CHAPTER 12

# Diversion of the criminal procedure vs. adequate criminal policy in the field of financial crime in Serbia

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SUMMARY: 1. Introduction. – 2. Compliance of the legislation of the Republic of Serbia with Directive 1317/2017. – 2.1 Criminal offenses protecting the European Union budget related to income. - 2.2. Criminal offenses protecting the European Union budget against intended consumption. – 3. Shortcomings of detection of criminal offences against the financial interests of the European Union. - 4. Diversion of the Criminal procedure and problems in practice. – 5. Shortcomings of application of diversion of criminal prosecution on financial crimes. – 6. Conclusion

ABSTRACT**:** As the candidate country for the EU membership, Republic of Serbia has access to EU pre-accession funds for more than two decades. To effectively protect the financial interests of the European Union, Serbia is also obliged to prescribe sanctions for conduct that caused harm. For some of these criminal offences it is necessary to prescribe stricter criminal sanctions, that could improve the effectiveness of general prevention and prevent the possibility of criminal prosecution becoming obsolete even before such an act is detected by the competent authorities. Furthermore, the statute of limitations in the national legislation for financial crimes is extremely short and due to the complex procedure in detecting the irregularities, often expires before initiation of criminal proceedings.

According to legal framework the deferred prosecution is possible for criminal offenses for which prescribed sanctions are fine or up to 5 years of imprisonment. Although this effectively ends criminal proceedings, the use of institutes to divert criminal proceedings has a limited scope, since the offender is not included in the criminal registry, and he does not plea. When it comes to crimes that harm the financial interests of the EU, deferred prosecution should take into account caused damage or the illegally spent money when deciding of the measure that will be proposed. Starting from the legal theory and application of the legal-dogmatic method in this paper authors try to make a proposal for improving both national legislation and practice, to ensure effective protection of the EU financial interests as well as national financial interests with which they are closely linked.

KEYWORDS: deferred prosecution, criminal procedure, criminal policy, the statute of limitation

## 1. Introduction

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The obligation to protect the financial interests of the European Union also applies to countries that are in the process of joining the EU. By signing the Stabilization and Association Agreement from 2008, the Republic of Serbia gained the opportunity to use funds from the Union. At the same time, the Serbian government has undertaken to establish adequate measures to control and protect the financial interests of the European Union.[3]

The protection of these interests and the harmonization of national legislation with the *acquis communautaire* in this area is one of the criteria established by the 1993 Copenhagen Principles. Their protection implies the application of various measures, including criminal law. However, that does not only mean prescribing criminal acts, but also the application of other criminal legal means and preventive measures.

An important element of criminal law is its protective function. Punishment itself must never be an end in itself. Some authors believe that the goal of criminal law is to protect certain social relations, i.e. the entire society from crime.[4] The justification for prescribing a certain criminal offense is conditioned by the nature of its object of protection. The object of protection of a criminal offense implies a good or interest to which criminal legal protection is provided from injury or endangerment by a crime. Which goods or interests will be protected depends on the real needs of a certain society, that is, the state. Therefore, protected goods and interests differ between individual states, and even within the same state at different periods.[5] However, economic integration of countries at the regional and global level is increasingly erasing these differences. When it comes to criminal acts to the detriment of the financial interests of the European Union, the question can be asked which object they protect. Given that they coincide with the legal description of some crimes that are already provided for in criminal law, it could be concluded that it is not only the budget of the European Union, but also the national budget.[6] Therefore, improving the efficiency of protection of criminal interests of the European Union should not be considered exclusively as an obligation imposed by the process of European integration, but above all as a need for effective protection of national fiscal interests.

[3] The Stabilization and Association Agreement entered into force on September 1, 2013, which gave Serbia the status of a country associated with the European Union. The two most important obligations that our country undertook with its signing are the establishment of a free trade zone and the harmonization of legislation with EU law. Negotiations on the said Agreement between the European Union and Serbia began in November 2005. The Stabilization and Association Agreement, together with the Interim Agreement on Trade and Trade-Related Matters, was signed in April 2008. The process of ratification of the agreement in the member states of the European Union was completed in 2013 after its ratification by Lithuania.

[4] N Mrvić Petrović, Đ Đorđević. *Moć i nemoć kazne [The power and powerlessness of punishment],* (Vojnoizdavački zavod, Institut za kriminološka i sociološka istraživanja 1998) 38.

[5] B Petrović, D Jovašević, *Krivično/Kazneno pravo Bosne i Hercegovine, Opći dio [Criminal Law of Bosnia and Herzegovina, General part]*, (Pravni fakultet Univerziteta u Sarajevu 2005) 119.

[6] J Kostić, *Krivičnopravna zaštita finansijskih interesa Evropske unije [Criminal protection of the financial interests of the European Union]*, (Institut za uporedno pravo 2018) 36.

Initially, the protection of the financial interests of the European Union did not imply criminal law measures. Simultaneously with its expansion, there was a need for more effective protection. This also required the prescribing of criminal sanctions in national legislation for behaviors that endanger them. However, effective protection of certain values does not only mean prescribing criminal sanctions for certain behaviours, but also the existence of the possibility for these crimes to be detected and their perpetrators punished.[7]

Although the European Commission assessed that in its report from 2021 that the Republic of Serbia has made significant progress in the process of accession to the European Union in terms of protecting the financial interests of the European Union, this paper assumes that it is necessary to further harmonize criminal protection interests with the *acquis communautaire*.[8]

Therefore, in order to confirm the stated assumption and give recommendations for the improvement of national legislation and practice regarding more efficient protection of the financial interests of the European Union, we apply the legal-dogmatic method and content analysis.

In this first part of the paper, we analyse the compliance of national legislation with European standards in the field of protection of financial interests of the European Union, then we will look at the challenges in the functioning of mechanisms to prevent illegal behaviour that harms these interests at the level of Serbia. A special part refers to the impossibility of efficient application of the institute of postponement of criminal prosecution, which also has a significant function in criminal policy.

## 2. Compliance of the legislation of the Republic of Serbia with Directive 1317/2017

Directive 1317/2017 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law has created a new legal basis for their protection. It established minimum rules regarding the definition of criminal offenses and sanctions in order to combat fraud and other illegal activities that negatively affect the financial interests of the European Union.[9]

[7] More about that in: J Šuput, 'Državna revizroska institucija i prevencija kriminaliteta belog okovratnika u javnom sektoru' ['State Audit Institution and White-collar Crime Prevention in the Public Sector'] (67/2014) *Zbornik radova Pravnog fakulteta u Nišu, [Proceedings of the Faculty of Law in Nis]*, 336.

[8] European Commission, *Report on the progress of the Republic of Serbia in the EU accession process for 2021,* <https://www.mei.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/izvestaj_ek_oktobar_21.PDF>, 83.

[9] J Kostić, *Krivičnopravna zaštita finansijskih interesa Evropske unije [Criminal law protection of the financial interests of the European Union]*, cit. 44.

According to the provisions of the Directive, Member States should provide for effective, proportionate and dissuasive criminal sanctions for perpetrators of criminal offenses to the detriment of the financial interests of the European Union. Therefore, they should prescribe a sanction of at least four years in prison if the commission of the act caused significant damage or significant material gain. In the event that the commission of some of the criminal offenses to the detriment of the financial interests of the European Union has caused damage or acquired property gain in the amount of less than 10,000 euros, Member States may prescribe other sanctions (misdemeanors) instead of criminal ones.[10]

The criminal legislation of the Republic of Serbia contains criminal offenses that can provide protection to the financial interests of the European Union, both in terms of protection of its public revenues and in terms of protection of its budget from unintended and illegal spending.[11]

### a. Criminal offenses protecting the European Union budget related to income

As the revenues of the European Union and revenues from customs duties on imports and exports from countries outside the European Union, as well as duties on sugar imports and revenues from value added tax collected on the territory of Member States, national legislation needs to prescribe adequate criminal protection measures which will sanction persons who evade the payment of obligations and duties that represent the income of the European Union budget. Such an obligation is also prescribed by the Directive 2017/1317.

The Criminal Code of the Republic of Serbia prescribes two criminal offenses that can provide protection to the financial interests of the European Union.[12] These are the crime of tax evasion and the crime of smuggling. However, as the Republic of Serbia is still not a member, the provisions of the Criminal Code should be changed after accession, because part of the value added tax collected on the national territory will be part of its revenues, as well as customs duties on imports from outside the European Union.

In addition to the above acts, the Law on Tax Procedure and Tax Administration prescribes the criminal offense of tax fraud in connection with value added tax.[13]

With the criminal offense of tax evasion, it is possible to provide criminal protection to the financial interests of the European Union in terms of collecting value added tax, bearing in mind that its percentage when it comes to EU member states represents the income of its budget. An offense exists

[10] Directive (EU) 2017/1317, art. 7.
[11] The criminal legislation means both basic and secondary criminal legislation.
[12] The Criminal code of the Republic of Serbia, Official Gazette of the Republic of Serbia, n. 85/2005...35/2019.
[13] The Law on tax Procedure and tax administration of the Republic of Serbia, Official Gazette of the Republic of Serbia n. 80/2002...144/2020, art. 173.a.

if someone intends to completely or partially avoid paying openness taxes or reporting other facts that affect the determination of such obligations, or who in the same intention otherwise conceals information related to the determination of the specified form, and the amount liabilities that are avoided are exceeded one million dinars. Before the last changes in the criminal code, that amount was 500,000 dinars.

Having in mind that the stated amount represents a legal motive for incrimination, in practice it often happened that tax inspectors do not distinguish between a misdemeanour and a criminal offense due to the low amount of tax or other obligation whose payment is avoided. It happened that tax inspectors sent a request to initiate misdemeanour proceedings, and that the pronouncement and explanation of misdemeanour courts included the criminal offense, so there was no possibility of instituting criminal proceedings, because in those situations the principle of *ne bis in idem* would be violated.

The sanctions prescribed for the perpetrator of the criminal offense are harmonised with the EU Directive, because the perpetrator of the basic form can be sentenced to imprisonment from one to five years and a fine.[14] In addition to the basic, the Criminal Code prescribes two more serious forms. The first aggravation exists if the action of the basic form of the act is undertaken in order to avoid the payment of taxes or other duties exceeding the amount of five million dinars. The perpetrator is sentenced to two to eight years in prison and a fine. Another serious form of crime exists if the action of the basic form of crime is undertaken in order to avoid paying taxes or other obligations in the amount of which exceeds fifteen million dinars. The perpetrator of that act is prescribed a sentence of three to ten years and a fine. Considering the amount and type of threatened punishment, the national legislation regarding the sanctions prescribed for the criminal offense of tax evasion is harmonized with the standards contained in the regulations of the European Union, which concern the protection of its financial interests. However, it is still not necessary to amend the provision of Article 225, which would stipulate that the criminal offense of tax evasion protects the financial interests of the European Union, given that the Republic of Serbia is still not a member, and therefore part of the revenue from value added tax is still not the revenue of the European Union budget.

The criminal offense of smuggling is prescribed by the Criminal Code in the group of criminal offenses against the economy.[15] The act exists if a person is engaged in the transfer of goods across the customs line while evading customs control measures or if, while avoiding customs control measures, he transfers goods across the customs line armed or to a group or using force or threat. The perpetrator is sentenced to six months to five years in prison and a fine.

[14] Directive 2017/1371, art. 7, para. 2.
[15] The Criminal code of the Republic of Serbia, art. 236.

A special form of crime exists if a person is engaged in the sale, distribution or stowage of unaccustomed goods or organizes a network of transporters or intermediaries for the distribution of such goods. The perpetrator is sentenced to one to eight years in prison and a fine. Having in mind the amount of threatened penalties for perpetrators of all forms of the crime of smuggling, it can be concluded that the Criminal Code in that part is harmonised with the standards of the European Union in terms of protection of its financial interests. The Criminal Code uses the term "customs line" and not "European Union customs line". This is completely in line with the current situation. Only after Serbia's accession to the European Union, it is necessary to change the existing provision in that part, which prescribes the criminal offense of smuggling.

The Law on Tax Procedure and Tax Administration prescribes a new criminal offense of tax fraud in connection with value added tax, which we assume was done with the intention of harmonizing the legislation of the Republic of Serbia with European standards as much as possible. The act is prescribed by Article 173a of the said Law and exists if a person intends to exercise the right to unjustified refund of value added tax or value added tax in the previous 12 months, submits one or more value added tax returns the value of false content, and the amount of refund or tax credit exceeds one million dinars. Bearing in mind that the legislator prescribed a prison sentence of one to five years and a fine for the perpetrator, it can be concluded that in this regard the national legislation of the Republic of Serbia is harmonised with European standards prescribing criminal measures to protect the financial interests of the European Union. In addition to the basic, two qualified forms are prescribed. The first serious form exists if the amount of value added tax exceeds five million dinars. The perpetrator of that form of crime is prescribed a prison sentence of two to eight years and a fine. Other serious forms of crime exist if the amount of value added tax exceeds 15 million dinars. In that case, the perpetrator is prescribed a prison sentence of three to ten years and a fine. Having in mind the amount, type and range of prescribed sanctions, it can be concluded that in that part the national legislation is harmonised with European standards. However, there is a problem with the collision of norms that prescribe the crime of tax fraud in connection with VAT and the crime of tax evasion. Tax evasion includes all types of taxes, including value added tax.

The amount determined for the existence of the criminal offense of tax fraud is determined in total (collectively) for all VAT returns filed in the previous year (12 months), as opposed to tax evasion where the amount that is the basis of criminal liability is determined only for one criminal charge. If there is a conflict in the interpretation in practice, due to that fact, there will be a possibility of initiating a tax-administrative procedure regarding the interpretation of regulations between the Tax Administration and taxpayers. This is a problem because the Tax Administration or the Tax Police file criminal charges with the competent authorities if the amount of tax determined during the control

exceeds one million dinars, although the tax-administrative procedure has not yet been finalised. Therefore, the defendants defend themselves that they did not commit a tax crime, although it has not been legally determined whether they were obliged to pay the tax charged.

As can be concluded, the problem that causes legal uncertainty is the prescribing of criminal offenses by tax and other non-criminal legislation. It should be emphasized that the same sanctions are prescribed for both basic and more serious forms of the criminal offense of tax evasion and fraud related to VAT.[16]

A natural person, entrepreneur and responsible person in a legal entity - taxpayer for a criminal offense shall be imposed a security measure prohibiting the performance of professions, activities and duties for a period of one to five years.

### b. Criminal offenses protecting the European Union budget against intended consumption

The criminal act of unfounded obtaining and use of loans and other benefits also protects the budget of the European Union from unintended spending. The crime is prescribed in the group of criminal offenses against property and exists if a person, by falsely presenting facts or concealing them, obtains for himself or another a loan, subsidy, or other benefit, even though he does not meet the prescribed conditions. The perpetrator of that act is prescribed a fine or imprisonment for up to two years. The same act exists if a person uses the obtained loan, subsidy, or other benefit for a purpose other than one for which the loan, subsidy or other benefit was granted. A fine or imprisonment of up to one year is prescribed for the perpetrator. For a criminal offense of unjustified obtaining and using credit and other benefits, the responsible person in the company or other business entity shall be punished with the prescribed penalty if the loan, subsidy, or other benefit was obtained for the company or other business entity or if used for other purposes than by those entities. The Criminal Code does not define the concept of subsidy. It is not defined by the Law on Budget System either. The mentioned Law only defines the notion of financial assistance to the European Union. According to that definition, these are Union funds that are used for purposes and implemented according to the established agreements between the Republic of Serbia and the European Union.[17]

Bearing in mind that the funds of the European Union are used as a pre-accession assistance on the territory of the Republic of Serbia, it is necessary to supplement the provision of Article 209 of the Criminal Code or the provision of Article 112 by defining the subsidy or other benefits. The sanctions prescribed for the crime of unjustified obtaining and using credit and other benefits are too lenient.

[16] Tax Attorneys, *New tax crime: VAT fraud* <https://www.vuk-ta.com/novo-poresko-krivicno-delo-poreska-prevara-u-vezi-sa-pdv.html>.

[17] Law on the budget System, Official Gazette of the Republic of Serbia, n. 54/2009...118/2021, art. 2, para. 1, item 46.

Considering the penalties prescribed for the perpetrator of the criminal offense provided for in Article 209 of the Criminal Code, the statute of limitations for criminal prosecution is three years in the case of unintentional obtaining and use of loans, subsidies, and other benefits. In the case of misuse of loans, subsidies, and other benefits, the status of limitation is only one year. Given that such crimes are most often detected by the bodies responsible for auditing the use of EU funds, as well as their compliance with the rules of administrative procedure, it can be concluded that the statute of limitations for prosecution is too short. Therefore, not only to protect the financial interests of the European Union, but also to protect the financial interests of the state (in some cases subsidies are granted from the budget of the Republic of Serbia, territorial autonomy, and local self-government), higher penalties should be prescribed for general crime prevention, which would contribute to the application of a longer statute of limitations in these cases.[18]

The criminal offense of embezzlement is prescribed by the Criminal Code in the group of criminal offenses against official duty (article 364). An offense exists if a person intends to misappropriate money, securities or other movable property entrusted to him or her in the service or at work in a state body, institution or other entity that does not perform economic activity in order to obtain illegal property gain. The perpetrator is sentenced to six months to five years in prison. In the event that the commission of a criminal offense provides material gain in the amount exceeding 540,000 dinars, elements of a more serious form of the offense will be realized, and for whose perpetrator a prison sentence of one to eight years is prescribed. Another more serious form of crime exists if the commission of the crime provides property gain in the amount exceeding 1,500,000 dinars. In that case, the perpetrator is sentenced to two to twelve years in prison. Considering that the Criminal Code prescribes intent as a constitutive feature of the criminal offense of embezzlement, as well as the amount of penalties, it can be concluded that the Criminal Code is harmonised with European Union legal standards in the field of protection of its financial interests.[19] However, only after the accession to the European Union can the above provision be supplemented in the part which will define that the provisions prescribing the criminal offense from Article 364 apply in the case of money, securities or other movable property entrusted to a certain person. in the service or work of an institution, body or agency of the European Union.

[18] According to art. 103 of the Criminal Code of Serbia, criminal prosecution cannot be undertaken if twenty years have passed since the commission of a criminal offense punishable by imprisonment for more than fifteen years, and fifteen years since the commission of a criminal offense punishable by imprisonment. over ten years, ten years from the commission of a criminal offense punishable by imprisonment by law over ten years, ten years from the commission of a criminal offense punishable by imprisonment by law over three years, three years from the commission of a criminal offense punishable by law by law, imprisonment may be imposed for more than one year and two years from the commission of a criminal offense for which imprisonment for up to one year or a fine may be imposed by law.

[19] Directive 2017/1371, art. 4, para. 3.

The criminal offenses of receiving and giving bribes are prescribed in the group of criminal offenses against official duty.[20] The criminal offense of receiving bribes has a basic and two minor forms. A basic form exists if a person directly or indirectly requests or receives a gift or other benefit or who receives a promise of gifts or other benefits for himself or another person, with his official authorization performed an official action that he shouldn't perform or not perform an official action that he should perform. The perpetrator is sentenced to two to twelve years in prison. The first easier form exists if the official directly or indirectly requests or receives a gift or other benefit or who receives a promise of gifts or other benefits for himself or another person, in order to perform, within the scope of his official authority or in connection with his official authority, the action he shouldn't have to perform or to not perform the official action he would have to perform. The perpetrator of that crime will be punished by a prison sentence of three to fifteen years. With regard to the prescribed criminal sanctions, the provision which provides for the criminal offense of accepting bribes is harmonised with the standards of the European Union. However, after joining the Union, it is necessary to expand the definition of an official, so that it includes an official employed in the institutions of the European Union.

Receiving bribery exists if a person makes, offers or promises a gift or other benefit to an official or another person, in order for an official within his official authority or in connection with his official authority to perform an official action that he shouldn't perform or not perform an official the action he would have to perform or if he mediates in such bribery of an official.[21] The perpetrator is sentenced to six months to five years in prison. In addition to the basic, a lighter form of crime exists when someone makes, offers or promises a gift or other benefit to an official or another person in order for an official to perform an official action within his official authority or in connection with his official authority in order to not perform an official act that he shouldn't have performed, as well as when a person mediates in bribing an official. The perpetrator is sentenced to up to three years in prison. The provisions which prescribe the criminal receiving of bribes shall also apply when the bribe is given, offered or promised to a foreign official. The first form of crime is in line with European Union standards in terms of sanctions, while the second form of crime should be higher. The reason for that is not only to harmonise with them in terms of the amount of the sentence, but also to enable the efficient conduct of the investigation and criminal prosecution. As the provisions prescribing a criminal offense apply in the case of bribery given, offered or promised to a foreign official, it can be interpreted that they also apply to officials and officials of the institutions of the European Union. The

[20] Criminal code, art. 367.
[21] Criminal code, art. 368.

perpetrator is sentenced to up to three years in prison. The provisions which prescribe the criminal giving of bribes shall also apply when the bribe is given, offered or promised to a foreign official.

## 3. Shortcomings of detection of criminal offences against the financial interests of the European Union

According to the Law on the Budget System of the Republic of Serbia, EU financial assistance is also considered public revenue (article 14, paragraph 1, item 6).[22] The manner of performing controls by national bodies and their cooperation with relevant bodies and institutions of the European Union in order to prevent illegality in the procedure of using IPA funds is regulated by the Regulation on the management of European Union pre-accession assistance programs under the Instrument for Pre-Accession Assistance (IPA II) for the period 2014-2020.[23] Based on the provisions of the Regulation, a special body has been established as an internal organizational unit within the Ministry of Finance to perform activities related to performing all measures and activities to protect the financial interests of the European Union and the Republic of Serbia. It primarily coordinates legal, administrative, and operational activities aimed at combating irregularities and fraud in the handling of European Union funds and conducts administrative checks on reports of irregularities and suspected fraud, establishes facts for the need to make decisions and initiate proceedings to sanction irregularities and abuses in handling European Union funding.[24]

Based on the Decree of the Government of the Republic of Serbia from 2011, the Office for the Audit of the EU Funds Management System was established as a service of the Government of the Republic of Serbia that acts as the Audit Body of the Instrument for Pre-Accession Assistance. Its responsibility is to audit the management and control system, the legality of activities, transactions and annual accounts in accordance with internationally accepted auditing standards and guidelines of the European Commission.[25]

However, in order to effectively detect crimes to the detriment of the EU's financial interests, the cooperation of various institutions at the national level is needed. However, although the AFCOS system has been established at the national level, as well as the other mechanisms for the prevention

[22] Law on the Budget System, art. 14, para. 1, item 6.
[23] Regulation on the management of European Union pre-accession assistance programs under the Instrument for Pre-Accession Assistance (IPA II) for the period 2014-2020, Official Gazette of the Republic of Serbia, n. 10/2019. The Regulation establishes the obligation and the manner of recovery of illegally spent funds. According to article 30, the IPA II Beneficiary has the obligation to recover improperly spent funds. The contract, ie other legal act regulates the manner of return of illegally spent funds.
[24] Law on the Budget System, art. 29.
[25] Decree of the Government of the Republic of Serbia, Official Gazette of the Republic of Serbia, n. 41/11 and 83/11.

and detection of criminal offences against the financial interests of the European Union in the new Strategic plan for the Fight against Fraud and Management of Irregularities in the Handling of EU funds in the Republic of Serbia for the period 2021-2023, are identified problems with inter-institutional coordination and cooperation, which are caused by the lack of awareness on the obligation to reimburse all incorrectly spent pre-accession assistance, risk and management and assessment of internal control systems, shortcomings in data collection and analytical tools, insufficient communication and insufficient exchange of information between the relevant institutions. In the mentioned Strategic plan are also identified problems in investigation procedures which are caused by following factors: insufficient knowledge of the current EU rules which requires additional time to process suspicions of fraud, the lack of source documents in Serbian and limited translation resources also execrate problems, lack of developed awareness among local authorities to have a contractual obligation to reimburse unintentionally spent money, lack of commitment and/or full responsibility of local authorities to fully respond obligations to return the amount of irregularly or excessively spent funds according to valid legal acts and change of the status of the legal entity what can lead to impossibility of reimbursement of irregularly spent funds.[26] Bearing in mind above mentioned it can be concluded that in practice exist the problems regarding the cooperation between relevant national institution. In addition, the mechanisms for recovering funds is not efficient. Lack in the cooperation of relevant institution takes to much times. It can slow down the prosecution of perpetrators. In practice that is a serious problem, bearing in mind that the statute of limitations in the national legislation for financial crimes is extremely short. This could be overcome by applying the institute of deferred criminal prosecution. If stricter penalties will be prescribed for some criminal offences against the EU financial interests, it will imply a longer statute of limitations for criminal prosecution. However, deferred criminal prosecution is applicable only for criminal offence up to five years of imprisonment.

## 4. **Diversion of the Criminal procedure and problems in practice**

The general principle of Serbian criminal procedure that guides the public prosecutor in performing the function is the principle of legality prescribed by Article 6 of the Criminal Procedure Code.[27] The principle of legality is the duty of the public prosecutor to undertake criminal prosecution when there are grounds for suspicion that a criminal offense has been committed or that a person has committed a

[26] The Strategic plan for the fight against fraud and management of irregularities in the handling of European Union funds in the Republic of Serbia for the period 2021-2023, Official Gazette of the Republic of Serbia, n. 99/2021, 10-12.
[27] M Škulić, 'Načelo zakonitosti u krivičnom pravu' [The principle of legality in criminal law] (vol 58, 1/2010), *Anali pravnog fakulteta u Beogradu [Annals of the Faculty of law in Belgrade]*, 66-107.

criminal offense for which the *ex officio* prosecution is envisaged. Exceptionally, the public prosecutor may decide to postpone or not to prosecute, under the conditions prescribed by law (Article 6 paragraph 3 of the Criminal Procedure Code). [28] This exception is the principle of the opportunity of criminal prosecution. The principle of opportunity contains the authority of the public prosecutor to decide on the performance of the function of criminal prosecution at his discretion.[29] However, the principle of opportunity does not give the public prosecutor the authority to arbitrarily, at his discretion, decide on the prosecution or non-prosecution of the perpetrator.

The deferred prosecution against adult perpetrators (principle of opportunity) of the Republic of Serbia was introduced for the first time in criminal procedure legislation by the Criminal Procedure Code from 2001.[30] After the enactment of the principle of opportunity, subsequent legislative amendments of the Criminal Procedure Code introduced changes in the regulation of the deferred prosecution, with the aim of creating a legal basis that allows for the widest possible application of the principle of opportunity.[31] One of the amendments to the Criminal Procedure Code, from 2009,[32] even introduced obligation of the public prosecutor to examine possibility of deferred prosecution for all crimes for which is prescribed sanction of up to three years of imprisonment. This intervention introduced principle of opportunity as a basic principle for one group of crimes. Subsequent amendments to the Criminal Procedure Code revised provisions on principle of opportunity and removed obligation of public prosecutor to examine possibility for its application in each case.

According to the valid provisions of the law, the authority of the public prosecutor to defer from prosecution is regulated by Article 283 of the Criminal Procedure Code, postponement of criminal prosecution for criminal offenses for which imprisonment of up to five years or fine is prescribed by Criminal Law. Article 284 paragraph 3 of the Criminal Procedure Code envisages the right of public prosecutor to decide not to prosecute for criminal offenses punishable by up to three years of imprisonment.

Article 283 of the Criminal Procedure Code refers to the so-called conditional opportunity according to which the public prosecutor can use the discretionary right only after the suspect accepts and then performs one of the envisaged obligations, while Article 284 paragraph 3 refers to the so-called pure opportunity according to which the public prosecutor can, but does not have to, reject the criminal

[28] Criminal procedure code of the Republic of Serbia, Official Gazette of the Republic of Serbia, n. 72/2011...62/2021- decision of the Constitutional court. art. 6, para 3.

[29] V Đurđić, 'Načelo oportuniteta krivičnog gonjenja u krivičnom postupku Srbije' [The principle of the opporunity of criminal prosecution in the criminal procedure of Serbia] (2-3/2011) *Revija za kriminologiju i krivično pravo [Review of Criminology and Criminal Law]*, 199-219.

[30] Official Gazette SRJ, n. 70/2001.

[31] J Kiurski, M Matic, *et al*, (2012) *Primena načela oportuniteta u praksi – izazovi i preporuke [Application of principle of deferred prosecution – challenges and recommendations]*, (Udruženje tužilaca i zamenika javnih tužilaca Srbije 2012).

[32] Official Gazette of Republic of Serbia, n. 20/2009, 72/2009.

charge for reasons of expediency or fairness, without any conditions. In practice, the notion of opportunity is generally identified with the provision of Article 283 of the Criminal Procedure Code.

The key features of the principle of opportunity in Serbian legislation are reflected in the following: the principle of opportunity regulates the obligation of prosecution; the public prosecutor as the only authorized state body entrusted with the function of criminal prosecution can apply principle of opportunity; for the application of the principle of opportunity it is necessary to obtain the legal conditions for initiation of criminal proceedings; as a result of the public prosecutor's discretion, the obligation to prosecute may be overlooked in cases where prosecution would not be expedient from the point of view of the public interest and in situations listed in the law.[33]

To apply principle of opportunity the public prosecutor is obliged to assess the fulfilment of legal conditions, as well as the assessment of the expediency of criminal prosecution from the aspect of public interest. In addition, the public prosecutor has to determine the fulfilment of formal requirements from Article 283 of the Criminal Procedure Code. Bearing in mind that the formal condition is provided for alternatively, and not cumulatively prescribed penalties, the application of postponement of criminal prosecution is not possible for criminal offenses for which a fine, as an ancillary sanction, is cumulatively prescribed with imprisonment. In situation when fine and imprisonment are cumulatively prescribed for criminal offence, the public prosecutor cannot use principle of opportunity, even for offences for which the sentence is less than five years of imprisonment.[34]

The legislator, as a formal condition for postponing of prosecution, envisages the consent of the suspect. The suspect needs to accept to perform the obligation (obligations) imposed by the public prosecutor in the order on postponement of criminal prosecution. However, the current legal solution does not foresee the consent of the court nor the consent of the injured party, which was condition for application of the principle of opportunity in previous legislation. The existing solution abolished restriction that could challenge prosecutor’s decision on deferred prosecution.

The consent of the suspect must relate both to the type of imposed obligation (obligations) and to the manner and deadlines for fulfilling the imposed obligation (obligations). Without the consent of the suspect, there is no possibility of postponing the criminal prosecution. The suspect's consent: must be unconditional; it must not be partial or incomplete; must be given voluntarily, without coercion or

[33] V Đurđić, 'Opravdanost i svrha načela oportuniteta krivičnog gonjenja', [Justification and purpose of the principle of opportunity for criminal prosecution] *Oportunitet krivičnog gonjenja*, *[Opportunity of prosecution]* (Srpsko udruženje za krivičnopravnu teoriju i praksu 2009) 13-28.

[34] For example, cumulative sanctions are envisaged for the criminal offence tax evasion from article 207 paragraph 1 of the Criminal code.

pressure; it must be authentic, not imposed; it must not be the result of misapprehension; must arise from awareness of the consequences of fulfilling or not fulfilling the imposed obligation (obligations). In that sense, negotiating with the suspect is not aimed at obtaining the "simple" consent of the suspect to accept the postponement of the criminal prosecution. On the contrary, having in mind the suspect's right to a fair trial and the right to be informed about accusation in line with the European Court of Human Rights jurisprudence, the suspect's consent needs to be the outcome of presentation of facts and evidence from the criminal charge and purpose of application of postponement of criminal prosecution.

When deciding to postpone criminal prosecution, the public prosecutor is obliged to assess the personality of the suspect in each specific case, as one of the circumstances in the assessment of the expediency of criminal prosecution from the aspect of public interest. Also, the assessment of the suspect's personality should be the subject of consideration by the public prosecutor when selecting the type of obligation under Article 283 of the CPC.

When assessing the personality, the public prosecutor should consider the circumstances from Article 54 of the Criminal Code, which the court considers when deciding on the type and amount of criminal sanction.

Accordingly, the public prosecutor in each case should particularly appreciate:

- Personal circumstances of the suspect - age, health condition, level of education, financial situation, etc.;
- Family circumstances of the suspect - marital and family status, number of minor children, number of persons supported by the suspect, etc. This circumstance is especially appreciated when determining the obligation that may affect the suspect's family;
- Previous life of the suspect - whether it is a perpetrator who has been criminally convicted or misdemeanour punished, bearing in mind that the postponement of criminal prosecution is justified, especially when it comes to unconvict persons;[35]
- Behaviour of a suspect after the commission of a criminal offense, and in particular treatment of the victim of the criminal offense;
- Whether it is a person who is ready to undergo any of the medical treatments to eliminate the causes that led to the commission of the crime.

[35] By the Instruction of the Republic Public Prosecutor A. No. 246/08 of March 28, 2019 it is envisaged that the conditional postponement of criminal prosecution cannot be applied if the measure has already been applied twice to the suspect for the same criminal offense. The public prosecutor, depending on all the circumstances of the case, will independently assess whether to apply the conditional postponement of criminal prosecution, if the person is in the central records for another criminal offense the case.

Pursuant to Article 283, paragraph 1 of the Criminal Procedure Code, the public prosecutor may apply the postponement of criminal prosecution for certain criminal offenses if the suspect accepts one or more of the following obligations:

1) to eliminate the harmful consequence caused by commissioning of a criminal offense or to compensate for the caused damage;
2) to pay a certain amount of money to the public revenues, which is used for humanitarian purposes or other public purposes;
3) to perform certain community service or humanitarian work;
4) to fulfil alimentation obligations which have fallen due;
5) to undergo to an alcohol or drug treatment programme;
6) to undergo psychosocial treatment to eliminate the causes of violent behaviour;
7) to fulfil the obligation established by the final court decision, or to respect the restriction determined by the final court decision.

The public prosecutor may order the suspect to perform one or more of the stated obligations within a certain period of time, provided that the suspect accepts it. If more than one obligation is specified, they can be determined only cumulatively.

Alternative or conditional determination of obligations is not allowed, however, it is possible to replace a certain obligation under the following conditions: that the originally determined obligation could not be performed for objective and justified reasons; and that the obligation cannot be carried out in the manner ordered or on the specified subject.

The legislator does not limit the number of imposed obligations, nor does it prescribe the criteria on the basis of which the public prosecutor will determine certain obligations in a specific case. In that sense, the public prosecutor, guided by the idea of restorative justice, makes a decision on the choice of obligation based on the assessment of: circumstances concerning the suspect's personality, circumstances related to the type and gravity of the committed crime, and the circumstances under which the act was committed.

Having in mind the restorative character of conditional postponement of criminal prosecution, as well as that the right of the victim[36] to compensation (if the criminal act caused damage), the public prosecutor should first propose to the suspect to eliminate the harmful consequences or compensation of caused damage, taking into consideration the personal and family circumstances of the suspect, his financial situation and other circumstances relevant to the selection of the obligation. Only if in the

[36] Injured party in Serbian legislation.

specific case, the fulfilment of this obligation is not possible, the public prosecutor will consider imposing other obligations. Of course, the imposition of this obligation does not exclude the possibility of the imposition of some other obligation (obligations).

Although the legislator has not given priority to any obligation over others, it can be concluded that the order in which the obligations are set suggests that the obligation to eliminate harmful consequences or compensation should take priority in all cases where its implementation is possible.
The manner of execution of the imposed obligation is regulated by the program and procedure of execution of the obligation. The public prosecutor determines the manner of execution, which depends, on the type and nature of the obligation.
The manner of fulfilling the obligation, represents the consent of the public prosecutor and the suspect, while the assistance of experts is necessary to determine the manner of performing certain obligations (i.e. in the case of medical treatment).
The program and procedure of performing the obligation is defined in the Order on Postponement of Criminal Prosecution, which states whether the obligation will be performed by a single action or multiple actions.
In practice, public prosecutors often order multiple actions, including for payment by ordering the suspect to pay a sum of money in instalments, based on the assessment of suspect's financial circumstances. In the case of application of this obligation, the manner of execution includes the manner in which payments are made (i.e. to the account, through the payment slip), as well as the manner in which the suspect proves to the public prosecutor that the obligation has been fulfilled (i.e. submission of payment slips, receipts, etc.). It is considered that the obligation was performed by submitting a receipt of the last payment which proves that the obligation has been performed in full.
If the suspect stops paying after payment of a certain number of instalments, it is considered that he has not fulfilled his obligation and the public prosecutor continues the criminal prosecution. In that case, the paid part of the money is not returned, and the final decision on the payment is made by the court during the procedure. Exceptionally, after obtaining the report of the commissioner from the administrative body responsible for the execution of criminal sanctions, the public prosecutor may change the manner of execution or replace the imposed obligation with another if the suspect fails to fulfil the obligation due to circumstances not attributable to his guilt. However, this approach of the public prosecutor should be an exception, bearing in mind that the Criminal Code stipulates that in

case the convict does not pay the fine, it will be replaced by imprisonment or work in the public interest and there is no flexibility.[37]

To achieve the purpose of postponing criminal prosecution, it is not enough to select the proper obligation and the manner of its execution, but also the deadline for execution. An unreasonably long deadline can make a properly chosen obligation meaningless.

The deadline is the time period in which the suspect is determined to perform the ordered obligation. The public prosecutor determines the deadline within which the suspect must perform the obligation (obligations). The deadline may not be longer than one year. The deadline of one year is primarily used for obligations of a medical treatment.

The Law on execution of non-custodial sanctions and measures prescribed that supervision over the execution of obligations under the decision of the Public Prosecutor on the postponement of prosecution is performed by the Commissioner from the Administration responsible for execution of criminal sanctions.[38] According to Article 11 of this Law, the Commissioner supervises the commitment of obligations determined to the suspect. The public prosecutor is obliged to submit an order on postponement of prosecution to the Commissioner within three days from the day of decision making.

The Commissioner is obliged to take the necessary actions for its execution immediately upon receipt of the decision. The Commissioner is also authorized to obtain data from the suspect, police, health and social protection institution, employer and other institutions, organizations and associations.

The Commissioner has the right to direct supervision of obligations, and the public prosecutor's obligations on the monitored supervision. If the suspect does not meet the ordered obligations, the Commissioner informs the public prosecutor. Also, if occurs circumstances that are preventing the suspect to fulfil obligation the Commissioner is obliged to inform public prosecutor. When the suspect meets the obligation (obligations) the Commissioner without delay informs the competent public prosecutor.

The Commissioner prepares report on all circumstances that affect the commitment of obligation and delivers report to the public prosecutor. Based on the report to the prosecutor shall issue a final decision on the postponement of prosecution, and the decision to reject the criminal charges or continued proceedings.

After the expiration of the deadline for fulfilment of obligation the public prosecutor checks whether the suspect fulfilled the obligation. The verification of the obligation is performed through the

[37] Criminal code, art. 51, para 2.

[38] Law on execution of non-custodial sanctions and measures, Official Gazette of the Republic of Serbia, n. 55/2014 and 87/2018.

Commissioner Office or in another adequate manner, depending on the type of ordered obligation and the manner of its execution.

If the public prosecutor determines that the suspect has fulfil the order, in the manner and within the deadline, it shall issue a decision on rejection of criminal charges in terms of Article 283 paragraph 3 of the CPC.

## 5. Shortcomings of application of diversion of criminal prosecution on financial crimes

Due to the removal of some formal conditions, such as consent of the judge and consent of the injured party, the application of principle of opportunity significantly increased in Serbia over the time. In the Republic of Serbia, deferred prosecution is used for resolution of the approximately 15 percent of total number of criminal cases.[39]

According to the annual reports of Republic Public Prosecutor Office in majority of cases the public prosecutor proposes obligation of payment of a certain amount of money to the public revenues, which is used for humanitarian purposes.[40] However, wide use of only this obligation has a consequence a bad public perception of deferred prosecution.

All other obligations are implemented in less than 20 percent of cases. For the prosecution of financial crimes two other obligations might be relevant. The obligation of elimination of harmful consequences is applied in less than 10 percent of cases and performance of community service in approximately 4.1 percent. However, the obligation of elimination of harmful consequences do not include possibility of calculation of damage by expert witness, since that will lead to delays and increase of the costs. As precondition for proposal of this obligation there should be a proposal or a claim of the injured party. The public prosecutor cannot, *ex officio*, impose this type of obligation without the motion or request of the injured party.[41] The motion or request of the injured party does not have to be submitted in a special form and can be stated on the record of the examination or in an official note.

According to the interpretation, the public prosecutor must determine the amount of damage prior to the proposal of the obligation, by obtaining evidence and verifying the circumstances. The obligation to compensate damages may be imposed for the purpose of full or partial compensation. If partial compensation for damages has been ordered, the public prosecutor shall refer the authorized person to litigation for the remaining amount, especially if the property claim is unrealistic.

[39] Calculation based on number presented in the Annual report of the Republic Public Prosecution Office for 2021.
[40] More than 80 percent of all obligations issued is the obligation to pay funds for humanitarian purposes.
[41] When the budget of the Republic of Serbia or a unit of local self-government is damaged, a request should be submitted from the competent state institution (representatives of property law interests of the Republic of Serbia or a unit of a local self-government) who then act on behalf of the injured party.

In addition, the community service is applied in relatively low number of cases to produce expected effects. Community service could be adequate additional obligation in some cases and would have impact on regaining trust of citizens. However, implementation of this obligation should be visible to local community to ensure positive effects. In relation to financial crimes, community service should be used jointly with obligation of elimination of harmful consequence or payment in humanitarian purposes.

There is no comprehensive guideline for application of deferred prosecution. In addition, the problem in practice is lack of oversight system i.e. monitoring of implementation of obligation (except for payment). Oversight is especially important for application of obligation of community service to ensure fulfilment of obligation over the prescribed period of time.

There is no data on prosecution of criminal offences for protection of EU financial interests.

## 6. Conclusion

The criminal legislation of the Republic of Serbia prescribes wide range of criminal offences that can provide criminal protection to the financial interests of the European Union. Based on the previous analysis, it can be concluded that criminal law provisions are largely aligned with European standards in the mentioned area. However, there still seem to be problems in practice. They are primarily reflected in lack of cooperation between relevant national institutions and shortcomings of mechanisms for recovering funds. The lack of cooperation has impact on the efficiency of criminal procedure, since it leads to delays and postponement of steps and actions during investigation and prosecution phase. That could be a huge problem, bearing in mind that the statute of limitations in the national legislation of the Republic of Serbia for financial crimes is extremely short.

The challenge of efficiency and lack of cooperation could be overcome by applying the institute of deferred criminal prosecution. However, there are additional challenges for application of deferred prosecution on financial crimes, especially when the financial interests of the European Union are included. On the one hand, it is necessary to prescribe stricter criminal sanctions to improve the effectiveness of general prevention and prevent the possibility of criminal prosecution becoming obsolete even before such an act is detected by the competent authorities. On the other hand, application of deferred criminal prosecution is not possible for the tax crimes in the Republic of Serbia, bearing in mind that legislation provide for that crime a fine as an ancillary sanction, cumulatively with imprisonment. In situation when fine and imprisonment are cumulatively prescribed for criminal

offence, the public prosecutor cannot use principle of opportunity, even for offences for which the sentence is less than five years of imprisonment.

Bearing in mind that differed prosecution represents an effective tool from the aspect of eliminating the harmful consequences of a criminal offense and compensates for the damage caused it is necessary to enable its application to a greater number of financial crimes. To specifically cover protection of the EU financial interest it is necessary to develop comprehensive guide for deferred prosecution and to empower prosecutors to properly estimate caused damage and to ensure coverage of damage through proposed obligation to the suspect. Furthermore, it is necessary to include injured party in that process as a control mechanism. Involvement of the injured party will require increasing capacities of public prosecutors to have dialogue with injured party to avoid that this become deterring request for prosecutor.

As could be concluded, although the national legislation of the Republic of Serbia is largely harmonised with the EU *acquis* in this area, the problem is the cooperation of the competent authorities in practice and lack of capacities of employees. Therefore, it is necessary to conduct additional education and organize round tables not only for employees of criminal prosecution bodies, but also for employees of institutions important for participation in the detection of criminal acts to the detriment of the financial interests of the European Union.

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