following the provisions and regulations in force. In addition, it focuses on performance monitoring or other large-scale projects, and analyzes the appropriate use of funds, providing an acceptable cost-benefit *ratio*. In addition, throughout the year, the Federal Court prepares special reports on issues that it believes the Parliament and the Federal Government should be informed promptly (Berger, Heiling, 2015, p. 93 ff.; Cornelia, 2012, p. 689 ff.). For example, the German Federal Court of Auditors has criticized the RFF by stating that this European program erodes the principle of individual responsibility of the member states. The German Court of Auditors also argues that the violation of this principle could lead to the instability of the monetary union and the "communitarization" of the debt (see here).

Its participation in the annual budget discharge procedure is relevant. The discharge procedure for the federal government is decided in the separate examination of the two Houses of Parliament - *Bundestag* and *Bundesrat*. The discharge for the Federal Territory Ministries is granted by the Federal Ministry of Finance and marks the end of the fiscal year's budget cycle. This Federal Court can be considered a model of discharge, because it functions as a collegiate body without legal responsibility. The discharge procedure is decided by specialized committees of both chambers after the examination of the annual report of the Federal Court (Cornelia, 2012, p. 689 ff.).

Each *land* has also a State Court of Auditors. Since Germany has a federal government structure, regional audit institutions and municipal audit offices audit the other levels of government. However, as the fiscal systems of the Federation and of the sixteen constituent states of the Federal Republic are largely intertwined, the German Supreme Audit Institution, hence the *Bundesrechnungshof*, and the independent regional audit institutions of the states work closely together (ECA Report, 2019, available here). This cooperation focuses mainly on programmes that the Federal Government and the states fund jointly, or on responsibilities that the central government has delegated to the states.

EU funds are managed by the federal government and the federal states (see Task No 1). Hence, the audit powers of both the *Bundesrechnungshof* and the State Courts of Auditors influence the management of EU funds as well (in addition to the role of the "internal" Audit authorities, as requested

[177] See Art. 1, *Bundesrechnungshof Ac*t, 1985.
[178] See Art. 15, Bundesrechnungshof *Act*, 2005.

for each fund by EU regulation). Key audit criteria include regularity, compliance, economy, efficiency and effectiveness of the use made of EU funds in Germany. EU law, particularly the regulations referring to the internal control framework, is also duly taken into account. The audit work done by German government audit institutions is of considerable significance, because early detection and remedial action prevents financial corrections of the EC (EU Report of German Audit Institutions, 2012, 74).

According to the European treaties, the ECA and the national audit bodies cooperate in a spirit of trust while maintaining their independence. The intertwining of EU law and national law and of EU and national management of EU funds creates a high potential for cooperative action. The ECA notifies the *Bundesrechnungsho*f well in advance of its audit missions in Germany. To help enhance cooperation, the ECA and the national Supreme Audit Institutions share ideas and information (e.g. they share their annual audit programmes) (*Bundesrechnungshof* Report, 2017, 47). In fact, it is not within the mandate of the ECA to express an opinion on the use of EU funds in individual member states. Therefore, the significant part of the EU budget that is spent via national programmes is not submitted to the ECA's performance audits. The SAIs of most member states carry out audits on EU programmes, either because they are mandated to do so by their Parliament, or because they have independently decided or include that topic on their work programme. In general terms and in keeping with the ECA's own findings, these national audits have found that little information was available on the outcomes and impacts achieved through EU funding and EU policies either in the Government's units in charge of managing the EU funds, or in the national performance framework. However, the performance audit of EU funds spent at national level remains scattered (OECD Report 2017, 42, available here).

The activity and efforts made by the German *Bundesrechnungshof,* and above mentioned, can be interpreted along this line of reasoning.

In accordance with a long-standing tradition, the president of the federal Court of Audits is also appointed to the position of Federal Performance Commissioner. In this position, he or she has a broad spectrum of possibilities to advise both the legislature and the executive and can also be asked to provide expert opinions. Nevertheless, the role does not feature as prominently in practice (Veith Mehden in Kuhlmann, Proeller, Schimanke, Ziekow, 2021, 197). Under the Federal Government's working guidelines as revised on 8 June 2016, the Commissioner puts forward proposals, recommendations, reports and opinions in order to enhance the efficiency of the federal administration including its off-budget funds. The Commissioner may also advise the Parliament at its request. Since 2013, the Federal Performance Commissioner has published "Good Practice Guides Developed by the External Audit Function" on the web pages. These are based on fundamental findings developed by the *Bundesrechnungshof* on various aspects of government operations (e.g. in the fields of human resources management, government grants or procurement). The purpose is to make a clear overview of these findings available to public managers and thereby to contribute to avoiding "typical errors" in the future. The Good Practice Guides are structured along issue areas. New Guides will be added on a case-by-case basis. During the past years, the Commissioner also issued quite a number of opinions on public sector performance and structural or operational organisation matters. Some of these refer to individual authorities or to non-federal bodies administering federal funds, whilst others dealt with government-wide or cross-sectional issues. In 1987, the Federal Commissioner began publishing studies of general interest to make expertise available to a broader public (*Bundesrechnungshof* Report, 2017, 56 ff.).

2.2. The National contact point with OLAF and the role of the Stability Council

In Germany, the Federal Ministry of Finance, the national authorities competent for implementing EU funds and customs authorities cooperate with OLAF to protect EU financial interest (Luchtman, et altri 2017, p. 58). In particular, the Federal Ministry of Finance is the Contact point for OLAF. It coordinates anti-fraud investigations carried out by the European institution in Germany. The functions and tasks of the German Ministry of Finance as contact point and anti-fraud coordination service are not regulated by law. It is not entitled to take any investigative or administrative measures against individuals or companies. On the one hand, the task of the coordination unit is a conceptual and strategic function in the area of anti-fraud policy. On the other hand, it fulfils operative tasks in the coordination of anti-fraud investigations triggered by OLAF. Despite this, its operational function is

limited. Indeed, the investigative and administrative measures are adopted by the competent authorities of the *Länder* as regards the part of the expenditure of the EU budget and by the customs administration as regards revenue - especially traditional own resources (Luchtman et al., 2017, p. 59).

As mentioned above, the cooperation between OLAF and the Federal Ministry of Finances is limited to its function as a contact point and coordination unit. In this context, the Federal Ministry of Finances assists OLAF in establishing contact with competent federal or state authority dealing with the case. In particular, the investigative measures in the area of traditional own resources are carried out by customs authorities according to the national rules for administrative proceedings – i.e. provision on tax inspections – and, in the sector of EU expenditure, by the federal or state authorities applying the conditions set out in the administrative decision granting a subsidy (Luchtman et al., 2017, p. 60). Nevertheless, the Federal Ministry of Finances has no power to carry out investigative measures, but OLAF may ask for information on economic operators. In any case, inspections in customs proceedings are not subject to a threshold, but form part of ongoing tax supervision. Moreover, the administrative powers of the tax investigation service are the same as those of tax offices and should therefore apply accordingly in OLAF customs investigations (Luchtman et al., 2017, p. 61)[179].

The Stability Council, which is a joint body of the Federal Ministry of Finance and the Ministries of Finance of the different *Länder*, plays a role in budgetary control. The Stability Council, based on Article 109 of the German Basic Law, controls the financial stability of Germany with regard to its EU-duties. Section 6 of the Stability Council Act requires the Council to monitor the budgets of the Federation, *Länder*, local authorities, and social insurance funds, to make sure that these – taken together – comply with the upper limit for the general government structural deficit of 0.5% of national gross domestic product as laid out in section 51 subsection (2) of the Budgetary Principles Act. This ensures that Germany complies with the relevant provisions of the Fiscal Compact and the EU Stability and Growth Pact.

The Stability Council plays an important role in limiting the structural deficit of Germany. It reviews compliance with the upper limit of the general government structural deficit twice a year. Furthermore, the Stability Council has to ensure that Germany takes care of its duties with regard to compliance with budgetary discipline as stipulated in the EU Stability and Growth Pact.

It is clear that even if the Stability Council does not play a direct role with regard to the PIF-Directive, it has to be underlined that the Stability Council can play a role in controlling the way governments are dealing with EU regulation and may potentially use or abuse EU financial support to improve their situation.

2.3. No independent authorities for the repression of corruption: the ministerial Central Service for the Repression of Corruption (CDBC-OCRC) and its relevance in the field of the protection of the EU financial interest

In international surveys, Germany is among the group of European countries generally perceived as less affected by corruption. In Transparency International's 2019 Corruption Perceptions Index, Germany occupies 9th place out of the 180 countries included in the survey (with only small deviations to either 10th, 11th or 12th place in the last five years). In the 2019 Eurobarometer, respondents in Germany perceived corruption to be less of a problem in their country than the EU average: 53% of respondents thought that corruption was widespread in Germany (EU average: 71%) with 35% of respondents saying that corruption had increased in recent years (EU average: 42%). Nine percent of respondents consider themselves to have been personally affected by corruption in their daily life (EU average: 26%). The only category in the 2019 Eurobarometer where respondents in Germany believe corruption is more prevalent than the EU average is private companies (with 43% of respondents

[179] Art. 208(1)(2) AO.

in Germany believing corruption is widespread vis-a-vis an EU average of 37%) (Greco Report, 2020, 7, available here).

In Germany, the fight against corruption is primarily governed by criminal law. In relation to the protection of the EU financial interest, the PIF-Directive provides that member states need to take the necessary measures to ensure that fraud affecting the Union's financial interests constitutes a criminal offence when committed intentionally. In addition to the repressive regulatory provisions available in Germany, there are few preventive corruption-specific provisions. Where other Member States developed an authority to deal with prevention of corruption, Germany decided to install a department in the Ministry of Internal Affairs which has to deal with the topic, at least for the federal administration (André-M. Szesny, 2020, available here).

The Federal Ministry of the Interior, Building and Community (BMI) is the ministry responsible for the classic interior affairs of the Federation (see Fröhlich et al., 1997). Although its areas of responsibility have changed numerous times since it was established 70 years ago, the federal ministry has always kept BMI in its German abbreviation. The principle of ministerial autonomy notwithstanding, the supreme federal authorities are guided by the general internal administration at the federal level, which is based at the BMI. Within the Federal Government, the BMI is the ministry responsible for issues related to the Constitution (together with the Ministry of Justice), organisation, public service law and security. Police matters and public security, including protection of the Constitution, migration and emergency management as well as the public service are key tasks. The BMI's executive agencies reflect the ministry's broad range of tasks and make up its administrative substructure. In fact, the BMI has the most executive agencies of any federal ministry (von Knobloch, in Kuhlmann, Proeller, Schimanke, Ziekow, 2021, 84 ff.).

The prevention of corruption is based on an internal directive by BMI, which includes the identification of the dangerous tasks, the introduction of the more eyes-principle. The internal directive also contains indications on how the organization should prevent corruption and how each contract should include an anti-corruption provision. The so called Anti-Corruption Directive is complemented with an Anti-Corruption Code of Conduct and Guidelines for supervisors and heads of public authorities. The Anti-Corruption Directive, Code of Conduct and Guidelines for supervisors and heads of public authorities are compiled in one brochure "Rules on Integrity" (*Regelungen zur Integrität*), which also contains further guidance to each of the provisions of the Anti-Corruption Directive (called Recommendations for prevention of corruption), additional circulars and administrative regulations on such issues as gifts, sponsoring (etc.), as well as relevant excerpts of the German Criminal Code, the Freedom of Information Act and useful internet links. This brochure (which was last updated in 2018) is made available to all employees in the public sector (and the public at large) on the website of the BMI (Greco Report, 2020, 16, available here).

Thus, punishment of corruption also constitutes a part of the tasks of the Minister of Internal Affairs with disciplinary sanctions but criminal prosecution and civil procedures are also possible and plausible, especially outside the public sector and outside the federal administration. Standardised rules to prevent corruption exist, in fact, for the public sector only. In the healthcare and private sectors, obligations are mainly organisational. Concerning the federate administrations, the law enforcement authorities and the courts are responsible for enforcing the anti-corruption legislation. In all German states, there are special public prosecutor's offices for white collar crime, in which special departments are set up to combat corruption. In some states, there are also specialised public prosecutor's offices for corruption offences.

At the moment, criticisms relate to inadequate legislation on the one hand and shortcomings in the prosecution of acts of corruption on the other. With respect to the current legislation, the rudimentary regulations on the liability of companies come in for particular criticism. Also the existing offences of corruption are in some cases perceived to be overly vague. The lack of regulations that would allow corruption to be combated more effectively is also criticised. In particular, Germany is reminded that it has inadequate whistleblower protection (see above). Since anonymous whistleblowers frequently provide the decisive clues and thus enable investigations into corruption cases in the first place, it is

recommended that whistleblower protection be improved to ensure a more effective fight against corruption (André-M. Szesny, 2020, available here).

3. The (criminal) law protection of the financial interests of the European Union: PIF Directive

On 17 June 2019, the German Parliament transposed the PIF-Directive. However, no administrative or independent new authorities was created to control the EU's financial interests. The Act of 17 June 2019 provides smaller changes in the criminal legal system. It provides sanctions for the abuse of the EU's financial interests. A sanction of five years or financial penalties are envisaged for subsidy fraud. A small amendment has been added to Art. 264 of the German Criminal Code with regard to subsidies, including subsidies granted by the EU. In a similar light, Art. 2 of the Act of 17 June 2019 provides for a Regulation allowing up to five years' imprisonment or a fine for those who accept or limit subsidies in the case of persons responsible for dealing with EU subsidies. No full Public Authority Centre dealing with the subsidies at EU level was introduced (Stephenson, Sánchez-Barrueco, Aden, 2021).

Also the penalties concerning the bribery of public servants have been recently raised[180] in article 335 to new levels, in accordance with the PIF-Directive (Galiot, 2017, 65 ff.)[181].

The Directive defines passive corruption as the action a public official who, directly or through an intermediary, requests or receives advantages of any kind for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way that damages or is likely to damage the Union's financial interests (Juszczak, Sason, 2017, 80 ff.). This definition is almost identical to Article 246 and Article 247(61-3) of the Criminal Code, although the Criminal Code does not envisage any distinction in bribery that can cause damage to either the national or the EU's financial interests.

Article 4, 2 b) of the Directive defines active corruption as the action of a person who promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party so that her or she will act or refrain from acting in accordance with his duty or in the exercise of his functions in a way that damages or is likely to damage the Union's financial interests.

Article 335 of the German Criminal Code provides new maximum sentences in the event of serious briberies. It provides the following:

(1) In especially serious cases
1. of an offence under
a) section 332 (1) sentence 1, also in conjunction with (3), and
b) section 334 (1) sentence 1 and (2), in each case also in conjunction with (3),
the penalty is imprisonment for a term of between one and ten years and
2. for an offence under section 332 (2), also in conjunction with (3), the penalty is imprisonment for a term of at least two years.

(2) An especially serious case within the meaning of subsection (1) typically occurs where
1. the act relates to a major benefit,
2. the offender accepts continued benefits demanded in return for the fact that the offender would perform an official act in the future or

[180] Article 25 and 26 of the Act of parliament of 19 June 2019.
[181] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

3. the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.

To date, in contrast to most European legal systems, there is no general provision in the German legal system establishing a genuine criminal liability of legal entities. Therefore, the commission of "PIF crimes" in Germany cannot entail proper criminal consequences for legal entities.

However, generally speaking § 30(1) of the Regulatory Offenses Act (*Gesetz über Ordnungswidrigkeiten, "OWiG"*) allows to impose a fine for administrative and criminal offences committed by legal persons.

This form of corporate liability is triggered by an offence committed by any "responsible person", i.e. qualified natural persons acting for the management of the entity, when the commission of the offence violated the legal entity's duties, or when the legal entity has been enriched or was intended to be enriched through the commission of the offence. Therefore, it follows the imputation model, meaning that it is based on the (criminal) conduct of its leading persons (Bose, 2011, 231).

Furthermore, under § 130 of the Regulatory Offenses Act, a fine can be imposed if an employee has committed an offence on behalf of a legal person and the management has failed to prevent the commission of that offence through appropriate supervisory measures. This is a provision upon which corporate liability can be also based (Bose, 2011, 231 f.), and – at least in this case – the organisational lack (*Organisationsverschulden*) is seen as the main element of corporate guilt (Tiedemann, 1988).

Hence liability of the legal persons in Germany can be said to be general, since in principle it may arise from the commission of any offence (or administrative violation), provided that it concerns offences (or administrative violations) whose commission is compatible with the mentioned imputation criteria; there is not a list of specific predicate crimes.

As for the administrative fine, it has two components, referred to as "punitive" and "confiscatory"; this latter refers to the fact that the maximum amount of the fine may increase considering the illicit profits of the corporation. In the context of the Phase 3 report on Germany by the OECD Working Group on Bribery, it was observed that the "punitive" component of the fine was too low given the high turnover and profit of many German enterprises (see OECD, 2018, 69). Thus § 30 of the Regulatory Offenses Act has been amended in 2013, and the envisaged fine is now higher (for criminal offences committed with intent, the maximum fine is EUR 10 000 000; for offences committed negligently, the maximum fine is EUR 5 000 000).

Even though the German model of corporate liability is administrative in nature, it is important to underline that the possibility of introducing *ex crimine* liability of legal entities has long been the subject of debate. Recently, there have been several reform proposals, showing that a change of perspective is somehow looming on the horizon. Indeed, in 2018 the introduction of stricter sanctions for corporations was included also in the Coalition Agreement between the German ruling parties.

Currently it is under discussion in the German Parliament the German Corporate Sanctioning Act *("Verbandssanktionengesetz" – "VerSanG"*) aimed at introducing a new punitive regime against corporations and increasing fines, at the same time promoting the adoption of compliance measures and encouraging companies to cooperate with internal investigations in the detection of offences.

It remains to be seen what the evolution will be in this respect, but this bill could be a major development in the German regulatory approach to tackle corporate misconduct.

3.1. A Special issue on the revenue side: VAT fraud in Germany

VAT evasion is one of the most common forms of tax evasion (Dannecker, 2019, p. 103 ff.; Sackreuther, 2019, p. 112 ff.; Keen, Smith, 2006, p. 861 ff.). In recent years, the classic cases of tax evasion are now being replaced by aggressive and enrichment-oriented criminal offenses. In Germany, the Ministry of Finance has released data on VAT fraud discovered since 2003. We have gone from 491

frauds in 2003 to 718 in 2017. In addition, the Ministry of Finance has reported an average of 1376 confirmed cases of VAT fraud from 2012 to 2016 (Sackreuther, 2019, p. 113). Also, in 2017, for example, total VAT revenue amounted to approximately 226 billion euro (see here). Value-added tax (VAT) fraud causes tax revenue shortfalls and diminishes public budgets correspondingly. This is especially the case with VAT, which in Germany accounts for around one third of German tax revenues. In this case, organized criminal structures have developed that commit fraud on a large scale (Sackreuther, 2019, p. 116).

VAT is a tax carried out as a net tax for all phases at all commercial levels. To avoid distortions of competition, in addition to taxes and turnover tax that culminate excessively, the entrepreneur can deduct his incoming turnover from the outgoing turnover. This system predicts that if the sales of inputs have been greater than the sales of output, the entrepreneur receives the sales of inputs fully refunded. Tax authority approval is required for reimbursement. Despite this, this system of deducting the input tax of entrepreneurs is systematically abused by the authors in order not to pay the VAT or to recover the input tax unduly and without justification by the financial administration. Indeed, VAT fraud can amount to the actual payment of turnover tax not previously paid to the Member State (Sackreuther, 2019, p. 116).

To avoid VAT frauds, the German legislator has made several amendments to the law since 2001. The first intervention has been the introduction of general penalties which apply to all customs and tax evasion. According to the literature, this entails greater independence of criminal tax law from fraud, which also serves to protect the financial interests of the European Union on the expenditure side (Dannecker, 2019, p. 106). In particular, legislation to combat VAT reductions and to amend other tax laws - i.e. law on combating tax reductions - includes the crime of commercial and group tax fraud and has increased the penalty from a maximum of five years of imprisonment and from one to ten years of imprisonment. Such penalties apply when the perpetrator reduces taxes or obtains unjustified tax advantages for himself or another person on a commercial basis or as a member of a criminal organization that is associated with the continuing commission of such offences (Dannecker, 2019, p. 108). Furthermore, to protection of the VAT income, the German legislator introduce the article 26(b) and 26(c) VAT Act in 2001:

§ 26b VAT Act: Damage to sales tax revenue (1) A person who does not pay or does not pay in full the turnover tax shown in an invoice within the meaning of section 14 at a due date specified in section 18 (1) sentence 4 or (4) sentence 1 or 2 is in breach of regulations. (2) The administrative offence may be punished by a fine of up to fifty thousand euros.

§ 26c VAT Act: Commercial or gang damage to sales tax revenue. A custodial sentence of up to five years or a fine shall be imposed on anyone who, in the cases of § 26b UStG, acts on a commercial basis or as a member of a gang that has committed itself to the continued commission of such acts.

In 2002, the German legislator intervened again limiting the content of the crime. After this change, tax evasion is punished with imprisonment from one year to ten years in cases of tax fraud if the offender reduces taxes or obtains unjustified tax advantages - for himself or another person - on a large scale, on a commercial base or as a member of a criminal organization whose purpose is the continuing commission of tax fraud. Instead, a prison sentence of between three months and five years was provided for minor cases (Dannecker, 2019, p. 108). In addition, in 2007, to better combat VAT fraud, the German legislator abrogated the offence referred to in art. 370(a) TUIR - that is, a uniform offence for tax and customs evasion. It has changed its strategies to the point of abolishing the qualification of tax fraud and introducing particularly serious cases of tax evasion. Consequently, in particularly serious cases, the penalty of imprisonment from six months to ten years is applied. In light of this change, a particularly serious case is where the criminal deliberately underestimates large-scale taxes or derives unjustified tax advantages - as a member of a group set up for the purpose -

underestimates the value-added tax or excise duties or derives unjustified advantages in terms of VAT or excise duties[182].

Moreover, the Ministry of Finance announced actions to fight VAT-fraud. In Germany, the Eurofisc framework is implemented in close coordination between the federal level and the *Länder* . On 2 October 2018, the EU finance ministers adopted various amendments to the Regulation on administrative cooperation and combating VAT fraud. These amendments will allow for an even more extensive cooperation in the future. The most important changes include (see here):

- *A basically obligatory performance of certain administrative enquiries, if requested by at least two EU member states. There is only restricted scope for declining such a request.*
- *A new instrument, for "administrative enquiries carried out jointly", which will enable officials of EU member states to take part in administrative enquiries in the territory of another EU member state, for example by participating in joint audits.*
- *The exchange of data from import declarations.*
- *The provision of access to EU member states' vehicle registration data.*
- *The expansion of Eurofisc's remits. Among other things, this expansion allows Eurofisc to request information from Europol and OLAF, and to share that information with other EU member states via the Eurofisc network".*

Nevertheless, the literature argues that the classification of cases of organized VAT fraud in Germany as a crime is unsatisfactory. Criminal structures show a high degree of organization of the groups involved and also show a rigorous business sense. In Germany, there is a professionalization of VAT offences. This happens because the fraudulent exploitation of the input tax deduction not only allows you to reduce your tax burden but can also induce the final authorities to damage themselves and enrich the authors, in particular through the refund of the input tax (Dannecker, 2019, p. 110).

[182] See Art. 370 (3), TUIR.

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GERMANY - SECTION II

I. Stockpile capacities in RescEU framework: the German case

Prof. Alexander De Becker and Dr. Alessandro Nato

1. National procedures for the implementation of national stockpile capacities: the role of the Federal Office of Civil Protection and Disaster Assistance (BBK)

The Federal Office of Civil Protection and Disaster Assistance is an executive agency of the Federal Ministry of the Interior. It is responsible for matters related to civil protection and disaster assistance. The agency is a federal office offering a wide range of services for authorities at all administrative levels, organizations and institutions involved in civil protection in Germany(see here). Furthermore, the agency uses a horizontal approach, and it acts to protect the population against all types of natural and disasters, including war. In addition, disaster actions refer to the federal government's task of providing support for disaster management measures in federal states in the event of major disasters of all kinds, especially support for information sharing, coordination, the management of scarce resources and the conduct of crisis management exercises (Kippnich, et altri, 2017, 606 ff.).

The federal agency is responsible for planning and preparing civil protection measures within the overall national security system. It coordinates, plans and prepares actions between the federal government and the Lander in the event of specific threats, providing basic and advanced training to enable managers to make the right decisions(see here). In addition, it maintains information and coordination services through the management of the German Joint Information and Situation Center (GMLZ). The agency also contributes to the development of the National Strategy for the Protection of Critical Infrastructures; warns and informs the public, strengthens civic self-help, conducts research and development and coordinates international cooperation actions (Fischer et altri, 2011, 523 ff.).

The Federal Office of Civil Protection and Disaster Assistance (BBK) was involved in the management of the covid-19 crisis. Germany introduced several measures to tackle the outbreak. Indeed, centralised and co-ordinated approaches on supranational, national and regional levels are being introduced to avoid sending competing messages to the market and to join forces against the COVID-19 crisis. Public procurement has been increasingly centralized in response to the crisis and the territorial units of the Civil Protection have begun to cooperate more and more closely(see here). The German Federal Ministry of Health has pushed for more centralization to meet medical equipment needs. In Germany, health procurement is generally conducted in a decentralized way. Before the Covid-19 crisis, procurement centralization was met with great reluctance by the German administration at all levels.

However, the health emergency forced the ministry of health to order the aggregate procurement of the necessary equipment (masks, gowns, disinfectants, etc.) for all medical offices, clinics, etc. In Germany. Thus, the purchases of various items were assigned to the Federal Procurement Office (BeschA), the Federal Central Customs Authority (GZD) and the Federal Office for Equipment, Information Technology and In-Service Support (BAAINBw) of the Bundeswehr. The coordination, distribution and designation of purchased items are managed by the Federal Ministry of Health. A procurement coordination unit exists in the form of Kaufhaus des Bundes, a coordination unit at the Federal Procurement Office (BeschA) of the Federal Ministry of the Interior (see here).

In particular, the Federal Customs Office (Generalzolldirektion) was charged with managing the procurement processes for masks and gowns in an open procedure. The price was set by the Ministry of Health, with a minimum offer of 25,000 masks per order. The media reported that the problem in securing the masks was related to logistics, such as the lack of transport possibilities between Germany and China. Meanwhile, the Federal Ministry of the Interior was tasked with procuring hand sanitiser. In addition, the Federal Armed Forces (BAAINBW) were tasked with tracing and procuring urgent equipment and reported having concluded 67 contracts worth € 334 million in three weeks, along with BeschA and the customs office (see here).

In total, in 2020, the German federal government allocated € 4 billion to help state and local governments expand and upgrade their public health services and provided € 9 billion for the purchase of medical protective equipment. In addition, it contributed around € 1 billion to the development of a vaccine (see here).

2. National procedure/RescEU procedure relationship

On 19 March 2020. The European Commission decided to set up a strategic stockpile of medical supplies (respirators, protective masks, vaccines, therapeutic agents, laboratory stocks) under the RescEU mechanism to assist EU Member States in the fight against the COVID-19 pandemic. The distribution of equipment collected under the RescEU is managed by the Emergency Response Coordination Centre (ERCC). Common European stocks of medical equipment collected under RescEU are currently stored in 9 Member States: Belgium, Denmark, Germany, Greece, Hungary, Romania, Slovenia, Sweden and the Netherlands (see here).

The medical equipment includes items such as intensive care medical equipment such as ventilators, personal protective equipment such as reusable masks, vaccines and therapeutics, laboratory supplies. The were piled under the coördination of the of Das Kompetenzzentrum Europäischer Katastrophenschutz der Johanniter-Unfall-Hilfe **(**JUH). This Center takes the lead with regard to this project.

As part of the project, warehouses are to be set up at several locations in the Federal Republic of Germany. This includes the storage of vaccines, antibody tests and Ebola therapeutics. A decision on the application is expected by the end of the year. After a positive decision, the project partners decide on the exact locations where the RescEU aid shall be stocked. The organising and piling took place in early 2021. The stock capacity is entirely funded by the EU within the framework of the EU Civil Protection Mechanism RescEU (see here). The project takes place in close coordination with the Federal Ministry of the Interior (BMI). The German Red Cross (DRK), the Malteser Hilfsdienst (MHD), the Charité and the federal states of Brandenburg and Lower Saxony are involved in the application as project partners. The Arbeiter-Samariter-Bund (ASB), the German Life Saving Society (DLRG), the Robert Koch Institute (RKI) and the Federal Ministry of Health (BMG) are active as supporting partners.

On 11 January 2021, the European Commission launched the idea of opening four additional stores of medical equipment. The European Commission concluded that also in 2021 the coronavirus will continue to pose a huge challenge for the healthcare system in 2021 and that vigilance had to be respected. The four additional stores of medical equipment were located in Belgium, Germany, the Netherlands and Slovenia. This way the EU is ensuring that vulnerable groups and health workers receive the equipment they need to ensure stable health systems across Europe and to keep them running (see here)

The piles include:

- over 65 million medical Masks and 15 million FFP2- and FFP3-masks;
- over 280 million pair medical hand gloves;
- almost 20 million medical protective gowns and aprons;
- several thousand oxygen concentrators and ventilators

The RescEU medical equipment reserve includes various types of medical equipment, such as protective masks or medical ventilators, used in intensive care. The reserve is held by Belgium, Denmark, Germany, Greece, Romania, Sweden, Slovenia, Hungary and the Netherlands, and these countries are also responsible for procurement. The European Commission finances the equipment as well as its storage and transport 100 percent. The Emergency Response Coordination Center coordinates the distribution of equipment to ensure it is used where it is needed most. This will be based on the needs that countries have raised in their requests for assistance to the EU under the Union Civil Protection Mechanism. Obviously, the role of to the European Commission Recommendation of 13 March 2020.

(2020/403) may not be left unmentioned in Germany although, it did not lead to specific adaptation of existing regulation.

3. Criminal offences, control procedures, and the risk of fraud affecting the EU's financial interest in this sector at national level

It is obvious that the purchase of medical equipment with regard to the public procurement regulations. Currently, a case is pending two MPs of the German Parliament have resigned due to the fact that he earned a significant amount of money (press sources speak of 250.000 euro) because their companies have made gains due to the purchase of face masks.(see here).

The German prosecutor is dealing with this topic. It concerns the gain of the two resigned MPs. It is clear that the financial interests of German and the EU might be affected due to the lobbying of some MPs. The German Prosecutor Fraud shall have to analyze to what extent their might be passive and/or active corruption with regard to the purchase of face masks in Germany. At this stage, it is not clear whether or to what extent the financial interests of the EU might be at stake. At first glance, it seems to concern the German financial interests themselves. However, this might be seen as one of the first potential corruption files with regard to the COVID19-rescUE policy within the EU.

Additionally, in May 2021, the Minister of Health announced that it would take tighter control of testing centres to counter reported misappropriation by coronavirus test providers across Germany. The allegations first surfaced last week, following reports that the test centres run by the MediCan company had issued financial reimbursement requests for hundreds of COVID-19 tests that had not been carried out. Five Landers have also launched investigations for embezzlement (see here).

Embezzlement in covid-19 testing centres is just the latest in a series of financial frauds that have plagued the health ministry's handling of the pandemic. The Federal Minister was accused of wasting taxpayers' money after he overpaid for large supplies of face masks. First, there was an agreement with a company where the husband of the Minister of Health works. Through this agreement, the health ministry spent nearly € 1 million on 570,000 surgical masks in April 2020. Also, in May 2021, it emerged that the German federal government had also paid an extremely high price for millions of FFP2 masks. of the Swiss company Emix (see here).

II. European resources for strategic investments supporting small and medium enterprises: the green sector, innovation and performances in Germany

Dr. Alessandro Nato

1. National support schemes for small and medium enterprises: access to credit and government programmes in Germany

In general, the category of small and medium-size enterprises (from now on SMEs) includes not only micro-companies with just a few employees but also successful enterprises with large staff numbers. However, there are different definition of the SME. The German authority defines SMEs as firms that have fewer than 500 employees or that generate up to 50 billion euro in annual turnover (Hansjörg, Zeynep Mualla, 2018, p. 2). Furthermore, Germany's government-owned development bank (from now own KfW), defines SMEs as firms with an annual turnover of up to 500 million euro (Schwartz, 2016). In addition, the European Commission states that SMEs are companies with fewer than 250 employees or that generate up to 50 million in annual turnover (see here).

Despite these different definitions, German SMEs are important both as a source of employment, sources of innovation and increased productivity (Hummel, Karcher, Schultz, 2013, 471 ff.). In German economy SMEs are considered the mainstay of the economic system. According to the literature there were almost 2.52 SMEs in Germany in 2018, an increase of 430,000 companies compared to 2011. The majority of these companies were micro-enterprises employing up to nine people, while the small businesses that employed between 10 and 49 people were about 357 thousand. In addition, the medium-sized enterprises employing between 50 and 349 people numbered around 58.8 thousand (see here). In addition, in 2018, out of a total of 19.1 million people employed by SMEs in Germany, around 5.9 million people were employed by micro-enterprises, 6.2 million by small one, and around 7 million by medium-sized enterprises. The contribution of SMEs to the non-financial sector of the German economy employed 63.2 per cent of the German workforce (see here). The sectors in which SMEs are most involved are: manufacturing; start-ups; retail; professional services, such as financial services; media, communication services; entertainment, and personal services (see here).

The success of German SMEs is due, on the one hand, to the expenditure they devote to innovation (Hansjörg; Zeynep Mualla, 2018, p. 7). Research spending on German SMEs and their frequency of innovation are among the highest in the EU. According to Eurostat data, 90.5 per cent of companies with 10 to 49 employees and 87.9 per cent of companies with 50 to 249 employees in Germany introduced new product innovation in 2014. This is the highest percentage in the EU (see here). Furthermore, Germany has the highest percentage of innovative enterprises in terms of product, process, organisational, and marketing innovation among all enterprises in the EU-27 (Eurostat 2012).

On the other hand, the success of SMEs is guaranteed by access to credit. The extended period of low interest rates has led to favourable conditions for back finance, which is still the most important source of financing for German SMEs (OECD, 2020). Indeed, most SMEs report little or no difficulty in financing their investments through bank loans. In Germany, the financial system is bank based and involves of three type of financial institution: private banks, public savings bank, and cooperative banks (OECD, 2020; Audretsch, Lehmann 2016). In particular, public savings and cooperative banks provide credit for the local economy. In fact, they are only allowed to provide loans in their geographical region. They operate within joint and several liability systems, which means they share responsibility for losses within the whole system (Hansjörg, Zeynep Mualla, 2018, p. 10). Furthermore, the KfW started to finance SMEs focusing on green growth projects and introduce clean technologies (Audretch, Lehmann 2016; Detzer et al. 2017). To support the green sector, KfW provides both long-term and short-term loans to SMEs for activities such as export financing. The KfW can provide credit directly to selected firms, but they generally use regional banks as mediators, especially public savings and cooperative

banks. This method of credit allocation exploits the knowledge of local banks and reduces the risk of corruption (Hansjörg, Zeynep Mualla, 2018, p. 10; Audretch, Lehmann 2016).

Also, the federal government provides a wide range of financial tools to support SMEs, prospective entrepreneurs and innovative start-ups to implement new projects, products, processes and services (Beck, 2013, 23 ff.). A strategic area of government support is broad-based backing for start-up and growth projects, including in the green sector. The ERP Special Fund provides for a differentiated and well-established system of promotional loan instruments for different start-up phases. It provides low-interest loans for start-ups. Moreover, ER-Capital for Start-Ups provides subordinated loans with favourable interest rates in order to strengthen a company's equity base and thereby to facilitate further external financing (OECD, 2020). Another relevant programme is the Hightech Start-Up Fund. It is an early-phase funding programme for highly innovative and technology-oriented companies with operative business activities. To be eligible for financing, projects must have shown promising research findings and be based on innovative technology (OECD, 2020). Also, INVEST is a German Government programme run by the Federal Ministry for Economic Affairs and Energy. It has been set up to support private investors wishing to acquire a stake in young and innovative companies. INVEST can provide funds for a maximum of 500,000 euro of investment per single investor for each year. The maximum amount eligible for funding that can be invested in a single company per year is 3 million euro (OECD, 2020).

Furthermore, the German Government has allocated other resources to support SMEs during the Covid-19 crisis (i.e. Corona-Soforthilfe). At the start of the first wave of the epidemic, the German Government approved an aid programme with a maximum volume of 50 billion euro for micro-enterprises in all sectors – including agriculture – and self-employed/freelancers alone or with up to 10 employees in difficulty due to the Coronavirus. Immediate financial aid consists of a one-off non-repayable contribution for 3 months, up to 9,000 euro for companies with up to 5 employees, and up to 15,000 euro for companies with up to 10 employees. If the landlord reduces the rent by at least 20%, the unused contribution can also be used for a further two months (see here). Moreover, for loans in working capital granted by the banking system for investments and operating assets for companies in difficulty due to the Coronavirus, the KfW assumes up to 100% of the risk. In particular, we note the rapid credit programme with a 100% federal guarantee through KfW and an interest rate of 3% that can be requested by companies from their trusted banks starting from 15 April 2020 (see here). KfW does not provide the loan directly, but gives online guidance to prepare credit applications with a trusted bank (see here).

2. National schemes and relationships with EU funds in the sector of access to credit for SMEs in the light of investments in the main drivers of innovation: the case of the EFSI throughout the multilevel system and green investments in Germany

During the European integration process, the European Investment Bank (from now on the EIB) has collaborated extensively with the German economic system and the German SMEs. It has provided tailored financing solutions to support SMEs' investments in a variety of sectors. In general, in the corporate sector, EIB financing is generally extended in the form of senior term loans, but subordinated and equity financing may also be available. Loans typically start at 25 million euro and can reach 500 million: they are tailored to meet clients' individual financing needs. EIB loans can complement a client's financing structure alongside commercial financing. For example, in 2015 the EIB granted a total volume of loans of around 2.1 billion euro to German companies which contributed to investments relating to the EU's strategic objective areas, such as research, development and innovation, energy efficiency/environment, and telecommunication infrastructures (see here).

The involvement of the EIB in Germany in recent years has been significant. It has provided total funding of over 6.1 billion euro, up from 5.6 billion euro in 2018. In 2019, the EIB focused on funding to strengthen research, development and innovation, for which it provided around 2.5 billion euro. Another area in which the EIB has been active has been the financing of climate protection. In the green economy sector in Germany, the EIB financed nearly 1 billion in funds in 2019, primarily to improve energy efficiency. SMEs were among the recipients of these funds. In addition, the European

Investment Fund has also focused on SMEs and mid-caps through financing operations of over 900 million euro (see here).

In addition, the EIB, together with the European Investment Fund, manages the European Foundation for Strategic Investments (from now on EFSI). The EFSI fund was launched by the European Commission led by Junker with the aim of mobilising investments in Europe to a total of at least 315 billion euro from 2015 to 2018. The German federal Government supported the boost of these investments with around 8 billion euro to be channelled through the KfW (see here). The funds mainly flowed into strategic investments in key sectors such as infrastructure and innovation and the green sector, as well as promoting SMEs by providing risk capital and guarantees. In particular, The ERP Start-up – Start Geld Loan programme benefits from a guarantee issued under the EU Competitiveness of Enterprises and SMEs (COSME) programme. Thanks to the EFSI, loans totalling 1 billion euro were granted by 2018 to support at least 15,000 start-ups and young businesses in Germany (see here).

At the outbreak of the health emergency, the Commission made liquidity measures available to support European SMEs (Juergensen, Guimón, Narula, 2020, p. 499 ff.). The Enterprise Europe Network (hereafter EEN) has helped SMEs through innovation partnerships in areas related to Covid-19, such as personal protective equipment, medical equipment, advice on access to European financial support, and national dedicated funds. In addition, the Commission is pursuing and adapting several measures for the new SME strategy[183] to limit the impact of the crisis, such as working with EU Member States on the implementation of the Late Payment Directive or reducing red tape. Furthermore, the Directorate-General for the Internal Market, Industry, Entrepreneurship, and SMEs has played an important role in contributing to the Commission's economic response to the epidemic, ensuring the exchange of essential protective equipment on the internal market and helping affected industries to mitigate the effects of the coronavirus epidemic. In addition, the Commission has promoted an SME recovery strategy and will specifically support SMEs during the sustainable and digital recovery phase (see here).

In particular, the German SME system benefited from the help of European funds through the intervention of the EIB Group comprising the EIB and the European Investment Fund. In October 2020, the EIB Group provided Commerzbank AG with a mezzanine tranche of guarantee of approximately 125 million euro in an existing portfolio of loans to small and medium-sized enterprises and mid-caps. The guarantee will free up regulatory capital for the Commerzbank and allow it to provide new loans of up to 500 million euro to SMEs and mid-caps in Germany on favourable terms. This should mitigate the impact of the Covid-19 crisis on SMEs, self-employed workers, and mid-caps, which are currently experiencing a liquidity shortage. The operation benefits from the support of the EFSI. Under the guarantee, the EIB assumes the mezzanine risk as part of a synthetic securitisation transaction with Commerzbank. Indeed, the EIF will provide a guarantee to Commerzbank in relation to an existing portfolio of loans to SMEs and medium-sized enterprises. An EIB counter-guarantee will fully reflect the EIF's obligations under this guarantee (see here).

3. Criminal offences, control procedures, and risk of fraud affecting the EU's financial interest in this sector at national level

The massive allocation of funds for small and medium-sized enterprises has resulted in an increase in the number of frauds in Germany. At the beginning of May 2020, the Anti-Money Laundering Unit received 2,300 suspicious reports concerning Corona-Soforthilfe – the immediate aid measures provided by the German government to support SMEs. The reports came directly from the banks. They had registered unusual deposits in some accounts because sums of aid between 9,000 and 15,000 euro had been credited to the accounts of some customers, whereas these accounts usually contained just a few hundred euro. Hence, the banks sent reports to the anti-money laundering authorities.

[183] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, AND THE COMMITTEE OF THE REGIONS An SME Strategy for a sustainable and digital Europe COM/2020/103 final

The German anti-money laundering authority reported that 530 fraud investigations had been launched in the first half of 2020, a number that increased after the regions, which managed the distribution of their own or federal Government incentives, initiated other investigation procedures. The national authority argued that the need to hurry, skipping traditional bureaucratic procedures, had favoured a streamlined and rapid mechanism. To access the Corona-Soforthilfe support, it was sufficient to fill in a simple online form, indicating fiscal details and a state of financial need. Subsequently, the applicant would find the required support on their account after a few days.

The procedure saved many small businesses from immediate bankruptcy, but the ease of access to emergency credit favoured scams. For example, in North Rhine-Westphalia, a criminal organisation had created a fake official page by intercepting and stealing sensitive data from applicants. In that *Land*, it was necessary to suspend the disbursement of aid for a few weeks to bring the situation under control.

The fast payment and follow-up system caused an excessive increase in fraud in the Berlin area too. The Berlin Development Bank (IBB), a public institution financing the capital's economy and managing the cash flow of quick aid, has reported 880 cases of suspected fraud investigations. In addition, 12,500 Berlin residents voluntarily returned the contribution that was not due to them, returning a sum equal to over 83 million euro (see here). In July 2020, the first trials for fraud against the Berlin Development Bank due to the disbursement of the Corona-Soforthilfe began (see here).

To sum up, in the first phase of the Corona-19 crisis, the European and national funds in the sector of small and medium-sized enterprises are dealt with through the German anti-money laundering legislation. Reporting to the anti-money laundering authority leads to investigations to recover the sums stolen. The supervisory authority in this area is the *BaFin – Bundesanstalt für Finanzdienstleistungsaufsicht*. This body monitors compliance with anti-money laundering obligations by credit institutions and payment service providers. Given the breadth and complexity of the criminal networks behind money laundering phenomena, government agencies are involved in investigating financial transactions to combat money laundering. These agencies are called Financial Intelligence Units – FIU for short – and operate in compliance with national and international regulations. In Germany, the *Zentralstelle für Finanztransaktionsuntersuchungen Beim Zollkriminalamt*, the central office for investigations into financial transactions at the customs criminal police, holds this function. The German anti-money laundering legislation was introduced in 1993 (Zoppei, 2017). It has been subject to several amendments, the most important dating back to 2011, when the *Gesetz Zur Optimierung der Geldwäscheprävention* (GWPräOptG), the national law on the prevention of money laundering, was added. which imposes a series of reporting obligations concerning certain institutions or freelancers offering financial services. Germany, however, has made some progress, especially since 2017 thanks to the transposition of the IV European Anti-money laundering Directive[184] and the establishment of the *Transparenzregister*, the electronic register, which, as governed by the GwG, requires companies operating on the financial markets to record and keep specific data (see here).

Despite prompt reporting by the banking system and the intervention of the authorities, the number of credit scams for small and medium-sized enterprises does not seem easy to stem. In this sector, the protection of financial interest appears to be at risk in Germany.

[184] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance).

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GERMANY - SECTION III

CONCLUSIONS

The regular and efficient use of the EU funds is in the interest of both the EU and the Member States. Being one of the major net contributors to the EU budget, this is particularly true for Germany. Since the relevance of shared management, management and control systems established in the Member States based on EU requirements are a key feature to observe (EU Report of German Audit Institutions, 73; see also Task No 1). The division of labour between the EU and its Member States provides for Union law to be enforced by the Member States through their public administrations and under their administrative law. It has become clear that this principle is not (or no longer) applied consistently. The EU's agencies enforce Union law in some areas, and Union law is constantly being added to, not only providing for substantive regulation but also increasingly determining the administrative practices of the Member States (Hoffman in Kuhlmann, Proeller, Schimanke, Ziekow, 2021, 58). The work done by the bodies in charge of internal controls in the management of the EU funds is an example of this process, considering also that these controls are then complemented by the external audit function at the European and national levels. The latter refers to the audit of financial management in full independence and accordance with the EU Treaty and applicable national regulations (see Task No 4).

It is not a case that the OECD suggested in one of its reports that the European Commission (EC) and the member states should work to promote coordination of national approaches to performance-based budgeting as a common, qualitative element of public financial frameworks in the EU, to respect the principle of sound financial management. For the future and especially in those areas where EU programmes are dependent for their effectiveness on significant national co-financing, OECD observed that, in principle, it would be reasonable that the *ex-ante* conditionalities attached to the programme could also include references to the quality of the national performance budgeting framework and its alignment with accepted standards of good practice (OECD Report 2017, 23, available here). However, National anti-fraud strategies for the protection of the ESI Funds, to ensure homogenous and effective implementation of anti-fraud measures especially where Member States' organisational structures are decentralised, exist only in ten of the, at that time, 28 Member States: Bulgaria, Czechia, Greece, France, Croatia, Italy, Latvia, Hungary, Malta and Slovakia. Romania also has a strategy, but it is now out-of-date (PIF report, 2017, 12). The idea of an anti-fraud strategy was a suggestion of the EC, according to which the concept of a formal anti-fraud policy corresponds to the "fraud risk management programme" defined by the Association of Certified Fraud Examiners (ACFE) in its "Fraud examiners manual" or in the "Fraud Risk Management Guide", developed with the Committee of Sponsoring Organizations of the Treadway Commission (COSO), and to the "formal counter fraud and corruption strategies" defined by the Chartered Institute of Public Finance and Accountancy (CIPFA) in its "Code of practice on managing the risk of fraud and corruption". The Member States that have not adopted a national strategy are, on the contrary: Belgium, Denmark, Germany, Estonia, Ireland, Spain, Cyprus, Lithuania, Luxembourg, Netherlands, Austria, Poland, Portugal, Slovenia, Finland, Sweden and United Kingdom (ECA report, No 6/2019). However, in 2016, the EC has already observed with favour as Germany adopted an anti-fraud and anti-corruption strategy, including a fraud risk assessment, of all ERDF measures (EC Annual Report, 2015, 17, available here; see also EC-DG REGIO, 2018, available here).

In all the latter cases, the task to evaluate the protection of the EU financial interest inside the national system, both on the revenue and expenditure sides, becomes even more complex than in the previous countries. This affirmation is true especially in Germany, on the one hand for its federal structure and extreme variance, particularly under the Administrative point of view (i.e. see Task No 4 for the complex system of audit courts, or Task No 1 for the regional personalization of the management and control systems). On the other hand, the descriptive picture of the non-explicit German anti-fraud policy is complicated by the peculiar judicial system, with its numerous jurisdictions. Task No 3 shows that different courts, at federal and regional levels, can have jurisdiction, directly or indirectly, for the protection of the public financial interest, with a European dimension as well (considering the importance of co-financing), and the guarantee of sound management. In particular, the goal to have a clear picture of the effective protection of the EU financial interest through the national judicial system

is neither immediate nor easily possible. Moreover, differently from the Italian and the Polish cases, there are not case-law that concerns specifically the relationship between the management of EU funds and constitutional issues. Well settled, on the contrary, is the constitutional jurisprudence that aims to guarantee that the European integration for Germany is built on a democratic playground respecting the proportionality principle (i.e. in terms of European Monetary and Fiscal policies). This is a different point of view from which to observe the protection of the European financial interest. Instead, considering the different political and economic position of Germany in the nowadays EU political arena (hence, a credit country with a quite strong economy), in comparison to Italy (South Country) and Poland (East Country), it is probably quite normal to observe that debates of "high level" are centred on the adoption of innovative instruments in the field of the EU budgeting cycle or on stability mechanisms (see also the special report to the Parliament by the Federal Court of audit of Germany on the RRF).

A certain coherence and easiness of reconstruction remain at the criminal law level, considering also the federal competencies in this field (i.e. in the case of the PIF directive and the group of crimes that can have a detrimental role for the protection of the EU financial interest; see Task No 2 and No 4). A prevalence of repression and criminal attitude is evident in the strategy against corruption. Consequently, also the more recent administrative strategy in the field is centralized and based on the activity of the Ministry of Interior Affairs. However, also on the criminal law side, some uncertainties remain as, for example, on the corporate criminal liability or the availability of data on the incidence of financial crimes with a European dimension. Notwithstanding this, Germany can count on a low corruption incidence and good performances of its public sector that can justify, for example, a "weaker" system of a whistleblower in comparison with other countries.

GENERAL CONCLUSIONS

In conclusion, given D.3, interviews with national institutions must focus on the general understanding and the concrete practices of the system of internal administrative controls with a relevance for the management of EU funds, as public resources more in general. In the specific case of administrative controls (Task No 4), theoretical research is complicated by the extreme heterogeneity of legal traditions in the field of Administrative Law - and a lack of comparative studies on this specific topic - and on the forms of government. It is easier to highlight the system of administrative internal controls in unitarian or regional countries, such as Poland and Italy, where national administrative reforms are possible and more plausible, compared to federal states, such as Belgium or Germany, where each region can adopt its specific system of controls – and this is the reason why regional examples have been provided in each national Task No 1 with regard specifically the cohesion policy. However, D.1. has also highlighted that the knowledge of the systems of administrative (external and internal) controls can help to have a clearer picture of the concrete difficulties that administrations meet with the management of EU resources, the main sources of irregularities and risks of frauds. The last observation also means that, notwithstanding the relevance of the repression strategy based on Criminal Law – at both the EU and National levels – prevention and detection strategies based on administrative capacities, controls and sanctions, with all the natural difficulties that characterized the inevitable shared administration approach in the management of the majority of EU resources, are elements that can not be ignored. Hence, even though the entry into the activity of the EPPO (but without the participation of some countries), it is even more urgent today, with a plethora of new funds, the vertical coordination of OLAF with national and regional authorities - as is expected, as well, for the EPPO with national prosecutors - but also a more general trend towards harmony between administrative prevention and criminal repression.

Based on the other information collected with D.1, additional open issues to be deepened given D.4 are, first of all, the more or less importance of national central coordination points with EU institutions concerning the protection of the EU financial interest, notwithstanding the attempt to decentralize the EU resources management, also in unitarian countries (such as in Poland, for example through the role of intermediate authorities). In this sense, in terms of organization, it could be interesting to verify during interviews with EU institutions (D.3.) with which countries the latter have more easiness to communicate: with those, such as Italy, that have created special national contact points or with countries where no special structures have been appointed; or with countries where the governance for the cohesion policy is more or less decentralized (data available in Task No 1 and 4).

Secondly, to be verified is the relevance of 1. the national experience, in terms of time, with EU financial programmes, 2. the stability of administrative and criminal legal orders and 3. the presence of a long tradition of protection of the national public financial interest for the necessity or the capacity of the country to create more or less *ad hoc* rules - as administrative, police or criminal legal actions - for the protection of the EU financial interest. As it appears at a first sight, it seems that every country experiments a decisive Europeanisation in the management of EIS funds (considering also the source of law involved, hence EU regulations). Notwithstanding the more or less experience with them, it does not happen the same with the protection of the EU financial interest *stricto sensu* under the role of OLAF, even though the adoption of EU regulations in this field as well and except for Italy that has appointed a special structure (COLAF), at least for certain kind of funds, and special units under the financial police forces and the NCA. However, this does not mean necessarily that Italy has better performances in contrasting irregularities and frauds against the EU financial interest, but that, having the country a history of unstable administrative reforms (such as in terms of controls), the legislator and/or the government have decided, at a certain point, to provide a special channel to comply with European standards.

Concerning *ad hoc* measures in the field of criminal law, the general trend that emerges from the report is that in the countries examined there are no criminal provisions dedicated to targeting only

frauds or other offences against the Union's financial interests, as the so-called PIF crimes are normally applicable at the same time, and under the same conditions, to both offences affecting national interests and European ones.

Moreover, an analysis of the report gives a clear picture of the fact that in these jurisdictions the PIF Directive of 2017 had a limited impact, insofar as it pushed those Member States to make sectoral and specific amendments/adaptations, such as the extent of existing sanctions or the list of predicate crimes that can trigger corporate criminal liability. Those legal systems, in short, had a set of criminal provisions largely already in line with the obligations posed by the 2017 Directive.

On the other hand, the report shows that in most of the analysed systems there is a lack of structured data on the number and outcome of criminal proceedings relating to PIF offences. This demonstrates how the provision of Article 18 of the PIF Directive - which, as is well know, requires States to submit to the Commission, on an annual basis, statistics data on PIF offences (such as several criminal proceeding initiated or amounts recovered following criminal proceeding and estimated damage) - was particularly appropriate. It will then be necessary to verify how the Member States will fulfil this obligation in practice and how EPPO's work will facilitate this information flows, including by coordinating with other authorities in this sector and also analysing, apart from the action of European prosecutors, information from States not participating in the EPPO system (such as, among those analysed, Poland).

Differently, the activity of OLAF has to take into consideration an extreme variance, for example in terms of PACA and administrative practices and funds. Hence, starting from the collection of criminal case-law, it could be easier to find information on the previous steps as well - such as police or administrative controls, complaints, etc. – filling the gap of information. Of a different opinion is the European Commission, which believes that the significant differences between the Member States in reporting fraud and irregularities could be related to the national system set up to combat fraud, rather than just non-harmonized reporting (see here). In any case, it is interesting to see how the Member States collect data on fraud within their legal systems.

Thirdly, the results from Task No 3 are also extremely relevant given D.4. Until now, only references to criminal cases-law have been made. However, the architecture of each national judicial system and the variety of funds and actors show how the jurisdictions involved are numerous, with civil, administrative, financial and constitutional aspects at stake, in addition to criminal ones. A lot of useful information comes out from this jurisprudential melting pot, such as the complexity of the protection of the EU financial interest at the national level. As a consequence, to be central for the topic of this report are not only the national criminal and administrative traditions but, more in general, the constitutional culture, such as the structure of the judicial system (i.e. in Italy with the distinction between subjective rights and legitimate interests or the double nature of the NCA; in Germany, the pluralism of jurisdictions and the attention paid by the German Federal Court for the European clause in the Basic Law), the activity of entities for the financial safeguard (as Court of Auditors or similar offices), the fight against corruption (again with different organization backgrounds: from independent authorities to simple ministerial offices), the behaviour of civil servants (notwithstanding the stemming of different systems concerning the whistleblower, deontological codes or kinds of disciplinary responsibility) or, also, the territorial organization (for example in terms of the activity of the Constitutional Court to solve controversy on the management of EU funds between central and regional instances).

Fourthly, there is the often marginal topic of political controls on the protection of the EU financial interest. This kind of control will probably obtain more centrality in the future in some countries, considering the extra funds linked to the pandemic and the new complexity of the European

budget and the European Semester. For example, in Germany, the National Court of Auditors reported to the Parliament in March 2021 on the risks linked to the Recovery Plan, especially for the consequences on the proportionality principle and the future of the Eu monetary and fiscal policies. And, hence, it is not a case that the majority of constitutional case-law concerning the financial interest, as reported in the D.1 country report, is intergovernmental-centred more than Communitaria-centred. In a different position, it is possible to find the case of Italy, where the lack of Parliamentary discussion on the NGEU has led to a governmental crisis in January 2021. Even different is the Polish situation, with its critics to the choice of the EU to conditioning the access to EU funds to the respect of the Rule of Law, considering the latter as an element of democracy but also a premise to concretely guarantee the EU financial interest. Thus, given D.4., it will be important to follow up the implementation of the national recovery and resilience plans. For example, the ongoing process in Italy shows a new attempt to centralize the governance and to partially differentiate the management system and the structures of controls from those provided for ESI funds.

Lastly, stemming from Task No 4 and case studies, there are also specific weaknesses of each country. Said differently, there are areas where the EU financial interest experiments with higher risk, such as the public procurement sector in Italy, the money laundering in subsidies to SMEs in Germany. They are all aspects to be deepened during interviews with national institutions (D.3), if it is true that each country has different needs and it concentrates EU resources in different sectors – infrastructures, support to the economy, social assistance –. The previous affirmation is easily verifiable, if one considers, for example, the second case study dedicated to the SURE mechanism, with a high incidence in Italy, Belgium and Poland but with no implementation in Germany.

ANNEX I

Task 1	IT	PL	BE	GE
Territorial system	regional	unitarian	federal	federal
Season of entry in the EU (experience in the management of EU resources)	originally	2004	originally	originally
Tendency to give/recognize autonomy to the territorial level	yes	yes	yes	yes
Attempts to centralize the management of the cohesion policy	yes	yes	no	no
Task 2	**IT**	**PL**	**BE**	**GE**
***Ad hoc* crimes for contrasting frauds affecting the EU financial interest**	In the area of PIF offences, apart from the minority criminal figure of Article 2 of Law No 898/1986 relating to rural funds, there are no criminal figures specifically aimed at punishing only fraud against the Union financial interests, but the offences placed in this area are applicable, under the same conditions, to both European and national funds. However, with	In Polish Criminal Law there is no separate types of offences against the financial interests of the European Union. However, it is possible to indicate particular types of offences, including fiscal ones, which may be applicable to combating infringements of the EU financial interests (see the list in the paragraph "main offences").	The Belgian Criminal Code does not provide for specific criminal offences concerning fraud regarding subsidies. However, a specific Royal Decree was introduced in 1933 to combat with fraud, subsidies and allowances. In 1994, the Federal legislator added a new definition of the criminal offence to the aforementioned Royal Decree by Act of 7 June	On 17 June 2019, the German Parliament transposed the PIF-Directive. The Act of 17 June 2019 provides only smaller adaptations to the German legislation. For example, it provides extra sanctions for the abuse of EU-financial interests (with regard to subsidy fraud, a sanction of five years or financial penalties are foreseen). A small modification has been added to

	the Legislative Decree No 75/2020, in order to comply with the 2017 PIF Directive, the italian legislator, *inter alia*, has increased the penalties laid down for some of PIF offences, or has established the possibility of criminalising the attempt to commit certain tax offences (see Article 2), or has introduced some crimes between the predicate offences that can trigger corporate criminal liability, only where these crimes can be considered against the Union's financial interests, or some other elements required by the 2017 Directive are met.		1994[185] in order to be able to combat fraud with funds and subsidies coming from the European Union.	article 264 of the German Criminal Code too, again with regard to subsidies granted by the EU.
Available data on crimes affecting the EU financial interest at the national level	Partially. There are data on the incidence of frauds and irregularities, on the incidence and perception of corruption and conflict of interest. However, data on the number of criminal proceedings and convictions	Partially. The only publicly available data includes information collected by the Police Headquarters for the period 2010-2016 in terms of recorded and detected offences. These are therefore relatively old data	The report of the Federal Prosecutors Office concerning the functioning of this service had a very dismal outcome for the Central Service for the Repression of Corruption. The Office states that, due to a shortage of	In Germany, the data about financial fraud are collected by the Financial Intelligence Unit (hereinafter FIU) In 2019, a record 114,914 suspected cases of money laundering and terrorist financing were recorded. This represent a jump

[185] Act of Parliament of 7 June 1994 amending the Royal Decree of 31 May 1933 regarding declarations concerning. subsidies, compensation, and allowances, Belgian Official Gazette 8 April 1994.

	affecting the EU financial interest still lack (even though a recent legislative provision has asked for a future specific monitoring report on the topic)	that do not reflect the current state of affairs and do not differentiate offences in the specific area of the European financial interest.	personnel, the effectiveness of the service is below par. A mere 60,600 working hours were spent on research and/or criminal investigations, and 67 new investigative files were added in 2018, while 143 were still open. Of particular note is that in 2016, zero files were opened, and in 2017, only two files concerning fraud regarding European Union funds were opened, which was a similar result compared with past years. The Federal Prosecutor's Office states that this disappointing result is due to the fact that OLAF filed fewer complaints concerning the European issue in relation to the Belgian authorities. The total working hours on the files concerning EU fund fraud fell to a dramatic 1,447 hours. of a European	of almost 50% compared to 2018. According to the Financial Intelligence Unit report, most of these cases were reported by German banks and other financial institutions, as well as by notaries and real estate agents. The cases have been linked to a total of 355,000 suspicious transactions. In the 2018 Report, the financial Unit had registered just over 77,000 cases of money laundering. In addition, it found an extreme vulnerability in the German real estate market when it came to dubious business. German Parliament passed a series of anti-money laundering measures in November 2020 to address the problem and align the country with EU directives. Among other innovations, the legislation has imposed stricter rules that oblige real estate agents, notaries, precious metal dealers and auction houses to declare suspicious transactions (see

				here). In essence, this Unit collects data on anti-money laundering, on financed crimes connected to the internet, on financial fraud against banking institutions, and data related to fraud on the financial interest of the German federal state. However, the reports of the Unit analyzed do not show a clear division between data concerning traditional financial crimes and those concerning the financial interest of the EU.

Task 3	**IT**	**PL**	**BE**	**GE**
Form of Government	Republic	Republic	Parliamentary Monarchy	Republic
Direct references to the protection of the public financial interest in the Constitution	No	No	No	No
Judicial system	Ordinary and administrative courts as two distinct jurisdictions. The Constitution also provides for a specific financial jurisdiction.	Supreme Court, the ordinary courts and administrative courts	Ordinary courts but with a special judge for administrative controversies.	Five distinct jurisdictions: the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court and the Federal Social Court as supreme

				courts of ordinary, administrative, financial, labour and social jurisdiction.
Relevance of case-law on the protection of the National and Eu financial interest (criminal, ordinary, accounting-administrative, combination of them)	There is now a consolidated body of case law, both of the Court of Cassation and of the Council of State on the point, applying to EU funds the same standards set for public grants and subsidies conferred by the domestic authorities, in line with the principle of equivalence enshrined in EU law. This jurisprudence follows and further elaborates on the traditional divide in Italian administrative law between subjective rights and legitimate interests. As there is no exclusive jurisdiction on this subject matter, the boundary between the jurisdiction of ordinary and administrative judges on the granting and the revocation of public subsidies – and EU funds – is set by the subjective legal position at stake. The jurisdiction of the ordinary judge is	Administrative courts (at the stage of financing), ordinary courts and the Supreme courts (for project implementation), and then criminal courts (in case of perpetration of crimes where are relevant the misappropriation of European funds). The main problem in Poland is therefore the competitiveness of the judicial route: the same case can often be heard in parallel by both civil and administrative courts.	The Tribunals of First Instance and Courts of Appeal handle the lion's share of cases concerning fraud with EU funds or concerning the protection of the financial interests of the European Union. Nevertheless, below an overview is provided of the Belgian Judiciary, because by implication, the extraordinary courts can also verdict, taking the EU's financial interests into account, when their competence is triggered.	It is commonly known that ordinary tribunals (*Amtsgerichte* and *Landgercihte*) and Courts of Appeal handle the lion's share of cases concerning fraud with EU funds or concerning the protection of the financial interests of the European Union. Nevertheless, below an overview is provided of the German Judiciary, because by implication, the extraordinary courts can also verdict, taking the EU's financial interests into account, when their competence is triggered.

	confirmed even if acts of revocation, resolution of the contractual relationship or the relinquishment (*decadenza*) from the use of the funds have been issued, provided that they are grounded on the alleged non-execution of the contractual obligations by the beneficiaries. By contrast, the jurisdiction of the administrative judge is relevant when the controversy predates the grant of the fund or when, following the attribution of the fund, the act through which it was conferred has been annulled or revoked for vices of legitimacy or for clashes with the public interest. In addition to this, administrative courts can also be involved in disputes between public authorities concerning the conferral and the management of EU funds. It is then relevant the activity of the NCA (see below). For what concerns specifically criminal courts, the issue of criminalization of the frauds against			

	the EU budget has evolved rapidly over the last thirty years. Hence, often time the same facts have triggered a proceeding in front of the Court of Auditors and proceedings before criminal courts. There have been cases of conviction of the beneficiaries of EU funds as well as of public officials for serious deficiencies in the control system, for their collusion in the disbursement of funds illegitimately granted and for concussion. The outcome of the two type of proceedings, however, may be divergent creating some uncertainty.			
Relevant activity of the Constitutional Court	The Constitutional Court is not part of the Judiciary, yet the guarantees of independence of constitutional judges are similar to other national judges of the supreme jurisdictions and the constitutional proceedings aim to follow the basic tenets of the due process. The Italian	The Constitutional Tribunal is one of the organs of the judicial power in Poland, but it is not included in the group of organs exercising the administration of justice. Undoubtedly, the most important competence of the Polish Constitutional Tribunal is the control of	The competences of the Constitutional Court are both limited and exclusive. According to the Belgian Constitution, the Constitutional Court is competent for the cases concerning the conflicts of competences of all legislators: the	The German Constitutional Court has ruled on numerous occasions on the topic of the EU's financial interests. However, the most relevant cases of the last years seem to be centred on the proportionality of the European measures in terms of Monetary and Fiscal policies (i.e. on the role of

	Constitutional Court has not been frequently involved in cases dealing with the management of EU funds and this is mainly due to the narrow leeway to access this Court, also compared to similar Courts in Europe, whereby neither individuals or minorities get a direct access to constitutional adjudication in Italy. Most of the relevant cases decided by the Italian Constitutional Court in this matter have been introduced via *principaliter* proceeding (Article 127 It. Const.), that is to say through the action brought by the national Government against regional legislation for violation of any clause of the Constitution or, vice versa, by regional government(s) against State legislation for alleged violations of regional competences by the State, which had previously authorized its use by the Region.	constitutionality of law, or more broadly, the hierarchical compliance of normative acts. So far, the Constitutional Tribunal has addressed the issue of management of EU funds in Poland only four times. In only one case did the Tribunal state that the provisions defining the rules for implementation of EU funds were unconstitutional (in the judgment of 12 December 2011 ref. no. P 1/1).	Court takes notice of conflicts of competence between federal acts of parliament, Regional Decrees, Brussels ordonnances. Furthermore, the Constitution states that the Court is competent to rule over violations of all legislative acts that violate the articles 10, 11 and 24 of the Constitution, which safeguard the principle of equality, non-discrimination and the freedom of education. Any other competences have to be explicitly foreseen by Act of Parliament. The Special Act concerning the Constitutional Court further elaborates the competences and the functioning of the Constitutional Court. The Constitutional Court has only ruled on the topic of the protection of the EU's financial interests	the ECB). The same worries seem to has been perceived recently with regard the Recovery Fund, considering the report of the German NCA (*Bundesrechnung shof*) to the Parliament in March 2021.

	Occasionally, also conflicts of attribution of authority between State and Regions - not affecting the exercise of the legislative power - have come under the radar of the Constitutional Court for what concerns the way EU funds have been used or non-used (Article 135, first section). Disputes over the use of EU funds have seldom been (indirectly) reviewed by the Constitutional Court in the framework of the *incidenter* proceeding (as in the case of the Taricco Saga).		once[186]. The Court received a prejudicial question concerning the conformity of article 84-*ter* of the Code on Value Added Tax[187] with Articles 10 and 11 of the Belgian Constitution on the principles of equality and non-discrimination.	
Existence and nature of a National Court of Auditors	Yes, explicitly provided by the Constitution, with judicial and control powers. Relevance of its case-law for the topic at stake: a great deal of the Court of Auditors' activity concerns the administrative-accounting liability of public officials for the revenue damages incurred as a consequence or in the exercise of	Yes, but as an administrative body (the Supreme Audit Office, NIK). NIK performs control activities over public funds, which include funds from the European Union budget. NIK is the supreme body of state control, is subject to the *Sejm* of the Republic of Poland, and acts on the basis of collegiality. It is a	Yes, the Court of Audit is charged with the supervision and of the accounts of the general administrations and of all those who are accountable to the Treasury. Furthermore, the Court ensures that no article of the expenditure of the budget is exceeded and that no transfer is made, the Court also exercises	Yes, the *Bundesrechnungshof*, the supreme federal authority, established on the basis of art. 114 of the German Basic Law, which hierarchically can be compared to the Office of the Federal President, the Chancellor and the ministries of the Federal Government. It has not jurisdictional function. Each region has

[186] Belgian Constitutional Court, 19 January 2017, n° 5/2017.

[187] Act of Parliament of 3 July 1969 introducing the Code on Value Added Tax, Belgian Official Gazette 17 July 1969, 7046.

	their functions, which is crucial to combat frauds against the EU financial interests. The jurisdiction of the Court of Auditors has been incrementally expanded for what concerns the mismanagement of EU funds. At least since 2006, the Court of Cassation has confirmed the Court of Auditor's exclusive jurisdiction on controversies surrounding the use of EU direct funds. Since 2002 the Court of Cassation has clarified - in what is now a consolidated body of case law - that the jurisdiction of the Court of Auditors is not limited to the involvement of administrators and civil servants but is extended to private citizens and companies who perform a role of "agent of the administration" in so far as they manage public (also European) funds.	functionally separate state body within the scope of implementing control tasks in the State. The use of funds from the European Union budget, which are managed and controlled by Polish authorities, legal persons and organisational units, is subject to the control by NIK as well. Acquisition and use of structural funds and the Cohesion Fund, as well as management of operational programmes financed from European funds and implementation by public administration of tasks related to Poland's membership in the European Union are among the main areas of audit research conducted by the Supreme Audit Office. In the current financial perspective, the audit has already covered not only the implementation of projects, but also the preparation of public administration for the use of funds from the EU	general control over revenue relating to the determination and recovery of rights acquired by the State, the Court is responsible for collecting all necessary information and supporting documents concerning the accounts of the various administration of the State. The Constitution mentions that the Court of Audit can also be appointed for the control of the accounts of the Communities and Regions. On an irregular basis, the Court of Audit reports concerning the budgetary management of European Funds in the different Regions of Communities. The most recent report was published in April 2020 (The Court of Audit, 2020) and handles the management of European Funds concerning the agricultural sector in the Walloon Region. For Flanders, the last published report dates concerning European Funds from 2010 (The	also a State Court of Auditors. EU funds are managed by the federal government and the federal states. The audit of the EU funds belongs to the tasks both of the *Bundesrechnungshof* and the State Courts of Auditors who discharge their functions independently of one another. Key audit criteria include regularity, compliance, economy, efficiency and effectiveness of the use made of EU funds in Germany. EU law, particularly the regulations referring to the internal control framework, is also duly taken into account. The audit work done by German government audit institutions is of considerable significance, because early detection and remedial action prevents financial corrections of the Commission. The Supreme Audit Institutions have responded to the increasing importance of European issues for the work of the

		budget and the functioning of management and control systems in units involved in the management of individual operational programmes.	Court of Audit, 2010) and discusses the organization and management of the means of the European Social Fund in Flanders. It concluded that Flanders complied to the financial standards of the European requirement of additionality. It noted that, at the time, a risk of double subsidies exists, because the lack of an adequate system of registration and knowledge exchange.	external audit function at national level by an intensive information exchange and enhance cooperation.
Existence and nature of a political control on the management of EU resources	The case for the Italian Parliament, which to date has not engaged in any meaningful scrutiny on the financial flow between the EU and Italy, of its management and of the frauds (suspected and detected), despite the number of reports it receives on the matter. To set up effective procedures of coordination between the legislature and the executive and between national and sub-national institutions, traditionally weak, on the	MPs actively use individual means of parliamentary control in the area of monitoring the spending of EU funds by formulating several dozens of interpellations, parliamentary questions and questions on current affairs devoted to this issue during the year. A parliamentary club and a group of at least 15 MPs are also entitled to request that a member of the Council of Ministers present current information at a sitting of the	According to Article 96 of the Constitution, the federal ministers are politically answerable vis-à-vis the members of the Chamber of Representatives. An important mechanism of political control for both the Chamber of Representatives and the Senate is the so-called right of inquiry, as envisaged in article 56 of the Belgian Constitution, which has been further developed by legal Act.	Under requests, reports of the NCA to the Parliament (however, the German SAI is free to decide on audit requests from Parliament or parliamentary committees); role of specific parliamentary committees (such as PAC)

	spending of EU resources, particularly in the aftermath of the launch of NGEU, is key to ensure that the country can guarantee both the national and EU financial interests. However, it is important to stress that the NCA presents yearly reports to the Parliaments, where also the topic of the management of EU resources is deepened.	*Sejm*. The parliamentary committees may also request that an audit be carried out by the Supreme Audit Office.	The designated Members of the Chamber have very special authority: they can undertake all the investigative measures envisaged in the Code of Criminal Procedure (such as home search, eavesdropping, recording of private conversations, foreclosure of goods,…). Concerning Flanders, the right of the Flemish Parliament to hold an investigate enquiry is envisaged by Decree and is similar to the enquiry on the federal level.	
Task 4	**IT**	**PL**	**BE**	**GE**
Relevance of the general administrative internal control system, considering its incidence on the System of management and control requested by the EU regulation in the field of the structural funds	Strong, considering the long season of administrative reforms in the field and the parallel experience of the country in the management of EU resources	Intermediate, NIK's external control activities allow strengthening the mechanism for improving the public administration's management and control of EU funds in Poland, but not replacing internal control. In order to implement the requirement under Article 143 of Regulation No. 1303/2013,	Weak, the administrative control systems have limited competences and can merely report. Far going investigative measures have to be taken by a prosecutor or investigative judge.	Strong. Control and accountability mechanisms in Germany are still primarily based on inputs and due process, and there has been no substantial increase in the capacities for strategic management. There continues to be a rather self-confident stance towards the functioning and control

		appropriate legal regulations were introduced in Poland in the Act of 11 July 2014 on the principles for the implementation of programmes in the area of cohesion policy financed in the financial perspective 2014-2020 (consolidated text: Journal of Laws of 2020, item 818). On the basis of the Act of 11 July 2014, implementing regulations were issued. An important supplementation of the procedures related to the protection of the correctness of the EU funds spending are the provisions of the Act of 27 August 2009 on public finance. The analysis of the jurisprudence of administrative courts (examining appeals against decisions on financial corrections) indicates that courts attach great importance to the correctness of spending funds from the European Union budget, considering irregularities in		mechanisms of the bureaucratic system in Germany. The New Steering Model (NSM) is the starting point and reference model for management-oriented reforms in Germany (starting from 1993). Its core elements include typical New Public Management (NPM) elements such as contract management, the decentralisation of responsibility for resources, performance measurement and customer orientation. The NSM was driven as a reform to reduce an excessive public sector. The central reform elements to advance the internal modernisation of local public administrations included the following: output orientation, decentralisation and performance agreements. The fact that the local management, leadership and control practices have changed during the past twenty years, and that NSM has

		their spending as having a harmful effect on the European Union budget by charging this budget with unjustified expenditure. In general terms, a) controls constituting the competence of the managing authority, b) Sample controls - check activities carried out by the control body, which does not participate in the implementation system of operational programmes and is functionally independent from the managing, intermediate or implementing authority. The body executing the aforementioned controls in Poland is the Head of the National Fiscal Administration (KAS), who executes controls with the help of Fiscal Administration Chambers. The Head of KAS performs the function of an audit authority, c) Controls performed by authorised EU institutions and national		provided a crucial impetus and conceptual framework for this transformation is not questioned, not even by critics. However, the approaches to reform have varied significantly across local governments. Therefore, heterogeneity and deviation from the model is neither surprising nor problematic, but should be expected and considered legitimate.

		institutions, which do not participate directly in the implementation of the structural funds.		
Specific areas of weaknesses for the protection of the EU financial interest	1. Public procurement and investments sectors (over-regulation); 2. civil servants and managers' behaviors and performances (know-how of the administrations); 3. kind of beneficiaries (cultural background)	1. The specific type of disciplinary responsibility, which is not a criminal responsibility (although the regulation sometimes resembles criminal regulations): it is a type of official, administrative responsibility (compared to criminal sanctions, they are quite severe and, in fact, they are sometimes more severe than criminal sanctions; doubts also concern the concurrence of disciplinary and criminal liability: theoretically, "official" liability extends, therefore, to all situations in which public funds are transferred outside the public finance sector to entities that undoubtedly do not belong to the public administration; the question then arises as to how	1. The Belgian Criminal Code makes no distinction between ordinary bribery and bribery concerning public servants who handle EU Funds. The implementation of the PIF Directive has thus led to increasing all penalties regarding briberies in order to be compliant. As a critical side-note, the Belgian Council of State, the competent organ for legislative technique, mentions that the raised penalties go further than required by the PIF Directive, as only crimes that have an impact on the EU's financial interests fall under its scope. 2. Belgium knows a complex constitutional	1. Incomplete Corporate Liability 2. Whistleblower is poorly applied 3. VAT fraud

		this responsibility differs from criminal responsibility? In Poland's constitutional realities, this is a very serious question, since disciplinary liability is decided by administrative bodies, whereas criminal liability can only be decided by the courts). 2. Spending of public funds, including funds from the budget of the European Union, may be carried out with apparent or incorrect application of the Act - Public Procurement Law. In order to avoid the effects of irregularities, the Act provides (art. 596) for the control of public procurement. The controlling bodies as well as the procedure and scope of their activities have been specified in the Act. The inspection authorities plan and carry out the inspection after a prior analysis of the likelihood of an infringement of the law in the framework of the award of the contract. This	landscape, which of course has also consequences concerning the management and control of the EU structural and investment funds. For third parties, it may not always be clear what institution or administration is either managing or auditing a certain European Structural Fund. This uncertainty is furthermore enforced by the fact that Belgium also knows a supervising body, The Interfederal Corps of the Finance Inspection, which may have confluent competences concerning the auditing of the European Structural Funds. Also, the territorial system in Belgium is subject to periodic constitutional reforms, which may have an important impact on the managing authorities of the diverse European Structural Funds	

		analysis includes identification of subject and object areas in which the risk of violation of the law is the greatest. In the case of spending funds from the budget of the European Union, prior control is also provided for. 3. There is a particular risk of abuse to the detriment of the EU's financial interest among employees working in positions related to the handling of the call for applications for funding and the selection of projects for funding, conclusion of grant agreements, handling of the appeal procedure, handling of applications for payment, carrying out the control of project implementation, as well as in managerial and director positions; 4. risk of differentiation, at a criminal law level, in the protection of the EU and National financial interest (with more protection to European instances)		

Relevance of independent authorities/administrative agencies (in addition to the national court/office of auditors) or other external sources of controls	ANAC (anti-corruption agency), Agency for the territorial cohesion, COLAF, a special unit of the Police Force.	The President of the Public Procurement Office (with regard to the application of the provisions of the Public Procurement Law); the Regional Chamber of Auditors (with regard to the management of EU funds by local governments); the Anti-corruption Office.	Central Service for the Repression of Corruption (CDBC-OCRC)	In Germany, the Federal Ministry of Finance and the national authorities competent for implementing EU funds and customs authorities cooperate with OLAF to protect EU financial interest. There is also the department in the Ministry of Internal Affairs which has to deal with the prevention of corruption, also in case of EU mismanagement (a ministerial Central Service for the Repression of Corruption, known as CDBC-OCRC).
National contact point with OLAF	The Irregular Management System is enabled by COLAF (the national contact point with OLAF), the internal office of the Department for European affairs in the Presidency of the Council of Ministers. Difficulties in assuring a common standard for all the administrations on the moment and kind of communication	The Ministry of Finance is the Polish contact point with OLAF. In particular, the Office for International Treasury Relations has, among its tasks, that to implement the Ministry's policy in the field of cooperation with OLAf.	The Ministry of Economical Affairs is the contact point for OLAF, the interdepartmental Commission for Coordination of the Fight against Fraud (CICF / ICCF) is the competent organ.	The Federal Ministry of Finance is the Contact point for OLAF.

	with regard to irregularities and frauds (lack of a clear definition of PACA)			
Implementation of the PIF directive: kind of incidence on the internal legal system	Low incidence, the country was already almost in line.	Low incidence, the provisions of Polish criminal law overwhelmingly correspond to the requirements of Directive (EU) 2017/1371. The first major amendment of the legislation in this area concerned the Fiscal Penal Code (hereinafter the CC) and took place in 2003. However, reservations may be aroused by the fact that penal sanctions have not been adjusted to the EU requirements in the case of one of important fiscal offences, i.e. Article 82 of the Penal Code, which penalises the exposure of public finance to depletion by improper payment, collection or misuse of subsidies or subventions, which is only punishable by a fine of up to 240 daily rates.	Low incidence, the implementation of the PIF Directive has led to increasing all penalties regarding briberies and subsidies in order to be compliant.	Low incidence, the Act of 19 June 2019 made some minimal modifications in order to comply with the PIF Directive. The aim of the amendment by act was to ensure that the existing mechanism to combat fraud with public funds (subsidies) would also be applicable to cases in which fraud with EU funds was established, as before, this would not have been the case.
Participation of the country to the EPPO	Yes	No	Yes	Yes

Main typologies of crimes	The crimes regarding fraud and other offences affecting the financial interests of the Union referred to in Articles 3 and 4 of Directive 2017/1731 can be found in a 'vast constellation' consisting of several groups of criminal offences contained both within and outside the Criminal Code, that can be divided in four macro-areas: first of all, there are offences related to the misappropriation and misapplication of public funds of the national state and the European Union; A second group of offences, which can be traced back to those described c) and d) of Article 3 of EU Directive 2017/1371 on revenues contributing to the Union's budget, including with respect to revenues deriving from VAT, concerns the tax offences set out in Legislative Decree No. 74/2000, which seems to ensure an adequate criminalization of the various frauds	These can be divided into five groups: fraud, offences against documents, official offences, collusion in tenders and fiscal offences. Since defrauding EU funds may take place within an organised group or association aimed at committing crimes, it is worth pointing to the provision penalising the leadership of or participation in such a group or association. It cannot be ruled out that in the area of infringements of the financial interests of the European Union other crimes may also be committed, e.g. crimes against property, such as misappropriation of property or computer fraud, or other crimes against economic turnover and property interests in civil law transactions, such as money laundering, but their analysis is beyond the scope of this study.	The Criminal Code criminalises general offences, such as counterfeiting, abuse of trust, and extortion, passive and active corruption. A Royal Decree of 1933 provides for the separate criminalisation of fraud with subsidies and provides specific measures to combat fraud regarding subsidies. Both instruments guarantee a wide array of measures to persecute fraud with EU funds.	Forgery of documents, extortion and attempted extortion, abuse of trust, passive and active corruption, fraud with subsidies, compensations and allowances, financed by public means, VAT crimes, money laundering.

	and illegal conducts that may occur in the tax sphere, with the consequent negative effects on the Union's finances; A third group of offences concerns bribery offences (in a "broad sense") of Art. 317 ff. of the Italian Criminal Code. The criminalization here concerns various types of conduct, starting from the abuse by the public agent of forcing (Art. 317) or simply inducing (Art. 319-*quater*) the private individual to give or promise to him or a third party unduly money or other benefits. It must be noted, then, that under Art. 319-*quarter*, unlike the former (Art. 318), the private individual who is not forced but simply induced to pay the bribe is subject to punishment; The fourth and last area of offences, also taking into account the indications of Art. 4(1) of the EU Directive 2017/1731, relates to offences concerning money laundering or self-laundering			

	or the putting into circulation of proceeds deriving from the aforementioned offences against Union's financial interests and offences with respect to conspiracy (criminal association) in committing the same criminal offences against Union's financial interests (especially Artt. 416 and 416-*bis* of the Penal Code).			