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## The DRAMP Project

### DIVERSION, RESTORATIVE AND MEDIATION PROCEDURES

## Questionnaire

### INTRODUCTION

The **DRAMP (Diversión, Restorative and Mediation Procedures) Project** submitted to the Call Hercule 2020 - 'Legal Training and Studies 2020' has been approved. The project aims to enhance legal and judicial cooperation in cases relevant to the newly established European Public Prosecutor Office (the "EPPO"), particularly in crimes against the EU financial interests. The core action is the identification and analysis of national legislation of Member States related to Diversion, Restorative and Mediation Procedures in criminal matters, and the assessment of their compatibility with the principles of restorative justice and EU law.

The research is coordinated by Professor Alessandra Lanciotti and carried out by a highly qualified team of researchers and professors from the Department of Law of the University of Perugia which includes Professors M. Montagna, V. Valentini, S. Cociani, R. Fonti, S. Sartarelli and S. Vezzani in cooperation with distinguished lawyers and academics throughout Europe and of members of the Association for European Criminal Law and for the Protection of the EU Financial Interests.

The main task of this research is to gather data and analyse the different procedures, both judicial and extrajudicial, that are applied in each Member State to dispute resolution in cases of fraud offences affecting the financial interests of the EU and falling within the competence of the 'EPPO'. The 'EPPO' is established by Council Reg.(EU) 2017/139; its competence is defined by the Dir.(EU) 2017/1371 on fight against fraud to the Union's financial interests (PIF Directive).

**State of play:** National legal systems provide for various types of prosecutions of a violation under simplified procedure, which may or may not include the involvement of a Court, for example in the form of transactions with the suspect or accused person. Such procedures are envisaged to solve disputes and set reparation in fraud cases considered "less serious" as per the amount due, number of individuals involved, or other specific conditions. If such procedures exist in the Member State concerned, the European Delegated Prosecutor can apply them under the conditions provided for in national law also in cases where *the final damage of the offence, after possible recovery of an amount corresponding to such damage, is not significant*" (reg 2017/1939, §82)

Reg. (EU)2017/1939 allows for the possibility of applying the simplified prosecution procedure in accordance with the conditions provided for in national law to cases relevant to EPPO's competence, including fraud cases considered "less serious". Reg. 2017/1939 makes a specific reference to *simplified prosecutions procedures* in article 40 which states: "If the applicable national law provides for a simplified prosecution procedure aiming at the final disposal of a case on the basis of terms



*agreed with the suspect, the handling European Delegated Prosecutor may [...] propose to the competent Permanent Chamber to apply that procedure in accordance with the conditions provided for in national law". It further identifies the grounds for the application of simplified procedures by reference to the seriousness of the violation, the intention to repair it and its compliance with the principles and objectives of EPPO.*

**Project's methodology:** The DRAMP Project aims to collate information relating to the national rules on alternative dispute settlement and diversion in force in each EU Member State. In order to ensure uniformity of the research Data concerning the different MS involved will be initially gathered by means of a questionnaire.

Then, the collected data will be analysed by the research group and finally, the outcome of this study will be discussed during an International Conference to be held in Perugia in Spring 2022.

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In order to assess the state of play of mediation and diversion procedures applicable in each Member State, we kindly ask you to answer the following questionnaire. Questions are written in both Italian and English, you can just stick to the English version.

We warmly thank you for your cooperation

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## QUESTIONNAIRE



1. Legislation
2. Competent Authority
3. Defendant
4. Legal persons
5. Procedure
6. Sanctions
7. Execution of Restorative Measures
8. Final. Info on reforms dealing with diversion, mediation and restorative procedures
9. Annex: definitions and terminology

### **How to complete the questionnaire:**

- ❖ Answer the questions, focusing on the national legislation and its application in the State concerned
- ❖ Provide additional useful information, if available (case law, scholarly analysis, comments) by writing underneath each question
- ❖ Attach useful documents (preferably English or French versions)

### **For further information about the questionnaire please contact**

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2.2. C'è un'autorità che attiva la procedura (chiede l'accesso, propone all'accusato la procedura alternativa) diversa da quella che ha la competenza per stabilire le condizioni per ricorrere alla procedura alternativa?

2.2. Is there an Authority that triggers the settlement procedure (requests access to it, proposes the alternative settlement to the accused) other than the one that has the competence to establish the conditions to resort to the alternative settlement procedure?

### 3. INDAGATO - DEFENDANT

3.1 Nella procedura l'indagato partecipa personalmente, è rappresentato da un difensore, un delegato, un mandatario, altro?

3.1. Does the accused personally take part in the alternative procedure? Does he/she have the right to legal counselling (lawyer, counsel, representative, or some kind of authorised agent)?

3.2. Nel vostro sistema penale, prevedendo la possibilità che più persone partecipino alla commissione della medesima violazione, è applicabile una procedura alternativa? Con quali effetti sugli altri soggetti presunti responsabili?

3.2. When multiple individuals jointly perpetrate the same violation, is the alternative procedure applicable even though only some of the accused request access to that procedure? Are there any particular consequences for the other persons under investigation who do not opt for the alternative procedure?

### 4. PERSONE GIURIDICHE - LEGAL PERSONS

4.1 È prevista la responsabilità diretta della persona giuridica? Essa ha la possibilità di aderire ad una procedura alternativa, di rendersi attivamente partecipe di un programma ripartivo?

4.1. Does the national legislation rule on legal persons' liability? Does it include the possibility for the legal person to resort to, or participate in alternative dispute settlements and be actively part of a reparation programme?

4.2. La responsabilità della persona giuridica è distinta dalla responsabilità penale delle persone che la rappresentano? Anche nell'accesso e svolgimento della procedura alternativa?

4.2. Is the criminal liability of the legal person separate from the criminal liability of its representative(s)? Does the separation between the legal person and its representatives in terms of criminal responsibility also include a separate access to, and distinct procedure for the settlement or alternative dispute resolution by that legal person?

### 5. PROCEDURA - PROCEDURE

5.1. Quali sono le condizioni di ammissione alla procedura alternativa? (es.: tipo di condotta, lista di reati indicati un dato capitolo del codice penale o pena max prevista, non contestazione di aggravanti, ecc...)

5.1. Please describe which are the preconditions for admissibility to the alternative procedure and report on the rules of procedure related to the trigger mechanism.

5.2. In che momento della procedura può intervenire questa opzione alternativa: prima, durante, dopo l'esercizio dell'azione penale; esiste una preclusione di fase?

**5.2.** At what stage of the proceeding can the decision to resort to an alternative settlement be made: a) during investigation; b) at the pre-trial hearing; c) at trial opening; d) during trial; e) at another time/stage (specify...).

**5.3.** L'accesso alla procedura alternativa è rimesso alla discrezionalità dell'Autorità giudiziaria competente? Può essere richiesto dall'interessato? costituisce un suo diritto?

**5.3.** Is access to the alternative procedure left to the discretionary decision of the competent judicial authority?

Can access to the alternative procedure be requested by the person involved in the offence? Does that person have the right to request the alternative procedure?

**5.4.** Con quali mezzi il convenuto viene informato dell'avvio di un'indagine sulla sua condotta e della possibilità di ricorrere ad un procedimento alternativo?

**5.4.** By which means is the defendant is informed of the initiation of an investigation into his conduct and the possibility of resorting to an alternative procedure?

**5.5** Come viene attivata la procedura alternativa: su richiesta del convenuto / su proposta dell'autorità procedente?

**5.5.** Please describe how the alternative procedure is triggered: by a request from the accused/ by a proposal from the proceeding authority?

**5.6.** L'autorità competente dispone di un potere discrezionale di iniziativa nel proporre la transazione alternativa al convenuto?

**5.6.** Does the competent authority have a discretionary power of initiative in proposing the alternative settlement to the defendant?

**5.7.** La richiesta di accesso alla procedura alternativa può essere rifiutata? Nel caso, per quali motivi?

**5.7.** Can a request to resort to the alternative procedure be rejected? If so, on what grounds?

**5.8.** La decisione di rigetto dev'essere motivata?

**5.8.** Does the decision of rejection need to be justified or motivated?

**5.9.** È previsto qualche rimedio per il rigetto?

**5.9.** Is there any legal remedy in case of rejection?

**5.10.** Che effetti ha l'apertura di questa procedura sull'azione penale (sospensione, conclusione, altro?)

**5.10.** What effects does the opening of the alternative procedure have on criminal prosecution (suspension, conclusion, other)? (e.g., the "main" prosecution is suspended (if so, for how long) or is finally closed (if so, what kind of closure decision, which effects), or other...(describe) ).

**5.11.** Quali elementi vengono forniti per l'adozione della decisione? (atti d'indagine, rapporti, relazioni di autorità investigative, documenti, testimonianze, altro...)

**5.11.** What elements and allegations must be presented to the authority to allow the resort to the alternative procedure? (Investigation results, reports from authorities, other)

5.12. La difesa ha accesso a questa documentazione? A partire da quale momento?

**5.12.** Are such elements and allegations disclosed to the defendant? If so, at which stage does the accused have access to allegation documentation against him?

5.13. La difesa ha accesso a tutte le prove d'accusa senza limitazioni?

**5.13.** Does the defendant have access to all allegations without limitation?

5.14. Che contributo può dare la difesa in relazione alla presentazione degli elementi utili alla decisione di applicazione della procedura alternativa?

Il convenuto ha il diritto di presentare argomenti a discarico, prove, documenti a sostegno della decisione di ricorrere alla procedura alternativa?

**5.14.** What contribution can the defendant give in relation to the presentation of the elements in favour of the decision to resort to the alternative procedure?

Is the defendant entitled to present discharge arguments, evidence, documents to support the decision to resort to the alternative procedure?

5.15. Le regole della procedura prevedono un contraddittorio? Si prega di specificare in che modo esso è garantito

**5.15.** Do the rules of procedure grant an adversarial process during the alternative settlement?

Please give further explanation on how the adversarial process principle is respected.

5.16. La procedura alternativa può basarsi su un accordo a compiere alcune attività riparatorie o risarcitorie? Se sì a quali condizioni?

**5.16.** Can the alternative procedure be based on an agreement to perform some restoration or reparation activities? (e.g., refunding, reparation of damage, modification of corporate control, etc...) If so, under which conditions?

## **6. SANZIONI - SANCTIONS**

6.1. Quali sono i criteri per la determinazione del contenuto sanzionatorio?

È prevista la valutazione del grado di partecipazione, delle circostanze, della gravità del fatto?

Sono rispettati il principio di proporzionalità e di equità?

**6.1.** What criteria are considered for the determination of the sanctions? (aggravating/mitigating factors; gravity of offence; circumstances of the case)

Are the principles of proportionality and equity respected?

6.2. Quali sono le regole finanziarie applicate per la definizione dell'importo riparatorio? Esiste una valutazione proporzionale al danno causato?

**6.2.** What are the financial rules applicable to determine the amount of reparation? Are proportionality criteria based on the evaluation of the damage caused applicable?

6.3. Esiste un obbligo di adesione alla proposta di definizione alternativa del procedimento?

**6.3.** Is there an obligation to accept the proposed alternative settlement?

6.4. Il contravventore può rifiutarsi di aderire ad una proposta di procedura alternativa? Con quali conseguenze?

**6.4.** Does the defendant have the right to refuse the proposed settlement arrangement?

Please describe briefly the consequences related to the defendant's refusal to accept the proposed alternative settlement

6.5. La decisione contenente l'adozione delle misure sanzionatorie/riparatorie può essere: annullata, modificata, impugnata?

**6.5.** Can the decision regarding the applicable sanctions/ restorative measures be: nullified, appealed, modified?

6.6. In caso affermativo, chi è legittimato a impugnarla e che tipo di impugnazione è prevista? Che procedura si apre a seguito di una impugnazione?

**6.6.** If so, who has the right to appeal?

Please, briefly describe the type of appeal procedure and its effects

6.7. È possibile una sovrapposizione fra le diverse azioni di accertamento della responsabilità, per esempio amministrativa e penale? L'applicazione di una procedura alternativa che effetti avrebbe?

**6.7.** Is an overlapping of two different procedures possible (e.g., administrative and criminal)?

In this case, what are the effects of the application of the alternative settlement procedure?

6.8. Quali sono gli effetti della conclusione di una procedura alternativa:

- A) per il contravventore (determinazione della responsabilità)
- B) per l'autorità competente a perseguire le violazioni di legge
- C) per terzi soggetti
- D) in relazione all'azione penale
- E) in relazione all'applicazione di sanzioni di natura differente

**6.8.** What are the effects of the conclusion of the alternative dispute resolution procedure for:

- A) the defendant (does the procedure establish his liability?)
- B) the authority prosecuting the violation
- C) third parties (other suspects/defendants, damaged parties, etc...)
- D) the criminal prosecution
- E) the application of sanctions of a different nature

6.9. La conclusione di una procedura alternativa costituisce una decisione finale di una vicenda giudiziaria (con applicabilità del *ne bis in idem*)? Gli obblighi e i requisiti della procedura alternativa sono considerati sanzioni?

**6.9.** Does the conclusion of the alternative procedure represent a final decision on the case (making the *ne bis in idem* applicable)? Are the obligations and requirements of the alternative procedure regarded as sanctions?

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6.10. Il contravventore risulta, in seguito, iscritto in un registro di autori di frode? con quali effetti e per quanto tempo?

**6.10.** At the end of the alternative procedure, is the name of the offender recorded in the list of fraud-offenders? If so, what are the consequences and what is the duration of the record?

6.11. La procedura dovrebbe essere applicabile senza distinzione a tutti i cittadini dell'UE. Esiste una disciplina specifica per i non residenti nello Stato procedente

**6.11.** The procedure should be applied to all European citizens without discrimination. Is there a specific discipline that applies to non-residents of the proceeding State?

6.12. Quali sono le regole riguardanti:

- a) la cooperazione giudiziaria;
- b) la procedura di consegna;
- c) l'esecuzione della decisione emessa da altro Stato membro;
- d) i motivi di rifiuto dell'esecuzione

**6.12.** Please indicate which are the rules governing:

- a) judicial cooperation;
- b) surrender;
- c) enforcement of the decision issued by another Member State;
- d) the grounds for non-enforcement of the decision in the requested State

6.13. Quali effetti ha l'applicazione della procedura alternativa in relazione a:

- a) deflazione dell'attività giudiziaria;
- b) rapidità e svolgimento della procedura-termini di soluzione della vicenda giudiziaria;
- c) recupero degli importi oggetto di frode (con particolare riferimento all'impatto finanziario, in relazione agli importi di frode accertati);
- d) applicazione di sanzioni accessorie come inibizione dalla partecipazione a gare, appalti, contratti con la PA, ecc...
- e) altro.

**6.13.** Please explain which are the effects of the alternative dispute resolution with regard to:

- a) Deflation of judicial activities;
- b) Speediness of the procedure;
- c) Recovery of the defrauded monies (with particular reference to the financial impact of the assessed defrauded amounts);
- d) Application of accessory sanctions (e.g., preventing participation to public procurements or public contracts);
- e) Other

## **7. ESECUZIONE DELLE MISURE RIPARATORIE - EXECUTION OF RESTORATIVE MEASURES**

7.1. Quale autorità è competente a recuperare i fondi sottratti? La restituzione degli importi oggetto di frode è parte della procedura alternativa o è oggetto di una procedura autonoma?

**7.1.** Which body is authorised to recover the defrauded monies ?

Does the restitution of the defrauded monies form part of the alternative procedure or is it part of an independent/ autonomous proceeding?

7.2. La restituzione delle somme oggetto di frode è obbligatoria? Si fonda su un'esecuzione volontaria o può essere forzata? Sono previsti interessi moratori? Come sono calcolati?

**7.2.** Is the restitution of the defrauded monies mandatory? Is restitution possible on a voluntary basis only, or can it be enforced by the authority?

Are default interests considered in the case of delay in restitution? If so, how are they calculated?

7.3. Esiste un termine di prescrizione per il recupero delle somme oggetto di frode?

**7.3.** Is there any statute of limitation applicable to the recovery of the defrauded monies?

7.4. Vogliate riferire sul tasso di recupero degli importi frodati in relazione agli importi individuati sulla base delle frodi denunciate

**7.4.** Please indicate the percentage of recovered sums in relation to the total amount due for fraud cases that have been prosecuted

## **8. CONCLUSIONE – FINAL REMARKS**

8.1 Con riguardo agli esiti della procedura alternativa, indicate se nel vostro ordinamento corrisponda maggiormente a

a) giustizia retributiva

b) giustizia ristorativa

**8.1.** With regard to the outcomes of the alternative dispute resolution, indicate what kind of justice it represents more:

a) retributive justice

b) restorative justice

8.2. Quali sono i pro e i contro della procedura alternativa in confronto ai risultati della giustizia “tradizionale”?

**8.2.** What are the pros and cons of alternative dispute resolution as compared to the “traditional” judicial proceedings?

8.3. Vogliate indicare (se noti) i casi nei quali le giurisdizioni domestiche hanno esaminato la compatibilità della legislazione nazionale sulla diversione, giustizia riparatrice e/o procedure di mediazione con le norme dell'UE. In particolare, sono state sollevate questioni di compatibilità con il diritto primario dell'UE (art. 325 TFEU, art. 47 della Carta dei diritti fondamentali) o di diritto derivato?

**8.3.** Please indicate (if known) cases in which domestic judicial decisions have addressed the compatibility with EU law on domestic diversion, restorative and mediation procedures. Notably,



has a conflict with EU primary law (Article 325 TFEU, Article 47 of the Charter of Fundamental Rights) or EU derivative law ever been raised?

8.4. *Vogliate descrivere eventuali proposte di riforma legislativa dell'ordinamento nazionale con riferimento alle procedure applicabili alla diversione/mediazione e procedure riparatrici.*

**8.4.** Please describe if in the examined legal system there is any proposal for legislative reform applicable to diversion/ mediation and restorative procedures

## **9. ANNEX: DEFINITIONS AND USEFUL TERMS**

- 1. Alternative Dispute resolution (ADR)**
- 2. Diversion**
- 3. Mediation**
- 4. Restorative Justice**
- 5. Legal Person**
- 6. Protection of the Union's financial interests**
- 7. Fraud and Serious offences against the common system of value added tax (VAT)**

### **1. Alternative Dispute Resolution (ADR)**

Alternative dispute resolution (ADR) is mentioned in **Dir. 2013/11/UE**.

ADR includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to a compromise, short of litigation. It is a collective term for the ways (other than by litigation) that parties can resolve disputes, with (or without) the help of a third party. The concept of ADR is based on the hypothesis that disputing parties wish to achieve the best result by resolving disputes themselves. The essence of ADR procedures is voluntary access by the parties to a process with a neutral third party (e.g., mediator etc.), who conducts the proceedings, and ensures confidentiality. The major goal of all ADR processes should therefore be the same as litigation, i.e., conflict resolution. The important distinction is that ADR focuses on the interests of the parties rather than their legal rights, and in this way the goal is to resolve the dispute so that the full interests of each party are satisfied.

### **2. Diversion**

“Diversion” means a variety of programs that implement strategies seeking to avoid the formal processing of an offender by the criminal justice system. In particular, it is a system for giving a chance for a first-time criminal defendant in lesser crimes to perform community service, make restitution for damage due to the crime, obtain treatment for alcohol or drug problems and/or counselling for antisocial or mentally unstable conduct. If the defendant cooperates and the diversion results in progress, the charges eventually may be dismissed. Usually, diversion may not be granted for a second offence.

### **3. Mediation**

According to article 3 of Dir.(EU) 2008/52, “Mediation” means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question

### **4. Restorative Justice**

Restorative justice is an approach in which the victim and the offender, and in some cases other persons affected by a crime “participate actively together in the resolution of matters arising from the crime, generally with the help of a facilitator.”

Restorative justice is a way of responding to criminal behaviour which emphasises repairing the harm caused by the crime and ‘restoring’ harmony as much as possible between offender, victim/survivor and society. It mainly involves some form of mediation and conflict resolution and often results in apologies, reparation, compensation and community service. In contrast to ‘retributive justice’, which focuses on punishing the offender via a two-way relationship (offender and state), ‘restorative justice’ addresses harm, needs, accountability and obligations via a three-way relationship (offender, victim/survivor and society). Restorative justice: makes the offender responsible for reparation of harm caused by the offence; gives the offender an opportunity to prove his/her positive capacity and qualities; tackles guilt feelings in a positive way; and involves others who have a role in conflict resolution including victims/survivors, parents, extended family members, schools and peers. (UNICEF)

**Under Council of Europe Recommendation concerning restorative justice in criminal matters(CM/Rec(2018)8)**, “Restorative justice” refers to any process which enables those harmed by crime, and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party (the “facilitator”).

**The ECOSOC adopted two Resolutions on “Basic principles on the use of restorative justice programmes in criminal matters in 2000 and 2002 (namely, Res 2000/14 and Res. 2002/12) according to which “restorative justice programme”** means any programme that uses restorative processes and seeks to achieve restorative outcomes.

**Restorative process** means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.

**Restorative outcome** means an agreement reached as a result of a restorative process. Restorative outcomes include responses and programs such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.

At the European level, the Council of Europe published Recommendation on Mediation in Penal Matters in 1999 in which restorative justice is defined as: “any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party”.

## **5. Legal person**

Under Dir. (EU) 2017/1371 , legal person is an entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.

## **6. Protection of Union’s financial interests**

Under Dir. (EU) 2017/1371, the expression “Union's financial interests” means all revenues, expenditure and assets covered by, acquired through, or due to: the EU budget; (ii) the budgets of the EU institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them.

According to Dir. (EU) 2017/1371, the protection of the Union’s financial interests concerns not only the management of budget appropriations but extends to all measures which negatively affect or



which threaten to negatively affect its assets and those of the Member States, to the extent that those measures are of relevance to Union policies

### **7. Fraud and Serious offences against the common system of value added tax (VAT)**

According to the definition provided for by Dir. (EU) 2017/1371, fraud falling within the scope of Dir. (EU) 2017/1371 is a fraudulent conduct with respect to revenues, expenditure and assets at the expense of the general budget of the European Union, including financial operations such as borrowing and lending activities.

Council Directive 2006/112/EC on the common system of value added tax (VAT) qualifies as “serious offences” against the common system of value added tax the most serious forms of VAT fraud, in particular carousel fraud, VAT fraud through missing traders and VAT fraud committed with a criminal organisation which causes serious threats to the common VAT system and thus to the Union budget.

Offences against the common VAT system are considered “serious” when they are connected with the territory of two or more Member States, result from a fraudulent scheme whereby those offences are committed in a structured way with the aim of taking undue advantage of the common VAT system and the total damage caused by the offences is at least of EUR 10 000 000.

The notion of total damage refers to the estimated damage that results from the entire fraud scheme, both to the financial interests of the member States concerned and to the Union, excluding interest and penalties.