



ARTICLES

THE SHAPE-SHIFTING DEFINITION OF THE EU'S FINANCIAL INTEREST AND ITS PROTECTION IN CONTEMPORARY EUROPE

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INTRODUCTION TO THE *SPECIAL SECTION*: THE SHAPE-SHIFTING DEFINITION OF THE EU'S FINANCIAL INTEREST AND ITS PROTECTION IN CONTEMPORARY EUROPE

In just a few years, the concept of protecting the EU's financial interests has become strategic and fundamental to understanding the economic and financial structure of the European legal system. But it is also essential in navigating the changes to constitutional, administrative, and criminal law that have marked the system following the pandemic and Ukrainian crises. Thus, the collective work presented here is based on the assumption that many parallel processes are currently elevating the centrality of the EU's financial interest for integration.

However, it is clear that the concept of "financial interest" is shape-shifting and requires inter-disciplinarily clarification whenever it is mentioned. For example, one area of concern is the protection of the financial interests of the "market". This has raised issues, particularly for the so-called creditor countries and, following the financial crisis of 2008 but still today with the "new" economic governance, those in favour of austerity policies. On a narrower level, at least until the adoption of the Next Generation EU (NGEU) in response to the Covid-19 crisis, the issue of the EU's financial interests can be viewed from the perspective of safeguarding the revenue and expenditure of the EU budget. This should also take into consideration the assimilation principle, as outlined in art. 325 TFEU.

Fraud involving European funds has always existed, but the substantial funds allocated through NGEU have certainly rocketed fraud and innovative schemes to new heights. Consequently, new scams require an appropriate response from both supranational and national systems designed to protect the EU's financial interests. This need arises not only because of the sheer size of the available funds, but also because of the particular importance of the interests these funds serve. They are intended to support the ecological and digital transitions alongside other public objectives for European integration and the continent's global competitiveness.

The incidence of irregularities and frauds will certainly not help foster a climate of mutual trust and solidarity among the Member States. But the other side of the coin is



that safeguarding the EU's financial interests will become even more central than it already is, as well as an important means of harmonising and reinforcing European integration. It must also be said that if frauds undermining European public finances is detected, this means that the national-level control and investigation mechanisms are functioning well. In fact, 96 per cent of EU fund frauds are reported by national authorities.

Until now, few legal studies have comprehensively analysed the topic despite its increasing importance in the European arena over the last few years. Given the importance of this discipline, it is now crucial to give specific attention to the legal aspects related to it. In fact, protecting financial interests can significantly influence both the institutional structure of the EU and that of its Member States.

A new project has recently been approved and funded by the European Commission: "Better Knowledge for the Next Generations" (BETKONEXT), supported by the Union Anti-Fraud Programme (EUAF-2023-TRAI). BETKONEXT is the continuation of an almost five-year journey that began in 2020 with the the "Better Knowledge for Better Solutions" (BETKOSOL) project, supported by the Hercule III programme of the European Commission. The first Project examined the system for safeguarding financial interests at the European Union level by tracing its origins and analysing European governance and the interaction between European and national institutions. Additionally, at the Member States level, it studied the Belgian, Italian, Polish and German legal systems.

The research primarily focused on three areas of inquiry. Firstly, the project explored institutional aspects, such as governance structures and inter-system relations, including the role of fraud prevention within the European framework and the interactions between the Union and Member States's own systems. Then, the project moved on to examine the issue from an accounting and financial perspective, as the regulations on protecting the EU's financial interests have an impact on the EU's financial system and also have repercussions on Member States's own systems. Lastly, the protection system was also studied from the administrative law perspective, focusing on the relationship between European and national administrations and the innovative procedural mechanisms established for implementing EU programmes and conducting administrative controls.

With the BETKONEXT project, the aim is to further analyze the concrete implementation of NGEU and understand the critical aspects for both the European institutional part and the effects on the Member States. The countries under consideration are Belgium, Italy, Poland, and Spain. But the most significant addition is the institutional collaboration in the project by the AFCOSs of the individual Member States of the countries involved in the research. Being able to actively collaborate with AFCOS will enable the research group to carry out research and work on the hubs of the anti-fraud network. One of the weaknesses of the anti-fraud system is the persistent fragmentation and lack of harmonisation among the different countries of the Union. In particular, it is crucial to undertake a European and comparative analysis to identify the most effective interlinking mechanisms,

both from the criminal and administrative perspectives, and from institutional, operational, and executive standpoints.

One important result achieved by the BETKOSOL Project was then the theoretical and conceptual refinement of key ideas. The researchers involved in the project have become fully aware, for example, of the polysemous and extensive nature of the term “protection of financial interests”, which, in the European legal system, has become both pervasive and central, encompassing every area of public finance, including national finances. It serves to ensure the democratic structure of the Member States’ legal systems, influencing adherence to the principles of the rule of law. Furthermore, it requires harmonised supranational and national mechanisms at both the administrative and criminal law levels.

As a consequence, it is necessary to further analyse the abovementioned shape-shifting notion of financial interest in the new BETKONEXT project from three perspectives: (i) EU Law and its core principles, (ii) its role in the institutional development of the EU legal system and its internal organisation (for example, in relation to the NGEU and REPowerEU), and (iii) its impact on the evolution of the legal systems of the Member States.

The first two essays are dedicated to the first objective.

Aldo Sandulli and Alessandro Nato’s *Article* answers the research question: “What is the impact of financial interests on the EU legal system and its fundamental values?” The central hypothesis presented is that protecting the financial interests of the European Union has contributed to the further evolution of the financialisation of legal and political arrangements, fostering the process of European integration and becoming one of its guiding principles. Financial interests condition the European rule of law from the outside, imposing external limits, but while they do not become part of its contents, they strongly influence its outer surface. In other words, financial conditioning is not an internal and characteristic element of the rule of law and does not belong to its genetic heritage. Instead, in conditioning the rule of law from the outside, it marks the perspective from which to read and apply it.

From this perspective, important questions arise regarding the foundation and contents of the rule of law principle in the EU legal system and the legal orders of the Member States and beyond. Specifically, what is the potential impact of the rule of law as a tool for integration between the EU and the national legal systems, or conversely, as an instrument of transforming the integration process? In his *Article*, Francesco Bilancia takes the latter approach. He aims to demonstrate in detail how conditionality mechanisms do not lead to the “financialization” of the rule of law, although respect for – and protection of – the rule of law principles, on the one side, and the European financial interests on the other, have been linked, assuming the former as an implementation tool of the latter.

The next two *Articles* focus on the second objective by examining current trends in the implementation of the NGEU from an institutional perspective.

In her *Article*, Maurizia De Bellis argues that the NGEU legal edifice exhibits both continuity and change. De Bellis notes that the NGEU has transformed conditionality mechanisms, expanding their goals to include long-term objectives, such as the digital and green transition, concerning already stable finance (still present in the linkage with the European semester) and methodology (pertaining to the pivotal role of the European Commission). However, the scenario is unstable due to factors such as the energy crisis and adjustments required to the national recovery and resilience plans by RepowerEU. As a result, also the underlying dynamics of solidarity and further integration are affected by continuing external shocks.

In contrast, Cristina Fasone and Marta Simoncini argue for transforming the EU's economic constitution and a new type of governance driven by "conditionality". In fact, adopting the Next Generation EU has revamped the use of conditionality tools in the EU. Although conditionality is not a new instrument under EU law, before NGEU, and the Recovery and Resilience Facility (RRF) in particular, we had never witnessed the interplay and intertwinement of so many conditionality regimes at the same time. Such a development triggers important questions about the constitutional implications of the rise of conditionality in the EU's internal governance. Consequently, the *Article* aims to shed light on the nature and legal effects of conditionality, which have remained unsettled to date.

The last two essays focus on the national level, examining the legal implications for protecting the EU's financial interests in two Member States that share some similarities, such as the amount of EU resources received, but also some differences, as Poland has not joined the EPPO. Despite the new processes underway on the continent, such as the NGEU and conditionality mechanisms, these final *Articles* adopt a more traditional approach to protecting the EU's financial interests. This involves adopting administrative and criminal measures to prevent irregularities and fraud in spending European resources through enhanced controls and criminal enforcement.

Emanuele Birritteri and Elisabetta Tati argue that under certain circumstances, the standard of protection for the financial interests of the European Union is no longer solely determined by the level of protection afforded at the national level. This contrasts with the usual practice when implementing the assimilation principle. Rather, the European rules contribute to shaping the national systems in terms of protecting public financial resources. This is exemplified by Italy, where EU law has exerted none-too-gentle pressure, both from the administrative side (in relation, for example, to the management of the considerable funds allocated by the RRF and the need for adequate control over spending) and from the criminal law perspective (concerning implementing the PIF Directive).

In his *Article*, Maciej Serowaniec notes that Poland has reported some of the highest instances of irregularities and fraud related to the use of EU funds in recent years, both in terms of quantity and value. As such, the fundamental question remains whether Po-

land's current administrative and criminal solutions for combating this fraud are effective, especially in the light of the significant influx of new funds that will be introduced in the coming years.

In conclusion, the six *Articles* in this *Special Section* proceed in pairs, offering different points of view and conclusions. This only confirms the ongoing debate and lack of consensus concerning the protection of the EU's financial interests and emphasises the need to continue exploring this topic.

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