

Newsletter n. 2/2021 BETKOSOL

Section 1. Last updates

—> From the kick-off meeting in January, our work continued. We are engaged in completing deliverables No. 1 and 2, see [here](#).

—> Stay tuned for the incoming Report from our kick-off meeting. Visit the BETKOSOL [homepage](#) in the next few weeks!

—> The new blog by Prof Aldo Sandulli, *Il rebus del Recovery Fund: spendere velocemente ed evitare frodi*, is available in Luiss Open (click here).

Section 2. Flash news: Covid-19, new funds and risk of fraud

—> *Covid-19 and Face Mask Supply Frauds: insights from Italy*

Since the beginning of the pandemic and as a country among the first to be severely affected by COVID-19, Italy has experienced many frauds in the procurement process of essential medical equipment and supplies.

Over the last weeks, the press has reported several cases of fraud linked to the supply of face masks without the CE marking and not meeting the legal requirements to be placed on the EU market. Indeed, three people were arrested and a preventive seizure of assets amounting to EUR 22 million was carried out by the Italian Finance Police as part of an investigation for fraud in public procurement and aggravated fraud, in connection with the supply of 5 million FFP2 masks and 430.000 medical gowns to the Lazio Region. The signed contracts provided for the supply of CE certified masks, but the businessmen now under investigation are accused of having provided illegitimate and fake certificates, e.g. not issued by the competent bodies, or falsely stating the conformity of the products, or not related to the goods actually sold. For more information, click [here](#) (a short news article in English is also available [here](#)).

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

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

These are just examples of the countless scams in the medical equipment procurement brought to light on a European and global level, also considering the ‘grey zone’ created in some cases by the response to this public health emergency. As the EU Chief Prosecutor Laura Kovesi noted already during the first wave of the pandemic, “the response to COVID-19 is inviting less-than-transparent practices, including the awarding of procurement contracts without open bids, or the use of fake documents to buy medical equipment or drugs at artificially inflated prices” (click [here](#) to read the full statement).

The European institutions announced as early as March 2020 that they would work closely with the competent authorities in Member States to prevent fake medical products from entering Europe. The European Anti-Fraud Office (OLAF) opened an official inquiry into the illicit trade of face masks, medical devices, disinfectants, sanitisers, medicines and test kits; unlike what is normally done, the investigation was

announced at an early stage so as to warn the public about the sale of such fake products (click [here](#) for the press release).

So far, OLAF's investigation has led to the identification of over 1,000 suspicious operators and to the seizure or detention of over 14 million items. As the vaccination campaign gets underway and the risk of fraud increases also in this area, OLAF has added an extra layer to this ongoing inquiry with the aim of tackling an illicit trade of COVID-19 vaccines, including fake ones, possibly carried out by illegally importing them into the EU. For more information, click [here](#).

—> *Belgium capacity in spending: last updates from the RRF*

As announced in the newsletter of January 2021, the Federal Government and the government of the regions in Belgium have reached an agreement on a first draft of a plan for recovery. Flanders will receive the lion's share of 2.25 billion EUR, Wallonia will receive 1.48 billion EUR and the federal government 1.25 billion EUR. For Brussels, the French and German community, respectively 495 million EUR, 395 million EUR and 50 million EUR is foreseen.

The recovery funds are causing quite a stir: recently, the German Constitutional Court ruled to suspend the German law ratifying the EU's 750 billion EUR recovery funds, while not all Member States have yet submitted their (draft) Recovery and Resilience Plans. Meanwhile, in Belgium, the EU Commission already disbursed some loans for (several regions in) Belgium, before the formal ratifying of the plan, totaling an amount of 6.2 billion EUR.

Last week, news spread that the Federal Bureau for Planning (Planbureau) had finished its analysis on the Belgian first draft of the plan of recovery. The Bureau had calculated that the 5.9 billion EUR of the foreseen European budget for Belgium would only account for the creation of a mere 13.900 jobs between now and 2026, which caused a lot of concern amongst politicians and employers. During the foreseen peak in 2022, when more than 1.5 billion will be infused in the Belgian economy, only 3.900 jobs will probably be created, which is a disappointing estimation. The Secretary of State for Reliance and Strategic Investments, Thomas Dermine, was hoping for a more optimistic outcome of the plan. However, he remarks, this meager return does not necessarily mean that the Belgian economy will not recover: the regions have already announced that they will also add up to the sum: Flanders already promised to double the amount received by European investments, up to 2.1 billion EUR.

The Belgian Secretary of State announced a renewed version of the plan for recovery (Relanceplan) for the beginning of April, but to this date, it has not been officially published nor has it been submitted to Parliament. It can be derived from the recent press conference that the new version would include a new selection of all projects but also a new plan for structural reforms in Belgium. The Secretary of State announced that the plan counts 600 pages and is composed of 87 projects. 57% of all investments are considered to be 'green', which is 20 % more in order to meet the European conditions. The Secretary remarked that the funds should be allocated as quickly as possible: 40% of the funds should be allocated in 2021, running up to 60% of the total during 2022 and 2023.

The situation in Flanders seems more optimistic: the so-called plan Vlaamse Veerkracht, has a total budget of 4.3 billion EUR, of which the Flemish Government foresees to include the EU funds in the budget. It follows a progress report of April 2021 that 93,34% of all projects have been started, while 42,78% of those are already on the political agenda. The Flemish Minister-President, Jan Jambon, stated that all projects will continue, whether or not the estimated EU funds will be provided.

The deadline to file the definitive report is due the end of this month. We will keep you posted.

Section 3. NGEU and unexpected consequences?

—> *Does the German Constitutional Court saga keep going?*

On April 21, 2021, the German Constitutional Court dismissed the appeals against debt sharing in the European Union. With this pronouncement, the German constitutional judges allow us to continue with

the Next Generation EU of 750 billion euros launched by the EU.

In essence, the German Constitutional Court did not accept the appeal of the civic association born around the founder of the AfD Bernd Lucke, the presentation of which had led to the decision of the judges of Karlsruhe to suspend the signature by the head of state Frank -Walter Steinmeier of the “green light” to the Next Generation EU voted by both the Bundestag and the Bundesrat on 25 and 26 March 2021. The examination of the German judges does not reveal a strong probability of violation of the constitutional law. In particular, the judges argued that the main complaint was not inadmissible in itself, nor was it devoid of merit. The German Constitutional Court argued that, based on a summary review, it was unlikely that it would discover that the recovery fund violated the German constitution. Consequently, the law can be ratified by the president.

According to the applicants the EU Treaties would prohibit the admission of common debts, but the federal government and the European Commission refer to article 122 TFEU, which provides for a regulation exceptional in the presence of natural disasters or other extraordinary events and allows the Member States to obtain financial support from the Union under certain conditions. The highest German jurisdiction will continue its scrutiny.

—> *The beginning of Poxexit from the European Union's legal order?*

On 16 April 2021, Prime Minister Mateusz Morawiecki's motion to examine the compatibility of three provisions of the Treaty on European Union with the Polish Constitution of 2 April 1997 was published. The allegations contained therein boil down, inter alia, to the question of the compatibility with the Polish Constitution of the principle of primacy of EU law and the principle of loyal cooperation between the union and the member states. The motion indicates that under the current case law of the CJEU, the principle of primacy of EU law and the principle of loyal cooperation have acquired a new content, an element of which is the conferment of jurisdiction on the courts, unknown to Polish law, to make decisions without regard to the Constitution, also when the decision is inconsistent with the Constitution.

The Prime Minister formulated the application to the Constitutional Court following the judgment of the Court of Justice of the EU of 2 March 2021 (judgment in case C-824/18 A.B.,C.D,E.F,G.H,I.J v. National Council of the Judiciary) on the possibility for courts to control the correctness of the process of appointment of a judge. The Court of Justice of the EU, answering questions from the Supreme Administrative Court, ruled that "successive amendments to the Act on the National Council of the Judiciary, which led to the abolition of effective judicial review of the Council's decisions to submit proposals for the appointment of candidates for Supreme Court judges to the President, may breach EU law".

The Prime Minister's motion challenged provisions which, in the contested understanding, entitle or oblige an authority to derogate from the application of the Polish Constitution, or order the application of legal provisions in a manner inconsistent with it. As emphasised in the motion, such an understanding of the provision 'raises far-reaching and justified constitutional doubts, finding no confirmation in the text of the treaties subject to the control of the Constitutional Tribunal'. The Prime Minister also has significant constitutional reservations about the challenged provision of EU law, as understood by him, which entitles the court to review the independence of judges appointed by the President and the NCJ's resolutions on the appointment of judges.

The BETKOSOL team