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EDITORIAL



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Editorial

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The special coronavirus recovery fund of the EU is to provide €750 billion for the years 2021 – 2023. In addition, the new EU multi-annual financial framework will amount to €1074 billion, including significant amounts earmarked for corona aid and other subsidies. Considering additionally that national and regional budgets also provide for similar aid, there will ultimately be an unprecedented increase in subsidies and thus a huge potential booty for criminals. A considerable number of corona subsidy fraud cases have already shown up in the Member States, including fake websites and phishing mails seeking to redirect corona aid to criminals' accounts, multiple applications, claims filed for non-existing companies or false data provided by applicants. Clearly, the respective public funds must be protected against fraud and abuse. For this to be achieved, we have to understand the reasons for these abuses (I.), in order to develop specific countermeasures (II.) and to generally improve our basic concepts of criminal policy (III).

I.

Subsidies are prone to fraud and corruption for a number of particular reasons:

- First, the granting of subsidies is especially susceptible to fraud since money is provided without a *quid pro quo*. Thus, this procedure lacks the natural *control element of compensation*, as was already described in the pioneering empirical studies by Prof. Klaus Tiedemann in the 1970s.
- Second, this “criminogenic factor” of subsidies is even stronger if they are administered or monitored by *national authorities*, but paid from *European coffers*, or similarly if funds of the central state are administered by regional institutions. This is especially the case if restitution of wrongful payments or flat rate financial corrections might have to be reimbursed to the EU by the administering national authorities.
- Third, new financial regulations created during *system changes and crises*, as today, can be particularly vulnerable to fraud when they are drafted and applied in haste, often without previous relevant experience. This effect can be aggravated by the political desire for “speed over thoroughness” in order to demonstrate political leadership and decisive action.
- Fourth, for decades, highly paid lawyers, tax consultants, economists and bankers have been *systematically analyzing new financial regulations* with respect to possible loopholes and weaknesses to be exploited. The recent “cum/ex” banking scandals are a case in point.
- Fifth, EU subsidy rules can be especially prone to such legal loopholes since they are often developed as *political compromises*: As a former EU Commissioner responsible for budget control once explained to me: “If parties do not find a compromise after nightlong EU negotiations, they agree on terms which each party can interpret in their own sense”.
- Sixth, the huge volume of subsidies will create additional incentives for *corruption*, both on the political level and on the levels of specifying the technical details of regulations and their application, thus leading to additional loopholes, a greater risk of misappropriations and tolerated fraudulence.
- Seventh, in many areas, our current control system against crime relies too much on (repressive) criminal law and *neglects (preventive) control measures*. According to police sources, the German coronavirus emergency aid program in the federal state of Berlin was at first implemented with almost no controls, which has already led to more than one thousand investigations. Freedom from bureaucracy was confused with freedom from controls, thus creating invitations and “rallies” to fraud. The above-mentioned cum/ex banking scandal and the recent Wirecard case (both with damages of far

above a billion Euros) are also perfect examples for the disastrous consequences of a “symbolic” and ineffective policy lacking effective preventive controls.

II.

In order to avoid widespread coronavirus aid fraud, criminal policy must not only focus on penal law, but must also comprise measures based on a variety of pillars and legal regimes. Relying instead only on criminal law would be comparable to a soccer team playing with only one player and dispensing with the other ten. The consequences of this insight for the prevention of subsidy fraud must include:

- First, *raising awareness* of politicians, administrators, law enforcement officers, auditors and the judiciary with respect to the new threats and preventive needs, including knowledge exchange on common fraud typologies and on special detection tools. This could be coordinated on all levels by OLAF (with its long experience and substantial knowledge on subsidy fraud and with its Irregularities Management System) and by Europol (with the new European Financial and Economic Crime Center).
- Second, *drafting subsidy laws only in cooperation with anti-fraud specialists or committees* in order to ensure basic anti-fraud requirements in the relevant regulations, such as clear definitions of the subsidy aims, abuse of law clauses and reliable identification measures for the recipients of financial aid. Just increasing some general figures in budget acts and establishing hastily written administrative regulations does not guarantee the achievement of the intended aims and is also questionable with respect to the rule of law and the requirement of parliamentary approval. European subsidies also cannot be entrusted to Member States lacking an independent judiciary capable of preventing an abusive diversion of subsidies.
- Third, *applying effective and proportional preventive control measures and audits*, which should not require a suspicion (as is indispensable for interventions of criminal law) but be primarily based on risk analyses, risk scoring, data mining and – possibly – artificial intelligence. This should be accompanied by leniency programs, which are highly successful in the field of European and national cartel law; remunerations for whistleblowers should also be discussed; sufficient funds for effective and fast supervision must already be provided for in the programs.
- Fourth, *developing an effective system of money laundering controls*, focusing on intelligence gathering for the analysis of illegal money flows by using an overarching analysis of national and international suspicious money flows and additional data.
- Fifth, *establishing specific restitution procedures for subsidies as well as general non-criminal (“civil”) confiscation schemes*, in which non-explanation of the origin of certain proceeds can be used as part of the necessary evidence. Together with the afore-mentioned intelligence-based money laundering control systems, these (non-criminal) confiscation schemes are needed as a general instrument against complex organized crime, but can also be helpful in the field of subsidy fraud for identifying and investigating the respective perpetrators and financial profiteers.
- Sixth, *using a comprehensive and bilateral sanction regime* that includes both: national *core criminal law* with effective transnational cooperation procedures as well as national and supranational *administrative sanction law* with special preventive powers, such as exclusion from future funding. Administrative sanction laws can indeed be more flexible than core criminal law, yet the various EU laws with administrative sanctions – for example in subsidy law, cartel law and banking law – require a codified body of general rules and human rights safeguards.

- Seventh, *combining and strengthening all these measures under a coherent security architecture*, especially by defining the information flows between the various actors, such as OLAF (applying an administrative regime), the EPPO (dealing with the repressive criminal law systems), Europol (as a criminal intelligence hub) and the various national authorities. Using again the above soccer simile: The eleven players must not only be present on the field, but they must also act as a unit.

III.

This rudimentary compilation of anti-fraud measures illustrates the following not only for subsidy fraud but also in general and for other fields of crime: An effective protection against complex crimes cannot only rely on penal law, but requires a variety of measures and regulations from different legal regimes forming a coherent security architecture in combination with tailored legal safeguards. As already mentioned: This general insight of modern legal policy is today not only valid in the field of subsidy fraud, but is at least equally important in other fields of complex crimes, such as economic crime, corruption, organized crime and terrorism.

This general change in criminal policy must also be considered in academia and future research. As a consequence, the traditional Max Planck Institute for Foreign and International Criminal Law has expanded: In addition to its two departments of criminology and of criminal law, it now has a new third department of public law, and from this year onwards is called the Max Planck Institute for the Study of Crime, Security and Law. In the future, *eucrim* will also increasingly reflect this fundamental shift of modern criminal policy by increasingly paying attention to alternative (non-criminal) measures of crime control with the resulting new architecture of security law and correspondingly tailored human rights. This new policy should change *eucrim* from a periodical on “*European Criminal Law*” to a broader journal on “*European Crime Control*”, which will encompass in a wider sense prevention, detection, restitution, intelligence gathering and prosecution of transnational and especially European crime. The articles of this issue show that the present issue represents a first step on this new path.

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Editorially reviewed articles published in English, French, or German, are complemented by timely news and analysis of legal and policy developments across Europe.

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