

BENCE UDVARHELYI*

Compliance as a mean for the protection of the financial interests of the European Union**

ABSTRACT: The protection of the EU budget and its financial interests is an important task of the Member States as well as the institutions, bodies and agencies of the Union. This objective can be reached by several means: by preventing criminal offences affecting the financial interests of the Union, by monitoring the regular implementation of the EU budget, by strengthening operational cooperation between national and EU authorities and by sanctioning of these criminal offences and illegal activities. However, in order to ensure an effective protection of the financial interests, the European Union has to primarily focus on the preventive measures, since it is always better to detect and prevent the commission of crimes than to react to committed illegal acts. In this context, compliance measures, e.g. risk assessment and risk management, internal investigation or whistleblowing, play an important role. This paper focuses on the protection of whistleblowing. In 2019, the European Parliament and the Council adopted a Directive on the protection of whistleblowers, which lays down common minimum standards that provide a high level of protection for persons reporting breaches of Union law. The scope of the Whistleblowing Directive also covers breaches affecting the financial interests of the Union, since it can be a useful tool for the early detection and prevention of such criminal offences.

KEYWORDS: protection of the financial interests of the European Union, EU budget, risk assessment, whistleblowing, internal reporting, external reporting, public disclosure.

* Associate Professor, Department of Criminal Law and Criminology, Institute of Criminal Sciences, Faculty of Law, University of Miskolc, Hungary. bence.udvarhelyi@uni-miskolc.hu.

** This study was prepared as part of the linkage project of the Humboldt Research Group "On the systematisation of criminal responsibility of and in enterprises" led by the University of Heidelberg and the University of Miskolc (2020-2025).

1. The importance of the protection of the financial interests of the European Union

The European Union (EU) has its *own budget* which amounts to approximately 140-170 billion euros per year. This huge amount attracts the attention of criminals, who use a variety of extremely diverse criminal behaviours and tools to illegally obtain smaller or larger sums from the EU budget. Fraud and other illegal acts that harm the financial interests of the EU can take various forms and cause serious damage. The proliferation of criminal offences affected the EU budget— for economic and political reasons —and forced the EU to create an appropriate framework for this form of crime. Thus, the protection of financial interests can also be considered one of the *legitimizing factors* of EU criminal law.

At the same time, it is important to note that the protection of the financial interests of the EU is primarily the *responsibility of the Member States* who collect the majority of revenues in the EU budget, and mostly use the resources from it. Furthermore, the obligation of the Member States to protect the financial interests of the EU can also be derived from the *principle of sincere cooperation* (Article 4(3) of the Treaty on the European Union (TEU)). Based on this principle, the Member States are obliged to take the necessary measures in order to prevent and sanction fraud, other irregularities and illegal acts affecting the EU budget, as well as to recover illegally acquired assets.¹

However, the financial interests of the EU cannot solely be protected by the Member States, as the cross-border and supranational nature of such criminal offences requires the action of the EU as well. Therefore, tasks related to the protection of the EU's financial interests are divided between the Member States and EU, especially the European Commission. In order to protect its financial interests as effectively as possible, the EU, in close cooperation with the Member States, is forced to develop a *complex, comprehensive, adaptable anti-fraud policy* that includes the control and monitoring of the EU budget; efficient and effective prevention, detection, and sanctioning of illegal actions harming financial interests, as well as the quick recovery of illegally acquired or used amounts from the supranational

¹ See: Explanatory Report on the Convention on the protection of the European Communities' financial interests [OJ C 191, 23.6.1997] [Online]. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51997XG0623\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51997XG0623(02)) (Accessed: 05 December 2024).

budget.² For this purpose, the EU has developed several *comprehensive anti-fraud strategies*.³

2. Instruments and institutions for the protection of the financial interests of the European Union

From our point of view, the legal protection of the financial interests of the EU is based on the following four fundamental pillars: *prevention, monitoring, cooperation, and criminal sanctioning*.

2.1. Prevention of criminal offences against EU budget

The first step in protecting the financial interests of the EU is *prevention of fraud and other illegal acts* that damage budgets. While the various legal consequences of administrative, civil, and criminal law reactively focus on and react to violations that have already been committed, preventive measures play a role in the early detection and, if possible, the prevention of fraud and other criminal offences. In this context, *compliance measures* can be of utmost importance.

Several preventive measures can be implemented. First, it is desirable for the EU to create a *coherent and simpler regulatory environment* because complicated, too detailed and often incomplete EU legislation provides countless opportunities, regulatory gaps, and loopholes which offenders can use for illegal acts. Increasing the effectiveness of preventive measures and

² Farkas, 2001a, p. 35.

³ See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions and the Court of Auditors on the Commission anti-fraud strategy [COM(2011) 376, 24.6.2011] [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0376> (Accessed: 05 December 2024); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Auditors – Commission Anti-Fraud Strategy: Enhanced action to protect the EU budget [COM(2019) 196, 29.4.2019] [Online]. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:283041a7-6a5b-11e9-9f05-01aa75ed71a1.0003.02/DOC_1&format=PDF (Accessed: 05 December 2024); Regulation (EU) 2021/785 of the European Parliament and of the Council of 29 April 2021 establishing the Union Anti-Fraud Programme and repealing Regulation (EU) No 250/2014 [OJ L 172, 17.5.2021] [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R0785> (Accessed: 05 December 2024).

eliminating support mechanisms that facilitate fraud commissions at the EU level can result in a significant reduction in damage.⁴

It is the legal duty of all actors to manage EU funds to prevent irregularities and fraud from affecting the EU budget. In order to achieve this objective, the institutions involved in the implementation of the EU budget (i.e. the European Commission, the Member States, and other partners) have an obligation to implement *management and internal control procedures* designed to prevent and detect irregularities, errors, and fraud.⁵ It is also essential to develop special *information, risk assessment, and management systems* that can provide data on warning signs of fraud and other crimes, fraud patterns, profiles of fraudsters, and the vulnerability of the internal control systems of the EU. With these methods, potential illegal acts can be detected and prevented at an early stage, thus, resources can be used more efficiently. The effective operation of the risk management system requires the adoption of relevant internal regulations, continuation of effective internal and external communication, and establishment of professional training and further education programs for EU and national officials. In order to detect and filter out fraud, the creation of *national and EU-level databases* may also be justified.⁶

2.2. Monitoring the regular implementation of the EU budget

A number of EU institutions are required to fight fraud and other crimes affecting the financial interests of the EU and have the competence for administrative, political, and financial control over the proper use of the EU budget. Among these, the following must be highlighted.

Monitoring the implementation of the EU budget is primarily the task of the *European Commission*, which is responsible for internal control of the EU budget. Within the European Commission, tasks related to budget control are conducted by the *Directorate-General for Budget (DG BUDG)*. The external, political control for the EU budget is provided by the *European Parliament*, which monitors the legality, efficiency, and effectiveness of budget implementation. The Parliament is responsible for

⁴ Aronowitz, Laagland and Paulides, 1996, p. 20; Hecker, 2015, pp. 509-510.

⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions and the Court of Auditors on the Commission anti-fraud strategy [COM(2011) 376, 24.6.2011] [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0376> (Accessed: 05 December 2024).

⁶ Bencze, 2007, p. 73, pp. 75-76; Mennens, 1996, p. 139.

monitoring the implementation of the EU budget, cost-effective use of EU funds, and investigating fraud and other irregularities in the implementation. These tasks are carried out by the *Budgetary Control Committee (CONT)* of the Parliament.⁷

The independent external financial audit of the EU is carried out by the *European Court of Auditors*, also known as the Union's financial conscience.⁸ The Court of Auditors examine the accounts of all revenue and expenditure of the Union, as well as of all bodies, offices, or agencies set up by the Union in so far as the relevant constituent instrument does not preclude such examination. The Court of Auditors provides the European Parliament and Council with a statement of assurance regarding the reliability of the accounts and legality and regularity of the underlying transactions. The Court of Auditors examines whether all revenue has been received, all expenditures have been incurred in a lawful and regular manner, and whether financial management has been sound. In doing so, it can report any case of irregularity (Articles 285-287 of the Treaty on the Functioning of the European Union (TFEU)).

Another institution whose importance cannot be neglected is the *European Anti-Fraud Office (OLAF)*, which operates within the framework of the European Commission but enjoys complete independence and plays a key role in protecting the financial interests of the EU. The OLAF conducts external and internal administrative investigations to strengthen the fight against fraud, corruption, and other illegal activities affecting the financial interests of the EU.⁹ However, it is worth highlighting that the OLAF does not have criminal competencies; its investigations remain within the territory of administrative law.

⁷ Holé, 2004, p. 305; Halász, 2018, p. 216, pp. 241-245; Várnay and Papp, 2005, pp. 829-830; Vervaele, 1992, pp. 75-84.

⁸ Jacsó, 2012, p. 67.

⁹ See in details: Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF) [OJ L 136, 31.5.1999] [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999D0352> (Accessed: 05 December 2024); 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] [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0883> (Accessed: 05 December 2024).

Finally, the *Advisory Committee for the Coordination of Fraud Prevention (COCOLAF)*, established by the European Commission in 1994¹⁰ and operated by the European Anti-Fraud Office, deserves special mention. COCOLAF is a consultative body that formulates suggestions for the Commission in relation to the prevention and reduction of EU fraud and other illegal acts affecting financial interests as well as cooperation between Member States and between Member States and the European Commission.¹¹ Within COCOLAF, four sub-groups have been created:

- a) *Fraud Prevention Group*, which stimulates cooperation between the relevant national authorities of EU countries and the Commission by exchanging experiences and best practices in fraud prevention;
- b) *Reporting and Analysis of Fraudulent and Other Irregularities Group*, which focuses on introducing and discussing statistical analysis of reported cases and considers other issues relevant to the preparation of the report pursuant to Article 325 of TFEU¹²;
- c) *Anti-Fraud Coordination Service (AFCOS) Group*, which exchanges experiences and best practices in the investigative cooperation between OLAF and national authorities;
- d) *OLAF Anti-Fraud Communicators' Network (OAFCN)*, which brings together spokespersons and public relations officers from relevant national authorities and the OLAF to share media strategies and promote communication on preventing and deterring fraud.¹³

2.3. Strengthening operational cooperation between national and EU authorities

The improvement of *institutional cooperation* between the relevant customs, tax, police, and law enforcement authorities of the Member States, as well

¹⁰ Commission Decision 94/140/EC of 23 February 1994 setting up an advisory committee for the coordination of fraud prevention [OJ L 61, 4.3.1994] [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31994D0140> (Accessed: 05 December 2024).

¹¹ Farkas, 2001a, p. 49; Holé, 2004, p. 306.

¹² Article 325(5) of the Treaty on the Functioning of the European Union (TFEU): '*The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article*'.

¹³ The EU's committee for coordinating fraud prevention, [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l33161> (Accessed: 05 December 2024).

as the interaction between the Member States and EU institutions, especially OLAF, can be an important tool in the fight against illegal acts committed to the detriment of the EU budget.¹⁴

Mutual assistance and operational cooperation between the Member States and EU authorities in the fight against fraud can take many forms, that is, cooperation for preventing criminal offences violating the EU budget; maintaining a regular and close operational relationship between competent authorities; collecting, exchanging, analysing, and evaluating information and good practices; cooperation in order to refund illegally obtained funds affected by irregularities; and mutual assistance implemented in the field of detection, investigation, and sanctioning of committed irregularities. As a prerequisite for the effective use of mutual assistance, the Member States are obliged to ensure that national legislation (i.e. rules on confidentiality) does not slow down, block, or aggravate the exchange of information between the Member States.¹⁵

Strengthening cooperation between the law enforcement authorities of the Member States is of key importance in protecting the financial interests of the EU. National criminal law and traditional forms of criminal cooperation alone cannot provide an adequate response to cross-border international criminal offences affecting the EU budget, as criminals can move freely between member states, while national law enforcement authorities can only act within their national borders based on the principle of territoriality.¹⁶ This causes countless problems for judicial authorities, such as the collection and use of evidence, exchange of information and data, and resolution of jurisdictional conflicts.¹⁷ Therefore, the successful prosecution of increased cross-border criminal offences presupposes closer, more coordinated, and more effective forms of cooperation between the law enforcement agencies of the Member States.¹⁸

Since the oldest, classical form of *bilateral, horizontal cooperation* between the law enforcement authorities of the states (e.g. extradition, transfer of criminal proceedings or execution of criminal sentences, mutual legal aid, and assistance) has serious disadvantages and its effectiveness is

¹⁴ Hecker, 2015, p. 509; Kuhl, 1998, pp. 267-269.

¹⁵ Aronowitz, Laagland and Paulides, 1996, pp. 21-26; Bencze, 2007, pp. 73-75; Farkas, 2001a, pp. 36-37; Mennens, 1996, p. 139.

¹⁶ Sieber, 2009, p. 4; Zieschang, 2001, pp. 262-263.

¹⁷ Murawska, 2008, pp. 58-59.

¹⁸ Farkas, 2001b, p. 13.

often questionable,¹⁹ the EU has sought to develop more effective means of cooperation for a long time. These forms are based on the *principle of mutual recognition* which can be regarded as the cornerstone of judicial cooperation in the EU (Articles 67(3) and 82 of the TFEU). Based on this principle, the EU has adopted a number of secondary legal acts, such as the *European Arrest Warrant*²⁰, the *European Investigation Order*²¹, and the *European Protection Order*²², whose primary objective is to provide a faster and more efficient solution in the fight against cross-border crimes instead of the traditional forms of horizontal cooperation.²³ Therefore, the cooperation system of the EU has gradually *transformed from horizontal to vertical cooperation* in which the Member States prosecute cross-border crimes directly and operatively.²⁴

The EU also recognised that the effective protection of its financial interests cannot be solely ensured with the help of the police and law enforcement authorities of the Member States, but the *establishment of different supranational bodies* is also essential in preventing criminal offences against the financial interests of the EU. Some EU institutions contribute to protecting the financial interests of the Union (e.g. Europol, Eurojust, and the European Judicial Network) and aim at operational cooperation, assistance, exchange of information between the police and law enforcement authorities of the Member States, coordination of investigations and criminal proceedings at the national level, and resolution of jurisdictional conflicts.²⁵ However, with the establishment of the

¹⁹ Ligeti, 2002, pp. 75-76; Sieber, 2009, pp. 17-18, p. 28.

²⁰ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [OJ L 190, 18.7.2002] [Online]. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:3b151647-772d-48b0-ad8c-0e4c78804c2e.0004.02/DOC_1&format=PDF (Accessed: 05 December 2024).

²¹ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [OJ L 130, 1.5.2014] [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0041> (Accessed: 05 December 2024).

²² Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order [OJ L 338, 21.12.2011] [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0099> (Accessed: 05 December 2024).

²³ Spencer, 2011, p. 351.

²⁴ Farkas, 2017, p. 279.

²⁵ Holé, 2004, pp. 306-307.

*European Public Prosecutor's Office (EPPO)*²⁶, new strategies have been developed in the fight to protect the financial interests of the EU as this supranational EU body conducts investigations and prosecutions in a unified manner.

2.4. Criminal law as a mean for the protection of the financial interests of the European Union

Although the prevention of criminal offences against the EU budget and the mutual cooperation carried out for this purpose plays an important role in the protection of the financial interests of the EU, seriousness of these crimes necessitates the *application of criminal law instruments* as an *ultima ratio*.²⁷ Due to the volume, severity, and economic and political consequences of these crimes, the EU cannot lack in uniform, EU-level criminal law measures.

In this context, the *Treaty of Lisbon* plays an important role because it provides reinforced and strong legislative competencies for the EU legislator to harmonise the criminal law and criminal procedural law of the Member States, as well as for the adoption of supranational criminal regulations in the field of crimes affecting financial interests.

The criminal law competencies of the EU can be divided into two categories: *legal harmonization* and *supranational legislative competencies*. The continuous harmonisation of legal systems primarily aims at the gradual elimination of differences between the criminal law systems and ensures that criminal offenders are judged in a similar manner in each Member State. Due to legal harmonisation, the Member States must declare the same conducts as criminal acts and impose similar sanctions on perpetrators.²⁸ However, legal harmonisation results in the adoption of minimum rules which allows the Member States to establish or maintain stricter rules than required by the EU. However, in the case of supranational legislative competence, the EU legislator not only harmonises or approximates, but also unifies the national regulation of criminal offences against the EU budget, as the Member States cannot deviate from the criminal law

²⁶ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office [OJ L 283, 31.10.2017] [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1939> (Accessed: 05 December 2024).

²⁷ Farkas, 2003, p. 106; Jacsó, 2012, pp. 69-70; Madai, 2011, pp. 235-236.

²⁸ Karsai, 2008, p. 434.

provisions introduced by the EU. Therefore, supranational criminal law competencies open the way for the development of ‘genuine’ EU criminal law.

The legal harmonisation competence of the EU is regulated by Article 82 TFEU²⁹ in the field of criminal procedural law and by Articles 83(1) TFEU³⁰ and Article 83(2) TFEU³¹ in substantive criminal law, whereas the supranational legislative competence of the EU can be found in Article 325 TFEU³².

²⁹ Article 82(2) of the TFEU: ‘To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern mutual admissibility of evidence between Member States; the rights of individuals in criminal procedure; the rights of victims of crime; any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament. Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals’.

³⁰ Article 83(1) of the TFEU: ‘The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament’.

³¹ Article 83(2) of the TFEU: ‘If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned’.

³² Article 325(4) of the TFEU: ‘The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union’s institutions, bodies, offices and agencies’.

3. Compliance as a mean for the protection of the financial interests of the European Union – the legal protection for whistleblowers

As already mentioned, the effective protection of the financial interests of the EU has to primarily focus on the prevention of criminal offences, as it is always better to detect and prevent the commission of crimes than to react to committed illegal acts. In this context, *compliance tools* also play an important role, for example *risk assessment and risk management*, *internal investigation*, or *whistleblowing*. Among these instruments, this paper focuses only on whistleblowing as it has been in focus of the EU legislation since 2019 when the Council and European Parliament adopted a Directive on the protection of whistleblowers.³³

3.1. The concept of whistleblowing

Whistleblowing is a concept of Anglo-Saxon origin which broadly refers to *any reporting of different violations and abuses*. Whistleblowing covers the reporting of violations of the law in the private or public sector. The types of whistleblowing can be classified differently: some authors distinguish between *active*, *passive*, and *embryonic whistleblowing*,³⁴ others distinguish between *legal and illegal*,³⁵ *hard and soft*³⁶ and *intern*, *extern*, and *mixed whistleblowing*.³⁷

Whistleblowing is one of the *most important areas of compliance*, particularly *corporate compliance*. If a criminal offence is committed within the framework or in favour of a legal person, whistleblowing enables people who first notice corporate abuse to disclose the information they have, thus enabling the initiation of legal proceedings.³⁸ Unlawful activities can occur in any organisation, either private or public, large or small. People who work for an organisation are often the first to know about such abuses and are in a privileged position to inform those who can address the problem.

³³ Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law [OJ L 305, 26.11.2019] [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937> (Accessed: 05 December 2024) (hereinafter referred to as Whistleblowing Directive).

³⁴ Westman, 1991, pp. 19-20.

³⁵ Vaughn, 2012, p. 11.

³⁶ Leiter, 2014, p. 436.

³⁷ Kohn, 2011, p. 23.

³⁸ Ambrus and Farkas, 2019, pp. 127-128.

Therefore, the effective protection of whistleblowers is essential in order to safeguard the public interest, protect freedom of expression, and promote transparency, accountability, and democratic governance in general.³⁹

Whistleblowing can play an important role in protecting the EU's financial interests. Fraud, corruption, money laundering, and other illegal acts that harm the financial interests of the EU are rarely carried out by criminals acting independently and are most often committed by organised groups, hierarchically structured or loosely operating criminal organisations, or within the framework of legal entities, economic organisations, or public institutions and offices. Persons who work for a public or private organisation or are in contact with such an organisation in the context of work-related activities, are often the first to know about criminal offences which arise in that context. By reporting breaches of Union law or irregularities affecting the financial interests of the EU, such persons act as '*whistleblowers*' and thereby play a key role in exposing and preventing such crimes, in protecting the EU budget and in safeguarding the welfare of society (Preamble (1) of the Whistleblowing Directive).

However, in the case of crimes committed within the framework of legal persons and organisations, a *high degree of latency prevails*, as potential whistleblowers are often discouraged from reporting their concerns or suspicions for *fear of retaliation* (Preamble (1) of the Whistleblowing Directive). People who '*raise an alarm*' often risk their careers and livelihoods, and in some cases suffer severe and long-lasting financial, health, reputational, and personal repercussions and/or discrimination.⁴⁰ Therefore, whistleblowers should be protected, and reporting should be encouraged while providing positive measures. However, the lack of effective protection across the EU can undermine the proper functioning of the internal market and make it more difficult to detect, prevent, and deter fraud, corruption, and other illegal activities that affect the financial interests of the EU.⁴¹ A consistently high level of whistleblower protection throughout the EU can encourage people to report wrongdoing that may harm the public interest. It can also enhance openness and accountability in government and corporate workplaces and enable journalists to perform their fundamental roles in European democracies.⁴² Therefore, the new EU

³⁹ Baran, 2019, p. 430; Georgiadou, 2018, p. 166.

⁴⁰ Baran, 2019, p. 430.

⁴¹ Baran, 2019, pp. 430-431; Georgiadou, 2018, pp. 166-167.

⁴² Georgiadou, 2018, pp. 168.

Directive aims to create an *effective framework for the protection of reporters and the encouragement of whistleblowing*.

3.2. The protection of whistleblowers in the European Union

The purpose of the Directive of the EU is to enhance the enforcement of Union law and policies in specific areas by laying down *common minimum standards* that provide a high level of protection for persons reporting breaches of Union law (Article 1 of the Whistleblowing Directive). The Directive also aims to strengthen the protection of whistleblowers and avoid retaliation against them, provide legal clarity and certainty, and support awareness-raising and fight against socio-cultural factors that lead to under-reporting.⁴³

The *material scope* of the Directive covers three main areas: first, the breaches falling within the scope of the Union acts in certain areas (public procurement; financial services, products and markets, and prevention of money laundering and terrorist financing; product safety and compliance; transport safety; protection of the environment; radiation protection and nuclear safety; food and feed safety, animal health and welfare; public health; consumer protection; protection of privacy and personal data, and security of network and information systems); second, *breaches affecting the financial interests of the Union* as referred to in Article 325 TFEU and as further specified in relevant Union measures (see Preamble (15) of the Whistleblowing Directive); and third, breaches relating to the internal market, including breaches of Union competition and State aid rules, and relating to the internal market in relation to acts which breach the rules of corporate tax or to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law (Article 2 of the Whistleblowing Directive). In connection with the material scope, the Directive therefore follows a *sectoral approach*, as it cannot be applied to all areas of EU law, but only to various EU policies.⁴⁴

According to the Directive, the *reporting persons*⁴⁵ shall *qualify for protection* if they have *reasonable grounds to believe that the information*

⁴³ White, 2018, p. 172.

⁴⁴ Ibid.

⁴⁵ Under Art. 5(7) of the Whistleblowing Directive, reporting person can be a natural person who reports or publicly discloses information on breaches acquired in the context of his/her work-related activities.

on breaches⁴⁶ reported was true at the time of reporting, and they reported either *internally or externally or made a public disclosure* (Article 6(1) of the Whistleblowing Directive). Therefore, the Directive differentiates between three categories of information provision:

- *Internal reporting* refers to the oral or written communication of information about breaches within a legal entity in the private or public sector. Legal entities (in the private sector; those with 50 or more workers) are required to establish impartial, secure, and confidential channels and procedures that enable their workers to report information on breaches (Article 5(4) and Articles 7-9 of the Whistleblowing Directive).
- *External reporting* refers to the oral or written communication of information regarding breaches to competent authorities. As a general rule, *reporting through internal channels has to precede the external reporting*, except when the breach cannot be addressed effectively internally or when the reporting person considers that there is a risk of retaliation. Thus, whistleblowers should first report information to their employers through internal reporting channels. This is necessary in order to ensure that information on violations swiftly reaches those closest to the source of the problem and most capable of addressing it. This also helps prevent unjustified reputational damage.⁴⁷ However, people are entitled to *report the violation directly through independent and autonomous external reporting channels* (Article 5(5) and Articles 7, 10-14 of the Whistleblowing Directive).
- *Public disclosure* is referred to making the information on breaches available to the public domain. The Directive stipulates that public disclosure can be made and the person concerned can be qualified for protection if the violation was first reported internally and externally, or directly externally, but *no appropriate action was taken* in response to the report, and the person has reasonable grounds to believe that the *breach may constitute an imminent or manifest danger to the public interest* (such as where there is an emergency situation or a risk of

⁴⁶ Under Art. 5(2) of the Whistleblowing Directive, information on breaches means information, including reasonable suspicions, about actual or potential breaches, which occurred or are very likely to occur in the organisation in which the reporting person works or has worked or in another organisation with which the reporting person is or was in contact through his/her work, and about attempts to conceal such breaches.

⁴⁷ Georgiadou, 2018, p. 168.

irreversible damage), there is a *risk of retaliation* or there is a *low prospect of the breach being effectively addressed* (such as where evidence may be concealed, destroyed, or where an authority may be in collusion with the perpetrator of the breach or involved in the breach) (Article 5(6) and Article 15 of the Whistleblowing Directive).

The Directive stipulates that the Member States are required to ensure that the *identity of the reporting person is not disclosed* to anyone *without his/her explicit consent*, except where this is a necessary and proportionate obligation imposed by the Union or national law in the context of investigations by national authorities or judicial proceedings, including with a view to safeguarding the rights of defence of the person concerned (Article 16 of the Whistleblowing Directive). However, in the context of *anonymous reporting*, the Directive leaves it within the competence of the Member States to decide whether legal entities in the private or public sector and competent authorities are entitled to accept and follow up on anonymous reports of breaches (Article 6(2) of the Whistleblowing Directive).

The protection of whistleblowers can be ensured by two means: on the one hand, by *negative means*, that is, the prohibition of and protection against retaliation, and on the other hand, by *positive, supportive measures*.

Retaliation has an intimidating effect on potential whistleblowers, particularly when the breach remains undeterred and unpunished.⁴⁸ Therefore, the Directive obliges the Member States to *prohibit any form of retaliation* against reporting persons, including threats or attempts at retaliation. Retaliation refers to any direct or indirect act or omission which occurs in a work-related context, is prompted by internal or external reporting or public disclosure, and causes or may cause unjustified detriment to the person reporting (Article 5(11) of the Whistleblowing Directive). The Directive lists the following possible types of retaliation: suspension, lay-off, dismissal, or equivalent measures; demotion or withholding of promotion; transfer of duties, change of location of place of work, reduction in wages, change in working hours; withholding of training; negative performance assessment or employment reference; imposition or administration of disciplinary measures, reprimand or other penalty, including a financial penalty; coercion, intimidation, harassment, or ostracism; discrimination, disadvantageous or unfair treatment; failure to convert a temporary employment contract into a permanent one, where the

⁴⁸ Ibid.

worker had legitimate expectations of permanent employment; failure to renew or early termination of a temporary employment contract; harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income; blacklisting on the basis of a sector or industry-wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry; early termination or cancellation of a contract for goods or services; cancellation of a licence or permit; psychiatric or medical referrals. However, this is not an exhaustive enumeration, therefore other possible forms of retaliation are also prohibited. The Member States are required to take necessary measures to ensure that *reporting persons are protected against retaliation*. Potential whistleblowers shall not be considered to have breached any restrictions on the disclosure of information and shall not incur liability of any kind with respect to such a report or public disclosure. Reporting persons shall not incur liability with respect to the acquisition or access to information, which is reported or publicly disclosed, provided that it does not constitute a self-standing criminal offence. The reporting persons shall have *access to remedial measures* against retaliation (Articles 19 and 21 of the Whistleblowing Directive).

For the *encouragement of whistleblowing*, the Directive also prescribes supporting measures, including comprehensive and independent information and advice, which are easily accessible to the public free of charge, on procedures and remedies available, on protection against retaliation, and on the rights of the person concerned; effective assistance from competent authorities before any relevant authority is involved in their protection against retaliation; legal aid in criminal and cross-border civil proceedings, legal counselling or other legal assistance; and financial assistance and support measures, including psychological support. Furthermore, the reporting persons shall enjoy the right to an effective remedy and a fair trial, the presumption of innocence, and the rights of defence, including the right to be heard and the right to access their file, in accordance with the *Charter of the Fundamental Rights of the European Union*. These rights and remedies cannot be waived or limited by any agreement, policy, form, or condition of employment, including a pre-dispute arbitration agreement (Articles 20, 22, and 24 of the Whistleblowing Directive).

Furthermore, the Member States are obliged under the Directive to *prescribe effective, proportionate, and dissuasive penalties* applicable to

natural or legal persons if they hinder or attempt to hinder reporting, retaliate or bring vexatious proceedings against reporting persons, or breach the duty of maintaining the confidentiality of the identity of reporting persons. However, the whistleblowers can also be punished with effective, proportionate, and dissuasive penalties if they *knowingly reported or publicly disclosed false information* (Article 23 of the Whistleblowing Directive).

Finally, it must also be highlighted that the Directive only provides for a *minimum-harmonization*, which does not prevent the Member States from introducing or retaining provisions which are more favourable to the rights of reporting persons (Article 25 of the Whistleblowing Directive). In this context, the Member States are entitled, for example, to provide a more complex encouragement and protection system for whistleblowers or to prescribe more severe sanctions for violations of the Directive.⁴⁹

4. Closing thoughts

In summary, compliance tools can play an important role in protecting the financial interests of the EU. Among the compliance measures, the protection of whistleblowers of legal violations committed within the framework of enterprises can be highlighted, which can help in detecting crimes that harm the financial interests of the EU and reduce the latency associated with such crimes. It is not a coincidence that the scope of the Whistleblowing Directive expressly covers breaches affecting the financial interests of the Union, since it can be a useful tool for the early detection and prevention of such criminal offences.

The Member States had to implement the provisions of the Directive on 17 December 2021. In Hungary, at the time of the adoption of the Directive, Act CLXV of 2013 on complaints and public interest disclosures, which came into force on 1 January 2014 contained the most important rules in connection with whistleblowing. Although the Act was generally in line with the requirements of the EU, several important differences could be observed because of which the European Commission initiated an infringement procedure against Hungary (along with fourteen other Member

⁴⁹ Ambrus and Farkas, 2019, p. 138.

States) for not having transposed the Directive until the required deadline.⁵⁰ Consequently, the Hungarian legislation adopted a new Act in 2023 (Act XXV of 2023 on complaints, public interest disclosures, and rules related to the reporting of abuses), which contains more detailed regulations and a *complex whistleblowing system*, which better complies with the provisions of the Directive of the EU.

⁵⁰ July Infringements package: key decisions, [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/EN/inf_22_3768 (Accessed: 05 December 2024).

Bibliography

- [1] Ambrus, I., Farkas, Á. (2019) *A compliance alapkérdései. Az etikus vállalati működés elmélete és gyakorlata*. Budapest: Wolters Kluwer Hungary; <https://doi.org/10.55413/9789632959344>.
- [2] Aronowitz, A. A., Laagland, D. C. G., Paulides, G. (1996) *Value-Added Tax Fraud in the European Union*. Amsterdam-New York: Kugler Publications.
- [3] Baran, B. (2019) 'Whistleblowers' protection – legal consequences', in Farkas, Á., Dannecker, G., Jacsó, J. (eds.) *Criminal Law Aspects of the Protection of the Financial Interests of the European Union – with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*. Budapest: Wolters Kluwer Hungary, pp. 430-434.
- [4] Bencze, J. (2007) 'Az adócsalás leggyakrabban előforduló formái Magyarországon és az Európai Unióban', *Rendészeti Szemle*, 2007/11, pp. 55-76.
- [5] Farkas, Á. (2001a) *Büntetőjogi együttműködés az Európai Unióban*. Budapest: Osiris.
- [6] Farkas, Á. (2001b) 'Európai büntetőjog Amszterdam és Nizza után', *Európai Jog*, 2001/2, pp. 12-17.
- [7] Farkas, Á. (2003) 'Egy lehetséges Európai Unió büntetőjog fejlődésének állomásai', in Farkas, Á. (ed.) *Emlékkönyv Kratochwill Ferenc (1933-1993) tiszteletére*. Miskolc: Bíbor, pp. 101-122.
- [8] Farkas, Á. (2017) 'Intézményrendszer', In: Farkas, Á. (ed.) *Fejezetek az európai büntetőjogból*. Miskolc: Bíbor, pp. 279-285.
- [9] Georgiadou, G. (2018) 'The European Commission's Proposal for Strengthening Whistleblower Protection' *Eucrim – The European Criminal Law Associations' Forum*, 2018/3, pp. 166-169; <https://doi.org/10.30709/eucrim-2018-016>.

-
- [10] Halász, Zs. (2018) *Az Európai Unió költségvetésének szabályozása*. Budapest: Pázmány Press.
- [11] Hecker, B. (2015) *Europäisches Strafrecht*. Berlin-Heidelberg: Springer Verlag; <https://doi.org/10.1007/978-3-662-47369-6>.
- [12] Holé, K. (2004) 'Gondolatok az Európai Ügyészségről', in Gellér, B. (ed.) *Györgyi Kálmán ünnepi kötet*. Budapest, KJK-Kerszöv, pp. 303-319.
- [13] Jacsó, J. (2012) 'Gondolatok az Európai Unió költségvetésének büntetőjogi védelméről a Lisszaboni Szerződés tükrében', in Róth, E. (ed.) *Tanulmányok Dr. Dr. h. c. Horváth Tibor professor emeritus 85. születésnapja tiszteletére*. Miskolc: Bíbor, pp. 63-85.
- [14] Karsai, K. (2008) 'A jogharmonizáció általános tanai', in Kondorosi, F., Ligeti, K. (eds.) *Az európai büntetőjog kézikönyve*. Budapest: Magyar Közlöny Lap- és Könyvkiadó, pp. 433-449.
- [15] Kohn, S. M. (2011) *Concept and procedures in whistleblower law*. Wesport: Quorum Books.
- [16] Kuhl, L. (1998) 'The Criminal Law Protection of the Communities' Financial Interests against Fraud. Part I', *Criminal Law Review*, 45(4), pp. 259-269.
- [17] Leiter, A. C. (2014) 'Soft whistleblowing', *Georgia Law Review*, 2014/2, pp. 425-498; <https://doi.org/10.2139/ssrn.2407095>.
- [18] Ligeti, K. (2002) 'Az Európai Unió büntetőpolitikája', *Állam- és Jogtudomány*, 2002/1-2, pp. 73-98.
- [19] Madai, S. (2011) *A család büntetőjogi értékelése*. Budapest: HVG-ORAC.

-
- [20] Mennens, E. (1996) 'Fraud on the Financial Interests of the Community', in Delmas-Marty, M. (ed.) *What Kind of Criminal Policy for Europe?* The Hague-London-Boston: Kluwer Law International, pp. 127-144; https://doi.org/10.1163/9789004641716_020
- [21] Murawska, A. A. (2008) *Administrative Anti-Fraud Measures within the European Union. Necessity and Means*. Baden-Baden: Nomos Verlagsgesellschaft.
- [22] Sieber, U. (2009) 'Die Zukunft des Europäischen Strafrechts – Ein neuer Ansatz zu den Zielen und Modellen des europäischen Strafrechtssystems', *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2009/1, pp. 1-67; <https://doi.org/10.1515/ZSTW.2009.1>.
- [23] Spencer, J. R. (2011) 'EU Criminal Law – the Present and the Future?', in Arnall, A., Barnard, C., Dougan, M., Spaventa, E. (eds.) *A Constitutional Order of States? Essays in the EU Law in Honour of Alan Dashwood*. Oxford-Portland: Hart Publishing, pp. 341-364.
- [24] Várnay, E., Papp, M. (2005) *Az Európai Unió joga*. Budapest: CompLex.
- [25] Vaughn, R. G. (2012) *The successes and failures of whistleblower laws*. Cheltenham: Elgar Publishing; <https://doi.org/10.4337/9781849808385.00019>.
- [26] Vervaele, J. A. E. (1992) *Fraud against the Community. The Need for European Fraud Legislation*. Deventer-Boston: Kluwer Law and Taxation Publishers.
- [27] Westman, D. P. (1991) *Whistleblowing. The law of retaliatory discharge*. Washington DC: The Bureau of National Office.

- [28] White, S. (2018) 'A Matter of Life and Death: Whistleblowing Legislation in the EU', *Eucrim – The European Criminal Law Associations' Forum*, 2018/3, pp. 170-177; <https://doi.org/10.30709/eucrim-2018-017>
- [29] Zieschang, F. (2001) 'Chancen und Risiken der Europäisierung des Strafrechts', *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2001/2, pp. 255-270; <https://doi.org/10.1515/zstw.2001.113.2.255>.