Deliverable 2

The Past and Future of EU Financial Interests

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INTRODUCTORY REMARKS

The deliverable aims to study the supranational framework of EU funds and the measures designed to protect EU financial interests. This deliverable will be the framework for deliverable D1, which deals with national cases. The paper presents a literature review of the major scholarship dealing with the themes at the heart of the deliverable, and the analytical tools used are mainly those of legal analysis. In particular, it refers to EU Law, European Criminal Law, and European Administrative Law.

The deliverable will be divided into two sections, which will be mutually interrelated.

Section I is divided in two chapters. Chapter I will begin by examining the principles by which the EU budget is structured and implemented. It will then look at the implementation and control of the annual budget by the EU institutions involved in the discharge procedure. After this, the 2018 EU budget will be analyzed. The paper examines the 2018 EU budget discharge procedure, which was the last discharge procedure to be completed. The final part of chapter I will study the changes that the covid-19 crisis has brought to the shaping of the EU budget. Along with the new MFF 2021-2027, the composition and governance of the Next-generation EU and the new conditionality mechanism will also be studied.

Chapter II analyzes the protection of EU financial interests in terms of both administrative and criminal law tools. First, this chapter will clarify what the functions and powers of the European Anti-Fraud Office (OLAF) are, and what the main criticisms regarding its functioning have been. This analysis will look into the methods and effects of OLAF's investigations and the cooperation between OLAF and national authorities. The study will also consider the 2020 reform of OLAF's powers. Furthermore, the deliverable will examine the characteristics of the European Public Prosecutor's Office (EPPO), focusing on its integrated model, underlining the peculiarities of this decentralized structure and how the centre connects with the national branches. In addition, the paper will investigate how the EPPO aims to achieve its main objective, namely to investigate and prosecute crimes affecting the financial interests of the EU more efficiently and effectively than the Member States. Chapter I will also analyze the competencies of the EPPO: from "PIF offences" – according to Directive (EU) 2017/1371 – L to offences relating to participation in a criminal organization as defined in Framework Decision 2008/841/GAI. Lastly, chapter I will analyze the problems of the relationship between OLAF and EPPO by looking in depth at the main problems of this cooperation in the future and the benefits for the protection of EU financial interests.

Section II will focus on case studies and includes an examination of three in particular: RescEU, SURE, and one for strategic investments supporting small and medium enterprises (EIB) in the green sector. These case studies were chosen because they represent three relevant actions that the EU has undertaken to respond to the first phase of the Covid-19 emergency in the sectors of health, work, and economic support for businesses. Section II will form the framework for the D1 case study. Through this study, the deliverable will study the impact of emergency funds in countering the covid-19 crisis and how these funds can be controlled to avoid fraud.

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SECTION I

CHAPTER I

The EU budget between past, present, and future

1. Introduction

The EU budget is the financial instrument through which the European institutions translate their policies into concrete reality (Kengyel, 2016; Citi, 2015; Laffan, 1997). Member States naturally consider the appropriate balance between their contributions and the transfers they receive to be of great significance, and it is fair to expect the net balance of a given country to be in line with its level of development. However, implementing this raises several problems. Even if all the Member States participate in financing the budget in proportion to their economic performance, the automatism that characterizes the operation of most common policies makes it difficult to determine a proportional distribution rate among Member States in advance.

The EU budget has attracted less scholarly attention than national ones. The reason could be that the resources administered by the EU are only a fraction of those controlled by the Member States. Indeed, most studies in this field have therefore focused on national budgets, especially their changing composition, the factors that explain budget deficits, and the reform process. Nevertheless, focus on the EU budget has increased over the last few decades (Zamparini, Villani-Lubelli, 2019; Degron, 2018; Becker, Bauer, de Feo, 2017; Laffan, Lindner, 2014; Benedetto, 2013; Laffan, 1997). Theoretical and empirical research on the EU budget has mainly concentrated on distributive issues and conflicts such as how the EU presidency affects the distribution of resources among Member States (Aksoy, 2010), the formation of coalitions of interest in adopting multiannual financial frameworks (Blavoukos, Pagoulatos, 2011), and the distribution of EU funds at sub-national level (Dellmuth, Stoffel, 2012). Other research has centred on the general pattern of stability and change in the budget (Citi, 2013; Crombez, Høyland, 2015).

However, little research has examined the factors that determine stability and change in resource allocation among the budget functions (Citi, 2015). Also, the budget topic has been studied from the perspective of possible kinds of fraud to which it may be subject (Berlin, Martucci, Picod, 2017). After the Covid-19 crisis and the new measures that have increased the EU's own resources, interest in the EU budget has grown, but before examining the news and recent changes, it is necessary to clarify the fundamental aspects of the EU budget. The paragraphs to follow will examine the foundations and principles of the EU budget.

2. The fundamental principles of the EU budget

The EU budget must comply with the key principles set out in the EU Treaties and the EU Financial Regulation. The provisions concerning EU financial planning are contained in the articles from Art. 310 TFEU to Art. 325 TFEU and, in accordance with Art. 322 TFEU, Financial Regulation EU No 2018/1046 details and elaborates in depth on these principles (Clemente, 2014, 2385). In particular, Art. 310 TFEU establishes the principles of unity, universality, balance, annuity, specification, and the sound financial management of the EU budget (Killmann, 2019, 1972; Clemente, 2014, 2386). The rule also incorporates the concept of budgetary discipline into the Treaty, as well as the obligation for the Union and the Member States to combat fraud and other illegal activities affecting the Union's financial interests (Tridimas, 2011).

The principles of unity and budget accuracy mean that, for every financial year, all revenue and expenditure of the EU must be entered in a single financial document: the budget. Furthermore, the principle of budget accuracy enshrined in Art. 8 Regulation EU No 2018/1046 requires that all EU revenue and expenditure must be booked to a budget heading and that no expenditure may be incurred in excess of the authorized appropriations. Indeed, without prejudice to authorized expenditure arising from the contingent liabilities referred to in Art. 310, para. 2, TFEU, no expenditure may be committed or approved beyond the authorized appropriations. These principles allow effective monitoring of the conditions under which EU resources are used (Craig, De Burca, 2020, 124; Killmann, 2019, 1975; Clemente, 2014, 2388). Moreover, the principle of universality means that the total revenue in the budget must cover total expenditure. In addition, Art. 20 of Regulation EU No 2018/1046 establishes that revenue constitutes a common fund in the budget, and is used to finance all expenditure without distinction. The principle of annuity, which serves to facilitate the budgetary authority in monitoring the executive body's activities, requires all budgetary operations to be attached to a single financial year. Art. 9 Regulation EU No 2018/1046 lays down that the appropriations entered in the budget must be authorized for a financial year that must run from 1 January to 31 December. This means that EU revenues and expenditure are estimated for each financial year, and the implementation of expenditure is authorized for only one of these, which coincides with the calendar year (Killmann, 2019, 1975; Clemente, 2014, 2388).

According to Art. 310 and Art. 17 of Regulation EU No 2018/1046, revenue and payment appropriations must be in balance, and the total amount of EU expenditure is capped by the limit of its own resources. For this reason, the EU and its institutions do not usually take out loans under the budget (De Feo, 2020, 335; Clemente, 2014, 2387; D'Alfonso, 2013a, 1). In this regard, the literature considers it questionable that the EU should contract debts in the light of Art. 310 TFEU (Paivi Leino, 2021). Under Art. 18 Regulation EU No 2018/1046, the balance for each year is entered in the budget of the following year as revenue in the event of a surplus or as a payment appropriation in the event of a deficit. The forecasts for revenue or payment appropriations are entered in the budget during the budgetary procedure and in a letter of amendment submitted pursuant to Art. 42 Regulation EU No 2018/1046 of this regulation. Subsequently, upon presentation of the provisional accounts for each financial year, any discrepancy between these accounts and the forecasts is recognized in the budget for the following year by means of an amending budget dedicated exclusively to that discrepancy. In this case, the Commission must submit the draft amending budget simultaneously to the European Parliament and the Council within 15 days of the presentation of the provisional accounts (Clemente, 2014, 2387).

Under Art. 28 Regulation EU No 2018/1046, appropriations must be earmarked for specific purposes by title and chapter, and the chapters must be further subdivided into articles and items. In particular, under the principle of specification, each appropriation must have a particular intended use and be earmarked for a specific purpose in order to prevent any confusion between the various appropriations when they are authorized or implemented. Also, Art. 310 TFEU and 33 of Regulation EU No 2018/1046 establish the principle of sound financial management, requiring budget appropriations to be used in accordance with the principles of economy, efficiency, and effectiveness. The first principle requires the resources used by a European institution to carry out its activities to be made available in good time, in suitable quantities, and to an appropriate quality at the best price. The second concerns the optimal ratio between the resources used and the results achieved. The third concerns the achievement of the specific objectives set and the achievement of the expected results. The application of the principle of sound financial management is based on the definition of specific measurable, achievable, relevant and temporal objectives for all sectors of activity (Killmann, 2019, 1976; Clemente, 2014, 2387). Achievement of these objectives is monitored by performance indicators in order to move from resource-based to results-based management. Any proposal submitted to the legislative authority that may have an impact on the budget must be accompanied by a financial statement and prior evaluation. It should be remembered that the principle of transparency enshrined in Art. 33 Regulation EU No 2018/1046 must be respected at every stage of the budget cycle, from its establishment and implementation to the presentation of the accounts (Killmann, 2019, 1976).

In turn, some EU budgetary principles appear to have inspired the latest reform European economic governance, in particular the shape of national budgets (Schnellenbach, 2018). For example, the principle of a balanced budget is established by Art. 310(1) TFEU and Art. 6 of the EU Financial Regulation, and, after the Six-Pack and the Fiscal Compact, the principle is now also applied to Member States' budgets, in particular to the budget's eurozone countries.[1] Furthermore, the principles of sound financial management[2] and transparency[3] have become general principles applicable to national budgetary procedures, especially after the Two-Pack.[4] (Terziev, Bankov, Georgiev, 2018, 53 ff.; Laffan, Schlosser, 2016, 237 ff.; Dawson, 2015, 976 ff.; Quaglia, 2013, 17 ff., Fasone, 2021; Laffan, Schlosser, 2016, 241).

2.1. How was the EU budget funded?

The operating expenses of the institutional machine of the Union, as well as those for the implementation of its activities and policies, are financed through the system of its own resources (Bernard-Reymond, 2012). Art. 311 TFEU establishes the principle of financing the budget from its own resources and sets out the procedure for adopting the Council decision, laying down the provisions relating to the own-resources system (Clemente, 2014, 2391). It does not alter the procedure for adopting that decision, but as an innovation it introduces the explicit possibility for the Council to adopt it by qualified majority, and after obtaining the consent of the European Parliament, a regulation laying down more detailed measures implementing that decision. Pursuant to Art. 311 TFEU, the Council decision on the system of EU own resources is, in fact, equivalent to primary legislation. The Member States virtually have absolute control over the adoption of this decision,

[1] See, in particular, Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011, amending Council Regulation (EC) No 1466/97 detailing the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJEU L306/12, 23.11.2011) and Art. 3 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the so-called Fiscal Compact).

[2] See Art. 310.5 TFEU and Art. 6 of the Financial Regulation.

[3] See Art. 6 Financial Regulation.

[4] See, in particular, Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJEU L 140/11, 27.5.2013.

whilst the European Parliament is merely consulted. Not only must the Council act unanimously, thus giving each Member State a right of veto, but, to enter into force, the decision must be ratified by the national parliaments in the same way as the Treaties[5] (Adam, Tizzano, 2017, 124; Besselink, Claes, Imamović, Reestman, 2014). In Germany, for example, the decision regarding its own resources is approved by a qualified majority of two thirds in the Bundestag and two thirds of the votes in the Bundesrat, a “constitutional” majority larger than the one needed to authorize the ratification of treaties.

The definition of own resources does not mean that these arise from tax or other levies received directly by the European Union. They are resources collected and levies made by the Member States and then transferred by them to the EU budget. However, their precise amount is the result of a tax set directly at the European level and predetermined percentages of a tax harmonized at that same level, or else a universally accepted parameter of the prosperity of the Member States. (Le Cacheux, 2010, 132). In this context, discussion on the matter between the Member States focuses on the overall volume of resources allocated to the EU, and not on the contribution due from each Member State, since it depends solely on the respective level of economic prosperity (Schratzenstaller, 2013, 305). Although European resources are collected at the national level by the administrations of the Member States, the activity of the national administrations must be carried out according to methods and conditions that make collection as effective as those for national taxes and charges of the same type.[6] Similarly, transfer of the corresponding amounts to the Union budget must take place every month, and therefore in almost automatic connection with their collection at the national level, under penalty of default interest payments (Schratzenstaller, Krenek, 2019, 175)[7].

First, the European Union’s “own resources” consist of traditional resources represented by agricultural levies and subsidies on sugar production and customs duties. These traditional resources account for 15% percent of the revenue. Added to these resources is the VAT levy consisting of the transfer to the European Union of a rate of VAT collected by each Member State. The resources from the payment of VAT represent 13% of the EU’s “own revenue” (Schratzenstaller, Krenek, 2019, 176). Most of the EU’s own resources derive from contributions based on gross national income. Each EU Member State transfers a uniform percentage rate of its gross national income to the Union, and the percentage is adjusted so that the overall revenue matches the agreed level of payments. (Schratzenstaller, Krenek, 2019, 176). It is noteworthy that the resource-based levy on gross national income has tripled since the late 1990s and currently represents around 75% of EU revenue. Lastly, the EU also receives a small fraction of its revenues from other sources, such as taxes on EU staff salaries, third-country contributions to programmes, interest on late payments, and fines on infringing competition rules. (Calaprice, 2020; D’Alfonso, 2014a).

The EU’s own resources are subject to an annual ceiling indicated in the decision on own resources, which is based on Art. 311(3) TFEU. Compliance with the ceilings is guaranteed through the annual adjustment of the rate on gross national income, so the contribution is linked to the wealth produced and the economic growth of each Member State (Zamparini, 2019, 145). The current ceiling is 1.24% of the gross national income of the entire EU, a threshold within which the maximum amount of the contribution collectively due by way of own resources by the Member States must remain. Based on these revenues, the EU budget appears very modest with respect to the powers exercisable and the activities it carries out; indeed, the EU budget corresponds to about 2% of the total national budgets of the Member States.

[5] The most recent was taken by the Council in the form of Council Decision (EU, Euratom) No 2014/335 of 26 May 2014 on the system of own resources of the European Union (2).

[6] ECJ, 27 March 1980, C-66/79, 127/79 and 128/79, Meridionale Industria Salumi e altri, p. 1237.

[7] Regulation EU No 1552/89.

The financing mechanism outlined automatically and autonomously assures the Union a guaranteed level of revenue in compliance with the principle of the adequacy of financial means (D'Alfonso A., 2014b, 10). However, the principle of autonomous financing of the EU budget is accompanied by the decline of real fiscal power (Fuest, Heinemann, Ungerer, 2015, 288 ff.; Clemente, 2014, 2392).

2.2. What is the MFF?

EU budgeting is a multilevel, multi-institutional, multisectoral, multilayered, and multi-temporal process (Goetze, Petz, 2016, 1040). Furthermore, the EU budget cycle is based on four pillars: raising revenues through the own resources system, multiannual financial planning, annual budgeting, and implementation. All these pillars have specific legal bases, laid down in Art. 310 TFEU to Art. 324 TFEU and inter-institutional agreements. The procedure in these pillars allocates different roles to the institutions involved, and actor constellations change accordingly (Bauer, Graham, Becker, 2018, 480). In other words, the EU budget cycle is a complex process (Becker 2014; Benedetto ad Milio, 2012; Saarilahti, 2014). The budget procedure primarily involves the European Commission, the Council and the European Parliament, and in this procedure, the interests of all these institutions must be balanced (Benedetto, Hoyland, 2007; Ackrill, Kay 2006). Art. 312 TFEU underlines the common responsibility of the three institutions in taking any measure necessary to facilitate the adoption of the financial framework. In particular, the involvement of the supranational parliament is an important measure for the legitimacy of the EU budget system (Bauer, Graham, Becker, 2018, 479)

Art. 312 TFEU establishes that at least every five years, the Council will unanimously adopt – with the approval of Parliament by a majority of its members – a Multiannual Financial Framework, which aims to ensure the orderly development of the Union's expenditure within the limits of its own resources (Killmann, 2019, 1980). The previous seven-year forecast entailed exposing the financial framework to greater revision flexibility. Therefore, the new financial framework is a fixed-term act, and failure to adopt the subsequent framework upon expiry would block the functioning of the EU. (Kaiser, 2019, 74). For this reason, Art. 312 TFEU provides for an automatic extension of the ceilings and other provisions of the framework in force in the last year covered until the adoption of the new act (Clemente, 2014, 2397). On the one hand, the multiannual financial framework has the dual function of containing a definition agreed by the three institutions involved in the budgetary procedure of the main political objectives of the Union for the period to be set with the relative allocation of the financial means necessary for achieving them. On the other hand, it is the tool that allows these institutions to exercise their respective budgetary power (Clemente, 2014, 2396). The political priorities are established in advance and by mutual agreement between the institutions, dividing them into headings with a pre-established maximum total of credits per allocation for each year of the reference period. Consequently, a programme cannot be financed under a heading other than the one to which the programme refers (Kaiser, 2019, 76).

The multiannual financial framework was transformed from an inter-institutional agreement into a legally binding act by the Treaty of Lisbon. In particular, Art. 312 TFEU establishes adoption of the Multiannual Financial Framework (MFF) through a special legislative procedure, producing a regulation to this effect (Killmann, 2019, 190). The current provisions of the Treaties omit any reference to an inter-institutional agreement, although this agreement was adopted, together with the regulation, in 2013[8], and will also be adopted for the 2021-2027 MFF. The substance of the MFF is enshrined in the text of the regulation, and the procedure for the approval of this piece of legislation is largely determined by the Council, which must decide unanimously[9], with the Parliament deciding it by merely approving or rejecting the legislative proposal (Vitrey, 2017). In essence, Member State governments control the process and content of the MFF, and they are also able to indirectly *control* the annual budget via the MFF. The adoption procedure essentially highlights the perseverance of an imbalance in the distribution of budgetary powers between the European Parliament and the Council (Bauer, Graham, Becker, 2015, 483). Furthermore, by virtue of the fact that the EU budget has to respect the multiannual financial framework[10], the MFF regulation shapes what the budget will be by influencing its drafting and setting expenditure ceilings, so in this context, intergovernmental influence on the MFF derives from its close link with the own resources decision[11]. Furthermore, Member States' governments have a clear interest in deciding the framework of how to spend "their" money, since "own" resources are mainly financed, as anticipated, through transfers from the budgets of the Member States (Fasone, 2021).

The MFF inter-institutional agreement also performs other important tasks. It regulates special financial instruments, i.e. EU funds not counted and administered through the EU budget, such as the EU Solidarity Fund, the Flexibility Instrument, the Emergency Aid Reserve, and the Fund for European adaptation to globalization (Killmann, 2019, 1981; Becker, 2019). The inter-institutional agreement should therefore rebalance the rigidity of the content and adoption procedure of the MFF regulation. Current and previous negotiations on the draft MFF regulations show that the MFF approval process has become much more complicated since the entry into force of the Lisbon Treaty. However, through the inter-institutional agreement, the MFF can, if necessary, be refined and updated to address non-EU budgetary financial operations and to address any developments that may occur concerning the availability of the EU's own resources (Fasone, 2021).

In summary, the MFF does not replace annual budgets but binds the budgetary authorities when approving them. Within the limits set by the MFF, the EU annual budgets must be negotiated annually by the European Commission, the Council, and the European Parliament. The MFF represents the long-term budget of the EU, thus carrying out the important function of aligning EU spending with its policies (Kaiser, 2019, 73). The EU budget divides expenditure into categories which correspond to the political priorities and areas of intervention of the EU. Financial spending limits are also set for each year within each category. The EU annual budget therefore establishes all the expenses and revenues of the European Union relating to a financial year. It ensures that funding of EU policies and programmes is in line with EU political priorities and legal obligations. (Dhéret, Marinovici, Zuleeg, 2012, 6). EU financial planning is divided into MFFs, also called financial perspectives, and annual spending plans, which are negotiated every seven years to set political priorities and ceilings on total expenditure for each category MFFs are not designed to function as seven-year spending plans, but they are intended to create a stable environment for financial planning (Leen, 2015, 55). Indeed, the actual allocations are decided each year, and the total expenditure usually remains below the MFF ceilings to cope with unforeseeable events (Schneider, 2018). Furthermore, a mid-term review of the MFF is envisaged, as seven years is a rather long time-frame.

As anticipated, not all EU actions are funded by the MFF and EU annual budget. Indeed, the EU budget does not include absolutely all the funds that the European institutions have to manage.

[8] EU Regulation No. 1311/2013 of 2 December 2013 establishing the Multiannual Financial Framework for the period 2014-2020 and the related Inter-institutional Agreement of 2 December 2013.

[9] See Art. 312 (2) TFEU.

[10] See Art. 312 (1) TFEU.

[11] See Art. 311 TFEU

There are funds not directly linked to the EU budget but managed by the institutions. In the EU framework, it is possible to observe that a host of funds and instruments with variable participation of Member States and a diverse range of decision-making and accountability procedures have emerged around the EU budget to support Union policy aims (Crowe, 2017, 429). For example, the following were still excluded in the MFF 2014-2020: the EDF European Endowment Democracy Fund; EU Trust funds; Facility for Refuges Turkey; the EFSF; the ESM; the GLF; and the EIB Group. Especially, in 2014 and 2015, these hybrid budgetary funds were used to finance EU action during the migration and refugee crisis. In particular, this hybrid solution makes it possible to overcome the rigidity of the Union's budgetary framework, to allow a non-uniform participation of Member States, and to allow the EU institution to carry out a highly flexible disbursement of funds at short notice and with a minimum of bureaucracy (Crowe, 2017, 444). Increased budgetary fragmentation and complexity are also evident within the EU budget. Since the Lisbon Treaty, a new element of complexity can be perceived in a shift away from the delivery of financial assistance through grants and subsidies towards improved use of financial tools taking the form of loans and guarantees backed by the Union budget (Crowe, 2017, 446). Such mechanisms are used in the MFF 2014-2020 to implement the Horizon 2020 and Connecting Europe Facility programmes. This complexity will increase still further after the entry into operation of Next Generation EU.

2.3. How is the EU annual budget approved?

The annual EU budget is drafted, examined, and approved within the general context of the MFF. Through this procedure, the key institutions are again the Commission, the Council, and the European Parliament. In particular, EU treaties assign the Commission the responsibility of drafting the annual budget, while they give the European Parliament and the Council the same rank in carrying out the budget procedure (Killmann, 2019, 1983; Clemente, 2014, 2401).

In the annual EU budget, all the revenues deriving from their resources are included together with the estimated expenditure for each financial year. The budget is adopted within the framework of a special legislative procedure governed in great detail by Art. 314 TFEU. The timing of the procedure is very tight and contains deadlines which, if not met, involve tacit approval by the institution that has remained silent. The goal is to avoid starting a new annual financial year without a duly adopted budget (Killmann, 2019, 1983). This could entail the EU operating on the basis of the twelfths system under Art. 315 TFEU. Furthermore, Art. 314 has created a "routine" in the process of approving the EU's annual budget, allowing fewer ongoing and time-consuming high-level negotiations. With the Treaty of Lisbon, the traditional distinction between compulsory and non-compulsory expenses – anyway never expressly typified by the Treaties – has disappeared, and this has increased the difficulty of negotiations. If, until then, the Parliament-Council agreement was only required for non-compulsory expenditure – effectively most expenditure – and the Council had a certain margin of autonomy regarding compulsory expenditure, the distinction was no longer made. The EP and the Council are 'forced' to agree on everything, putting approval of the budget at risk, as happened in 2015, when the Commission was forced to present a new draft budget in late November, restarting negotiations from scratch. Another problem systematically occurring in budget negotiations is that the European Parliament tries to widen appropriations on commitments as much as possible, while the Council always tends to limit appropriations on payments.

Budget negotiations at the technical level have also given the Commission greater influence in discussions with budget experts in the Council and the EP owing to its extensive IT resources (Goetz, Patz, 2016, 1044; Linder, 2006, 46). Routinization also decreases the risk of failed budget negotiations and the subsequent installment of provisional monthly budgets, which, under the current rules, effectively entail a budget freeze or decrease (Goetz, Patz, 2016, 1044; Benedetto, 2013).

The EU budget's annual procedure is set out in Art. 314 TFEU, which specifies the stages and time limits for negotiating the budget. The Commission starts the process and prepares a draft budget under the guidelines laid down by the Parliament and the Council. The Commission has the further task of acting as a moderator between the Council and the European Parliament during inter-institutional negotiations (Art. 314(5) TFEU), and it has participation rights throughout the whole budgeting procedure (Goetz, 2014, 580). Under its exclusive right to amend the proposal until the Council has acted, the Commission has similar powers over the MFF, adopted in a special legislative procedure (Art. 312 TFEU). For these reasons, the literature has linked the presence of the Commission to a finance minister throughout the whole budget procedure (Goetz, Patz, 2016, 1041, Laffan, 1997, 71).

This draft is based on statements drawn up by various EU institutions, with each estimating its own needs arising from MFF obligations and legislative acts, among other items (Kaiser, 2019, 73; Bauer, Grahm, Becker, 2018, 482). The Commission must submit the draft to both Parliament and the Council by September 1, when the formal negotiation period starts. The Council has until October 1 to adopt a position on the draft budget and submit it to Parliament. Although adoption is officially qualified by a majority vote, Council members try to negotiate a consensus position whenever possible. Aside from the stringent governing norm of not imposing the will of the majority on minorities, there are other reasons for seeking a unified stance: the Council must fully justify its position. Parliament then has 42 days to deliberate. If it approves the Council's position or declines to decide, the budget is adopted. If a majority votes for amendments, then the new draft is referred back to the Council and the Commission, and the Conciliation Committee is immediately convened (Kaiser, 2019, 75; Killmann, 2019, 1983; Clemente, 2014, 2402).

The Committee is made up of an equal number of representatives from both the Parliament and the Council. It has 21 days to agree on a common text, reached by a qualified majority vote of Council representatives and a majority vote of EP members. If the Committee produces a joint text, Parliament and the Council have 14 days to approve it. If neither rejects the joint text, it is adopted as the budget. Furthermore, if EP rejects it, or if EP takes no action but the Council rejects it, the Commission must prepare a new draft, and the process starts again. If the Council rejects it but Parliament acts positively, the outcome depends on what that action is. If Parliament confirms some or all of its previous amendments by a supermajority – 60% of the total votes cast and a simple majority of its component members, then its draft version is adopted. If it fails to attain this supermajority, the outcome is taken to signify approval of the joint text, which is then adopted. This procedure for the adoption of the EU budget is concluded by the act of the President of the EP based on Art. 314, para. 9, TFEU by which he/she, after verifying that the procedure has been concluded lawfully, declares the budget adopted (Killmann, 2019, 1983; Clemente, 2014, 2403).

Even after approval of the budget, the annual cycle is not yet completed. Indeed, throughout the financial year, the budget is constantly modified during implementation. Furthermore, the EU budget only mobilizes part of the EU resources, while EU special instruments or other funds are administered differently. The combination of these aspects strengthens the Commission's position as a kind of playmaker for the EU budget, with significant room for change on the part of the budgetary authorities (Citi, 2013, 1159; Bauer, Ege, 2012, 403 ff.).

Art. 315 TFEU establishes procedures to ensure the continuity of the Union's action when it is not possible to adopt the annual budget before the start of the new financial year. The law automatically authorizes a monthly execution for provisional 'twelfths', which are appropriations that do not exceed either those already authorized the previous year or those proposed in the not yet adopted budget. However, it is possible to exceed the 'twelfth' limit to give continuity to the specific needs of the Union. Financing of expenses based on the provisional twelfths rule is ensured by the own resources automatically received from the Union. (Killmann, 2019, 1983; Adam, Tizzano, 2017, 123; Clemente, 2014, 2404).

2.4. *How is the EU annual budget executed and implemented?*

The Commission and the Parliament are the two main institutions involved in implementing the budget. The Commission monitors budget implementation in co-operation with national administrations[12]. On the other hand, the Parliament leads the discharge procedure[13]. Furthermore, the Parliament and the Council indirectly oversee the implementation of the budget as legislators, as the payment of any expenditure has two legal bases, one in the EU budget and the other in EU legislation that explicitly authorizes such an outlay.

In particular, the principle of the Commission's political responsibility for its management is affirmed by Art. 234 TFEU and allows the European Parliament to override the Commission through a motion of censure. In this regard, it should be clarified that the motion can be approved not only for issues relating to the budget, but in general. Furthermore, this norm is recalled by Art. 317 TFEU, together with the principle whereby the implementation of the budget is the responsibility of the Commission (Killmann, 2019, 1988). Regarding the financial statements, Art. 317 TFEU provides for a discharge procedure that allows the budgetary authority to judge the responsibility of the Commission for implementing the budget (Clemente, 2019, 2406). The principle of the Commission's competence to implement the budget is an integral part of the executive function of the European institution (Killmann, 2019, 1988). Two issues arise here: most revenues are transferred from the State level, and 85% of expenditure is managed at the national level; the European Commission tries to evade its responsibility for implementing the budget by appealing to the subsidiarity principle. (Clemente, 2014, 2407). Also, Art. 317 (2) TFEU provides for the possibility of imposing obligations on Member States to intervene in the field of controlling European funds. It also states that Art. 59 of the Financial Regulation generally imposes *ex-ante* and *ex-post* controls on the Member States. (Clemente, 2014, 2407).

The European Commission is responsible for implementing the Union's general budget. However, EU institutions and bodies are individually responsible for executing the relevant sections of the budget affecting them directly. The Commission implements the budget in accordance with the procedures set out in the aforementioned text of the Financial Regulation (Curtin, Egeberg, 2013; Egeberg, Martens, Trondal, 2009). It publishes monthly reports on the state of implementation of the budget on its website. These highlight the actual commitment of the funds in the budget. Also, the Commission publishes the EU's annual accounts consisting of consolidated reports on the implementation of the budget and the balance sheet. These reports are prepared according to international public accounting standards. They bring together the accounts of all the institutions and bodies of the Union, as well as most agencies. Considering the limits set by the Financial Regulation[14], the Commission can transfer resources between the different chapters of the EU budget[15]. Depending on the stage of the exercise, the size, and the nature of the transfer, the Commission may make a transfer unilaterally, but it must inform the Parliament and the Council or

[12] See Art. 17 (1) TEU and Art. 317 TFEU.

[13] See Art. 319 TFEU.

[14] See Art. 30, Art. 31, and Art. 32. Financial regulation.

[15] See Art. 317 TFEU.

submit a proposal deemed approved six weeks later unless it is rejected or amendments are approved. This demonstrates the Commission's wide margin of discretion (Crum, Curtin, 2015; Nugent, Rhinard, 2015)

Under Art. 318 TFEU, the Commission must submit the accounts of the past year to the Parliament and the Council. It must also communicate a balance sheet that shows the assets and liabilities of the Union. The EU accounts include the consolidation of the financial information contained in the financial statements of institutions financed by the budget and the bodies created by the Union, which have legal personality and receive grants from the budget[16]. In the EU Budget procedure, Art. 318 (2) TFEU introduced an evaluation report of the EU finances based on the results achieved. The Commission is obliged to submit the report to the discharging authorities – the EP and the Council – in addition to the financial statements (Killmann, 2019, 1990; Clemente, 2014, 2408).

The Commission's budget implementation action is subject to multiple scrutiny procedures: external, accounting, and political (Vogiatzis, 2019; Laffan, 1999). Art. 319 TFEU provides that after transmission of the report on the accounts and in the light of the report of the Court of Auditors and any other useful document, the EP – upon recommendation of the Council – grants the discharge. The discharge is the act that closes the life of the budget and frees the executive from managing it (Gabolde, Perron, 2010, 1828). On the one hand, it serves to check the accuracy of financial management. On the other hand, this procedure makes it possible to definitively close the revenue and expenditure accounts for the year based on the reports of the Court of Auditors (Killmann, 2019, 1990; Clemente, 2014, 2049). The discharge procedure is coordinated centrally by the Parliamentary Budgetary Control Committee (CONT), while the sectoral committees deliver their opinions based on the subject, and potentially with several Commissioner hearings. The EP decides whether or not to approve from a political and technical point of view, as well as how the budget has been spent by the Commission and the other institutions involved, or it can postpone its decision. The yearly accounts can be closed only if the discharge is granted. Through the budget discharge procedure, Parliament expresses both a technical opinion on the accounts and a political judgment on the work of the Commission (Bauer, Graham, Becker, 2018, 457). In some cases, Parliament refused to grant a discharge for rather more political than strictly budgetary reasons. For example, in 1998, the EP postponed the decision on the discharge of the 1996 budget. In this case, the Parliament's refusal indirectly resulted in the whole Commission resigning, having been hit by a scandal over the mismanagement of EU resources and expenditures by some of the Commissioners (Villani-Lubelli, 2019, 12 ff.).

Each year, the Parliament and the Council are asked to review more than fifty reports, financial statements, and accounts of EU institutions, as well as bodies and agencies in order to decide on discharge. To do so, they follow a procedure set out in Art. 319 TFEU, the Financial regulation, and the internal regulation of the European Parliament – Art. 99 and Art. 100 and Annex V. The discharge procedure for financial year 'N' is expected to be completed by 15 May of the second financial year - N + 2 following the adoption of the budget under review. Such a lengthy procedure is needed to allow the Parliament to properly analyze the accounts, reports and declarations received, together with the report of the Court of Auditors and the relevant observations submitted by the EU institutions and bodies by November 30 of the financial year following the one to which the budget refers - N + 1. Within the deadline set in financial year "N + 2", the plenary of the Parliament is required to approve or deny discharge, to provide indications or comments on the future management of accounts or to postpone the discharge decision, provided that clear justifications are provided for doing so, such as in the event of lack of information or data, for example (Fasone 2021).

[16] See Art. 141 Financial regulation.

Although such a decision expresses political criticism of the Commission, it does not have the same consequences as a motion of censure (Bauer, Graham, Becker, 2018, 457). According to Art. 231 TFEU, refusal of discharge is now voted by a simple majority. Furthermore, the discharge procedure takes place regularly every year and always ends in a parliamentary vote. In the light of this procedure, and without a clear legal basis in the Treaties[17], the EP has started using the discharge procedure as an instrument of accountability for all other EU institutions – except for the ECB, which has a separate budget – and for most of the EU bodies and agencies (Perreau, 2019, 128; Benedetto, 2019, 329 ff.; Bauer, Graham, Becker, 2018, 458). The management of expenditure through budget execution has led to an inter-institutional struggle that pits the EP against the Council and the European Council. Indeed, these intergovernmental institutions are reluctant to accept the interference of the EP in implementing their budget. Consecutively, from 2011 – as regards the EU budget for 2009 – to 2019, the European Parliament consistently refused to grant discharge to the Council and the European Council, given their refusal to let the Parliament access key financial information to achieve this goal. In particular, by adopting a restrictive interpretation of Art. 319 TFEU, which only mentions the Commission as the subject of this procedure, the Council does not recognize that the Parliament has any authority to carry out the discharge procedure against it (Fasone, 2021).

To protect EU finances, the Treaty obliges both the Union and the Member States, as direct or indirect beneficiaries European funds, to combat fraud and other illegal activities that jeopardize the financial interests of the Union (Killmann, 2019, 1998)[18]. For this reason, the Union has created a special office, OLAF, which, despite having the formal status of an agency of the Commission, operates as an independent body tasked with investigating and combating any illegal activity that damages the finances of the European Union, whether within the institutional apparatus or at national level (Hofmann, Stoykov, 2019, 268 ff.). According to Art. 325 (2) TFEU, in their activities to combat European frauds, Member States must adopt the same measures in place to combat fraud against their own financial interests. This is the principle of assimilation in the protection of European and national financial interests. (Killmann, 2019, 1999). The principle implies that national authorities must proceed with the same diligence against fraud against EU finances as they do in the execution of their national laws. In particular, these authorities must apply sanctions to frauds that are, from a substantive and procedural point of view, but similar in nature and importance, provided that such sanctions are effective, proportionate and dissuasive (Killmann, 2019, 2000; Clemente, 2104, 2420). Art. 325 TFEU also provides for the possibility for the Council to adopt specific measures to achieve effective and equivalent protection of the financial interests of the Union in all Member States. Furthermore, Art. 86 TFEU now provides that to combat crimes affecting the financial interests of the Union, the Council, acting according to regulations following a special legislative procedure, may establish a European procedure capable of identifying, prosecuting, and indicting perpetrators who harm these interests (Clemente, 2014, 2419).

Before moving on to Section II and Section III on examining the control measures, it is worth dwelling a little on MFF 2014-2020 and MFF 2021-2027.

3. The Past: Analysis of MFF 2014-2020 and EU annual budget 2018

The MFF is the new long-term spending package that sets ceilings within which the EU may agree annual budgets. It is not a budget itself but merely a series of limits for commitments to expenditure, which are then authorized in each annual budget (Benedetto, 2013; Piris 2010). The

[17] See Art. 100 Financial Regulation.

[18] See Art. 310 (6) TFUE and Art. 325 TFUE.

MFF 2014-2020 was adopted in 2013 in a context characterized by economic and financial crisis and budgetary restrictions in several Member States. Consequently, it focused on investments in the sectors with the highest European added value in order to stimulate growth and employment. It introduced elements of conditionality in the use European funds through national and regional programmes. In addition, the 2014-2020 MFF introduced a more results-based budgetary approach, to make the sums of money spent by the EU budget more profitable by properly evaluating the results obtained from the expenses incurred (D'Alfonso, 2013b). However, the 2014-2020 MFF contains old critical issues. The EU makes political commitments to support economic innovation and new technologies, but it directs relatively little funding to such ends. The literature highlights a paradox in the EU budget: it is both too much and too little (Benedetto, 2017). Due to insufficient payment appropriations to fulfil obligations towards the recipients of EU funds on time, and a 2014-2020 MFF which, for the first time in the history of the EU budget, led to a net decrease in levels of commitments and payments, there have been unprecedented budgetary conflicts since the introduction of the MFF in 1988 (Georgieva, 2014, 5).

3.1. The Multiannual Financial Framework 2014-2020

The 2014-2020 multiannual financial framework is the result of the agreement reached on 27 June 2013 between the presidents of the Commission, Parliament, and Council on a package that included global ceilings for commitment appropriations at 960 billion euros – 1% of the gross national income of the EU on the whole – and payment appropriations at 908 billion euros, or 0.95 of the EU overall gross national income. In its resolution of 3 July 2013 on the political agreement regarding the 2014-2020 multiannual financial framework, the EP recalled that the adoption of the MFF regulation was linked to the adoption of the corrected budgets necessary to ensure the availability of additional payment appropriations for 2013, the political agreement on the legal bases of the relevant multiannual programmes, and the establishment of a high-level group on own resources. Once these conditions were met, the European Parliament approved the draft regulation that was then adopted by the Council on 2 December 2013 (European Commission, 2013, 7).

EU Regulation No 1311/2013 of the Council established the 2014-2020 multiannual financial framework[19]. The resources of this multiannual financial framework were largely allocated to four categories: smart and inclusive growth, sustainable growth, security and citizenship, and global Europe.

The first is about smart and inclusive growth. So here we find not only the European programmes that stimulate growth and create jobs but also EU funding for research and innovation, investments in trans-European networks, programmes for energy and digital networks, and the development of small and medium-sized enterprises (European Commission, 2013, 17). Furthermore, all the funds for economic, social and territorial cohesion, also called European structural and investment funds, have been grouped within this heading[20]. This category includes the European

[19] Council Regulation (EU, Euratom) No. 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020.

[20] Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development, and the European Maritime and Fisheries Fund. The Regulation also lays down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, and the European Maritime and Fisheries Fund, repealing Council Regulation (EC) No 1083/2006 and Regulation (EU) No 1303/2013. In particular, see Art. 1 Regulation (EU) No 1303/2013.

Regional Development Fund (FESR)[21], which promotes balanced development in the different regions of the EU. In addition, the European Social Fund is part of the heading (FSE)[22] that supports employment projects across Europe and invests in the human capital of Europe: workers, young people, and all those looking for work. The category includes the Cohesion Fund (CF)[23], which finances projects in the transport and environment sectors in countries where per capita gross national income (GNI) is less than 90% of the EU average[24], and the European Agricultural Fund for Rural Development (EAFRD)[25]. Also, the MFF contemplates the competitiveness for growth and jobs categories, with an expenditure ceiling of €125.61 billion, an increase of more than 37% compared with the previous MFF (European Commission, 2013, 18). As for economic, social, and territorial cohesion, the expenditure ceiling amounts to €324.94 billion (European Commission, 2013, 18). In particular, the 2014-2020 MFF defines appropriations relating to spending commitments for the entire programming period, allocating 508,921 million euros to interventions for smart and inclusive growth. Of these, 366 billion are dedicated to supporting economic development managed by the Member States through operational programmes (European Commission, 2013, 18). This amount is divided between the various funds: the Cohesion Fund benefits from 18.1% of these funds, the European Regional Development Fund 52.2%, the European Social Fund 24.7%, and the resources allocated to the Youth Guarantee initiative amount to 0.9% (European Commission, 2013, 18).

The 2014-2020 framework introduced some changes regarding the structural investment funds. It has not only linked the structural funds to the achievement of the objectives of the Europe 2020 strategy (Papadaki, 2012, 151; Natali, 2010, 93; Soriano, Mulatero, 2010, 289), but has also introduced new measures to improve the effectiveness, management, and control of the financial resources invested through these funds. To adequately monitor progress in achieving the objectives set for each structural investment fund, the programmes must define a reference framework for the effectiveness of implementation based on various indicators and set clear, realistic, and measurable milestones and final objectives (Leen, 2015, 55)[26]. The evaluations are conducted by the European Commission. In the second half of 2019, the Commission reviewed the results of these programmes, based on the annual implementation reports submitted by the Member States, which cover the results achieved by the end of 2018. Following this review, the Commission assigned the programmes and an implementation performance reserve of between 5% and 7% of the allocation of the individual priorities for the priorities that have met their respective milestones. In cases where there is an evident and serious deficiency in achieving the milestones of a priority due to shortcomings in implementation, the Commission may suspend all or part of the interim payments, and, in the event

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[21] Regulation (EU) No 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning investment for growth and jobs and repealing Regulation (EC) No 1080/2006.

[22] Regulation (EU) No 1304/2013 of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006.

[23] Regulation (EU) No 1300/2013 of the European Parliament and of the Council of 17 December 2013 on the Cohesion Fund and repealing Council Regulation (EC) No 1084/2006.

[24] In the period 2014-2020, these were Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia and Slovenia. The 'EMFF Regulation' (No 508/2014). Furthermore, the regulation (No 1299/2013) on European territorial cooperation applies to cooperation programmes co-financed by the ERDF.

[25] Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005.

[26] See Art. 19 Regulation EU No 1303/2013.; Art. 20-22 Regulation EU No 1303/2013.; Art. 23 Regulation EU No 1303/2013.

of serious failure to achieve the objectives, it can make corrections at the end of the programming period.

Furthermore, the regulations have established thematic or general *ex-ante* conditionality linked to specific investment priorities. Also, Member States must consider both national reform programmes and any relevant Council recommendations to ensure that Structural Funds are used in accordance with the priorities set under the European Semester (Urquijo, 2017, 49).

What is more, the new 2014-2020 framework introduced changes to the control and management of the structural funds.[27]. In MFF 2014-2020, the responsibility of the managing authority was strengthened compared with previous years (Bachtler, Mendez, 2020; Casula 2020; Bubbico, Langthaler, 2015; Bachtler, Mendez, 2007). The managing authority has to draw up an annual declaration of assurance and an annual summary of the final audit reports, while controls are carried out on structural investment funds. Managing authorities must also implement effective and proportionate anti-fraud measures, taking into account the risks identified. The conformity assessment of the control and management systems has been replaced by a national procedure created for the designation of the managing authority. The Commission can evaluate this procedure if the total amount of support provided to the programme in question by the Structural Funds exceeds a certain amount, after a risk assessment or on the initiative of the Member State. The Commission examines the annual budgets of the operational programme and, where appropriate, issues the annual management declaration. The Commission will apply net financial corrections if an EU audit identifies deficiencies in the Member State's management and control system (Crescenzi R., Fratesi U., Monastiriotis V. 2020, 5).

The second category of the 2014-2020 MFF relates to sustainable growth, and it is under this heading that the EU agricultural policies have been funded. Most of the funding is allocated directly to the Member States. The European Agricultural Fund (FEGA) makes direct payments to farmers and finances measures to regulate agricultural markets so as to ensure a decent standard of living for agricultural workers and a stable and secure food supply at affordable prices for consumers. In addition, the Agricultural Fund for Rural Development (EAFRD) aims to develop rural economies and increase the productivity of agriculture and forestry. The expenditure ceiling of this category is 372.93 billion euro (European Commission, 19).

The third category contains funds aimed at security, citizenship and immigration. This category finances actions relating to asylum, migration, initiatives, external borders, and internal security. The expenditure ceiling of the category is 15.67 billion euros (European Commission, 2013, 20). The last category – global Europe – aims to finance EU action at the international level, including humanitarian aid and development assistance (European Commission, 2013 21). A significant exception is the European development fund, which receives direct financial support from the Member States. In this category, the spending ceiling is 58.70 billion euros. There are two other categories of expenditure present in the other MFFs: administration, concerning the costs of EU buildings and staff, and the headline of compensation between annual revenue and budget expenditure. Here, the spending ceiling is 61.63 billion euros. (European Commission, 2013 22).

The medium-long-term planning of the MFF is based on calculations and projections related to a specific economic situation, which may change over time due to the emergence of new and unforeseen needs. For this reason, EU regulation No 1311/2013 of the Council establishing 2014-2020 financial programming envisaged that, by the end of 2016, the European Commission reviews this financial framework and proposes its possible revision, fully taking into account the economic

[27] See Art. 122-128 Regulation EU No 1303/2013.

situation at that time and the most recent projections[28]. This proposal is a political act through which the European Commission provides its reading of the EU context and defines any adjustments to the evolution of the situation (Polverari, 2016, 59 ff.).

The financial package proposed by the European Commission for the last programming period of the current MFF, covering the years 2017-2020, provided for a substantial increase in budget appropriations for 2017 in order to raise expenditure for the management of migratory flows, some appropriations for the European Structural and Investment Funds, and an increase in the amounts of expenditure on security and programmes for growth and jobs. For 2017-2020, the Commission proposed a package of 13 billion euros of additional appropriations for growth and jobs, migration, and security[29]. After the Commission's proposal, the Parliament and the Council reached an agreement and, on 20 June 2017, the Council unanimously adopted the revised MFF for 2014-2020 (D'Alfonso, 2017b, 16)[30].

While it is possible to recognize that remarkable shifts were agreed to in connection with some policy areas, the main structure of budgetary expenditures at EU level reflects the traditional division of expenditures. This means that, all together, 72% of expenditures in the period 2014-2020 go towards agricultural and cohesion polices (Kengyel, 2016). For this reason, MFF 2014-2020 does not represent a radically new expenditure structure. Fundamentally, these budgets are a continuation of the historically development expenditure structure, with only minor changes in proportions compared with 2007-2013. Indeed, in comparison with MFF 2007-2013, there were three fields with this heading upon which significant changes were agreed. In the field of education and training policy, the Erasmus+ programme has a budget of almost 15 billion euro, which is more than 40% higher than former levels in real terms. The other important field is innovation policy, for which the Horizon 2020 programme has a budget of almost 80 billion euro, which represents around a 30% real increase compared to the former financial framework (Kengyel, 2016). The third most important field worth mentioning is the Connecting Europe Facility. It supports strategic infrastructure investment at EU level in the transportation, energy, and ICT sector with 33.3 billion euros in funding. This programme represents a 50% increase over the Trans-European Networks budget (Kengyel, 2016). The special treatment of agricultural policy, which is almost universally regarded as extremely costly, has not been stopped, but expenditure is gradually decreasing. Partly as a result of this approach, the main instruments for strengthening the competitiveness of the EU economy have not been allocated significantly higher shares in the budget. However, a serious shift has begun that could increase the budgetary background of these policies (Kengyel, 2016). Although spending on agriculture and cohesion policy decreased with MFF 2014-2020, these policies continue to occupy most of the EU budget. The predominance of agriculture subsidies and regional development expenditure during the history of the EU budget clearly indicates that the primary aim of Member States with regard to the EU budget is to use it for redistribution rather than to promote the achievement of other common objectives of the EU (Kengyel, 2016).

3.2. EU Budget Execution and Implementation: the case of the 2018 EU annual budget

In this section, the 2018 annual budget will be examined through a case study. This budget was the last one to be given a discharge by the European Parliament at the time of writing. Analysis

[28] See Art. 2 Regulation EU No 1311/2013

[29] Proposal for a Council Regulation amending Regulation (EU, Euratom) No 1311/2013 laying down the multiannual financial framework for the years 2014-2020.

[30] Parliamentary Resolution of 26 October 2016 on the mid-term revision of the MFF 2014-2020

of the documents will prove that the first check on the EU budget and the first bulwark in defence of the EU's financial interest is represented by the audit work carried out by the European institutions involved in the discharge procedure, namely the Commission, the Court of Auditors, the Council of the European Union, and the European Parliament.

3.2.1 European Commission budgetary control

The first institution to be analyzed in the annual budget review procedure is the Commission. Like many international public administrations, the European Commission has delegated a range of tasks related to budgeting. The Commission enjoys a large degree of autonomy in all the steps of the routine annual budget procedures leading to the adoption of the draft annual EU budgets (Gotze, Patz, 2016, 1038). It also has visible influence over the discharge of the EU annual budget. The Commission's influence on the procedural aspect of the budgeting procedure has changed and increased over the last decade (Ellinas and Suleiman, 2012; Ban 2013; Wille 2013; Kassim et al. 2013; Hartlapp et al. 2014). In particular, the Commission has become the first controller of EU expenditure and the first protector of the EU's financial interest (Goetze, Patz, 2016, 1041). The DG Budget plays a central role in preparing the reports that allow the Commission to start the procedure for closing the annual budget accounts, which will end with discharge before the European Parliament.

To understand the role of the European Commission in the procedure for closing the annual budget, auditing the accounts, and protecting financial interests, it is necessary to examine the "Integrated Financial and Accountability Reporting 2018"[31]. The integrated financial and accountability reporting brings together comprehensive information on the implementation, performance, results, sound financial management, and protection, of the EU budget in 2018. It contains the contents of five reports produced by the European Commission for the 2018 financial year, the annual management and performance report[32], the consolidated annual accounts of the EU[33], and the report on the follow-up to the discharge for the 2017 financial year[34]. The Commission reports to the discharge authority on internal audits carried out in 2018[35] and the long-term forecast of future inflows and outflows of the EU budget (2020-2024)[36] (European Commission, 2019, 7). These financial reports provide input for the annual discharge procedure through which the European Parliament and the Council hold the Commission accountable for how it manages the EU budget.

The Commission's report provides an accurate picture of the EU's annual finances. In 2018, the implementation of the EU budget totalled 173.1 billion euro in commitment appropriations and 156.7 billion euro in payment appropriations (European Commission, 2019, 23). On the other hand, the 2018 budget forecast was 160,144 euros for commitments and 144,681 euros for payments[37].

According to the Commission's reporting action, the 2018 adopted budget focused on two main policy priorities for the EU: supporting the ongoing recovery of the European economy and addressing security and humanitarian problems. In 2018, the implementation of the EU budget

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[31] See https://ec.europa.eu/info/publications/integrated-financial-and-accountability-reporting_en

[32] See https://ec.europa.eu/info/publications/annual-management-and-performance-report-2018_en

[33] See https://ec.europa.eu/info/publications/annual-accounts-2018_en

[34] See https://op.europa.eu/en/publication-detail/-/publication/8310a9c9-bd88-11e9-9d01-01aa75ed71a1/

[35] See https://op.europa.eu/en/publication-detail/-/publication/f2577fc9-c2f4-11e9-9d01-01aa75ed71a1/

[36] See https://op.europa.eu/en/publication-detail/-/publication/d46a2c24-c2f3-11e9-9d01-01aa75ed71a1/

[37] See https://www.consilium.europa.eu/en/press/press-releases/2017/11/30/2018-eu-budget-adopted/

totalled 173.1 billion euro in commitment and 156.7 billion euro in payment appropriations. Almost half of the funds were intended to stimulate growth, employment and competitiveness: 87.4 billion euro in commitments (European Commission, 2019, 23). The stimulus measures included funding for research and innovation under Horizon 2020, education under Erasmus +, and support for SMEs. The 2018 EU budget also allocated funds to the fight against climate change. The EU has integrated climate action through the following programmes: cohesion, energy, transport, research, innovation policies, and agricultural policy. The EU budget is a key factor of sustainability for the European institutions. In 2018, the amount allocated was over 32 billion euros, which represents 20% of the total budget. The total cumulative amount for climate dimension integration was over 141 billion euros at the close of 2018 (European Commission, 2019, 23).

In 2018, the EU budget provided extra emergency assistance to Greece for the migration sector and to increase the security of migrants, staff, and finance operation run by the European Border and Coast Guard Agency (European Commission, 2019, 21). Furthermore, 1.4 billion euros of EU funds were spent for humanitarian aid in over 90 countries, a significant part of which was spent on supporting the conflict-affected population in Syria and refugees in neighbouring countries (European Commission, 2019, 21). Almost half of the funds – 87.4 billion euros – for commitments were allocated to stimulate growth, employment and competitiveness. This included funding for research and innovation under Horizon 2020, education under Erasmus+, and supporting SMEs (European Commission, 2019, 23). Moreover, in the fight against climate change, EU institutions have integrated spending on climate action across all the EU programmes, such as those focusing on cohesion, energy, transport, and research and innovation policies, as well as the common agricultural policy. This makes the EU budget a key driver of sustainability. Indeed, the total cumulative amount for climate mainstreaming was more than 141 billion euro by the close of 2018 (European Commission, 2019, 21).

In 2018, the total revenue of the EU budget amounted to € 159.4 billion. Most of the revenues came from the contributions of the Gross National Income of the Member States (GNI) and represent 65.85% of the EU's resources for the fiscal year in question. The remainder comes from VAT revenues (10.75%) and customs duties (12.74%) (European Commission, 2019, 24). The rest of the revenue is represented by taxes on EU staff salaries, contributions from non-EU countries to certain programmes, and fines for companies breaching competition law.

The Commission presented the total amount of the commitment for 2018. In particular, EU commitment shows a legal obligation to finance the cost of projects, contracts, and grants. Although commitments are made for the full amount of the EU contribution to the project in the first financial year, payments are made in installments in subsequent financial years as the project progresses. For the year 2018, EU Commitments amounted to 173.1 billion euros (European Commission, 2019, 25). Specifically, EU commitments represent a legal obligation to fund the cost of projects, contracts, and grants. Although commitments are made for the full amount of the EU contribution to the project in the first financial year, payments take place in instalments over subsequent financial years as the project progresses. On the other hand, the payments made in 2018 amounted to 156.7 billion euros. The biggest payments were made for economic, social and territorial cohesion (34.8%), sustainable growth (37%), and competitiveness for growth and jobs (13.7%). Administration (6.3%), Global Europe (6.1%), and security and citizenship (2%) represent minor payments (European Commission, 2019, 25).

In 2018, the European Commission, obtained good results on the proper use of the EU budget. First of all, the assurance that the EU budget is well managed is based on a reinforced system of corporate governance. Governance within the Commission is based on a clear division of responsibilities between the political, corporate, and department levels. Effective implementation of the EU budget is delegated to Directors general and heads of service. They are responsible for the sound financial management of resources. In implementing the EU budget, they must comply with the provisions of the financial regulation and establish an appropriate internal control framework. This framework applies both to the expenses for which the European administration is responsible and the control of expenses in shared management. 74% of the EU budget is spent together with Member States under what is known as shared management (European Commission, 2019, 35). The authorities in Member States – such as ministries for regional development – or entrusted entities manage expenditure under the supervision of the Commission (European Commission, 2019, 36). For this reason, in the first instance, they are accountable for sound financial management. Instead, the ultimate responsibility for the implementation of the EU budget lies with the Commission. When Commission departments face particular challenges due to weakness in their control systems or in financial management, declarations of assurance are qualified by reservations. In 2018, the financial impact of reservations on management assurance remained fairly stable at 1.078 million euros compared with 1.053 million euros in 2017 (European Commission, 2019, 37).

Furthermore, the EU institutions have designed an efficient control system to ensure the legality and regularity of transactions. The Commission considers that the financial statements are effectively protected when the risk to the legality and regularity of financial transactions is below the 2% threshold (European Commission, 2019, 39). In general, the risk is estimated at two key stages in the cycle: payment and closure. Risk at payment qualifies those errors that might still affect payment after preventive controls have been carried out. These risks are detected thanks to controls carried out after the payment has taken place. The risk at closure is the one that will remain at the end of the programme's life cycle, after estimated future corrections have taken place. These are the corrections that each department estimates they will implement as a result of controls carried out in subsequent years. In 2018, both risk at payment and risk at closure remained low at below 2%. Risk at closure was even 1% (European Commission, 2019, 40). This shows that the European Commission has ensured appropriate risk management measures relating to the legality and regularity of transactions. It also shows that the financial corrections and recoveries made over the entire life of the programme protect the EU budget overall. The European Commission report shows how EU finance management has steadily improved over recent years. The simplification of regulation and more effective control systems introduced in the programmes have contributed to the structural decrease and stabilization of payment and closure risks. Also, it should be emphasized that risk analysis by the Commission concerning the legality and regularity of financial transactions is not only useful for reporting purposes but also because it is an important management tool. This helps the Commission to identify any weaknesses at programme level and to take action to correct them. This approach ensures continuous improvement of the Commission's financial management over the years.

In addition, assurance that the EU budget is well managed is based on the revised anti-fraud strategy and the implementation of a zero-tolerance policy to fraud. Each Director General and head of service, as delegated authorizing officer, is responsible for internal control, including anti-fraud controls, and gears them to the characteristics and specific challenges of their operations. To valorize effectiveness and efficiency, the new strategy places strong emphasis on methodology and co-operation. Regarding methodology, the Commission has to acquire greater knowledge about fraud patterns and trends in order to fight the phenomenon more effectively (European Commission, 2019, 41). Furthermore, closer co-operation amongst the services concerned is making its anti-fraud action more consistent.

Not only this, but the EU budget is checked by the internal audit service of the European Commission, the external audit of the EU Court of Auditors, and the discharge procedure is led by the European Parliament.

According to Art. 118(8) of the financial regulation, the internal audit service of the European Commission has to produce a summary report to be forwarded to the discharge authority. In 2018, the internal auditors deemed the procedures put in place by the Commission adequate to assure the achievement of EU financial objectives and to protect the EU budget. Moreover, the internal auditor services of the Commission confirmed that 97% of its recommendations followed up during 2014-2018 were effectively and promptly implemented by the Commission departments. However, the internal audit departments recommend improving the overall performance of several key processes in the areas of governance, IT security, human resources, synergies, and use of resources (European Commission, 2019, 42).

3.2.2 The EU Court of Auditors and budgetary control

As in previous years, in its 2018 audit report, the EU Court of Auditors stated that the EU accounts provided a true and fair picture of the Union's financial situation. Furthermore, given that the EU's revenue audited by the Court was not materially affected by the error, it expressed a positive opinion on the regularity of the revenue side of the budget. At the same time, the Court expressed a qualified opinion on the regularity of the transactions underlying the 2018 accounts. The report shows that the errors found through the Court's audit work are not pervasive and therefore the actual financial situation EU is not misrepresented. The 2018 report shows that the overall level of irregularities in EU spending remained within the range found for 2016 and 2017. Generally speaking, the estimated level of error in EU budget spending for 2018 was 2.6%, and half of the expenditure was paid to beneficiaries who met certain conditions (EU Court of Auditors, 2019, 6). For this type of expenditure, the Court estimated that the most likely level of error was below the materiality threshold of 2% (EU Court of Auditors, 2019, 6). As in the two previous years, a significant part of the expenditure audited by the Court was not materially affected by the error. This confirms a marked improvement in the management of EU finances in recent years. As in 2017 and 2016, the Court of Auditors expressed a positive opinion with observations only on the payments in 2018, whereas until 2015 it had expressed negative opinions (EU Court of Auditors, 2019, 6).

However, in the 2018 report, the Court of Auditors calls on the European institutions to focus their control efforts on sectors where particular shortcomings persist and the risks are particularly high. In this regard, the Court of Auditors asked the EU institutions – especially the Commission – to work together to further develop and harmonize the Court's audit practices and methodologies (EU Court of Auditors, 2019, 5). In particular, the Court found that the information provided by the Commission on regularity sometimes differs from its own. The Commission's estimates of error levels are close to the Court's estimates for competitiveness and natural resources sub-headings, while they are lower than the Court's for cohesion. In 2018, there was a significant increase in payment applications submitted for the European Structural and Investment Funds by the Member States. At the same time, the absorption of structural funds continued to slow down. For this reason, outstanding commitments relating to structural funds increased (EU Court of Auditors, 2019, 6).

During the checks carried out for the 2018 budget, the Court of Auditors brought nine cases of alleged fraud to the attention of OLAF. It should be noted that the Court of Auditors closely collaborates with OLAF in combatting fraud to the detriment of the EU budget. The Court informs OLAF of any suspicion of fraud, corruption, or other illegal activity damaging the financial interests of the EU that it identifies in the course of its audit work. This body then follows up on these cases, decides whether to launch an investigation, and cooperates if necessary with the authorities of the Member States. In 2018, the Court of Auditors assessed the regularity of 728 transactions as part of the audit activity carried out for the annual report and produced 35 special reports (EU Court of

Auditors, 2019, 14). It notified OLAF of 9 cases of alleged fraud. In 2017 however, 17 cases were referred (EU Court of Auditors, 2019, 14). In 2018, the most frequent instances of fraud in the course of the Court's work reported to OLAF concerned the alleged artificial creation of necessary conditions for obtaining EU funding, alleged declarations of expenditure that do not meet the eligibility criteria, or alleged procurement irregularities. The Court of Auditors pointed out that some of the alleged fraud cases reported to OLAF involved various irregularities. However, OLAF only launched two investigations. In seven cases, it did not initiate an investigation for one of the following reasons: it considered that other European institutions were better equipped to deal with the case and therefore passed it on to them; there was already an ongoing investigation at national level; for reasons of proportionality or insufficient suspicion of fraud. Based on the audit information sent by the Court between 2010 and 2018, OLAF recommended the recovery of a total of 312.8 million euros. The financial recommendations underlying these recoveries refer to 24 cases identified during the Court's audit work (EU Court of Auditors, 2019(b), 32)[38].

3.2.3 The Council of the European Union and budgetary control

On 18 February 2020, the Council of the Union adopted its position on the discharge of the 2018 EU budget by qualified majority. Ministers recommended that the European Parliament grant the Commission discharge to implement the 2018 EU budget[39]. Specifically, in the Council of the European Union, it is the Budget Committee that deals with matters relating to the EU budget. It deals with the EU annual budget procedure and any changes to the EU annual budget, as well as the annual budget discharge procedure. In addition, the Budget Committee is responsible for legislative work on EU financial legislation, including the Financial Regulation. The recommendation was prepared on the basis of the EU Court of Auditors' annual report on the implementation of the budget, published in October 2019. The Council agreed with the EU Court of Auditors and affirmed that the estimated level of error in payments from the EU budget increased a little in 2018 compared with 2017 – precisely 2.6% against 2.4% (Council, 2019, 5). Nevertheless, the Council highlighted that for the third time in a row the audited expenditure was not affected by a material level of error. Indeed, the error rate was below the materiality threshold of 2% (Council, 2019, 5).

However, the Council was concerned about the increase in the estimated level of error for reimbursement-based payments from 3.7% in 2017 to 4.5% in 2018 and noted that this type of expenditure, subject to complex rules, carries a high risk of error (Council, 2019, 5). The Council stressed that, in order to achieve the reduction of error rates and ensure effective and correct management of EU funds, simpler, more transparent and more predictable legislation must remain a top priority. In this context, the Council welcomed the changes to the regulatory framework introduced in 2018, which were meant to streamline and clarify the funding rules, and was looking forward to seeing their positive impact[40]. Furthermore, the Council adopted recommendations on discharge to be given to the directors of decentralized EU agencies, executive agencies, and joint undertakings for the implementation of their budgets (Council, 2019, 3). In essence, these recommendations follow the Court's 2018 annual reports on EU agencies and joint undertakings.

[38] In particular, see from point 1.42 to 1.46 of 2019 / C 340/01; Annual report of the Court of Auditors on the implementation of the budget for the financial year 2018, together with the replies of the institutions, 8 October 2019.

[39] See Council recommendation on the discharge to be given to the Commission in respect of the implementation of the general budget of the European Union for the financial year, 18 February 2020, p. 3.

[40] Council recommendation on the discharge to be given to the Commission in respect of the implementation of the general budget of the European Union for the financial year 2018, 5760/20, P. 5

The 2018 EU budget documents of the Commission, the Court of Auditors, and the Council are examined by the European Parliament's Committee on Budgets. The EP committee has the task of verifying how the European Commission, the other European institutions, and the agencies have implemented the EU budget. Moreover, it prepares the decision of the European Parliament on the discharge of the financial year. After considering the reports prepared by its Committee on Budgetary Control[41] and the recommendations of the Council, the Parliament decides whether to approve, postpone, or reject the discharge. In particular, the Committee on Budgetary Control takes a decision based on the data provided by the EU Court of Auditors, the Council's recommendations, and discussions with Commissioners and other senior EU officials. To ensure that EU taxpayers' money is used correctly, the members of the Committee on Budgetary Control travel to the Member States to verify the implementation of the budget on the ground[42].

3.2.4 The European Parliament budgetary discharge

Each year the Parliament must adopt the discharge decision by 15 May. Only if the European Parliament grants discharge, the accounts for the year are closed, and the execution of the budget definitively approved (D'Alfonso, 2020b, 3). The European Parliament may decide to postpone the decision if it detects irregularities. Before submitting the discharge again, the institution or agency must apply the recommendations of the European Parliament. If the recommendations are not implemented by the autumn, the European Parliament may decide to refuse discharge.

All European institutions, agencies, and bodies must obtain the approval of the European Parliament. In total, MEPs approved 52 reports during the plenary session on 13-14 May 2020. At that session, members of the European Parliament granted a discharge of the Commission's accounts for 2018 (European Parliament, 2020, 3) covering 94% of the entire EU budget with 499 votes in favour, 136 against, and 56 abstentions, but they asked for the rules to be strengthened to combat fraud[43]. Indeed, in the accompanying resolution, MEPs called for even stronger protection of EU spending against fraud, corruption, conflict of interest, intentional abuse, and organized crime, as well as a fairer distribution of EU money. According to the European Parliament, to avoid fraud and asymmetrical distribution of EU subsidies, the Commission should propose a cap on direct payments by natural persons, making it impossible to receive subsidies worth hundreds of millions of euros during the life of a single Multiannual Financial Framework (European Parliament, 2020, 28). The Commission should also propose rules to reveal who benefits from agricultural funds and inform the European Parliament which are the fifty largest beneficiaries of EU funds across the EU (European Parliament, 2020, 65).

Furthermore, by reporting the cases of Italy and Slovakia[44], the EP calls for the creation of a complaint mechanism at EU level that will allow farmers to inform the Commission when there are cases of embezzlement of land, misconduct by national authorities, pressure from organized crime, and forced labour (European Parliament, 2020, 27). The European Parliament then asked the committee to present guidelines to combat conflicts of interest affecting high-profile politicians, also asking the Council to adopt common ethical standards in this regard. In addition, the EP expressed

[41] See https://www.europarl.europa.eu/committees/en/cont/documents/latest-documents

[42] In February 2020, MEPs carried out an information mission to the Czech Republic to investigate possible irregularities in the management of agricultural and cohesion funds.

[43] See European Parliament decision of 13 May 2020 on discharge in respect of the implementation of the general budget of the European Union for the financial year 2018, Section I – European Parliament (2019/2056(DEC))

[44] Paragraphs 18 and 19 discharge of the EP to the Commission.

concern about the situation in the Czech Republic and asked the Commission to check payments to companies owned directly and indirectly by the Prime Minister of the Czech Republic (European Parliament, 2020, 59).

MEPs also granted most of the EU institutions discharge for the year 2018. The EP also decided to postpone the discharge of the 2018 budget of the European Economic and Social Committee,[45] asking to deal with internal functioning problems first. The EP also refused to discharge the 2018 accounts of the budget of the Council and the European Council[46] due to the institutions' lack of co-operation in providing the information requested by the Parliament.

4. The Present and the Future: the EU budget after the Covid-19 outbreak

The crisis caused by the Covid-19 pandemic has put the EU at a crossroads: to fight in order to continue the integration process, or to break up definitively. National closures to try to limit the spread of the infection have exposed many segments of European citizens to the risk of losing their jobs and facing poverty. Although the EU response has been fragmented and delayed, the institutions have tried to mitigate the socio-economic impact of the crisis.

To fight the effects of the pandemic, one of the Commission's first actions was to activate the Emergency Support Instrument of the MFF 2014-2020 regulation proposal to provide Member States with a 37-billion Corona virus Response Initiative for assistance with the Covid-19 pandemic and to amend the annual availability of the EU solidarity fund[47]. Furthermore, a mobilization of 140 million euros was pledged to health research, including research for a vaccine through the Horizon 2020 Programme, and all the remaining budgetary flexibility of MFF 2014-2020 were drained by the Corona Virus Response Investment Initiative Plus (Castellarin, 2020, 1021). The expenditure ceiling of the MFF 2014-2020 was increased to 6 billion, raising economic, social, and territorial cohesion to 53 billion euros, and section 4-Global Europe to 9.7 billion. Based on Art. 312 TFEU, these actions had an effect on the increased EU contribution to the Solvency Support Facility under the European Fund for Strategic Investments and the EIF. Also available are the Cohesion Funds under the Assistance Programme recovery for cohesion and the territories Europe-REACT-EU as additional funds for the European Fund for sustainable development (Fernandez, 2020, 1413).

The EU response to the Covid-19 crisis has been very complex and includes the following measures: Next Generation EU, the new Multiannual Financial Framework 2021-2027, and the European Central Bank's Pandemic Emergency Purchase Programme (PEPP) (Benigno, Canofari, Di Bartolomeo, Messori, 2020, 103), as well activation of the General Escape Clause of the Stability and Growth Pact and the State Aid framework to assist companies and business heavily affected by the Covid-19 crisis. In other words, the EU's response to the crisis is based on recovery, emergency aid, public health expenditure, and investment in research and innovation. The EU aims to restore the economy and the internal market to its pre-Covid-19 state as well as to build resiliency for future cross-border threats (Dermine, Markakis, 2020, 1 ff.).

In late March 2020, the European Commission proposed that the Multiannual financial framework (MFF) 2021-2027 should play a central role in economic recovery by providing funding

[45] See European Parliament decision of 13 May 2020 on discharge in respect of implementing the general budget of the European Union for financial year 2018, Section VI – European Economic and Social Committee (2019/2060(DEC)).
[46] See European Parliament decision of 13 May 2020 on discharge in respect of implementing the general budget of the European Union for financial year 2018, Section II – European Council and Council (2019/2057(DEC)).
[47] Communication COM(2020) 174, op. cit.

for a temporary targeted recovery fund. The Euro-group latched onto the idea, agreeing that a revised MFF 2021-2027 may play a central role in the economic recovery by providing funding for a temporary targeted recovery fund. The European Council endorsed the idea on 23 April 2020 and asked the Commission to develop a detailed proposal. The object of inter-governmental dispute shifted from corona bonds to the size and nature of the recovery fund (Genschel, Jachtenfuchs, 2021, 363), and the turning point of this process was the European Council meeting for almost a week in July 2020, adjusting the Commission's proposal with a series of changes, in turn inspired by an idea of Macron and Merkel's.

In December 2020, upon obtaining the Parliament's consent, the Council adopted the regulation laying down the EU's multiannual financial framework for 2021-2027. The 2020/2093[48] regulation provides for a long-term budget of 1,074 billion euros for the EU, including the integration of the European Development Fund. Furthermore, MFF 2021-2027 will be coupled with a temporary recovery instrument to mobilize 750 billion euros: the Next Generation EU, a package containing numerous measures[49]. These two tools will allow the EU to provide an unprecedented 1.8 trillion euros of funding over the coming years to support recovery from the Covid-19 pandemic and the EU's long-term priorities across different policy areas. To these funds, another 1.5 billion euros of resources disbursed through the PEPP programme will be added.

4.1. MFF 2021-2027 and EU annual budget 2021

The size of the 2021-2027 MFF, with its 1,835.3 billion euro, is extremely significant compared to MFF 2014-2020, which amounted to 1,083.3 billion euros. MFF 2021-2027 will cover seven spending areas: *i)* the single market, innovation, and digitalization; *ii)* cohesion, resilience, and values; *iii)* natural resources and the environment; *iv)* migration and border management; *v)* security and defence; *vi)* neighbourhood and the World; *vii)* European Public Administration. It will provide the framework for funding almost 40 EU spending programmes in the next seven years. The new MFF 2021-2027 will be geared towards new and reinforced priorities across the EU's policy areas, including green and digital transitions. The cohesion and common agricultural policy will continue to receive significant funding and undergo modernization to ensure that they contribute best to the EU's economic recovery and the its green and digital objectives (D'Alfonso, 2021b). Indeed, almost a third of EU spending under the long-term budget will contribute to new and reinforced policy areas. In particular, the EU will be spending 132.8 billion euros in the area of the single market, innovation, and digitalization, and 377.8 billion on cohesion, resilience, and values. These amounts will increase to 143.4 billion euros and 1099.7 billion euros respectively, with additional funding created through the European Union Recovery Instrument, including grants and loans for Member States. Furthermore, 356.4 billion in funding will go to natural resources and the environment. MFF 2021-2027 allocated 22.7 billion euros in the areas of migration and border management, 13.2 billion euros in the fields of security and defence, and 98.4 billion euros for the EU neighbourhood. Moreover, the EU will have an overall target of at least 30% of the total amount of the EU budget and the RRF expenditures supporting climate objectives. The new investment strategy allows MFF 2021-2027 to support the digital transition with the Digital Europe programme to promote the large-scale roll out and uptake of the key digital technologies, such as artificial intelligence applications and state-of-the-art cybersecurity tools. In addition, the new MFF will finance the EU4Health programme, which will

[48] Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework from 2021 to 2027.
[49] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis.

provide a strong basis for EU action in the health field based on lessons learned during the Covid-19 outbreak. In the field of research and innovation, the Horizon Europe programme will benefit from a significant increase once funding from the EU's recovery instrument becomes available. Also, programmes for young people, such as Erasmus+ and the European Solidarity Corps will also be strengthened, with the Erasmus programme expected to triple the number of participants in the course of the new MFF 2021-2027. Besides, a new Just Transition Fund has been created to support the most vulnerable carbon-intensive regions in their transition towards a climate-neutral economy. It will receive funding under both the next long-term budget and the EU recovery instrument.

The composition of the EU annual budget has also been affected by the Covid-19 crisis. On 10 December 2020, the Commission proposed the second draft budget for 2021, and the Council adopted its official position on 14 December 2020. On 18 December 2020, the Parliament supported the agreement by a large majority[50]. After adoption by the EP, in 2021, the EU will have an annual budget of 164 billion euros in commitments and 166 billion in payments. Furthermore, from a procedural point of view, the EU 2021 budget has had few precedents. It was approved on the basis of the 2021-2027 MFF which, however, was under negotiation until 10 December.

The budget reflects the EU's priorities – relevant to ensure a great recovery. It allocates 48.2 billion euros in commitments to support recovery, boosting investment in economic, social, and territorial cohesion. Furthermore, the 2021 EU annual budget assigned 55.7 billion euros to the Common Agricultural Policy and 760.7 million to the European Maritime and Fisheries Fund, for Europe's farmers and fishermen, but also to strengthen the resilience of the agri-frood and fisheries sector and provide the necessary scope for crisis management. Moreover, the 2021 EU annual budget distributes 1.1 billion euros under the Just Transition Fund and 753.5 million under the LIFE programme to support the environment and climate action. It also assigns 2.8 billion to the Connecting Europe Facility for transport infrastructure to facilitate cross-border connections. In addition, the 2021 annual budget allocates 575 million for the Single Market programme, and 36 million and 126 million euros respectively for programmes supporting co-operation in the fields of taxation and customs. Above all, it distributes 2.7 billion euros for Erasmus Plus to invest in the younger generations, as well as 306 million euros for the cultural and creative sectors through Creative Europe. The latest funds provided by the EU's 2021 annual budget are distributed between 12 billion euros to support our neighbours and international development/co-operation, as well as 1.9 billion for pre-accession assistance, including 873.3 million for the Asylum and Migration Fund and 533.5 million for the Integrated Border Management Fund, to step up co-operation on external border management as well as migration and asylum policy. 176 billion have been allocated to the Internal Security Fund and 945.7 million for the European Defence Fund to support European strategic autonomy and security. In summary, the first annual budget under MFF 2021-2027 will allow the EU to mobilize substantial public funds for a continued EU response to the coronavirus pandemic and its consequences, to start sustainable recovery, and to protect and create jobs. It will enable the EU to start investing in the future to achieve a greener, more digital, and more resilient EU.

4.2 Next Generation EU: composition and governance

Post-Covid-19 recovery will be implemented by MFF 2021-2027 and Next Generation EU. Indeed, the EU's long-term budget, coupled with Next Generation EU, will be the largest stimulus

[50] See Definitive Adoption (EU, Euratom) 2021/417 of the European Union's general budget for financial year 2021 OJ L 93, 17.3.2021, p. 1–2286, ELI: http://data.europa.eu/eli/budget/2021/1/oj.

package ever financed through the EU budget, with a total of 1.8 trillion euros to help rebuild a post-COVID-19 Europe.

In particular, Next Generation EU is made up of various dimensions. The first measure is the Recovery and Resilience Facility. It is the centerpiece of Next Generation EU with 672.5 billion euros in loans and grants available to support reforms and investments undertaken by EU countries. Furthermore, Next Generation EU includes 47.5 billion euros for Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU). It is a new initiative that continues and extends the crisis response and crisis repair measures delivered through the Coronavirus Response Investment Initiative and the Coronavirus Response Investment Initiative Plus. It will contribute to a green, digital, and resilient recovery of the economy. The funds will be made available to the European Regional Development Fund, the European Social Fund, and the European Fund for Aid to the Most Deprived; These additional funds will be provided in 2021-2022 by Next Generation EU and in 2020 through a targeted revision of the current financial framework. Next Generation EU will also bring additional money to other European programmes or funds such as Horizon2020 (5 billion euros), Invest EU (5.6 billion euros), rural development (7.5 billion euros), the Just Transition Fund (10 billion euros), and RescEU (1.9 billion euros)[51].

Regarding controls on the use of European funds, there will be no changes for those provided through EU programmes and financed by the structural investment funds or the general EU budget. There will be problems for programmes financed through different instruments, like SURE. In this case, the controls will be carried out by the Commission and the Member States jointly.

Next Generation EU is a suitable tool to promote a tight common economic policy capable of encouraging reforms that, once the programme is over, will allow the Member States to resume the growth (Piana, Nato, 2020, 55; Lionello 2020). Indeed, Next Generation EU could represent a federative moment, the so-called “Hamiltonian moment”, because it links the temporary fiscal capacity of the EU to a common growth agenda (De la Porte, Jensen, 2021, 388; Celi, Guarascio, Simonazzi, 2020, 411).

The 2020/2094 regulation that creates the European Union Recovery Instrument is based on Art. 122 TFEU. Paragraph 1 of this article allows the Council, upon receiving a proposal from the Commission, to decide – in a spirit of solidarity between the Member States – upon the measures appropriate to the economic situation. This is especially true if numerous difficulties arise in the supply of certain products, notably in the area of energy. Moreover, Art. 122 (2) TFEU states that where a Member State is in difficulties or is seriously threatened by difficulties caused by natural disaster or exceptional occurrences beyond its control, the Council – under certain conditions and upon receiving a proposal from the Commission – may grant financial assistance to the Member State concerned (Grund, Guttenberg, Odendahl, 2020, 173), in derogation of the no-bailout clause. Next Generation EU is based on three pillars. The first consists of tools to support the efforts made by the Member States to recover from the crisis, overcome its effects, and re-emerge stronger (Bremer, Kuhn, Meijers, Nicoli, 2020). This pillar is grounded on the RRF. The RRF receives 672.5 billion out of the 750 billion euros to support Member State reforms and investment in sustainable growth. In particular, the RRF includes 312.5 billion euros in grants, 360 billion euros in loans, 10 billion euros for Horizon Europe, 5.6 billion euros for the Invest-Europe Fund, 47 billion euros for REACT-EU, 7.5 billion for the European Agricultural Fund for Rural Development, and 10 billion euros allocated

[51] See https://ec.europa.eu/info/strategy/recovery-plan-europe_en

to the Just Transition Fund (Fernandez, 2020, 1403)[52]. The residual 77.5 billion euros for the second and third pillars serve to refill EU programmes. The second pillar will receive 26 billion to provide measures aimed at stimulating private investment and supporting companies in difficulty. It will also receive a 5.6 billion euro grant for InvestEUu, which will mobilize private investment and strategize investment for green and digital transitions (Fernandez, 2020, 1404). The third aims to strengthen EU strategic programmes to learn from the crisis and make the single market stronger and more resilient. They will also work to accelerate the dual green and digital transition. It will allocate 5 billion euros to research and innovation at Horizon Europe and 1.9 billion to RescEU for crisis stockpile resources (Fernandez, 2020, 1404).

The conditions for the disbursement and supervision of funds raise two crucial issues. The first question concerns the relationship between the grants and loans making up the instrument (Codogno, van den Noord, 2020). The second is crucial because the tool provides conditions for the disbursement of funds and control over their use (De la Porte, Jensen, 2021, 388). Although Next Generation EU represents a step forward in the evolution of European economic governance because it adds vertical coordination between these policies and budgets to the horizontal surveillance of national fiscal policies, the governance of the Recovery and Resilience Facility remains complex (Buti, Messori, 2020, 12).

The governance of the RRF[53] still rests on the intergovernmental method used for the 2008 economic crisis: national plans to access funds must be presented in the framework of the European Semester, and final decisions are taken by the Council (De Feo, 2020, 333). The intergovernmental character is even more marked than that of the procedures of the Stability and Growth Pact on which the Commission decides, unless the Council opposes it with a reverse qualified majority, which never occurred. Indeed, the Member States must present their economic recovery and resilience plan in full alignment with the European Semester to access the funds that will be distributed between 2021 and 2023 (Tridimas, 2021, IX; Zeitlin, Vanhercke, 2020). Together with the country-specific recommendations, through job creation, growth potential, or resilience goals, the green and digital transition becomes a relevant criterion for assessing the 'national recovery and resilience plans within two months of application for the disbursal of any EU funding[54]. The European Commission will approve these plans after consulting the Economic and Financial Committee. In particular, the Commission should seek the opinion of the Economic and Financial Committee on the satisfactory achievement of the milestones and objectives set for each national plan – and this Committee will decide in the event of unanimous consensus among its members. Subsequently, the Council will express its approval by a qualified majority, without the participation of the European Parliament. Indeed, the European Parliament is involved only in the scoreboard and the control carried out by the Commission, from which it may opt to withdraw delegation. It is also involved in 'dialogue' regarding the RRF. If a Member State expresses concerns over another Member State's serious deviations from achievement of the objectives, an examination procedure allows any plan to be revised in the Council meeting (De la Porte, Jansen, 392; Fernandez, 2020, 1403). In other words, the European Semester, on the one hand, supports the Member States in developing national projects for the preparation of the related National Recovery and Resilience Plans. The national plans must be framed in the context of the challenges and priorities already identified by the European Semester. The timing of the presentation of the Plans and the subsequent stages of implementation are framed within the calendar

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[52] See Council of the EU Press Release of 17 December 2020, the Multiannual financial framework for 2021-2027 adopted, the Multiannual Financial Framework 2021-2027, and Next Generation EU (Commitments, in 2018 prices), www.consilium.europa.eu

[53] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

[54] Conclusions of the Special meeting of the European Council (17-21 July 2020),

of the European Semester. On the other hand, it supports national governments in articulating the implementation process. In addition, the European Semester will ensure compliance with approved programs by carrying out monitoring in parallel. Concerning the aspect of checks and controls, Member States will have to report quarterly based on the deadlines prescribed by the European Semester on the progress made in achieving the objectives indicated by the reform commitments undertaken with the NRPs (Bilancia, 2021, 58).The balance within this governance framework could be precarious during the implementation phase and could lead to a stall in the implementation mechanism, due to a potential multiple veto among the Member States and the risk of conflicts between the Commission and the Council. Despite this, an emergency break – which provides for the involvement of the European Council to resolve the impasse – should be a further incentive for Member States to respect the objectives set with the Commission's agreement (De Feo, 2020, 334; Fernandez, 2020, 1421; D'Alfonso A., 2020a, 7). However, the real problem of the RRF will not be delayed disbursement caused by this governance but whether the beneficiary Member States have designed adequate strategies and are ready to specify the series of projects in the national recovery and resilience plans and to closely monitor the implementation phases between 2021 and 2024 (Buti, Messori, 2020, 10). Access to the Recovery and Resiliency Facility by potential beneficiary Member States first requires the definition of a set of investments and strategic reforms inscribed within a coherent high-profile planning and organizational framework. Specifically, eligibility to access the RRF may be proved by presenting concrete projects able to meet the priorities assigned to each of the applying Member States by the European Semester and that mark national progress in terms of the green and digital transition. Each Member State will have to justify access to Recovery and Resiliency Facility resources by drawing up an appropriate National Recovery and Resilience Plan. In addition, this national plan must be consistent with the corresponding National Energy and Climate Plan, in a addition to the Plan linked to the Green Deal, and be developed in the framework of the Fund for Just Transition, with specific Partnership agreements and the National Operational Programmes concerning the use of other EU funds (Buti, Messori, 2020, 11). The Member States must intertwine their programmes with the objectives of the European programmes as they would weave a spider's web; only in this way can their national plans be considered valid. The complexity of the drafting, presentation, and approval procedure for national plans demonstrates that access to relevant resources by the Member States is neither easy nor unconditional (De Feo, 2020, 333; Buti, Messori, 2020, 11). In summary, access requires a preventive and systematic effort to define strategic use of the resources made available to the individual Member States by the European Commission through the specific programmes included in Next Generation EU if they are consistent with EU objectives. Furthermore, this strategy must be translated into concrete projects to be submitted to the approval of the EU institutions and must be implemented in a short time. The last step is the realization of the single projects through the effective transfer of the different flows of resources to their final beneficiaries (Buti, Messori, 2020, 11). All the steps in Next Generation EU require a strong institutional/political investment (Buti, Messori, 2020, 12). The European institutions and the Member States will have to work to balance the various interests at stake and make the complex mechanism work better (De la Porte, Jansen, 2020, 399). This would also help restore trust between the Member States and, ultimately, between the EU and its citizens (Buti, Messori, 2020, 12).

However, the promotion of Next Generation EU in conjunction with the Multiannual Financial Framework for MFF 2021-2027 shows that EU Member States can jointly agree on a policy – with funding – to address large-scale crises (De la Porte, Jensen, 2021, 388). MFF 2021-2027 and Next Generation EU represent a step forward along the path to European integration. Indeed, they have boosted investment in EU programmes to improve public health and tackle cross-border crises, including increased funding for emergency aid programmes and health research. Also, the expansion of the MFF 2021-2027 budget helps the economic recovery of the Member States while providing a flexible budget that allows faster responses to future crises (Fernandez, 2020, 1421). Furthermore, in terms of structure and general financial leverage, the MFF 2021-2027 will have the role of guaranteeing and anchoring the loans that the Commission will contract on the financial markets in the execution of the NGEU and parallel projects. From here, radiates the fundamental role of each Member State - intergovernmental influence and unanimous decision in the Council - in jointly supporting the overall project of loans and the partial sharing of loan guarantees, with all the consequences in terms of the trust. mutual, collaboration in implementation and solidarity in the common debt. It is possible to glimpse some prospective elements in this European public investment program that could consolidate shortly and become structural in the EU multiannual budget. The first is the relevant transnational redistributive phenomenon. The second is the partial sharing between the Member States of the responsibility for the debt lines on the financial markets, which the European Commission will be able to access to finance the programs of the Member States. These new aspects could lead to the revision of the Treaties in the future (Bilancia, 2021, 43).

Despite this, it should be emphasized that the intergovernmental method and the consequent key role of the Member States, entrusted with the management of most of the Next Generation EU funds as well as the Structural Funds – part of the ordinary budget of the Union – demonstrates how the governance is fairly similar to that used in the last decade to tackle the financial and economic crisis. Although this governance intersects with that of the European Semester, decision-making power seems more skewed in favor of the Council and the Member States.

4.3 Next Generation EU and own resources: what's new?

Like the case of MFF 2021-2027, funding for Next Generation EU will be provided as a result of the 'own resource' decision, which developed from Council Decision 2014/335/EU and was then proposed in 2018 as a simplification of the budget system[55]. It is important to underline that the current EU own resources system primarily relies on national contributions with various correction mechanisms, and this causes tensions between net contributors and net beneficiaries (Fernandez, 2020, 1402; Buzkova, 2020, 23; Hudetz et al., 2017, 609). In addition, past analysis shows that the system does not adequately reflect or directly support core EU policies (Scharatzentaller, 2013, 303). For these reasons, the EU institutions have proposed some reforms over the last few years to change this opaque and complex system of "own resources" (Benedetto, 2017, 615 ff.). However, the need for profound reform has not been translated into reality so far due to the difficult decision-making process, which – according to Art. 311 TFEU – in the case of own resources – requires unanimous Council approval, and the European Parliament's role is only consultative (D'Alfonso, 2016, 46; Bernard-Reymond, 2012). Another requirement is approval at the national stage. Nevertheless, the consequences of the Covid-19 crisis and the need for massive financial aid for the Member States represent an opportunity to adopt new own resources that directly feed EU policies, and there is political consensus that recovery will require financial effort by the EU, not least to support repayment of the EU's debt (Kalfin, 2020, 70).

The Council did not take into account the Commission's work in recent years nor, and especially, the High-Level Group on Own Resources lead by Mario Monti. This Group was established in 2014 to explore how the revenue side of the EU budget could be simpler, more

[55] Council Decision 2014/335/EU on the system of Own Resources of the European Union; Communication COM(2018) 325 final of 2 May 2018 from the Commission; Proposal for a Council Decision (EC) 2018/0135(CNS) on the system of Own Resources of the European Union.

transparent, fair, and democratically accountable. In December 2016, the Group presented its report[56] in which it examined existing resources – those that should be maintained – and prepared a list of potential new own resources. Besides reformed VAT-based resources, the Group proposed a carbon tax-based resource, inclusion of the EU Emission Trading Scheme proceeds, a motor fuel levy, an electricity tax-based resource, EU corporate income tax; and a financial transaction tax, or – as an alternative option – a bank levy (Buzkova, 2020, 28). In this case, it should be emphasized that tax-based own resources must respect the limited fiscal competencies of the EU: i.e. Art. 113 TFEU and Art. 115 TFEU in the case of harmonization or approximation, and Art. 192 TFEU and Art. 194 TFEU in the case of tax measures that pursue energy-related purposes (Buzkova, 2020, 29). Consequently, new own resources based on the revenue sharing system and the surcharge system are compatible with the Treaties. On the other hand, a possible tax based on the separation system would require its own legislative and fiscal powers of the Union, which would require an amendment of the Treaties (Schratzenstaller, Krenek, 2019, 171 ff.)

Based on the report and recommendations, the Commission evaluated whether reform was required. Firstly, the Reflection Paper on the future of Finances[57] published in 2017 confirmed the need to reform the EU budget. Secondly, the Commission published a proposal for the 2021-2027 EU long-term budget, which also counts with a reformed set of own resources that would generate additional income[58]. Also, the Commission proposed a legislative package including a proposal for a new Council Decision on the EU own resources system and implementing measures[59]. According to this proposal, the collection costs should be reduced to 10%, the VAT-based resource simplified, the own resources ceiling increased, and corrections phased out by means of a transition mechanism. Furthermore, the proposal envisaged the introduction of three new own resources: a common consolidated tax base, an EU emissions trading system, and non-recycled plastic packaging waste (Buzkova, 2020, 29). The first tax targets multinational companies operating in the single market, and it should help EU efforts to tackle tax avoidance. This resource would be calculated annually by each Member State by applying a uniform call rate of 3% on the number of taxable profits attributed to that Member State under CCCTB rules[60]. The emissions trading system devised by the Commission would make it possible to harmonize and flow into national budgets at Union level. This resource could bring in up to €3 billion annually by allocating 20% of certain revenues out the total number of allowances available for auction to the EU budget[61]. In the Commission's view, the plastic tax would be directly proportional to the amount of non-recycled plastic packaging waste generated in each Member State. The contributions of the Member States would be calculated by applying a levy of 0.80 EUR/kg to this quantity[62]. These Commission proposals would have made it possible to improve the EU's own resources framework.

However, on 21 July 2020, the conclusion of the European Council [63] radically changed the context. For the first time in the European integration process, the Commission will be authorized to borrow funds on the capital markets to finance actions against a European crisis (Buzkova, 2020, 30). During the European integration process there were two other precedents of this type. In the 1970s,

[56] See the report here: https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2014-2020/revenue/high-level-group-own-resources_en
[57] https://op.europa.eu/en/publication-detail/-/publication/5f9c0e27-6519-11e7-b2f2-01aa75ed71a1
[58] COM (2018) 322 final
[59] Proposal COM (2018) 325 final.
[60] Proposal COM (2018) 326 final.
[61] Proposal COM (2018) 325 final]
[62] Proposal COM (2018) 325 final.
[63] EUCO 10/20.

relating to the oil crisis and the European financial stabilization mechanism, and for an amount not comparable to that of 750 billion euros (Fasone, Lindesth, 2020). The powers granted to the Commission to borrow are limited in quantity, duration, and scope (Tridimas, 2020, X). To cover these liabilities, the own resources ceiling will be temporarily increased by 0.6 %. Instead, the own resources ceiling will be increased to 1.46% of the EU GNI for commitments and to 1.40% for payments (Buzkova, 2020, 30). Moreover, EU leaders agreed to provide the EU with new resources to pay back funds raised under Next Generation EU. They agreed on a new plastic levy to be introduced in January 2021. Also, in 2021, the Commission should propose a carbon adjustment measure and a digital levy, both of which to be introduced at the latest by 1 January 2023. In addition, the European Council asked the Commission to draw up a proposal on the EU emissions trading system, possibly extending it to the aviation and maritime sectors. Furthermore, it does not rule out that other new EU own resources, such as a financial transaction tax, could be launched. The proceeds from the new own resources introduced after 2021 will be used for early repayment of the Next Generation EU loans (D'Alfonso, 2021a, 4). As regards traditional own resources, from 2021, a Member State may retain 25% of the collected amounts as collection costs, which is 5% more than today, and 15% more than the amount the Commission proposed in 2018. As for the VAT-based resource, from 2019, it was to be replaced by a simplified and refined alternative method: a uniform rate of 0.3% is applied to the value-added tax base of each Member State, with the taxable VAT base capped at 50% of the GNI of each Member State. As for the Gross National Income (GNI)-based resource, the method will remain unchanged (Buzkova, 2020, 30).

On 14 December 2020, the Council of the European Union adopted the Council's own resources Decision 2020/2053[64], which incorporates the proposal of the conclusions of the July European Council. Above all, this decision authorizes the Commission to temporarily borrow up to 750 billion euros on the capital markets to address the consequences of the Covid-19 crisis. Also, the own resources ceiling will be exceptionally and temporarily increased by a further 0.6% points to cover all EU liabilities resulting from this borrowing until all the borrowed funds have been repaid. In addition, the decision confirms the simplification of EU own resource calculation based on value added tax and introduces the plastic tax from 1 January 2021. To enter into force, the decision requires approval by all 27 EU Member States in accordance with their constitutional requirements.

The changes made in 2020 do not represent a true reform regarding EU resources, and the new context in which the European integration process is moving requires new ones. An adequate reform of the EU's own resources should respond to the political concerns of the Member States (Kalfin, 2020, 69). Under these preconditions, there are some elements that the new own resources system should include. These features are contained in the report of the High Group led by Mario Monti. The report warns that EU institutions should decide on taxes and levies with a mandate from the national authorities and should establish a system to improve the exchange of co-operation and information between the European Parliament and the national parliaments on EU budgetary matters (D'Alfonso, 2017a, 2). In this case, another solution might be to increase transparency in EU budget negotiations, to make them dependent on procedures in the Council, to involve national parliaments more, and to increase the autonomy and flexibility of the budget by rebalancing the share of genuine own resources without limiting the sovereign right of the Member States to decide on taxation (Kalfin, 2020, 61). Furthermore, the report suggests that the Member States should set limits on the redistribution of income through separate own resources. In this way, the EU budget could achieve the political priorities set by the Member States (Schratzenstaller, 2018, 301). The research proposes that own resources should be exploited only in areas where the EU creates added value, while some

[64] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom

of the value created is used to maintain the mechanism. The sectors indicated are the single market, climate change and environmental protection, security and defence, and migration policy (Schratzenstaller, Krenek, 2019, 171 ff.). In addition, increased own resources should be accompanied by greater capacity on the part of the EU institutions to divert part of these resources towards new challenges, such as the digital transition. According to the Monti group, any decrease in the share of GNI-based contributions should be accompanied by an improved European Commission mechanism for budget management (Schratzenstaller, 2018, 301 ff). The measures must include the authorization of a treasury function, the prior fixing of annual national contributions under the agreed MFF ceilings, the possibility of keeping reserve accounts, and re-use of the balance sheet of reimbursements resulting from the application of financial instruments (Kalfin, 2020, 69).

Financing recovery adequately requires the alignments of economic reasons with political interests (Kalfin, 2020, 70). The political consensus towards greater EU commitment to supporting the Member States in the Covid-19 crisis could allow European institutions to undertake a concrete reform of the EU's own resource system by taking up the recommendations of the research led by Mario Monti. One of the problems that Member States will have to pose in a decade or so is precisely how to repay the European debt. Even the new resources proposed by the Monti group, if ever introduced, will be insufficient to repay the part regarding subsidies. Either the EU must be allowed to use fiscal leverage – basically after modifying the treaties – or national finances will have to intervene to support it.

4.4 A new control mechanism: Conditionality and Sustainability in the "Regulation on a general regime of conditionality for the protection of the Union budget" and its contested implementation

Regulation 2020/2092 on the general regime of conditionality for the protection of the EU budget establishes a new legal instrument to protect the financial interests of the EU from violations of the rule of law. This regulation, relating to the general conditionality regime for the protection of the EU budget, is closely linked to the package of measures included within MFF 2021-2027 and Next Generation EU.

It stems from two processes. First, the emergence of rule-of-law back sliding in the EU has forced the European institutions to take measures to counter it. It happens in different ways, but the cases of Hungary and Poland are the EU's most significant examples. Poland and Hungary are among the net beneficiaries of the European budget, and their illiberal governments have gained consensus also thanks to benefiting from huge European resources. This is another reason it was necessary to introduce the 2020/2092 regulation. European funds have been used to finance and consolidate a vast patronage system to the benefit of family members and people close to the Hungarian and Polish leaders/governments. This constitutional retrogression is characterized by some key elements (Pech, Scheppele, 2017; Muller, 2014). Initially, the regression of rule of law arises when a significant number of citizens lose confidence in their system of government for a variety of reasons ranging from rising inequality to persistent unemployment to the predatory practices of the ruling elites. The first stage in rule-of-law backsliding is the consolidation of power. After that, the autocrats act quickly to inhibit institutions that might oppose them, such as an independent judiciary or the media, and coercive institutions such as the security services and the prosecutor's office. When about to lose their popularity, these autocrats bestow benefits on their supporters and control public debate. Furthermore, they change the electoral law and *de facto* suppress competitive elections. When this happens, it is too late for the citizens to overthrow the autocratic regime. Indeed, the authoritarian government has now destroyed all institutional channels through which other views can be expressed, and the opposition has few options to resist because their constitutional system has been weakened, and there is no constitutional procedure left to challenge the government. In other words, regression of the rule of law is the process by which elected public authorities deliberately take measures to systematically weaken, annihilate, or acquire, internal control over power to pull apart the liberal democratic State and strengthen the government's long-term hegemony (Pech, Scheppele, 2017; Muller, 2014).

The second process is linked to the 2018 proposal for a regulation on rule-of-law conditionality tabled by the European Commission. This proposal aimed to sanction generalized deficiencies in the guarantee of the rule of law at national level, which had a negative effect on the financial interests of the Union. The 2018 proposal was weakened during the legislative process and is unable to adequately containing illiberal pressures in some Member States. (Fasone, 2021(b)). Indeed, the contents of the final regulation are weaker than the original proposal (Baraggia, 2020).

The legal basis of the regulation is Art. 322 (1)(a) TFEU and provides for the adoption of appropriate measures where breaches of the rule of law seriously affect or threaten to affect the principles of sound financial management or the protection of the financial interests of the EU. Indeed, the rule of law is a fundamental element for compliance with the principle of sound financial management (Art. 317 TFEU). Proper management of funds can only be ensured if national authorities act under the law, effectively prosecute fraud, conflict of interest, fight corruption and illegal actions are subject to review by an independent judiciary (Tridimas, 2020, XII; Beqirai, 2020). Moreover, the regulation establishes the conditions under which measures can be taken as well as their content, and the procedure for their adoption and withdrawal.

According to Art. 4 of Regulation EU 2020/2092, measures against the Member States can be taken when two conditions are met. First, there must be some violation of the principles of the rule of law. Second, any such breach must undermine or seriously risk affecting the sound financial management of the Union budget or the protection of the Union's financial interests in a sufficiently direct way and cannot be effectively tackled otherwise (Tridimas, 2020, XI, Benqiraj, 2020).

The measures can be activated after a series of violations of the rule of law have been detected. Art. 3 of regulation 2020/2092 provides for some specific violations of the rule of law that trigger the sanction mechanism, namely endangering the independence of the judiciary, failing to prevent correct or sanction arbitrary or unlawful public authority decisions, and limiting the availability and effectiveness of legal remedies. These breaches may be committed by any branch of government or any authority exercising public power and can be the result of either law or practice (Tridimas, 2020, XIII). Furthermore, the regulation provides for a closed list of areas that breach of rule of law must concern. According to Art. 4(2) of Regulation 2020/2092, these are as follows: the proper functioning of the authorities implementing the EU budget, including loans and other instruments guaranteed by the EU budget – especially in the framework of public procurement or grant procedures, the proper functioning of authorities carrying out financial control, monitoring and audit, the proper functioning of the investigation and prosecution of fraud, and effective judicial review by independent courts. Other are the prevention and sanctioning of fraud, corruption or the protection of EU financial interests, the recovery of unduly paid funds, co-operation with Olaf and the EPPO, and any conduct by authorities of relevance to the sound financial management of the EU budget or protection of the financial interests of the EU. This is a closed list. Art. 4(1) provides a second prerequisite for establishing measures whereby violations of the principles of the rule of law must seriously affect or risk undermining the sound financial management of the EU budget or the protection of the EU's financial interests in a sufficiently direct way. The definition of "sufficiently directly link" should be understood in the light of the objectives of Regulation 2020/2092. In general, there is a strong link between respect for the rule of law, mutual trust, and financial solidarity among the Member States. The condition is therefore fulfilled when infringement of the rule is liable to directly affect that mutual trust (Tridimas, 2020, XVI). It should be noted that the fact that a violation may impact other areas not concerned with the European Union budget does not mean that the financial interests of the EU are not directly affected (Tridimas, 2020, XVI). Furthermore, systemic violation is the most significant for triggering the mechanism. For example, violation of the principle of judicial independence could well fulfil the circumstance of the branch of the rule of law. Art. 5 of Regulation 2020/2092 establishes the measures that the European institutions can take when the conditions of Art. 4 are satisfied. These measures involve the suspension or interruption of payments, the reduction of economic benefits in the context of EU financial instruments, and the prohibition of entering into new agreements. These measures must respect the principle of proportionality, considering elements such as the nature, duration, gravity, and extent of any violations of the rule of law (Beqiraj, 2020; Fasone, 2021b).

Moreover, the procedure for adopting measures extends a central role to the Commission but entrusts the Council with the final decision. Indeed, the final decision rests with the Council, which decides by a qualified majority vote. Under Art. 6, the first step in the procedure is for the Commission to notify the Member State in writing, setting out the facts and the specific reasons that justify its conclusions. The Member State must respond within three months. At the same time, the Commission must also inform the European Parliament and the Council. The Commission's assessment must be carried out within one month of receiving any information or observations from the Member State concerned. Within this period, it must decide whether to submit a proposal to the Council for an implementing decision on appropriate measures. At this stage, the Member State concerned could intervene by commenting on the proportionality of the measures proposed by the Commission. The Council should therefore take this decision within one month – exceptionally extendable by two months – and may amend the Commission proposal, adopting the amended text acting by qualified majority (Julinda, 2020; Tridimas, 2020, XIX).

In the light of this reasoning, it is possible to affirm that the regulation does not solve the problem of rule-of-law backsliding but serves to protect the financial interest of the EU. Indeed, in the framework of the regulation, the presence of a direct link between the specific violation of one of the principles that make up the rule of law and the consequent injury to European financial interests is a major concern. In other words, if it is true that the instrument of conditionality operates only in the presence of direct prejudice to the rule of law, this is not sanctioned as such, but only to the extent that it causes damage to the EU budget and there are no alternative and more effective instruments in European law to counter it, such as the political procedure that can be activated through Art. 7 TEU (Fasone, 2021b). However, it is possible to recognize that the regulation is part of a more general model of EU response to the crisis of the rule of law. This model seeks to strengthen the institutional and regulatory framework to limit breaches by imposing procedural guarantees, recognizing new roles for institutions, shaping institutional structure, and providing for substantial measures to counter violations (Tridimas, 2020, XXI). Furthermore, it is important to underline that the 2020/2092 regulation breaks with the accession logic of reinforcement for reward and tries to introduce negative conditionality (Blauberger, Van Hullen, 2021, 4). This type of conditionality could generate social pressure and persuade Member States to continue violating the rule of law. Moreover, even if the simultaneous threat of sanctions may not be persuasive, the EU could still seek to maintain or create a form of contact that would create a depoliticized context and a highly deliberative quality of interaction with the target government (Blauberger, Van Hullen, 2021, 14; Sedelmeier 2017, 345). The success of regulatory procedures will depend on the determination of other Member States. And the pursuit of violations of the rule of law will depend on the willingness of Member States to deliver on their commitments. In this regard, the EU institutions must demonstrate institutional personality and resilience. Unfortunately, the premises are not comforting. On 11 March 2021, Hungary and

Poland filed a complaint before the European Court of Justice (EJC)[65] against the regulation that links the disbursement of block funds to the situation of the rule of law in the EU Member States. On March 17, 2021, the European Parliament adopted a resolution asking the Commission to promptly implement the regulation 2020/2092 mechanism against breaching Member States[66] (Tridimas, 2020, XX; Piana, Nato, 2020, 57).

[65] See Court of Justice, 11 March 2021, C-157/21, *Poland vs European Parliament and Council and Court of Justice*, 11 March 2021, C-156/21, *Hungary vs European Parliament and Council*.

[66] European Parliament resolution on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP))

5. Concluding remarks on Chapter I

The European Union budget is constantly evolving. The Covid-19 crisis has placed European institutions and the Member States in front of difficult choices on which the entire process of European integration depends. The divisions have been recomposed through continuous negotiation and compromises that have achieved some important objectives but have not allowed the Union to take the decisive step towards a community of debt and a significant increase in the EU budget.

There are two major innovations in the new EU Budget from 2021 to 2027. On the one hand, there is Next Generation EU: the agreement reached on the Next Generation can be considered both good and balanced overall, but it identifies the increase in discounts and cuts in the amounts initially proposed for various future-oriented programmes as two negative aspects (D'Alfonso, 2020a, 2). However, it is undeniable that the provision for collective debt makes this the most significant budget agreement in the history of the EU (Laffan, 2020b). On the other hand, there is renewed legislative debate on the Union's resources. In particular, this debate is articulated around the goal of simplifying the current framework of EU own resources and introducing new revenues to support the commitments that will be contracted under Next Generation EU. Hence there are now some critical issues related to the proliferation of financial instruments used to finance the EU policy, which has now become a veritable galaxy (Crowe, 2017, 429). First of all, it will be opportune in the coming years to be able to balance the swift use of funds with the protection of the EU financial interest. The anti-fraud system will find itself operating in a changed context compared to the past, where the structural problems –for instance, rule-of-law backsliding – have been exacerbated by the Covid-19 crisis. In other words, EU institutions and Member States are faced with the challenge of spending well, spending time, and avoiding fraud in the interest of the Union. The next sections of this deliverable will examine the tools that can be used to protect the financial interests of the Union and to look at which EU institutions are involved in these actions.

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CHAPTER II

The Protection of the EU financial interests between administrative and criminal tools: OLAF and EPPO

Summary: 1. The protection of the EU's financial interests between administrative and criminal tools: the role of OLAF and EPPO; 2. The role of OLAF in the protection of the EU's financial interests; 2.1. Administrative investigation powers and their functioning; 2.2. The shortcomings of the system and the 2020 Reform; 3. The role of the EPPO in the protection of the EU's financial interests; 4. The problems ahead; 4.1. The cooperation between OLAF and EPPO; 4.2. The problematic relationship between the EPPO and national prosecutors.

1. The protection of the EU's financial interests between administrative and criminal tools: the role of OLAF and EPPO

From the beginning of the 1980s, the problem of how to protect the Community budget from fraud began to be considered pressing. From the so-called PIF Convention of 1995 to the recent EU Directive 1371/2017, moreover, the Union relied upon the instrument of harmonization of the criminal law provisions of the Member States, with measures relating, *inter alia*, to fraud and other offences against the Union's financial interests and concerning both natural and legal persons (for a detailed analysis see D1, Task 2).

Believing that control activities could not be carried out effectively exclusively at national level, a Task Force for the Coordination of Anti-Fraud Policies (UCLAF) was set up in 1988. Faced with the scandal that led to the resignation of the Santer Commission, and therefore dissatisfaction with the action of the Task Force, the European Anti-Fraud Office (OLAF) was established in 1999 (Chiti, 1999)[67].

For twenty years, OLAF, entrusted with the power to conduct administrative investigations, has been the main anti-fraud controller at EU level (Kratsas, 2012). Despite the significance of its activities (M. Hofmann-S. Stoykov, 2019, 268), however, the rate of recovery of unlawfully used financial resources used has long been unsatisfactory (European Court of Auditors (2019b), 40-54). This is one of the reasons that lead to the approval of the establishment, in 2017, of the European

[67]Commission Decision 1999/352/EC of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (notified under document number SEC(1999) 802), 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) and Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OCAF).
Reg. 1073/1999 and Reg. 1074/1999 were later repealed with European Parliament and Council Regulation 883/2013 of 11 September 2013, concerning the investigations carried out by OLAF and repealing Reg. 1073/1999 and Reg. 1074/1999 ('OLAF Regulation').

Public Prosecutor Office (EPPO), initially intended to become operational by the end of 2020[68] and later postponed to June 1, 2021. OLAF itself has also been reformed[69].

Do the recently approved reforms address the shortcomings of the system protecting the 'financial interests of the EU' (hereinafter: PIF)[70]? And what type of co-operation is supposed to take place between the EPPO and OLAF? What type of interaction is established between administrative and criminal tools in the protection of the EU's financial interests? Lastly, how will the EPPO and the national prosecutors manage their coexistence?

In order to answer these questions, the research will first clarify the functions and powers of OLAF and the main criticisms concerning its functioning (Paragraph 2). From the analysis, it will be clarified that OLAF conducts investigation ending in the preparation of reports and recommendations with no binding legal effect on the EU or Member States authorities. It is up to the EU institutions or to national authorities to decide whether to proceed with administrative or judicial action. However, the recent 2020 reform has strengthened OLAF's powers, with the twofold purpose of facilitating coordination with the EPPO and enhancing the effectiveness of OLAF's investigations (European Commission (2018), 1-3; European Court of Auditors (2019a), 4-5).

The research will then proceed to examine the establishment and features of the EPPO, highlighting its integrated model: a central office in Luxembourg headed by the European Chief Prosecutor and a decentralized level composed of European Delegated Prosecutors (EDPs), located in the Member States, where they carry out their investigations according to national law (Paragraph 3). As will be pointed out, the primary aim of the EPPO is to investigate and prosecute crimes affecting the EU's financial interests in a more efficient and effective way than the Member States do. The competences of the EPPO are quite broad: from "PIF offences" (according to Directive (EU) 2017/1371) to offences regarding participation in a criminal organization as defined in Framework Decision 2008/841/JHA, plus any other criminal offence inextricably linked to the former.

The main problems ahead, that will be explored in the research, have been outlined for the purposes of this deliverable (Paragraph 4). On the one hand, several criticisms can be raised concerning the co-operation between OLAF and EPPO (Paragraph 4.1.), as the mechanisms of co-operation in place will need to be attentively tailored, and – ultimately – OLAF's in the changed legal landscape will have to be clarified. This change might also require further strengthening of the safeguards currently in place. On the other hand, the EPPO's relationship and coexistence with national prosecutors is a crucial issue (Paragraph 4.2.). It will be observed that, in order to avoid any serious conflict of competences between the EPPO and national prosecutors, it would be advisable for them to behave with mutual trust and in accordance with the principle of sincere co-operation. Furthermore, since the national courts are competent for EPPO proceedings, the reasonable length of judicial proceedings becomes a fundamental target for ensuring an effective and efficient protection of the EU's financial interests.

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[68] European Parliament and Council Directive 2017/1371 of 5 July 2017 on the fight against fraud against the Union's financial interests by means of criminal law ('PIF Directive') and Council Regulation 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

[69] Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No. 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of European Anti-Fraud Office investigations.

[70] The acronym PIF stands for *Protection des Intérêts Financiers* (in French).

2.The role of OLAF in the protection of the EU's financial interests

2.1. Administrative investigation powers and their functioning

OLAF performs a variety of functions (for example, assistance and the development of fraud prevention methods; Inghelram, 2011); the most important, however, is undoubtedly that of conducting investigations (Kratsas, 2012, 68; Groussot-Popov, 2010, 607). OLAF's administrative investigations cover fraud and administrative irregularities that damage the financial interests of the EU. OLAF's functions were originally governed by Regulation No. 1073/1999, later replaced by Regulation No. 883/2013, recently amended with Regulation 2020/2223. In the following pages, Reg. 883/2013 will be referred to as amended by Reg. 2020/2223, unless otherwise specified.

As for its structure, OLAF is an internal organization of the Commission, but it has autonomy and operational independence (Groussot-Popov, 2010, 606); for example, the initiation of investigations is decided by the Director General on his or her own initiative (Art. 5, Regulation 883/2013 op. cit.).

The scope of OLAF's action covers any fraud, administrative irregularities, or other detrimental activity that can damage the financial interests of the EU. From the quantitative point of view, OLAF's main areas of intervention are the Structural Funds and the Common Agricultural Policy (https://ec.europa.eu/anti-fraud/investigations/investigations-related-eu-expenditure_en).

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 on the territory of Member States) (Arts. 3 and 4, Regulation 883/2013).

The type of powers that OLAF inspectors may use include controls and spot checks, access to information and documentation, extracting copies of documents and requesting oral explanations (Art. 3, paras. 2 and 3, and Art. 4, para. 2, Regulation 883/2013). In addition to extracting copies of documents, the appointed officials may also, "if necessary", take possession of them "to avoid any risk of subtraction" (Art. 4, para. 2, Regulation 883/2013).

A substantial condition for starting an investigation (either internal or external) is that there is sufficient suspicion (which can also be based on anonymous information) to lead to the supposition of the existence of fraud, corruption, or other activity detrimental to the financial interests of the EU. The decision to initiate the investigation, as expressly provided for by the Regulation, must take into account the resources OLAF has at its disposal and, above all, the proportionality of the measures used (Art. 5, para. 1, Regulation 883/2013).

From the procedural point of view, a decision by the Director General, whether taken on his or her own initiative or at the request of an interested State or EU institution, is necessary to open an investigation (Art. 5, para. 1, Regulation 883/2013), while the powers to be used during the inspections are specified in a written authorization from the Director General (Art. 3, para. 7 and 7, para. 2, Regulation 883/2013). It does not need to be notified.

Regarding co-operation with national authorities, in the event of external investigations, they are obliged to provide the assistance necessary to carry out inspections (Art. 3, para. 3, and Art. 7, para. 3, Regulation 883/2013). To this end, the Member States must designate a specialized service to coordinate the protection of the EU's financial interests (recital 10 and Art. 3, para. 4, Regulation 883/2013). In the case of internal investigations involving an official or other officer of a European institution, the institution of affiliation is expected to be informed and is required to provide assistance (Art. 4, para. 4 and Art. 7, para. 3, Regulation 883/2013).

In external investigations, the economic operator has a duty to cooperate; however, if the economic operator resists inspection, the law enforcement authorities of the Member States will provide assistance through the use of force (Art. 3, para. 4, and Art. 4, para. 2., Regulation 883/2013).

OLAF has the power to conduct investigations, but it does not issue sanctions. At the end of the investigation, it prepares a report, describing the preliminary findings and recommendations. These recommendations indicate the disciplinary, administrative, financial or judicial action to be taken by EU institutions, bodies, offices, and agencies, and the competent authorities of the Member States concerned. As clarified in the case law of the Court of Justice[71] and now specifically recognized in the revised OLAF Regulation (recital 30, Regulation 2020/2223), such recommendations have no binding legal effect on the EU or Member States authorities. It is up to the EU institution or to national authorities to decide whether to proceed to take administrative or judicial action.

2.2. The shortcomings of the system and the 2020 Reform

In its 20 years of activity, OLAF has conducted 5,000 investigations (Hofmann-S. Stoykov, 2019). In 2018, OLAF closed 167 investigations and produced 256 recommendations, opening 259 new investigations (OLAF, 2019, 3).

Despite the significance of its activities, however, the rate of recovery of unlawfully used financial resources has long been unsatisfactory: between 2009 and 2016, OLAF's investigations led to prosecution in fewer than half of cases and resulted in recovery of less than a third of funds (European Court of Auditors, 2019b, 40-54).

There are three main reasons for dismissal of a case by national authorities: the evidence initially collected by OLAF was considered insufficient for prosecution (56 %); the action investigated by OLAF is not considered a criminal offence under national law (22 %); the time limit for initiating criminal proceedings under national law had expired (14 %) (European Court of Auditors, 2019b, 40-54; Venegoni, 2013; Nilsson, 2013; Perduca, 2013).

As mentioned above, the 2020 reform of Regulation 883/2013 has the main objectives of coordinating OLAF's role with the newly established EPPO and to enhance the effectiveness of

[71] Case T-193/04 Hans-Martin Tillack ECLI:EU:T:2006:292 paras. 67-68, 70, 72; Case T-215/02 Santiago Gómez-Reino ECLI:EU:T:2002:251 para. 50; Case T-392/17 TE v. Commission, ECLI:EU:T:2018:459; Case T-29/03 Comunidad Autónoma de Andalucía, ECLI:EU:T:2004:235 para. 40; Case T-309/03, Manel Camós Grau ECLI:EU:T:2006:110 paras. 55-58; Case T-4/05, Guido Strack ECLI:EU:T:2006:93; Case C-237/06 P Guido Strack ECLI:EU:C:2007:156; Case T-289/16 Inox Mare Srl ECLI:EU:T:2017:414 para. 28.

OLAF's investigations. The need to improve safeguards for the inspected entities – the main driver for the 2013 OLAF reform (Groussot-Popov, 2010, 606; Covolo, 2011, 210) – was not at the core of the 2020 version, even though some specific changes have been made.

i. As for the need for *coordination with the EPPO*, it must be recalled that the latter has not absorbed OLAF's competences. First, as further discussed below (Section 3), Council Regulation 2017/1939 establishing the EPPO is directly applicable to 22 Member States[72][73]. OLAF's action, on the contrary, applies to all Member States; moreover, it investigates on serious misconduct also in the European institutions. Second, the EPPO's mandate covers criminal offences – not administrative irregularities (Art. 4, Regulation 1939/2017). However, it is clear that there are risks of overlap and there is a need to clarify the mechanisms of co-operation between the two bodies (Weyembergh and Brière, 2018).

Co-operation between OLAF and the EPPO does not find its legal basis in the Lisbon Treaty, as Art. 86(1) of the Treaty on the Functioning of the European Union (TFEU), which, as will be further explained below (Section 3), provides the basis for the EPPO, mentions its co-operation only with Europol and Eurojust but not with OLAF (Weyembergh and Brière, 2018, 71). The main principles governing this relationship were, however, already established under the PIF Directive (Art. 15) and the EPPO Regulation (recitals 100, 103 and 105, Articles 101 and 110). These are mutual co-operation, information exchange, complementarity and the avoidance of duplication. The reformed OLAF Regulation reinstates these principles (Art. 1. para. 4a, Regulation 883/2013) and specifies the ways such principles must be implemented.

OLAF is, first of all, called to play a supportive role in the EPPO's investigations, providing information, analyses, expertise, and operational support (Art. 12 *e*, Regulation 883/2013).

The most sensitive point, however, is how the two institutions should operate when conduct that can fall within the mandate of both institutions emerges. According to the principles of mutual co-operation and non-duplication, OLAF has an obligation to report to the EPPO – without undue delay – any criminal conduct regarding which it can exercise its competence, (Art. 12 *c*, Regulation 883/2013). The report must at least contain a description of the facts, including an assessment of the damage caused or likely to be caused, the possible legal classification, and any available information about potential victims, suspects, or other persons involved. Only when the Office does not have this information can it start a preliminary investigation, with the sole purpose of supplying it to the EPPO (Art. 12 *c*, paras. 2 and 3, Regulation 883/2013). When, upon receiving the report, the EPPO starts its own investigation, OLAF will discontinue its investigation. If the EPPO is conducting an investigation on the same criminal activity, OLAF will not open a new investigation (Art. 12 *d*, Regulation 883/2013).

An exception to this general rule whereby OLAF should refrain from conducting an investigation on conduct falling within the EPPO's remit, is the provision allowing OLAF to carry out *complementary investigations*. The conditions for this are strict. First, the Director-General, if "in duly justified cases, considers that an investigation by the Office should also be opened in accordance

[72] The 22 Member States are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Germany, Greece, Spain, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovenia and Slovakia.

[73] and joined the EPPO in 2018.

with the mandate of the Office with a view to facilitating the adoption of precautionary measures or of financial, disciplinary or administrative action”, must inform the EPPO, specifying the nature and purpose of the investigation (Art. 12 *e*, para. 1, Regulation 883/2013). Second, the EPPO may object to the opening of an OLAF investigation (or only) to the performance of certain acts pertaining to the investigation), specifying when the grounds for the objection cease to apply (Art. 12 *e*, para. 2, Regulation 883/2013).

The detailed arrangements for these mechanisms of co-operation are to be specified in a working arrangement between the EPPO and OLAF (Art. 12 *g*, Regulation 883/2013).

ii. As for the aim of *strengthening OLAF's investigation powers*, this objective is pursued under the reformed OLAF Regulation in two ways: first, broadening OLAF's powers; second, clarifying the applicable legal framework in order to remove ambiguities.

Among the most significant changes in the broadening of its powers, the Office must also have access to information stored in privately owned devices when used for work purposes, and to bank account information (Art. 3, para. 5, and Art. 4, para. 2, Regulation 883/2013).

As for the simplification of the legal framework, it must be recalled that, according to its original formulation, Reg. No. 883/2013 referred to the Office's compliance with national rules in the context of external inspections. Before the amendments introduced with Reg. 2020/2223, Reg. 883/2013, Art. 3, para. 3 provided that, during on-the-spot checks and inspections in the context of external investigations, “the staff of the Office shall act, subject to the Union law applicable, *in compliance with the rules and practices of the Member State concerned* and with the procedural guarantees provided for in this Regulation” (italics added).

In particular, the requirement to comply with the national law of the Member State concerned could be interpreted in the sense that a preventive judicial warrant should be requested when national law requires it (Scholten-Simonato, 2017, 27). However, in the *Sigma Orionis* case, the General Court clarified that there is no obligation for OLAF inspectors to comply with national law, and in particular for a preventive warrant to be sought, *unless the inspected entity formally resists the inspection* (Case T-48/16 Sigma Orionis SA ECLI:EU:T:2018:245 para. 80-81). Finding that the limits of application of national law to the Office's investigative activity were not “completely clear” and with the purpose of taking into account the *Sigma* ruling (European Commission (2018), 10; recitals 19-22, Regulation 2020/2223), the recently approved reform of the OLAF Regulation establishes that only Union applies to OLAF's investigations, while national law, and in particular the prior warrant requirement, apply only when national officers assist OLAF and when an economic operator formally resists inspection (Art. 3, paras. 3-7, Regulation 833/2013).

iii. Another significant change to the legal framework applicable to OLAF's investigation is the one increasing *legal protection for the inspected parties*.

One of the main flaws in the protection of those subject to OLAF's inspections was the limit to access to OLAF's files, refused also after the investigation had been completed (Case T 110/15, International Management Group ECLI:EU:T:2016:322 para. 35). Limitations to the right of access to OLAF's file have been extensively criticized, as they impair the right of the defence of the inspected party (Ligeti, 2017, 17). According to the amended OLAF Regulation, when a judicial follow up is recommended, the Office must now deliver the inspection report to the party concerned. However, several limitations still apply: first, the party concerned has to make the request; second, the Office has to communicate the request to all the recipients of the report, and lastly to grant access only with the explicit consent of the recipients. Access will only be granted if the recipients make no objection, or if they do not respond within a twelve-month period (Art. 3b, Regulation 833/2013).

A second significant change introduced with the recent reform of the OLAF Regulation is the establishment of a "controller of procedural guarantees", an administrative body with the task of monitoring the Office's compliance with procedural guarantees (Art. 9a, Regulation 833/2013). However, while the first Commission proposal aiming to revise OLAF regulation assigned the Controller, *inter alia*, the task of *authorizing* inspections (European Commission (2014); European Court of Auditors (2014), 4), the approved text shapes the newly established Controller as an *ex post* mechanism to review complaints alleging infringements of procedural rules or fundamental rights (Art. 9a and 9b, Regulation 833/2013). The Controller is an administrative complaint mechanism, which is not an alternative to judicial remedies and that can issue recommendations that are not-binding on OLAF's Director-General (art. 9b, para. 5–7, Regulation 833/2013). The Controller works as a sector-specific complaint instrument that could be activated in addition to any other means of redress available under EU law and can be considered part of a general tendency in the multiplication of sector-specific administrative review bodies (De Bellis, 2021).

3. The role of the EPPO in the protection of the EU's financial interests

The institution of the EPPO finds its legal basis in the Treaty of Lisbon, which entered into force in 2009. Art. 86(1) of the TFEU stated that "In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust".

Furthermore, Art 86 TFEU also provided that: the EPPO "shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interest" (para. 2); this field of competence may be extended to "serious crimes having a cross-border dimension" by unanimous decision of the European Council (para. 4); for crimes within its competence, the EPPO "shall exercise the functions of prosecutor in the competent courts of the Member States" (para. 2); for the adoption of the regulation – which "shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions" (para. 3) – in the absence of unanimity in the Council, "at least nine Member States" may establish "enhanced co-operation on the basis of the draft regulation concerned" (para. 1).

Precisely thanks to the enhanced co-operation of 20 Member States[74], on 12 October 2017, Council Regulation (EU) 2017/1939 establishing the EPPO was adopted. Now it is binding in its entirety and directly applicable in 22 Member States[75].

[74] The 20 Member States are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Germany, Greece, Spain, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovenia and Slovakia.
[75] Malta and the Netherlands joined the EPPO in 2018.

This was the conclusion of a long-lasting consultation process begun in 1997, when the *Corpus Juris* for the protection of the financial interests of the European Communities presented the first project of the European Prosecutor's Office[76]. At the same time, Regulation No. 2017/1939 followed up the general and programmatic provision of Art. 325 TFEU, according to which "The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies".

The EPPO, which is operational since June 1, 2021, represents a sensational innovation. So far, the EU has 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 the Member States refuse to carry out OLAF's investigations. Therefore, only national authorities could investigate and prosecute EU-fraud, but their jurisdiction stops at national borders.

The EPPO is preparing to fill this institutional gap. It is a real centralized Prosecutor's Office at the European level, with headquarters in Luxembourg[77], supported by a decentralized structure based in the territory of the 22 Member States, where the European Delegated Prosecutors act.

The EPPO constitutes an independent body of the Union with legal personality (Art. 3 Reg.) and is accountable to the European Parliament, the Council, and the Commission for its general Activities (Art. 6 Reg.).

The primary aim of the EPPO is to investigate and prosecute crimes affecting the EU's financial interests in a more efficient and effective way than the Member States (Vervaele, 2018, 17) through a specialized and well-equipped office.

To this end, the EPPO is "competent in respect of the criminal offences affecting the financial interests of the Union that are provided for in Directive (EU) 2017/1371", the so-called PIF Directive, "as implemented by national law, irrespective of whether the same criminal conduct could be classified as another type of offence under national law" (Art. 22, par. 1, Reg.). The offences against the EU's financial interests encompass, among others, fraud (including VAT fraud), corruption at the expense of the EU budget, money laundering, and embezzlement by a public official. These crimes

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[76] In 2000 a second version of the *Corpus Juris* included a set of rules for the functioning of the European criminal prosecution Authority drafted by a group of academics directed by Prof. Mireille Delmas-Marty. On December 11, 2001, the European Commission presented a Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor. After the Lisbon Treaty (2009) and the Commission's Communication on the protection of the EU's financial interests through criminal law and administrative investigations (2011), on July 17, 2013, the Commission drafted a Regulation proposal for the creation of the EPPO (No. 534/2013), but the text received negative reactions from various States. On April 3, 2017, a group of 17 Member States (later followed by others) notified the European Parliament, the Council, and the Commission that they wished to enter into closer cooperation on the establishment of the EPPO. On the historical process that led to the current EPPO, see Delmas-Marty and Vervaele, 2000; Ligeti, 2011, 123; Ligeti and Simonato, 2013, 7; Ligeti and Weyembergh, 2015, p. 54; Alexandrova, 2015, 11; Coninsx, 2015, 21; Mitsilegas, 2016, 103; Fidelbo, 2016, 92; Satzger, 2018, 132.

[77] The EPPO headquarters is located in the Kirchberg district, in "Tower B", close to the impressive European Court of Justice building.

directly affect the Union's budget by depriving it of huge amounts and are disadvantageous to all the Member States' taxpayers (De Amicis and Kostoris, 2018, 240).

Regarding offences concerning revenue arising from VAT own resources[78], the EPPO is only competent when the intentional acts or omissions are "connected with the territory of two or more Member States and involve a total damage of at least EUR 10 million" (Art. 22(1) Reg.)[79].

The EPPO's competence also extends to the "offences regarding participation in a criminal organization as defined in Framework Decision 2008/841/JHA, as implemented in national law, if the purpose of the criminal activity of such a criminal organization is to commit any of the offences referred to in paragraph 1" of Art. 22 Reg., i.e. any of the offences in the PIF Directive (Art. 22(2) Reg.).

Lastly, the EPPO is also "competent for any other criminal offence that is inextricably linked to criminal conduct that falls within the scope of paragraph 1" of Art. 22 (Art. 22(3) Reg.: the so-called annex or ancillary competence).

The competences of the EPPO are strengthened by the right of evocation: the national judicial authorities must report to the EPPO, without undue delay, any criminal conduct regarding which it can exercise its competence (Art. 24 Reg.), and, upon receiving all relevant information, the EPPO will decide whether to exercise its right of evocation as soon as possible, but no later than 5 days after notification (Art. 27 Reg.).

In the case of disagreement between the EPPO and the national prosecuting authorities over the question of competence, the EPPO Regulation states that "the national authorities competent to decide on the attribution of competences concerning prosecution at national level shall decide who is to be competent for the investigation of the case. Member States shall specify the national authority which will decide on the attribution of competence" (Art. 25(6) Reg.). The Italian legislator assigned this competence to the *Procuratore Generale* at the *Corte di Cassazione* (Art. 16 of Legislative Decree n. 9, 2 February 2021; see Salazar, 2021, 64; Balsamo, 2019, 4). Furthermore, in accordance with Art. 267 TFEU, the Court of Justice of the European Union has "jurisdiction to give preliminary rulings concerning the interpretation" of Arts. 22 and 25 of the Regulation "in relation to any conflict of competence between the EPPO and the competent national authorities" (Art. 42(2)(b) Reg.).

The EPPO is headed by a European Chief Prosecutor[80], who also represents the Office vis-à-vis the other EU bodies and agencies, as well as the Member States. The central office in Luxembourg is also composed of the Deputy European Chief Prosecutors, the European Prosecutors (one per each Member State that participates in the EPPO enhanced co-operation), the College, and some Permanent Chambers (Art. 8(3) Reg.).

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78 These offences are referred to in point (d) of Article 3(2) of Directive (EU) 2017/1371, as referenced by Art. 22(1) Reg. 2017/1939.

79 Where a criminal offence "caused or is likely to cause damage to the Union's financial interests of less than EUR 10.000, the EPPO may only exercise its competence if: (a) the case has repercussions at Union level which require an investigation to be conducted by the EPPO; or (b) officials or other servants of the Union, or members of the institutions of the Union could be suspected of having committed the offence" (Art. 25(2) Reg.); furthermore, beyond this case, the EPPO – with the consent of the competent national authorities – can equally exercise its competence "if it appears that the EPPO is better placed to investigate or prosecute" (Art. 25(4) Reg.).

80 With Decision (EU) 2019/1798 of the European Parliament and of the Council of 23 October 2019 Ms Laura Codruţa Kövesi was appointed European Chief Prosecutor for 7 years from 31 October 2019.

The decentralized level consists of European Delegated Prosecutors (EDPs), who are located in the Member States (Art. 8(4) Reg.), where they carry out their investigations according to the instructions coming from the European Prosecutors and the Permanent Chambers.

The choice of the number of the EDPs is left to the Member States, but there is a minimum of two (Art. 13(2) Reg.). Italy decided to designate twenty EDPs spread over nine judicial offices[81].

EDPs act on behalf of the EPPO in their respective Member States and have the same powers as national prosecutors with regard to investigations, prosecutions, and bringing cases to judgment (Art. 13(1) Reg). This means that the functioning of the EPPO is based on an extensive reliance on national law (Ligeti, 2020, 39). According to the Regulation, EDPs s may also exercise functions as national prosecutors (Art. 13(3) Reg.) under the so-called "double hat", but Italy, together with other States (including France and Belgium), decided against this option in order to better preserve the independence of the EPPO.

The Permanent Chambers are small collegial organs made up of two European Prosecutors with the European Chief Prosecutor (or his or her deputy) acting as chair. They are entitled to monitor and direct the investigations and prosecutions conducted by the EDPs (Art. 10(2) Reg.). On the other hand, the College mostly performs management functions (Ligeti, 2020, 41) and takes no operational decisions in individual cases, but it may decide on strategic matters or general issues arising from individual cases, in particular with a view to ensuring coherence, efficiency, and consistency in the EPPO prosecution policy throughout the Member States, as well on other matters as specified in the Regulation (Art. 9(2) Reg.).

Even now that the EPPO has assumed its functions, the role of Eurojust is still important. It will be able to exercise its competence in cases concerning crimes for which the EPPO is competent, where the crimes in question involve both Member States participating in enhanced co-operation, and Member States that do not (Ruggieri, 2019, 187; Salazar, 2019, 47). In such cases, Eurojust should act at the request of non-participating Member States or at the request of the EPPO. Obviously, non-participating Member States may continue to request Eurojust's support in all cases regarding offences affecting the financial interests of the Union. Therefore, as provided for by the Regulation, the EPPO will establish and maintain a close relationship with Eurojust based on mutual co-operation within their respective mandates and on the development of operational, administrative, and management links between them. To this end, the European Chief Prosecutor and the President of Eurojust will meet on a regular basis to discuss issues of common concern (Art. 100(1) Reg.).

4. The problems ahead

The establishment of the EPPO gives rise to several issues. We can recall, among others, its relationship with the different European bodies and agencies involved in the protection of the EU's financial interests, and in particular with OLAF. We may also mention its cooperation with non-participating Member States (Franssen, 2018, 291 ff.) and the need to find an adequate balance between prosecution and defence, since the defendant's rights depend on the national law of the State

[81] The nine Italian judicial offices of the EPPO are located in Rome, Milan, Naples, Bologna, Palermo, Venice, Turin, Bari and Catanzaro.

with jurisdiction over the case (Bachmaier Winter, 2018, 120 ff.; Illuminati, 2018, 181 ff.; Rafaraci, 2019, 159 ff.; Wade, 2019, 179; Mitsilegas, 2016, 123; Luchtman and Vervaele, 2014, 140 ff.). Another issue is the admission of evidence at trial in cross-border cases, when the evidence is gathered in another Member State or in accordance with the law of another Member State (Bachmaier Winter, 2018, 122 ff.; Illuminati, 2018, 193 ff.; Satzger, 2018, 135; Camaldo, 2018, 972; Balsamo, 2019, 3; Luchtman and Vervaele, 2014, 140 ff.). Then, there is the lack, among the Member States, of common criminal law provisions defining the EPPO's field of action formed by the PIF crimes (Sicurella, 2018, 849) and the assessment of the appropriate EPPO data protection regime (De Hert and Papskonstantinou, 2019, 34 ff.; De Amicis and Kostoris, 2018, 243). Lastly, we can mention the possible extension of the EPPO's competences to further areas of action, such as terrorism and environmental crimes (Colaiacovo, 2017, 174; Di Francesco Maesa, 2018, 191 ff.).

In any case, there are two particularly problematic issues: on the one hand, the EPPO's co-operation with OLAF, and – on the other – the EPPO's relationship and coexistence with the national prosecutors.

4.1. The cooperation between OLAF and EPPO

Several criticisms have been raised concerning relations between the two main bodies intervening in the protection of financial interests: OLAF and EPPO. Specific criticisms regarding co-operation, and in particular when the case of complementary investigations emerge, will need to be addressed within a working arrangement. However, in more general terms, it is the very role of the administrative arm of the system that will need to be reassessed in a context in which the EPPO becomes fully operational.

From this standpoint, it has been argued that two different visions of OLAF's role could theoretically be conceived. On the one hand, OLAF could be transformed into a sort of 'EPPO's investigatory arm', responding to EPPO's priorities and orders (supporting a merger, claiming that this solution would provide a more efficient allocation of resources, see Kratsas, 2012, 95; Covolo, 2011, 218). On the other hand, OLAF and the EPPO should work as two autonomous bodies, while the main operative support to EPPO should come from the national authorities (Weyembergh and Brière, 2018, 75-76).

While some elements in the current legal framework support the first view (in particular, OLAF's role in supporting EPPO after the 2020 Reform, and its obligation to discontinue its own investigations when it emerges that the EPPO is competent), there are at least two main arguments in favour of the second perspective. The first is based on a reading of the relevant legal texts: on the one hand, Article 86 of the TFEU clearly understands the national authorities as the main counterparts of the EPPO (Weyembergh and Brière, 2018, 75-76); on the other, the type of relationship between OLAF and the EPPO emerging from both the revised OLAF Regulation and the EPPO Regulation is one of co-operation, not of hierarchy (Luchtman and Wasmeier, 2017, 246). The second type of argument is rooted in considerations of efficiency. As the European Court of Auditors has clearly pointed out, administrative tools can protect the EU's financial interests more effectively and at lower cost than criminal ones in the recovery of funds (European Court of Auditors (2019b), para. 111).

From this point of view, a synergy between administrative and criminal tools would appear to be preferable (Weyembergh and Brière, 2018, 70).

If the second perspective is to be adopted, open issues concerning OLAF will need to be addressed. Procedural guarantees for the inspected parties were extremely low when OLAF was put in place, as the main objective was to foster the efficiency of investigations (Covolo, 2010). Improvements have been made over time, for example with the recognition of the right to avoid self-incrimination (Art. 9, para. 1, Regulation 883/2013). With the 2020 reform of the Regulation, a limited right of access to OLAF's file was introduced, albeit still subjected to several limitations. As a result, private parties still enjoy fewer guarantees in administrative investigations than in criminal ones (Ligeti, 2017, 8; Weyembergh and Brière, 2018, 67). Gaps in the guarantees for the inspected parties can also affect the efficiency of investigations as OLAF's final reports can constitute admissible evidence in administrative or judicial proceedings in the Member States only if they meet the same conditions of admissibility as reports drawn up by national inspectors (Ligeti, 2017, 27; European Court of Auditors (2019a), paras. 40 and 45).

Inconsistencies and gaps in judicial review are particularly problematic (Ligeti and Robinson, 2017); Inghelram, 2011, 189). The non-binding nature of OLAF recommendations has significant consequences from the point of view of subsequent judicial protection (De Bellis, 2021). Applying the *IBM* requirements[82], the Court has considered the decision to inspect, any act of inspection, the inspection report and recommendations, and the transmission of information during the investigation non-reviewable under Article 263 TFEU (Tillack op. cit. paras. 67-81; Santiago Gómez-Reino op. cit. para. 50; Comunidad Autónoma de Andalucía op. cit. para. 40; Manel Camós Grau op. cit. paras. 55–58; Inox Mare, paras. 29–30). This means that only two judicial remedies are available to the inspected entity: on the one hand, an indirect challenge against the final national measure, and, on the other, an action for damages under Articles 268 and 340 TFEU. The establishment of the Controller of procedural guarantees does not solve this problem, as the newly established body is an administrative complaint mechanism, which can issue recommendations, but they are not-binding on OLAF's Director-General (Art. 9b, paras. 5–7, Regulation 883/2013). As such, it adds a new non-judicial remedy that economic operators can use to protect their rights; however, it is doubtful that this additional layer of non-binding control can solve the problems of effectiveness of judicial control over OLAF's acts (Ligeti, 2017, 24).

4.2. The problematic relationship between the EPPO and national prosecutors

As mentioned, the integrated model of the EPPO adopted by Regulation 2017/1939 consists of a 'head' at the central level and 'arms' in the form of EDPs in the Member States (Ligeti and Simonato, 2013, 15). This structure aims to improve coordination without losing the necessary integration within national legal systems (Bachmaier Winter, 2018, 119). It also implies that the functioning of the EPPO is permeated by an extensive reliance on national law and the authorities of the Member States (Ligeti, 2020, 43; Wade, 2019, 175). Indeed, the EDPs, who are the kingpins of the Office's investigations (Ligeti, 2020, 41), play a decisive role in European inquiries, together with

[82] Case 60/81, *Int'l Bus. Mach. Corp. v. Comm'n*, 1981 E.C.R. I-02639, para. 9.

the competent national authorities (De Amicis and Kostoris, 2018, 242), such as, in Italy, the *Guardia di Finanza* or the special corps of the *Carabinieri* and *Polizia*.

The efficiency and effectiveness of the EPPO therefore depend on the proper functioning of the national judicial system and the clear division of competences with the national prosecutors.

Two issues arise regarding the first topic. The first is that the independence of the EPPO is hampered in several continental systems – such as Belgium, France and the Netherlands – where there is a hierarchical relationship between the public prosecutor and the executive power, with the consequence that a legislative reform is now required with regard to PIF investigations to preserve the autonomous exercise of the European prosecutorial function (Ligeti, 2020, 45).

The second issue is related to the inherent feature of the EPPO Regulation aiming to unify – for the first time in EU law – the pretrial phase of criminal proceedings, namely the stage that runs from the start of the official investigation until the trial proper. The problem is that this procedural phase is regulated in rather different ways across Europe: in France, for instance, the *juge d'instruction* conducts the *instruction* for serious crimes, assuming the double and ambiguous nature of investigator and judge. In such national systems the need to ensure the consistent and swift conduct of EPPO investigations may suggest legislative changes to enhance the investigative autonomy of the public prosecutors acting as EDPs in the PIF domain (Ligeti, 2020, 47 ff.).

These two issues don't seem to be significant in Italy. Indeed, the Italian public prosecutor is, on the one hand, fully independent of the government (Art. 104 of the Italian Constitution) and, on the other, the central actor in the pretrial phase, since the *Giudice per le indagini preliminari* is involved *ad acta* – upon request of the public prosecutor – in authorizing a specific measure (Ligeti, 2020, 48).

On the other hand, the relationship between the EPPO and the national prosecutors in Italy seems to be problematic and potentially controversial as far as the division of competences is concerned.

This issue mainly arises from two provisions established by the Regulation. The first states that the EPPO is competent not only for PIF crimes but also "for any other criminal offence that is inextricably linked" to such criminal conducts (Art. 22(3) Reg.). The second extends the EPPO's competence to "offences regarding participation in a criminal organization as defined in Framework Decision 2008/841/JHA, as implemented in national law, if the focus of the criminal activity of such a criminal organization is to commit any of to the" PIF offences (Art. 22(2) Reg.). The EPPO Regulation does not define the "inextricably linked criminal offence", but merely recalls that "The notion of 'inextricably linked offences' should be considered in light of the relevant case law which, for the application of the *ne bis in idem* principle, retains as a relevant criterion the identity of the material facts (or facts which are substantially the same), understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time and space" (recital no. 54 of the Regulation). Similarly, the double reference to "offences regarding participation in a criminal organization as defined in Framework Decision 2008/841/JHA, as implemented in national law", and the PIF offences as described in the domestic legal systems, actually highlights that the Regulation refrains from explaining the relevant criterion, since it defers the matter to the decision of the national legislator (Sicurella, 2018, 848 ff.).

The last issue is a particularly sensitive topic of discussion in Italy, where the fight against criminal organizations is the specific task of a specialized investigation and prosecution authority, the Direzione Nazionale Antimafia (DNA), structured into various Direzioni Distrettuali Antimafia (DDA) (moreover, the EPPO model may recall the same integrated model adopted by the Italian DNA: Ligeti, 2020, 40). There is thus a real risk of conflict and overlap between the EPPO and the DNA in sharing their respective competences or, in the worst-case scenario, a risk of investigative deadlock.

According to the EPPO Regulation, the former prevails over national law. Indeed Art. 5 states that "The investigations and prosecutions on behalf of the EPPO shall be governed by this Regulation" and "Where a matter is governed by both national law and this Regulation, the latter shall prevail" (Art. 5(3) Reg.). The same Art. 5 Reg. also provides that "The EPPO shall be bound by the principles of rule of law and proportionality in all its activities" (Art. 5(2) Reg.). The principle of proportionality is one of the two fundamental legal principles enshrined in Art. 5 TEU, together with the principle of subsidiarity; both principles limit the exercise of the EU's powers (Satzger, 2018, 46). Lastly, Art. 5 Reg. states that "The competent national authorities shall actively assist and support the investigations and prosecutions of the EPPO. Any action, policy or procedure under this Regulation shall be guided by the principle of sincere co-operation" (Art. 5(6) Reg.; see also the recital no. 14 of the Reg.).

These general principles alone draw a guiding line to avoid any serious conflict of competences between the EPPO and the national prosecutors: they both have to behave with the highest sincere co-operation (Belfiore, 2020, 179) and sense of fair play (Salazar, 2021, 63). In other words, the conducts of the EPPO and the national prosecutors have to be inspired by mutual trust rather than competition or jealousy (Salazar, 2021, 72).

So, with reference to the annex competence of the EPPO (Art. 22(3) Reg.), the European prosecutor has to carefully evaluate the real repercussions of the crime on the EU's interests (Salazar, 2021, 63). Furthermore, in the context of the fight against organized crime in the Italian system, in view of the specialization of the DNA, and on the basis of a self-restraint criterion, the EPPO could limit its competence to cases in which criminal organizations are purely focused on PIF offences (Salazar, 2021, 72).

Similarly, as the right of evocation constitutes a strong limitation of the Member States' sovereignty, the EPPO should use this right with particular caution, according to the principles of subsidiarity and proportionality (Satzger, 2018, 52).

In the event of disagreement between the EPPO and the national prosecution authorities over the question of competence, the proceedings before the national authorities competent to decide on the attribution of competences (i.e., in Italy, before the *Procuratore Generale* at the *Corte di Cassazione*) need to be reasonably quick in order to ensure the efficiency of the investigations.

Lastly, since the national courts are competent for EPPO proceedings, a slow or ineffective judicial system would imply a failure of the European prosecution (Satzger, 2018, 50). This entails that the reasonable length of judicial proceedings is not only a guarantee of a 'fair trial' (according to Art. 6 of the ECHR) but, today, also a fundamental target of the EPPO's structure to ensure effective and efficient protection of the EU's financial interests.

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SECTION II

Case Study: European Framework

Summary: 1. Introduction; 2. The Health Sector: stockpile capacities in the RescEU framework; 2.1 The role of EU Public Health Policy in the Covid-19 crisis; 2.2 The RescEU Medical Stockpile; 2.3. The use of stockpiling capacities in the RescEU framework and risk of fraud affecting the EU's financial interest; 3. Labour Law: SURE mechanism; 3.1. The role of the short-term labour support mechanism in the Covid-19 crisis; 3.2 The SURE Mechanism; 3.3. Use of the SURE fund and the risk of fraud affecting the EU's financial interest; 4. Strategic investments supporting small and medium enterprises (EIB): green sector; 4.1 EU Strategic investments supporting small and medium enterprises; 4.2. The role of strategic investments supporting small and medium enterprises and the EIB in the Covid-19 crisis; 4.3. Use of strategic investments supporting small and medium enterprises as part of the Green Deal (under EIB activity) and the risk of fraud affecting the EU financial interest; 4.3.1. EIB Anti-Fraud Policy; 4.3.2. Relevant data on irregularities and fraud affecting the EIB's activity, also at Member State level: cases involving SMEs in the 2019 report, the Covid-19 year, and future risks under new programmes for SMEs and the Green Deal.

1. Introduction

This section includes the examination of three case studies: RescEU, SURE, and Strategic investments supporting small and medium enterprises (EIB) for the green sector. These case studies were chosen because they represent three relevant actions that the EU has created to respond to the first phase of the Covid-19 emergency in the sectors of health, work, and economic support for businesses. The section will serve as a framework for the parts analyzed in D1. This study will help us understand the impact of emergency funds in countering the Covid-19 crisis and how these funds can be monitored to avoid fraud.

2. The Health Sector: stockpile capacities in the RescEU framework

The paragraph 2 will deal with EU actions to support Member States' medical equipment needs during the first wave of the pandemic. In particular, the stockpile capacities in the RescEU framework will be studied. To do this, the RescEU mechanism will be examined. In addition, it will also be appropriate to investigate the tools that have allowed the European Commission to purchase the medical materials that make up the ResEU stock, i.e. the Joint Procurement Agreement and the Emergency Support Instrument. Finally, the paragraph 2 will address how RescEU stocks are used and the dangers of fraud in this sector. Before going into the analysis of these issues, it will clarify the competence of the EU in the field of Public Health policy, its competencies and how the covid-19 crisis has required greater intervention by the European institutions to help the Member States.

2.1 The role of EU Public Health Policy in the Covid-19 crisis

In the EU legal order, the European institutions and the Member States must guarantee the right to health of European citizens (Greer, Sokol, 2014, 77).

However, Member States retain a leading role by defining the contents and essential elements of the right to health (Art. 168 (7) TFEU) (Greer, Jarman, 2021, 34). From an analysis of Art. 2 (5) TFEU in conjunction with Art. 4 (2) (k) TFEU and with Art. 6 (a) TFEU, it is clear that the EU exercises a complementary competence in the health sector, acting to support, coordinate, or complement the actions of the Member States (Sindbjerg, Martinsen, Vasev, 2015, 427). There is concurrent competence only in the limited area of issues relating to security in the field of public health. Art. 168 (1) TFEU confirms the complementary nature European competence. It provides for a wide range of situations in which EU intervention seeks to complement the policies of the Member States and encourage cooperation among them. Furthermore, it establishes the need to ensure a high level of health protection in EU policies and activities (Greer, Jarman, 2021, 34). Despite this, scholars maintain that a reservation held by Member States may not peremptorily exclude intervention by the Union to ensure uniform essential or high levels of health services across the EU territory equally. This situation could arise if a general competing competence for the protection of human health is identified.

Art. 35 of the Charter of Fundamental Rights completes the regulatory framework of reference for sources of primary law. In providing for the right of every individual to access health prevention and obtain medical treatment, this rule makes its application subject to the conditions established by national laws without any supranational legislative instrument capable of guaranteeing the essential levels of health services to be provided. Besides, the rule contained in the EU catalogue of fundamental rights does not introduce new competencies. It is relevant only if EU law is directly applicable (Giunta, 2018, 39; Hervey, McHale, 2014, 951).

The Union's reduced competencies are due to some peculiar aspects of health matters. In other words, the huge expenses underlying the health system are covered through tax and contribution instruments, imposing taxes on citizens to find the resources to invest in the organization of national health systems. The marked heterogeneity of the organizational decisions in the health systems of the Member States makes it difficult to proceed towards harmonization. In this context, the right to health protection emerged through secondary legislation, which includes regulations on the coordination of social security systems[83], Directive 2011/24[84] concerning the application of patients' rights relating to cross-border healthcare, and, above all, the jurisprudence of the ECJ (Di Federico, Negri, 2019; Di Federico, 2017).

As part of the guarantee of the freedom of movement of persons and services provided by the EU Treaties, the case-law of the ECJ and the supranational legislator have recognized the positive right of European patients in need of treatment to access cross-border health services (Nedwdick, 2009, 854). Among the effects of freedom of movement, the possibility of moving from one Member State to another to benefit from medical treatment is of particular relevance (André, 2014, 145). Indeed, the Court of Justice has broadened the right of EU citizens to access transnational care. The European judges have not only clarified the scope of the provisions contained in Regulations 1408/71 and 883/2004 but have designed a parallel access mechanism for access to

[83] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.
[84] See Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare.

transnational medical assistance that anticipates various contents of Directive 2011/24. In particular, the Court of Justice has focused on prior authorization and reimbursement of medical expenses procedures. On the one hand, the case law has clarified the nature, scope and eliminated the obstacles to obtaining prior authorization[85]. On the other hand, it has widened the possibilities for EU citizens to gain reimbursement of cross-border care[86]. Despite this, the EU has not yet managed to create an obstacle-free European health area in which EU citizens can move and easily access treatment. For example, reimbursements for cross-border treatment continue to vary significantly from Member State to Member State.

In this framework of limited capacity for action in the sphere of public health, European civil protection is making progress. Since its creation in 2001, the Civil Protection Mechanism is a tool to co-ordinate and strengthen Member States' relief capacities in disaster preparedness and training (Morsut, 2014, 145; Konstadinides, 2013, 270; Ekengren, Matzén, Rhinard, Svantesson, 2006, 458). Initially used for outbreak of disaster outside the EU, it has increasingly been operating inside the EU for civil protection crises beyond the capabilities of individual Member States. In March 2019, the Civil Protection Mechanism was upgraded and renamed RescEU[87]. It is based on Art. 196 TFEU, which mandates that the EU must help coordinate Member State civil protection, and Art. 214 TFEU, which authorizes the EU to assist victims of natural or human-caused disasters worldwide. The Civil Protection Pool is the register of assets that the Member States make available to rescue activities. These specialized assets are certified as suitable and engage in regular exercises to ensure that they can be deployed and work together. They are only deployed in EU activities by their Member States after a request from the Civil Protection Mechanism has been received (Villani, 2017, 124). The Civil Protection Pool includes the European Medical Corps, which was set up in the aftermath of the 2020 corona-virus outbreak in the EU. This initiative is closely coordinated with the WHO initiative. Indeed, it is the EU's principal contribution to the WHO's Global Health Emergency Workforce initiative, which seeks to certify competency and identify the type of medical resources needed in an emergency and thereby improve matching and ensure that the right expertise and equipment arrive.

Furthermore, the Emergency Response Coordination Center acts as a hub for requests and coordination. In other words, it remains under Member State control, but with a slowly increasing degree of Europeanization through coordination, joint planning, joint preparation and exercises, and joint service in crises (Greer et altri, 2019, 88). In this area, the Member States are strenuously safeguarding their autonomy and resources both in principle and practice. In the face of pandemics and natural disasters in an increasingly integrated EU and an increasingly threatening global climate, coordination, joint work, and even shared resources are needed.

The pandemic has revolutionized the EU public health policy sector. Until now, the EU has left the protection of health to the Member States, dealing only with public health in the collective sense. The pandemic crisis has strengthened the latter role, which could affect the first in the long term. The European institutions have promoted EU4Health, which includes a far larger budget and a remit that includes strengthening surveillance and health systems in the Member States (Greer, de

[85] See above all Court of Justice, 28 April 1998, C-158/96, Koll.
[86] See above all Court of Justice, 12 July 2001, C-157/99, Smits and Peerbooms; 16 May 2006, C-372/04, Watts.
[87] See Decision (EU) 2019/420 of the European Parliament and of the Council of 13 March 2019 amending Decision No. 1313/2013/EU on a European Union Civil Protection Mechanism.

Ruijter, Brooks, 2021; Alemanno, 2020, 721) [88]. The EU4health plan is governed by Art. 168(5) TFEU. The article stipulates that the European Union must undertake to support national health policies and encourage cooperation between Member States and regulate the different types of health system. All this is based on an idea that represents the pillar of the Union, namely not to run into health crises and protect human health. The new funds have been increased compared with the previous EU health policy budget, and this additional expenditure was a reinforcement of existing EU health structures and institutions. The EU4Health action for the Multiannual Financial Framework 2021-2027 is 5.1 billion euros, against an initial Commission proposal of 9.6 billion and has been accompanied by an increase in RescEU, and a separate vaccine strategy. In the 2014-2020 period, the resources for RescEU were just over €574.02 million for the implementation of the mechanism in the 2014-2020 period. In fact, taking advantage of the experience gained with Covid, the "new" RescEU will be able to count on 3 billion euros, 1.9 billion of which from Next generation EU and the remainder from the 2021-2027 multi-year budget[89].

EU4Health included crisis response, health systems strengthening, and continuing to work on the pre-existing priority areas of cancer, pharmaceuticals, and eHealth (Greer, de Ruijter, Brooks, 2021, 750). In addition, other EU programmes will provide further investments in the health sector to complement EU4Health. These are European Social Fund Plus, to support vulnerable groups in accessing healthcare, the European Regional and Development Fund to improve regional health infrastructures, Horizon Europe, for health research, Union Civil Protection Mechanism/RescEU, to create stockpiles for emergency medical supplies, and Digital Europe and Connecting Europe Facility, to create the digital infrastructures needed for digital health tools. EU health policy change and the EU institutions seek to address the issues of communicable disease control, civil protection, and RescEU, as well as the medicines and vaccines market, with an unprecedented amount of money and engagement (Greer, Jarman, 2021, 40). In summary, following the outbreak of Covid, the EU institution and Member States have opted to strengthen the existing model of EU health and reinforce RescEU (Pacces, Weimer, 2020, 238). Reviewing the EU's weak legal basis in health matters, institutions have struggled to respond to the Covid-19 crisis (Brooks, de Ruijter, Greer, 2020, 34). In the first phase of the health emergency, supranational civil protection mechanisms were relatively ineffective in preventing the expansion of EU influence (de Ruijter 2019), but the crisis events have led to an expansion of the role of the Union (Greer 2009).

2.2 The RescEU Medical Stockpile

The health crisis has made it possible for the European Commission to create a series of initiatives to support Member States in acquiring the necessary amount of medicines and protective devices at affordable prices. In this perspective, the Commission has made use of joint procurement procedures. In particular, it used those provided by the Joint Procurement Agreement to procure medical countermeasures from the RescEU reserve and the instrument for emergency support.[90].

[88] See COM(2020) 405 final, 28 May 2020, Proposal for a Regulation of the European Parliament and the Council on the establishment of a Programme for the Union's actions in the field of health for the period 2021–2027, and repealing regulation (EU) No 282/2014 ("EU4Health Programme").

[89] See https://ec.europa.eu/info/strategy/recovery-plan-europe_it

[90] See Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union; Council Regulation (EU) 2020/521 of 14 April 2020 activating emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak.

These actions financed using EU funds have allowed the Commission to increase its coordination powers in the field of civil protection.

Before 19 March 2020 when the Commission announced the compilation of a strategic stockpile of medical equipment such as ventilators and protective masks, RescEU did not really have its own resources – equipment, people, and budget – or foresight capacities to adequately address a pandemic. Decision EU 2020/414 creates a strategic RescEU stockpile of medical equipment such as ventilators and protective masks to help EU Member States during the Covid-19 pandemic[91]. Medical equipment in the stockpile will include intensive care medical equipment such as ventilators and personal protective equipment, like reusable masks, vaccines and therapeutics, and laboratory supplies (Greer, de Ruijter, Brooks, 2021, 754; Beaussier, Cabane, 2020, 813).

According to the decision of March 2020, the Commission finances 100% of RescEU capacity, including procurement, maintenance, and delivery costs hosted by several Member States and constantly replenished. The Commission may define RescEU's resources through implementing acts, taking into account the identified and emerging risks, resources, and shortcomings at Union level, in particular in the field of aerial forest firefighting, and chemical, biological, radiological, and nuclear accidents, as well as the emergency health response[92].

Decision EU 2020/414 changed some rules to allow for a more flexible allocation of resources. While, on the one hand, the percentage of funds to be allocated to prevention, preparation and response to disasters respectively is established, on the other, there is a margin of flexibility that will allow the Commission to reallocate funds in an emergency. This approach will therefore allow the EU to react better to the unpredictable nature of disasters and to use the funds where they are most needed.

Eligible operating costs include all those necessary in relation to a resource to ensure its operational effectiveness. These costs may include payments relating to personnel, international and local transport, logistics, consumer goods and supplies, maintenance, and other costs necessary to ensure the effective use of the resources. With the 2020/414 Decision, operating payments also include those for the constitution of stocks of medical materials. The costs of medical devices are calculated based on market prices at the time the resources are purchased, rented, or leased.[93]. When purchasing, hiring, or leasing RescEU resources, Member States must provide the Commission with documentary evidence of market prices, or equivalent evidence if there are no market prices for some of the components of these resources.

Furthermore, the RescEU stock material can be purchased, leased, or hired by the Member States. To this end, the Commission may award direct grants to the Member States without a call for proposals. The Commission may also acquire resources on behalf of Member States through the joint procurement procedure. The RescEU stockpile is hosted by the Member States that purchase, rent, or lease such assets. In the event of joint award, the resources are hosted by the Member States on whose behalf they were acquired[94]. A Member State that acquires resources for RescEU must record its

[91] See Commission Implementing Decision (EU) 2020/414 of 19 March 2020 amending Implementing Decision (EU) 2019/570 as regards medical stockpiling rescEU capacities.
[92] See Art. 12(2) Decision 2019/420/EU.
[93] See Art. 12(3) Decision 2020/414/EU.
[94] See Art. 12(3) Decision (EU) 2019/420.

registration in the CECIS[95]. Also, it must ensure the availability and possibility of mobilizing these resources for the operations of the EU mechanism. The RescEU stockpile may be used for national purposes if they are not used or needed for response operations under the EU mechanism. However, to ensure an effective disaster response, the Commission and the Member States must ensure, where appropriate, adequate geographical distribution of RescEU resources[96]. For these reasons, the resources are spread over the various Member States and in different geographical areas. Indeed, Germany and Romania were the first Member States to host the medical stockpile RescEU, followed by Denmark, Greece, Hungary, and Sweden in September. In January 2021, Belgium, the Netherlands, and Slovenia became new host Member States for RescEU medical supplies. Moreover, Germany will host a second medical supply.

The mechanism under consideration has a lot of potential, but more running-in is needed to enable an immediate and widespread response to EU transnational health crises. By leveraging the experience gained during the pandemic, the RescEU instrument will be able to strengthen the capacity of the national components of civil protection cooperation and, at the same time, improve the response at the supranational level. The agencification of networks could create systems better suited to the organizational and political realities of the EU (Boin et altri, 2014, 431). Indeed, strengthening RescEU would give the EU a more independent instrument that would increase its influence on the professionalization and standardization of civil protection in Europe through its reserves, its training programmes, and the provision of guidance on national prevention strategies, but without the politically sensitive step of formally making it a leading network organization (Parker, Persson, Widmalm, 2018; 1331). This could likely increase the effectiveness of civil protection at the national and EU levels.

Within the framework of a coordinated EU health response, together with the RescEU stockpile, adopted under the EU Civil Protection Mechanism, the Joint Procurement Agreement has emerged as a core instrument to support pan-EU purchasing of PPE, ventilators, and the devices necessary for coronavirus testing. This coordinated approach gives the Member States a strong position when negotiating with the industry on the availability and price of medical products. The JPA helped to find material at a time when international demand for medicines far outstripped supply. Also, it has made it possible, on the one hand, for the Member States to collaborate in the procurement, allocation, and storage of medical countermeasures, in particular in the event of a health emergency (Beetsma et al., 2021, 1). On the other hand, the JPA has made it possible to avoid the revival of protectionism and national sovereignty in public health. Decision 1082/2013/EU introduced the possibility for the Member States to engage voluntarily in a procedure to jointly procure medical countermeasures, especially vaccines[97]. In 2014, the EU Joint Procurement Agreement was adopted and entered into force after being signed by 14 Member States.

The JPA is thus configured as a contract, aimed at establishing the operating procedures of the joint award procedure between the Commission and the participating States. In particular, in relations with the Member States, the JPA can be assimilated to a framework agreement for the management of initiatives conducted jointly between the central and territorial levels of government (Pugliese, 2020; McEvoy, Ferri, 2020, 851; Sanchez-Graells, 2020). It should be emphasized that the JPA does not entail any obligation to participate in individual procedures, involves no financial

[95] See Art. 12(5), Decision (EU) 2019/420.

[96] See Art. 12 (1) Decision (EU) 2019/420.

[97] See Art. 5 Decision 1082/2013/EU.

burdens, and does not prevent the Member States that are part of it from activating independent procurement procedures, also relating to the same counter-measures and the same operators[98].

The JPA provides for a rather low minimum number of participants. Five Member States are enough to initiate a procedure[99]. This allows smaller Member States to proceed with a JPA. The European Commission acts as the Permanent Secretariat, which is also in charge of the preparation and organization of the joint procurement procedure. For each procurement procedure, the technical specifications and allocation criteria are determined by a separate committee. For each procurement procedure, a separate committee determines the technical specifications and allocation criteria: the Steering Committee[100]. The Commission is responsible for preparing and organizing the award procedure and adopting the decision. According to the Commission decision, it is up to the participating States to individually sign supply contracts[101] previously approved by the committee (Pugliese, 2020; Greer et al., 2019, 83). The number of medical countermeasures intended for each Member State is established based on its requests within the Steering Committee[102].

Lastly, the actions to collect medical material for RescEU were funded by the Emergency Support Instrument (ESI). ESI is flexible, designed to respond to different types of evolving needs. Member States can use it when they require immediate support in addressing a crisis. The ESI is meant to enhance existing EU programmes and instruments, including RescEU and the Joint Procurement Procedure, as well as to complement ongoing efforts at the national level. The ESI provides fast, targeted actions to support the Member States in extraordinary circumstances. It allows funds to be directed to logistics, medical supplies, testing, vaccines, treatment, emergency aid, and health care facilities and staff. The Emergency Support Instrument may support the transport of patients and medical staff across the EU Member States, the procurement of essential medicines, the research and production of treatment and vaccines, and the development, purchase, and distribution of testing supplies.

2.3. The use of stockpiling capacities in the RescEU framework and risk of fraud affecting the EU's financial interest.

The RescEU reserve of medical equipment is completely financed by the EU budget. The first investment authorized by the European institutions to strengthen the RescEU stock was 50 million euros in March 2020[103]. Furthermore, EU budget decisions, made specifically to free up funds for RescEU to tackle the Covid-19 pandemic, were adopted in April 2020. In particular, Decision 2020/547 allowed the use of the Contingency Margin in 2020 to provide emergency assistance to Member States and further reinforce the Civil Protection Mechanism and RescEU budget, providing 714,558,138 euros in commitment appropriations. This figure will be offset against the margin under the commitment ceiling of the financial year 2020 for the heading Administration of the multiannual financial framework. The RescEU budget for 2021 consists of 90,203,000 euro of commitments and

[98] See Art. 1 JPA.
[99] See Art. 13 JPA.
[100] See Art. 5(2) JPASC.
[101] See Art. 4(2)(a) JPASC.
[102] See Art. 17 JPA.
[103] See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_476

25,613,000 euro of payments[104]. However, RescEU's budget remains smaller than other programs. For example, the 2021 EU budget allocates 11 506 527 000 euros of commitments and 9 835 078 549 euros of payments [105].

On 2 May 2020, deliveries of purchased stocks of RescEU medical equipment began. In fact, 330,000 protective masks were delivered to Italy, Spain and Croatia, and more batches of protective masks were delivered to Lithuania, (20,000), North Macedonia (10,000) and Montenegro (10,000) under the EU Civil Protection Mechanism. Furthermore, on 7 May 2020, the European Commission delivered 1.5 million masks to 17 Member States and the UK to protect EU healthcare workers. This is the first batch of 10 million masks purchased by the Commission via the Emergency Support Instrument. They were delivered over the following six weeks in weekly instalments of 1.5 million masks to the Member States and regions in need.

Throughout the summer of 2020, deliveries of RescEU continued. On June 2020, a pilot operation successfully delivered over seven tonnes of personal protective equipment to Bulgaria. The cargo included over 500,000 protective masks, purchased by Bulgaria with transport costs covered by the EU. On 7 July 2020, the EU delivered 65,000 additional masks to Croatia already delivered[106]. In the first week of August, more batches of protective masks were distributed to Croatia, Montenegro and North Macedonia from the common RescEU reserve[107].

RescEU deliveries continued during the autumn wave of the outbreak. Following a request by France via the EU Civil Protection Mechanism, two batches of 2 million surgical gloves offered by Norway were delivered in October and November 2020. On 22 October, the EU sent a first batch of 30 ventilators from the common European stockpile of medical equipment to Czechia. Together with contributions from the Netherlands and Austria, Czechia's request for 150 ventilators was fully answered[108]. Upon the request by France via the EU Civil Protection Mechanism, two batches of 2 million surgical gloves offered by Norway were delivered in October and November. The EU Civil Protection Mechanism then also coordinated the deployment of an Italian Emergency Medical Team of six medical experts to Azerbaijan to support local health authorities in the fight against the Coronavirus.

In January 2021, the rescEU medical reserves hosted by Greece and Germany delivered 107,000 protective masks to North Macedonia and 78,000 to Montenegro. Macedonia also received 35,000 protective gowns and 140,000 overalls, and Montenegro 15,000 medical gowns[109]. Moreover, in February 2021, following a request for assistance from Moldova, Romania sent 1.5 million surgical masks, 100,000 FFP3 masks, 100,000 protective suits and 100,000 gloves[110]. In February 2021, the RescEU medical reserve hosted by Greece delivered 600,000 FFP2 protective masks and 650,000 pairs of gloves to Serbia. So far, the EU Civil Protection Mechanism has responded to 25 requests

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[104] See Definitive adoption (EU, Euratom) 2021/417 of the European Union's general budget for the financial year 2021.

[105] See Definitive adoption (EU, Euratom) 2021/417 of the European Union's general budget for the financial year 2021, p. 17.

[106] See https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1289

[107] See https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1464

[108] See https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1882

[109] See https://ec.europa.eu/commission/presscorner/detail/en/mex_21_21

[110] See https://ec.europa.eu/commission/presscorner/detail/en/mex_21_703

throughout the pandemic and provided personal protective equipment, medicines and health experts[111].

Fraud involving medical materials has been substantial across the EU. Analysis of will be carried out in the national case studies. There are several examples of the countless scams in the procurement of medical equipment brought to light at European and world level, also considering the ‘grey zone’ sometimes created by the response to this public health emergency. As EU Chief Prosecutor Laura Kovesi noted already during the first wave of the pandemic, “the response to Covid-19 is inviting opaque practices, including the awarding of contracts without open bids, or the use of false documents to buy medical equipment or drugs at artificially inflated prices”[112]. The European institutions announced as early as March 2020 that they will work closely with the competent authorities of the Member States to prevent the entry of fake medical products into Europe. OLAF has launched an official investigation into illicit trade in face masks, medical devices, disinfectants, medicines, and test kits. Unlike normal practice, the investigation was announced at an early stage to warn the public about the sale of these counterfeit products[113]. So far, OLAF’s investigation has led to the identification of over 1,000 suspicious operators and the seizure or withdrawal of over 14 million items. With the launch of the vaccination campaign and the increased risk of fraud in this area, OLAF has added another layer to this ongoing investigation with the aim of tackling the illicit trade in Covid-19 vaccines, including fake ones, possibly by unauthorized persons importing them into the EU[114].

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[111] See https://ec.europa.eu/commission/presscorner/detail/en/mex_21_761

[112] See https://www.reuters.com/article/us-health-coronavirus-eu-corruption-inte-idUSKBN22O1SG.

[113] See https://ec.europa.eu/anti-fraud/media-corner/news/13-05-2020/inquiry-fake-covid-19-products-progresses_en.

[114] See https://ec.europa.eu/anti-fraud/media-corner/news/15-02-2021/olaf-warns-against-fraudsters-offering-covid-19-vaccines_it

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3. Labour Law: SURE mechanism

Paragraph 3 focuses on the study of the SURE mechanism. The program was created by the European Commission to support the Member States and workers during the health crisis. The analysis of the Commission's first report on this scheme will allow us to understand how resources have been distributed and what are the risks of fraud concerning this sector.3.1. The role of the short-term labour support mechanism in the Covid-19 crisis

The health crisis caused by the Covid-19 pandemic has created a picture of strong socio-economic instability in all the Member States of the European Union. National governments and European institutions are facing an unprecedented adverse situation due to the scale and speed with which it has spread throughout the EU. In particular, the Covid-19 pandemic is having a major negative impact on employment. For this reason, both the Member States and the European Commission have moved in the direction of implementing measures to contain the impact of the crisis on employment and in the hardest-hit sectors (D'Ambrosio, 2020, 115). Indeed, the confinement measures and the massive decline in the liquidity available to companies have resulted in a forced reduction in working hours in many economic sectors, and this leads to an increase in national welfare system spending for short-term subsidies to support work (Giupponi, Landais, 2020).

In a time of economic crises, temporary social benefits to support work can be much more effective than other forms of social protection such as unemployment protection tools, universal transfers, or wage subsidies. For these reasons, short-term employment support programmes have been at the heart of the emergency policies launched by EU Member States to protect employees and self-employed workers and reduce the incidence of unemployment and loss of income. These tools are the equivalent of the Italian "*cassa integrazione guadagni*" and match the provision of a social benefit to deal with the temporary reduction in the number of hours worked in companies affected by momentary shocks (Baller, Geherke, Lechthaler, Merkel, 2016, 99). These social benefits allow the employer – suffering from a drop in demand or production – to limit the hours of their employees rather than firing them. Furthermore, employees receive a subsidy from the welfare system proportional to the reduction in the hours cut. Freezing the workforce during a transitory recession allows a company to keep its skilled staff and avoid both the expensive separation process and that of rehiring and training when economic conditions improve. Moreover, they make it possible to maintain both the experience and the career spurs acquired (Müller, Schulten, 2020). Without direct subsidies to support employment in the short term, the accumulation of unusable labour could lead the company to lay personnel off to recover liquidity and competitiveness on the market (Gelormino, Marino, Leombruni, Costa, 2017, 168). In addition, scholarship stresses that the use of this social benefit can lead to significant negative reallocation effects in the labour market, since, by subsidizing the retention of existing staff, this instrument limits the possibilities of workers to move from low-productivity companies to those with high productivity during recessions (Gelormino, Marino, Leombruni, Costa, 2017, 168). Besides, the 2008 financial crisis shows that if well designed and accompanied by other economic stimulus measures, such social programmes, can be an effective tool for safeguarding the jobs and integrity of the companies that benefit from them, helping to accelerate economic recovery (Giupponi, Landais, 2020; Kopp, Siegenthaler, 2019, 5).

The Covid-19 crisis has caused an exponential demand for access to temporary subsidies to support employment, causing a substantial increase in national public spending (Cantillon, Seeleib-Kaiser, van der Veen, 2021, 328). As part of the support package to cope with the economic impact of the Covid-19 crisis, the Commission proposed to the Council the creation of a new supranational instrument of temporary support to reduce the dangers arising from the loss of income and employment in the EU[115].

Taking up this proposal, the Council adopted Regulation 2020/672/EU[116], establishing a European Temporary Support Instrument to mitigate the risks of unemployment in a state of emergency (hereafter: SURE). SURE represents a variant of the tools necessary for a monetary union to react to severe economic or financial shocks (Andor, 2020, 141). Indeed, SURE helps the EU Member States to distribute part of the financial risk associated with crises and caused by a decline in aggregate demand. However, it does not resolve the productive problem and the lack of competitiveness of the labour market (Andor, 2017, 156). Nevertheless, supporting the Member States through automatic stabilizers allows national schemes both to protect the public investment capacities of each member country and the employee (Brandolini, Carta, D'Amauri, 2014, 21). Furthermore, SURE represents a novelty in the panorama of supranational social policies, an area in which the EU has limited room for manoeuver. As for the aspects defined by the EU Treaties in the field of social policies, according to Art. 4(2)(b), TFEU, the Union has competing competence with that of the Member States, which makes them equally entitled to intervene. On the other hand, as regards the aspects not defined by the Treaties, according to Art. 5(2)(3) TFEU (Nato, 2020, 20), the European Union is competent to implement actions to ensure coordination of the employment policies and social policies of the Member States. In this case, the role of the EU is subsidiary to the initiatives of the Member States and can only promote co-operation, support and, if necessary, integrate state action, without ever being able to replace it. This parallel competence is characterized by the lack of erosive action on State prerogatives and by a lower intensity compared to competing competencies. Also, Art. 153(3) TFEU establishes that the European Commission can encourage co-operation between the Member States and facilitate the coordination of their action in matters relating to labour law and working conditions, training and further training, social security, protection against accidents and occupational diseases, and the right of association and collective bargaining between employers and workers (Nato, 2020a, 23).

Considering the limited power of intervention of the European Union and the preponderant role of the Member States, SURE implements EU social policies using a new method, hence, the innovations made by SURE will be explored in the next paragraphs.

3.2 The SURE Mechanism

The legal basis for SURE is Art. 122 TFEU. According to Art. 122(1) TFEU, the Council may establish appropriate measures to fight the economic crisis. Besides, Art. 122(2) TFEU specifies that the Council may provide temporary and ad hoc financial help through the organization and management of a loan system if a Member State is in difficulty due to natural disaster or exceptional circumstances beyond its control. The Council has a wide margin of discretion to assess whether the conditions for applying these tools are met and the Covid-19 pandemic is a case that justifies appeal. During the previous crisis, Art. 122 (2) TFEU was used as the legal basis for the creation of the European Financial Stabilization Mechanism (EFSM)[117], which helped Member States in difficulty

[115] Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Euro-group, Coordinated economic response to the COVID-19 Outbreak, COM/2020/112 final.
[116] Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak.
[117] Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism.

to access the capital market and prevent a sharp rise in the cost of loans from leading to an excessive increase in public debt (Palmstorfer, 2012). This instrument has been used to grant loans to Ireland, Portugal, and Greece in exchange for structural reforms. Although the use of the SURE does not impose budgetary austerity measures, and the legal basis recalls solidarity, the choice to entrust the support of this instrument through the provision of loans rather than non-repayable contributions gives little value to the structural profile of the solidarity principle. SURE shapes a kind of precarious solidarity on loan, which envisages that the Member States repay the loan.

SURE is a complex mechanism. According to Art. 3 (1) Regulation 2020/672, SURE may be triggered by Member States when their actual and budgeted public expenditure will undergo a drastic and sudden increase to support national measures directly linked to the tools to reduce working hours to cope the negative social and economic effects caused by the pandemic. Member States can access SURE even if they foresee an increase in spending following the establishment of ad hoc social measures to preserve employment during the health crisis[118]. The beneficiary Member States must make use of financial assistance primarily in support of their national schemes to reduce working hours or similar measures and, where applicable, in support of the relevant health measures. In other words, SURE will serve as a second line of defence to finance working-time reduction schemes and similar measures, helping the Member States to safeguard jobs, protect employed and self-employed workers from the risk of unemployment and loss of income (Andor, 2020, 141; Nato, 2020b; Petzold, 2020, 161). Furthermore, the SURE guarantees additional financial assistance in conjunction with the European Social Fund.

Under Art. 4 Regulation 2020/672, SURE is temporary and allows the Union to grant financial assistance to the Member States concerned through the provision of loans for a maximum amount set at 100 billion euros. The European Commission will be able to borrow on behalf of the Union on capital markets or from financial institutions at the most appropriate time to optimize the cost of financing, and preserve its reputation. To safeguard the financial strength of the fund, the share of loans given to the three Member States representing the largest portion of subscriptions granted must not exceed 60%, while the amount that the Union will finance in a given year must not exceed 10% of the maximum amount of the entire availability of the fund[119]. Member States can contribute to SURE financing through counter-guarantees against the risks borne by the Union.

The guarantees made to the Union will be irrevocable, unconditional, and issued on voluntary request. They are subject to a specific agreement concluded between the Commission and the Member State concerned[120]. The activation of the guarantees provided by the Member States takes place in proportion to each Member State's relative share of the gross national income of the Union. Subsequently, the Commission will conclude an agreement with a contributing Member State on the irrevocable, unconditional, and on-demand guarantees[121].

If a Member State fails, in full or in part, to honour a call in time, the Commission will have the right to make additional calls on guarantees to the other Member States in order to cover the part corresponding to the Member State concerned. Such calls will be made in relation to the relative share of each of the other Member States in the gross national income of the Union and adapted without taking into account the relative share of the Member State concerned. The Member State which failed

[118] See Art. 3(2) Regulation 2020/672.
[119] See Art. 9, Regulation 2020/672.
[120] See Art. 11(3) Regulation 2020/672.
[121] See Art. 11(3) Regulation 2020/672.

to honour the call remains in any case liable to honour it. The other Member States will be reimbursed for additional contributions from the amounts recovered by the Commission from the Member State concerned[122]. This is equivalent to the mutualization of the debt contracted by the Commission in the event of difficulty of one or more Member States in fulfilling the activations of the guarantees given or the loan within the agreed terms (Morgese, 2020, 107). The guarantee called from a Member State must be limited, in all circumstances, by the overall amount of guarantee contributed by that Member State under the agreement between the Commission and the Member State itself[123].

The resources made available by SURE are disbursed to the Member States through a rapid procedure. After a request from a Member State, the European Commission verifies the public expenditure increase related to the short-time scheme or similar measures[124]. The Council decision will be based both on the assessments of the European Commission and on the current and expected needs of the requesting Member State, as well as on requests for financial assistance under Regulation 2020/672 already submitted or planned by the other Member States while applying the principles of equal treatment, solidarity, proportionality, and transparency. This decision will establish the amount of the subscription, the maximum average maturity, the price formula, the maximum number of installments, the period of availability, and the other detailed rules necessary for granting financial assistance[125].

The beneficiary Member State will open a special account with its national central bank for the management of the financial assistance received. It shall also transfer the principal and the interest due under the loan agreement to an account with the European System of Central Banks, TARGET2, 20 business days prior to the corresponding due date[126]. In addition, the European Commission will be assisted by the European Central Bank in the administration of loans granted to the Member States[127]. The Commission must also ensure that the necessary provisions on controls and audits are included in the agreement concluded with the beneficiary Member State. In particular, the agreement must comply with the control procedures established in Art. 220 of regulation 2018/1046[128]. Indeed, the beneficiary Member State must regularly check that the SURE founds have been used in accordance with the agreement. To this end, the Member State is required to take appropriate measures to prevent irregularities and fraud and, if necessary, the national authorities must take legal action to recover the funds granted and that have become subject to misappropriation. To ensure the protection of the financial interests of the Union, this regulation authorizes the Commission, OLAF, and the Court of Auditors to exercise their rights, namely to carry out investigations, including on-the-spot checks and verifications[129]. If these verification procedures find that, with regard to the management of financial assistance, the beneficiary country has been involved in acts of fraud or corruption, or other illegal activities affecting the financial interests of the Union, the European institutions have the right to request early repayment of the loan.

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[122] See Art. 11(4) Regulation 2020/672.
[123] See Art. 11(4) Regulation 2020/672.
[124] See Art. 6, Regulation 2020/672.
[125] See Art. 6(3)(a) Regulation 2020/672.
[126] See Art. 10(2) Regulation 2020/672.
[127] See Art. 10(1) Regulation 2020/672.
[128] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.
[129] See Art. 220(5) Regulation 2018/1046.

In addition, the European Commission is subject to an information obligation concerning monitoring the implementation of the mechanism. Within one year of the entry into force of Regulation 2020/672, the Commission has to submit a report on the use of the funds lent and on the continuation of the exceptional circumstances that justified their adoption and application to the Economic and Financial Committee, the Employment Committee, and the Council[130].

The actually shape of the SURE conveys a type of precarious and borrowed solidarity, which could limit the effectiveness of its impact in the Member States affected by the Covid-19 pandemic, paving the way for other critical aspects (Giubboni, 2020). However, one of the major problems is the coordination between the supranational mechanism and the corresponding national instruments. The context of the symmetrical crisis caused by Covid-19 indicates that the period for action is limited and, therefore, the Commission should not impose detailed and stringent conditions for the implementation of the measures dictated by SURE. Rather, it should allow the sustainability of internal policies to be balanced with the transnational sharing of risks, avoiding making the mechanism ineffective (Bennaars, 2019, 47).

3.3. Use of the SURE fund and the risk of fraud affecting the EU's financial interest

On March 22, 2021, the European Commission published its first preliminary assessment of the impact of SURE. The evaluation arrived six months after SURE began and refers to the disbursements of funds made up by February 2021. This report is the first half-yearly report on SURE sent to the Council, the Parliament, the Economic and Financial Committee, and the Committee for employment. According to Art. 14 of Regulation 2020/672, the Commission is legally required to publish the report within six months from the day the instrument became available and while SURE remains available. Also, the report provides the relevant reporting on the allocation and impact of SURE proceeds under Section 2.4 of the EU SURE Social Bond Framework.

Up to February 2021, the Commission proposed total financial support of 90.6 billion euros to 19 Member States, of which 90.3 billion euros have already been approved by the Council in favour of 18 Member States. SURE can still make more than 9 billion euros in financial assistance available and Member States can still submit requests for support. In response to the resurgence of infections and new restrictions, the Commission may consider further requests for supplementary support from the Member States.

Italy, Spain, and Poland have benefited from most of the funds disbursed by SURE. The initial funding requested was slightly reduced to meet the concentration limit of 60 billion euros for each of the three largest beneficiaries under the regulation. The other Member States received the requested funding. Belgium, Portugal, and Romania each received between 4 and 8 billion euros, while Greece, Ireland, the Czech Republic, Slovenia, and Croatia received between 1 and 3 billion euros. The other applicant Member States – Slovakia, Lithuania, Bulgaria, Hungary, Cyprus, Malta, and Latvia – received under 1 billion euros. (Communication SURE, 2021, 1). Investors showed strong interest in SURE bonds. Up to January 2021, the Commission had raised € 53.5 billion in the first four issues on the financial market. All the funds were raised as social bonds, which guarantees investors that their money will be used for measures with a real social purpose, supporting household incomes in a period of crisis. The EU's ability to raise funds for SURE is backed by a twenty-five billion euro guarantee from all Member States. It should be emphasized that SURE is also the first case where the

[130] See Art. 14 Regulation 2020/672.

EU has issued social bonds to fund EU financial assistance for the Member States, building on its commitment to sustainable finance. The EU has adopted and published an EU SURE Social Bond Framework to facilitate this commitment. The Commission recalls that SURE resources will be used to finance eligible social measures.

SURE has provided aid to Member States to cope with sudden and severe increases in effective public spending from 1 February 2020 due to the spread of short-term work programmes and similar measures to address the socio-economic effects of the COVID-19 pandemic. The Commission reports 80% of total planned public expenditure on eligible measures had already taken place by the end of 2020. It also allowed the use of financial assistance for planned increases in public expenditure for these measures. As of June 2020, public spending supported by SURE accounted for 46% of total public spending, with this figure rising to 80% in December 2020. The Commission report shows that the Member States spent less than originally planned in 2020. When Member States applied to access SURE funds, they expected to spend 90 billion euros for the whole of 2020. In total, they spent 79.3 billion euros, 9.6 billion euros less than expected. In most Member States, this is associated with higher planned spending in 2021 (Communication, 2021, 14). In general, the updated implementation of the Member States provides for an increase in expenditure. Expected spending in 2021 increased from 7.4 billion euros in the initial reporting in August 2020 to 19.8 billion euros in the January 2020 Report. In the March 2021 report, the Commission predicts total national public spending of 99.1 billion euros on eligible measures, which is higher than the total amount granted so far under the whole programme. This is in line with SURE's complementary nature, as it complements national funding of employment support (Communication, 2021, 14).

The report shows that SURE mitigated the serious socio-economic impact of the Covid-19 crisis. In the beneficiary Member States, the Commission states that the instrument helped to ensure that the increase in unemployment during the crisis was significantly lower than that recorded during the financial crisis of 2008. This result was achieved despite the greater decline in GDP that occurred in 2020 compared with that of 2008. Policy measures adopted to address the health crisis in 2020 have mitigated the impact of the decline in production on unemployment. For this reason, in most Member States, the rise in unemployment rates was lower than the preliminary statistics estimated. Commission studies predict that in winter 2021 real GDP growth will decline by 5.8% in the Member States that benefited from SURE funding in 2020. This decline is greater than that seen during the peak of the global financial crisis in 2009. However, the report predicts that the unemployment rate is expected to rise by just 0.7 percentage points in 2020, compared to an increase of 2.6 percentage points in 2009. One of the main reasons for the limited increase in unemployment rates in 2020 is political support measures, such as SURE. Indeed, the report specifies that, based on the available data, the lower-than-expected increase in unemployment can be partly attributed to the widespread use of part-time work programmes funded through SURE. This helped maintain employment and limited the rise in unemployment. Furthermore, the Commission states that other factors are related to the fact that citizens have not been able, or have been discouraged, from actively looking for work due to the closure of most economic sectors (Communication SURE, 2021, 21-21). Furthermore, the Commission's report shows that the instrument supported between 25 and 30 million workers in 2020, representing about a quarter of the total number of people employed in the 18 beneficiary Member States. Besides, between 1.5 and 2.5 million companies have benefited from SURE (Communication SURE, 2021, 17-18).

The European Commission argues that the impact of SURE goes beyond preserving jobs. The report mentions that it probably contributed to increasing general confidence in the EU's ability to respond effectively to an unprecedented crisis. One of the major achievements of SURE has been to encourage the use of part-time labour policies and sometimes to modify them in the Member States. It has played a role in temporarily increasing the coverage and generosity of part-time work programmes and the overall funding of policies to address the COVID-19 crisis.

The Commission report does not reveal fraud on funds granted through SURE. It recalls that it is the responsibility of the beneficiary Member State to regularly check that SURE funds have been used in accordance with the agreement. Indeed, the Member State is required to take appropriate measures to prevent irregularities and fraud and to take legal action to recover the funds granted that have become the object of embezzlement. Member States and the Commission will have to assess which companies have benefited from the programme funds and whether all citizens have received the benefits granted through the short-time schemes. For these aspects, we must wait for the next Commission reports.

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4. Strategic investments supporting small and medium enterprises (EIB): green sector

4.1 EU Strategic investments supporting small and medium enterprises

With the SMEs strategy for a sustainable and digital Europe, the Commission wants to support and empower SMEs of all sizes and sectors, from innovative tech start-ups to traditional crafts (COM(2020) 103, *An SME Strategy for a sustainable and digital Europe*). The strategy proposes actions based on the following three pillars: capacity-building and support for the transition to sustainability and digitalization; reducing regulatory burden and improving market access; and improving access to financing. To gain results, the strategy must be driven jointly by EU-level actions and strong commitment by Member States, including regional and local authorities. Active involvement of the SME community and companies themselves will be a key point. Entrepreneurs should also seize the opportunity offered by EU investment programmes. The strategy builds on the very strong foundations of the EU's existing SME policy framework and support programmes, notably the 2008 *Small Business Act*, the 2016 *Start-up and Scale-up Initiative*, the *Competitiveness for Small and Medium Enterprises* (COSME) Programme, and SME support actions funded under the *Horizon 2020* programme and the *European Structural Investment Funds* (The ERDF and ESF has reached out to over 900.000 and 500.000 SMEs in Europe, respectively). It will be instrumental to implementing, *inter alia*, the *European Green Deal*, *the Circular Economy Action Plan*, the *European Strategy for Data*, and the *European Social Pillar*. The strategy is also part of the industry package.

The case study described here will focus especially on the pillar of "access to financing and credit" and on the future development of the *European Fund for Strategic Investments*, specifically addressing the transition to a green and sustainable economy. Hence, the EU resources under scrutiny will mainly belong to two programmes: the Green Deal and InvestEU.

On the one side, Europe is the birthplace of green tech, and its leadership will depend on SMEs to spearhead the innovations in the green sector. This will be supported through the *European Green Deal Investment Plan* (COM(2020)21). Almost a quarter of SMEs in Europe already enable the transition by offering green products or services (*Eurobarometer on SMEs, resource efficiency and green markets*, 2017). Many SMEs (including social economy enterprises) are already doing a lot for the communities where they are based. But there are also major challenges. Some SMEs struggle with the transition towards more sustainable business models. A third of SMEs report that they face complex administrative and legal procedures when trying to make their business more resource-efficient. Yet, as awareness of risks related to climate and other environmental pressures increases and consumer preferences change, this transition to sustainable business practices and conduct is key for SMEs' continued competitiveness and growth. It is essential to support SMEs in this process and equip them with instruments to understand environmental risks and mitigate those covering specific sectors, including construction, plastics, electronics and agro-food.

On the other hand, access to finance is essential for SMEs to give them the investment needs for the transition. SMEs face a major finance gap of 20-35 billion euros in Europe despite substantial support programmes at the EU and national levels (debt financing gap per year during 2014-2018, see SWD(2018)320), and in some Member States access to finance remains one of the key problems they face (European Commission and European Central Bank, *Survey on the Access to Finance of Enterprises*, 2019). EU banking regulation must provide the foundation for a stable banking system that delivers adequate finance to all businesses. The EU banking package maintained the SME supporting factor and extended it to all loans provided to SMEs. The EC will ensure that any future financial market legislation takes account of the interests European SMEs and supports their uninterrupted access to a wide array of financing options. In 2014-2018, EU financial instruments helped mobilize EUR 100 billion in financing, notably for SMEs, in the form of debt and equity finance. The future EU Investment Plan is expected to support over 1 million SMEs. Through the SME window of InvestEU, the EC will build on the positive experiences from the existing EU SME guarantee schemes (COSME, Horizon 2020, the Creative Europe programme, and EU cohesion policy funds). The SME InvestEU window of will support equity financing for SMEs and small midcaps in areas of special EU policy interest such as space and defence, sustainability, digitalization, innovation, gender-smart financing, and deep and green tech.

The European Fund for Strategical Investments (EFSI) operated under the supervision of the EU Commission and was the central pillar of the last “Juncker” Investment Plan for Europe. The European Investment Bank (EIB) too has a key role, especially in the so-called EIB group (EIB and European Investment Fund, EIF). EIF has to support – as its central mission – Europe’s micro, small, and medium-sized businesses by helping them to access finance. The EIF designs and develops both venture and growth capital, as well as guarantee and microfinance instruments which specifically target this market segment. Hence, the EIB especially is called upon to manage directly the European resources that SMEs receive through national financial and banking intermediaries. The EIB and the EIF are able to take on a higher share of project risk, encouraging private finance providers to participate in the projects. The EFSI allows the EIB Group to finance operations riskier than its average investments. Often, EFSI-backed projects are highly innovative, undertaken by small companies without a credit history, or they pool smaller infrastructure needs by sector and geography. Supporting such projects required the EIB Group to develop new financing products, for example venture debt with equity features or investment platforms. This changed the DNA of the Bank and revolutionized the way Europe finances its priorities. Importantly, the EFSI also enables the EIB to approve a greater number of projects than would be possible without the EU budget guarantee’s backing, as well as to reach out to new clients: three out of four projects receiving EFSI backing are new to the bank. This proves the added value of EFSI operations. Thanks to EFSI support, the EIB and its subsidiary for financing small businesses and the EIF have provided financing for hundreds of thousands of SMEs across a wide range of sectors and in all EU countries (examples range from sustainable agriculture in Belgium, to innovative medical technology in Spain, to an energy efficiency company in Lithuania; see here).

4.2. The role of strategic investments supporting small and medium enterprises and the EIB in the Covid-19 crisis

As has been stated in the literature (Juergensen, Guimón, Narula, 2020), the continuing competitiveness of European manufacturing SMEs derives from their capacity to be innovative, more flexible, and more adaptable than their larger counterparts because of their small size, their tendency to be privately owned, and their relatively flat hierarchical structures, all of which can be beneficial during a crisis. However, because of their size and ownership structure, they also generally struggle with profitability and liquidity, thus becoming particularly vulnerable to external shocks (European Commission, 2019). In fact, crises such as the Covid-19 pandemic are likely to have a detrimental effect on SMEs (Laufs and Schwens 2014; OECD 2009), given their limited resources (human, financial and technical) compared to large firms (Martin *et al.*, 2019; Narula, 2004). This vulnerability became apparent in the aftermath of the 2008 global financial crisis. Hence, it is critically important to consider the role of manufacturing SMEs in recovery from the economic crisis associated with the Covid-19 pandemic. For example, survey data from May 2020 suggest that 41% of UK SMEs ceased operations, and 35% feared they would be unable to reopen again (FSB, 2020). In Germany, 50% of SMEs expected a negative effect due to the crisis, with one-third anticipating a decline in revenues of more than 10% (DIHK, 2020). In Italy, over 70% declared they were directly affected by the crisis (CNA, 2020). While SMEs in other European countries have voiced similar concerns (OECD, 2020), these firms are also highly heterogeneous along several dimensions.

SMEs experience “short-term” consequences because of the various national lockdowns. However, the biggest impact on their functioning will be in terms of “long-term” consequences, if no long-term public policy is taken into consideration.

Hence, during the Covid-19 outbreak, the EC mobilized financial support for SMEs through the COSME programme. In particular, it boosted the existing “Loan Guarantee Facility” (LGF) under the programme with additional resources from the European Fund for Strategic Investments to enable banks to offer bridge financing for SMEs. This includes long-term working capital loans (of 12 months or more), as well as credit holidays allowing for delayed repayments of existing loans. The measures have been made available through the European Investment Fund (EIF) by means of a call for expressions of interest for financial intermediaries open up to 30 June 2020. The measures were available current (at the time) COSME LGF financial intermediaries and new ones, providing higher risk cover, simplified eligibility criteria, and a fast approval process so that they could engage in new SME lending. SMEs then had the opportunity to apply for working capital facilities directly from the participating financial intermediaries. Additionally, EU countries, as well as national promotional and commercial banks were putting measures in place for adversely affected SMEs. They focused on facilitating financing, in particular working capital, and flexibility on repayments of existing loans. Lastly, The European Scale-up Action for Risk capital (ESCALAR) programme supported venture capital and growth financing to help promising companies scale up.

In terms of long-term public policies, policymakers will need to adopt a more proactive role, coordinating new industrial efforts to couple domestic capacities with the dynamics of Global Value Chains. The Covid-19 crisis may also act as an accelerator of digitalization and sustainability transitions, while spurring a renewed interest in emerging health technologies such as biotechnology and genetics. Policymakers will have to create new incentives for European firms to benefit from these opportunities. This calls for a new generation of demand-oriented innovation policies, such as strategic public procurement for innovation and investment in environmentally-oriented projects in the fields of renewable energy, transport infrastructure, and information technologies (Juergensen, Guimón, Narula, 2020).

Thus, already over the past years, and especially after the coronavirus outbreak, the focus of the EFSI shifted: it has inspired InvestEU, the Commission’s new investment programme for the years 2021-2027 (see Task 1, D.2). The EFSI of the future will also play a key role in the Next Generation EU package of measures to rebuild the European economy after the coronavirus shock. For example, it will do this via a top-up for a *Solvency Support Instrument*, which aims to prevent insolvency in European businesses. More generally, the InvestEU Programme will bring together under one roof the multitude of EU financial instruments currently available to support investment in the EU, making funding for investment projects in Europe simpler, more efficient, and more flexible. It will then support four policy areas that represent important policy priorities for the Union and bring high EU added value: sustainable infrastructure; research, innovation and digitization; small and medium-sized businesses (€6.9 billion); and social investment and skills. Thus, for example, it will help mobilize private investments for the European Green Deal and the digital transition. It will take resources from the Next Generation EU package and the new MFF 2021-2027 (the guarantee amounts to €26.2 billion, and the overall investment to be mobilized on this basis is estimated at over €372 billion). The guarantee will be open to the EIB Group and also to National Promotional Banks and

Institutions (NPBIs) as well as other International Financial Institutions (such as the European Bank for Reconstruction and Development (EBRD). In addition, Member States will be able to use InvestEU as a tool to implement their recovery and resilience plans under the Recovery and Resilience Facility (RRF), if they wish. Concretely, funds from RRF allocations may be channeled through Member State compartments under InvestEU to help with the implementation of the Member States' Recovery and Resilience Plans while respecting the Plan's milestones and targets. Member States can also contribute through structural funds. In all these ways, they will benefit from the EU guarantee and its high credit rating, giving national and regional investments more strength.

The European Green Deal (COM/2019/640), to be coordinated with the new European Industrial Strategy, will be based on a pool of different resources. In particular, it will benefit from a Just Transition Mechanism (especially with the involvement of the EIB), comprising resources from InvestEU, the Just Transition Fund (with special attention, again, to the development and support of green SMEs), Horizon2027, and dedicated resources in the field of cohesion policies and the Recovery package – these too among the Next Generation EU programmes. In total, it is estimated that around 37% of the Next Generation EU package will be redirected to the EU Green Deal.

4.3. Use of strategic investments supporting small and medium enterprises as part of the Green Deal (under EIB activity) and the risk of fraud affecting the EU financial interest

By way of clarification, on the one hand, there are national fiscal measures aimed at strengthening not only the healthcare systems but especially to support firms, particularly SMEs (here, 19). These will be complemented by direct and indirect funds to support investments. On the other hand, EU and national authorities have also adopted supervisory and regulatory measures to guarantee banks' continued support of the economy. The European Banking Authority (EBA) has affirmed in its 2020 Risk Assessment of the European banking system that in the early stages of the COVID-19 outbreak, non-financial corporations (NFCs), especially small and medium-sized enterprises (SMEs), used available loan commitments to secure liquidity and operational continuity. Later on, credit demand was mostly driven by government-guaranteed loans. The increase in lending, along with the surge in cash balances subsequent to central bank extraordinary liquidity allotments, resulted in a 7% increase in total assets year on year (YoY). Looking forward, the question of whether banks maintain adequate lending volumes will be important, particularly when public guarantee schemes (PGS) for new lending end (here, 10). Hence, other measures were introduced, earlier than originally planned, to incentivize banks to finance SMEs by extending the scope of the SME supporting factor (here, 19).

Hence, capital support for SMEs is especially open under all the policy windows of InvestEU, and it will therefore contribute to the EU priorities concerning the green and digital transitions.

Specifically, the InvestEU Regulation provides that the InvestEU fund as a whole will target at least 30% of investment contributing to climate objectives. Under the sustainable infrastructure policy window, at least 60% of the investment will contribute to meeting the Union objectives on climate and environment.

Such financing may be provided directly by the EIB, the EIF, the EBRD, or National Promotional Banks, or else through financial intermediaries or dedicated vehicles. An implementing partner will have to propose – under one or more of the policy windows – a financial product that aiming to deliver capital support for SMEs and building a portfolio of operations. The financing provided will be partially covered by EU guarantee. SMEs are eligible if they operate in one of the areas identified in Annex II of the InvestEU Regulation and do not carry out activities excluded by the list in Annex V, point B, of the InvestEU Regulation. Financing will typically take place through financial intermediaries that obtain equity participations, convertible loans, and other equity-type financing. These intermediaries would typically be independent, commercially-run fund managers that select companies with adequate return prospects driven by a commercial logic when selecting companies in which to invest or provide other forms of financing. InvestEU intervention will be on commercial terms and will crowd in private investors.

As in the case of EFSI, a Steering Board will give strategic direction on implementing the programme. It will be composed of the Commission (4 members), the EIB Group (3 members), and other implementing partners (2 members) as well as a non-voting expert appointed by the European Parliament. The Steering Board will strive to make its decisions by consensus. The Steering Board will be assisted by an Advisory Board composed of representatives of the Commission, the implementing partners (one member each), and Member States (one member each). In addition, the Committee of the Regions and the Economic and Social Committee will have one member each. The Commission will be able to consult this board when preparing and designing new financial products or following market developments and share information. This Advisory Board will be able to issue recommendations to the Steering Board on the implementation and functioning of the InvestEU programme. An Investment Committee composed of independent experts will be responsible for approving individual applications to use the InvestEU guarantee based on compliance with the eligibility criteria set by the Regulation and the Investment Guidelines. The Investment Committee will be supported by a secretariat, staffed by, and located in, the Commission. The Committee's decisions must be made independently, with no political interference.

Hence, together with the EC, the EIB is the leading institution and, notwithstanding its double nature (as a private credit entity and, at the same time, a European institution), it is also subjected to anti-fraud policy, and it operates in close connection with OLAF and national authorities active in the fight against (in this case, mainly financial) fraud. The fight against fraud will be even more relevant considering the additional resources after the Covid-19 outbreak and the involvement of Member States through funds in shared management. Just to cite an example, the EIB Group will issue a €795 million guarantee to the global bank ING to support new lending to SMEs and mid-caps to mitigate impact from the pandemic. In addition, ING has committed to grant new loans and leases for a substantial amount at a favourable interest rate to support the new investments and growth opportunities of Dutch SMEs and mid-caps. This transaction with ING is part of the EIB Group’s Covid-19 response, announced in March 2020. This was meant to help companies manage the current crisis. Through this arrangement, ING commits to make €1.1 billion of new lending available during these difficult economic conditions. Under agreements between ING and the EIB Group, favourable lending conditions will apply to €702 million of this total amount. Part of the transaction is supported by the EFSI. The guarantee is provided in the form of a synthetic securitization in which ING will retain a first-loss-piece of the guaranteed portfolio, with EIF backing up the senior and mezzanine tranches. In turn, the EIB will counter-guarantee the EIF for the mezzanine tranche and part of the senior tranche.

4.3.1. EIB Anti-Fraud Policy

The legal basis for the EIB Anti-Fraud Policy and the authority for EIB to conduct investigations stems from Art. 325 of the Treaty on the Functioning of the European Union (TFEU), Article 18 of the EIB Statute, Council Regulation (EC, Euratom) No 966/2012 of 25 October 2012, and the EIB Board of Governors' Decision of 27 July 2004 concerning EIB's co-operation with OLAF.

Created by the Treaty of Rome, the EIB is the financing body of the European Union. As such, the Bank operates in accordance with the EU legal framework and is bound by Article 18 of the EIB Statute, which states that: "In its financing operations, the Bank shall […] ensure that its funds are employed as rationally as possible in the interests of the Union". The Bank therefore ensures that its loans are used for the intended purposes (see EIB, *Anti-Fraud Policy*. *Policy on preventing and deterring prohibited conduct in European Investment Bank activities,* 2013, still in force). Members of EIB governing bodies and staff, as well as its project related parties, counterparts and partners must maintain the highest level of integrity and efficiency in all EIB activities. This policy applies to all the EIB's activities, including projects it finances using third party resources and procurement on the Bank's own account. It applies, specifically, to the following persons and entities: members of its Board of Directors, its Management Committee, staff and consultants, without regard to their position, rank, or length of service; borrowers, promoters, contractors, sub-contractors, consultants, suppliers, and beneficiaries (as the case may be), and – in general – relevant persons or entities involved in EIB-financed activities, as well as consultants, suppliers, service providers and other persons or entities procured by the EIB on its own account, and all counterparties and others through which the EIB deals in its borrowing or treasury activities.

In this general context, the Bank endeavours to ensure that its activities are free from "Prohibited Conducts" (corruption, fraud, coercion, collusion, obstruction, money laundering and financing of terrorism defined as follows, see point No. 10, EIB, *Anti-Fraud Policy,* 2013). Consequently, the Bank will work to prevent and deter Prohibited Conducts from occurring, and, if it *does* occur, will address it in a timely and expeditious manner. To this end, investigation procedures must also be adopted. Any Prohibited Conduct is to be reported promptly and investigated thoroughly and fairly; wrongdoers are to be sanctioned in accordance with applicable policies and procedures, and appropriate legal steps are to be taken to recover misapplied funds. For example, the EIB's Guide to Procurement contains a number of measures to ensure transparency and integrity in procurement, and EIB's financing documentation will contain appropriate contractual rights of inspection and access to information for the Bank and other competent EU institutions. The EIB's operational departments are the first line of protection in preventing Prohibited Conduct through the project appraisal process. They are also the first line of detection for possible integrity concerns during the project appraisal process, given their knowledge of the potential promoters, borrowers, and circumstances in which the project is to be undertaken. Integrity concerns arising during the loan appraisal process must be reported in a timely manner to the Chief Compliance Officer of the EIB.

Through its Fraud Investigations Division, the Bank's Inspectorate General investigates allegations of Prohibited Conduct. The Bank therefore has the duty, to the extent necessary to verify compliance with applicable EU legislation and, as the case may be, in compliance with Article 325 TFEU, to conduct all investigations and take all necessary measures in order to prevent and deter Prohibited Conduct in relation to EIB activities and, in so doing, ensure rational use of the Bank's funds in the interest of the Union. Outside the European Union, where the EU public procurement Directives, are not applicable, the EIB has implemented a number of significant measures to ensure that equivalent standards of protection and measures to prevent and deter Prohibited Conduct exist as within the EU.

Fraud Investigations work in close partnership with OLAF. The former is responsible for receiving reports of alleged or suspected Prohibited Conduct involving the EIB's activities or its governing bodies and staff. It also investigates such matters and cooperates directly with OLAF in order to facilitate its investigations. In addition, it reports its findings to the President, OLAF, and the

Audit Committee, which has an oversight function, as well as any other staff member on a need-to-know basis. When conducting internal investigations into allegations relating to EIB governing bodies and staff that could result in disciplinary or criminal proceedings, OLAF will request (unless it considers it harmful for the investigation) co-operation from the EIB's Fraud Investigations Division. For situations requiring an urgent response, the Fraud Investigations Division may, in consultation with OLAF, take any necessary measures required for the investigation, notably to preserve evidence. The Fraud Investigations Division will enjoy complete independence in the exercise of its responsibilities. Without prejudice to the powers conferred on OLAF, the Head of the Fraud Investigations Division will have full authority to open, pursue, close, and report on any investigation within its remit without prior notice to, consent of, or interference from, any other person or entity.

The Fraud Investigations Division may refer suspected prohibited conduct to national authorities within and/or outside the EU for further investigation and/or criminal prosecution, providing further assistance as requested. However, if OLAF has conducted an investigation, the Office transmits its final report to the competent authorities where appropriate. If an investigation into suspected prohibited conduct is initiated by a national authority and may involve EIB financing, the Fraud Investigations Division will – in consultation with the services – liaise with, and provide appropriate assistance to, the national authorities. In the event of an investigation by judicial, administrative, legal, law enforcement or tax authorities, the Fraud Investigations Division may decide to await the results of the investigation and request a copy of their findings before taking further action.

Considering the importance of the EIF in the EIB group, it is relevant to observe that the *EIF Anti-Fraud Policy*, 201 is also available. In 2017, the *EIB Fraud Investigations Division Charter* (IG/IN) was adopted. This sets out the mission, scope, authority, and core principles of the Fraud Investigations Division of the European Investment Bank, acting also, insofar as powers are entrusted to it, through the European Investment Fund, for the entire European Investment Bank Group. This document collects and summarizes in one document the various EIB Group policy statements concerning the work of the IG/IN (such as those in the EIB Anti-Fraud Policy, the EIF Anti-Fraud Policy, the IG/IN Investigation Procedures, the EIB Whistleblowing Policy, the EIF Whistleblowing Policy, and the Uniform Framework for Preventing and Combating Fraud and Corruption). In the event of conflict between the Charter and a policy or a question of interpreting the Charter, the respective EIB and EIF policies prevail. Recently, the Intake and Analysis Unit and the Investigations Unit were created (2018) to improve the investigation workflow, increase case management efficiency, and better allocate investigation resources. The Fraud Detection/Proactive Integrity Reviews Unit was created in 2019. Rather than on specific allegations, this unit relies on system-based data-driven models to identify the risks of prohibited conduct and other vulnerabilities within EIB Group projects and transactions. The Policy area works closely with the other units to develop and keep the Group's anti-fraud policy framework up to date while ensuring its overall implementation. It also advises other EIB Group services on prohibited conduct and related issues, as well as coordinating fraud and corruption awareness activities.

4.3.2. Relevant data on irregularities and fraud affecting the EIB's activity, also at Member State level: cases involving SMEs in the 2019 report, the Covid-19 year, and future risks under new programmes for SMEs and the Green Deal

The *2019 Activity Report on fraud investigations*, published by the EIB in 2020, begins by affirming that fraud and corruption can affect countries, regions and organizations, and the EIB Group is no exception. Fraud and corruption divert funds needed for the climate and innovation. They can curtail much-needed resources for health, and they can wipe out social benefits or undermine public trust in investments. With the COVID-19 crisis, this has never been more relevant, and the EIB Group will continue to remain vigilant regarding these situations.

In 2019, IG/IN registered 228 new allegations and worked on 472 cases (including cases carried over from 2018). This represents an increase of 24% in the number of allegations referred to IG/IN compared with 2018. IG/IN carried out a total of 58 investigative missions to countries inside and outside the EU. 69% of allegations came from EIB Group staff members, 30% from external sources such as other European institutions or bodies, national authorities, international organizations, project-related parties, civil society, and the media. The remaining 1% came from anonymous sources. While the reports from external sources have remained stable over the last few years, the number of reports from EIB Group staff members increased from 54 in 2015 to 158 in 2019. This increased number can be explained by the enhanced awareness programme implemented by the Fraud Investigations Division on the risks posed by fraud and corruption. The Fraud Investigations Division receives allegations of prohibited conduct from multiple internal and external sources. It can also initiate the opening of cases arising from press reports or proactive fraud detection findings. When the Intake and Analysis Unit determines that an allegation warrants the opening of an investigation, the case is passed on to the Investigations Unit of the division. Investigations targeting cases of common interest are conducted in close co-operation with OLAF and other international financial institutions, including joint or parallel investigations. The Investigations Unit also coordinates with national authorities whenever relevant. As of December 2019, of the 228 cases registered in 2019, 34% proceeded to investigation, 41% were completed during assessment, and 25% were still under assessment. 40 out of the 220 cases completed in 2019 (18%) were substantiated, leading to the issuance of recommendations to EIB Group services and/or referrals to the competent authorities. In any case, 51% of the incoming allegations related to EIB projects in 2019 involved activities outside the EU.

Fraud and corruption within EIB Group operations are the most common types of allegations received by the Fraud Investigations Division while the sector most impacted by incoming allegations on EIB projects in 2019 was Transport, followed by "Industry services, health, education, agriculture" and "Water, sewerage, solid waste, then by "Energy" and "SMEs" (the results are consistent with the data collected over the last six years and the volume of EIB investments in these sectors).

Based on the outcome of its assessments and investigations, the Fraud Investigations Division refers relevant cases to OLAF, national authorities, the Luxembourg Financial Intelligence Unit (FIU), investigative bodies, and other EIB Group services. However, there are limits to what the EIB Group can achieve on its own and within its mandate. Referrals of cases to relevant authorities serve to integrate capabilities and mandates between the EIB, OLAF, national authorities, and the FIU. If, during an investigation, the EIB Group suspects that the laws of a country have been violated, the Group should also promptly inform the relevant national authorities and ask them to run their own assessment. IG/IN's co-operation and information sharing with national authorities continued in 2019 with the signing of six Memoranda of Understanding with the Bulgarian Public Prosecutor's Office, the Italian General Prosecutor's Office (in addition to the National Anti-Corruption Authority), the Spanish Public Prosecutor's Office, the Lithuanian Financial Crime Investigation Service, the Serbia Public Prosecutor, and the Government Office of the Slovak Republic.

The annual document reports several examples of irregularities and fraud, following different schemes. For example, an external source informed IG/IN that a national railway company and a local company were under investigation by the national authorities for potential involvement in a case of fraud, corruption and money laundering. These two companies were involved in several ongoing EIB projects. IG/IN met with the national authorities, which provided results from a judicial and tax evasion investigation. Based on this information, it was possible to conclude that EIB financing was not involved in the national investigations. The collaboration between IG/IN and national authorities allowed the Bank to confirm that EIB funds were not involved in the tax evasion scheme. Furthermore, EIB signed a Memorandum of Understanding with the relevant authority in order to facilitate future co-operation and information exchange. In a different scheme, IG/IN successfully operated with OLAF and investigated the role played by a consultant in relation to the supply of medical equipment to projects financed by the EIB and another international financial institution. The investigation found evidence of corruption and tender manipulation by the consultant in two EIB-financed contracts. As a result of national criminal proceedings, the illicit funds have been recovered and the consultant was sentenced to six years in prison for corruption.

In addition to investigations that follow a "red flag", IG/IN specifically selects projects for an in-depth review, known as the Proactive Integrity Review, using its risk assessment tool (the so-called FIRST). The projects selected are not usually the subject of an allegation, but are often implemented in challenging conditions. Once selected for review, IG/IN analyses these projects to identify indicators of fraud and corruption through a detailed review of project implementation. In particular, the Proactive Integrity Reviews aim to check: (i) the procurement processes followed by promoters in the context of investment or framework loans, as well as the quality of the works and services procured; and (ii) credit procedures followed by financial intermediaries (banks, public support lending agencies) in the context of multi-beneficiary intermediated loans, as well as the eligibility and actual use of on-lent funds by the final beneficiaries.

In conclusion, these examples and schemes give an idea of the complexity to be addressed once European and National institutions are engaged in the fight against fraud and the protection of their public financial interest. As for financing for SMEs by European institutions (such as EIB, considering its key role in the future) and national authorities (in or outside a European shared administration framework), the number of actors and the sectors involved complicate the picture even more. For example, one has to consider that European and national credit and bank sectors are involved, so the financial offences are perpetrated by intermediaries. The perspective is probably even riskier if one imagines that resources will be invested what, for many national banking systems, are innovative and non-traditional sectors, such as the world of environmental sustainability. For this reason, the expertise of some banking institutions (such as the EIB, together with its memoranda with national authorities) will be even more crucial, also in terms of fighting irregularities and fraud. Another area to pay special attention to will be that of the beneficiaries, considering that in the area of this case study these are locally rooted SMEs, with all their cultural specificities, such as a high propensity for criminal activities. These two perspectives – financial intermediaries and beneficiaries' behaviour (especially in the light of EIB projects) – will be the special target of observations for the national facet of this third case study.

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CONCLUDING REMARKS

The research conducted so far shows that both the EU budget and the control mechanisms to protect EU financial interests are constantly changing.

The European integration project has been severely tested by the covid-19 crisis. In the new EU budget framework 2021-2027 there are two big innovations. On the whole, Next Generation EU can be considered good and balanced, increasing risk-sharing and reversing the austerity approach of the 2008 financial crisis. On the other hand, it has renewed legislative debate on the Union's resources. In particular, this debate revolves around the aim of simplifying the framework of the EU's resources. Furthermore, the EU and the Member States need to be able to balance the rapid use of funds with the protection of the EU's financial interests. In other words, EU institutions and Member States face the challenge of spending well, shortening times, and avoiding fraud relating to the EU's financial interests. In addition, the anti-fraud system will operate in a whole new context in which structural problems have been exacerbated by the covid-19 crisis.

In this context, collaboration between the EPPO, OLAF and the Member States will be fundamental to protect the financial interests of the EU, but cooperation between the different levels appears difficult to achieve, and the establishment of the EPPO raises several problems. Essentially, there are two particularly problematic areas. On the one hand, cooperation between the EPPO and OLAF, and, on the other, the EPPO's relationship and coexistence with national prosecutors.

Several criticisms have been raised regarding relations between the two main bodies involved in the protection of financial interests: OLAF and EPPO. Specific weaknesses in the cooperation, especially when cases of complementary investigations emerge, will have to be addressed in the framework of a working agreement. But in more general terms, it is the role of the administrative arm of the system that needs to be re-evaluated in a context in which the EPPO becomes operational. From this viewpoint, it has been argued that – in theory – two visions of the role of OLAF could be conceived. On the one hand, OLAF could become an "investigative arm of the EPPO", which responds to the priorities and orders of the EPPO; on the other, OLAF and the EPPO should function as two autonomous bodies, while the main operational support for the EPPO should come from the national authorities.

The functioning of the EPPO is permeated by extensive use of national law and the authorities of the Member States. Therefore, the efficiency and effectiveness of the EPPO depend both on the proper functioning of the national judicial system and the clear division of competences in relation to national prosecutors. Regarding the first argument, two questions arise. The first is that the independence of the EPPO is hampered in several national systems, such as Belgium, France, and the Netherlands, where there is a hierarchical relationship between the prosecutor and the executive power, so that that legislative reform is now required regarding PIF investigations to preserve the autonomous exercise of the European criminal function. The second question relates to the intrinsic characteristic of the EPPO Regulation, which aims to unify – for the first time in EU law – the preliminary phase of criminal proceedings: the phase that goes from the beginning of the official investigations to the trial. The problem is this procedural stage is regulated in different ways throughout Europe. In France, for example, the investigating judge investigates serious crimes, assuming a dual and ambiguous role of both investigator and judge. In such national systems, therefore, the need to ensure the coherent and rapid conduct of EPPO investigations may suggest legislative changes to strengthen the investigative autonomy of prosecutors acting as EDP in the PIF domain (Ligeti, 2020, 47 ff.). Improvement of the protection of EU financial interests will come about from the improvement of cooperation between the Member States and the EPPO.

Finally, from the case studies (rescEU, SURE and strategic investments supporting small and medium enterprises in the green sector), it emerges that EU action has partially supported the effort of the Member States. Delays in providing resources, such as medical devices provided by rescEU, have caused difficulties for Member States, which, as we will see in deliverable D1, have had to put in place national emergency measures to find what is necessary to counter the crisis. Furthermore, SURE and the large-scale use of strategic investments supporting small and medium enterprises in the green sector have increased both the variety of forms of financing and the complexity of distributing EU funds. These problems can certainly make it difficult to control and protect the financial interests of the EU. For an in-depth analysis of these critical issues, we refer to the work completed in deliverable D1.