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Thematic Paper on Corruption

European funds and their use by organised crime

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Introduction

The funds which are covered by the financial interests of the European Union account for approximately 145 bn. euro per year of the EU budget. They are exposed to multiple risks of fraud, corruption and other criminal activities also referred to as EU fraud. The purpose of this paper is to explore the link of fraud and irregularities to the detriment of EU financial interests with organised crime, the existing instruments and structures for the fight against EU fraud and to identify necessary improvements.

Organised crime

There are different definitions of organised crime. On an EU level, the Council Framework Decision on the fight against organised crime of 24 October 2008 does not define organised crime as such, but it provides for a definition of a criminal organisation which has been the basis of the analysis conducted.

According to the mentioned Framework Decision a criminal organisation is defined as:

- A structured association, established over a period of time
- Of more than two persons acting in concert
- with a view to committing offences punishable with a prison sentence of at least four years or more serious sanctions
- in order to obtain a financial or other material benefit.

Definition of the EU funds and financial interests

The EU's financial interests which, consist of its revenues, expenditures and assets, constitute the financial interests of the Union.

Revenues¹ are funds deriving on the one hand from import duties in respect of trade with non-member countries and contributions provided for in the framework of the common organisation of the markets (sugar and isoglucose levies,) and on the other hand from VAT, even if it is not collected directly for the account of the Union, it makes a substantial contribution to the Union budget. Furthermore, the revenue from the application of a uniform rate to the sum of all the Member States' gross national income (GNI), should also be mentioned as the fourth own resource, which is transferred by the Member States to the European Union.

Expenditures are funds paid out from the general budget of the Union, as well as those from the budgets administered by the Union or on its behalf, including subsidies and aid paid by the European Agricultural Guarantee Fund (EAGF), European Agricultural Fund for Rural Development (EAFRD), European Fisheries Fund (EFF), funds in the area of cohesion policy (European Social Fund, European Regional Development Fund (ERDF) and Cohesion Fund), and the Instrument for Pre-Accession Assistance (IPA), as well as direct expenditures of the Union (internal and external). The development funds administered by the Commission and the European Investment Bank are also included, as are certain funds not covered by the budget and administered for their own account by Union bodies which do not have institutional status.

¹ Funds derived from the first two categories of own resources referred to in Article 2(1) of Council Decision 2007/436/EC, Euratom on the system of the European Communities' own resources.

Moreover the financial interests of the Union also include expenditures covered by the budget of the other bodies established by the Treaty on the Functioning of the European Union (including the ECB and the EIB).

The impact of EU fraud and involvement of organised crime

EU financial interests are put at risk by fraud, corruption, and other illegal activities as well as mismanagement which is harmful to the Union's financial interests and represent a considerable prejudice for the EU taxpayer and the EU citizen in general. It appears to be difficult to obtain concrete figures as regards the precise extent of EU fraud and even more on the involvement of organised crime in EU fraud. The reason is certainly due to the nature of the subject that only discovered cases can give a basis for extrapolation to an overall estimate but there is also the division of competences in investigation and prosecution which hinder the generation of a more complete picture. The development of the existing structures and competences in the field of intelligence (i.e. research and analysis), investigation and prosecution seems to be needed.

Intelligence at a European level could be helped by initiatives such as the financial monitoring: «CAPACI Project»² presented in the public CRIM meeting on 24 September 2012 by Prefect Bruno Frattasi of the Italian Ministry of Interior which is an experimental programme used for the financial monitoring of some major public works with the objective of pursuing an improved protection of the market of public contracts by enhancing transparency and exploiting the informative potential of financial flows recorded on bank accounts of all businesses (general contractor, subcontractors, suppliers) involved in the implementation of public works, in order to acquire an increased knowledge of the use of public resources and to provide support to investigations aimed at preventing criminal infiltration in public contracts.

Another problem which hinders a coherent approach is the disparity of competences and resources between the EU institutions and Member States and between the latter. Moreover, Member States should contribute in an even more structured manner to the EU analysis.

According to the statistics collected by the European Anti-Fraud Office, OLAF, on the basis of reports from Member States, **from EU expenditures** (EAGF, EAFRD, ERDF, ESF and the Cohesion Fund) **and revenues** (Traditional Own Resources) implemented or collected by Member States alone, a total of 13,631 cases of **illegal activities** involving EU funds (so-called "irregularities") took place in 2010. These cases caused cumulative damage to EU public money of approximately 2 bn euro. The number of reported cases and amounts involved has increased since 2008, with the average value of each case almost doubling over that period from € 87,934 in 2008 to € 152,112 in 2010. Within the amount of the illegal activities in 2010, suspicion of fraud amounted to € 617 million of EU public money potentially lost to crime.

It is necessary to better analyse the involvement of organised crime not only with financial and white collar crime in general but also to investigate the impact of organised crime on political decision making. This approach seems to be even more necessary, as it has been seen in the delegation of the CRIM Special Committee to Italy. Taking the example of Italy, it has been clearly shown that organised crime not only reaches out for legal businesses for the

² Creation of automated procedures against criminal infiltration in public contracts.

purpose of laundering its criminal proceeds but also tries to infiltrate politics. Relevant analysis and suggestions for preventive measures need to be undertaken to prevent such developments in other Member States as well as to the EU and other international institutions.

Due to the limitations of available data it is not possible to report actual figures for the total number and value of financial crimes. However, indicative estimates can be derived based on a combination published in the OLAF annual report on fraud, unpublished case data from OLAF, national legal research undertaken by the study on impact assessment on the criminal law directive team and responses from stakeholder consultations.

In order to produce some figures on the extent and impact of organised crime detected during its administrative investigations, OLAF has analysed a number of 375 cases closed between 2009 and 2010. This internal analysis shows that OLAF cases relating to organised crime amount to approximately 10 % of the total number of fraud cases, but their financial impact accounts for more than 40% of the analysed EU fraud cases.

In many OLAF cases relating to organised crime, criminal investigations are conducted in the concerned Member States, and many lead to actual indictments. A significant number of criminal proceedings are concluded with imprisonment sentences being imposed by national courts. However, as far as OLAF is aware, only a limited number of judicial convictions for criminal association have taken place.

Organised crime results in an over proportionate share of the prejudice to the EU financial interests by EU fraud.

The attempts of analysis show some interesting facts and trends. More common analysis is strongly requested in this respect from OLAF and national authorities, in particular, as is in the remit of the competence of national criminal courts to determine whether or not a group of individuals, or companies, constitutes a criminal association.

Cases include cigarette counterfeiting and smuggling linked with money laundering and VAT fraud, individual cases of large scale fraud in public procurement in the field of regional policy (Italy, Calabria) involving Mafia organisations or research policy, counterfeiting, transnational VAT fraud.

VAT fraud, and in particular in its form of (transnational) missing trader fraud, are causing enormous financial losses to Member States' VAT revenues and are affecting the functioning of the EU's own resources system. The overall VAT gap in the EU is an estimated 100 bn. euro per year of which an important share (which can account in single Member States for more than 20%) is supposed to be due to tax fraud. A single set of cases with a spectacular tax damage of approximately 5 bn. euro with emissions certificates³.

Development of responsibilities in the fight against EU fraud

The Union's legal basis for action against fraud or any other illegal activities affecting the financial interests of the Union is Article 325 of the Treaty on the Functioning of the European Union - it clearly sets out the **shared responsibilities** of the EU and its Member States.

³ The European Court of Justice has clearly points out the importance of VAT fraud for the EU financial interests, C-539/09.

There are on the one hand the European institutions, i.e. Commission services, in particular the European Anti-Fraud Office (OLAF), the Court of Auditors, Europol and Eurojust, as well as by the Member States as the EU budget is managed to a great extent by them. Third countries and their administrations can be included to the combat against EU fraud through anti-fraud agreements (i.e. Switzerland and possibly Liechtenstein) or through other forms of cooperation agreements or arrangements.

Currently the fight against EU fraud is to a large extent based on the concept of cooperation relying on important contributions by Member States for essential steps in investigations and in particular prosecution. This can result on the one hand in ineffective use of already scarce resources in a disparity as regards the intensity of law enforcement and prosecution.

The European institutions and services are already working closely together on the basis of an improved framework in the cooperation of OLAF, Europol and Eurojust.

Organised crime is a type of crime typically having a trans-national dimension. The traditional concept to tackle this type of crime is the concept of cooperation and coordination. This cooperation has traditionally operated through the exchange of mutual legal assistance requests based on Conventions in that area which have been negotiated by international organisations such as the Council of Europe and the United Nations, and as from the mid 1990's also by the EU⁴. In some cases liaison magistrates have been exchanging on a bilateral basis to help in the cooperation and coordination.

The entry into force of the Amsterdam Treaty allowed for new steps to be taken at EU level. The concept of mutual recognition of decisions taken by national judges was introduced and institutions such as Eurojust and the European Judicial Network were established to further facilitate judicial cooperation and coordination. The experience made by OLAF shows that the sole concept of cooperation does not always provide a sufficient framework for combating complex cases which go beyond the national context. As a consequence this experience and in order to tackle effectively the fight against EU fraud the EU and its institutions and services should be given a clearer framework for assisting Member States, providing them with intelligence also on the basis of financial information from the anti-money laundering sector and given the case, provide for coordination of investigations⁵. It is also important that EU institutions and services such as OLAF are not limited to counterparts at national Member States' level but that they are free to cooperate with regional and local levels in their investigations.

Important steps in harmonising the fight against EU fraud include the proposal for an EU directive for the protection of the EU financial interests by the means of criminal law, transferring the conventions into EU law as well as the forthcoming initiative for a European Public Prosecutors' Office (EPPO). The EU would require for the efficient investigation and prosecution of EU fraud, the creation of a European Public Prosecutors' Office (EPPO) as provided for by Article 86 of the TFEU. The extension of its competences to serious cross border crime are envisaged as a possibility for amending Article 86 (1) should be considered in the preparation of the proposal for the EPPO.

⁴ E.g. 1990 Schengen Implementation Convention, 2000 Convention on mutual legal assistance in criminal matters, 2001 Protocol to this Convention

⁵ Cf. the Commission proposal for a Regulation for mutual assistance for the protection of the EU financial interests, COM 2006(473).

Third countries issues

Cooperation with third countries can be an important element for tackling fraud as regards customs, investigations, legal and administrative assistance and intelligence. Increasing the number of anti-fraud agreements, such as with Switzerland, is necessary. It is inconceivable that the draft Liechtenstein anti-fraud agreement is still taken hostage by considerations relating to the need for unanimity in tax policy.

Moreover, the CRIM delegation visit to Serbia has shown the very positive effects of negotiations on the accession to the EU on the efforts to tackle organised crime and build up stronger and independent national institutions for preventing and combating crime. The progress made by Serbia in this respect will clearly profit not only the Serb citizens but the direct neighbours of Serbia and the overall EU security interests.

Conclusions

Organised crime is involved in cases of EU fraud and is using the proceeds of EU fraud for financing other criminal activities. However, the data and analysis of the links of organised crime and EU fraud deserve more research – therefore the European Commission should conduct additional research, analysing the financial flows and liaising with Member States' authorities as well as with other European and international services and institutions.

Fraud prevention - Additional awareness raising and training for administrations and public administrators in the field of public expenditure in Member States as well as in acceding countries would help avoid irregularities and EU fraud. This could include, in particular, public procurement.

Strengthening intelligence - The Italian IT Project could be an example for additional analysis of financial flows as an element of integrated intelligence.

Strengthening cooperation on EU fraud between EU services at all state levels, including regional and municipal level, which play a key role for managing EU funds.

European Prosecutor - Progress should be made as regards the establishment of the EPPO, in particular in view of its competence for fighting transnational organised crime.

VAT fraud - The fight against tax fraud detrimental to the financial interests of the EU, namely VAT fraud, needs stronger operational and intelligence support from the competent Commission services, namely the EU Anti Fraud Office, OLAF and to make use of new instruments for anti-fraud cooperation proposed by the EU Commission⁶.

Third countries - Cooperation with third countries should be enhanced with ongoing negotiations on Anti Fraud agreements, for example with Liechtenstein. The link between the EU fraud policy with development, tax and trade policy needs to be strengthened.

⁶ Amended proposed regulation of the European Parliament and of the Council of 14 September 2006 relating to mutual administrative assistance to protect the financial interests of the Community against fraud and any other illegal activities (presented by the Commission under Article 250 (2) of the EC Treaty), COM(2006)473.