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Member States' obligations resulting from wasteful spending funds in the implementation of projects co-financed by EU funds in the light of the EU law. Searching for a common standard for management and control systems

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Abstract. This study aims to verify whether despite the generally formulated obligations in EU law intended to ensure that European funds are spent correctly, it is possible to clearly identify the scope of these obligations, and at the same time specify the standard recommended by the EU for national management and control systems. Author primarily uses the formal-dogmatic method to analyze the relevant EU law, the decision-making practice of the European bodies involved in the protection of EU financial interests, the Court's case-law and the legal doctrine. Due to the lack of clearly recommended model at EU level while generally formulated conditions (especially those resulting from the Charter of Fundamental Rights) that need to be considered by Member States when designing their management and control systems, it is difficult to ensure that the systems are effective which is crucial for guarantee the protection of EU financial interests. The analysis showed that the problem starts at the source as the implementation of both fraud and irregularity concepts varies across Member States which significantly hinders their correct identification. To assist Member States in implementation of management and control systems, the respective guidelines adopted at EU level summarizing the key requirements applicable to national authorities involved in distribution of EU funds are worth considering.

Keywords: EU projects, EU funds, management and control system, fraud, irregularity, cohesion policy.

JEL Classification: K23, K33.

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INTRODUCTION

Since the beginning of EU membership, Poland has been indicated as the largest beneficiary of EU funds under the cohesion policy, which supports activities leading to equalization of economic and social conditions of EU regions. Also in the EU financial perspective 2021-2027 Poland is to maintain its leading position and to remain the largest beneficiary of the cohesion policy, receiving more than EUR 76 billion for that purpose (Ministry of Development Funds and Regional Policy, 2022).

Appropriate control mechanisms play a key role in ensuring that the allocated funds are properly spent. Although the European Commission (Commission) remains liable for implementation of EU budget in cooperation with the Member States, in practice most of EU funds is spent under shared management whereas Member States have the primary responsibility for the management and control of programmes and actions supported by the EU Funds. Thus, EU law requires Member States to establish appropriate national management and control systems for their programmes that will allow for preventing, detecting and correcting the wasteful spending funds, such as irregularities and frauds. At the same time, due to its specific nature, the EU law defines these obligations in a very general manner and does not provide for specific measures determining the ways of fulfilling these obligations by national authorities. The new EU financial perspective for 2021-2027 and legislative package adopted within its framework, are the impulse to consider this issue in more detail. Especially, taking into account the fact that the Commission may impose a financial correction on a Member State if it does not fulfill its obligations properly, e.g., when national measures adopted to prevent, detect and correct irregularities are not fully effective.

Hence, this study aims to verify whether despite the generally formulated obligations in EU law intended to ensure that European funds are spent correctly, it is possible to clearly identify the scope of these obligations, and at the same time specify the standard recommended by the EU for national management and control systems. The results of this analysis will allow to verify a research hypothesis according to which the freedom left to Member States in shaping national management and control systems is in fact only apparent and may hinder the proper fulfillment of their obligations. This, in turn, allows for formulating appropriate conclusions for the EU legislator and the national authorities involved in the distribution of EU funds.

The author first introduces the legal framework for protection of EU financial interests (part I), and then discusses the main categories of failures in the implementation of projects co-financed by EU funds (part II) which determine the scope of Member States' obligations within their management and control systems (part III) and try to transpose the considerations to the requirements to be fulfilled by the national procedural measures (part IV). The summary contains conclusions resulting from the conducted analysis, including postulates addressed to the EU legislator (*de lege ferenda* conclusions) and to the domestic authorities involved in the distribution of EU funds.

The considerations focus on the cohesion policy which is the EU main investment policy contributing to correct the economic and social imbalances between European countries (for more *see* Baun & Dan, 2014; Molle, 2007). As Poland has been and still remains a leading beneficiary of funds from the Cohesion Fund and Structural Funds, this article will focus on Member States's obligations resulting from wasteful spending funds in the implementation of projects co-financed by EU funds under the cohesion policy, whilst taking into account the relevant domestic measures adopted in Poland.

PROTECTION OF EU FINANCIAL INTERESTS: LEGAL FRAMEWORK

The concept of EU financial interests is defined very broadly by EU law as "all revenues, expenditure and assets covered by, acquired through, or due to the Union budged and the budgets of the Union institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them" (Article 2(1)(a) of the Directive 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 18.7.2017, p. 29; hereinafter: Directive 2017/1371). The responsibility to protect the EU financial interests viewed in this light lies

with the Union and the Member States. This is confirmed directly by Article 325(1) of the Treaty on the Functioning of the European Union (OJ C 202, 7.6.2016; hereinafter: 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 (…) 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 so-called principles of deterrence and effectiveness expressed in the mentioned provision, are supplemented by the principle of assimilation enshrined in paragraph 2. In accordance with the Article 325(2) TFEU, Member States shall take measures to counter fraud affecting the financial interests of the EU as they take to counter fraud affecting their own financial interests. Hence, Treaty demands that the Member States protect the EU financial interests with the same diligence and the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests (Marín, 2020, p.38; *see also* Nunes and de Matos, 1999, pt. 13). In the light of the above, according to the settled CJEU case-law, Member States are entitled to impose criminal penalties for offences concerning EU funds to ensure that such infringements "are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive" (Commission v Greece, 1989, pt. 24; *see also* Anklagemyndigheden v Hansen & Søn, 1990, pt. 17).

As aptly pointed out in the legal doctrine, the application of the principle of assimilation is not too complex, as it requires determining the domestic standard applicable to the protection of national interests and using it to protect the EU financial interests. In other words, the way in which Member States protect their own financial interests (both in the sphere of exercising legislative, executive and judicial power) should be the same with respect to methods used for protecting EU financial interests (Swart, 1996). However, it is more difficult to assess whether the measure used meets the requirement of effectiveness, as the concept is very vague (Łacny, 2012).

Although in the light of Article 317 TFEU, the Commission remains liable for implementation of EU budget, in practice most of EU funds is spent under shared management. According to this concept, both Commission and Member States are responsible for the management and control of programmes co-financed by EU funds, whereas Member States have the primary responsibility for such management and control and should ensure that operations supported by the EU Funds comply with applicable law. Their obligations in that regard are specified in so called horizontal and sectoral acts constituting together the legal framework adopted to protect the EU financial interests, discussed in the following sections of this study.

The first category includes mainly in the Council Regulation No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ L 312, 23.12.1995, p. 1; hereinafter: Regulation 2988/95) which provides for general rules relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to EU law (Article 1(1), Regulation 2988/95). This legal act is called horizontal as it establishes the requirements applicable to all EU policies, including the Common Agricultural Policy (Łacny 2017a, p. 35; for more *see* Łacny, 2017b, p. 49-61). Meanwhile, the sectoral acts relate to the selected policies and stipulate the rules for the implementation of specific EU funds. These acts include Regulation No 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (OJ L 231, 30.6.2021, p. 159; hereinafter: Regulation 2021/1060) which plays a key role for the implementation of cohesion policy in 2021-2027.

The obligation to protect the EU financial interests imposed both on the EU and Member States covers fraud and any other illegal activities affecting the financial interests of the Union, such as irregularities. Hence, these two

concepts need to be analyzed in more detail as they are key points of reference determining the scope of Member States' obligations to protect the EU financial interests.

FRAUD OR IRREGULARITY, THAT IS THE QUESTION

Originally, fraud has been defined in the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests of 26 July 1995 (OJ C 316, 27.11.1995, p. 48) separately for the expenditure and revenue area. However, with effect from 6 July 2019, it has been replaced by the already mentioned Directive 2017/1371. Currently, the Article 3(2) of the Directive 2017/1371 slightly modifies this definition specifying that expenditure area covers non-procurement-related expenditure and procurement-related expenditure while revenue area refers to revenue other than arising from VAT own resources and revenue arising from VAT own resources. In general, as for each of these categories (subject to activities committed in respect of revenue arising from VAT own resources where they have been defined differently – *see* Article 3(2)(d), Directive 2017/1371), fraud is any act or omission relating to one of three types of acts. First, the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets (or the diminution of the resources in case of revenue) from the Union budget or budgets managed by the Union, or on its behalf. Second, non-disclosure of information in violation of a specific obligation, with the same effect. Third, the misapplication of funds or assets (or legally obtained benefit in case of revenue). In the light of the Directive 2017/1371, fraud is constitutes a criminal offence when committed intentionally which Member States are obliged to penalize (Article 3(1), Directive 2017/1371).

The second category of acts affecting the EU financial interests is irregularity. In the current legal environment, there are two categories of irregularities. In the literature, they are referred to as horizontal and sectoral concept (*see* Łacny, 2022, p. 41-51). The first one appears in the Regulation 2988/95 and is defined as "any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure" (Article 1(2), Regulation 2988/95) The definition outlined in this way differs slightly from the concept of irregularity in sectoral terms. In accordance with the Article 2(31) the Regulation 2021/1060 irregularity means "means any breach of applicable law, resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the budget of the Union by charging unjustified expenditure to that budget".

These two concepts differ in both subjective and objective areas. In the subjective sphere, they treat an economic entity whose actions or omissions may be a source of irregularity differently. In the light of the Regulation 2021/1060, it is understood narrowly, by excluding a Member State exercising its prerogatives as a public authority (Article 2(30), Regulation 2021/1060). On the other hand, in the subject area, this regulation defines the scope of infringement of law broadly, extending it to breach of any applicable law, not only provisions of EU law (*see* Łacny, 2022, p. 43). Although the definitions of irregularities provided for in those regulations differ, the differences are not significant and those two concepts remain essentially the same as emphasized in the legal doctrine (Łacny, 2022, p. 43; Poździk, 2023, p. 71). In addition, as indicated by the Court of Justice (hereinafter: CJ or Court), those definitions must be interpreter in a uniform manner, not only their wording but also the context in which their occur and the objectives pursued by the rules of which their form part (*see* Județul Neamț and Județul Bacău, 2016, point 34-38). Consequently, the conditions for irregularity boils down to the occurrence of three elements: an act or an omission by an economic operator; a breach of law and the real or potential effect of prejudicing the general budget of the EU, between which there must be a causal link.

Consequently, the irregularity is a broader concept than fraud as the latter requires that breach of law has been committed intentionally. Hence, as explained by the European Court of Auditors "if a grant beneficiary tries to intentionally mislead the funding provider in order to claim unjustifiably high expenditure, then that is fraud"

(European Court of Auditors, 2019, p. 8). It should be also emphasized that a fraud is an act punishable as a crime under the penalty law, while irregularity is a concept that includes to the area of administrative law (Poździk, 2012, p. 12). More interestingly, Commission argues that risks of irregularities (both fraudulent and non-fraudulent) appear to be higher in the areas of the cohesion policy related to transport, environment protection, research, technological development and innovation (RTD&I), social inclusion and promotion of employment and labour mobility (Commission, 2022a, p. 71).

Undoubtedly scope of Member States' responsibilities varies depending on the nature of the infringement and it is crucial for them to correctly identify a given defect in spending EU funds as it defines the scope of their obligations. However, the implementation of both fraud and irregularity concepts varies across Member States in practice. In particular, the procurement fraud as understood by the Directive 2017/1371 (i.e. wording of the requirement "at least when committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interest") lefts a broad margin of discretion to the Member States when defining and prosecuting procurement frauds. In the 2022 report on the implementation of the Directive 2017/1371, the Commission confirms that there are differences across Member States which may lead to the uneven protection of the EU financial interests since certain fraudulent activities are not being investigated or prosecuted in some domestic orders, while other Member States present a different approach to investigate or prosecute these activities (Commission, 2022b, p. 11).

Also when identifying the irregularities, Member States are left with a significant margin of discretion. As already indicated, under the Regulation 2021/1060 irregularity is understood as the infringement of any provision that applies to a given case – regardless of whether it is a respective domestic or EU law. Although the wording of the Regulation 2021/1060 requires of broad interpretation of premise of breach of law, imposing an obligation to beneficiary on the basis of internal provisions is inadmissible. This conclusion can be drawn from the relevant CJEU case-law (Liivimaa Lihaveis,2014), which – although regarding the legal requirements of the appeal procedure available for entrepreneurs applying for EU funds – confirms that it is not possible to identify irregularities and impose the obligation to return funds resulting therefrom due to the violation of a commonly binding act adopted the national authorities responsible for the administration of EU funds. However, as the practice shows, not every Member State follows that approach, which is discussed in more detail later in this article.

In addition, the above judgment of the Court deserves a special attention with regard to the obligations that fall upon the Member States when designing and implementing their national management and control systems. Hence, this is an ideal opportunity to the scope and the legal nature of the these duties from the perspective of combating fraud and any other illegal activities affecting the financial interests of the Union, such as irregularities.

MANAGEMENT AND CONTROL SYSTEM: KEY MEMBER STATES' OBLIGATIONS FROM THE PERSPECTIVE OF IRREGULARITIES

At the heart of protection of EU financial interests are the national management and control systems. They should be set up by each Member State which are obliged to ensure their effective and efficient functioning during the implementation of the programmes (*see* recital 63, Regulation 2021/1060). From the perspective of irregularities relating to the spending of EU funds, the management and control system is a key point of reference as it shall guarantee the prevention, detection and correction of irregularities, including fraud. The concept of a management and control system is not defined by EU law, its meaning, however, should be determined on the basis of provisions specifying the elements of this system, the requirements it is supposed to meet, the purpose of its functioning and the consequences of its malfunctioning (Łacny, 2017b, p.63-64).

In this context, Title VI (Chapter I) of the Regulation 2021/1060 dedicated to general rules on management and control, is a compass reading for Member States. In particular, Article 69 provides the general responsibilities of Member States which must be met when creating and implementing national management and control systems.

In particular, a management and control system can only be effective if the Member States prevent, detect and deal effectively with any irregularities, including fraud committed by beneficiaries (*see* recital 71, Regulation 2021/1060). Consequently, Article 69(2) of the Regulation 2021/1060 clearly stipulates that "Member States shall ensure the legality and regularity of expenditure included in the accounts submitted to the Commission and shall take all required actions to prevent, detect and correct and report on irregularities including fraud".

As to the latter, Member States are obliged to report on irregularities in line with the criteria for determining the cases of irregularity to be reported, the data to be provided and the format for reporting set out in Annex XII (Article 69(12), Regulation 2021/1060). In accordance with information contained there, the specific categories of irregularities require to be reported. These include irregularities that have been the subject of a first written assessment by a competent administrative or judicial authority which has concluded that an irregularity has been committed; irregularities that give rise to the initiation of administrative or judicial proceedings at national level in order to establish the presence of fraud or other criminal offences; irregularities preceding a bankruptcy and specific irregularity or group of irregularities for which the Commission submits a written request for information to the Member State following the initial reporting from a Member State. They should be reported by the Member States to the Commission within two months following the end of each quarter from their detection or as soon as additional information on the reported irregularities becomes available. At the same time, however, the irregularities may have repercussions outside a given Member State's territory, should be reported immediately. In this context, it is also worth mentioning that some defects in implementing projects co-financed by EU funds identified as irregularities are expressly excluded from the obligation to be reported, such as irregularities for an amount lower than EUR 10.000,00 (*see* section 1.2 of the Annex XII to the Regulation 2021/1060).

According to the Commission's statistical evaluation of irregularities reported for 2021, between 2017 and 2021 the number of irregularities related to the programming period 2007-2013 decreased for the European Structural and Investment Funds, while the number of irregularities reported for the programming period 2014-2020 increased, in particular non-fradulent irregularities for which the fall in the number and financial amounts is striking. As Commission explains there are many potential explanations that, including delay in implementation of operational programmes and increased capability of implementing bodies and beneficiaries (Commission, 2022a, p. 71).

Only in the area of reporting of irregularities, the provisions precisely indicate the conditions under which this should be done. Hence, the question arises as to what specific measures must be taken by Member States when preventing, detecting and correcting irregularities, including frauds, to guarantee the effective functioning of their management and control systems. The Regulation 2021/1060 (in line with previous regulations laying down the common rules applicable to the European structural and investment funds, including the Regulation 1303/2013 of the European Parliament and of the Council) does not provide a specific or concrete answer to this question, limited to indicating the general principles that must be taken into account.

First and foremost, the Member States are obliged to ensure their functioning in accordance with the principle of sound financial management. This principle was expressed in Article 317 TFEU as one of the key rules according to which the Commission shall implement the EU budget in cooperation with the Member States, while Member States shall cooperate with the Commission to ensure that the appropriations are used in accordance with this principle. The correct interpretation of the principle of sound financial management requires "a concern for the practical consequences of the acts of financial management, using as a reference point, in particular, the principle of the effectiveness of Community (EU) law" (Council of European Municipalities and Regions v. Commission, 2000, pt. 73) and the rules expressed in the Regulation 2018/1046 (European Parliament and the Council Regulation 2018/1046 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, OJ L 193, 30.7.2018, p. 1). It introduced a number of regulations which enable effective and transparent management of the general budget of EU, strengthen the proper management of its funds

and control and protection of the EU's financial interests while maintaining the principle of sound financial management as the main point of reference for controlling the correct use of EU public funds (Poździk, 2013, p. 101-103).

In light of the Regulation 2018/1046, the concept of sound financial management means that the budget should be implemented respecting principle of economy, the principle of efficiency and the principle of effectiveness (Article 2 point 59 and Article 33, Regulation 2018/1046) widely known as "the three E's" principles (Kennedy, 2018, p. 671). The principle of economy requires that the resources used by the EU institution concerned in the pursuit of its activities shall be made available in due time, in appropriate quantity and quality, and at the best price (Article 33(1)(a), Regulation 2018/1046). The principle of efficiency refers to the best relationship between the resources employed, the activities undertaken and the achievement of objective (Article 33(1)(b), Regulation 2018/1046), whereas the principle of effectiveness concerns the extent to which the objectives pursued are achieved through the activities undertaken (Article 33(1)(c), Regulation 2018/1046).

Although one could say that the principle of sound financial management mainly concerns the EU institutions responsible for implementation of EU budget and is of less practical importance for beneficiaries (*see* Inghelram, 2018), this is too far-reaching simplification. In practice, the project co-financed by EU funds complies with the principle of the sound financial management only if a beneficiary follows these three principles (Poździk, 2023, p. 46). Hence, in case of non-compliance with "the three E's" principles (e.g. by incurring expenditures non eligible for financing), a competent authority shall take the appropriate measures to claw back the awarded funds.

Apart from the broadly formulated obligation to ensure that the implemented management and control systems comply with the principle of sound financial management, the Regulation 2021/1060 lists some issues in more detail, such as the key requirements listed in Annex XI to the Regulation 2021/1060 which should be taken into account by the Member States. This document covers the crucial conditions that should be met by an effective management and control system (e.g. appropriate criteria and procedures for the selection of operations; effective implementation of proportionate anti-fraud measures; appropriate procedures for confirming that the expenditure entered into the accounts is legal and regular). On their basis, the Commission classifies the management and control systems with regard to their effective functioning in order to specify whether any improvements are needed as the Member States shall, upon request of the Commission, take the actions necessary to ensure the effective functioning of their management and control systems (Article 69(3) and Article 70(1), Regulation 2021/1060).

The Regulation 2021/1060 specifies what kind of measures should be adopted by Member States with regard to the disputes between the applicant for EU funds or beneficiaries and national authorities involved in the distribution of EU funds under the implemented management and control systems. In accordance with Article 69(7) of the Regulation 2021/1060, Member States shall make arrangements necessary to ensure the effective examination of complaints concerning the funds, covering any dispute between beneficiaries (potential and selected) with regard to the operation (proposed or selected) and any disputes with third parties on the implementation of the programme or operations thereunder, irrespective of the qualification of means of legal redress established under domestic law. At the same time, the scope, rules and procedures concerning those arrangements shall be the responsibility of Member States in accordance with their institutional and legal framework.

PROCEDURAL AUTHONOMY IN DISTRIBUTION OF EU FUNDS: DOES IT EVEN EXIST?

In the light of the above considerations, the Regulation 2021/1060 obliges Member States to take appropriate measures to ensure the effective functioning of the management and control system. In this area, the principle of procedural autonomy applies according to which in case of the lack of the relevant EU legal regulations, the enforcement of EU law at the national level should be governed by the procedural and institutional rules adopted by the Member States. This has been clearly stipulated in the recital 13 of the preamble to the Regulation 2021/1060,

in the light of which "Member States at the appropriate territorial level, in accordance with their institutional, legal and financial framework and the bodies designated by them for that purpose, should be responsible for preparing and implementing programmes". The prefatory condition (absence of EU rules on a given subject) is however strictly linked and subject to the dual requirement of equivalence and effectiveness. In the light of the *Rewe* case, the equivalence requires that the treatment of the claims arising out of EU law shall not be less favourable than the treatment of those relating to similar actions of a domestic nature while the effectiveness seeks to seeks to prevent the situation where the national procedural rules would make the enforcement of EU law based rights impossible or excessively difficult in practice (Rewe, 1976, p. 5; *see also* Comet, 1976, p. 13-16; Bobek, 2011).

Some argue that in fact there is no such thing as national procedural autonomy as it would suggest that there are areas of procedural law in which the Member States are free from any constraints provided by EU law, uncontrolled by the Court (*see more* Bobek, 2011). As rightly pointed out in the doctrine: "National procedures and remedies are not immune from EU law. They are not even uniquely shielded from EU law intrusion" (Halbestam, 2021, p. 157). These remarks remain fully relevant in the area of implementing management and control system. Although Member States have the power to self-regulate institution or procedure framework applicable for applying for EU funds and the implementation of projects (subject to some general requirements regulated at the EU level such as the overall framework for eligibility rules for expenditure; more Poździk, 2014, p. 5-6), in fact their autonomy is significantly restricted when implementing management and control systems, in particular in the area of the procedure for recovering funds incorrectly used.

In this context, the already mentioned Liivimaa Lihaveis case deserves a particular attention. This judgment primarily concerns the issues related to legal protection of entrepreneurs applying for EU funds and it confirms that every applicant must be able to bring the decision not to grant a financial support before a competent court. Consequently, domestic provisions that exclude this right, breach Article 47 of the Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391 hereinafter: Charter of Fundamental Rights or Charter) by depriving the applicant of its right to an effective remedy. However, a more general conclusion applicable to the national management and control systems can be drawn from this judgment. Namely, to the extent to which they relate to rights and obligations of individuals (both applicants and beneficiaries), in particular in the area of the prevention, detection, correction of irregularities and the recovery of funds, must provide the possibility to challenge the decisions of the authorities involved in management and control in judicial proceedings. Despite the national autonomy in creating the management and control system, the Charter of Fundamental Rights significantly limits the Member States' freedom in this regard.

The authorities involved in the distribution of EU funds in Poland, including those participating in management and control, are obliged to comply with the Charter as its provisions apply to matters related to the spending of EU funds (*see more* Łacny, 2015, p. 26-29). The Regulation 2021/1060 respects the fundamental rights and observes the principles recognized therein and the Charter together with horizontal principles laid down in Article 3 TFEU should be respected in the implementation of funds which has been explicitly confirmed by preamble to the Regulation 2021/1060 (*see* recital 6 and 95, Regulation 2021/1060). Hence, one may conclude that in the absence of the management and control model defined at EU level, the Charter together with horizontal principles will mainly set an important legal standard in this respect, including the area of the prevention, detection and correction of irregularities. This naturally raises another question as to whether and to what extent the national management and control systems meet these requirements. The Polish model is a perfect example that designing an effective management and control system, respecting the fundamental rights of individuals, is a major challenge for Member States.

The already discussed issues considered on the basis of Liivimaa Lihaveis case was also the subject of a judgment of the Polish Constitutional Tribunal (hereinafter: Tribunal). In case P 1/11, one of the most important Polish judgments concerning EU funds, the Tribunal shared the doubts of the Voivodeship Administrative Court in Łódź regarding the unconstitutionality of Article 5(11) of the act on the principles of conducting development

policy (Polish: *ustawa o zasadach prowadzenia polityki rozwoju*) and ruled on its non-compliance with Article 87 of the Polish Constitution, defining a closed catalog of commonly binding acts (P 1/11, 2011). The Tribunal stated that the national implementation system (defining the rules and procedures applicable to competent institutions, including, inter alia, management, evaluation, control, and appeal procedure open to applicant), cannot be regarded as sources of commonly binding law. According to the Tribunal, a situation where the rights and obligations of individuals (both applicants and beneficiaries) would be governed by the provisions of internal law should be considered unacceptable. It noted that EU law does not prescribe which legal acts should regulate the rights and obligations of individuals applying for EU funds from regional operational programmes. However, as pointed out by the Tribunal, the Member States' freedom to choose the appropriate management and control system remains limited due to the obligation to respect the general EU principles, such as the principle of equivalence and the principle of effectiveness. The Tribunal underlined that regulating the rules of procedure in cases for co-financing by the internal law would infringe the latter, making the enforcement of EU law based rights of authorized entities excessively difficult in practice (*see more* Perkowski & Martyniuk, 2017). The Tribunal ruled in a similar spirit in its subsequent jurisprudence, emphasizing that the need to formalize and ensure efficient redistribution of European funds cannot justify a violation of the principles set out in the Polish Constitution, in particular limiting the right to an effective remedy and the right to a court (SK 8/12, 2012[1]).

Therefore, the case-law of the Tribunal shows that there are no grounds for deriving the obligations of beneficiaries from the provisions of internal law. Despite this fact, its judgments were not implemented in their entirety, both in the sphere of adopting and applying the law. Firstly, at the level of generally applicable law no relevant provisions have been introduced so far that would apply to all rights and obligations of applicants and beneficiaries (Borys, 2023, p. 112-113). Secondly, the decision-making practice of some institutions involved in the management and control for shows that infringement of internal law may be sufficient for identifying irregularities and issuing a decision imposing a obligation to return the funds.

CONCLUSIONS

In accordance with the shared management, Member States have the primary responsibility for the management and control of programmes and actions supported by the EU Funds and, consequently, their activities represent the first line of defense against any attempt to defraud EU budget or – more broadly – to damage EU financial interests (OLAF, 2022, p. 47). Consequently, the respective EU provisions impose the obligation on Member States to "take all required actions" to prevent, detect, correct and report on irregularities including fraud. At the same time, however, they do not precise what kind of measures should be taken to ensure the effective functioning of the national management and control systems (except for the area of reporting of irregularities, where EU law precisely indicates the conditions), leaving a broad margin of discretion to the Member States in this respect. Although in the light of the principle of procedural autonomy, Member States have the power to design their institutional, legal and financial framework concerning implementation of programmes, in fact their autonomy is only superficial, also in terms of prevention, detection and correction of the irregularities.

Even though the Regulation 2021/1060 being a part of a legislative package within new EU financial perspective for 2021-2027 does not specify what concrete measures must be taken at national level in this respect, the general principles stipulated therein (in particular principle of sound financial management and horizontal principles laid down in Treaty) significantly limit the Member States' margin of discretion. And, at the same time, they make it more challenging to create the management and control systems. In this context, the requirements resulting from the Charter deserve special attention, considering that the Charter is a mean of legal protection

[1] Judgment of the Polish Constitutional Tribunal (2012), SK 8/12, item 1237.

increasingly used by both applicants and beneficiaries of EU funds which confirms an increasingly richer case-law of CJ (*see* Łacny, 2015 together with the case-law cited there). Hence, although it is difficult to talk about a common standard recommended by EU law when it comes to management and control system, in fact the Charter shall be a key point of reference for Member States. The Polish model is a perfect example that designing an effective system respecting the fundamental rights of individuals is still a challenge for Member States.

Due to the lack of clearly recommended model at EU level while generally formulated conditions that need to be considered by Member States when designing their management and control systems, it is difficult to ensure that the systems are effective which is crucial for guarantee the protection of EU financial interests. Especially that the analysis showed that the problem starts at the source as the implementation of both fraud and irregularity concepts varies across Member States which significantly hinders their correct identification. Even though the Commission formulates some general advice on how detection of irregularities including fraud could be improved (e.g. by adding to preventive checks before payments and audits of operations also ex-post thematic risk analysis projects focusing on groups of past transactions which should consider these transactions in the wider context - *see* Commission, 2022a, p. 142), these recommendations remain rather general. To assist Member States in implementation of management and control systems, the respective guidelines adopted at EU level summarizing the key requirements of national authorities involved in distribution of EU funds are worth considering. Practice shows that such *soft law* instruments adopted in other areas of law (e.g. recommentations addressed to the national courts concerning the preliminary ruling procedure) facilitate the fulfillment of Member States' obligations significantly contributing to guarantee the effectiveness of EU law.

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