BETKONEXT
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Deliverable 1.3

Working Paper

The Institutional 'Constellation' for the Protection of the EU's Financial Interests

Past, Present and Future

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The Institutional 'Constellation' for the Protection of the EU's Financial Interests

Past, Present and Future

Work Package 1 - Deliverable 1.3

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The sections on Europe were drafted by experts in European, comparative, administrative, and criminal law and were coauthored by Prof. Maurizia De Bellis with Drs Giorgio Ardizzone, Marco Bevilacqua, Emanuele Birritteri, Alessandro Gerardi Virgili, Alessandro Nato, Rossella Sabia, and Elisabetta Tatì, under the supervision of Professors Maurizio Bellacosa, Maurizia De Bellis, Antonio Gullo, Filippo Dinacci, Cristina Fasone, Aldo Sandulli, Marta Simoncini.

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SUMMARY

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GENERAL OVERVIEW

Deepening the prismatic definition of EU financial interests

Alessandro Nato, Rossella Sabia, Elisabetta Tatì

The definition of financial interests and their protection is in constant evolution, and several factors contribute to this change, such as macroeconomic balance, national and public accounting regulations, project management, anti-fraud policy, and many other related aspects.

For example, we can analyse the topic in terms of safeguarding the revenue and expenditure of the EU budget, also taking into consideration the assimilation principle outlined in Art. 325 TFEU. The treaties state that the financial interests of the EU should be safeguarded using the same instruments, or at least equally effective mechanisms, as those used to protect national financial interests.

It is especially in this regard – the proper use of resources – particularly when transferred EU resources become part of a 'shared administration' with Member States (i.e. the Recovery and Resilience Facility, RRF), that financial interests overlap with the goals of public accounting on both the European and national levels. On the other hand, the purpose of public accounting, as a branch of administrative law, is precisely to manage resources and enforce control over them.

Also when considering the protection of financial interest as a European constraint on public finance (and therefore the control of macroeconomic balances), accounting comes to the fore, but in a form that is more narrowly defined as 'national', understood precisely as the discipline that deals with how macroeconomic quantities are defined and calculated (an accounting system that shows the relationships between a country's various economic considerations). In this field too, various control schemes and instruments are created on a case-by-case basis and are, in turn, integrated into both European and national regulations.

Thus, first and foremost, the issue is one of financial interest, then followed by the need to protect that interest. Hence the need to combat fraud that harms the European budget, which often constitutes an offence in national law. Alongside preventive, often administrative, measures, investigations are often carried out in connection with legal action regarding cases of crime and organised crime involving the misuse of public resources, also – and above all – the so called European PIF crimes. Anti-fraud policies are developed by administrations as part of their preventive strategy. In addition to the different measures to ensure effectiveness, efficiency, and economy in the management of public resources, there are also mechanisms in place to prevent corruption, such as transparency, as well as case-by-case regulations for monitoring public procurement and the conduct of public employees. However, ensuring legal compliance through control measures often operates on a separate, and at times, parallel track from criminal

prosecution. One example is investment in National Recovery and Resilience Plans (NRRPs), which may be certified by the European Commission because they have actually been achieved (performance), but ex-post, a criminal scheme is discovered, either through a complaint or official control (many such examples are now beginning to emerge, for example in Italy, as the news constantly informs us).

This working paper is therefore dedicated to European, Administrative, and Criminal Law, also comparing them (see Task 1.2), to analyse how financial interests and their protection are represented in contemporary Europe.

In Task 1.1, the report resembles EU governance, first adopting an institutional approach, considering all the subjects involved in the protection of the EU's financial interests and updating the results obtained from BETKOSOL (referring to a sort of "institutional constellation"). Next, a more procedure-based methodology is adopted to analyse particular sets of rules and procedures, emphasising how safeguarding the financial interests of the EU promotes the coordination, cooperation, and even integration processes.

From this perspective, it is also necessary to take into account how the protection of the EU's interest relates to the rule of law. Over the last decade, there has been growing public debate surrounding the decline of common values and the rule of law in certain Member States, especially the democratic backsliding of some countries, including Hungary and Poland.

The connection between the two issues – financial interests and the rule of law – arises from the fact that the EU can act to defend its financial interests through the authorities of its Member States, hence the importance of the rule of law in these countries. For example, according to the World Justice Project (WJP) Rule of Law Index, the absence of corruption, which is one of the nine enabling factors, is directly linked to the misappropriation of public funds or other resources.

Neither the RRF Regulation nor the Common Provisions Regulation (CPR), which governs the four cohesion policy funds, were created specifically to address breaches of the principles of the rule of law in the Member States (as observed by the European Court of Auditors in a recent 2024 report). Nevertheless, both instruments include tools that can be used to protect the EU's financial interests against such breaches, albeit in different ways.

Regarding the cohesion policy and the CPR, we can take into account the number of prerequisites (known as 'horizontal enabling conditions') that a Member State has to fulfil before it receives EU funding.

With regard to the RRF, the Commission must ensure that Member States' National Recovery and Resilience Plans effectively address a significant subset of country-specific recommendations and other challenges identified in relevant documents that have been officially adopted by the Commission through the European Semester procedure. Country-specific recommendations and other such challenges may lead to the establishment of NRRP milestones and targets for reforms or investments to address challenges related to the rule of law in a Member State (milestones related to the rule of law).

In addition, when evaluating national RRPs, the Commission is required to assess whether Member States have adequate measures in place to prevent, detect, and rectify instances of fraud, corruption, and conflicts of interest when using RRF funds. As with all other EU funds, RRF funds must also be used in accordance with the Conditionality Regulation.

Given the potential short circuits in the Rule of Law itself (see *infra*), financial interests and their lack of protection appear to be both cause and effect (or the means and the goal) of the activation of conditionality instruments, especially concerning the RRF. However, in what sense can we refer to a 'short circuit'?

We must look to the part of the Rule of Law that guarantees the protection of financial interests and thus, for example, the set of instruments, guarantees, and safeguards relating to administrative and criminal law that, if present and properly implemented, have a positive effect on the protection of the EU's budget.

Only when these systems of national regulations fail to guarantee the protection of European resources (which lies at the heart of the assimilation principle under Art. 325 TFEU, where the standard of protection for European resources must be at least that of the Member States), is the mechanism of financial conditionality (or the one envisaged for the RRF) activated.

In this situation, if Article 325 fails, the standard of resource protection becomes that of the European Union itself. Obviously, in order to activate the conditionality mechanism, it must be proven that the violations in question directly affect or seriously threaten to undermine sound financial management, but this is obvious if the violation concerns the very system of principles and rules that guarantee the protection of financial interests in the national system.

Consequently, it is essential to address the issue at an early stage, since the conditionality mechanism(s) for protecting financial interests are only activated when ordinary means are unsuccessful.

Pausing at this preliminary step also means understanding how the financial interest itself, and its protection, are integral to the concept of the 'Rule of Law'. Accordingly, it is worth briefly mentioning the stance of the Court of Justice of the EU, not so much with regard to the activation of conditionality mechanisms (and the well-known 2022 ICJ judgments C-156/21 on Poland and Hungary's request to annul Regulation 2020/2092), but rather to this internal tension within the Rule of Law: suffice it to recall the *Lin* Judgment, for example (of July 24, 2024, Case C-107/23).

In its recent judgment, the Court of Justice ruled that, to ensure an effective fight against fraud to the detriment of the financial interests of the European Union, the Member States' domestic rules governing criminal statutes of limitation must effectively allow for real prevention and prosecution. Therefore, the national court is required to disapply national rules or case law that create a systemic risk of impunity for such crimes. In this judgment, the Court of Justice returns to the limits that characterise the primacy of EU law, intersecting the protection of EU financial interests, the principle of rule of law, and the principle of criminal legality.

More details will be provided in the following sections.

Here, it is sufficient to observe that there is a tension within the rule of law itself between the protection of financial interests and other guarantees and protections that are in any case fundamental to the rule of law.

It is at this point that the short circuit arises: if the protection of financial interests is essential to the rule of law, but if the rule of law itself contains conflicting principles, which principle should take precedence?

Let us consider a hypothetical scenario: a Member State does not comply with the rule of law, and the conditionality mechanisms for European funds (when violations jeopardise the Union's budget) are activated, but, at the same time, the same Member State has to make its case before the Court of Justice to ensure a balance between the protection of financial interests and compliance with internal guarantees (e.g. limitation periods).

In the rule of law melting pot, are financial interests a 'standard', while the many other internal guarantees (such as limitation periods) are a more specific set of rules?

Apart from these speculations, there has been a change (or an evolution) over time, from the *Taricco* saga to the *Lin* ruling, with a certain increase in favouring the protection of the EU's 'systemic' financial interests as the standard approach. This is (of course) balanced against other principles and values confirming the trend towards the financialisation of integration itself.

In more concrete terms, will it actually be possible to ascertain that States are not adequately implementing and controlling the RRF, to such a degree as to trigger the conditionality mechanism (i.e. to such an extent that non-compliance with the rule of law causes direct damage to the EU budget)? If the prevention and punishment of irregularities, fraud and corruption, such as the protection of financial interests, falls under the rule of law (which is debatable), is any mismanagement of the National RRPs (at least theoretically) a violation of the rule of law?

These unresolved issues are a testament to the importance and recent evolution of the topic at hand. They also justify the thematic choices made in this working paper, namely an attempt to further systematise the state of knowledge concerning the European Union's financial interests and their protection, updating the topic following the conclusion of the BETKOSOL project in 2022.

SECTION I

At the EU Level

Task 1.1

AT THE EU LEVEL

EU GOVERNANCE FOR THE PROTECTION OF THE EU'S FINANCIAL INTERESTS

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1. INTRODUCTION: AN INSTITUTIONAL CONSTELLATION?

The purpose of this first section is to provide a brief overview of all the key EU actors that may be considered to be involved in protecting the financial interests of the Union. The institutional constellation that appears to support EU governance in this sector is indispensable if we are to follow the reasoning presented in section n. 2, dedicated to in-depth arguments.

Building on the previous work for BETKOSOL, the authors agreed to focus on some developments in governance, analysing the relevant case law and the new legislation for combating money laundering. For a more detailed explanation of the roles of the Commission, the Council, and the European Commission, as well as a thorough analysis of the EU budget and its procedures, please refer to Deliverable D2 of the BETKSOL project (see here).

1.2. JUDICIAL POWER AND THE PROTECTION OF THE FINANCIAL INTERESTS OF THE EU: THE EUROPEAN COURT OF JUSTICE

The European Court of Justice plays a fundamental role in protecting the financial interests of the European Union through the judgments it hands down in response to preliminary

references, i.e. the instrument that allows European courts to express their views on issues concerning protection of the Union's financial interests on the one hand, and the protection of the individual's fundamental rights on the other. Recent Court of Justice rulings testify to how it continues to address the issues raised in the earlier Taricco case (Case C-42/17, M. A. S. and M. B.). The Court's two most recent rulings on the subject will be discussed below.

1.2.1 The Court of Justice after Taricco: the protection of EU's financial interests, the rule of law principle, and the protection of fundamental rights in the Lin case

In its recent judgment of July 24, 2024, Case C-107/23 PPU, *Lin*, the Court of Justice ruled that, to ensure an effective fight against fraud involving the financial interests of the European Union, the Member States' domestic rules governing criminal statutes of limitation must be applied in such a way as to permit effective prevention and prosecution. Therefore, national courts are required to disapply national rules or case law that create a systemic risk of impunity for such crimes. In this judgment, the Court of Justice again addresses the matter of limits on the primacy of EU law, intersecting the protection of the EU's financial interests, the principle of the Rule of Law, and the principle of lawfulness in criminal matters (G. Vosa, 2024).

Before examining the judgment, it is necessary to explain the facts. The case centres on a group of Romanian nationals who were sentenced to prison for tax fraud involving value-added tax (VAT). They appealed against the conviction to the Brasov Court of Appeal in Romania, arguing that the statute of limitations had expired and that they should no longer be held criminally responsible.

The Romanian citizens' argument is supported by two Romanian Constitutional Court rulings handed down in 2018 and 2022. These rulings invalidated a national provision regulating grounds for suspending statutes of limitations in criminal cases, namely procedural acts or judgments that interrupt the statute of limitations for criminal liability. In the light of these judgments, Romanian domestic law provided no grounds for suspending statutory limitations for almost four years. In real terms, this means that, during that time, applying the Romanian understanding of the principle of legality in relation to crimes and penalties, which includes rules on statutory limitations, no procedural action could impinge on said limitations. In addition, the Romanian defendants argued that this failure to give reasons regarding the 'interruption' period (suspending the limitation) constitutes a breach of criminal law. Consequently, the retroactive application of this suspension of procedural acts carried out before 2018 must be deemed ineffective, being unlawful due to the failure to give reasons.

Based on the date of the incriminating acts, the convicted individuals in question believe that the statute of limitations would have expired before the conviction became final, which would have resulted in the criminal proceedings being dismissed and the impossibility of convicting them.

This interpretation seems doubtful due to its potential conflict with EU law. Not only would it exempt the convicted individuals in question, but it would also absolve a significant number of other people from their criminal liability for tax fraud offences, which would harm the EU's financial interests. Furthermore, the Brasov Court of Appeal observes that, in order to comply with EU law, it may be necessary to disregard the case law of the Constitutional Court and/or the national Supreme Court. Therefore, under the new disciplinary system in Romania, judges who disregard such case law may face sanctions. The Court of Brazov has made a preliminary reference to the Court of Justice, asking the following question: does the primacy of European Union law preclude the emergence of disciplinary liability of the judges in the main proceedings? In essence, the preliminary reference raised by the Romanian court asks whether European Union law precludes the application of such statutes of limitations even though they are based on a ruling by the Constitutional Court and are, in fact, caused by the inertia of the legislature.

Firstly, in the ECJ's ruling, the European courts state that failure to comply with the obligation to provide effective, proportionate, and dissuasive criminal sanctions to protect the financial interests of the European Union would constitute a violation of EU law (Case C-107/23 PPU, Lin, para. 83). EU law requires Member States to adopt dissuasive and effective measures to combat fraud and other illegal activities detrimental to the Union's financial interests. Indeed, the Court holds that "While the Member States are free to choose the applicable penalties, which may take the form of administrative penalties, criminal penalties or a combination of the two, they must nonetheless ensure, under Article 325(1) TFEU, that cases of serious fraud or other serious illegal activities affecting the financial interests of the European Union are punishable by criminal penalties that are effective and that act as a deterrent (see, to that effect, judgments of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 191, and of 8 March 2022, *Commission* v *United Kingdom (Action to counter undervaluation fraud)*, C-213/19, EU: C:2022:167, paragraph 219)". (Case C-107/23 PPU, *Lin*, paragraph 84). In other words, the European judges indicate that these Member States must ensure that the statutes of limitation established in their national laws allow for the effective prosecution of crimes related to fraud against the EU's interests (Case C-107/23 PPU, *Lin*, para. 86). The Court of Justice also recognises that the jurisprudential solutions adopted in Romania, from which it appears that for almost four years, Romanian law did not provide for any cause of interruption of the limitation period for criminal liability, constitute a systemic risk of impunity for the crimes in question that is not compatible with the requirements of EU law (Case C-107/23 PPU, Lin, para. 92). This risk is intensified by the retroactive application of this absence of grounds for interruption to a previous period under the principle of the most lenient criminal law (Case C-107/23 PPU, *Lin*, paras. 93 and 94).

Secondly, the ECJ has expressed its opinion on the obligations of national courts responsible for applying EU law and the need to guarantee fundamental rights. The European courts have stated that domestic courts must disregard national legislation and case law if these

would lead to exemption from criminal liability in such a large number of cases of serious fraud affecting the financial interests of the Union as to constitute a systemic risk of impunity for crimes of this kind (Case C-107/23 PPU, *Lin*, para. 98). Such an obligation may be incompatible with ensuring the protection of fundamental rights. In this regard, the Court considers that if a court of a Member State is called upon to review compliance with fundamental rights of a national provision or measure that, in a situation where the actions of Member States are not entirely determined by Union law, implements that right, it remains permissible for national authorities and courts to apply national standards of protection for those rights, provided that doing so does not compromise the level of protection provided by the Charter of Fundamental Rights of the European Union or the primacy, unity, and effectiveness of European Union law (Case C-107/23 PPU, *Lin*, para. 110).

Adopting this jurisprudential approach in the *Lin* case, the European courts distinguish between, on the one hand, the principle of legality concerning crimes and punishments as applied and interpreted in the national case law in question, and the principle of the retroactive application of the most lenient criminal law, on the other. After emphasising the importance of the principle of legality concerning crimes and punishments from the perspective of its requirements in terms of the foreseeability and precision of criminal law, the ECJ ruled that national courts, in derogation from their obligation to give full effect to EU law, are not required to disregard this case law (Case C-107/23 PPU, *Lin*, para. 118).

In contrast, national courts are not authorised to apply a national standard of protection relating to the principle of retroactive application of the most favourable criminal law in circumstances such as those that gave rise to the preliminary ruling proceedings under discussion. In this regard, the ECJ emphasises that national courts should not question the interruption of the limitation period for criminal liability pertaining to procedural acts that occurred before the relevant national provisions were found to be invalid. Such questioning would heighten the systemic risk of impunity for crimes affecting the financial interests of the Union arising solely from the absence, for almost four years, of grounds for interrupting the statute of limitations in Romania (Case C-107/23 PPU, *Lin*, paras 124 and 125).

Thirdly, the ECJ addresses the issue of the disapplication of its own motion of national case law and the disciplinary responsibility of judges. The European courts have affirmed that, by virtue of the principle of the primacy of European Union law, a decision given by the Court for a preliminary ruling binds national courts regarding the interpretation of EU law for the resolution of the dispute at hand (Case C-107/23 PPU, *Lin*, paras. 134 and 135). Consequently, courts cannot be prevented from immediately applying EU law in a manner consistent with a ruling or the case law of the European Court, if necessary, by disapplying any national case law that impedes the full effectiveness of that law. According to the Court of Justice, such conduct by the national court cannot even be considered a disciplinary offence (Case C-107/23 PPU, *Lin*, para. 136). For these reasons, the Court of Justice has stated that "the principle of primacy of EU law must be interpreted as precluding national legislation or a national practice under which the ordinary national courts of a Member State are bound by the decisions of the Constitutional Court

and by those of the supreme court of that Member State and cannot, for that reason and at the risk of incurring the disciplinary liability of the judges concerned, disapply of their own motion the case-law resulting from those decisions, even if they consider, in the light of a judgment of the Court, that that case-law is contrary to provisions of EU law having direct effect." (Case C-107/23 PPU, *Lin*, para. 137).

1.2.2. CASE C-281/22, *G.K. AND OTHERS* (EUROPEAN PUBLIC PROSECUTOR'S OFFICE): A TUMULTUOUS BEGINNING?

The European Public Prosecutor's Office (EPPO) has jurisdiction to prosecute the perpetrators of crimes affecting the financial interests of the Union. The structure of this EU body comprises both a central and a decentralised level. The latter consists of European Delegated Prosecutors based in EU Member States. Regulation (EU) 2017/1939, which established the EPPO, regulates how it can conduct transnational investigations.

Going beyond classic judicial cooperation mechanisms, the EPPO does not avail itself of the European Investigation Order to acquire evidence in the territory of another Member State but uses the system described in Article 31 of Regulation (EU) 2017/1939. According to this rule, it is sufficient to associate the European Delegated Prosecutor of the State where the act is to be carried out with the electronic file for its execution once a measure has been ordered under the national law of the State in whose territory the European Delegated Prosecutor conducting the investigation operates. Applying this rule has raised problems from the outset, since Article 31 of the EPPO Regulation, which distinguishes between the EPPO system and the European Investigation Order (EIO) system, as laid down in Directive 2014/41/EU, rather than facilitating transnational investigations by the European Public Prosecutor, actually risks making them more difficult (Venegoni, 2022).

Specific issues regarding transnational investigations arise due to the nature of the EPPO itself. Although it is one body, it operates within a legal and judicial system that is not uniformly consistent (Bellacosa, De Bellis, 2023; Ligeti, 2020; Mitsilegas, 2020). The regulation governing the functioning of the EPPO does not allow it to independently adopt a unified set of rules for its operation, nor does it stipulate that national laws should harmonise them. In fact, the secondary legislation examined here establishes the principle that the EPPO applies the national law of the State in which it operates. This may be fine in cases where EPPO investigations are purely domestic, in which case, the question of which law is applicable does not arise, since it is the one where the European Delegated Prosecutor conducting the investigation operates (Venegoni, 2022; Bachmaier Winter, 2018).

However, the problems in this system come to the fore during cross-border investigations, where the provisions of Article 31 of Regulation (EU) 2017/1939 apply. This provision seeks to

solve the problem of which law is applicable in cases requiring cooperation between the two European Delegated Prosecutors involved in cross-border investigations, namely the relationship between *lex fori* and *lex loci*. Following the reasoning set out in Article 31 of the founding regulation of the EPPO, the *lex loci* applies in cases of cross-border investigations. *Lex fori* may be applicable where this does not contradict the fundamental principles of the legal system in the Member State where the handling European Delegated Prosecutor operates. The EPPO Regulation states, however, that the standard of protection of the rights of the defence should always be of the highest level. The principle is to always apply the highest standard of judicial protection, whether in the State where the prosecutor is based or where the measure is being executed, especially with regard to obtaining authorisation or validation from a court (Venegoni, 2022).

In addition to the question of authorisation of the measure by a court, there is also the matter of lodging an appeal. The Court of Justice was recently called upon to pronounce on these questions in its judgment of December 21, 2023, Case C-281/22, *G.K. and others* (European Public Prosecutor's Office). Here, several people are being prosecuted for fraud related to the importing of European Union biodiesel. This fraud allegedly harmed the financial interests of the EU amounting to approximately EUR 1,295,000. The EPPO has launched an investigation led by a European Prosecutor assigned to the case in Germany. The investigation prompted an order to search and seize assets in Austria. The German European Prosecutor in charge of the case then delegated the execution of these measures to an Austrian European prosecutor with jurisdiction across Europe. The defendants challenged these investigative measures before the Austrian court, which decided to refer questions to the Court of Justice for a preliminary ruling on whether it is authorised to exercise complete control (as it would in a purely domestic case) or whether its control should be limited to procedural matters concerning the implementation of the cross-border investigative measures. The referring court posed three questions for a preliminary ruling, essentially asking whether Articles 31 and 32 of Regulation (EU) 2017/1939 should be interpreted to mean that the controls carried out within the Member State of the handling European Delegated Prosecutor should cover both the matters relating to the justification and adoption of an assigned investigative measure requiring judicial authorisation and those relating to its implementation under the laws of that Member State. It asks, in this context, whether the judicial review of the measure, which has already been carried out in the Member State of the handling European Delegating Prosecutor also affects the scope of the review of the measure – under that judicial authorisation – in the Member State of the assisting European Delegated Prosecutor (Case C-281/22, *G.K. and others* (European Public Prosecutor's Office), para. 38).

In other words, the central question is which court has jurisdiction to assess the lack of evidence or signs regarding the crime that are required as prerequisites of the measure. Thus, in summary, does jurisdiction lie with the court of the Member State of the handling European Delegated Prosecutor? Is it where the measure is ordered? Or is it also before the court of the Member State of the assisting European Delegated Prosecutor where the measure was executed?

To answer these questions, Article 42(1) of Regulation (EU) 2017/1939 stipulates that acts of the European Public Prosecutor are subject to review before national courts, of course, in accordance with their respective domestic laws (Oberg, 2021; Mitsilegas, Giuffrida, 2020; Mitsilegas, 2020). Thus, when conducting transactional investigations, the court in the Member State of the handling European Delegated Prosecutor must examine the entire file in order to authorise or validate any measures under Article 31(2) and (3) of Regulation (EU) 2017/1939. It must also decide on judicial review from the point of view of the requirements regarding the measure, which makes the mechanism when the EPPO is involved more complex than the mechanism for transactional investigations in standard cases of judicial cooperation. In fact, in the EIO system, the authorities of the requested Member State do not examine the entire investigation file but verify only the information contained in the certificate. In essence, if it is deemed that the court in the executing State should also have access to the entire file to assess the merits of the appeal according to the prerequisites of the measure, two judges from different Member States must assess the evidence to suggest that serious criminal activity has taken place (Sicurella, 2023; Panzavolta, 2018). This may lead to contradictory decisions, which may make the investigation even more complicated.

Given these concerns, the Court of Justice's ruling in Case C-281/22, *G.K. and others* (European Public Prosecutor's Office), will have a significant bearing on how the EPPO will work in future. According to the Court, the oversight carried out by the assisting European Delegated Prosecutor should only regard matters related to the implementation of cross-border investigative measures. The adoption and justification of an investigative measure are governed by the law of the Member State of the handling European Delegated Prosecutor, while the implementation of such a measure is governed by the law of the Member State of the assisting European Delegated Prosecutor.

The Court bases its reasoning on two general principles of EU law, namely mutual recognition and mutual trust between Member States.

The Court states that Articles 31 and 32 of Regulation (EU) 2017/1939 were introduced to ease and simplify judicial cooperation between the Member States that accept the application of criminal law in force in other Member States, even if their own national laws might lead to different outcomes (Case C-281/22, *G.K. and others* (European Public Prosecutor's Office), paras. 54 and 55). However, allowing substantive vetting by the judicial authority of the Member State of the assisting European Delegated Prosecutor would result in a less effective system than the one established by regulations already in place, to the detriment of the objective it pursues (Case C-281/22, *G.K. and others* (European Public Prosecutor), para. 68).

Thus, not only would there be a duplicate judicial review on substantive issues, but the competent authority in the Member State where the assisting European Delegated Prosecutor is operating would have to examine in detail the entire case file, which would have to be forwarded to it by the authorities of the Member State of the handling European Delegated Prosecutor and, where relevant, translated (Case C-281/22, *G.K. and others* (European Public Prosecutor), para. 69).

Since the assessment of the justification and adoption of investigative measures are subject, under Article 31(2) of Regulation (EU) 2017/1939, to the law of the Member State of the handling European Delegated Prosecutor, the competent authority of the Member State of the assisting European Public Prosecutor is clearly in no better position to carry out such an examination in accordance with the law of the latter Member State than the competent authority of the Member State of the handling European Delegated Prosecutor (para. 70). Downstream of this reasoning, the CJEU states that, on the one hand, the judicial authorities of the Member State of the handling European Delegated Prosecutor are, under Article 31(2) of Regulation (EU) 2017/1939, entitled to review the merits of the justification for and adoption of an investigative measure. On the other hand, the European courts rule that the judicial authorities of the Member State of the assisting European Delegated Prosecutor are, on the other hand, only entitled (under Articles 31(3) and 32 of Regulation (EU)) to examine matters relating to the execution of the cross-border investigation. In other words, the European Delegated Prosecutor can assign cross-border investigative measures without having to transmit and translate the entire procedural file to the assisting European Delegated Prosecutor. The European Delegated Prosecutor is not required to seek authorisation from a judicial authority as would be the case when having to assess substantive elements, and the validity of these substantive elements cannot be made subject to judicial review by the Member State of the assisting European Delegated Prosecutor.

Nevertheless, the European Court of Justice has yet to address a specific question regarding fundamental rights. Its interpretation raises some concerns regarding Article 32 of Regulation (EU) 2017/1939 which states that the formalities and procedures expressly indicated by the handling European Delegated Prosecutor must not conflict with the fundamental principles of the law of the Member State of the assisting European Delegated Prosecutor. According to the Court, when investigative measures involve serious interference with fundamental rights, such as searches and/or asset freezing, the Member State of the handling European Public Prosecutor provides adequate and sufficient safeguards under its national law, such as prior judicial review, to ensure the legality and necessity of the measures. On the other hand, although the judicial authorities of the assisting Member State of the European Delegated Prosecutor are not empowered to examine the justification for and adoption of a given investigative measure, it should nevertheless be noted that under Art. 31(5)(c) of Regulation (EU) 2017/1939, if a European Delegated Prosecutor considers that a less intrusive alternative measure would achieve the same results as the assigned investigative measure in question, they will inform their supervising European Delegated Prosecutor and consult with the handling European Delegated Prosecutor in order to resolve the matter bilaterally. Under Article 31(7) of Regulation (EU) 2017/1939, if the relevant European Delegated Prosecutors cannot resolve the matter within seven working days and the assignment is maintained, the matter is referred to the competent Permanent Chamber (Case C-281/22, *G.K. and others* (European Public Prosecutor's Office), para. 77). Accordingly, Judgment C-281/22, *G.K. and others* (European Public Prosecutor's Office) establishes that Articles 31 and 32 of Regulation 2017/1939 must be interpreted as meaning that, in cases where an assigned investigative measure requires judicial

authorisation in accordance with the law of that Member State, review carried out within the Member State of the assisting European Delegated Prosecutor may only concern matters relating to the enforcement of the measure and not those relating to its justification and adoption, which must be subject to prior judicial review in the Member State of the handling European Delegated Prosecutor in the event of serious interference with the rights of the person concerned guaranteed by the Charter of Fundamental Rights of the European Union (Case C-281/22, *G. K. and others* (European Public Prosecutor), para. 78).

At this point, it is necessary to ask what the safeguards of fundamental rights within the system of the Member State are, and to what degree measures are enforced. In this sense, if the judicial authority of the Member State of the assisting European Delegated Prosecutor is in no better position to apply the criminal law of the Member State of the handling European Delegated Prosecutor in cases where an assigned investigative measure requires judicial authorisation under the law of that Member State (para. 70), then the authority of the Member State of the handling European Delegated Prosecutor is not in the best position to apply the fundamental principles of the Member State of the assigned European Delegated Prosecutor (Golino, Minucci, 2023). Moreover, as the Court of Justice recognises in the so-called Taricco saga (Judgment of Case C-42/17, *M. A. S. and M. B.*, paras. 46 and 47), courts may oppose the so-called counter-limit theory, where Union law entails renouncing supreme principles and fundamental rights as part of the constitutional traditions of the Member States.

1.3. THE EUROPEAN COURT OF AUDITORS AND THE PROTECTION OF THE EU'S FINANCIAL INTERESTS

The European Court of Auditors is an EU institution and is part of the institutional constellation that contributes to protecting the EU's financial interests and as such is responsible for overseeing the EU's finances. As the EU's external auditor, this institution contributes to improving its financial management. Its operation is based on the provisions of Articles 285 and 287 TFEU and the provisions of Regulation (EU) 2018/0146, which establishes the financial rules applicable to the general budget of the Union, and in particular, Title XIV on external audit and discharge.

The European Court of Auditors is independent and competent to examine all accounts relating to the revenue and expenditure of the European Union and any EU institution or body (Vogiatzis, 2019). The Court carries out checks to obtain reasonable assurance regarding the reliability of the annual accounts of the Union, the legality and regularity of their transactions, and sound financial management.

The activity of the European accounting courts is constant and can be carried out before the conclusion of the annual financial year. In accordance with Article 255 of Regulation (EU)

2018/0146, examination by the Court of Auditors consists of verifying whether all revenue has been received and all expenditure incurred lawfully and properly in accordance with the treaties, the budget, the Regulation itself, the delegated acts adopted pursuant to the Regulation, and all other relevant acts adopted pursuant to the treaties. The review takes into account the multiannual character of programmes and related supervisory and control systems. In short, the audit is based on documents and can also be conducted on site, i.e. at EU institutions and agencies or at the premises of any body that manages revenue or expenditure on behalf of the EU. The court may also hear any natural or legal person who receives payments out of the EU budget. The audit in the Member States is carried out in collaboration with the national supreme audit institutions, and those subjected to audits are required to provide the Court with all documents or information it deems necessary to carry out its task. The Court has no investigative powers and, therefore, reports possible cases of fraud and corruption to OLAF or the EPP, which then deal with them according to their respective competences. After carrying out audits, the European Court of Auditors publishes annual reports on the implementation of the EU budget, along with specific annual reports on EU agencies, decentralised bodies, and Joint Undertakings. It also produces reports on topics of interest, issues of sound financial management, and specific strategic or spending areas. Through this external audit procedure, the European Court of Auditors contributes to the protection of the EU's financial interests.

1.4. THE EU BODY FOR ADMINISTRATIVE AND CRIMINAL CONTROL

The European Anti-Fraud Office (OLAF) and the EPPO are two key EU bodies contributing to the protection of the EU's financial interests.

The scope of OLAF's activities covers any fraud, administrative irregularity, or other harmful activity likely to harm the EU's financial interests. To respect the separation of roles between investigation and adjudication deriving from the principle of ensuring fair treatment – not unlike the practices followed by the judiciary – OLAF is authorised to conduct investigations but not to impose penalties. At the conclusion of its inquiries, it can formulate a report and make recommendations. The European Court of Justice – see T-289/16, *Inox Mare srl*, par. 28 – has clarified that OLAF's recommendations have no binding legal effect on EU or Member State authorities. It is up to the EU institution or Member State authorities to determine whether or not to apply OLAF's recommendations and pursue administrative or legal action in court (Cahn 2023: 329; Kratsas 2012: 65).

The EPPO, the missing pillar in the EU anti-fraud architecture, became operational on 1 June 2021. It was Article 86 TFEU of the Lisbon Treaty that finally established the necessary legal foundation for the creation of the EPPO. This provision allowed the Council, acting unanimously and with the consent of the European Parliament, to establish the European Public

Prosecutor “from Eurojust”. The provision also permitted a group of at least nine Member States to request a Council decision and establish the EPPO through enhanced cooperation. The Treaty of Lisbon itself placed two provisions of equal fundamental importance before Article 86 TFEU: Articles 82 and 83 TFEU. These provisions, which specify the guidelines set out in Article 325 TFEU, enshrine the European Union’s legislative power to lay down common minimum rules to approximate the criminal, substantive, and procedural aspects of national legislation. (Lopez 2021: 700). Article 86 and the regulation establishing the EPPO, from which it derives its legitimacy, affect these normative bases with a distinctly derogatory character.

The EPPO, an innovation in the EU legal framework (Sicurella 2023: 19; Oberg 2021: 164; Ligeti 2020: 33), is a rare case of growing collaboration within the EU. In fact, twenty-two EU Member States currently participate in it. Prior to its creation, the EU had no power to investigate and bring to justice the perpetrators of crimes against the EU’s financial interests. Existing EU bodies – such as OLAF, Eurojust and Europol – do not have, and cannot be given, a mandate to conduct criminal investigations and have no coercive powers if Member States refuse to carry out OLAF investigations. Previously, only national authorities had the power to investigate and prosecute EU fraud, but their jurisdiction ends at national borders. The EPPO fills the institutional void since fraud that harms the EU’s financial interests is mostly transnational in nature. In a spirit of increasing cooperation, in 2017, twenty Member States adopted Council Regulation (EU) 2017/1939 establishing the EPPO. This Regulation is now binding in its entirety and directly applicable in twenty-two Member States

However, EPPO’s and OLAF’s areas of activity are closely linked. The shared goal of both bodies is to improve fraud detection at the EU level and optimise the recovery of the EU budget. In addition, both EU bodies combine their investigative and other capacities to further the protection of the EU’s financial interests. To prevent the unnecessary duplication of tasks, the relationship between OLAF and EPPO relies heavily on their working arrangement. Currently, the Annual Activity Reports of the two agencies for 2021 show that the cooperation between OLAF and EPPO is running smoothly and that any obstacles are resolved without major problems (see OLAF, The OLAF Report 2021, 1, 37 (2022); EPPO, Annual Report 2021, 1, 88 (2022)).

There are several potential effects of this greater cooperation between the two EU bodies. Complementing the European Public Prosecutor, OLAF is authorised to carry out administrative investigations regarding identical factual circumstances. This allows OLAF to address critical matters related to safeguarding the EU’s financial interests, such as recommendations for the expeditious recovery of assets, the formulation of interim administrative measures, and systemic recommendations for improvement in cases where administrative shortcomings (such as procurement procedures) are detected. These investigations are conducted in close and mutually agreed cooperation with the EPPO. OLAF may support the EPPO in its investigations by providing operational, forensic, and analytical expertise and tools to enhance the activities of OLAF and the EPPO, while fully respecting the applicable procedural safeguards. In 2021, for example, OLAF investigators assisted the EPPO by acting as expert witnesses in complex cases

and providing forensic analysis and comprehensive documentation of relevant EU projects and programmes. This cooperation will ensure that OLAF becomes a reliable operational partner for EPPO and that all available means are used to protect taxpayers' money from fraud and other irregular activities (see OLAF, The OLAF Report 2021, 1, 37 (2022)).

Nevertheless, there has been unambiguous criticism (see Bellacosa & De Bellis 2023: 26; Klement 2021: 51) regarding the matter of simultaneous investigations between OLAF and the EPPO. The OLAF guidelines have recently addressed the issue. According to Article 12 of the OLAF Guidelines, the agency is allowed, provided the EPPO raises no objection, to conduct a supplementary investigation on the same case. Such investigations can be initiated by OLAF itself or on the EPPO's request, to enable the adoption of interim administrative measures, as well as financial, disciplinary, or administrative action.

However, in more general terms, it is the very role of the administrative arm of the system that will need to be reassessed in the light of the creation of the EPPO. On this, it has been argued that two different visions of OLAF's role could theoretically be considered. On the one hand, OLAF could be transformed to function as a sort of "EPPO investigatory arm", responding to the EPPO's priorities and orders. This would help to bring about the unification of the two agencies by enabling a more efficient allocation of resources (Bellacosa & De Bellis 2023: 26; Kratsas 2012: 95). On the other hand, OLAF and the EPPO could work as two autonomous bodies, and the main operative support to the EPPO would come from the national authorities (Bellacosa & De Bellis 2023: 26; Weyembergh & Brière 2018: 75-76). The innovations pertaining to OLAF and the EPPO will be discussed in a later section.

1.5. Cooperation in judiciary and police operations to protect the EU's financial interests

The institutional constellation safeguarding the financial interests of the European Union is completed by two bodies that support police and judicial cooperation: the European Union Agency for Judicial Cooperation in Criminal Matters (Eurojust) and the European Union Agency for Law Enforcement Cooperation (Europol).

Eurojust, the European Union's judicial cooperation body, is responsible for investigations and prosecutions of serious crimes involving at least two Member States of the EU.

Article 85 TFEU states that Eurojust's task is to support and strengthen coordination and cooperation among national authorities responsible for investigating and prosecuting serious crime affecting two or more Member States or requiring prosecution on a common basis, based on the operations carried out, and information provided, by Member State authorities and Europol. Furthermore, while Article 85 TFEU specifies that Eurojust's role is to bolster

coordination and cooperation among national authorities responsible for investigation and prosecution, this remains within the domain of cooperation among governments. However, it is equally true that the direction taken, given the possibility for the European Parliament and the Council to directly confer the power to initiate criminal investigations and resolve conflicts of jurisdiction under Article 85(1) TFEU, is that of an increasing move towards supranational cooperation (Luchtman, Vervaele, 2014; Weyembergh, 2011).

Established by Council Decision 2002/187/JHA, Eurojust has legal personality and is represented by a college composed of a national member with the title of magistrate, judge, or police officer, seconded by each Member State in accordance with its legal system. Eurojust's objective is to strengthen cooperation between the competent ministries and judicial authorities of the Member States by coordinating national interventions to combat organised crime, easing the execution of extradition requests and assisting the competent national authorities in their investigations and prosecutions (Suominen, 2008). Eurojust is mandated to tackle serious forms of crime and those falling within Europol's jurisdiction, such as terrorism, the illicit drug trade, human trafficking, counterfeit currency, and money laundering. It is also tasked with prosecuting offences such as cybercrime, fraud, corruption, and involvement in criminal organisations.

When carrying out its functions, Eurojust operates through one or more national members or the college. It may also request the authorities of the Member States concerned to initiate a criminal investigation or set up a joint investigation team.

Eurojust works closely with Europol. In fact, contacts between Eurojust and Europol have been steadily improving. The secure communication network has enabled the exchange of information and allowed for easier access to Europol's analysis files. However, cooperation between Eurojust and Europol's various national liaison offices is still inconsistent. In this regard, contacts should be strengthened, and the exchange of information with their mutual offices must be optimised.

During the integration process, the European Union set up an agency to promote greater cooperation among the national police authorities of its Member States and law enforcement agencies (De Moor, Vermeulen 2010a, De Moor, Vermeulen 2010b). Its mission is to support national authorities in preventing and combating international crime and terrorism. Article 88 TFEU states that Europol's mission is to support and reinforce the work of Member States' law enforcement authorities and other law enforcement agencies in preventing and combating serious cross-border crime involving Member States, terrorism, and crime affecting common interests regulated by EU policy. Regulation (EU) 2016/794, which amends and expands the provisions of Decision 2009/371/JHA establishing Europol, assigns several tasks to achieve these objectives. Among them, Europol works to support the competent judicial authorities by facilitating the exchange of information, providing criminological analysis and assistance in coordinating cross-border operations. It is also the main hub for information on crime in the EU, identifying shared information gaps and investigation priorities. It is evolving as a European centre for law enforcement expertise, experimenting with new techniques, as well as fostering knowledge exchange and delivering quality training and education in specialist areas such as

terrorism, drugs and counterfeiting. Regulation (EU) 2022/991 also amends its predecessor and strengthens its mandate to combat crime and terrorism and to address emerging security threats. As stated in recital 28 of Regulation (EU) 2016/794, Europol enables Eurojust and OLAF to access the data it has available, using a positive or negative feedback system, to promote operational collaboration between the agencies and identify any connections between the data they hold. In fact, Europol and Eurojust have concluded a working arrangement that ensures access on a reciprocal basis within their respective mandates to all information that has been provided for cross-checks and the possibility of making queries using the data in compliance with the specific safeguards and data protection established by the Regulation. Access to data available from Europol will be permitted and limited through technical devices to information falling within the respective mandates of these Union bodies.

Article 21 of Regulation (EU) 2016/794 established various forms of collaboration between Eurojust, OLAF, and Europol that are beneficial when working together on cases involving the protection of the EU's financial interests. According to para. 1, of Article 21 of Regulation (EU) 2016/794, Europol takes all necessary measures to enable Eurojust and OLAF, within their respective mandates, to indirectly access – based on a positive or negative feedback system – information provided for strategic or thematic analysis, albeit subject to any limitations indicated by the Member State, EU body, Third Country, or international organisation that provided the information. Article 21(5) of Regulation (EU) 2016/794 provides that, when Europol processes information relating to an individual investigation, and Europol or a Member State recognises the need for coordination, cooperation, or support under the mandate of Eurojust or OLAF, it will inform them accordingly and initiate the procedure for sharing the information, complying with the decision of the Member State that provided it. In this case, Eurojust or OLAF consults with Europol.

These rules illustrate how Europol, Eurojust and OLAF establish forms of cooperation in order to collaborate in the fight against fraud in the financial interest of the European Union. Collaboration is enriched by the exchange of good practices and continues even after the creation of the EPPO. In fact, the EPPO has collaboration agreements with both Eurojust and Europol to exchange information, provide mutual support in investigative operations, and participate jointly in training activities. Lastly, it is important to note that collaboration between EPPO and the two agencies is also envisaged by Regulation (EU) 2017/1939. For example, under Article 100, paragraph 2, letter (b) of the Regulation establishing the EPPO, when the European Public Prosecutor's Office conducts investigations involving EU Member States that are not part of the EPPO, it may seek assistance in the form of judicial cooperation from the national member of Eurojust involved in the case.

1.6 ANTI-MONEY LAUNDERING AND THE NEW AML AUTHORITY

For various reasons, it has become clear over time that the measures for countering the financing of terrorism and anti-money laundering must be strengthened at the EU level.

The rapid development of new technologies is shaping this "illegal" economy, making it even more urgent for public authorities to intervene in a coordinated fashion to prevent it through regulation and control. The link to the protection of the financial interests of the European Union is also evident.

Recital 15, Regulation 241/2021 reads: "The COVID-19 crisis has also highlighted the importance of reforms and investments in health, and economic, social and institutional resilience, that aim, inter alia to increase crisis preparedness and crisis response capacity, in particular by improving business and public service continuity, the accessibility and capacity of health and care systems, the effectiveness of public administration and national systems, including minimising the administrative burden, and the effectiveness of judicial systems as well as fraud prevention and anti-money laundering supervision.".

So, with the intervention of public authorities in the economy on the rise, regulation for Anti-Money Laundering (AML) becomes even more imperative.

It must be remembered that many of the resources available for supporting businesses, such as for SMEs, especially in times of health and economic crisis, were provided by the EU and Member States, but their visibility as European or public funds, and their implications for the protection of the EU's financial interests, was not so obvious, as they entered the system through financial intermediaries or the interventions of the Member States. The European Investment Bank, for instance, operates its own investigative service to address incidents of fraud within the sector, as many resources assume the form of business aid (see BETKOSOL D.2).

The occurrence of money laundering in fraud schemes that involve public funds is widely acknowledged, for example in Italy. A recent Banca D'Italia report discusses its incidence in NRRP investments.

On 20 July 2021, the European Commission presented an ambitious package of legislative proposals to strengthen the EU's anti-money laundering and counter the financing of terrorism (AML/CFT) rules, as follows.

The new Anti-Money Laundering Directive (Directive VI) is Directive (EU) 2024/1640, of the European Parliament and of the Council of 31 May 2024 on the mechanisms to be put in place by Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Directive (EU) 2019/1937, and amending and repealing Directive (EU) 2015/849 (Directive IV), with day of effect 9 July 2024.

Previous AML Directives

- Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (AMLD1);

- Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering - Commission Declaration (AMLD2);

- Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (AMLD3);

- 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 (AMLD4);

- Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directives 2009/138/EC and 2013/36/EU (AMLD5).

The Regulation for recasting Regulation (EU) 2015/847 on fund transfers, which enables tracking of transfers of crypto-assets; Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets, amending Directive (EU) 2015/849, approved in June 2023. This is the first provision to be adopted.

Cybersecurity – AML: what is the rationale behind this regulation?

One significant aspect of cyber crimes is their connection to money laundering, where illicitly gained funds are disguised to appear legitimate.

The connection between cyber crimes and money laundering is intricate and concerning. Cybercriminals often employ money laundering techniques to conceal their illicitly obtained funds. By funnelling the money through various bank accounts and financial transactions, they aim to make it appear legitimate and remove any trace of its criminal origins.

Money laundering is a crucial component of the cybercrime ecosystem, enabling criminals to enjoy the financial benefits of their illegal activities without raising suspicion. The unregulated nature of cryptocurrency also presents opportunities for cyber criminals to launder money, due to the difficulty in tracing transactions.

The increasing popularity of cryptocurrencies presents an ongoing challenge in combating money laundering. Governments and regulatory bodies are striving to establish stricter measures to monitor cryptocurrency transactions and ensure compliance with anti-money laundering regulations (Lessambo, 2023).

- The Anti-Money Laundering Regulation (AMLR), which would set directly applicable rules, including in the areas of customer due diligence and beneficial ownership: Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on

the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

The previous acts form the new legal framework, creating a 'single rulebook to address the diverging interpretations and fragmented application of AML/CFT rules by Member States'.

At the heart of July's 2021 legislative package is the creation of a new EU authority revolutionising AML/CFT supervision within the EU and strengthening cooperation among financial intelligence units (FIUs). In 2021, a proposal was made (Com(2021)421) to establish the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010).

The Council reached a partial political agreement on the proposal on 29 June 2022. The file was referred to the Committee on Economic and Monetary Affairs (ECON) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE) in the European Parliament. The co-rapporteurs issued their joint report in May 2022. The joint committee report was voted on 28 March 2023, and the mandate to enter trilogues was granted at the plenary of 17 April 2023.

The legislative procedure for this specific Regulation, (EU) 2024/1620), has now been completed. On 30/05/2024, the Act was adopted by the Council after Parliament's 1st reading; on 31/05/2024 the Final Act was signed, and on 19/06/2024, it was published in the Official Journal, see here).

As noted in the opening recitals of Regulation (EU) 2024/1620, the current framework, which heavily relies on national implementation, has revealed weaknesses not only in the efficient functioning of the EU's AML/CFT framework but also in the integration of international recommendations.

These weaknesses create new obstacles to the proper functioning of the internal market.

The new European Anti-money Laundering Agency (AMLA) will be the central authority coordinating national authorities to ensure that the private sector correctly and consistently applies EU rules. AMLA will be based in Frankfurt and begin operations in mid-2025. It will have over 400 staff members. The establishment of this new authority will facilitate coordination between all the different actors mentioned at the beginning (Urbani, 2022).

To summarise the current institutional setting in the AML sector, we can refer to De Falco's analysis of 2022. Currently, supervision is the responsibility of national competent authorities designated by Member States when transposing the AML directives (as described below). These authorities have direct supervisory power over entities that must comply with the regulations.

Article 32 of the AMLD obliges Member States to set up a national FIU, namely a single national body responsible for receiving and analysing information from private entities on transactions that may be associated with ML/CFT, and for receiving cash-related data from customs authorities.

In the financial sector, AML supervision is always distinct from prudential supervision in the Member States. However, several States have a single authority which conducts both types of supervision for some or all financial sector entities.

To reduce fragmentation, the 2010 founding regulations of the three European supervisory authorities (ESAs) enabled them to act within their powers and the scope of AML directives "for fostering the consistent and effective implementation, by national competent authorities, of the EU's AML/CFT legislation". Subsequently, Regulation (EU) 2019/2175 gave the European Banking Authority (EBA) the responsibility of leading, coordinating, and monitoring the AML/CFT efforts of all financial services providers and competent authorities in the EU, consolidating the three ESAs AML/CFT mandates. It also tasked the EBA with establishing an EU-wide AML/CFT database of risks and supervisory actions: EuReCA, launched in early 2022. However, the EBA's powers to enforce standards and guidelines remain limited, as the authority does not supervise individual financial institutions directly and does not currently have the legal tools to enforce compliance.

The European Commission also includes considerations on possible limits to the EBA's governance in its proposal for the establishment of the new authority. Furthermore, the exchange of information between national AML and prudential authorities and the ECB is regulated by AMLD5.

At the end of the chain, law enforcement agencies and competent authorities ultimately aim to punish criminals (enforcement). They receive relevant information and analysis from FIUs and, if there are sufficient grounds, they can open a criminal investigation and adopt measures such as arrests, definitive freezing of transactions, and confiscation of assets.

Other institutions' mandates have a bearing on AML, namely the EPPO, responsible for investigating, prosecuting, and bringing to judgment crimes against the financial interests of the EU. Europol and Eurojust's mandates also include AML-related concerns.

Several unresolved issues have emerged from the initial analysis of the new regulation, indicating a need for further research in the future. Firstly, there has been a shift in focus from cooperation to integration, both institutionally (as the term 'agencification' suggests) and normatively, moving away from reliance on directives and a few regulations towards directives and a multitude of regulations, with a greater need to adopt delegated and implementing acts, (Articles 290 and 291, TFEU). What does this mean for the EU integration process? Considering that the fight against money laundering is no longer restricted to the financial sector but has now spread to many others, including the food industry and is international in scope, integration in this sector could have a significant impact on many other areas, promoting coordination and harmonisation.

Secondly, it is clear that there is a real effort to link the various aspects of AML through the legal system of the EU: from prevention (sharing information and monitoring by FIUs, linked in each country to the new EU Agency) to formal supervision and control (with the involvement of the EU Agency/Authority), and finally, prosecution (Pavlidis, 2022). Of course, the model is mixed, considering the decision, among the different regimes analysed in the EU Commission

proposal, to share competences between the EU and the Member States beyond the financial and/or banking sector (excluding the option to expand EBA or ECB powers) (De Falco, 2023; Pavlidis, 2023b).

Thirdly, and linked to these points from the EU law and EU administrative law perspectives, the classical and constitutional tension between the exercise of public powers (such as for the protection of financial interests or the fight against illegality and organised crime), requiring collaboration among different private actors (such as financial firms, professionals, and lawyers), and individual freedoms and negative rights, such as the privacy of clients/customers and the protection of data, is even greater.

Fourthly, and this time in connection with public and administrative law, the changes to the regulation of AML underline the importance of the primary 'public' objective mentioned earlier: the protection of the EU's financial interests. There is currently a paradigm shift in the approach to fighting corruption (Pavlidis, 2023). At the same time, it has been demonstrated, for example in Italy, that there is a strong connection between corruption and money laundering, and that the solution to both issues can also be similar: transparency, which can also be achieved through tracing financial flows (Gargano, 2019; Nicolosi, 2023). The topic of money laundering is particularly interesting, especially in cases where public funds are indirectly involved, as it directly relates to the protection of public financial interests.

Fifthly, regarding 'transparency' as a solution, some Member States (such as Italy) and the EU have adopted a similar instrument/approach, albeit for different reasons. At the national level, a transparency-based approach to tackling money laundering and corruption prioritises administrative remedies over criminal punishment, with public policy focusing on prevention. At the EU level, the 'transparency' approach (although of a different nature) may be the only viable solution for overcoming the limitations of the treaties (concerning jurisdiction, hence the functioning of the new authority being based on Article 114 TFEU) and judicial doctrines (such as the non-delegation principle). As for the future functioning of the new EU authority/agency, the procedure will involve making recommendations to the MSs, publishing the final decisions of national governments to ensure transparency and accountability, and assessing the remedies suggested by the EU Commission but based on technical arguments presented by the EU authority (moral suasion). Lastly, as previously mentioned, the fight against fraud and irregularities that harm the financial interests of the EU (and the public in general) requires a balanced approach to unlawful activities that will occupy a middle ground between criminal and administrative procedures, also for historical reasons; for example, the fact that the Italian approach to ML in the nineties was a model for the earliest EU regulation of the problem (Barbieri, 2019). So, due to the obligation to report suspected cases (suspicious transaction reporting vs PACA system), the problem arises of determining whether the conduct falls under the category of criminal activity or not.

2. COOPERATION, COORDINATION, AND INTEGRATION FOR THE FUTURE OF THE EU'S FINANCIAL INTEREST AND ITS PROTECTION

This section aims to highlight the procedural steps, key figures, and a set of rules, as well as the 'where' and 'when' of taking decisions for the future of the topic, shaping EU policymaking and institutional coordination.

An analysis of additional institutional nodes will further highlight the lack of harmonisation in the protection of the EU's financial interests in terms of its common understanding through norms and procedures. This protection is still largely dependent on voluntary 'cooperation' rather than binding regulation 'coordination' from the institutional perspective. It is important to observe, before going into more detail, that the European Commission, through OLAF and other agencies, is working to improve and coordinate the protection of the Union's financial interests.

In fact, while protecting the EU budget is a shared responsibility between the EU and its Member States, the European Commission plays a leading role in setting the standards and creating its framework. A critical tool for implementing this role is the Commission's Anti-Fraud Strategy (CAFS) and its accompanying action plan, the latest dating back to April 2019 (COM/2019/196 and SWD(2019)170).

The 2019 CAFS specified that the action plan would be reviewed and amended as appropriate, but the new realities facing the Commission in its efforts to protect the EU budget call for such a revision, decided in 2023 (COM(2023) 405). The revised action plan is the result of an extensive Commission internal consultation process, notably through the Fraud Prevention and Detection Network (FPDNet), in which all Commission departments and Executive agencies are represented. The process was led by OLAF as the Commission's lead anti-fraud department and the head of FPDNet

Like its predecessor, the revised action plan seeks to strengthen all parts of the anti-fraud cycle: prevention, detection, investigation and correction. It complements several other recent or ongoing policy initiatives, such as the proposal for an interinstitutional Ethics Body, the Anti-corruption package, the ongoing recast of the Financial Regulation, the Rule of Law mechanism, and the Conditionality mechanism (see other sections in this working paper). It also complements the independent investigations conducted by OLAF and the EPPO.

The list of seven new issues that need to be addressed is as follows:

- to foster digitalisation and the use of IT tools to fight fraud
- to support Member States to reinforce the protection of the RRF, cohesion, agricultural and fisheries funds
- to reinforce the protection of funds under indirect management and in the external relations area
- to reinforce the EU's capacity to fight customs fraud and protect EU revenues
- to reinforce the EU anti-fraud architecture

- to reinforce the Commission's anti-fraud governance and maintain a high level of coordination and cooperation among Commission departments and Executive agencies
- to strengthen the culture of ethics and anti-fraud in the Commission

Regarding institutional arrangements, Section 5 stands out as particularly important.

As the basic assumption for this first working paper in the context of the BETKONEXT project (but also emphasised in BETKOSOL), the EU anti-fraud architecture consists of a large number of players who must work together in a coordinated manner to ensure maximum protection of the EU's financial interests. The increasingly complex anti-fraud landscape and the sophistication of fraudsters make both "cooperation" and "coordination" across organisational boundaries more important than ever. "Cooperation" must be developed with important partners such as authorities from Member States and the EPPO to effectively combat fraud. The European Commission must boost its support, in terms of 'coordination', to decentralised agencies and joint undertakings.

Under the umbrella term 'cooperation', Administrative cooperation arrangements (ACAs), for example, are an important instrument for OLAF to improve cooperation with investigative bodies and other partners in fighting fraud. They outline practical ways of increasing operational cooperation, such as by designating contact points and encouraging operational exchanges. ACAs are adopted with external partners (for example, OLAF signed two ACAs in March 2023 with strategic partners in the United States of America), as well as internal ones. Regarding the latter category, OLAF has requested access to national business registries in the Member States and signed two cooperation agreements for this purpose; the first in June 2023 with the French National Council of Commercial Court Clerks (Conseil National des Greffiers des Tribunaux de Commerce, CNGTC) and GIE Infogreffe, and the second with the Spanish Association of Registrars in July 2023. Various working arrangements have also been signed with other EU institutions, such as the European Parliament, Eurojust, and Europol.

Point 6 of the Commission's revised Anti-Fraud Strategy is also worth examining because it provides a sectoral perspective, which will be the subject of future BETKONEXT deliverables.

Although there has been considerable progress in terms of strengthening anti-fraud governance and improving coordination, cooperation, and processes in the Commission, these efforts need to be sustained and strengthened in specific areas to remain effective and efficient in the longer term.

OLAF continues to support Commission departments and executive agencies through FPDNet and its advice on anti-fraud strategies. However, anti-fraud policy must be considered in its wider EU policy context. Anti-fraud considerations must be further integrated into other policy areas intrinsically linked to anti-fraud, such as anti-corruption and Rule of Law, and steps must be taken to leverage potential synergies.

2.1. UPDATES ON THE IMPLEMENTATION OF NEXT GENERATION EU: THE ROLE OF CONDITIONALITY REGIMES

Over the last few years, the complex relationship between the European Union and the Member States has entered a new chapter, especially since the issue of preserving financial and economic unity came to the fore. It is still early to assess the consolidation of the emergency measures introduced to counter the effects of COVID-19, but it may be useful to observe that the EU budget – set by the multiannual financial framework (MFF) for the period 2021-2027 – has been modified in the wake of the pandemic. However, the European Commission's behaviour can be traced back to the 2012 Fiscal Compact. This suggests that emergencies and crises should be viewed as factors triggering a change in European governance. By examining the case studies of Hungary and Poland, it will become clear that there is a stronger connection than meets the eye – between conditionality mechanisms and the protection of European funds allocated to Member States. More precisely, there is a correlation between the rule of law, the European budget, the principle of solidarity, and the principle of mutual trust.

Since the enactment of the European Recovery Program (ERP), also known as the Marshall Plan, in 1948, the distribution of supranational aid funds has been subject to specific conditions. To ensure the effective management of resources, individual countries can submit their spending propositions for evaluation by the representatives of the ERP. The main difference compared with the Marshall Plan is that more recent European conditions are, and must first be, discussed and evaluated by the Member States, adhering to the principles of consensus and compromise. This reference to the Marshall Plan helps us grasp the scope of the recent EU extraordinary funding plans, such as NextGenerationEU and REPowerEU, which share many similarities.

In the United States system, using conditionality to foster compliance on rule of law issues for cases affected by corruption is nothing new. Although conditionality has been used as a policy tool in the United States since the 1940s, it was only incorporated into the legal system of the European Union in the late 1980s.

For decades, conditionality was primarily used in EU external policy (Fierro, 2018; Bartels, 2005; Kochenov, 2018), but it gradually found its way into the EU internal sphere during later enlargements and significantly expanded in the aftermath of the 2008 economic crisis. On the contrary, conditionality could nowadays be defined as "a mutual arrangement by which a government takes, or promises to take, certain policy actions, in support of which an international financial institution or other agency will provide specified amounts of financial assistance" (Killick 1998: 6). In this regard, conditionality represents an exchange currency for the adoption of certain policy actions at the domestic level in return for providing financial aid in the form of grants and facilitated loans.

How the mechanism has impinged on the relationship between the Union and the Member States over the last twenty years has mostly been determined by risk regulation (for a study of how the EU legal order has adapted its policy on risk and disaster prevention, see M.

Simoncini, 2010, 2017) and disaster management. But rulemaking in a time of pandemic cannot be approached as a state of emergency defined as a governance model which "implies the possibility of isolating a passage of time for a distinctive form of governing" (White, 2015). In fact, only Council Regulation (EU) 2020/2094 provides specific measures for tackling the COVID-19 crisis by establishing a European Union Recovery Instrument. The response to the pandemic was not left to the autonomy (more accurately, the 'sovereignty') of the Member States, since there is an EU civil protection mechanism that coordinates domestic risk and emergency management. It follows that in the context of the EU, it is not feasible to consider two different governing regimes, one associated with emergency rules and the other with 'normality laws' (Neocleous, 2006). Since the 2012 Fiscal compact, emergencies and crises have to be considered as triggering factors for a change in European governance (Schimmelfenning, Sedelmeier 2004: 670), where the main issue appears to be the preservation of financial and economic unity.

Moreover, transitioning from the imposition of financial conditions through international treaties (e.g. the Two Packs [Ioannidis, 2014] and Six Packs agreements of 2012) to the introduction of conditionality mechanisms through regulatory instruments also underlines their internal importance, and not only in extending European influence over non-member States.

The pandemic itself has not led to the introduction of new conditionality mechanisms, changing the framework for compliance with European law by Member States and those wishing to enter the Union. Rather, the introduction of an alternative mechanism to the one discussed in Lisbon, to safeguard the values and principles enshrined in Article 2 TEU, dates back to the economic crisis of 2007-2008, to which the European Union put a check with the approval in 2012 of the Fiscal Compact in the form of an international treaty for coordination and governance within the Economic and Monetary Union. One of the provisions of the treaty is that each Member State must incorporate into its legal system the principle that the State budget must be in balance or in surplus, as stated in the 'golden rule'. It is well known that for a treaty to be legally binding, each signatory State must ratify it. Otherwise, it will not be enforceable by law. As a result, the logic of safeguarding the financial resources of the Union through conditionality, which was adopted in 2012, has been incorporated into the European legal framework through regulations directly applicable in the legal systems of all Member States.

In fact, the subsequent Regulation 2020/2092, which transposes the amendments made by the European Parliament, refers to the rule of law as "an essential precondition for compliance with the principle of sound financial management enshrined in Article 317 of [Treaty on the Functioning of the European Union (TFEU)]" (recital 7). And even the nomenclature of the recently adopted 'Conditionality Regulation' is misleading as it suggests that the rule of law is merely a mechanism, rather than a fundamental principle of European governance. It can be inferred that compliance with the rule of law is now the only condition for receiving EU funding. Therefore, governments that do not adhere to the rule of law will no longer receive funding from the EU. The Regulation of 2020 is not a new development despite the recent contingency. It

builds upon a previous proposal but has the unique ability to connect a breach of the Rule of Law to economic sanctions resulting in the suspension of European funds.

In this regard, every founding pillar of the Union seems to be connected by the need to preserve public resources. According to Viță, "diplomacy, law, commerce[,] military intervention", and budget are "economic tools of statecraft" (Viță 2019: 204). Therefore, spending power can be used to influence or change each of them. In this sense, every driver can be traced back to conditional spending (and lending) in order to preserve Europe's common budgetary resources.

Following the legal actions taken by Hungary and Poland regarding the conditionality mechanism, the Court of Justice of the European Union promoted the systemic function of the Union budget as "one of the principal instruments for giving practical effect, in the Union's policies and activities, to the principle of solidarity, mentioned in Article 2 TEU, which is itself one of the fundamental principles of EU law". The Court also underlined that "the implementation of that principle, through the Union budget, is based on mutual trust between the Member States in the responsible use of the common resources included in that budget" (CJEU, C-156/21 and C-157/21, sections 129 and 147, respectively; Fasone, 2022).

The observations reveal that there is a connection between conditionality mechanisms and the protection of European funds disbursed to the Member States. There is, then, a correlation between the rule of law, the European budget, the principle of solidarity, and the principle of mutual trust. To quote Commission Vice-President Věra Jourová, the mechanism's capacity for encouraging countries like Hungary and Poland to act according to the bloc's principles through financial pressure can be summed up as: "the one who can't understand the values, can understand the money" (Maukonen, Jourová, 2021).

The condition of abiding by the Rule of Law is relevant 'only' in terms of eligibility for access to EU funds (for a different approach emphasising the conditional nature of the Rule of Law, see Halmai, 2019): it involves ex-ante evaluation of the application, but once a Member State receives the resources, the control is conducted ex-post – as in the NextGenEu mechanism – and it might then cease to comply with the Rule of Law, which is a prerequisite for receiving funds.

The EU can enforce its policy objectives at the national level through its financial resources. This study proposes a new perspective on how EU budget spending and public debt can be used as tools to further the political goals of the Union.

The Rule of Law seems not to be the core of the European conditionality mechanism introduced by Regulation 2020/2092, even if it is explicitly mentioned that it is, instead, used to preserve the EU budget. Although the conditionality regulation allows for ex-post control on the national systems that benefit from the Structural Funds and the NGEU to ensure compliance with the rule of law, a new mechanism has been introduced with the reform of European fiscal rules. With the adoption of Regulation EU 2024/1263, a new multilateral budgetary surveillance mechanism has been put in place.

In essence, the European Commission evaluates in advance whether the national budgetary plans of Member States comply with the policy areas in which the Union directs investments and reforms (see Article 13, Regulation EU 2024/1263). The 2024 regulation includes a provision for monitoring the actual spending of resources in the areas mentioned above, which the Commission carries out in conjunction with independent fiscal institutions at the domestic level.

In the light of the regulatory forecast that outlines in which policy areas the Member States should spend European financial resources, the Commission's control over national budget plans both before and after Structural Funds are granted suggests that the Union is somehow influencing economic and financial decisions at the domestic level, which goes well beyond the mere coordination of economic policies. The implementation of these control mechanisms essentially allows the Union to intervene conditionally in the use of European resources, ushering in a new phase in the evolution of the allocation of competencies between the Union and the Member States (Article 2, TFEU).

The policy goals set by the 2024 Regulation dictate how public resources are allocated, through rigorous ex-ante review of domestic budgetary planning. It follows that these plans serve as a means of ensuring compliance with European rule of law. In this context, conditions on spending (Baraggia, Bonelli, 2022) – which are clearly different from general conditions – are designed to ensure that Member States allocate EU money for specific purposes.

This trend has been reinforced by a series of measures adopted by the EU following the regulations on conditionality and the Recovery Resilience Facility. The common thread running through the newer regulations introduced in the European legal system (one on the Cohesion Fund, the other on the new fiscal rules) is that of protecting the European Union's budget (and Next Generation EU) – and therefore its financial interests – "against irregularities including fraud, standardised measures to collect, compare and aggregate information and figures on the recipients of Union funding" (recital 73, Reg. EU 2021/1060). This Regulation is important due to its role in establishing a connection between common rules on several (structural) funds, including the Cohesion Fund (established by Regulation EU 2021/1058), adopted under Article 322 TFEU, and a general "regime of conditionality for the protection of the Union budget" (recital 7) that the former must include.

In this sense, the Commission should be able to interrupt payment deadlines, suspend interim payments, and apply financial corrections where the respective conditions are fulfilled to safeguard the financial interests and the budget of the Union (recital 70, Reg. EU 2021/1060). On the domestic level, Member States must also "prevent, detect and deal effectively with any irregularities, including fraud committed by economic operators" by "ensur[ing] that any person or entity receiving Union funds fully cooperates in the protection of the financial interests of the Union, grants the necessary rights and access to the Commission, OLAF, the Court of Auditors" (recital 71, Reg. EU 2021/1060).

Although the European legal order has strengthened the Commission's capacity to protect the Union's financial interests, the recently implemented measures still mainly target the

Member States both as recipients and creditors of the resource. It could be argued that the Union's strategy is still to integrate the European legal system from the bottom up, using mechanisms that must be implemented by the Member States, such as checks to prevent, detect, and correct cases of fraud, corruption, and conflicts of interest (art. 22, para. 1, Reg. EU 2021/241).

It is important to note that the legal foundations for the latest regulations safeguarding the Union's budget and financial interests differ somewhat.

Regulation EU 2020/2092 is based on Article 322, paragraph 1(a) TFEU, which allows the European Parliament and the Council to adopt fiscal rules on the procedures for the implementation of the budget. Indeed, Regulation EU 2021/241 is based on Article 175 TFEU and also refers to Articles 120 and 121 on the coordination of the economic policies of the Member States as a matter of common concern. Even if there is no express mention of Article 175 TFEU, the reference to Article 121 is sufficient to establish a link between the RRF and the new fiscal rules on the coordination of economic policies with the guiding principles of stable prices, sound public finances and monetary conditions, and a sustainable balance of payments.

Moreover, the principle of sound financial management is also closely linked to compliance with the rule of law, and Regulation EU 2020/2092 states that "there is therefore a clear relationship between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management" (recital 13). As a result, the rule of law, mentioned in Article 2 TEU must implicitly incorporate the concepts. Therefore, the three Regulations in question are grounded in the idea of safeguarding the Union's budget from breaches of the rule of law that might jeopardise the sound financial administration of the Union's financial interests.

2.2 The reform of the PIF Directive and the approach to fighting corruption

2.2.1 The prospect of reform of the PIF Directive in the context of the fight against corruption in the European Union

A reconstruction of the evolution of the criminal protection of the Union's financial interests at the EU level was carried out in the last BEKTOSOL project (D1, Task 2) (Sabia, 2021, 21 ff.). This section therefore aims to provide a critical update on previous research findings, especially concerning the regulatory changes that have been introduced in the meantime.

As already highlighted, Directive (EU) 1371/2017 (the so-called PIF Directive) builds upon the broad framework of the PIF Convention and its Protocols. Nonetheless, in defining offences harming the EU's financial interests (Mezzetti, 1994, 1 ff.; Manacorda, 1995, 230 ff.; Grasso, 2006, 93 ff.), Art. 4 of the Directive provides a broader conception than that found in the

first PIF Protocol of active and passive corruption (Venegoni, 2018, 4282 ff.; Grasso-Sicurella-Bianco-Scalia, 2018). This is because, in the context of the Single Market, it is necessary to introduce common minimum rules to restrict the phenomenon for the survival of the market itself, which is one of the main objectives of the Union (Sotis, 2007, 77 ff.; Basile, 2017, 63). Of course, this need to protect the Union's budget then becomes just as essential to ensure the efficient development of EU policies, and to prevent pathological phenomena such as corruption from draining large amounts of resources.

In fact, the focus of the European legislator was not limited to fraud in the strict sense, in that it harms EU funds. With the goal of protecting both EU public administration and the rule of law, Art. 4 of the PIF Directive aims to harmonise certain "ancillary offences", including active and passive corruption and misappropriation, defined as the crime of the public official, who manages funds or assets and uses them in ways contrary to their intended purpose, thereby harming the EU's financial interests. This is a significant addition, as the PIF Convention did not previously address this specific offence, although the 1997 Brussels Convention on the fight against corruption, that provided for criminal enforcement for such behaviours, had already been adopted.

Lastly, Article 4(4) of the PIF Directive provides a flexible definition of 'public official' that is flexible, yet consistent with the laws of Member States. Indeed, it includes anyone, regardless of their formal status, involved in managing or making decisions about the EU's financial interests, extending the definition to persons providing public services in Member States or Third Countries.

In this context, the recent proposal for a directive of the European Parliament and of the Council on combating corruption (COM/2023/234 final) introduces some changes to the above-mentioned discipline on several key points. We will take a closer look at these changes in the sections that follow.

2.2.2 Important innovations to the proposal for a Directive on fighting corruption. The new definitions of public officials

The Commission identified the legal basis for the draft Directive on fighting corruption in Arts. 83(1), 83(2) and 82(1)(d) TFEU, which is expected to replace outdated instruments like the Council Framework Decision 2003/568/JHA and the 1997 Convention on the fight against corruption involving officials of the European Communities, aiming to provide more comprehensive coverage of corruption-related crimes and create a coherent European framework that will involve all corruption-related offences. Furthermore, the proposal also provides for obligations to penalise active and passive bribery in the private sector, extending therefore its original scope of protection to other values important to the EU, such as fair competition.

As for the amendments to the PIF Directive, Article 2 of the proposal makes significant changes to the definitions of 'Union official' and 'national official' previously found in Art. 4 of the PIF Directive. It also introduces a new comprehensive notion of 'public official'. In particular, Article 2(4) defines 'Union official' as follows: "(a) a member of an institution, body, office or agency of the Union and the staff of such bodies shall be assimilated to Union officials; (b) an official or other servant engaged under contract by the Union within the meaning of the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Union laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68 (the 'Staff Regulations'); (c) seconded to the Union by a Member State or by any public or private body, who carries out functions equivalent to those performed by Union officials or other servants". On the other hand, a 'national official' is anyone who holds "an executive, administrative, or judicial office at national, regional or local level, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority. Any person holding a legislative office at the national, regional, or local level is considered a national official for the purpose of this Directive". Furthermore, according to Art. 2(3) of the proposal, a 'public official' can also be "any other person assigned and exercising a public service function in Member States or third countries, for an international organisation or for an international court".

The new definitions provided in the proposed Directive extend the scope of those previously outlined in Art. 4(4) of the PIF Directive by emphasising the *de facto* performance of duties as a criterion for qualifying as a 'Union official', as per Art. 2(3), Lett. b). Moreover, the same definition includes the members of an institution, body, office, or agency of the Union, thus eliminating the practice, adopted in the 1997 Convention, of considering them in the same way as members of national parliaments, ministers, and judges in the individual Member States (Salazar-Clementucci, 2023, 79).

2.2.3 Important innovations to the proposal for a Directive on fighting corruption. The preventive approach

The proposed legislation in Articles 3 to 6 outlines the need for Member States to establish an effective system for preventing corruption within the public sector. The European legislator recognises that relying solely on punishment is ineffective in the fight against corruption, as scholars have pointed out (Flick, 2018, 462; Severino, 2016, 7 f.), and as can also be derived from Art. 41 CDFEU, that calls for an actual "right to good administration". Arts. 3(2) and 3(3) call for accountability and transparency in public administration. Therefore, Member States should conduct a risk assessment to identify the areas most susceptible to corruption, which will reinforce control measures for these activities. To ensure that this system operates correctly, it is important to establish one or more central authorities that are independent

of the executive branch and specialised in combating corruption. Art. 4(1) and (2) of the draft Directive require the establishment of "one or several bodies, or organisation units" specialised, respectively, in the prevention and punishment of corruption. These will provide access to information regarding their activities while ensuring the protection of personal data and the confidentiality of investigations. The proposal also prescribes that the activities and operating protocols of this Authority or Authorities should be provided for by law so that the public can perceive their work as transparent and accountable.

In this context, the draft Directive also includes the widespread promotion of legality, stating in Article 3(1) that "Member States shall take appropriate action, such as information and awareness-raising campaigns and research and education programmes, to raise public awareness on the harmfulness of corruption and reduce the overall commission of corruption offences as well as the risk of corruption".

Lastly, Article 6 of the proposal lays the ground for making the above-mentioned preventive measures effective through training programmes for public officials so as to ensure that they are capable of identifying various forms of corruption and related risks in the course of their duties and can promptly and appropriately respond to any suspicious activities. Specialised anti-corruption training is also required for certain categories of public officials, such as the judiciary and the personnel of the authorities responsible for criminal investigations and proceedings related to the offences outlined in the proposal.

2.2.4 Important innovations to the proposal for a Directive on fighting corruption. The new mandatory criminal offences

One of the most important changes that the Directive seeks to bring about is to make certain crimes listed in the UNCAC, such as foreign passive bribery, trading in influence, abuse of functions, bribery and misappropriation in the private sector, and illicit enrichment mandatory rather than semi-mandatory, so that all Member States must prosecute them as criminal offences (Mongillo, 2023, 5).

As far as illicit trading in influence is concerned, Article 10 of the proposed Directive is modelled on Article 12 of the Council of Europe's 1999 Criminal Law Convention on Corruption, requiring the criminalisation of a wide range of intermediary conduct preliminary to corruption. Indeed, it is necessary to establish a law making it an offence to promise, offer or give any undue advantage to someone to exploit their real or supposed influence by offering a public official something to obtain an unfair advantage. Similarly, the conduct of requesting or receiving an undue advantage from a third party to use one's real or supposed influence to obtain a different undue advantage from a public official must be penalised. According to Article 7(2) of the proposal, it is irrelevant whether the influence it describes was exercised or led to the

desired result when establishing whether the offence of trading in influence has been committed (Mongillo, 2024, 15 ff.).

As will be discussed in more detail later (see D2), the description made by the European legislator runs the risk of not fully complying with the principle of legality in criminal matters, which is also a pillar of the European Union and potentially conflicts with existing lobbying regulations in various Member States (Mongillo, 2023, 10).

The definition of abuse of office (Art. 11) also seems to pose similar problems. The provision in fact criminalises the conduct of a public official who performs any official act or omits to perform it in breach of the law in order to obtain an undue advantage for him/herself or others. In this way, the proposal contained in the Merida Convention, which requested States that had ratified it to "consider" criminalising such conduct (Salazar-Clementucci, 2023, 79) is made binding for EU Member States. Nevertheless, it has also been observed with reference to the public sector that this risks becoming a 'catch-all provision' (Mongillo, 2023, 6), which would allow conduct not warranting (*prima facie*) a criminal sanction to be brought within its scope of application, thus risking the paralysis of administrative activity. Moreover, Art. 11 also requires a similar rule for the private sector, mandating Member States to punish the conduct of a senior or subordinate person in a company who, in breach of his or her duties, performs or omits to perform an act in order to procure an undue advantage for himself or herself or others.

As far as the private sector is concerned, the directive proposal makes the introduction of criminal enforcement mandatory also for the offences of private corruption and embezzlement. Article 8 abandons the previous approach of Art. 2(3) Council Framework Decision 2003/568/JHA, which allowed Member States to impose a criminal penalty for such conduct only if affected free competition, again in line with the UNCAC guidelines. The chosen pattern of incrimination thus seems to depart from the publicist model centred on the protection of competition, and focus on the breach of duties functional to obtaining an undue economic advantage, therefore adopting a loyalist or patrimonialist perspective.

Upon closer examination, it is apparent that the new proposal has adopted a different approach, which no longer solely focuses on the protection of the Single Market. Instead, the EU now takes into account the safeguarding of its financial interests, even by means of ancillary offences.

Additionally, Article 9(2) deals with the offence of misappropriation in the private sector, requiring any manager or employee of a private sector entity who, even indirectly, engages in embezzlement or misappropriation of any utility entrusted to him/her to be punished.

With regard to the new obligations on criminalisation, Art. 13 introduces the new offence of illicit enrichment, punishing the "intentional acquisition, possession or use by a public official of property that that official knows is derived from the commission of any of the offences" relevant to the public sector and established by the Directive, "irrespective of whether that official was involved in the commission of that offence". As will be emphasised in the D2 report, this offence is highly problematic and may conflict with fundamental principles of criminal law in several Member States. It is no coincidence that Article 20 of the Merida Convention requires

the criminalisation of such conduct, while also including a clause that guarantees compatibility with the legal traditions of the ratifying States (Mongillo, 2023, 13). Indeed, there is a risk, at least with reference to the mere possession of the bribe, of a violation of the substantive *ne bis in idem* principle (Giacona, 2022, 151 ff.; Silva, 2018, 173 ff.) if a public official who has already committed the crime of passive bribery is indicted a second time for simply being in possession of the money.

Apart from the new obligations related to criminalisation, the draft Directive also includes pioneering provisions on the need not to apply immunities and privileges (Art. 19), jurisdiction (Art. 20), the statute of limitations (Art. 21), and investigative tools (Art. Regarding the statute of limitations (to be analysed in D2), some issues appear to be emerging in relation to providing equal minimum time limits for crimes that are not equally harmful, such as misappropriation in the public and private sectors.

2.2.5 Important innovations to the proposal for a Directive on fighting corruption. The new approach to corporate criminal liability

Another innovative aspect of the proposed Directive concerns the legal liability regulations for corporations. In fact, Art. 16 establishes, not unlike Art. 6 of the PIF Directive, that entities will also be liable for the offences envisaged in the proposal when they are committed in their interest or to their advantage, even if no stance is taken on the nature of this liability (Mongillo, 2013, 55 ff.). However, this provision also specifies the criteria for determining who is responsible for the offence, which may be considered outdated (Mongillo, 2023, 15). In fact, the model followed centres on a position-based liability, as the crime has to be committed by a person who represents, manages or controls the corporation, in its interest or to its advantage, and the key element is the person's role and responsibilities within the company.

Similarly, the company must be liable for the underlying offence if it was made possible by a lack of supervision or control over an employee by any of the above-mentioned persons.

Lastly, along the lines of Art. 6(3) of the PIF Directive, the liability of the corporation is cumulative with that of the natural person who materially committed the offence, following a model that has already been tested in numerous Member States (Mongillo, 2018, 176 ff.).

On the other hand, the attribution of the offence remains unaffected by the 'virtuous organisation' of the entity. Article 18(2)(b) stipulates that an effective internal control system designed to prevent offences is considered solely as a mitigating factor.

From this perspective, holding corporations accountable for negligence must play a fundamental role in combating this type of crime. Such accountability encourages entities to organise themselves and prevent offences being committed. It is clear that the higher the incentive offered, be it a mere mitigating factor or a cause of exclusion of liability, the more

likely corporations will be to implement compliance programmes to effectively reduce the risk of crimes being committed.

In terms of sanctions, the most significant change in the draft Directive is the possibility of calculating pecuniary penalties based on a company's overall revenue.

In fact, Article 17(2)(a) stipulates that entities may face a fine of no less than 5% of their overall turnover, which is similar to the penalties imposed by competition law, and more recently, a new Directive on protecting the environment through criminal law. The other penalties for entities come in many forms and may include "the exclusion of that legal person from entitlement to public benefits or aid; the temporary or permanent exclusion from public procurement procedures; the temporary or permanent disqualification of that legal person from the exercise of commercial activities; the withdrawal of permits or authorisations to pursue activities in the context of which the offence was committed; the possibility for public authorities to annul or rescind a contract with them, in the context of which the offence was committed; the placing of that legal person under judicial supervision; the judicial winding-up of that legal person; and the temporary or permanent closure of establishments which have been used for committing the offence".

These penalties are, of course, very diverse and, according to the prevailing opinion (Mongillo 2023, 17; Salazar-Clementucci, 2023, 14), constitute nothing more than an open catalogue from which national legislators can freely choose which ones to include, without necessarily being obliged to implement all the penalties listed for companies.

2.3. THE EPPO: FUNCTIONING AND PROCEDURES. SOME RECENT CRITICAL ISSUES

2.3.1 BRIEF INTRODUCTION AND MAIN FUNCTIONS OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

As already extensively highlighted in the previous research report from the BETKOSOL project (see D2), until 2017, the EU had no power to investigate and bring to judgment the perpetrators of crimes affecting the financial interests of the Union. Existing EU bodies – such as OLAF, Eurojust and Europol – do not have, and cannot be given, the mandate to conduct criminal investigations and do not have coercive powers if Member States refuse to carry out OLAF's investigations (Bellacosa and De Bellis, 2023, 23 ff.). Therefore, only national authorities had the jurisdiction to investigate and prosecute EU fraud, but this jurisdiction stops at national borders. In this setting, the European Public Prosecutor's Office (later "EPPO"), set up by the Council Regulation (UE) 2017/1939, which has been operating since 1 June 2021, represents a significant innovation.

One of the main reasons for the creation of the EPPO is the wish to transfer the power to carry out criminal prosecutions for PIF crimes into a new common supranational structure

(Sicurella, 2018, 849) capable of operating in a more coordinated and, therefore, efficient manner (De Amicis and Kostoris, 2018, 243; Vervaele, 2018, 17). This institution aims to guarantee a common European space of freedom, security and justice, which is considered an essential element of the European Union's primary objective under Articles 3 TEU and 67 TFEU (Gutiérrez Castillo, 2021, 103; Amalfitano, 2009, 73; Di Stasi and Rossi, 2020, *passim*; Caggiano, 2007, 335; Parisi, 2013, 4), especially in the light of the increasing number of actors within the European judicial network.

The EPPO fills an institutional gap. It is an independent body within the Union and has legal personality (Art. 3 Reg.); it is accountable to the European Parliament, the Council, and the Commission for its general Activities (Art. 6 Reg.). Its structure is based on cooperation between Member States and the criterion of subsidiarity, as will be illustrated shortly. Furthermore, the EPPO operates as a centralised Europe-level Prosecutor's Office, with headquarters in Luxembourg, supported by a decentralised structure based in the twenty-two Member States, where the European Delegated Prosecutors operate. For more details about the rise and implementation of the EPPO's structure and functions, we can refer to the abovementioned D.2 report (see also Bellacosa and De Bellis, 2021, 58 ff.), which further underlines its full jurisdiction and specific powers.

It is important to underline here that, although investigations are actively conducted by prosecutors sent by the EPPO to the Member States (the "European Delegated Prosecutors"), these figures conduct investigations on behalf of the EPPO in accordance with the laws of the State in which they work (art. 5 reg. EPPO) and lack control over fundamental decisions relating to case files. Specifically, it falls to the EPPO Central Office to decide whether to request dismissal or referral for trial (Salazar, 2017, 5 ff.).

An attempt was made to move beyond the horizontal logic of simple cooperation between Member States, by applying the principle of subsidiarity, which allows the European Union to intervene in areas of its exclusive jurisdiction when its actions are deemed more effective than those available at the national, regional, or local levels within the various countries (Ligeti, 2020, 39).

The principle of subsidiarity determines the conditions under which the European Union has priority for action over Member States, enabling strong and direct European action compared to that of the individual Member States.

Precisely with regard to the EPPO's investigative aims and its punitive role, significant unresolved issues remain concerning the determination of subject matter expertise, even though territorial jurisdiction profiles are unequivocally clear. (art. 23 reg. EPPO).

Sector-specific regulations are found at the beginning of Article 22, par. 1, Reg. EPPO, which references all the cases covered by the "PIF directive" (Directive (EU) 2017/1371), as mentioned in previous sections, as well as crimes harming the financial interests of the European Union. They do not, however, establish a unified European standard specifying which crimes are involved, precisely naming them or the penalties they incur.

This creates a divergence from Article 86, par. 2, TFEU, which assigns jurisdiction for certain crimes to the EPPO as defined by the Regulation. The PIF Directive, which is by its very nature disjointed due to the various ways it is transposed by Member States, undermines the principle of legal certainty and increases the difficulties linked to the application of Articles 22 to 25 of the Regulation. The lack of uniformity in the rules that define the different kinds of crime results in interpretative uncertainties and potential issues for future application of a certain gravity. These problems arise from the inevitable differences in the national transposition laws, which lead to the new investigating authority being given varying powers, depending on the degree of participation of the Member States. Negative repercussions can arise when trying to identify the national rules to establish the transposition of the directive, and also when determining which law applies if, unfortunately, the directive is transposed incompletely or incorrectly.

It would be beneficial to aim for harmonisation, even if only with regard to the names or classifications of crimes across Europe, particularly those covered by the EPPO Regulation, thus providing legal certainty, whose benefits could also lead to an increase in the quality of procedural practices.

2.3.2 The regulation of European investigations and procedural aspects in accordance with Council Regulation (EU) 2017/1939

In accordance with the contents presented in paragraph 1.2.2., we will now provide a brief overview of the investigative activities and mandatory safeguards established by the EPPO Regulation. We will also touch on some critical issues, which will be explored in greater detail in the next Deliverable.

The legislation that regulates the procedural specifications of the EPPO is set out in Chapter V of Reg. (EU) 2017/1939, which lays down the basic rules for the investigation procedures of the EPPO, delegating detailed regulation to Member States (Bachmaier Winter, 2018, 119). This is where the first problems arise: in the absence of a uniform procedural regulation, the EPPO procedures vary depending on the Member State where the evidence-gathering and procedural activities are carried out.

The next section provides details of the individual activities mandated by Regulation (EU) 2017/1939.

2.3.2.1 Clarifying investigative authority

To outline the EPPO's investigation activity, we must refer to Article 25 Reg. which defines the EPPO's jurisdiction as concurrent. This provision governs the relationship between the EPPO and national investigative authorities, requiring the latter to inform the European Public Prosecutor's Office of any crimes committed within its jurisdiction, a duty which also extends to EU institutions, offices, and agencies (Article 24.1) and is part of the broader principle of sincere cooperation, essential to the relationship between the EPPO and national authorities (art. 5, par. 6, reg.).

As a consequence of this principle, in fact, both the EPPO and the competent national authorities are expected to support and inform each other to effectively combat the crimes within the EPPO's jurisdiction.

This somewhat undetailed regulation, however, leaves the internal systems of the Member States unchanged in terms of how criminal investigations are organised, but the competent authorities are invited to inform the EPPO, without delay, of any conduct that could constitute a crime falling within its remit. Adherence to this reporting obligation is considered essential for the proper functioning of the EPPO.

The central office of the EPPO will then request, case by case, any further information from the authorities of Member States.

The concurrent power, however, imposes a further obligation: the regulation provides that the national authorities will have to abstain from exercising their competence if the EPPO decides directly to initiate investigations or to exercise its power of advocacy in relation to the same crime (art. 25, par.1, reg.).

Moreover, Article 22 Reg. allows the EPPO to handle crimes closely related to those harming the financial interests of the European Union, thus identifying an ancillary competence whose scope will be determined through consultations between the EPPO and national prosecuting authorities. However, in the event of disagreement, the decision will fall to the authorities (art. 25, par.6, reg.). Relevant guidance is provided in recitals 55 and 56, which suggest that the EPPO should be deemed competent if the crimes are inextricably connected and the one that harms the financial interests of the Union is the primary offence from the point of view of statutory gravity, as reflected in the maximum penalty that can be imposed or if the other closely linked crime is considered to be accessory. It is merely instrumental to the one harming the financial interests of the EU, especially if it was committed mainly to create the conditions for committing the primary offence, and its primary purpose is to obtain the material or legal means to commit the PIF crime or secure the ensuing profit or product.

The concept of "inextricably connected crimes" should be interpreted, based on the indications offered by recital 54 and the jurisprudence of the Court of Justice of the European Union. According to this jurisdiction, which addresses the conditions for applying the principle of *ne bis in idem*, the main criterion is the subsistence of material facts (or substantially identical facts) or a set of concrete circumstances inseparably linked to each other in time and space, substantially forming one event.

But, in reality, in the absence of a clear interpretation, Article 3, par. 4, of Regulation 2018/1727/EU, which establishes the European Agency for Criminal Judicial Cooperation, may also be relevant. This provision refers not only to crimes committed to acquire the means to carry out other serious crimes or to facilitate their execution, but also those committed to ensure the impunity of their perpetrators, effectively extending the scope of ancillary jurisdiction beyond penalising PIF crimes.

2.3.2.2 INVESTIGATION ACTIVITIES

Concerning the investigative activities of the EPPO, Article 30 of Regulation (EU) 2017/1939 makes explicit reference to national legislation, establishing a general framework based on cooperation between the Member States themselves, with one fundamental specification: the maximum penalties that a Member State's national laws establish for specific crimes.

When the crime being investigated carries a maximum penalty of at least four years' imprisonment, Member States must ensure that European Delegated Prosecutors are authorised to order or request searches of premises, land, means of transport, private homes, clothing, and other personal property and computer systems. They are also authorised to implement any precautionary measures to preserve their integrity or avoid the loss or contamination of evidence.

European Prosecutors may also obtain archived, encrypted, or deciphered computer data, in either the original or another specified form, including bank account data and traffic data. They can freeze instrumentalities or proceeds of crime, including assets, that are expected to be subject to confiscation by the trial court if there is reason to believe that the owner, possessor, or controller of those instrumentalities or proceeds will seek to frustrate the judgment ordering confiscation.

Prosecutors may also order the interception of electronic communications sent or received by the suspected or accused person through any means of electronic communication he or she uses.

All these investigative measures may be subject to conditions laid down by applicable national law, including specific restrictions concerning specific categories of persons or professionals legally bound by an obligation of confidentiality.

A matter of fundamental importance is the formulation of requests for cooperation and coordination. If a crime affecting the EU's financial interests involves more than one State and it is necessary to collect evidence in another country, the European Prosecutor will be able to act on the basis of a single judicial authorisation from the Member State where the investigation will be carried out. This eliminates the need to resort to traditional cooperation mechanisms, such as rogatory commission, which must be used when the evidence has to be obtained from Member States that do not come under the EPPO.

Lastly, it is important to note that there is no regulation on the admissibility of evidence collected by the EPPO, unlike the general reference standards contained in Article 86, par. 3. TFEU (Bachmaier Winter, 2018, 122 ff.).

The regulation merely states that "evidence presented by prosecutors of the EPPO or the defendant shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State" (art. 37). This means that evidence collected according to the rules of one State (*lex loci*) may be admitted and used in another even when the internal law of that State (*lex fori*) provides for different forms and conditions of admissibility, as long as they respect the impartiality of the judge, the rights of defence recognised by the Nice Charter and, in general, the fundamental rights provided for by Article 6 TEU, the ECHR, and the national Constitutions.

2.3.2.3 The conclusion of the investigation

Once the investigations are over, the European Prosecutor responsible presents the European Prosecutor in charge of supervision with a report containing an illustrative summary of the case and a draft decision (art. 35, par. 1, reg.), also indicating possible alternatives, such as prosecution before a national judicial body, or dismissal.

The associated documentation, possibly accompanied by assessments produced by the prosecutor in charge of supervising the case, is sent to the Permanent Chamber. The Chamber then decides whether the prosecution should proceed in the Member State of the Delegated Prosecutor handling the case. If there are "sufficiently justified reasons" (Article 36(3)), the Chamber may appoint a Delegated Prosecutor from another Member State. If the prosecution is to be carried out in the Member State where the investigations are carried out, even when more than one national criminal court has jurisdiction, the case can be transferred to another Member State if the Permanent Chamber decides that involving a different judicial authority would better serve the general interest of justice. It is important to emphasise that the significant discretion granted to the Permanent Chambers is not subject to judicial review by the Court of Justice, which risks interfering with prejudicial effects on the right of defence (Lopez, 2021, 5).

The decisions that order the transfer or reassignment of the proceedings from one State to another are in fact capable of harming the defensive strategy planned or modulated on the rules of the national legal system in which the investigations were undertaken. In these cases, it must be modified according to the peculiarities of the different systems indicated by the Permanent Chamber.

The reasons for dismissal, on the other hand, are set out in Article 39 reg.: a) the death of the suspected or accused person; b) the mental illness of the suspected or accused person; c) amnesty granted to the suspected or accused person; d) immunity granted to the suspected or accused person, unless revoked; e) the expiry of the national legal deadline for criminal

proceedings; f) the final decision concerning the suspect or accused person regarding the same criminal acts; g) lack of relevant evidence.

2.3.2.4 COMMITMENT FOR TRIAL

Commitment for trial may be ordered by the EPPO only before the courts of Member States participating in strengthened cooperation and only if the crime being investigated was committed on their territory or by one of their citizens (Illuminati, 2018, 181).

There is no specific regulation for the judgment phase, although Art. 86 TFEU stipulates that the EPPO conducts criminal proceedings before national courts and that the trial phase, therefore, takes place before these. It is important to note that Article 5 of the Regulation envisages that, for all aspects not covered by the regulation itself, national law should apply. This refers in particular to the provisions that regulate the hearing phase, during which the European Delegated Prosecutors have the same powers as national prosecution bodies.

2.4. OLAF FUNCTIONING AND PROCEDURES: RECENT CRITICAL ISSUES

2.4.1. BRIEF INTRODUCTION TO OLAF: MAIN FUNCTIONS AND LIMITATIONS ON OLAF'S POWERS

The origin and functions of OLAF were extensively examined in the previous research report from the BETKOSOL project (see D2). However, as a starting point for the current framework, it is necessary to briefly review OLAF's main features and the problems connected with its functioning. This subsection will outline OLAF's main characteristics, while Section 2.4.2. will describe the principal reforms introduced after the establishment of EPPO. Section 2.4.3. will identify the main critical issues concerning the effectiveness of OLAF's actions and the safeguards for the parties involved.

Following the scandal that led to the resignation of the Santer Commission and the dissatisfaction with the actions of the Task Force for the Coordination of Anti-Fraud Policies (UCLAF), established in 1988, the European Anti-Fraud Office (OLAF) was created in 1999 (Commission Decision 1999/352/EC of 28 April 1999 establishing the European Anti-fraud Office (OLAF) and Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)).

OLAF's functions were originally governed by Regulation no. 1073/1999, later replaced by Regulation no. 883/2013; this last act has been recently amended by Regulation no. 2020/2223 (Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations). However, the legal framework regulating OLAF's powers is both complex, as Reg. no. 883/2013 refers in several points to Regulations no. 2988/96 and no. 2185/96, and multi-layered, as the latter regulations also refer to compliance with national law (Bellacosa and De Bellis, 2023).

As for its structure, OLAF is an internal organisation of the Commission, but it is autonomous and operates independently (for example, investigations are initiated by the Director General on their own initiative). OLAF inspections are divided into two types: internal (in cases in which the activities under investigation are carried out by employees of European institutions), and external (related to the conduct of economic operators in the territory of Member States). The type of powers that can be used by OLAF inspectors include: controls and spot checks, access to information and documentation, extracting copies of documents, and requesting oral explanations. In addition to extracting copies of documents, the appointed officials may also, "if necessary", take possession of them "to avoid any risk of subtraction". Moreover, in the context of on-the-spot inspections, OLAF often conducts digital forensic operations (DFO), such as the identification, acquisition, imaging, collection, analysis and preservation of digital evidence, which are covered by specific internal guidelines adopted in 2016.

OLAF has the power to conduct investigations, but it cannot impose sanctions. At the end of the investigation, it prepares a report describing the preliminary findings, and recommendations. Those recommendations indicate disciplinary, administrative, financial or judicial action to be taken by the institutions, bodies, offices, and agencies of the EU, and by the competent authorities of the Member States concerned. As clarified in the case law of the Court of Justice and now specifically recognised in the revised OLAF Regulation, these recommendations have no binding legal effect on the EU or Member States authorities. It is up to the relevant EU institution or national authorities to decide whether to proceed in taking administrative or judicial action.

Entrusted with the power to conduct administrative investigations, OLAF has been for twenty years the main anti-fraud controller at the EU level, conducting over 5,000 investigations. Despite the importance of its activities, however, the rate of recovery of financial resources has long been unsatisfactory: between 2009 and 2016, OLAF's investigations led to prosecution in fewer than half of the cases and resulted in the recovery of less than a third of the funds (European Court of Auditors, Special report No 01/2019: Fighting fraud in EU spending: action needed, 40-54). The lack of follow-up to OLAF's reports and recommendations has long been one of the crucial problems in the functioning of the system of protection of the EU's financial interests and one of the reasons behind the establishment of EPPO. The 2020 reform of Regulation 883/2013 sought principally to coordinate OLAF's role with the newly established EPPO and to

improve the effectiveness of OLAF's investigations, a necessity that has increased with the launch of NGEU and the flow of resources connected with it.

2.4.2. THE ROLE OF OLAF IN THE REFORMED FRAMEWORK

The legal basis for cooperation between OLAF and the EPPO is not the Lisbon Treaty, since art. 86(1) of the Treaty on Functioning of European Union (TFEU), which, as explained earlier (Section 2.3) provides the EPPO's legal basis, mentions the EPPO's cooperation only with Europol and Eurojust but not with OLAF. The main principles governing this relationship, however, were already established under the PIF Directive (art. 15) and the EPPO Regulation (recitals 100, 103 and 105, articles 101 and 110), namely mutual cooperation, information exchange, complementarity and the avoidance of duplication. The reformed OLAF Regulation reiterates these principles (Regulation 883/2013, art. 1. para. 4a) and specifies how they are to be implemented. The detailed arrangements of these cooperation mechanisms are further specified in a working arrangement between the EPPO and OLAF.

First of all, the relationship of mutual cooperation between the two bodies is based on a reciprocal duty of exchange of information. Information that may be relevant for the other party must be provided spontaneously or upon request and on a regular basis.

Secondly, if an investigation uncovers a case that falls under another institution's mandate, it is managed according to the principles of non duplication.

On the one hand, OLAF has an obligation to report to the EPPO any criminal conduct in respect of which the EPPO could exercise its competence, without undue delay (Regulation 883/2013, art. 12 *c*). Upon receiving the report, the EPPO must quickly inform OLAF of its decision to start its own investigation (Working arrangement between OLAF and EPPO, art. 5.1.2). If the EPPO decides to start its own investigation, OLAF will discontinue its ongoing investigation. In any case, if the EPPO is conducting an investigation regarding the same situation, OLAF shall refrain from opening a new investigation (Regulation 883/2013, art. 12 *d*). For this purpose, before starting its own investigation, OLAF shall verify via the EPPO's management system whether it is conducting an investigation.

On the other hand, the EPPO too has a duty to inform OLAF whenever it lacks competence to examine a case and it considers that the illegal activity in question may affect the financial interests of the Union. Such cases include not only all non-fraudulent irregularities affecting the EU's financial interests but also criminal offences not covered by the PIF Directive or covered by the directive but for which the EPPO is not competent (Regulation 883/2013, art. 8; Working arrangement between OLAF and EPPO, art. 5.2.3). While in the latter cases the EPPO has to inform OLAF, there are additional cases in which the EPPO may share information with

OLAF without being obliged to do so: for example, if it decides to dismiss a case or when it considers that a follow up of a non-criminal nature might be necessary (Working arrangement between OLAF and EPPO, art. 5.3).

An exception to the general rule whereby OLAF should refrain from investigating acts falling within the EPPO's remit is the provision permitting OLAF to carry on *complementary investigations*. They can be requested by the EPPO or proposed by OLAF and should facilitate the adoption of precautionary measures or financial, disciplinary or administrative action (Regulation 883/2013, art. 12 *f*.). The conditions under which OLAF can propose complementary investigations are strict. Firstly, if the Director-General, "in duly justified cases, considers that an investigation by the Office should also be opened in accordance with the mandate of the Office", he or she must inform the EPPO, specifying the nature and purpose of the investigation (Regulation 883/2013, art. 12 *e*, para. 1. If possible, also the physical persons or legal entities involved should be identified: Working arrangement between OLAF and EPPO, art. 6.2.2.). Secondly, the EPPO may object to the opening of an investigation by OLAF (or only to the performance of certain acts pertaining to the investigation), specifying when the grounds for the objection cease to apply (Regulation 883/2013, art. 12 *e*, para. 2). In its response, the EPPO might even identify the specific procedures for conducting the complementary investigations (Working arrangement between OLAF and EPPO, art. 6.2.6).

Other means of cooperation between OLAF and EPPO include the setting up of institutional structures, such as the organisation of high-level meetings between the Director General of OLAF and the European Chief Prosecutor at least once a year and the invitation of each of the heads of the two institutions to the other's management meetings (Working arrangement between OLAF and EPPO, art. 9).

Under the current legal framework, not only the 2020 reform of the OLAF Regulation but also the legal framework for NGEU must be taken into account. Because of the large amounts of EU financing that the NGEU is mobilising and because of the pressing deadlines for their use (both for the time frame of the NGEU itself, until 2026, and because of the stringent requirements concerning milestones and targets that States must meet for the payments to be disbursed), the risks of irregularities and fraudulent action are extremely high (European Commission, 32nd Annual Report on the Protection of the European Union's financial interests. Fight against fraud 2020, 2021, at 39-40).

The EU legislator was very well aware of these risks when the NGEU was approved. The key component of this framework, the Recovery and Resilient Facility Regulation (RRF), obliges States to set up internal control mechanisms (Reg. (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, art. 22, para. 1). In the event of irregularities or fraud, OLAF and the EPPO are required to intervene. The RRF Regulation refers to the current legal framework for OLAF (as well as the EPPO and

ECA) but makes no further specification (art. 22, para. 2 (e)). However, it uses the term "serious irregularities" (comprising fraud, corruption and conflicts of interest), which blurs the distinction between the competences of the two bodies still more.

2.4.3. Critical Issues: Effectiveness vs. guarantees?

In 2022, OLAF concluded 265 investigations, issuing 309 recommendations to the relevant national and EU authorities, of which 185 were financial, and recommended the recovery of €1.04 billion lost to the EU budget (OLAF 2023 Report). Over the same period, 190 new investigations were opened, 26 (14%) of which were related to EU own resources and 2 (1%) to illicit trade, 85 (45%) to shared management and the RRF, 23 (12%) to indirect management, and 39 (21%) to direct management. 18 (9%) investigations concerning internal matters were opened. Nevertheless, there are several areas in which the effectiveness of OLAF's action could be increased, in particular *vis-à-vis* the risks associated with the use of RRF funds. Calls to address these risks have been multiplying, and several institutions have identified a clash between the need for control and the need for expeditious implementation of the national recovery and resilience plans (ECA, *The Recovery and Resilience Facility's performance monitoring framework. Measuring implementation progress but not sufficient to capture performance*, Special Report 2023; OLAF Report 2022; Joint Europol/Olaf Report, *Assessing the Threats to the NextGenerationEU (NGEU) fund*, 2022; European Parliament resolution of 18 January 2024 on the protection of the European Union's financial interests – combating fraud – annual report 2022). Given this scenario, OLAF's role is a complex one: it has to carry on conducting administrative investigations, to provide support to Member States (through Union Anti-Fraud Program), and to streamline cooperation with the EPPO.

Firstly, as for cooperation with the EPPO, data currently available show that OLAF has so far submitted 133 requests to the EPPO in order to avoid parallel investigations (European Parliament, Resolution of 18 January 2024 on the protection of the European Union's financial interests – combating fraud – annual report 2022, para. 97). In 2022 alone (the latest available data), OLAF submitted 79 cases to EPPO, while EPPO shared information with OLAF in 81 cases (OLAF Report 2023, at 10). Twenty-two complementary investigations were opened in 2022, while OLAF supported the EPPO in 4 cases (OLAF Report 2023, at 10). Further examination, through interviews, of how cooperation between the two bodies is working is needed.

Secondly, there was a slight decrease in the number of investigations opened in 2022 compared to 2021 (190 new investigations against 192). This reduction may be attributed to the EPPO expanding its operations, potentially absorbing some areas of investigation. This trend, along with data on complementary investigations, suggests that the dynamic between the two bodies is evolving, consolidating a supportive role for OLAF, instead of an autonomous one. An

alternative explanation, suggested by the European Parliament, is that OLAF lacks the resources it needs, which should be increased (EP Resolution, 2024, para. 36).

In addition to further analysis on how initiatives intended to improve the effectiveness of OLAF are working in practice, a fuller analysis of how the guarantees for the parties involved are functioning is needed. The lack of sufficient guarantees for the inspected parties during OLAF's investigations is a lasting problem (Kratsas, pp. 65-97; Groussot-Popov, at 606; Covolo, at p. 210). Even though guarantees were substantially increased with the approval of Regulation no. 883/2013, several flaws were still present. The 2020 reform of the regulation addressed the most evident one, ie. the absence of a right to access to OLAF's files.

Under the current legal framework, when a judicial follow-up is recommended, the Office must now make the inspection report available to the person concerned. However, several limitations still apply. First, only the person concerned can make such request, while it is possible that the measures taken on the basis of OLAF's report can affect persons that were not qualified as concerned by OLAF, and that would then not be entitled to seek access. Secondly, the Office has to send requests to all recipients of the report and can grant access only with the explicit consent of the recipients. Access can be granted only if the recipients do not object, or if they fail to respond within 12 months.

A second innovation introduced in 2020 was the establishment of a "controller of procedural guarantees", an administrative body with the task of monitoring the Office's compliance with procedural guarantees (Regulation 833/2013, art. 9a). The first controller was appointed on 3 May 2022. In responding to complaints, however, the Controller can issue recommendations that are not binding on OLAF's Director-General. More specifically, the Controller first invites OLAF to take action to resolve the complaint (proposal for a solution). If no such solution can be found, as a second step, the Controller makes a recommendation to OLAF on how to resolve the complaint (Decision of the Controller of procedural guarantees adopting implementing provisions for the handling of complaints 2022/C 494/07, OJ C 494, 28.12.2022). Considering that the Controller came into operation in October 2022, it has so far been working for only one year. In 2023, 17 complaints were submitted (of which the vast majority concerned internal investigations) and, by the end of the year, the Controller had completed assessments relating to 14 complaints. Of these, in 10 cases the Controller found no breach of the complainants' procedural guarantees; in one it closed the case because the complainant had brought the same issues before a court, and one complaint was dismissed for lack of interest. In two cases the Controller closed the case as OLAF had accepted its invitation to resolve the complaint (OLAF Controller of Procedural Guarantees, *Annual activity report 2023*). Thus, no case has so far arrived at the second stage of the procedure, in which the controller issues a recommendation.

How the two innovations introduced in 2020, namely the (limited) right to access and the introduction of a controller of procedural guarantees, are working in practice is worth close examination. It is widely known that there are several gaps in judicial review, given that the Court of Justice has established under Article 263 TFEU of OLAF's decision to inspect, of any

inspecting act, of the inspection report and recommendations, and of the of information during the investigation (Case T-193/04, *Tillack*, paras. 67-81; Case T-215/02, *Santiago Gómez-Reino*, para. 50; Case T-29/03, *Comunidad Autónoma de Andalucía*, para. 40; Case T-289/16, *Inox Mare*, paras. 29–30). Whether controller of procedural guarantees can constitute an effective remedy vis-à vis these limitations is worth.

2.5. COORDINATION AND COOPERATION BETWEEN EU AND NATIONAL ADMINISTRATIONS FOR THE PROTECTION OF THE FINANCIAL INTERESTS OF THE UNION: THE AFCOS NETWORK

The BETKOSOL project has already highlighted the role of OLAF, and earlier sections of this working paper have focused exclusively on this office and its recent updates. In this sub-section, we will examine how protecting the EU's financial interests influences the design of procedures in the Member States within the broader framework of the Functioning of the European Union.

2.5.1. COORDINATION AND COOPERATION UNDER REGULATION (EU, EURATOM) NO 883/2013

'Cooperation' and 'coordination' are two keywords in Regulation (EU, Euratom) No 883/2013 on investigations conducted by the European Anti-Fraud Office (OLAF) (the 'Regulation'). Their combined use is a signal that the approach to the protection of the financial interests of the Union is still a mixed one. 'Cooperation' reflects the interaction between independent parties – national institutions representing Member States and European institutions with specific, limited powers. On the other hand, 'coordination' reflects the institutional arrangements among the various actors and common procedures that create a single administrative system readable through the lens of 'integration'. While the word 'cooperation' implies an international law approach, 'coordination' recalls an approach more akin to administrative law. It is no coincidence that Article 14 refers to 'cooperation' with third countries and international organisations.

Article 1 establishes that OLAF provides the Member States with assistance from the Commission in organising close and regular 'cooperation' between their competent authorities in order to 'coordinate' their action to protect the financial interests of the Union against fraud. More specifically, OLAF promotes and coordinates, with and among the Member States, the sharing of operational experience and best procedural practices in safeguarding the financial interests of the Union and supports joint anti-fraud actions by Member States on a voluntary basis (Art. 1(2), Regulation (EU, Euratom) No 883/2013).

To apply the Regulation, the competent authorities of the Member States, in concert with institutions, bodies, offices, or agencies may set up administrative arrangements with the Office. These may concern sending information and how investigations are carried out (Art. 1(5), Regulation (EU, Euratom) No 883/2013). Among the definitions provided, one concerns

'administrative arrangements', i.e., tools of a technical and/or operational nature employed by OLAF to facilitate 'cooperation' and the exchange of information between the parties without creating additional legal obligations (Art. 2(7), Regulation (EU, Euratom) No 883/2013).

According to the Regulation, each Member State also designates a service (the so-called 'anti-fraud coordination service', AFCOS) to aid effective 'cooperation' and the exchange of information, including information of an operational nature, with OLAF. Where appropriate, and in accordance with Member State national law, the AFCOS may be considered the competent authority for the purposes of the Regulation (Article 12a(1), Regulation (EU, Euratom) No 883/2013). At OLAF's request, before deciding whether to open an investigation, as well as during or after an investigation, the AFCOS provides or coordinates the necessary assistance to allow OLAF to perform its tasks effectively. This assistance includes support from various competent authorities in Member States, as stipulated in Article 3(5) (6) (concerning external investigations), Article 7(3) (concerning investigation procedures), and Article 8(2)(3) (on the duty to inform OLAF) of the same Regulation (Article 12a(2), Regulation (EU, Euratom) No 883/2013). An AFCOS should assist OLAF upon request so that the Office may conduct 'coordination activities' in accordance with Article 12b (see below), including, where appropriate, 'horizontal cooperation' and exchange of information between different AFCOSs (Article 12a(3), Regulation (EU, Euratom) No 883/2013).

Article 12b concerns 'coordination activities'. It establishes that OLAF can organise and facilitate 'cooperation' between the competent authorities of Member States, institutions, bodies, offices and agencies, as well as third-country authorities and international organisations, in accordance with the cooperation and mutual assistance agreements and any other legal instrument in force. To protect the financial interests of the Union, the participating authorities and the Office may collect, analyse, and exchange information, including operational information. OLAF personnel may accompany competent authorities during investigative activities if requested to do so by those authorities. The Office will, where appropriate, draw up a report on the coordination activities conducted and share it with the competent authorities of the other Member States and institutions, bodies, offices, and agencies concerned (par. 1 and 2).

2.5.2. The Working Party on Combating Fraud (GAF) in the Council of the European Union

The Council of the EU is supported by the committee of permanent representatives of the governments of the Member States to the European Union (Coreper) but also by more than 150 highly specialised working parties and committees known as the "Council preparatory bodies".

The interpretation arrangements for Council preparatory bodies are laid down in Decision No 54/18 (as amended by Decision No 16/21) of the Secretary General of the Council, concerning interpreting for the European Council, the Council and its preparatory bodies.

The preparatory bodies can be divided into three categories. The first are the committees set up by the treaties, intergovernmental decisions, or by an act of the Council. They are mostly permanent and often have an appointed or elected chairperson. Secondly, there are committees and working parties set up by Coreper itself. These deal with very specific subjects and are chaired by the delegate of the country holding the rotating 6-month presidency of the Council. Thirdly, ad hoc committees can be created for a specific purpose and cease to exist when their task is fulfilled.

The Working Party on Combating Fraud (GAF), which is not a permanent preparatory body, is part of the second group, as can be inferred from doc. N. 16975/23, POLGEN 194, Council of the EU, Brussels, 20 December 2023.

The GAF deals with issues related to the protection of the financial interests of the EU and the fight against fraud and other illegal activities affecting those interests, particularly in connection with the work of OLAF. The working party is responsible for examining proposals for legislation relating to the work of the Commission and OLAF on combating fraud, as well as for examining the annual reports on the protection of the EU's financial interests.

The working group meets several times a year. Among the topics discussed, we can find, for example, the presentation and discussion of the OLAF's Report for 2023 (meeting held on 19th June 2024, through an informal video conference). For the presentation and discussion of the PIF Report and the CAFS (meeting held on 11th October 2023, in person).

The GAF is also responsible for preparing the Interinstitutional Exchange of Views in accordance with Article 16 of Regulation (EU, Euratom) No 883/2013. According to this provision, the European Parliament, the Council, and the Commission must meet OLAF's Director-General for an exchange of views on the political level to discuss the latter's policy regarding methods of preventing and combating fraud, corruption, or any other illegal activity affecting the financial interests of the Union. OLAF's Supervisory Committee is expected to participate in the exchange of views. In addition, the European Chief Prosecutor is invited to attend the exchange, together with representatives of the Court of Auditors, the EPPO, Eurojust, and Europol, who may be invited to attend on an *ad hoc* basis when requested by the European Parliament, the Council, the Commission, the Director-General, or the Supervisory Committee.

The exchange of views may relate to any subject upon which the European Parliament, the Council, and the Commission agree. In particular, the exchange of views may relate to the strategic priorities for OLAF's investigation policies, the opinions and activity reports of the Supervisory Committee provided for under Article 15, Regulation (EU, Euratom) No 883/2013, the reports of the Director-General under Article 17(4), Regulation (EU, Euratom) No 883/2013 and, as appropriate, any other reports by the institutions relating to OLAF's mandate, the framework of the relations between OLAF and the institutions, bodies, offices and agencies, in particular the EPPO, including any horizontal and systemic issues encountered in the follow-up to the Office's final investigation reports, the framework of the relations between OLAF and the competent authorities of the Member States, including any horizontal and systemic issues encountered in the follow-up to the OLAF's final investigation reports, the relations between

OLAF and the competent authorities in third countries, as well as international organisations within the framework of the arrangements referred to in this Regulation, and the effectiveness of OLAF's work in terms of fulfilling its mandate.

2.5.3. The Advisory Committee for the Coordination of Fraud Prevention (COCOLAF) and the Anti-fraud Coordination Service (AFCOS) Group

OLAF cooperates directly with EU Member State authorities to improve fraud prevention policy and practice through the Advisory Committee for the Coordination of Fraud Prevention (COCOLAF), which coordinates how the European Commission and its Member States go about combating fraud involving EU money. The legal basis for COCOLAF is Decision 94/140/EC, as amended by Decision 2005/223/EC. The committee has also adopted its own rules of procedure (Group Art 280/19-07-05/7/EN).

The important annual Commission report on the Protection of the EU's financial interests, adopted under Article 325 TFEU (the 'PIF Report'), is prepared by OLAF as the lead service in cooperation with the Member States within the framework of COCOLAF.

The participants in COCOLAF are representatives from the competent national services of the Member States and Commission services. The Commission is represented in the Committee by OLAF (the Coordinator), the Commission services responsible for the revenue side of the EU budget (DG BUDG, DG TAXUD), and the Commission services responsible for shared management funding and other horizontal services (DG GROW, Legal Service, etc.). The Committee consists of two representatives for each Member State, and they may be assisted by two representatives of the competent national authorities. It is chaired by a representative of the Commission (Art. 3, Decision 94/140/EC, as amended by Decision 2005/223/EC).

COCOLAF's mission is to advise the European Commission on any matter relating to the prevention and prosecution of fraud and all other illegal activities adversely affecting the financial interests of the Community. It also addresses any matter concerning cooperation between national authorities or between Member States and the Commission, to protect these financial interests. Its goal is to organise more effective and regular cooperation among the competent authorities to counter fraud. Among its specific tasks, the committee may be consulted by the Commission on any matter relating to the protection of the EU's financial interests and the protection of euro banknotes and coins against counterfeiting. The Committee may also be consulted by the Commission on any matter relating to the legal protection of the financial interests of the EU, in particular the police and judicial aspects of developing, and cooperating on, the fight against fraud. Further, COCOLAF assists the Commission in the preparation of delegated acts, coordinates with Member States, exchanges views, and provides the Commission with expertise when preparing implementing measures, i.e. before the Commission submits these draft measures to a comitology committee (for its powers and tasks, see Art. 1, Decision 94/140/EC, as amended by Decision 2005/223/EC).

OLAF and the AFCOSs meet regularly under the umbrella of COCOLAF, usually once or twice a year. Details of the meetings of the COCOLAF expert group and its sub-groups are published on the Communication and Information Resource Centre for Administrations, Businesses and Citizens (CIRCABC) platform of the Europa public server. Access to the online COCOLAF Interest Group requires the use of personal data and is restricted to relevant anti-fraud public authorities in the Member States.

COCOLAF's chairperson may canvass the position of the Committee members on the items on the agenda for the meeting. As far as possible, the chairperson attempts to obtain the general agreement of the Committee on these questions. Any members of the Committee who object may request that the reasons for their objection be recorded in the Minutes of the Meeting (Art. 4, COCOLAF Rule of Procedure).

There are also sub-expert groups for different policy areas (Art. 3(3), 1, Decision 94/140/EC, as amended by Decision 2005/223/EC and Art. 5, COCOLAF Rule of procedure). These groups elicit cooperation among specialised national fraud prevention services (Fraud Prevention Group), share operational experience and good practices, and raise awareness of fraud (Reporting & Analysis of Fraudulent and Other Irregularities group).

In the context of this working paper, special attention should be given to the AFCOS Group as a proper introduction to the following section. In fact, all Member States have established an AFCOS in accordance with Article 12a of Regulation 883/2013. The main purpose of these AFCOS Group meetings is to ensure that OLAF and national authorities cooperate and share information efficiently. This includes exchanging experiences and best practices in investigative cooperation.

Member States differ in how they participate in COCOLAF. The majority are represented by the Ministry of (Economy and) Finance. Sometimes these ministries are linked to other sectoral public authorities, as in Sweden, where the National Economic Crimes Bureau also participates in the meetings. Conversely, Membership Status in Italy is represented by four public authorities: the Ministry of Agricultural Policy, the *Guardia di Finanza* (the Financial Police), the *Presidenza del Consiglio dei Ministri* (the Presidency of the Council of Ministers), and the *Agenzia delle Dogane* (the Customs Agency). Denmark has adopted a mixed approach, as the institutions involved are the Danish Food Industry Agency, the Tax and Customs Administration, the Ministry of Finance, the Ministry of Employment, the Enterprise and Construction Authority, and the Ministry for Food, Fisheries and Agriculture.

2.5.4. THE MAIN FEATURES OF THE AFCOS NETWORK ACROSS EUROPE

As briefly mentioned in the introductory section (1.2.5.1), EU Member States are required to designate an AFCOS in accordance with Article 12a of Regulation 883/2013. These are not the same national institutions involved in COCOLAF, although they do participate in its

AFCOS group. Of course, in countries where only one public authority has been appointed for COCOLAF, that same authority will act as the corresponding AFCOS and will join the AFCOS group.

The mandate of the AFCOSs may vary, depending on country-specific circumstances. In all cases however, the AFCOS should have the mandate for ensuring cooperation with OLAF as required by Article 325 of the Treaty on the Functioning of the EU and coordinating, within the country, legislative, administrative, and investigative obligations and activities related to the protection of the EU's financial interests as appropriate.

Member States are autonomous in deciding where to best place the AFCOS within their national administrative structure. Italy (COLAF – Italy's Anti-Fraud Coordination Service, (the Department for European Policies), Romania (the Fight Against Fraud Department – DLAF), and the Slovak Republic (the National OLAF Office) set up a specific service within the Prime Minister's/Government Office. Most of them opted for the Ministry of Finance (or similar), apart from three countries: Sweden opted for the Ministry of Justice, and Lithuania for the Ministry of the Interior. Others chose technical authorities, with Greece opting for the National Transparency Authority (NTA), and Hungary for the National Tax and Customs Administration (NTCA), along with the OLAF Coordination Bureau.

In the next part of this working paper, dedicated to national experiences, four case studies will be analysed in detail.

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SECTION II

The Comparative Study

Task 1.2

COMPARATIVE STUDY

1. GENERAL INTRODUCTION

The BETKOSOL project previously conducted a comparative study focused on administrative and criminal law aspects. This study revealed the complexity of each country's institutional arrangements for protecting the EU's financial interests. In the second part of this working paper, a new comparative analysis will examine four Member States (Italy, Belgium, Poland, and, this time, also Spain), specifically focusing on the role and nature of AFCOSs, as well as certain administrative procedures and controls. Additionally, it will cover the most relevant updates related to the protection of the EU's financial interests from the perspective of criminal law and procedure, including the PIF Directive and the functioning of the EPPO.

From the administrative law perspective, some research questions arise from the previous European-level analysis (especially par. 2.5). These questions, especially concerning the interaction between EU and national administrations in protecting the EU's financial interests, will also be the focus of future working papers.

Firstly, it should be determined whether all the AFCOSs are respecting their mandate. If not, it is important to understand why, and to ensure that the corresponding networking operates effectively for the purposes of Regulation 883/2013 and beyond.

Secondly, it is important to understand the rationale behind the AFCOS model adopted in each country. Why did each Member State choose its particular approach? Three out of four countries in this report adopted the prevalence model, establishing their AFCOS within the Ministry of Finance (or a similar entity). Only Italy, since 1992, has taken a specialised and unique approach for its AFCOS, creating a 'module' of coordination under the Presidency of the Council of Ministers.

This analysis contains both concrete and more theoretical implications.

In the first case (concrete implications), a comparative analysis could improve the effective functioning of the AFCOS network. Perhaps the first issue to be addressed is the effectiveness of its coordinating role as a 'sorting point' within each national legal system (taking for granted the constellation of institutions involved, see BETKOSOL D.1, the first paragraph of the current working paper and Chapter 3 of the PIF Report, which reveals the complexity of the EU control framework with its multitude of players at both European and national levels) and its interaction with OLAF. Another important operative issue is whether an AFCOS has investigative powers like those of OLAF. In this sense, it is interesting that OLAF itself can be a model for the national AFCOSs, especially in countries that will join the EU in the coming years. For example, Romania's approach is instructive. The question as to which administrative

authority in a Member State should be assigned ex-ante controls or whether an authority should have the mandate to perform both ex-ante and ex-post controls like OLAF was answered by Romania in establishing the Fight Against Fraud Department (DLAF).

Romania established this department as its AFCOS in 2003. DLAF is the national antifraud coordinator responsible for fulfilling all the Romanian obligations regarding the protection of the EU's financial interests according to the provisions of Art. 325 of the TFEU. Since 2011, the DLAF has operated as an entity with legal personality within the working apparatus of the Government, under the coordination of the Prime Minister. The DLAF is led by a Head of Department holding the rank of State Secretary and is organised into three main directorates, namely Control, Legal Affairs, and Information Management. It is tasked, first, with coordination (it coordinates the national institutions involved in the fight against fraud), operational coordination, and intelligence, training and communication activities. It also has to cooperate (in the form of receiving technical assistance or operational support from OLAF and national authorities or counterpart organisations from EU Member States). Other roles include prevention (taking legal and administrative measures and running training programmes and media campaigns), investigation (carrying out operative controls to identify irregularities, fraud and other illegal activities affecting the EU's financial interests in Romania), and reporting irregularities (guaranteeing, coordinating, and monitoring that irregularities are reported between the national institutions and the European Commission). It shares many features with the Italian AFCOS, but the latter has no investigative or sanctioning powers, nor a legal personality of its own.

In the second case (abstract implications), we might ask if this is the confirmation that the European Union has been experimenting for some time with the 'financialisation' of its integration. Is the protection of the EU's financial interest merely a technical matter, or does it also have a political dimension? How do financial interests enter the rule of law? How are financial interests shaping the rule of law? These are questions that find an answer, in part, in the first section of this working paper (European level). Nonetheless, it could benefit from a bottom-up approach.

Turning to substantive and procedural criminal law, research conducted under the BETKOSOL project revealed that the protection of the EU's financial interests has driven several significant innovations.

First, the previous report (D1 BETKOSOL) demonstrated that Member States have worked to align their provisions on offences affecting the EU's financial interests with the criminalisation requirements of the PIF Directive. In this respect, the BETKOSOL project identified various trends: on the one hand, some Member States have, with regard to certain provisions, introduced criminal penalties for criminal offences affecting the EU's financial interests that are even stricter than those against national financial interests, raising concerns about fairness and the proportionality of criminal penalties. On the other hand, the annual reports on the protection of the EU's financial interests (the "PIF" Report) have highlighted several cases of non-compliance with the Directive's obligations in national legislation.

Moreover, from the point of view of criminal procedural law, the previous research examined the strengths and weaknesses associated with the start of the activity of the new EPPO (see D2 BETKOSOL), together with a comparative analysis of the different choices made by the countries identified as 'case studies', including as to whether or not to join the EPPO system.

In the light of the above, the main purpose of this section is to provide an update on the current state of national systems for protecting the EU's financial interests. The analysis will employ a comparative methodology, focusing, as mentioned, on the four selected countries participating in this research, with particular attention to normative developments since the conclusion of the BETKOSOL project.

As we shall see, although some gaps and criticalities remain, there are many regulatory changes worth examining more closely that indicate some steps forward. For example, Poland's recent involvement in the EPPO and Italy's recent reforms to amend the (few) features of the legislation still not in line with the PIF Directive, are noteworthy improvements.

Some further developments are expected soon, particularly after the recent proposal for an EU directive on combating corruption by the European Commission in 2023, which – if adopted – will have a substantial effect on the protection of the EU's financial interests through criminal law.

The next pages will provide a broad overview of these topics in the context of criminal law and procedure, setting the scene for future developments, which will be examined in greater detail in the subsequent stages of the BETKONEXT project.

Section II

Comparative Study

Italy

Italy

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2. ITALIAN CASE STUDY

This section on the Italian case updates the results of the BETKOSOL project.

The key players in the protection of European financial interests are unchanged, but over the last two years, some sets of rules have evolved and gradually transformed. On the one hand, there is significant emphasis on achieving the objectives of the National Recovery and Resilience Plan (NRRP). On the other, the system has adapted to the establishment and operation of the EPPO.

2.1. UPDATES FROM THE ADMINISTRATIVE LAW PERSPECTIVE: THE CHALLENGE OF THE NRRP IN TERMS OF EXTERNAL AND INTERNAL CONTROLS FOR PROTECTING THE EU'S FINANCIAL INTERESTS

Regarding the first aspect mentioned, the governance of the NRRP and its stakeholders illustrate how management, organisational culture, and public accounting practices are evolving gradually, largely due to the influence of the European system (Tatì, 2024).

Among the changes inspired by the NRRP investment implementation process—particularly due to the performance-based nature of the plan—impacting managerial and organisational culture and accounting practices, are:

- the adoption of common monitoring indicators, also in line with sustainable development objectives, thus opening up the culture of impact measurement.

In order to enable the European Commission to monitor the implementation of the NRRP and measure the achievement of the general and specific objectives set (Art. 29, Regulation (EU) 2021/241), it was given the power to adopt, by means of special delegated acts, a set of so-called 'common indicators', approved by Delegated

Regulation 2021/2106 and whose transmission obligation is reiterated in point 1.11 of the Operational Arrangements of the NRRP. The common indicators are 14 in all and require, in some cases, details by gender and age group. The Commission has prepared a Statistical Guide, which provides initial guidance on the definitions of each indicator. As a result, the Ministry of Economy and Finance (*Ministero dell'economia e delle finanze*, MEF) adopted specific circulars, also following technical discussions with the administrations in charge of cohesion policies, given the adoption of a similar logic already for the structural funds. In the MEF Circular No. 34/2022, with annexed guidelines, it is specified that it is the task of the implementing entities to update the indicators on the ReGis system (the informatic system available for monitoring the NRRP achievements in the county), and on this basis, and after verification of the quality of the data by the NG-EU Mission Unit, the collection of common indicators is transmitted to the Commission by the National Contact Point through the European Fenix platform, by 28 February and 31 August each year. The guidelines state that the common indicators are inspired by the 'outcome' logic, i.e. aimed at tracking progress achieved through the RRF targets, as they seek to indicate the changes that have taken place in a given context and the effects that these changes have for the relevant beneficiaries. The general principles underpinning them apply to all reforms and investments supported by the Facility, regardless of the source of their financing, which may be fully or partially covered by RRF resources.

- experimentation with more accrual-oriented management and reporting sensitive to simplified cost options (CSOs), also in line with important national reform projects.

1. So-called accrual accounting is economic accounting. In the context of the management of the NRRP resources, entities in financial accounting, e.g. local authorities, were required to manage the resources related to the projects financed under the NRRP according to the provisions of that Ministerial Decree (of 11.10.2021) which originally assigned the NRRP resources to the national administrations. Specifically, for local authorities, Article 3 stipulates that transfers of these resources must be made to the respective single treasury account. Failing this, to the respective bank/post accounts. Having said this, it has been clarified, through the FAQ of the General Accounting Office (*Ragioneria Generale dello Stato*, RGS, inside the MEF) that the implementing entities are required to comply with the obligation to ring-fence the resources of the NRRP by opening specific chapters (Art. 9, Decree-Law No. 77/2021, see here). To this end, the 'Manual of the financial procedures of the NRRP interventions' attached to the MEF Circular No. 29/2022 and in particular paragraph 10, provides for the integration of the description of such chapters with the indication of the mission, component, investment and CUP (*Codice unico di Progetto*, a single code associated with each public investment) for local authorities in financial accounting. Since the tied resources of the NRPP for local authorities are also subject to the cash constraint, it is specified that Legislative Decree No. 118/2011 (which provides the accounting rules for the local sector) does not provide for a specific method of managing this constraint, therefore, autonomous local authorities can self-regulate. It has been specified that the perimeter obligation is considered fulfilled also with the use of the articulations of the elementary units of the Executive management plan and the financial management budget.
2. As recalled on the ItaliaDomani website, Article 10, paragraph 4 of Law Decree No. 121/2021 (one of the different decrees that set the rules for facilitating the NRRP implementation) allows the use of the so-called CSOs, in reality even beyond the NRRP and the structural funds: 'Where not otherwise provided for in the NRRP, for the purposes of accounting and reporting of expenditure, the administrations and entities responsible for implementation may use the "simplified cost options" provided for in Articles 52 et seq. of Regulation (EU) 2021/1060 [...]. Where possible, the simplified modality referred to in the first sentence shall also be extended to the accounting and reporting of expenditure incurred under the Development and Cohesion Plans referred to in Article 44 of Decree-Law No. 34 of 30 April 2019 [...]' (See Guide to Simplified Cost Options (CSOs) - Guideline EGESIF_14-0017).

- At the macroeconomic level, the effects of the NRRP on public finance balances and, therefore, the influences (if any) of these new instruments or procedures on the functioning and debate for a new European economic governance will also have to be investigated.

Along the same paths, for the continuation of the research (as suggested by the referee), monitoring could also be of interest: i) Law draft AC 1621 of 19.12.2023 on 'Amendments to Law No. 20 of 14 January 1994, to the Code of Accounting Justice, as set out in Annex 1 to Legislative Decree No. 174 of 26 August 2016, and other provisions on the auditing and advisory functions of the Court of Auditors and liability for fiscal damage'. Hearings were held at the end of July 2024 before the Joint Commissions on Constitutional Affairs and Justice; ii) of the consequences of the Constitutional Court's ruling no. 132 of 2024, which rejected the claims of constitutional illegitimacy raised against the so-called erarial shield referred to in Article 21, paragraph 2, Decree-Law no. 76 of 2020. The choices on the subject of liability for damage to the treasury are also likely to affect the proper use of European public resources.

Despite these long-term trends in public accounting and project management, if one wished to reconstruct an evolutionary parabola for NRRP governance between 2021 and 2023, what would come to light first would be a so-called 'upturn' phase and then a 'technical-political' split (under Meloni Government), with a rethinking of the role of the Presidency of the Council of Ministers (*Presidenza del Consiglio dei Ministri*, PCdM). There has also been more direct involvement of the Minister for European Affairs, inter-ministerial committees, and the *Cabina di Regia* (steering committee) for the NRRP to the detriment of the Ministry of Economy and Finance (MEF). This marks a departure from the earlier "coupling" approach between the PCdM and the MEF that had characterised the governance emphasised under Decree-Law no. 77/2021 during the Draghi Government.

This split suggests a more substantial recharacterisation of governance than a mere strengthening of the PCdM. The constitutionalist doctrine, as noted by Menegus (2023), was already divided on whether the new NRRP governance model in 2021 had intensified endo-governmental dynamics, which had long seen the dominance of the President of the Council of Ministers over the collegiality of the government, as required by the Constitution. The governance models, while differing and constrained by structural and contextual factors, both seek to uphold the constitutional framework. In the 2021 governance model, this involved favouring the MEF, resulting in an unusual but less intense dominance of one ministry over the others. The 2023 governance model revived the role of minister without portfolio, strengthening that of the *Cabina di Regia* and the interministerial committees, which has led to an even greater encroachment on regional and local autonomy. On the academic debate concerning NRRP governance, see Niccolai (2024).

In this regard, we can observe a certain 'verticalisation' of governance, particularly in terms of strengthening relations with European institutions. The Minister for European Affairs

is not only responsible for coordinating the NRRP but also oversees 'South and Cohesion Policies', leading to a reconfiguration of governance in these areas. The Minister for European Affairs is, therefore, at the head of the Department for Cohesion Policies at the PCdM, which now incorporates the functions previously managed by the defunct Agency for Territorial Cohesion. Meanwhile, the Department for Regional Affairs and Autonomies, also within the PCdM, remains under another minister without portfolio.

This reflects an effort to consolidate the management of 'European funds' – including structural funds and the NRRP – under the purview of European affairs rather than regional and autonomous affairs. Another element of discontinuity consists, therefore, precisely in what can be defined as the 'reabsorption' of NRRP-specific management into the broader framework of structural funds. These forecasts have reopened space for the role of a key organisational body responsible for overseeing European funds, namely COLAF (the Italian AFCOS). Previously, COLAF's role was somewhat ambiguous due to the NRRP's distinctiveness. However, the penultimate annual COLAF report, which refers to 2021 but was presented in December 2022, highlighted the Minister of European Affairs' focus on this entity in his introduction, where he presented its activities and changing structure. For instance, it is described as the government body in charge of combating irregularities and fraud against the EU budget, with its involvement in the NRRP Fraud Contact Network explicitly noted. NRRP Governance Decree No. 4 intervened precisely on the functioning of this committee in 2024 (see below for more details).

On the contrary, with the 2023 (and 2024) reform, there were no big governance changes in the so-called 'downturn' or descending phase, apart from the consequences of the application of the spoils system to the NRRP mission units in the ministries. In fact, in terms of implementation, there is no ad hoc governance for the NRRP, at least not through express legislative provision, and it remains within the discretion of each administration. However, the renegotiation of funding by the Government with the European Commission, underway during 2023, as well as the exclusion of concurrent control (*controllo concomitante*) by the National Court of Auditors (*Corte dei Conti*), have affected the implementation of investments by the implementing entities, bringing repercussions on the organisation and internal activities of the individual administrations. Indeed, on 27 February 2023, Regulation (EU) 2023/435 was approved, amending Regulation (EU) 2021/241, with the inclusion of the so-called REPowerEU chapters in the national recovery and resilience plans.

Specifically concerning the control phase, it should be noted that the Court of Auditors plays a significant role in overseeing NRRP investments and reforms. Recent changes have further influenced its internal organisation. The Court's ability to perform effective and timely oversight of the NRRP undoubtedly depends on its endogenous functioning. The need for coordination among various offices and departments was evident in the regulation governing the Committee for Concurrent Control (*Collegio per il controllo concomitante*). This regulation frequently addresses the need for collaboration between different Chambers with distinct functions at the territorial level within the NRRP control system, and between the control and judicial functions. Thus, the 'network design' approach within the coordination framework of

controls was made explicit. For instance, the Committee for Concurrent Control, acting in its role overseeing NRRP-related controls, worked alongside other relevant sections to prepare the six-monthly report for parliament, presented by the *Sezioni reunite in sede di controllo*.

NRRP Governance Decree No 4 (Decree-Law No 19/2024) seems to have opened up a further phase in the history of NRRP governance, which might be called 'self-awareness' with regard to control activity. On the one hand, is the (one might say 'inevitable') strengthening of COLAF. On the other hand, in the absence of concomitant control, an alternative procedure of supervision over holders and implementers was provided for in the PNRR mission structure at the PCdM, in synergy with the Inspectorate General for the PNRR at the MEF. Lastly, the issue of recovering funds not recognised by the European Commission due to unmet objectives is explicitly addressed in Articles 1 to 3 of Decree-Law No. 19 of 2 March 2024.

2.1.1. THE "IN-DEPTH" FUNCTIONING OF THE ITALIAN AFCOS. UPDATES FOLLOWING CHANGES TO NRRP GOVERNANCE

As reported in *The Protection of EU Financial Interests across Four National Legal Systems: a Comparative Perspective*, Deliverable 1 of the BETKOSOL project (Grant Agreement (GA) No: 101015421), in https://betkosol.luiss.it, p. 51, 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 OLAF investigations, COLAF has been designated as the central AFCOS for Italy. COLAF operates at the Department for European Policies, in the Italian 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). It is chaired by the political authority responsible for European Affairs (the Minister or Secretary of State) or his/her delegate.

Thus, in addition to the Head of Department for European Policies, it is made up of the Chief of the Financial Police Anti-fraud Unit (*Guardia di Finanza, Nucleo per la repressione delle frodi nei confronti dell'UE*, created under 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 (appointed by the Chair), and Members appointed by the national Conference of Regions, Cities, and Local Authorities.

Among its numerous tasks, COLAF provides advice and coordination at the 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 involving European funds and oversees their recovery in case of misuse. It also reports to the European Commission in accordance with Article 325 TFEU. Article 54 of Italian Law No 234/2012 requires COLAF to draw up a specific annual report for parliament, illustrating the initiatives undertaken, the

measures adopted, the results achieved, and the national strategy to protect the EU's economic and financial interests.

Hence, COLAF has no direct investigative authority, its function being limited to coordination. However, from the point of view of what is of interest here, the legislator has recently introduced significant regulatory innovations.

To reinforce the unified strategy of the activities for preventing and combating fraud and other unlawful acts relating to PNRR funds, the cohesion policies for the 2021-2027 programming cycle, and the related national funds, Article 3 of Decree-Law No. 19 of 2 March 2024 extended COLAF's functions set out in Article 3, paragraph 1 of the regulation referred to in Presidential Decree No. 91 of 14 May 2007 to include the PNRR.

To achieve this goal, COLAF: a) requests information on the initiatives taken by institutions, bodies and entities to prevent and counter fraud and other unlawful acts on PNRR-related funding; b) promotes the conclusion and monitors the implementation of specific memoranda of understanding with the *Guardia di Finanza* without imposing new or greater burdens on the public finances. Within the framework of these memoranda, procedures can be established for the *Guardia di Finanza* to share (even derogating from the obligation of official secrecy) data, information, and documentation acquired during institutional activities and deemed relevant to the activities falling within the competence of the General Accounting Office of the State and the central administrations responsible for the interventions provided for by the PNRR (Article 7, paragraph 8, of the cited Decree-Law No. 77 of 2021); c) assesses the suitability of drawing up any proposals, including regulatory proposals, to be submitted to the competent administrations or the PNRR Steering Committee (Article 2 of Decree-Law No. 77 of 2021); d) develops analytical activities related to the results of the measures preventing and countering fraud and other unlawful acts concerning PNRR funds.

For the purposes set out in Article 3 of Decree-Law No. 19/2024, the composition of COLAF is supplemented as follows: a) the coordinator of the PNRR Mission Structure (Article 2 of Decree-Law No. 13 of 24 February 2023); b) the Head of the Department for Cohesion Policies and the South of the Presidency of the Council of Ministers; c) the coordinator of the Special Economic Zone (SEZ) Mission Structure (Article 10, paragraph 2 of Decree-Law No. 124 of 19 September 2023); d) the chairman of the Network of anti-fraud contact persons of the PNRR established at the MEF - Department of the State General Accounting Department; e) the chairman of the Coordination Committee established at the Ministry of the Interior by the Public Contracts Code (Article 39, paragraph 9, Legislative Decree no. 36); f) a representative of the General Command of the Carabinieri Corps; g) a representative of the General Command of the *Guardia di Finanza*; h) a representative of the Special Public Expenditure and EU Fraud Repression Unit of the *Guardia di Finanza*; i) a representative of the Court of Auditors; l) a representative of the National Anti-Corruption Authority; m) one representative of the FIU of the Bank of Italy; n) one representative of the National Anti-Mafia and Anti-Terrorism Directorate; o) one representative of the Ministry of the Interior - Central Directorate of the

Criminal Police; p) one representative of the Ministry of the Interior - Anti-Mafia Investigation Directorate.

2.1.2. INTERNAL CONTROLS: PERFORMANCES AND RESULTS

The Italian system is composed of an intricate network of internal controls, and this complex structure is also reflected in the controls for the protection of the financial interests of the European Union. A detailed analysis of these aspects can be found in BETKOSOL Deliverable D1.

Of primary importance in this regard is the so-called Si.ge.co. (*Sistema di gestione e controllo* – Management and control system), which is dealt with extensively in BETKOSOL Deliverable D1, referring to it as a first-level control, as it is necessary to ensure the efficient governance of programmes and projects; indeed, the main role of Si.ge.co. is to adapt the internal control system to the requirements of the European Union.

There have been some changes since the BETKOSOL investigations. According to MEF Circular No. 9 of 10 February 2022, as stipulated in Article 8 of Law Decree No. 77/2021, each central administration responsible for NRRP interventions is now required to coordinate management activities, monitoring, reporting, and control of the relevant investments and reforms. Each administration with a Mission Unit must have an adequate management and control system designed to prevent, detect, and rectify fraud, conflicts of interest, and double funding. This is to ensure the effective implementation of interventions and guarantee the achievement of targets and milestones. The operation of this management and control system is supervised by the NRRP Audit Unit.

In accordance with the recommendations from the final BETKOSOL Deliverable, D6, one of the fundamental ways of protecting the financial interests of the European Union is by ensuring that an efficient system of internal controls is in place also for the NRRP (Marra, 2024). It was remarked in the Deliverable that it was essential to verify that internal controls and the flow of information to central administrations, especially via Re.gi.s, were sufficient to guarantee proper performance. It should be recalled that Re.gi.s is the central platform of the *Ragioneria Generale dello Stato – Ministero dell'economia e delle finanze* (MEF) enabling central and peripheral administrations, local authorities, and implementing entities to manage operations related to monitoring, reporting and controlling measures and projects financed by the NRRP (https://area.rgs.mef.gov.it/canali/230/bacheca/news/666665/regis).

This platform was created to meet various requirements, including: (i) the validation of monitoring data and their transmission to the NRRP central service; (ii) the implementation of NRRP financial resource planning processes and the definition of performance indicators and objectives; (iii) the activation of project selection procedures, their management and the achievement of NRRP objectives; (iv) the reporting of expenses incurred for projects; (v) the recording of the results obtained from verification and control activities in the pursuit of NRRP

objectives; (vi) the management of requests for the disbursement of resources; (vii) the management of the outcomes of audit activities.

However, data collected by ANCI reveal that the activation phase of Re.gi.s. was not without difficulties. In fact, on many occasions, the responsible administrations failed to enter the data necessary for local authority reporting or submitted incorrect information. The support services offered by the entitled administrations were also often inefficient and very slow (ANCI, 2023).

The effectiveness of Re.gi.s. is also supported by the provisions contained in Art. 2, Law Decree No. 19 of 2 March 2024 as amended by Law No. 56 of 29 April 2024. The regulation requires implementing entities to upload or update the procedural and financial timetable for each programme or intervention, including the state of progress and payments on Re.gis within 30 days from the date of enactment. The Mission Structure for the NRRP at the Presidency of the Council of Ministers and the General Accounting Office monitor compliance with this obligation and, if misalignments are found, requests clarifications from the administrations, to be provided within 20 days (extendable by 10 days). If this deadline passes or if misalignments or inconsistencies persist, the Steering Committee for the NRRP recommends the President of the Council of Ministers exercise substitutive powers under Art. 12 of Law Decree No. 77 of 21 May 2021.

In this scenario, the Independent Performance Evaluation Bodies (OIVs), established in 2009 with the Brunetta Reform, play a vital role. The OIVs monitor the system of controls and manage the performance cycle. The development of these controls was discussed in BETKOSOL Deliverable D1.

The OIVs may be set up as single-member bodies according to criteria defined by the Department of Public Administration. The article also contains a list of the tasks that are entrusted to the OIVs, including: (i) monitoring the overall functioning of the system of evaluation, transparency, and integrity of internal controls; (ii) informing the competent government and administration bodies, as well as the Corte dei Conti of any anomalies; (iii) ensuring that performance measurement and evaluation processes are carried out correctly; (iv) promoting and certifying the fulfilment of transparency and integrity obligations; (v) verifying the results and good practices in the promotion of equal opportunities.

The performance of administrations is ensured throughout the performance management cycle (Art. 4, Legislative Decree No. 150/2009). The cycle is divided into several phases, which consist of: (i) defining and assigning objectives; (ii) linking objectives and resource allocation; (iii) monitoring throughout the year and taking corrective measures if necessary; (iv) measuring and evaluating both organisational (Art. 8, Legislative Decree No. 150/2009) and individual performance (Art. 9, Legislative Decree No. 150/2009); (v) adopting merit-based reward systems; (vi) reporting results to political and administrative bodies, senior management, and the competent internal and external control bodies, as well as citizens, stakeholders, and service users.

The cycle is established in the performance plan (Art. 10, Par. 1, Lett. a), Legislative Decree No. 150/2009 and by the annual performance report (Art. 10, Par. 1, Lett. b), Legislative Decree No. 150/2009. The performance plan is a three-year planning document, defined by the political-administrative body in collaboration with the senior management of the administration and is drawn up by 31 January each year. The plan identifies strategic and operational guidelines and objectives, defining the indicators for measuring and evaluating the administration's performance and the objectives of management personnel. The performance report reflects the plan, highlighting the organisational and individual results achieved in the previous year, in relation to the planned objectives and the resources allocated. Each administrative body must draw up its report by 30 June which is then submitted for approval to the political-administrative body and validated by the OIV.

It should be noted that today the performance plan is to be merged into the Integrated Activity and Organisation Plan – Piano integrato di attività e organizzazione (PIAO). Envisaged by Article 6 of Decree-Law No. 80 of 9 June 2021, the PIAO is the single planning and governance document that, as of 30 June 2022, absorbs many of the Plans that until now public administrations were required to prepare annually. The PIAO is a single programming and governance document that, in particular, replaces, with a view to administrative simplification, in addition to the performance plan, the Personnel Requirements Plan – Piano dei fabbisogni del personale (PFP) and the Concrete Actions Plan – piano delle azioni concrete (PAC), the Plan for Rationalising the Use of Equipment – Piano per razionalizzare l'utilizzo delle dotazioni strumentali (PRSD), the Prevention of Corruption and Transparency Plan – Piano di prevenzione della curruzione e della trasparenza (PdPCT), the Organisational Plan for Agile Work – Piano organizzativo del lavoro agile (POLA) and the Positive Action Plan – Piano delle azioni positive (PAP).

In the intention of the legislator, the PIAO should be a concrete simplification of bureaucracy to the benefit of administrations, allowing Italy to take another decisive step towards greater efficiency, effectiveness, productivity and performance measurement, improving the quality of services to citizens and businesses. However, the provision can be criticized (and it has been by many legal scholar). For example, with special attention to the local sector (many implementing authorities under the NRRP are local entities), the performance plan was previously part of the Executive and Management Plan – *Piano esecutivo e di gestione* (Peg). Thus, there was a narrower connection between the programming and planning of activities (especially investments and public works) and performance, that now is missing clarity (at least on the paper).

Coming back to the performance cycle, validation, therefore, plays an important role within the performance cycle as it verifies the effectiveness of performance, serving as a tool for improving management and ensures accountability. The validation process can be concluded in one of three ways: (i) full validation of the report, when all the criteria[1] are met; (ii) validation with observations, when the OIV identifies issues that do not affect validation but should be

addressed in the next report; (iii) non-validation of the report if serious problems are found with some criteria.

Significant data emerge from the Corte dei Conti's document dated 13 May 2024, which is based on information provided by the OIVs for the period 2020-2022 (Corte dei Conti, 2024), as well as from the report by President Mauro Orefice at the BETKONEXT kick-off meeting on 24 May 2024.

This revealed, in several cases, a lack of communication between the OIVs and the Corte dei Conti, to which the data were sometimes not transmitted. This is due to the transition from internal controls – exercised by a body within the administration itself – to external controls – delegated to a body outside the administration. External controls serve as a point of synthesis, as they rely on assessments made by an independent body separate from the administration holding a specific function. For more on external controls, see point 2.1.2 of this Deliverable.

Regarding the reports received, it often emerged that the objectives were set too low and were self-referential, with insufficiently challenging performance indicators, which resulted in an upward trend in personnel evaluations and the awarding of inadequately justified bonuses. Common findings were: (i) the lack of adequate management control systems; (ii) failure to update the performance measurement and evaluation system; (iii) failure to comply with participatory evaluation criteria; and (iv) insufficient attention to gender balance.

Moreover, it emerged that the scoring classes adopted by the individual administrations are not uniform, which makes it difficult to compare them. In addition, there was a general failure to assess many of those employed by the central administrations. Finally, with regard to timing, delays emerge with respect to the timeframe of the evaluation cycle.

What can be deduced from the Corte dei Conti's document and President Orefice's report is that the performance system is not sufficiently effective, since it is unable to uniformly and adequately measure the quality of civil servants' performance due to the absence of genuinely consistent parameters. This situation is complicated by the fact that the responsibility for defining objectives and score classes rests with the very management being evaluated. At the same time, there is a clear need for truly effective reward mechanisms. Effective performance evaluation depends on several factors, such as: (i) the consistency of the parameters adopted; (ii) the evaluation of all employees in all administrations; and (iii) the adoption of a schedule consistent with the economic and financial planning cycle.

In conclusion, the picture that emerges from this concise reconstruction of internal performance controls is that they are rather complex, diversified, and in need of coordination. If the Re.gi.s. and Si.ge.co. systems appear to be more related to the coordination, management and monitoring of investments and reforms connected to the NRRP, the performance control carried out by the OIVs is on a different and – one might even say – consequential level. The objectives pursued by administrations are assessed through the evaluation of the tasks performed by their employees.

The debate can and must extend to the financial interests of the European Union. What seems evident is that administrations appear more concerned by, and interested in, meeting

efficiency criteria set by the European financial regulations than in striving to achieve concrete results. Performance rules should certainly be acknowledged and followed, but the focus should be on achieving the set objectives rather than merely complying with European regulations. Additionally, there is concern that the time spent on control is time stolen from action (Tatì, 2022).

2.2. THE STATE OF THE PROTECTION OF THE EU'S FINANCIAL INTERESTS IN CRIMINAL JUSTICE: A BRIEF INTRODUCTION TO THE ITALIAN CASE

As pointed out in the general introduction to this comparative section, the BETKOSOL research showed that the protection of the EU's financial interests has been evolving over the last few years, bringing important normative innovations to substantive and procedural criminal law.

This is also the case of the Italian legal system which, even before the adoption of the PIF Directive, was already largely in line with the indications of this regulatory act. Moreover, to fulfil supranational obligations related to the PIF sector, Italy introduced an important new regime in 2001 concerning the criminal liability of legal entities.

However, BETKOSOL also identified significant issues with regard to protecting EU financial interests within the Italian system. As mentioned, these include the introduction, in some cases, of stricter measures for criminal offences affecting the EU's financial interests than those in force for offences affecting national interests, raising issues about the fairness and proportionality of criminal penalties (a situation in some ways the opposite of the well-known Taricco saga and prompting questions about a possible 'reverse breach' of the assimilation principle), and ongoing aspects of the legislation still not in line with PIF Directive obligations, in addition to the problems related to coordination actions and legislative amendments required for the EPPO to do its work.

Therefore, the following sections will provide an update on the current state of the Italian legal system, examining aspects regarding both substantive and procedural criminal law.

As we shall see, the Italian legislator has recently adopted a new legislative decree to align with the requirements of the PIF Directive. This follows the initial decree of 2020 and aims to adjust certain provisions to meet the standards set by the European Act.

From another perspective, the recent reform concerning the offences of abuse of office and trading in influence has exposed potential conflicts between the national reform decisions and the new perspectives outlined in the proposed EU anti-corruption directive.

In addition, the experience of the European Public Prosecutor's activities in Italy – one of the countries with the highest number of cases brought by the European Public Prosecutor – has become well-established.

2.2.1. CHANGES TO ITALY'S APPROACH TO COMBATING CORRUPTION? THE CHALLENGES OF PROTECTING EU FUNDS

In the light of an update of the relevant section of the BEKTOSOL research report concerning the Italian criminal law system in the field of protection of the EU's financial interests (D1, Task 4; see Birritteri, Tatì, 2021, 54 ff.), it is worth noting that, with respect to the regulatory framework it describes, the legislator recently intervened with Legislative Decree No. 156 of 4 October 2022 (the so-called "Correttivo PIF"). The main objective is to align the national regulatory framework with certain aspects of the PIF Directive that were still not addressed after Legislative Decree No. 75 of 14 July 2020, which formally transposed the EU Secondary Law Act. The legislative amendments contained in the measure have to be coordinated with those envisaged in Article 2, paragraph 1, of Law Decree No. 13 of 25 February 2022, which also contains some rules for the "adjustment" of the Italian regulatory framework on the subject of fraud with respect to the PIF Directive (Picciotti, 2022).

Regarding this provision, and in compliance with Art. 10 of the PIF Directive, it is noteworthy that the scope of application of so-called disproportionate confiscation under Art. 240-*bis* of the Criminal Code has been extended. This kind of confiscation is based on a double presumption: upon conviction for one of the crimes mentioned by the provision, it is presumed that the convicted person committed other offences and that his or her assets are therefore of illicit origin, taking account of his or her income (Finocchiaro, 2022, 56 ff.). It is therefore basically grounded on the disproportion, that must be proved by public prosecutor. Indeed, the predicate offences for which disproportionate confiscation applies now include aggravated fraud for obtaining public funds under Art. 640-*bis* of the Criminal Code and fraud to the detriment of the State, other public bodies, or the European Union under Art. 640, paragraph 2, No. 1) of the Criminal Code, although there are still some inconsistencies. Indeed, while active bribery (Art. 321 of the Criminal Code) is still not included, Art. 319-*quater* – that punishes the person induced by the public official, who abuses of his/her function or powers, to promise or give undue money or other advantages – is comprised therein.

It also has to be pointed out that the regulations contained in the PIF Directive on seizure and confiscation recall EU Directive 2014/42, whose Art. 5 expressly provides for confiscation of a similar kind (Marandola, 2016, 79 ff.). Indeed, according to some scholars (Maugeri, 2015, 316 ff.), this confiscation would require a stronger standard of proof than the confiscation provided for in Art. 240-*bis* of the Criminal Code in relation to the illicit origin of the profit, providing the disproportion as an evidence within a more comprehensive evidential framework. In this perspective, Art. 16 of the new EU Directive 2024/1260 provides for a similar kind of confiscation, enabling the seizure of properties derived from a criminal conduct liable to give rise to substantial economic benefit, as long as that conduct is committed within the framework of a criminal organisation. Indeed, among the criteria used to determine whether to confiscate or not such properties, the disproportion of the asset's value to the lawful income of the person shall be taken into account.

Moreover, it should be noted that the catalogue of predicate offences under Art. 240-*bis* of the Criminal Code already included the less serious case of undue receipt of public funds under Art. 316-*ter* of the Criminal Code. It can therefore be said that the regulatory amendment was also imposed by requirements of systematic reasonableness, as also pointed out by the Italian Constitutional Court, that in its judgements No. 33/2018 and 24/2019 called for a revision of the catalogue of offences listed in Art. 240-*bis* of the Criminal Code that could give rise to the application of that kind of confiscation. In particular, the Constitutional Court asked the Legislator to pay specific attention to the rationale of such provision within the Italian legal system, deeming it justified as long as the offences listed therein respond to standards of reasonableness.

The aforementioned Legislative Decree 156/2022 had a similar aim: its Art. 3(1) introduced seizure for equivalent value and extended disproportionate seizure also to the offence of undue receipt of agricultural subsidies under Art. 2, Law No. 898 of 23 December 1986, which specifically penalises fraud to the detriment of the European Agricultural Funds, the EAGF and the EAFRD (Mazzanti, 2020, 106; Ardizzone, 2024, 1 ff.). The same law at the time only envisaged seizure "for equivalent value" for smuggling, under Art. 301, paragraph 1, Presidential Decree No. 43 of 23 January 1973.

Returning to Law Decree 13/2022, the second front on which the legislative act intervened for the full implementation of the Directive concerns the aforementioned offences of fraudulent conduct, i.e. the undue receipt of funds under Art. 316-*ter* of the Criminal Code, aggravated fraud under Art. 640-*bis* of the Criminal Code, and the crime of embezzlement under Art. 316-*bis* of the Criminal Code. In particular, the legislative amendment modified the headings of embezzlement and misappropriation, establishing that the offending conduct should relate to "public disbursements" and no longer to the "detriment of the State" alone, precisely to also bring the classes of offences into line with Art. 3 of the PIF Directive.

With the same intent, the aforementioned Law Decree then extended the material object of the offences, stating, with regard to all three of the mentioned crimes, that fraudulent conduct may relate to "contributions, subsidies, financing, subsidised loans or other disbursements of the same type, however they are named".

As regards offences against the Public Administration, Art. 1 of Legislative Decree 156/2022 included abuse of office within the catalogue referred to in Art. 322-*bis* of the Criminal Code, with the consequence that also non-national public officials – members of international courts, European Union bodies, international parliamentary assemblies or international organisations or officials of foreign States – could be held liable for this offence. However, the approval of the "Nordio" bill – named after the current Minister of Justice – of 11 July 2024 (on which see *infra*) abrogated the offence, rendering the amendment made by the "Correttivo PIF" act irrelevant.

On the other hand, a more substantial change was brought about by the amendments to Legislative Decree No. 74 of 10 March 2000, which addresses tax offences. In particular, Art. 6 of the aforementioned legislative decree was reworded to correctly identify punishable cases of

false invoicing and fraudulent declaration by means of other artifices and untrue declarations. The combined provisions of Articles 3(2)(d) and 5(2) of the PIF Directive establish that attempts to make fraudulent declarations related to VAT are also punishable if they fall under the definition of fraud affecting the EU's financial interests. However, the Italian regulations on fraudulent declarations did not allow mere attempts to be punished (Lanzi-Aldovrandi, 2020, 98 f.), and Legislative Decree 75/2020 was therefore modified with the addition of paragraph 1-*bis* to Art. 6 of the abovementioned decree, but it did not identify its scope of application. The 'Correttivo PIF' has therefore replaced it, providing that, while the aforementioned offences concerning fraudulent declarations are not punishable under Art. 56 of the Italian Criminal Code, the offence of making a fraudulent declaration becomes punishable as an attempted crime if the conduct is carried out "for the purpose of evading value added tax in cross-border systems, connected to the territory of at least one other Member State of the European Union, from which a total damage equal to or exceeding Euro 10,000,000 results or is likely to result". Under the same conditions, fraudulent declaration offences are also punishable if attempted, provided, however, that the act is not already punishable under Art. 8 of Legislative Decree 74/2000, which establishes the offence of issuing invoices or other documents for non-existent transactions. The decision to limit the scope of application only to the serious cases referred to in Art. 2(2) of the Directive is explained by the systematic nature of Italian offences concerning fraudulent declarations, which until the transposition of the PIF Directive were not punishable if merely attempted.

Lastly, this definition of cross-border fraud has also been replicated for the criminal liability of the entities referred to in Art. 25-*quinquiesdecies* of Legislative Decree No. 231 of 8 June 2001, paragraph 1-*bis* of which has been amended to make it conform to the definition contained in Art. 6 of Legislative Decree 74/2000 (Bellacosa, 2020, 611).

2.2.1.1. TAX OFFENCES REFORM

Legislative Decree No. 87 of 14 June 2024 has introduced significant amendments concerning the confiscation and seizure related to tax crimes, specifically regarding VAT. In particular, Art. 12-*bis* of Legislative Decree 74/2000 now stipulates that the seizure and confiscation of the profit from tax offences are not permitted "unless there is a real danger of dispersion of the patrimonial guarantee, inferable from the offender's income, assets or financial conditions, also taking into account the seriousness of the offence, [...] if the tax debt is in the process of being extinguished by payment in instalments, also following conciliatory procedures or "accertamento con adesione", provided that, in such cases, the taxpayer is in order with the relevant payments" (Lanzi-Aldovrandi, 2020, 271 ff.). The legislator aimed to align preventive seizure practices with case law approaches to confiscation. Historically, confiscation was not permitted if the taxpayer had committed to repaying the tax authorities. The recent changes seek

to extend this principle to preventive seizure, a precautionary measure in the Italian legal system designed to pre-emptively address the impact of confiscation before a final conviction is issued. Nevertheless, the revised wording of the Article now permits an exception to this rule in cases where, given the defendant's assets, it is likely that the profit from the offence will not be recoverable by the end of the trial. Moreover, the phrase "taking into account the seriousness of the offence" seems to permit the application of the precautionary measure even when, although the preconditions of the *periculum in mora* do not apply, the tax offence committed is particularly serious. In this sense, an interpretation in line with Arts. 2(2) and 10 of the PIF Directive for offences within its scope would probably safeguard compliance with the directive of the Italian legal system. In addition, the new rule requires the taxpayer to make payments in instalments in order to avoid confiscation, so as to ensure that revenue not collected by the State due to the commission can still be recovered.

The other amendments concerning VAT omission offences and grounds for non-punishability do not, however, seem to affect compliance with the Directive. Article 3(2)(d) of this secondary legislation requires only that conduct involving fraud, such as the use of false documents, failure to report in breach of specific obligations, or the submission of declarations which, although accurate, fraudulently conceal non-compliance or unlawful refunds, be criminalised. Such conduct is sanctioned by way of offences relating to fraudulent declarations, which remain unchanged by the Reform, in addition to that of issuing false invoices for non-existent transactions, which is also unaffected by Legislative Decree 87/2024. In fact, the only relevant changes to the offences concerning VAT regard the offence under Art. 10-*ter* of Legislative Decree 74/2000 that punishes mere non-payment without considering the declaration presented or the use of false documentation, thus falling outside the scope of European legislation.

2.2.1.2. Innovations concerning offences against the Public Administration

Offences against the Public Administration introduced by the above-mentioned "Nordio" bill warrant greater attention. As mentioned above, following extensive debate (Cupelli 2023; Pelissero 2023; Cantone 2023; Lattanzi 2023; Romano, 2023), the offence of abuse of office was abolished. It was considered a "catch-all provision" that could not be reformed without it ceasing to be subject to criminal penalties. As detailed further in future BETKONEXT deliverables, with reference to the above-mentioned proposal for a directive to combat corruption, such a change could result in the Italian legal system becoming non-compliant with the European recommendations on criminal matters, leaving certain conduct that inevitably falls within the scope of Art. 11 of the aforementioned directive proposal uncovered. With this in mind, the recent Legislative Decree No. 92 of 4 July 2024 added the new Art. 314-*bis* to the Criminal Code, which establishes prison sentences ranging from six months to three years, "except in the

cases provided for in Art. 314, a public official or a person in charge of a public service, who, because of his office or service, possesses or otherwise has access to the money or other movable property of others and puts it to a use other than that permitted by specific provisions of the law or by acts with the force of law for which there is no margin of discretion and intentionally procures for himself or others an unfair pecuniary advantage or unjust damage". The provision replicates "peculato per distrazione" (embezzlement by misappropriation), which Law 86/1990 had sought to bring within the scope of Art. 323 of the Criminal Code (Sicignano, 2023, 1 ff.). The inclusion of this rule therefore aims to prevent protection gaps and ensure compliance with the obligations of criminalisation established by the European source referred to in Art. 4(3) of the PIF Directive (Gatta, 2024; Micheletti, 2024).

For the same reason, the rule has also been included in Art. 322-*bis* of the Criminal Code, which makes it punishable even when committed by a non-national public official. However, no provision has been made for the mandatory confiscation of any gain under Art. 322-*ter* of the Criminal Code or "disproportionate" seizure under Art. 240-*bis* of the Criminal Code, potentially conflicting with Art. 10 of the Directive in question.

It should also be pointed out that Law No. 112 of 8 August 2024, which converted the aforementioned decree of 4 July into law, included the new offence in the catalogue of predicate crimes for the *ex crimine* liability of legal persons, amending Article 25 of Legislative Decree No. 231/2001. Moreover, by amending Article 323-*bis* of the Criminal Code, it also allowed the application of the mitigating circumstance in the event of 'particular tenuity' of the offence.

The second important amendment of the recently approved reform concerns the crime of trading in influence, also present in the proposed Directive to combat corruption. The offence referred to in Art. 346-*bis* of the Criminal Code has in fact been reformulated to reduce its range of application. The new provision envisages from one year and six months to four years and six months imprisonment for anyone who, "except in cases of complicity in the offences established in Arts. 318, 319 and 319-ter and in the offences of corruption established in Art. 322-bis, intentionally using for this purpose existing relationships with a public official, or a person in charge of a public service, or one of the other persons referred to in Art. 322-*bis*, unduly causes to be given or promised, to himself or to others, money or other economic benefits in order to remunerate a public official or a person in charge of a public service or one of the other persons referred to in Art. 322-*bis* in connection with the performance of his/her duties, or in order to carry out some other form of unlawful mediation". Anyone who unduly gives or promises money or other economic benefits is subjected to the same penalty. There is also a definition of unlawful mediation, meaning mediation to induce the public official or the person in charge of a public service or public agent "to perform an act contrary to the duties of office constituting an offence from which an undue advantage may be derived". Referring to the next report (D2) regarding the most problematic scenarios, it appears that the new rule does not address the supposed relationships with public officials, which Article 7 of the Draft Directive also mandates for criminalisation.

On the other hand, the crime in question has been included in the catalogue of offences under Art. 322-*bis* of the Criminal Code so as to make it punishable even when committed by a non-national public official, which is now an aggravating circumstance according to the new paragraphs 3 and 4 of Art. 346-*bis* of the Criminal Code. The regulations on mitigating circumstances under Art. 323-*bis* of the Criminal Code, and non-punishability under Art. 323-*ter* of the Criminal Code, have also been extended to this crime, so the offender may now be exempt from punishment if, before becoming aware that an investigation is being or has been carried out against him or her in relation to the acts constituting the crime, and in any case within four months of the date on which it was committed, he or she "voluntarily reports it and provides useful and concrete indications to ensure the proof of the crime and the identify the other perpetrators", as well as making available the gains or sums of money received.

2.2.2. EPPO GOVERNANCE AND PROCEDURES IN ITALY

2.2.2.1. PRELIMINARY CONSIDERATIONS

The European Public Prosecutor's Office's presence in Italy through the directly applicable Regulation has necessitated a special coordination law to fully integrate this framework into the Italian legal system. The new regulatory framework has been added to Legislative Decree No. 9 of 2 February 2021, issued on 2 February 2021. The delegated lawmaker adopted a self-restraint approach (Salazar, 2021, 54), limiting its intervention to the minimum necessary to define the procedure for designating candidates for the offices of European Prosecutor or European Delegated Prosecutors, to regulate the communication of the crime reports to the Prosecutor's Office, and name the authority competent to resolve possible conflicts of competence.

Setting aside the first two aspects, which refer strictly to Italian domestic law, what is relevant here from the perspective of harmonising the EPPO is the sharing of crime reports with the European Public Prosecutor's Office and the identification of the authority competent to resolve possible conflicts of jurisdiction. This will be analysed in detail as it contributes to the integration of Regulation (EU) 2017/1939 and the cooperation it necessitates.

2.2.2.2. SHARING CRIME REPORTS WITH THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND CONDUCTING INVESTIGATIONS

Article 14 of Legislative Decree 9/2021 regulates the reporting and registration of crime reports for offences falling under the competence of the EPPO. It states that when these reports

concern offences for which the EPPO can exercise its jurisdiction, they must be submitted to, or shared with, not only the European Delegated Prosecutor but also with the national public prosecutor (concerning their independence, see Ligeti, 2020, 48).

The legislator's choice thus leaned towards a form of dual communication, requiring that a copy be sent to the territorially competent national prosecutor as well as to the EPPO. This approach is not intended to create 'parallel' national case files but rather to log the transmitted crime report in a dedicated automated register established at the national level. This process takes place pending the EPPO's decision on whether to exercise its jurisdiction by taking over the case or to return it to the national authorities. According to the regulation, this decision must be made as quickly as possible and anyway within five days of receiving the information (Salazar, 2021, 62).

However, if the national public prosecutor needs to undertake urgent action, or if there is reason to believe that a delay in initiating investigations might compromise their outcome, they are required to comply with the provisions of Article 335, paragraph 1, of the Code of Criminal Procedure. This includes immediately registering the crime report in the appropriate register and notifying the EPPO. The same procedure applies if the EPPO has indicated that it does not intend to exercise its jurisdiction.

As for investigative measures, it should be noted that Regulation (EU) 2017/1939 provides that European Delegated Prosecutors may always exercise the investigative powers granted to them by Member States when the offence being prosecuted is punishable by a maximum sentence of at least four years' imprisonment (Camaldo, 2018, 972). These measures include interception, although they are subject to specific safeguards, with States having the option to limit them to certain categories of serious crimes. In this regard, Article 17 of the Legislative Decree declares that, through the application of a principle of substantial assimilation, European Delegated Prosecutors are authorised to order or request the interception of communications and the controlled delivery of goods within the limits and under the conditions provided by Italian law. Consequently, the EPPO must be informed of the list of offences for which the current Italian laws allow the use of interceptions or controlled deliveries of goods for investigation purposes.

Concerning matters of personal freedom, the powers of European Delegated Prosecutors are identical to those available to national public prosecutors in similar cases in each participating State. They can directly order or request the issuance of arrest warrants or precautionary measures, and they can issue or request a European arrest warrant if the suspect is in another Member State.

To this end, Article 15 of the Legislative Decree merely establishes that the procedures relating to European arrest warrants issued by European Delegated Prosecutors are governed by Law No. 69 of April 22, 2005, as amended by Legislative Decree No. 1032 of February 2, 2021 (Picciotti, 2021, 1 ff.)

2.2.2.3. Definitions of Jurisdictional Conflicts

Article 25, paragraph 6 of the Regulation establishes that, in the event of a disagreement between the EPPO and national prosecutors regarding jurisdiction, the conflict will be resolved by the national authorities competent to handle such conflicts. In this regard, each participating State must specify the national authority responsible for deciding on jurisdictional matters.

In compliance with this provision, Article 16 of the legislative decree assigns the authority to decide to the General Prosecutor at the Supreme Court. The applicable Articles 54, 54-*bis*, 54-*ter*, and 54-*quater* of the Italian Code of Criminal Procedure, which governs jurisdictional conflicts between public prosecutors, are applied where compatible (De Amicis, 2022, 6 ff.)

In accordance with Article 42, in the delicate balance of relations that the regulation establishes and seeks to preserve between the EPPO and the national authorities, the European Court of Justice plays a central role with regard to the regulation of conflicts. If the conflict is not resolved, it can "give a preliminary ruling on the interpretation of Articles 22 and 25 of the [...] regulation concerning any conflicts of jurisdiction between the EPPO and the competent national authorities".

Nominating the General Prosecutor at the Supreme Court of Cassation as the authority competent to decide on the abovementioned conflicts is in line with current domestic law and complies with the regulatory provision that refers to the internal rules of each participating State (Traversa, 2019, 62).

A question must be raised here: if the General Prosecutor at the Court of Cassation deems it necessary to request an interpretation of the regulation's provisions from the Court of Justice to decide, will he or she be entitled to refer the preliminary question to the Court under Article 267 TFEU? A careful reading of the relevant norm, which refers exclusively to the national judicial body, suggests—according to consistent case law—that it does not include the public prosecutor (Salazar, 2021, 54).

However, according to Article 25, paragraph 6, of the EPPO Regulation, which states that "the national authorities competent to decide on the attribution of competences for prosecuting at the national level decide who is competent to investigate the case", read in conjunction with Article 42, paragraph 1(c), of the EPPO Regulation, should nonetheless legitimise the full admissibility of preliminary questions from the perspective of the Luxembourg Court as the sole national authority competent to decide on the attribution of competences for prosecuting at the national level with the exclusive power to resolve jurisdictional conflicts.

Moreover, and conversely, a provision excluding the judicial nature of the competent Italian authority would ultimately deprive the parties involved in the Italian context of the ability to refer a preliminary question to the Court of Justice regarding the interpretation of the regulation's provisions on competence.

In any case, a detailed analysis of the subject will be provided in the next Deliverable.

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Section II

Comparative Study

Poland

Poland

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3. POLISH CASE STUDY

Poland submitted its draft National Recovery Plan (the 'KPO') to the European Commission on 3.05.2021. The Commission did not give a positive opinion on the plan until more than a year later, on 17.06.2022. In contrast, the Council approved the Polish KPO in its Executive Decision of 17.06.2022 on the approval of the assessment of Poland's Recovery and Resilience Plan. Despite the approval of the KPO in June 2022, Poland did not submit a payment request to the Commission until December 2023. The Government's inactivity in this regard was primarily due to the lack of progress in meeting milestones on the independence of judges, the independence of the judiciary and the restoration of rule of law standards in line with Court of Justice of the European Union and European (CJEU) and Court of Human Rights (ECtHR) rulings.

The democratic coalition that won the parliamentary elections in Poland on 15 October 2023 embarked on an arduous systemic transformation process to restore the rule of law. Restoring the disrupted constitutional order is quite a challenge because of the very rough cohabitation between the Government and the President, and the bankruptcy of the Constitutional Tribunal. Corrective action must be ad hoc and taken step-by-step. Given the state of Polish politics, this method is hardly easy. The initiatives taken by the new parliamentary majority to restore the rule of law met with the approval of the European Commission, which on 29.02.2024 issued a positive assessment of Poland's first application for payments from the Recovery Fund. The European Commission justified its decision by Poland's satisfactory fulfilment of two 'super milestones' to strengthen the Polish judiciary's independence by reforming the judges' disciplinary system. The planned reform's main points concern resolving problems with the National Council of the Judiciary, the Supreme Court, and the Constitutional Tribunal. The plan also includes separating the office of the Minister of Justice and the Prosecutor General and introducing a system for the institutional enforcement of ECtHR rulings. Euro 6.3 billion was paid to Poland in the first tranche under the National Recovery Plan.

The almost three-year delay in launching the National Recovery Plan has also necessitated another request from the Polish government to approve amendments to the KPO. On 17.07.2024, the EU Council for Economic and Financial Affairs (ECOFIN) adopted a draft revised EU Council Executive Decision approving amendments to the Polish National Recovery Plan. In late August/early September, the Ministry of Funds and Regional Policy plans to send the second and third payment requests from the NERP, and payment is expected at the end of 2024. The revision process took a record short time (3.5 months). The changes were based on a review of the status of implementation of the reforms and investments included in the KPO, conducted by the Ministry of Funds and Regional Policy, together with other ministries, in January 2024. A month-long public consultation on the proposed changes to the KPO revision took place in mid-March. On 30 April 2024, the Council of Ministers adopted a resolution on the KPO revision, submitted by the Minister of Funds and Regional Policy. The revision was then sent to the European Commission. Based on bilateral agreements, on 1 July 2024, the EC approved Poland's proposal to revise the KPO and presented a draft revised EU Council Implementing Decision approving the changes to the KPO. Most of the changes (approximately 95 per cent) submitted by the Polish side as part of the formal proposal were accepted by the European Commission.

The revision of the KPO covered 7 components. It concerned 18 reforms (12 from the grant part and six from the loan part) and 39 investments (26 from the grant part and 13 from the loan part of the KPO) (R. Horbaczewski, 2024 see here).

The most important changes concern:

- Healthcare - regarding the modernisation of the infrastructure of medical facilities; the changes will allow tenders for support in different areas (oncology, cardiology, and general support for hospitals) to begin in stages.
- The agricultural sector - increasing support for farmers and fishermen implementing projects to modernise infrastructure and equipment and to support Agriculture 4.0 technologies; increasing the number of storage and distribution centres built or modernised, and modernised wholesale markets; the addition of a new indicator on Agriculture 4.0 education.
- Support for local government units by transferring funding from the loan area to the grant area for long-term and geriatric care centres in district hospitals.
- Replacing the tax on internal combustion vehicles with a system of subsidies for individuals to purchase, rent, and lease electric cars.

After the revision, the NRRP consists of 57 investments and 54 reforms. Poland will receive €59.8 billion from the KPO, including €25.27 billion in grants and €34.54 billion in concessional loans. In line with EU targets, a significant part of the KPO budget is allocated to climate objectives (44.96 per cent) and digital transformation (21.28 per cent) (Completion of KPO revision - the Council of the European Union has accepted the revision of the Polish KPO see here).

3.1. POLAND: BRIEF INTRODUCTION TO THE ACTORS INVOLVED IN PROTECTING THE EU'S FINANCIAL INTERESTS

Spending public funds entails the risk that those involved may breach the rules laying down the conditions for their use. The consequences if the law is infringed when funds from the European Union budget (EU funds) are disbursed are defined by EU law. Its provisions oblige the national authorities of Member States to recover sums of money spent in breach of the law and to impose administrative and criminal penalties, and in doing so, Member States apply EU and national rules (J. Łacny, 2014, 41).

To apply any penalty for the irregular use of EU funds, it is necessary to identify the irregularities, which are most often revealed during the application of control procedures. Audits carried out during the disbursement of EU funds enable the avoidance of errors, while follow-up (ex-post) audits allow lessons to be learned for the future.

According to Article 325 of the Treaty on the Functioning of the European Union, the protection of its financial interests is the shared responsibility of the European Union and the Member States. The responsibilities of the Member States mainly boil down to setting up and ensuring the functioning of management and control systems and carrying out activities related to the prevention and detection of irregularities, as well as to correcting and recovering amounts wrongly paid and communicating any irregularities to the European Commission (A.P. Chociej, P. Woltanowski, 2019, 69).

The basic national legal act regulating the issue of overseeing how EU funds are spent in Poland is currently the Act of 28 April 2022 on the principles of the implementation of tasks financed from European funds in the financial 2021-2027 perspective. This Act serves to apply the Regulation of the European Parliament and of the Council (EU) 2021/1060 of 24 June 2021, laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Fair Transition Fund, the European Maritime, Fisheries, and Aquaculture Fund and their financial rules, as well as the Asylum, Migration, and Integration Fund, the Internal Security Fund, and the Financial Support Instrument for Border Management and Visa Policy (Dz. OJ EU L 231, 30.06.2021, p. 159 and OJ EU L 261, 22.07.2021, p. 58); Regulation (EU) 2021/1058 of the European Parliament and of the Council of 24 June 2021 on the European Regional Development Fund and the Cohesion Fund (OJ L 231, 30.06.2021, p. 60 and OJ L 13, 20.01.2022, p. 74); Regulation (EU) 2021/1057 of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No 1296/2013 (OJ L 231, 30.06.2021, p. 21 and OJ L 421, 26.11.2021, p. 75); Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Fair Transition Fund (OJ EU L 231, 30.06.2021, p. 1 and OJ EU L 421, 26.11.2021, p. 74); Regulation (EU) 2021/1059 of the European Parliament and of the Council of 24 June 2021 on specific provisions concerning the European territorial

cooperation objective (Interreg) supported by the European Regional Development Fund and the external funding instruments (OJ EU L 231, 30.06.2021, p. 94).

Article 24 of this law regulates the scope of controls and audits. According to Article 24(1), control and audit include the following, among others: controls of programme implementation to ensure that the management and control system is working properly and that expenditures under the programme are incurred in accordance with legal provisions, national and EU rules, and the project co-financing agreement or decision. In turn, Article 25 regulates in detail the controls and audits of beneficiaries and applicants, the place of control, the obligations of the beneficiary and others, and inspections. It follows directly from Article 25(2) of this Act that the beneficiary is obliged to submit to audits or controls performed by the audit institution, the European Commission, the European Anti-Fraud Office (OLAF), the European Court of Auditors, and other entities authorised to do so under separate provisions, or as commissioned by these institutions. If irregularities are found, a financial correction is imposed.

The European Parliament has for many years been pointing to the need to increase the role of supreme audit institutions in the Member States in controlling the use of EU funds in order to improve the management of Community funds and to obtain additional assurance that European Union funds are used correctly (See Chamber of Control, Summary report on the results of the NIK control in the field of utilisation of resources from the budget of the European Communities within the framework of the cohesion policy in Poland, Warsaw 2009, KAP-462-1/2009, p. 6) The literature indicates that the highest-ranking body for institutional control of public finances in Poland is the Supreme Audit Office (NIK) (E. Ruśkowski, 2021, 13), the functioning of which is regulated in the Act of 23 December 1994 on the Supreme Chamber of Control.

The Supreme Audit Office is the highest State control body and is subordinate to the Sejm. The Supreme Audit Office controls the activities of the bodies of government administration, the National Bank of Poland, State legal persons and other State organisational units. The Supreme Audit Office may control the activities of bodies of local self-government, self-governing legal persons, and other self-governing organisational units. The Supreme Audit Office may also control the activities of other organisational units and business entities (entrepreneurs) to the extent to which they use State or municipal assets or funds and fulfil their financial obligations to the State.

Article 5(1) of the Act on the Supreme Audit Office indicates that the Supreme Audit Office has oversight regarding legality, economy, purposefulness, and reliability. The audit criteria for local government are different (the audit is carried out in respect of legality, economy, and reliability - Article 5(2)) and the activities of organisational units and entrepreneurs (the audit is carried out in terms of legality and economy - Article 5(3)) (M. Serowaniec, 2019, 79-80).

The audit proceedings conducted by NIK are aimed at establishing the facts of the audited entities' activities, documenting them reliably and assessing the audited activities according to the criteria set out in Article 5.

The National Revenue Administration (KAS) is also competent to control the spending of EU funds in Poland. The KAS is a specialised government administration performing tasks in the area of fulfilment of revenues from taxes, customs duties, fees, and non-tax budgetary dues, the protection of the interests of the State Treasury, and the protection of the customs territory of the European Union, as well as providing service and support for the taxpayer and payer in the proper performance of tax obligations and service, and support for the entrepreneur in the proper performance of customs obligations.

In the light of Article 14(1) of the Act of 16 November 2016 on the National Fiscal Administration, the tasks of the Head of the National Fiscal Administration include:

1) auditing the management of funds from the budget of the European Union and non-reimbursable aid granted by the Member States of the European Free Trade Agreement (EFTA) concerning the management and control system for national operational programmes and national programmes in the managing authorities, the Common Agricultural Policy system, the security of IT systems used in the implementation of operational programmes, and Common Agricultural Policy,

2) the supervision and coordination of the audit of the management of funds from the budget of the European Union and non-reimbursable aid granted by the Member States of the EFTA with regard to the audit of the management and control system for national programmes in the institutions of the implementation system, excluding the managing authorities, the management and control system for regional operational programmes and regional programmes, the operations of national and regional operational programmes, national and regional programmes, and common agricultural policy,

3) auditing the management of funds under the Erasmus+ programme, as referred to in Regulation (EU) 2021/817 of the European Parliament and of the Council of 20 May 2021 establishing 'Erasmus+', the Union Programme for Education and Training, Youth and Sport repealing Regulation (EU) No 1288/2013 (OJ L 189, 28.05.2021, pp. 1-33),

4) auditing the management of funds under the European Solidarity Corps programme as referred to in Regulation (EU) 2021/888 of the European Parliament and of the Council of 20 May 2021 establishing the European Solidarity Corps Programme and repealing Regulations (EU) 2018/1475 and (EU) No 375/2014 (OJ L 202, 08.06.2021, pp. 32-54),

5) cooperating with the competent authorities of other countries and with international organisations and institutions,

6) performing the functions of the independent audit body referred to in Article 14(1)(a) of Regulation (EU) 2021/1755 of the European Parliament and of the Council of 6 October 2021 establishing a post-Brexit adjustment reserve (OJ L 357, 08.10.2021, p. 1),

7) acting as an anti-fraud coordination unit required by Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.09.2013, p. 1, as amended),

8) referring to the European Anti-Fraud Office (OLAF), upon its request under Article 8(2) of Regulation (EU) No 883/2013, any documents or information in its possession relating to an administrative investigation by OLAF;

The audit and control carried out by the Head of the National Fiscal Administration can be seen as professional and independent, and they aim to ensure that Poland's absorption of EU funds is uninterrupted. It is one of several entities whose objective in the area of EU finances is to ensure that EU funds are spent transparently and under EU and national regulations.

An important control entity in Poland is the regional Chambers of audit, which function according to the provisions of the Act of 7 October 1992 on regional Chambers of audit. It follows from Article 1(2) that regional Chambers of auditors, among other things, control the financial management of the local government sector. Since a significant part of the funds from the European Union budget is spent in Poland by local government units, the role of this control body is not insignificant.

It follows from Article 5(1) of the Act on Regional Chambers of Audit that they control financial management based on the criterion of compliance with the law and compliance of documentation with the facts. On the other hand, it follows from Article 5(2) that control of the financial management of local government units within the scope of government administration tasks performed by these units based on laws or concluded agreements is also performed considering the criteria of purposefulness, reliability and economy.

It is important to note that, under Article 7(1), the regional chambers of audit carry out a comprehensive audit of the financial management of local government units at least once every four years. An audit protocol is drawn up and signed by the audit inspector, the manager of the audited entity, and the treasurer (chief accountant). Based on the audit results, the Chamber sends the audited entity a post-audit statement, indicating the sources and causes of irregularities, their extent, the persons responsible, and the conclusions in order to remove them and improve the audited activity.

A complementary role in controlling the correctness of the spending of EU funds is also played by the President of the Public Procurement Office, which functions according to the provisions of the Act of 11 September 2019 - Public Procurement Law. According to Article 596(2)(1), it is the entity (along with, among other things, managing authorities and regional chambers of audit) that carries out control over the award of public contracts. Public procurement is carried out with public funds, part (in some cases all) of which may come from the European Union budget.

Article 597(1) of the Public Procurement Act stipulates that oversight bodies, in connection with the conducted control, must cooperate, exchanging information on the checks being conducted and their results. This provision should be contrasted with Article 601(1) of the Act, from which it follows that the basis for stating that a procedure for the award of a contract has not been conducted under the Act is a violation of a provision of the Act which has affected the outcome of the procedure. Article 597(2) of the Public Procurement Law introduces a proviso that "The provision referred to in paragraph 1 shall not apply in the case of control of a procedure for the award of a contract co-financed from the funds of the European Union". This is because the disclosure of irregularities by the President of the Public Procurement Office at the level of public procurement as regards EU funds is subject to sanctions specified in separate regulations (concerning the expenditure of EU funds).

In Poland, control procedures are performed by many entities. On the one hand, these are entities 'specialising' in EU funds, operating in their granting, implementation and disbursement procedures. Firstly, these are managing, but also certifying and auditing institutions. On the other hand, important functions are performed by entities that deal with financial control in the broad sense of the term (National Revenue Administration, regional chambers of accounts), or entities for which financial control is only one aspect of activity (President of the Public Procurement Office, Supreme Audit Office).

Although several entities perform control functions, there are no conflicts in the scope of their activities. Each entity carries out control activities in its area of operation**.**

3.2. THE "IN-DEPTH" FUNCTIONING OF THE POLISH AFCOS

3.2.1. DESIGNATION OF THE ANTI-FRAUD COORDINATION UNIT (THE SO-CALLED AFCOS) BY EUROPEAN UNION MEMBER STATES.

According to Article 325 of the Treaty on the Functioning of the European Union, the Union and the Member States must counter fraud and any other illegal activities affecting the financial interests of the Union and provide effective protection in the Member States and all the Union's institutions, bodies, offices, and agencies. This provision is in Chapter Six of the Anti-Fraud Treaty. It establishes that Member States must take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their financial interests. As a rule, Member States will coordinate their action to protect the financial interests of the Union against fraud, organising, together with the Commission, close and regular cooperation between the competent authorities. The Commission, in cooperation with the Member States, draws up an annual report on the measures taken to implement this provision, which it sends to the European Parliament and the Council.

The legal basis for the designation of the anti-fraud coordination unit ('AFCOS') of the European Union Member States is Article 12a of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999. The designation of a unit by each Member State is intended to facilitate effective cooperation and exchange of information with the European Anti-Fraud Office ('OLAF' or 'the Office'), including the exchange of information of an operational nature. Depending on the specific case, the anti-fraud coordination unit may, under national law, be considered a competent authority for Regulation No 883/2013.

It is up to the EU Member States to decide independently whether to locate the AFCOS within their national structure. According to OLAF's 2013 annual report, Croatia, Cyprus, the Czech Republic, Estonia, France, Latvia, Hungary, the Netherlands, Slovenia, and Poland placed the AFCOS as a constituent body within the Ministry of Finance; Bulgaria and Lithuania within the Ministry of the Interior; and in Malta, Romania and Slovakia the AFCOS is an independent body within the national government (See OLAF Report, 2013, see here).

At the request of the Office, before a decision is taken on whether or not to open an investigation, as well as during or after an investigation, the anti-fraud coordination units must provide or coordinate the necessary support for OLAF to carry out its tasks effectively. Support includes, among other things, assistance from the competent authorities of the Member States. According to Article 12a(3) of Regulation 883/2013, the anti-fraud coordination units may assist OLAF upon request in order for OLAF to carry out coordination activities under Article 12b of the said Regulation, including, where appropriate, horizontal cooperation and the exchange of information between the anti-fraud coordination units. In addition to the provisions cited above, the regulation of the fight against EU fraud and the functioning of OLAF is situated in numerous pieces of primary and secondary EU law (M. Krawczak, 2021, 856-858).

In its guidelines on the main tasks and responsibilities of the Anti-Fraud Coordination Unit (AFCOS) (Special Report of the European Court of Auditors, 2013, see here) the Commission has specified that the AFCOS units should have, within the scope of the country concerned, the power to coordinate all legislative, administrative and investigative obligations and actions related to the protection of the EU's financial interests. The Irregularity Management System (IMS), available on the OLAF platform, allows the authorities of the Member State concerned to report suspected or confirmed fraud to the Commission (See here).

The European Parliament Resolution of 18 January 2024 on Protection of the European Union's financial interests - Fight against fraud - Annual Report 2022 (see here) supported the Commission's intention to start monitoring the status of the anti-fraud coordination units (AFCOS) established in the Member States. At the same time, the resolution pointed out that to guarantee uniform and harmonised conditions throughout the Union, the definition of the structure, role, responsibilities, and mandate of AFCOS should be clarified, thereby facilitating their cooperation and the exchange of information. The Commission was again requested to

update the guidelines for AFCOS, which had originally been formulated in 2015, which are no longer adequate to effectively support national authorities in developing a well-structured coordination service and asked the Commission to provide the discharge authority with a detailed explanation of the work carried out.

3.2.2. COMBATING FRAUD TO THE DETRIMENT OF THE REPUBLIC OF POLAND OR THE EUROPEAN UNION

The European Commission, by its decision of 16 May 2002, adopted the PHARE Multinational Programme to assist the new Member States and candidate countries in meeting their obligations under Article 280 TEC. Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia joined the programme (See here). The 1999 PHARE programme for Poland included a project, developed in cooperation with OLAF, specifically aimed at setting up a multidisciplinary anti-fraud structure in Poland (OLAF Annual Report, 2001, see here). From the PHARE, SAPARD and ISPA pre-accession programmes, Poland received more than Euro 887 million between 1999 and 2002 (see here).

The unit coordinating the fight against fraud in Poland, i.e. the Polish AFCOS, started operations in 2003 and was located in the Ministry of Finance (see Annex No. 10 to the IKON procedure. AFCOS unit in Poland - synthetic information, p. 2 - source: study of the National Fiscal Administration, Ministry of Finance made available by the Department of Audit of Public Funds). In Poland, even before accession to the European Union, i.e. before 1 May 2004, a Government Plenipotentiary for Combating Financial Irregularities to the detriment of the Republic of Poland or the European Union was appointed by virtue of the Regulation of the Council of Ministers of 1 July 2003 (Regulation of the Council of Ministers of 1 July 2003 on the Government Plenipotentiary for Combating Financial Irregularities to the Detriment of the Republic of Poland or the European Union (Dz.U. 2003, No. 119, item 1113). This regulation entered into force on 24 July 2003 and was repealed on 30 September 2022 by a regulation of the Council of Ministers of 19 September 2022 (Regulation of the Council of Ministers of 19 September 2022 on the abolition of the Government Plenipotentiary for Combating Financial Irregularities to the Detriment of the Republic of Poland or the European). This amendment was justified in particular by (see here):

- the correct implementation over the years of solutions that have ensured an adequate level of protection for the expenditure side of the EU budget,
- ensuring an ongoing exchange of information,
- securing proper coordination in administrative checks and criminal proceedings, and

- revenue reform in the operation of the revenue and customs services and the establishment of the National Revenue Administration ('KAS'), which in effect contributed to the Plenipotentiary's 'mission accomplishment' and the abolition of the structure for ensuring and coordinating the protection of the EU's financial interests in Poland, which, in addition to the Plenipotentiary, included the 2018 abolition of the Inter-Ministerial Team for Combating Financial Irregularities to the Detriment of the Republic of Poland or the European Union.

As part of the KAS reform, relevant powers to act were granted to the Head of KAS, anyway subordinate to the minister in charge of public finance (Article 13 of the Act of 16 November 2016 on the National Fiscal Administration (i.e. Journal of Laws 2023, item 615 as amended). The tasks of the Head of KAS with regard to cooperation with the Office within the scope of ongoing investigations are regulated in Article 14(1)(18) - (18b) of the Act of 16 November 2016 on National Fiscal Administration. The Head of KAS is obliged to:

- perform the tasks of the anti-fraud coordination unit based on the content of Regulation 883/2013,
- forward to the Office, upon its request referred to in Article 8(2) of Regulation No 883/2013 or on its initiative in so far as national law allows, the documents or information in its possession relating to an administrative investigation being conducted by OLAF (see also K. Teszner, 2024); and
- fulfil the tasks of Article 7(3a) of Regulation No 883/2013, i.e. in particular to provide the necessary support to the Office's staff in compliance with national legislation to enable them to carry out their tasks effectively, and
- ensure that officials, other staff, members, heads, and staff members also provide the necessary assistance in the above areas.

According to § 34(1)(5) of the Ordinance of the Minister of Finance of 31 January 2022 on the establishment of the organisational regulations of the Ministry of Finance, the Department of Audit of Public Funds is responsible for performing the tasks of AFCOS referred to in Article 14(1)(18) of the KAS Act. As follows from § 34 (2) of the Ordinance mentioned above, the Department is competent in matters regulated by the KAS Act concerning the audit of the management of funds originating from the EU budget and non-reimbursable funds from aid granted by the Member States of the EFTA. According to information from the Ministry of Finance, in certain situations, the Department of Audit of Public Measures cooperates with OLAF within the framework of selected areas of internal investigations and irregular spending of funds implemented by the EC in connection with direct management (Annex No. 10 to the IKON procedure, the AFCOS unit in Poland – summary of information, pp. 2-3 - source: study by the National Fiscal Administration, Ministry of Finance made available by the Department of Audit of Public Funds).

3.2.3. THE TASKS OF THE POLISH AFCOS UNIT

Under the tasks and competencies of the Polish AFCOS, the Ministry of Finance lists the following activities:

- improving effective cooperation and exchange of information with the Office before, during, and after investigations in accordance with the provisions of Regulation 883/2013, including, in particular, support before and during on-the-spot checks and inspections;
- working interaction and information exchange with other AFCOS units;
- cooperation and mutual transfer of information with the relevant national institutions (see here) involved in the management and control system for the implementation of EU funds and the Audit Authority;
- cooperation with national law enforcement authorities, i.e. the National Public Prosecutor's Office, and the Police Headquarters, provided this is motivated by the subject matter of OLAF's request;
- analytical and risk assessment activities carried out in order to identify EU-funded projects likely to be subject to fraud; and
- participation in activities aimed at interaction, awareness-raising, communication, dissemination of results, recognitions or leading anti-fraud practices, as appropriate.

Member States of the European Union are free to allocate excess tasks, i.e. those not resulting from Article 12a of Regulation No 883/2013, to their AFCOS units depending on internal demand. According to information from the Ministry of Finance, the Polish AFCOS is responsible for several duties closely correlated with OLAF's sphere of interaction (see Annex No. 10 to the IKON procedure. AFCOS unit in Poland – summary of information, pp. 3-4 – source: a study by the National Fiscal Administration, Ministry of Finance made available by the Department of Audit of Public Funds):

- analytical interaction for the Audit Authority;
- representing Poland in the Council of the European Union at the GAF working group level;
- coordinating the procedure for notifying the European Commission via the electronic IMS system (Irregularity Management System) of any irregularities in the management of EU funds;
- coordinating the preparation of the national contributions to the Commission's annual Report on the protection of the EU's financial interests under Article 325 TFEU; and
- participating in Commission working groups: the COCOLAF Fraud Prevention Coordination Advisory Committee and its sub-groups.

3.2.4. OLAF Report 2023

According to OLAF's twenty-fourth annual report for 2023, investigations have revealed the need to recover more than Euro 1 billion. OLAF's investigators examined 3,548 new pieces of information from private, public and OLAF sources, preventing Euro 209 million in undue expenditure and the resolution of 265 cases. OLAF issued 309 financial, judicial, disciplinary and administrative recommendations, the vast majority of which concerned the recovery of EU funds by competent authorities at EU and national level (OLAF Annual Report 2023, see here).

In 2023, nine investigations into the use of EU funds managed or disbursed in full or in part at the national or regional level in Poland were completed, five of which resulted in recommendations (OLAF Annual Report 2023, see here). Among other things, OLAF investigated irregularities resulting from a project co-financed by the European Regional Development Fund in Poland, which involved the construction of a concert hall housing over 300 people. As a result of the investigation, OLAF found several irregularities in the tendering process, including conflicts of interest and the use of false documents, and that completion of the work would have resulted in the construction of an unfinished concert hall that could not be used (OLAF Annual Report 2023, see here). In this way, OLAF prevented the undue disbursement of nearly Euro 4.5 million, the amount corresponding to the full EU contribution to the project (OLAF Annual Report 2023, see here). Judicial recommendations were also sent to the national Prosecutor's Office. The 2023 report also showed that more recommendations were made to Romania, Italy, Slovakia and France than to Poland.

Table 1. OLAF investigations conducted in Poland between 2015 and 2023.

	2015	2016	2017	2018	2019	2020	2021	2022	2023
Number of investigations	8	16	10	8	7	7	10	9	9
Number of recommendations issued	5	8	7	3	4	2	7	7	5

Source: Table prepared using data from OLAF Annual Reports 2015-2023 (see here).

Table 1 shows a cross-section of the number of investigations carried out by OLAF staff and recommendations made between 2015 and 2023. The lowest number of investigations over the years indicated was in 2019 and 2020, and the highest in 2016. The lowest number of recommendations issued was in 2020 and the highest in 2016, with the number of investigations in 2016 being more than twice as high as in 2020. From the analysis of the data presented in Table 1, there is mixed data from 2015 to 2023, so it is difficult to conclude a downward or

upward trend in the categories adopted. Nevertheless, the number of investigations from 2017 to 2023 did not increase above ten or the number of recommendations above 7.

3.3. CHANGES IN THE ANTI-CORRUPTION APPROACH IN POLAND? THE CHALLENGES OF PROTECTING EU FUNDS

The transposition of the PIF Directive into national law was due by 6 July 2019. Although Poland introduced various provisions in several stages and reported the implementation as completed, in the opinion of the European Commission, it still did not fully comply with this obligation. As a result, the Commission initiated infringement proceedings and issued a letter of formal notice for failure to transpose the PIF Directive correctly. Such proceedings were also initiated against Bulgaria (see here).

The PIF Directive requires the criminalisation of the indicated types of offences (Articles 3-4 of the PIF Directive) to the detriment of the EU's financial interests. It contains additional provisions on substantive criminal law (concerning, among other things, the stage and phenomenal forms of liability of legal persons, jurisdiction, etc.).

In Poland, the provisions applicable to the criminal protection of the EU's financial interests are scattered across many chapters of the Penal Code (see Act of 6 June 1997 Criminal Code (i.e. Journal of Laws 2024, item 17, referred to from now on as the "CC") as well as outside it - in the Fiscal Penal Code (see Act of 10 September 1999. Fiscal Penal Code, i.e. the Journal of Laws 2023, item 654, as amended, referred to from now on as the "Fiscal Penal Code". Characteristically, the Polish legislator did not decide to distinguish new types of criminal offences relating to the protection of the financial interests of the Union, but only in some cases extended the scope of criminalisation (C. Nowak, 2023, 172). As a result, it is not easy to find equivalents of the acts stipulated in Articles 3 and 4 of the PIF Directive in Polish criminal law, and there are several applicable provisions of national law for almost all the offences stipulated in Article 3.

Among the criminal provisions of national law, several groups of common and fiscal offences applicable to the fight against fraud of EU financial interests can be distinguished. The first basic group includes fraud: subsidy fraud (also referred to in the national literature as credit fraud) under Article 297 of the Penal Code and ordinary fraud under Article 286 of the Penal Code, followed by offences against the credibility of documents (Arts. 270-273 of the Penal Code), then offences of officialdom, including, in particular, sell-outs (Art. 228 of the Penal Code), bribery (Art. 229 of the Penal Code) and abuse of office (Art. 231 of the Penal Code), offences related to public tenders (Art. 305 of the Penal Code), money laundering (Art. 299 of the Penal Code), and embezzlement, consisting in the appropriation of someone else's movable property (Art. 284 of the Penal Code). The most significant fiscal offence is the undue payment,

collection, or misuse of a grant or subsidy (Art. 82 of the Fiscal Penal Code). It is also necessary to mention the offence of participation in an organised group or association to commit a crime or fiscal offence (Art. 258 § 1 of the Penal Code); in addition, further consequences are envisaged for the perpetrator of a crime committed in an organised group or association to commit a crime, among other things in the form of an extraordinary aggravation of punishment (Art. 65 § 1 of the Penal Code, Art. 37 § 5 of the Penal Code) (see Daśko, 2021, 113, 121, see here).

With regard to substantive criminal law, the problem in the transposition of the PIF Directive mainly concerns the most important provision from a practical point of view, i.e. subsidy fraud. According to Article 297 § 1 of the Penal Code, it is a criminal offence to submit, in order to obtain for oneself or someone else, from a bank or an organisational unit conducting similar economic activity according to the Act or from an authority or institution disposing of public funds - a credit, a cash loan, a suretyship, a guarantee, a letter of credit, a grant, a subsidy, confirmation by a bank of an obligation arising from a suretyship or guarantee or similar monetary benefit for a specific economic purpose, a payment instrument or a public order, a forged, counterfeited, falsified or dishonest document or an unreliable written statement on circumstances material for obtaining the aforementioned financial support. In turn, Article 297 § 2 of the Penal Code penalises the failure to notify a competent entity that a situation has arisen which may have an impact on the withholding or limitation of the amount of financial support granted, as defined in Article 297 § 1 of the Penal Code, or a public order, or on the possibility of further use of the payment instrument, contrary to the obligation. C. Nowak rightly notes that the scope of criminalisation provided by Article 297 § 2 of the Penal Code is not sufficient in the context of the requirements of the PIF Directive, because it does not provide for the obligation to notify the competent entity of the situation arising at the stage of granting financial support. This gap may be filled to a certain extent by Article 231 of the Penal Code, but only when a public official neglects to do so (C. Nowak, 2023, 141).

A further problem with Article 297 of the Fiscal Penal Code is that it does not cover behaviour involving the misuse of funds or assets for purposes other than those for which they were originally granted or the misuse of lawfully obtained benefits resulting in damage to the financial interests of the EU, as referred to in Article 3(2) of the PIF Directives. Legal scholarship has already expressed the view that the use of a grant or subsidy for a purpose other than the one for which it was granted may be qualified under Article 82 of the Penal Code (that is, the fiscal offence of exposing public finances to depletion through undue payment, collection or misuse of a grant or subsidy) (C. Nowak, 2023, 143-145; I. Sepioło-Jankowska, 2020, 158-159; L. Wilk, 2010; A. Adamski, 2004, 5). The problem is that Article 82 of the Fiscal Penal Code is only punishable by a fine, and such a sanction is incompatible with the PIF Directive, which has been emphasised in the literature for years, again under the Convention (A Adamski, 2004, 18-19).

Article 82 of the Criminal Code may be an example of another inconsistency in the Polish regulations. As Nowak remarks, the problem is the criminalisation of staged forms in the case of fiscal penal law. Under Article 21 § 1 of the Fiscal Penal Code, an attempt to commit a fiscal offence punishable by a penalty not exceeding one year of deprivation of liberty or a lesser

penalty is punishable only if the Code so provides. In contrast, the PIF Directive does not provide for such derogations (C. Nowak, 2023, 174).

An in-depth analysis of the Polish regulations makes it possible to identify more cases of inconsistency with the PIF Directive.

The liability of legal entities is also problematic, and, according to the PIF Directive, must be provided for in national law. Poland formally complies with this requirement, the issue being regulated by the Act of 28 October 2002 on the Liability of Collective Entities for Criminal Acts (Act of 28 October 2002 on the liability of collective entities for acts prohibited under penalty (i.e. Journal of Laws of 2023, item 659, as amended). According to this Act, the liability of collective entities is secondary in nature, i.e. under Polish regulations, it is first necessary to prosecute an individual belonging to one of the categories specified in the Act (e.g. acting on behalf of or in the interest of a collective entity under a power or duty to represent it) for an offence committed in connection with the functioning of the entity (T. Oczkowski, 2021, 217). After more than twenty years of this law being in force, the Polish model of liability of collective entities has proven to be complicated and inefficient (W. Zalewski, 2017, 403), which is certainly not conducive to the protection of the financial interests of the EU (C. Nowak, 2023, 182-185, 257).

The lack of full transposition of the PIF Directive is probably not the reason for the problems associated with the effective prosecution of crimes against EU financial interests. The number of prosecutions for offences against EU financial interests in Poland is not significant, especially given the scale of EU support received. In 2021, there were only 677 prosecutions; in previous years, as shown in Table 1, the number of prosecutions was even lower.

Table 1 Proceedings initiated by the police in 2013-201

	Total	**PIF matters**
2021	491 781	677
2020	479 883	555
2019	531 687	597
2018	553 102	590
2017	492 404	511

Source: C. Nowak, 2023, 238.

On the other hand, as regards specific types of offences, which were the subject of the largest number of proceedings initiated by the Police, these were, in order: subsidy fraud (Article 297 § 1 of the Penal Code), ordinary fraud (Article 286 of the Penal Code), misappropriation of funds (Article 284 § 2 of the Penal Code), and falsification of documents (Article 270 of the Penal Code). However, against the background of the total number of proceedings initiated for a given type of crime, the number of proceedings concerning crimes against the financial

interests of the EU constitutes only a small part (only in the case of Article 297 of the Penal Code is the situation different) (C. Nowak, 2023, 242).

Table 2. Proceedings initiated by the police in relation to selected types of crime in 2017-2020.

	Article 270 of PC		Article 284 of PC		Article 286 of PC		Article 297 of PC	
	Total	to the EU's detriment	Total	to the EU's detriment	Total	to the EU's detriment	Total	to the EU's detriment
020	9350	17	2093	1 4	83822	221	366	248
019	1190	22	2458	3 1	84009	229	518	277
018	1267	11	2448	2 2	81241	200	719	321
017	1367	11	2576	2 0	82754	155	318	302

Source: C. Nowak, 2023, 243.

The protection of the European Union's financial interests through criminal law is not limited to the area of substantive criminal law, particularly the delimitation of the scope of criminalisation. However, it is complemented by institutional solutions aimed at combating these abuses. The most important role in this respect is played by OLAF and, more recently, by the EPPO, whose task is to conduct criminal proceedings concerning the offences defined in the PIF Directive. At the beginning of 2024, Poland finally submitted a notification to the European Commission and the Council of the European Union to join the European Public Prosecutor's Office. It therefore appears that Poland's accession to the EPPO will become a reality within a few months, which is to be welcomed, as the above comments lead to the conclusion that the protection of EU financial interests in Poland needs to be strengthened. Firstly, it is necessary to rectify the infringements identified by the Commission and fully transpose the PIF Directive. Secondly, it is necessary to prosecute infringements more effectively (M Serowaniec, N. Daśko, 2024, 113-114).

3.4. EPPO GOVERNANCE AND PROCEDURES IN POLAND

3.4.1 PROCEDURE FOR THE APPOINTMENT OF THE EUROPEAN PUBLIC PROSECUTOR FROM POLAND

Minister of Justice Adam Bodnar applied to the Prime Minister of the Republic Donald Tusk for Poland's accession to the EPPO on his first day in office at the Ministry of Justice, on 13 December 2023. On 5 January 2024, Poland submitted a formal notification of accession to the EPPO to the European Commission and the Council of the European Union. On 29 February 2024, the European Commission confirmed Poland's participation in the EPPO. The EPPO would investigate crimes affecting the financial interests of the Union committed in Poland after 1 June 2021.

Poland would become part of the EPPO when the European Commission's decision comes into force. The EPPO can start its activities and investigations in Poland 20 days after the Council appoints a European Public Prosecutor from Poland. Each country participating in the EPPO nominates three candidates, from whom the EU Council selects one and then appoints him or her for a 6-year term (see here).

The Minister of Justice, Adam Bodnar, issued an order appointing a Panel to select candidates for the office of European Public Prosecutor. The Selection Panel received five offers, but one was rejected for formal reasons. After interviews, the team selected three candidates, who were presented to the Selection Panel for their opinion on the candidates proposed for the office of European Public Prosecutor. The Ministry of Justice stated that during the interviews, the candidates' experience in handling fraud prosecutions and international criminal justice cooperation, degree of proficiency in the English language, and any academic achievements were assessed, among other things. During the interviews with the candidates, persons appointed by non-governmental organisations whose statutory activities include activities in the sphere of dissemination and protection of human rights, freedoms and civil liberties and persons appointed by the Supreme Bar Council, the National Chamber of Legal Advisers, the General Prosecutor's Office of the Republic of Poland, and the Chancellery of the Prime Minister were present as observers, but they did not have the right to vote (see A. Borek, here).

Following a national selection procedure by a Panel appointed by the Minister of Justice, Poland identified the following candidates: Agnieszka Adamowicz; Grażyna Stronikowska; and Paweł Wąsik.

The next step in selecting the European Public Prosecutor from Poland was for the Selection Committee to interview the individual candidates. The Selection Panel consisted of 12 members selected from among former members of the Court of Justice of the European Union and the Court of Auditors, former national representatives of Eurojust, members of national supreme courts, senior prosecutors designated by the European Parliament and lawyers of recognised competence. The hearings were the basis on which the Selection Committee prepared a written opinion on each candidate, giving reasons. Based on the opinions provided, the Council of the EU will select one of the candidates presented by Poland to take up the position of European Public Prosecutor from Poland.

There will be twenty-four European Public Prosecutors, who will be district prosecutors in Poland. They will function in three or four offices of the EPPO: one in Warsaw and the others in other cities of the country.

3.4.2 CHANGES IN THE FUNCTIONING OF THE NATIONAL PROSECUTOR'S OFFICE RESULTING FROM POLAND'S ACCESSION TO THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

A draft amendment to the Rules of Procedure for Public Prosecutions has been submitted to the Government Legislation Centre (Draft Ordinance of the Minister of Justice amending the Ordinance - Rules of Procedure of the Common Organisational Units of the Public Prosecutor's Office, see here). It is intended to adapt the provisions of the Regulation to Poland's accession to the EPPO. It aims to extend the circle of entities authorised, among other things, to apply for the European Arrest Warrant (a head of a department in the National Public Prosecutor's Office, a head of an internal affairs division in the National Public Prosecutor's Office, a head of a local division, a regional prosecutor or district prosecutor). Provisions that apply to the prosecutor's cooperation with prosecutors from the EPPO in other Member States of the European Union have been defined. New obligations regarding information on the part of prosecutors' offices towards the EPPO concerning offences under its jurisdiction emerge. The prosecutor's duties are described after the EPPO has taken over a case and after a case has been taken over from the EPPO. Until the EPPO becomes aware of a decision to take over a case (or not) or resolves a dispute over jurisdiction, the Polish Public Prosecutor's Office is to take only action considered urgent. When a decision is taken to take over a case by the EP, the national prosecutor will issue a transfer decision and order the case to be deleted as settled. Once a case has been taken over from the EP Prosecutor's Office, an order will be issued to initiate criminal proceedings. If national proceedings have already been opened in the case, a request for an extension will be made if necessary.

The amendment to the Rules of Procedure of Public Prosecutors' Offices is not all. A draft amendment to several laws has also appeared in the Government Legislation Centre: the Border Guard, the Code of Criminal and Fiscal Procedure, and the Law on the Liability of Collective Entities, among others (see Draft Act amending certain acts in connection with the accession of the Republic of Poland to enhanced cooperation in the field of European Public Prosecutions, see here). Under these, provisions, in cases where the maximum sentence for a pre-trial offence is four or more years' imprisonment, Member States are to ensure that delegated European public prosecutors have the power to order the interception of electronic messages, or those sent by any means of electronic communication, to a suspect or accused person.

Taking into account that Poland will operate within this enhanced cooperation structure, the drafter intends to regulate the principles of cooperation with the EPPO in a separate section, namely section XIIa of the Code of Criminal Procedure, containing statutory definitions, the manner of proceeding in European proceedings, recognition of evidence collected in these proceedings, and other relevant rules. In the first place, the task of the draftsman is to define the new concepts introduced into the Code. The accession of Poland to the EPPO makes it necessary to distinguish European proceedings from national criminal proceedings. In the opinion of the drafter, the concept of 'European proceedings' should be defined as criminal proceedings

conducted or supervised by a prosecutor of the European Public Prosecutor's Office within the jurisdiction of the EPPO. European proceedings will be delimited by the material scope of the European Public Prosecutor's Office as indicated in Article 22, Article 23 and Article 25 of Regulation 2017/1939, which simultaneously delimits the jurisdiction of the EPPO's national delegations.

According to the provisions mentioned above, the EPPO has jurisdiction over offences affecting the financial interests of the Union defined in Directive (EU) 2017/1371, as well as offences concerning participation in a criminal organisation within the meaning of Framework Decision 2008/841/JHA and any other offence inextricably linked to an offence falling within the scope of Article 22(1) of Regulation 2017/1939, but jurisdiction over such offences may only be exercised in accordance with Article 25(3) of Regulation 2017/1939.

European proceedings will be criminal proceedings based on the relevant provisions of the Code of Criminal Procedure and the directly applicable provisions of Regulation 2017/1939. Therefore, it is necessary to define European proceedings together with the simultaneous definition of national proceedings, which is 'proceedings conducted or supervised by a public prosecutor of a general organisational unit of the public prosecution service'. The draft also provides for the introduction of the concept of a European Public Prosecutor, namely a public prosecutor designated by the competent authority of the Republic of Poland and appointed as a European Public Prosecutor or as a delegated European Public Prosecutor, which is in line with Articles 8, 12, 13, 16 and 17 of Regulation 2017/1939.

Under the proposed regulation, conducting a procedural action online in European proceedings will be possible even if Polish law does not provide for such a form of action. This will be of particular importance in cases where the conducted proceedings will be of a cross-border nature, so it will be necessary to conduct activities on the territory of several Member States. The EPPO will be given the right to initiate proceedings concerning the liability of collective entities.

3.5. MILESTONES ACHIEVED IN RESTORING THE RULE OF LAW IN POLAND

To address the shortcomings identified under this horizontal basic condition of the EU Charter, Poland has introduced several measures in the last two years. Firstly, Poland has established effective institutional and procedural arrangements to ensure compliance with the Charter at all stages of the programming and implementation of funding programmes for cohesion policy, European maritime policy, fisheries and aquaculture, and home affairs. Roles and responsibilities concerning bodies such as the Human Rights Ombudsman and Charter Coordinators are clearly defined. An effective complaints and reporting mechanism is also in place. Secondly, Poland has addressed issues of judicial independence by reforming the disciplinary system for judges. In addition, Polish courts can initiate proceedings to verify

whether a judge meets the independence requirements under Article 19 TEU on the rule of law (Poland's efforts to restore the rule of law pave the way for accessing up to Euro 137 billion in EU funds).

As part of the measures taken, the system of disciplinary responsibility applicable to Polish judges was partially reformed. The Disciplinary Chamber of the Supreme Court was abolished and replaced by an independent and impartial court established by a law adopted on 9 June 2022, i.e. the Chamber of Professional Responsibility (June 2022 law). The system of disciplinary responsibility was also reformed, and safeguards were put in place so that judges were no longer disciplined for the content of their rulings or the application of Union law. This was achieved through the June 2022 Act and the February 2024 Order of the Minister of Justice setting out a framework for appointing ad hoc disciplinary commissioners, which allows for discontinuing unjustified disciplinary proceedings. All judges affected by the decisions of the Disciplinary Chamber were entitled to have their case heard by the new Supreme Court Chamber within a clearly defined timeframe and based on the new system set out in the June 2022 law. All judges who had been wrongfully suspended were reinstated (see here).

In addition, Poland's submitted action plan explicitly reaffirms its commitment to respect the primacy of EU law and the case law of the Court of Justice of the EU (CJEU). This includes the CJEU's ruling of 5 June 2023 (Case C-204/21), which found that certain provisions of the Polish Law on Disciplinary Misconduct of Judges violate EU law, which obliges all national authorities, and in particular all national courts, to disapply these provisions. The pro-European stance, moreover, found its direct expression in the resolution of the Polish Sejm of 20 December 2023. In this resolution, the Sejm declares that it will take action to restore the rule of law to compliance with constitutional and international standards, and calls on public authorities, in particular the President of the Republic of Poland, to take immediate action to restore the National Council of the Judiciary to its constitutional position and functions as defined in the Constitution of the Republic of Poland and in a manner appropriate to a democratic state under the rule of law. With this resolution, the Sejm has also attempted to implement numerous rulings of the Court of Justice of the EU, the European Court of Human Rights, the Supreme Administrative Court, and the Supreme Court, which have challenged the legality of the neo-KRS. The resolution further calls on all authorities to implement the European Court rulings and act under EU law.

Despite the measures and initiatives taken, Poland is only at the beginning of a bumpy road towards restoring rule of law standards. However, in February 2024, the European Commission acknowledged that the ambitious changes in the Polish judiciary, dissected into multiple threads in the 'super' milestones of the Polish KPO, had been achieved through the adoption of two legal acts, i.e. the amendment to the Act on the Supreme Court of June 2023 (enacted – *nomen omen* – under the Law and Justice Government) and a short, technical order of the Minister of Justice of February 2024. The changes introduced by Poland and the Commission's analyses were not accompanied by an EU or Polish public debate or environmental consultation. The favour of the European Commission, although leading to the

long-awaited payments of the Recovery Instrument, raises questions about how it exercises its discretion, the motives behind it, and the objectivity required of it (J. Łacny, 2024, 18). Thus, one has to agree with J. Łacny that it is somewhat surprising to note the ease with which the European Commission acknowledged in February 2024 that a reform of the Polish judiciary had been implemented in Poland, including a new regime on the disciplinary responsibility of judges, ensuring their independence as required by Article 19 TEU (J. Łacny, 2024, 18).

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Section II

Comparative Study

Belgium

Belgium

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4. BELGIAN CASE STUDY

4.1. THE BELGIAN AFCOS AND RECENT UPDATES IN THE DISCIPLINE OF DETENCTION, INVESTIGATION AND PROSECUTION OF FRAUD

According to the document "Measures adopted by the Member States to protect the EU's financial interests - Implementation of article 325 TFEU", accompanying the 34th PIF Report (here, 2023, 9), Belgium does not currently have a national anti-fraud strategy. Nevertheless, the Member State reported that preparations for establishing this strategy were ongoing.

From the same document, it can be observed that the Belgian national anti-fraud strategy has already been discussed at the latest 2022 Belgian AFCOS meeting.

Preliminarily, it is useful to remember that the Ministry of the Economy is the contact point for OLAF and, more specifically, the Interdepartmental Commission for Coordination of the Fight against Fraud (*Commission Interdépartementale pour la Coordination de la Lutte contre les Fraudes dans les secteurs économiques*, CICF/ICCF) is the competent organ. In fact, the Belgian AFCOS is a coordination platform which includes all the Belgian authorities competent for safeguarding the financial interests of the EU, namely the Ministry of Finance, the Ministry of the Economy, the Ministry of Justice, the Customs Bureau, the regional agencies for agriculture, social funds, and regional development funds. The director-general of the Inspection Department of the Ministry of the Economy chairs the meeting, whereas the Belgian AFCOS only has a coordination role (see here, 21).

During one such meeting, it was agreed that statutory changes would form the basis for the national anti-fraud strategy, while special attention would be paid to Recovery and Resilience Facility-associated risks. The latter could be adequately accounted for by integrating the Early Detection and Exclusion System database into the ongoing fraud prevention culture (see the following section for more details).

The most important developments can be summarised in three points.

The first legislative package aims to improve the detection, investigation, and prosecution of tax fraud by clarifying existing rules and rectifying flaws. The Belgian law provides for various fiscal and financial solutions, introducing a VAT penalty payment mechanism. It also modifies the time limits for investigations, as well as for the conservation of books and records under the VAT code.

The second legislative package is horizontal, generally endorsing the protection of whistleblowers for a stronger bottom-up approach to fraud prevention and detection. It contains two laws that became effective on January 1, 2023. The first measure transposes the European Whistleblowing Directive, establishing shared minimum standards to guarantee a high level of protection to those who report breaches of Union and national law. The second measure, the Law of 8 December 2022, regulates reporting channels and the protection of whistleblowers in the public sector. In addition to the federal public administration and the police, the law also applies to strategic bodies, implementing a recent Group of States against Corruption recommendation to Belgium (GrecoEvalRep (2019)3). The Group of States against Corruption (GRECO) monitors the compliance of its Member States with the Council of Europe's anti-corruption measures. GRECO's monitoring includes an "evaluation procedure", which is based on country-specific responses to a questionnaire and on-site visits, followed up by an impact assessment ("compliance procedure") that examines the measures taken to implement the recommendations resulting from the evaluations of the various States. A dynamic process of mutual evaluation and peer pressure is applied, combining the expertise of practitioners acting as evaluators and State representatives sitting in plenary session. Belgium joined GRECO in 1999.

Belgium's third and final measure during the 2022 reporting year was a single organisational update that integrated Walloon bodies in charge of RRF funds into an existing 'OLAF working group' to facilitate interagency cooperation through improved information flows (but see the following section.)

4.2. BELGIUM AND EU FUNDS: PROGRAMMES AND UPDATES

In the research carried out for the BETKOSOL project, the Belgian research team provided a detailed account of the structure of the governance system for European funds in Belgium (see here). This section aims to offer some updates on the previous findings and highlight some possible new issues.

4.2.1. EXPENDITURE AND CONTROLS OVER EUROPEAN FUNDS IN BELGIUM IN THE LIGHT OF PREVIOUS EXPERIENCE

In a recent report, the European Court of Auditors pointed out that Belgium has been slow to claim part of the European funds granted (see here). Nearly a quarter (24 per cent) of the European Structural and Investment Funds (ESI) have yet to be "absorbed" by the end of the year, amounting to 723 million euros. Under the ESI, Belgium was allocated an investment of 2.28 billion euros from 2014 to 2020. Once funds are accepted, a Member State must submit a dossier for payment. Most of these expenditures are due within three years, which means that Belgium must submit a claim for payment of all these funds by the end of 2023.

The ECA pointed out that the Belgian authorities have been slow to claim the funds because in some cases, Belgium does not have enough civil servants to process applications. According to the ECA report, in the case of infrastructure or construction projects, for example, permits are sometimes not granted, or projects are not completed. Belgium is not very efficient in handling these kinds of bureaucratic procedures. Since 2018, Belgium has faced enormous difficulties in absorbing European funds. The country's institutional complexity, characterised by its many overlapping governments and authorities, probably contributes to these problems.

According to the EU, funds totalled nearly 500 billion euros between 2014 and 2020, of which 80.4 per cent (396 billion) have already been disbursed. If we compare the various results in the EU, Ireland has been the best at absorbing these funds, having already applied for 91 per cent of the allocated funds. Denmark performed the worst, with just 67 per cent.

The organisational set-up in Member States also has an impact on their ability to prevent and detect errors relating to European funds.

According to the Commission's estimates (see here), in 2014-2020, Member States established approximately 1,400 different authorities to manage and control cohesion policy programmes, including 116 audit authorities, 300 certifying and managing authorities, and 900 intermediate bodies In the ex-post evaluation conducted on the 2007-2013 Cohesion Policy, the Commission noted that the involvement of multiple authorities in a programme increased the risk of different levels interpreting the rules in different ways.

The European Court of Auditors' analysis (see here) found that there is a correlation between the number of programmes in each Member State and the levels of error identified by the audit authorities (i.e., evidence indicating several weaknesses in the work done by the managing authorities). The Court also observed an inverse correlation with the size of the programmes: smaller programmes returned a higher number of errors.

This suggests that Member States such as Belgium, Germany, France, Spain, and Italy with decentralised administrations and regionalised programme implementation face greater challenges in terms of the effective implementation of Cohesion Policy programmes.

4.2.2. COHESION FUND 2021-2027 IN BELGIUM

The Cohesion Policy of the EU contributes to strengthening economic, social and territorial cohesion in the European Union. The policy aims to correct imbalances between countries and regions. It delivers on the Union's political priorities, especially green and digital transition. To reach these goals and address the diverse development needs in all EU regions, 392 billion euros, almost a third of the total EU budget, has been set aside for the Cohesion Policy over the period 2021-2027. In general, the Cohesion Policy has a strong impact in many fields, and its investments help to deliver many EU policy objectives and complement EU policies such as those concerning education, employment, energy, the environment, the single market, research, and innovation.

Belgium received almost 3 billion euros in Cohesion Policy funding in 2021-2027 (see here) to accelerate its green and digital transition and support the development of a competitive, innovative and inclusive economy. The strategy and details of these investments are set out in the Partnership Agreement adopted between Belgium and the Commission. Under the European Regional Development Fund (ERDF), nearly 500 million euros will boost investment in research, innovation and digitalisation. This amount includes support for the transfer of advanced technologies to increase the competitiveness of small and medium-sized businesses (SMEs), and investments in the digitalisation of SMEs and public services. Moreover, almost 400 million euros from the ERDF will be invested in greenhouse gas emission reduction, energy efficiency, and renewable energy. Furthermore, over 1.3 billion euros from the European Social Fund Plus (ESF+) will be invested in social cohesion and employment.

Close to 500 million euro will be invested in up-skilling and retraining both unemployed and employed people to help them acquire new skills to find quality jobs. It will also support employment, education, and training policy reforms to improve social inclusion, address skills mismatches, and reduce shortages in the labour market. In addition, around 300 million euros will be allocated to employment support, much of it focused on young people. This will help them to successfully apply for jobs, for example through career guidance services and internships. Some 400 million euros will be invested in active social inclusion for vulnerable groups, such as migrants, the low-skilled, the long-term unemployed, and those currently neither in work nor seeking employment. The fund will also tackle child poverty by supporting community-based care services. Another 50 million euros will go towards food and non-food assistance for the neediest, mainly through food banks.

The European Maritime, Fisheries and Aquaculture Fund (EMFAF) will support the fisheries sector through investments leading to more sustainable fisheries amounting to 40.3 million euros. These investments will focus on improving safety, health, hygiene, and working conditions on fishing vessels, as well as ensuring compliance with landing obligations and reducing bycatch at sea. It will also focus on innovation (e.g. electronic identification of non-commercial and endangered species, new digital data collection tools through image analysis for species recognition/identification) and sustainable and forward-looking management of fish stocks by supporting fisheries control and scientific data collection. Energy efficiency and decarbonisation in fisheries, aquaculture and processing will also be supported. In the aquaculture sector, diversification of farmed species will be promoted, which should also have an impact on the establishment of fish processing. Lastly, Belgium is focusing on developing its coastal zone through a local action group.

4.2.3. The European regional Development Fund 2021-2027 in the Brussels-Capital Region

For the first time, the ERDF department itself drew up the 2021-2027 programme in the Brussels-Capital Region. In the past, this task had been carried out by external service providers. However, the department wanted to take on this challenge because of its expertise and its proximity to the actors on the ground. The document describes the operations to be financed, the developments to be promoted and the measurable results to be achieved. Great attention has therefore been paid to the description of the actions to be carried out under the programme.

The preliminary draft ERDF Programme containing these various strategic data (and diagnostic elements) was approved by the Brussels Government on February 3, and public hearing and consultation with partners (advisory committees, etc.) were held on the preliminary draft. In July 2022, the draft programme passed its second reading by the BCRG. The ERDF Programme was then submitted to the European Commission for adoption in September 2022.

4.2.4. Next Generation EU in Belgium

The reforms and investments in Belgium's plan are helping it become more sustainable, resilient, and better prepared for the challenges and opportunities from the green and digital transition. Following Council approval of Belgium's plan on 13 July 2021, its recovery and resilience plan was updated on 8 December 2023 also to introduce a REPowerEU chapter (see here). Belgium's initial maximum contribution to finance its National Recovery and Resilience Plan was set, in fact, to 5,924 million euros in grants. However, the maximum financial contribution was updated in June 2022 and reduced to 4,523 million euros. In addition, the non-repayable allocation for the REPowerEU chapter to reinforce the NRRP's energy dimension is set at 281 million euros. Belgium also submitted a reasoned request to transfer part of its provisional allocation from the resources of the Brexit Adjustment Reserve to the RRF (228 million euros). Lastly, it requested a loan support of 264 million euros. The total value of the plan presented by the Belgian authorities is 5,299 billion euros divided as follows: 5,034 billion euros in RFF grants and 264 million euros in RRF loans.

In total, the National Recovery and Resilience Plan provides 119 investment streams and 40 reforms. 51% of the plan will support climate objectives, and 27% will be invested in the digital transition. The transformative impact of Belgium's plan is the result of a strong combination of reforms and investments to address the country's specific challenges. The reforms address bottlenecks to lasting and sustainable growth, while investments are targeted to accelerate the transition towards a more sustainable low-carbon and climate-resilient economy to maximise the benefits of the digital transformation and ensure social cohesion. The plan also intends to improve connectivity within the country, and boost labour market performance and the innovation capacity of the economy, making public spending more efficient and sustainable.

All the measures must be implemented within a tight timeframe as the Regulation on the Recovery and Resilience Facility requires them to be completed by August 2026.

Belgium's plan now includes a REPowerEU chapter, comprising four reforms and 25 investments to reduce its reliance on fossil fuels, in line with one of the goals of the REPowerEU Plan. To finance this greater ambition, Belgium has asked for a share of its Brexit Adjustment Reserve to be transferred to the plan, amounting to 229 million euros. These funds would be added to Belgium's REPowerEU grant of 282 million. Belgium has also requested loans of 264 million euros under the RRF, most of which is to be used to finance its REPowerEU chapter. Among other important measures, the REPowerEU chapter includes the reform of the appeal procedures of the Council of State, which aims to accelerate the deployment of renewable energy in Belgium by removing administrative bottlenecks linked to investments in renewable energy. A call for projects to decarbonise industry provides financial incentives for investments in the energy transition of industries in the Walloon region and the development of new industries for green technologies. Subsidies will be available to companies in Flanders investing in R&D activities related to the production of innovative technologies in the field of solar energy, as well as to companies investing in the electrification of port infrastructure. An additional investment is envisaged for charging infrastructures for buses in the Brussels-Capital Region, which will lead to fewer emissions from urban public transport.

4.3. EPPO'S PERFORMNCE IN BELGIUM

The role of the European Public Prosecutor's Office (EPPO) is to protect the financial interests of the EU through criminal law (see BETKOSOL, Deliverable 2). The EPPO investigates fraud involving EU funds of over 10,000 euros and cross-border VAT fraud involving damage above ten million euros. The EPPO, together with the Court of Justice of the EU, represents the justice pillar of the EU. In general, the EPPO focuses on cross-border investigations into sophisticated economic and financial crime, particularly where serious organised crime is involved.

According to the EPPO Annual Report (EPPO, 2024), by 31 December 2023, the EPPO had 1,927 investigations active, concerning estimated damage of over 19.2 billion euros. VAT fraud accounted for 17.5% of the total amount, resulting in an estimated loss of 11.5 billion euros. The proportion of cross-border investigations (acts either committed on the territory of several countries or causing damage to several countries) remained stable (28%). In 2023, the EPPO processed 4,187 crime reports, which is 26% more than in 2022. This increase has mainly been driven by reports from private parties (2,494, which is 29% up on 2022) as well as from national authorities (1,562, or 24% more than in 2022). This growth demonstrates that the level of detection of fraud affecting the financial interests of the EU in participating Member States has continued to improve. It also shows that there is greater public awareness of the EPPO and that the expectations of European citizens remain high. However, reports from EU institutions,

bodies, offices and agencies were still very few (108), which means there was no improvement in terms of detection and reporting on their part. Based on all the available information, the EPPO opened 1,371 investigations in 2023, up 58% more than in 2022. This is mostly the result of the combination of improved cooperation between the EPPO and the relevant national authorities, and its determination to target criminal organisations particularly active in non-procurement expenditure fraud and revenue fraud (VAT and non-VAT). In 2023, with 139 indictments filed (which is over 50% more than in 2022), the EPPO started to bring more perpetrators of EU fraud to judgment in national courts. Ultimately, in line with its goal to focus on damage recovery, courts granted European Delegated Prosecutors freezing orders worth 1.5 billion euros, which is over four times greater than in 2022.

The report contains a section for each Member State.

From the data concerning Belgium, it is possible to affirm that in 2023, the EPPO opened fifteen investigations for damage to an estimated value of 65 million euros (21 in 2022, with estimated damage for over 1 billion). During the same period, the EPPO had 54 pending cases open in Belgium, worth 1.33 billion euros (44 in 2022, worth 1 billion euros). VAT fraud accounted for 16.6% of these cases, with estimated damage amounting to 482,9 million euros (€361.7 million in 2022). There have been a total of 32 cross-border investigations, 26 of which took place in 2022. A total of 144 decisions were made to assign measures to assist EDPs in different participating Member States, 77 of which were incoming and 67 outgoing. Freezing orders granted in 2023 total 303.3 billion euros. In the same year, there were three indictments, with eight individuals being charged. Lastly, the EPPO received (i) eight reports from EU institutions, bodies, offices and agencies, (ii) eight from private parties, (iii) eleven from national authorities, and (iv) two *ex officio* reports. Overall, the EPPO's pending cases can be classified according to type: (i) 21.73% (20) non-procurement expenditure fraud; (ii) 8.69% (8) procurement expenditure fraud; (iii) 7.60% (7) PIF crime-focused criminal organisations, (iv) 19.56% (18) non-VAT revenue fraud, (v) 10.86% (10) VAT revenue fraud, (vi) 4.34% (4) corruption, (vii) 11.95% (11) misappropriation, (viii) 11.95% (11) money laundering, and (ix) 3.26% (3) inextricably linked offences.

Belgium, therefore, follows the European trend, with an increase in cases of fraud affecting the financial interests of the EU and, consequently, a rise in EPPO interventions.

4.4 REFERENCES

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Section II

Comparative Study

Spain

Spain

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5. SPANISH CASE STUDY

The following section outlines the progress made in Spain in recent years regarding the protection of the European Union's financial interests.

Firstly, it highlights the recent regulations that have been approved in Spain in relation to the Spanish anti-fraud coordination authority regarding the protection of European funds, as stated in article 12a of the Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999. In this first section, some other agents and institutions that have taken on central roles in protecting those interests are also presented.

Secondly, it provides a critical analysis of the current state of the fight against corruption and fraud in Spain, considering the advancements introduced by anti-corruption rules aimed at protecting the Union's financial interests and compliance with EU law and especially with Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the RRF.

And thirdly, some references to the EPPO governance and procedures in Spain are made regarding the relevant legislation and some data about the EPPO's activity in Spain.

This section provides the state of the art on the topic for the Member State, adding a new country to those already analysed in the BETKOSOL comparative study. More critical insights, especially in the third part of this section (criminal law aspects), will be provided in the next working paper, within the framework of Deliverable n. 2.

5.1. THE SPANISH STATE AND THE PROTECTION OF THE EU'S FINANCIAL INTERESTS

In Spain, there are three levels of territorial administration: the State Administration, the administration of each of Spain's autonomous communities (17 autonomous communities, and two autonomous cities), and the local authorities.

Legislative power is divided between the parliaments of the Autonomous Communities and the national parliament, which is made up of two chambers, the Congress of Deputies and the Senate.

Legislative powers in criminal matters are the exclusive competence of the State under Article 149.1.6 of the Spanish Constitution. In accordance with EU law, Organic Law 1/2019 of 20 February 2019 was introduced amending Organic Law 10/1995 of 23 November 1995 on the Criminal Code to transpose European Union Directives in the areas of finance and terrorism and to address international issues, which transposed into the Spanish legal system, among others, 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 through criminal law.

In terms of regulating the functioning of public administrations, matters are generally divided between basic legislation, which is the responsibility of the State, and development, which is the responsibility of the Autonomous Communities (Articles 148 and 149.1.18 Spanish Constitution).

According to internal regulations, approved by the national parliament and the national government, all public administrations and public bodies using European funds have obligations regarding the protection of the correct use of funds, and the prevention of fraud and corruption. Among many other administrative provisions against fraud and corruption for the protection of the EU's financial interests, the following two orders should be specially highlighted: Order HFP/1030/2021 of September 29, which sets up the management system for the Recovery, Transformation, and Resilience Plan (PRTR); and Order HFP/55/2023 of January 24, related to the systematic and automated analysis of conflict-of-interest risk in the procedures executing the Recovery, Transformation, and Resilience Plan (PRTR). These orders, among other Spanish rules, are covered and discussed in further detail below.

5.2. THE FUNCTIONING OF THE SPANISH AFCOS. UPDATES FOLLOWING THE NRRP GOVERNANCE CHANGES

Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, establishes, in Article 12a, that "Each Member State shall, for the purposes of this Regulation, designate a service (the 'anti-fraud coordination service') to facilitate effective cooperation and exchange of information".

In Spain, the National Anti-Fraud Coordination Service (*Servicio Nacional de Coordinación Antifraude*, or 'SNCA'), was set up by Royal Decree 802/2014, of 19 September, amending Royal Decree 390/1998, of 13 March, regulating the functions and organic structure of the Economy and Finance Delegations; Royal Decree 1887/2011, of 30 December,

establishing the basic organic structure of the ministerial departments; Royal Decree 199/2012, of 23 January, developing the basic organic structure of the Ministry of the Presidency; Royal Decree 256/2012, of 27 January, developing the basic organic structure of the Ministry of Finance and Public Administrations and Royal Decree 696/2013, of 20 September, amending the previous one.

In 2015, the Seventh Final Provision of Law 40/2015 amended the General Law on Subsidies (Law 38/2003, of 17 November, General Law on Subsidies) to give legal status to the creation and regulation of the SNCA.

The SNCA is part of the General Intervention of the State Administration and is responsible for coordinating actions to protect the financial interests of the European Union against fraud. It is empowered to create and implement national strategies for safeguarding the European Union's financial interests, to identify possible deficiencies in the national systems for the management of European Union funds, establish channels for coordination and information on irregularities and suspected fraud between the different national institutions and OLAF, and promote training for the prevention and fight against fraud.

Subsequently, the structure of the SNCA was developed by Royal Decree 91/2019, of 1 March, which regulates the composition and functioning of the Advisory Council for Preventing and Combating Fraud against the European Union's financial interests. This regulation governs the Advisory Council, which had already been envisaged since the 2015 regulation but had not been implemented previously.

At present, it is Royal Decree 206/2024, of 27 February that forms the basic organic structure of the Ministry of Finance, which establishes the institutional location of the SNCA in the General Intervention of the State Administration, in the Ministry of Finance (Article 11). Section 5.f of Article 11 also reproduces the functions of the SNCA already contained in the General Law on Subsidies.

Regarding the national plan regulation, the PRTR (see here), it must be highlighted that, in its regulatory development, it was stated in the 2021 Annex III.c of Order HFP/1030/2021 of September 29, that institutions must report cases of fraud or possible fraud to the SNCA for assessment and possible communication to OLAF. This order also establishes some obligations for Spanish public administrations using PRTR funds, regarding the prevention of corruption, fraud and conflicts of interest, such as an anti-fraud measures plan, the mandatory use of declarations relating to conflict of interest, and the establishment of a procedure to deal with any conflicts that may emerge. Some of these measures will be discussed in greater depth in section 2.1.2.

Two years later, another order, Order HFP/55/2023, added two important new tasks for two actors in the control of the management of EU funds under the national PRTR plan: the National Tax Agency and the Specialised Conflict of Interest Advisory Unit.

In the 2023 order, the task assigned to the Tax Agency was to monitor procurement and granting procedures through a digital AI-based system called Minerva, created from scratch,

made obligatory under the 2023 order, in order to red-flag possible situations of conflict of interest (also discussed in section 2.1.2).

The Specialised Conflict of Interest Advisory Unit is a new consultative body, created under Art. 8 of the 2023 order as an integrated office within the General Intervention of the State Administration. This new unit has the power to disseminate good practices to avoid and prevent conflicts of interest and prepare practical manuals on identifying and dealing with situations of conflict of interest and is aimed at both anti-fraud committees and managers. However, its main function is to issue a report on the existence of a risk of conflict of interest (as stated in Art. 6.3 of the 2023 order) within a procedure to manage a conflict of interest carried out on account of a file red-flagged by the Minerva system. It is not mandatory to make the report accessible, and it can only be accessed by the anti-fraud committees.

However, a negative aspect of all this is that the creation of anti-fraud committees in the public sector has been imposed indirectly through Law 31/2022 (Final Provision 112ª.6) and Art. 6 of this 2023 order, since those rules assumed that they exist, and these committees have been given a role in the abstention procedure linked to the Minerva system. In this respect, it should be noted that the creation of an anti-fraud committee in each public organisation was not imposed previously, and those committees were not even mentioned in Order HFP/1030/2021 of 29 September, so not all institutions had opted for this organic solution when establishing their framework to comply with the 2021 order (Clemente, 2023, 315).

The last aspect to address in this section is the national anti-fraud strategy. The 34th Annual Report on the protection of the European Union's financial interests and the fight against fraud-2022, COM(2023) 464 final, underlines that "Spain does not have a national anti-fraud strategy" (p. 42), even though this is a fundamental task of the SNCA. At the time of writing, the national strategy is still being developed, involving several relevant actors, such as the antifraud offices that exist in some Autonomous Communities (see here). However, this strategy is expected to be approved in the coming months, since Law 2/2023 of February 20, regulating the protection of people who report regulatory infractions and the fight against corruption established in its fifth additional requirement that the Government must approve a national strategy against corruption within a maximum of eighteen months after the law comes into force.

5.3. CHANGES IN THE ANTI-CORRUPTION APPROACH IN SPAIN: THE CHALLENGES OF PROTECTING EU FUNDS

The RRF was established in Regulation (EU) 2021/241 of the Parliament and of the Council of February 12, 2021. To protect the Union's financial interests, these funds must be managed properly and allocated to the intended purposes within the framework of the requirements established by the European Union. Article 22 of Regulation (EU) 2021/241 requires Member States to establish effective internal control systems and take appropriate measures to prevent, detect, and correct fraud, corruption, and conflicts of interest.

In Spain, the RRF is implemented internally through the Recovery, Transformation, and Resilience Plan (with its Spanish acronym PRTR) as a national strategy for managing European funds received under the RRF.

To protect the Union's financial interests under the PRTR in Spain, three main regulations have been approved regarding the proper management of European funds:

- Order HFP/1030/2021 of September 29, which sets up the management system for the Recovery, Transformation, and Resilience Plan (PRTR);
- Law 9/2022 of the General State Budget Bill for 2023;
- Order HFP/55/2023 of January 24, related to the systematic and automated analysis of conflict-of-interest risk in the procedures executing the Recovery, Transformation, and Resilience Plan (PRTR).

It is worth noting that the aspects relating to the integrity of the PRTR in Law 9/2022 are only referred to in the 112th Additional Provision. The Order HFP/55/2023 was issued during the drafting of the 112th Additional Provision of the previously mentioned budget law.

These three regulations have ultimately shaped a management system for European funds based on three fundamental elements that have been introduced mandatorily and represent interesting innovations in preventing fraud and corruption cases in Spain. These consist of the risk management approach through an anti-fraud measures plan introduced by the 2021 Order, the declaration of absence of conflicts of interest ('DACI'), also introduced in 2021 and reformulated in 2023, and the automated analysis for detecting conflicts of interest by using an artificial intelligence (AI) based system, introduced by budget law 31/2022 and its development order of 2023.

However, the novelty and relevance of these measures should be considered temporary and partial, since they are only limited to the use of PRTR funds, meaning they apply only as long as the PRTR is being executed and exclusively with regard to contracting and granting procedures that use those funds.

Lastly, I believe it is pertinent to relate the protection of the Union's financial interests and the fight against fraud and corruption with reporting channels and whistleblower protection, which recently set a new paradigm for Spanish public administrations in 2023. Although this regulation is not directly related to the protection of financial interests under the PRTR, it allows for safe reporting and the protection of whistleblowers who raise concerns about breaches of national or European law, which may include embezzlement or other fraudulent conduct and malpractices in the use of EU funds. Moreover, the European directive on protecting whistleblowers explicitly correlates this subject to the protection of the Union's financial

interests in its recital 15. This directive, which regulates the Member States' harmonisation of legal systems regarding whistleblower protection, is Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

The Directive of 2019 was transposed into Spanish law through Law 2/2023 of February 20, regulating the protection of people who report regulatory infractions and the fight against corruption.

This regulatory framework leads to four major blocks being proposed to critically expose and analyse the new trends in Spain regarding the prevention of conflicts of interest, corruption, and fraud, with special regard to the protection of RRF funds.

The four sections into which the exposition will be subdivided are as follows: a) risk assessment and management through the anti-fraud measures plan; b) the declaration of absence of conflicts of interest (DACI); c) automated control; and d) the promotion of whistleblowing and whistleblower protection.

5.3.1 Risk assessment and management: the anti-fraud measures plan

In Spain, risk planning in relation to fraud and corruption risks in the use of funds from the RRF was imposed by the Order of 2021. Before this important milestone, public administrations in Spain had never used this technique, which was totally unknown to public officials and civil servants. However, international instruments and organisations had been promoting this methodology to ensure integrity in the public sector as an anti-corruption tool for years. For example, Article 10 of the United Nations Convention Against Corruption states that the national publication of information about corruption "may include periodic reports on the risks of corruption in its public administration" (see here). Also, in reports and recommendations, among the many other organisations and institutions, this technique has been proposed or recommended by the OECD (see here) and the European Union (as the EU Anti-corruption report says, "Overall, most of the above-mentioned Member States lack coherent risk assessment mechanisms or sector-specific strategies to tackle corruption in vulnerable sectors" (European Commission, 2014:17).

Specifically, for the Spanish State (Annex 9), the EU Anti-Corruption report (European Commission, 2014) highlighted the need to implement this approach, which had been unknown to the Spanish public administrations in relation to the fight against corruption: "Initiatives to modernise public administration are also underway, including a draft law on local administration reform which aims to enhance control and improve coordination among the national, regional and local administrations. […] To be fully effective, they will need to be complemented by a coherent risk-based approach which goes beyond purely legislative measures to comprehensively address corruption" (European Commission, 2014: Annex 9, 2).

Some countries, such as Italy, had adopted this approach to corruption risk planning years before, as early as 2012 (Carloni, 2017: 91). Moreover, some Spanish scholars and anti-corruption practitioners had suggested, years before, the need and opportunity to adopt this approach as a modern and useful system to organise and rationalise a more effective fight against corruption (Nieto and Maroto, 2014; Capdeferro, 2016: 26).

As I mentioned above, this gap in the public integrity systems in Spain was partially addressed in 2021. Article 6 of Order HFP/1030/2021 of 29 September, which establishes the management system for the Recovery, Transformation, and Resilience Plan, requires institutions to have a plan with anti-fraud measures to be eligible to use PRTR funds, which, as previously stated, uses Next GenerationEU funds. The same Article 6 also specifies the minimum content required for the plan and the guidelines for its preparation.

It was also stipulated that those plans should be approved within a relatively short period: either 90 days from the entry into force of the 2021 order mentioned above, or 90 days from the notification of participation in the implementation of the PRTR. This period must be considered very short, since, as we observed before, public administrations in Spain did not previously have any similar obligation regarding risk management for fraud, corruption or any other maladministration practices. In general, the risk management approach regarding integrity issues was largely unknown in Spanish public administrations.

If the plan is not approved, municipalities will not have access to these funds, since having a plan of anti-fraud measures is a requirement imposed on any entity, decision-maker or executor that participates in the implementation of PRTR.

Hence, to comply with the obligation of putting an anti-fraud measures plan in place, there has been a tendency to copy anti-fraud measures plans or directly outsource their construction. These bad practices are not compatible with the notion of risk self-assessment, which is particularly important for an accurate definition of the actors and administrative files that are actually most exposed to the risk of corruption. Moreover, the importance of the involvement of one's own personnel in the design and development of a plan of this kind has been highlighted in the United Nations guide on corruption risk management, stating that the implication is not only important for accurately identifying vulnerabilities and tailoring procedures relevant to the organisation but also in increasing acceptance of the subsequent measures to be adopted by the rest of the personnel (UNODC, 2020: 10).

Therefore, solutions copied from other bodies or generically designed by private companies 'specialised' in offering quick solutions to public administrations, which hire external staff to draw up the anti-fraud plan, are of little or no use and completely undermine the logic of self-assessment and the involvement of their own staff in risk management. Thus, it should be noted that in risk management, solutions that are not tailored to the institutions and their specific problems and functions, also known as the 'one-size-fits-all approach' (Olechowski et al, 2016), are particularly to be discouraged.

In this sense, the need to impose, with certain minimum requirements (e.g. the need to create an internal committee to draft the plan, and an external assessment unit with expertise,

among many others), this type of methodology should also be assessed in order to guarantee the proper and fair management of European funds and prevent measures of this type adopted by Member States from ending up as mere formal compliance, creating the appearance that the organisation has carried out a real risk analysis.

5.3.2. TOWARDS A BEHAVIOURAL APPROACH IN ANTICORRUPTION CONTROLS: THE DECLARATION OF THE ABSENCE OF CONFLICTS OF INTEREST (DACI)

The Declaration of Absence of Conflict of Interest is established only for PRTR fund management procedures, like the other innovative anti-corruption measures described in this section. In consequence, this is only a temporary and partial measure against corruption, limited to a few procedures, depending on the origin of the funds used.

The DACI is a document that must be signed by those with particularly important or decision-making functions, where the signatory declares that he or she is aware of the regulation on conflicts of interest and, especially, of the cases that lead to abstention, and declares that he or she finds themselves in no such condition with respect to a specific procedure.

The obligation to complete a DACI was introduced by Article 6.4 of Order 1030/2021. This order establishes that the declaration will be compulsory for all who participate in procedures implementing the PRTR, which, interpreted in a broad sense, may be imposed on a large number of public servants.

The 2023 Order establishes a new model of DACI, this time conceived as a model with the minimum mandatory content (information may be added, but not omitted, to what is included in the model) for decision-makers in the framework of public procurement or granting procedures implementing the PRTR. These DACIs, which must be signed, are included in the administrative file and form part of the automated analysis procedure imposed by the 2023 Order (Article 1.2 Order 55/2023).

In this regard, it should be added that Spanish administrative law has traditionally regulated the abstention of public servants in the event of a conflict of interest, setting out a relatively detailed list of the causes that give rise to abstention.

Thus, currently, Art. 23 of Law 40/2015 of 1 October on the Legal Regime of the Public Sector establishes the abstention of personnel who must participate in an administrative procedure when any of the following circumstances apply:

a) they have a personal interest in the matter in question or in another matter whose resolution may be influenced by the resolution of that matter; they are a director of the company or entity concerned or have litigation pending with any interested party;

b) they have a marital relationship or similar de facto situation, a blood relationship within the fourth degree or an affinity within the second degree with any of the interested parties, with the administrators of the entities or companies involved, or with the advisers, legal

representatives or agents involved in the procedure, or they share professional premises or are associated with them for the purpose of advice, representation, or delegation;

c) they have a close friendship or manifest enmity with any of the persons mentioned in the previous section.

d) they have participated as an expert or witness in the proceedings in question.

e) they have a relationship of service with a natural or legal person directly involved in the case or have provided them with professional services of any kind and in any circumstance or place in the last two years.

If any of these circumstances apply, the person concerned must inform his/her immediate superior, if he/she has one, so that the superior may decide what is appropriate. In this sense, the cases and this procedural step involving the hierarchical superior are in line with the concept and procedural provisions established for conflicts of interest in the management of European funds, as in the case of PRTR funds, which can be found in Article 61 of Regulation (EURATOM) 2018/1046 of the European Parliament and of the Council of 18 July on the financial rules applicable to the general budget of the European Union.

Other articles of national legislation regulate conflicts of interest and establish management mechanisms, such as Article 53.5 of the Royal Legislative Decree 5/2015, of 30 October, approving the revised text of the Law on the Basic Statute of the Public Employee, or Article 11 of Law 3/2015, of 30 March, regulating the exercise of senior positions in the General State Administration.

Therefore, it can be stated that the DACI does not introduce, for PRTR implementation procedures (i.e. for domestic procedures involving the use of European funds), new cases that give rise to compulsory abstention, nor does it establish a new specific abstention management procedure. However, the 2021 Order establishes the obligation to approve and set up a procedure, freely configurable by each organisation, to manage conflicts of interest according to Art. 6.4 of Order 2021.

However, it does add an approach that comes from behavioural science, consisting of recalling a series of pre-existing rules at a key moment so as to influence the decision-maker, who will bear them in mind, so that his or her actions are in accordance with that set of rules.

Some studies seem to have found fewer instances of dishonest behaviour when, in experiments, participants were asked to remember the Ten Commandments, sign a code of ethics, or even a truthfulness or fair compliance clause before filling in a form containing data that could be misrepresented for profit (Ayal et al., 2015: 739). From this set of experiments, it could be concluded that it is effective to include awareness-raising messages or ethical and legality reminders just prior to the adoption of certain actions, as proposed by the DACI.

In the same vein, the OECD has suggested the use of different behavioural tools to modify the decisional architecture of public employees in favour of integrity, including the use of reminders and the incentivisation of commitments (OECD, 2018: 14-15), such as DACIs.

This behavioural approach, which the DACIs bring to the Spanish anti-corruption system, can therefore be seen as something new and relevant in the fight against corruption.

It is possible, however, to raise a possible criticism, which could be excessively (or perhaps blindly) based on a strict interpretation of the theory of the rational decision-maker. Thus, ignoring the scientific evidence and the recommendations from the behavioural sciences, one could criticise the potential lack of effectiveness of a control system in which the controlled subject is the same as the controller. However, this possible criticism is resolved in the DACIs established in the 2023 Order since these at least are subject to verification or control by an automated system for detecting conflicts of interest, as described in the following subsection. However, the rest of the DACIs, outside the scope of the 2023 Order and signed in accordance with the Order of 2021, are not monitored by the automated system for detecting cases of conflict of interest. As this point shows, the coexistence of two types of DACI can be problematic and generate confusion in Spanish administrations, so it might be worth reconsidering the regulation of DACI uniformly within the framework of the PRTR.

As mentioned at the beginning of this subsection, it must be borne in mind that the measure is temporary and limited to the management of European funds in the PRTR. Because of the virtues of such techniques, as indicated in the behavioural science literature, it may be appropriate for governments to consider extending the use of such declarations to other procedures, or at least to those identified as being subject to a higher risk of corruption.

5.3.3. AUTOMATED CONTROL THROUGH AN AI-BASED SYSTEM: MINERVA

There were discussions among Member States as to how to control the management of the funds for the Next Generation EU programme, and no consensus was reached regarding the implementation of the Arachne system to monitor their fair management. Regarding the use of Arachne by Member States and its potentially binding use in the future, it is also interesting to see the answers to Parliamentary Question (European Parliament) - E-001007/2022(ASW) and E-002217/2022(ASW).

Consequently, each State has been given the autonomy to select its own mechanisms to combat fraud and corruption, particularly emphasising the prevention of conflicts of interest in managing these funds.

This problem could be caused by the lack of familiarity with the system, although it has been available to Member States for almost a decade: “One of the impediments to universal adoption of ARACHNE highlighted in our study is national authorities’ lack of familiarity with the system and its advantages. This leads to many authorities preferring to use their own national systems which have data sets restricted to information collected within their country and prevents the use of data mining in cross-border fraud cases” (Malan, 2022:138).

Order HFP/1030/2021 of 29 September, which configures the management system of the RTRP, refers to the EU’s Arachne system (Annex III.c) in the context of fraud detection tools and points out the suitability of using data mining tools to prevent fraud and corruption.

However, it does not impose their use, nor was a tool provided in 2021 to carry out automated checks for the proper management of conflicts of interest and to prevent fraud and corruption.

This task was addressed later, in 2023. Additional provision 112 of Law 31/2022, of 23 December, on the General State Budget for 2023, imposes the obligation to carry out a systematic and automated analysis of the risk of conflict of interest in public procurement procedures and granting procedures that execute PRTR funds. This obligation is set out in Order HFP/55/2023 of 24 January, in which the digital Minerva system was also established, along with its associated procedure.

Minerva is an AI-based data mining tool, which may be classified as a red flag system: "Red flags are proxy measures for corruption signalling risks of corruption, rather than actual corruption. They are expected to be correlated with corrupt practices, rather than perfectly matching them" (Gnaldi and Del Sarto, 2023, 3).

This digital tool is managed by the Spanish Tax Agency ('AEAT', *Agencia Estatal de la Administración Tributaria*), and its purpose is to detect "possible direct or indirect family relationships or corporate links in which there may be a personal or economic interest likely to cause a conflict of interest" between interested persons participating in administrative procedures and the members of the bodies competent to assess, inform or decide on public procurement or granting procedures (Art. 3.1 Order 2023).

If the Minerva system detects a conflict of interest, i.e. if a red flag is raised as a result of the analysis of a file, a procedure is established to determine whether the person affected by the conflict of interest should abstain (Art. 6 Order HFP/55/2023) since, unless justified, the person affected by the conflict of interest must refrain from participating in the procedure. If a red flag is alerted by the Minerva system, the hierarchical superior of the person affected by the conflict of interest is responsible for the decision regarding the need for the person to abstain. The superior's decision, which must be accompanied by reasons, has to be based on the information provided by Minerva on the allegations of the person concerned and, if requested, on the report of the corresponding anti-fraud committee in the same Public Administration. In turn, this anti-fraud committee may seek the opinion of the Specialised Conflict of Interest Advisory Unit of the General Intervention of the State Administration, created by Art. 8 of Order HFP/55/2023, to be able to report on the appropriateness of the abstention.

In consequence, according to the 2023 Order, in Spain, the Union's financial interests are protected through an AI-based tool, the Minerva system, which, again, is only used in procurement and grant procedures linked to European funds. However, even within this limitation, the system has further constraints in terms of when it can be used in relation to granting procedures under the PRTR. Specifically, there is a limitation on the use of the system in cases of mass applications, set at more than 100, in grant procedures not exceeding Euro 10,000. In this case, the analysis will only be carried out for a selection of applications. This decision does not seem entirely suitable since, although one can understand the need not to saturate the system with a single grant file, it is precisely the capacity to cover the analysis of many cases at high speed that makes it attractive to opt for automated rather than human control.

It could be argued that this digitally automated system is rather simple, since according to the information provided in 2023 it seems that it can only detect the most obvious causes of abstention, such as the fact of having a direct interest in the matter, either on an individual, familial, or corporate level, by being at the same time a decision-maker and a person interested in the procedure, or when there is a direct familial or corporate link between them. It is not enough, therefore, to signpost situations that are somewhat more difficult to detect and also require abstention, such as intimate friendship or manifest enmity. Moreover, Minerva cannot detect schemes in which it is fraudulently sought to circumvent incompatibilities or it is necessary to abstain because of an agreement between public decision-makers with private interests in companies.

Lastly, some reflection needs to be made regarding AI-based tools in the fight against fraud and corruption. Concerning the use of artificial intelligence systems, it is also relevant to consider Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139, and (EU) 2019/2144, as well as Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (the 'AI Act'). This regulation will apply to all AI systems, such as automated control systems used against corruption. However, the extent to which the high-risk systems regime should apply to anti-corruption AI systems should be considered with care. According to Annex III of the AI Act, systems used to detect fraud would not be considered high-risk, and, among those used to prevent, detect, and sanction malpractice, only those used by law enforcement authorities in relation to criminal offences may be deemed high-risk.

Therefore, if the system is used by the Public Prosecutor's Office or another competent authority to prosecute crimes, it would be a high-risk system, but if it is used by an administrative authority with no jurisdiction to investigate crimes, its use could be understood to be preventive and serving law compliance rather than law enforcement. In short, depending on the authority that is going to adopt them, similar systems could have different legal frameworks regulating their use, which is why it may be of interest to start developing research on the characteristics and conditions of each type of anti-corruption system in view of the AI Act.

5.3.4. WHISTLEBLOWING

It may not be possible to detect cases of corruption through data analysis, as the data may be falsified, or the corrupt act may not have left any significant traces (e.g. the payment of a bribe, which is not recorded anywhere) (see, among others, Adam & Fazekas 2021, 2; Nesvijevskaia et al.,2021, 7)).

It is therefore necessary for those who are aware of cases of corruption to be able to collaborate in detecting and correcting them. One mechanism to facilitate such cooperation is through a secure reporting system and the assurance that the whistleblower will not suffer

reprisals. This important issue has already been addressed in Directive 2019/1937, but attention must also be paid to the current and actual state of whistleblowing and whistleblower protection.

Thus, it is widely known that the transposition of this directive has been significantly delayed. The deadline for transposition was December 2021. After that deadline, in January 2022, the Commission sent letters of formal notice to twenty-four Member States, since the obligation to transpose the directive was not being complied with. Finally, on 15 February 2023, the Commission brought an action before the Court of Justice of the European Union under Article 260(3) of the Treaty on the Functioning of the European Union, for failure to transpose the directive by eight Member States.

Even when the directive has been transposed, the reality may be that there is still no effective protection. For example, in Spain, which transposed the directive with considerable delay in February 2023, there is still no national authority to manage the external reporting channel at the central level and offer protection to whistleblowers.

However, some advances have been made recently. At the time of writing, it appears that the Spanish Government may be able to make progress in the coming months towards a future national protection authority, the Independent Authority for Whistleblower Protection. On 9 May 2024, the draft statute of the Independent Whistleblower Protection Authority was submitted for public consultation, and it is expected to be finally approved as a royal decree in the course of 2024.

Once again, the delay in this matter can be seen, given that Art. 44 and the eleventh final provision of Law 2/2023 set the deadline for approving the statute of the authority at one year from the entry into force of the law (13/03/2023). The delay in the approval of the statute is also surprising since during the Council of Ministers' agreement of 28 March 2023, it was agreed to urgently process the draft royal decree, under the provisions of Article 27.1 of Law 50/1997 of 27 November on the Government.

This statute regulates organisational aspects and details the exercise of its functions. For its part, the Report on the Regulatory Impact Analysis ('RRIA') of this draft royal decree states that "its main objective" is "to make effective the creation of the Independent Authority for Whistleblower Protection" (RRIA, p. 9). This same report may explicitly mention the factor that has delayed, and continues to delay, the effective implementation of the whistleblower protection law: these are tasks and requirements that are "new for the Spanish public administrations as a whole" (RRIA, p. 34 and 35).

On the other hand, some few Autonomous Communities have made progress and have created their external reporting channels and protection authorities. In Catalonia, the seventeenth additional provision of Law 3/2023 of 16 March on fiscal, financial, administrative, and public sector measures for 2023 establishes that, provisionally, the Catalonia Anti-Fraud Office is assigned the functions of Law 2/2023 that may be assumed by institutions or competent bodies of the Autonomous Communities. Also, the Andalusian Office against Fraud and Corruption is using the powers provided in Law 2/2023, which, through the Resolution of 20 March 2023, of the same office, declares that the references to the autonomous authority in Law 2/2023 are

understood to be addressed to this anti-corruption office. A third example is the case of Navarre. Thus, through Resolution 4/2023, of 26 June, of the Director of the Office of Best Practices and Anti-Corruption of the Community of Navarre, the external complaints channel of the Office of Best Practices and Anti-Corruption of the Community of Navarre has been set up as an external channel for the purposes of Law 2/2023. The Agency for the Prevention and Fight against Fraud and Corruption of the Valencian Community has also taken on the functions of an external channel and protection authority. It also used to be possible to find the external reporting channel under Law 2/2023 in the Office for the Prevention of and Fight against Corruption in the Balearic Islands, but this office was later extinguished by Balearic Law 2/2024, of 11 April, upon the creation of the Register of Transparency and Control of the Assets and Activities of Public Officials of the Balearic Islands. The reason given for this extinction is the alleged duplication of the office's functions, an argument that seems hard to sustain, especially at a time when an authority is required to carry out the functions of investigating complaints and protecting whistleblowers.

Despite this limited regional progress, the national authority is still missing, and the rest of the Autonomous Communities should either create their own regional authority or subscribe to an agreement in order to transfer the powers for protection (and also for investigation and sanctioning) within their territory to the national authority. This means, then, that there are still many cases in which potential whistleblowers in Spain have neither an external channel for reporting nor an authority that can protect them.

In addition to the slow implementation of the law from an institutional or organisational point of view, the other worrying aspect is the limitation set on applying protection to whistleblowers.

According to Spanish Law No. 2/2023, protection against retaliation extends, in principle, for a maximum period of two years. The moment this two-year period starts is not specified, which can also constitute a problem, since it is important to know from exactly when a harmful act can be understood to be retaliation. And once this two-year period has expired (with no specification as to when it starts), protection is exceptional and is only granted if it is considered justified by the protection authority and if requested (Art. 36.4 Law 2/2023). Thus, it appears that legal uncertainty and excessive discretion have to be present in order to make the right to protection effective.

This two-year limitation, in the preliminary draft of the law, was even included in the definition of reprisal and was justified on budgetary grounds. The Council of State, in its Decision 1361/2022 of 8 September 2022, pointed out that the directive does not establish any time limit for protection against reprisals, so this time limitation should be removed from the draft. Thus, since this general condition of protection limited temporarily to two years still remains in Article 36.4 of the law, it could be said that the Spanish regulation does not fit well with the content of the directive, since without the need to request an extension of protection, it should always be possible to extend the measures against potential reprisals, and not only at the

discretion of the protection authority. Despite this, it has not been unusual for limitations to be included in other Member States' laws on whistleblower protection (Pérez Monguió, 2023: 270).

5.4. EPPO GOVERNANCE AND PROCEDURES IN SPAIN

The appointment of the persons to become part of the EPPO is regulated by Royal Decree 882/2022 of 18 October, which regulates the procedure for the selection and appointment of the shortlist of candidates for the European Public Prosecutor and candidates for European Delegated Prosecutors in Spain.

To comply with Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), Spain passed Organic Law 9/2021 of 1 July 21 implementing Council Regulation (EU) 2017/1939 of 12 October 2017 on enhanced cooperation in establishing a European Public Prosecutor's Office, according to the report on the national compliance with the Council Regulation (EU) 2017/1939 of 12 October 2017. More compliance assessment measures were adopted by the Member States to adapt their systems to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), Annex I- Overview of the situation per Member State.

Spanish national law is not fully compliant with eleven provisions of the Regulation. These are partially compliant with four provisions, namely Articles 25.6, 26.2, 36.7 and 42.2, and non-compliant with seven provisions, namely Articles 24.1, 24.2, 24.3, 27.7, 29.2, 30.1.e) and 30.5.

Some of the problems identified regarding non-compliance need to be addressed by deep-running reformulations of the current Spanish legal system, given the difficult fit of the design of the EPPO with Spanish criminal procedural law (Tinoco Pastrana, 2023: 31).

The annual EPPO Report for 2023 (see here) indicates that in 2023 the EPPO opened twenty-nine new investigations in Spain, for a total estimated damage of Euro 217.3 million, which, when added to the previous cases, amounts to a total of forty-seven active investigations in Spain, representing an estimated damage of Euro 327.1 million.

In 2024, the EPPO intervened in some cases of high public interest, as stated, for example, in a piece of news published by the EPPO office (see here), regarding a judicial investigation into the purchase of Covid-19 protective equipment.

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