HERCULE III PROJECT
CONCLUSIONS & THE RECOMMENDATIONS

I. INTRODUCTION

The *general objective* of the HERCULE III PROJECT – HUUNIMISKOLCPFI 786253 *"Criminal law protection of the financial interests of the EU – Focusing on money laundering, tax fraud, corruption and on criminal compliance in the national legal systems with reference to cybercrime"* is the protection of the financial interests of the European Union and preventing and combating fraud, corruption, money laundering and other illicit activities affecting the financial interests of the Union.[1] The action aims at focusing on new practical challenges related to the topic (e. g. cybercrime).
In connection with this general objective, the *specific objectives* of the project are the following:

- the raise of the awareness of the branches of legal professions that are involved in the protection of the financial interests of the European Union through organizing international conferences, workshops and trainings
- improvement of cooperation between practitioners and academics
- comparative analysis of the legal regulation and practice of the Member States involved
- exchange of information and best practices
- use of the results in the legal education
- examination of the relationship between EPPO and non-EPPO countries and fostering the sensitiveness in connection with this question.

The main aim of the project is to pursue a complex, practice-oriented comparative research in the aforementioned topic. Based on the results of the research, the consultations between the cooperation partners and the lectures of the international conferences and workshops organized within the framework of the project and after detailed consultations with the foreign cooperatives, the Hungarian project group[2] came to the following conclusions.

II. GENERAL CONCLUSIONS IN CONNECTION WITH THE CRIMINAL LAW PROTECTION OF THE FINANCIAL INTERESTS OF THE EUROPEAN UNION

1) The Treaty of Lisbon can be regarded as an important milestone in the history of the protection of the financial interests of the European Union, since it empowered the European Union with a supranational legislative competence in the field of the protection of the financial interests of the Union. This legislative competence is regulated in Article 325(4) TFEU, according to which, *"the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies"*. These provisions of the Treaty enable the Union to adopt directly applicable, supranational criminal law norms in the form of regulations in this field. However, there are scholars and Member States who do not accept such a competence.

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[1] Website of the project: https://hercule.uni-miskolc.hu/EN

[2] Prof. Dr. Farkas Ákos university professor (project manager), Dr. habil. Jacsó Judit associate professor (project coordinator), Dr. Udvarhelyi Bence assistant professor (project coordinator), Csemáné Dr. Váradi Erika associate professor (project member), dr. Dornfeld László PhD student (project member), University of Miskolc, Faculty of Law

2) In 2017, the European Union adopted a new Directive on the fight against fraud to Union's financial interests by means of criminal law (PIF Directive).[3] Although the European Union legislator could have adopted the Directive based on Article 325(4) TFEU, the legal basis of the Directive finally became Article 83(2) TFEU. According to Article 83(2) TFEU, *"if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned"*. Since the Directive only contains minimum rules concerning the definition of criminal offences and sanctions with regard to combatting fraud and other illegal activities affecting the Union's financial interests, this decision pays attention to the national sovereignty of the Member States. However, a regulation could be a more effective tool for the protection of the financial interests of the European Union.

3) The PIF Directive regulates fraud as well as money laundering, corruption and misappropriation affecting the Union's financial interests. However, in order to provide a more effective fight against the criminal offences affecting the financial interests of the European Union, the scope of the PIF Directive could be extended to other criminal offences which could harm the financial interests of the European Union. For example, issuing of bogus invoices which can be qualified as aiding in tax evasion, especially VAT fraud system could be regulated as a specific separate criminal offence (lex specialis to VAT fraud) penalizing the businesslike behaviour of such enterprises. It could be considered to supplement the criminal offences of EU fraud with other alternative requirements, e.g. businesslike commission or commission of the criminal offence as a member of a group formed for the purpose of repeatedly committing such acts.

4) The PIF Directive regulates criminal offences affecting the Union's financial interests for which the European Union has already adopted several legal acts. In connection with these acts, the European Union has to pay special attention to guarantee the horizontal coherence between these legal acts since there could be practical problems in connection with their application. For example, regarding money laundering there are three different EU provisions, all of which have an impact on national legislation some of which are the same, but partly they are different:

   - The 4th Anti-Money Laundering Directive[4], which in principle pursues preventive objectives, but which has led to the introduction of criminal offences in most of the Member States, has therefore influenced the national criminal laws. All PIF offences (with the possible exception of "misappropriation") are predicate offences of the 4th Money Laundering Directive's notion of money laundering.
   - The PIF Directive obliges the Member States to introduce a criminal offence of money laundering involving property derived from any PIF offence. For the definition of money laundering it refers to the definition of the Anti-Money Laundering Directive. This means that the legal definition of the Money Laundering Directive must be applied to PIF offences.

[3] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to Union's financial interests by means of criminal law [OJ L 198, 28.7.2017, p. 29-41]

[4] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [OJ L 141, 5.6.2015, p. 73–117]

- The Directive on combating money laundering by criminal law (6th Anti-Money Laundering Directive)[5] provides for an obligation to introduce a criminal offence of money laundering. The definition of money laundering in this directive is not exactly the same as the definition in the Anti Money Laundering Directive. Since money laundering as regards PIF offences as predicate offences is explicitly excluded from the scope of the Directive on combating money laundering by criminal law, for money laundering involving property derived from PIF offences the definition of money laundering is different compared to all other predicate offences foreseen in the Direction on combating money laundering by criminal law.

This leads to the result that Member States have different obligations because of different legal obligations and it might be a challenge to establish provisions which are in line the different EU regimes on money laundering.

5) Member States shall adopt and publish, by 6 July 2019, the laws, regulations and administrative provisions necessary to comply with the PIF Directive. In order to implement the provisions of the PIF Directive, an intensive legislation began in the Member States.

6) In 2017, the European Union adopted a Regulation on the establishment of the European Public Prosecutor's Office (EPPO Regulation).[6] According to the Regulation, the EPPO shall be competent for the criminal offences affecting the financial interests of the Union in the PIF Directive as well as for any other criminal offence inextricably linked to these criminal conducts. In order to ensure an effective and unified fight against these criminal offences and to guarantee coordinated investigative measures it would be essential for the EPPO to exercise its competence in all cases where there is a possibility for the threat of the financial interests of the European Union.

7) The EPPO will not be applicable for all Member States; it will be established in the form of enhanced cooperation. However, for the unified protection of the financial interests of the European Union, it would be helpful to conclude an agreement between the non-EPPO Member States and EPPO Member States in order to develop an efficient and active cooperation. The Hungarian model ("network model") could be regarded as a model for the cooperation between Member States that do not participate in the EPPO and the EPPO.

8) According to the recent judicial practice of the Court of Justice of the European Union, the effective protection of the financial interests of the European Union could lead to the challenge of fundamental rights and fundamental principles of criminal law. This tendency could lead to the decrease of the level of the procedural guarantees, too. Therefore, it is necessary to find a proper balance between the two competing interests: the protection of the fundamental rights and the protection of the financial interests of the European Union.

III. SPECIAL CONCLUSIONS FOCUSING ON VAT FRAUD

9) Several documents of the European Union have highlighted the importance of the problem of tax fraud, particularly VAT fraud.

10) It can be regarded as a significant development in the field of the fight against VAT fraud within the European Union, that the scope of the PIF Directive covers VAT fraud as well. The EU legislator has also taken into account with regard to it the case law of the Court of

[5] Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law [OJ L 284, 12.11.2018, p. 22-30]

[6] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office [OJ L 283, 31.10.2017, p. 1-71]

Justice of the European Union, according to which there is a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second. Therefore, the PIF Directive foresees minimum rules concerning the definition and sanctions of VAT fraud, since it has to cover the most serious forms of VAT fraud, in particular carrousel fraud, VAT fraud through missing traders, and VAT fraud committed within a criminal organization.

11) Compared to other cases of EU fraud, the PIF Directive has narrowed the application of the Directive to VAT fraud, since the Directive only applies to this criminal offence if it is connected with the territory of two or more Member States of the Union and involves a total damage of at least EUR 10.000.000. According to the preamble, 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. This solution resulting of a political compromise could cause practical problems in connection with the cross-border carrousel fraud cases.

12) The operation of tax systems falls primarily within the competence of the Member States. The organization of the tax administration, the control of taxable persons and the collection of the taxes are areas which belong to competence of the Member States. However, in order to ensure the proper functioning of the internal market and to provide an efficient protection of the financial interests of the European Union, the harmonization of substantive criminal law of the Member States plays an essential role. The PIF Directive could be regarded as an important step in this process.

13) However, there are a number of practical problems in connection with the fight against VAT fraud caused by the substantial difference between the regulations of the Member States. While in some Member States (Germany, Austria), self-reporting is regulated as a criminal impediment in case of tax fraud, in other Member States it is an unknown legal institution. Therefore, the introduction of a clear regulation of strategies by active repentance and self-reporting can be considered preferable.

14) The exchange of information (international requests) between EU Member States should be continuously improved and accelerated. According to the currently applicable rules, the deadline of the execution of the requests is 90 days which can be extended and there is no sanction in case of the lack of the fulfilment of this request. The European Union should prescribe sanctions in case of the non-compliance with the international requests taking into account the fundamental rights and principles, which could foster a more effective cooperation between the authorities of the Member States.

15) The introduction of the online cash register system in all EU Member States and the ameliorating of the electronical visibility given to tax administrations in the European Union in order to determine which commercial transactions have taken place between businesses in the Member States taking into consideration the data protection rules should be regarded as an important step to make. These could trigger the acceleration of the information, as the information requested could be directly available.

16) In 2018, the European Commission issued a proposal according to which the transitional destination VAT system would be replaced with the country of origin principle. It would result that the taxpayer will be taxed after the purchase in the country where he bought the good concerned, and not in the country where he was established for economic purposes. This measure would significantly reduce the functioning of the current taxpayers' sales chains, as the tax liability could therefore no longer be concealed from the tax authorities

concerned. This would result in the termination of the currently applicable fraud mechanisms and make criminal law less necessary according to the ultima ratio principle.

IV. SPECIAL CONCLUSIONS FOCUSING ON MONEY LAUNDERING

17) In 2018, the European Parliament and the Council adopted a new directive on the fight against money laundering by criminal law (6th Anti-Money Laundering Directive), which can be considered as an important milestone in the history of the Anti-Money Laundering legislation of the European Union. It is important to emphasize that the 6th Anti-Money Laundering Directive supplements and not replaces the preventive 4th Anti-Money Laundering Directive and its amendment (5th Anti-Money Laundering Directive)[7]. Since the Treaty of Lisbon, money laundering is among the ten particularly serious crimes with a cross-border dimension, i.e. the so-called eurocrimes referred to in Article 83(1) TFEU, in connection with which the European Union obtained legal harmonization competence. However, it is important to emphasize that the EU legislator has already regulated money laundering before the Lisbon Treaty in order to effectively protect the internal market.

18) One of the most significant development of the new Anti-Money Laundering Directive was the extension of the catalogue of the predicate offences. The Directive lists approximately 30 criminal offences as predicate offences and as a general rule it states every criminal offence can be regarded as predicate offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards Member States that have a minimum threshold for offences in their legal systems, any offence punishable by deprivation of liberty or a detention order for a minimum of more than six months.

19) Money laundering has also been regulated by the PIF Directive, therefore it can be regarded as a criminal offence affecting the Union's financial interests. According to the PIF Directive, money laundering are the conducts described in the 4th Anti-Money Laundering Directive involving property derived from the criminal offences covered by the PIF Directive (EU fraud, corruption, misappropriation). However, the 6th Anti-Money Laundering Directive states that it does not apply to money laundering as regards property derived from criminal offences affecting the Union's financial interests, which is subject to specific rules laid down in the PIF Directive. Money laundering cases may therefore be subject to different adjudication depending on whether they affect the financial interests of the Union or only the interests of the Member States. It may be a question how to separate the money laundering cases based on this aspect.

20) In addition to defining the substantive elements of money laundering, the 6th Anti-Money Laundering Directive also lays down rules to facilitate criminal proceedings. In order to ensure the effective fight against money laundering, the Directive states that a prior or simultaneous conviction for the criminal activity from which the property was derived is not a prerequisite for a conviction for money laundering. Furthermore, the conviction for money laundering can also be possible where it is established that the property was derived from a criminal activity, without it being necessary to establish all the factual elements or all circumstances relating to that criminal activity, including the identity of the perpetrator.

21) Regarding the cross-border nature of money laundering, it can be problematic in the practice where the predicate offence and the money laundering was committed in different Member States. In line with previous preventive regulations, the 6th Anti-Money Laundering Directive

[7] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [OJ L 156, 19.6.2018, p. 43-74]

also states that there should be no obstacle to the prosecution of money laundering if the predicate offence was committed in another Member State or in a third country. In this case, the conduct has to constitute a criminal activity in the criminal law of the Member State concerned.

22) Member States should ensure that certain types of money laundering activities are also punishable when committed by the perpetrator of the criminal activity that generated the property *("self-laundering")*. In such cases, where the money laundering activity does not simply amount to the mere possession or use of property, but also involves the transfer, conversion, concealment or disguise of property and results in further damage than that already caused by the criminal activity, for instance by putting the property derived from criminal activity into circulation and, by doing so, concealing its unlawful origin, that money laundering activity should be punishable. Although the criminalization of self-laundering was introduced due to the requirements of the FATF, this could cause doctrinal problems in the national legal systems of the Member States, e.g. if the result is a double incrimination.

23) The national preventive AML/CFT regimes play an important role in the fight against money laundering. In particular, the important role of the financial intelligence units (FIUs) has to be highlighted. FIUs receive STRs/SARs, analyse them, disseminate the result of their analysis and exchange information in international context. As for the dissemination function, FIUs can proactively trigger cases of money laundering as well as support ongoing cases with financial and other information on funds that are the proceeds of criminal activity. However, all the abovementioned actions of FIUs have to respect the fundamental right of the citizens and be monitored under this perspective.

V. SPECIAL CONCLUSIONS FOCUSING ON CORRUPTION

24) Similarly to money laundering, corruption can also be subject to legal harmonization of the European Union according to Article 83(1) TFEU.

25) Corruption constitutes a particularly serious threat to the Union's financial interests, which can in many cases also be linked to fraudulent conduct. Therefore, active and passive corruption is also regulated in the PIF Directive which defines their definition and the applicable sanctions.

26) Since passive corruption can only be committed by a public officer and active corruption can also be committed in relation to a public office, the PIF Directive contains the definition of public officials which covers all relevant officials, whether holding a formal office in the Union, in the Member States or in third countries. One of the most important improvements of the PIF Directive was the extension of the notion of public officer. As private persons are increasingly involved in the management of Union funds, in order to protect Union funds adequately from corruption, the definition of public official needs to cover persons who do not hold formal office but who are nonetheless assigned and exercise, in a similar manner, a public service function in relation to Union funds, such as contractors involved in the management of such funds.

27) Corruption is one of the most difficult crimes to investigate and prove. The mechanisms for criminal exploration and investigation, control and supervision mechanisms could be reinforced, and the access to electronic data is expected to facilitate e-evidence. An extension

of the retention period of electronic data could be considered. Furthermore, the European Union has to establish a systematic protection for whistleblowers.[8]

VI. SPECIAL CONCLUSIONS IN CONNECTION WITH CRIMINAL PROCEDURAL QUESTIONS AND THE PROTECTION OF FUNDAMENTAL RIGHTS

28) The harmonization of the substantive criminal law of the Member States can only contribute in a more effective protection of the financial interests of the European Union if the criminal procedural rules of the Member States are also approximated for cross-border cases. Therefore, the European Union should focus on the establishing minimum rules for the specific aspects of criminal procedure, especially the gathering, evaluation and mutual admissibility of evidence, while respecting fundamental rights.

29) In the context of cross-border crime, it is also crucial to define and harmonise the mutual elements of fair trial requirements. This is also of utmost importance from the point of view that, according to the judicial practice of the Court of Justice of the European Union, the principle of effectiveness requires a re-evaluation of procedural safeguards. In this context, the European legislator must examine which common aspects and elements of the areas of the fair trial (rights of accused persons, rights of the defendants, presumption of innocence, etc.) can be further developed.

30) Although mutual recognition of cross-border evidence works in practice, mutual trust in principle could be further strengthened by harmonization measures. The Member States could cooperate more effectively if they had sufficient information on the procedural rules of the Members States. A standardized "information sheet" developed by each Member State for each investigative measure could provide the basis for the development of mandatory rules by the courts and enable the defence to argue for a fair trial in which evidence is not admissible. Some harmonized rules on the documentation of investigative measures may also be helpful.

31) According to the Treaty of Lisbon, the principle of mutual recognition is the cornerstone of the judicial cooperation in criminal matters. However, the recent jurisdiction of the Court of Justice of the European Union formulated a number of principles which could hinder mutual recognition. According to the judicial practice of the Court of Justice, the principle of mutual recognition can be rejected if there is objective, reliable, specific and properly updated evidence of systemic or generalised deficiencies in connection with the protection of human rights in the Member States concerned. In order to avoid abuse of decisions in the Member States, the European Union should find an appropriate balance between the effective cooperation in criminal matters and the protection of the fundamental rights with regard to the Commission's proposal on the protection of the Union budget in case of general deficiencies in the area of the rule of law in the Member States.[9]

32) In order to ensure effective protection of the financial interests of the European Union, the EU must place greater emphasis on administrative cooperation with the Member States and with third countries.

VII. SPECIAL CONCLUSIONS IN CONNECTION WITH CYBERCRIME

[8] See: Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law [COM(2018) 218 final, 23.4.2018]

[9] Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States [COM(2018) 324 final, 2.5.2018]

33) Cyberspace is a perfect environment for criminal activity, and as technology advances, it is fundamentally changing crime. Most of what is collectively referred to as 'cybercrime' is basically old criminal behaviours committed through new means, but there are also new crimes that take place entirely in cyberspace (e.g. hacking). Cybercrime is a global phenomenon and it is a growing new threat in the areas of money laundering, corruption and VAT fraud. Previous regulations drafted before the digital era fail to properly combat cybercrime and therefore new regulations are needed, preferably at EU level, but over-regulation must be avoided as it can hinder the further development of new technologies. Especially, the development of AI must be monitored.

34) The 4th and 5th Anti-Money Laundering Directives are certainly a step in the right direction as they focus on reducing the risks of virtual currencies and limiting the use of prepaid credit cards. The players in the crypto-currency market are now obliged to comply with the anti-money laundering rules. This market is inherently decentralized and lacks any authority, so great care must be taken to ensure that these rules are effectively enforced at national level. One solution could be a mandatory registration of users and a ban on certain aspects of the use of crypto currencies, aimed at keeping them untraceable. Further rules are needed, especially on the issues of taxation and confiscation of crypto currencies.

35) The proposed E-Evidence Regulation and the proposed European Union Directive[10] can be considered as an important development. The European Investigation Order[11] was mainly aimed at producing physical evidence, so the idea of a new European Production Order exclusively for producing e-evidence is certainly useful. It will enable authorities to obtain e-evidence within a very short period of time directly from service providers irrespective of their country, which is an ideal and convincing solution to the current problems of the current mutual legal assistance regime. EU legislation will also be applied to service providers established in third countries, which solves a long-standing problem of large technology companies not complying with EU rules. One of the weaknesses of the proposed regulation is the lack of rules on data retention, which could potentially lead to the data requested are no longer being available, while one should also be more cautious about fundamental rights protection, as in this field private individuals are acting in the field of gathering evidence.

36) New technologies should be used to solve problems. A system that logs transactions from electronic cash registers can be critical in preventing the concealment of income. The use of electronic invoices could also contribute to the transparency of the economic life and reduce the number of false invoices. There are no concrete answers to the problems raised, the approach should be "pilot project-like" and ideas from the private sector should not be excluded. Artificial Intelligence (AI) could be developed and used to monitor suspicious activities, log and analyse huge amounts of data with regards to its downsides (it cannot react to unforeseen situations, the question of accountability if it makes a mistake), respecting the rights of personal data and the fundamental rights.

37) The share of good practice and knowledge is very useful in preventing and prosecuting cybercrime, which adversely affects the financial interests of the European Union.

VIII. SPECIAL CONCLUSIONS IN CONNECTION WITH CRIMINAL COMPLIANCE

[10] Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters [COM(2018) 225 final, 17.4.2018]; Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings [COM(2018) 226 final, 17.4.2018]

[11] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [OJ L 130, 1.5.2014, p. 1-36]

38) Compliance is a broad term which must be framed. The term compliance, as it is used in the fight against economic crimes, tax crimes and corporate criminal law, refers to compliance with legal obligations (whereas non-compliance – which may or may not be a criminal offence – in any case creates an environment in which criminal offences can be committed). Thus, corporate criminal liability could be considered as a strengthening factor in the development of compliance structures that protect also the financial interests of the European Union.

39) (National) specialized public prosecutors against economic crimes and corruption turn out to be effective in investigating economic crimes. Where not yet done, implementation should be considered.

IX. SPECIAL CONCLUSIONS IN CONNECTION WITH CRIMINOLOGICAL QUESTIONS

40) In order to make international comparisons, to identify trends and to develop effective preventive mechanisms related to illegal activities against the financial interests of the European Union, it is necessary to establish a unified criminal statistical system in the Member States.