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THE ANTI-FRAUD MEASURES IN THE RECOVERY AND RESILIENCE FACILITY AND IN
NATIONAL RECOVERY AND RESILIENCE PLANS

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Abstract

This paper will analyse the most important anti-fraud measures contained in the RRF Regulation and in NRRPs.

Firstly, it will examine the main questions on the protection of the EU's financial interests posed by the RRF Regulation. This evaluation will be conducted with regards to both the specific budgetary measures and all spending areas. The purpose is to evaluate whether, and to what extent, the safeguarding of the EU's financial interests in the NGEU is carried out with different tools in comparison to the other Union funds.

Secondly, it will identify the level playing field of the protection of the EU's financial interest resulting from the NRRPs. It will examine the dimensions of this level playing field and determine to what extent, and with what regulatory results, it has been implemented in these regards by the Member States.

Thirdly, it will explain the different roles of OLAF and the EPPO in the protection of EU' financial interests under the RRF and NRRPs and the expected results of their interconnection.

Keywords:

Recovery and Resilience Facility - National Recovery and Resilience Plans - EU Financial Interests – Anti-Fraud Measures - OLAF – EPPO

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I. Introduction

The Next Generation EU (NGEU) plan is the Union's most important response to the economic problems generated by the Covid-19 pandemic. Compared, for its impact on economic and social cohesion, to the *New Deal* and the *Marshall Plan*, its resources are destined to relaunch reforms, investments and growth, supporting the modernisation of the Union, especially through the climate and digital transition.

Operationally, in order to finance the NGEU, the European Commission - on behalf of the EU - raises funds in the international financial market. These funds are shared between the Member States in relation to structural - such as population - and contingent - such as the loss of GDP following the health emergency - variables. Legally, this has been established, among others, by the Recovery and Resilience Facility Regulation (RRF) which represents the most important part - in financial terms - of the NGEUⁱ.

The NGEU has been implemented through the National Recovery and Resilience Plans (NRRPs), each of them having been endorsed by the European Commission and approved by the Council. A specific delivery mechanism has been provided by the RRF Regulation. Member States will receive the accorded financial support – loans and grants – subject to the implementation of reforms and investments outlined in their NRRPs. The European Commission will make payments subject to the fulfilment of milestones and targets reflecting progress on these reforms and investments. As a result, payments will be linked to the performance of the Member States and not directly to the ultimate costsⁱⁱ.

The NGEU has been promulgated with the aim of ensuring that the EU's financial interests are adequately protected. This protection, in general terms, can be pursued at two different levels. The first is that of the Union. The second is that of the Member States. Indeed, article 325, para. 1 TFEU, affirms that «the Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union (...)». At first sight, with reference to the NGEU, this should be pursued jointly by the Union and the Member States. RRF Regulation, on the other hand, assigns this task only to Member States since they are solely responsible for the implementation of the measures contained in the NRRPs.

II. The protection of the EU's financial interests in the RRF Regulation

RRF Regulation poses a set of questions concerning the protection of the EU's financial interests. Among the others, the first one is about the “management mode” for the measures to be implemented in order to do this. Within this ambit, the starting point is article 62, para. 1, Regulation 2018/1046ⁱⁱⁱ. It provides three different methods of budget implementation: i) “direct management” by Commission departments and Union delegations; ii) “shared management” with Member States; iii) “indirect management” by entrusting budget implementation tasks to certain EU entities, Member States organisations, third countries or international organisations. In any case, the “management mode” has a relevant impact not only on the mere implementation of the funds but also on the related control and anti-fraud framework. Even if article 8, RRF establishes that measures “shall be implemented by the Commission in direct management” there are many differences in comparison to other programmes run under this mode. The most important concerns the nature of the immediate beneficiary. While the latter is, generally, a natural person or entity - including private enterprises - article 22, para. 1 RRF affirms that it is a Member State.

The second question concerns the balance of responsibility between the Member States and the Union in the protection of the EU's financial interests. Formally, article 22 RRF assigns the task of the protection of the pertinent EU financial interests to Member States. Indeed, para. 1 provides that “(...) the Member States, (...), shall take all the appropriate measures to protect the financial interests of the Union and to ensure that the use of funds (...) complies with the applicable Union and national law, in particular regarding the prevention, detection and correction of fraud, corruption and conflicts of interests. To this effect, the Member States shall provide an effective and efficient internal control system and the recovery of amounts wrongly paid or incorrectly used. Member States may rely on their regular national budget management systems”. The rule clarifies the responsibility of Member States above and beyond the implementation of the measures, providing them the specific obligation to protect the EU's financial interests in their entirety. It also identifies national control systems as the main instrument for the safeguard at issue. Substantially, para. 2, lett. e) also establishes specific tasks for certain EU bodies although they must always be carried out through an activity of the Member States. Indeed, the latter have the duty “to expressly authorise the Commission, OLAF, the Court of Auditors and, where applicable, EPPO to exert their rights (...) and to impose obligations on all final recipients of funds paid for the measures for the implementation of reforms and investment projects included in the recovery and resilience plan, or to all other persons or entities involved in their implementation to expressly authorise the Commission, OLAF, the Court of Auditors and, where applicable, EPPO to exert their rights (...) and to impose

similar obligations on all final recipients of funds disbursed". The RRF Regulation confirms that the competence of EU control and investigation institutions and bodies applies through the explicit and specific conferral of power set up for the purpose. Within this ambit, it refers to the principle of cooperation for protection of the financial interest of the Union enshrined in article 129, para. 1 of the Financial Regulation. It consists in the need to expressly authorise in financial agreements the power of the Commission, OLAF, the Court of Auditors and, where applicable, the European Public Prosecutor's Office to exert their own competences. Therefore, Member States must ensure that the rights at issue are effectively "cascaded down" to the final recipients of funds.

The third question is about the concept of "serious irregularities". The RRF Regulation introduces their notion which cannot be found as such in the rules previously adopted with regard to the protection of the EU financial interests. Recital 53 of the RRF Regulation defines them as "fraud, corruption and conflicts of interest in relation to the measures supported by the Facility". This definition makes it possible to overcome the old dichotomy between "criminal" and "administrative" profiles of conduct used in other acts relating to the matter in question, such as in the annual reports on the protection of the EU's financial interests. The latter, in fact, are limited to the distinction between "fraudulent irregularities" and "non-fraudulent irregularities". Following the conventional logic of many jurisdictions, cases of "fraud" and "corruption" would fall into the "criminal" category while "conflicts of interest" should be included in the "administrative" one. In any case, with reference to the RRF Regulation, this somewhat articulated tripartition of categories is brought back to unity and the commission of one of this implies the same responsibility. As a result - and as part of the national level of the protection of the EU's financial interests - Member States are supposed to lay out in their NRRPs their systems to prevent, detect and correct serious irregularities, regardless of the category in which they are configured. The Commission, in turn - as stated in article 19, para. 3, lett. j) - and as part of the EU level of the protection of the EU's financial interests, shall assess the efficiency of the NRRPs evaluating the measures outlined in them. Furthermore - as stated in article 22, para. 5 RRF Regulation - it can reduce proportionately the financial support under and recover any amount due to the Union budget or ask for early repayment of the loan, in cases of fraud, corruption, and conflicts of interests, i.e. "serious irregularities" affecting the financial interests of the Union that have not been corrected by the Member State, or a serious breach of an obligation resulting from such agreements. This must be carried out under the principle of proportionality enshrined in article 5, para. 4 TEU for which "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". With reference to the present issue, it implies that the decisions on the amount of the recovery and reduction, or the amount to be repaid early, shall take into account the seriousness of the fraud, corruption and conflict of interests affecting the EU's financial interests, or of a breach of an obligation. Finally, the Member State can present its observations before the reduction is made or early repayment is requested.

The fourth question refers to the collection of data provided in article 22, para. 2, lett. d) sub. ii). It contains an explicit requirement for Member States to collect certain of them such as the names of final recipients, contractors, sub-contractors, and beneficial owners of RRF expenditure. This constitutes a true and significant novelty compared, for instance, to the rules in the Multiannual Financial Framework 2014-2020. This has been introduced in accordance to the method "follow the money" which is, nowadays, crucial in financial investigations. It is of particular value in the fight against fraud, keeping in mind, moreover, the performance-based nature of the RRF.

III. The main innovation introduced by the RRF

An important innovation in the protection of EU's financial interests contained in the RRF Regulation is the drafting of NRRPs in advance of the disbursement of funds. In light of the performance-based nature of the mechanism, their main objective is to describe and develop the predicted reforms and investments, including corresponding milestones and targets. Anti-fraud measures must also be analysed under the same mechanism. Indeed, the NRRPs must contain the definition of the respective proposed systems to prevent, detect, and correct serious irregularities as well as the arrangements taken in order to avoid double funding from both the Facility and other EU programmes. The Commission subsequently assesses the measures outlined in each NRRP and does the same before each disbursement. Through this competence, the Commission also fulfils its task of performing an *ex-ante* check of the Member States' audit and control systems within the ambit of the RRF.

As a result - in accordance with article 2.10, Annex I, RRF Regulation - the Commission, for the assessment of the NRRPs, shall take into account whether: i) the internal control system described in them is based on robust processes and structures and identifies clear actors (bodies/entities) and the respective roles and

responsibilities for the performance of the internal control tasks; ii) control system and other relevant arrangements described in the NRRPs, in particular to prevent, detect and correct corruption, fraud and conflicts of interests - when using the funds provided under the Facility - are adequate. As a result, when a NRRP fails the evaluation at issue with regard to the audit and control performances, it fails in its entirety and, therefore, transversely, albeit in compliance with the above-mentioned principle of proportionality. These consequences reflect the meaning and the scope connected to the anti-fraud measure within the framework of the NRRP.

IV. The level playing field

The comparative analysis of audit and control arrangements in NRRPs makes it possible to identify a level playing field of the protection of the EU's financial interests resulting from the NRRPs themselves. Member States generally make use of control systems and bodies that already exist and operate with reference to national budgetary procedures and/or shared management with the Union. As the RRF represents an additional source of funding for them - that already receive contributions from other Union funds - the pressure on these management and control systems will increase significantly. However, the somewhat narrow implementation deadline for RRF spending by 2026 could contribute to increasing this pressure^{iv}.

For some Member States, the Commission will have to specifically monitor the implementation of those measures which, although approved in the NRRPs, still need to be developed. This concerns, for example, the definition of new rules or the introduction of technical adjustments to the IT systems for data collection concerning the final recipients of the funds. This monitoring will be carried out in conjunction with the targets and milestones established in the NRRPs which must be achieved and documented prior to the first disbursement. Within this ambit, the importance of implementing additional anti-fraud measures, such as training and awareness raising, should be stressed.

Since the RRF Regulation does not provide for the use of a common IT tool for the collection and storage of data concerning the final recipients of the funds, Member States are required to make these activities on their own. Although the EU institutions will have access to these data upon request, the efficiency and effectiveness of this two-tier structure has yet to be assessed. In any case, it will depend on the level of cooperation between the national and EU structures on this matter. Finally, the Commission recommends carrying out the risk analysis through the ARACHNE system as the only data mining and risk scoring tool^v. Several Member States have announced that they intend to use this system for RRF purposes. For Member States that continue to rely on national systems, the Commission will need to ensure that this does not undermine the ability to analyze risk patterns/trends and identify risky beneficiaries. In any case, consistent and homogenous use of ARACHNE by all Member States in the long term would certainly bring significant benefits.

V. The role of OLAF

In 1999, the Commission set up the European Anti-Fraud Office (OLAF) in order to investigate fraud, corruption and any other illegal activities affecting the financial interests of the EU. It helps Member States prevent and fight fraud^{vi}. Regulation No 883/2013 sets out its investigative remit^{vii}. Its mandate includes, about other things: i) to conduct independent investigations into fraud and corruption involving EU funds so as to ensure that EU taxpayers' money reaches projects that can stimulate the creation of jobs and growth in the Union; ii) to develop EU policies to counter fraud. It is competent for investigative matters relating to fraud, corruption and other illegal activities affecting EU financial interests regarding all EU expenditure. The main spending categories are NGEU and European Structural and Investment Funds.

Although it has no prosecutorial power, OLAF has several investigative tools at its disposal, including the authority to conduct "on-the-spot checks" and to interview witnesses and persons concerned.

Upon completion of an investigation, it makes appropriate judicial, administrative, financial and/or disciplinary recommendations to EU entities and to Member States. Judicial recommendations are referrals that OLAF makes to local law enforcement partners in the Member States to prosecute individuals and / or entities for fraud against the EU under national laws and procedures. Administrative recommendations are proposed to Member States to improve policies or procedures to prevent a repeat of misappropriation and fraudulent EU funds. The financial recommendations aim at the recovery by the EU institutions from the Member States of EU funds embezzled. Finally, Disciplinary recommendations outline proposed corrective measures that EU institutions must take against EU officials and staff or members of EU institutions who have violated the rules of professional conduct. In any case, although it can make recommendations, it does not have

the authority to oblige the EU institutions or Member States to implement them. However, it monitors implementation and records and analyzes the results of the recommendations followed.

OLAF played an active role in providing anti-fraud advice to the relevant Commission departments and the national authorities in the preparation of the pertinent chapters of their NRRPs. In particular, it has provided its input on whether the control and audit mechanisms established in them had the adequate solidity to protect the EU's financial interests, with the aim of ensuring that the measures were as effective, efficient and operational as possible. It also had a significant role in the screening and assessment of NRRPs^{viii}. So far, the NRRPs of 24 Member States have been adopted^{ix}. This confirms that, in general, they have included audit and control arrangements in their respective NRRPs which transpose the specific provisions of the RRF Regulation.

The measures to protect the EU's financial interests have been the subject of a first, experimental phase of use, corresponding to the verification, by the Commission, of fulfilment of a group of milestones and targets reflecting progress on reforms and investments of NRRPs. Indeed, upon completion of the relevant agreed milestones and targets indicated in their NRRPs, the Member States will present a request to the Commission for a disbursement of financial support. Within this phase, OLAF fulfills its mandate by carrying out administrative inquiries into the expenditure incurred in implementing the measures provided for in the NRRPs. This kind of activity, moreover, has already been carried out by OLAF in the other sectors in which the EU intervenes through funding. OLAF will also provide financial support to Member States for the implementation of anti-fraud measures through a specific funding instrument, the Union Anti-Fraud Program^x. In addition to the traditional activities concerning the protection of the EU's financial interests, further activities will be needed to guarantee these interests with specific respect to the RRF. To this end, a major work of OLAF aimed at cooperation with national authorities and its partners at EU level, such as Europol and, where appropriate, EPPO is desirable. The possible forms of this cooperation are manifold. For example, based on past shared management experience, OLAF should support the Commission services in relation to RRF expenditure by continuing to carry out dedicated anti-fraud advice on Member States' management systems. What has been learned so far in the screening activities of NRRPs and in the investigative experiences in RRF expenditure should be integrated into fraud prevention measures and used to issue warning and to report effective cases. It is also advisable to contact the Member States to raise awareness and, where necessary, develop *ad hoc* support measures for the pursuit of the objectives at issue.

Against this background, the defy would be how well different actors at EU level cooperate with Member States to fulfil the common objective of protecting the EU's financial interests to avoid that EU effort to relaunch the European integration process after the COVID-19 pandemic could be undermined by fraud.

VI. EPPO

Since the EPPO started its activity exactly one year ago, it was not possible for it to contribute - nor would it have had the power - to the scrutiny of the Commission of individual NRRPs. Even with reference to the analysis concerning the first requests, by Member States, for disbursement - which took place last winter - its work was still quite marginal. However, this does not prevent us from reflecting on the impact that its activity could have on the implementation of NRRPs and on the protection of the EU' financial interests, especially if one observes the close relationship between it and OLAF.

While OLAF has specific and significant tools to carry out its investigative mandate, it must necessarily rely on the competent national authorities to prosecute wrongdoers. The EPPO, on the other hand, in its capacity as first EU supranational public prosecutor office has the power to investigate and prosecute wrongdoers through the European Delegated Prosecutors appointed by the participating Member States.

EPPO was established in 2017^{xi} and started its activities on 1st June 2021. Given the common objectives of EPPO and OLAF - and their potential overlap - the regulation establishing the former expressly directs it to establish and maintain a close relationship with the latter based on mutual cooperation within their respective mandates and on the exchange of information. Their relationship is founded on the use of all available means to protect the EU's financial interests through the complementarity and support of the latter towards the former. In order to promote coordination of individual operations, on 23 December 2020, it was necessary to amend the OLAF Regulation^{xii}. Parallel to the EPPO Regulation, the OLAF Regulation, as amended, provides in the relevant part that the latter will work with the former "to ensure the highest level of protection of the financial interests of the Union through synergies between [them] while ensuring close cooperation, information exchange, complementarity and the avoidance of duplication". OLAF is also invited to agree on working arrangements with the EPPO to facilitate the exchange of information and complementary investigations. To this end, on 5th July 2021 they concluded a detailed working agreement. In particular, it has the purpose to

establish close cooperation between them in the exercise of their investigative and prosecutorial mandate and within the existing limits of the respective legal frameworks.

In accordance with the obligation to report without undue delay to the EPPO any criminal conduct in relation to which it may exercise its competence, OLAF is required to determine whether the EPPO is investigating particular behavior by checking the case management system. If the latter does not have an open case, OLAF must report the facts to the EPPO so that it can consider whether to open a new case. In this way, OLAF can propose to the EPPO to carry out a complementary investigation or provide support in the continuation of the current investigation. The EPPO can also request investigative support from OLAF. In specific circumstances, it may or should report information to OLAF. The working agreement requires the EPPO to report to OLAF matters where it is not competent to prosecute a case involving a model of fact that could constitute unlawful conduct affecting the financial interests of the EU. The working agreement defines further scenarios in which the EPPO should consider informing OLAF of potential cases in which it refuses to open a proceeding, decides not to investigate or prosecute or decides to close. In such circumstances, the EPPO will consider informing OLAF whether precautionary measures and/or financial, administrative or disciplinary actions may be appropriate to protect the financial interests of the EU, so that OLAF can initiate its own investigations.

Regarding mutual support and cooperation between them, it should be noted that any complementary OLAF investigation, proposed by OLAF or requested by the EPPO, should aim at gathering the necessary information to take precautionary measures or make administrative or disciplinary recommendations.

VII. Conclusion

The legal framework of the RRF Regulation to protect the EU's financial interests seems to be solid. Member States, as beneficiaries or borrowers of RRF funds, have the duty of identifying and correcting all irregularities, especially serious ones, such as fraud, corruption and conflicts of interest. Member States, with the exception of the Netherlands, have submitted their NRRPs and 25 of them have been approved by the Commission. Each NRRP includes an audit and control system. Consequently, the Commission, with the contribution of OLAF, has also positively assessed them. Furthermore, the management and control systems of the Member States will be supported and complemented by the joint activity carried out by the EU institutions and bodies. It is clear that no authority can individually assume the burden of protecting the EU's financial interests related to the RRF. Therefore, the latter should oblige all anti-fraud actors, both at EU and national level, to reconsider their priorities, adapting their working methods according to the needs of a complex and constantly evolving system, such as the RRF, requires and collaborate even more closely to ensure the correct functioning of the control system.

As structured, the OLAF and EPPO present - both in general and with reference to the RRF and NRRPs - a potentially formidable force to be reckoned with in the fight against fraud affecting the EU financial interests. While the EPPO is set to take the lead on prosecuting wrongdoing in the 22 participating Member States, OLAF will continue to investigate conduct that could adversely affect the EU's financial interests in the five Member States that do not participate in the EPPO^{xiii}. In addition to the criminal prosecution brought by the latter, OLAF's financial, administrative and disciplinary recommendations will continue to promote the recovery of any and unduly misappropriated RRF funds, to address the root causes of conduct that have a negative impact on the EU's financial interests and to regulate serious misconduct by EU officials and staff as well as members of the EU institutions.

Effective cooperation and collaboration between the EPPO and OLAF will strengthen the fight against fraud affecting the EU's financial interests of the EU in general and of the RRF and NRRPs in particular. Given the initial phase of EPPO operations, it remains to be seen how effectively and efficiently they will coordinate and cooperate in practice.

ⁱ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, *OJ L 57*, 18.2.2021, p. 17–75.

ⁱⁱ C. Kreith, C. Arwidi, *Protecting the EU's Financial Interest in the New Recovery and Resilience Facility – The Role of the European Anti-Fraud Office* (2021) *EuCrIm* 3, 171-175, 171.

ⁱⁱⁱ 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, *O.J. L 193*, 30.7.2018, 1-222.

^{iv} C. Kreith, C. Arwidi, *op. cit.*, 174. See, also Z. Darvas, *Will European Union countries be able to absorb and spend well the bloc's recovery funding?*, in *Bruegel Blog Post*, 2020.

^v It is an integrated IT tool for data mining and data enrichment developed by the Commission with the objective to support managing authorities in their administrative controls and management checks in the area of structural funds.

It establishes a comprehensive database of projects, implemented under the structural funds in the Union and provided by the pertinent authorities. It also enriches the data with publicly available information in order to identify, based on a set of risk indicators, the projects, beneficiaries, contracts and contractors which might be susceptible to risks of fraud, conflict of interest and irregularities, without distinguish if serious or not. In making this, it does not aim at assessing the particular individual conduct of fund recipients and does not as such serve to exclude automatically any beneficiaries from the EU funds. The tool provides highly valuable risks alerts to enrich management verifications, but it does not supply with any proof of error, irregularity or fraud.

^{vi} 1999/352/EC, ECSC, Euratom: Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (notified under document number SEC(1999) 802), OJ L 136 , 31/05/1999, 20-22.

^{vii} Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 OJ L 248, 18.9.2013, 1–22.

^{viii} *The OLAF Report 2020*, Luxembourg, 2021, 50.

^{ix} With the exception of those of Poland, Hungary and the Netherlands. The latter was not presented to the European Commission.

^x The programme has a budget of around EUR 181 million for the period 2021-2027 to help Member States to fight fraud by: i) continuing to protect the EU's financial interests through financial support, in particular technical support, operational support for investigations, specialised training and research activities; ii) organising mutual administrative assistance and cooperation in customs and agricultural matters, notably via the Anti-Fraud Information System (AFIS); iii) operating the Irregularity Management System (IMS) so Member States can report irregularities.

^{xi} Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, 1–71.

^{xii} 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 the European Anti-Fraud Office investigations OJ L 437, 28.12.2020, 49–73.

^{xiii} C. Hague Andrews, D. Lew, L. Malgrain, J.-P. Picca, K.-J. Xilander, M. Fain, *The Complementarity roles of the EPPO and the OLAF*, 2022 White & Case LLP.