Criminal Law Aspects of the Protection of the Financial Interests of the European Union

with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime

Edited by:
Farkas – Dannecker – Jacsó

Wolters Kluwer

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CRIMINAL LAW ASPECTS OF THE PROTECTION OF THE FINANCIAL INTERESTS OF THE EUROPEAN UNION

WITH PARTICULAR EMPHASIS ON THE NATIONAL LEGISLATION ON TAX FRAUD, CORRUPTION, MONEY LAUNDERING AND CRIMINAL COMPLIANCE WITH REFERENCE TO CYBERCRIME

Hercule III (2014–2020) Programme
2. Law training and studies
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University of Miskolc

University of Miskolc
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Association of Hungarian Lawyers for the European Criminal Law

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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

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(HUUNIMISKOLCPFI – 786253)

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WEBSITE OF THE PROJECT: *https://hercule.uni-miskolc.hu/EN*

Wolters Kluwer Hungary Kft.
Budapest, 2019

EDITORIAL

The *"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"* project[1] was funded by the European Anti-Fraud Office's (OLAF) HERCULE III programme (2014–2020) *"Legal Training and Studies 2017"*. The project started in January 2018 with the University of Miskolc as main coordinator and academics and practitioners from six countries (Austria, Germany, Greece, Hungary, Italy and Romania). Within the framework of the project, *four events were organised*: the *opening conference* entitled *"The Criminal Law Protection of the Financial Interests of the European Union Manifestations with Special Issues"*, *two workshops* and a final *Winter Academy* entitled *"Current questions and answers relating to the criminal law protection of the financial interests of the European Union"*.

This volume contains the results of the project and the edited versions of the presentations of the international conferences and workshops. In formulating the structure of the volume, we have taken into account the evaluation carried out after each international conference and workshop. The volume is devided into five main parts: The first part deals with the general issues of the criminal law protection of the European Union's financial interests. The second and third part analyses the fraud (particularly VAT-fraud) and other criminal offences (money laundering and corruption) affecting the financial interests of the EU in the criminal law systems of the Member States (Austria, Germany, Greece, Hungary, Italy, Romania). In these parts, the authors examine the theoretical and practical problems related to the protection of the financial interests of the EU in the Member States. In this context, we attached great importance to the presentation of best practices in the different Member States. The fourth part of the volume examines some horizontal issues related to the financial interests of the European Union, i.e. criminal compliance, cybercrime, criminological and procedural issues. This part also deals with the question of the establishment of the European Public Prosecutor's Office. The fifth part contains the conclusions and recommendations resulting from the research.

[1] More information about the activities and results of the project and the lectures and articles of the international conferences and workshops can be found at the website of the project: *https://hercule.uni-miskolc.hu/EN*

We recommend this volume to both practitioners and academics involved in the protection of the financial interests of the European Union. We hope it will contribute to the daily work of all readers of the book and will be useful in the legal education as well.

Miskolc, June 2019

The editors

PREFACE

The general objective of the project *"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"* was the protection of the financial interests of the European Union and preventing and combating fraud, corruption and other illegal activities detrimental to the financial interests of the Union. The aim of the action was to focus on new practical challenges related to the issue (e. g. cybercrime). In the context of this general objective, the specific objectives of the project were the following:

– raising awareness of the legal professions involved in the protection of the financial interests of the European Union by organizing international conferences, workshops and training sessions,
– improving cooperation between practitioners and academics,
– comparative analysis of the legal regulations and practices of the Member States
– exchange of information and best practices
– use of the results in legal education
– examination of the relationship between EPPO and non-EPPO countries and promote awareness of this issue.

Four events were organised within the framework of the project. The *opening conference* of the project entitled *"The Criminal Law Protection of the Financial Interests of the European Union Manifestations with Special Issues"* took place in the University of Miskolc on the 23–24th March 2018. The aim of the conference was the practice-oriented discussion of the main issues and various special forms of criminal law protection of the financial interests of the European Union by presenting the best practices of the Member States. The conference focused on criminal offences falling within the narrower meaning of the term EU fraud, as well as horizontal challenges such as cybercrime and compliance, which were analysed in the context of the protection of the Union's financial interests. The actuality of the conference was the adoption by the European Parliament and the Council in 2017 of the new Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law.[1] The so-called PIF Directive, which must be implemented into the national legal sys-

[1] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [OJ L 198, 28.07.2017, 29–41]

tems of the Member States by the 6 July 2019, has introduced several innovations compared with the previous regulations. Therefore, one of the main objectives of the opening conference was to examine the regulation of the Directive in the light of the Member States regulations. The presentations are available on the project's website: *https://hercule.uni-miskolc.hu/EN.*

The opening conference was followed by *two workshops*. The first workshop on corruption and money laundering was organized on 2 to 4 July 2018 by the project members of the Vienna University of Economics and Business and the University of Miskolc. The second workshop on VAT fraud was organized by the University of Oradea and University on Miskolc on 29 to 31 October 2018. These events enabled local (Austrian and Romanian) practitioners to exchange their experiences on the issues.

The *closing event* of the project was a *Winter Academy* entitled *"Current questions and answers relating to the criminal law protection of the financial interests of the European Union",* which took from 14 to 16 February 2019 at the Hungarian Judicial Academy (Budapest). The event was organized by the Law Faculty of the University of Miskolc, the Association of Hungarian Lawyers for European Criminal Law, the Research Centre for European Criminal Law of the Law Faculty of the University of Miskolc and the National Office for the Judiciary (NOJ).

The Winter Academy was opened by Dr. András Osztovits, Director of the Hungarian Judicial Academy, Dr. Tünde Handó, President of NOJ, Dr. Bóka János (State Secretary for Judicial Cooperation between the EU and the International Community, Ministry of Justice, Hungary) and Prof. Dr. Ákos Farkas, Project Manager and former Dean of the University of Miskolc, Faculty of Law. The participants of the Winter Academy received a certificate signed by the professors of the University of Miskolc, the University of Heidelberg, the University of Linz and the Vienna University of Economics and Business Administration. Video recordings of the presentations are available on the project's website.

It can be umarized that the closing event of the project was very successful. The appromximately one hundred participants could listen to highly informative lectures, which were accompanied by a lively professional discourse. The complexity of the topics was clearly visible, as theoretical and practical experts from various fields were able to express their opinions on the topics of the conference. We are convinced that the HERCULE Winter Academy has achieved its goal and offered the opportunity for a theoretical and practice-oriented examination of a broad spectrum of professional issues as well as for the development of collegial relationships and informal exchange of information.

I would like to thank the co-editors of this volume, Prof. Dr. Gerhard Dannecker and Assoc. Prof. Dr. Judit Jacsó as well as the technical editor by Assist. Prof. Dr. Bence Udvarhelyi.

Miskolc, June 2019

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ACKNOWLEDGMENTS

First of all, we would like to thank the *European Commission (OLAF)* for its support of the project plan in the HERCULE III programme (2014–2020) *"Legal Training and Studies 2017"*, which has enabled a fruitful exchange between legal academics and practitioners, the identification of best practices in other Member States and the exchange of experience in the field of criminal law protection of the European Union's financial interests. We are convinced that this can contribute to a more effective protection of the Union's financial interests and to greater trust between Member States.

We thank our *cooperation partners* for their decisive contribution to the activities of the HERCULE III projects – the opening conference in Miskolc, the two workshops (in Vienna and Oradea) and the HERCULE Winter Academy in Budapest – and contribute decisively to the final conclusion and recommendations of this project:

from Austria: Prof. Dr. Robert Kert, head of institute (Vienna University of Economics and Business); *Prof. Dr. Richard Soyer*, head of department (University of Linz); *Dr. Stefan Schumann,* assistant professor (University of Linz)

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from Italy: Adj. Prof. Dr. Carbone Vincenzo (University of the International Studies of Rome, lawyer (Rome Bar Association), member ("Anti-Money Laundering"and Tax Law Commission)

from Romania: Prof. Dr. Valentin Mirișan, dean (University of Oradea).

Our thanks also go to *Prof. Dr. Gerhard Dannecker* for the opening project meeting at the University of Heidelberg, *Prof. Dr. Robert Kert* for organisating the workshop in Vienna (Vienna University of Economics and Business). We thank *Prof. Dr. Dr. Dr. Dieter Kindel* for organising the meeting with experts in Vienna, *Prof. Dr. Valentin Mirișan* for the co-organisation of the workshop in Oradea (University of Oradea)

and *Dr. Tünde Handó* (President, National Office for the Judiciary) and *Dr. András Osztovits* (Director of the Hungarian Judicial Academy) for the co-organisation of the Winter Academy at the Hungarian Judicial Academy (Budapest) and *Dr. László Kis* (deputy Head of Department) and *Dr. Márta Ábrahám* for the support and assistance of the organisation.

We are thankful for all the *lectures and other contributions* on the events of the HERCULE III project: *Prof. Dr. Gabriele Aicher,* First Advocate General (Attorney General of the Supreme Court, Austria)*; Assist. Prof. Dr. Beata Baran PhD,* Attorney at Law (Jagiellonian University, Cracow)*; Dr. János Bóka,* State Secretary (Ministry of Justice, Hungary)*; Mag. Dr. Christian Böhm,* Judge (Vienna Regional Criminal Court)*; Prof. Dr. Wolfgang Brandstetter,* Judge (Constitutional Court of Austria) and Head of Department (Vienna University of Economics and Business), former Minister of Justice of Austria; *Prof. Dr. Jens Bülte*, Head of Department (University of Mannheim)*; Assoc. Prof. Dr. Diana Cîrmaciu,* Vice Dean (University of Oradea)*; Radu Dacin,* Lawyer (Bar Association Oradea); *Carlos de Almeida Lemos,* Lawyer (Portuguese Bar Association)*; Diego Di Giuseppe,* Lawyer, Researcher (Autonomous University of Lisbon)*; Dr. Carmen Adriana Domocoș* Judge, President (Bihor District Court, Romania)*; Assoc. Prof. Dr. Éva Erdős,* Associate Professor (University of Miskolc)*; Dr. Krisztina Farkas,* Delegated Prosecutor (National Institute of Criminology); *Emanuela Furini*, Officer (The Large Business Taxpayers Office, LAZIO'Regional Directorates, Italian Revenue Agency – ROMA)*; Dr. Gábor Gál,* Member of the Competition Commission (Hungarian Competition Authority)*; Assoc. Prof. Dr. Glaser Severin,* Associate Professor (Vienna University of Economics and Business)*; Prof. Dr, Ilona Görgényi,* Head of Institute (University of Miskolc)*; Viktor Halász*, Chief Investigator (National Bureau of Investigation)*, Dr. János Homonnai,* Public Prosecutor (Office of the Prosecutor General); *Dr. Szabolcs Hornyák,* Judge (National Office of Judiciary); *Dr. Péter Tamás Horváth,* Judge (Court of Appeal of Debrecen); *Prof. Dr. David Hummel,* Legal Secretary (European Court of Justice); *Prof. Dr. Dieter G. Kindel,* Lawyer (Vienna); *Dr. Oliver Landwehr,* Senior Legal and Policy Officer (European Commission, OLAF); *Alin Leucea*, Public Prosecutor (Romania); *Assoc. Prof. Dr. Sándor Madai,* Head of Department, Associate Professor (University of Debrecen); *Assoc. Prof. Dr. Cristian D. Mihes,* Director of Department (University of Oradea); *Dr. Ligia Valentina Mirișan,* lecturer (University of Oradea); *Dr. Gábor Miklós Molnár,* Judge, President of Chamber (Curia); *Dr. Christian Manquet,* Senior Public Prosecutor (Ministry of Justice, Austria); *Dr. Ádám, Péceli,* Public Prosecutor (Office of the Prosecutor General, Hungary); *Dr. Judit Pettkó-Szandtner,* Managing director (UniCredit Bank Hungary Zrt.); *Dr. Péter Pfeifer,* Judge (Tribunal of Veszprém); *MMag. Eberhard Pieber,* Senior Public Prosecutor (Vienna); *Dr. Nóra Rácz,* Auditor, Tax Consultant (LeitnerLeitner Partner, Budapest); *Dr. Franz Reger,* former Head of Department (Ministry of Finance, Austria); *Prof. Dr. Erika Róth,* Head of Department (University of Miskolc); *Kai Sackreuther,* Public Prosecutor (Public Prosecutor's Office of Mannheim); *Prof. Dr. Anne Schneider,* Head of Department (University of Mannheim); *Assist. Prof. Dr. Thomas Schröder,* Assistent (University of Heidelberg); *Dr. Vanessa Seibel,* Public Prosecutor (Public Prosecutor's Office of Mannheim);

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Last but not least as project leader I would like to thank the project team from Miskolc for their committed contribution: project coordinators *Dr. Judit Jacsó,* Vice Dean and Associate Professor, and *Dr. Bence Udvarhelyi,* Assistant Professor; furterhmore the project members *Erika Csemáné Dr. Váradi,* Associate Professor and *Dr. László Dornfeld,* Technical Assistant, PhD student, and the administrative and financial assistants *Veronika Molnárné Tóth*, *Krisztina Mádainé Erdősi* and *Edit Juhász*, and all students of the University of Miskolc Faculty of Law for their interest in participating in the program. My thanks go to *Marissa Malley* for revising the articles. We are very grateful for the professional support in publishing the project results to the Wolters Kluwer Hungary Kft., especially to *dr. Brigitta Krizsán*.

Miskolc, 2019 June

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PART IV

LIST OF ABBREVIATIONS

AAIS	Attacks against information systems
AI	Artificial Intelligence
AML	Anti Money Laundering
AML/CFT	Anti Money Laundering and Combating the Financing of Terrorism
AML/CFT Act	Act LIII of 2017 on the Prevention and Combating of Money Laundering and Terrorist Financing (Hungary)
AMON	Anti Mondey Laundering Operational Network
AO	Abgabenordnung (Deutschland)
A&R	*Arzneimittel und Recht / journal (Germany)*
Art.	Article(s)
BAK	Bundesamt für Korruptionsprävention und Korruptionsbekämpfung / Federal Anti-Corruption Office /Austria
BaRD	beyond a reasonable doubt
BB	Betriebs Berater / journal (Germany)
BGBl.	Bundesgesetzblatt / Federal Law Gazette (Germany)
BGH	Bundesgerichtshof / German Federal Supreme Court
BGHSt	Enstscheidungen des Bundesgerichtshofs in Strafsachen / Decision oft he Federal Court in Criminal Matters (Germany)
BTC	bitcoin
BT-Drs.	Drucksache des Deutschen Bundestages / Bundestag printed paper (Germany)
BverfG	Bundesverfassungsgericht / Federal Constitutional Court (Germany)
BverfGE	Sammlung der Entscheidungen des BverfG / Collections of the Federal Constitutional Court's decisions
c	Case
CARIN	Camden Asset Recovery Inter-agency Network
CC	Criminal Code
C2C	Consumer to consumer trading
CCZ	*Corporate Compliance-Zeitschrift / journal (Germany)*
CDU	Christian Democratic Union of Germany
CEO	Chief Executive Officer
cf	compare
CFR	Charter of Fundamental Rights of the European Union

CFT	Combating the Financing of Terrorism
CJEU	Court of Justice of the European Union
CLOUD Act	Clarifying Lawful Overseas Use of Data Act of 2018
CoC	Code of Conduct
CoE	Council of Europe
COSI	Standing Committee on Internal Security
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CSU	Christian Social Union in Bavaria
CTOC	United Nations Convention against Transnational Organized Crime
DB	Der Betrieb / journal (Germany)
DCF	Directorate for Combat Against Fraud (Romania)
DFZ	*Der freie Zahnarzt / journal (Germany)*
DNA	National Anticorruption Directorate n.t. (Romania)d
doc.	document
DStR	Deutsches Steuerrecht / journal (Germany)
DZWIR	*Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht / journal (Germany)*
e.g.	for example
EBA	European Banking Authority
EBH	Elvi Bírósági Határozat / Principled judicial decisions (Hungary)
EC	European Commission
ECN	European Competition Network
EJCCLCJ	*European Journal of Crime, Criminal Law and Criminal Justice*
ECBA	European Criminal Bar Association
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ecolex	*Fachzeitschrift für Wirtschaftsrecht / journal (Austria)*
ECPI	European Criminal Policy Initiative
EctHR	European Court of Human Rights
ed.	editor(s)
edn	edition
EEW	European Evidence Warrant
EIO	European Investigation Order
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EMPACT	European Multidisciplanary Platform Againts Criminal Threats
EPPO	European Public Prosecutor's Office
ERÜBS-ENYÜBS	The abbreviation of the Hungarian Uniform Investigation and Prosecution Statistics
ESMA	European Securities and Markets Authorities
et al.	and other
et seq.	and the following page/paragraph
EU	European Union
EuCLR	*European Criminal Law Review*

Eucrim	*European Criminal Law Association's Forum*
EUR-Lex	Access to European Union law
Eurojust	European Union's Judicial Cooperation Unit
EUROPOL	European Police Office
f.	and the following page/paragraph
FATF	Financial Action Task Force on money-laundering
FDR	Fraud Detection Rate
ff.	and following pages/paragraphs
FFL	Fraud Level
FinStrG	Finanzstrafgesetz /Act on Fiscal Offences (Austria)
FIU	Financial Intelligence Unit
FPA	Fiscal Penal Act
Frontex	European Border and Coast Guard Agency
FWD	framework decision
GA	Goltdammer's Archiv für Strafrecht / journal (Germany)
GDPR	General Data Protection Regulation / EU
GG	Grundgesetz / Constitution /Basic Law of the Federal Republic of Germany
GP	Gesetzgebungsperiode / Legislative period
GPC	Greek Penal Code
GRECO	Group of States Against Corruption
GNI	Gross National Income
GWG	Geldwäschegesetz / Anti-money Laundering Act (Germany)
GWR	*Gesellschafts- und Wirtschaftsrecht / journal (Germany)*
HCA	Hungarian Competition Authority
HCCJ	The High Court of Cassation and Justice (Romania)
HFIU	Hungarian Financial Intelligence Unit's
HRRS	*Onlinezeitschrift für Höchstrichterliche Rechtsprechung zum Strafrecht*
i.a.	inter alia / among other
i.e.	id est / that is
Î.C.C.J	*High Court of Cassation and Justice t.n. (Romania)*
ICT	Information and Communication Technology
IDR	Irregularity Detection Rate
IS	IT systems
IMF	International Monetary Fund
IMS	Irregularity Management System
JHA	Justice and Home Affairs Council
JIBL	*Journal of International Business and Law*
JICJ	*Journal of International Criminal Justice*
JITs	Joint Investigation Teams
JURA	*Juristische Ausbildung / journal (Germany)*
KstA	Korruptionsstaatsanwaltschaft / Public Prosecutor's Office for Corruption Offences (Austria)

KYC	know your customer
margin no.	margin number
MASZP	Multy Annual Strategic Action Plan
medstra	*Zeitschrift für Medizinstrafrecht / journal (Germany)*
MIFID	Markets In Financial Instruments Directive
MJECL	*Maastricht Journal of European and Comparative Law*
ML	Money Laundering
MLA	mutual legal assistance
MMORPGs	Massive multiplayer online role-playing games
MNB	Magyar Nemzeti Bank / The Central Bank of Hungary
MONEYVAL	The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
MS	Member States
MTIC	Missing Trader Inter Community, a common way of misusing VAT regulations
n.c.n.p.s.l.	Nullum crimen, nulla poena sine lege
NOJ	National Office for the Judiciary (Hungary)
NJECL	*New Journal of European Criminal Law*
NJOZ	*Neue Juristische Online-Zeitschrift / journal (Germany)*
NJW	*Neue Juristische Wochenschrift / journal (Germany)*
NJW-Spezial	*Neue Juristische Wochenschrift – Spezial / journal (Germany)*
NATA	National Agency for Tax Administration (Romania)
NAV	National Tax and Customs Administration
no/nos	Nummer / number
NOJ	National Office for the Judiciary (Hungary)
NoV	*Nomiko Vima / journal (Greece)*
Nr.	Nummer (number)
NStZ	*Neue Zeitschrift für Strafrecht / journal (Germany)*
NTCA	National Tax and Customs Administration (Hungary)
NZG	*Neue Zeitschrift für Gesellschaftsrecht / journal (Germany)*
NZKart	*Neue Zeitschrift für Kartellrecht / journal (Germany)*
NZS	Neue Zeitschrift für Sozialrecht / journal (Germany)
NZWiSt	Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht / journal (Germany)
OAP	Operative Acton Plans
OBH	Országos Bírósági Hivatal / The National Office for the Judiciary (NOJ) (Hungary)
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
OLAF	European Anti-Fraud Office – European Commission
OPGH	Office of the Prosecutor General of Hungary
OwiG	Ordnungswidrigkeitengesetz / Administrative Offences Act
ÖJZ	*Österreichische Juristen-Zeitung / journal (Austria)*
para(s)	paragraph(s)

PGO	Prosecutor General's Office (Hungary)
P2P	peer-to-peer / direct transfer with no intermediaries
POCA	Proceeds of Crime Act 2002
PharmR	*Pharma-Recht / journal (Germany)*
PIF Convention	Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests
PIF Directive	Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law
PLog	*Poinikos Logos / journal (Greece)*
PoinChr	*Poinika Chronika / journal (Greece)*
PoinDik	*Poiniki Dikaiosini / journal (Greece)*
PotE	preponderance of evidence
PSG	Payment Services Directive
PStR	Praxis Steuerstrafrecht / journal (Germany)
RCC	Romanian Constitutional Court
RCPC	Romanian Criminal Procedure Code
s	sentence
SAPARD	Special Accession Programme for Agricultural and Rural Development
SAR	suspicious activity reports
sec	section
SIAK-Journal	*Zeitschrift für Polizeiwissenschaft und polizeiliche Praxis / journal (Austria)*
SOCTA	Serious and Organized Crime Threat Assessment
SOP	Standard Operational Procedures
SPD	Social Democratic Party of Germany
StGB	Strafgesetzbuch / Criminal Code
StPO	Strafprozessordnung / Criminal Procedure Code
STR	Suspicious Transaction Reporting
StV	*Strafverteidiger / journal (Germany)*
SWIFT	Society for Worldwide Interbank Financial Telecommunications
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TOR	The Onion Router, a free a software for enabling anonymous communication
Tpvt.	Hungarian Competition Act
TREVI	Terrorisme, Radicalisme, Extrémisme et Violence Internationale
UCLAF	Unité de coordination de lutte anti-fraude
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCTOC	United Nations Convention Against Transnational Organized Crime
UR	Umsatzsteuer Rundschau / journal (Germany)

WEBSITES

EC	*https://ec.europa.eu/commission*
ECJ	*http://curia.europa.eu/*
EU	*https://europa.eu/european-union*
ECtHR	*https://www.echr.coe.int/Pages/home.aspx?p=home*
EUR-Lex	*https://eur-lex.europa.eu/homepage.html*
EUROJUST	*http://www.eurojust.europa.eu/pages/home.aspx*
EUROPOL	*https://www.europol.europa.eu/*
FATF	*https://www.fatf-gafi.org/*
OLAF	*https://ec.europa.eu/anti-fraud/home_en*
UN	*https://www.un.org/en/*

PART I

GENERAL QUESTIONS ABOUT THE CRIMINAL LAW PROTECTION OF THE FINANCIAL INTERESTS OF THE EUROPEAN UNION

OUTLINE OF THE DEVELOPMENT OF EUROPEAN CRIMINAL LAW FROM THE 1990S TO THE PRESENT*

*Prof. Dr. Ákos Farkas***

1. The concept of European criminal law

In the international literature, the concept of European criminal law appears in two terms, one broader and one narrower. In defining the broader, multi-component concept, the development of human rights is the starting point.

After the Second World War, national criminal laws in Europe have been expanded with new elements. Among these, the powerful impact of human rights was the most conspicuous.

The mechanisms for enforcing human rights have evolved in several stages. The first step is when the state declares human and citizens' rights to its citizens, mostly in its constitution. In the next step, the state creates institutions and procedures that provide the citizens of the state the opportunity that they can use if another citizen violates these rights. In the third stage, the state creates the opportunity for its citizens to act against it domestically, if it violates the rights it provides. Finally, the state also ensures the jurisdiction of international forums in proceedings against itself by submitting a declaration of subordination, if it violates human rights guaranteed by international conventions.

The latter was based on the Universal Declaration of Human Rights established within the UN framework on 10 December 1948. The International Covenant on Civil and Political Rights, adopted in 1996, has made an outstanding contribution to the development of human rights. The United Nations General Assembly adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (only) in 1984, which entered into force on 26 June 1987, following the submission of the twentieth instrument of ratification or accession. In addition, the codification of international criminal law has begun under the auspices of the United Nations.

In 1950 the European Convention on Human Rights (ECHR) was adopted in Rome and entered into force in 1953, and was followed by the establishment of the European Court of Human Rights (ECtHR), based in Strasbourg, for the protection of human rights declared in ECHR.

The jurisprudence of the Court of Justice established by over half a century of operation has significantly determined the criminal law legislation and case law of the

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state parties to the Convention, including the prohibition of torture and other inhuman and degrading punishment, as enshrined in Art. 3 of the ECHR, the enforcement of which was guaranteed by the ECtHR.

This was the first step in the approximation of national criminal laws. Even if the case law of the Court of Justice has never been aimed at harmonizing or approximating law, but "just" to decide whether the State complained against has indeed infringed the human rights declared in the Convention. The decision only binding for that particular state. Nonetheless, the judgments have provided general testimonies that have become the norm for all state parties.

In addition, the European Committee on Crime Problems was established in 1957 as a committee of the Council of Europe, which made recommendations on the fight against various serious crimes with international characteristics (organized crime, corruption, cybercrime, bioethics and cloning) with a significant impact on Member States' legislative responses.

Within the framework of the Council of Europe, the International Convention on the Prevention of Punishment of Inhuman and Degrading Punishments was drafted in February 1987 and entered into force on 1 February 1989. An international body of independent experts, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), monitors the implementation of the European Convention for the Prevention of Torture by visiting sites for the placement of 'persons deprived of their liberty by public authority'. The Commission contributes to the strengthening of fair criminal justice and law enforcement that respect human rights through its monitoring visits and reports.

Although the main activity of the OECD, which was established in 1961 from the Organization for Economic Cooperation in Europe, as its name implies, focuses on the economies of the member states, it has been a catalyst for the creation of a number of criminal law conventions (anti-corruption, cybercrime, tax evasion, anti-money laundering convention) that aim is to promote a clean, fair economy and, at the same time, as a binding recommendation to the Member States, it entails them the task of incorporating them into their criminal law, which is checked.

The other component of the broader concept is related to the EU, which plays a prominent role in our topic. The European Communities have been established as economic and political organizations. Its creators at the beginning did not think that criminal law would ever play a role in its operation. Although it cannot be denied that from 1957, the signing of the Treaty of Rome on the European Communities (EC) to 1992, when the European Union (EU) was established, and until the Maastricht Treaty entered into force on 1 November 1993, in many cases, the idea of cooperation in criminal matters arose, but these have not become concrete measures. Both the TREVI cooperation (1976–1989), which lacked the formal contractual frameworks, and Schengen I–II. (1985, 1990) Convention was a product of the 1970s and '80s that fell outside the scope of the EC Treaty, but was undoubtedly a precursor to a new type of cooperation, based on direct operational relations. In addition, there was a system of administrative sanctions and European cartel law, which, in view of its weight and the powers of law enforcement, showed serious similarities with the system of criminal sanctions and coercive measures.

Although the EC could not obligate Member States directly to criminal law legislation, criminal law nevertheless played a role in shaping the relationship between the organization and the Member States. The freedoms and policies declared by the EC Treaty have laid the foundation for this. Freedom of movement of goods, capital, services and labor have become the pillars of the EC. EC legislation has been instrumental in serving the fulfilment and protection of these. However, whether it is a regulation of direct effect, or a directive or decision requiring Member State legislation, the legislative and enforcement discipline and interpretative power of the Member States did not always meet the EC's expectations. Law enforcement ignoring the obligations of the regulations and delayed legislation prompted the EC Commission to enforce these obligations through the ECJ.

Consequently, a number of court rulings have been made obliging Member States to abolish, establish or amend criminal law legislation. However, it expressed a negative view on the protection on the criminal law protection of the Communities. However, among these court rulings, there were some exceptions; one for example, could no longer exclude this area from the defense mechanism of the EC in order to protect the common agricultural policy. This indicated that criminal law could have a place in protecting community interests after all.

Referring to the *principle of assimilation* in the ECJ judgments, namely that a Member States should not differentiate between Community and domestic law regarding protection and legal consequences, it only required that the sanction imposed for infringement of Community law be effective, proportionate and dissuasive, but did not specify its nature, leaving its definition to the Member States.

2. Cooperation in criminal matters in the European Union

The creation of the EU was a turning point in the organisation's position on criminal law. In EU's three pillars structure, the so-called third pillar was responsible for enhancing criminal cooperation between Member States. The Maastricht Treaty initially sought to fill the framework for intergovernmental cooperation in the 'field of justice and home affairs' with mutual assistance cooperation. With the exception of the conventions already in force today, this plan has not lived up to the expectations and the framework decision created in the Amsterdam Treaty quickly expelled conventions from the EU system of instruments. Since 2000, no new conventions have been created.

The co-operation in the Treaty of Amsterdam in 1998 has already emerged as an area of "Freedom, Security and Justice", which aims to safeguard and protect the freedom, security and rights of EU citizens, inter alia by strengthening criminal cooperation.

In this system - in which decisions were made unitarily and not by majority consent – appeared the framework decision as a form of decision-making and principle of mutual recognition became the cornerstone of cooperation, which put the implementation of cooperation on a new but unambiguous and unstable basis. Subsequently, a number

of outstanding framework decisions on criminal and procedural matters have had a serious impact on Member States' criminal law. Among these is the Framework Decision on the European Arrest Warrant.

The Framework Decisions imposed legislative obligations on Member States to transpose the provisions contained therein within the deadline set by the Framework Decision by using their own legal instruments. There was no longer a need for a lengthy ratification process.

The Treaty of Nice has created the institutional framework for third pillar co-operation, creating the organization of Eurojust, which has become a catalyst for operational cooperation over time in the context of high-priority cross-border crime requiring EU cooperation.

Equally important was the drafting of the Charter of Fundamental Rights of the European Union and its attachment to the EU Treaty, which is also linked to the Treaty of Nice. The Charter independently regulates the fundamental human rights and freedoms of EU citizens. Although the ECHR was undoubtedly the basis of the document, however, the EU's intention to join the ECHR, declared in the Treaty of Amsterdam is a more exciting perspective.

The Maastricht Treaty has created the EU's own budget. Preventing the illegal outflow of budgetary funds has become a pressing problem with the establishment of the budgetary system. (It is estimated that the lower limit of illegal outflow is 2% of the budget, while the highest estimate is 20%. The real rate is 10%.)

As a means of doing so, criminal law was an obvious choice, but EC law in the first pillar only allowed the use of administrative tools. As a first step, the EU has put in place a defense mechanism in accordance with the third pillar. As a result, the aforementioned PIF convention was born, which, however, had all the problems of the mutual assistance cooperation without the EC having any formal legal means to eliminate them.

Because of the procrastination surrounding the ratification of the PIF Convention, the EC Commission created a draft regulation at the end of the 1990s, intended to resolve defense issues within the system of directly binding legal sources. However, this attempt have failed. The Commission tried to justify this by creating the concept of 'implied jurisdiction'. It was nothing more than to make it clear logically by means of legal interpretation that, in the absence of explicit legal instruments, criminal law could also be included in the conceptual framework of the first pillar Pillar of the EU Treaty. This experiment has clearly failed.

In parallel, a research (Corpus Juris project) was launched in the mid-1990s with the support of the EU Commission to examine the possibility of drafting a catalogue of offenses acceptable to all Member States for the protection of financial interests (EU fraud and closely related crimes) and an EU-wide prosecutor to prosecute these offenses. The project summary material was published in 1997 with recommendations. In 2000, Corpus Juris's improved and enhanced version was released, taking into account the feasibility studies that have been completed in the meantime. In 1999, the European Anti-Fraud Office (OLAF) was created with the main task of investigating EU fraud by administrative means in the Member States.

The afterlife of the project is adventurous. During the first years of the 2000s, it seemed that the initial mixed but positive acceptance was replaced by total rejection, and the fate of the project is to be forgotten and direct criminal cooperation between Member States will be managed only through Eurojust.

However, the draft Treaty establishing a Constitution for Europe in 2005 reintroduced the European prosecutor to be set up and the Lisbon Treaty made it clear that the institution should be created from Eurojust. The question of how to do this was not answered at this time, but in June 2013 a draft decree on the establishment of the European Public Prosecutor's Office (EPPO) was adopted and, in February 2017, under the Maltese Presidency, it was decided that 11 of 28 Member States would join the enhanced cooperation. More Member States decided to join and now 22 are part of the enhanced cooperation to establish the European Public Prosecutor's Office, to which Hungary has not yet acceded at the time of writing this study.

The organizations outlined so far and the legislation they have created have not left the criminal law of the Member States untouched, so in this sense we can talk of a specific 'Europeanized' criminal law that shows the faint signs of uniformity.

The components described so far represent a broader sense of European criminal law. Although the UN and the OECD are undoubtedly not European organizations, EU Member States are also members of them, so the legislation they issue is part of the criminal law of these countries, and therefore of European criminal law.

Most often, however, the literature uses the narrower concept of European criminal law, which is linked to the European Union and is embodied in the criminal law legislation and institutional system related to the relationship between the EU and the Member States and that of the EU and EU citizens. However, this criminal law cannot be described by conventional criminal law concepts. We can hardly say there are uniform principles of criminal law, general and special aspects or uniform dogmatic thinking. The large number of Member States, their different criminal systems, legislation, judicial organization and case law make the establishment of such a coherent system particularly difficult.

It appears from the literature that European criminal law would be limited to substantive criminal law, since most of the literature is related to that, although European criminal procedural law is also part of it. Without this, it would be impossible to enforce criminal law at a European level. That is why it must take its rightful place in legislation at EU level and research alike.

PROTECTION OF THE EU'S FINANCIAL INTERESTS BY MEANS OF CRIMINAL LAW IN THE CONTEXT OF THE LISBON TREATY AND THE 2017 DIRECTIVE (EU 2017/1371) ON THE FIGHT AGAINST FRAUD TO THE UNION'S FINANCIAL INTERESTS[*]

Prof. Dr. Maria Kaiafa-Gbandi[**]

1. Fundamental changes in the EU's institutional framework and their importance in the fight against fraud to the Union's financial interests by means of criminal law

The protection of the EU's financial interests, particularly by means of criminal law, is now crucially affected by the characteristics of the EU's institutional operation in the field of criminal law under the Lisbon Treaty.

Compared to the status in force at the time of the PIF conclusion, the Lisbon Treaty practically elicited three fundamental changes regarding Member States:

– The first change stems from the legal instruments now employed to implement the protection of the EU's financial interests by means of criminal law. In other words, even if the Union choses to intervene by way of a directive – rather than a regulation – to ensure the effective protection of its financial interests, transposition of the pertinent provisions into national legal systems is now binding for Member States under the threat of monetary penalty;[1] this was not the case under the PIF Convention. Hence, the content of the Directive's provisions inevitably becomes much more significant, as any deviation from its requirements may cause substantial problems for Member States.
– The second change concerns the binding nature attributed under Union law to the Charter of Fundamental Rights of the EU, particularly its institutional equivalence to the *primary* law of the Treaties and its immediate application according to ECJ case law, even by the national judge who finds a violation.[2] This aspect is obviously of particular value to national legislators attempting to transpose an EU legal instrument into their internal legal systems, when they detect Charter violations by the EU itself intervening in criminal law. In other words, this binding effect is now

[*] This paper is based on a presentation made at the international conference on "The criminal law protection of the financial interests of the European Union-Manifestations with special issues", which has been organized by the University of Miskolc Faculty of Law, the Research Centre of European and International Criminal Law and the Association of Hungarian Lawyers for the European Criminal Law on March 23rd 2018, in Miskolc. The conference was funded by the European Union's Hercule III programme. The study was first published in ZIS 12/2018, 575–582.

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[1] Art. 258 and 260 TFEU.

[2] See, e.g., Case C-617/10, Judgment of the Court (Grand Chamber) of 26 February 2013, Åklagaren v. Hans Åkerberg Fransson, para 45, 46.

technically linked to the requirement of Member States to abide by primary Union legislation. This is why it is now instrumental to screen the content of secondary EU legislation under transposition (in this case, the said Directive) in terms of possible incompatibilities with both the Charter of Fundamental Rights of the EU and primary Union law in general.

– The third fundamental change is linked to the enhanced enforcement arsenal already envisaged in primary law with respect to the fight against fraud to the EU's financial interests. In such cases of fraud, general provisions on mutual recognition and facilitation of prosecutorial and judicial mechanisms of criminal justice with the help of European institutions (e.g. Europol and Eurojust) do not apply unreservedly. Art. 86 TFEU foresees the already established EPPO,[3] specifically to investigate, prosecute and refer such acts for adjudication. Through EPPO, a semi-central criminal process is now advanced, to the extent that the pre-trial stage will remain under the decisive competence of the EPPO, while the cases will be adjudicated in one of the Member States (if more than one jurisdiction are involved). This shift demonstrates the institutionally acquired efficiency of the protection of the EU's financial interests within the Union, which must apparently be counterbalanced by rules ensuring that criminal suppression of EU-fraud abides by the rule of law.[4] In fact, this should be the case with respect to both substantive law (i.e. primarily at the level of substance of the Directive requiring Member States to criminalise relevant behaviour) and the procedural arsenal built around the EPPO's establishment and operation.

In this broader context, this paper attempts to present the Directive's new substantive provisions on fraud against the financial interests of the EU; it will also highlight certain challenges posed to national legislators (in view of the anticipated transposition) and the Union legislator alike, with a view to improving EU legislation itself.

2. The directive's legal basis and its significance

Before proceeding to the content of Directive (EU) 2017/1371, it is worth reviewing its legal basis, as it does not only put across an important outlook for future criminalisation or amendments to provisions relating to the protection of the EU's financial interests by means of criminal law, but it also carries practical implications for the leeway left to Member States to react.

The Lisbon Treaty, aside from unifying the pillars into a single institutional structure, broadened the EU's competence to intervene with respect to the criminal law of Member States. Especially in regard to the criminal protection of the EU's finan-

[3] Council Regulation (EU) 2017/1939 of 12. October 2017, Implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("The EPPO"). On the establishment of the EPPO see inter alia AMBOS 2018, 574 et seq. Csonka–Juszczak–Sason 2017, 125 et seq, Kuhl 2017, 135 et seq., Met-Domestici 2017, 143 et seq., Guiffrida, 2017, 149 et seq., Di Francesco Maesa 2017, 156 et seq.

[4] Kaiafa-Gbandi 2015, 234–235.

cial interests, it is argued that the EU was granted competence not only to introduce minimum rules concerning the constituent elements of the offences and the respective criminal sanctions via Directives but also to define the respective offenses via regulations, i.e. on its own initiatives without the cooperation of the Member States. According to this view, apart from Art. 83 TFEU, Art. 325(4) TFEU also provides a legal basis for the above-mentioned protection, referring specifically to combatting fraud against the EU's financial interests.[5] Art. 325(4) TFEU, as it currently stands by referring to the adoption of necessary "measures" in the field of the prevention of and fight against fraud affecting the financial interests of the EU, does not exclude the adoption of a regulation since the term "measures" includes both directives and regulations according to EU law and based on common practice. It is further suggested that Art. 86(2) TFEU on the European Public Prosecutor's Office also provides a legal basis for the adoption of a regulation for the criminal protection of the EU's financial interests, insofar as this provision links the definition of the offences falling within the competence of the EPPO to the regulation on its establishment (Art. 86(1) TFEU).[6]

These views, which seek to offer a legal basis for the criminal protection of the EU's financial interests in provisions of the Treaty, other than Art. 83 TFEU, have become the subject of criticism, with notable counter-arguments.[7]

However, it is noteworthy that the EU chose Art. 83(2) TFEU as its legal basis for a Directive concerning the fight against fraud to the EU's financial interests in the post Lisbon era. The use of the latter provision [instead of Art. 325(4) TFEU] has allowed Member States to rely on the emergency brake in the framework of the legislative process, whenever they consider that the draft Directive would affect fundamental aspects of their criminal justice systems, a possibility that exists only under Art. 82 and 83 TFEU, and not under Art. 325 TFEU. Of course, it has been argued that the emergency brake should also apply to Art. 325(4) TFEU.[8] However, this is not unanimously accepted. Thus, the use of this provision as a legal basis would grant the EU, at least according to a certain view, a much broader range of options, since the draft Directive would not risk being countered by an emergency brake, which might undermine the effort for a harmonised and effective protection of the EU's financial interests throughout its territory and lead to the establishment of enhanced cooperation among only certain Member States. Nevertheless, an attempt to employ Art. 325(4) as a legal basis was actually made in the Commission's proposal,[9] but it was unsuccessful, given that the final version of the Directive, after the intervention of both the Council and the European Parliament, invokes as such Art. 83(2) TFEU.

The legal basis ultimately relied upon for the anti-fraud Directive conveys a sound approach suitable for a democratic two-tier system of enacting criminal statutes: the supranational body foresees the elements of crimes, but each Member State is left

[5] See inter alia Fromm 2009, 70–71.
[6] See Krüger 2012, 409; cf. SAFFERLING, 2011.
[7] See mainly Asp 2013, 142 et seq, 147 et seq., Sicurella 2011, 236 et seq.
[8] Asp 2013, 154 et seq., Satzger 2018, 132.
[9] COM (2012) 363 final, Brussels 11.07.2012.

with a margin to specify the elements of the criminalised acts and their envisaged penalties coherent with its national criminal law system. This *collaborative* model[10] is particularly valued in supranational regimes that communicate their respect for the fundamental rights and constitutional traditions of their Member States, as the latter are predominantly linked with criminal law as a measure for both safeguarding legally protected interests and guaranteeing civil liberties.

3. Key points of the directive and a concise assessment

As far as its content is concerned, the Directive will replace the PIF Convention and its protocols, as it is explicitly cited in Art. 16. In comparison with the regime under the PIF Convention, the Directive bears certain key characteristics:

3.1. The notion of the EU's financial interests

First of all, the Directive clearly defines the financial interests of the EU (Art. 2) by referring to all revenues, expenditure and assets covered by the budget of the EU, of its institutions and of other bodies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them. It goes as far as to clarify that the Directive shall also apply in respect of revenue arising from VAT own resources, but only in cases of serious offences, which are defined as offences connected with the territory of two or more Member States and involving a total damage of at least EUR 10,000,000. Initially, the Commission aimed to criminalise as fraud to the EU's financial interests any "fraud affecting Value Added Tax (VAT) [which] diminishes tax receipts of Member States and subsequently the application of a uniform rate to Member States' VAT assessment base".[11] In addition, it had invoked ECJ's case law,[12] according to which "there is a direct link between, on the one hand, the collection of the Value Added Tax revenue in compliance with the applicable Union law, and on the other, the availability to the Union budget of the corresponding Value Added Tax resources, since any lacuna in collection of the first potentially causes a reduction in the second". However, this position was not accepted by the Council; finally, the compromise made includes only cross-border VAT fraud, which, additionally, must concern a large sum of money.[13]

Despite the cross-border dimension of the act, though, this choice is still not undisputable, because VAT fraud directly affects the property of each Member State, and only indirectly the property of the EU.

[10] Kaiafa-Gbandi 2016, 13 et seq.

[11] COM (2012) 363 final, Brussels 11.07.2012, 12.

[12] See already Case C-539/09, Judgment of the Court (Grand Chamber), 15 November 2011, European Commission v. Federal Republic of Germany, para 72.

[13] Also see Art. 18 para 4lit. a of the directive, providing that the Commission shall by 2022 assess whether the threshold indicated in Art. 2 para 2 for VAT fraud (total damage of 10,000,000 euros) is appropriate, highlighting the concern and the interest of the Commission in this matter.

Particularly, it is well-known that VAT proceeds do not constitute revenue of the EU budget in and of themselves, but they are a simple computational point of reference for the proportional determination of the contribution of each Member State to the Union budget. Therefore, they are assets owned by Member States, of which Member States are obliged to apportion a certain percentage to the EU. Accordingly, any perceived damage to the EU assets is *indirect*, i.e. it affects the capability of Member States to apportion a fraction of evaded earnings from own assets.[14] The contrasting outlook of the ECJ[15] and the Directive essentially converts a national legally protected interest into a Union one, thereby repositioning it in the Union's criminal repression orbit. The problem inherent in this view can be grasped if conceived that – according to it – any fraudulent violation against a Member State's GDP (i.e. the calculation basis for its contribution to the EU budget) should be considered an abuse against the financial interests of the Union.[16]

Of course, the EU disguises the problem by containing only serious and transnational fraud, i.e. essentially remaining under the competence of Art. 83(1) TFEU, to intervene in the proscription of offences and sanctions. However, transnational VAT fraud does not fall under the list of euro-crimes, and besides the EU expressly evokes Art. 83(2) TFEU[17] as a legal basis for the Directive, because it aims at guaranteeing the effectiveness of its harmonised provisions on the circulation of goods and services within the Union by means of criminal law, at the same time effectively ensuring the financial interests of the Member States involved.[18] However, it should not escape our attention that in this case a party under protection by criminal law (the EU) engages in "self-protection" to safeguard something that it is yet not its own, but claims to possess in the future, because it relates to its financial existence.

Moreover, the preamble to the Directive (para 4) reveals both the genuine legally protected interest inflicted and the confusion created by the inclusion of VAT fraud within its scope. In particular, the preamble mentions: "Offences against the common VAT system should be considered to be serious where 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 10,000,000 EUR. 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…*". This raises a crucial issue: the calculation of total

[14] See relevantly Papakyriakou 2016, 11–12.

[15] See inter alia Case C-539/09, Judgment of the Court (Grand Chamber) of 15 November 2011, European Commission v. Federal Republik of Germany, paras 69–72, as well as Case C-617/10, Judgment of the Court (Grand Chamber) of 26 February 2013, Åklagaren v. Hans Åkerberg Fransson, para 26. Cf. also C-524/15, Judgment of the Court (Grand Chamber), of 20 March 2018, Menci, para 21.

[16] See Papakyriakou 2016, 12–13. Also cf. Case C-524/15, Judgment of the Court (Grand Chamber) of 20.3.2018, Menci.

[17] On the legal basis, see the initial reference of the preamble to the Directive: "Having regard to the Treaty on the Functioning of the European Union, and in particular Art. 83(2) thereof…"

[18] Cf. Papakyriakou 2016, 13.

damages, including the alleged losses of both the EU and Member States results in an erroneous *double* computation of amounts already accounted for as Member States' losses from VAT fraud, as the calculation of the percentage attributable to the EU is made on the basis of evaded VAT inflows. Therefore, the preamble's attempt to define the total damage in the way it did, *directly violates the proportionality principle*. In other words, the EUR 10,000,000 threshold cannot include a percentage of the amount already calculated in its entirety as such. No damage other than that relating to Member States exists so as to justify its inclusion on account of infliction against another legally protected interest. Moreover, if the rationale behind the provision is the EU's exposure to the risk of failure to collect contributions from its Member States, *it is because of the losses they themselves incur* and *under no circumstance is it reasonable for such losses to be recalculated – even to a certain proportion – as Union-relevant impairment jeopardy.*

Apart from that, the definition of serious offences against the common system of value added tax (VAT) – particularly the pertinent provision in Art. 2(2) of the Directive – should encompass the other elements referred to in the preamble (obviously apart from the inclusion of damages incurred and the link to the EU's financial interests), as incorporating types of conduct such as forms of fraud resulting from a fraudulent scheme or in a structured way, etc. because such elements reduce the extent of criminalization that Member States are bound to introduce. Thus, the Directive does not adhere to the *principle of legality* in this respect.

3.2. Definition of "fraud" (actus reus and mens rea)

The definition of fraud distinguishes the acts that concern expenditure from the acts that concern revenue; the offence still needs to be committed intentionally and it is still titled imprecisely (Art. 3), because the prosecuted act is not necessarily a fraudulent one. Regarding expenditure fraud, there is further specification of the relevant acts. In respect of non-procurement-related expenditure, fraud may be committed via "the misapplication of such funds or assets for purposes other than those for which they were originally granted" (i.e. without further damage required); in respect of procurement-related expenditure, the misapplication of funds, as defined just above, needs to damage the EU's financial interests, while all the relevant acts are restricted by the additional requirement of the perpetrator's aim to make unlawful gain for him/herself or another by causing loss to the EU's financial interests.

Opting for the above distinctions fundamentally function towards adherence to the principle of legality (n.c.n.p.s.l) to which the EU is subject when introducing minimum standards for the definition of offences and sanctions via Directives,[19] while the delineation of the EU's financial interests in Art. 2(1)(a) is equally helpful in this regard. However, the general reference to any act or omission relating to (e.g.) the use or presentation of false, incorrect or incomplete statements or documents, etc. remains an

[19] See European Criminal Policy Initiative (ECPI), A Manifesto on European Criminal Policy, ZIS 2009, 708 et seq.

essential problem with respect to the demarcation of all individual forms of criminal conduct, as any act or omission *simply associated* with a given conduct could ultimately include any behaviour whatsoever.[20] Thus, the actus reus should firmly be associated with the particular acts described ("the use or presentation of false, incorrect or incomplete statements", etc.). Besides, committing fraud by omission should be linked to the conditioning of a particular legal obligation incumbent on the perpetrator to prevent the occurrence of the result. Only this may an act be viewed as equal to an omission from a normative perspective. These amendments would definitely serve the principle of legality regarding the punishable offences (n.c.s.l. certa) as well as show respect for the ultima ratio principle, and they would facilitate national legislators in effectively incorporating EU law into their national legislation.

As to the punishable conduct, which may only be intentional, it is encouraging that the preamble stresses that the notion of intention must apply to all the elements constituting the criminal offences (para 11). At the same time, however, and especially in view of the accompanying reference to the specific point that "the intentional nature of an act or omission may be inferred from objective, factual circumstances", it must be clarified that the notion of intention with its *dispositional identity*[21] is subject to a complex and hierarchical system of empirical/observable indications and counter-indications, i.e. to a system which includes many more additional elements than those possibly encompassed by a reference to "factual circumstances".

3.3. Sanctions

Compared to the PIF Convention, provisions on criminal sanctions are for the first time introduced in the directive; this is understandable in view of the legal instrument used, as well as the evolution of the EU institutional regime, especially with regard to the EU's competence to intervene in the criminal laws of the Member States.

Regarding fraud, the sanctions that the Member States are required to introduce maintain the general form used in PIF Convention: they should be "effective, proportionate and dissuasive criminal sanctions" [Art. 7(1)]. The maximum penalty must consist in imprisonment [Art. 7(2)]; in addition, the EU sets a minimum number of years for the maximum penalty that must be provided for by the Member States regarding cases of serious fraud (i.e. when they involve damage or advantage over EUR 100,000). More specifically, a maximum penalty of at least four years of imprisonment is required. This provision follows the approach also used in other Directives, where the EU sets minimum standards for the maximum penalties to be provided for by the national legislators. In the case of this Directive, following the above-mentioned approach has been the choice of the Council and of the European Parliament. The Commission, on the other hand, attempted to impose on the Member States minimum

[20] Kaiafa-Gbandi 2012, 331.

[21] See inter alia Hassemer 1990, 183 et seq., Hassemer 1980 243 et seq., Kaiafa-Gbandi 1994, 172 et seq., Mylonopoulos 1987, 687 et seq.

standards also with regard to the minimum penalties to be provided for by the national legislators; this intervention, which was suggested for the first time, was rightfully rejected. Such a choice is incompatible with the characteristics of a Directive, since it would not have left any margin for actual decisions on the penalties to Member States, and it would have caused significant problems for the criminal justice systems of those Member States that do not provide for minimum penalties.

Besides, it is noteworthy that the same maximum penalty is linked to VAT fraud, which is considered as serious when it involves a *total* damage of at least EUR 10,000,000, bringing about questions on the proportionality of the penalties, given that serious fraud that does not concern VAT starts with a damage of at least EUR 100,000 according to the Directive.

Similar proportionality issues derive from the provision of the same minimum maximum penalty of four years for all the different offences of Art. 4 in the Directive, such as receiving a bribe that can damage the EU's financial interests or laundering the proceeds of a crime under the same condition, regardless of the fact that those offences affect different legal interests.[22]

Besides, the provision of Art. 8, which provides that the commission of the offences of the Directive within a criminal organisation shall be considered to be an aggravating circumstance, is also flawed. The provision amounts to a breach of the principle of proportionality, because this issue could very well be dealt with by applying the rules of concurrence, in so far as participating in a criminal organisation is criminalised as a distinct offence in the EU. Of course, there is Recital 19 of the preamble of the Directive, which clarifies that "Member States are not obliged to provide for the aggravating circumstance where national law provides for the criminal offences as defined in Framework Decision 2008/841/JHA to be punishable as a separate criminal offence and this may lead to more severe sanctions". Even so, this should not be left to interpretation, but should be clarified by the provision itself once the Union legislator decided to include an unnecessary provision on aggravating circumstances referring to fraudulent acts committed within a criminal organisation.

Another point of concern is that the only reference of the Directive to the prohibition of double jeopardy (the ne bis in idem principle) is confined to its preamble [(17), (31)]. This prohibition also applies to the accumulation of criminal and administrative sanctions for the same act according to ECJ[23] and ECtHR[24] case-law (as is typically the case in fraudulent conduct against the EU's financial interests) when "administrative" sanctions are essentially penalties (according to the Engels criteria). On the contrary, Art. 14 of the Directive includes a reverse wording for the principle, i.e. "the application of administrative measures, penalties and fines…shall be without prejudice to this Directive" and "Member States shall ensure that any criminal proceedings…do not

[22] Kaiafa-Gbandi 2012, 329.

[23] See Case C-617/10, Judgment of the Court (Grand Chamber) of 26 February 2013, Åklagaren v. Hans Åkerberg Fransson, paras 33 et seq, as well as C-524/15, Judgment of the Court (Grand Chamber), of 20 March 2018, Menci, para 21.

[24] See indicatively Kapetanios v. Greece, 30.4.2015, A. and B. v. Norway, 15.11.2016.

unduly affect the proper and effective application of administrative measures, penalties and fines that cannot be equated to criminal proceedings".

However, on the positive side, one should note the provision allowing Member States not to criminalise acts of fraud (or related offences) that cause damage or bring benefit of less than EUR 10,000 and are not considered as "serious" [Art. 7(4)] – (see the similar PIF provision providing for a sum of under 4,000 ECU). Such a provision is consistent with the principle of employing criminal law as an *ultima ratio*.

Last but not least, in the field of criminal sanctions as well, the provision regarding confiscation (Art. 10) is new compared to the second protocol of the PIF Convention, insofar as it refers to the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (2014/42/EU) and not to the national laws of the Member States. The said Directive has been seriously criticised, since, in providing for extended confiscation in relation to ordinary offences (not just organised crime and terrorism), it breaches the principle of proportionality, while its provisions also fail to abide by the principle of guilt and the presumption of innocence.[25] When taking into consideration how important it is to the EU to recover proceeds of economic offences in order to support the notion "crime does not pay", one can see how significant but also problematic the link of the PIF-Directive to the Directive on confiscation is.

3.4. Other criminal offences affecting the Union's financial interests

An important difference regarding the PIF convention is also spotted in the Directive's broader reference to "Other criminal offences affecting the Union's financial interests" (Ar. 4). Besides money laundering and bribery concerning public service acts that may affect the EU's budgets, there is a novel offence, cited as "misappropriation" [Art. 4(3)], which covers the action of a public official directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the EU's financial interests. An important element of this offence that renders it more than a mere breach of the terms of use regarding the allocated resources is the direct causality link between the specific conduct and a demonstrable actual damage against EU property.

On the other hand, bribing a public official to act in a way which is likely to damage the EU's financial interests has a broader scope as well, because it is now connected to *legal* actions of the public official, too, although it is hard to imagine how these can actually damage the EU's financial interests. At the same time, the definition of "public official" is itself broadened, because the term "Union official" [Art. 4(4)] includes not only "an official or other servant engaged under contract by the Union", but also "any other person assigned and exercising a public service function involving the management of or decisions concerning the EU's financial interests in Member States or third countries" (e.g. public contractors dealing with EU funds).

[25] Kaiafa-Gbandi 2014b, 215 et seq.

Broadening the scope of the "other criminal offences *affecting the Union's financial interests*" as described above is problematic. In particular, money laundering of assets derived from EU fraud and active and passive bribery, which is detrimental or likely detrimental to the financial interests of the EU, are among the first-mentioned "other criminal offences affecting the Union's financial interests" (Art. 4). However, whether the laundering of criminal proceeds harms the same legally protected interest as the predicate offence is quite doubtful, and the modern theory fairly rejects this position.[26] Therefore, money laundering of EU-fraud proceeds does not harm the Union's financial interests. In addition, passive or active bribery that are detrimental or likely detrimental to the financial interests of the EU, primarily damage another legally protected interest (national or EU public service), which is in any case safeguarded autonomously at both the national and the EU level,[27] while service-related acts perpetrated by a public official that are detrimental or likely detrimental to the EU property are, by and large, autonomously penalised (e.g. in the form of disloyalty, embezzlement, etc.)

In other words, introducing special versions of offences that relate to fraud is not justified as long as there are other EU legal instruments criminalising the respective acts, such as money laundering or bribery. Bribery (e.g. under the 1997 Convention)[28] does not even need to be connected to public service acts that may affect the EU's financial interests.[29] Besides, under the Convention, public service has a notion that even covers persons who do not hold formal office but are nonetheless assigned and exercise a public service function,[30] and last but not least it affects, of course, a totally different legally protected interest.

Therefore, fabricating a whole body of provisions around EU fraud and misleadingly labeling it "other offenses against the financial interests of the EU" serves expediency by ideologically promoting the principal choice made for largely effective protection of EU's financial interests. In particular, including provisions regarding other criminal offences in the Directive obviously aims to serve the formation of a very clear field of competence for the European Public Prosecutor's Office (Art. 4 of the Regulation 2017/1939), which has been recently established. However, even this does not justify the above-mentioned addition since it is possible for the EPPO's competence to

[26] See rel. Chatzinikolaou 2014, 758, 767 with further bibliographical references.

[27] On the prior relevant criticism against the proposal for a directive see Kaiafa-Gbandi 2014a, 476 et seq.

[28] Council Act of 26 May 1997, OJ C 195 of 25 June 1997.

[29] According to the Convention e.g. passive corruption is the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties. Thus, there has been practically no need, despite the opposite opinion expressed in the preamble (para 8), to introduce an offence of bribery in the Directive concerning the protection of the EU financial interests, as in order to damage or endanger the official act needs to be in breach of the official's duties.

[30] According to the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union European official is "any person who is an official or other contracted employee within the meaning of the Staff Regulations of Officials or the Conditions of Employment of Other Servants of the European Communities, as well as any person seconded to the European Communities by the Member States or by any public or private body who carries out functions equivalent to those performed by European Community officials or other servants".

include offences defined in different EU legal instruments, as long as their definitions are clear.[31] Therefore, fraud-related bribery and money laundering should not have been included in the Directive; the only offence justified to remain, under this reasoning, is misappropriation by public servants.

Of course, one must not forget the most important aspect of this debate: the delimitation of substantive law provisions proscribing criminal offences in such a manner as to facilitate the exercise of the competence by EPPO (which will also be able to prosecute related offences).[32] In effect it *instrumentalises substantive criminal law for procedural purposes of effective prosecution*. This approach tends to systematically emasculate substantive criminal law as the elements of crimes no longer derive from a specifically affected and thoroughly delineated legally protected interest, but are rather determined on the basis of procedural expediencies it is called upon to serve.

The other offences affecting the Union's financial interests are problematic as regards the sanctions envisaged. The penalties for EU fraud and for the other above-mentioned offences against the financial interests of the Union [Art. 7(3)] are not further classified on account of the harm done when the damage or profit exceeds EUR 100,000. However, one can only wonder how it is possible to even out abuses against different legally protected interests, such as EU property and public service, especially when the latter requires an additional harm or risk to the EU's financial interests.[33] Obviously, the ideological confusion over what is punishable and the focus on procedural considerations tend to undermine the principle of proportionality as to the prescribed penalties – since this requires an unambiguous understanding of the punishable subject matter – and do not foreshadow a sound coexistence among the newly- established crimes alongside existing ones.

3.5. Participation, attempt, liability of legal persons and jurisdiction

It is positive that the Directive, unlike the PIF Convention, does not require the criminalisation of the preparation or supply of false, incorrect or incomplete statements or documents, given that it introduces provisions concerning participation in connection to all the offences defined therein [Art. 5(1)], including money laundering; in this respect, it broadens the scope of PIF and its protocols.

Contrary to participation, the Directive only asks for the criminalisation of the attempt of fraud and misappropriation [Art. 5(1)], just as the PIF Convention required only the criminalisation of the attempted fraud. This approach is correct because the above-mentioned offences actually harm (not just endanger) the re-

[31] See e.g. Art. 22 para 3 of the Regulation 2017/1939, referring to any other criminal offence that is inextricably linked to criminal conduct that falls within the scope of paragraph 1 of Art. 22, which has to do with the fraud against the EU financial interests.

[32] See art. 4 of the EPPO regulation: "The EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in Directive (EU) 2017/1371…".

[33] For critical assessment on the proposal for a directive see Kaiafa-Gbandi 2014a 480.

spective legal interests. Thus, punishing their attempt does not amount to excessive criminalisation.

The Directive includes provisions on the liability of legal persons which are essentially the same (Art. 6 and 9) as in the PIF Convention; thus, Member States can still provide for administrative sanctions.

On the other hand, the Directive obliges Member States to extend their jurisdiction regarding fraud and fraud-related offences committed outside their territory, compared to the PIF Convention. More specifically, Art. 11 calls for the establishment of jurisdiction based on the active personality principle, without allowing reservations or the introduction of the double criminality requirement or the provision of other conditions, i.e. that the victim file a complaint or that the government of the country where the offence was committed formally request prosecution (para 4). Such extension of jurisdiction is understandable when it concerns offences committed in the territory of third countries, where it may actually not be linked to the double criminality principle. However, it needs to be emphasised that – despite the broadening of jurisdiction to more Member States by virtue of the above provisions – the Directive makes no explicit reference to the need to safeguard the ne bis in idem principle when the same act falls within the scope of jurisdiction of more legal systems, once more marginalising such an important reference in its preamble (para 21).

3.6. Limitation periods

Art. 12, concerning the limitation periods for the criminal offences and for the sanctions imposed, is one of the main novelties of the Directive. Apart from the open question whether the EU has competence to act in respect with the statute of limitations or not[34] since the latter usually falls within the scope of the general part of national criminal laws, another important issue arises from the fact that not only does the Directive define a minimum limitation period (of at least five years from the time the offence was committed) for offences punishable by a maximum sanction of at least four years of imprisonment, but it also intervenes with regard to the suspension of limitation periods that are shorter than five years (Art. 12 para 4).[35]

The predominance of achieving effectiveness in the protection of the EU's financial interests is evident also with respect to this matter (Art. 12).[36] This intervention in Member States' criminal justice systems is incompatible with EU's primary law, which naturally foresees the obligation to provide *effective* protection of EU assets, but – referring in particular to criminal law – stipulates that Member States shall assume *the*

[34] Caeiro 2011, 124 et seq.

[35] According to it, Member States may establish a shorter limitation period, but not shorter than three years, provided that the period may be interrupted or suspended in the event of specified acts.

[36] Specifically, consistent with Art. 12(2): "Member States shall take the necessary measures to enable the investigation, prosecution, trial and judicial decision of criminal offences referred to in Art. 3, 4 and 5 which are punishable by a maximum sanction of at least four years of imprisonment, for a period of at least five years from the time when the offence was committed."

same measures to counter EU fraud as they do to counter fraudulent acts against their own financial interests. Therefore, the obligation to envisage special relevant limitation periods may not be imposed by EU law.[37] In addition, this would constitute an unacceptable intervention in terms of rule of law, given that the statute of limitations – to the extent that it is acceptable by a legal system – is subject to evaluations related to the comparative gravity of all individual offences, as well as to other general decisions within a legal order.

As expressly stated in the Directive's preamble, the above-mentioned provision was selected for reasons of criminal repression *efficiency* (para 22). However, one should also be familiar with the ECJ's Taricco I[38] and – especially – Taricco II[39] judgments. In the latter, the ECJ dealt with a preliminary question of the Italian Constitutional Court and, following extensive criticism of Taricco I, was forced to explicitly accept that the effective protection of the EU's financial interests imposed on Member States by virtue of Art. 325 TFEU may not take precedence over the protection of fundamental rights and principles enshrined in the EU Charter and acknowledged as such in the Member States' constitutional orders.[40] Thus, the implicitly holds that if the specific provision violates the principle of proportionality in the legal order of a Member State on the rules applicable on the statute of limitations as a whole, the Member State is not obliged to comply.

4. Conclusion and the way forward

As a general conclusion concerning the Directive, one should keep in mind the broadening of the scope of the criminal law provisions on the fight against fraud to the EU's financial interests, promoted through the addition of fraud-related offences and the determination of minimum maximum penalties, as well as through provisions regarding the statute of limitations, jurisdiction beyond the territoriality principle and confiscation, which follows an entirely new direction based on the respective EU Directive.

However, this broadening of the scope is accompanied by deficiencies of the new Directive, leading to violations against fundamental rights of the EU Charter, general principles of criminal law, and even primary EU law, which regulates aspects of the relationship between the Union and its Member States. Despite the constructive reference in para 28 of the preamble, that "this Directive respects fundamental rights and observes the principles recognised in particular by the Charter" and that it "seeks to ensure full respect for those rights and principles and must be implemented accordingly", the Directive's normative content leaves it short of achieving these goals at

[37] Of course, the EU obviously hovered towards a relatively low period that would not overturn the existing status in individual Member States, but this coincidental effect does not preclude the need to institutionally circumscribe a *special* statute of limitations for EU-fraud.

[38] Case C-105/14, Judgment of the Court (Grand Chamber), 8.09.2015.

[39] Case C-42/17, Judgment of the Court (Grand Chamber), 5.12.2017.

[40] Op. cit. para 62.

least with respect to some of the issues involved. Perhaps that is why the EU legislator has not incorporated the relevant stipulation within the body of the Directive's provisions, although this has been done in other EU legal instruments of the single area of freedom, security and justice.

These circumstances call for increased attention, primarily for national legislatures, as compliance with fundamental rights and principles of Union law is at any rate expressly binding according to the established ECJ case-law. Therefore, national legislatures should:

– Regulate the relationship between administrative and criminal penalties for such fraudulent conduct into their national legal systems, with utmost respect to the ne bis in idem principle;
– be aware that any EU intervention to expand criminalization and incorporate VAT fraud should unambiguously describe the characteristics of serious cross-border criminality that could justify it (e.g. committed within a criminal organisation, in a structured way, involving at least two Member States in a concrete way, etc.) and also define the method of calculation of the minimum damage exceeding EUR 10,000,000, which cannot include any other aspect beyond the damage incurred due to VAT evasion in Member States;
– restore respect for the principle of legality in proscribing the offenses under Art. 3 of the Directive, both by defining individual acts or omissions allegedly associated with the Directive's provision and with the requirement of a special legal obligation for perpetration by omission;
– restore the principle of proportionality as regards the threatened penalties for individual acts of EU fraud (especially those relating to VAT fraud) and avoid the introduction of an aggravating circumstance when such acts are committed in the context of a criminal organisation, if they already proscribe the participation in a criminal organisation as a distinct offence with reference to fraudulent acts against the EU's financial interests;
– verify whether the so-called "other crimes affecting the financial interests of the European Union" (Art. 4 of the Directive) are already punishable in their national legal systems (e.g. money laundering, active and passive bribery of officials) and address issues of regulatory confluence with EU fraud, in order to further adhere to the principle of proportionality as regards punishing these offences in view of the differentiation between the abused legally protected interests; and last but not least
– ensure that the limitation period for offences against the Union's interests adheres to the principle of assimilation of their safeguarding by means of criminal law with the corresponding protection they foresee for their own financial interests, simultaneously ensuring an effective protection for both categories, with compliance to fundamental rights and the principles of the rule of law.

These constraints are also to be observed by the EU legislature, which is required to respectively amend the recent Directive on the protection of the financial interests of the EU by means of criminal law. Its laxity apparently offers neither an excuse nor the possibility to deviate from the respect imposed by EU law for the above principles and fundamental rights, which the national legislators are called upon to restore in

transposing the Directive in their internal legal order. Moreover, this is the added value of a *collaborative* model of establishing criminal provisions within a supranational organisation such as the EU, as both tiers participating in the production of legislation become *"custodians" of fundamental rights* and *assume full responsibility for their appreciation* and their *direct* applicability in the framework of both regulatory levels.

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ECJ'S JURISPRUDENCE ON THE PROTECTION OF THE FINANCIAL INTERESTS OF THE EU AND PROTECTION OF FUNDAMENTAL RIGHTS: A CRITICAL ASSESSMENT OF THE CASES HANS ÅKERBERG FRANSSON, MENCI AND TARICCO I/II

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1. Introduction and the main starting points

The protection of the EU's financial interests holds a prominent place within the Union's institutional framework, as historically evident from its inclusion in EU primary law the requirement of Member States to ensure their *effective* protection, *equivalent* to that reserved for their own counterparts. In the post-Lisbon era, this special regime has become even more explicit, not only due to the institutional intensification of the EU's authority to intervene in their protection by means of criminal law (Art. 82ff. TFEU), but also through the foundation of a European Public Prosecutor's Office (Art. 86 TFEU) specially competent to investigate and prosecute offences against Union property. In the years to come, the EPPO will radically alter the identity of European criminal law, promising *effectiveness* in protecting EU property, i.e. EU's essential financial backdrop as a Union of States and peoples of Europe with – at least to date – a predominantly financial nature.

However, the full extent of this protection does not arise solely from the relevant institutional framework. It also decisively surfaces from a combination of parameters, including the pertinent ECJ case-law and the now binding safeguarding of fundamental rights within the Union, as part of its primary law (Art. 6 TEU). It is therefore particularly beneficial to explore the relationship between effective protection of EU's financial interests and the obligation to defend fundamental rights, as the current historical turn in the institutional evolution of the EU (which has still to accede to the ECtHR) induces such a clarification more than ever.

Before proceeding, two essential clarifications are necessary:

(a) The entry into force of the Lisbon Treaty (December 2009) has drastically transformed criminal repression in all fields where the EU intervenes in national legal orders. National law implementing EU law must be interpreted according to the latter. In case of doubt, *national courts are not competent to interpret EU provisions; instead, they must address preliminary questions to the ECJ (Art. 19 TEU)*. However, when an EU provision is not properly transposed in the internal legal order of a Member State, a national judge cannot broaden the scope of criminalisation through interpretation in

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order to fulfil the obligation deriving from the EU provision; such an interpretation would contradict the n.c.n.p.s.l. principle, which is guaranteed in Art. 49 CFR of the EU.

(b) The institutionally binding protection of fundamental rights in the Charter does not only entail a direct obligation for national judges to implement these rights, but it also brings the issue of the relationship between EU primary law and national law, especially national Constitutions, to the foreground. Despite different opinions on this matter, according to the ECJ's view, EU primary law supersedes national Constitutions. This position may come with significant practical consequences for national judges, which are easily made clear through the example of the ne bis in idem principle, as it will be demonstrated in detail below. On the other hand, of course, the issue of the relationship between EU primary law and national Constitutions invites the question of the existence of any limits to the supremacy of EU primary law. This question has also been in essence posed again recently, on the occasion of ECJ's decisions regarding limitation concerning offences against the EU's financial interests, which will also be examined below.

Finally, the above-mentioned (new) institutional reality regarding criminal repression in the Member States along with its practical consequences must be placed within the wider institutional framework of the EU, where criminal law belongs. In this regard, the fact that criminal law has a dual identity in democratic societies, constituting not only an instrument to preserve legally protected interests but also a mechanism for protecting the citizens' freedoms, is of utmost significance. This identity cannot be altered because of the participation of a state in intergovernmental or supranational organisations. Besides, in the EU structure, criminal law falls within the Area of Freedom, Security and Justice (Art. 67 et seq. TFEU), which, according to Art. 67 para 1 TFEU, as well as Art. 2, 3 and 6 TEU, must respect fundamental rights which guarantee citizens' freedoms.

2. Grand Chamber decisions in cases Åklagaren v. Hans Åkerberg Fransson (C-617/10, 26.2.2013) and Menci (C-524/15, 20.3.2018): The application of the ne bis in idem principle on 'administrative' and criminal sanctions

As we all know, at least in some Member States, violations against the EU's financial interests commonly receive cumulative administrative and criminal sanctions for essentially the same offence, as one and the same behaviour may constitute both an administrative infringement and a criminal offence. However, the question here is whether such a practice violates the ne bis in idem principle, now explicitly enshrined in Art. 50 CFR of the EU. The particularity of the issue lies especially in the fact that it does not imply a dual punishment of the same conduct with *criminal* sanctions but the dual *administrative* and *criminal* reaction to/punishment of the same conduct.

The ECJ has taken up the issue with two noteworthy judgments. The first was issued in the case Åklagaren v. Hans Åkerberg Fransson (Grand Chamber, 26 February

2013, C-617/10). More specifically, in a Swedish case of tax evasion partly related to violations of obligations regarding VAT statements, the Court ruled that tax sanctions and criminal prosecution for tax evasion concerning VAT fall within the scope of Art. 2, 250 and 273 of Directive 2006/112/EC regarding the common system of VAT and of Art. 325 TFEU and therefore of EU law. Thus, since the applicable law was that of the EU, so was the Charter. Consequently, the ECJ, after confirming its competence to reply to the preliminary questions addressed to it, decided as follows:

(a) Art. 50 of the Charter on the ne bis in idem principle does not preclude a Member State from imposing, for the same acts of non-compliance in the field of VAT, a combination of tax penalties and criminal penalties (para 34). It is only when the tax penalty is criminal in nature, for the purposes of Art. 50 of the Charter, and has become final that the provision of Art. 50 precludes criminal proceedings in respect to the same acts from being brought against the same person (para 34 et seq.).

(b) The assessment of the criminal nature of tax penalties is based on the three well-known criteria established by the ECtHR: the legal classification of the offence under national law, the nature of the offence and the nature and degree of severity of the penalty which could be imposed for this offence (para 35). Therefore, the ne bis in idem principle does not preclude a Member State from imposing successively, for the same acts of non-compliance in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, which is to be determined by the national court (para 37).

(c) To the extent that the ECtHR does not constitute a legal act formally incorporated in the EU legal order since the EU has not acceded to it, EU law does not govern the relations between the ECtHR and the legal orders of the Member States, nor does it determine the conclusions to be drawn by a national court when there is conflict between the rights guaranteed by the ECtHR and a rule of national law (para 44).

(d) *The national court, which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary by refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior* setting aside *of such a provision by legislative or other constitutional means* (para 45). In other words, EU law precludes court practices which withhold from national courts the power to assess fully, possibly with the cooperation of the ECJ, whether a national provision is compatible with the Charter (para 48).

The scope of protection of the ne bis in idem principle is also influenced, of course, by the relevant case law of the ECtHR. This may not be binding to the EU's legal order (yet), however, especially for the Member States who have acceded to the ECHR, the importance of the relevant judgments of the ECHR is obvious. In the cases of Kapetanios et al. v. Greece (30.4.2015, paras 55–56, 66–75) and Sismanidis and Sitaridis v. Greece (9.6.2016, paras 35, 40, 41–47), for example, the Strasbourg Court found that the administrative procedures in relation to the same facts of smuggling, for which the applicants were acquitted with final criminal judgments, were in breach of Art. 4 of the 7th Protocol of the ECtHR, which guarantees the same principle. Nevertheless, with subsequent decisions in cases A and B v. Norway (15.11.2016, paras 130 et seq.) and

Johannesson and others v. Iceland (18.5.2017, paras 49 et seq.), the ECHR emphasised in relation to the ne bis in idem principle the element of close connection, substantive and time-wise, between the different sanctioning procedures for the same behaviour, on the basis of which all of these procedures could, despite being independent, be considered as forming a coherent whole. In the ECtHR's view, when this element exists, it prevents the violation of the ne bis in idem principle, despite the cumulative imposition of administrative and criminal sanctions for the same behaviour.

On the basis of this more recent jurisprudence of the ECtHR on the application of the ne bis in idem principle, a decision of the Grand Chamber of the ECJ was issued in March 2018 (C-524/15 of 20.3.2018, in the Menci case), which is moving in the same direction. In particular, the Court, judging on a preliminary question of an Italian court in a case of failure to pay VAT on time, which constituted an administrative violation but since it was above a certain amount of money was also a criminal offence, and for which not only the tax authority had imposed a final penalty and criminal proceedings were also initiated, found that:

(a) A precondition for the application of Art. 50 of the Charter is the "criminal" nature of the administrative penalty, which in this case was confirmed since the administrative penalty had a repressive/punitive aim and was quite strict (paras 26–33).

(b) The criminal proceedings essentially concerned the same facts and the required additional mens rea element for the criminal sanction cannot cast doubt on the nature of these facts (paras 34–38).

(c) Limitations to the ne bis in idem principle can, however, be justified on the basis of Art. 52 para 1 CFR of the EU. Specifically, a double 'criminal' procedure and penalty may be justified if the concerned procedures and penalties have complementary aims, connected to different aspects of the illegal behaviour. In other words, in terms of violations of the VAT, it seems – according to the ECJ – fair for a Member State to aim initially to prevent and to punish every violation of rules for the VAT return or collection with the imposition of administrative penalties, and then to prevent and repress serious violations of such rules that are significantly harmful for the society with the adoption of severe criminal penalties (paras 44–45).

(d) Nevertheless, the principle of proportionality requires that a double criminal procedure and penalty do not exceed what is appropriate and necessary for the accomplishment of fair goals. This requires the existence of rules which ensure coordination so that the additional harm caused to those affected by the double procedure and penalty is limited to what is absolutely necessary. These rules must oblige the competent authorities to ensure that, during the imposition of the second penalty, the gravity of all imposed penalties does not exceed the gravity of the violation (paras 46–47, 49, 52–53, 58).

On the basis of these thoughts, the ECJ reviewed the Italian legislation and found that, according to it, the execution of the administrative penalty is suspended during the criminal proceedings and also indefinitely impossible following the criminal conviction of the taxpayer, whereas the willing payment of the administrative penalty constitutes a mitigating circumstance taken into consideration in the criminal proceeding. Thus, the Court came to the conclusion that the relevant national legislation provides

for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned (para 56). In fact, the ECJ noted explicitly that in light of Art. 52 para 3 of the Charter, the above-mentioned interpretation of Art. 50, in combination with Art. 52 para 1 of the Charter, ensures a level of protection of the ne bis in idem principle, which is similar to the one of Art. 4 of the 7th ECtHR Protocol and to what was decided with the ECtHR decision in the case A and B v. Norway (paras 60–62).[1]

The above-mentioned ECJ decisions are of pivotal significance and clarify three important elements for the EU and national law:[2]

(a) In accordance with the consistent – although incorrect – position of the ECJ, violations relating to the VAT are regulated by the EU law concerning the financial interests of the EU, which must be effectively protected in accordance with Art. 325 TFEU through EU law.

(b) National courts must set aside (without waiting for any legislative or constitutional amendments) national law which violates fundamental rights guaranteed in the Charter, such as the ne bis in idem principle, when they decide on issues regulated by EU law (such as, according to the ECJ, tax violations relating to the VAT).

(c) The ne bis in idem principle, as a fundamental right guaranteed explicitly in Art. 50 of the Charter, does not preclude the successive imposition of administrative and criminal penalties for the same tax violation, as long as, however, the administrative penalties are not of a criminal nature, according to the three known ECtHR criteria, a condition which is determined by the national court. If, by contrast, the tax penalties are criminal in character, imposing them for the same facts that were assessed in a final decision of a criminal court is prohibited. Nevertheless, it is *exceptionally* justified to successively impose administrative and criminal penalties if they aim to pursue an objective of general interest, such as in the case of combating VAT offences. Even in this case, however, the principle of proportionality must be fully respected (para 63).

This conclusion of the jurisprudence of the two European Courts, which seem to find themselves in an informal dialogue, especially in light of the EU not having acceded to the ECHR, is certainly not as protective of the fundamental right deriving from the ne bis in idem principle as their initial jurisprudence on this issue. The position of the ECJ especially in the Menci case favours the effective protection of EU financial interests rather than the citizens' fundamental rights. This comes as no surprise to those who historically follow ECJ case law, as the Court undoubtedly confirmed its preeminent identity as the "motor of the EU integration process", whose nodal element is to ensure effective protection for the Union's financial interests.[3] In other words, it must be made clear that the actual scope of the protection of fundamental rights within the EU should be understood by viewing ECJ's Åkerberg Fransson and Melloni rul-

[1] Cf. The decisions on the cases C-537/16, C-596/16 and 597/16 in which the administrative penalties were (to be) imposed after a final decision of criminal proceedings for the same acts and the subject matter did not concern the EU financial interests.

[2] Kaiafa-Gbandi 2017, 223 et seq.

[3] Swoboda 2018, 277–278.

ings in tandem.[4] Their combined reading reveals that the ECJ understands the ECtHR not only as part of its primary law *guaranteeing a level of protection potentially higher than that envisaged by Member States,*[5] but also as *a repellent of a potentially higher level of protection envisaged by individual Member States through their constitutional provisions*, if such protection poses obstructs the objectives of the integration process.[6] This dual function for the protection of fundamental rights within the EU in ECtHR terms enables us to understand why the ECJ seized the opportunity granted by the ECtHR case-law developments on the application of the ne bis in idem principle in relation to cumulative administrative and criminal sanctions for the same violation, as the retraction observed in recent ECtHR case-law on the protection linked to the ne bis in idem right obviously benefits more effective protection of EU's financial interests through the conditional non-prohibition of cumulative imposition of administrative and criminal sanctions for the same violation.

On the other hand, one must also note that the thoughts of the Grand Chamber of the ECJ in the Menci case are characterised by a methodological and intra-systematic problem: If an administrative penalty constitutes in a specific case a criminal "punishment" on the basis of substantive criteria and concerns the same offending behaviour, then both the cumulatively imposed penalties with their punitive/repressive character cannot aim for complementary goals related to different aspects of the same offence, but obviously aim for identical goals. Besides, the graduation in the reasoning of the ECJ, that criminal penalties concern the most serious violations, leads also to the conclusion that the more serious level of repression includes the milder one and that there is nothing additional to be complemented. Lastly, invoking the principle of proportionality implies that there is a common punishable element, otherwise the parallel coexistence of different, even if complementary, goals would not prohibit the accumulation of different penalties, not even on the basis of the principle of proportionality.

Nevertheless, the substantive application of the principle of proportionality, which is recognised explicitly by the ECJ in its decision on this specific issue, sets a crucial limit for any deviation that violates the ne bis in idem principle, and therefore regulating the procedural application of the principle of proportionality with regard to administrative and criminal penalties, which is a tool to protect citizens from excessive punishment, is of pivotal significance and must be ensured in a clear and strict manner, if this is not already the case in the national legal orders.

[4] Swoboda 2018, 282–283.

[5] See the right deriving from the ne bis in idem principle as to the confluence of administrative and criminal sanctions for the same offence in the Åkerberg Fransson case.

[6] See Melloni, Case C-399/11, Grand Chamber, 26 February 2013, on the right to fair trial and to defence.

3. The decision of the Grand Chamber in the Taricco I and Taricco II (MAS a. MB) cases (C-105/14, 8.9.2015, and C-42/17, 5.12.2017): Disapplying national provisions on limitation periods in order to ensure the effective protection of the financial interests of the EU in view of the supremacy of EU law?

Contrary to the ECJ decisions regarding the application of the ne bis in idem principle between 'administrative' and criminal penalties, which – despite ECJ's retraction from its original stance – have positive elements with regard to the protection of fundamental rights, the decision in the Taricco I case has been an *extremely problematic* judgment of the Court with very significant practical consequences. Both in Taricco I and in the ensuing Tarrico II, the Court was essentially called upon to answer whether the effective protection of the EU's financial interests is somehow restricted by the protection of fundamental rights or even by fundamental constitutional principles that are cornerstones of a Member State's democratic character.

The Taricco I decision concerns a preliminary question addressed by an Italian court in the case of the formation of and participation in a criminal group aiming to commit VAT related offences, where it was apparent that, despite the interruption of the limitation period, the offences would be prescribed (at the latest on 8.2.2018) before the issuance of a judgment. As a result, the accused, who had allegedly committed VAT-related fraud amounting to millions of euros, would probably not be punished due to the expiration of the limitation period since Italian law allows for a limited extension of the limitation period when interrupted by a procedural act by only a quarter of its initial duration, starting from the time of commission of the offence. Therefore, in view of the fact that cases like this one are particularly complex and last long across all instances during the judicial process, the de facto impunity in such cases in Italy is the rule and not an exception.

The referring court considered that since, due to this situation, the EU primary law provisions concerning free competition (Art. 101 and 107 TFEU) and the principle of sound public finances (Art. 119 TFEU), as well as the VAT Directive 2006/112/EC (Art. 58), were violated, if it was allowed to not apply the national provision on limitation, the effective application of EU law would be ensured; thus, it submitted a preliminary question on this matter to the ECJ. More specifically, the question concerned, on the one hand, whether the Italian rule for the short extension of the limitation period after its interruption by a procedural act leads to the introduction of an exemption from VAT (not provided for in Art. 158 of the relevant Directive of 2006), and on the other hand, in case the answer to the above is affirmative, if it was acceptable to not apply the relevant national provisions for limitation (para 27).

The ECJ found that, with this specific preliminary question, the Italian Court essentially asked whether a national provision, such as the one of Italian law on limitation, hinders the effective fight against fraud in the field of VAT. After stressing, once again, that VAT-related matters directly concern the EU budget and are integrated into the concept of fraud according to PIF, the ECJ replied that the national court must determine whether the national provisions allow in practice for the efficient punishment

of severe cases of fraud against the financial interests of the EU, such as in the current case; if not, then the national court must itself ensure the full effectiveness of EU law by not applying, if necessary, the national problematic provisions, without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure (para 49). In any case, if the national court does not apply the national provisions, it must, according to the ECJ, ensure that the fundamental rights of the persons concerned are respected (para 53). However, according to the Court, Art. 49 of the Charter does not pose a problem in this specific case since under the above-mentioned line of thought, the sole effect of the disapplication of the national provisions on the issue would be to not narrow further the general limitation period in the context of pending criminal proceedings (para 55). Besides, based on ECtHR case-law, the extension of the deadline of a limitation period and its direct application do not violate Art. 7 of the ECHR (n.c.n.p.s.l.) since the relevant acts have never become subject to limitation (para 57).

The above-mentioned findings of the ECJ, without exaggerating, not only degrade the rule of law but are also doctrinally wrong.[7] It is not a coincidence that they led the Italian judges, immediately after the decision of the ECJ, to submit questions in cases similar to the Tarrico I, this time to the Constitutional Court of Italy, and then the latter to submit a new preliminary question to the ECJ regarding its findings in the Taricco I case.

The basis for the preliminary question of the Italian Constitutional Court to the ECJ was the *principle of legality* regarding the definition of the criminal offences and the foreseeability of the penalties, which is guaranteed in Art. 25 para 2 of the Italian Constitution. According to the Judges of the Italian Constitutional Court, this principle applies to limitation as it is an institution of substantive criminal law, thereby providing broader protection at the national level than the ECtHR and the ECJ do when interpreting Art. 7 of ECtHR and 49 of the EU Charter, respectively. Therefore, the Italian Constitutional Court, considering that the principle of legality constitutes, according to Italian law, a fundamental principle of the Italian constitutional order and an undeniable human right that defines the constitutional nature of the Republic of Italy, based on Art. 4 para 2 TEU (which obliges the EU to respect the national identity of the Member States, as this identity is determined, inter alia, in their Constitutions), it explicitly stated that in its view such principles are protected by national legal orders, if necessary, even against any obligation that derives from EU law and despite the supremacy of the latter; consequently, it submitted to the ECJ the question as to what extent its decision in the Taricco I case should be considered binding for Member States, in the case that it violates fundamental principles and rights guaranteed by national traditions.

In light of the above, it is clarified that the Italian Constitutional Court posed to the ECJ the sensitive question about the extent to which the supremacy, unity and effectiveness of EU law can be supported, even in contradiction to national constitutional

[7] Kaiafa-Gbandi 2017, 230 et seq.

principles, and about the compatibility of the EU legislation with these fundamental rights, as they are enshrined in the EU. The supremacy of the arguments made by the Italian Constitutional Court is, according to my view, clear:

First of all, the ECJ decision in Taricco I seems to not realise that it creates a very significant problem. It is easy for someone to consider that a national rule on limitation should not apply without any further consideration, because it contradicts EU law. But what does this mean? In practice, it means that the offence has no limitation because a judge cannot determine new, longer limitation periods in view of specific cases. A judge, however, does not have the right not to apply a limitation period either, i.e. to de facto introduce the absence of a limitation period because in this way the principle of *the separation of powers is violated*. This principle is violated, as the Italian Constitutional Court rightly noted, also because of the fact that, in accordance with the ECJ, the national judge must determine on his/her own whether the relevant national provisions do not correspond to the requirements of EU law for an effective and preventive character of the measures in the fight against EU fraud in order to not apply them, if necessary. Such a decision, beyond the fact that it provides the judge with broad discretion, which is not compatible with the need to ensure the foreseeability of the provisions on limitation at the time of the commission of the criminal offence, it further constitutes an assessment of *political nature*, which, as such, is within the exclusive jurisdiction of the legislator, resulting, by adopting the ECJ's view, in the blurring of the fundamental separation of powers, which should have reinforced safeguards particularly in the field of criminal law.[8]

Second, the ECJ decision seems to not have considered the fact that in some national legal orders, as in the Greek one as well, limitations constitute a basis for excluding criminal responsibility and are therefore an *institution that falls within the scope of substantive criminal law*. This means that any change of the relevant regime, even if in this case such a change would occur through an interpretation of the national court following the view of the ECJ, should be covered by the application of the *more lenient law*, in accordance with the relevant fundamental principle guaranteed by EU primary law, i.e. the Charter of Fundamental Rights (Art. 49 para 1, last sentence CFR of the EU). Therefore, even if the view of the ECJ were accepted, in no case would it be possible to apply it in pending cases.

Finally, the possibility of national constitutions to provide for broader protection of fundamental rights is undoubtedly recognised by both the EU and the international community since the legal tools of the latter aim to guarantee a minimum common level of protection. Besides, placing limitation in the substantive criminal law framework within a legal order, as well as its nature as an institution that excludes criminal liability, is expected to require the application of the principle of legality, since precluding the imposition of penalties means that the offence no longer exists. The foreseeability of the limitation period is, therefore, important to citizens, just as the foreseeability concerning penalties is. In other words, within the framework of the principle of legal-

[8] Corte Constituzionale, decision 24/2017, § 5.

ity, being able to foresee when a crime is no longer punishable because the state no longer considers there to be a criminal claim is as important as being able to foresee the penalty for the offence. This in fact should have been accepted by the ECJ as well, since it is called to operate in a *unifying manner* for the legal orders of the EU Member States when determining the content of the fundamental rights of the EU legal order. In other words, it should not have been decisive whether a Member State adopts a different approach to institutions which affect fundamental rights, such as in this case for limitation, which other Member States consider an institution of substantive criminal law, others of procedural criminal law and others of a mixed character.

Fortunately, the view of the ECJ after the preliminary question of the Italian Constitutional Court regarding its decision in the Taricco I case changed entirely. In the case now known as Taricco II (MAS a. MB), the ECJ was forced to accept, and in fact explicitly (para 52), that the obligation to guarantee the effective collection of the EU's own resources cannot violate the principle of n.c.n.p.s.l., which is in fact shared across the common constitutional traditions of the Member States recognised by the Treaties. Therefore, Art. 325 paras 1 and 2 TFEU can oblige the national judge to not apply, within the framework of criminal proceedings that concern VAT-related crimes, national provisions on limitation if they preclude the imposition of criminal penalties of preventive and effective character in a large number of cases of severe fraud against the EU. However, *the limit* of such non-application should be the violation of the n.c.n.p.s.l. principle as a result of lack of clarity of the applicable law or because of retroactive application of legislation that imposes stricter conditions for establishing criminal liability (para 62).

Of course, the methodological error in this view of the Court is that the principle of n.c.n.p.s.l. and the principle of non-retroactive application of the stricter provisions are *always* violated when the national judge does not apply the national provisions of *substantive* criminal law on limitation because of EU law, so one cannot talk of an exception. Besides, these principles are guaranteed both in the Charter and in the ECHR, which has been ratified by the Member States. Consequently, there is no room for non-application of national *substantive* criminal law provisions regarding limitation because of EU law.

Therefore, Taricco I and II bring forth anew and more intensely the issue of the scope of fundamental rights protection in the EU, against the demand for an effective implementation of relevant policies, and particularly against the effective protection of the Union's financial interests.

Nevertheless, the extremely important aspect of the eventual EU law predominance over Member States' protective constitutional principles which express the respective national identities is also to be taken into account under Art. 4 (2) TEU. Indeed, by recalling what was previously mentioned for the Hans Åkerberg Fransson and Melloni ECJ rulings, it is firstly clear to the ECJ that a potentially *superior* (in relation to the ECHR) level of national protection of fundamental rights with regard to the scope of EU law must withdraw, as the latter prevails over the prior. In Taricco II, the ECJ clarified that this primacy is also somehow limited when the demotion of the protection of a fundamental right in the (minimal) common to all Member States EU level collides

with the national identity of the Member States inherent, inter alia, in their constitutional structures, as established in Art. 4 (2) TEU.

Although Taricco II does not reap clarity,[9] most agree that the ECJ accepted national standards of protection for fundamental rights but concurrently raised the level of protection for the fundamental right of Art. 49 CFR of the EU, in this case towards the outlook of the Italian Constitutional Court (i.e. accepting the rules on limitation as substantive, the Charter and ECHR could be cited to reach the conclusion that the actual obligation under Art. 325 TFEU should be limited).[10] It did so to avoid conflict between the EU's legal order and its national counterpart and to not entirely revert from Taricco I, thus avoiding accepting that the principles of effectiveness and supremacy of Union law are limited by a general exception in favour of the national identity of the Member States inherent in their constitutional structures,[11] a perception that would surely entail a much wider acknowledgment as to the protection of fundamental rights.

Whatever the case, however, it is clear that Taricco II conceals an exceptional acknowledgment of a national ordre public proviso clause,[12] attempted to be draped in an EU coat, i.e. to appear as a threshold imposed by a European ordre public proviso, and particularly as a limit to the effective protection of EU's financial interests imposed by the n.c.n.p.s.l. principle, shared across the common constitutional traditions of the Member States recognised by the Treaties. If we take the protection of fundamental rights seriously, such limitations are obviously indispensable in the EU legal order.[13] What is more, these are limitations that derive from EU law itself, acknowledged in its provisions [e.g. Art. 4 (2) TEU, Art. 82 (3) TFEU, Art. 83 (3) TFEU]. Therefore, the resulting protection of fundamental rights should assert at least equal treatment in the ECJ's outlook against both the effective promotion of EU policies (such as the protection of its financial interests) and the endorsement of primacy of EU over Member States' law (including their Constitutions). If this approach does not change, it is right to point out that the introduction of European public interest provisos or the accounting of the Member States' national identity as determined in their national constitutions will not suffice to bring about the desirable enhancement in the protection of fundamental rights within the EU to the level it deserves based on EU law itself.[14]

4. Conclusion

Comparing the selected ECJ judgments concerning important case-law on the protection of EU financial interests and of fundamental rights, we may now highlight a trend

[9] Sicurella 2018, 24, 25 et seq., Bonelli 2018, 357, 372.

[10] Satzger 2018, 330.

[11] Swoboda 2018, 292.

[12] Satzger 2018, 330.

[13] Satzger 2018, 330.

[14] Swoboda 2018, 294–295, cf. relevantly the decision of the Italian Constitutional Court, which followed the Taricco II and with regard to it Staffler 2019.

of the Court which has wider implications for the current developments of EU criminal law:

As far as the financial interests of the EU are concerned in relation to which the Court continues to have an approach that broadens their content (by including therein VAT), the process of aiming at their effective protection sometimes leads to decisions that challenge fundamental principles of criminal law. This trend once again proves that the ECJ constitutes the driving force behind the further elaboration of EU law, the motor of integration, especially with regard to the financial interests of the EU, for the effective protection of which it has tried to promote a concept of unlimited supremacy of the EU primary law over the constitutional legal orders of the Member States, fortunately with no success in the end, as the Taricco II case has showed.

In the context of this development, it is important to understand that the protection of fundamental rights – especially while the EU has yet to accede to the ECHR – must be upgraded under conditions already envisaged in the Treaties. The level of protection already offered by the Charter is not only a mere binding minimum for Member States but also an eventual higher level of protection, especially when it touches the core of national constitutional identities, and thus it should be recognised as a threshold for the limitation of protection imposed by Union law to ensure its application and effectiveness.

Within this context, it remains significant that not only the legislators but also the judges in the Member States contribute to the further improvement of this situation by challenging with preliminary questions to ECJ to take a stand in cases where EU legal instruments or their implementation do not guarantee freedoms in an appropriate manner. National judges should be convinced that the rule of law requires daily efforts for its upholding and that this, when it concerns EU law, must be done, in most cases, in coordination with the competent institutions of the Union's legal order. The process of preliminary questions to the ECJ, especially when it concerns fundamental rights, should be understood as a chance that is not to be missed.[15]

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[15] See also Swoboda 2018, 295.

THE EUROPEAN COURT OF JUSTICE AND THE FIGHT AGAINST VAT FRAUD

Prof. Dr. David Hummel[*]

1. Introduction

The European Court of Justice (hereinafter ECJ) and the fight against VAT fraud is a never-ending story, and this story results in particular from the character and the special technique of the VAT System.

As a starting point, everyone would agree that the VAT formally taxes the entrepreneur but materially taxes the consumer in an indirect way. In the area of VAT – as the ECJ always underlines – taxable persons merely act as tax collectors for the State.[1]

The problem is how to deal with persons who are involved – intentionally, negligently or through no fault of their own – in VAT fraud. This is demonstrated by the high number of preliminary rulings of the national courts dealing with this topic.[2]

2. General remarks

The problems with VAT and fraud (or the fight against fraud) result from the system of the VAT. It is a very complex system based on a solid concept in theory but with many problems in practice.

First, I will discuss the reasons for the system's complexity, and then I will focus in detail on the problems with which the ECJ has to deal on a regular basis.

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[1] ECJ of 20.10.1993 – C-10/92 – Balocchi (EU:C:1993:846, par. 25); ECJ of 21.2.2008 – Netto Supermarkt (EU:C:2008:105, par. 21).

[2] ECJ of 6.9.2012 – C-273/11 – Mecsek-Gabona (ECLI:EU:C:2012:547); ECJ of 21.6.2012 – C-80/11 u.a. – Mahageben and David (ECLI:EU:C:2012:373); ECJ of 6.12.2012 – C-285/11 – Boink (ECLI:EU:C:2012:774); ECJ of 18.12.2014 – C-131/13 – Italmoda (ECLI:EU:C:2014:2455); ECJ of 9.7.2015 – C-183/14 – Salomie and Oltean (ECLI:EU:C:2015:454); ECJ of 22.10.2015 – C-277/14 – PPUH Stehcemp (ECLI:EU:C:2015:719); ECJ of 28.7.2016 – C-332/15 – Astone (ECLI:EU:C:2016:614); ECJ of 5.10.2016 – C-576/15 – Maya Marinova (ECLI:EU:C:2016:740); ECJ of 9.2.2017 – C-21/16 – Euro Tyre (ECLI:EU:C:2017:106); ECJ of 18.5.2017 – C-624/15 – Litdana (ECLI:EU:C:2017:389); ECJ of 14.6.2017 – C-26/16 – Santogal (ECLI:EU:C:2017:453); ECJ of 20.6.2018 – C-108/17 – Enteco Baltic (ECLI:EU:C:2018:473).

It is now commonly accepted that VAT generally applies to transactions relating to goods or services; it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied with the result that the final burden of that tax ultimately rests on the consumer. One can see this in Art. 73 of the VAT directive. According to this provision, the tax base includes everything which constitutes the value of the consideration obtained or to be obtained (received) by the supplier.

In my opinion, the VAT is a very fair tax because it taxes the financial ability to pay in a very equal way. He who consumes more also has to pay more. Because it is an indirect tax, there is no possibility for a progressive tax rate nor for a basic tax-free amount. That is only possible with a direct tax. Moreover, the VAT system is neutral for the entrepreneur.

However, it is a very complex system with taxation at each step in the transaction chain. There are four reasons for this:

The first idea behind this fractional taxation with the right of deduction is to avoid an accumulation of the tax burden that increases with the length of the transaction chain.

Second, it splits the risk of the loss of the taxation income. Even when one entrepreneur goes bankrupt, the state loses only part of the VAT in the chain.

The third advantage of this complex system is that the entrepreneur, who performs a service, does not have to decide whether the contract partner is a consumer or an undertaking. For him it is, in general (with the exception now of the reverse charge system), not important to know this.

The fourth large advantage is the impact for the verification of the income (or corporate) tax. With the VAT return, in particular with the declaration of deductible VAT, the tax administration receives information about the costs of a trader and can deduce the profit from it.

Like all taxes (in principle), the VAT is also a value-neutral tax. It is not relevant whether the goods are of use for society or are considered to be of high value. You have to pay VAT if you buy a gun or if you buy nappies for your baby.

VAT only takes into account whether someone paid money for a certain good or service and whether there has been a transfer from an entrepreneur to a recipient of goods or services. VAT is only due once independently of what happens with the goods (or services) purchased. A robber has to pay the same amount as a cook, even though the first wants to use the knife for a crime.

Or, as the ECJ had already ruled[3]: "The good or bad faith of a taxable person seeking deduction of VAT has no bearing on the question whether there has been a delivery, for the purposes of Art. 10(2) of the Sixth Directive. In accordance with the objective of that directive, which aims to establish a common system of VAT based, inter alia, on a uniform definition of taxable transactions, the concept of 'supply of goods' in Art. 5(1) of that directive is objective in nature and must be interpreted without regard to

[3] ECJ of 27.6.2018 – C-459/17 and C-460/17, C-459/17, C-460/17 – SGI (ECLI:EU:C:2018:501, par. 38).

the purpose or results of the transactions concerned and without it being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person or for them to take account of the intention of an economic operator other than that taxable person involved in the same chain of supply".[4]

For the purpose of taxing the costs of the final consumer, the deduction system is intended to relieve the trader entirely of the burden of the VAT to be paid or already paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities regardless of the purpose or results of those activities provided that they are themselves subject to VAT.

Whether the supplier has actually paid the VAT to the tax administration is not important for the right of deduction of the receiving entrepreneur. Therefore, the VAT on the input-side and on the output-side does not depend on the motivation of the receiver of the service or the supply of goods. It does not matter what he plans to do with these goods or services.

3. Relevance of VAT fraud for the right of deduction and for the exemption of a cross-border supply

Because of that, the question of whether the entrepreneur who wants to have the VAT deduction made a transaction with a fraudster should be irrelevant. It should be irrelevant for the right of deduction in the same way as for the application of the exemption of his transaction (normally for an intra-Community supply).

However, the ECJ points out that it must also be borne in mind that the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112. The background of this jurisprudence is the fact that a part of VAT is part of the EU Budget. Meanwhile, there are several ECJ judgments regarding the possibilities for the tax administration in the case of VAT fraud.

If the taxable person concerned knew or ought to have known that the transaction that he carried out was involved in a tax evasion scheme of the purchaser, and he did not take all reasonable steps in his power to prevent the evasion, he should be denied the exemption.[5]

This leads to the result that the Member States have to refuse the exemption (if the taxable person is the supplier) or have to refuse the right of deduction (if he is the receiver of the goods). In connection with that, on the one hand, the Court has made it abundantly clear that EU law cannot be relied on for abusive or fraudulent ends.

On the other hand, it has also pointed out that the measures adopted by the Member States must not go beyond what is necessary to achieve the objectives pursued. There-

[4] See, to that effect, ECJ of 21.11.2013 – C-494/12 – Dixons Retail (EU:C:2013:758, paras 19 and 21 and the case-law cited).

[5] See, to that effect, ECJ of 20.6.2018 – C-108/17 – Enteco Baltic (ECLI:EU:C:2018:473, par. 94); ECJ of 9.10.2014 – C-492/13 – Traum (EU:C:2014:2267, par. 42), ECJ of 6.9.2012 – C-273/11 – Mecsek-Gabona (ECLI:EU:C:2012:547 par. 54); ECJ of 21.6.2012 – C-80/11 et al. – Mahageben and David (ECLI:EU:C:2012:373, par. 42).

fore, they cannot be used in such a way that they would have the effect of systematically undermining the right to deduct VAT and, consequently, the neutrality of VAT.[6]

On several occasions, the Court has held that the authorities may not obligate a taxable person to undertake complex and far-reaching checks as to that person's supplier, thereby de facto transferring their own investigative tasks to that person.[7] By contrast, it is not contrary to EU law to require a trader to take every step which could reasonably be required of him to satisfy himself that the transaction that he is carrying out does not result in his participation in tax evasion.[8]

On this point, there are – in my point of view – two different lines recognisable in the jurisprudence of the ECJ:

The first line is the protection of the entrepreneur who acts in good faith.[9] The other one can be described as "No protection for the fraudster".[10] There are very exciting cases like *Vetsch* that deal with the link of one exemption for a non-fraudster party with another exemption for delivery through a third party who was a fraudster.[11] More on this later.

4. Legal consequences for a fraudster (or a person who should have known)

In the opinion of the ECJ, it is not contrary to EU law to require a trader to take every step which could reasonably be required of him to convince himself that the transaction which he is carrying out does not result in his participation in tax evasion.[12]

That is not only the case where tax fraud is committed by the taxable person himself but also in the case in which a taxable person knew, or should have known, that by his purchase he was taking part in a transaction connected with VAT fraud. In such circumstances, the taxable person concerned must, for the purposes of the VAT Directive, be regarded as a participant in such fraud whether or not he profits from the resale of the goods or the use of the services in the context of the taxable transactions subsequently carried out by him.[13]

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[6] ECJ of 21.3.2000 – C-110/98 to C-147/98 – Gabalfrisa and Others (EU:C:2000:145, par. 52, ECJ of 21.6.2012 – C-80/11 et al. – Mahageben and David (ECLI:EU:C:2012:373, par. 57).

[7] See, to that effect, ECJ of 21.6.2012 – C-80/11 et al. – Mahageben und David (ECLI:EU:C:2012:373, par. 65), ECJ of 31.1.2013 – C-642/11 – Stroy trans (EU:C:2013:54, par. 50).

[8] See, to that effect, ECJ of 27.9.2007 – C-409/04 – Teleos and Others (EU:C:2007:548, par. 65 and 68); ECJ of 21.6.2012 – C-80/11 et al. – Mahageben and David (ECLI:EU:C:2012:373, par. 54).

[9] ECJ of 18.5.2017 – C-624/15 – Litdana (ECLI:EU:C:2017:389); ECJ of 14.6.2017 – C-26/16 – Santogal (ECLI:EU:C:2017:453).

[10] ECJ of 18.12.2014 – C-131/13 – Italmoda (ECLI:EU:C:2014:2455); ECJ of 5.10.2016 – C-576/15 – Maya Marinova (ECLI:EU:C:2016:740); ECJ of 28.7.2016 – C-332/15 – Astone (ECLI:EU:C:2016:614, par. 58).

[11] ECJ of 14.2.2019 – C-531/17 – Vetsch (ECLI:EU:C:2019:114).

[12] ECJ of 19.10.2017 – C-101/16 – Paper Consult (C-101/16, EU:C:2017:775, par. 52); ECJ of 21.6.2012 – C-80/11 et al. – Mahageben and David (ECLI:EU:C:2012:373, par. 54); ECJ of 27.9.2007 – C-409/04 – Teleos and Others (EU:C:2007:548, par. 65 and 68).

[13] See ECJ of 6.12.2013 – C-285/11 – Bonik (EU:C:2012:774, par. 38 and 39 and the case-law cited); ECJ of 13.2.2014 – C-18/13 – Maks Pen (EU:C:2014:69, par. 27).

This leads in the end to the following legal consequences:

– Consequence 1: Each person who knew or should have known that he was involved in fraud has no right of deduction.
– Consequence 2: Each person who knew or should have known that he was involved in fraud cannot make use of the exemption for intra-Community supply.
– Consequence 3: Normally, each Member State will punish each person who knew or should have known that he was involved in fraud (as an offender or participant) via national criminal law.

5. Problems of these legal consequences

This case law with the said legal consequences leads to a number of problems, on which I want to make a few remarks.

– First of all, if the Court is effectively creating a system of "black and white", then the distinction between black and white is very important.
– Second, if there is a long supply chain with a lot of cross-border supplies and each financial authority can refuse the right of deduction and the cross-border exemption, the tax administration gains more tax income than under normal circumstances. That leads to, in my point of view, problems with the principle of proportionality, as well as to the danger of curious incentives for the tax administration. After all, for the (financial) result of a tax audit, it is always better to come to the conclusion that the entrepreneur should have known that he was involved in the fraud of another party.
– Third, there could also be a problem with the "ne bis in idem" principle and a conflict with the case law of the European Court of Human Rights if an entrepreneur has to pay VAT twice and is also prosecuted and punished under criminal law. However, this is another story[14] that I will not lay out here. Here I will confine myself to the problems of differentiation and overcompensation.

5.1. Differentiation

The main problem in practice is the distinction between a person who should have known that, by his purchase, he was taking part in a transaction connected with VAT fraud and a person who cannot be expected to have known this.

At the moment, I am still missing clear rules and indicators for legal practice here. The ECJ sometimes gives some guidance, but it mostly states that it is for the referring court to ascertain, on the basis of an overall assessment of all the facts and circumstances of the dispute in the main proceedings, whether the entrepreneur acted in good

[14] See the different approaches of the ECJ and the EuCHR in relation to the ne bis in idem principle in VAT matters: ECJ of 20.3.2018 – C 524/15 – Menci (ECLI:EU:C:2018:197); EuCHR of 18.5.2017 – Johannesson a.O. vs. Iceland – Application no. 22007/11.

faith and took all the steps which could reasonably be asked of him to satisfy himself that the import and supply transactions he carried out did not result in participation in tax evasion.[15]

As the ECJ states[16]: "When there are indications giving grounds for suspecting an infringement or fraud, a prudent trader could, depending on the circumstances of the case, be obliged to make enquiries about another trader from whom he intends to purchase goods or services in order to ascertain the latter's trustworthiness. However, the tax authority cannot, as a general rule, require the taxable person wishing to exercise the right to apply the margin scheme, first, to verify, inter alia, that the issuer of the invoice relating to the goods in respect of which the exercise of that right is sought has satisfied his obligations as regards declaration and payment of VAT, in order to be satisfied that there are no irregularities or fraud at the level of the traders operating at an earlier stage of the transaction or, secondly, to be in possession of documents in that regard".

In the case of a supply of a high-priced car, the Court ruled, a little more precisely,[17] "that in this respect, it must be added that the entrepreneur had to display a high degree of diligence, first, having regard to the value of the vehicle at issue and, second, given that, in the context of the acquisition of a new means of transport, an individual cannot claim a VAT deduction, even in the event of resale of a purchased vehicle, and therefore has a greater interest than a trader in avoiding the tax and if the entrepreneur was in a position to know that the temporary registration was intended merely for non-residents and that the purchaser had provided several addresses in Spain which could raise doubts regarding his actual residence. Besides the vendor's behavior, the financial authorities' behavior must also be taken into account. On the assumption that the entrepreneur had presented documents in order to benefit from the exemption of the transaction at issue and those documents had been examined and accepted by the competent authority, which it is for the referring court to verify, it must be noted that the principle of legal certainty precludes a Member State which has accepted, initially, the documents submitted by the vendor as evidence establishing entitlement to the exemption from subsequently requiring that vendor to account for the VAT on that supply, because of the purchaser's fraud, of which the vendor had and could have had no knowledge."

In other decisions the Court clearly states that the circumstance that the importer communicated with his customers by electronic means does not mean that lack of good faith or negligence on his part may be identified or that it may be presumed that the company knew or ought to have known that it was participating in tax evasion.[18]

Not sufficient either is the sole fact that the vendor, on the one hand, was aware of the fact that at the time of the transactions the purchaser was neither registered in the

[15] ECJ of 20.6.2018 – C-108/17 – Enteco Baltic (ECLI:EU:C:2018:473, par. 95); see, to that effect, ECJ of 6.9.2012 – C-273/11 – Mecsek-Gabona (ECLI:EU:C:2012:547, par. 55).

[16] ECJ of 18.5.2017 – C-624/15 – Litdana (ECLI:EU:C:2017:389, par. 39 et seq..).

[17] ECJ of 14.6.2017 – C-26/16 – Santogal (ECLI:EU:C:2017:453, par. 74 et seq.).

[18] ECJ of 20.6.2018 – C-108/17 – Enteco Baltic (ECLI:EU:C:2018:473, par. 97).

VIES system nor came under a system of taxation on intra-Community acquisitions and, on the other hand, believed that the purchaser would subsequently be registered as an intra-Community operator with retroactive effect. This is not a sufficient ground for the national tax authority to refuse to grant an exemption from VAT.[19]

In conclusion, everything is a little bit vague. It leads to uncertainty for the involved enterprises, which is very hard to manage in a business.

5.2. Overcompensation of the damage

5.2.1. Introduction

In my opinion, the main dogmatic problem, however, has to do with overcompensation. That problem has to be solved somehow. In the end, it is based on the basics of VAT law explained above. To be clear: Input tax deduction and tax exemption are not subjective advantages for an entrepreneur but are part of a complex tax system.

This problem is illustrated quite well by a case with three different persons, in which the exemption of the first transaction (exemption of import) is linked with the exemption of the second transaction [exemption of a subsequent intra-Community supply Art. 143 MwStRL)]. This is the aforementioned *Vetsch* case. The facts here are as follows:

Bulgarian company Y bought goods from a factory (X) in Switzerland and got the power of disposal there. By order of Y, these goods would be released in Austria for free circulation and for consumption through V (Vetsch), a limited liability company that operates a forwarding business. Afterwards, the goods would be transported by a transport enterprise in the name of Y to Y in Bulgaria.

Vetsch submitted declarations for release of goods for free circulation and for consumption to an Austrian customs office as the indirect representative of the recipients in question, including the Bulgarian trader Y and in each declaration applied for exemption from import turnover tax using Code 4200 in box 37 of the single administrative document. On that basis, the goods were released for free circulation and for consumption without import turnover taxes being entered in the accounts.

Y declared and taxed the intra-Community transfer from Austria to Bulgaria both in Austria and in Bulgaria the correct way. According to the referring court, it can be assumed that the goods arrived in Bulgaria and were under the control of Y the entire time during the transport.

The Bulgarian company Y subsequently resold the goods (apparently taxable) to a third person. However, they did not declare this sale but rather declared it as a tax-free intra-Community supply to Vetch. However, it is argued that such a delivery never took place. According to the referring court, Y is responsible for tax evasion in Bulgaria in this respect. The reference for a preliminary ruling does not provide any indication that Vetsch was involved in this VAT fraud in any way.

[19] ECJ of 9.2.2017 – C-21/16 – Euro Tyre (ECLI:EU:C:2017:106, par. 41).

The Bundesfinanzgericht in Austria found that the Bulgarian recipients had been given the right of disposal over the goods by a vendor of the goods in Switzerland prior to customs clearance in Austria. The Bulgarian recipients had declared the intra-Community acquisitions of the goods concerned in Bulgaria but were responsible for tax evasion in Bulgaria because on the resale of the goods concerned they had wrongly declared exempt intra-Community supplies to the appellant, a forwarding company not trading in such goods.

On the basis of the case law of the Court of Justice, the exemption for the intra-Community supply in Austria therefore had to be refused (only for that reason). One of the conditions for exemption from import turnover tax thus was not met.

The national court asked the ECJ for guidance. The opinion of Advocate General Kokott was published on 6th September 2018, and the judgment was published on 14th February 2019.[20] The ECJ completely followed the opinion.

5.2.2. Combination of refusing the right of deduction and refusing the exemption at the same time

The problem that one can see in this case is a basic problem for all cases of VAT fraud. It will be multiplied in a long supply chain with a fraud somewhere in the chain.

In my view the real problem is that the Member States have a duty to refuse the right of deduction, but the taxation of the delivery or service remains in place. This leads automatically to double (and more) taxation: On the one hand, the deduction of input tax is refused, but on the other hand, the output transactions are taxed at the same time. Or – with the same effect – the refusal of the exemption of the intra-Community supply (in one Member State), the taxation of the intra-Community acquisition (in another Member State) and the refusal of the right of deduction in each Member State. In each version you will have overcompensation of the VAT damage.

Dogmatically this case law is already not necessarily convincing since the value added tax damage actually always results only from the difference of turnover tax debt and input tax deduction. The punitive nature of the value-added tax finally created in this manner is problematic but maybe acceptable for the actual perpetrator (i.e. the value-added tax fraudster).

But this case law of the ECJ is not only for the real fraudster. It is also relevant in cases where a taxable person knew or should have known that, by his purchase, he was taking part in a transaction connected with VAT fraud. In such circumstances, the taxable person concerned must, for the purposes of the VAT directive, be regarded as a participant in such fraud, whether or not he profits from the resale of the goods or the use of the services in the context of the taxable transactions subsequently carried out by him.

In this case, the concerns above are particularly valid, especially if the idea of sanctions is extended to a participant. In my opinion, this can only be convincing to

[20] ECJ of 14.2.2019 – C-531/17 – Vetsch (ECLI:EU:C:2019:114) and opinions of AG Kokott of 6.9.2018 – C-531/17 – Vetsch (ECLI:EU:C:2018:677).

a certain extent in the case of collusive cooperation between the actors (i.e. complicity).

If, on the other hand, the refusal of input tax deduction is not limited to collusive cooperation but is extended to the case of entrepreneurs who merely should or could have known that someone is involved in a VAT fraud upstream or downstream in the supply chain, the following fundamental problem arises:

The tax authorities would be able to generate a total of four times the tax revenue here. The Republic of Austria could set an import VAT rate and at the same time deny the tax exemption of the transfer in Austria. The Republic of Bulgaria, on the other hand, could refuse to deduct the VAT on the declared intra-Community acquisition while, at the same time, fix the tax for the supply in Bulgaria.

On closer inspection, however, one would be able to say that if VAT fraud is committed, the damage to the tax creditor results solely from the non-payment of the VAT by the service provider with simultaneous input tax reimbursement by the service recipient.

If, for example, Y has not paid VAT in the example above, the tax creditor only suffers a loss if Vetsch and all trade levels thereafter were able to deduct the input tax in respect to this turnover and only for the amount of the VAT not paid by Y.

The refusal of the input tax deduction and the tax exemption on all turnover levels before the fraud due to the assumption of so-called fraudulent turnover (with simultaneous assertion of tax liability of the service provider with regard to these so-called fraudulent turnovers) would not eliminate damage or prevent turnover tax fraud. In the end it has as a result a hidden increase in tax revenue at the expense of the entrepreneurs involved and a reinterpretation of the turnover tax as a pure penalty payment but without criminal proceedings.

Even if it is assumed that not all "turnover tax claims" can be enforced successfully, the "argumentation" of the tax authorities with "fraudulent sales" leads to the fact that the targeted elimination of the actual incurred damage cannot be achieved with this procedure and that, instead, the tax creditor could claim the same damage several times with different persons/entrepreneurs in an almost arbitrary manner with one and the same argumentation.

The tax authorities would thus be in a better position than they would have been if there had been no VAT fraud at any step of the transaction chain.

5.2.3. Proportionality

This, in my eyes, leads to a substantial problem with the principle of proportionality. The ECJ consistently states that measures to protect the tax income have to be proportional.

However, the measures which the Member States may thus adopt must not go further than what is necessary to attain the objectives of ensuring the correct levying and collection of the tax and the prevention of tax evasion. Such measures may therefore not be used in such a way that they would have the effect of undermining the neutrality of VAT, which is a fundamental principle of the common system of VAT.

However, the assessment of a tax liability amounting to a multiple of the tax loss cannot be considered necessary for the purposes of this case law. If at all, then a liability of all "involved parties" within the meaning of the ECJ case law for the entire damage (i.e. as a total debtor) should be regarded as necessary in order to combat VAT fraud and to ensure a precise levying of the tax without undermining the fundamental principle (neutrality of turnover tax, provided that even taxable transactions are made) of VAT law.

If the ECJ would be asked whether it is proportionate that a fraud at the beginning of a transaction chain is used to generate more tax income than would ever have been paid in the same case without fraud, I am really not sure that the ECJ would agree.

According to recent case law of the European Court of Justice, the decisive factor is rather whether the recipient of the service was involved (included) in the underlying fraud. In this case he cannot invoke the input tax deduction to which he is actually entitled. But even in this constellation, the ECJ has not ruled that the party providing the "fraudulent" turnover also owes the turnover tax in addition without the possibility of correcting this tax liability, e.g. by uncovering the fraud, etc.

6. Conclusion

At the moment the ECJ is – in VAT cases – obviously thinking in two categories. If fraud is conceivable, then the taxpayers have a problem. If no fraud is conceivable – just a violation of formal rules or something else like this – the tax administration is in trouble. When a third party is a fraudster (without anyone knowing) and there is a link between two exemptions for the fraudster and the non-fraudster (like in Art. 143 of the VAT directive) the Court protects the entrepreneur who is acting in good faith, and with good reason. The conditions for the exemption of the third party must be met objectively as a result, so that good faith of the third party is rightly irrelevant for assessing the tax exemption of the other trader.

THE PROTECTION OF THE FINANCIAL INTERESTS OF THE EU IN GERMANY: THE RESPONSIBILITY OF ENTERPRISES

Prof. Dr. Gerhard Dannecker[*]

1. Introduction

German criminal law does not currently provide for any criminal responsibility of enterprises. Instead, the Administrative Offences Act ("Ordnungswidrigkeitengesetz" – OwiG) imposes fines on legal persons and associations. This makes Germany one of the few states within the European Union that do not provide for criminal sanctions again legal persons. For some years, however, there has been an intense discussion regarding the need for a corporate criminal law,[1] and the Grand Coalition of the Christian Democratic Union of Germany (CDU), the Social Democratic Party of Germany (SPD) and the Christian Social Union in Bavaria (CSU), which has formed the new government since March 2018, has given high priority to the introduction of criminal liability for legal persons.[2] This will also affect the protection of the financial interests of the EU.

2. EU requirements on the responsibility of legal persons

2.1. PIF Directive

On 15 July 2017, the European Union adopted Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law.[3] This Directive lays down minimum rules for the definition of criminal offences and penalties in the fight against fraud and any other illegal activities affecting the financial interests of the Union. In addition to the punishment of natural persons, the Directive also requires Member States to introduce criminal responsibility of legal persons. In this matter, the Directive states that Member States shall ensure that legal persons can be held accountable for the offences covered by the Directive that have been committed for their benefit by one of the following persons:

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[1] Rogall 2017, 1 et seq.; Schünemann 2014, 91 et seq.; Hoven 2014, 19 et seq.; Rogall 2015, 260 et seq.; Odenthal 2015, 19 et seq.; Wagner 2016, 112 et seq.; Jahn–Schmitt-Leonardy–Schoop 2016.

[2] See 17, 126 of the coalition agreement between CDU, CSU and SPD from 07.02.2018; Beisheim–Jung 2018, (67).

[3] *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.198.01.0029.01.ENG.*

(a) a person authorised to represent the legal person,
(b) a person empowered to take decisions on behalf of the legal person or
(c) a person exercising control over the legal person. Lack of supervision or control by one of these persons which has enabled the commission of an offence in favour of the legal person by a person under his authority is sufficient to establish the responsibility of that legal person.

The main penalties are criminal fines (the German equivalent being "Geldstrafen") or administrative fines (the German equivalent being "Geldbußen"). In addition, the following sanctions can be considered in particular:
(a) exclusion from public benefits or support,
(b) temporary or permanent exclusion from public tendering procedures,
(c) a temporary or permanent ban on the exercise of a commercial activity,
(d) placing under judicial supervision,
(e) court-ordered resolution or
(f) temporary or permanent closure of facilities used to commit the offence.

With respect to the criminal or administrative responsibility of legal persons, the European Union confines itself to providing a substantive legal framework for the requirements of punishment. The choice of sanctions, on the other hand, is largely left to the Member States. Therefore, penalties are only mentioned paradigmatically. In this respect, the EU does not force harmonisation on its Member States. This requires the Member States to decide, within the framework established by the European Union, whether they prefer to introduce a system criminal penalties or an administrative fine-based sanctioning system in order to introduce the required appropriate, dissuasive and effective sanctions.

2.2 Requirements of the PIF guideline for a sanction system for legal entities

The PIF Directive is based on the following basic considerations on the criminal liability of legal persons.

2.2.1. Addressees of the sanctions

The sanctions are addressed to legal entities. Legal entities are capable of acting and can be held liable for criminal sanctions. All legal entities shall be covered, including state-owned corporations. However, governments, international organisations and entities of public law are not covered. The question of how to define "legal entities" in detail has to be answered by national law.

2.2.2. Legal requirements for the responsibility of the enterprise

The criminal responsibility of legal persons provided for in the PIF Directive is based on the model of representation and attribution, which is in turn is based on the principle that legal entities can be responsible only for their own behaviour under criminal

or administrative law.[4] Liability is therefore limited to acts and ommissions by and on behalf of the executive bodies and representatives holding a managerial function. These persons form and implement the will of the association. Further, the organ or representative of the enterprise must have acted on behalf or in favour of the association or must have breached obligations of the enterprise.

2.2.3. Intended sanctions

As regards the sanctions to be imposed, the European Union calls for effective, proportionate and dissuasive sanctions without specifying whether they are criminal or administrative fines (see 2. 1 above).

Optionally, further sanctions are mentioned, which are preventive in nature, but can be imposed in addition to the criminal sanction.

2.3. Legislative leeway

National legislators are therefore faced with the question of whether to opt for a criminal or administrative law model. In the meantime, more and more legal scholars in Germany are of the opinion that criminal dogmatic considerations do not legally restrict the legislator from introducing a criminal law system in order to punish legal entities and enterprises.[5] Constitutional law also does not prohibit the introduction of such a system.[6] However, this means that the legislator is provided a far-reaching leeway in structuring the content of a sanction system for legal entities and/or enterprises.

3. Legal policy considerations beyond criminal dogmatic and constitutional considerations

Given the European Union's relative lack of determination with regard to the concrete structure of national corporate sanctioning law systems, the various criminal and administrative sanction systems should be judged, from a legal point of view, by their suitability as a system of corporate responsibility. The sanctions to be imposed cannot be determined separately from the chosen form of substantive law and thus from the requirements that constitute an offence: Taking seriously the choice of a corporate criminal law system subjected to the principle of mandatory prosecution, it is necessary to develop a new specific attribution model that takes into account the specific features of corporations. It seems undisputed that the "respondeat superior" model underlying US corporate criminal law, according to which any action within a company is attributable to the company itself, is too far removed from the existing criminal

[4] In depth: Böse 2014, 137 et seq.
[5] For example: Kubiciel 2014, 135 including further citations; Engelhart 2015, 203.
[6] Jahn 2016, 88 et seq.

justice system. Rather, an attribution or representation model is preferred in Germany. In such a model, (only) the behaviour of leading staff members is attributed to the association as if it were its own behaviour.

The specific characteristic of criminal laws is the sanction. Any misconduct is of criminal relevance if it is subject to criminal punishment. Criminal law typically provides for two main penalties – imprisonment and fines.

Criminal sanction regimes include criminal and administrative fine regimes. What both regimes have in common is that they require the commission of an act of misconduct and that they are aimed at the infliction of an evil in consequence of the act committed. The imposed repressive sanctions are not free of purpose but rather aim at preventive – special and general – objectives.[7]

3.1. Criminal responsibility of corporations

The harshest measure judicial systems can take in response to misconduct is criminal punishment. It inflicts an evil on the perpetrator as fair compensation for his or her unlawful, culpable behaviour. In addition, punishment is a symbol of public disapproval of a particular behaviour.[8] An essention characteristic of criminal law is that the level of punishment is mainly determined by the extent of the unlawful conduct. Through punishment a certain behaviour is labelled as misconduct. The punishment itself expresses this classification to the perpetrator and the public. As already mentioned, this procedure is used to clearly identify certain types ob behavior as misconduct with special and general prevention goals.[9]

Modern criminal law does not use punishment as a kind of atonement.[10] There is a need for a broader definition of criminal punishment, especially when it comes to punishing corporations. The retributive character of criminal sanctions could be used to justify a criminal law system aimed at punishing corporations.[11] Retribution – for example – is the basic concept within the Anglo-American system for sanctioning corporations.[12]

3.2. Responsibility of an association in respect to administrative fines

Administrative fines are also an evil inflicted on a person for misconduct.[13] Administrative fines also follow the concept of retribution.[14] Therefore, administrative fines are regarded as criminal sanctions the broader sense of the definition. However, admin-

[7] Roxin 2006, § 3, margin no. 33; Streng 2012, Recital, margin no. 3 et seq.
[8] BVerfGE 105, 135 (153); 109, 131 (168).
[9] Schmoller 2007, 525.
[10] Rössner 1999, 210 et seq.
[11] French 1991, 133 et seq.
[12] von Hirsch 2016, 162 et seq
[13] Dannecker, G.– Dannecker, C. 2016, 171.
[14] Dannecker, C. 2015a, 404 s.; Dannecker, C. 2013, 928 et seq.

istrative fines can be imposed without a court proceeding.[15] The process of imposing administrative fines has to guarantee not only constitutional standards but also the standards of the European Court of Human Rights (ECHR).[16] The German Federal Constitutional Court ruled that the criminal proceeding standards as laid down in the ECHR only apply on a lower level.[17] In contrast to criminal sanctions, administrative fines, are not intended to express socio-ethical disapproval.[18]

Administrative fines are used in two highly different areas. They are used to sanction minor infringements of administrative rules[19] and therefore decriminalise certain behaviour. However, in antitrust law, administrative fines also serve as a punishment for a larger scale of misconduct.

3.3. Additional measures

In addition to criminal punishments and administrative fines, certain other measures can be applied. Criminal punishments or administrative fines, as well as recovery and confiscation, measures are legal consequences of misconduct. They therefore have an *inseparable inner link*. If an additional measure is imposed on a person, this must be taken into account when determining the penalty. However, the duration of the custodial sentence is determined without regard to the imposition of additional measures.[20]

3.4. Evaluation of the criminal and administrative penalty system

The starting point for the legal policy discussion on a system of sanctions for legal entities should be that companies are the "main actors of the moderne age"[21] who commit substantial rule violations in pursuit of economic objectives that are often far more serious than the rule violations of individuals. The legislators can establish the liability and criminal responsibility of these actors. Legislators have made use of there power in civil, administrative and administrative fine law. This legislative decision was made due to the assessment that enterprises should be included in the processes of attributing social responsibility. The question is how *social corporate responsibility* can be expressed and comprehended and how we are able to measure legal entities on a definable normative horizon of expectation. The concept chosen has to assess its proximity to or its distance from criminal punishment in order to enable a critical discourse on this basis.[22]

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[15] In respect to the often not fully recognized connection to the exclusive authorities of judges in the area of criminal sanctions (Art. 92 GG) and the principle of „full jurisdiction" which also applies for administrative fines Dannecker, C. 2015b, 34 f and recital 38.

[16] Gaier 2014, 162 et seq.

[17] cf. BVerfG NJW 1990, 1103; NJW 1967, 1220; NJW 1959, 619; critique Dannecker, C. 2015a, 406 s.

[18] So BVerfGE 27, 33.

[19] See Achenbach 2012, 275 s.

[20] BGH 28.9.1984 – 2 StR 568/84, NStZ 1985, 92.

[21] Ortmann 2010, 9 et seq.

[22] In depth Dannecker, G.–Dannecker, C. 2016, 168 et seq.

3.5. Preferability of a criminal sanction system for legal entities in comparison with an administrative fines law regime

In the case of the establishment of a sanctioning system for corporations, the question of legal policy arises: if a criminal corporate law or administrative fines system is preferable.[23]

3.5.1. The avoidance of retrospective effects of the criminal sanction system for legal entities in criminal law

In order to remain in clear distance to criminal law, an administrative fines system could be established. Thus, the responsibility of legal entities has no retroactive effect on criminal law. The advocates of such a "small" administrative solution argue that by means of this model, an "insidious" implementation of a corporate criminal law regime could be prevented. Instead, they support a statutory and proportionate administrative fines law regime aimed at the confiscation of proceeds from enterprises.[24]

3.5.2. A regime of fines as a qualitatively independent system below the threshold of criminal law targeted at economic governance and providing economic supervision

Administrative fines targeted at corporations can be applied effectively – as proven by the application of the current German antitrust law regime – while still providing the fundamental criminal guarantees. However, the scientific discussion regarding antitrust fines also shows that administrative offences are not necessarily understood as punishment but rather as an independent system below the threshold of criminal law which is targeted at economic governance and providing economic supervision. Yet, if administrative fines are considered to be purely preventative measures, they fail to express a verdict of wrongfulness and fail to hold legal entities criminally responsible as *Corporate Citizens* for their infringements of the law.

3.5.3. Administrative offences as inferior wrongfulness versus criminal offences as severe infringements of the law

Regardless of the administrative fines against associations in section 30 OWiG (which are classified as a monetary sanction), the existing legal proximity between fines imposed on corporations and conventional administrative offences should be removed, since the latter typically covers disobedience to administrative prohibitions. If it is really a question making it clear that corporations are *the* actors of the modern age who are to be held criminally responsible for offences committed in their

[23] Closely to that Schmitt-Leonardy 2016, 255 et seq.
[24] Neumann 2012, 19.

favour or within their structure, and that these corporations should be punished accordingly, then it is necessary to allocate the system of responsibility of corporations within criminal law.

It seems to be the crucial factor that criminal offences express a condemnation of wrongfulness more severe both in emphasis and significance and that they address the corporation in its right to social esteem and its corporate dignity as a corporate citizen. Only criminal penalties can express that offences of corporations are serious violations of law which are condemned legally – in a way similar to the criminal punishment for offences committed by individuals.[25]

3.5.4. Labelling injustice as injustice

Finally, in terms of efficiency, it seems reasonable to establish a corporate criminal law system for legal entities. It can be expected that such a system has an increased preventive effect.[26] Only criminal sanctions can force the entity to take actions regarding an adequate organisational and control structure in an effective manner.[27] Nevertheless, it is essential that injustice is labelled as such by imposing an adequete sanction. Where there is socially harmful injustice, it should be up to criminal law to mark the difference between right and wrong and to sharpen people's awareness of that.[28]

3.5.5. An association's capability of being sanctioned

Associations are capable of being sanctioned. Indeed, one has to admit that a legal entity will neither experience a sanction as a personal evil, nor feel the individual ethical blame which is (allegedly) closely related to the criminal sanction; here "no body to kick, no soul to damn" applies.[29] A legal entity can nevertheless perceive a sanction as an evil. That is why the purposes of a sanction can be fulfilled. Imposing a heavy fine on a corporation will have the same effect on other legal entities as imposing a fine on an individual.[30] Besides, a sanction can have preventive effects on entities: Having been sanctioned once, the legal entity will try to avoid infringing the same law a second time.[31] In this regard, legal entities are addressable in a normative way.[32] Also, the notion of retaliation applies to legal entities as they have rights as well as duties and therefore are addressees of norms.

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[25] In respect to the necessity of introducing a criminal law for associations from a criminal policy perspective, see Ackermann 1994, 175 et seq.; Hirsch 1991, 6/44 s.; Lampe 1994, 734; Müller 2000, 438 s.; Schroth, 1993, 25, 221 et seq.; Tiedemann 1993, 531 s.

[26] Thereto Sieber–Engelhart 2014, 113 et seq.; Heine 1995, 75 et seq.

[27] Cf. Busch 1933, 245 et seq.; Eidam 1997, 57 et seq.; Hirsch 1995, (287 s.; Lütolf 1997, 24 et seq.; Schall 1996, 102 et seq.

[28] Dannecker, G. 2001, 104.

[29] Leipold 2009, 383 s.; Wohlers 2012, 243 s.; for representatives of a lacking capability of being sanctioned cf. Vogel 2012, 205 (206).

[30] Thereto Hirsch 1995, 285, 294 s.; more restrictive Wohlers 2012, 242 s. including further citations.

[31] See Hirsch 1995, 295 with further citations; Dannecker, G. 114; cf. also Wohlers 2012, 243 s.

[32] Dannecker, G.–Dannecker, C. 2016, 17.

Taking for granted that legal entities are subjects "being filled with life" by their members and representative bodies, legal entities cannot only perceive sanctions but also feel them. This requires that the term "feeling" is not seen from an (individual) psychological point of view.

3.5.6. Acknowledging associations as corporate citizens

Thus, there are no significant fundamental concerns regarding criminal punishment of corporations. Rather, legislators are capable of acknowledging corporations as *corporate citizens* and punishing them in case of a criminal offence. This is in line with the expectations of the European Union, which demands the introduction of criminal or administrative sanctions against associations.

If the legislators choose the criminal law model against associations, the evils associated with the legal consequences of criminal law should be named as such – thereby expressing the condemnation of socially harmful corporate wrongdoing by the state. This highlights the element of retribution of corporate culpability, which, however, is not identical to individual culpability. In doing so, the labelling of the sanctions against corporations should already clarify that punishments against legal entities differ from the conventional penalties against individuals.

Such a criminal policy decision leads to a serious interference in the corporate sphere of freedom. The function and limits of national penal power thereby directly relate to the position of corporations within and towards the state. The matter concerns the conflict between the freedom of corporations guaranteed by the constitution on the one hand and the protection of third parties and the public on the other. The constitutional guarantees, which are also given by the threats to freedom inherent in criminal power and historically directed at the protection of the individual from national criminal power, also apply to corporations.[33] If criminal law is to be introduced for corporations, they must in principle be subject to the same guarantees as individuals. This makes it clear that the conception of legal entities cannot be exclusively designed by means of company law.

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[33] Exemplary for the principal of nemo tenetur Dannecker, C. 2015a, 396 et seq., 402 et seq.

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PART II

FRAUD AFFECTING THE FINANCIAL INTEREST OF THE EU (PARTICULARLY VAT FRAUD) IN THE CRIMINAL LAW SYSTEMS OF THE MEMBER STATES

Austria

LEGAL FRAMEWORK AND PRACTICE OF THE FIGHT AGAINST VAT FRAUD IN AUSTRIA

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1. Introduction

It is an important feature of the Austrian fraud prosecution system that there is a structural duality between expenditures and receipts of a state or the EU which also has consequences for the prosecution of VAT fraud: Fraud that relates to state and EU expenditures (subsidies etc.) is governed by the Criminal Code,[1] and fraud related to the receipts of a state or the EU (tax and customs fraud) is governed by the Act on Fiscal Offences (Finanzstrafgesetz).[2]

What are the consequences of this distinction for VAT fraud?

In principle, the evasion of VAT is punishable according to the criminal provisions of the Act on Fiscal Offences. However, the application of these provisions requires that someone is obliged to pay taxes or represents someone who is obliged.[3] This means he/she must be an entrepreneur according to the VAT Act.[4] As long as someone is not an entrepreneur, the Act on Fiscal offences is not applied since he/she is not obliged to pay VAT. Therefore, if someone pretends to be an entrepreneur according to the VAT law to receive input tax deduction, this is not punished as a tax offence according to the Act on Fiscal offences but as fraud (Sec 146 Criminal Code) according to the Criminal Code since the person is not a taxpayer and deceives about his/her capacity to receive input tax deduction, which causes a damage to the state.[5]

If someone is an entrepreneur according to the VAT Act because he independently carries out commercial or professional activities, the Act on Fiscal Offences is applied.

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[1] Strafgesetzbuch (StGB)/Criminal Code, BGBl 60/1974 idF BGBl I 70/2018.

[2] Finanzstrafgesetz (FinStrG)/Act on Fiscal Offences, BGBl 129/1958 idF BGBl I 62/2018.

[3] Sec 33 para 1 Act on Fiscal Offences.

[4] Sec 2 para 1 Umsatzsteuergesetz (UStG/VAT Act).

[5] Austrian Supreme Court of Justice 19.10.1982, 10 Os 180/81; Kert 2012, 433; Kahl 2017, 361.

2. Evasion of taxes

2.1. General provision concerning annual VAT

In Austrian fiscal penal law there is not a specific provision only for VAT fraud, but VAT fraud is covered by the various tax offences which are applicable to all or at least a group of taxes. The core offence among tax offences is tax evasion according to Section 33 FinStrG.[6] The protected legal interest of this offence is the tax system as a whole, including the system of the taxpayer's duties to cooperate and inform the tax authorities.[7] According to the provision of tax evasion, a person is punished who intentionally evades tax by violating a statutory obligation to assist and notify the tax authorities, disclose facts relevant for taxation or tell the tax authorities the truth in respect to tax issues (Section 33 para (1) FinStrG). It is required that the offender breaches a statutory obligation. These obligations are defined in detail by the relevant tax laws. Under these provisions, all circumstances relevant to the existence and extent of a tax liability or to obtaining tax privileges must be fully and truthfully disclosed by the taxpayer in accordance with the tax provisions. The offence requires that the treasury is damaged. Regarding mens rea, this provision requires that the perpetrator acts with intent. *Dolus eventualis* is sufficient.[8]

This general criminal provision of tax evasion is applied to all taxes and duties and therefore also to VAT. If someone is obliged to pay VAT, he or she is obliged to disclose all relevant circumstances at the end of the year to enable the tax authorities to calculate the VAT. If someone does not give this information or gives wrong information, this is a breach of the obligation, and if this leads to an incorrect assessment of the taxes, this is an offence.[9]

2.2. Specific provision referring to advance payments of VAT

Beside this general statutory definition of tax evasion, there is a special provision for the evasion of advance payments of VAT.[10] In general, in the case of an infringement of an obligation to notify, the evasion of taxes to be calculated by the taxpayer himself constitutes the basic element of tax evasion. According to this provision, someone is punishable for tax evasion, if he/she causes the evasion of advance payments of VAT in violation of the obligation to file a preliminary tax return according to the Act on VAT. The VAT Act obliges an entrepreneur to submit a VAT advance return on the 15th day of the second month following the relevant month for tax return.[11] If the taxpayer does not submit this preliminary VAT return *and* does not pay the advance payment of VAT

[6] Sec 33 para 1 FinStrG/Act on Fiscal Offences.
[7] Brandl–Leitner 2017, 438.
[8] Brandl–Leitner 2017, 487.
[9] Brandl–Leitner 2017, 453.
[10] Sec 33 para 2 FinStrG/Act on Fiscal Offences.
[11] Sec 21 UStG/VAT Act.

in due time, he/she is punished for tax evasion. This means that only if the taxpayer violates his duty to submit the preliminary VAT return and does not pay the advance payment of VAT he/she will be punished according to Section 33 para 2 FinStrG. If the taxpayer submits this VAT advance return but does not pay the VAT in due time, he/she is not punished for tax evasion.

On the level of mens rea, the evasion of advance payments of VAT is only punishable in the case of knowledge with regard to the caused damage (the evasion of taxes).[12] Conditional intent – which is normally required in other cases of tax evasion – is not sufficient in this case. Regarding the violation of VAT law, dolus eventualis is required.[13]

If the offender commits the evasion of advance payments of VAT with regard to the VAT advance payments according to Section 33 para 2 FinStrG and the evasion of annual VAT with respect to the identical VAT amounts, the Austrian courts say that the evasion of the advance payments becomes part of the evasion of the annual tax.[14] Therefore, the taxpayer is only punished because of the evasion of the annual VAT and not because of both offences.

3. Sanctions

The Act on Fiscal Offences contains a system of penalties that is different compared to the rest of Austrian criminal law.[15] Whereas the Criminal Code provides for both imprisonment penalties and financial penalties as primary penalties, in fiscal penal law for most of the offences, financial penalties are the only primary penalty; imprisonment sentences may only be imposed additionally.[16] Financial penalties are also calculated in a different way compared to the Criminal Code. The Criminal Code foresees a system of day fines. In fiscal penal law, the fines are imposed as a sum ("Geldsummenstrafe") and depend on the amount of the taxes or the duties which have been evaded.[17] This is the assessment basis and the maximum penalties are a multiple of this amount. The maximum penalty for tax evasion (Section 33) is twice the evaded amount of duties.[18] For example, if the evaded amount of taxes is EUR 1 million, the maximum financial penalty is EUR 2 million. According to the jurisprudence of the Supreme Court, this amount ("strafbestimmender Wertbetrag") is no element of the offence and therefore does not have to be covered by the intent of the offender.[19] Therefore, it is sufficient

[12] Sec 33 para 2 FinStrG/Act on Fiscal Offences.

[13] Brandl–Leitner 2017, 459.

[14] Austrian Supreme Court of Justice 21. 11. 1991, 14 Os 127/90; 25. 11. 2015, 13 Os 95/15t; see also Austrian Supreme Administrative Court 11. 12. 1992, 92/13/0179.

[15] Brandl 2017, 367.

[16] Brandl 2017, 367.

[17] Brandl 2017, 368.

[18] Sec 33 para 5 FinStrG/Act on Fiscal Offences.

[19] Austrian Supreme Court of Justice 04. 10. 1988, 15 Os 88/88; 18. 9. 2001, 14 Os 84/01; 15. 3. 2006, 14 Os 145/05p; critically Brandl–Leitner 2017, 494 ff.

that the offender acts with the intent to cause any damage, but it is not required that he/she has an intent with regard to a concrete amount.

Additionally, an imprisonment sentence up to two years may be imposed but only in the case that this is needed to protect the general public from the commission of further tax offences.[20] The maximum penalty which may be imposed by an administrative authority is three months.[21]

Moreover, in 2015[22] the legislator introduced a provision that the entrepreneur loses the right to deduct VAT if he/she knows or ought to know that the revenue is in any way connected to the evasion of VAT (Section 12 para 14 Umsatzsteuergesetz). This also applies if the evasion concerns revenue of any other person or entity in a supply chain before or after one's own revenue.[23]

4. Procedure in fiscal penal cases

It is an important feature of fiscal penal law that the competence for the leading of the procedure, adjudicating and sanctioning is divided between administrative authorities and criminal courts.[24] Depending on the amount of the evaded taxes ("strafbestimmender Wertbetrag"), it is divided into an administrative fiscal penal procedure ("verwaltungsbehördliches Finanzstrafverfahren") for minor cases and a judicial criminal procedure ("gerichtliches Finanzstrafverfahren") for major cases. For the administrative fiscal penal procedure, there is a specific authority called fiscal offence prosecution authority ("Finanzstrafbehörde"), which in minor cases where the damage of the tax evasion is not more than EUR 100,000 (for smuggling and evasion of import and export duties the limit is EUR 50,000) may investigate, prosecute and adjudicate on its own. Depending on the amount evaded, the fiscal offence prosecution authorities make their decisions as single officers or as panels. If the amount exceeds EUR 22,000, the panel has mandatory jurisdiction, and single officers normally make the decisions below that threshold.

If the damage of the tax evasion is more than EUR 100,000 and the tax evasion is committed intentionally, the offence is a criminal offence, and criminal courts are competent to adjudicate. In this criminal procedure the fiscal offence prosecution authority has a special role. It takes over the tasks of the police and has the position of a "Privatbeteiligten" (partie civile) by virtue of law. But the Finanzstrafbehörde is not only a partie civile but also a sort of subsidiary prosecutor (with the right to prosecute in the place of the Public Prosecutor, with the right to appeal, etc.).[25]

[20] Sec 33 para 5 FinStrG/Act on Fiscal Offences.
[21] Sec 15 para 3 FinStrG/Act on Fiscal Offences.
[22] Steuerreformgesetz 2015/2016, BGBl I 118/2015.
[23] For more details see Brandl 2018, 106 ff.
[24] Sec 53 para 1 FinStrG/Act on Fiscal Offences.
[25] Sec 200 FinStrG/Act on Fiscal Offences.

5. Negligent evasion of taxes and duties (Section 34 FinStrG)

The evasion of taxes and duties can also be committed negligently, with the exception of evasion of advance payments of VAT.[26] This means that only the evasion of annual VAT can be committed negligently. In 2016 the provision was amended, and since then it has been required that the offender acts with gross negligence. Minor negligent behaviour is not punishable. The grossly negligent evasion of taxes and duties is penalised by a fine up to the evaded amount.[27] Imprisonment is not provided for.

6. Tax fraud (Section 39 FinStrG)

6.1. Statutory definition of the offence

With the aim to be able to impose higher penalties, in 2010 the Austrian legislator introduced a new provision of tax fraud ("Abgabenbetrug") in the Act on Fiscal Offences. It is in principle an aggravating circumstance related to tax evasion, smuggling and evasion of import and export duties – in Austrian doctrine called "qualification" – with significantly higher penalties than the ones that had been provided for in fiscal penal law. Before that, only financial penalties had been foreseen as primary sanctions. Imprisonment sentences could only be imposed additionally. Under certain circumstances, for tax fraud imprisonment up to 10 years is foreseen. These aggravating circumstances are only applied if the tax evasion is committed intentionally and the evaded amount is so high that the adjudication is in the competence of the courts.[28] This means that the evaded amount must be more than EUR 100,000.[29] The aggravating circumstances, which are particularly important with regard to the evasion of VAT, are if the offence is committed:

– by using a false or falsified document, false or falsified data or a false piece of evidence,
– by using fictitious transactions or fictitious actions,
– by manipulating a computer program which amends or deletes data.[30]

Moreover, there is a special provision of tax fraud concerning pre-tax amounts.[31] It is an aggravating circumstance if someone claims for pre-tax amounts that are not based on actual supplies or achievements to cause an evasion of taxes. This provision is foreseen to have effective means in the fight against VAT fraud like, for example, carousel fraud.[32] However, it is interesting that only such carousels are covered by the

[26] Sec 34 FinStrG/Act on Fiscal Offences; Brandl–Leitner 2017, 477.
[27] Sec 34 para 3 FinStrG/Act on Fiscal Offences.
[28] Sec 39 para 1 FinStrG/Act on Fiscal Offences.
[29] Sec 53 para 1 FinStrG/Act on Fiscal Offences.
[30] Brandl–Leitner 2017, 642; Kert 2014, 210; Jacsó 2017, 200.
[31] Sec 39 para 2 FinStrG/Act on Fiscal Offences.
[32] Explanatory Remarks to the Government bill 874 BlgNR 24. GP 10; Auer–Siller–Spies–Zolles 2018, 945; see also Brandl 2012, 152.

provision where no supplies or achievements have been delivered. If there are any supplies or achievements, a punishment according to this provision is excluded.[33]

The consequence of this regulation shall be illustrated by the following cases: A company provides services that are not officially invoiced, but the beneficiary pays the money without an invoice. These revenues are neither taken into the VAT advance return nor into the annual VAT return. The money goes directly to the shareholder. In this case, the manager is only punished because of evasion of taxes (Section 33 FinStrG) since no aggravating circumstance of tax fraud is fulfilled. False or falsified documents, false or falsified data or a false piece of evidence nor fictitious transactions or fictitious actions were used, so the provision of tax fraud cannot be applied.

In contrast to this previous example, the following case leads to another result: A company provides services, 50% of them are officially invoiced, the other 50% are not. The manager of the company takes 50% of the revenues into the VAT advance return. The other 50% are accepted as cash as "black" money, which is not taken into the VAT advance return or into the annual VAT return. In this case, the manager is punished according to tax fraud since a false invoice is used. Therefore, the requirements of tax fraud are fulfilled.

6.2. Sanctions

Unlike the offence of tax evasion, tax fraud imprisonment penalties are foreseen as primary penalties which can be imposed independently of a financial penalty.[34] Depending on the evaded amount of taxes different penalties are foreseen:

- If the evaded amount is up to EUR 250,000 imprisonment up to three years is foreseen; in addition to this imprisonment penalty, a fine up to EUR one million may be imposed.
- If the evaded amount is more than EUR 250,000 imprisonment up to five years is provided for; besides this, a fine up to EUR 1.5 million may be imposed. In this case, the imprisonment may only be up to four years.
- If the evaded amount is more than EUR 500,000 imprisonment up to 10 years is provided for; a fine up to EUR 2.5 million may be imposed. In this case, the imprisonment may only be up to a maximum of eight years.

7. Administrative offences

In Section 49 FinStrG several administrative offences are foreseen for minor violations of tax law with regard to intentional non-payment of self-assessed taxes. There is punishment if someone does not pay self-assessed taxes in time, particularly advance payments of VAT.[35] It is imposed only because of the non-payment of VAT; the viola-

[33] Brandl–Leitner 2017, 664; Auer–Siller–Spies–Zolles 2018, 944.
[34] Sec 39 para 3 FinStrG/Act on Fiscal Offences.
[35] Sec 49 para 1 lit a FinStrG/Act on Fiscal Offences.

tion of any other duties is not required. However, if the amount due is reported to the authorities in time, the default is not punished.[36] This provision is only applied if the provisions of tax evasion and tax fraud cannot be applied.

Moreover, it is a fiscal offence adjudicated by the fiscal offence prosecution authority if someone illegally claims pre-tax amounts by transferring false advance VAT returns.[37] As sanctions, financial penalties up to the half of the amount of the non-paid taxes are foreseen.[38]

8. Limitation period

The limitation period for the most important fiscal offences such as tax evasion (or smuggling) is five years.[39] However, this period will be extended if the offender commits another intentionally committed fiscal offence within the period of limitation. In this case, all periods of limitation end together. When the case is prosecuted by the authorities, the limitation period is suspended. For fiscal offences which fall into the competence of the courts, there is not an absolute period of limitation. This means that there is no limit for the actual limitation period, which, for example, can be extended by the commission of a new offence during the limitation period. In fiscal penal cases this happens quite often since fiscal offences are committed frequently every year to avoid former evasion of taxes being detected because of the "new". Therefore, it is possible to punish a tax offender even if the tax claim has already become time-barred. In administrative penal law there is an absolute limitation period of 10 years.

9. Does Austria need to modify the legal regulations with regard to Directive (EU) 2017/1371?

Finally, it shall be examined whether Austrian fiscal penal law is in line with Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law and where the Directive requires amendments to Austrian law with regard to VAT fraud.[40]

9.1. Definition of offence

The statutory definitions of offences in the Act on Fiscal Offences are quite wide and therefore, in principle, cover all definitions of fraud affecting the Union's financial in-

[36] In more detail see Austrian Constitutional Court 20.06.2002, G 110/02.

[37] Sec 49 para 1 lit b FinStrG/Act on Fiscal Offences.

[38] Sec 49 para 2 FinStrG/Act on Fiscal Offences.

[39] See Sec 31 para 2 FinStrG/Act on Fiscal Offences.

[40] Directive (EU) 2017/1371 of the European Parliament and the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [OJ L 198, 28.07.2017, 29–41].

terests contained in Art. 3 of the PIF Directive.[41] Regarding VAT fraud, the provisions of tax evasion and tax fraud cover most of the actions. However, it is not clear which cases should be covered by Sec. 3 para 2 lit d (iii) of the Directive, which requires that the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds be punished. Since the Austrian statutory definitions require a violation of a statutory obligation to assist and notify the tax authorities and to disclose facts relevant for taxation, such behaviour is not covered by the existing provisions. If a taxpayer presents correct tax returns, in principle, responsibility according to tax evasion is excluded. It is unclear whether and how this provision will be implemented since it is not totally clear which cases should be covered by this provision.[42] If someone presents a correct tax return, the fiscal authority knows the relevant circumstances to determine the taxes. Therefore, it is another case if the fiscal authority gets wrong information, and it is questionable under which circumstances the imposition of criminal sanctions is necessary.

This could be the case if someone issues an invoice to his/her business partner to enable an input tax deduction, but later he/she does not pay the VAT to the tax authorities. This results in damage to the treasury. If the offender has the intention not to pay VAT already in the moment of the issue, it is justified to punish the person. This could be an effective instrument against VAT carousels. Another case could be that the correct VAT return serves to conceal the evasion of taxes of a third person.

9.2. Penalties

Regarding penalties, the Directive requires that Member States shall take the necessary measures to ensure that the criminal offences are punishable by a maximum penalty of at least four years of imprisonment when they involve considerable damage or advantage. Austrian law is not totally in compliance with the Directive given the case that the criminal offences involve considerable damage according to the Directive, but the requirements of tax fraud according to Austrian fiscal penal law (e.g. false or falsified document, use of fictitious transactions or fictitious actions) are not fulfilled. In these cases, the behaviour only constitutes tax evasion, for which the maximum penalty is only two years.[43] In most cases, the requirements of tax fraud will be fulfilled, but if not, there are problems regarding the Directive.[44] Therefore the Austrian legislator has to introduce higher penalties, at least for EU fraud involving considerable damage.

9.3. Jurisdiction

One important point is that the Austrian Act on Fiscal Offences currently protects Austrian VAT only, not the VAT regulated and to be paid in other Member States. Therefore,

[41] Kert 2019, 22.
[42] Kert 2019, 22.
[43] Kert 2019, 23.
[44] Staffler 2018, 64.

there is no jurisdiction if an Austrian citizen evades VAT in another Member State.[45] Regarding Art. 11 PIF Directive, the Austrian legislator has to amend the provisions on jurisdiction.[46] This would also help to prosecute cross-border cases of VAT fraud.

The extension of jurisdiction to VAT regulated in other Member States would also solve the problem that the amounts of VAT evaded in another Member State could be included in the calculation of the overall damage, which is relevant for the maximum sanctions.[47]

9.4. Limitation period

Regarding limitation periods, the Austrian legislation is in compliance with the Directive since the period foreseen for the most relevant tax offences is five years, and there are several circumstances which extend the period.[48]

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[45] Brandl–Leitner–Schrottmeyer–Toifl 2010, 21.
[46] Staffler 2018, 62.
[47] Kert 2019, 26; Auer–Siller–Spies–Zolles 2018, 945.
[48] Kert 2019, 26; Auer–Siller–Spies–Zolles 2018, 945.

THE NEED FOR A UNIFIED EU OFFENCE FOR VAT FRAUD

Dr. Franz Reger[*]

1. Preface

The title of this presentation may be misleading. The Directive 2017/1371[1] on the fight against fraud to the Union's financial interests by means of criminal law (hereinafter PIF Directive) already forces the Member States to harmonise their legislation relating to VAT fraud. So, the pressing question is how the Member States can manage the implementation of this Directive in their domestic legislation with respect to their legal tradition. Having this in mind, I will try to explain this challenge with view to the Austrian Fiscal Penal Law, restricted to the problems of formulating an offence conforming to the Directive. I want to start with a short look at the genesis of the harmonisation of VAT fraud.

2. VAT fraud: The long way into Directive 2017/1371

2.1. VAT and the protection of the financial interests of the EU

There has been a long dispute between the Member States on VAT as a PIF-relevant revenue. In its Explanatory Report[2] to the PIF Convention[3] the Council of the European Union explicitly noted that revenue from the application of a uniform rate to Member States' VAT assessment base is not included. This position has been justified with the fact that "VAT is not an own resource collected directly for the account of the Communities". Contrariwise the Commission always opposed this position of the Council, but the Member States in general implemented the Convention according to the interpretation of the Explanatory Report. Austria, too, followed this interpretation in shaping its legislation.

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[1] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [OJ L 198, 28.07.2017, 29–41].

[2] Explanatory report on the Convention on the protection of the European Communities' financial interests [OJ C 191, 23.06.1977, 1–10].

[3] Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests [OJ C 316, 27.11.1995, 48–57]; "PIF Convention".

Let us have a glance at the budgetary relevance of VAT:

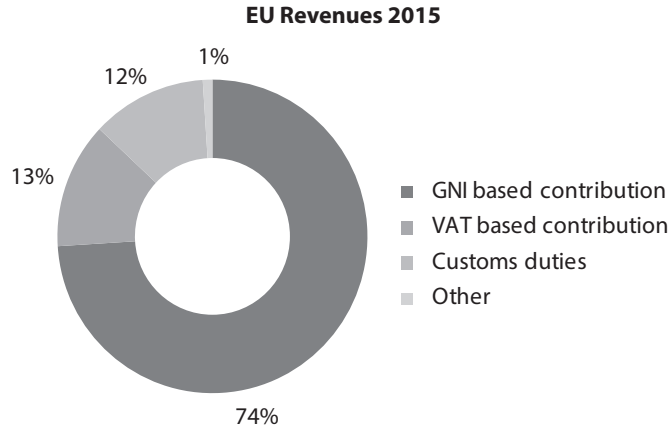

Figure 1: EU-Budget at a glance, 18.
Source: Directorate-General for Budget, 2015.06.08.

In 2015 VAT-based own resources of the EU amounted to about 13% of the total revenues. That is even a little more than Customs Duties contribute to the budget. It is not a huge but also not negligible part of the EU budget.

If we turn to a Member State's budget, the picture shows that only a tiny part of national VAT revenues is dedicated to the own resources of the EU.

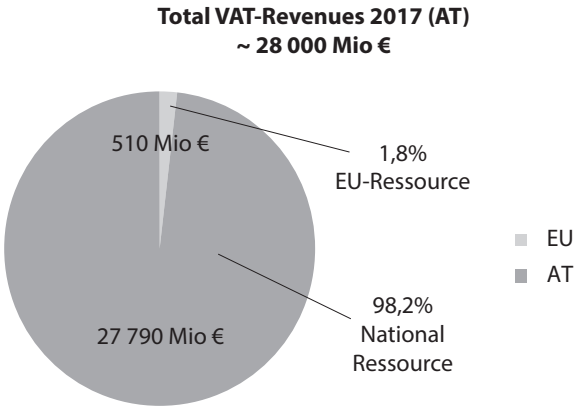

Figure 2: EK, Financial Report 2017; BMF-Calculations[4]
Source: Statistic Austria, Quarterly Data, 2001–2018[5]

[4] EK, Financial Report 2017; BMF-Calculations *https://www.bmf.gv.at/budget/budgetangelegenheiten-der-eu/181008BMF-Bericht_EU-Haushalt_FINAL.pdf?6o2q75* (29.01.2019).

[5] Statistic Austria, Quarterly Data, 2001-2018 *https://www.statistik.at/wcm/idc/idcplg?IdcService=GET_NATIVE_FILE&RevisionSelectionMethod=LatestReleased&dDocName=020005* (29.01.2019).

For Austria this part amounted in 2017 to only about 1.8% of the whole VAT revenues. In fact, VAT is at its core a national revenue, albeit fuelling the EU budget with a tiny part. However, this illustrates that efforts in combatting VAT fraud are in the vital interest of the member states themselves.

The legislative process of the PIF Directive reopened the discussion about VAT again. These debates had been deeply affected by the "Taricco" judgment of the European Court of Justice, Case C-105/14 from 8 September 2015.[6] In his findings (following the opinion of the advocate general[7]) the court rejected the narrow interpretation of the Council. According to this judgment, without doubt, the PIF Convention would be applicable to VAT, whereas the Explanatory Report would only express the opinion of the Council without any legal binding.

2.1.1. Compromise reached in the Directive

This judgment eventually triggered the legislative process in the direction to a compromise. So, VAT is now explicitly mentioned in Art. 2 of the PIF Directive, but the applicability is limited to "serious offences" [Art. 2(2)]. The meaning of "serious offences" in this context is defined as follows:

– Intentional acts or omissions as defined in Art. 3(2)d) (I will return to this later),
– Connected with the territory of two or more Member States and
– Involving a total damage of at least EUR 10 million.[8]

All these conditions have to be fulfilled.

The reached compromise is evidently focused on fighting cross-border VAT fraud. One could find this a poor outcome of long-lasting discussions, but this makes sense for some good reasons.

– *First:* This gave way to a legally binding minimum common understanding of what should be deemed as VAT fraud punishable as a criminal offence.
– *Second:* As shown above, VAT is in its core a national revenue, so national interests to combat fraud in this field prevail. On the other hand, large-scale VAT fraud is in general multinationally organised. That is why a national approach in tackling this kind of criminality comes up short.
– *Third:* The focus on cross-border criminality matches perfectly with the aim of the European Public Prosecutor's Office[9] whose competence derives from the PIF related offences.[10]

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[6] Judgement of the Court (Grand Chamber) of 8 September 2015 (Request for a preliminary ruling from the Tribunale die Cuneo – Italy) – Criminal proceedings against Ivo Taricco and Others (Case C-105/14) [ECLI:EU:C:2015:555; CELEX: 62014CJ0105] [OJ C 363, 3.11.2015, 11–12].

[7] Opinion of Advocate General Kokott delivered on 30 April 2015, Case C-105/14 [ECLI:EU:C:2015:293; CELEX: 62014CC0105].

[8] In my view, this threshold has to be calculated not only from the part contributing to the EU-budget but from the whole VAT-damage including the national part of the revenue.

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

[10] Although I know that the EPPO-Regulation gives an autonomous definition, mirroring the PIF-Directive.

2.2. VAT offences as defined in the Directive [Art. 3(2)d)]

Now, let's see what the defined common understanding of fraudulent conduct in respect to VAT is.

According to Art. 3(2)(d), the Directive stipulates three kinds of intentional behaviour (act or omission) as fraud affecting the Union's financial interest in respect to VAT:

(a) The use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as a diminution effect on the resources of the Union budget,

(b) Non-disclosure of VAT-related information in violation of a specific obligation, with the same effect or

(c) The presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of right to VAT refunds.

In addition, all these acts or omissions must be committed in cross-border fraudulent schemes.

As the Directive does not give a necessarily full definition of an offence, this compilation of threatening conduct has to be transformed into national law. Most national legislation provides for offences that comprise in their elements some or all of the elements defined in the Directive, and so does Austria.

3. VAT-related offences as defined in Austrian legislation

The Austrian legislation on fiscal offences is codified in the Fiscal Penal Act (Finanzstrafgesetz). And indeed, there are some definitions of fiscal offences covering most of the elements of VAT fraud according to Art. 3(2)d) of the Directive:

– Tax Evasion (Art. 33 FPA)
– Tax Crime (Art. 39 FPA)
– Misdemeanour in respect to VAT (Art. 49 FPA).

I provide a working translation of the related offences below:[11]

Tax Evasion (Art. 33 FPA)
"Art. 33 (1) Guilty of tax evasion shall be anyone who, in violation of a fiscal duty of notification, disclosure or trueness, intentionally brings about a reduction of taxes.
(2) a) Guilty of tax evasion is also anyone who intentionally brings about a reduction of value added tax (advance payments or credit) in breach of the obligation of advance notification according to Art. 21 Value Added Tax Act and considers this reduction not merely to be possible but certain.

...

(5) The evasion of taxes shall be punished with a fine of up to the twofold amount of the evaded taxes (or unjustified credits). This amount comprises only those taxes (unjustified credits) where the reduction was affected in connection with the irregularities which were part of the intention of the perpetrator. In addition to the fine, a custodial sentence up to two years shall be imposed subject to Art. 15."

[11] There exists no official translation, so I beg for indulgence. The official German version of the FPA is electronically available via *https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10003898.*

Tax Fraud (Art. 39 FPC)
"Art. 39 (1) Guilty of tax fraud shall be anyone who commits an offence of tax evasion, smuggling, evasion of import or export duties or duty fencing according to Art. 37 para. 1 falling under the jurisdiction of the court and
uses false or falsified documents, false or falsified data or other pieces of evidence, other than untrue tax declarations, registrations, notifications, records and determinations of taxable income, which are to be provided according to tax, monopoly or customs law or
uses fictitious deals or other fictitious acts (Art. 23 Federal Tax Act) or
...
(2) Guilty of tax fraud is also whoever, without fulfilling para. 1, commits an offence of tax evasion under jurisdiction of a court by claiming input VAT without underlying supplies of goods and services with the aim to obtain an unjustified tax credit."

Misdemeanour (Art. 49 FPC)
"Art. 49 (1) Guilty of a fiscal misdemeanour shall be anyone who intentionally
does not pay taxes which are to be self-assessed, especially advance payments of value added tax, at the latest on the fifth day after the due date, unless he gives notice to the tax authority in charge of the amount owed until that day; otherwise a pure failure to pay at due date is not punishable;
claims unjustified tax credits by submission of incorrect advance notifications (Art. 21 Value Added Tax Act 1994).
(2) A fiscal misdemeanour shall be punished with a fine of up to half the amount of the taxes not paid timely or of the tax credit claimed."

4. Implementation issues

4.1. Already compliant legislation

Analysing the elements of the Austrian offence of Tax Evasion, one can state, that Art. 3 para 2 sec. d) point (i) and (ii) of the Directive are covered:

The use or presentation of false, incorrect or incomplete statements or documents, as well as the non-disclosure of VAT-related information in violation of a specific obligation corresponding to the violation of a fiscal duty of notification, disclosure or trueness.

4.2. Necessary amendments

The implementation of the conduct as described in Art. 3 para 2 sec. d point iii seems to be more complicated. Austrian legislation does not know a criminal offence covering the mere payment of taxes. It provides only for a Misdemeanour in Art. 49 FPA if there is an intentional non- or non-timely payment of taxes to be self-assessed.

More seriously, the presentation of correct statements cannot create an offence according to the legislation in force as this is conduct in fulfilling a legal obligation. On the other hand, in the context of VAT fraud schemes as such – formally correct conduct – more and more the practice of "missing traders" is used to obscure their intention not to pay the VAT due. Moreover, criminal prosecution can be avoided as a favourable side effect because in much legislation such behaviour does not (yet) constitute an element of a fiscal offence.

At the end, this situation proves to be a considerable impediment in the fight against VAT fraud: In most cases the "criminal core" of a fraud scheme is centred on the missing trader. If there is no way to prove a criminal conduct at this point of a fraud-scheme there is actually no way to prosecute the whole system.

In effect, the Union-wide implementation of Art. 3(2)d(iii) as an element of an offence turns out to be a keystone for the effective combatting of VAT fraud.

Nevertheless, there remains a fundamental contradiction in criminalising a legally obliged behaviour, that is, the presentation of correct statements. This contradiction has to be resolved when defining a respective offence. In addition, there can be several reasons why due payment of VAT is impossible, e.g. lacking liquidity, accidents or other economic or factual circumstances, that are not sufficient for criminalising.

At a first glance, the wording of the Directive can probably lead to a solution. Criminalising the presentation of correct statements is limited to two conditions:

(a) it must be done as an act within a cross-border fraud scheme and

(b) it has to be aimed in fraudulently disguising the non-payment or wrongful creation of the right to VAT refunds.

The Directive puts the specific fulfilment of the legal obligation in a greater context, and by that makes it an element of a superior crime.

This means that – as a first step – you have to prove the existence of a fraudulent scheme wherein the filing of correct statements is "part of the game". After that – at the second step – you have to prove the fraudulent intent of the correct filing.

In practice, this leads to very complicated investigations due to the need of bringing about evidence for every step. Proving the fraudulent aim will be the most sophisticated burden as our experience with the similar shaped offence of "Fraudulent Registration to Social Security or the Construction Workers' Leave and Severance Payment Fund" (Art. 153d Austrian Penal Act) shows.

Is there an alternative way for implementation?

I think that focusing only on the element of "fraudulent VAT scheme" to shape the wording of a specific offence could be a sufficient. That means that if such a fraudulent system can be established, all intentional participation should constitute criminal conduct. Under this circumstance, it would not be necessary to prove fraudulent intent in producing correct statements.

What remains is the need of a legal definition of a "fraudulent scheme". Without that the offence would lack the demand for a sufficient degree of determination.[12] Possible elements of this definition:

– Production of a diminution of the resources of the Union budget
– Predetermination of the chain of purchases
– Certain degree of organisation

[12] Art. 7 European Convention on Human Rights; Art. 49(1) Charter of Fundamental Rights of the European Union.

5. Remaining challenges in combatting international VAT fraud

5.1. VAT fraud involving third countries

The Directive establishes minimum standards concerning the definition of criminal offences with regard to combatting fraud (see Art. 1). This builds a common understanding between the Member States and – hopefully – leads to powerful cooperation in fighting VAT fraud. But fraudulent conduct is not limited to the EU. More and more serious threats to VAT revenues come from fraud schemes managed from outside the Union, so a more global approach is necessary to improve international cooperation between the tax authorities, as well as between the legal enforcement agencies.

5.2. Necessary improvements of the VAT System

Fraudulent schemes are shaped around the weak points of the European VAT System. The response by criminal prosecution is only half of the battle. Far more effective than criminal action in securing VAT revenues would be the reshaping of the VAT System Directive in the way of closing the "input tax deduction play" between business operators.

Having in mind the long-lasting discussions on this topic and the complicated technical issues to be solved, and in view of the latest amendments to the VAT System Directive,[13] there will be less movement in this direction. However, I cannot withstand touching this sore spot once more.

6. Conclusion

Coming to the end, allow me to sum up the key aspects of my presentation.

(a) Despite the predominant national character, combatting serious VAT fraud demands an international approach

(b) The reached compromise in explicitly addressing VAT fraud within the PIF Directive is a proper and effective approach to creating a common understanding of the essential elements of VAT offences.

(c) Implementing the Directive's minimum rules concerning the definition of a criminal VAT offence in national legislation remains a challenging task as shown regarding the contradictory definition of Art. 3 para 2 sec. d point iii.

(d) In a further step, cooperation with third-party countries in fighting VAT fraud has to be extended.

(e) In my view, a highly effective measure combatting VAT fraud would be to fix the loophole of input tax deduction within the chain of business operators.

[13] E.g. Council Directive (EU) 2018/2057 of 20 December 2018 amending Directive 2006/112/EC on the common system of value added tax as regards the temporary application of a generalised reverse charge mechanism in relation to supplies of goods and services above a certain threshold [OJ L 329, 27.12.2018, 3–7].

Germany

THE FIGHT AGAINST VAT FRAUD IN GERMANY

Prof. Dr. Gerhard Dannecker[*]

1. Introduction

Criminal tax law in the European Union remains a domain of national law. Despite the competences granted in Art. 325 TEU, the European Union has refrained from harmonising the laws of the Member States relating to fraud and criminal tax offences. Nevertheless, the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law contains criminal law provisions, which Member States are obliged to implement in their national law system. For Germany, the Federal Government initially assumed that there was no need for implementation in this respect with the exception of certain amendments in the field of combating subsidy fraud. Ultimately, however, the German legislator passed its own criminal side-law to protect the financial interests of the European Union.[1] This step is not least intended to facilitate the work of the European Public Prosecutor's Office.

Germany has a uniform offence for tax and customs evasion, which is also applicable to VAT evasion:

Section 370
Tax evasion
(1) A penalty of up to five years' imprisonment or a monetary fine shall be imposed on any person who
1. furnishes the revenue authorities or other authorities with incorrect or incomplete particulars concerning matters that are relevant for tax purposes,
2. fails to inform the revenue authorities of facts that are relevant for tax purposes when obliged to do so, or
3. fails to use revenue stamps or revenue stamping machines when obliged to do so
and as a result understates taxes or derives unwarranted tax advantages for himself or for another person.
(2) Attempted perpetration shall be punishable.
(3) In particularly serious cases, a penalty of between six months and ten years' imprisonment shall be imposed. In general, a particularly serious case is one in which the perpetrator

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[1] „Gesetz zur Umsetzung der Richtlinie (EU) 2017/1371 des Europäischen Parlaments und des Rates vom 5. Juli 2017 über die strafrechtliche Bekämpfung von gegen die finanziellen Interessen der Union gerichtetem Betrug" of 19 June 2019, BGBl. I., 844.

1. deliberately understates taxes on a large scale or derives unwarranted tax advantages,

2. abuses his authority or position as a public official or European public official (section 11(1) number 2a of the Criminal Code),

3. solicits the assistance of a public official or European public official (section 11(1) number 2a of the Criminal Code) who abuses his authority or position,

4. repeatedly understates taxes or derives unwarranted tax advantages by using falsified or forged documents, or

5. as a member of a group formed for the purpose of repeatedly committing acts pursuant to subsection (1) above, understates value-added taxes or excise duties or derives unwarranted VAT or excise duty advantages.

6. uses a third-country company (as defined in section 138(3)) over which he can directly or indirectly exercise controlling or decisive influence alone or jointly with related parties (as defined in section 1(2) of the External Tax Relations Act), where such use is for the purpose of concealing facts that are relevant for tax purposes and in this way understating his taxes or obtaining unwarranted tax benefits on an ongoing basis.

(4) Taxes shall be deemed to have been understated in particular where they are not assessed at all, in full or in time; this shall also apply even where the tax has been assessed provisionally or assessed subject to review or where a self-assessed tax return is deemed to be equal to a tax assessment subject to review. Tax advantages shall also include tax rebates; unwarranted tax advantages shall be deemed derived to the extent that these are wrongfully granted or retained. The conditions of the first and second sentences above shall also be fulfilled where the tax to which the act relates could have been reduced for other reasons or the tax advantage could have been claimed for other reasons.

(5) The act may also be committed in relation to goods whose importation, exportation or transit is banned.

(6) Subsections (1) to (5) above shall apply even where the act relates to import or export duties which are administered by another Member State of the European Communities or to which a Member State of the European Free Trade Association or a country associated therewith is entitled. The same shall apply where the act relates to value-added taxes or harmonised excise duties on goods designated in Article 3(1) of Council Directive 92/12/EEC of 25 February 1992 (OJ L 76, 1) which are administered by another Member State of the European Communities.

(7) Irrespective of the lex loci delicti, the provisions of subsections (1) to (6) above shall also apply to acts committed outside the territory of application of this Code.

2. VAT fraud as a new type of offense: "Tax evasion as a business"

The classic cases of tax evasion are now being replaced by aggressive, enrichment-oriented criminal offences. Particularly in the case of VAT, which in Germany accounts for about one third of German tax revenues, structures have developed that can be described as "tax evasion as a trade" ("Steuerhinterziehung als Gewerbe").[2] A German journalist described this vividly with the words: "The EU - a gold mine for fraudsters".[3]

The harmonised turnover tax in the European Union is carried out as net all-phase taxation at every level of trade.[4] In order to avoid competition being distorted by turn-

[2] Joecks 2002, 201, 203 f.; BGH NStZ-RR 2007, 176 f.; NJW 2005, 374, 375.

[3] Ott 2013.

[4] Birk–Desens–Tappe 2014, Rn. 1671 ff., 1678 ff.; Lippross 2012, 61 et seq.; Muhler 2009, 1, 2 et seq.

over tax and turnover tax culminating excessively, the entrepreneur can deduct his input turnover from output turnover. If the input sales were higher than the output sales, he receives the input sales fully reimbursed, for which the approval of the tax authority is required.[5] This system of input tax deduction of entrepreneurs is systematically abused by the perpetrators in order not to pay VAT or in order to recover input tax unduly and without justification from the tax authority. VAT-fraud can amount to the effective payment of a turnover tax not previously paid to the state.[6]

2.1. VAT carousels and drop-ship transactions as leading cases of "tax evasion as a business"

Typical manifestations of VAT evasion are so-called VAT carousels,[7] which enable those involved to enrich themselves at the taxpayer's expense.[8] In recent years, carousel transactions in emission certificates have attracted a great deal of attention due to the extremely high loss sums involved.[9] The term "carousel transaction" is used to describe the basic pattern of those acts which, like a carousel, can cause fictitious deliveries to circulate several times across the internal borders of the EU.[10]

At the beginning, an entrepreneur from a foreign EU country usually delivers goods that are easy to transport to another entrepreneur, the so-called missing trader, in Germany as a tax-free intra-Community delivery in the country of origin. Although the missing trader is subject to the taxation of intra-Community acquisitions, it is offset by an input tax deduction of the same amount. The missing trader essentially functions as a fictitious company, but is duly registered with the tax office. This fictitious enterprise delivers the goods in Germany to another entrepreneur, the so-called distributor, at an often only small surcharge and issues a corresponding invoice authorising this entrepreneur to deduct input tax. A VAT claim arises, which the missing trader does not pay as planned and which cannot be enforced because the missing trader cannot be found or is insolvent.[11] All input taxes are systematically claimed, but not all VAT debts are paid. The profit margin of the participants is fed by the input tax deduction which the distributor can claim in the amount of the turnover tax owed by the missing trader.

To cover up, further companies can be brought in, which can also be in good faith. If they know or should have known about the evasion, they will be denied the right to deduct input tax because of abuse. If they still make it valid, they are committing a tax evasion.

Today, drop shipment business is increasingly used to reduce VAT. In these cases, the goods are also delivered to a missing trader. After the missing trader has sold the

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[5] Lippross 2012, 59 et seq.; Birk–Desens–Tappe 2014, Rn. 1739 et seq.

[6] Reiß 2002, 561 et seq.; Lippross 2012, 61 et seq.; Muhler 2009, 1, 2 et seq.

[7] Lippross, 61 ff.; Bergmann 2008, 1 ff., 245 f.; Nordhoff 2009, 38 ff.; Gaede margin no 4 et seq.

[8] Bundestags-Drucksache 14/7471, 8.

[9] *http://www.sueddeutsche.de/geld/emissionshandel-grossbetrug-tango-mit-der-deutschen-bank-1.1068304; http://www.zeit.de/wirtschaft/2011-03/umsatzsteuer-betrug-bank;* Wegner 2010, 89 f. and with the sum of 260 million BGH DStR 2013, 140.

[10] Bielefeld 2007, 9; Tormöhlen 2013, § 26b margin no. 3.

[11] BGH NStZ 2003, 528; BGHSt 47, 343, 353 et seq.; BGH NJW 2011, 1616.

goods, the service recipient immediately realises the advantage gained by selling the goods at a reduced price to an end customer at a higher price and deducting the input tax from the previous input turnover. Both sales – tax carousels and drop shipments – cause monetary damage for the state and distortions of competition, which are detrimental to competitors. It is therefore essential to combat these forms of crime by means of criminal law.

2.2. Jurisdiction of the European Court of Justice on the abuse of rights in the system of VAT law

The German offence of § 370 AO requires an incorrect or incomplete declaration to the tax authorities or a failure to inform the tax authorities in accordance with a duty to do so, which in every case must result in a tax loss. The prerequisites for criminal liability are normative elements of the offence, which are to be determined with recourse to substantive tax law. Here, the interpretation of VAT law by the ECJ is binding for national criminal law. This means that the ECJ influences and determines the national criminal law by its tax decisions on the abuse of rights in connection with VAT. This is of particular practical relevance, because there is probably no other area of criminal law in which the jurisprudence of the European Court of Justice has such a great significance, such as in proceedings under criminal VAT law. This is based on the structure of tax evasion, which refers to substantive tax law by means of elements such as "substantial tax information" or "tax abbreviation". Insofar as national tax law is referred to, the relevant provisions of the VAT System Directive, as interpreted by the European Court of Justice, are at the same time referred to by the offence of tax evasion.

The case law of the European Court of Justice, which is to be applied in particular in determining the damage of the offense, raises problems in criminal law above all if the abolition of the tax exemption is based on arguments that bring the tax consequences close to a sanction. The offenses neither of fraud nor of tax evasion protect the sanction claims of the state. From the perspective of tax evasion, however, the object of the offence is not the abolition of the tax exemption but the German VAT claim. The claim arising from the rejection of a tax-exempt intra-Community supply is a tax claim which, in German law, also serves the purpose of establishing state revenues and thus assets. However, this is an asset position which cannot be denied a purpose which also serves to constitute assets. Therefore, it is basically possible to adapt the protection of German criminal tax law to the case law of the European Court of Justice on VAT law.

3. Criminal law revisions by the German legislator to better combat VAT evasion

Beyond the amended interpretation of VAT law by the ECJ, the German legislator has made several amendments to the law since 2001 in order to take account of developments in crime in the field of VAT. In doing so, it has largely refrained from creating a special criminal law for value-added tax and has introduced general penalties which

apply to all customs and tax evasions. This leads to a greater independence of criminal tax law from fraud, which also serves to protect the financial interests of the European Union on the expenditure side.

3.1. Reaction of the legislator in 2001

3.1.1. Introduction of "commercial and gang tax fraud" as a felony (Verbrechen) without connection to VAT fraud by the German legislator in 2001

The guiding principle, which the German legislator also based its legislation on in 2001, is the so-called VAT carousel. According to the legislator, those involved in this constellation of crimes want to enrich themselves as long as possible without restraint at the taxpayer's expense. In addition to classic sales tax evasions, which have related, for example, to trade in scrap metal, there are also special forms of carousel business with emission certificates, which have led to extremely high damage sums of approx. 850 million euros.

In order to counter such developments in the field of VAT evasion, the German legislature introduced by the Act to Combat Tax Reductions in Value Added Tax and to Amend Other Tax Acts (Tax Reductions Combat Act)[12] includes the offence of commercial and gang tax fraud and increased the penalty range from up to five years imprisonment to between one and ten years imprisonment.[13] Tax evasions under the mentioned aggravating circumstances are felonies (Verbrechen).[14] This penalty framework applies if the perpetrator reduces taxes or obtains unjustified tax benefits for himself or another person on a commercial basis (gewerbsmäßig) or as a member of a gang (als Mitglied einer Bande) that is associated with the continued commission of such offences.

The purpose of this new rule was to include "tax evasion as a business activity". However, the indiscriminate linkage of the newly introduced elements of the offence to each case of tax evasion did not guarantee a link to the special constellations of VAT evasion. The tightening of the rules applied to all cases of tax evasion and therefore proved to be too drastic. Because the classic cases of tax evasion are aimed at not having to pay taxes from one's own assets. On the other hand, VAT evasion is an aggressive behaviour aimed at enriching the assets of others. It is not only about the goal of tax savings, but also about making it possible to earn additional income from the value added tax to which the state is entitled and which the taxpayer has collected for the state.

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[12] Gesetz zur Bekämpfung von Steuerverkürzungen bei der Umsatzsteuer und zur Änderung anderer Steuergesetze (Steuerverkürzungsbekämpfungsgesetz) / Value Added Tax Reduction Act.

[13] BGBl. I 2001, 3922, 3924. To the corresponding motivation Meyer 2002, 879, 881; Schneider, 23 et seq.; Wulf, § 370a margin no. 1. Bundestags-Drucks. 14/7470.

[14] § 12 penal code: "Crimes and misdemeanours.

(1) Crimes are unlawful acts which are punishable by a minimum term of imprisonment of one year or more. (2) Misdemeanours are unlawful acts which are punishable by a lower minimum term of imprisonment or a fine."

3.1.2. Introduction of a criminal offence and an administrative offence (Ordnungswidrigkeit) of damage to turnover tax revenue

In addition, in 2001 the German legislator introduced new sanction provisions by means of the German Value Added Tax Reduction Act (Umsatzsteuerverkürzungsbekämpfungsgesetz) in order to improve the protection of the VAT income.

§ 26c VAT Act (Umsatzsteuergesetz)

Commercial or gang damage to sales tax revenue
A custodial sentence of up to five years or a fine shall be imposed on anyone who, in the cases of § 26b UStG, acts on a commercial basis or as a member of a gang that has committed itself to the continued commission of such acts.

§ 26b VAT Act (Umsatzsteuergesetz)

Damage to sales tax revenue
(1) A person who does not pay or does not pay in full the turnover tax shown in an invoice within the meaning of section 14 at a due date specified in section 18 (1) sentence 4 or (4) sentence 1 or 2 is in breach of regulations.
(2) The administrative offence may be punished by a fine of up to fifty thousand euros.

The new criminal offence penalises the case of commercial or gang action already in the event of non-payment of a VAT due, which is shown in an invoice. Non-payment in the context of organised crime should be punishable because it can lead to a dangerous imbalance in the VAT system and distortion of competition due to the deduction of input tax. The injustice consists in a combination of non-payment of the tax as a form of financial damage or endangerment and the nature of the damage, which does not have to fulfil the condition of fraud. This complements the injustice of tax evasion with a more general damage offence. This is a preliminary offence to tax evasion, which leads to an advance transfer of the investigative powers under criminal tax law.

3.2. Reaction of the legislator in 2002: Regulation for particularly serious cases

Therefore, after only half a year, the law was amended again and its classification as a felony was retained, but the content of the offence was restricted. Tax evasion was now punished with a prison sentence from one year to ten years in cases of tax fraud if the offender reduces taxes or obtains unjustified tax advantages (for himself or another person) on a large scale (großes Ausmaß), insofar as he acts as out of gross self-seeking (aus grobem Eigennutz), on a commercial basis (gewerbsmäßig) or as a member of a gang (als Mitglied einer Bande) whose purpose is the continued commission of tax fraud. For minor cases, a penalty range of three months to five years imprisonment was provided.

By cumulatively adding the requirement of tax evasion on a large scale (which regularly means a significant increase in the injustice committed), the legislator wanted to

limit the excessive scope of the wording of the law to serious cases. And once again, the legislator refrained from limiting qualified tax fraud to evasion of VAT. Once again, the legislator refrained from limiting qualified tax evasion to VAT evasion.

As before, the new offence came under criticism, in particular because the feature of the large scale was too vague and it was unclear whether several offences could be added together.[15] 795 The German Federal Court of Justice took up this criticism in an obiter dictum.[16] Therefore, the legislator withdrew the classification as a felony by the "Law on the New Regulation of Telecommunications Surveillance and Other Concealed Investigation Measures as well as on the Implementation of the Directive 2006/24 EC"[17] 800 and pursued a new path without giving up his criminal law policy objectives.

3.3. Reaction of the legislator in 2007

The legislator drew consequences from this development. It repealed the crime of § 370a of the Tax Code as of 31.12.2007, but retained the criminal policy objectives pursued to date. He changed his strategies to the extent that he now abolished the qualification of tax fraud and introduced "particularly serious cases" of tax evasion. In particularly serious cases, a penalty of between six months and ten years of imprisonment shall be imposed. In general, a particularly serious case is one in which the perpetrator (section 370 (3) No 1) deliberately understates taxes on a large scale or derives unwarranted tax advantages – as a member of a group formed for the purpose of repeatedly committing acts pursuant to subsection (1) above – understates value-added taxes or excise duties or derives unwarranted VAT or excise duty advantages. With section 370(3) No 5 of the tax code the legislator has created a special regulation for value-added taxes. The characteristic of gross selfishness ("grober Eigennutz"), which had previously been required cumulatively, was abandoned in order to bring about a significant increase in the penalty. Therefore, any large-scale tax evasion was now a particularly serious case, punishable by at least six months to ten years imprisonment.

With the introduction of "particularly serious cases", the legislator refrained from classifying the serious cases of tax evasion as felonies, but achieved an intensification of the penalty, comparable to the penalty for a felony (imprisonment of up to 10 years). In addition, the limitation period for particularly serious cases was increased from 5 to 10 years and special investigative measures (telephone tapping) were introduced. The legislator has thus achieved its goal to treat severe VAT fraud like a felony.

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[15] See Harms 2003, 413, 419 et seq.; Schneider 2006, 276 et seq.

[16] See BGH NJW 2004, 2990, 2991 et seq.; 2005, 374, 375 et seq.; wistra 2004, 274; 2005, 147, 148; approving Ransiek 2008, 171, 176 et seq.; Harms 2003, 413, 419 et seq.; distanced BGHSt 53, 71, 83:

This may be different with the use of the term large scale as a constituent element of a crime."; differing view Schneider 2006, 288 et seq., who refers to the previous, supposedly concrete interpretation of § 370 III 2 No. 1 AO, old version, although the legislature only found the overall assessment requirement for the crime (!) in this respect without concretisation.

[17] BGBl. I 2007, 3198, 3209.

4. Conclusion

The classification of the cases of organised VAT fraud in Germany as an offence is unsatisfactory. The crime structures show a high degree of organisation of the groups involved and also show a strict business acumen, since the crimes are carried out as professional business. The organised "tax evasion as a trade" generally arises from a crime pattern of particularly severe quality. This is essentially based on the fact that the fraudulent exploitation of the input tax deduction not only makes it possible to reduce one's own tax burden, but can also cause the final authorities to damage themselves and enrich the perpetrators, in particular through input tax refunds. Many creative models are being developed which reduce the VAT revenue with immense effects. The classical tax evasion is today only one of two divergent basic patterns of tax evasion beside crime samples, which reduce the own tax burden by the unjustified repayment of performed sums and by reducing the value-added taxes. The new case groups are characterised by the fact that the perpetrators attack the fiscal revenue of the state with the means of tax law.

Tax law must react to these grievances. The ECJ does this by referring to the general idea of abuse of rights in such cases and deriving far-reaching tax corrections from this. According to the German understanding, there are reservations against this method as a strict principle of legality is demanded in tax law. If this requirement of the rule of law were met at the level of the European Union, criminal tax law could be directly linked to this in order to substantiate the punishable duty to declare significant tax facts and the reduction of taxes as criminal damage.

The vagueness of the interpretation by the European Court of Justice extending criminal liability is not without problems. The constellation of disguised intra-Community supply shows exemplarily the demanding intensification in which criminal law, tax law, constitutional law and Union law develop. In criminal law in particular, predictability standards must be taken into account here, which under certain circumstances lead at least to marginal corrections of the ECJ case law.

If one compares the protection of the EU's revenues regarding tax evasion with the protection of the expenditure side regarding fraud, frictions arise. Preparatory measures for qualified fraud, for example, are punishable because it is a crime, but not in the case of highly organised VAT carousels. In this respect, the EU's revenues or protected more extensively against fraud than against tax evasion. In addition, the abolition of the crime of tax fraud in individual cases enables dubious suspensions of proceedings (against the imposition of a fine) in accordance with section 153a German Code of Criminal Procedure (Strafprozessordnung – stop), which are eliminated in the case of qualified fraud. This is of central importance especially if the suspension is against payment of a fine and it turns out afterwards that it was a serious case. Only if the serious tax evasion provide to be a felony, the legal force of the decision under the law would not stand in the way of a reopening of criminal prosecution and a new decision. However, since the legislator has only introduced one offence in the area of tax evasion, which is a misdemeanor, a breach of the principle of legal validity in such cases is not permissible.

One of the main tasks for the German legislator will be to distinguish VAT evasion, which is carried out exclusively as a "criminal trade", from VAT evasion in connection with legal business conduct. To draw a clear distinction is associated with serious difficulties. In particular, this requires the elaboration of specific criteria which increase unlawfulness and which can be used to distinguish between tax evasion and tax fraud. Here, the criminal tax law regulations of the other member states on VAT evasion and VAT fraud are to be used for comparative legal purposes.

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THE CRIMINAL LAW PROTECTION OF THE FINANCIAL INTERESTS OF THE EUROPEAN UNION – SPECIAL ISSUES: VAT FRAUD EXPERIENCE FROM GERMANY – PRACTICAL PROBLEMS AND ANSWERS IN THE PROSECUTOR'S PRACTICE

Kai Sackreuther[*]

1. Basics of the punishment of VAT fraud in Germany

VAT fraud has always been a criminal offence in Germany under § 370 Abgabenordnung (AO, German Fiscal Code) as a special form of VAT evasion.

§ 370 (1) and (2) AO reads as follows:

(1) A penalty of up to five years' imprisonment or a monetary fine shall be imposed on any person who

1. furnishes the revenue authorities or other authorities with incorrect or incomplete particulars concerning matters that are relevant for tax purposes,
2. fails to inform the revenue authorities of facts that are relevant for tax purposes when obliged to do so, or
3. fails to use revenue stamps or revenue stamping machines when obliged to do so

and as a result understates taxes or derives unwarranted tax advantages for himself or for another person.

(2) Attempted perpetration shall be punishable.

In particular, the VAT fraud is also recorded in § 370 (3) No. 5 AO as a particularly serious case of tax evasion since 1 January 2008. The penalty of between six months and 10 years' imprisonment shall be imposed.

In addition, on 1 January 2005, § 26c Umsatzsteuergesetz (UstG, German VAT Law) was also introduced in response to the increase in VAT fraud. There, the failed payment of VAT is penalised if the person acts as a member of a group formed for the purpose of repeatedly committing such omissions. In my opinion, this offence covers facts as described in Art. 3 II d) iii) Directive (EU) 2017/1371. In such cases, a penalty of up to five years' imprisonment or a monetary fine shall be imposed.

Usually, the limitation period in cases of tax evasion in Germany is five years.[1] Specifically for acts within the meaning of § 370 (3) AO, however, the limitation period is 10 years.[2] The same applies if the tax evaded is more than EUR 50,000, so in cases of VAT fraud, usually a statute of limitations of 10 years applies.

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[1] § 78 (3) No. 4 German Criminal Code (StGB).

[2] § 376 (1) AO.

Therefore, in my opinion, in Germany there is no need to modify the legal regulation with regard to Directive (EU) 2017/1371.

2. Changes in the VAT fraud structure in Germany

For a long time in Germany all levels of a VAT carousel (missing trader, buffer, distributor) were observed. Affected on the one hand was the trade in high-priced CPUs and mobile phones. On the other hand, massive scams were detected in the metal trade, especially in copper and gold. Large damage in Germany was also caused in connection with the trade of greenhouse gas emission allowances. In this area in particular, it was noticeable how quickly the criminal organisations were able to react to changes in the law. After the VAT rate was set to 0 percent in the United Kingdom, fraudulent trade suddenly moved from there to Germany.

This development is also evidenced by the following table:

Table 1: Development of the VAT fraud structure in Germany

Year	VAT Evasion	Changes %	Other Tax Evasion	Changes %	VAT Fraud Proportion %
2003	491	29.6	1,629	5.7	30.14
2004	539	9.8	1,613	–0.9	33.42
2005	591	9.6	1,658	2.8	35.65
2006	558	–5.6	1,434	–13.5	38.91
2007	575	3.0	1,604	11.9	35.85
2008	514	–10.6	1,475	–8.1	34.85
2009	625	21.6	1,566	6.2	39.91
2010	702	12.3	1,746	11.5	40.21
2011	984	40.2	2,229	27.7	44.15
2012	2,048	108.1	3,080	38.2	66.49
2013	1,013	–50.5	2,051	–33.4	49.39
2014	1,011	–0.2	2,451	19.5	41.25
2015	1,406	39.1	3,025	23.4	46.48
2016	1,407	0.1	3,180	5.1	44.25
2017	718	–49.0	2,900	–8.8	24.76
SUM	**13,182**		**31,641**		**41.66**

Source: Federal Ministry of Finance; www.bundesfinanzministerium.de

The especially high increase in the years 2011 and 2012 is the result of large investigations regarding VAT fraud in gold trading and on the market of greenhouse gas emission allowances. When analysing the table, it must be considered that the table are recorded in the year in which the investigations were completed, not in the year the tax evasion actually happened. For this reason, the sharp declines in 2013 and 2017 alone prove that the criminal market has reorganised and that new investigations are needed to identify the new crime areas of VAT fraud. Unfortunately, a new increase is expected in 2018 or 2019.

A similar development can now be observed in Germany after the reverse charge procedure was established in the trading sectors where fraud had been particularly massive. After the reverse charge procedure was established in Germany in trading sectors with fraud-prone goods, the organisers of VAT carousels were no longer interested in installing missing traders in Germany in these sectors. However, the existing business structures were used to place so-called in-and-out buffers. They receive goods from a supplier that is a resident in another Member State. This delivery is exempted from VAT, and the same goods are supplied immediately to a missing trader in another Member State who is also exempted from VAT. Often these in-and-out buffers now supply missing traders in Eastern European countries. The traded goods remain the same. In place of the previous fraud-prone goods, VAT carousel deals in Germany can now be found in other markets. For that reason, it is difficult to identify the new fraud-prone markets and the new targets of VAT fraud. It is a never-ending race between the criminals and prosecutors.

3. Criminal liability for in-and-out buffering

Regardless, the question is how in-and-out buffering is punishable. From a legal point of view, the action of these in-and-out buffers is – first of all – aiding the fraudulent activities in the countries of destination. The in-and-out buffer assists the missing trader and the organiser of the tax evasion in the other Member State. Although this aiding mainly occurs in the state of destination, where the VAT is also primarily evaded, this aiding is punishable by § 370 (6) AO by German prosecutors. § 370 (6) AO provides that a person may be liable for prosecution for tax evasion in Germany who evades taxes that are administered by another Member State. That is an important exception in German tax law. Usually only the evasion of German taxes and not of taxes in other countries is punishable as tax evasion in Germany. There are only two other exceptions by § 370 (6) AO: duties and excise duties administered by another Member State.

But in addition to aiding the tax evasion in the other Member State, the in-and-out buffer also commits tax evasion in Germany. According to the ruling of the European Court of Justice in case R,[3] the exemption from VAT for an intra-Community supply must be refused if the supplier has concealed the identity of the true purchaser upon delivery in order to enable him to evade VAT. That is exactly what happens when the in-and-out buffer supplies the goods to a missing trader. Because of that, the exemption from VAT for this intra-Community supply must be refused. If the in-and-out buffer nevertheless invokes the tax exemption in his tax return, he furnishes the revenue authorities with incorrect particulars concerning matters of substantial significance for taxation. As a result, he also understates taxes because fraudulent intra-Community supply is not VAT-exempt. The in-and-out buffer has to pay the regular VAT for this

[3] ECJ Case C-285/09 „R“ [2010].

supply to the German state. So in the end, there are two offences: the aiding in the other Member State and the tax evasion by the in-and-out buffer by himself.

But unlike, for example, in Austria,[4] there is no explicit rule in Germany that denies the tax exemption in such cases. The tax exemption in Germany is denied solely on the case law of the European Court of Justice. Based on that, German VAT law must be interpreted in the sense of the case law of the European Court of Justice, and this interpretation leads to criminal liability for tax evasion.[5] Likewise, the person who has lost his right to deduct VAT based on the case law of the European Court of Justice[6] incurs a penalty in Germany if he still claims non-deductible VAT input, although there is no written law prohibiting it.[7]

That is the reason why it is alleged that these grounds of criminal liability violate Art. 103(2) of the German Constitution (Grundgesetz) and Section 1 of the Criminal Code. These rules state that an act may be punished only if it was defined by a law as a criminal offence before the act was committed.[8] However, the German Federal Constitutional Court rejected this view with a decision in 2011. The German Federal Constitutional Court decided that the conviction for tax evasion does not violate the Basic Law in a case such as the one underlying the decision of the European Court of Justice in the case R.[9]

In summary, it can be said that the decisions of the European Court of Justice aimed at combatting VAT fraud are fully applicable to German criminal tax law. Deficits do not exist in this respect.

4. Practical problems in handling VAT fraud cases

Also, the procedural means given to the German prosecutors contribute to an effective fight against VAT fraud. In particular, we have had the possibility of telephone wiretapping since 2008 in serious cases of VAT fraud. Wiretapping has proven to be a very important instrument in law enforcement. Nevertheless, the prosecution of organised VAT fraud often proves to be difficult, especially with cross-border issues. On the one hand, it would be desirable if there were more coordinated cooperation between the Member States. Often, the prosecutor of one Member State focus too much on their own case. In the end, there are only uncoordinated requests for legal assistance. That holds the danger that members of cross-border criminal organisations are warned and can remove important evidence.

[4] See § 29 (8) öUStG and Art. 6 (1) sent. 2 Anhang (Binnenmarkt), see also § 12 (14) öUStG concerning the right of deduct.

[5] Jäger 2018, § 370 margin no. 372.

[6] ECJ, Case C-439/04 Kittel and Recolta [2006]; Case C-131/13 Italmoda [2014]: the national court has to refuse a taxable person entitlement to the right to deduct, who knews or should has known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of value added tax.

[7] BGH, judgment dated 08.02.2011 – 1 StR 24/10.

[8] Nulla poena sine lege.

[9] BVerfG 16.06.2011 − 2 BvR 542/09.

In addition, uncoordinated prosecution carries the great danger that prosecution is barred in Germany because of the "ne bis in idem" principle, the right not be punished twice for the same criminal offence, as defined in Art. 50 Charter of Fundamental Rights and in Art. 54 Schengen Agreement. In this context, the decision of the European Court of Justice in the case Kretzinger[10] is important. Although this decision is based on a case of cross-border cigarette smuggling, the principles there can also apply to cross-border VAT evasion. I myself am working on a case in which I have accused a German car dealer of tax evasion because he claimed tax exemption for fraudulent intra-Community supplies of cars to Italy. Because of these supplies, he was also charged in Italy with aiding tax evasion. There, the procedure was terminated because of limitation. Therefore, in the opinion of the German court, tax evasion committed in Germany also can no longer be punished, although in Germany no statute of limitations has yet occurred. In the opinion of the German court, the wrong tax return and the aiding of the fraudulent practice in the other Member State are the same criminal offence, even though they took place at different times and in different places.

According to the case law of the German Federal Court of Justice, especially in Germany, there is an even higher risk that a penalty in the other Member State for the aiding there could barred from prosecution in Germany. Based on case law, every false VA return of one assessment period is part of the same criminal offence, so every preliminary VAT return and the annual VAT return are part of the same offence.[11] In the end, one penalty for aiding in another Member State during one preliminary VAT period may bar prosecution for a whole year.

5. Conclusion

In Germany, VAT evasion is one of the most common forms of tax evasion. It causes significant damage every year. From a legal point of view, the prosecution authorities have sufficient possibilities for reacting. In Germany there is no need to modify the legal regulation with regard to Directive (EU) 2017/1371.

However, criminal prosecution often proves difficult. This initially follows on the one hand from the fact that the markets that are the target of VAT fraud often change. In addition, cooperation in cross-border cases is proving difficult. At least in Germany, it also poses legal difficulties that jeopardise effective prosecution. For that reason, knowing the different legal situations in the Member States and better coordination of investigations are important prerequisites to effectively combat cross-border cases of VAT fraud.

[10] ECJ, judgment dated 18. 7. 2007 - C-288/05 – case Kretzinger.
[11] BGH, 24. 11. 2004 - 5 StR 206/04.

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THE NEED FOR A UNIFIED EU OFFENCE FOR THE ISSUE OF BOGUS INVOICES

Kai Sackreuther[*]

1. Changes of issuing bogus invoices

The issuing and using of bogus invoices for the purpose of tax evasion has a long tradition. However, this phenomenon was downplayed for a long time. There was nothing fishy about buying a private bedroom wardrobe and getting an invoice for office furniture. It did not gnaw at the teacher's conscience if her new designer handbag metamorphosed into a briefcase. And in my bookstore, I was always asked if I need a bill of a law textbook, even if I had just bought the latest Marvel comic.

Mens rea does not really exist in this context. If only there were a possibility of declaring some more tax-allowable expenses. Tax evasion was – if it even was recognised – classified as a trivial offence. The bogus bills are trivialised as a helpful complaisance.

This public perception matched at first glance with the fact that in Germany the issuing of bogus invoices is only sanctioned as an administrative offence under § 379 of the German Fiscal Code. But only at first glance. It must not be forgotten that the person issuing a bogus invoice is also committing a crime. The issuance of a bogus invoice is criminal aiding of tax evasion if the addressee uses the bogus invoice in his tax declaration to claim tax-allowable expenses or to deduct VAT. In that regard, the issuing of bills was always punishable, of course only in aiding tax evasion. The administrative offence of § 379 AO is only effective if there is no tax evasion by the addressee of the bogus bill.

However, the existing criminal liability for issuing bogus invoices in aiding tax evasion is no longer sufficient in today's times. We are no longer dealing with small-scale cheating, which indeed is classified as petty crime. The fictitious companies described as "service companies" or as "invoice factories" are an important part of organised tax evasion. In recent years, I have not met any VAT carousel scheme not using a huge number of bogus bills.

The criminal use of bogus bills is not limited only to the scope of VAT fraud. The use of bogus invoices for unlawful purposes is manifold; bogus invoices are also used to cover expenses that criminal companies need to pay for bribes, and bogus invoices

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are used to cover expenses to pay wages and salaries, which shall not be declared to the tax and revenue office as part of illegal employment.

2. Structures of bogus invoice systems

Illegal systems are not limited to bogus transactions between two business partners. In fact, several fictitious companies are connected on different horizontal and vertical levels. So in the end, we have to deal with huge bogus invoice cascades. That conceals individual responsibilities even more. For that reason, the work of the law enforcement authorities is even more complicated.

In addition, especially in Germany, the fictitious companies are classified as so-called small companies. For these companies in Germany there is less control by the tax and revenue offices. Small companies only have to submit an annual sales tax return.[1] For that reason, a bogus issuer can often act for a full year or even more without the tax authorities being able to detect that it is a bogus corporation. And in the end, the fact that there is only the obligation to submit an annual sales tax return also reduces the risk of prosecution, as I will show later on.

The companies that issue bogus bills often change their place of business. This also causes monitoring deficits because there are not clearly regulated competences of the tax and the law enforcement authorities.

All of these manipulations do not happen by chance. They are intentionally planned in order to further disguise the criminal activity and minimise the risk of criminal liability.

These findings prove that the initiators of bogus invoice systems are aware of the legal aspects they can use to cover their criminal activities. They have got the knowledge and the possibilities to build structures that mislead law enforcement authorities in many ways, so it takes a lot of manpower to discover the real circumstances. That is why the issuing of bogus invoices is that dangerous. An illegal parallel industry has developed in this area specialising solely in the issuing of bogus invoices. Depending on the quality of the bogus bill, 5 to fifteen percent of the invoice amount is paid as a fee for issuing it. Just as with the initiators of VAT fraud systems, the initiators of bogus invoice systems are part of organised crime. Both go hand in hand.

3. Legal problems prosecuting bogus invoice systems

Not only are the facts of issuing bogus invoices difficult to find out but from a legal point of view, the investigations also raise some problems that make it more difficult to effectively punish the offences in this context.

[1] § 18 (2) sent. 2 dUStG (German VAT-Law).

3.1. Criminal liability for regular companies issuing bogus invoices

At first glance in Germany, it is not that difficult to prove the elements of the offence of tax evasion in such cases. According to § 18 (4b) dUStG (Umsatzsteuergesetz, German VAT Law), the issuer of bogus bills also has to declare these fake sales in his tax return. If he does not comply with this obligation to declare, he will be liable for prosecution of tax evasion under § 370 (1) Nr. 2 dAO (Abgabenordnung, German Fiscal Code).

In order to avoid the tax bill resulting from the bogus invoices, the larger fictitious companies, acting on the first level within bogus invoice systems, use bogus invoices from other fictitious companies to deduct the VAT shown there. At first sight, first-level fictitious companies behave legally, so it is even more difficult to detect the offence.

But in the end, the problems of prosecuting these offences are placed on the level of evidence, not on the level of the elements of the crime. Nevertheless, in Germany in such cases there is the great danger that prosecution is barred because of the "ne bis in idem" principle, the right not be punished twice for the same criminal offence, as defined in Art. 50 Charter of Fundamental Rights. On the basis of German case law, every false VAT return of one assessment period is part of the same criminal offence, so every preliminary VAT return and the annual VAT return are part of the same offence.[2] If the offender is acquitted or convicted in the context of only one preliminary tax return of one assessment period, prosecution is barred because of the "ne bis in idem" principle. This applies regardless of how high the penalty is. I am aware of cases in which, because of a small fine of EUR 500, prosecution was barred, despite facing VAT fraud of more than EUR 2 million. Instead of imprisonment, the offender got away with paying EUR 500. In my opinion, this chance for an exemption from punishment is one of the main reasons for changing the place of business so often, as I mentioned above. Different prosecutors are dealing with the same case during one assessment period, so there is a great chance that one of them, only focused on a short period, offers a small fine, and all the other offences during the assessment period cannot be punished anymore.

3.2. Criminal liability for small companies issuing bogus invoices

From a legal point of view, it will be more difficult to prosecute issuers of bogus invoices if the fictitious companies are classified as so-called small companies. In such cases, small companies only have to submit an annual VAT tax return, even if the companies have a business volume of more than EUR 10 million. In these cases, it is also possible for the issuer of bogus invoices to be liable for prosecution for tax evasion in connection with the annual declaration. However, in a huge number of cases, the obligation to submit the annual declaration is dispensed with because of the announcement of the investigation. According to the case law of the German Federal High Court, there is no obligation for any tax return if the investigation is

[2] BGH 24.11.2004 - 5 StR 206/04.

announced because nobody is obliged to self-incriminate.[3] Therefore, if the small business owner is informed of the investigation before the deadline for submission of the annual VAT return has expired, he can no longer be prosecuted because he no longer has to submit the annual VAT return. In my opinion, that is the reason why the initiators of bogus invoice systems prefer small business companies. If the exemption from the obligation to submit advance turnover VAT return is revoked, the previous small business company will be replaced by another small business company, and the game starts again.

3.3. Criminal liability for aiding and abetting tax evasion

So in the end, there remain a lot of cases in which issuing bogus invoices only could be prosecuted for aiding and abetting tax evasion.

The criminal liability for aiding tax evasion, however, causes further problems. On the one hand, it is required to clarify the details of the main offence. It must be proved that a main criminal offence is present because aiding and abetting is an accessory to the main offence. Only if there is a main offence may the assistant be convicted of aiding. The public prosecutor and also the court must therefore investigate and ascertain the main offence before they can convict the issuer of the bogus statements of aiding tax evasion.

In a case in which the issuer of a bogus invoice does have only one buyer of his bogus bills, this can be done without problems. However, if he has several "customers" for his bogus invoices, such findings are even more difficult to make. The authorities pursuing the assistant must coincidentally carry out several simultaneous investigations against the main offenders, even if they do not have competence for these main offenders. The main offenders, on the other hand, do not receive bogus invoices from only one fictitious company. Therefore, it is necessary to determine which part of the tax evasion of the main offender is caused by the issuer of the bogus invoices, who should be convicted of aiding in the certain case.

Usually the main offenders are prosecuted by other prosecutors. So there is a risk of dissenting decisions. Dissenting decisions may be prevented if the prosecutor who investigates the main offender also prosecutes the issuers of bogus invoices. But first of all, in such cases, unfortunately, there is a not enough manpower to handle all these connected cases. On the other hand, there again is the danger that the prosecution may be barred because of the "ne bis in idem" principle. According to the case law of the Federal Court of Justice, the tax evasion committed by the issuer of the bogus invoice and the aiding of the tax evasion committed by the addressee of the bogus invoice are part of the same criminal offence.[4] So if – what usually will be done – the prosecutor who investigates the main offender only focuses on the bogus invoices this main offender has received from one fictitious company, the issuer of these bogus invoices

[3] BGH 26. 4. 2001 - 5 StR 587/00.
[4] BGH 02.12.1997 - 5 StR 404/97.

will be convicted only of aiding tax evasion for issuing these bogus invoices. The prosecution of all the other bogus invoices from these fictitious companies will be barred.

Further legal problems exist if the fictitious companies are classified as small companies. As I already mentioned, the obligation to submit the annual declaration may be dispensed with because of the announcement of the investigation. That may cause the issuer of bogus invoices on level 1 in a bogus invoice system to not commit tax evasion. But if there is no main offence on level 1, the issuer of bogus invoices from level 2 cannot be convicted of aiding, so there is a risk that a large number of issuers of bogus invoices will not be punished at all, which in my opinion is unacceptable for preventive reasons, in particular when there is a significant increase in these unlawful practices.

4. How to solve legal problems in prosecuting bogus invoice systems

In other Member States the problems seem to be the same. In Austria the issuer of bogus invoices has to pay the VAT which is shown in the bogus invoice. However, there is no obligation to declare this VAT in a tax return. For that reason, there is no criminal liability under § 33 Austrian Financial Criminal Law. Only criminal liability for aiding and abetting the tax evasion of the invoice addressee remains. And it is the same in Hungary, where the issuing of bogus invoices also only can be convicted as aiding tax evasion. I guess there are similar problems in factual and legal terms in other Member States.

In my opinion, the above findings clearly show that there must be a criminal offence for the issuing and placing of bogus invoices. Only in this way the crime gaps shown above could be avoided and investigations could be made more effective. Such effective prosecution of bogus invoice issuers is urgently required.

For example, a criminal offence could be formulated as follows:

"*A penalty of up to five years' imprisonment or a monetary fine shall be imposed on any person who issues a document that are factually incorrect, if the person acts repeatedly because of commercial reasons and the issued document should be used by another person to commit an unlawful act.*"

This offence of abstract endangerment only focuses the illegal action itself, so there is no need to find a breach of duties concerning to tax returns or to clarify main offences. All the legal problems mentioned above would no longer exist. Effective prosecution would be possible.

The prosecution of the bogus invoice issuers should be in the competence of the European Public Prosecutor. This would avoid unnecessary investigations and ensure coordinated investigative measures. National conflicts of jurisdiction would be eliminated. This, too, would contribute to the urgently needed punishment of issuing bogus invoices.

Greece

VAT FRAUD IN GREECE

Dr. Polyxeni Tsouli[*]

1. Protected legal interest

Protected legal interest according to the tax evasion rules refers to public assets. Money that is kept from the State via tax evasion is money that belongs to the State and should be in the treasury of the State.

By tax evasion we mean the practice of unlawful actions or omissions to the internal revenue (taxing) authority with the purpose to mislead said authority so as to prevent the imputation and payment of the owed amount. The taxpayer, in this case, makes use of illegal means in order to achieve an unlawful end and, in particular, falsifies or improperly suppresses circumstantial, tax-relevant facts from the competent tax authorities, thus aiming to prevent imputation of a tax debt or cause the imputation of a tax debt smaller than the lawful amount. The direct consequence of tax evasion is the loss or delay in the recovery of the statutory government revenue as prescribed in the budget and the infringement of public property.

Especially in terms of VAT, Greece is one of the EU Member States that has consistently shown a large deficit in its collection. Greece is second among EU countries with a so-called "VAT deficit" according to a study by the European Commission. The best performers in the EU, with a VAT deficit below 5%, are Luxembourg, Sweden, Hungary, Spain, Malta, the Netherlands and Cyprus.

2. Causes

Possible causes of tax evasion: the complexity of the tax system, the constant increases of the tax burden, underreporting from the self-employed, the economic crisis, inefficiencies in tax collection mechanisms and the lack of systematic record keeping and data collection.

3. Troubleshooting

Seeing as tax evasion has global implications, it requires international cooperation to combat it. In recent years, a series of efforts have been made in the EU and internationally with the goal of not only tackling the phenomenon but also fostering fiscal con-

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sciousness. Due to the multinational nature of corporations, it was deemed advisable to tackle the issue globally rather than nationally. Greece participates in the international and European effort to combat tax evasion and integrates European directives into its legislation.

4. Measures

The measures taken by the Greek state to tackle the phenomenon of tax evasion extend to all levels of legal intervention.

"Preventative" arrangements in the area of substantive tax law:

– creation of objective tax criteria
– introduction of obligations to keep and issue tax records
– the obligation to inform tax authorities about contracts, certifications, etc.

Serious charges against offenders include imprisonment of up to 20 years, additional taxes and fines of millions of euros, the suspension of business operations and rigorous auditing procedures.

5. Tax penalties

Tax penalties are divided into two categories:

(a) administrative sanctions imposed by tax administration or administrative courts (e.g. fines, additional taxes or multiple charges, cessation of contracts with the State and exclusion from public tenders, as well as subsidies and loans, a limitation on the right to exploit property, the freezing of bank accounts, suspension of operations, co-responsibility for payment of administrative sanctions imposed on third parties) and

(b) criminal penalties imposed by criminal courts.

6. Applicable law and tax liabilities

VAT fraud is regulated in Art. 66 Law 4174/2013 and not in the Criminal Code. VAT fraud has been punishable since 1997.

Table 1: Regulation of VAT fraud

Crime	Legal provision	Penalty	Jurisdiction
Non-payment of VAT tax over EUR 50,000 per fiscal year	66 1 § β′ in combination with 3 § β′-ββ' L. 4174/2013	Minimum 2 year imprisonment	Three-member Misdemeanour Court
Non-payment of VAT tax over EUR 100,000 per fiscal year	66 1 § β′ in combination with 4 § α' N. 4174/2013	Imprisonment 5–20 years	Single-member appeals Court for Felonies

Source: Dr. Polyxeni Tsouli, 2019.

Current legal framework (Art. 66 Law 4174/2013):

VAT tax evasion

The non-forwarding in whole or in part of VAT in excess of EUR 50,000 per fiscal year is punishable by a minimum of two years; if the amount of value added to be forwarded exceeds EUR 100,000 per fiscal year, imprisonment is five to 20 years. Sophisticated manipulation of accounts is an aggravating offense (Art. 66(6) N 4174/2013).

If most of the occurrences of the tax evasion offense for non-payment or inaccurate VAT return are in the same period of time, that is to say in the same fiscal year, then it is a singular offence. If, on the contrary, the act spans more than one fiscal year, then there are multiple offences, and therefore the offence is considered a crime on a repetitive basis.

Determining the nature of the offense requires:

(a) non-payment of VAT,

(b) inaccurate payment of VAT,

(c) offsetting of VAT,

(d) inaccurate VAT deduction,

(e) misleading the tax administration by presenting false statements as true, or by unlawful interference or concealment of true statements, and non-repayment or inaccurate repayment or estimation, or inaccurate deduction or refund of VAT, or

(f) retention of VAT.

In order for the act to be considered an offence, deception, knowledge and intent of non-repayment of VAT, and the premeditation of non-repayment of VAT are required. The act is only considered a punishable offence when the evasion's amount of VAT to be estimated or reimbursed or not remitted exceeds the amount of EUR 50,000 per fiscal year.

7. Concurrence

In the event of a concurrence of falsified statements and tax evasion, the prosecution is only for the act of tax evasion if the offence was committed for the purposes of tax evasion.

In the event of a concurrence of fraud and tax evasion, only the tax evasion offences will be prosecuted.

8. Liabilities

Liable for the above crimes are the natural persons and the legal representatives of the companies, as well as the legal, contractual or in-house management teams. In foreign

companies and in all kinds of foreign organisations, the liable parties are the Greek executives, representatives or agents of said companies.

9. Criminal prosecution and statute of limitations

Criminal prosecution is required by the General Secretary of Public Revenue, the Tax Administration or the Financial Police Directorate of the Hellenic Police Force. The prosecution is exercised ex officio.

The statute of limitations of the existing law shall commence upon the final judgment of the appeal or, in the absence of appeal, from the finalisation of the tax registration due to the lapse of time for appeal. The statutory limitation period is five years in the case of VAT fraud up to EUR 50,000 per year and 20 years in case of VAT fraud over EUR 50,000.

The appeal before the Administrative Courts does not affect the criminal proceedings. However, the criminal court may, if it considers that the pending administrative proceeding is essential for its own judgment on the case, postpone the decision until the Administrative Court reaches its final decision.

10. Tax compromise

Prior to the current law, the offender could have reached a compromise with the tax authority, and then the criminal provisions were not applied. However, following the entry into force of the new Code of Tax Procedure (L.4174/2013) this is not the case, but it can be applied for offences that occurred prior to 31 December 2013.

11. Public prosecutor, investigators and independent authorities

In the major cities (Thessaloniki and Athens), a Special Prosecutor of Economic Crime investigates major offences. There are also independent administrative authorities aimed at fighting financial crime such as the Independent Public Revenue Authority; which is responsible for detecting tax evasion, smuggling, tax fraud, illicit economic activity and attribution of tax evaded material; the Authority on the Prevention of Money Laundering and Funding of Terrorism; and the Auditor of Declared Assets, which aims to take and implement the necessary measures to prevent, detect and combat money laundering and terrorism financing and audit asset statements.

There is also a special police force unit specialised in economic crimes with great experience and a police unit specialised in cybercrime. The Financial Crime Prosecutor, the investigators and the chief of the Audit Service have access to financial accounts and bank records, as well as the books and records kept by liable parties. The chief auditor shall be empowered to request from any financial institution any information it deems necessary to facilitate its audit work, which said institution is required to

provide. In order to fulfil this obligation, any form of confidentiality shall be removed by an act of the Financial Crime Prosecutor at the request of the body responsible for the audit with further agreement of the chief of the Directorate General for Tax Audit. As a result, banking deposit data of taxpayers in domestic banks is accessible at all times to auditors for audit purposes, or, at the very least, auditors may have access to such data. A very important instrument in the hands of prosecutors and investigators is the European Order Investigation through which one country of the European Union can ask for information and request investigating acts from another country of the European Union.

12. Practical problems

The main problem that may occur in practice is that often in many cases, issues arise that can only be solved by the Administrative Courts since they are mainly based in administrative law. However, either the citizen has not appealed to the Administrative Court or has appealed but has not received a final court decision yet.

13. Conclusion

VAT fraud has been punishable in Greece since 1997. Current penalties are very strict in order to tackle the phenomenon of tax evasion. Greece participates in the international and European effort to combat tax evasion and integrates European directives into its legislation. The existence of specialised prosecutors, investigators, police force and independent authorities certainly helps the judicial system fight VAT fraud.

Hungary

THEORETICAL QUESTIONS OF THE FIGHT AGAINST BUDGET FRAUD (VAT FRAUD) IN HUNGARY

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1. Introductory remarks

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*[1] – under certain conditions – covers *VAT fraud* as well. The EU legislator recognised that the most serious forms of VAT fraud – carrousel fraud and VAT fraud through missing traders – create serious threats to the common VAT system[2] and thus to the Union budget and to the protection of the financial interests of the European Union.[3] The European Commission has taken a firm standpoint on this issue during the legislative process of the PIF Directive. Referring to the case law of the Court of Justice of the European Union, the concept of EU fraud *expressis verbis* covered the VAT in the proposal of the PIF Directive.[4] Finally – as a result of a political compromise – in respect of revenue arising from VAT own resources, the PIF Directive shall apply only in cases of *serious offences against the common VAT system*. Offences against the common VAT system shall be considered to be serious where the intentional acts or omissions are connected with the territory of two or more Member States of the Union and involve a total damage of at least EUR 10,000,000.[5]

In Hungary, the reform of the financial criminal law took place with the modification of the Hungarian Criminal Code in 2011. From the 1st January 2012, a new concept for the *complex protection of the budget* has been introduced, which – similarly to the PIF Directive – is characterized by the unified regulation of the revenue and the expenditure side of the budget.[6] The currently effective Hungarian Criminal Code of

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[1] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [OJ L 198, 28.7.2017, 29–41], Art. 3(2)(c).

[2] See: Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [OJ L 347, 11.12.2006, 1–118].

[3] Preamble (4) of PIF Directive.

[4] See: Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law [COM(2012) 363 final, Brussels, 11.7.2012.], the cited court judgement: C-539/09., Commission v Germany of 15 November 2011 (OJ 2012, C 25, 5).

[5] PIF Directive Art. 2(2).

[6] The PIF Directive defined the legal definition of „Union's financial interests". According to Art. 1(1)(a) of the Directive, it covers all revenues, expenditure and assets covered by, acquired through, or due to

a) the Union budget;
b) the budgets of the Union institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them.

2012[7] essentially took over the provisions of the Criminal Code of 1978[8] with some minor modifications. However, with regard to the common protected legal interest, all offenses against the budget are regulated in a separate chapter.[9] Therefore, the criminal law protection of VAT fraud is realized through the criminal offence of *budget fraud* in Hungary. The purpose of this study is to examine to which extent the Hungarian regulation meets the requirements of the PIF Directive.

2. Regulatory models of tax fraud in Europe

According to the research of *Dannecker and Jansen,*[10] the national rules on criminal tax laws can be divided into three models:

(a) In countries with a comprehensive regulatory model, we find a single criminal offence for all kind of taxes, which also intends to protect the incomes of the European Union in addition to the national tax revenues (e.g. Germany).

(b) In countries with a differentiated system, there is a fundamental distinction between tax evasion and its more serious forms (tax fraud), which implies "some extra criminal activity" (e.g. perpetration with the use of fictitious bills, transactions). This solution was introduced for example in Austria, by the reform of the Financial Criminal Law (Finanzstrafgesetz – FinStrG) in 2010.

(c) In the countries classified in the third group, specific criminal law provisions can be found in different tax laws.

The currently effective *Hungarian regulation* can basically be classified into the comprehensive regulatory model. However, the unified approach that focuses on the budget differs greatly from the regulation of the other Member States, therefore – according to our point of view – it forms a separate category.[11]

3. Fight against budget fraud (VAT fraud) in Hungary

3.1. About the elements of the complex system

If we intend to analyse the means of fight against VAT fraud, we can distinguish between *administrative and criminal measures*. In this paper we mainly focus on the latter, but in connection with the administrative measures, it has to be highlighted that there was an important *reform in the tax system* in the recent years in Hungary.[12]

[7] Act C of 2012 on the Criminal Code (hereinafter referred to as: CC).
[8] Act IV of 1978 on the Criminal Code (hereinafter referred to as: previous CC).
[9] Chapter XXXIX: Criminal offenses against public finances.
[10] Dannecker–Jansen 2007, 15–93.; Dannecker 2015, 373–439; Jacsó 2015, 187–189; Jacsó 2017a, 135–137.
[11] Jacsó 2017a, 136–137.
[12] About non-criminal measures see: Jacsó 2017b, 1330–1332.

On the 1st of January 2011, a new central budget body, the *National Tax and Customs Administration*[13] was established in order to perform public tax and customs duties more efficiently and to develop a criminal organization system which can detects financial crimes effectively. In 2017, a new *Act on the Rules of Taxation* was adopted.[14] Furthermore, in 2015, the *online cash register*[15] was introduced. It is also important to mention, that the *Electronic Public Road Trade Control System* was introduced as well. In connection with VAT fraud, the latter has a particular importance, since its objective is to strengthen the market positions of the compliant economic operators, to make the circulation of goods more transparent, to eliminate fraud related to food products often endangering human health and; last but not least, to eliminate tax evasion. By the use this system, the actual route of the goods can be tracked because transport related data (name and quantity of goods, consignee, consignor, registration number of vehicles etc.) have to be registered in a central electronic system before starting the transport.[16]

3.2. The criminal law protection of the budget in Hungary

3.2.1. Regulation backgrounds

Hungary was required to *ensure the criminal protection of the financial interests of the European Union* even *before the accession of the country to the EU*. The PIF Convention[17] and its Additional Protocols[18] were among the EU documents which had to be implemented by all the pre-accession States. One of the most important reasons of it was the fact that several pre-accession funds were available for the candidate countries through which the Community budget could potentially be damaged.[19] Although Hungary has formally ratified the PIF Convention only in 2009,[20] in order to ensure the compliance with the Convention, Act CXXI of 2001 entered into force on the 1st April 2002 inserted the criminal offense of *violation of the financial interest of the European Communities* into the previous Hungarian Criminal Code.

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[13] Act CXXII of 2010 on the National Tax-and Customs Administration.

[14] Act CL of 2017 on the Rules of Taxation.

[15] See: 48/2013. (XI.15.) NGM regulation on the technical requirements of cash registers, the distribution, use and servicing of cash registers for issuing cash registers, and the provision of data recorded by the cash register to the tax authority, which was issued on the basis of the authorization of Act CXXVII of 2007 on Value Added Tax [points c) and h)–e) of Section 260(1)].

[16] See: *https://ekaer.nav.gov.hu* (20.10.2018).

[17] Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests [OJ C 316, 27.11.1995, 48–57].

[18] Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities' financial interests [OJ C 313, 23.10.1996, 1–10]; Council Act of 29 November 1996 drawing up, on the basis of Art. K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests [OJ C 151, 20.05.1997, 1–14]; Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests [OJ C 221, 19.07.1997, 11–22].

[19] See: Madai 2010, 97.

[20] Act CLIX of 2009 on the promulgation of the Convention on the protection of the European Communities' financial interests drawn up based on Art. K.3. of the Treaty establishing the European Community, and of the Additional Protocols thereto and of the declaration based on Art. 35(2) of the Treaty on the European Union.

It can be therefore seen, that the Hungarian legislator – unlike many other EU Member States – did not try to comply with its legal harmonization obligation by amending the existing criminal offenses, but through the creation of a new, separate criminal offence. This resulted, however, that the national and the EU budget were protected by different criminal law provisions in Hungary until 2012. According to the previous Criminal Code, the protection of the national budget was covered by *tax fraud,*[21] *employment related tax fraud,*[22] *excise violation,*[23] *illegal importation*[24] and *unlawful acquisition of economic advantage*[25] while the financial interests of the European Union was tried to be safeguarded by the crime of *violation of the financial interest of the European Communities*.[26] However, this distinction generated several difficulties in the practice.[27]

Therefore, *Act LXIII of 2011* entered into force on the 1st January 2012 integrated the fraud-related crimes (tax fraud, employment related tax fraud, excise violation, illegal importation, VAT fraud, unlawful acquisition of economic advantage, violation of the financial interest of the European Communities) in one criminal offence. The name of this integrated criminal offence was *budget fraud*.[28]

The currently effective fourth Criminal Code, which came into force on 1st of July 2013, did not bring any substantial changes in relation to the budget fraud. Into the criminal offence of budget fraud, a *new punishable conduct* was introduced, which is the *"making a false statement"* in connection with budget payment obligation or with any funds paid or payable from the budget. With this provision, the legislator wanted to emphasise that the misleading conducts during the tax return or reporting obligation in electronic form is also covered by this criminal offence.[29]

The Criminal Code regulates the *criminal offences against public finances* in Chapter XXXIX which contains *four criminal offences*:

(a) Fraud relating to social security, social and other welfare benefits[30]

(b) Budget fraud[31]

(c) Omission of oversight or supervisory responsibilities in connection with budget fraud[32]

(d) Conspiracy to commit excise violation[33]

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[21] Section 310 of the previous CC.

[22] Section 310/A of the previous CC.

[23] Section 311 of the previous CC.

[24] Section 312 of the previous CC.

[25] Section 288 of the previous CC.

[26] Section 314 of the previous CC.

[27] See in details: Halász 2006, 632–633.; Láris 2011, 29–30.; Madai 2010, 99–102.; Molnár 2009, 213.; Miskolczi 2007, 33–35; Udvarhelyi 2014a, 177–179.

[28] Section 310 of the previous CC.

[29] See the official justification of the Section 396 of CC.

[30] Section 395 of the CC.

[31] Section 396 of the CC.

[32] Section 397 of the CC.

[33] Section 398 of the CC.

3.2.2. Budget fraud

With the *new regulation of the financial criminal law* of 2011, the legislator intended to achieve the following objectives:
– the provision of a *more effective and coordinated defence* of the budget,
– the elimination of loopholes and the possibilities of abuse,
– the abolition of the interpretational problems in connection with the criminal offence of *violation of the financial interest of the European Communities*,
– the elimination of the delimitation problems,[34]
– the *unified protection of the revenue and the expenditure side of the budget* and of the *national and the EU budget*.

In order to achieve the aforementioned objectives, the *focus of the protection of budget fraud becomes the budget* itself. This regulatory concept is fully in line with the expectations of the European Union, which concept was formulated in the PIF Convention and in the PIF Directive.[35]

According to the legal definition of the CC *"budget shall mean the sub-systems of the central budget - including the budgets of social security funds and extra-budgetary funds -, budgets and/or funds managed by or on behalf of international organizations and budgets and/or funds managed by or on behalf of the European Union. In respect of crimes committed in connection with funds paid or payable from a budget, budget shall also mean – in addition to the above – budgets and/or funds managed by or on behalf of a foreign State"*.[36]

Both the revenue and the expenditure side of the EU budget are covered by budget fraud on the basis of the legal definition. Regarding to the expenditure side, the Hungarian regulation protects not only the budget which is managed by the European Union or by other Member States, but also the budget of *any other foreign states*.

Table 1: Structure of the regulation of budget fraud in the Hungarian Criminal Code

<table>
<tr><th colspan="5">Budget fraud (Section 396)</th></tr>
<tr><td colspan="2">Section 396(1) a)–c)</td><td>Section 396(2)–(5)</td><td>Section 396(8)</td><td>Section 396(9)</td></tr>
<tr><td>1st category</td><td>Budget fraud in the narrower sense</td><td rowspan="3">Aggravating circumstances</td><td rowspan="3">Reduction of the penalty without limitation</td><td rowspan="4">Explanatory provisions:
– budget
– financial loss</td></tr>
<tr><td colspan="2">Section 396(6)</td></tr>
<tr><td>2nd category</td><td>Budget fraud committed on excise goods</td></tr>
<tr><td colspan="2">Section 396(7)</td><td colspan="2"></td></tr>
<tr><td>3rd category</td><td>Administrative budget fraud</td><td>–</td><td>–</td></tr>
</table>

Source: Jacsó 2017d, 227

[34] In practice, the biggest problem was the delimitation of tax fraud (VAT fraud) and fraud. In 2006, the Supreme Court made a uniformity decision on these delimitation issues. See in details: Tóth 2002, 83.; Molnár 2011, 196–201.
[35] Udvarhelyi 2014a, 170–188.; Udvarhelyi 2014b, 530–547.; Jacsó 2017c, 53–57.
[36] Section 396(9)(a) of the CC.

The criminal offences of budget fraud can be divided into three different type of conducts: we can distinguish between *budget fraud in the narrower sense,*[37] *budget fraud committed on excise goods*, and the *violation of the settlement, accounting or notification obligations relating to funds paid or payable from the budget (administrative budget fraud)*.[38]

3.2.3. Budget fraud in the narrower sense

Budget fraud in the narrower sense can be committed by anybody who

(a) induces a person to hold or continue to hold a false belief, or suppresses known facts in connection with any budget payment obligation or with any funds paid or payable from the budget, or makes a false statement to this extent;

(b) unlawfully claims any advantage made available in connection with budget payment obligations; or

(c) uses funds paid or payable from the budget for purposes other than those authorized;

and thereby causes financial loss to one or more budgets. The criminal offence is a misdemeanor which is punishable by imprisonment not exceeding two years.[39]

The *PIF Directive* lists the following acts or omissions committed in cross-border fraudulent schemes in respect of revenue arising from VAT own resources:

– the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget;
– non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or
– the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.[40]

If we analyse the provisions of the PIF Directive, it can be observed that the Hungarian regulation is mostly in compliance with them.

According to the Hungarian Criminal Code, budget fraud is a *material delict* which is punishable if it causes *financial loss to one or more budgets*. This provision also complies with the PIF Directive which punishes EU-fraud only if it effects the *misappropriation or wrongful retention of funds or assets* from the Union budget or budgets managed by the Union, or on its behalf; or the *illegal diminution of the* resources of the Union budget or budgets managed by the Union, or on its behalf.

The definition of *financial loss* can be found among the explanatory provision of the CC, in accordance with which financial loss shall mean *damage to one's property,*[41]

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[37] Karsai 2013, 833.
[38] See in details: Udvarhelyi 2019, 18–22.
[39] Section 396(1) of the CC.
[40] Art. 3(2)(d) of PIF Directive.
[41] Therefore, the depreciation of property caused by crime. (Point 16 of Section 459(1) of the CC).

including *lost income*.[42] In connection with budget fraud, the Criminal Code contains a specific provision which supplements the aforementioned definition. According to this provision, financial loss also includes *"any loss of revenue stemming from non-compliance with any budget payment obligation, as well as the claiming of funds from a budget unlawfully or the use of funds paid or payable from a budget for purposes other than those authorized"*.[43]

Similarly to the PIF Directive, budget fraud can only be committed *intentionally*; negligent conducts are not punishable. The consciousness of the perpetrator has to capture not only the punishable conducts but the result as well.[44]

According to the Hungarian Criminal Code the *punishment* which could be imposed on the perpetrators of budget fraud *depends on the amount of the financial loss*.[45] If the financial loss caused by budget fraud is 100,000 HUF or less, it shall be treated as an administrative offence (violation of customs regulations) instead of a criminal offense. If budget fraud causes a financial loss between 100,001 and 500,000 HUF, it is punishable by imprisonment not exceeding two years. The penalty is imprisonment not exceeding three years if the budget fraud results in considerable financial loss (500,001–5,000,000 HUF); imprisonment between one to five years if it results in substantial financial loss (5,000,001–50,000,000 HUF); imprisonment between two to eight years if it results in particularly considerable financial loss (50,000,001–500,000,000 HUF) and imprisonment between five to ten years if it results in particularly substantial financial loss (over 500,000,000 HUF). The legislator defined as aggravating circumstance if the budget fraud is committed in *criminal association with accomplices* or on a *commercial scale* as well.

Art. 7 of the PIF Directive contains provisions in connection with the sanctions against natural persons. Member States shall ensure that the criminal offences defined in the Directive are punishable by effective, proportionate and dissuasive criminal sanctions and by a maximum penalty which provides for imprisonment. Instead of the financial loss, the Directive uses the definition of damage. If the *damage or advantage is considerable*, i.e. if it involves more than EUR 100,000, the criminal offences have to be punishable by a *maximum penalty of at least four years of imprisonment*. Member States may also provide for a maximum sanction of at least four years of imprisonment in other serious circumstances defined in their national law. Furthermore, the Directive allows the Member States to provide for sanctions other than criminal sanctions where a criminal offence involves damage of less than EUR 10,000 or an advantage of less than EUR 10,000.

It can be stated that the provisions of the Hungarian Criminal Code meet these requirements. The domestic legislator has exercised the power to impose additional aggravating circumstances for more serious legal consequences. It is important to mention that the Hungarian legislator provided a possibility for the *reduction of the penalty*

[42] Point 17 of Section 459(1) of the CC.
[43] Section 396(9)(b) of the CC.
[44] Gula 2013, 607.
[45] The individual categories are interpreted in the Closing Provisions of the CC.

without limitation. According to this provision, the penalty may be reduced without limitation if the *perpetrator provides compensation for the financial loss caused by the budget fraud* referred to in Sections 396(1)–(6) *before the indictment*. The reduction is applicable *regardless to the financial loss caused*. However, this provision shall *not apply if the criminal offense is committed in criminal association with accomplices or by a habitual recidivist*.[46] Similar provision cannot be found in the PIF Directive. However, the Criminal Codes of some Member States regulate self-reporting as a criminal impediment in case of tax fraud.

3.2.4. Administrative budget fraud

It is an important social interest that the subsidies and payments from the budget have to be used in a transparent way. Therefore, the Hungarian legislator created a *supplementary criminal offence*[47] which criminalizes the *violation of the settlement, accounting or notification obligations relating to funds paid or payable from the budget*. This criminal offence can only be committed in connection with the *expenditure side of the budget*, i.e. in connection with *funds from the budget*. The offence is committed by any person who *does not comply or inadequately complies with the settlement, accounting or notification obligations relating to funds paid or payable from the budget*; *makes a false statement* to this extent; or *uses a false, counterfeit or forged document or instrument*. Contrary to the budget fraud in narrower sense, this criminal offence is *immaterial*; it does not contain any results, which means that the financial loss is not necessary for the realization of the offence. In this respect, the Criminal Code provides an enhanced protection of the expenditures of the budget compared to the provisions of the PIF Directive.[48]

The administrative budget fraud can be committed by *anybody* who is charged with one of the statutory obligations. This offense can only be committed *intentionally*; the perpetrator must be aware of his settlement, accounting or notification obligations, and that the statement made by him is false, or the document or instrument used is false, counterfeit or forged.[49] The punishment of this offence is imprisonment not exceeding three years.

3.2.5. Omission of oversight or supervisory responsibilities in connection with budget fraud

The Criminal Code also regulates the *specific liability of the director of an economic operator*, or a *member or employee with authority to exercise control or supervision*. Before the 1st January 2012, the *omission of oversight or supervisory responsibilities in connection with budget fraud* was only criminalized in connection with the violation

[46] Section 396(8) of the CC.
[47] See: Miskolczi 2013, 39.
[48] Miskolczi 2013, 37–38.
[49] Gula 2013, 611.

of the financial interest of the European Communities.[50] Currently the scope of this criminal offence covers all type of conducts of budget fraud and all budgets. However, the negligent conduct is no longer punishable, since it was incompatible with the dogmatic system of Hungarian criminal law, and it was also unknown in the judicial practice.

According to the provision of the Hungarian Criminal Code, the director and the member or the employee of an economic operator can be held liable if he *fails to discharge the obligation of exercising control or supervision*, and thus makes it possible for the member or employee of the economic operator to commit the budget fraud within the framework of their respective functions.[51] The aim of the criminalization of this type of omission is to *establish an appropriate control and monitoring system* that encourages the directors of an economic operator to prevent budget fraud.[52]

4. Closing thoughts

As it could be seen, the Hungarian Criminal Code provides an *adequate and effective protection of the national budget* and – with regard to the legal harmonization obligation of the Hungarian legislator – of the *budgets and/or funds managed by or on behalf of the European Union*. In connection with the protection of the financial interest of the European Union in the Hungarian legal system, it can be concluded that the *Hungarian legislator has fulfilled its implementation obligation resulting from the EU law*. The regulations of the Criminal Code are mostly in conformity with the new PIF Directive, the minor differences are mainly caused by the specialty of the Hungarian legal language. Furthermore, due to the fact that the PIF Directive only prescribes minimum harmonization, the Hungarian criminal law determines stricter rules in connection with the infringement of the financial interests of the European Union than the EU requirements. According to the Hungarian criminal law, the national and the European financial interests are protected in the same way, therefore our solution could serve as an example for other countries.

However, in order to ensure the adequately protection of the financial interests of the Union, an appropriate law enforcement and judicial practice is also required. In this context, the recently established *European Public Prosecutor's Office*[53] could contribute to the establishment of a more adequate and effective protection of the EU's financial interests, however its achievements can only be judged in the future.

[50] Klenanc 2015, 462–466. Molnár 2017, 107–118.

[51] Section 397 of the CC.

[52] Gula 2013, 613.

[53] 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, 1–71].

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HUNGARIAN REGULATION ON THE PROTECTION OF THE FINANCIAL INTERESTS OF THE EUROPEAN UNION AND PROSECUTORIAL ACTIONS AGAINST BUDGET FRAUD IN PRACTICE

Prof. Dr. Péter Polt[*]

1. An interesting legal case…

A company operating an enormous webshop has purchased some items of goods via several fictive companies. The goods were imported from other EU Member States into the country on behalf of so-called fictive "missing trader" companies owned by frontmen, and the buyer company re-sold the goods to the seller via several other companies in a way that none of the companies which fictitiously participated in the domestic distribution chain declared and paid VAT on the goods.

The National Tax and Customs Administration of Hungary has investigated the criminal case of budget fraud resulting in particularly substantial financial loss committed by criminal organisations. This investigating authority has been investigating the tax-avoiding acts and activity of six different criminal organisations that have been in an invoicing relationship with each other.

The National Tax and Customs Administration of Hungary, together with the National Bureau of Investigation Asset Recovery Office, took coordinated actions and searched 230 crime scenes in order to locate and secure physical evidence. These authorities also seized evidence at the crime scenes, and in order to indemnify the financial loss caused to the budget, they took asset recovery measures and arrested two leaders of the criminal organisations. Based on available information, the criminal act caused a financial loss of HUF 4.5 billion to the budget as a result of the unpaid value added tax. In order to secure confiscation of assets, the Hungarian court ordered freezing of the assets. The criminal proceeding is ongoing.

2. Protection of the Budget

The above legal case has several elements that help to point out in what context and scope regulation concerning the protection of financial interests can be interpreted and what obstacles emerge when law is applied. Next, I would like to focus on the development and essence of substantive law, and afterwards I will highlight two key elements

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of the national application of law that are probably the most important: the issue of VAT and certain problems of evidence presentation. Finally, I will touch on the role of the EU and that of OLAF within the EU as my topic concerns criminal acts with EU dimensions.

With Hungary's joining the EU, the national and European budgets got into considerably closer contact with each other. By this I mean not only the budget drafting phase but also the legal protection extending to both budgets, which is given detailed regulation in Art. 36 of the Fundamental Law of Hungary. Financial constitutionality, however, concerns not only the field of constitutional law but also the field of public administration and tax law as well. It eventually relates to criminal law, too, as criminal law is *ultima ratio* since it can be applied in the event of the most serious and gravest illegal acts. This multilayer system of protection also means a legal and organisational matrix that includes the jurisdiction and activity of national and EU organs starting from budget drafting through the adoption, implementation and monitoring of the budget. My presentation will elaborate only on the set of criminal law tools of this complex system looked at both from a national and EU dimension.

The legal definition of budget fraud primarily protects the smooth functioning of Hungary's public finances and that of the EU budget. A notable element of the regulation – even when compared to international regulations – is that the protection provided by criminal law extends to budgets handled by and on behalf of international organisations, as well as to budgets and funds handled by or on behalf of foreign states.

3. The process and aims of national legislation

Creating the legal definition of budget fraud, whose definition had actually been inserted in the former Criminal Code before the new Criminal Code – namely Act C of 2012 – entered into force, was one of the elements of the comprehensive reform of criminal legislation.

Within the framework of the former Criminal Code, legislators consolidated the individual legal definitions of illegal acts committed against budgets that various parts of the Special Part of the Criminal Code contained, and it used this approach of regulation without any essential changes to the new Criminal Code, which entered into force on 1 July 2013. The result of this consolidation is expressed by the legal definition of budget fraud punishable under Section 396 of the present Criminal Code.

The legislative objective was to enhance the efficiency of protection against criminal offences committed against the central or EU budgets, so legislators tried to give the most general and comprehensive definition of the category of things against which budget crimes can be committed.

This model of regulation differs from the previous one, where the protection of Hungarian and EU budgets covered various and separate legal definitions, and the case was similar for the protection of the revenue and expenditure sides of the Hungarian budget, too. Accordingly, some revenue forms of the Hungarian budget – for example, taxes and excise duties – are separately mentioned as things against which

various criminal offences defined in the Special Part of the Criminal Code can be committed. Their criminal law protection has been guaranteed by punishing various forms of conduct that are described in different ways in each legal definition of crime. The protection of the expenditure side of the budget also covered various legal definitions of crime in the Special Part of the Criminal Code. In this context, let me note that the formerly effective legal definition of unlawful acquisition of economic advantage (Section 288 of the former Criminal Code) and the violation of financial interests of the European Communities (Section 314 of the former Criminal Code) provided protection for different things against which crimes can be committed – thus including the expenditure side of the Hungarian and EU budgets – by sanctioning different forms of conduct.

When creating the legal definition of budget fraud effective as of 1 January 2012, legislators aimed at providing criminal law protection for both the Hungarian and EU budgets by setting forth *one single and uniform legal definition of crime, covering both revenues and expenditures of the budget* in a comprehensive way. Accordingly, the most general legal definition was set forth for the crime, and things that the crimes could be committed against, as well as criminal conduct, were most generally described. In this model of regulation, legislators gave an extensive interpretation of the "financial loss" element of crime, which element is the result of crime. This extensive interpretation, however, has become part of the definition of budget fraud only when the new Criminal Code entered into force.

The legal definition of budget crime was created as a result of consolidating nine crimes. On the revenue side, tax fraud, tax fraud committed in relation to employment, excise violation, smuggling, VAT fraud, crime affecting the financial interest of the European Community and any other forms of fraud that affect or causes damages to the budget are included in this legal definition. On the expenditure side, the new legal definition of budget fraud unites the former definition of the unlawful acquisition of economic advantage, the crime affecting the financial interests of the European Community and all the forms of fraud that violates or causes damage to the budget.[1]

4. Practical experience, the role of VAT

It is not without reason that I have decided to include for illustration the legal case presented in the introductory part. With that legal case I also wanted to illustrate that legal practice shows budget fraud is most commonly committed against value added tax. Such cases make up a considerably large proportion of the total number of cases. Therefore, when practical issues of budget fraud are looked at, budget fraud needs to be deeply analysed.

Tax fraud (Section 318 of Criminal Code) and fraud (Section 310 of Criminal Code), as having been defined in the former Criminal Code, were applied to crimes

[1] See: Miskolczi 2016, 1325.

committed with respect to value added tax. The practical importance of these legal definitions of crime can be felt even today, as in accordance with Section 2 (2) of the new Criminal Code, the new legal definition of budget fraud can be applied to crimes committed before 1 January 2012 only if this application is more favourable for the perpetrator. Let me note, however, that all of this raises several questions as far as the legal qualification of crime is concerned.

Budget crime can be committed against value added tax on the revenue and expenditure side of the budget depending on whether non-declared and paid or reclaimed VAT is concerned by the crime.[2] This act is committed by a person who induces a person to hold or continue to hold a false belief, or suppresses known facts in connection with any budget payment obligation or with any funds paid or payable from the budget, or makes a false statement to this extent.

Background provisions regarding value added tax are included in the Act on VAT.[3] The scope of the Act on VAT extends to the supply of goods and services for consideration within the domestic territory, the intra-Community acquisition of goods for consideration within the domestic territory and the importation of goods, all of which are subject to taxation.[4] Any of these transactions may constitute acts of crimes committed against VAT. The most commonly occurring case from them is the supply of goods and services for consideration within the domestic territory, but the presented legal case also included the failure to pay VAT with respect to intra-Community acquisition of goods.

According to the general rule set forth in Section 138 of the Act on VAT, in connection with the supply of goods and/or services, VAT is payable by the taxable person who carries out the transaction acting in his own name. According to Section 56 of the same Act, unless otherwise prescribed in this Act, the amount of VAT payable shall be assessed at the time the chargeable event occurs. A rule deviating from this stipulation prescribes that tax-paying obligation shall also apply if an invoice is issued in the absence of a chargeable event [Section 55 (2) of Act on VAT]. Similarly, the person charging VAT on the invoice he issues shall be liable for payment of VAT [Section 147 (1) of Act on VAT].

In the most general case defined by the Act on VAT, in the event of transactions within the domestic territory, the person charging VAT on the invoice issued by him about the supply of goods or services passes on liability for payment of VAT to the addressee of the invoice, and the addressee of the invoice pays to the issuer of the invoice the VAT as part of the gross price. In order to avoid double-payment and cumulation of taxes, the addressee of the invoice shall be entitled to exercise the right of deduction [Section 119 (1) of Act on VAT], which arises at the time when the payable tax becomes chargeable, so at the soonest when the invoice is issued, provided this does not coincide with the time of performance.

[2] See: punishable conduct and mode of perpetration specified by Section 396 (1) a) of the present Criminal Code

[3] Act CXXVII of 2007 on Value Added Tax.

[4] Section 2 of Act on Value Added Tax.

The taxable person shall be entitled to deduct from the VAT which he is liable to pay [Section 120 a) of Act on VAT] the tax whose payment another taxable person has passed onto him with respect to the supply of goods or services. Holding an invoice which verifies the performance of the transaction shall be a requirement for this [Section 127 (1) a)].

5. Admissibility and assessment of evidence

Based on what has so far been explained, one can differentiate between taxes payable on the sale and taxes payable on the acquisition of goods; in other words, payable and deductible taxes.[5]

In the event of value added tax payable on acquisition of goods, the essence of the conduct is the ineligible exercise of the right of deduction, which generally occurs when "fictive invoices" are made out – as illustrated by the legal case described in the introductory part.

In practice, investigations into crimes committed in relation to value added tax almost always commence on the basis of criminal complaints of the tax authority, which are preceded by a tax inspection. As a result, criminal complaints are usually filed in two cases by the tax authority: on the one hand if the tax inspection procedure finds that fictive invoices have been used to reclaim VAT and the other case is if during the tax inspection the inspected taxable person cannot substantiate his right of deduction with an invoice verifying the performance of transaction, which leads the tax inspection procedure to find a tax debt.[6] It is important to note that a criminal complaint in itself gives grounds only for suspicion of crime, and it is an occasional mistake in the investigating authority's proceeding that reasonable suspicion is grounded directly on the information contained in the criminal complaint. Contrary to this practice, case files of the tax inspection can be assessed as documentary evidence [Section 76 (2) of Criminal Procedure Code]. Apart from this, the tax inspection procedure and the result thereof shall not be binding on authorities handling the case [Section 10 of Criminal Procedure Code].[7]

[5] In accordance with Section 153/A (1) of Act on Value Added Tax the taxable person may deduct from the amount of the payable tax the VAT applied at the preceding stage and carried out or to be carried out by another taxable person. The difference between the two determines the amount and the profit margin of the two for a given tax period. If the profit margin of the two is positive, in other words, if the tax payable on the supply of goods exceeds the tax payable on the acquisition of goods, tax shall be paid on the margin. Conversely, in event of negative margin the excess VAT payable on the acquisition of goods can be reclaimed by the taxable person in accordance with the Act on VAT, i.e. the taxable person may request the excess VAT be returned to him, or the taxable person may set off the excess tax against the amount of the payable VAT or of other type of tax in order to reduce the tax amount payable by him.

[6] Section 127 (1) a) of Act on VAT.

[7] Based on Section 75 (1) of the Criminal Procedure Code authorities handling criminal cases present evidence autonomously to prove facts essential in view of the application of substantive criminal law and criminal procedure law by using means of evidence specified by Section 76 (1) of Criminal Procedure Code. The aim of evidence presentation is to perform criminal procedural tasks defined under Section 164 (1) of Criminal Procedure Code while identifying the perpetrator and locating evidence.

6. The issue of coercive measures restricting property rights

Enhancing the effectiveness of criminal law protection against budget crimes necessarily raises the need for compensation for damages caused to the budget. The removal of proceeds of crime in criminal proceedings is of the utmost importance, as expressed in the determination of the rules of asset recovery procedure – which is a special procedure – effective as of 1 July 2013 [Sections 554/P–554/R of former Criminal Procedure Code].

The special nature of the crimes committed against the budget implies that the application of substantive criminal law provisions in this context is sometimes based on special-ancillary provisions of law related to certain taxes (e.g. VAT). Judicial practice interprets the application of provisions relating to the removal of proceeds of crime with respect to financial crimes as a separate matter,[8] which is also justified by the fact that the outcome of the previously conducted tax inspection procedure also has a significant impact on the application of criminal law. It is contrary to the rule of law to remove property undoubtedly owned by a different entity, so the satisfaction of a civil claim in criminal proceedings takes precedence over confiscation.[9] Asset confiscation is only applicable to property that does not serve a civil claim [Section 74 (5) a) of Criminal Code].

However, criminal enrichment is of a special nature since it can typically be embodied not only in unlawful tax return, in unduly received budget support, but also in the absence of the decrease of property due to illegal non-declaration and non-payment of tax. In the latter case, there is no actual increase in wealth, so the result of the crime is also negative.

The basis for confiscation is the unlawfully returned tax, ineligibly used budget support and the loss of tax revenue due to unpaid tax.[10] A typical case of the latter is that the value added tax revenue is reduced by deducting and settling the value added tax on a fictive invoice, which, as mentioned before, is not embodied by the affluence of the business entity concerned.[11]

In the past, the National Tax and Customs Administration of Hungary also acted on behalf of the state to enforce civil law claims by exercising limited rights of the victim in criminal proceedings. However, this has changed significantly with the adoption of Criminal Law Uniformity Decision 4/2015, which clearly states that, in order to compensate for the damage caused by such a crime, the National Tax and Customs Administration of Hungary as a private party *is not entitled to launch civil action in criminal proceedings*. The reason for this, as explained in the Decision of the Curia, is that the National Tax and Customs Administration of Hungary cannot be regarded as

[8] See: Opinion 95/2011 BK of the Hungarian Curia's Criminal Committee.

[9] See: Opinion 69/2008 BK of the Hungarian Curia's Criminal Committee on Confiscation of Assets.

[10] See: Section III of Opinion 95/2011 BK of the Hungarian Curia's Criminal Committee.

[11] In context of such cases, in accordance with provisions of substantive criminal law, thus in accordance with Section 396 (9) b) of Criminal Code financial loss shall also mean any loss of revenue stemming from non-compliance with any budget payment obligation, which based on Section 74 (2) of the Criminal Code shall in itself give rise to confiscation of the tax amount unpaid with reference to ineligible deduction.

a victim in the criminal proceedings initiated for the crime of fiscal fraud; therefore, it cannot enforce a civil claim as a private party and may not submit a motion for ordering seizure of property to secure that civil claim.

In the event of financial crimes, in addition to enforcing civil law claims or a final tax administration decision on the payment of outstanding tax, confiscation is usually only an ancillary coercive measure. However, this is only the case if coercive measures are applied against a legal person subjected to tax inspection procedure who has acquired proceeds of crimes by committing a financial crime. Confiscation of assets, on the other hand, is a primary and binding obligation if a natural person has acquired proceeds of crime by a criminal offense involving a legal person.

7. Special protection of the EU budget

The legal case mentioned in the introduction highlights another important problem. VAT is not only the revenue of the Hungarian central budget, but it is also the own resource of the EU. Thus, VAT crimes, including the crime mentioned in the legal case, affect and cause damage not only to the domestic budget but also to the EU budget.[12] The creation of the legal definition of budget fraud has uniquely provided equal protection both for the domestic and EU budget as well.

The fight against fraud affecting the budget and the financial interests of the EU plays an important role in the work of the Prosecution Service of Hungary.

The concept of protection of the financial interests of the European Union, which is now rooted in EU law, derives from primary law. Protecting its own budget has long been a priority for the European Union. The first element of criminal law protection of the financial interests of the European Union was introduced in 1995 with the adoption of the Convention on the Protection of the European Communities' Financial Interests (PIF Convention) and the protocols thereto. General EU criminal law measures taken in this field also include provisions on confiscation of proceeds of crime, assets and instruments used for the commission of crime, and "this framework is completed by general EU criminal law measures taken for the fight against certain illegal activities which are particularly harmful for legal economy, such as money laundering or corruption, which – although do not specifically aim at the protection of the Union's financial interests – also contribute to their protection".[13]

In particular, the *Treaty on the Functioning of the European Union*[14] contains several references to the act of fraud affecting the budget.

While introducing the structure, operation, field of action and tasks of Eurojust in Art. 85, it is indicated that "the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, *particu-*

[12] Miskolczi 2016, 1338.

[13] Proposal for a Directiveof the European Parliament an of the Council on the fight against fraud to the Union's financial interests by means of criminal law/* COM/2012/0363 final - 2012/0193 (COD) */.

[14] TFEU *http://eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=CELEX:12012E/TXT&from=HU.*

larly those relating to offences against the financial interests of the Union" [Art. 85(1)(a) TFEU] is of utmost importance.

The fight against illegal activities affecting the financial interests of the European Union is a very special and unique policy area, which is also indicated by the fact that in Title II of the TFEU on Financial Provisions, a separate chapter (Chapter 6) was devoted to anti-fraud provisions. Pursuant to Art. 310(6), "the Union and the Member States, in accordance with Art. 325, shall counter fraud and *any other illegal activities affecting the financial interests of the Union*", and "Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests".

Art. 325 underlines that both the European Union and the Member States "shall counter fraud and *any other illegal activities affecting the financial interests of the Union*". Its text uses strong expressions such as the Member States and the institutions and bodies of the European Union shall act as a "deterrent", shall "afford effective protection" and shall "afford effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies". The Member States "shall take the same measures to counter *fraud affecting the financial interests of the Union* as they take to counter fraud affecting their own financial interests".

The so-called *PIF Directive*[15] on the fight against fraud to the Union's financial interests by means of criminal law also provided a solution to the issue of the legal basis of primary law. Ultimately, the Directive does not refer to Art. 325 of TFEU but to Art. 83 (2) as a legal basis. By doing so, the EU has moved towards a weaker regulation since "while Art. 83 (3) allows the EU legislator to lay down minimum rules for Member States, Art. 325 (4) does not apply such a restriction".[16]

However, the legal framework that underpins this legal basis continues to emphasise that the protection of the Union's financial interests is an important and common objective that any instrument, including criminal law, regarded as the *last resort*, can be used against it. As the Union's budget is the basis for the Union's economic and support policies and thus for integration as well, acts affecting and causing damages to the budget will ultimately undermine integration.[17] This is why the European Union is using such a wide range of instruments.

8. The role of OLAF

Further instruments of the European Union develop and elaborate the above-mentioned regulations regarding substantive, procedural law, as well as the organisation of the EU. In the case of the latter, it is very important to mention OLAF, the European Anti-Fraud Office (Office de Lutte Anti-Fraude).

[15] Directive 2017/1371/EU of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

[16] Miskolczi 2018, 60.

[17] Miskolczi 2016, 1327.

OLAF has close relationship with the prosecution offices of the Member States, and it has been widening its competencies (spheres of authorities) since 1988, the year of the establishment of its predecessor, the UCLAF (Unité de coordination de lutte anti-fraude). The activity covering 30 years of experience is coordinated by the Commission.

It is the financial interests of the EU that are at the centre of OLAF. According to Art. 2, the "financial interests of the Union shall include revenues, expenditures and assets covered by the budget of the European Union and those covered by the budgets of the institutions, bodies, offices and agencies and the budgets managed and monitored by them".[18]

OLAF (also referred to as "Office") has no criminal law tools. Its inspections have an "administrative" character which means that the supervision, monitoring and other measures taken by OLAF cannot have influence on jurisdiction concerning the initiation of criminal procedure of the competent authorities of the Member States [Art. 2 (4)].

Regulation 883/2013 keeps the procedural mechanism of the earlier Regulation 1073/1999/EC, namely the duality of the external and internal inspections. According to Art. 3, the Office carries out on-the-spot inspections and checks in on the Member States during external inspections, while according to Art. 4 the Office shall carry out administrative investigations within the institutions, bodies, offices and agencies (internal investigations). Besides inspections, the Office may help the work of the Member States' authorities; it contributes to the administrative inspections made by them, or it harmonises the cases concerning more Member States.

The Regulation makes an obligation for OLAF to keep in connection and cooperate with national judicial authorities. The Cooperation Agreement between the Prosecution Service of Hungary and OLAF, which has had an effect on common activity of the two organisations, is one of the illustrative examples of this connection and cooperation.

The role of the Prosecution Service of Hungary is also supported by an internal organisational regulation besides substantive, procedural and international provisions. Circular No 5/2014 (XI 30), issued by the Prosecutor General of Hungary, contains provisions in details on making the work of prosecutors more precise in relation to procedures regarding crimes that violate the financial interests of the European Communities.

Since 2012 until the beginning of 2018 OLAF issued altogether 36 judicial recommendations and four indications for the Office of the Prosecutor General of Hungary, which indicated suspected crimes based on their own administrative investigations. In each case, the Prosecution Service of Hungary ordered that a criminal investigation should be opened, and if a criminal investigation was already ongoing, the OLAF recommendation was attached to the investigation files and was assessed as a part thereof.

[18] Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Councin of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999.

In the majority of cases received from OLAF, OLAF made recommendations for initiating criminal procedures or made indications to crimes of misuse committed in relation to some funding programmes of the EU or concerning applications for programmes supported from EU funds.

Prior to 2012, OLAF did not issue any recommendations in accordance with Art. 11 of Regulation (EU, Euratom) No 883/2013 of the European Parliament; it only forwarded its final reports on its external investigations to the Hungarian judicial authorities. In 2010 the Prosecution Service of Hungary received no final reports from OLAF. In 2011 only one final report was received from OLAF. In connection with this OLAF final report, a criminal procedure was launched, an indictment was filed and the case ended with a final judgment on 24 June 2016.

Thus – as far as the entire time period is concerned – courts delivered two judgments that convicted the offenders based upon nine indictments. There are seven other cases that have not been decided by the court yet. Eight cases were closed with the termination of criminal proceedings. In all of the other cases, the criminal investigation is still ongoing.

The rate of indictments and terminations in criminal proceedings opened on the basis of OLAF's recommendations, transmitted information or final reports exceed the EU average. According to the 2016 OLAF Report, the EU average is 44%; without SAPARD cases it is 50%.

Practical experience gained during the years shows that – in addition to many other factors – OLAF also completes the activity of judicial organs of the Member States, and in this way, actions taken against crimes violating the financial interests of EU really prove to be more effective.

9. Conclusion

As the above-mentioned shows, competences and jurisdictions relating to the protection of the EU and Hungarian budgets give important tasks to the Prosecution Service of Hungary. The legal definition of budget fraud set forth by the Criminal Code serves as the ultima ratio tool for the protection of the budget against fraud, protection of which is given special emphasis by the Fundamental Law of Hungary. Since substantive law regulation has provided sufficient legal framework, in my opinion, more efficient protection of the budget can be achieved by a more enhanced use of procedural tools – and within that, the use of investigating tools – in the near future.

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CRIMINAL PROTECTION OF THE FINANCIAL INTERESTS OF THE EUROPEAN UNION: BUDGET FRAUD

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1. Introduction

Since the topic of the conference is the criminal protection of the financial interests of the European Union, with special regard to value-added tax (VAT) fraud, I would like to briefly introduce different scopes of the Hungarian regulations and, subsequently, highlight some relevant international aspects of this particular type of offence.

It is to be noted right at the beginning that in English terminology used in the European Union, the phrase value-added tax refers to the so-called 'general turnover tax' (általános forgalmi adó) in the Hungarian taxation system, therefore both expressions are to be understood when it comes to value-added tax depending on whether we examine the offence domestically or in a cross-border related way.

2. Hungarian criminal regulations

The Act C of 2012 (hereinafter Criminal Code) does not contain specific offences concerning different types of taxes. Different criminally characterised behaviours are integrated into one offence, namely the so-called budget fraud, which was introduced as the descendent of tax fraud (in which general turnover tax is also included).

The terminus technicus of budget fraud, instead of tax fraud, was introduced on 1 January 2012 by the amendment of the former Hungarian Criminal Code (Act IV of 1978).

As an introduction, I would certainly like to point out that we are talking about a complex area of law where cooperation and thinking together among different fields of expertise is essential for an effective investigation of a case. The relationship between tax administration and criminal proceedings is very close since a criminal offence also exhausts the elements of tax infringement at the same time. That is, the same behaviour justifies the initiation of two procedures, which raises several problems, of which only the mutually exclusive effects of the procedures, the applicability of sanctions and the applicability of each piece of evidence are exemplary. The same facts must be examined in both the taxation procedure and criminal proceedings, and findings shall

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be made for the same act. At the same time, in criminal proceedings, i.e. a higher-level procedure with regard to their hierarchy, the authority takes a stand on the issue of guilt and, as a guarantee rule, it is irrespective of the findings of the tax authority since they do not bind the criminal court.

Now I would like to present the essence of the Hungarian regulation of budget fraud relevant to VAT in order to understand how Hungarian regulation is integrated into the focal area of the conference.

2.1. Budget fraud

The protected legal subject of budget fraud is the budget itself.

According to the Criminal Code, budget shall mean:

– the subsystems of the central budget including the budgets of social security funds and extra-budgetary funds;
– budgets and/or funds managed by or on behalf of international organisations and of the European Union.

The way of the criminal conduct is regulated by § 396 of the Criminal Code.

Pursuant to this §:

– inducing a person to hold or
– continuing to hold a false belief
– making false statement
– suppressing known facts
– unlawfully claiming advantage made available
– using funds for purposes other than those authorised

provided that such conduct occurs in connection with any budget payment obligation or with any funds paid or payable from the budget.

As a further conjunctive condition, the law determines that any of the above-mentioned behaviours must cause financial loss to at least one budget.

It is also worth mentioning that anyone who, in the absence of a condition laid down in the Excise Duty Act or without an official license is likewise punishable, if he

– manufactures
– obtains
– stores
– sells or
– trades excise goods.

Here, too, a further condition is causing financial disadvantage to the budget.

As a rule, budget fraud falls within the jurisdiction of the district court, but the Criminal Code, in the case of the most serious forms of budget fraud, refers to them as a major crime related to economy and transfers them to the jurisdiction of the regional court. The punishment of the act is based on the magnitude of the financial damage caused.

2.2. Aggravated forms of the offence and the penalties thereof

Let us take a look at the aggravated forms of the offence and the related penalties:
- up to three years of imprisonment if the offence committed results in a greater financial loss (HUF 500,001 – 5,000,000)
- up to five years of imprisonment if the offence committed results in a substantial financial loss (HUF 5,000,001 – 50,000,001)
- between two and eight years of imprisonment if the offence committed results in a particularly considerable financial loss (HUF 50,000,001 – 500,000,000)
- between five and ten years of imprisonment if the offence committed results in a particularly substantial financial loss (over HUF 500,000,000)

Apart from the limits of financial loss, in each case a separate aggravating circumstance is the offence committed in criminal association with accomplices or on a commercial scale, which qualifies the act up to one higher qualified form.

In order to understand the essence of qualified forms of the offence, it is necessary to clarify the notion of a criminal association and of business conduct:

According to § 459 Point 2 of the Criminal Code, 'criminal association' shall mean when two or more persons are engaged in criminal activities in an organised fashion, or they conspire to do so and attempt to commit a criminal act at least once without, however, creating a criminal organisation.

According to the same § Point 28, a crime is deemed to be committed on a commercial scale if the perpetrator is engaged in criminal activities of the same or similar character to generate profits on a regular basis.

I feel it is necessary to point out, only briefly, that the issue of repetition of acts of the same kind was very interesting in the case of tax fraud and, later on, budget fraud, which arose mainly from the accumulation of values.

When determining budget fraud, the natural unity "trumps" the statutory unity of continuously committed offences, and these two categories do not compete with each other. The offence of budget fraud is committed as a natural unit if the financial damage caused by the offence affects a single budget only. However, if the financial loss affects more than one budget, the offence constitutes a statutory unit. If assessing the acts of the same kind as one offence arose from the nature of the criminal act (natural unit), we cannot talk about repetition of the same offence. According to the former practice, the court established the repetition of acts of the same kind when the subject of taxation caused financial loss concerning the same tax but in several tax declaration periods.

When there are several partial acts in the statutory unit that in themselves amount to a criminal offence and the counts merge them into one as a statutory unit, the commitment on a commercial scale can be clearly established. The same applies when the perpetrator commits only one criminal offence, that is, the commitment on a commercial scale can be established, but one further condition shall be fulfilled, namely intention to generate profit on a regular basis need to be observed. In other words, the conclusion should be drawn as to the intention of committing more than one criminal act.

2.3. Unlimited mitigation of punishment

The possibility of unlimited mitigation is a relevant element of the statutory facts, according to which, if the perpetrator reimburses the financial loss caused by budget fraud before the indictment, his punishment can be mitigated indefinitely.

Submitting a self-check is not suitable for eliminating the criminal consequences; only the reimbursement of the financial loss caused, up until the submission of the indictment, is suitable.

However, this provision shall not apply if the offence is committed in a criminal organisation or as a habitual recidivist.

2.4. Limitation, wilfulness-negligence

In the case of budget fraud, the minimum limitation period, as a general rule, is five years, while the maximum limitation period is 10 years, which is adjusted to the maximum length of imprisonment that can be imposed.

Budget fraud can only be committed deliberately; there is no negligent form thereof. However, the situation differs if the financial loss of the offence remains below the crime threshold. In this case, we can only speak of the responsibility for misdemeanour, in which case negligent behaviour also can be observed.

The lower limit of punishability is HUF 100,000, meaning that the crime is committed only to cause this financial loss, under which we can talk about customs misdemeanour.

2.5. Sanctions

With the most lenient form of budget fraud and the slightest form of qualified cases, § 33 (4) of the Criminal Code, i.e. if the upper limit of the punishment for a crime is not more severe than three years of imprisonment, other forms of punishment may be applied instead of imprisonment, which are as follows:

– custodial arrest
– community service work
– fine
– prohibition to exercise professional activity
– expulsion.

Several of these penalties can be imposed together. It is to be noted that the imposition of the above-mentioned punishments is unlikely in practice in cases tried by regional (i.e. higher) courts.

Beyond the imposable punishments, it is worth mentioning the confiscation of property as an applicable sanction. In this respect, it should be emphasised that confiscation of property must be applied in the same amount as the financial loss caused in the budget. However, when determining the extent of this, it is necessary to return to the findings made during the tax administration procedure. In view of the prohibition of double withdrawal, there is no place for the confiscation of property if the offender

has already been obliged to pay the financial loss caused in the budget. However, if the payment obligation does not reach the amount determined by the court, the measure shall be applied to the remaining difference. It is interesting that the confiscation of property, if the amount in question enriches not the offender but the business entity, shall be applied against the latter.

2.6. Statistical trends

Without mentioning accurate statistical data, it can be said that budget fraud accounts for nearly two-thirds of economic crimes committed in Hungary. What is even more worrying, however, is that regarding the financial loss caused by economic crimes, budget fraud represents 90% of economic crimes and is accompanied by a very low rate of return, approximately 10%.

It is a fact that both domestic and cross-border Community VAT fraud is constantly adapting, becoming more and more complex and indirect.

3. Carousel fraud

In the following I would like to briefly describe how cross-border carousel fraud, which is closely linked to budget fraud, works in practice. First of all, I would like to point out that the danger of this type of crime to society is not merely the damage caused to the budget and its cross-border nature, as it is also one of the very typical forms of organised crime, but also that it can take on undertakings who have no idea that they have become part of a fraudulent business. The aim of their "involvement" is twofold. Primarily, it is the appearance of the legality of the sales chain, and, in the alternative, they need to be the "scapegoats" in the event of a breakdown to whom responsibility can be shifted. The prosecution of the latter (whether administrative or criminal) or the exemption from liability is largely dependent on the depth of the examination or investigation conducted.

The essence of carousel fraud is to avoid paying the general turnover tax (VAT), which will be the profit itself. The process can be typed, repetitive (hence its name) and usually has four players. Most of them belong to the same interest group, with the primary aim to commit tax fraud. Damage or financial loss caused to the budget is the benefit to the person or persons managing the interest group.

Since a Member State's product is sold to another Member State at a net price, i.e. the customer does not have to pay VAT at the time of sale, the whole storyline is about buying and selling between players in the Member States of the Community.

The four players in carousel fraud are the broker, the channel, the buffer and the missing trader, whose role – in a simplified way – is the following. Brokers play a central role, as it is a market participant that is also engaged in purchase activities legally with other products similar to the products in the fraudulent supply chain, which poses additional difficulties during the discovery. For the carousel fraud scheme, the broker purchases (from a legal source) the products from a MS of the Community that

is either bulk goods (sugar, cereals, flour, oil, etc., i.e. goods that cannot be identified individually) or products of high value like computing devices or mobile phones. The broker sells the product with a small profit to the channel within domestic sales, who then pays the tax and subsequently sells the goods abroad (it is to be noted that this could also be done by the broker due to the reverse VAT to be applied when selling within the Community). Considering that the channel pays the VAT after the purchase, it claims back the amount from the tax authority. The buffer company then sells the goods to the broker within Community sales, who therefore obtains the same product for a reduced price.

The broker (often only on paper) sends the goods to the other Member State through the channel, which is bought by the missing trader, who often returns the product to the broker in the country of origin. This means that the missing trader has got the goods at a net price and then returns them to the country of origin and sells them at a net price. In this case, the business "profit" is the VAT refunded by the channel. The point is that the missing trader does not pay the VAT.

Sales between Member States under the VAT provisions do not have to be charged by the seller, and the buyer has to pay the VAT according to the VAT rate of his own country, which does not, however, constitute a real obligation to pay as it is also payable and deductible in the same return.

The nature of carousel fraud – hence its name – is that the process can be started from the beginning again and again. In such a case, the missing trader sells the goods at the gross price of the purchase in his own country. The point is that the VAT content of the revenue – although it would be obligatory – will not be paid but will disappear, usually before the submission of the return.

The buffer buys the goods from the missing trader and then sells them abroad to the broker, that is, the goods are returned to the broker at the end of the process, i.e. everything is unchanged except for the price of the product; the same products or goods have been returned to him at a lower price. The greatest benefit can be realised if the buffer, the channel and the missing trader are controlled by one organiser since in this case all the profits are realised by him, and a part of the profit is later returned to his assistants.

With the use of multiple buffers, multiple channels or several Member States, it is more difficult to uncover the carousel fraud and to detect the fraudulent process. However, this also increases the risk of exposure.

As far as the investigation is concerned, in the case of carousel fraud, similar to corruption crimes, a very high latency can be observed, so what we judges are facing in the courtroom is just the tip of the iceberg.

THE FIGHT AGAINST VAT FRAUD FROM THE POINT OF VIEW OF THE TAX AUTHORITY

Tamás Jármai[*]

1. Introduction

There is a still existing problem since the creation of the EU, and this is the realisation of tax evasion between malicious partners within the Member States. VAT fraud is estimated to be close to EUR 150 billion for all EU Member States (2016 data).

Tax evasion in several Member States of the Community primarily affects VAT. Instead of applying the country of origin principle, the Member States in 1967 determined the introduction of the tax liability according to the destination country. This system, initially intended for transition, is still in operation today. The EU has often tried to deal with limiting the possibilities of tax fraud, and several measures have been taken to this end. The Green Paper on the future of VAT, adopted by the European Commission in 2010, is of paramount importance in this regard. They have been looking for solutions in every area of VAT:

(a) the practical implementation of the country of origin principle instead of the current destination tax payment liability,

(b) the extended application of the reversed charged VAT,

(c) changing the scope of VAT (how much public actors are involved),

(d) the reform of the current system of exemptions or the abolition of exemptions,

(e) modifying the terms of the deduction right,

(f) strengthening the single market through legislative harmonisation,

(g) the idea of creating a uniform VAT rate,

(h) possibilities for reducing bureaucracy,

(i) facilitating the position of small – and medium – sized enterprises,

(j) revision of VAT collection methods:

– *split payment*: The bank would transfer the net amount of the sale to the supplier, while the VAT would be transferred to a special account with limited access to the taxpayer, but he/she would be able to reclaim it from here, and the tax authority could recover it directly from this account if needed.

From a practical point of view, this would create very favourable budgetary opportunities for companies with independent legal personality, as it would simplify execution for the tax authority. However, it could cause liquidity problems for honest enterprises

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because it would deprive all economic operators of the short-term possibility of VAT management of the current reporting period, and it would limit the competitiveness of the Union through the increasing short-term credit needs of businesses. Administration would also increase. Its general introduction would be a barrier to economic growth, although it could be a perfect solution against fraudulent business activities.

– *creating a central VAT surveillance database* to record all data of the invoice – the tax authority could directly access data or verify e-invoicing

In Hungary, as with several other Member States, both the vendor and the customer have to provide information about the transaction in one day above a certain threshold if the invoice is made by a billing program (over HUF 100,000 VAT content since 1 July 2018). In the case of a manually issued invoice, it has to appear in the online billing system within five days. In this case, suspicious transactions can be traced by continuous risk management, so the tax authority can intervene in fraud processes even on the move.

– *creating a secure VAT data warehouse* (for the taxpayer or a group of taxpayers) into which the taxpayer uploads certain data in a specified format

This is related to the previous point. In Hungary an online billing system has been introduced in which the data manager is the tax authority and the participating companies can control their own trade relations, so it also has a preventive effect.

– *strengthening the dialogue between the taxpayer and the tax authority*: The VAT compliance procedure and the internal controls of the taxable person are certified.

Significant progress has been made in this direction through the tax-centred tax authority practice in Hungary with supportive procedures and audits; all help is given for the taxpayers who are willing to comply with their legal requirements.

2. VAT fraud mechanisms

The following typical VAT fraud mechanisms can be distinguished in the European Union:

2.1. False intra-Community sales

We are talking about false intra-Community trade when the Hungarian vendor (producer) apparently sells his product to a company in another Member State that is not in fact in contact with the Hungarian company. Typically, in addition to the invoice, they also produce supporting documents with untrue content. In these cases, the real delivery takes place to domestic customers who do not appear in the accounts.

This form of fraud is relatively easy to recognise and prove through the process of international information exchange. The number of such procedures causes the problem: This type is easy to organise. There is evidence for the non-existent Community partner in the accounting instead of the real trading partners. Actually, there is no need for a relationship with a Community partner company. There will be no VAT on the invoices, although for real domestic customers, this should be shifted.

2.2. Involvement of a missing trader: false intra-Community acquisition

A missing trader is involved in the second basic case. The case exists because, according to the obligation to pay VAT at the place of destination, the Hungarian company must pay the tax in the framework of the acquisition of the intra-Community trade, and the Hungarian company can also practise the right to deduct the VAT. In addition, the domestic sales must also be subject to VAT, which results in a significant amount of tax to be paid in the customer's periodic report.

The malicious taxpayer is trying to avoid this, and he places an inaccessible Hungarian business partner between his intra-Community partner and himself. The real delivery takes place typically between the intra-Community seller and the actual buyer. The missing trader does not have any storage capacity and does not take possession of the goods. The documents do not record real data and contain apparent evidence of a missing trader. The missing trader is typically inaccessible; even its seat is typically not real.

2.3. False intra-Community triangular sales

False intra-Community triangular sales is the mechanism in which partners from several Member States sell goods with the involvement of at least two intermediaries that are not involved in the delivery of the goods. It is essential that the Hungarian company become tax-free, one of the Hungarian taxpayers or one of its customers orders the goods and the products are transported cross-border amongst them. Either there is no border crossing between the two parties or one of the Hungarian taxpayers or buyers did not order the transport service, but one of the other participants arranges the order in the chain. Then the Hungarian taxpayer may not fix VAT-free Community sales on the invoice.

2.4. Carousel fraud

The mechanism of carousel fraud is similar to the case of false intra-Community triangular sales. The difference between the two types is that the goods are transported from the country of origin to the same country, while the products are actually or apparently transiting through several Member States. The mechanism makes it also possible to implement tax evasion in a number of Member States through the involvement of one or more missing traders.

2.5. Objective consciousness of the taxpayer

The fundamental requirement is the identification and demonstration of due diligence according to the judgments of the European Court of Justice in writing before the findings of the tax authority. Due diligence can be proven by the existence of a relationship with a spouse, relative or friend or by the provision of information to which the participant would not have a view if there were not a normal, independent economic

relationship. There are two types of due diligence: active and passive. With active due diligence, there is evidence that the participant knows about the activities for tax evasion. With passive due diligence, the taxpayer could be able to see the suspicious business conditions under normal economic circumstances and could see that there is fraud if he would do everything to recognise the conditions.

All possible circumstances must be identified in each case in order to comply with the expectations of the European Court of Justice that it must happen within the strict time limits set by the Hungarian tax laws.

3. Concrete practical experience (S Limited)

In the case of S Ltd., the company bought a chocolate production line in the Hungarian county of Borsod-Abaúj-Zemplén. The invoice of the purchase was EUR 804,630 (VAT content EUR 171,063). The relevance of the case lies in the fact that the purchase of the machinery was financed 40% from a subsidy of the European Union. See below the way of the invoice:

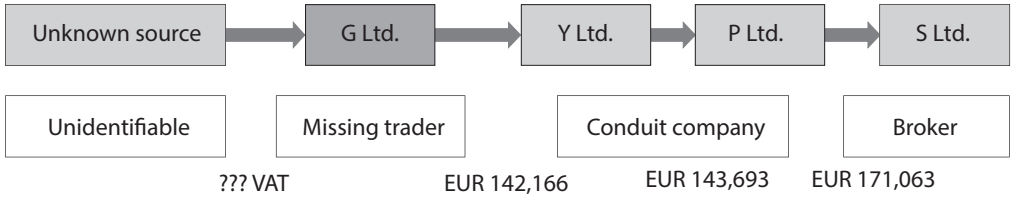

Figure 1: The way of the invoice in the practical case
Source: National Tax and Customs Administration, Hungary.

It is based on accounting documents that include the findings of related tax audits. During the tax audit, the auditors carried out an on-site check, and the chocolate production line was located at the declared site. The verification of the supply chain was no longer possible because the G limited company was unreachable and did not hand over its documents during the audit.

The route of the product was only traceable because there was a domestic delivery note available from the beneficial owner (broker). The chocolate production line was indeed physically available, but there was no other document available at all. It was not S Ltd. that delivered the production line.

The way of money was traceable because the beneficial owner and the conduit companies were paying by bank transfer, but G Ltd. took it out in cash as it arrived in his bank account, and the cash could not be followed.

There was no information available on the manufacturer of the product during the audit, and no information was provided by the beneficial owner or the conduit companies either. The tax audit was unable to advance due to the related audits, but the deadline was not extended due to suspension.

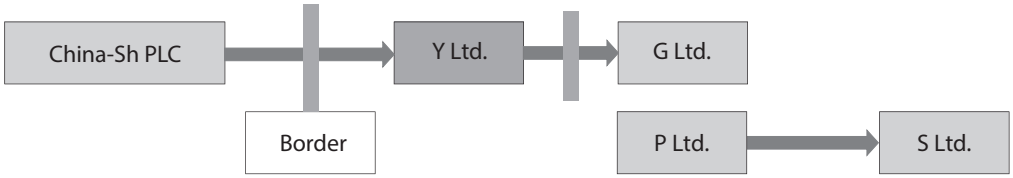

Figure 2: The manufacturer and the shipping of the production line
Source: National Tax and Customs Administration, Hungary

Unexpected information arrived from another tax directorate, which indicated that the production line – delivered to S Ltd. – came from China from a manufacturer named Sh PLC, with USD 100,000 in customs declaration (EUR 76,666). In addition to the customs control procedure, criminal investigations were also launched in which expert judgment was also sought.

The value of the production line was set at EUR 96,550 in the Customs Verification Procedure, which already includes the costs associated with the renovation.

In the expert's judgment, the worth of the production line was set at EUR 119,900, which includes the total value of the renovation.

S Ltd. received an invoice of EUR 804,630 for the production line. Due to the purchase of the production line, VAT refunds of EUR 171,063 were included in the declaration. Tax audits carried out at the company (and at the suppliers) were completed with findings. The authority with appellate jurisdiction and the Court decided the cases the same way. The Curia also made the same decision.

The investigation was closed during the criminal proceedings, and the executive was arrested in pre-trial detention, which was extended.

4. The conclusion of the practical case

The taxpayer's intention was to use the European Union's subsidy of EUR 253,427 and to claim a VAT refund of EUR 171,063 from the Hungarian budget, which covered the total real purchase value of EUR 119,900. In practice, the taxpayer would have earned EUR 304,590 from the production line procurement, which he would have taken as pure profit.

This has been prevented by criminal investigations and tax audits. The decision of the European Court of Justice to uphold the judgment would still be required if the taxpayer appeals to it.

THE ROLE OF AUDITORS AND TAX ADVISORS IN THE FIGHT AGAINST VAT FRAUD

Dr. Nóra Rácz[*]

In the struggle against tax fraud, the question of VAT occupies a prioritised position. Creating and enforcing a correct and legitimate tax system is not only an authority-related role but the goal of professionals in the tax sector, as well.

In the following, I will present the role of the advisory profession, namely the role of tax advisors, tax experts and auditors, in the fight against VAT fraud with respect to the available tools and opportunities in this regard.

The advisors may appear in two type of roles; they can be cooperating indirectly or directly.

The indirect role encompasses the clarification of tax matters and the establishment of well-functioning tax management within the framework of classical counselling. This also means giving advice for the "future", namely providing a detailed explanation to the customer, sometimes even convincing them that it is worth it to operate in a potentially more expensive but legitimate tax structure.

We can support taxpayers in the past by improving the self-auditing of tax management errors in previous tax years and by implementing other necessary corrections. Be it past, present or future, the avoidance of situations with possible tax shortages should always be kept in mind.

The indirect role of consultants is also reflected in the provision of tax planning services. It is particularly important that the tax planning process strictly refrains from using aggressive tax structures as well as the so-called "offshore" areas.

Counsellors can also assist in the direct dialogue between their clients and the tax authority, providing a solution to unique and complex issues. This widens not only the case law of the tax authority but also the reassuring and lawful handling of tax law situations that are difficult to interpret.

The national and international legal frameworks of taxation are constantly evolving and transforming. The role of advisors is also prominent in supporting change and compliance. Therefore, it is of the utmost importance to inform the clients regularly and comprehensibly about changes in the legal environment, thereby ensuring the continuity of the law-abiding behaviour.

The consultants are also responsible for the so-called "health checks" and due diligence services, that is, company due diligence. With these procedures, tax advisors

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are not only able to support taxpayers through acquisitions, but it is also worthwhile to perform these procedures from time to time to ensure that the tax treatment of each transaction is correct. Practically, these procedures take place from the point of view of an outside expert, identifying transactions or certain behaviours of the taxpayer that involve tax risk. These complex reviews support the development of an appropriate tax culture and entrepreneurial approach in the long run.

However, it is not only important to periodically review the client's business, but it is also an important role of the advisors to give practical advice in the tax supervision of partner companies. Thus, it is necessary to consider how to conduct the review of the partner correctly in a given situation and what signs should be observed and where the business partner can be identified or suspected to be involved in tax evasion.

Advisors also have other tools at their disposal to promote the law-abiding conduct of their clients, namely informing them about possible sanctions or supporting them by developing good tax practices.

In the event of suspicion of a criminal offense on the part of the advisor's own client, it should be a primary concern to comply with the reporting obligation under the Anti-Money Laundering Act, meaning that the competent authority must be notified in any case. Ultimately, the suspicion can also lead to the termination of the consultancy contract.

The Hungarian tax authority (National Tax and Customs Administration, NAV) also supports taxpayers by several means, e.g. sending information letters about partners with tax problems and regularly publishing a list of taxpayers with tax deficits. As a result of a regular rating process, the tax authority classifies taxpayers as reliable, risky or "normal". The distinction results in advantages or disadvantages aimed at promoting law-abiding behaviour.

Advisors can also take part directly in the fight against VAT fraud, for example developing new measures through their involvement that enable legislation to take more effective action against fraud. In order for the system to be effective and work as efficiently as possible, it is important to receive feedback from the practical side. Therefore, the cooperation between the legislators and law enforcement is essential.

Professional roundtable discussions and discussions with tax advisors and auditors are essential, as counsellors are the ones who can see the practical side of the rules. The realisation of the legal system is made possible by the input of professionals who perceive everyday practical usage of the rules and enable the creation of more effective solutions for legislation. Naturally, the measures taken in the fight against VAT fraud, and the transformation of the legal environment, must not result in the disadvantage of taxpayers who comply with the regulations and act accordingly. Therefore, it is important that the advisors' involvement also ensures that the interests of law-abiding taxpayers are represented in the legislation.

In the following I would like to present a practical example about the information sharing of a VAT fraud suspicion towards to the NAV. It should be noted that the possibility of public reporting has several advantages, such as a competitive advantage for the correct taxpayers and the "whitening" of the economy in the long run.

In the case at hand, public notification referred to the possibility of tax irregularities in an enterprise's Hungarian business activity with suspicion of being involved in VAT fraud.

In this case, the suspected company was selling its products in Hungary through distance selling from a webshop. According to the rules of distance selling, the country of dispatch of the goods was determined as the place of supply and thus no Hungarian VAT was charged on the sale. As there was a doubt that the sales volume may exceed the range of distance selling, the NAV was informed of the fact that the company's distance selling activity could damage the Hungarian budget or put its competitors at an unjust disadvantage.

A detailed report containing the description of the suspicion was forwarded to the tax authority with the involvement of a tax advisor in March 2016. Subsequently, in April NAV confirmed that the submission was categorised as a public announcement, and the procedure was initiated following the notification. In December 2016, the investigation of the reported entity was completed, and the company that had submitted the complaint was notified within the official framework. Finally, according to our latest information, the case was referred to the European Court of Justice in September 2018 for a preliminary ruling. As we can see, the system is working.

Through the direct involvement of advisors, we also have an influence on NAV's practices because in case of tax administration procedures, it is not only the taxpayers who need to act lawfully but also the tax authorities. It is also possible to "adapt" the practices of NAV to the EU practice in the VAT proceedings through officially submitted remarks and appeals. Examples include the European Court of Justice's decisions made in the chain transaction cases of Tóth, Dávid and Mahagében as part of the Glencore case with regard to the legitimate claim for late payment interest.

So, the role of the advisors are twofold; on the one hand they promote the law-abiding behaviour of taxpayers, and on the other hand they also affect the practice of the authority. At the same time, the process of shaping Hungarian tax administration practice is moving slow, and it also requires significant energy and resources from consultants and thus from the taxpayers.

Italy

VAT FRAUD IN THE ITALIAN LAW SYSTEM: CURRENT SITUATION AND PROSPECTS FOR REFORM

Adj. Prof. Dr. Vincenzo Carbone[*]

1. Introduction

The Italian legal system does not have an explicit definition of VAT fraud. In fact, it is not governed by the Penal Code but by Legislative Decree 74 of 10 March 2000 concerning tax offences and thoroughly revised by Legislative Decree 158 of 24 September 2015, in force since 22 October of the same year.

The Decree of 2000 introduces a radical change in direction with respect to the structure of the tax penal system under Law No. 516 of 1982, based on the identification of cases purely prodromal to evasion. Such law, in fact, entrusted the repressive intervention to criminal cases aimed at striking behaviours considered abstractly suitable to realise a future evasion, independently of an effective injury to the interests of the State.[1]

The present decree, on the other hand, identifies in the tax declaration the pivot around which the criminal relevance of the various evasive phenomena is modulated.

Chapter I, Title II of the normative text of 2000, as subsequently modified, incriminates in four distinct criminal hypotheses, three of a commissive nature (Art. 2, 3 and 4) and one of an omissive nature (Art. 5), the violation of the obligation to complete and verify the exposure of the quantitative and qualitative components which determine the taxable base.[2]

It follows that the legislature has thus punished, in an excursus of decreasing gravity, in Art. 2 hypotheses of reduction of the tax base exclusively through the increase of the taxable elements with the use of invoices for non-existent transactions. In Art. 3 it has introduced the first elements of specificity, requiring that the alteration, whether decreasing assets or increasing liabilities, takes place on the basis of false representation of the accounting records and by fraudulent means. Finally, in Art. 4, it has provided for the conduct of those who limit themselves to reducing the taxable base, altering the assets and/or liabilities. On the other hand, in Art. 8 it autonomously punishes the conduct of those who make such conduct possible through the issue or release of false tax documentation.[3]

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[1] Flora 1991, 443.

[2] Mereu 2011, 22.

[3] Antolisei 2001, 345.

2. Fraudulent declaration through the use of invoices or other documents for non-existent operations

Art. 2 regulates the offence of fraudulent declaration through the use of invoices or other documents for non-existent operations. It represents the most serious ontological case since it occurs when the declaration is not only untrue but is altered by a documentary system capable of distorting the reality represented.

The active subjects of the crime are all those who are required to submit tax and VAT returns.[4] Since this is a crime of a commissive nature, its essential constituent element is represented by the indication, in one of the declarations, of fictitious passive elements, using invoices or other documents for non-existent transactions.

The Italian Supreme Court also confirmed in sentence 51027/2015 that the offence in question exists both in the hypothesis of objective non-existence of the transaction, i.e. when the transaction was never carried out in reality,[5] in the hypothesis of relative non-existence, i.e. when the transaction was carried out but for a lower amount and, finally, in the hypothesis of qualitative over-invoicing, i.e. when the invoice certifies the transfer of goods or services with higher prices than the real ones. The object of criminal repression, therefore, is any type of divergence between commercial reality and its documentary expression.

The crime, therefore, is committed with the presentation of the declaration. Any corrective declaration of the fraudulent one, even if it has taken place within the terms provided by law for the presentation of the annual declaration, does not constitute a cause of non-punishability.[6]

The intent required by the case is a specific intent. Legislators, therefore, punish those who intend to evade taxes or obtain an undue refund or recognition of a non-existent tax credit. The incriminating case, therefore, does not exist when the subject has been moved by other purposes. The Italian judge is obliged to verify the existence of the psychological element. In other words, the offence in question is committed not by the mere use of documents but by subsequent and distinct behaviour, such as the presentation of the declaration.

The Italian system aims to limit the criminal repression only to facts directly related to the injury of tax interests. Therefore, it renounces the prosecution of purely preparatory and formal violations considered prodromal to the actual damage of the protected legal asset.

In this regard, it should be pointed out that, at the express wish of legislators, the use of invoices for non-existent operations is no longer punishable as an attempt if the latter are not included in the tax declaration.

The Italian provision does not provide for a threshold of non-punishability. In 2011, moreover, the legislator eliminated the third para of Art. 2 and 8 of Legislative Decree

[4] Iorio-Mecca 2011, 2998.

[5] Court of Cassation, sent. no.22930/2006; no. 23897/2006; no. 32544/2006.

[6] Court of Cassation, sent. no.7289/2001.

74/2000, which provided for a substantial reduction in the punishment for the offences referred to in the aforementioned articles, carried out by means of fictitious passive elements of less than EUR 154,937.07.

This criminal conduct referred to in Art. 2 is punishable by imprisonment from one year and six months to six years.

With regard to carousel fraud, characterised by the issue of invoices for non-existent transactions and carried out by international criminal organisations in order to obtain a fictitious right to VAT deduction or reimbursement of VAT credit,[7] the Italian legislator introduced into Legislative Decree 74/2000 a new type of offence listed under Art. 10-*ter*, as *"Failure to pay VAT"*.[8] According to the above-mentioned article, anyone who does not pay, within the term for the payment of the advance relating to the following tax period, the value added tax due on the basis of the annual declaration for an amount exceeding EUR 250,000 for each tax period, is punished with imprisonment from six months to two years. For this type of offence, the Supreme Court, with sentence 18924/2917, held responsible for issuing subjectively false invoices both the legal director, who did not comply with the duty of supervision and control, and the de facto director, who actually carries out the prohibited conduct.

3. Fraudulent declaration by other means

Art. 3 of the legislative decree in question outlines the case of fraudulent declaration by means of devices other than the use of invoices or other documents for non-existent operations. Therefore, this provision includes all the devices capable of hindering investigation and misleading the financial administration. With regard to the notion of fraudulent means, the Circular of the Minister of Finance No. 154/E of 4 August 2000 specifies that "the simple violation of the obligations of invoicing and registration, although aimed at evading taxes, is not sufficient, in itself to constitute the crime in question, having to verify, in the specific case, whether, for the methods of implementation, has a degree of insidiousness such as to hinder the activity of assessment of the financial administration. In this regard, the presence of systematic and continuous violations or the keeping of black accounts or the use of bank current accounts for operations destined not to be accounted for can be decisive".[9]

Even in this case, the active subjects are all those who are required to declare income and VAT, even if not bound to keep accounting records. Obviously, as mentioned above, the intent of the offender will be fundamental. Also in this case, in fact, they detect the conduct aimed at evading value added tax or income tax or to obtain an undue refund or non-existent tax credit.

The offence in question is committed only when the false declaration of assets or liabilities leads to the combined exceeding of two thresholds. Firstly, the evaded tax,

[7] Antonacchio 2005, 2723; Perini 2003, 6759.
[8] Soana 2007 111.
[9] Bricchetti 2001, 7069; Lanzi 2001, 207.

considered the quantitative difference between the tax actually due and that indicated in the tax return, must exceed EUR 30,000. Furthermore, it is necessary that the total amount of the active elements subtracted from the tax, also by indicating fictitious passive elements, is higher than 5% of the total amount of the active elements indicated in the declaration or, in any case, is higher than EUR 1.5 million, or if the total amount of fictitious credits and withholdings deducted from the tax is greater than 5% of the amount of the tax or, in any case, greater than EUR 30,000.

The relationship between the offence in question and that referred to in Art. 2 is governed by the subsidiarity clause of Art. 3, which excludes the application of fraud with other devices when Art. 2 is applicable.[10]

4. Unfaithful declaration

Art. 4 regulates the crime of unfaithful declaration. The structure of this offence coincides with that of the crime of unqualified fraudulent declaration referred to in the preceding article. The only differentiating element is the absence of fraudulent means.[11]

The offence under review is undoubtedly of a residual nature. Therefore, the relevant case can be said to be integrated outside the cases provided for in the previous articles. In essence, the offence is committed when there is a divergence between the declared economic result and the real economic result, without the support of fraudulent means.

Also in this case, as for the previous crimes, the active subject is whoever indicates in one of the annual declarations active elements for a lower amount than the actual one or non-existent passive elements. Obviously, the intent with which such conduct is carried out is relevant, aimed, as before, at evading tax.

The peculiarity of this crime, characterised by a lower damaging charge, has induced the legislator to provide for a less severe penalty. The offender will be sentenced to between one and three years' imprisonment.

The punishability, moreover, occurs when two quantitative thresholds are exceeded, which must be used together. For the purposes of criminal relevance, it is therefore necessary that the evaded tax exceeds EUR 150,000 and that the total amount of the assets subtracted from the tax, also by indicating non-existent taxable items, is greater than 10% of the total amount of the assets indicated in the declaration or, in any case, is greater than EUR 3 million.[12]

The 2015 reform also introduced a non-punishability clause for accounting errors. The legislator, in essence, with para 1-*bis* wanted to maintain a favourable view in relation to values corresponding to incorrect valuations of assets or liabilities, provided they objectively exist.

Still, on the subject of valuations, it is worth mentioning para 1b, also introduced in 2015, according to which, with the exception of the cases provided for in the previ-

[10] Iorio 2017, 21.
[11] Santoriello 2017, 3075.
[12] Gennai-Traversi 2011, 79.

ous paragraph, valuations that differ by less than 10% from actual valuations are not punishable.

It must be said that the assessment carried out by the Italian tax authorities for the identification of assets that are lower than their actual value is carried out by means of presumptions made by the inspectorate during the tax audit. This VAT assessment activity is governed by Art. 54 and 55 of Presidential Decree 633/1072.

5. Attempt

Pursuant to Art. 6 of Legislative Decree 74/2000, the offences referred to in Art. 2, 3 and 4 are not punishable as attempts. As already mentioned above, the aforementioned offences are instantaneous offences and are committed upon presentation of the declaration.

Breaking with the past, the legislator, therefore, wanted to punish the fact relevant and harmful to the Treasury and not the related prodromal acts. Therefore, their realisation is not punished as an attempt to commit crimes of fraudulent and unfaithful declaration. This thesis was also reiterated by the Constitutional Court in its ruling 49/2002.

The punishability of the attempt in the criminal tax law thus represents an exceptional hypothesis.

6. Issuance of invoices or other documents for non-existent operations

A last relevant case to complete the analysis of the Italian regulations concerning VAT fraud is that governed by Art. 8 of Legislative Decree 74/2000. It punishes with imprisonment from one year and six months to six years anyone who, in order to allow third parties to evade income tax or value added tax, issues or issues invoices or other documents for non-existent transactions.

The autonomy conferred on this conduct stems from the need to repress this action taken by illegal companies set up with the aim of placing false documentation on the market. Whoever carries out such conduct does not directly subtract income from the Treasury but carries out a simulated operation, by virtue of which the user of the false invoice will carry out the direct injury. Art. 8, in other words, indirectly protects the tax assets.[13]

To this end, the Italian Supreme Court, with sentence 24307/2017, reiterated that the crime of issuing false invoices or other documents for non-existent transactions is configurable even in the case of only subjectively false invoicing, that is, when the transaction subject to tax has been carried out but there is no correspondence between the service provider indicated in the invoice and the one that provided the service. Even in this case, in fact, it is possible to configure illegal allowing third parties to evade taxes on income and value added.[14]

[13] Spagnolo 2003, 1792.

[14] Court of Cassation, sent. no. 20357/2010.

The active party in this case is anyone who issues invoices or documentation for non-existent transactions. It is a common offence.[15]

The legislator has split the offence into two different and complementary moments: the issuing of the invoice or documentation for non-existent operations and the use by a third party of the aforementioned documentation.

In this crime the psychological element is also required. According to the legislator, therefore, it is important that the offender carries out the action with the intention of having evasion carried out by a third party. It should be pointed out, however, that the psychological element capable of configuring the crime under review is given by intent and not by damage. The offence, therefore, is committed with the mere issue of an invoice and not with the subsequent execution of the evasion.

The peculiarity mentioned above makes it impossible to punish as an attempt to commit the crime referred to in Art. 8. A hypothetical attempt, in fact, should refer to a moment prior to the actual issue of fictitious invoices, excluding the possibility of verifying the use of the same. Therefore, two parties are inevitably involved in the commission of the offence: the issuer and the user. For this reason, part of the doctrine maintains that the issue, pursuant to Art. 8, and the use, pursuant to Art. 2, are nothing more than the hypothesis of complicity in a single crime.[16] This hypothesis, however, is expressly excluded by the legislator who, in Art. 9, states that the issuer of invoices or other documents for non-existent operations and whoever contributes to the same is not punishable by way of aiding and abetting the crime provided for in Art. 2. Likewise, whoever uses invoices or other documents for non-existent transactions and whoever contributes to the same is not punishable by way of aiding and abetting the offence referred to in Art. 8.[17]

As mentioned above, the 2011 reform eliminated the previous threshold of punishment of EUR 154,937.07.

7. PIF Directive and Italian legislation

As is well known, the Directive (EU) 2017/1371 regulates VAT fraud.[18] According to the fourth recital of the preamble to the cited Directive, the European discipline applies to the most serious forms of VAT fraud (so-called serious offences), in particular VAT fraud through missing traders, VAT fraud committed within a criminal organisation and carousel fraud, which create serious threats to the common VAT system[19] and thus to the Union budget. Offences against the common VAT system are considered to be serious where the result from a fraudulent scheme whereby those offences are committed is structured in a way with the aim of taking undue advantage of the common

[15] Perini 1999, 172.
[16] Perini 2002, 738.
[17] Caraccioli 2017, 29.
[18] Udvarhelyi 2017, 4
[19] Established by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

VAT system, they are connected with the territory of two or more Member States and the total damage caused by the offences is at least 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.

In other words, the Directive applies only in cases of serious offences against the common VAT system, where the concept of seriousness is defined having regard to the high amount of damage and the cross-border nature of the illegal conduct.

In the opinion of the writer, it seems that the above threshold is too high and neglects all of the instances of fraud that do not reach that level but which are still characterised by an intrinsic relevance to the protection of EU interests. Indeed, the Italian legislation, with the cited Legislative Decree No. 74 of 10 March 2000, currently punishes violations even for amounts significantly lower than those indicated in the EU source.

Particular attention should be paid to Art. 5 of the Directive, entitled "Incitement, aiding and abetting, and attempt". In the first paragraph, it requires Member States to "take the necessary measures to ensure that inciting, and aiding and abetting the commission of any of the criminal offences referred to in Art. 3 and 4 are punishable as criminal offences". In the following paragraph, it also prescribes the same measures "to ensure that an attempt to commit any of the criminal offences referred to in Art. 3 and Art. 4(3) is punishable as a criminal offence".

With regard to the complicity in person in the crime, it should be borne in mind that in the field of VAT violations, Art. 9 of Legislative Decree No 74/2000 excludes the criminal relevance of the complicity of the user of false invoices for transactions that do not exist in the conduct of the other issuer, or the person who issues them. This exclusion is in conflict with European law. For this reason, it is desirable to abolish this exception for a peaceful and proper implementation of the Directive.

Finally, with regard to the attempt, it should be pointed out that Art. 6 of the abovementioned Decree of 2000 excludes the possibility of an attempt limited to the cases of fraudulent declarations by using invoices or other documents for non-existent transactions, fraudulent declarations by other means and unfaithful declarations, which are governed by Art. 2, 3 and 4 of the abovementioned Decree, respectively. Again, it is desirable to remove this exception.

7.1. Criminal liability of legal entities

The concept of a legal person, covered by Art. 2(1) (b), is extremely broad and general. According to the European rules, "legal person" means 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.

Art. 6 states that legal persons shall be held liable if they have benefitted from the commission of the offences referred to in the previous paragraph,[20] if they have been

[20] See the Art. 3, 4 and 5 of the PIF Directive.

committed by their senior members or as a result of the failure to carry out checks by the company's top management.

This form of liability of the entity does not exclude the possibility of criminal proceedings against the natural persons who committed the alleged crime.

Moreover, from the point of view of sanctions, Art. 9 of the Directive states the need to ensure that the legal persons held criminally liable are subject to effective, proportionate and dissuasive sanctions, which include criminal or non-criminal fines, such as disqualification fines.

In this regard, part of the doctrine maintains that, from the combined provisions of Art. 6 and 9 of the Directive, one can see the consolidated indifference of the legislature to the attribution of a genuine criminal label to the punitive subsystem of collective bodies, in accordance with the traditions of the Member States according to the principle of *societas delinquere non potest.*[21]

In Italy, the liability of entities is governed by Legislative Decree No. 231 of 8 June 2001, which governs the administrative liability of legal persons, companies and associations, including those without legal personality.[22]

This decree, after a long genesis, was introduced in accordance with Art. 11 of Law No. 300 of 2000,[23] which was aimed at ratifying the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which, in Art. 2, expressly provided for the obligation for each party "to take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official".[24]

The Legislative Decree No. 231 of 2001, therefore, in its current version, has a wide scope largely covering the range of the crimes covered by the Directive.[25] However, offences in tax matters and therefore those relating to VAT are also excluded.

As correctly observed by the doctrine, in order to implement the new legislation, it will be necessary, or at least appropriate, to include in the punitive subsystem provided for by Decree 231 not only VAT fraud but the entire criminal tax sector referred to in Legislative Decree no. 74/2000.[26]

It is therefore necessary to enrich the list of offences alleged to be the responsibility of collective bodies, including VAT fraud.

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[21] Vermeulen – De Bondt – Ryckman 2012, 22; De Simone 2012, 117; Baysinger 1991, 341; Conti 2001, 861.

[22] Pistorelli 2017, 610; Piergallini 2002, 571; De Simone 2011, 1895.

[23] Gennai – Traversi 2001, 380.

[24] See the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997.

[25] See in particular Art. 24 of Legislative Decree 231/2001 which refers, among others, to Art. 316-ter and 640-bis of the Italian Criminal Code; Art. 24-ter which refers, among others, to Art. 416 and 416-bis of the Italian Criminal Code; Art. 25 on the subject of extortion, undue induction to give or promise benefits and corruption; Art. 25-octies on the subject of receiving stolen goods, money laundering and use of money, goods or benefits of unlawful origin, as well as self-money laundering.

[26] Basile 2017, 63.

8. Concluding remarks

The Italian legislation seems to be largely in line with European suggestions. The introduction of tax offences within the rules on the criminal liability of entities, as set out in Legislative Decree no. 231/2001 therefore represents the next challenge of Italian criminal tax law.

The current absence of tax offences in the catalogue of predicate offences highlights the limits of a system that fails to guarantee effective prevention and repression of tax offences. Such a manoeuvre, therefore, in addition to satisfying the demands of the European Union, would have a positive impact on the fight against tax evasion, combatting even more radically the crime of profit.

It is important to underline that the threshold set by the Directive for VAT fraud is too high and neglects fraud that does not reach that level but which is still characterised by an intrinsic relevance to the protection of EU interests.

In the opinion of the writer, it would be desirable to reduce the threshold and to extend the cooperation with third-party countries in fighting VAT fraud, improving the exchange of information.

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THE ITALIAN ADMINISTRATIVE AND PENAL SANCTIONS SYSTEM AGAINST VAT FRAUD THROUGH A CONCRETE CASE: "EDOM GROUP"

Emanuela Furini[*]

1. EDOM GROUP

In 2013, the Italian Revenue Agency was engaged in an investigation into VAT and direct tax evasion concerning an operator's activities in the e-commerce sector.

One of the most important operators in the national market in the electronic products sector was the EDOM GROUP which owned the brand "Trony".

The EDOM GROUP had a central position in the G.R.E. Group. The G.R.E. is a purchasing group founded to improve the purchasing capacity of the companies within the group. The EDOM GROUP was connected to 14 subsidiaries.

2. Governance

The investigations carried out, in detail, highlighted the existence of an organisation that, to fraudulently reduce the total tax burden, proceeded to the establishment of a two-level structure of the company:

– The first level, represented by numerous companies that mainly carry out the retail sale of home appliances, electronics and IT products, each of which holds a point of sale, administered by *MR. X* and by the company itself directly and through HI-TECH. The companies proceed with the acquisition of the goods, almost exclusively from the EDOM GROUP, which, as said, acts as the central purchasing body for the entire group. The companies have two functions: On one hand, the companies were established to limit the business risk associated with individual stores. On the other, as will be seen, the companies constitute the vehicles formally used for the realisation of tax offenses;
– As a second level, EDOM GROUP is interposed between the companies of the first level and the G.R.E. (Household Appliances Wholesalers), owner of the Sinergy and Trony brands.

The organisational model adopted is typical of a large-scale retail trade operator (GDO), where individual points of sale – which can be configured as "branches" of a single economic entity, although legally autonomous – share certain company functions with a common factor and centralise them.

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The role of planning and coordination is carried out by Mr. X also through EDOM GROUP. The employees of EDOM GROUP in the commercial area also perform the function of area manager of points of sale (organisation of the point of sale, positioning of products on the shelves, motivation and incentives for sales staff, organisation of promotions, etc.). At the central level, commercial policies are developed, such as the offer campaigns on individual products and the related advertising campaigns. Procurement policies are also typically managed centrally, i.e. the choice of suppliers and the management of purchases with the related pricing policies.

The employees of the administrative area deal with all of the management aspects of the first level companies: keeping the accounts, completing tax and social security obligations, payments and relations with suppliers, relations with banks, personnel management, etc.

3. VAT fraud scheme

From the tax checks made, regarding years 2009 and 2010, it was possible to intercept a standard scheme according to which the parent company, EDOM GROUP, issued a series of invoices for operations of non-existent operations, mounting up to millions of euros. Meanwhile, invoices were not recorded or registered for significantly smaller amounts to lower the VAT payments.

The above-mentioned fake invoices were received, registered and reported in the annual VAT declarations by the first-level companies of the Group, so as to create artificially fictitious VAT credits for millionaires for those companies. These credits were then used as follows:

– to neutralise VAT payables related to active operations;
– to make undue compensation, through the presentation of models of payment F24 "with zero balance", of tax, social security contributions and insurance related to the services rendered by the employees and by the same Mr. X.

Concerning the millionaires invoiced, this "system" created imbalances. In fact, on the one hand it allowed the EDOM GROUP to have no VAT debts (failure to register active invoices) and the other companies to have fictitious VAT credits (registration of passive invoices). On the other, for IRAP[1] and IRES,[2] it generated a series of abnormal costs, resulting in civil and fiscal losses. To make up for the losses, the EDOM GROUP issued a series of credit notes to the latter, which are also objectively fictitious, known in the same way as invoices not recorded by the same, which are issued systematically without charging VAT and allowed the fictitious costs to be reversed.

In addition to the aforementioned serious violations, as specified below, it was anticipated that during the checks it emerged that books/records, in some cases, were altered.

[1] IRAP Regional Tax on Productive Activities.
[2] IRES Italian Tax on Corporate Income.

Furthermore, the appeal by the companies of the EDOM GROUP to invoices for absolutely non-existent transactions is so non-existent that it can also be used for purposes other than tax purposes.

The investigation conducted by the Italian Revenue Agency showed:

– systematic, repeated and large withdrawals of cash from company accounts;
– alteration of accounting;
– the cancellation of entire blocks of registrations, the concealment of fees, the accounting of fictitious costs and the annotation of transfers and transfers of results without any economic justification.

This way, the EDOM GROUP's funds were emptied and a large amount of money was transferred to the San Marino Banks. Engaging in such unlawful activities, the EDOM GROUP evaded VAT mounting up to EUR 9 million in the years 2009 to 2010.

4. Italian VAT code: D.P.R. 633/1972

The VAT is governed by European legislation, of which the European VAT Directive is the primary piece of legislation. The interpretation of this Directive is a key aspect of applying national legislation regarding VAT. Italian legislation is mainly the following:

– D.P.R. 633/72 on VAT general rules
– D.L. 331/93 on intra-Community transactions

As provided for in Art. 21, para 7 of the EU directive: "If an invoice is issued for non-existent transactions, or if the fees for the transactions or the related taxes are indicated in the invoice above the real amount, the tax is due for the entire amount indicated or corresponding to the invoice indications".

5. Italian sanctions code d.Lgs. 18/12/97 N. 471

For tax offences as explained before, the Italian Revenue Agency shall impose the following administrative sanctions:

– Unfaithful billing of taxable operations:
– supposing objectively non-existent invoices are issued; pecuniary sanction is from 100% up to 200% of the tax with a minimum of EUR 516 (Art. 6)
– Unfaithful declaration:
– a pecuniary sanction is from 100% up to 200% of the tax (Art. 5)
– Irregular keeping of the accounts:

The pecuniary sanction is fixed from EUR 1,032.00 to EUR 7,746.00 with a minimum of EUR 516 (Art. 9).

Consequently, EDOM GROUP had to pay to the Italian Revenue Agency VAT and administrative sanctions of almost EUR 20 million for the years 2009 and 2010.

6. Criminal code: Legislative Decree no. 74/2000 (Amended by Legislative Decree of 24/09/2015 no. 158)

In Italian legislation, we do not have a specific definition of VAT fraud. According to the doctrine, there are two types of fraud.

The two types to be considered are, on the one hand, the fraud carried out through non-existent transactions and, on the other, the fraud affected by the omitted payment of the VAT.

In Italy, the above-mentioned forms of conduct are punishable by Legislative Decree No. 74/2000, which splits the crimes into two main categories:

– tax crimes related to tax returns and
– tax crimes related to accounting records and tax payments

In regards to VAT fraud, we have to consider the first category (Art.2 – Art.5).

The most relevant tax criminal offences:

– Fraudulent tax return by using false invoices for non-existent transactions (Art. 2)
– Fraudulent tax return by using other fraudulent means (Art. 3)
– False tax return (Art. 4)
– Failure to file a tax return (Art. 5)

According to Art. 2: "*Anyone who, to evade income tax or value-added tax, using invoices or other documents for non-existent transactions, indicates false costs in one of the relevant declarations shall be punished with imprisonment from one year and six months to six years".*

The illegal act is committed when invoices or other documents for non-existent transactions are used and when such invoices or documents are registered in the mandatory accounting records or are held as for the purpose of proof for the tax authorities.

7. Prosecutor's Office

For the tax crimes for issued and used invoices for non-existent transaction and for a undue compensation, the Italian prosecutor's office arrested Mr. X, who was the shareholder of the company and its chief executive officer; his tax consultant and an employee of the tax consultant were also arrested.

Moreover, Mr. X was charged with the crime of fraudulent bankruptcy, and the process is in ongoing.

Prosecutor's office also found links between the name of Mr. X and

– MAFIA CAPITAL (ROME)
– IOR (the Institute for the Works of Religion but is generally known under the name of Vatican Bank)

8. Preventive seizure[3]

The prosecutor's office used the preventive seizure as provided by Legislative Decree 74/2000 to secure confiscation of assets gained by tax offences. In the event of conviction for one of the crimes of Legislative Decree 74/2000, the confiscation of assets is always ordered unless they belong to a person not involved in the crime. If it is not possible to confiscate the original assets of the offence, the confiscation of goods for a value corresponding to this price or profit shall be automatically ordered.

Mr. X's real estate property and cars equal to the sum evaded were sequestered for a value of EUR 20 million.

9. Verification with acceptance[4]

The EDOM GROUP and the Italian Revenue Agency tried to reach an agreement on the penalties to be paid, but a solution was not applicable.

10. Arrangement with creditors[5] and failure[6]

As a consequence of the state of insolvency generated by the serious debt exposure, the EDOM GROUP, initially admitted by the Court of Rome to the "arrangement with creditors", was declared "bankrupt" on 13 February 2017.

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[3] Art. 321 Code of Criminal Procedure; Presidential Decree of 22 September 1988, No. 477.

The preventive seizure, in the Italian legal system, is a measure envisaged by art. 321 Italian criminal procedure code upon request by the public prosecutor (PM) during preliminary investigations and validated, with motivated decree, by the judge for preliminary investigations (GIP) when there is the risk that the free availability of a thing may aggravate or prolong the consequences of a crime, allow the commission of new crimes or when the thing is dangerous in itself. In the event that, in the cases provided for by the law, during the preliminary investigations it is not possible to wait for the judge's response regarding the request for preventive seizure, the latter is ordered directly by the judicial police by decree justified, with validation of the GIP within 48 hours of the provision.

[4] Art. 5-bis D. LGS. 218/1997. *Verification with acceptance* allows the taxpayer to define the taxes due and thus avoid the emergence of a tax dispute. It is an "agreement" between taxpayer and office that can be reached either before the issuing of a notice of assessment and after, provided that the taxpayer does not appeal before the tax court. The procedure covers all the most important direct and indirect taxes and can be activated both by the taxpayer and by the office of the Revenue Agency in whose territorial district the taxpayer has the tax domicile.

[5] The arrangement with creditors is an insolvency procedure of the Italian bankruptcy law which can be recourse to a debtor (be it an individual entrepreneur, a company or a different body) having the requisites that he is in a state of crisis or insolvency, in order to attempt the reorganization also through the continuation of the activity and possibly the transfer of the activity to a third party or to liquidate its assets and put the proceeds at the service of the satisfaction of the credits, thus avoiding bankruptcy. It is a juridical institution which, in the Italian legal system, originates from the moratorium regulated by the abrogated Commercial Code of 1865. The discipline of the procedure of arrangement with creditors is contained in the bankruptcy law (Royal Decree March 16, 1942 No. 267) and has been revised several times in recent years by the legislator with interventions aimed at favouring the overcoming of the business crisis.

[6] Bankruptcy, in the Italian legal system, is a liquidation insolvency procedure, aimed at satisfying creditors through the liquidation of the entrepreneur's assets, which can be used in the presence of certain requirements. It involves the commercial entrepreneur with the entire estate and its creditors. This procedure is aimed at ascertaining the state of insolvency of the entrepreneur, ascertaining the claims against him and their subsequent liquidation according to the criterion of the conditional par creditorum, taking into account the legitimate causes of pre-emption. It is regulated by the Royal Decree of 16 March 1942, n. 267 but the discipline has been modified several times over time. Alternatively, overcoming the company's crisis is possible by arranging with creditors, or by attempting a corporate restructuring or the request for a controlled administration, to allow the company to be rescued through agreements between the entrepreneur and the creditors.

It is important to underline that, in addition to the financial and economic aspects linked to the loss of tax revenue, the bankruptcy of the EDOM GROUP has had serious consequences also at a social level.

More than 43 outlets have been closed and more than 500 people lost their job. Trony's marketing director died, and the investigators think it may be a suicide after the failure of the EDOM GROUP.

11. Conclusions

As said in the introduction to this article, Directive (EU) 2017/1371 (Art.2, point 2) shall apply only in cases of *serious offences* against the common VAT system.

For this Directive, offences against the common VAT system shall be considered to be serious where the intentional acts or omissions defined in point (d) of Art. 3(2) are connected with the territory of two or more Member States of the Union and involve a total damage of at least EUR 10 million.

According to Directive (EU) 2017/1371 the EDOM GROUP VAT fraud could *not* be a case of serious offence against the common VAT system given the values of Italian VAT fraud analysed.

This demands that we reflect on a desirable clarification of the concept of "*damage*". Should it remain limited only to the VAT amount not being declared and unpaid, or should it include other related economic elements? And why must the fraud be connected with "*the territory of two or more Member States of the Union"*? In this analysed Italian VAT fraud case, the countries concerned were Italy and San Marino, which is not a Member State of the European Union.

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Romania

PROTECTION OF THE BUDGET OF THE EUROPEAN UNION IN ROMANIA UNDER CRIMINAL LAW RULES: THEORETICAL AND PRACTICAL ASPECTS

Prof. Dr. Valentin Mirişan[*]

1. General considerations

In the context of the integration of Romania into the European Union and the assumption by our country of a real and effective protection of the financial interests of the EU, it was necessary to adopt criminal law and criminal procedural rules in this matter.

Naturally, in parallel with the normative acts adopted by the Romanian Parliament, there were also operations to adapt the Romanian criminal law, starting from the European regulations in this field. Obviously, in the paper we will mainly refer to the Romanian criminal law and criminal procedural rules, which protect the EU budget, yet referring to the headquarters of the matter detached from the European regulations, to which we relate.

In this process of adapting the Romanian criminal legislation to the EU rules, the Constitutional Court of Romania was also involved, by establishing the unconstitutionality of a national provision on grounds of violation of the competences of the Union.[1] By two more recent decisions, the Court has established a hierarchy between constitutional rules and Union law rules, resolving the conflict between the supremacy of the Constitution and the primacy of Union law. [2]

We only refer to the two decisions, with the mention that the constitutional court, in the supremacy – primate conflict, has adopted the position of ensuring the application of the Union law. This topic could be the subject of an analysis of another paper, also within this project.

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[1] Lupu 2017.

[2] Constitutional Court, Decision *no. 683/2016 regarding the objection of unconstitutionality of the provisions of the Law on certain measures regarding the payments of beneficiaries of Sit Natura 2000*, published in the Official Gazette of Romania no. 56 of January 19, 2017; Constitutional Court, Dec. no. 887/2015, published in the Official Gazette no. 191 of March 15, 2016.

2. Offences against the financial interests of the EU regulated in the Romanian criminal law

2.1. Short history

The legislation on criminal law at the EU level did not really exist at the beginning of the 1990s–2000s. Criminal law was a taboo subject, and the regulations in the field concerned the sovereignty of the Member States, not being an EU task.

In this situation, with a view to adequate protection of financial interests, the European Union budget being of interest to the European Union bodies, a convention on the protection of the financial interests of the European Union was adopted through criminal law instruments – the so-called 1995 PIF Convention. On the basis of this convention, Romania's national criminal law concerning the protection of the financial interests of the European Union was adopted in 2003, in order to be able to join in 2007.

This Convention and the additional protocols 1 and 2 on money laundering and corruption, in relation to the frauds affecting the EU budget, create the general framework or the framework of national legislations in the field. [3] Thus, two main directions have been developed: either the assimilation of the financial interests of the European Union with the national interests, as some Member States did, or the adoption of specific legislation on the protection of the financial interests of the European Union, as other Member States did.

After the accession of Romania to the European Union in 2007, respectively after the Treaty of Lisbon in 2009, the possibility of adopting secondary legislation in criminal matters appeared, and so appeared the Directive no. 1371/2017 of the European Parliament and of the Council, after three or four years of negotiations on the fight against fraud against the financial interests of the European Union, by means of criminal law.

2.2. Romanian criminal law

In Romania, crimes that affect the financial interests of the EU have begun to grow with the accession of our country to the European space, which made it necessary to adopt the normative framework needed to clamp down this type of fraud, as well as the establishment of bodies, norms and rules for accessing these funds for the Member States.

In this context, the Romanian state has taken legislative measures to incriminate crimes that are considered to affect the financial interests of the EU, both in terms of revenue and expenditure, even though some provisions are objectionable.[4]

[3] The Convention of 26 July 1995 known under the generic term of *The PIF Convention and its protocols* is available on the DLAF website.

[4] Costea 2017.

Therefore, even before accession, but in the context of fulfilling the conditions for this, Law no. 161/2003 was adopted on certain measures for ensuring transparency in the exercise of public dignities, public functions and business environment and prevention of corruption, through which they were incriminated and integrated into the content of Law no. 78/2000 on the prevention, detection and sanctioning of corruption, a series of acts against the financial interests of the EU.[5]

Thus, section 4/1 of the law, currently titled „Offences against the Financial Interests of the EU", includes the following crimes: money laundering, misappropriation of funds, illegal mitigation of resources and negligence in the office, which undermines the financial interests of the EU.

Even though the special law did not give a marginal name to these crimes, they were defined by doctrine and judicial practice in relation to the content of the incriminating texts.

The first offence is referred to as „money laundering", known in the doctrine and under the name of fraud in respect of expenditures, as it follows from art. 1 of the PIF Convention.

The Romanian legislator only partially took over the definition of the Convention, incriminating only the first two variants. In contrast, the third version of the Convention, relating to misappropriation of funds, was governed in a separate article [Art.18(2)].

We consider that the systematization in Art. 1 of the Convention is more rigorous for it takes into account an essential criterion for distinguishing between frauds related to expenditures and those related to revenue. Or, the misappropriation of funds is a crime related to expenditure fraud. As a result of this mode of regulation, in the Romanian doctrine and practice there are controversies such as: a single complex offence or a contest of offences between the money laundering and the misappropriation of funds, etc.

Also, from the way it is defined as a complex crime in the incriminating text, it is the question whether it is absorbed in the content of the offence of falsehood or only the presentation of false or inaccurate or incomplete documents (trafficking and misrepresentation). The solutions in judicial practice are unequivocal in this view, in the sense that all the crimes of forgery, trafficking and misrepresentation, or only the crimes of trafficking and misrepresentation are absorbed. Controversies on this topic have been the subject of study and analysis of other specialized papers.

Both the doctrine and the judicial practice are unanimous in accepting that the offence of forgery is not absorbed in the content of the crime of European money laundering, while the trafficking and misrepresentation are part of the complex offence mentioned.[6]

Regarding the offence of forgery in official documents and falsification of a public instrument, stipulated in the Romanian Criminal Code, these crimes will be held in concur-

[5] Law no. 78/2000, published in the Official Gazette no. 219 of May 18, 2000; Law no. 161/2003, published in the Official Gazette no. 279 of 21 April 2003.

[6] Dobleagă–Baciu–K aroly 2008, 160; Neagu 2008, 87.

rence with the offence of making illegally-gained European proceeds, for it is sufficient for the existence of such facts to falsify the documents, without requiring the condition of their use. In this respect, the judicial practice in this field expressed its view. [7]

Normally, misappropriation of European funds means that I use these funds for a purpose other than that for which they were assigned. I have been given funds, say, to build a motorway, to build a fun park, to build a hostel, for example. I get those funds and pay a credit to my bank, or I am going to vacation, or I am buying I do not know what car, or do anything else besides doing that project. This would be the offence of embezzling European funds. The question arises: What happens if we have obtained European funds illegally, but have not used them as intended?

Will money laundering and misappropriation also be withheld, or will it only withheld obtain European money laundering? That is why I referred to the European provisions in the matter, because, on the basis of these regulations, which were the main reason for the adoption of the national provisions, we can tell whether in this situation we have a criminal offence or a single offence.

If we look into European law and the Convention on the Protection of the European Union's Financial Interests,[8] but also in Directive 1371/2017 on the Protection of the European Union's Financial Interests by Criminal Law, we will see that the ways in which expenditure frauds are committed are alternative. That is, both money laundering and misappropriation are alternative ways of doing the same thing.

Starting from this interpretation, in the Romanian doctrine it was considered that the introduction of the misappropriation of European funds in a distinct text, in Romania, was the option of the Romanian legislator to sanction not a distinct crime, but a mitigated version of the fraud in terms of expenditures. Due to the fact that the former is punished by imprisonment from 2–7 years, the other is punished by imprisonment from 1–5 years. As such, the author contends, when the constitutive content of both facts is achieved, only the type variant, not the attenuated variant, that is, only the offence of European money laundering, will be retained.[9]

In another opinion,[10] which we share, the Romanian legislator adopted an original solution, in the sense that he included in Art. 18/2 of the Law no. 78/2000 (different paragraphs) an offence of fraud in respect of expenditure (para 1) and an offence of fraud related to revenue (para 2). The author comes to the conclusion, we claim to be well grounded, that we are in the presence of a contest of crimes between the European money laundering and the misappropriation of funds. In support of this view, we consider that the misappropriation of European funds is incriminated both if the funds have been obtained legally and in the event of their illegal acquisition.

The illegal diminution of resources from the EU budgets constitutes an offence under Art. 18/3 of the special law, being a transposition in the national legislation of the

[7] Criminal decision no. 369 / R of 10 October 2010 of the Târgu - Mureș Court of Appeal, published on the *www.pna.ro* website at the final decisions section.

[8] OJ C (information and notices) of 27 November 1995, 48–57.

[9] Timoce 201.

[10] Grădinaru 2016, 62–64.

provisions of Art. 1 point b) of the PIF Convention. This detriment affects the financial interests under the EU resources.

The EU budget is mainly financed from three categories of resources: own resources (customs duties, agricultural levies); VAT-based resources; the resource based on Gross National Income (GNI).[11] This offence mainly relates to customs duties in relations with non-EU third countries, taxes which are the main source of income directly charged in the EU account.

The *offence of negligence in the office* which affects the financial interests of the EU is provided by Art. 18/5 of Law 78/2000 and is closely related to the other abovementioned offences or to offenses of corruption or money laundering related to EU. The rule of incrimination is enlightening in this respect.

In the case of the offences referred to in this chapter, money, values or any other property that has been given to determine the offence or to reward the offender or those obtained by committing the offence, unless they are returned to the damaged person and to the extent to which they do not serve to compensate it, are confiscated, and if the goods are not found, the convict is compelled to pay their equivalent in money.[12]

If an offence has been committed as provided for in this chapter, taking precautionary measures is mandatory.

The attempt of the offences provided in Art. 18 / 1–18 / 3 is incriminated and possible, which is why it is punished. Negligence in the office, being a culpable offence, neither the preparatory acts or the attempt are possible.

2.3. Controversies among EU Member States with regard to VAT

Currently the EU budget is also financed from VAT-based resources. All started from the Explanatory Report of the European Union's Convention on the Protection of the European Union's Financial Interests, which considered that among the revenues making up the EU budget are those generated by value added tax. It was intended that this provision should be introduced in Directive No. 1371/2017.[13]

When the negotiations in the Member States, in the Council, were reached, negotiations were blocked precisely because of this. The Member States said: „No. The value-added tax is a national tax, it only affects the EU budget indirectly. It affects me 99%, it affects you 1%. Why introduce this into the directive and give the *European Public Prosecutor's Office* the power to investigate offences related to tax evasion, VAT fraud. I do not want to do this." This was the option of the Member States, and for this reason this draft directive was introduced in 2012–2013 and was adopted after four years, in 2017 to the end. The reason was that they failed to agree on this sensitive issue. Meanwhile, the Taricco[14] case has arisen, where exactly this kind of question was asked to the CJEU: „What do we do? We have a VAT fraud. Does it affect the interests of the

[11] Csűrös 2013, 96; Jacsó 2017, 82–100.
[12] Mirișan 2017, 80–85.
[13] Tudor 2017, 308–320.
[14] Case C-105/14/2015 of the CJEU, Ivo Taricco and others, on *www.curia.europa.eu* (09.03.2018).

European Union budget? „And the CJEU said yes, a VAT fraud affects the financial interests of the European Union. And from that moment on, all talks have ended.

Even the Member States, in the Council negotiations, could not do anything, having this decision of the CJEU but to put it into practice. From the negotiations, on the other hand, the following conclusion came up: that *the European Public Prosecutor's Office* is competent to investigate VAT frauds only if the total damage is of ten million Euro or more. For smaller frauds, the *European Public Prosecutor's Office* is not competent, even if the fraud is transnational, even if it is committed by an organized criminal group.

Incriminating texts stipulated in law no. 78/2000. The legal definition of offences

Art. 18/1
(1) Using or presenting in bad faith false, inaccurate or incomplete documents or statements, which has as result the illegal obtaining of funds from the general budget of the European Communities or from the budgets administrated by these or on their behalf, shall be punished with imprisonment from 3 to 15 years and interdiction of certain rights.
(2) The deliberate omission to provide the information required according to the law, with the purpose of obtaining funds from the general budget of the European Communities or from the budgets administrated by these or on their behalf, shall be sanctioned with the same punishment as the one provided by paragraph (1).
(3) If the deeds provided by paragraphs 1 and 2 caused particularly serious consequences, the punishment shall be imprisonment from 10 to 20 years and the interdiction of certain rights.

Art. 18/2
(1) Changing the destination of the funds obtained from the general budget of the European Communities or from the budgets administrated by these or on their behalf, without abiding by the law, shall be punished with imprisonment from 6 months to 5 years.
(2) If the deed provided by paragraph 1 caused particularly serious consequence, the punishment shall be imprisonment from 5 to 15 years and the interdiction of certain rights.
(3) Changing the destination of a legally obtained benefit, without abiding by the law, if it results in the illegal diminishing of the resources of the general budget of the European Communities or of the budgets administrated by these or on their behalf, shall be sanctioned with the same punishment as the one provided by paragraph 1.

Art. 18/3
(1) Using or presenting in bad faith false, inaccurate or incomplete documents or statements, if it results in the illegal diminishing of the resources of the general budget of the European Communities or of the budgets administrated by these or on their behalf, shall be punished with imprisonment from 3 to 15 years and the interdiction of certain rights.
(2) The deliberate omission to provide the information required according to the law, if it results in the illegal diminishing of the resources of the general budget of the European Communities or of the budgets administrated by these or on their behalf, shall be sanctioned with the same punishment as the one provided by article (1).
(3) If the offences provided by paragraphs 1 and 2 caused particularly serious consequences, the punishment shall be imprisonment from 10 to 20 years and the interdiction of certain rights.

Art. 18/4
The attempt to commit the offences provided by art. 181 - 183 shall be punished.

Art. 18/5
Willingly not observing an office duty, as a result of non-performing it or deficiently performing it, by a director, administrator or the person with decisional or control tasks within an economic agent, if it had as result the perpetration of one of the offences provided by art. 181 - 183 or the perpetration of a corruption or money laundering offence in connection with the funds of the European Union, by a person subordinated to him/her and who acted on behalf of that specific economic agent, is punished with imprisonment from 6 months to 5 years and the interdiction of certain rights.

Once the appropriate legislative framework for the protection of the financial interests of the EU was established, the Anti-Fraud Department (DLAF) was set up in Romania, and a specialized service for the investigation of this type of crime was set up within the National Anticorruption Directorate.

Also, Romanian judicial police bodies, through specialized fraud investigation structures, are working to prevent and combat this type of criminal offence.

Besides these institutions, there are also other bodies with attributions in Romania to find irregularities and to apply sanctions consisting of financial corrections, stipulated in G.E.O. no. 66/2011 (authorities in charge of European funds management, the Ministry of Finance - Certifying and Paying Authority, the Court of Accounts – Audit Authority),[15] but which are not the subject study of this paper.

3. Criminal procedural aspects of investigating offences against the financial interests of the EU

3.1. General considerations and referral proceedings

The criminal prosecution for offences under Art. 18 / 1–18 / 5 of Law no. 78/2000, as subsequently amended and supplemented, is carried out mandatory by the prosecutor, and the criminal action is initiated ex officio. These crimes were given in the exclusive competence of the National Anticorruption Directorate, according to Art. 1 point 17 of G.E.O. 134/2005. [16]

Until the entry into force of the current Code of Criminal Procedure, the court of first instance was in the jurisdiction of the courts. After that date, the jurisdiction to settle these cases lies with the tribunals at first instance, as a general rule, and the appeal jurisdiction lies with the Court of Appeal. By way of exception, the jurisdiction of the Court of Appeal lies with the Court of Appeal, considering the quality of the defendant, and in appeal the Î.C.C.J.[17] *(High Court of Cassation and Justice t.n.) has jurisdiction.*

The Department for Anti-Fraud may take notice ex officio or from other sources (controls or by OLAF on possible irregularities affecting the financial interests of the EU). If any indications of a criminal nature are found, after all the necessary verifi-

[15] Cîrmaciu 2010, 24–27.
[16] Official Gazette no. 899 of 7 October 2005.
[17] Official Gazette no. 486 of 15 July 2010.

cations have been carried out, the control act is sent to the competent prosecutor's office of the National Anticorruption Directorate with a view to taking measures for disposing of the funds, as well as for the recovery of the produced damages and for the criminal prosecution of the persons guilty.

At the same time, the Anti-Fraud Department makes a verbatim report, able to retain delinquents and assess the damage. The Finding Act is a means of proof in subsequent criminal proceedings.

3.2. Notification of the criminal prosecution bodies

The criminal investigative body is notified under the conditions provided by art. 288 of the Romanian Criminal Procedure Code (complaint, denunciation, ex officio referral, documents of the finding bodies). There are many referrals of this type in Romania. Unfortunately, according to the reports provided by Romania to the European Commission bodies, especially the European Anti-Fraud Office, it seems that most happen in Romania or most of them are reported in Romania.

These frauds are reported by the specific bodies, in our case, those who instrument them – DNA (National Anticorruption Directorate n.t.). The Department for Fighting Fraud also has attributions related to irregularities and suspected frauds that they report to the DNA. Anyway, the DNA gathers data from courts on filed, sued cases, convictions, which are reported further to the European bodies. This does not mean that we are the first to have fraud in Europe, but that we have the most active judicial bodies investigating these types of crimes.

3.3. Initiation of criminal prosecution, initiation of criminal proceedings and notification of the competent court, according to the law

The investigating criminal prosecution body has the right to initiate the criminal prosecution of the offences (in rem), in the conditions stipulated in the Romanian criminal procedure code, by order, after which the prosecution of the suspect (in personam) is ordered. If there is clear evidence that the suspect committed the offence with the form of guilt required by law, the prosecutor disposes by order the commencement of the criminal action, the suspect acquiring the capacity of the defendant.

During the prosecution, if the prosecutor finds new facts or data regarding the participation of other persons or circumstances that may lead to a change in the legal framing of the deed, he will order the extension of the criminal prosecution or the change of the legal classification, as the case may be.

At this stage, the prosecutor has the obligation to collect the necessary evidence to identify the assets and values subject to special confiscation and extensive confiscation, according to the Romanian Criminal Code in force. Taking precautionary measures is mandatory, according to art. 20 of the Law no. 78/2000.

In order to take such measures, the insurers must observe a certain procedure and against taking these measures the judge of rights and freedoms may be appealed, within three days from the date of communication of the ordinance for taking the measure.

As we can see, the prosecution goes through two phases: investigating the crime and investigating the person. Naturally, throughout the criminal prosecution, evidence is given, provided that the suspect or defendant, as the case may be, is granted the right to defence, enjoys the presumption of innocence and is guaranteed that the other fundamental principles of the criminal proceedings are observed.

If the evidence adduced confirms the existence of the offence and the guilt of the defendant, the file is filed with the court, the notification being made by the prosecutor's indictment.

The competent court sends the case to the Preliminary Chamber, where a judge examines the lawfulness of the evidence adduced, the procedural acts and the indictment. If everything is alright, the Preliminary Chamber judge orders the commencement of the trial.

Otherwise, if all the issues involved in the prosecution were excluded, the Preliminary Chamber judge will return the case to the prosecutor's office who issued the indictment.

We point out that in these cases, according to art. 324 of the Criminal Procedure Code,[18] the prosecution is obligatorily carried out by the prosecutor. Moreover, the special law expressly provides that for this kind of offence the criminal prosecution is mandatory carried out by the prosecutor. Exceptionally, the prosecutor may order the delegation of criminal investigation bodies of the judicial police to carry out criminal prosecution, except for procedural acts and measures that cannot be the object of the delegation.

3.4. Completion of criminal prosecution

Completion of criminal prosecution can be accomplished in several ways:

- issue of the indictment, the act by which the prosecutor notifies the competent court, if the legal provisions guaranteeing the truth and the prosecution are complete;
- the prosecutor concludes with the defendant an agreement on the recognition of the guilt, under the conditions provided by the law, after which he or she shall notify the competent court for its confirmation or refusal;
- the prosecutor adopts a non-adjudication (prosecution or waiver) decision, in which case an ordinance will be issued; classification is ordered when the criminal action cannot be exercised or the criminal action is extinguished; the waiver of the prosecution is ordered when there is no public interest in the prosecution of the defendant, in which case an ordinance will be issued.

3.5. Issues related to the competence according to the type of offence of the criminal investigation bodies in Romania

By way of example, tax evasion was until recently the responsibility of DIICOT (Directorate for Investigating Organized Crime and Terrorism n.t.); it is currently the re-

[18] The Code of Criminal Procedure (Law 135/2010), published in the Official Gazette no. 486 of 15 July 2010, in force since 1 February 2014.

sponsibility of the ordinary prosecutor's offices. When the damage exceeds ten million euros and becomes a fraud affecting the EU budget, according to the law, the case should be investigated by DNA, on national territory and if it is transnational fraud, by the European Prosecutor's Office.

This leads to some problems in terms of creating conflicts of jurisdiction between the criminal investigation bodies mentioned, resulting in successive declines in competence, accompanied by the sanction of nullity of acts by an incompetent body.

Also, with regard to sanctioning, in our legislation tax evasion is disproportionately sanctioned in relation to other tax offences. Take for example smuggling, which is punished by imprisonment from 2 to 7 years. Tax evasion with particularly serious consequences or when the damage is over 500,000 Euro is punishable by imprisonment between 9 and 15 years.

This punishment is higher than the punishment for the offence of battery or death-related injury that is approaching the punishment for the rape offence followed by the death of the victim, robbery followed by the death of the victim and which is a little less than the punishment for the offence of murder. Examples could continue, but the exposure time is limited.

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THE NEW ANTI-FRAUD POLICY IN THE FIELD OF VALUE ADDED TAX IN ROMANIA AND THE LEGAL FRAMEWORK IN MATTER (REGULATORY)

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1. General considerations and regulatory framework in Romania: Short history

In the context of the integration of Romania into the European Union and the assumption by our country of real and effective protection of the financial interests of the EU, it was necessary to adopt criminal law and criminal procedural norms in this field. Certainly, in parallel with the normative acts adopted by the Romanian Parliament, there were also operations to adapt Romanian criminal legislation, starting from the European regulations on the fight against VAT fraud within the EU. We refer to the latest EU Directive No. 1371/2017, with which Romanian criminal legislation in the field of VAT must align.

Starting on 1 January 1970, VAT was adopted by the Member States of the Common Market, aiming at eliminating the cascade taxation (repeated charges), which is practiced through the turnover tax. It was not until 1977 that the final harmonisation of VAT was achieved in the countries of the European Union.[1] As it results from the Fiscal Code, VAT is an indirect tax owed to the state budget, therefore it is a tax not on the wealth, possession or income of a taxpayer but on the sale of goods or the provision of services.

VAT is a consumption tax because it is not based on wealth (viewed qualitatively) but on the degree of consumption. Under such conditions, social justice, from a tax point of view, is not achieved. The value added tax does not highlight the principle of equality by tax (according to which, in tax policy, within the taxation system, it must be taken into account that each taxpayer will participate in the formation of general money for the company in proportion to their material situation) but, on the contrary, the principle of equality before tax (according to which the taxation is done in the same way for all natural or legal persons, without distinction of tax treatment and thus without taking into account the personal, concrete situation of each taxpayer).

Among indirect taxes, VAT occupies a top place, being considered as the most modern form of taxation and adopted by a large number of states, including the EU

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[1] Terra-Kajus 2019 3,4.

countries; it is an essential requirement and an obligation at the same time for the EU countries.

Thus, starting from the regulatory norms of the Fiscal Code, the Romanian legal doctrine stated that VAT is an indirect unique tax but with a fractional payment, with a fixed quota[2] determined by the value added at each stage of the economic circuit.

In the literature, several features of VAT were highlighted. Some of these will also be highlighted by us:

– transparency – VAT provides each taxable person with the opportunity to know exactly what the size of the tax and the payment obligation is;
– uniqueness – VAT is not independent of the extent of the economic circuit. Whatever process the product has to get through to reach the final consumer, the level of the quota and the amount of tax is the same;
– VAT is always borne by the beneficiary;
– it is a neutral tax, eliminating tax inequalities between product outlet circuits.

2. Presentation of the repressive measures against VAT fraud

In Romania, several normative acts regulate the matter of VAT fraud. Thus, the Fiscal Code is the basic normative act that defines the VAT and its advantages for the state. Also, the 2015 Fiscal Procedure Code, in force since 1 January 2016 and further amended and supplemented, constitutes the basis for regulating tax procedures, including VAT.

In the matter of legal liability, including criminal liability, we have special laws regulating all sorts of offences against VAT, such as Law no. 241/2005 on tax evasion, including certain offences with regard to the VAT fraud, as well as Law no. 78/2000 concerning the prevention, detection and sanctioning of corruption, which contains a chapter on crimes against the financial interests of the European Union.

(a) What interest is protected by criminalising this act?

(b) What are the punishable behaviours in VAT fraud?

Law no. 241/2005 only penalises offences of tax evasion and offences related to them. The exclusive criminal regulation of tax evasion by this normative act is not the most appropriate, namely that some measures to penalise tax evasion are provided for by this law and other measures for the same purpose are to be regulated by the Fiscal Procedure Code, the Accounting Act or the Customs Code. Even if the degree of social danger of these two categories of deeds is different, we appreciate that there was no need for their strict separation. It is worth mentioning, however, that the VAT was reduced from 24% to 9% for food, non-alcoholic beverages, live poultry, plant seeds and food ingredients starting in 2015, and the rate of criminality in this area has dropped sharply as a 9% VAT no longer justifies criminal behaviour of such amplitude. The rationale behind criminal or contravention criminalisation is the same, namely that the

[2] Cîrmaciu 2010, 156.

violation of certain rules on tax discipline of taxpayers requires a punitive response of the state. Regardless of the nature of the criminalisation, the legislator proceeds from the assumption that a certain social value has been violated by this behaviour and a penalty is imposed, either by criminal sanctions or by contraventional sanctions.

The unitary regulation of the two illicit, contraventional and criminal forms reflects in a more coherent way the criminal policy of the legislator in the field of taxation. The option to exclusively sanction criminal behaviour in the field of tax evasion through Law no. 241/2005 is proof that the legislator has obviously opted for the adoption of an authoritarian model, which emphasises the absolute trust of the state in criminal repression.

In adopting this normative act, the Romanian legislator put into practice the most classical form of the authoritarian model, considering the three defining levels: the criminal incrimination, the procedural aspects and the type of sanction adopted. In relation to the special criminal law, the authoritarian conception requires the multiplication of criminal incriminations accompanied by penal sanctions.

In relation to the procedural aspects, Law no. 241/2005 takes over the authoritarian conception underlying the whole Romanian criminal procedural system. The legislator proceeded from the premise of mandatory and unavailable criminal action. Thus, the recovery of damages does not require the abandonment of the criminal action on the grounds of opportunity, but on the basis of irrevocability it determines only its exhaustion, which manifests on the sanctioning level, causing the abandonment of the criminal action either by conviction of the perpetrator with a subsequent prison sentence within the special limits reduced by half or by conviction with alternative punishment with a fine, or by applying an administrative penalty.

The authoritarian conception of this normative act is manifested from the procedural point of view and through the assumption of the principle of the officiality of the criminal action. Thus, the criminal proceedings initiated and carried out as a result of committing a crime provided by the law belong entirely to the Public Ministry. The law does not provide, as a condition for initiating the criminal action, the complaint or the notification of the tax administration as a subject of the law inflicted by the offence, but the criminal action is ex officio exercised by the Public Ministry, represented by the prosecutor.

From the point of view of the punishments provided by Law no. 241/2005, the legislator has obviously emphasised his preference for four years of imprisonment when the damage or the created advantage exceeds EUR 100,000 with committing the offence within a criminal organisation as an aggravating circumstance.

3. Special issues relating to the protection of EU financial interests

Does Romania need to modify its current regulation in line with the new 2017/1371 Directive (in the sense of providing the possibility of applying penalties other than criminal penalties for less than EUR 10,000 or the regulation of a maximum penalty)?

The solution: The Directive introduces a new standard of stringency in the criminal policy of each Member State and, anticipating the challenge launched by the European legislator, together with its national anti-fraud partners, will analyse the impact of the Directive within the National Anti-Fraud Strategy for the Protection of the European Union's Financial Interests in Romania, 2017-2023 (general objective 6: staged preparation of the legal and institutional infrastructure of the national anti-fraud system from the perspective of European initiatives in the field).

From 6 July 2019, the Directive will replace the current legislative framework made up of the Convention on the Protection of the Financial Interests of the European Communities (since 26 July 1995) and the related Protocols (since 27 September 1996, 29 November 1996 and 19 June 1997).

Member States are required to adopt and publish the laws, regulations and administrative provisions necessary for compliance by 6 July 2019.

The Directive establishes minimum rules defining illegal activities and offences that are detrimental to the financial interests of the European Union, as well as sanctions. These refer to fraudulent behaviour regarding income, expenses, assets and also financial borrowing and lending operations.

The Union policy on the protection of the Union's financial interests has already been the subject of harmonisation measures, such as Regulation (EC, Euratom) no. 2988/95. In order to ensure the implementation of the Union's policy in this area, it is essential to continue approaching the criminal law of the Member States by completing the protection of the financial interests of the Union by administrative and civil law in the most serious types of fraud in this field while avoiding inconsistencies in both these areas of law and among them.

The protection of the Union's financial interests requires a common definition of fraud falling within the scope of this Directive, including the fraud behaviours relating to revenue, expenditure and assets at the expense of the general budget of the European Union (hereinafter the Union budget), including financial operations, such as lending and credit activities. The concept of serious infringements against the common system of value added tax (VAT), as established by Council Directive 2006/112/EC (hereinafter the common system of VAT), refers to the most serious forms of VAT fraud, in particular carousel fraud, VAT fraud through phantom companies and VAT fraud in a criminal organisation, that pose serious threats to the common system of VAT and therefore to the Union budget. Crimes against the common system of VAT should be regarded as serious when linked to the territory of two or more Member States resulting from a fraudulent scheme whereby these offences are committed in a structured manner in order to obtain undue advantage from following the common system of VAT, and the total damage caused by the offences is at least EUR 10 million. The concept of total injury refers to the estimated loss resulting from the whole fraudulent scheme, both for the financial interests of the Member States concerned and for the Union, excluding interests and penalties. This Directive seeks to contribute to the efforts to combat these criminal phenomena.

4. Brief considerations regarding the definition of VAT and its advantages in Romania

As it results from the Fiscal Code, VAT is an indirect tax owed to the state budget, so it is a tax determined not by the wealth, possessions or income of a taxpayer but by the sale of the goods or the provision of services.

VAT is a consumption tax because it is not based on[1] wealth (viewed qualitatively) but on the degree of consumption. Under such conditions, social justice, from a tax point of view, is not achieved. The value added tax does not highlight the principle of equality by tax (according to which, within the taxation system it must be taken into account that each taxpayer will participate in the formation of the general funds for the company in proportion to their financial situation) but, on the contrary, the principle of equality before tax (according to which the taxation is done in the same way for all natural or legal persons, without distinction of tax treatment and thus without taking into account the personal, concrete situation of each taxpayer).

An indirect tax such as VAT has numerous advantages for the State,:

(a) It always has a high fiscal return, meaning:

– it is payable by all beneficiaries of the transactions subject to taxation;
– it does not claim high taxation charges;
– it is not susceptible to tax evasion except for very few situations;

(b) It is stable and not subject to fluctuations due to economic conjuncture;

(c) It is elastic as it can be increased or decreased (by changing the tax rate) according to the concrete needs of the state budget.

It should be noted, however, that these are advantages only for the state and not for the taxpayer. Although indirect taxes have multiple disadvantages for taxpayers, they have been adopted by economically developed countries because they undoubtedly provide much greater security and safe income that is not susceptible to tax evasion.

Among indirect taxes, VAT occupies a main place and is considered the most modern form of taxation and has been adopted by a large number of states, including the EU countries; it is an essential requirement and an obligation at the same time for the EU countries.

Thus, on the basis of the regulatory norms of the Fiscal Code, Romanian legal doctrine stated that VAT is an indirect tax, yet with a fractionated payment and having a fixed quota determined by the value added at each stage of the economic circuit.

In the literature, several features of VAT have been highlighted. Some of these will also be highlighted by us:

– transparency – VAT provides each taxable person with the opportunity to know exactly what the size of the tax and its payment obligation is;
– uniqueness – VAT is not independent of the extent of the economic circuit. Whatever links the product has to go through to reach the final consumer, the level of the quota and the amount of tax are the same;
– VAT is always borne by the beneficiary;
– it is a neutral tax, eliminating tax inequalities between product distribution circuits.

4.1. The VAT mechanism[3]

Value Added Tax is a tax calculated on a monthly basis as the difference between VAT on taxable transactions and VAT on the purchase of goods and services by the VAT payer.

VAT on taxable transactions is called output VAT, and VAT on the purchase of goods and services is called deductible/input VAT. In order to be taken into account in the calculation of VAT, any amount of output or input VAT must be entered on a VAT invoice for the VAT payers (Art. 319 Fiscal Code).

As we have seen, the VAT tax period is the calendar month. The document on the basis of which VAT is calculated is the VAT return. Thus, until the 25th of the month following that for which the VAT is calculated, the persons registered as VAT payers must prepare and submit to the competent tax authority the VAT return where, in two separate columns, the output VAT and the input VAT are highlighted.

The result of the mathematical operation of the deduction of the input VAT deduction from the output VAT may be:

– positive, and then VAT will be payable for the tax reporting period according to Art. 303 par. (2) Fiscal Code
– negative, and then a negative amount of VAT will result.

In the case of a negative VAT amount, the taxable persons may request the reimbursement[4] of the balance of the negative amount of the tax, provided that this balance is "of at least RON 5,000 inclusive" according to Art. 303 par. (7) Fiscal Code.

At the level of the European Union, the Court of Justice of the European Union (hereinafter CJEU) took into account the VAT deductibility aspect in the case Commission of the European Communities v. Italian Republic (C-132/06). [5]

Thus, under the common system of VAT, Member States are required to ensure compliance with the obligations incumbent on taxable persons and, in that connection, enjoy a certain amount of latitude, in particular in terms of the way in which they use the means at their disposal.

However, this latitude is limited by the obligation to ensure the efficient collection of the Union's own resources and not to create significant differences in the treatment

[3] Art. 226 Law no. 227/2015 Fiscal Code, published in the Official Gazette of Romania no. 688/10.09.2015.

[4] Repayment may be claimed only after the taxable person has previously carried out the following operations, provided for in Art. 303 para (2) – (4) Fiscal Code:

– determine the negative cumulative VAT amount by adding to the negative VAT amount, resulting from the tax reporting period, the balance of the negative amount of the VAT carried over from the previous tax period, if it has not been requested to be reimbursed;

– the cumulative payment VAT is determined, in the tax reporting period, by adding to the VAT due to be paid from the tax reporting period of unpaid amounts to the state budget until the date of submission of the VAT return of the VAT balance of the previous tax period;

– by the VAT return, the taxable persons must determine the differences between the amounts stipulated in par. (2) and (3), which are the tax adjustments and the determination of the VAT balance or the balance of the negative amount of VAT. If the cumulative VAT due to be piad is higher than the negative cumulative VAT amount, there is a VAT payment balance in the tax reporting period. If the negative cumulative VAT amount is higher than the cumulative VAT, there is a balance of the negative amount of VAT added in the tax reporting period.

[5] CJEU, Grand Chamber, judgment of 17 July 2008, Case C-132/06, Commission of the European Communities v Italian Republic.

of taxable persons either in H one of the Member States or in the Union as a whole. The Court has held that the Sixth Directive[1] must be interpreted in accordance with the principle of fiscal neutrality inherent in the common system of VAT, according to which the economic operators carrying out the same transactions must not be subject to different treatment in relation to the collection of VAT. All Member States' actions concerning the levying of VAT must comply with this principle.

The jurisprudence of the CJEU[6] in matters of VAT deduction is extremely relevant. In that regard, it must be borne in mind that the right of deduction provided for in Art. 167 et seq. of Directive 2006/112/EC is an integral part of the VAT mechanism and, in principle, cannot be limited. It shall be exercised immediately for all charges levied on upstream operations.[7]

Thus, it is clear from the case law, on one hand, that although it is true that the taxable persons have, according to Art. 213 of Directive 2006/112/EC, the obligation to declare when they modify or terminate their activities, the Member States are not allowed whatsoever to deprive a taxable person of the exercise of that right[8] in the absence of a declaration.

Canceling the VAT code is a measure that cannot result in anything related to the taxpayer whose code was canceled in the tax law field, in which the taxpayer and the state are each on one hand subjects of rights and obligations, so neither party can be penalised for the conduct of a third party that is not the subject of these rights and obligations.

In the field of VAT, there is no requirement that, in exercising the right to deduct VAT, the supplier is a person registered for VAT but a taxpayer within the scope of VAT. However, the suppliers fully meet this requirement, being VAT taxable persons in the area both in terms of taxable transactions carried out and in terms of exceeding the threshold of RON 220,000 for small businesses. The right to deduct VAT is exercised under these conditions defined in Art. 297 Fiscal Code, clear conditions that have an exclusive character and can no longer be added to. Moreover, by Art. 265 it is clear that Title VII of the Fiscal Code is the one under which VAT is collected, and this aspect is imperative.[9]

Moreover, it is clear from the requirements of uniform application of European law and from the principle of equal treatment that the terms of a provision of European law which make no express reference to the right of the Member States to determine its meaning and scope must normally receive autonomous and uniform interpretation throughout the Union.[10]

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[6] CJEU, First Chamber, Judgment of Trawertyn, points 40 and 47.

[7] CJEU, Third Chamber, Judgment of 05.06.2010, Case C-368/09, Pannon Gep Centrum (ECR 20101-07467), point 37.

[8] Council Directive 77/88/EEC of 17.05.1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ L 145, 13.6.1977, 4–40).

[9] CJEU, Fourth Chamber, Judgment of 29.10.2009, Case C-174/08, NCC Construction Danmark (ECR 20091-10567).

[10] CJEU, First Chamber, Judgment of 15.07.2004, Case C-321/02, Harbs (ECR 20041-07101), point 28; ECJ, Fourth Chamber, Judgment of 18 October 2007, Case C-195/06, Osterreichischer Rundfunk (ORF) {ECR 20071-08817), point 24.

The general principles of law to be observed by a Member State when transposing European law into national law, namely the application of national transposing provisions, require that certain operations be effectively enforced by the method which national law provides for them. The principle of the lawfulness of the work of the administrative bodies, within the meaning of the jurisprudence of the European Court of Justice, is one of the recognised principles of Community law. As a consequence, tax administration must comply with the law and order of law and cannot decide taxation contrary to the legal provisions.

The disregard of the deductible VAT calculation would breach the principle of legal security if the taxpayer could not rely on the fact that the transaction would be taxed according to the legal provisions. Depending on the individual situation, it can be assessed whether an incorrect application of internal VAT rules is also a breach of the principles of equal treatment and tax neutrality. The principle of equal treatment, which, in the field of VAT, took the form of the principle of fiscal neutrality, requires uniform treatment for similar transactions.

The manner in which the CJEU interprets the right to deduct VAT, namely the conditions under which it is exercised and the possibility for the Member States to restrict the exercise of that right, is the decision in Case C-438/09 Dankowski. Thus, in its judgment, the European Court of Justice, as the sole body entitled to interpret European law, stated that the Sixth Directive must be interpreted as meaning that a taxable person is entitled to a deduction in respect of value added tax added on the goods or services supplied by another taxable person who is not registered for value added tax purposes where the invoices relating to them contain all the information required by law, in particular those required to identify the person who drew up those invoices and the nature of the goods supplied.[11]

As the Court has repeatedly pointed out, the right to deduct provided in Art. 1 167 et seq. of Directive 2006/112/EC is an integral part of the VAT mechanism and, in principle, cannot be limited. In particular, this right shall be exercised immediately for all the charges levied on upstream operations.[12]

The deduction scheme aims to fully relieve the entrepreneur of the VAT due or paid in all the economic activities he carries out. The common system of VAT therefore guarantees the neutrality of taxation of all economic activities, irrespective of the purposes or results of those activities, providing that those activities are, in principle, themselves subject to VAT.[13]

The question of whether the VAT due for prior or after sale of the goods in question was or has not been paid to the Treasury does not affect the right of the taxable person to deduct VAT paid upstream.

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[11] *CJEU,* Fourth Chamber, Judgment of 8 February 2007, Case C-435/05, CECR 20071-01315), point 22.

[12] *CJEU,* Judgment of 21 March 2000, Joined Cases C-10/98 to C-147/98, *Gabalfrisa and Others* (ECR 20001-01577), point 43;CJEU, Third Chamber, Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling* (ECR 2006 1-06161), point 47;CJEU, Third Chamber, Judgment of 30 September 2010, Case C-392/09, Uszodaepito (ECR 2010 1-08791), point 34; *Commission v Hungary*, point 43.

[13] *CJEU,* Third Chamber, Judgment of 21 June 2012, Cases C-80/11*, Mahageben and David.*

5. Criminal responsibility in fiscal law in Romania

Criminal liability can occur in case of non-fulfilment of tax obligations when they meet the constitutive elements of any of the offences provided by criminal law or other special laws issued for this purpose, to which we have referred in the previous sections, such as:

– the refusal to submit to the control bodies the supporting documents necessary for the establishment of obligations towards the state;
– incomplete or inappropriate preparation of primary documents or accounting records or acceptance of such documents;
– evasion of tax liabilities;
– fictitious statements about the company's headquarters.

6. Controversies among EU member states with regard to VAT

Currently the EU is also financed from VAT-based resources. All started from the *Explanatory Report on the Convention on the protection of the European Communities' financial interests*, which considered that among the revenues making up the EU budget are also those generated by value added tax. It was intended that this provision should be introduced in Directive No. 1371/2017.[14]

When the negotiations in the Member States in the Council were reached, negotiations were blocked precisely because of this. The Member States said: "No, value added tax is a national tax; it only affects the EU budget indirectly. It affects me 99%, it affects you 1%. Why introduce this into the Directive and give the European Prosecutor the power to investigate tax evasion, VAT fraud? I do not want to do this". This was the option of the Member States, and for this reason this draft directive was introduced in 2012–2013 and was adopted after four years, in 2017 to the end. The reason was that they failed to agree on this sensitive issue. Meanwhile, the Taricco[15] case has come up, where this exact type of question has been posed to the CJEU: "What do we do? We have VAT fraud. Does the CJEU say yes, a VAT fraud affects the financial interests of the European Union?" And from that moment on all the talks have ceased.

Even the Member States, in the negotiations in the Council, have had nothing to do with this decision of the CJEU except to put it into practice. From the negotiations, on the other hand, the following conclusion was reached: The European Parliament is competent to investigate VAT fraud only if the total damage is EUR 10 million or more. For smaller fraud, the European Prosecutor is not competent, even if the fraud is transnational or even if it is committed by an organised criminal group.

[14] Tudor 2017, 308–320.
[15] Case C-105/14/2015 a CJUE, *Ivo Taricco and others*, on *www.curia.europa.eu* (09.03.2018).

6.1. Good practice: Presenting a specific case

Four doctrinal methods of defrauding the state budget have been identified by failing to pay VAT on intra-Community acquisitions.

The first method and the "classical method" refers to intra-Community purchases made by an economic operator in Romania.

For example, company A in Romania, registered for VAT purposes under Art. 153 of the Fiscal Code, wishes to make an intra-Community acquisition from company B, located in another Member State.

In order to circumvent these tax obligations representing VAT, the A decision makers will set up another "arrow" company, C, whose sole associate and administrator is a "straw man". C is actually being controlled by the representatives of company A. At the establishment of company C, it declares as a VAT payer by option but declares an annual turnover below the value threshold of EUR 100,000 in order to benefit from the possibility of submitting the VAT return quarterly, according to the provisions of Art. 1561 para (2) and (3) Fiscal Code. Subsequently, company C is making intra-Community acquisitions from company B, and company C is applying the reverse charge regime for these operations.

The goods thus acquired are subsequently invoiced to the actual beneficiary, namely company A. For these internal delivery operations, company C collects the corresponding VAT and company A deducts it, using as evidence the invoices drawn up by company C in compliance with the provisions of Art. 155 para (5) Fiscal Code. The operations described above have a precisely determined "lifespan" of no more than three months, up to the stipulated deadline for C's obligation to file a VAT return. Shortly before this deadline, company C "disappears" without being able to be subsequently identified and without registering, declaring and paying the VAT collected as a result of internal deliveries to company A. Practically, company C has as its "sole object of activity" the delivery of supporting documents to company A for the purpose of the deduction of VAT by the latter.

A second method of "carousel" fraud is, in fact, a form of "refinement" of the one described above, in the sense that the products ultimately go from company A to company B, their original sender. This method can be identified as the auto-generating mechanism of the "carousel" type of fraud, with visible effects in lowering the price of the products that are subject to these transactions. This mechanism is structured on the fact that the delivery price of company A to company B (the delivery price without VAT) is lower than the sale price originally applied by company B to company C since when company A sells to company B, company A carries out intra-Community delivery, which falls under VAT exempt transactions; company A can "support" this delivery price from the "VAT gain" that comes from the upstream transactions with C.

A third method of this type of fraud refers to simulated deliveries made by an economic agent from Romania, registered for VAT purposes according to Art. 153 Fiscal Code, to an economic operator from another Member State registered for VAT purposes under the specific legislation of the Member State of which it is a member. In this respect, the Romanian company performs an intra-Community delivery, invoices

without VAT based on the VAT code belonging to an external economic agent from the Community space, but, in fact, it sells these products on the domestic "black market". This method can be carried out both through the complicity of the external partner which communicates its VAT code or without its knowledge, for example by purchasing the VAT code from various means of information. The so-called "intra-Community delivery" will have to be highlighted by the Romanian economic agent in the VAT return, the statement, and the data reported to the public authorities in Romania will be subsequently confronted with those reported by the external partner to the public authorities of its country, but during this time the economic agent concerned will demand VAT reimbursement, then it will "vanish".

Finally, a fourth method refers to the situation where an economic agent from Romania, registered for VAT purposes under Art. 153 Fiscal Code, makes an intra-Community acquisition and declares all the operations in this respect from an absolutely legal point of view. Later, it records a mark-up and simulates the retail sale through electronic fiscal cash registers. In fact, these products are marketed on the "parallel market" at prices much higher than those recorded in the accounting records. The "classic" example of this is the intra-Community acquisition of flour and simulating its commercialisation to individuals, whose subsequent identification is not required by any law and moreover cannot be identified, when in reality it is being sold to various bakery and pastry units.[16]

7. Issues related to the competence of the criminal investigation bodies in Romania

In Romania, there were doctrinal discussions on the competence of the criminal investigation bodies by substance, but also with reference to the characterisation of tax evasion facts in the field of VAT fraud, in connection with the evasion of European or intra-Community funds or fraud of the national VAT.

Thus, if the fraud concerns European or intra-Community funds, the criminal act will be qualified as the offence provided by Law no. 78/2000, which attracts the competence of NAD (National Anti-Corruption Directorate, a specialised structure) while if the fraud concerns funds in the national domain, the act will constitute the offence of tax evasion provided by Law no. 241/2005 on preventing and fighting tax evasion, which attracts the competence of ordinary (usual) prosecutors.

But if fraud refers to both European funds and national funds, which criminal investigative body has the competence to resolve it? The NAD (The National Anticorruption Directorate) or the ordinary prosecutor's office? The doctrine is contradictory, and the criminal procedural legislation in place leaves room for different interpretations.

A solution accompanied by a proposal for lex ferenda will be found in the content of the paper presented in extenso.

[16] Decision no 2973/2012 of the *High Court of Cassation and Justice.*

Another problem is whether we are in the presence of a single complex offence provided by one of the two special laws or in the presence of two offences in the context (tax evasion and fraud in European funds) – one being an offence by means and the other a purpose offence. The same question: Who is the competent body?

As another example, tax evasion was until recently the responsibility of DIOCT (Directorate for Investigating Organised Crime and Terrorism); it is currently the responsibility of ordinary prosecutor's offices. At a time when the damage exceeds EUR 10 million and becomes fraud affecting the EU budget, according to the law the case should be investigated by NAD, on the national territory, and, if it is transnational fraud, by the European Prosecutor's Office.

This leads to some problems in terms of creating conflicts of jurisdiction between the aforementioned criminal investigative bodies, resulting in successive declines in competence, accompanied by the sanction of nullity of acts by an incompetent body.

Also, with regard to sanctioning, in our legislation tax evasion is disproportionately sanctioned in relation to other fee and tax offenses. Take for example smuggling, which is punished by imprisonment for two to seven years. Tax evasion with particularly serious or damaging consequences over EUR 500,000 is punishable by imprisonment between nine and 15 years.

This punishment is greater than the punishment for the offence of battery or death-related injury and is approaching the punishment for the offence of rape followed by the death of the victim or robbery followed by the death of the victim, which is a little less than the punishment for murder.

8. The synthesis of the paper instead of conclusions

We have highlighted in the paper the main aspects relevant to the fight against VAT fraud in Romania, with an explicit reference to the protection of the financial interests of the EU.

Thus, we have presented the regulatory framework, referring to the normative acts (special laws) in the matter. We have shown, essentially, that these facts have been criminalised as crimes in our country and what their content is. Of course, these facts constitute offences from the date of coming into force of the normative acts of a special character, which we have referred to.

It follows from the content of the report that the EU's financial interests and national financial interests are equally protected.

We have also taken into account the criminal behaviour of VAT fraud, showing the alternative ways of committing these crimes and the forms of guilt they can be committed with. Thus, the offences provided by Law 78/2000, subjectively, are committed with direct or indirect intent, the perpetrator pursuing or accepting that doing the facts could cause damage to the EU budget. Also, under certain conditions, negligence in dereliction of duty is being criminalised when it undermines the financial interests of the EU and the act is committed by fault.

In the case of the tax evasion offences provided by Law 241/2005, the guilt forms are the direct intent, characterised by a purpose of evasion of tax obligations, or indirect intent when the perpetrator provides the result of his deed that he does not seek but accepts.

The terms of presumption of criminal liability are those provided by the Penal Code in force and are of eight years and 10 years, depending on the seriousness of the crimes committed and start from the date of the offences.

The penalties applicable to offenses under Law no. 78/2000 are between six months and 15 years of imprisonment and the prohibition of rights, depending on the legal, generic and concrete social danger of these deeds. For the tax evasion offences provided by Law 241/2005, the applicable penalties are between two and eight years of imprisonment and the prohibition of certain rights. There are also offences with a lower social danger for which the law provides for a criminal fine or imprisonment from six months to three years. The punishment limits for aggravated forms of tax evasion can vary up to 15 years in prison, and it is possible to increase this maximum penalty (two to three years) given the existence of special causes of aggravation.

There is no threshold for quantitative or value punishment of these crimes. On the other hand, there are general mitigating and aggravating circumstances, regulated by the Romanian penal code in force, that are also applicable to these crimes. There are also causes for non-punishment and reduction of punishment provided by the law on combatting tax evasion

Depending on the value of the damage caused, there are facts that would fall within the competence of the European Prosecutor's Office. Thus, the European Prosecutor is competent to investigate VAT fraud only if the total damage is of EUR 10 million or more. For smaller instances of fraud, the European Prosecutor is not competent even if the fraud is transnational or is committed by an organised criminal group.

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COMBATING VAT FRAUD FROM THE POINT OF VIEW OF THE ADVOCATES

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1. Introduction

Tax evasion or tax fraud, with specifics on EU financial interests, is and would probably be a main topic with concerns on procedural and substantial procedures used to effectively protect those interests by use of adequate instruments in a way that they would also maintain the fairness and legality of trials. Any analysis on criminal law procedures, whether connected to fraud or not, must consider and adapt the fundamental rights of the suspect or accused in order to ensure the fairness of the procedure conducted against him, the defence's rights, the scope of all said before being, finally, to achieve the protection of EU financial interests without disregarding the preservation of legal and fair features of the abovementioned procedures.

I selected, from a large range of defence connected problems, just a few practical elements that transcend national provisions and would probably raise the same issues when transborder criminal actions occur.

Without going into lengthy details, as far as the national criminal provisions are concerned, we could debate quite a bit on classification of charge as value added tax evasion (as a crime) is regulated based on progressive aggravated liability going as high as 9–15 years in prison if the damage is more than 500,000 euros considering tax base and or without fiscal appurtances such as fines, penalties, interests. An actual dispute concerns criteria used in classification of charge considering the moment of illegal action, the value of frauded tax base,[1] an opinion sustained by most lawyers during all procedures or, on the contrary, the cumulate value of both tax base and the appurtances that often exceed the tax base value by so much that makes difficult for the accused to settle and pay a reasonable amount (eg. tax base and a fine) in order for both him and the state budget to benefit. To be noted here that there are recent decisions confirming first option[2] but both opinions were embraced in case law.

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[1] Hotca, available on *www.juridice.ro/554168/suma-evazionata-coincide-cu-prejudiciul-in-momentul-consumarii-infractiunii-de-evaziune-fiscala.html.*

[2] Decision (Ordonanţa) 9/II.2/2018, issued by District Prosecutor (Parchetul de pe lângă Curtea de Apel Oradea) in case file 193/P/2013, confirmed by Decision (Încheiere) issued by preliminary chamber judge in case file 364/83/2018 of Satu-Mare Regional Court, available on *www.portaljust.ro*.

One other important matter would be the procedure used by prosecution to establish the values indicated above, using specialists hired and paid by prosecution. Observing relevant provisions of Art. 64 and 172 of Romanian Criminal Procedure Code (RCPC) it was argued that these specialists cannot be accepted as independent or impartial so, in that respect, courts must not rely solely on observations/opinions of those specialists and should, thus, allow an independent expert to examine all technical matters and offer an opinion. Unfortunately, in most situations, courts rely on observing the damages exclusively calculated by internal specialists paid by prosecution, disregarding not only Art. 6 par 1 and 3 of European Convention of Human Rights (Convention) but also national provisions (Art. 172 of RCPC) that stipulate a positive obligation of the court to appoint an independent expert in such situations. Only recently[3] Romanian Constitutional Court (RCC) decided that all situations that influence independence and impartiality of an expert (stipulated in Art. 174 para 1 of RCPC) also apply to the specialist hired by prosecution or other state institution. The provision above referred forbids the judge to justify or base a decision on a specialist's conclusion if criteria of independence and impartiality is not met (Art. 64 para 1 RCPC – there is a conflict of interests if a person is or was a representative of one of the participants involved in the trial and also Art. 64 para 1 lit f of RCPC, if there is a reasonable suspicion that, whatever the reason, the impartiality or independence of a person is influenced).

Concerning the purpose of the evasion law provisions, related to the consequences of a value added fraud crime or evasion (non-payment of tax base and other civil liability results – fines, penalties, interests).

2. Substantial and procedural benefit in case of covering or settling the caused financial damages by the suspect or accused

I shortly have to point out that Romania had a different criminal policy until 2014, meaning that under the effect of Art.10 of Law 241/2005 (in force until 1st of February 2014 but *still applied as most favourable law in most cases*, thus relevant if during the judicial procedures a matter of different provisions is raised) the defendant was allowed *to pay in full the legal damages (material/financial) caused*, either *during the preliminary investigation* activities or up until the *first arraign* (in RCPC there is a procedure conducted by the judge, after all administrative matters were already resolved, including citations, summons, communication or notice of accusations, instructions towards the defendant or lawyers concerning legal rights of defence with underline of content and benefits of the abbreviated/shortened procedure applied when a *guilty plea* is entered, all regulated by Art. 374 of RCPC). Consequently, as applied during former provisions of the same law, if the total amount of damages did not exceed 50,000 euros the court could only impose an administrative penalty/sanction with mandatory mention in the criminal record or, if the amount due exceeded 50,000 EUR but within

[3] RCC 2019 Decision issued on 13.02.2019 (*www.universuljuridic.ro*).

100,000 euros, the court was limited to impose a criminal penalty as a sanction. Furthermore, for all the situations where the amount above mentioned exceeded 100,000 euros, if paid in full, the limits of possible punishment sanctioned in the specific law provisions/articles would be mandatory reduced to half.

Currently, however, from 2014 onwards, the modified tax evasion law uses a different terminology providing that only in limited situations (those referred in Art. 8 and 9) the limits of criminal punishment legally established by law would be reduced only if the defendant pays in full the civil complainant's damage claims (always a fiscal representative of the state). The indicated modification raises a number of problems that influence not only legal procedures but also the purpose of retrieving the amounts not paid.

First of all, a radical change is to be noted since the initial provisions were more likely to insure the full recovery of the financial damages considering the benefits of the procedure as explained above – limited or even no criminal liability up to 100,000 euros. As to the benefit of half reducing the limits, the main difference is that in the *matter of value added tax one of the key legal elements of crime is intent to defraud* (a specific intent crime considering the purpose of illegally avoiding tax payments, a matter unanimously resolved both in literature and practice) and is regarded as a crime only if there is an action of inaction that produced the result forbidden by law. As explained, any situation connected with amounts of tax base or appurtances are not simple civil matters but legal parts of definition or classification of crime. As a personal opinion, the pending provision ignore that, in order to be noted as legal, all material or financial damages have to be examined by judicial bodies (prosecutor and the rest of the investigative team) precisely because they have to be included both in the initial notification of charge and in the indictment (in Romanian law is issued by prosecutor) as also mentioned in Art. 6 para 3 lit a, b of the Convention.

Furthermore, damages claimed by plaintiff/complainant *have to be checked on corroborating evidence base by the prosecutor* and *could be challenged by defence that could also include affirmative evidence* (e.g. proof of payment) which could influence the actual amount of damages. Not only the provision disputed here ignores the result of defence evidence but it has the same effect on the prosecutors specific evidence based conclusions (including the examination of the matter by an independent expert) because nowhere in the content of the modified version does it say that the claims could be checked and reduced by a prosecutor or even the court. *Consequently, if the complainant* (who is also representative or agent of the state in fiscal matters, subject to be verified by a fiscal administrative body called Accounts Court) *does not willingly modify the amount requested, where the situation indicated above occurs, either the defendant would have to pay an illegal amount for the procedural and substantial benefit or most likely will not pay a bigger amount and in a lot of situations that would also mean that taxes will not be recovered by the state*.

In the same matter of damages, The High Court of Cassation and Justice (HCCJ) issued a recent decision,[4] a preliminary decision of stating the right provision of law

[4] Decision 9/2017 – issued by Romanian High Court of Cassation and Justice as a general ruling to be enforced as law, available on *www.scj.ro*.

to be applied in a specific legal matter that could decisively influence the outcome of the trial or litigation. This type of decision may only be issued by the HCCJ and, once issued, have to be applied as law in all consequent cases.

The decision in question contains the HCCJ analysis, examination and solution in the matter of paying, covering or settling the civil damages in full the conclusion being that the legal matter in discussion is a personal one and would benefit only to the defendant who settles the whole amount (paid in full as legal terminology used) within the legal timeframe provided by law, as explained above. Without challenging the main remarks of the court, I would like to address at a basic level a few problems ignored both by the HCCJ and the legislator:

– In value added tax case law, traditionally, we have both a private defendant and a company with one or more shareholders (in Romania most companies are organised as LTD's but same principles apply to other types). First, considering decision 9/2017 of HCCJ, if, as an example, a damage of 34,000 euros is legally established by prosecutor and accepted by the defendant (*private person*), if he or she pays the whole amount, *the company would not benefit* (even in such cases where the same private person is owner and has full administrative powers as it is often the case in Romania).
– Second, if the c*ompany has the possibility and pays the full amount* by the order of the private defendant (usually, in such cases, the order of payment can only be issued personally by the accused, the only person with full administrative powers considering also that, as an abstractness, the company could only function in material world through actions or decisions of people) *only the company would benefit*.

A specific problem that I encountered in recent judicial practice is that of *cases or trials versus multiple co-defendants* where we could have different possibilities such as:

(a) *One of the co-defendants settles the damage in full before the others are even notified of the charge.* This situation could develop depending on what the financial authority will do (accept further payments or not). In my opinion, further payments would be illegal if accepted by the state since there would be no ground for cashing such payments.

(b) *All the defendants are notified of the charge, same material damages and connected option to pay and benefit at the same time but one of them is quicker than others.* This raises the question of solving the legal situation of other co-defendants who pay the same amount (regardless of the knowledge of initial payments – it could be difficult to prove) and should benefit like explained above even if the court has to decide to return the money since it would be an undue payment (*plată nedatorată*) or an unjust cashing.

As a development, also as a result of numerous defence challenges in the matter, there is to be noted that recently some of the prosecutors choose to divide the amounts based on effective contributions at criminal actions of suspect/accused. This approach results in a better guarantee of the accused's right to be fully informed on the content and classification of the accusation. It also contributes to a higher chance in settling of the damages. In most cases, however, the formal accusation targets a unique amount

(sometimes it is significant and challenging to be settled by a single or even a group of private persons or companies) consequently integrated in indictment.

De lege late, RCPC does not provide an effective procedural instrument for the accused or the defence to solve the addressed issues in due time in order to also benefit from the procedure.

– *A third problem* connected to the matter of damages concern the issue of substantial and procedural benefits of Art. 10 of Law 241/2005 (as indicated above) in specific situations consisting in settling the value added tax amount as a tax base mentioned in the initial *criminal charging document* or *final indictment* without paying the fines, penalties or interests.

  Two practical situations with the same solution may occur as follows:

– The state (through the designated agent – ANAF) files a *civil action* (it is called civil even if it is associated to a criminal action and the outcome of the crime should be part of criminal charge as it is a specific result crime) targeting *a tax base of 10,000 euros* (as eg) and requests full penalties and intrests without stating (specifying/calculating) the precise amount of those connected alleged debts (often present in actual Romanian jurisprudence);
– The judicial body followed an *ex officio referral procedure* (sesizare din oficiu) and based on evidence obtained indicates a material damage but although notified, the financial authority chose not to file a civil complaint. In some particular situations[5] state's representative chose to challenge the prosecutor's decision to close the case on grounds that only the tax base was settled and not also the connected dues.

As a recent development in the matter[6] HCCJ decided that plaintiff's (state agent in this type of offences) failure to calculate the exact amount of appurtances within legal timeframes indicated above is an affirmative negligence that objectively prevents the accused to fulfil the indicated obligation and cannot be held against the accused in any circumstance. It is important to note that the HCCJ's decision apply regardless of the state's decision to file a specific civil complaint before first arraign or not. The solution remains the same and applies accordingly if the amounts other that frauded tax base are not calculated and notified, with detailed explanations concerning legal base of analysis and calculation.

3. Specific procedural problems on freezing assets

As mentioned in RCPP (Art. 249–256), procedure as a whole includes two steps:

(a) An order of freezing/seizing assets is issued by the prosecutor (Ordonanţă) or judge (Încheiere) in order (provided by law as a *legal purpose* to be referred and justified in orderţs content) to avoid hiding, destruction, selling of assets that could serve at

[5] File No. 1871/108/2018, Bihor District Court, available on *www.portaljust.ro/111/SitePages/dosar.aspxid_dosar=1080000000010747&id_inst=111.*

[6] High Court of Cassation and Justice , decision no 370/A/2016 , available on *www.scj.ro.* Similar decisions were issued by Local High Courts – decision no. 127/2016 of Bucharest Appeal Court, also available on *www.portal.just.ro.*

the recovery of damages, are/could be object of special/ extended confiscation or could serve to cover punishment fines or prosecution/judgement costs

(b) The order is completed by a so called *carry out procedure*, generally executed by a police agent who identifies the assets, establishes their value and draws up a detailed official minute (proces verbal de aplicare) in this respect.

Art. 249 par 5 of RCPC states that freezing orders could be issued with target on or towards the officially notified suspect/ accused's assets to the limit of the *probable or presumable value of damages*.

Art. 11 of L 241/2005 specifies that in crimes sanctioned by the same law (tax evasion including value added tax evasion) freezing assets of the accused is mandatory.

A challenge could be filed against both freezing order and the carry-out document within 48 hrs from notification.

First problem to address would be the lack of predictability issue of the reference point (guide mark) used by the legislator, that of the presumable or probable values of goods.

Recently,[7] in a particular case, during the preliminary investigation an *in personam* notification of charge was issued against of a local company and its two managers mentioning reasonable suspicions of value added fraud of about 1.8 million euros. Same notification (ordonanță) mentioned that the three became formally suspects and also they were notified on main suspects rights such as the right to remain silent, the right to defend in person, the right to have access to the file, right to be defended by a lawyer, right to free interpretation all mentioned by Art. 317 and 83 RCPC. At the time the formal criminal was notified to the accused, there was no actual evidence both on the value of the alleged fraud or towards the actions of the managers or the company regarded as offences. That became clear not only when the defence was granted access to the file for the first time (during the motion to deny the freezing order) but would also became a fact later on, when the prosecutor decided to drop all charges. The case file (as evidence) consisted of a financial authority report exhibiting commercial connections within a group of companies controlled by the same administrators as private persons, financial data and a single statement from a witness claiming a frauded value of 1000 euro in local currency. After a search warrant issued by the judge was executed, *a freezing order for all the assets both personal and those of the companies was issued by the prosecutor who also dismissed the defence lawyer's requests of administering further evidence and establish the real value of the assets, much higher than the one used by prosecution (mentioned in Bihor Townhall fiscal archives).*

Also, in front of the rights and liberty judge authorised to decide on the challenge motion against the freezing order, the defence produced an independent official evaluation of just the real estate head-quarters value (set at 1.6 mil euros), asking the judge to obtain a direct evaluation of all the assets and limit the order according to the guidemark above mentioned. This request was also denied on different grounds such as bur-

[7] File no. 2889/111/2016, available on *www.portaljust.ro/111/SitePages/Dosar.aspxid_dosar11100000000104546&id_inst=111.*

den of proof, minimal intrusion against the private property or interlocutory content of the order.

In august 2018, after a change of venue to another jurisdiction on lack of impartiality of the local prosecutor, a decision of dropping the charges not for the lack of evidence but because evidence showed that there was no offence committed either by company or the two managers.[8] The assets were seized for a period of more than 2 years. In this period both the company and the managers had major difficulties to continue working with foreign partners (who were also notified of the procedure) and had also major difficulties in maintaining the same financing package from the banks they worked with. Also the income of yearly taxes that the company paid before the described procedure decreased in an obvious manner.

Discussing the matter of predictability and clarity of the law, we can observe that when the provision refers to the material damages in terms of the limit of freezing orders, it uses terminology such as *presumable or probable value*, without also providing enough guide marks in order to provide a proper protection for the suspect or accused or to offer the possibility of an adequate response from the defence strictly towers the estimated value of the allegedly frauded tax or material damages. In the same time, there are no specific provisions or guide marks on the proper procedure to establish a real value for the frozen assets or towards possibilities to challenge such a value on behalf of the accused.

As a conclusion, an argument directed to the issue addressed (challenge on the procedure used to determine a correct value of the seized assets or goods)is limited considering the provisions discussed and will generally be dismissed by the court since there is no specific provision to provide an adequate procedural instrument to resolve the addressed matter.

Second, partially connected to the case referred above, in recent jurisprudence *the issue of nature and limits of judge's activities or object of examination when solving a motion to dismiss against a freezing assets order was debated both in literature and in judicial practice.* Considering the restricted procedure to be followed in case of challenge, I believe that it is essential to underline the limits of judge's competence when there is such a court referral since specific problems raised in practice following different grasp of those limits above indicated.

In recent literature comments, relevant authors[9] argued correctly that those measures are, as a rule, optional. In those situations where a specific law provision stipulates a mandatory decision for the purposes indicated, the decision is not to be a mere formal one, judges being legally bound to observe the *standard of proportionality between the legal purpose imposed and the right of the subject to use the personal goods as to avoid an individual excessive burden*. Such standard should be observed in connection with a proper determination of a patrimonial (economic) value of both goods and purposes, the

[8] *Final* preliminary chamber *decision no. 221/17.12.2018* (file no. 1871/108/2018, Bihor County Court), available *www.portaljust.ro/111/SitePages/dosar.aspxid_dosar=1080000000010747&id_inst=111.*

[9] Udroiu 2018, 862–864.

complex character of the case, either the slushiness/inertia or the pro-active behaviour of the prosecution bodies, specific means to ensure preservation as well as to avoid an excessive deterioration of the goods and/or other relevant matters. The same argument was acknowledged by the High Court of Cassation and Justice as being also consistent with art 1 from First Additional Protocol to European Convention of Human Rights and Art. 53 para 2 of Romanian Constitution.[10] Same authors observed also CEDO relevant decisions in Hutten – Czapska vs Poland, Depalle vs France or Hermann vs Germany that would also acknowledge the same rule.[11] Unfortunately, in particular cases, these grounds are rarely applied, as I argued before.

It was also argued[12] that RCPC relevant provisions do not require that prosecution or judge to establish the existence of a reasonable suspicion to commit the criminal fraud offence as a particular criteria for such measures. I believe that such ascertainment is consistent with specific provisions that regulate in detail the steps to be followed when a person is formally or substantially accused in connection with a VAT fraud offence (Art. 305, 307, 309, 311 RCPC). Essentially, reasonable suspicion (exists if there are enough evidence to convince an independent observer on such suspicion) must result from the content of evidence legally obtained but the decision and an official notification of charge can be issued only if other legal obstacles are not present (art 16 of RCPC), one well known example being *ne bis in idem rule*.

On the addressed matter, prosecution representatives argued that the judge is limited only to observe if the *formal aspects of the procedure* are consistent with the law (as above mentioned Art. 249 RCPC and 11/ L 241). In this approach*, judges will verify exclusively the object of the file if the crime is a tax evasion specific crime mentioned in L 241 and if the defendant was officially accused (and notified) of such a crime.*

Others, mainly defence representatives, argued that judges should also be permitted to refer issues such as opportunity (considering the imminent peril or danger for the specific purposes of freezing assets provided by law) or proportionality with the fundamental right to property when, e.g., freezing a house of 200,000 for a damage of 1,000 euro) or *any other legal matters* in direct connection with the discussed procedure.

*One of those issues is that of evidence sustaining reasonable suspicion as a key element for deciding to formally charge someone with such a crime (*but I personally argued in front of the judge that the challenge of such decisions cannot be viewed as effective if the referred judge is not permitted to observe both the formal aspects of the order and the substantial matters that could have a legal influence in a direct or indirect manner on the freezing order[13]) . Simply put, just because this key legal element of a criminal charge has to be analysed and justified by the prosecutor in order to formally accuse someone does not mean that, within legal limits, the judge may not do the same

[10] HCCJ, Decision 19/RIL/2017, available on *www.scj.ro.*

[11] Available on *www.echr.coe.int.*

[12] Udroiu 2018, 862–864.

[13] File No. 2329/111/2018.
www.portaljust.ro /111/SitePages/rezultate_dosare.aspxk=Codrean%20Rares&a=&20Mjmpldinstitutie=111

in a different procedure (as I personally argued, it is a legal obligation of the judge to do so).

Although not so common in national judicial practice *one other issue* the defence used in challenges against freezing orders was related *the statute of limitation stipulated by the Criminal Code to notify a charge has passed* and the provisions of Criminal Procedure Code that impose that the prosecutor mandatory either do not formally accuse the defendant or drop the charges accordingly (Art. 16 and 314 alin.1 lit a and of RCPC). It was argued that the decision to issue the *in personam order on charges* targeted at the defendant was illegal *ab initio* and, consequently, the freezing order is illegal based on Art. 280 RCPC on fruit of the poisonous tree doctrine.

One of those relevant aspects concern a statute of limitation for a period (legal timeframe) stipulated considering the limits of punishment. *Controversy appeared towards a possible discontinuance or intermission of statute of limitation either by following a legal procedure within the period or by submitting a legal charge notification on a fraud offence formally notified to the accused in a direct manner (personally)*.

Relevant provision which can be identified in Art. 154 of Criminal Code that establish a maximal limit of 8 or 10 years (depending on the lengths of legal limits of punishment provided by law) and 155 of same act that stipulates that statute of limitation may be interrupted by a formal notification towards any participants within the case. However, relevant to those provisions, Romanian Constitutional Court decided[14] that the indicated period could only be suspended or interrupted if the accused is formally notified with the specific charge that has to be personally communicated/notified (to clear the matter, a notification served to suspect A will not interrupt statute of limitation for person B until the latter is also personally notified of the cause and nature of the accusation). All the above considered, it seemed natural (and argued consequently in front of the judge) that if a legal challenge or motion is filed against the freezing order the judge not only should be allowed but also has an obligation to verify all legal aspects that influence the order, in the discussed situation, exceeding the time limit stipulated by law as an impediment to all procedural actions on proving criminal liability.

We see as relevant the provisions of Art. 13 ECHR and Art. 47 EU Charter of Fundamental Rights that guarantee the right to an effective remedy. They both establish this right as an essential component of access to justice. As neither the ECHR nor the EU Charter of Fundamental Rights define the term 'remedy, the overriding requirement is for a remedy to be 'effective' in practice and in law.[15] Also the right to an effective remedy is observed within a close connection between Art. 13 ECHR and 47 EU Charter of Fundamental Rights on regarding effectiveness of the remedy as a

[14] Decision No. 297/2018 (*www.ccr.ro*).

[15] *https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2016-handbook-on-access-to-justice_en.pdf*, page 92.

cornerstone of UE's legal order[16]). Specific attributes of effectiveness are accessibility, possibility of providing redress in respect of the applicant's complaints but more important the possibility of a reasonable success for the applicant.[17] The principle of effectiveness requires that domestic law does not make it impossible or excessively difficult to enforce rights under EU law.

Where a possibility to file a motion to dismiss a freezing order is provided by law (just a reminder that all the above were presented considering the analysis of Art. 249–250 RCPC) as in the situation debated, we only have to examine the existence of the main attributes of effectiveness, since Art. 250 RCPC clearly provisions a remedy against unlawfully issued freezing orders. Recently, at the request of defence lawyers, a rights and liberties judge decided[18] that within the above mentioned procedure, a competent judge is mandated to observe the sequence of all prior acts/ documents/ procedures or measures that decisively influence legal aspects/conditions related to the freezing order. Based on the statute of limitation, the judge decided that nullity applies (Art. 282 and 16 RCPP) and also all consequent decisions or measures will have to be sanctioned with nullity based on Art. 280 Criminal Procedure Code (fruit of the poisonous tree rule).

One other argument would be that of the direct application of *Directive 2014/42/UE on freezing and confiscating crime or offence results*, that is if the national authorities do not interpret national provisions in harmony with the European ones. The directive stipulates that national authorities should notify any person who has personal legal interests or fundamental rights (§34) and should provide remedies for those person onto a possible motion to dismiss (§33). As we argued before, the directive (Art. 8 § 1) underlines the attribute of effectiveness when referring at the remedy and also underlines the scope of maintaining all fair trial rules within the discussed procedures.

In this particular case the judge accepted defence's point of view and observed the whole procedure as illegal,[19] but the matter is far from being resolved in relevant or constant case law since the rights and liberties judges are still hesitant to resolve the matter accordingly.

Third, in a recent, still pending investigation, c*ase with multiple co-defendants a total damage of approx. 100,000 euro was established by prosecution. During the carry out procedure police agents identified assets of over 1 mil euros since the procedure was applied to each individual co-defendant.*[20]

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[16] CJEU, Joined cases C-402/05 Poland C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, 3rd September 2008, para. 335. 314 CJEU, C-294/83, Parti écologiste "Les Verts" v. European Parliament, 23.04.1986; CJEU, C-50/00 P, Unión de Pequeños Agricultores v. Council, 25 July 2002; CJEU, C-222/84, Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary, 15.05.1986 *https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2016-handbook-on-access-to-justice_en.pdf*, 94.

[17] R, Vučković and Others v. Serbia [GC], No.17153/11 and 29 other cases, 25.03.2014, paras. 71 and 74, 95.

[18] Decision JDL 54/2018 issued in file 2329/111/2019 by a rights and liberties judge from Bihor Tribunal, available on *www.portaljust.ro /111/SitePages/rezultate_dosare.aspxk=Codrean%20Rares&a=&20Mjmpldinstitutie=111.*

[19] Idem.

[20] Freezing order issued in case file no. 8/P/2013 DNA Local Structure Oradea confirmed by Court Order no. 7/2018 in case file no. 7230/111/2017 by District Court Bihor, avalilable on *www.portal.just.ro.*

In Romanian jurisprudence the issue of exceeding the legal limit of freezing/seizure is not new and was discussed, apart from the issue of guide marks on presumable value, especially in situations where the material damages were established by prosecution with a degree of certainty. It was disputed (especially by the judicial bodies) enforcing the freezing order *in personam* (the same single value was held repeatedly, against each individual) is essential because some of the accused might be found not guilty by the courts during subsequent legal procedures. If that were the case, the damage could be easily recovered from the others.

From a defence point of view, the decisive issue here is the *in rem* aspect, the value imposed on the accused's being unique and freezing of the assets is limited to the probable or presumable value of those damages and could not be multiplied. We cannot accept the argument indicated above since it refers to a subsequent aspect, nondependent of the freezing procedure (in reaching a verdict the judge will only analyse and decide on legal elements of the offense including guilt regarding also the standard of proof). The verdict to be reached during the trial is not a legal element of the freezing procedure.

Some particular situations concerned freezing assets of third parties, not directly involved in the crime in question, most often courts had to solve challenging from spouses who argue that (according to family law) they owe half of the assets. HCCJ decided that the issue raised does not lead to an illegal procedure, it just prohibits entitled fiscal authority to cash the whole sale price of the assets during the subsequent procedures, after the defendant would have already been found guilty. Freezing the assets of a family of two (husband and wife) with a total value of 300,000 euro was considered legal by court even if the certain value of the fraud was 100,000 euro (as indicated in the notification of charge). The decision was justified by the judge, surprisingly, on matters that exceeded procedural limit for a motion to supress the freezing order such as that the value of frozen assets might decrease until the trial is concluded in a manner that it would not cover the frauded amount.

To conclude on this matter, the courts are hesitant to decide and ensure a proper balance between the public interest (state's interest and obligation to retrieve unpaid taxes and establish proper criminal liability for defendant if the guilt is proved beyond reasonable doubt) and the fundamental rights stipulated by Convention and RCPC (especially right to an effective defence, equality of arms and right to use private property).

4. Particular aspects during trial procedures

4.1. Abbreviated procedure in case of guilty plea

Art. 374/375 of RCPC provisions that the defendant who enters a complete guilty plea and does not challenge the evidence presented (included in the case file) against him will procedurally benefit by a proportional decrease of legal punishment limits (1/3 from initial limits provided by law if the crime is punishable by imprisonment or 1/4 if the law provides a criminal penalty).

Especially in tax fraud cases, if there is a strong case against the accused, most of the times lawyers will advise to a guilty plea since the accused will have benefits both from the above mentioned procedure and from settling the damage as already explained.

Problems occurred when the defendant argued that he would only admit a limited guilt since that particular position is consistent to the true state of fact. The referred article only permitted the judge to declare admissible such a procedure if the accused entered a guilty plea for all the indictment's content corroborated with the specific request that a judicial decision should be based on the evidence gathered during the investigative procedures. On the content and benefits of the procedure (Art. 374 alin 4 RCPC) the judge will mandatory inform the defendant in detail.

The provision was largely criticised by defence lawyers on grounds that it created an unfairness and imbalances considering the purpose of criminal proceedings, that of establishing the truth and reaching a just verdict. The procedure, as described above, encouraged the defendant to admit guilt even if he was only partially guilty if he wanted to benefit by reduced limits of punishment. Also, if the defendant admitted a partial guilt and a classic trial procedure was followed, the courts could not grant the procedural benefit even if the evidence sustained the defendant's version.

The procedure was updated in 2016. The conditions of abbreviated procedure's admissibility are the same but, currently, Art. 396 para 10 from RCPP provides that if the judge stipulates that the facts presented by defence are consisted with the corroborating evidence the same benefits apply even if a complete guilty plea was not entered and the abbreviated procedure was not admitted by the judge.

Even if a complete guilty plea is sustained by the defendant, the court still has to examine all legal aspects of indictment. Consequently, it is possible that the indictment is denied, totally or partially, on legal grounds other than lack of guilt or lack of evidence. On this matter, in recent literature[21] a different position was sustained, based on Art. 349 RCPP with referral to court's obligation to examine all evidence and decide that there is enough evidence to conclude on any relevant aspect of the trial before the abbreviated procedure is declared admissible. The article indicated does not impose a guilty conclusion or verdict but merely states that the court must find the evidence conclusive. If that is not the case and the court has any kind of doubts, it will have to declare the whole abbreviated procedure as inadmissible and proceed with examination of evidence in a classic procedure (Art. 349, 375 RCPC). However, if the examined evidence confirm the defendant's version, regardless of the content (total or just partial admission of guilt), the court will grant the procedural benefit described above (Art. 396 pct. 10 RCPP).

HCCJ decided recently[22] that an acquittal verdict cannot be reached (in case of the abbreviated procedure is admitted) on grounds above mentioned (lack of guilt or lack of evidence) although referred articles do not impose such a limit. This decision, in

[21] Zarafiu, available on *www.juridice.ro.*

[22] Decision RIL 4/11.02.2019 available on *www.scj.ro.*

a personal opinion, (that has the same rank as any other law and will be enforced as such) will create other issues connected with the position of the judge that is called to decide on the abbreviated procedure. In most trials we currently have both guilty pleas and not guilty pleas. In those situations, before the discussed decision, judges would declare admissible the abbreviated procedure if all criteria's are met but would not be able to decide on a verdict until the examination of evidence in a classic procedure was close for the defendants that sustained a not-guilty plea. This leads to, at least, three conclusions:

– considering the consequences of decision 4/2019 of HCCJ, a judge who declares the abbreviated procedure as admissible, implicitly, expresses a conclusion on guilt and evidence, both in detriment of the defendant;
– the judge will become conflicted as provisioned by Art. 64 alin 1 lit f RCPP (there is a reasonable suspicion the impartiality of the judge is influenced in any way), and will have to abstain from judgements and verdicts on not guilty pleas;
– the decision ignores that, in cases where we have both type of pleas and the evidence are brought in front of the court (there is also a possibility of new evidence to be obtained), if the situation or the result of evidence changes during the trial, the judge will still not be allowed to decide in favour of the defendant.

4.2. Standard of proof

As a general rule in criminal proceedings and cases, the evidence presented by prosecution must prove all elements of crimes mentioned in indictment *beyond reasonable doubt (Art. 4 para 2 RCPC)*.

In tax fraud criminal case law however, more often than not, judges will value circumstantial evidence and base their conviction decisions on the fact that some companies or persons issued false invoices (facturi fictive) that were used by other companies accused of fraud to justify expenses. Judges often accepted that the suspect fiscal behaviour of the author of those invoices and the fact that the selling company did not officially register the sold goods in their booking accounts (in some cases the goods did not exist in other cases they existed but were not actually ever owned by the author of invoice) justify also the conviction of the company or person (also accused) that used those invoices to justify the expenses. In the vast majority of case law, the authors of invoice/s claimed that they cashed the price wired by bank transfer only to give it back to the buyer in exchange for a percentage of the value, that they did not ever owned the goods mentioned in the documents and they had no intention of paying the dues owned for those transactions.

From defence position, it was argued that in most of those cases there is no direct evidence to support such claims. Furthermore, the selling company presented itself as a legitimate seller, having a value added tax legally issued code, no problems with banks, being registered as an active business, representatives with valid powers of administration etc. There was also a strong argument that the person responsible for the fictitious invoices have personal procedural interests to make those statements, starting with reduced sentence, limited or none civil or material liability and so on.

As a personal opinion, it is possible that some of the persons conducting illegal operations value added tax connected could foresee both techniques used by investigative bodies and the standard of proof accepted by courts and act accordingly since, usually, those persons do not have assets under their names, if they get caught they just admit the accusations (true or false) get all substantial and procedural benefits and all the material/financial damages would eventually be pursued towards the buyer.

The fact that the sale is registered or not in the seller's account cannot, in itself, be held against any third party unless there is evidence of knowledge of such or criminal intent connected with that behaviour. Also, these decisions disregard the possibility that a third or fourth person was misled as to the true ownership of the goods or other factious aspects followed by prosecution. Without setting a rule (since the standard of proof is already provisioned by law) it seems that in tax fraud related cases, also considering the special techniques and methods available to investigators (phone tapping, use of undercover investigators, access to financial transactions, bank accounts and so on), there should be more to the evidence apart from a simple testimony from another suspect and the accounting documents of the buyer. Even from this specific approach (defence point of view) we can accept a guilty verdict where methods used and the chain of fraud was proved also by results of surveillance of both phone and live conversations and banking operations.[23] Although not so common, we can also note some decisions, mainly issued by prosecution at the end of preliminary investigation phases (confirmed by preliminary chamber judges based on the procedure provisioned by Art. 318 alin. 12 RCPP in case of dismissal of charges based on lack of public interest or Art. 341 RCPP in case of motions to dismiss not guilty verdicts in the rest of the cases) that observed that the standard of proof (beyond reasonable doubt) was not met.[24]

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COMBATTING VAT FRAUD FROM THE POINT OF VIEW OF THE TAX OFFICER

Assoc. Prof. Dr. Diana Cîrmaciu[*] *– Dr. Codruța Tivadar*[**]

Considering need to strengthen the legal framework for the fight against evasion, in 2013 the National Agency for Tax Administration (NATA) was reorganised.[1] The change included taking over of the activity of the Financial Guard, a public institution which was then abolished.

By modifying the law, NATA was restructured both in terms of organisation and territory. Eight regional public finance departments were established that took over the customs offices and the Financial Guard, while the county directorates remain with limited competencies for small taxpayers and some of the medium ones. It is worth mentioning that a bill for amending GEO no. 74/2013 has been debated in the Romanian Parliament. It aims to return to the way of organising the financial administrations at a county level by invoking the following facts:

(a) The performance of the central fiscal body in relation to the failure of the implementation of the reorganisation project does not justify the maintenance of an additional administrative level – the regional one, which is costly in budgetary terms and generates distortions and long delays in the information chain up to the final link, the taxpayer;

(b) The current organisation of NATA has a negative influence on the taxpayer because in their case there was a derogation from the principle stated in the Fiscal Procedure Code according to which, for claims due to budgets other than the local ones, material and territorial competence lies with the territorial fiscal body in the territorial area where the taxpayer resides. Basically, additional costs are thought to have been incurred by them, and they are ultimately reflected in the price of products/services offered on the market, artificially affecting their competitiveness;

(c) The initial results of the actions undertaken by the Regional Tax Administration Directorates had, in the first stage, a particular media impact, but a significant number of acts were subsequently abolished by final sentences of the courts, and, as consequence, the state had to pay important material damage.

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[1] See Government Emergency Ordinance no. 74 of June 26, 2013 on various measures for the improvement and reorganization of the activity of the National Agency for Fiscal Administration, as well as for the modification and completion of some normative acts, published in the Official Gazette of Romania no. 389 / 29.06.2013. GEO no. 74/2013 was approved with amendments by Law no. 144 of October 21, 2014 published in the Official Gazette of Romania no. 777 / 10.24.2014.

The General Anti-Fraud Directorate was established within NATA, a structure whose tasks are preventing and combatting acts and deeds of tax evasion and tax and customs fraud.

Within the central structure of the General Anti-Fraud Directorate, besides the structures for prevention and control, there is the Directorate for Combat Against Fraud (DCF), which provides specialised technical support to the Prosecutor in for the criminal prosecution of cases involving economic-financial offences. For this purpose, the anti-fraud inspectors within this department are seconded within the prosecutor's offices according to the law.

For the performance of their duties, at the disposition of the prosecutor, the DCF anti-fraud inspectors carry out the following tasks:

(a) technical-scientific assessment reports, which are means of evidence according to the law;

(b) financial investigations for the freezing of assets;

(c) any other tax inspections ordered by the prosecutor.

If, following any of the above activities, the anti-fraud inspector considers it necessary to obtain data or information or to clarify certain circumstances, he shall make a proposal in this respect to the prosecutor. When assessing the proposal as grounded, the prosecutor proceeds to the criminal investigation, which he deems necessary or orders that it be carried out by the criminal investigation body.

When the anti-fraud inspector performs a technical-scientific assessment, he shall draw up a report in accordance with the provisions of the Criminal Procedure Code.[2] When conducting financial investigations in order to freeze assets or any other fiscal verifications, the DCF anti-fraud inspector draws up minutes.

Anti-fraud inspectors are empowered to carry out inspections on national territory. Basically, the anti-fraud inspectors, except those under the DCF, carry out operations of unexpected inspections in the form of current or targeted inspections. Anti-fraud inspectors are required to ensure the confidentiality of the activities carried out and of the data and information obtained during their activities, including when such data and information were acquired accidentally.

The activities to be carried out by DCF anti-fraud inspectors shall be provided by the prosecutor by means of an ordinance, indicating the activities to be carried out and the term in which they are to be carried out. The following shall be taken into account when determining the term: the urgency of the activities, the complexity of the case and the volume of activity of DCF anti-fraud inspectors. In complex criminal cases handled within the prosecutor's offices attached to the first degree courts, when technical support of DCF anti-fraud inspectors is deemed necessary, the prosecutor draws up a proposal with a reasoned proposal in this respect. After the management of the Prosecutor's Office attached to the court approves it, the proposal is forwarded to the management of the prosecutor's office attached to the court, which decides on the use of anti-fraud inspectors seconded to this unit by the lower Prosecutor's Office.

[2] Art. 178 Criminal Procedure Code.

The DCF anti-fraud inspectors use the databases provided by NATA. DCF anti-fraud inspectors' access to these databases is only in the interest of the financial and tax investigations that are necessary in the criminal cases in which they provide technical support. It results from the discussions with the inspectors that the procedure of consultation of these databases is still difficult, bureaucratic and conditioned by prior permissions.

Collaboration between criminal investigating bodies and the General Anti-Fraud Directorate (GAFD) can be done in ways other than through anti-fraud inspectors seconded to prosecutor's offices.

Therefore, when the specific activities carried out by the GAFD reveal the existence of indications regarding offences provided by criminal law in the financial-fiscal or customs field, the competent prosecutor's office is notified. The notification will contain the elements provided by the Criminal Procedure Code and will be accompanied by documentation regarding the criminal offence that has been noticed.

We must point out that there are also the so-called "special cases" – those offences provided by criminal law that produce consequences or can cause consequences that are likely to have a severe impact on the economic circuit. Cases that meet the following cumulative criteria are considered a priority in the process of selecting special cases:

(a) the presumed damage generated to the state budget must be at least RON 10 million (EUR 2.1 million);

(b) competition and the economic environment in certain sectors of activity are severely affected;

(c) the coordinators of the criminal group and the economic agents that they control are involved in continuous and current criminal activity;

(d) the criminal activity is carried out within the range of more territorial administrative structures;

(e) the complex measures involving GAFD must be coordinated centrally.

Special cooperation is carried out exclusively within a criminal case filed at the level of the competent prosecutor's office with the coordination and guidance of the prosecutor.

The criminal investigation bodies' request to initiate a special case is done by the prosecutor, either on his own initiative or at the proposal of the criminal investigating body, in writing, with the approval of the hierarchically superior prosecutor and addressed to GAFD – the central structure. The request for the initiation of a special case by the GAFD is made through its central structure and addresses the head of the prosecutor's office which has the competence to carry out the criminal investigation.

With special cases, cooperation shall be carried out within the joint operational teams based on a joint action plan, which shall set out specific objectives and tasks for the information and documents exchange.

In the following table we have presented some statistical data on the activity of anti-fraud inspectors.

Table 1: Statistical data on the activity of anti-fraud inspectors

Number of anti-fraud inspectors In Romania, according to the law, a number of 340 anti-fraud inspector positions have been set up	Total number of reports	Total number of financial investigations for freezing of assets	Total value of established damages (EUR)	Total value of frozen assets following the actions of anti-fraud inspectors (EUR)	Indictments/ guilt admittance agreements	Dis-missals
Year 2014						
251	2,620	770	1,400,195,580	377,253,603	334	-
Year 2015						
273	3,707	1,237	1,689,661,009	418,459,672	584	-
Year 2016						
317	3,879	1,233	1,136,192,233	89,961,816	803	962
Year 2017						
305	2,714	1,366	724,155,506	59,396,567	810	853
Term I year 2018						
291	1,335	848	343,082,448	24,480,384	315	372

Source: Assoc. Prof. Dr. Diana Cîrmaciu – Dr. Codruța Tivadar, 2019.

Finally, we provide some practical aspects regarding the investigations of anti-fraud inspectors.

Case 1. Classic VAT fraud through unjustified purchase invoices registration

Supplier A issued to company SL seven invoices between April and September 2012 totalling EUR 270,000 from which EUR 218,000 was taxable base and EUR 52,000 was VAT based on the agreement number 6 from 10 April 2012 – the subject being the execution, extension and rehabilitation of a water treatment plant.

Meanwhile, looking at the payment documents in the case folder, we discovered that company SL issued to company A invoice number 7 on 26 October 2012 for "the rent for a year from 1 November 2011 to 30 November 2012" for a total of EUR 46,000 taxable base without VAT to company A.

Company D issued to company SL four invoices from October 2011 to September 2012 for a total amount of EUR 193,000 from which EUR 156,000 was taxable base and EUR 37,000 was VAT, the billing products being construction materials and services according to the contract.

Like in the case of company A, we identified that on 16 October 2012, company SL issued invoice number 6 to company D for a total amount of EUR 125,000 taxable base without VAT. The services were "rent of industrial hall from 1 November 2011 to 30 November 2012".

The prosecutor order described company A and D as a missing traders, so the invoices issued by company SL to A and D did not contain real commercial operations/ transactions. The purpose of the invoices issued by company SL was to create the appearance of legal activity by missing traders A and D. Another purpose was to use netting arrangements. To establish the situation that is closer to reality, we need to consider that the revenue registered by company SL from the invoices issued to A and D is unreal and that it is going to be decreased from the taxable base of the unreal purchases.

The amount of the damage caused to the national state budget by the representative of company SL was established be EUR 121,480 composed of EUR 89,000 in VAT and EUR 32,480 in income tax, which was paid before first court hearing. The defendant and his accomplice (representative of companies A and D) were convicted with a suspended three-month prison sentence.

This type of fraud is the one used most often for intermediaries. Through remote missing traders IC purchases (meat, fruits and vegetables) are used to lower the price, be competitive on the market and rapidly sell the goods.

Case 2. VAT fraud through unjustified purchase invoices registration and simulation of IC delivery

The major activity of company CT LTD is to buy beef from Community suppliers and sell it through Romanian companies. The IC acquisitions are recorded in accounting documents as reverse tax, meaning they are registered at the same time as deductible and collectable VAT. If the company does not register national acquisitions or imports, generators of deductible VAT, the company is going to owe almost the entire VAT resulting from national deliveries.

In order to avoid taxes, company CT started to register national unreal acquisitions of the same products, buying from company MM and related company CT. Because of the method described, company CT was registering a double merchandise stock, which is unreal. As a result, company CT was also going to register unreal IC deliveries to company Euro KFT.

Case 3. Using a related company to ensure national unreal acquisitions with tax fraud happening in the moment of speaking

The organising company was conducting the following activities in 2013: buying cheap goods from the EU or importing them from China. The company was organising events to present their top shop products to the population. In the first year of activity, the company recorded the costs of employees (the company has a call centre), the acquisition price of goods and rent and sold the products at marked up prices (1000% retailer's margin, e.g. cost EUR 20.00 with price EUR 200). After the first year of activity, the company registered EUR 1.3 million turnover, EUR 400,000 in costs and EUR 200,000 in VAT owed to the national state budget and other taxes.

In a few years (2016), the company registered EUR 2 million turnover, EUR 2.1 million in costs and no VAT owed to the national budget. How is it possible?

Every year some of the companies from the group (real companies with low activity) transform into an unusual missing trader. The company employees are transferred to the missing traders, the IC purchases or imports and rent are also registered by the missing traders. The next step is the issuing of invoices by the missing trader for the overpriced amount, obtaining in this case the mentioned situation.

What do the unusual missing traders do?

In order to avoid taxes, the missing traders register in accounting and legal documents acquisitions from big companies like Metro and Selgros, but those companies never deliver goods or services to them. This is how the missing traders never owe taxes to the national state budget.

Every year another group of unusual missing traders is used, but there are also new registered companies.

In this case three beneficiary companies and 20 missing traders in transactions from 2012 to the present were analyses, and damage was estimated to amount to EUR 1 million in VAT. What about profit tax?

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PART III

OTHER CRIMINAL OFFENCES AFFECTING THE FINANCIAL INTERESTS OF THE EU (MONEY LAUNDERING AND CORRUPTION) IN THE CRIMINAL LAW SYSTEMS OF THE MEMBER STATES

Austria

THE NEED FOR IMPLEMENTATION IN THE AREAS OF MONEY LAUNDERING, CORRUPTION AND MISAPPROPRIATE USE OF FUNDS

Prof. Dr. Robert Kert[*]

1. Introduction

Art. 4 of Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law[1] governs other criminal offences than fraud affecting the Union's financial interests. It is a mixture of different offences which have partly been contained in the Protocols to the PIF Convention.[2] They are offences which do not directly affect the EU budget but which have indirect effects on the financial interests of the EU or which are linked to fraud affecting the Union's financial interests. Art. 4 provides for provisions of three different offences: money laundering, corruption and misappropriation.

The initial Commission proposal included an offence that concerned the abuse of public procurement procedures that had not been provided for in former legal acts. However, this provision was not included in the final version since it did not find a majority in the Council because it was considered too far-reaching by criminalising conduct that is merely a breach of contractual obligations.[3]

2. Money laundering

2.1. Provisions in the PIF Directive

According to Art. 4 para. 1 of the Directive, Member States have to take the necessary measures to ensure that money laundering involving property derived from the criminal offences covered by the PIF Directive constitutes a criminal offence.

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[1] Directive (EU) 2017/1371 of the European Parliament and the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [OJ L 198, 28.07.2017, 29–41].

[2] Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests [OJ C 316, 27.11.1995, 48–57]; Protocol drawn up on the basis of Art. K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests [OJ C 313, 22.10.1996, 2–10]; Second Protocol, drawn up on the basis of Art. K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests [OJ C 221, 18.07.1997, 12–22].

[3] Kert 2019, 19.

For the definition of money laundering, the PIF Directive refers to Art. 1 para. 3 of Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (4th Anti-Money Laundering Directive),[4] which has since been amended by the 5th Anti-Money Laundering Directive.[5]

According to this Directive, money laundering can be, when committed intentionally, the following conduct:

– the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action;
– the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity or from an act of participation in such an activity;
– the acquisition, possession or use of property, knowing at the time of receipt that such property was derived from criminal activity or from an act of participation in such an activity;
– participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of one of these actions (Art. 1 para. 3).

In all cases the offender must know that the property was derived from criminal activity.

The PIF Directive requires that money laundering is punished if the property derives from one of the offences covered by the Directive. According to the Anti-Money Laundering Directive (Art. 1 para. 3), the property must derive from criminal activity. 'Criminal activity' means any kind of criminal involvement in the commission of specific serious crimes that are defined in the Directive. Inter alia, fraud affecting the Union's financial interests, where it is at least serious according to the definition in Art. 1 para. 1 and Art. 2 para. 1 of the Convention on the Protection of the European Communities' financial interests and corruption are predicate offences ("criminal activities").

Art. 3 para. 4 lit f of the 4th Anti-Money Laundering Directive has added to the catalogue of predicate offences "tax crimes relating to direct taxes and indirect taxes and as defined in the national law of the Member States", which are punishable by deprivation of liberty of more than one year or, as regards Member States that have a minimum threshold for offences in their legal system, offences punishable by deprivation of liberty for a minimum of more than six months".[6] The latter category goes further than the PIF Directive's definition of EU fraud regarding VAT evasion (Art. 2

[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 purpose of money laundering or terrorist financing [OJ L 141, 05.06.2015, 73–17].

[5] 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 purpose of money laundering or terrorist financing [OJ L 156, 19.06.2018, 43–74]; Dittenberger 2018, 578.

[6] Glaser–Kert 2015, 169.

para. 2 PIF Directive) since – depending on the sanctions under national law – it might include evasion of VAT even if the total damage is less than 10 million euro. The only PIF offence that is not contained in the list of predicate offences in the 4th Anti-Money Laundering Directive's money laundering notion is "misappropriation" according to Art. 4 (3) PIF Directive.

According to the Anti-Money Laundering Directive, the Member States are obliged to prohibit money laundering according to the Directive, but it does not contain an obligation to criminalise money laundering. However, the PIF Directive has introduced an obligation not only to prohibit but to also criminalise money laundering with regard to property that derived from a PIF offence.[7] Even though there was no obligation by the Anti-Money Laundering Directive, probably, most Member States have already introduced criminal offences for money laundering to implement the Anti-Money Laundering Directive. Whereas Art. 4 para. 1 PIF Directive refers to property derived from a PIF offence without any limit regarding the seriousness of the offence, the Anti-Money Laundering Directive refers to any kind of criminal involvement in the commission of serious crimes. In this regard, the requirements of the PIF Directive outreach the ones of the Anti-Money Laundering Directive.

2.2. Directive on combatting money laundering by criminal law

However, in October 2018 the EU adopted a new Directive on combatting money laundering by criminal law.[8] Unlike the Anti-Money Laundering Directives, this Directive does not deal with money laundering prevention, but it is the first Directive which aims to achieve an approximation of the criminal offence of money laundering in the different Member States of the EU.[9] Therefore, it is a completely new directive that exists alongside the Anti-Money Laundering Directive. The Directive, based on Art. 83 para. 1 TFEU, establishes minimum rules concerning the definition of criminal offences and sanctions in the area of money laundering and obliges Member States to criminalise certain conduct when committed intentionally. The conversion or transfer of property, the concealment or disguise of the true nature, source, location or ownership, or the acquisition, possession or use of property derived from a predicate offence must be punishable as a criminal offence, but only if the offender knows at the time of receipt of this property that it was derived from criminal activity. Regarding the conversion or transfer of property and the concealment or disguise of the true nature, source, location or ownership, self-laundering ("Eigengeldwäsche") must also be criminalised, whereas for the ownership, acquisition or possession this is not required.[10] Such a differentiation is not foreseen in the Anti-Money Laundering Directive. This means that the two definitions are different.

[7] Kert 2018, 19.

[8] 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, 22–30].

[9] Glaser–Kert 2019, 21.

[10] Staffler 2019, 69.

Directive 2018/1673 contains a catalogue of predicate offences, listing approximately 25 criminal offences as predicate offences. As a general rule, it states that all criminal offences can be regarded as predicate offences which are punishable by deprivation of liberty 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 for a minimum of more than six months. Regarding the PIF offences as predicate offences, the Directive on combatting money laundering by criminal law contains an explicit exclusionary rule. According to Art. 1 para. 2, the Directive does not apply to money laundering as regards property derived from PIF offences, which is subject to specific rules laid down in the PIF Directive. The PIF Directive is regarded as lex specialis and remains untouched.[11]

According to Art. 3 para. 2 of the Directive, Member States may take the necessary measures to ensure that the conduct is punishable as a criminal offence where the offender suspected or ought to have known that the property was derived from criminal activity. There is no obligation of the Member States to criminalise negligent money laundering.[12]

However, the Directive provides for rules to facilitate criminal proceedings. Member States shall take necessary measures to ensure 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;
- a conviction for money laundering is 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;
- the money laundering offence also extends to property derived from a predicate offence in the territory of another Member State or of a third country, where that conduct would constitute a criminal activity if it had occurred domestically.

Such provisions are not foreseen in the PIF Directive, and the obligations of Directive 2018/1673 go further.

The Directive entered into force on 2 December 2018 and has to be implemented in national regulations by 3 December 2020 at the latest.

2.3. Relation between the different legal acts dealing with money laundering

This means we have three different EU provisions on money laundering,[13] which all influence national legislation and which partly are the same and partly different:

(a) The Anti-Money Laundering Directive, which in principle pursues preventive objectives but which led in most of the Member States to the introduction of criminal

[11] See Recital 10 of Directive (EU) 2018/1673.
[12] Staffler 2019, 69.
[13] See also Glaser 2018, 441.

offences for money laundering and therefore has influenced the national criminal laws over the last decades. These criminal offences provide for various predicate offences. All PIF offences (with the possible exception of "misappropriation") constitute predicate offences according to the 4th Anti-Money Laundering Directive's notion of money laundering.

(b) The PIF Directive obliges the Member States to introduce a criminal offence for 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 statutory definition of the Anti-Money Laundering Directive must be applied with regard to the PIF offences.

(c) The Directive on combatting money laundering by criminal law provides for an obligation to introduce money laundering as a criminal offence. The definition of money laundering in this Directive is not completely 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 of combatting 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 Directive on combatting money laundering by criminal law.

This can cause difficult challenges for the Member States that have to introduce criminal offences for money laundering in their criminal codes that are in line with the obligations according to the PIF Directive on the one hand and the Directive on combatting money laundering by criminal law on the other hand. Member States have the option either to create a broad statutory definition of offence that covers all definitions of money laundering in the Directives or to create separate offences to implement each Directive.

Since the PIF Directive refers to the definition of money laundering in the Anti-Money Laundering Directive, which foresees self-laundering with respect to all predicate offences, the transposition of the PIF Directive requires that regarding PIF offences, self-laundering must always be criminalised. On the contrary, the Directive on combatting money laundering by criminal law does not provide for a criminalisation of self-laundering in the case of acquisition, possession or use of property. This means that regarding PIF offences (as predicate offences), the obligation to criminalise goes further than the obligation according to the Directive on combatting money laundering by criminal law.[14]

This has the consequence that self-laundering must be criminalised for all acts of laundering. For Member States this raises problems about how to deal with self-laundering of tax savings. This is not a new problem, but it is still discussed in the Member States. First, it is a question how tax savings can be considered proceeds that derive from a criminal offence and can be an object of money laundering. If a tax offender saves money by not paying his/her VAT, it is difficult to identify the property that de-

[14] Glaser–Kert 2019, 21.

rives from the tax offence.[15] For example, in Austria certain tax offences are already provided for as predicate offences. However, in Austrian doctrine, it is the prevailing opinion that mere tax savings cannot be property that derives from criminal activity and therefore cannot be an object of money laundering. Only tax credits can be an object of money laundering.[16] The reason for this is that property can only be something that is sufficiently concrete that it can be transferred to another person. It would not be possible to individualise which property derives from such savings.

Even if the money laundering of saved tax is regarded as possible, self-laundering of tax savings leads to new problems since it raises the question of whether every act of use or investment of money after the tax evasion is automatically criminalised. The consequences only can be mentioned: It leads to conflicts with the principle of proportionality, ne bis in idem or the nemo tenetur principle. It has the consequence that if somebody fails to pay due taxes, he/she commits the offence of self-laundering simply by possessing the saved money. Since proceeds are not identifiable in this case, any use of money after tax evasion can be considered self-laundering. It will be the task of national legislators to decide and find useful solutions how to deal with the concurrence between tax offences and self-laundering.

3. Corruption

3.1. Obligation to criminalise passive and active corruption

The PIF Directive obliges Member States to take the necessary measures to ensure that passive and active corruption, when committed intentionally, constitute criminal offences.

According to Art. 4 para. 2, passive corruption means the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind, for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way that damages or is likely to damage the Union's financial interests. Active corruption means that a person promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way that damages or is likely to damage the Union's financial interests.

3.2. Definition of "public official"

A "public official" is defined in Art. 4 para. 4: It can be a Union official or a national official, including any national official of another Member State and any national official

[15] Bülte 2013, 178.

[16] Glaser 2017, 726 f; Kirchbacher 2019, § 165 No. 6.

of a third country, or any other person assigned or exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries. This means that any person who exercises a public service function can be a "public official". This notion hence also applies to private persons involved in the management of EU funds.

A "Union official" is a person who is:

– an official or other servant engaged under contract by the Union within the meaning of the Staff Regulations of Officials and the conditions of Employment of Other Servants of the European Union laid down in the "Staff Regulation", or
– seconded to the Union by a Member State or by any public or private body, who carries out functions equivalent to those performed by Union officials or other servants.

Members of the Union institutions, bodies, offices and agencies, set up in accordance with the Treaties and the stuff of such bodies shall be assimilated to Union officials, as far as the Staff Regulations do not apply to them.

The term "national official" is understood in the sense of the definition of an "official or public official in the national law of the Member States or third country in which the person in question carries out his or her functions". In any case, the term "national official" shall include any person holding an executive, administrative or judicial office at the national, regional or local level. Any person holding a legislative office shall be assimilated to a national official.[17]

In the case of proceedings involving a national official of another Member State, or a national official of a third country, a Member State is not bound to apply the definition of "national official" except insofar as that definition is compatible with its national law. This means that a Member State can apply its own definition and not the other Member State's or third state's definition, but it is necessary that the person is also an official in the law of the state in which the person carries out his or her functions.

3.3. Statutory definition of the offence

The definition of active and passive corruption is not totally new but is known from other international legal acts and similar to the definition in the UN Convention against Corruption.[18] Compared to the PIF Convention, the element of "breach of duties" was removed from the definition. This means that it is not only corruption, if the official acts contrary to duty but it also must be punished, if he/she acts in line with his duty and requests or receives an advantage. This must be punished. It only foresees that his/her act damages or is likely to damage the Union's financial interests. Even if in most of these cases the official acts contrary to a duty, since he/she mostly will have a duty to protect the financial interests of the EU and violate this duty, this is not a necessary requirement. In Member States where corruption is only punishable if the official acts

[17] Kert 2019, 20.

[18] UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/48/422.

in contrary to a duty, this provision will require an amendment of the national laws to bring their national laws in compliance with Directive 2017/1371. The Directive does not require that every act which is in accordance with legal or other duties is punished, but it must be punishable if the consequence of the act is a damage or a risk of danger to the EU's financial interests.

4. Misappropriation

Art. 4 para. 3 PIF Directive provides for a completely new offence in EU legal acts. Member States are obliged to take necessary measures to ensure that misappropriation constitutes a criminal offence. Misappropriation means that a public official who is (directly or indirectly) entrusted with the management of funds or assets commits or disburses funds or appropriates or uses assets contrary to the purpose for which they were intended in any way which damages the Union's financial interests. A prerequisite for the criminalisation is that the appropriation has been committed intentionally. A similar offence has already been foreseen in the Corpus Juris,[19] an expertise by several criminal law professors from various EU Member States.

This provision shall protect the Union's financial interests from the abuse by public officials who manage the funds or assets in the EU and in the Member States and cause a damage to the EU's budget. It is in a certain way the counterpart of fraud where the financial interests are affected by an illegal act by someone from outside the office by a grant recipient or a taxpayer. However, the damage can also be caused by public officials who violate their duties and use the assets in other ways not foreseen by law, e.g. if they give subsidies to a person who does not fulfil the necessary requirements.

Offenders can only be public officials – as already described before – and they must be directly or indirectly entrusted with the management of funds or assets are connected in any way with the Union's financial interests. It is necessary that a certain duty for the official exists. This duty must be violated by committing or disbursing funds or appropriating or using assets contrary to the purpose for which they were intended.

As a last requirement it is necessary that a damage to the Union's financial interests is caused. This means that there must be a result, namely the damage of the EU's budget; only danger or risk for the financial interests is not sufficient.

Comparing the definition of the offence of misappropriation in Art. 4 PIF Directive with provisions in national laws, it is similar to the offence of dishonesty or abuse of trust ("Untreue"), which is foreseen for example in the German, Austrian, Spanish or Portuguese criminal codes.[20] It is necessary for this offence that a person abuses his or her authority to dispose of property of another person or to engage another, thus causing a financial detriment to the other person. It is necessary that the person has the authority to dispose of another's property and to protect the property or interests and

[19] Delmas-Marty 1997.

[20] See for Austria Section 153 StGB/Criminal Code; for Germany Section 266 dStGB/German Criminal Code.

that the person is bound by certain internal rules that must be respected. It is, however, not totally the same as the offences of misappropriation ("Veruntreuung") or "embezzlement" ("Unterschlagung") in national criminal codes, which require that property belonging to another person is in the possession of the offender and he/she applies it to his or her own use. An official who administers funds normally does not have the property in his or her possession despite having the authority to manage funds and assets. This is mostly covered by the offence of dishonesty ("Untreue").

In contrary to the offence of misappropriation according to the Directive, the group of offenders committing dishonesty or abuse of trust is not limited to public officials, but can be committed by any person who has the authority to dispose of assets of another person. At least in Austria and Germany, the offence of dishonesty is an offence that can also be committed by public officials. Therefore, in those Member States which provide for an offence like dishonesty – like Austria or Germany do – an introduction of a new provision will not be necessary, as long as the sanctions foreseen in national laws are in line with the requirements of the directive.

On the other hand, in some Member States offences exist which foresee the punishability of abuse of official authority and which are applicable if the public official acts in the sector of sovereignty administration. As far as the management of funds concerns sovereignty administration, these offences could also serve to implement the Directive.

5. Incitement, aiding and abetting, attempt

The Directive further obliges Member States to criminalise inciting, aiding and abetting the commission of these criminal offences. Regarding attempt, an obligation to criminalise exists – besides fraud – for misappropriation only but not for money laundering and corruption.

6. Penalties

Looking at the sanctions that Member States should introduce for these offences, besides the general obligation to introduce effective, proportionate and dissuasive criminal sanctions, Member States have to take measures to ensure that these offences are punishable by a maximum penalty which provides for imprisonment. When the criminal offences involve considerable damage or advantage, maximum penalties of at least four years of imprisonment must be provided for. As well as for the damage resulting from fraud, the damage or advantage shall be presumed to be considerable where it involves more than EUR 100,000. However, Member States may also define other serious circumstances that lead to a penalty of at least four years.

7. Conclusions

(a) The Member States face different EU provisions which oblige them to introduce criminal offences for money laundering: on the one hand the PIF Directive, which refers to the 4th Anti-Money Laundering Directive, and on the other hand the Directive on combatting money laundering by criminal law. They provide different requirements. If money laundering concerns property derived from PIF offences, the Anti-Money Laundering Directive is to be applied. On the one hand, these provisions go further, for example regarding self-laundering. What is more, the Directive on combatting money laundering by criminal law provides rules for cases where the predicate offence and the money laundering were committed in different states. There is no reason for these different regimes. There should be a common approach for all predicate offences.

(b) According to the definition of the PIF Directive, passive and active corruption must be punishable independently from a "breach of duties" by the public official. It shall also be punished if the public official acts in line with his/her duties and his/her act damages or is likely to damage the Union's financial interests.

(c) The offence of misappropriation protects the Union's financial interests against the use of funds and assets by public officials contrary to the intended purpose. Such conduct might be covered by the offences of abuse of trust, embezzlement or abuse of official authority in national criminal codes. The establishment of a specific offence for public officials is only necessary if this behaviour is not covered by existing criminal offences.

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Germany

MONEY LAUNDERING AND CORRUPTION: LEGAL FRAMEWORK AND DISTINCTIVE FEATURES OF GERMAN CRIMINAL LAW

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1. Introduction

Modern white-collar crime takes many forms. The following article deals with the German perspective on two of those forms which are characterised by a close linkage to lawful economic activities: money laundering[1] and corruption.[2] After giving an overview of the legal framework, the focus will be on issues arising due to distinctive features of German criminal law regarding money laundering and corruption.

2. Money laundering

2.1. Legal framework

Although this presentation concentrates on German criminal law, an isolated consideration of German regulations on money laundering is neither expedient nor sufficient; it is rather imperative to first consider these regulations in an international and European context.[3]

2.1.1. International regulations and requirements

International and European regulations have an extensive and crucial influence on German national law regarding money laundering and form the framework for these domestic regulations.

Firstly, the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances of 1988,[4] which was ratified by Germany in 1993,[5] is notable in regard to the threat of and fight against money laundering. Art. 3 of this convention sets an obligation for convention parties to establish specific acts in connection with illicit traffic in such drugs and substances as criminal offences.

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[1] See Koslowski 2016; for a comparative law perspective see Jacsó 2007.
[2] See Dannecker 2012, 159 et seq.
[3] See Schnabl 2014, margin no. 1.
[4] United Nations, 1988.
[5] BGBl. II no. 25, 1136 et seq.

Also, two Council of Europe conventions were ratified by Germany and therefore have binding effect:[6] firstly, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990[7] and furthermore the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005.[8] Both conventions[9] set requirements pertaining to laundering offences.

Moreover, from 1991 to 2018, the European Union adopted five directives to address the threat of money laundering. The first Council directive on prevention of the use of the financial system for the purpose of money laundering[10] did not yet establish an obligation for criminal penalties[11] but only for the prohibition of money laundering, section 2 first EU directive. The second directive amending the first directive[12] determined, inter alia, the institutions on which obligations are imposed.[13] The third directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing,[14] for instance, established an obligation to ensure the liability for infringements by effective, proportionate and dissuasive penalties.[15] The fourth directive[16] primarily deals with measures regarding compliance. All four directives have been incorporated into German law by now.[17]

The European Commission also made a proposal for a fifth directive[18] in 2016, which was adopted by the European Parliament and Council on 30 May 2018.[19] The directive particularly focuses on transparency regarding virtual currencies; for instance, it allows and simplifies the obtaining of information about the owners of virtual currency by national Financial Intelligence Units (FIUs)[20] and includes a further extension of obligated entities in regard to compliance measures.[21] [22] The fifth EU directive moreover stipulates a lower threshold for anonymous prepaid cards and identification obligations for transactions with an amount exceeding 50 euros[23] and the establishment of centralised automated mechanisms such as registers to enable the Member States to

[6] BGBl. 1998 II no. 12, 519 et seq.; BGBl. 2016 II no. 36, 1370 et seq.

[7] Council of Europe Treaty Series (ETS) – No. 141; Council of Europe, 1990.

[8] ETS – No. 198; Council of Europe, 2005.

[9] See Art. 6 ETS – No. 141 and Art. 9 ETS – No. 198.

[10] Council directive of 10 June 1991 (91/308/EEC), OJ L 166/77; hereinafter "first EU directive".

[11] See section 14 first EU directive.

[12] Directive 2001/97/EC of the European Parliament and the Council of 4 December 2001, OJ L 344/76; hereinafter "second EU directive".

[13] See Art. 2a second EU directive.

[14] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005, OJ L 309/15; hereinafter "third EU directive".

[15] Art. 39 para. 1 third EU directive.

[16] Directive (EU) 2015/849 of the European Parliament and the Council of 20 May 2015, OJ L 141/73; hereinafter "fourth EU directive".

[17] For a detailed overview see Altenhain, 2017, margin nos. 1 et seq.

[18] European Commission, 2016.

[19] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018, OJ L 156/43; see European Union, 2018; hereinafter "fifth EU directive".

[20] Recital 9 of the fifth directive.

[21] Recital 8 of the fifth directive; see Art. 1 para. 1 fifth EU directive.

[22] For more details and an overview of the amendments see also Hugger–Cappel 2018, 1071 et seq.

[23] Recital 14 of the fifth directive; see Art. 1 para. 7 lit. b fifth EU directive.

timely access of information on beneficial owners,[24] as well as enhanced due diligence measures concerning business relationships and transactions involving high-risk countries.[25] [26] Furthermore, the Member States are obligated to encourage the reporting of suspicions of money laundering and to ensure legal protection of whistleblowers from certain adverse measures.[27] This fifth EU directive has to be transposed into national law until 10 January 2020.[28] The increased requirements of the fifth EU directive and their consequences will especially affect Austria and Liechtenstein.

On 2 December 2018, the "EU Directive on combating money laundering by criminal law" also entered into force.[29] The Member States must transpose it into national law by 3 December 2020, if necessary. Irrespective of the wording used by some authors, it does not seem appropriate to place this directive in the category of the five money laundering directives to date, since it neither replaces nor modifies them. On the contrary, it is standing alongside the fourth and fifth Money Laundering Directives, which it supplements with aspects of minimum harmonisation under criminal law. To describe Directive 2018/1673 as the "sixth Directive on money laundering" therefore seems at least misleading – its description as a directive on money laundering criminal law seems more appropriate.[30] The European legislator bases its harmonisation competence on Art. 83 TFEU, since an effective fight against money laundering can only be achieved through judicial cooperation between the Member States because of its cross-border dimension.[31] The minimum requirements relate to the definition of offences to combat money laundering, the standardisation of the lists of predicate offences and the harmonisation of the levels of sanctions. The aim is also to improve international cooperation between the authorities responsible for combating money laundering. A German draft for an implementation law has not yet been presented.

Although not legally binding, the various Financial Action Task Force (FATF) recommendations are nonetheless of great significance for the penalisation of money laundering and are therefore also worth mentioning.[32]

2.1.2. German regulations on money laundering

In German domestic law, money laundering is primarily regulated as a criminal offence pursuant to section 261 of the German Criminal Code (Strafgesetzbuch – StGB).

Firstly, the offence of money laundering requires property assets obtained by criminal means, section 261 para. 1 first sentence StGB. Unlike sections 257 and 258 StGB

[24] Recital 20 of the fifth directive; see Art. 1 para. 15 lit. b, para. 16 lit. c fifth EU directive.

[25] Recital 12 of the fifth directive; see Art. 1 para. 11 fifth EU directive.

[26] See also HUGGER–CAPPEL, 2018. 1071 et seq.

[27] Art. 1 para. 39 lit. a, b fifth EU directive; see Hugger–Cappel, 2018, 1071.

[28] Art. 4 no. 1 fifth EU directive.

[29] Directive (EU) 2018/1673 of the European Parliament and the Council of 23 October 2018, OJ L 284/22.

[30] Schröder–Blaue 2019, 161.

[31] Directive (EU) 2018/1673, ABl. L 284/22; for a critical assessment see Böse–Jansen 2019, 591, 598.

[32] Altenhain 2017, margin no. 1; Neuheuser 2017, margin no. 27; Herzog–Achtelik 2018, margin nos. 60 et seq.; Kim 2017, 365; see recital 4 of the fourth EU directive; critical in regard to the rule of law and constitutional structures Bülte 2017, 285 et seq.; also rather critical Spoerr–Roberts 2017, 1143.

– regulating abetting the offender in the aftermath of a crime and obstruction of justice, which have no limitation to certain offences as possible predicate offences –, section 261 para. 1 second sentence StGB establishes – in order to limit criminal liability to cases of serious crime[33] and in accordance with international and European regulations[34] – a list of possible predicate offences from which such property assets may be obtained. Included are, for example, theft (section 242 StGB), fraud (section 263 StGB) and extortion (section 253 StGB) – but only if committed commercially or in a gang (section 261 para. 1 second sentence no. 4 lit. a StGB).[35] Furthermore, the concealing or disguising of the illicit origin, or thwarting or jeopardising the determination of the origin, locating, confiscating or securing of the property assets (para. 1), or the acquisition, possession or use of the property assets derived from criminal activity (para. 2) is necessary. Criminal liability does not require intent on part of the offender; recklessness with regard to the illicit origin of the property asset is sufficient according to section 261 para. 5 StGB.[36] However, the level of penalty is reduced in cases of recklessness.[37] It is notable that this extension of criminal liability to recklessness was not a requirement of international or European law and that the German legislator acted on its own initiative.[38]

Furthermore, the Money Laundering Act (Geldwäschegesetz – GwG) deals with aspects of compliance by implementing specific obligations for certain obligated entities to allow the authorities a complete retracing of illegal financial flows.[39]

2.2. Distinctive features

In the following, an overview of special features of German criminal law on money laundering is given, especially with regard to questions that were raised recently due to (potential) changes because of the fourth EU directive on money laundering.

2.2.1. Extension of the scope of section 261 StGB

In the course of incorporating international and European regulations into German national law, section 261 StGB has undergone a number of changes, particularly the list of predicate offences has been vastly expanded.[40]

At first only offences with regard to narcotic drugs and organised crime, as well as offences with a minimum of more than a year deprivation of liberty, were possible predicate

[33] BT-Drs. 12/989, 27.

[34] For more details see Altenhain 2017, margin no. 2.

[35] Critical Koslowski 2016, 285 et seq., 324 et seq.

[36] See BT-Drs. 12/989, 27; for more detail and a review of jurisprudence referring to this regulation see Bülte 2016, 377 et seq.

[37] See Jahn 2016, margin no. 80.

[38] Bülte 2017, 285.

[39] Neuheuser 2017, margin no. 1; see also Schnabl 2014, margin no. 19.

[40] For an overview see Bülte 2017, 284 et seq.

offences.[41] In 1994 the list of predicate offences was expanded to certain offences with less than a year deprivation of liberty.[42] However, it was necessary for these offences to be committed commercially *and* in a gang.[43] This requirement was later modified so that up until now the commitment of such an offence commercially *or* in a gang suffices.[44] Further modifications were, for instance, the inclusion of tax offences[45] and corruption in the private sector pursuant to section 299 StGB[46] as predicate offences.

2.2.2. Tax offences as predicate offences

Certain tax offences can in principle be predicate offences of money laundering. Pursuant to section 261 para. 1 second sentence no. 3 StGB, this is the case for commercial, violent and gang smuggling [section 373 German Tax Code (Abgabenordnung – AO)] as well as commercial or gang handling of the profits of tax evasion (section 374 para. 2 AO). Tax evasion (section 370 AO) itself can only be a predicate offence if it is committed commercially or in a gang, section 261 para. 1 third sentence StGB. With the wording of section 261 para. 1 third sentence StGB, the German legislator expanded the scope of application to saved expenses.[47] However, the ascertainment of saved expenses proves difficult and is therefore especially problematic under the constitutional aspect of "nullum crimen sine lege", Art. 103 para. 2 Constitution.[48]

The incorporation of the fourth EU directive on money laundering also raised the question of whether section 261 StGB needs amending: Art. 3 para. 4 lit. f fourth EU directive defines tax crimes relating to direct and indirect taxes punishable by deprivation of liberty for a minimum of six months as "criminal activity" and therefore as possible predicate offences. This, however, is no requirement with regard to criminal law; the European Union has not exercised its legislative power in the field of criminal law on this matter.[49] Moreover, there are no tax offences in German criminal law which have a minimum of six months deprivation of liberty.[50] Consequently, a modification of the list of predicate offences in section 261 StGB in accordance with Art. 3 para. 4 lit. f fourth EU directive is not compulsory.[51] Art. 3 para. 4 lit. f fourth EU directive only has relevance with regard to administrative law (GwG).[52]

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[41] OrgKG, BGBl. 1992 I no. 34, 1304.

[42] VerbrBG, BGBl. 1994 I no. 76, 3188.

[43] BGBl. 1994 I no. 76, 3188.

[44] OrgKBVG, BGBl. 1998 I no. 25, 845.

[45] OrgKBVG, BGBl. 1998 I no. 25, 845; StVBG, BGBl. 2001 I no. 74, 3924.

[46] Gesetz zur Bekämpfung der Korruption, BGBl. 2015 I no. 46, 2025.

[47] Altenhain 2017, margin no. 83; Bittmann 2010, 128; Neuheuser 2017, margin no. 42; Schmidt–Krause, 2010, margin no. 13; differing view Nestler 2014, margin no. 75.

[48] El-Ghazi 2018, margin no. 80; Fischer 2018, section 261 margin no. 8c; Jahn 2016, margin no. 31; Nestler 2014, margin no. 75; Neuheuser 2017, margin no. 42; Stree–Hecker 2014, margin no. 12; Voß, 2007, 129 et seq.; Wulf 2008, 328.

[49] Bülte 2017, 283.

[50] See Bülte 2017, 284.

[51] Considering a "voluntary" modification Bülte 2017. 284.

[52] More detailed Bülte 2017. 284.

2.2.3. 5.9% ruling of the German Federal Supreme Court

If both legal and illegal property assets are mixed, for instance in cases of bank deposits, determining criminal liability proves difficult with regard to the requirement of "property assets of illicit origin". In its judgment of 20 May 2015[53] the German Federal Court of Justice (BGH) decided that bank deposits consisting of legitimate incoming payments and incoming payments based on criminal activity are overall property assets of illicit origin according to section 261 StGB if the incoming payment is, in economic terms, "not completely irrelevant". Subsequently, a contamination of all bank deposits takes place ("Totalkontamination").[54] According to this BGH ruling, a not completely irrelevant incoming payment shall be presumed at a quota in the range of 5.9 % and 35 %.[55] Some parts of the legal literature oppose this ruling with regard to constitutional aspects,[56] as well as the far-reaching implications of this ruling, namely the contamination of all bank deposits which de facto prevents any further legal disposition over these deposits and thus creates the risk of criminal liability pursuant to sections 263 and 266 StGB.[57]

2.2.4. Compliance

Especially concerning money laundering, preventive compliance measures are of the utmost importance.[58] Therefore, the range of obligated entities, the obligations for obligated entities itself, as well as the range of administrative sanctions, have been vastly extended due to various EU directives on money laundering, which had a significant impact on regulations of the GWG.[59]

In accordance with Art. 2 fourth EU directive, obligations pursuant to the GWG are no longer restricted to financial activities and professions.[60] Under certain conditions, even legal professionals (section 2 para. 1 nos. 10, 11 GwG), auditors and accountants (section 2 para. 1 no. 12 GwG), trust or company service providers (section 2 para. 1 no. 13 GwG), estate agents (section 2 para. 1 no. 14 GwG), providers of gambling services (section 2 para. 1 no. 15 GwG) and persons trading in goods (section 2 para. 1 no. 16 GwG) can be obligated entities.

The obligations of these obligated entities were extended several times, for example with regard to customer due diligence (sections 10 et seq. GwG; "know-your-customer-

[53] BGH NJW 2015, 3254 et seq.

[54] BGH NJW 2015, 3254 et seq; see also BGH NStZ 2017, 169; Kraatz 2015, 703; Neuheuser 2017, margin nos. 55 et seq; Schmidt–Krause 2010, margin no. 12; with limitations Altenhain margin nos. 76 et seq.; Stree–Hecker 2014, margin no. 11.

[55] BGH NJW 2015, 3254 et seq.

[56] Bülte 2017 286 et seq.; El-Ghazi 2018, margin nos. 77 et seq.; Eschelbach 2017, margin no. 37, however, generally critical with regard to a specific quota; Krug 2016, 160; Voß 2007, 50 et seq.

[57] Bülte 2016, 387; Bülte 2017, 286 et seq.

[58] See recitals 2, 5 of the fourth EU directive; Dannecker–Leitner, 2010, 39 et seq.

[59] For an overview see Kim 2017, 367 et seq.; for further legislative modifications due to the directive see Zentes–Glaab 2017, 72.

[60] Different still in the first EU directive, OJ L 166/77.

principle"),[61] documentation (section 8 GwG) and cooperation (section 55 GwG). There is also an obligation to report suspicious transactions (section 43 GwG)[62] as well as to keep records regarding beneficial ownership information (sections 20 et seq. GwG).

The intensification of obligations due to the fourth EU directive particularly affects entities beyond the financial sector.[63] In particular, the obligation to implement a transparency register raised questions and in part also concerns in legal literature[64] and appears to be potentionally in conflict with fundamental rights as the obligation results in a considerable extension of the processing of personal data.[65] Due to these expanded obligations, there is also a higher risk of criminal liability for obligated entities, particularly in cases of recklessness.[66]

Furthermore, in the course of incorporating the fourth EU directive into German national law, the range of administrative sanctions was expanded, and the level of the sanctions was increased (Art. 59 fourth EU directive, section 56 GwG). Unlike the third EU directive, which established, as mentioned above, a rather general obligation to ensure the liability for infringements by "effective, proportionate and dissuasive" penalties (Art. 39 para. 1), the fourth EU directive established a penalty system with specific administrative sanctions.[67] The decisions imposing such an administrative sanction are to be published by the competent authorities on their official website (Art. 60 fourth EU directive; section 57 GwG; "name and shame").[68]

3. Corruption

3.1. Legal framework

Recent significant international and European regulations[69] in the context of corruption are, for instance, the Council of Europe Criminal Law Convention on Corruption of 1999[70] and the Additional Protocol to the Criminal Law Convention on Corruption

[61] See Bülte 2017, 279; for an overview of the discussion regarding the scope of this obligation see Paul 2018, 147 et seq.

[62] Critical Bülte 2017, 280 et seq.

[63] For a more detailed overview see v. Busekist–Henke 2017, 1567 et seq.; Krais 2015, 251 et seq.; Spoerr –Roberts 2017, 1142, 1144 et seq.; Zentes–Glaab 2017, 67 et seq.; detailed for legal professionals see Dahns 2018, 126 et seq.; Schubert 2018a, 41 et seq; Schubert 2018b, 86 et seq.; for accountants see Beckmann 2017, 1724 et seq.; for persons trading in goods see Bielefeld–Wengenroth 2016, 2499 et seq.; regarding the impacts on the financial sector see Rößler 2015, 1406 et seq.

[64] See for example Bochmann 2017, 1311; Fisch 2017, 408 et seq.; Glos–Hildner–Glasow 2017, 83 et seq.; Krais 2017, 266 et seq.; Rieg 2017, 2314 et seq.; Spoerr–Roberts 2017, 1146 et seq.; Windeknecht–Junginger 2017, 551 et seq.; pointing out positive aspects Kim 2017, 371.

[65] Müller 2017a, 88 et seq.; Müller 2017b, 121 et seq.

[66] Neuheuser 2017, margin no. 102; using the example of section 11 GwG (old version) Neuheuser 2015 241 et seq.

[67] See Bülte 2017, 283.

[68] See more detailed Glos –Hildner–Glasow 2017, 88; Müller 2017a., 98 et seq.

[69] For a general overview see Greeve 2016, margin nos. 15 et seq.

[70] ETS – No. 173; Council of Europe, 1999.

of 2003,[71] the European Union Council framework decision 2003/568/JI of 2003 on combatting corruption in the private sector,[72] as well as the United Nations Convention against Corruption of 2004.[73] These international and European regulations and requirements caused the German legislator to amend German regulations on corruption in 2015.[74]

German criminal law includes various regulations on corruption and distinguishes between active and passive corruption as well as corruption in the public and in the private sector.

3.1.1. Active and passive corruption

German Criminal law entails regulations on active and passive corruption. The term active corruption includes offering, promising or giving an advantage (for instance, see section 333 para. 1, 2 StGB), while passive corruption describes the act of requesting or receiving an advantage or accepting the promise of such an advantage (for example, see section 331 para. 1, 2 StGB). Advantage is defined as attention to which the offender has no claim and which improves his financial, legal or personal situation.[75]

3.1.2. Corruption in the public sector and in the private sector

Furthermore, the regulations distinguish between corruption in the public and private sector.

With regard to the public sector, section 331 StGB includes passive corruption acts, whereas section 333 StGB regulates active corruption. Sections 331 para. 1 and 333 para. 1 StGB require the involvement of a German or European public official or a person with special obligations towards public service. Para. 2 of sections 331 and 333 StGB expands the range of application to judges, members of a European Union court and arbitrators. The other involved party will generally be a private individual[76] but can also be a public official.[77] In return for the advantage which is offered, promised or given to such a public official, etc. (section 333 StGB), or the advantage which is requested, received or the promise of such an advantage accepted by such a public official, etc. (section 331 StGB), the performance of a service is expected. The advantage and the act in the exercise of official duties must be related; it requires an agreement of the involved parties that the service is performed in exchange

[71] ETS – No. 191; Council of Europe, 2003.

[72] OJ L 192/54.

[73] United Nations Office on Drugs and Crime, 2004.

[74] BT-Drs. 18/4350, 1, 12; BGBl. I no. 46, 2025 et seq.; see Walther 2015, 255 et seq.; for an overview of the modifications see Grützner 2016, 253 et seq.

[75] BGH NJW 2001, 2559; see Dannecker 2017, margin no. 54.

[76] Kuhlen 2017a, margin no. 82.

[77] BGHSt 14, 123 et seq.

for the advantage ("Unrechtsvereinbarung").[78] These basic offences pursuant to sections 331and 333 StGB are qualified by sections 332 StGB (taking bribes) and section 334 StGB (giving bribes), which in addition require an infringement of the public official's duty.

Concerning corruption in the private sector, section 299 StGB deals with passive (para. 1) and active (para. 2) corruption of employees or business agents in the course of business activities. For criminal liability pursuant to the respective no.1 of those paragraphs, preferential treatment in competition is necessary, while the respective no. 2 requires a breach of duty due to performing or refraining from an act. Like sections 331 et seq. StGB, section 299 StGB moreover requires a relation between the advantage and the preferential treatment or breach of duty; an agreement that these acts are performed in exchange for the advantage is necessary.[79]

Sections 299a and 299b StGB deal with the special situation in the healthcare sector. Section 299a StGB regulates passive corruption, whereas section 299b StGB pertains to active corruption.

Sections 108b and 108e StGB are also worth mentioning. Due to section 108b StGB, active (para. 1) and passive (para. 2) corruption of voters is a punishable offence. Section 108e StGB regulates passive (para. 1) and active (para. 2) corruption of elected officials. Furthermore, section 119 para. 1 no. 1 German Works Constitution Act (BetrVG) deals with active corruption relating to works council elections. However, these latter regulations are of little practical relevance.[80]

3.2. Distinctive features

In 2015 and 2016 German criminal law on corruption was subject to a number of changes due to two legislative actions: Gesetz zur Bekämpfung der Korruption[81] and Gesetz zur Bekämpfung der Korruption im Gesundheitswesen.[82] While the first legislative action in 2015 aimed to comply with international and European requirements,[83] the legislative changes in 2016 were not based on any need for transposition of international or European requirements[84] but rather on legislative gaps pointed out by a BGH ruling in 2012.[85]

These recent modifications and developments will be outlined in the following section.

[78] Fischer 2018, section 331 margin no. 23; more detailed see Korte 2014, margin no. 93 et seq.; Kuhlen 2017a, margin no. 82 et seq.; Sowada 2014, margin no. 64 et seq.

[79] More detailed Dannecker 2017, margin no. 64 et seq. with further references; see also Pfaffendorf 2016, 8 et seq.

[80] Bannenberg 2014, margin no. 43.

[81] BGBl. 2015 I no. 46, 2025 et seq.

[82] BGBl. 2016 I no. 25, 1245 et seq.

[83] BT-Drs. 18/4350, 1.

[84] Dannecker–Schröder 2017, margin no. 67.

[85] BGH NStZ 2012, 505 et seq.; see BT-Drs. 18/6446, 1.

3.2.1. European and international reach of German regulations on corruption

Due to legislative measures in 2015, the scope of German regulations on corruption was widely extended, and regulations that were scattered over various legal acts were concentrated in the StGB.[86]

A regulation formerly located in Art. 2 section 2 EU Bribery Act (EU –Bestechungsgesetz – EUBestG)[87] regarding the scope of application of German criminal law was modified and integrated into section 5 StGB.[88] Pursuant to section 5 no. 15 StGB, German criminal law applies, under certain conditions, for corruption offences (sections 331 to 337 StGB)[89] even if these offences are committed abroad. Moreover, section 11 para. 1 no. 2a StGB now includes a definition of the term "European public official", which was so far regulated in Art. 2 section 1 para. 1 EUBestG.[90]

Sections 331, 332, 333 and 334 StGB, which formerly only included public officials and judges "pursuant to German law" (section 11 para. 1 nos. 2, 3 StGB), now also apply to European public officials (defined in section 11 para. 1 no. 2a StGB) and members of an EU court (section 11 para. 1 no. 2a lit. a StGB).[91] In this respect, German criminal law now even exceeds European requirements.[92]

Furthermore, the scope of application of sections 332 and 334 StGB was extended to foreign public officials and judges due to the newly added section 335a para. 1 StGB.[93] Thus, European and international requirements were transposed, and former Art. 2 section 1 EUBestG and Art. 2 section 1 International Bribery Act (Gesetz zur Bekämpfung internationaler Bestechung – IntBestG)[94] were modified and integrated into the StGB.[95] The scope of application of sections 331 and 333 StGB was extended less and only includes members and public servants of the ICC, section 335a para. 2 StGB.[96] This distinction is based on the breach of duty required pursuant to sections 332 and 334 StGB.[97]

Section 299 paras. 1 and 2 StGB also apply to foreign competition. Thus, national and international competition are protected.[98] This expansion is based on legislative measures in 2002.[99] However, until 2015 this extension of the scope of application

[86] See BT-Drs. 18/4350; Kappel–Junkers 2016, 384 et seq.

[87] See BGBl. 1998 II no. 37, 2340.

[88] See BT-Drs. 18/4350, 16 et seq.; BGBl. 2015 I no. 46, 2025.

[89] However not section 299 StGB, see BT-Drs. 18/4350, 18.

[90] See BT-Drs. 18/4350,18; BGBl. 1998 II no. 37, 2340.

[91] See BT-Drs. 18/4350, 23; BGBl. 2015 I no. 46, 2026.

[92] BT-Drs. 18/4350, 23

[93] See BT-Drs. 18/4350, 24; BGBl. 2015 I no. 46, 2026 et seq.; regarding problems with the definition of "foreign" see Kappel–Junkers 2016, 385; Kuhlen 2017b, margin nos. 16 et seq.

[94] BGBl. 1998 II no. 37, 2327.

[95] BT-Drs. 18/4350, 24; for a detailed overview of the changes and consequences see Kuhlen, 2017b, margin nos. 7 et seq.

[96] See BT-Drs. 18/4350, 25; BGBl. 2015 I no. 46, 2027.

[97] BT-Drs. 18/4350, 24.

[98] BT-Drs. 18/4350, 22; for more detail see Dannecker 2017, margin no. 120.

[99] BGBl. I no. 61, 3387; detailed Dannecker 2017, margin no. 120.

was regulated in section 299 para. 3 StGB and was only then incorporated – without substantive amendments – into section 299 paras. 1 and 2 StGB.[100] Since section 299 StGB is not limited to German employees and business agents, it also applies to foreign employees or business agents without an explicit legislative amendment being necessary.[101] However, such offences committed by foreign employees or business agents are only punishable if at least part of the offence takes place in Germany, section 3 StGB, or a German national takes part in it, section 7 StGB.[102]

3.2.2. Introduction of the principal model

Section 299 StGB (old version) only punished corruption acts with regard to preferential treatment in competition ("Wettbewerbsmodell").[103] In accordance with European regulations and requirements, the scope of section 299 StGB was extended.[104]

In doing so, German criminal law adapted a model already predominantly used in Europe,[105] and section 299 para. 1 no. 2 and para. 2 no. 2 StGB now include actions or refraining from such actions if therein lies a breach of duty on the part of the employee or business agent at the expense of the principal to which the principal did not give his consent ("Geschäftsherrenmodell").[106] Thus, the financial interests of the principal fall under the scope of protection of section 299 StGB.[107]

This, however, runs counter to the system of offences in the StGB where section 299 StGB is categorised as an offence against competition.[108] Beyond that, the question arises about how this new regulation will affect the first alternative pertaining to preferential treatment in competition and the related, highly controversial issue of whether the consent of the principal may offer absolution from criminal liability; in this respect, the German legislator possibly even created a case of overcompensation.[109] Moreover, the extension appears to be problematic in several other aspects, for instance with regard to section 266 StGB as well as to Art. 103 para. 2 GG and is therefore criticised

[100] BT-Drs. 18/4350, 22.

[101] BT-Drs. 18/4350, 22; see Dannecker 2017, margin no. 120.

[102] Detailed Dannecker 2017, margin nos. 122 et seq.; 124 et seq.; Kappel–Junkers 2016, 382 et seq.

[103] See BT-Drs. 18/4350, 20 et seq.

[104] See BT-Drs. 18/4350, 20 et seq.; Fischer 2018, section 299 margin no. 33; in doing so the German legislator seemed to be acting primarily to comply with European and international requirements rather than on its own conviction, see Hoven 2015, 560; Dann 2016, 203; skeptical with regard to the binding effect Gaede 2014, 284 et seq.; Schünemann 2015, 70.

[105] See Gaede 2014, 290; Walther 2015, 256.

[106] BT-Drs. 18/4350, 20 et seq.; BGBl. 2015 I no. 46, 2026; for more detail see Dannecker–Schröder 2015, 48 et seq.

[107] Momsen–Laudien 2018, margin no. 6; Sahan 2017a, margin no. 3; see Fischer 2018, section 299 margin no. 2.

[108] Momsen–Laudien 2018, margin no. 6; Sahan 2017a, margin no. 3; Schröder-Frerkes 2015, 303; differing view and arguing for the legal nature as an offence in both alternatives primarily against competition Kubiciel 2014, 671 – rebuttal offered by Krack 2016, 87 et seq.

[109] See Kieferle 2017, 394 et seq. with further references; Krack 2016, 88 et seq.

in legal literature.[110] In order to avoid an extensive and unforeseeable criminalisation, it seems sensible to limit the scope of the newly added alternative to the violation of duties that are at least also related to the protection of competition.[111]

3.2.3. Sections 299a, 299b StGB: Corruption in health care

In 2012 the Grand Panel of the BGH for Criminal Matters ruled that independent physicians are neither public officials pursuant to sections 331 et seq. StGB (more specifically section 11 para. 1 no. 2c StGB) nor business agents pursuant to section 299 StGB and therefore do not fall under the scope of German regulations regarding corruption.[112] In order to close the resulting legal gap, the German legislator reacted by adding two new sections specifically dealing with corruption in health care[113] which are structurally based on the model of section 299 StGB.[114]

Section 299a StGB regulates passive corruption, whereas section 299b StGB pertains to active corruption of health care professionals. Health care professionals in this context are (following section 203 para. 1 no. 1 StGB) doctors, dentists, pharmacists and even veterinarians.[115] Sections 299a and 299b StGB include German as well as foreign (but only if German criminal law applies pursuant to sections 3 et seq. StGB[116]) academic and non-academic health care professionals.[117] In return for the advantage which is offered, promised or given (section 299b StGB) or requested, received or the promise of such an advantage accepted (section 299a StGB) by such a health care professional, preferential treatment concerning certain acts in the context of the exercise of the profession[118] is expected. Included medical decisions – if exercised in a professional function – are the prescription (no. 1) or obtaining (no. 2) of medication, therapeutic products, assistive aids or medical devices, or the referral of patients and samples (no. 3). Furthermore, a relationship between the advantage and the intended preferential treatment is necessary ("Unrechtsvereinbarung").[119]

These regulations protect fair competition in health care as well as the confidence in the integrity of medical decisions; this was the explicit intention of the German

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[110] See Dann 2016, 204 et seq.; Dannecker–Schröder 2015, 48 et seq.; Grützner 2016, 25; Heuking – v. Coelln 2016, 326 et seq.; Hoven 2015, 557; Kubiciel 2014, 670; Sahan 2017a, margin no. 3; Schröder-Frerkes 2015, 302 et seq.; Walther 2015, 256 et seq.; Wolf 2014, 33 et seq.

[111] See more detailed Dannecker 2017, margin. nos. 18, 93 et seq.; Dannecker–Schröder 2015, 49 et seq.; Kubiciel 2014, 669 et seq.; approving Hoven 2015, 558 et seq.; critical Schröder-Frerkes 2015, 305; Schünemann 2015, 70; Walther 2015, 257 et seq.

[112] BGH St 57, 2020 et seq.; for an overview of previous jurisprudence on this matter see Dannecker 2013, 38; Geiger 2012, 172 et seq.

[113] BT-Drs. 18/6446, 1, 11 et seq.; for a detailed overview of the legislation process see Dannecker–Schröder 2016, 48 et seq.; Dannecker–Schröder 2017, margin nos. 1 et seq.; Schröder 2016, 131 et seq.

[114] BT-Drs. 18/6446, 1; approving Gaede–Lindemann–Tsambikakis, 2015. 144 et seq.; critical Brettel–Duttge–Schuhr 2015, 934 et seq.

[115] See BT-Drs. 18/6446, 17.

[116] See Dannecker–Schröder 2017, margin nos. 105, 201.

[117] BT-Drs. 18/6446, 17; detailed Dannecker–Schröder, 2017 margin nos. 99 et seq.

[118] See BT-Drs. 18/6446, 20: private actions are not sufficient.

[119] BT-Drs. 18/6446, 18; Sahan 2017b, margin no. 19; with regard to the decision against a de minimis limit BT-Drs. 18/6446, 17 et seq.; Dannecker 2016, 21; Brettel–Mand 2016, 103.

legislator.[120] The scope of protection extends to national and international competition.[121]

Under constitutional aspects, the legislative decision to counter corruption in health care itself[122] and the implementation of this decision by integrating sections 299a and 299b StGB (in their current version) do not raise any well-founded concerns.[123]

However, there are doubts regarding the implementation of this decision from a dogmatic and criminological point of view and also where legal policy is concerned.[124] Sections 299a and 299b StGB seem to be more of a compromise[125] rather than a well-balanced and successful solution to a legislative challenge.[126] Due to the wording of these regulations, not all possible and punishable situations of corruption in health care are accurately described and therefore included, which questions the effectiveness of sections 299a and 299b StGB in countering corruption in this area.[127] For instance, the limitation of sections 299a and 299b StGB to preferential treatment in competition can lead to legal gaps with regard to situations which are unrelated to competition but equally punishable; therefore, integrating an alternative (admissible under constitutional aspects) entailing a breach of trust would have been preferable.[128] Furthermore, due to the three possible medical decisions regulated by the German legislator in section 299a StGB – none of which penalise the purchase of medication – pharmacists are, although explicitly mentioned, de facto mostly excluded from criminal liability with regard to passive corruption.[129]

4. Conclusion

German criminal law has been subject to numerous changes over the last decades due to a variety of international and European regulations and requirements as a reaction to altered global conditions. In order to effectively oppose cross-border crime and to

[120] BT-Drs. 18/6446, 12 et seq.; approving after a rather intricate interpretation of sections 299a, 299b StGB Dannecker–Schröder 2016, 60 et seq.; Schröder 2016, 147 et seq.; critical Brettel–Mand 2016, 101; Dann–Scholz 2016, 2077 et seq.; Krüger 2017, 130; Sahan 2017b, margin no. 3; Tsambikakis 2016, 132.

[121] More detailed Dannecker–Schröder, 2017, margin nos. 199 et seq.

[122] Detailed Dannecker–Schröder 2016, 52 et seq.; Dannecker–Schröder 2017, margin nos. 48 et seq.; Schröder 2015a., 323 et seq.; Schröder 2016, 137 et seq.; see also Dannecker 2013, 38 et seq.; Brettel–Duttge–Schuhr 2015, 930; Kubiciel 2016, 70 et seq.

[123] Detailed Dannecker–Schröder 2017, margin nos. 68 et seq.; Krüger 2017, 134 et seq.; different for the previous drafts, for instance by the Federal Ministry of Justice and Consumer Protection or the Federal Government, which were discussed controversially in legal literature with regard to the Constitution, see Aldenhoff and Valluet 2015, 196 et seq.; Brettel–Duttge–Schuhr 2015, 931 et seq.; Dannecker 2016, 22; Dieners 2015, 532; Gaede 2015, 144 et seq.; Gaede–Lindemann–Tsambikakis 2015, 152 et seq.; Schröder 2015a, 330 et seq.; Schröder 2015b, 361 et seq.; Wigge 2015, 449 et seq.; for an overview and comparison of these previous drafts see Jary 2015, 100 et seq.

[124] See Dannecker–Schröder 2017, margin no. 72.

[125] Gaede 2017, margin no. 6.

[126] Dannecker–Schröder 2016, 46; Dannecker–Schröder 2017, margin no. 72.

[127] Dannecker–Schröder 2017, margin nos. 73 et seq.; see Schröder 2016, 145; as well critical Kubiciel 2016, 85.

[128] Dannecker–Schröder 2017, margin no. 77; Kubiciel 2016, 80 et seq.; Schröder 2015a, 325; Schröder 2016, 144 et seq; see BR-Drs. 181/16, 1; Brettel–Duttge–Schuhr 2015, 931 et seq; Dannecker–Schröder 2016, 67.

[129] Dannecker–Schröder 2016, 52, 65 et seq.; Dannecker–Schröder 2017, margin nos. 107 et seq.; Grzesiek–Sauerwein 2016, 371; Kubiciel 2016, 83 et seq., Schröder 2016, 136.

ensure the prosecution of such crimes, the assimilation of the different legal systems is necessary to a certain degree. However, the process of transposing international and European regulations into national law often proves difficult and creates a lot of uncertainty in legal practice and science. The German legislator is challenged not only to implement these regulations but also to ascertain resulting inconsistencies with existing distinctive features of domestic law and react accordingly. It seems comforting to a certain extent to find that the German legislator in its "pressure" to comply with a large number of European and international requirements did not – as the example of sections 299a and 299b StGB demonstrates – lose sight of issues closer to home.

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INITIATION OF MONEY LAUNDERING AND CORRUPTION CASES IN GERMANY: SUSPECT NOTIFICATIONS BY FIU AND FINANCIAL POLICE

Dr. Vanessa Seibel[*]

1. Importance of suspect notifications in victimless crimes

Money laundering and corruption have in common that they are victimless crimes with many unreported cases. Consequently, special legal instruments are required to detect money laundering and corruption. Among these legal instruments are the suspicious transaction reports (STRs) by obligated entities under the German anti-money laundering act (GWG) (below II.) and suspect notifications in corruption cases by the Financial Police (below III.). It will be shown that both legal instruments require – beyond their legal setup – co-operation, collaboration and unimpeded information flow between all relevant competent authorities.

2. Suspicious transaction reports (STRs) in money laundering

Obliged entities submit STRs via the Financial Intelligence Unit (FIU) to the Prosecutor's Offices. The German FIU was reorganised as of 26 June 2017 within the context of the implementation of the Fourth Anti-Money Laundering EU Directive.[1] This reorganisation represents a shift from a law enforcement-type FIU to an administrative-type FIU.[2] Formerly, the German FIU was allocated with the Federal Criminal Police Office, which integrated the FIU into the law enforcement entities, hence the agency focused particularly on combatting money laundering and its predicate offences. Now the "new" German FIU is part of the General Directorate of Customs,[3] which allows for a broader range of activities beyond the initial suspicion of a crime. This "new" German FIU is designed to serve as a general information-clearing hub that analyses and filters information before reporting to various other agencies, among them law enforcement entities.

The reorganisation of the German FIU emphasises some current challenges and solutions for detecting and combatting money laundering efficiently:

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[1] Gesetz zur Umsetzung der Vierten EU-Geldwäscherichtlinie, zur Ausführung der EU-Geldtransferverordnung und zur Neuorganisation der Zentralstelle für Finanztransaktionsuntersuchungen vom 23.07.2017, BGBl. I 1822).

[2] Re terminology see IMF, 2004, 9 et seq. See also ECOLEF, 2013, 17, 141.

[3] German Website: *http://www.zoll.de/DE/Home/home_node.html*; currently no English Website available.

Firstly, the sharp increase of STRs in Germany of ca. 170% poses a challenge that needs to be faced with enhanced IT systems and/or an increase of personnel. In 2016 40,690 STRs were submitted to the old German FIU.[4] Between 26 June 2017 and 30 April 2018, the new German FIU already received 57,714 STRs.[5] Even though the sharp increase of STRs put the new organisation under a pressure test, the German legislator seems to promote this development rather than sanctioning it as over-reporting. The law implementing the Fourth Anti-Money Laundering EU Directive emphasises the European concept of a risk-based approach.[6] Obliged entities must implement an early warning system in relation to their specific institutional risks, their customer structure and the type of service offered. Therefore, at least the financial institutions that are supervised by the German Federal Financial Supervisory Authority (BaFin) seem to construe their duty to submit STRs broadly. At the same time, the reorganisation of the FIU naturally resulted in a transition period in which organisational workflows needed improvement. The software used for the communication between obliged entities and the FIU (goAML) was tested for IT security until November 2017, increasing the manual workload of the FIU. Despite the organisational challenges, the new FIU managed to process 31,235 STRs as of 30 April 2018 and to forward 19,874 STRs to competent entities.[7] Furthermore, the new FIU implemented 29 emergency measures under § 40 GWG and saved 11,361 STRs for monitoring.[8]

Secondly, the FIU's access to information does not depend on its classification as a law enforcement or an administrative FIU.[9] The new German FIU in general has the same information access rights as the old FIU. Among these are especially the following (§ 31 GwG): direct access to databanks of the Federal Criminal Police Office, direct access to account master data of financial institutions, the right to request information from obliged entities (whether a STR was submitted or not), the right to request information from other German authorities and the right to exchange information with other FIUs (within Europe direct databank access via FIU.net).

Instead, the efficiency of the FIU largely depends on how it is embedded within the legal system and specifically its extensive communication and information flows in everyday practice.[10] In current German practice, the new FIU generally forwards STRs to the German State Criminal Police Offices for law enforcement purposes without exhausting its information rights. Although the legislator intended to assign the analyses of the STRs completely to the new FIU,[11] the German State Criminal Police Offices and the Prosecutor's Offices continue to play a role for law enforcement purposes. The State Criminal Police Offices and many Public Prosecutor's Offices have had specialised units for anti-money laundering for years. The State Criminal Police

[4] BKA, FIU yearly report for 2016, 8.
[5] BT-Drs. 19/2263, 4.
[6] BT-Drs. 18/11555, 1.
[7] BT-Drs. 19/2263, 4.
[8] BT-Drs. 19/2263, 4.
[9] See IMF 2004, 10, ECOLEF 2013, 162; European Parliamentary Research Service, 2017, 14 et seq.
[10] See ECOLEF 2013, 306.
[11] Explanatory memorandum of the legislator, BT-Drs. 18/11555, 142.

Offices has direct access to state police data, e.g. to a state whistleblower hotline in corruption matters that allows for secure and anonymous communication with the state police. Even though Prosecutor's Offices and State Criminal Police Offices do not have direct access to federal databanks, bank data can be received in a well-practised two-step procedure: Firstly, BaFin, which has direct access to account master data of financial institutions, provides a list of a person's bank accounts [§ 24c of the Banking Act (KWG)]. Secondly, the financial institutions have to send detailed account data to the Prosecutor's Offices as witnesses. Moreover, the anti-money laundering units have already collaborated closely with the financial police and customs offices for years.

3. Suspect notifications in corruption

Collaboration between agencies has proven to be effective for the detection of money laundering and corruption. Criminal procedures in corruption cases conducted by the prosecutor's office do not only stem from STRs under the German anti-money laundering act but also from specific suspect notifications by the German Financial Police. The mere numbers on the sources of corruption procedures in Germany for 2017 show the importance of collaboration between different agencies: In 2017 31.4% of the corruption procedures were initiated as follows via other agencies (in 2016: 13.9%), 31.3% by whistleblowers (also anonymous) (in 2016: 22.5%) and 16.1% by other investigations (in 2016: 55.9%).[12]

The legal backbone for the suspect notifications is the German Income Tax Act, which is consistent with the recommendations issued by the OECD on the tax deductibility of bribes to foreign public officials in international business transactions since 1996.[13]

Under the German Income Tax Act, the receiver of a bribe shall declare the bribe revenue in his/her tax declaration [§ 22 no. 3 German Income Tax Act (EStG)]. Furthermore, the donor is prohibited to deduct bribes from his/her income for tax purposes (§ 4(5) sent. 1 no. 10 EStG). Hence, both the receiver and the donor can face criminal liability due to both corruption and tax evasion. Consequently, the law imposes a mutual duty on prosecutors' offices and tax authorities to notify each other about corruption cases (§ 4(5) sent. 1 no. 10 EStG). This suspect notification procedure is quite established in practice.

The suspect notification procedure highlights the importance of tax law for detecting and combatting corruption in Germany since the Financial Police's suspect notification duties are a rare exemption from the fiscal secrecy privilege. Under this fiscal secrecy privilege, criminal procedures can in general not profit from any tax information because the person accused of a crime has the right to refuse to make a statement (*nemo tenetur*). In contrast, any person is obliged to file tax declarations and

[12] BKA, corruption yearly report for 2017, 19; BKA, corruption yearly report for 2016, 14.
[13] OECD 2013, 3.

offer additional information to tax auditors. Therefore, the fiscal authorities are banned from reporting each case of criminal behaviour to the Prosecutor's Offices. Important exemptions from the fiscal secrecy privilege are money laundering (§ 31b AO) and corruption (§ 4(5) sent. 1 no. 10 EStG) offences. Against this background, so far the jurisprudence construes the Financial Police's suspect notification duties broadly in a way that not only cases of double criminality – tax evasion and corruption – need to be reported.[14] As a result, tax authorities in general accept their duty to report any corruption cases to the prosecutor's office.

The major advantage of this notification system lies in the tax audits conducted by the tax authorities. The tax auditor obtains comprehensive knowledge of income and cost structures of a firm. In particular, the balance sheet accounts of (listed and) large firms are very specific, thus enabling the tax auditor to differentiate project cash flows and to examine commission payments, consulting fees and international payments. The OECD issued a Bribery Awareness Handbook for tax auditors,[15] which compiles a list of indicators for corruption such as payments to offshore companies, issuance of credit notes to entities located in high-risk countries or deviation from normal procedures in approving payments.

It goes without saying that in practice this corruption notification procedure requires close co-operation between tax authorities and other law enforcement authorities. The Revenue Office, the tax auditors, the Financial Police, the Prosecutor's Office and the police – which is investigating the corruption crime – need to communicate on corruption cases, e.g. a tax auditor who has doubts about commission payments needs to come forward with his findings willingly and involve the Financial Police in the first place.

4. Conclusion

In Germany, the law provides a vast array of means to detect and prosecute corruption and money laundering such as specialist units in Prosecutor's Offices and State Police Departments, broad information access (e.g. to bank account data), anonymous whistleblower IT systems and tax audits, as well as notification duties of financial institutions. To be effective in practice, each tool needs to dovetail with the other. Beyond the provisions in the law, the legal instruments require employees of all different law enforcement agencies to collaborate and share information in long-established and personal information channels.

[14] For a more restrictive interpretation see the Federal Department of Treasury, BMF, 2002, BStBl. I S. 1031.
[15] OECD 2013, 7.

Greece

PUNISHING CORRUPTION IN THE PUBLIC AND THE PRIVATE SECTOR: KEY ISSUES ON CURRENT EU POLICY AND RULE-OF-LAW CHALLENGES*

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1. Introduction: Corruption and the pertinent EU institutional framework for its criminal law repression

The roots of corruption are historically traced within contexts of primarily bureaucratic structures of authority and administration. Addressing the phenomenon requires, of course, a multifaceted approach, which will account for the underlying problematic structures of the social and institutional reality generating corruption. On the other hand, it is true that corruption is closely linked to economic criminality. The pursuit of wealth maximisation by dishonest means often entails bribery of public officials, thus intensifying the occurrence of corruption in practice. Moreover, both economic globalisation and the transnational expansion of organised crime[1] have elevated corruption to an international phenomenon.[2]

The term 'corruption' concisely (albeit with some fluidity) refers to a variety of types of conduct. Naturally, then, no specific definition thereof appears in pertinent legal documents.[3] Of course, one might easily grasp the effects of corruption even in the absence of a clear-cut definition. Corruption is indeed a phenomenon whose consequences are associated with major predicaments afflicting contemporary societies:[4] poverty, immigration, environmental degradation and especially the corrosion of democracy and the rule of law. Despite its inherent ambiguity, which significantly confines its descriptive accuracy for the purposes of criminal law, the term 'corruption' is quite familiar to international organisations that attempt to shape the criminal legisla-

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[1] See Weigend 2007, 757–758.

[2] However, the empirical substantiation on the spread of corruption is limited, especially on an international level (see Weigend 2007, 759); this aspect is quite significant, especially when international efforts to expand criminalization appeal to the expansion of the phenomenon.

[3] On the efforts to define corruption at the level of political, social, economic, and other contexts, see in detail Androulakis 2006, 32 et seq. Also see Alexiadis 2007, 24; Lazos 2005; Chrisikos–Vlassis 2004, 725; Busch 2009, 291; Carr 2007, 231; Kerner 1996, 359; and United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and investigators (2004), 23.

[4] See Labelle 2013; Carr 2007, 228.

tion of individual states in this field. The vagueness and breadth of the term allows for a wide margin of flexibility in exercising some sort of 'internationalised' criminal policy, thereby undermining the safeguards traditionally associated with criminal law.

However, even within this terminological ambiguity, a number of concrete features are perceptible. Bribery of public officials and civil servants lies at the core of corruption. In that sense, one can definitely include the offer or promise of any undue pecuniary or other advantage to a person who (willing to accept such offer or promise) acts in breach of his/her duties within the context of a public service, an organisation, or a business unit, in relation to legal or illegal acts or omissions for which the 'donor' has an interest.[5] In other words, corruption has bribery in its nucleus (alongside other features), linking a 'gift' to a specific service provided in exchange. Thus, corruption may also involve undue advantages for the aim of simply creating 'favourable conditions'[6] and could be associated with a number of punishable deeds, usually committed by public officials, and generally hinting at its ultimate objective: abuse of power, breach of trust, issuing of false certifications, etc. On the other hand, corruption is nowadays viewed (not unreasonably) as one of the most acute social threats because it degenerates the function of the state apparatus in all its aspects (legislative, executive, judicial), thus causing extensive damage to society to the detriment of the people's welfare.[7]

Nevertheless, one should not overlook the risks that derive from the relevant criminal legislation (international and national alike). 'Convenient' as it may be, the impetuous and excessive resort to criminal law by state legislatures, who are eager to demonstrate their commitment to combatting corruption by the harshest means available, tends to undermine civil liberties without necessarily achieving its declared purpose. Regrettably, criminal law appears to be employed for essentially symbolic purposes,[8] thereby setting aside the protection of fundamental rights, which should limit its application.

Modern legal developments concerning the fight against corruption are characterised by two constituents: the *internationalisation* of legal action assumed against the phenomenon and the *increased focus on private-sector corruption*. Both of these aspects are linked with the global domination of market economy, which – sadly – pulls the strings of the world and seems to have effectively overridden politics and, in some cases, democracy itself. Obviously, then, the criminal repression of corruption cannot be viewed in isolation from the international scene, which institutionally affects it.

This is all the more true in the case of the European Union, i.e. a supranational organisation which is more than an international 'neighbourhood' employing its legal instruments to direct the actions of its Member States towards optimally addressing corrupt practices. Following the Lisbon Treaty, which established the applicability of

[5] See Androulakis 2007, 38–39; Carr 2007, 238; Bitzilekis 2009, 98; PapakYriakou 2009, 1129; Nieto 2006, 117 et seq; United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and investigators (2004), at 23. For the existing criminal law models for defining and countering corruption in the economy internationally see, among others, Vogel 2004, 39 et seq.

[6] See Tiedemann 2007, 1060, and criticism by Jositsch 2000, 62, and Hinterhofer 2009, 250.

[7] See Convention Against Corruption, Preamble, para. 5.

[8] On the symbolic utilization of criminal law in the field of reducing corruption, see Androulakis 2007, 38–39.

the majority principle[9] for the enactment of criminal decrees, it has become evident that the EU may bind its Member States to establish criminal regulations even against their will. The lowest threshold of criminalisation is established via Directives that introduce minimum elements of criminal conduct, hence Member States may punish more, but not less than the requisite standard posed by the EU. Therefore, the present and future position of Member States as to the criminal repression of corruption greatly depends upon the relevant EU legislation and its future prospects.

Under the above-mentioned 'dualism', i.e., the need to employ criminal law in the battle against a phenomenon that is corrosive for modern democratic societies and the simultaneous need to prevent a breach of fundamental criminal law principles, the following sections will elaborate on the so-called 'anti-corruption' EU legislation and the future trends underlying central themes of counter-corruption policies at an EU level.

2. Main reference axes and essential clarifications

There are three main axes of reference that can facilitate an overall understanding of the criminal repression of corruption within the EU: (a) the notional delineation; (b) the extent of criminalisation, especially with respect to the corruption of Member State and EU officials; and (c) the specific EU outlook on the offence of bribery in the private sector.

However, it should be noted at the outset that the EU has assumed efforts to coordinate its initiatives for criminally addressing corruption with those of other international organisations. This is because EU Member States participate in a number of such organisations, and thus their domestic legislation is affected by the pertinent international conventions they ratify. Accordingly, before discussing specific EU initiatives in this field, it is imperative to sketch out the basic international legal framework as comprised by the pertinent Conventions of the OECD, the Council of Europe and the United Nations.[10]

These Conventions first and foremost demonstrate the trend to expand criminalisation, revealed through the tendency to move beyond fully identifying corruption with bribery. The stipulations of a number of Conventions in criminalising trading in influence, abuse of power and illegal enrichment[11] are quite indicative. These offences feature criminal conduct which is either classifiable as a preparatory act to corruption *stricto sensu* or is used as a 'proxy', owing to the inability to prove bribery itself. That being noted, the expansion of criminalisation often lies in the discretion of the states

[9] See Kaiafa-Gbandi 2011, 13.

[10] See extensively Kaiafa-Gbandi 2010, 143, as well as Abbott 2001, 275; Androulakis 2007, 219; Bantekas 2006, 468; Carr 2007, at 227 et seq., 233, 238; Pieth 2007, 563 et seq.; Pieth 1996, 323; Schünemann 2003, 308; Webb 2005, 193, 195–196; Wolf 2007, 12–14; Wolf 2008, 371.

[11] See Convention of the Council of Europe, Art. 12 (trading in influence), and UN Convention, Arts 18 (trading in influence), 19 (abuse of power or position), and 20 (illicit enrichment).

that sign and ratify these Conventions,[12] which are allowed some discretion in proscribing the pertinent offences.

Another trend, though not apparent in all relevant international Conventions, is the exclusive association of mandatory criminalisation of corruption in the foreign public sector (i.e. bribery of foreign public officials) with the field of international business transactions.[13] Thus, criminal law only protects the foreign public service to the extent that this is deemed necessary to safeguard international economic competition, which is ultimately the object of protection.

A third trend relates to the declared purpose of attaining a 'holistic' criminalisation of corruption in both the public and the private sector, which evokes the increasing importance of privatisation, unbridled competition and a globalised economy. International economic competition can obviously be affected not only by acts of corruption of public officials involved in national or international financial transactions, but generally by acts of corruption of persons employed in the private sector and are either involved in decision-making processes or generally operate in business activities.

In light of the above observations, one can more easily place the three basic EU priorities as regards corruption in their proper context:

– First, according to its categorical pronouncements, the EU endeavours not to become entangled in fields already covered by other international Conventions on corruption so as to avoid unnecessary overlaps. The EU itself is a signatory party to the UN Convention, in an attempt to convince its Member States to 'follow suit'. Subsequently, it has focused its initiatives on issues regarding exclusively the promotion of its own concerns.[14]
– Secondly, the EU has even proscribed (active and passive) bribery in the public sector both in general terms and with specific reference to Community officials in a manner that is explicitly and implicitly oriented towards the safeguarding of its financial interests.[15]
– Thirdly, the EU has actively advanced the criminalisation[16] of bribery in the private sector, *requiring* its Member States to proceed accordingly, in contrast to the Conventions of the Council of Europe and the UN, which allowed state parties the possibility to opt of non-criminalisation. Thus, the EU attests to its nature as a primarily economic Union, albeit in an indirect and improper manner.

3. Expanding the concept of criminal corruption beyond bribery?

As mentioned previously, the EU has refrained from intervening in combatting corruption in general. However, this should not lead to the conclusion that it did not assume

[12] See Convention of the Council of Europe, Arts 36–38, and UN Convention, Arts 18–22.
[13] See the OECD and UN Conventions.
[14] COM(2003)317 final, 5, 9; and Wolf 2007, 25.
[15] See section 4 below.
[16] See section 5 below.

a position on the possible expansion of criminalising corruption beyond the strict confines of bribery, as other international organisations did. To attest to this point, the EU signed the UN Convention as a supranational organisation, thus, among other things, aiming at compelling its members to adopt it.[17] However, it is worth noting that this course of action cannot in any way be equated with the potential introduction of common minimum rules on criminal law through Directives, which would extend the EU criminalisation of corruption beyond bribery. Indeed, it is only through establishing minimum elements of criminal conduct through a Directive that the EU can compel its Member States to extend criminalisation, under threat of sanctions if necessary.[18] In contrast, the mere signing of international conventions by the Union– on behalf of itself alone[19] – provides leeway granted to Member States by the pertinent international Conventions themselves, which permit non-adoption of certain provisions; thus, such a 'strategy' fails to produce equivalent results to those that would arise out of the Union's own legal instruments with respect to criminal law. This is true in all fields where the EU lacks competence to issue regulations. Put differently, Art. 83(3) of the Treaty on European Union (TFEU) provides that whenever common minimum criminal provisions are introduced through Directives, Member States are entitled to invoke emergency suspension of the EU legislative process in order to avoid any commitment; such a possibility cannot be indirectly negated by means of any other procedure requiring Member States to adopt criminal legislation, including through the signing of an international Convention by the EU on behalf of its Member States.[20]

It follows that, while the EU has consented to the expansion of the concept of criminal corruption beyond bribery, it has stopped short of resorting to its strongest institutional 'arsenal' to compel its Member States towards such a prospect. Therefore, the Union is up to this date institutionally confined to the conceptual nucleus of corruption, i.e. bribery.

4. Criminalisation of bribery in the public sector: Bribery of EU and member state officials

4.1. Protocol No. 1 to the PIF Convention

The origins of EU intervention concerning the criminalisation of bribery of both Community and national officials, including officials of other Member States, arose within Additional Protocol No. 1 to the Convention on the Protection of EC Financial Interests (PIF) of 27 September 1996.

[17] COM(2003) 317 final, 5, 9; and Wolf 2007, 25.

[18] See Kaiafa-Gbandi 2011, 15.

[19] Such accession primarily takes place for the prevention of corruption and transparency in the operation of organizations.

[20] As in the case of the mutual agreements on extradition and judicial cooperation between the EU and the United States: for a pertinent critical appraisal see Kaiafa-Gbandi 2004, 31.

The Protocol provided a definition of the term 'Community official' [Art. 1(1)(b)], while the term 'official' in general clearly includes national officials of all Member States, according to the respective applicable definition in each individual state [Art. 1(1)(c)]. However, according to the Protocol, in cases involving an official of another Member State, the prosecuting state is only obliged to apply the definition of 'national public official' of the respective Member State, to the extent that this definition is compatible with its own national legislation [Art. 1(1)(c) final para]. What is even more important, both passive and active bribery have been defined so as to require *damage or likely damage to the European Communities' financial interests* (Art. 2 and 3). Based on that same requirement, members of the European Commission, the European Parliament, the Court of Justice of the European Union (CJEU) and the Court of Auditors of the European Communities have been assimilated to Government Ministers, elected members of national parliamentary chambers, members of national highest courts and members of national Courts of Auditors as regards acts of bribery committed by or against them (Art. 4).

Opting for a link between the criminalisation of bribery and damage to the European Communities' financial interests (which also underscored a number of other legislative proposals)[21] was aptly criticised,[22] not only because bribery in the public sector may not exclusively be connected to the breach of financial interests as such but primarily because such a link has been fabricated to concoct a body of otherwise disparate penal provisions revolving around the protection of EU financial interests (namely, concerning fraud, bribery, disloyalty), absent any systematic cohesion or substantive justification.

4.2. 1997 Convention on the fight against corruption involving officials of the European Communities or officials of Member States

The EU came back in 1997 with a Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, wherein the damage or likelihood of damaging the European Communities' financial interests *was no longer a requisite for criminal responsibility*. This development came about not due to the above doctrinal objections but rather because the EU wished to *improve judicial cooperation* in criminal matters between Member States, particularly with respect to acts of bribery involving officials of the European Communities.[23] As regards judicial cooperation, the (crucial up to then) accompanying element of damage or likelihood of damage to EC assets obviously posed an impediment, to the extent that it required a certain evidentiary basis. Nonetheless, even though the

[21] Such as the familiar Corpus Juris (see Kaiafa-Gbandi 2001, 97) and the Proposal for a Directive on the protection of EU financial interests, COM(2001) 272 final (23 May 2001) and COM(2002) 577 final (16 October 2002), along with the proposals in the Green Paper on the Creation of a European Public Prosecutor's Office with reference to the Protection of EU Financial Interests, COM(2001)715 final (11 December 2001).

[22] See Kaiafa-Gbandi 2003m 130.

[23] See Convention Against Corruption, Preamble, paras 5 and 6.

Preamble to the Explanatory Report of the 1997 Convention[24] generally linked it to the fight against bribery bearing international characteristics, it also stressed the need to reinforce judicial cooperation between Member States in cases of bribery alongside the expected contribution of this Convention to the smooth operation of the EU internal market, which is automatically linked to its financial interests.

Therefore, the basic characteristics of the EU Convention on the fight against corruption (of 26 May 1997) remained identical to those of the relevant PIF Protocol, excluding the element of potential damage of the European Communities' financial interests due to the illicit activity of public officials. However, the pre-existing link to the above element left its 'mark' even after its elimination as regards the offences of active and passive bribery. Specifically, according to the 1997 Convention and contrary to the Council of Europe and UN Conventions, active and passive corruption of public officials is punishable only when it relates to *illegal acts*.[25] This can easily be explained since in the case of a *legal* act on behalf of the official, active and passive bribery *cannot harm the financial interests of the EU*. Moreover, the EU Convention restricts criminal responsibility to acts of bribery for *future* actions or omissions and not for completed ones, as opposed to domestic provisions of various legal orders of Member States (e.g. in Greece, Germany, etc.). This can be attributed to the prior connection of bribery to the financial interests of the EU, which cannot possibly be harmed by completed acts of officials, at least not without an additional action carried out *after* the bribery (unless one could prove prior concerted action, which would normally be quite difficult).

Beyond active and passive bribery of officials, the elements of which were identically defined with respect to the Community and national officials of all Member States, respectively, the EU refrained from harmonising other provisions (e.g. bribery of parliamentary representatives, judges, etc.). By applying the principle of assimilation (Art. 4)[26] to both the Convention and its preceding Protocol, it asserted that "each Member State shall take the necessary measures to ensure that in its criminal law the descriptions of the offences referred to in Art. 2 and 3 [i.e., passive and active corruption respectively] committed by or against its Government Ministers, elected members of its parliamentary chambers, the members of its highest Courts or the members of its Court of Auditors in the exercise of their functions apply similarly in cases where such offences are committed by or against Members of the Commission of the European Communities, the European Parliament, the Court of Justice and the Court of Auditors of the European Communities respectively in the exercise of their duties".

The practical implication of this provision is that variations may occur between different legal orders as to criminalisation, for instance of bribery of Members of the European Parliament, depending on the definition adopted by individual Member States

[24] [1998] OJ C391/1–2, 15 December 1998.

[25] The European Council's Convention grants Member States the ability to limit criminalization to illegal acts, when such acts refer to the bribery of foreign public officials [Art. 37(1)], whereas the UN Convention [Art. 16(2)] allows states discretion in criminalizing passive bribery of foreign public officials and officials of international organizations.

[26] See Androulakis 2007, 290–291.

of bribery of Members of Parliament, which they are called upon to extend to corruption of Members of the European Parliament. Germany, for example, has adopted a rather narrow definition, linking the specific offence to the 'amortisation of vote'[27] (Strafgesetzbuch (StGB), section 108e). The EU did not show any interest in requiring the harmonisation of provisions concerning corruption of high-ranking political agents or judges and resorted to the principle of assimilation (Art. 280 TEC/Art. 325 TFEU), possibly because the fundamental problem of acts of bribery that may damage the EU's financial interests was in practice witnessed at the level of public officials rather than the political elite or the judiciary. Nonetheless, such differentiation is essentially unjustified[28] since corrupt practices are not entirely unknown to the highest political echelons of the EU.[29]

With respect to sentencing, the 1997 Convention confined itself to requiring effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty which can give rise to extradition. At the same time, the Convention explicitly provided that, in determining the penalty to be imposed, the national criminal courts may, in accordance with the principles of their national law, take into account any disciplinary penalty already imposed on the same person for the same conduct. This latter provision clearly promotes respect for the principle of proportionality.

Last but not least, the 1997 Convention established the liability of directors of business units (Art. 6) for acts of bribery by individuals operating under their instructions, inasmuch as the said individuals commit bribery on behalf of the corporation. According to the Explanatory Report to the Convention, the wording was intentionally selected so that Member States might even opt for strict liability, if the principles of their national legislation so permit.[30] Nevertheless, one cannot overlook that strict liability in the field of criminal law directly violates the principle of guilt, which is binding under primary EU law, emanating from the presumption of innocence under Art. 48(1) of the Charter of Fundamental Rights and also from the principle of proportionality, respect for which is required by Art. 5 TEU.[31]

Nevertheless, the ability of Member States to prosecute passive bribery of EU officials according to the individual national legislation that ratified and transposed the 1997 Convention should not be overstated, as the waiver of their immunity[32] remains an absolute prerequisite. This is envisaged in the Protocol on the Privileges and Immunities of the European Communities (Art. 11 and 17),[33] which also applies to the

[27] See Bauer–Gmel, s. 108e, Rn 10.

[28] See criticism by Wolf 2007, 25–26.

[29] For example, the resignation of all members of the European Commission in March 1999 under the pressure of a fraud scandal due to a report by the Committee of Independent Experts in *www.europarl.eu.int/experts.*

[30] [1998] OJ C 391/1, 15 December 1998, according to analysis under Art. 6.

[31] See European Criminal Policy Initiative (ECPI), 'A Manifesto on European Criminal Policy' ZIS 2009, 707, and Kaiafa-Gbandi 2011, 30.

[32] See accurate remark by Samios 2000, 190.

[33] [2008] C115/266, 9 May 2008 and Protocol (No 7) of the Consolidated Versions of TEU and TFEU, OJ 326, 26.10.2012, 266 et seq.

CJEU[34] and has explicitly been consolidated through the 1997 EU Convention [Art. 4(4)]. Immunity of EU officials may only be waived by EU agencies and only when such waiver does not run contrary to the Communities' interests [Protocol on the Privileges and Immunities, Art. 17(2)]. If the EU genuinely wishes to allow transparency to infuse its whole structure, then this provision has to be amended.

An overall assessment of the above-mentioned issues to date leads to the following conclusion: With reference to the criminal suppression of corruption in the *national* public sector, the EU legislation expanded the scope of the pertinent provisions as to their application to foreign public officials of other Member States and to Community officials. Likewise, in the case of bribery of Members of Parliament and bribery of judges, it expanded their ambit to Members of the European Parliament, Commissioners and judges of the CJEU, thereby protecting the fundamental interests of foreign (Member States') public office, and the European fundamental interest of the Community office, when such acts or omissions take place in Member States or abroad by an EU national or against a Member State's official, or when the perpetrator is a Community official employed in an EU organisation or body which has its headquarters in any Member State, and the latter has extended (with reference to the last three cases) its penal jurisdiction abroad (Art. 7 of the 1997 Convention).[35]

This indicates a considerably narrower scope compared to the international Conventions on bribery of foreign officials, partly because the other international Conventions are addressed to a larger number of states and also because some of those states have already opted for criminalisation in broader terms, including the extension of the definition of corruption to acts other than bribery.

However, it should be underlined that the European Union's interest in combatting corruption has not been equivalent to that of other international organisations.[36] The EU primarily aspired to safeguard the Community (now Union) office and the public office of Member States as a *crucial requirement* for the effective protection of its financial interests, and also *uniformly* throughout each and every Member State. For this plan to succeed, the EU had to initially direct each Member State towards the harmonised criminalisation of bribery of officials from all Member States in order to achieve the uniform punishment of corruption of Community (now Union) officials, which was directly connected to violations against its financial interests, and called for repressive measures by all Member States according to the principle of assimilation, i.e. according to provisions reserved for national public officials of Member States.

It is thus made clear that, while the involvement of the EU in the fight against corruption in the public sector seems at first glance to flow from its reasonable interest to protect the 'Community office' as a European fundamental interest, the real driving force behind these regulations was (and still is) the need primarily to protect the Com-

[34] See Protocol on the CJEU, art. 3, Consolidated Versions of TEU and TFEU, OJ 326, 26.10.2012, 210 et seq.

[35] The EU did not oblige its Member States to enforce their penal law extra-territorially. Such an obligation was not deemed necessary, as the criminalization sought by the EU was established through its instruments, regardless of the Member State where the act was perpetrated.

[36] See contra Androulakis 2007, 301–302.

munity budget. Therefore, one safely arrives at an assumption that cannot be contested even in the EU context; on an international level, the criminal suppression of corruption in the foreign public sector was a *crucial tool* for the protection of financial and economic components and factors.[37] This perhaps made some sense back when the EU was confined to a purely economic character. In the post-Lisbon era, however, as the EU assumes an ever-growing political role, this hypothesis is hardly self-explanatory.[38] Consequently, the following questions arise: Why should the acceptance of an undue advantage on behalf of a Community official for carrying out a legal act (as a form of passive bribery) escape criminalisation? Does the uncorrupted function of the Community's administrative apparatus not carry a self-inclusive value when it deals with European citizens, with an obligation to serve both the wealthy and the destitute with transparency, integrity and equality? Certainly, this does not imply that the punishment of bribery for legal acts should be indistinguishable from that of bribery aiming at illegal acts, nor that the elements of the two types of conduct should be identical.

4.3 The 2017/1371 (EU) Directive on the fight against fraud to the Union's financial interests by means of criminal law and the accompanying bribery offence

The legal framework delineated above has been amended through the 2017/1371 (EU) Directive on the fight against fraud to the Union's financial interests by means of criminal law, which will replace the PIF Convention and its Protocols with effect from July 2019. This will not affect the 1997 Convention on the fight against corruption except for those cases which are linked to fraud against EU financial interests. The said Directive employs the same approach found in the first Protocol to the PIF Convention concerning fraud-related bribery. In other words, it specifically refers to active and passive bribery related to official acts that harm or are likely to harm the financial interests of the EU [Art. 4 para. 2 (a) and (b)]. Once again, the explicit connection between punishing corruption and protecting financial interests becomes evident.[39] The Directive, however, *inter alia*, introduces three key amendments with respect to bribery: (a) no longer does its criminalisation rely upon the official's illegal acts; (b) it provides a definition of 'official' tailored to the requirements of crimes harming the EU's financial interests, through a functional criterion: the latter includes not only the exercise of legislative, executive or judicial powers but also the exercise of public office by other persons when it relates to participation in management or decision-making concerning the financial interests of the EU; it is not only restricted to officials

[37] See Kaiafa-Gbandi 2010, 149.

[38] See the proposal in the 'Programme for a European Criminal Justice', considering crimes of bribery of Community officials and crimes against the judiciary as crimes against collective European legal interests that should be placed within the core of European criminal law, designated exclusively by the EU; see Schünemann 2006, 59, and in detail Hefendehl 2006, 216. For criticism see Bitzilekis–Kaiafa-Gbandi–Symeonidou-Kastanidou 2006, 230.

[39] For a criticism of the Directive's Proposal (COM 2012, 363 final, 11 July 2012) already see Kaiafa-Gbandi 2012, 319.

of the EU or Member States but extends even to third countries (Art. 4 para. 4); and last but not least, (c) it prescribes minimum sentences imposable by Member States for bribery, which are sometimes not proportional in comparison to those applicable to fraud.[40]

One could argue that this blueprint is pointless, especially with regard to the expansion of criminal responsibility concerning officials of third countries since these legal orders cannot be compelled to introduce relevant offences by means of an EU Directive. Of course, one might argue that the Union seeks to open its regulatory framework to officials or persons involved in management or decision-making relating to financial interests in third countries, in order to protect them effectively, at least as far as the jurisdiction of its Member States permits it. On the other hand, however, it is obvious that the Directive replicates the drawbacks of Protocol No. 1 to the PIF Convention: Bribery, regardless of its link with possible violations against the Union's financial interests, is itself a criminal act, after bribery had been criminalised in the 1997 Convention. Moreover, the main problem is that, even though the Directive no longer requires bribery to be linked to an unlawful act of the official, thus expanding culpability in relation to the 1997 Convention, it insists on associating the criminalisation of bribery with acts of officials that might affect the financial interests of the EU, which (as stated above) excludes cases where the official assumes legal action. Last but not least, under the 1997 Convention, public service has a notion that covers even persons who do not hold formal office but who are nonetheless assigned and exercise a public service function.[41] The main conclusion arising out of the above analysis is that the criminal treatment of bribery should be disassociated from acts of officials that might harm the Union's financial interests and also be extended to legal acts carried out by officials. Any other crucial initiative with respect to corruption which might violate the EU's financial interests, including any amendments that arise from the said association (e.g. concept of an 'official', introduction of aggravating circumstances) should take place by means of a legal instrument amending (or replacing) the 1997 Convention.

[40] See however the directive on the fight against fraud to the Union's financial interests, which does not prescribe minimum sentences for the starting point of the legislatively set penalty range.

On the other hand, it is also crucial to underline that the directive does not specifically refer to the introduction of corporate director liability, but only liability of legal persons for their actions (art. 6). However, the phrasing in the description of individual crimes, and particularly of fraud, is so broad (art. 3: '(a) in respect of expenditure, any act or omission relating to (i) the use or presentation of false, incorrect or incomplete statements') that it does not exclude liability in cases of lack of supervision of directors of their subordinates.

[41] According to the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union European official is "any person who is an official or other contracted employee within the meaning of the Staff Regulations of Officials or the Conditions of Employment of Other Servants of the European Communities, as well as any person seconded to the European Communities by the Member States or by any public or private body who carries out functions equivalent to those performed by European Community officials or other servants".

4.4 Intermediate conclusions: The EU agenda on criminalising corruption in the public sector

The above analysis leads to certain intermediate conclusions:

(a) Despite its commitment to combatting corruption as an ancillary measure to support the economy, the EU has stopped short of protecting foreign public service as a fundamental interest alongside international financial transactions, as opposed to most of the other international Conventions concerning corruption in the foreign public sector, at least since 1997. This is because the Union could achieve a better level of protection of its financial interests via judicial assistance and cooperation between Member States when acts of bribery of its officials and Member State officials relating to budget violations were independently punishable and did not require additional invocation and therefore proof of that causal link. Moreover, the Union is an institution featuring public service as its own fundamental interest, as well as possessing assets of its own, i.e. two capacities which appear to be firmly linked with each other when violations occur. Accordingly, the EU aspired to indirectly protect the latter interest (i.e. financial interests) by imposing sanctions on conduct harming the former (public service). In this sense, the focus on the EU's financial interests, albeit implicitly always present, did not produce identical results compared to those achieved by other international organisations. Nevertheless, even if the approach introduced by Protocol No. 1 of the PIF Convention (associating the punishment of bribery with acts of officials that are likely detrimental to the financial interests of the EU) has been once again be chosen under the Directive on the fight against fraud to the Union's financial interests by means of criminal law, which seems to have aimed at clarifying the extent of competence of the newly established European Public Prosecutor's Office,[42] such a link will not be necessary as long as the 1997 Convention applies (at least in the cases covered by the Convention), and judicial cooperation could proceed without reference to the EU's financial interests.

The EU has required its Member States to protect other Member States' public office as well as 'EU office' as a European fundamental interest, at least when such fundamental interests are violated in their territory. Moreover, the EU has proceeded to harmonise the penalties for bribery of Member State officials, inasmuch as these acts could be related to violations of its economic interests. Applying harmonised penalties over bribery of national officials, including officials of each Member State, was also necessary for the uniform treatment of bribery of Community (now Union) officials, which had to be addressed by Member States based on the principle of assimilation. Nonetheless, the EU did not aspire to uniformity in the criminalisation of bribery at the highest political level and in relation to judges.

(b) The new Directive on the protection of EU financial interests introduces a new definition of 'official'. However this is not general since it is only designed for bribery concerning acts of officials which could be detrimental to the Union's financial in-

[42] See Council Regulation (EU) 2017/1939, OJ L 283, 31.10.2017, 1 et seq.

terests. However, in such a case, Member States will seek to protect additional foreign fundamental interests ('office' or simply 'public service' of persons), especially in relation to cases of participation in decision-making processes concerning the financial interests of the EU. In these cases, the legal protection of an expanded notion of 'public service' will be purely ancillary to the protection of finances, without which it would be rendered moot.

5. Criminal repression of corruption in the private sector

Furthermore, the EU became interested in combatting bribery in the private sector. The EU was not only a pioneer in this field (its initiatives dating back to 1998[43]) but also extremely active compared to other international organisations.[44] The EU is the sole international organisation that mandated criminalisation of corruption in the private sector, although in the narrow sense of (active and passive) bribery. It is in this field that one can straightforwardly link EU initiatives with the common market and with the Union's effort to uphold the rules of internal competition, i.e. with its 'par excellence' economic character of a supranational configuration.

Of course, the EU claim to criminalise bribery in the private sector encompasses a broader counter-crime and socio-political justification. It alludes to contemporary reality,[45] i.e. to the fact that the private sector is larger than the public one in several countries, owing to the ever-growing privatisation trend, which has led large public enterprises to cross over to the private economic sector. In addition, the significant financial impact of multinational ventures, especially their activities in developing countries, coupled with the general direction of a now globalised economy and the reinforcement of internal markets (with respect to the EU in particular) explain the tendency towards equating the treatment of the private and public sectors in terms of adopting legislative measures to counter bribery. Still, the justification of criminalising bribery in the private sector requires fulfilment of the conditions that underline criminal law in general. In light thereof, it is essential to identify key elements of the pertinent EU initiative, as expressed through Framework Decision 2003/568/JHA.

5.1. Bribery in the private sector 'in the course of business activities'

The first feature is that the EU, just like other organisations,[46] is interested in punishing bribery in the private sector only to the extent that it occurs in the course of 'business

[43] With a Common Action ([1998] OJ L358/2–4, 31 December 1998) which was replaced by Framework Decision 2003/568/JHA ([2003] OJ L192, 31 July 2003); see also COM(2003)317 final, 12), following a pertinent initiative by Denmark.

[44] For a comparative analysis see Huber 2003, 564 and for evaluation of the Common Action see Wolf 2007, 25–26.

[45] For analysis see Argandona 2003 254; Webb 2005, 212.

[46] See the somewhat broader wording of the UN Convention which refers to 'economic, financial or commercial activities'.

activity'. Thus, 'bribery' in the course of a private relationship outside the business environment is not a punishable act (e.g. when the superintendent of a building, while representing the apartment owners, receives a bribe to hire a cleaner who is not properly qualified compared to other candidates). This aspect not only implies the link between bribery and the function of economic units but also restricts the otherwise limitless criminalisation of bribery related to ordinary social activities.[47]

5.2. Bribery with the aim of employees acting 'in violation of their duties'

Since bribery (both active and passive) should relate to the operation of a business unit and occur towards or on behalf of persons who work for such a unit, regardless of their rank, it should also relate to acts *in breach of these individuals' duties*. The specific precondition is reasonable because the protected fundamental interest cannot possibly be the function of a service per se, such as 'public office'. The latter, being created by a state with a particular 'social identity', exists to serve the general public and thus ought to guarantee transparency, reliability, impartiality and integrity.[48] This explains why (at least in some legal orders) bribery of an official is an offence even if the bribed official acts *in accordance with* his/her duties. In the private sector, on the other hand, the characteristics of economic units which employ officials and the subsequent formation of structures and relations are of a different nature (i.e. not a form of state-operated establishment with a social identity committed to serving the public) and pursue different goals (i.e. carrying out transactions with other economic parties, thus serving corporate interests).[49]

However, the fundamental question posed by Framework Decision 2003/568/JHA is the way it defines 'breach of duties'. According to its text, this should be understood according to national law but 'cover as a minimum any disloyal behaviour constituting a breach of a statutory duty, or, as the case may be, *a breach of professional regulations or instructions*, which apply within the business of a person who in any capacity directs or works for a private sector entity' (emphasis added). This provision underlines

[47] See VOGEL 2004, at 400 and the comparison between the various models of penal confrontation of corruption in the economy, which illustrates that, depending on the model selected, criminalization may assume totally unjustified proportions. Also, see in Greek theory the view that bribery should be perpetrated within a business transaction between the briber and a private organization for which the recipient works, through which economic benefits must be pursued by both, in SYmeonidou-Kastanidou 2012, 92; Chatzikostas 2010, 29 et seq. and also the criticism by Anastasopoulou 2013, 186, 199–200, since such narrow interpretation is justified neither by the Explanatory Report nor by the essential features.

[48] As to the identity of the legal interest behind the reference to public office, see MANOLEDAKIS 1998, 314 et seq. and also BITZILEKIS 2001, 1 et seq.

[49] See also Papakyriakou 2009, 1128, noting that 'contrary to private enterprises, the State mechanism is devoted to serving the citizens' interests indiscriminately'. Of course, there exists a trend to assimilate corruption in the public sector to corruption in the private sector and to apply a uniform model of criminal repression for both. If one were to employ this model consistently, it would also imply the punishment of bribery in the private sector even for the offering or receiving of undue advantages for lawful economic transactions, and punishment not only for employees or officials in a business unit of the private sector in general, but also for private business units' owners or consumers, freelance professionals, etc.

the risks that inhere in criminalising violations of simple business instructions that are ordinarily given by the owner-entrepreneur in the private sector.

5.3. Bribery in the private sector without any further (even potential) impact of such duty breaches upon economic or other factors

The third and most significant aspect is that the Framework Decision clarifies that the criminalisation of bribery in the private sector does not require a further, at least probable, impact of the pertinent breach of duty on the property of the relevant business unit or on consumers or competition itself. Member States were simply granted *the option* to restrict criminalisation to those acts which imply or may imply a distortion of competition in relation to the purchase of goods or trade services.

Such discretion was to be allowed for five years following a relevant statement as the Council, under Art. 2(5) of the Framework Decision, was required to re-evaluate it before 2010 and decide whether to renew the provision. In 2011, the Commission expressed the view that this prerogative of Member States was only valid until 22 July 2010 (i.e. the date of expiration of the five-year period) due to the fact that the Council had failed to carry out such a review before that time.[50] In other words, the Commission considered that the possibility of restricting criminalisation had ceased to exist, even if Member States had previously employed it. This is not the correct approach. Since December 2009, i.e. when the Lisbon Treaty entered into force, the Council has no longer been single-handedly competent to redefine the minimum threshold of criminalisation resulting from pre-existing Framework Decisions, as the European Parliament's involvement in the process is under the (Lisbon) Treaty mandatory. Thus, even though Framework Decision 2003/568/JHA provided that the Council would reconsider the matter within five years, the fact that such reconsideration did not occur before the Lisbon Treaty entered into force means that the provision remains in its original form; it is no longer possible to eliminate it by means of a decision by the Council (as this would broaden the ambit of criminalisation without the consent of the European Parliament), nor should it be regarded as tacitly abolished (since this would imply a broadening of criminalisation without an ad hoc decision of the now competent EU institutions). Therefore, any existing provisions of the Member States that explicitly limit the application of bribery in the private sector remain intact, and Framework Decision 2003/568/JHA continues to apply in its original form. Under the general transitional provisions of the Lisbon Treaty,[51] if the Framework Decision was not replaced within five years by a pertinent Directive, it remains in force in its present form, thereby continuing to permit Member States to restrict criminalisation.

[50] See COM(2011)309 final (Brussels, 6 June 2011) and in line, Anastasopoulou 2013, 198–199, and Symeonidou-Kastanidou 2012, 89.

[51] See Protocol No. 36 to the Lisbon Treaty, Arts 9 and 10, on transitional provisions.

5.4. Protected legal interest justifying criminalisation of bribery in the private sector

The rationale behind this specific provision is directly correlated with the fundamental interest protected through the provisions concerning bribery in the private sector, as well as the relevant models of liability selected in the legal systems of individual Member States.[52] The limitation to types of conduct that distort or could distort competition within the market of commodities and trade services reveals a connection between criminalisation and the safeguarding of 'fair competition' within the common market, which subsequently restricts the extent of criminal responsibility. This association also keeps a tight rein on the intrinsic vagueness of the term 'breach of duties' in the private sector, especially when such breach alludes to professional regulations or instructions. On the contrary, if criminalisation required no other precondition than a broadly defined intentional breach of duty, such 'breach' might simply be defined in relation to the owner of an enterprise and be tailored to the relationship between the 'business director and the employee'. Such a construal of 'breach' is palpably not sufficient to justify criminalisation[53] even when it refers not only to a simple infringement of the loyalty obligation but also to a breach of a *specific statutory duty*. The lack of any further link between the breach of duty and actual economic damage (or risk thereof) might lead criminal law down a precarious path. In other words, criminalisation might entirely rest upon the violation of a private bond of authority which imposes the obligation of loyalty or other duties in order simply to ensure the sound *modus operandi* of enterprises.[54] Even if the latter could be considered an interest worthy of legal protection, such protection could be ensured by the business units themselves through other means (i.e. internal audits and inspections, reimbursements, etc.).[55]

It has been claimed, of course, that the legal interest protected by the provisions on bribery in the private sector is *the business* as a real social component of particular importance in modern societies.[56] In particular, it is argued that corruption in the private sector via breach of duty concerning financial transactions with other companies alters/destabilises the status of the business in trade associations with other businesses. This violation is considered to have a completely different implication as it modifies the business's position in the economy, thereby constituting a significant infringement of the position of the business unit as such, not requiring a further link to potential damage to property or breach of fair competition.

[52] See Vogel 2004, 400 et seq.; for Greek theory see Dionysopoulou 2009, 967.

[53] On the breach of loyalty owed by the employee to their employer see Androulakis 2007, 375, and criticism by Dionysopoulou 2009, 970 and CHatzikostas 2010, 21 and 60 et seq.

[54] See also Vogel 2004, 402–404, 410–411, who underlines the disadvantages of this model, emphasizing that in its most extreme case it leads to criminalization based on morality as opposed to actual harm, while in the event of breach of a labour duty, the author fails to understand why it is imperative to criminalize the violation of a private relationship.

[55] See particularly Argandona 2003, 259.

[56] See SYmeonidou-Kastanidou 2012, 92–3.

Setting aside the obscure character of such a 'fundamental interest',[57] the above suggestion (despite its effort to limit criminalisation) ultimately legitimises an unacceptable degree of criminal repression (in terms of the *ultima ratio* principle), extending bribery in the private sector to a much broader field than would be allowed by the connection of such conduct with property offences or breach of fair economic competition. For instance, it assumes that breach of duties relating to the financial transactions of the business with other entrepreneurs always infringes the core of the business unit because it modifies the will of the unit (expressed through its representative) to the interest of a third party.[58] However, this conclusion does not respond to social reality. No business is ever affected in its existence by the mere fact that one of its employees falsely 'modifies' its will to benefit a third party in breach of his/her duties. If one wishes to proscribe the re-positioning of an enterprise within the economy, one should introduce other elements that clarify this correlation in the wording of the provision concerning bribery in the private sector. Even in this case, one wonders whether a deterioration of the corporate status in trading within the economy really calls for an activation of criminal law when it is not accompanied by any risk to assets or fair competition, especially given that there are other less invasive and more efficient means to address such phenomena.

On the other hand, one cannot agree with the effort to equate the illegal bribery of public and private officials (as proposed by some), which is based on identifying the violated fundamental interest of bribery in the private sector (as well as in the public sector) in the (general) *pro bono* character of professional activities as an existential element of economic and social development, arguing that it is a legitimate 'supra-personal' interest; such an interest presumably combines basic conditions of organised human existence and also ensures the existence and operation of an undetermined number of different interests in numerous societies, to the extent that in a general and abstract (*ex ante*) perspective, it is impossible to predict what personal legal interests will ultimately suffer from a specific act of bribery.[59]

This position seeks to rely even more on general arguments of legal policy: (a) the law is not governed by a political approach that prioritises the state over the individual (and thus elevates the wrongfulness of a violation against the public office in particular); (b) the central concern of law is the individual and not the state; and (c) our shared prosperity requires the proper functioning of both the public and private sectors, whose importance in modern Western societies does not justify the notion that an act of bribery in the private sector implies in each case fewer harms and risks than one in the public sector.

This argument invites the following objections: First, the 'anthropocentric' nature of law is certainly not challenged by the views that distinguish between the affected legal interest in cases of bribery of public officials and that affected by corruption in the

[57] Which features define the corporate status within the economy as a legal interest? Does its reputation or its assets (or possibly even other factors) contribute to such status?

[58] See SYmeonidou-Kastanidou 2012, 93.

[59] See Anastasopoulou 2013, 47.

private sector because the public office not only exists as a 'commodity' that directly serves citizens (and therefore humans beings) but also stands out as a legal interest of official structures and relationships in private enterprises, exactly due to this specific operation towards society. In other words, the distinction views the citizen (human) as a cornerstone that should be served by the state, and not vice versa. Secondly, beyond the obvious remark that it is possible for a *specific* act of bribery in the private sector to be more harmful than a *specific* minor bribery of a civil servant, it should be emphasised that the growing importance of the private economy for the welfare of modern Western societies does not at all imply that it can automatically justify the equation of violations resulting from the bribery of activities among civil servants and private sector employees. We should not, in other words, fail to grasp the undeniably different function of public service compared to the private sector: Public service is committed to serving the society, while the structure of a private company first and foremost serves its private interests. A private company is generally not obliged to regulate its operations based on the interests of society as a whole; and even when it does so, it is only indirectly, i.e. through the promotion of its private interests. Finally, the proposed legal interest arising from the '*pro bono*' character of professional activities as an existential element of economic and social development in fact reveals that what lies behind it is substantially related to the economic development of the business units within the social context, and it would be proper to understand the protected legal interest in this light. Only then can criminal law safely serve the human beings who lie at its core; in any other case, under the proposed conception of a supra-personal legal interest 'which comprises the basic conditions of organised human existence and also ensures the existence and operation of an undetermined number of different goods in numerous societies', citizens risk being punished for any breach of a professional duty, without even the need to prove a substantial breach of economic and social development to which the breach is hypothetically linked.

Therefore, it is reasonable to conclude that criminalisation of bribery in the private sector is justified when it is not merely a means to guarantee the proper internal operation of businesses but when such improper internal and external operation affects or could affect their property, their field of activity or the consumers. It is only then that criminalisation ceases to rely on a *simple breach of a private contractual relationship* between the business owner and the employee and acquires a point of reference to society. Moreover, this marks the difference from bribery in the public sector, where the point of reference to society is concrete, since serving the people is the reason for recognising public office as a legal right protected by law. On the contrary, however blameworthy the bribery of a business employee might seem to be (e.g. the employee is bribed in order to violate priority in the delivery of orders, thus infringing his/her duties), such conduct still constitutes a breach of a private contractual relationship or even an improper external operation of business. Therefore, countering it through criminal law is not justifiable, to the extent that the said conduct does not involve the possibility of violating property belonging to the business or to any other third person

or the possibility of distorting competition.[60] In other words, any act which infringes even a specific professional duty does not necessarily entail an abstract endangerment of the above-mentioned legal interests.[61] The latter would require that the breach act as a contributing factor that mobilises a causal course towards violation of the particular interests by establishing at the very least a functional and open source of danger with an autonomous potential of leading to actual infringement.[62] If the additional components mentioned above, in correlation with *one or more specific legal interests*, are not prescribed as requirements, then the ensuing criminalisation would define the status of business units with regard to their employees in terms of 'absolutistic' principles. Therefore, it would only be sensible for criminalisation to rely on the specific association of bribery with business activities in the private sector. This goal can only be met through an explicit element linking criminalisation with acts of the recipient that could affect the assets of *the business* itself or *the wealth of consumers* or, at the very least, *the whole process of healthy competition*.[63] Otherwise, there is no point in restricting the criminalisation of bribery to *business* activities.

Moreover, since the EU has invoked the need to safeguard its *internal market when* delimiting its competence to regulate the criminalisation of bribery in the private sector, it is only rational that this criminalisation should unequivocally be confined to acts of bribery that can damage business property or consumers or impinge on economic competition.[64] In addition, the underlying rationale of criminalisation set out in the Preamble to Framework Decision 2003/568/JHA underlines the link between bribery and the distortion of competition, along with the hindrance of efficient economic growth, which are the only components (even under the Lisbon Treaty) that may substantiate the establishment of criminal responsibility in the Member States [Art. 83(2) TFEU], given that this field of criminality is not intrinsically of transnational character [Art. 83(1) TFEU].

On the other hand, it would be erroneous for anyone to assume that the EU appears more cautious than the international community as regards the criminalisation of bribery in the private sector simply because it grants Member States the capacity to limit criminal responsibility to cases involving the distortion of competition in relation to the purchasing of commodities or trade services. As mentioned above, the EU *obliges*

[60] For the more general idea of linking criminalization to a fundamental interest in the economy, see Hassemer 2009, 172.

[61] Also see the broadest construal of Kindhäuser 1994, 130 et seq. and the criticism of Kaiafa-Gbandi 2005, 52 et seq.

[62] See Kaiafa-Gbandi 2005, 42 et seq.

[63] As regards protection of economic competition see Argiroiliopoulos 2003, 16 and also Bitzilekis 2009, 99, who seems to erroneously believe that, according to Law 3560/2007, art. 5, bribery in the private sector is perforce linked to the manipulation of free competition.

[64] See the apparent preference of Vogel 2004, 405–407, 410–411, for a model of criminal repression of corruption in the private sector based upon the potential to generate negative property consequences. It should be noted, moreover, that in view of the enduring validity of the Framework Decision in its original form, as already mentioned, it cannot be argued that the alternative link of criminality beyond the possibility of competition distortion and with the risk of violating business assets or consumer rights restricts the threshold of criminalization required by the EU, because the inclusion of such breaches of other legal interests do more to lower the threshold than restrict it.

its Members to adopt at least one of the alternatives for fighting bribery. In contrast, the remaining institutions of the international community have left criminalisation of bribery in the private sector[65] *to the absolute discretion* of states and have also broadened the concept of corruption in the private sector beyond mere bribery.[66]

As a result, the EU appears to be the most vigorous supporter of criminalisation of bribery in the private sector, not only because of its mandatory nature, and in view of the Member States' obligation to provide a broad designation for breach of duty in professional conduct, which alone can sustain the harmfulness caused by bribery, but also because of the (tentative) capacity of Member States to disassociate criminal responsibility with the distortion of competition. Moreover, the EU has not provided sufficient justification as to why this compulsory criminalisation is the ultimate solution when it is easy for anyone to pinpoint other (more moderate) means to address this problem (e.g. compensation, multi-level internal control models in contractual agreements, etc.). Conversely, the other international Conventions have properly appreciated the ability of individual states to adopt such moderate means in lieu of criminal law provisions, thus leaving the criminalisation of bribery in the private sector to the discretion of individual states.

6. Suggestions for enhancing the EU institutional framework against corruption

Based on the above analysis, and with an eye to the future, one arrives at a number of recommendations to improve the EU institutional framework regarding the criminal repression of corruption.

(a) First, it is worth highlighting that, under the Treaty of Lisbon, the Union is not *competent* to intervene other than with a Directive in order to criminalise corrupt practices of either EU officials or officials of Member States based on the new institutional framework, which lacks any provision that would allow for such an intervention via a Regulation. Therefore, earlier proposals which suggested that the EU should criminalise such acts itself[67] are now moot, and the only provisions that could provide a rudimentary legal basis are those contained in Art. 83 TFEU, which calls for a collaboration of Member States to establish criminal responsibility in this field.

(b) As regards the content of criminal corruption, the EU must first review the definition of punishable bribery of EU and Member State officials, as a core of corruption, particularly with respect to 'bribes' for legal or even completed official acts. Such acts of 'corruption', regardless of their eventual classification as offences (e.g. by taking into account parameters such as the use of criminal law as an *ultima ratio)* and the potential specific differentiations against corresponding corruption aimed at il-

[65] Council of Europe Convention on Corruption, Arts 36–37, UN Convention on Corruption, Arts 21–22.
[66] UN Convention on Corruption, Arts 18–20.
[67] See Schünemann 2006, 310, and Hefendehl 2006, 460–461.

legal official acts, still affect the legal interest of the *pro bono* administrative operation of the Union and its Member States, which must function with transparency, integrity and equality for all citizens. That is why the EU has a responsibility to make calculated, balanced and informed choices. On the other hand, it is also important for the EU to reconsider the scope of punishable corruption by its officials, even beyond acts of bribery. Nowadays, for example, trading in influence, abuse of power or position or illicit enrichment are only covered through the possible ratification by Member States of international Conventions that mandate the criminalisation of specific types of conduct related to officials of international organisations, including the EU.[68] This creates an unjustifiable disparity as to the criminal treatment of corruption by EU officials and raises issues pertaining to equality.

(c) Employing the assimilation principle also appears unjustified in regulating liability for corruption offences at the top levels of EU political and judicial structures based upon the treatment of respective cases in individual Member States. This also leads to an irregular and, ultimately, unequal treatment of EU employees. Moreover, one cannot overlook the systemic contradiction arising out of the Union opting for a uniform criminal repression of corruption for its administrative apparatus and not for its top-level political or judicial mechanism.

(d) The EU should also review its provisions on waiving immunities of officials of EU institutions in the event of prosecution for corruption offences; indeed, the revocation of immunity only in those cases that do not affect its interests without a specific differentiation and without a balancing of other equally important interests hinders transparency as well as the proper functioning of EU institutions.

(e) It is also evident that the Union should eliminate any provisions introducing strict criminal liability, such as the provision concerning the liability of business directors for acts of corruption perpetrated on their behalf by persons under their orders. Such provisions infringe the guilt principle and contradict primary EU law.

(f) As regards bribery, it should not be criminally proscribed through a special provision as an *accompanying offence* of fraud against the financial interests of the EU when it refers to the commission (or omission) of official acts that are likely to damage the EU's financial interests since the breach of public office is independent from the act's probable impact on any other legal interest. Moreover, the current provision is pointless when bribery of officials is already penalised regardless of the additional requirements that followed from the Directive on fighting fraud against the Union's financial interests. Indeed, even any possibly held as necessary extension of the concept of public office for acts of corruption related to the financial interests of the EU should be promoted via a special provision in the institutional framework that relates to the criminal treatment of corruption, and not vice versa.

[68] See European Council Convention on Corruption, Arts 9 and 12, which require Member States to penalize trading in influence by officials or servants of supra-national institutions to which the state is a party, and UN Convention, Arts 2c, 18, 19 and 20, according to which officials of public international organizations (including the EU) are considered public officials and Member States are required to penalize, among other things, trading in influence, abuse of power or office, and illicit enrichment, without an obligation to adopt all relevant types of culpability.

(g) Finally, as regards the criminal proscription of bribery in the private sector, it should first of all be made clear that the discretion of Member States in restricting criminalisation to acts that involve, or may involve, a distortion of competition in the field of goods or commercial services remains in force today, while the EU is competent to intervene in the criminal repression of the phenomenon only in terms of safeguarding the internal market and therefore only in connection with acts of corruption that can lead to financial damage to businesses or consumers or to the disturbance of competition.

In a nutshell, resorting to criminal law is not a panacea in addressing social problems, and especially those that relate to conduct which shapes political, educational, social and other activities, political structures and even lifestyles.[69] In other words, a state or a supranational organisation does not 'pay its dues' in the fight against corruption simply by criminalising more and more types of conduct or demonstrating increasing severity against them.[70] The state begins to fulfil its responsibilities when it establishes and effectively operates institutions that sustain non-monetary values[71] within modern societies, institutions that secure meritocracy, accountability, integrity and transparency in all fields of social and political activity;[72] that improve and simplify the state's administrative operations;[73] that guarantee the full independence of Justice;[74] respect the oversight function of independent authorities;[75] are equally applicable to political parties, labour unions, the mass media and top-level politicians; and, last but not least, when it promotes institutions that raise public awareness of and stimulate action against corruption.[76]

The EU, as a supranational organisation which now has power to direct the penal policy of its Member States, ought to advocate for such institutions rather than move in the direction of broadening criminalisation; it might thus delineate the proper boundaries for addressing corruption in a much more effective fashion.

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[69] See analysis by Manoledakis 2004, 589 et seq. and especially 592 et seq.

[70] See also Androulakis 2006, 2099; Bitzilekis 2009, 106; and Bitzilekis 2013, 328.

[71] See Sandel 2013.

[72] See the proposals of the General Inspector of Public Administration in the concise presentation in his Annual Report for 2011, 10.

[73] See Raikos 2006, 207 et seq., 311 et seq., 483 et seq.

[74] See as regards justice in general Kousoulis 2005, 1014.

[75] Fytrakis 2009, 23.

[76] See pertinently Kalfelis 2005, 881; Kourakis 2002, 3.

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FIGHTING MONEY LAUNDERING WITH THE MEANS OF CRIMINAL LAW: THE GREEK EXPERIENCE

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In contrast to the situation in other Member States of the EU, the Anti-Money Laundering (AML) criminal provisions play a very important role in Greek criminal practice. This is largely due to the fact that they offer an extensive and flexible basis of criminal liability, which has been utilised in many cases till today by the Greek judicial authorities. The said provisions are not located in the Greek Penal Code, but they form part of a special law framework that was last amended in 2018 by Law 4557/2018[1] in order to adapt to the provisions of the 4th EU AML Directive.[2] Law 4557/2018 comprises both repressive and preventive AML measures.[3] The main characteristics of the criminal law provisions, which have taken their current shape already in 2008,[4] can be summarised in *15 key remarks* as follows.

(I) The crime of money laundering (ML) is constructed as an *ancillary offence*. It presupposes the commission of another offence ("predicate offence"), which must have produced illicit property ("dirty property", "dirty money"). The offence of ML consists of different types of acts that have as their object the illicit property ("laundering acts"). Taking into consideration the above structure, the scope of the ML crime depends on the definition of the notions of the predicate offence, the (dirty) property and the laundering acts. The Greek legislator adopted a very broad definition regarding all three notions. This, coupled with the fact that there is still a strong dispute over the protected legal interest, which is decisive for the teleological interpretation of the relevant law, opens up a wide scope for the AML criminal provisions.

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[1] See Law 4557/2018 "Prevention and Suppression of Money Laundering and Terrorist Financing (transposition of Directive 2015/849/EU)", Official Gazette A΄ 139/30.07.2018.

[2] The first AML provisions in Greece were of criminal nature. The Greek legislator established in 1993 (by Art. 5 of Law 2145/1993) a new offence, inserting the relevant new provision in the Greek Penal Code (see Art. 394A GPC). Two years later (1995) the above provision was abolished and a new special Law (Law 2331/1995) was enacted, which included both preventive and repressive AML provisions, aiming at transposing the 1st AML EU Directive. Law 2331/1995 was substantially modified by Law 3424/2005, which aimed at transposing the 2nd EU AML Directive, and 3 years later was totally replaced with Law 3691/2008, which transposed the 3rd EU AML Directive. The last major step in the historical evolution of the Greek AML framework was the replacement of Law 3691/2008 with Law 4557/2018.

[3] The preventive AML provisions of Law 4557/2018 are supplemented by relevant administrative regulations, which contain directions and details on the application of AML policies to all agencies, authorities, covered institutions, etc.

[4] See Law 3691/2008 ("Prevention and Suppression of Money Laundering and Terrorist Financing", Official Gazette A΄ 166/05.08.2018), aimed at transposing the 3rd EU AML Directive.

(II) In Greek legal theory there is a major controversy relating to the *legal interest protected* by the AML criminal provisions. Whilst some authors identify the protected interest with the interest that is threatened or harmed by the predicate offence, other authors consider that the AML criminal provisions protect autonomous legal interests, such as the integrity and the reputation of the financial system, the good functioning of the economy as a whole, the public order or the good functioning of the judicial system. Some authors, finally, adopt a pragmatic approach, noting that the AML criminal provisions serve general anti-crime policy purposes, consisting in the establishing of a more effective basis for the prevention, detection and prosecution of the predicate offences, thus introducing a new paradigm of criminal law that is not geared to the protection of a specific legal interest. According to Greek case law, the AML criminal provisions cumulatively protect the internal security of the state, the society as whole, the financial system and the judicial system.[5]

(III) With regard to the notion of the *predicate offence*, the Greek legislator has opted for a mixed method, i.e. a *combination of a list of predicate offences and a threshold approach*.[6] The list mentions specific categories of serious crimes that were designated by the international instruments to be covered as predicate offences, such as active and passive bribery of civil servants, political officials and judges; EU fraud; tax evasion; drug trafficking;, trafficking in human beings; environmental crimes; organised crime; and terrorism financing. Besides, there is a general clause, a catch-all provision, which extends the scope of the AML criminal provisions to "any other offence punishable by deprivation of liberty for a minimum of more than six months and having generated any type of economic benefit". This last provision makes the list of predicate offences non-exhaustive since it leaves room for any type of criminal behaviour that results in

[5] See indicatively Areios Pagos (Supreme Civil and Criminal Court of Greece), Decision no. 1185/2014.

[6] See Art. 4 of Law 4557/2018: "For the purposes of this Law as *"predicate offences"* shall be understood the following crimes: a) participation in a criminal organization as defined by Art. 187 GPC; b) terrorist activities and terrorist financing as defined by Art. 187A GPC; c) passive and active bribery of civil servants as defined by Art. 235 and 236 GPC; d) trading in influence and passive and active bribery in private sector as defined by Art. 237A and 237B GPC; e) passive and active bribery of political officials and judges as defined by Art. 159, 159A and 237 GPC; f) trafficking in human beings as defined by Art. 323A GPC; g) computer fraud as defined by Art. 386A GPC; h) sexual exploitation as defined by Art. 351 GPC; i) the offences provided for in Art. 20 to 23 of Law 4139/2012 [Drug trafficking] (Government Gazette A΄ 74); j) the offences provided for in Art. 15 and 17 of Law 2168/1993 [Crimes related to weapons, ammunition, explosives etc.] (Government Gazette A΄ 147); ja) the offences provided for in Art. 53, 54, 55, 61 and 63 of Law 3028/2002 ["Protection of antiquities and cultural heritage in general"] (Government Gazette A΄ 153); jb) the offences provided for in Art. 8 §§ 1 and 3 of Presidential Decree 181/1974 ["Protection from ionised radiation"] (Government Gazette A΄ 347); jc) the offences provided for in Art. 29 §§ 5 to 8 and Art. 30 of Law 4251/2014 ["Code of Immigration and Social Integration"] (Government Gazette A΄ 80); jd) the offences provided for in the third, fourth and sixth Art. of Law 2803/2000 ["Protection of the financial interests of the European Communities"] (Government Gazette A΄ 48); je) the offences provided for in Art. 28 to 31 of Law 4443/2016 [Insider Trading and Capital Market Manipulation Crimes] (Government Gazette A΄ 232); jf) the offenses of (aa) tax evasion provided for in Art. 66 of Law 4174/2013 (Government Gazette A΄ 170) with the exception of the first subparagraph of § 5 (bb) smuggling provided for in Art. 155 to 157 of Law 2960/2001 (Government Gazette A΄ 265), (cc) the non-payment of debts to the State provided for in Art. 25 of Law 1882/1990 (Government Gazette A΄ 43), with the exception of § 1 (a) and the non-payment of debts resulting from financial penalties or fines imposed by the courts or by administrative and other authorities, jg) the offenses provided for in Art. 28 § 3 of Law 1650/1986 (Government Gazette A΄ 160), jh) any other offence punishable by deprivation of liberty for a minimum of more than six months and having generated any type of economic benefit".

profit, even if it is of lesser to medium importance (as it includes misdemeanours punishable by imprisonment of a few months).

(IV) It is noteworthy that *tax crimes* are mentioned explicitly as predicate offences and in recent years, after the eruption of the fiscal crisis in Greece, have also been used very often as a basis for initiating proceedings for ML. However, there are still many difficulties in distinguishing the dirty from the legitimate property of the perpetrator of the predicate offence, especially in those tax offences which do not involve any illegal acquisition or embezzlement of new assets but relate to legally obtained property and consist in the avoidance of expenditures, such as the evasion of income tax or the non-payment of debts to the State.

(V) According to Art. 3 § 1 Law 4557/2018, the notion of *property* includes "assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, as well as documents or data of any kind, printed, electronic or digital, evidencing a title or rights to acquire such assets". Furthermore, pursuant to Art. 40 § 1 Law 4557/2018, property which can be an object of laundering acts and confiscation is every asset derived from a predicate offence or acquired directly or indirectly out of the proceeds of such an offence.

(VI) As regards to the notion of *laundering acts*, the Greek legislator has *criminalised all types* of ML provided for in the recommendations of the FATF and in the relevant UN and Council of Europe Conventions, *including those types which he had the discretionary power pursuant to the respective international texts not to criminalise*.[7] In particular, he has criminalised not only the first two types of ML, the so-called genuine ML, i.e. the conversion or transfer of illicit property and the concealment or disguise of illicit property, but also the third type of ML, i.e. the acquisition, possession or use of illicit property, the so-called non-genuine ML. At the same time, he has also criminalised the so-called self-laundering, i.e. the cases in which the person who commits ML operations is also the person who committed the predicate offence. According to the provisions of Law 4557/2018, criminal liability for the predicate offence does not exclude the punishment of offenders for the crime of ML when the *actus reus* elements of the specific type of ML committed are different from those of the predicate offence.[8]

[7] See Art. 2 § 2 of Law 4557/2018: "Money laundering consists in the following acts: a) the conversion or transfer of property, knowing that it originates from a criminal activity or an act of participation in such an activity in order to conceal or disguise its illicit origin or to provide assistance to any person involved in this activity for the purpose of avoiding the legal consequences of his/her acts; b) the concealment or disguise of the truth as to the nature, the origin, the disposition, the movement or the use of property or the place where the property was acquired or it is at present, or the ownership of the property or related rights, knowing that such property derives from a criminal activity or an act of participation in such an activity; c) the acquisition, possession or use of property, knowing at the time of acquisition or management, of the fact that the property derives from a criminal activity or an act of participation in such an activity; d) the use of the financial sector by placing on it, or transferring through it, of proceeds of crime in order to lend false legitimacy to such proceeds; e) the establishment of an organization or a group of at least two individuals for the commission of one or more of the acts referred to in (a) to (d) and the participation in such an organization or group; f) the attempt to commit, instigate, incite, facilitate or counsel third parties in committing one or more of the acts referred to in (a) to (d)."

[8] See Art. 39 § 2 of Law 4557/2018: "Criminal liability for the predicate offence shall not exclude the punishment of the respective offenders (the principal and his/her accomplices) for the offences referred to in (a), (b) and (c) of this paragraph [basic and aggravated forms of ML offences], if the actus reus elements of the ML acts are different from those of the predicate offence".

(VII) The above-mentioned extensive criminalisation, in particular the combined criminalisation of *non-genuine* ML and *self-laundering*, can provide a very effective prosecution tool for the following reason: The third type of ML, which consists in the possession or use of the illicit property, is a *continuous crime*. As long as the perpetrator of the predicate offence possesses the original illicit assets or other assets, which he/she acquired through the conversion of the original assets, he/she continues to commit a new crime, i.e. the ML crime, the *statutory limitation period* of which does not even start running. Therefore, law enforcement and judicial authorities may intervene and prosecute the offender, even if the limitation period for the predicate offence has expired.[9] This has been happening in a large number of corruption cases in Greece over the past 15 years.[10] Corruption crimes, mainly consisting of bribery of judges and political officials, had taken place in the late 1990s or early 2000s when the crime of passive bribery was punishable in Greece only as a misdemeanour and thus subject to a statutory limitation period of five years. When the crimes came to light, their statutory limitation period had expired, and their prosecution was therefore barred. In order to overcome this problem, the Greek authorities made extensive use of the AML criminal provisions and initiated corresponding proceedings, which led to heavy prison sentences. A well-known case falling under the above category is the case of the former Greek Minister of Defence, Mr. Akis Tsoxatzopoulos, who is serving a long prison term not for the bribery crimes he committed but for the offence of laundering the bribes he received.

(VIII) For all ML crimes, Law 4557/2018 requires that the perpetrator acts with *knowledge* (and acceptance) of the criminal origin of the assets and/or with the *purpose* to conceal, disguise or lend false legitimacy to that origin or to provide assistance to any person involved in the predicate offence.[11] It is in this respect that there is no room for negligently committing any type of ML. Until the enactment of Law 4557/2018, there was a special legal provision (Art. 2 § 5 Law 3691/2008) providing that the state of mind of the perpetrator could be drawn from the overall factual circumstances of committing the act. Law 4557/2018 does not include any comparable provision any more.

(IX) The prosecution and conviction for any ML crime are not dependent upon the previous prosecution, let alone the conviction for the corresponding predicate offence.[12] However, according to Greek case law, the *predicate offence must be identified in relation to its main elements*. A mere suspicion about the commission of a predicate offence and its perpetrators is inadequate. The identity of the predicate offence, the

[9] According to Art. 39 § 3 subparagraph 2 of Law 4547/2018, the elimination of the punishability of a predicate offence due to prescription (i.e. due to the expiration of the statutory limitation period for its prosecution) does not affect the punishability of the ML offences related to the proceeds of this predicate offence.

[10] See indicatively Areios Pagos (Supreme Civil and Criminal Court of Greece), Decision in Council no. 924/2009, Decision in Council no. 1925/2010, and Decision no. 1149/2017.

[11] See above, Kaiafa-Gbandi 2015, 234–235.

[12] See Art. 39 § 2 of Law 4557/2018: "Prosecution and conviction for money laundering do not require criminal prosecution or conviction of the culprit for the predicate offense".

time of its commission[13] and its perpetrators must be adequately specified. The mere inability of an accused person to justify the possession of a certain amount of money is not considered to be a sufficient evidential basis for establishing the criminal origin of this amount and rendering the accused person liable for ML.

(X) The prosecution of a ML crime is possible, even if the *criminal activities* which generated the illicit property have been *carried out abroad* and Greece has no jurisdiction to punish them. However, it is necessary that those activities are punishable under the law of the foreign country in which they took place and that they would constitute a predicate offence if they had been committed in the Greek territory.[14]

(XI) ML crimes are subject to *extremely severe penalties*. They are characterised as felonies punishable in their basic form with a prison term of between five to 10 years and a pecuniary penalty ranging from EUR 20,000 to EUR 1 million. Furthermore, according to the current law, it constitutes an aggravating circumstance, which leads to imprisonment up to 20 years and a pecuniary penalty up to EUR 1.5 million or EUR 2 million if (a) the ML act is carried out by an official of a legal person falling within the categories of legal entities which are obliged to implement the preventive AML measures (e.g. banks, insurance companies, etc.), (b) the predicate offence is a crime of bribery, (c) the offender carries out ML acts by profession or by habit or is a recidivist or (d) the offender acts on behalf of, for the benefit of, or within a criminal or terrorist organisation or group.[15]

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[13] See indicatively Areios Pagos (Supreme Civil and Criminal Court of Greece), Decision in Council no. 2035/2009.

[14] See Art. 2 § 3 of Law 4557/2018: "Money laundering also occurs when the activities which generated the property to be laundered were carried out in the territory of another country, provided that these activities would be a predicate offence if committed in Greece and are punishable according to the law of such other country".

[15] See Art. 39 § 1 of Law 4557/2018: "a) Persons who commit money laundering acts [see Art. 2 § 2 of Law 4557/2018 as cited in Kaiafa-Gbandi 2015, 234–235.] shall be punished with imprisonment from 5 to 10 years and a pecuniary penalty of €20,000 to €1,000,000. b) The perpetrator of the offence referred to in (a) above shall be punished with imprisonment from 5 to 20 years and a pecuniary penalty of €30,000 to €1,500,000 if he/she acted as an employee of an obliged legal person or if the predicate offence is included in the offences referred to in Art. 4 (c), (d) and (e) [active and passive bribery crimes, see Council Regulation (EU) 2017/1939 of 12. October 2017, Implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("The EPPO"). On the establishment of the EPPO indicatively see Csonka–Juszczak–Sason 2017, 125 et seq, Kuhl 2017, 135 et seq., Met-Domestici 2017, 143 et seq., Guiffrida, 2017, 149 et seq., Di Francesco Maesa 2017, 156 et seq.], even if these offences are misdemeanours [i.e. punishable with a maximum prison term of 5 years]. c) The perpetrator of the offence referred to in (a) above shall be punished with imprisonment from 10 to 20 years and a pecuniary penalty of €50,000 to €2,000,000 if he/she engages in such activities by profession or by habit or he/she is a recidivist or has acted on behalf of, for the benefit of, or within a criminal or terrorist organization or group d) An employee of an obliged legal person or any other person obliged to report suspicious transactions shall be punished with imprisonment up to 2 years if he/she intentionally fails to report to the competent authorities suspicious or unusual transactions or activities or provides false or misleading data, in breach of the relevant legal, administrative or regulatory provisions and rules, provided that his/her act is not punishable with heavier criminal sanctions by other provisions. e) Criminal responsibility for the predicate offence shall not exclude the punishment of offenders (the principal and his/her accomplices) for the offences referred to in (a), (b) and (c) above, if the actus reus elements of the money laundering offence are different from those of the predicate offence. f) If the envisaged penalty for the predicate offence is imprisonment up to 5 years, the offender shall be punished for the money laundering offence with imprisonment from 1 to 5 years and a pecuniary penalty of €10,000 to €500,000. The same sanction shall apply to any perpetrator of a money laundering offence who is not an accomplice to the predicate offence if he/she is a blood relative of the perpetrator of the predicate offence or a relative by marriage up to second degree, or a spouse, adoptive parent or adopted child thereof. g) If the perpetrator of the predicate offence

(XII) Acts of ML are punishable as *misdemeanours* with a maximum imprisonment of up to five years or less only (a) if the predicate offence is also a misdemeanour and the illicit property produced does not exceed the amount of EUR 15,000 or (b) if the predicate offence is a misdemeanour and the ML crime is committed by the perpetrator of the predicate offense or by blood relatives or relatives by marriage of the perpetrator of the predicate offence. In the latter case referred to in (b), the provision for the more lenient penalty does not apply if the predicate offence is a crime of bribery or the offender engages in ML acts by profession or by habit or is recidivist or he/she acts on behalf or for the benefit of or within a criminal or terrorist organisation or group. If the perpetrator of the predicate offence has been convicted of that offence, then the criminal sanction which can be imposed on him/her or on any person of those referred to in (b) above for laundering the illicit proceeds generated by the same predicate offence may not exceed the penalty imposed for the commission of the predicate offence.[16]

(XIII) The direct and indirect proceeds of the predicate offences, as well as the proceeds of the ML offences, are subject to *compulsory confiscation*. According to Art. 46 § 1 of Law 4557/2018, "assets derived from a predicate offence […] or from an ML offence […] or acquired directly or indirectly out of the proceeds of such offences, or the means that were used or were going to be used for committing these offences shall be seized and, if there is no legal reason for returning them to the owner […] shall be compulsorily confiscated by virtue of the court's convicting decision". There are also provisions for a *Value-Based* Confiscation,[17] a *Third-Party* Confiscation,[18] a *Non-*

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was convicted for this offence, then the criminal sanction which can be imposed on him/her or a third person of those referred to in the second sentence of item (f) for laundering the illicit proceeds generated by the same predicate offence, may not exceed the penalty imposed for the commission of the predicate offence. h) The provisions of items (f) and (g) do not apply to the circumstances of item (c) above and to the predicate offences referred to in (b) above. i) If the envisaged sanction for the predicate offence is imprisonment up to 5 years and the illegal proceeds do not exceed €15,000, the penalty for the offence of money laundering shall be imprisonment of up to 2 years. If the circumstances referred to in (c) above apply to the perpetrator of the predicate offence or to a third person, the penalty for the offence of money laundering shall be imprisonment from 2 to 5 years and a pecuniary penalty from €30,000 to €500,000. j) As regards the implementation of Art. 88 to 93 of the GPC [: provisions providing for the imposition of more severe penalties in cases of recidivism etc.] in cases of money laundering crimes shall also be taken into account irrevocable convictions handed down by courts of other States Parties to the 2005 Council of Europe Convention on Money Laundering, seizure and confiscation of the proceeds of crime and the financing of terrorism (Law 4478/2017, Government Gazette A´ 91).

[16] See Art. 39 § 1 items (f), (g), (h) and (j) of Law 4557/2018, as cited in Kaiafa-Gbandi 2016, 13 et seq.

[17] See Art. 40 § 2 of Law 4557/2018: "Where the assets or proceeds [generated by the predicate offence or the ML offence] no longer exist or have not been found or cannot be seized, assets of a value equal to that of the said assets or proceeds as at the time of the convicting decision shall be seized and confiscated. Their value shall be determined by the court. The court may also impose a pecuniary penalty up to the value of the said assets or proceeds if it rules that there are no additional assets to be confiscated or the existing assets fall short of the value of the said assets or proceeds".

[18] See Art. 40 § 1 subparagraph 3 of Law 4557/2018: "Confiscation can be imposed even if the assets or means belong to a third person, provided that such person was aware of the predicate offence or the offences referred to in Art. 2 [ML offences] at the time of their acquisition".

Conviction-Based Confiscation[19] and an *Extended* Confiscation.[20] For the imposition of the latter, the Greek legislator has opted for a civil procedure and therefore describes the respective confiscation measure as "compensation" which has to be claimed by the Greek State through the filling of a lawsuit before the civil courts.

(XIV) In order to secure the confiscation of the illicit proceeds, which can take place only in the later stages of the criminal procedure, Law 4558/2018 provides also for *measures of asset freezing*.[21] Asset freezing can take place even at the earliest stages of information gathering by the Hellenic FIU. The head of the FIU may freeze assets by issuing an order. If an ordinary investigation (for a ML crime or a predicate offence) is conducted by an investigative judge, he/she may issue, in agreement with the public prosecutor, a freezing order to secure assets that could be the proceeds of the investigated crime or could be later used for a Value-Based Confiscation. The interested party may appeal against the order to the competent judicial council. The head of the FIU and the investigative judge may freeze all types of assets (bank accounts, bank deposit boxes, bonds, invested money, real estate, etc.), as well as prohibit the liquidation of assets or any change of their status.

(XV) Finally, taking into consideration that the Greek legal order does not recognise criminal liability of legal persons, Law 4557/2018 provides for the *imposition of administrative sanctions upon legal persons* and other legal entities "if any money

[19] See Art. 40 § 3 subparagraph 1 of Law 4557/2018: "Confiscation shall be ordered even where no criminal proceedings have been initiated because of death of the offender or where the initiated prosecution was terminated or declared inadmissible. In these cases, confiscation shall be ordered by a decision of the competent judicial council or by the court decision terminating prosecution or declaring prosecution inadmissible. If no criminal proceedings have been initiated, confiscation shall be ordered by a decision of the judicial council of the misdemeanours' judges court having competence *ratione loci*. The provisions of Art. 492 and 504 § 3 of the Greek Code of Criminal Procedure shall also apply by way of analogy to this case."

[20] See Art. 41 of Law 4557/2018: "1. The State may, following a report or an opinion of the State Legal Counsel, claim before the relevant civil tribunals any other property acquired by a person who has been irrevocably sentenced to a custodial sentence of at least 3 years for a crime referred to in § 2, when this property has been acquired by the commission of another crime referred to in § 2, even where no criminal proceedings for that latter offence was initiated due to death of the offender, or even where the prosecution for that latter offence was terminated or declared inadmissible. 2. Paragraph 1 shall apply to the following offenses, provided that they may, directly or indirectly, lead to an economic benefit: a) in the offences provided for in Art. 4 (a) to (i) of Law 4557/2018 [see Council Regulation (EU) 2017/1939 of 12. October 2017, Implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("The EPPO"). On the establishment of the EPPO indicatively see Csonka–Juszczak–Sason 2017, 125 et seq, Kuhl 2017, 135 et seq., Met-Domestici 2017, 143 et seq., Guiffrida, 2017, 149 et seq., Di Francesco Maesa 2017, 156 et seq.], b) in the offences provided for in Art. 207 to 208a GPC [counterfeiting of currencies and circulation of counterfeit currencies], (c) in the offences provided for in Art. 216 [forgery], 372 [theft], 374 to 375 [aggravated forms of theft and embezzlement] and 394 GPC [acceptance of stolen goods], in so far as they relate to means of payment other than cash, d) in the offences provided for in Art. 348A to 348C [child pornography, attracting children for sexual purposes etc.], 349 §§ 1 and 2 [pimping], and e) in offences provided for in Art. 292b §§ 2–3 [crimes against the security of telephone communications] and 381A §§ 2–3 GPC [damage to electronic data]. 3. If the property referred to in § 1 has been transferred to a third party, the convicted offender shall be liable for compensation equal to its value at the time of the hearing of the claim. The above claim may also be filed [a] against a third party who acquired the property by a gratuitous cause, if at the time of the acquisition he/she was a spouse or a relative in blood with the convicted offender or his/her brother or foster child [b] as well as against any third party who acquired the property after the initiation of criminal proceedings for the above crime, if those persons at the time of acquisition were aware of the criminal prosecution against the convicted offender. The third person and the convicted offender are jointly and severally liable."

[21] See Art. 42 of Law 4557/2018.

laundering or predicate offence … is committed to the benefit or on behalf of a legal person or an entity by a natural person acting either individually or as member of a legal person's or entity's organ and having a directorial status within them or a power of their representation or an authorisation to take decisions on their behalf or to exercise control within them".[22] Administrative sanctions can also be imposed where the lack of supervision or control by any natural person of those referred to above has made possible the commission, by a natural person under its authority or by a trustee of the legal person or the entity, of any predicate or ML offence for the benefit of or on behalf of that legal person or entity.[23] The administrative sanctions provided for include administrative fines; temporary or permanent suspension of the license for the operation of the legal person's or entity's businesses; temporary prohibition to exercise specific activities, set up branches or increase the share capital; and temporary or permanent exclusion from public funding, aids, grants, subsidies or advertising of the public sector or public legal entities.[24] The cumulative or disjunctive imposition of the said sanctions and their harshness are to be determined based on the gravity and the duration of the offence, the degree of liability of the legal person or entity, the financial status of the legal person or entity, the amount of the illicit revenues or the benefits acquired by the offence, the damages caused to third persons and the acts of the legal person or entity after the commission of the offence, as well as the recidivism of the legal person or entity.[25]

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[23] See Art. 45 § 2 of Law 4557/2018.

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Hungary

THE FIGHT AGAINST MONEY LAUNDERING IN HUNGARY

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1. Introductory remarks

The *fight against money laundering* has significant importance in the *protection of the financial interests of the European Union* since this criminal offence can also negatively affect the EU's financial interests. Therefore, the PIF Directive of the European Union also regulates money laundering as a criminal offence affecting the Union's financial interests.[1] However, the European Union has already adopted several other legal acts against money laundering since the EU legislator recognised that money laundering could jeopardise the functioning of the internal market because the lack of EU action against money laundering could lead Member States, for the purpose of protecting their financial systems, to adopt measures which could be inconsistent with completion of the single market.[2]

Because of the legal harmonisation obligation resulting from the EU membership of the country, Hungary also participates in the *fight against money laundering with criminal and non-criminal measures* as well. The most important objective of this paper is to analyse the means of the fight against money laundering in Hungary. In this context, we intend to answer the question of whether Hungarian criminal law is in compliance with the relevant EU regulations, in particular with the new Anti-Money Laundering Directive of the EU adopted in 2018.

2. Fight against money laundering at EU level

Before we begin to analyse the Hungarian Anti-Money Laundering regulation, it is essential to briefly mention the most important results of the *fight against the criminal offence at the EU level* since Hungary has an implementation obligation in connection with the EU provisions. The Anti-Money Laundering measures of the European Union

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[1] Art. 4 of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [OJ L 198, 28.7.2017, 29–41] (hereinafter: PIF Directive).

[2] See: Jacsó 2004, 143–144; Jacsó 2005, 99; Udvarhelyi 2013a, 458.

can be divided into two main categories. On the one hand, there are *five Anti Money Laundering Directives*[3] which regulate the *preventive instruments against money laundering* with their primary objective being to prevent the financial sector from being used for the purposes of money laundering by requiring customer due diligence and reporting obligations.[4] On the other hand, there is a *Criminal Law Directive*[5] that contains the *repressive measures of combatting money laundering* and lays down *minimum standards for criminal offences and sanctions*.[6] Furthermore, as it was mentioned before, the *PIF Directive* also contains regulations in connection with money laundering.

Within the framework of this paper, we only analyse the *Criminal Law Directive of 2018* in detail.[7] The Preamble of the Directive emphasises that money laundering and the related financing of terrorism and organised crime are significant problems at the EU level because they damage the integrity, stability and reputation of the financial sector and threaten the internal market and the internal security of the Union. In order to tackle these problems and to complement and reinforce the application of the preventive Anti-Money Laundering Directives, this Directive aims to combat money laundering by means of criminal law, enabling more efficient and swifter cross-border cooperation between competent authorities.[8]

The Directive first sets out the *definition* and the *predicate offences of money laundering*. In connection with the latter, it has to be mentioned that the *list of predicate offences has significantly been expanded* compared to the previous and current preventive directives.[9] According to the currently effective preventive directives, predicate offences of money laundering can be terrorism-related criminal offences, drug-related crimes, the activities of criminal organisations, fraud – at least serious forms – affecting the Union's financial interests, corruption and all offences – including tax crimes relating to direct taxes and indirect taxes – that are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards Member

[3] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [OJ L 166, 28.06.1991, 77–82]; Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering – Commission Declaration [OJ L 344, 28.12.2001, 76–82]; Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [OJ L 309, 25.11.2005, 15–36]; 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, 73–117]; 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, 19.06.2018, 43–74].

[4] See in details: Bausch–Voller 2014, 6–9; Bülte 2010, 94–99; Gál 2004, 42–45; Jacsó 2004, 142–157; Jacsó 2005, 98–122; Jacsó 2009, 221–228; Jacsó–Udvarhelyi 2017a, 8–24; Langlois 2013, 96–98; Met-Domestici 2016, 170–179; Udvarhelyi 2013a, 456–464, 467–469.

[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, 22–30].

[6] Art. 1(1) of Directive 2018/1673.

[7] See in details: Schröder–Blaue 2019, 161–168.

[8] Preamble (1) of Directive 2018/1673. See Jacsó 2017, 128–129; Jacsó–Udvarhelyi 2017b, 40.

[9] See: Jacsó 2017, 130; Jacsó–Udvarhelyi 2017b, 43–44.

States that have a minimum threshold for offences in their legal systems, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months.[10] In contrast, the *Criminal Law Directive* lists more than *20 criminal offences* that are considered criminal activity and therefore can be predicate offences of money laundering:

– participation in an organised criminal group and racketeering;
– terrorism;
– trafficking in human beings and migrant smuggling;
– sexual exploitation;
– illicit trafficking in narcotic drugs and psychotropic substances;
– illicit arms trafficking;
– illicit trafficking in stolen goods and other goods;
– corruption;
– fraud;
– counterfeiting of currency;
– counterfeiting and piracy of products;
– environmental crime;
– murder, grievous bodily injury;
– kidnapping, illegal restraint and hostage-taking;
– robbery or theft;
– smuggling;
– tax crimes relating to direct and indirect taxes, as laid down in national law;
– extortion;
– forgery;
– piracy;
– insider trading and market manipulation;
– cybercrime.[11]

The Directive defines these offences, where relevant, by *reference to the related legal act of the EU*. In the case of the other criminal offences, Member States should be able to decide how to delimit the range of offences.[12] As a *general rule*, however, the Directive also stipulates – in accordance with the preventive Anti-Money Laundering Directives – that any offences should be regarded as a predicate offence of money laundering which are punishable, in accordance with national law, 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*.[13]

It is also important to mention that the provisions of this Directive do not apply to money laundering as regards property derived from criminal offences affecting the

[10] Art. 3(4) of Directive 2015/849; Art.1(2) of Directive 2018/843.
[11] Art. 2(1) of Directive 2018/1673.
[12] Preamble (5) of Directive 2018/1673.
[13] Art. 2(1) of Directive 2018/1673.

Union's financial interests, which is subject to specific rules by the PIF Directive.[14] However, it should be noted that the PIF Directive still refers to the provisions the 4th preventive Anti-Money Laundering Directive in connection with the definition of money laundering.

The *definition of money laundering* is regulated similarly to the previous preventive directives. Accordingly, Member States are required to take the necessary measures to ensure that the following forms of conduct, when committed intentionally, are punishable as a criminal offence:

(a) The conversion or transfer of property,[15] knowing that such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action.

(b) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity.

(c) The acquisition, possession or use of property, knowing at the time of receipt that such property was derived from criminal activity.[16]

As it could be seen, the Directive criminalises the aforementioned forms of conduct when they are committed *intentionally* and with the *knowledge that the property was derived from criminal activity*. When determining whether the property is derived from criminal activity and whether the person knew that, the specific circumstances of the case should be taken into account, such as the fact that the value of the property is disproportionate to the lawful income of the accused person and that the criminal activity and acquisition of property occurred within the same time frame. Intention and knowledge can be inferred from *objective, factual circumstances*.[17]

Beside the criminalisation of intentional money laundering, the Directive also allows the Member States to punish the aforementioned forms of conduct as a criminal offence where the offender *suspected or ought to have known* that the property was derived from criminal activity.[18] In connection with this provision, the Preamble of the Directive also emphasises that the Directive only provides for minimum rules and therefore Member States are free to adopt or maintain more stringent criminal law rules in that area. Consequently, Member States should be able to provide that *money laundering committed recklessly or by serious negligence* constitutes a criminal offence.[19]

Since the requirements relating to the accurate determination of the predicate offences extremely aggravate the fight against cross-border money laundering, the Di-

[14] Art.1(2) of Directive 2018/1673.

[15] According to Art. 2(2) of Directive 2018/1673 property means assets of any kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or an interest in, such assets.

[16] Art. 3(1) of Directive 2018/1673. See Art. 1(3) of Directive 2015/849.

[17] Preamble (13) of Directive 2018/1673.

[18] Art. 3(2) of Directive 2018/1673.

[19] Preamble (13) of Directive 2018/1673.

rective contains a number of specific rules in connection with predicate offences.[20] According to the Directive, 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, a conviction for money laundering is also 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*. The Directive also stipulates that money laundering can also be punishable if the property derived from a predicate offence that occurred in the *territory of another Member State or of a third country*, where that conduct would constitute a criminal activity had it occurred domestically. However, with the exception of some predicate offences listed in the Directive, Member States can prescribe the requirement of *double incrimination*, according to which the relevant conduct also has to constitute a criminal offence under the national law of the other Member State or of the third country where that conduct was committed.[21]

Contrary to the previous preventive directives, the Criminal Law Directive obliges Member States to criminalise *self-laundering* as well. That means that – in the case of the conversion or transfer of property and the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, the property derived from criminal activity – the perpetrator of the predicate offence can be held liable for money laundering as well. However, the perpetrator of the predicate offence is not punishable for the mere acquisition, possession or use of the property.[22]

Due to the differences between the criminal justice systems of the Member States, the Directive requires the Member States to ensure that *aiding and abetting, inciting and attempting* money laundering are punishable as criminal offences.[23]

The Directive also contains detailed provisions on the *penalties to be imposed*. The Directive obliges the Member States to prescribe *effective, proportionate and dissuasive criminal penalties*, and in serious cases, money laundering has to be punishable by a *maximum term of imprisonment of at least four years*. The Directive also provides the Member States the possibility to prescribe additional sanctions or measures when they consider it necessary.[24] Member States are required to regard it as an *aggravating circumstance* if money laundering was committed within the framework of a criminal organisation[25] or if the perpetrator is an obliged entity under the 4th Anti-Money

[20] See in details Jacsó 2017, 130–131; Jacsó–Udvarhelyi 2017b, 44–45.

[21] Art. 3(3)–(4) of Directive 2018/1673.

[22] Art. 3(5) of Directive 2018/1673. See Jacsó–Udvarhelyi 2017b, 45.

[23] Art. 4 of Directive 2018/1673.

[24] Art. 5 of Directive 2018/1673.

[25] A criminal organisation means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit. Art. 1(1) of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [OJ L 300, 11.11.2008, 42–45].

Laundering Directive[26] and has committed the offence in the exercise of their professional activities. Member States may also assess whether it is considered an aggravating circumstance if the laundered property is of considerable value or if the laundered property derives from certain types of predicate offences.[27]

Apart from natural persons, the Directive also obliges Member States to ensure the *liability of legal persons*.[28] Among the *sanctions which can be imposed on legal persons*, the Directive lists criminal or non-criminal fines; exclusion from entitlement to public benefits or aid; temporary or permanent exclusion from access to public funding, including tender procedures, grants and concessions; temporary or permanent disqualification from the practice of commercial activities; placement under judicial supervision; a judicial winding-up order; and temporary or permanent closure of establishments that have been used for committing the offence.[29] Furthermore, the Directive also contains regulations in connection with the *freezing and confiscation of the proceeds derived from and instrumentalities used or intended to be used in the commission or contribution to the commission of the offences*[30] and with the *establishment of the jurisdiction of the Member States.*[31]

3. Fight against money laundering in Hungary

Similarly to the international requirements, the Hungarian Anti-Money Laundering policy is based on two different pillars. Therefore, we can distinguish between *criminal law, repressive measures*, which are regulated in the Hungarian Criminal Code, and *non-criminal, preventive measures*, which are specified in other Acts.

3.1. Repressive measures against money laundering

In Hungary, money laundering has been *criminalised since 1994*.[32] Parallel with the modification of the former Hungarian Criminal Code,[33] a new Act[34] was adopted that prescribed specific obligations for the members of the financial sector. With this legislation, Hungary fulfilled its legal harmonisation obligation that was prescribed as a condition for its accession to the European Union, especially the implementation of the 1st Money Laundering Directive of the EU. Since the enactment of money laundering in the Hungarian Criminal Code, the criminal offence has been modified several times although there has not been significant judicial practice in connection with the offence.

[26] See: Art. 2 of Directive 2015/849.
[27] Art. 6 of Directive 2018/1673.
[28] Art. 7 of Directive 2018/1673.
[29] Art. 8 of Directive 2018/1673.
[30] Art. 9 of Directive 2018/1673.
[31] Art. 10 of the Directive 2018/1673.
[32] Act IX of 1994 on the Modification of Criminal Law Acts.
[33] Act IV of 1978 on the Criminal Code (hereinafter: previous CC).
[34] Act XXIV of 1994 on the Prevention and Combating of Money Laundering.

The main reason for the modifications was the *fulfilment of the obligations of Hungary resulting from EU law and other the international obligations*.

The *currently effective Hungarian Criminal* Code[35] entered into force on 1 July 2013 and regulates money laundering in a *separate Chapter,*[36] which contains two criminal offences: *money laundering*[37] and *failure to comply with the reporting obligation related to money laundering.*[38] According to the Hungarian legislator, the *protected legal interest* of money laundering is, on the one hand, the fight against organised criminality and terrorist financing and, on the other hand, the trust in the proper functioning of the legal economy and the protection of the financial institutions and other participants in financial life.[39]

Compared with the previous Criminal Code, it can be stated that the new Hungarian Criminal Code has also modified the criminal offence of money laundering in several places. These modifications mostly affected the *predicate offences of money laundering* and the *punishable conduct and the intent*.[40] The reasons for these amendments were the implementation of the modified international obligations of Hungary with particular emphasis on the recommendations elaborated by MONEYVAL within the framework of its Fourth Evaluation Round in 2010.[41]

3.1.1. Predicate offences of money laundering

One of the most important modifications of the new Criminal Code related to money laundering was the *extension of the predicate offences of money laundering*.

In connection with the predicate offences of money laundering, it can be stated that their scope has continuously been expanded since its enactment in the Criminal Code. The legislative proposal that was originally submitted to the Hungarian Parliament in 1994 included an exhaustive list of the predicate offences of money laundering: *terrorism, misuse of narcotic drugs* and *smuggling of weapons*. During the debate, the list of predicate offences was widened. Therefore, the original text of the previous Criminal Code punished money laundering in connection with *criminal offences punishable by imprisonment of more than five years, as well as illegal immigrant smuggling, misuse of narcotic drugs and violation of international legal obligations*.[42] In 1998, two other criminal offences, *bribery and bribery in international relations*, were added to the catalogue of predicate offences. According to the modification in 1999, *all criminal offences punishable by imprisonment* could become predicate offences of money laun-

[35] Act C of 2012 on the Criminal Code (hereinafter referred to as: CC).
[36] Chapter XL of the CC.
[37] Section 399–400 of the CC.
[38] Section 401 of the CC.
[39] Jacsó 2013, 620; Molnár 2012, 706.
[40] See in details Udvarhelyi 2013b, 313–318.
[41] *https://rm.coe.int/report-on-fourth-assessment-visit-anti-money-laundering-and-combating-/16807161bb* (02.05.2019.).
[42] See Fejes 1994, 53.

dering. Finally, according to the currently effective Criminal Code, *any punishable criminal offence* could become a predicate offence of money laundering.

It is worth emphasising that most *international documents define the scope of predicate offences much more narrowly* than Hungarian criminal law.[43] This means that the *Hungarian Criminal Code maintains stricter regulation than the relevant EU Directives* since it does not distinguish between criminal offences. It also means that, according to the Hungarian Criminal Code, assets arising out of any criminal offence can be subject to money laundering.

It has to be mentioned that the Hungarian Criminal Code uses the term *"punishable criminal offence"*, which means that money laundering can be punished even if the perpetrator of the predicate offence is unknown or is not punishable. The punishment of the perpetrator of the predicate offence is therefore not a prerequisite for the punishment of the perpetrator of the money laundering. Furthermore, in connection with the liability for money laundering, it is also irrelevant whether the predicate offence falls under Hungarian jurisdiction. Nowadays, money laundering is committed almost exclusively on an international scale, which means that a criminal offence committed abroad can also be a predicate offence for money laundering, provided that it is punishable in both countries. In conclusion, it can be stated that *any criminal offence committed by anybody, anywhere that is punishable under Hungarian law can be a predicate offence of money laundering*.[44]

3.1.2. Punishable conducts of money laundering

The criminal offence of money laundering in the Hungarian Criminal Code can be divided into *four main categories of punishable conduct*. The first three cases can be committed *intentionally*, while the fourth category is *negligent money laundering*. Among the three intentional categories, the first two can be committed by *anybody except the perpetrator of the predicate offence*, while the third can only be committed by the *perpetrator of the predicate offence*. The punishable conducts of these categories are listed in the following table.[45]

According to *Section 399(1) of the Criminal Code*, the perpetrator can be held liable for money laundering if he converts or transfers the asset[46] arising from criminal offence or performs any financial transaction or receives any financial service[47] in con-

[43] See in details Udvarhelyi–Jacsó 2014, 350–356; Jacsó–Udvarhelyi 2017a, 12–14.

[44] See: Gál 2013, 51; Molnár 2012, 707; Tóth 1998, 41.

[45] Jacsó 2013, 622.

[46] According to Section 402(1) of the CC, the term asset shall also cover instruments embodying rights to some financial means and dematerialized securities, which allow access to the value stored in such instrument in itself to the bearer, or to the holder of the securities account in respect of dematerialized securities.

[47] According to Section 402(2) of the CC, financial activities and financial services shall mean financial services and activities auxiliary to financial services, investment services and activities auxiliary to investment services, commodity exchange services, investment fund management services, venture capital management services, exchange services, central depository services, the activities of bodies acting as central counterparties, insurance services, reinsurance services, and the activities of independent insurance intermediaries, voluntary mutual insurance funds, private pension funds and institutions for occupational retirement provision.

nection with the asset. Furthermore, it is also punishable if the perpetrator conceals or disguises the origin of the asset and any right attached to the asset or any changes in this right or conceals or suppresses the place where the asset can be found. This category of money laundering is often called *dynamic money laundering* since this conduct always results in the transfer of property.[48] According to our point of view, however, it is not necessarily true in case of the forms of conduct defined in Point b) of Section 399(1).

In connection with the forms of conduct described in Point a) of Section 399(1), the Criminal Code also requires a *specific intent* from the perpetrators: The aim of the offender has to be to *conceal or disguise the origin of the asset* or to *frustrate the criminal proceedings conducted against the perpetrator of a punishable criminal offence committed by others*. In connection with the forms of conduct listed in Point b) of Section 399(1), however, the Criminal Code does not require any specific intent. According to the justification of the Criminal Code, the reason of this differentiation is compliance with international standards. As can be seen in the analysis of the Directive of the EU, the relevant international and EU documents also regulate these forms of conduct differently: While the conversion or transfer of property requires specific intent, the concealment or disguise of the true nature, source, location, disposition or movement of the property does not require any intent. Therefore, the Hungarian legislator has endeavoured to describe the punishable forms of conduct of money laundering in such a way that they could fully *cover those specified in international and EU documents* but with *respect to Hungarian legal language* and with the *intent to avoid unnecessary repetitions and overlaps*.[49]

The currently effective Criminal Code also modified the intent in connection with the conduct listed in Point a) of Section 399(1). In the previous Criminal Code, only the concealment of the origin of the asset was mentioned as the required intent of the perpetrator, whereas the new Criminal Code added two other alternative intents: the disguise of the origin of the asset and the frustration of the criminal proceedings conducted against the perpetrator of the predicate offence. The most important reason for this modification was the recommendations of MONEYVAL because the organisation was critical of the fact that the international conventions regulated both concealment and disguising as intent while the Hungarian Criminal Code only contained the former. The Hungarian authorities stated that the two terms have the same meaning, but this was not accepted by MONEYVAL. It is true that there are differences between the two types of conduct: While concealment is a passive behaviour because of which the perpetrator can only be punished if he has a legal obligation to disclose the data, disguising is an active behaviour when the offender deliberately attempts to hide the link between the perpetrator of the predicate offence and the assets deriving from this offence.[50] The new Criminal Code has corrected these shortcomings and has developed a *regulation which is fully in compliance with international standards*.

[48] Gál–Sinku 2008, 134.
[49] Molnár 2012, 708.
[50] Gál 2013, 54.

Table 1: Money laundering in the Hungarian Criminal Code

INTENTIONAL MONEY LAUNDERING (Section 399 of the CC)			
Money laundering committed by a person other than the perpetrator of the predicate offence			
1. Section 399(1) *"Dynamic money laundering"*	a)	**Punishable conduct:** *– converts the asset* *– transfers the asset* *– performs any financial transaction or receives any financial service in connection with the asset*	**Intent:** *aa) conceal or disguise the origin of the asset* *ab) frustrate the criminal proceedings conducted against the perpetrator of the predicate offence*
	b)	**Punishable conduct:** *– conceals or disguises the origin of the asset and any right attached to the asset or any changes in this right, or conceals or suppresses the place where the asset can be found*	
2. Section 399(2) *"Static money laundering"*	**Punishable conduct:** *– obtains the asset for himself or for a third person* *– safeguards, handles, uses or consumes the asset, or obtains other financial assets by way of or in exchange for the asset, or by using the consideration received for the asset*		
Money laundering committed by the perpetrator of the predicate offence			
3. Section 399(3) *"Self-laundering"*	**Punishable conduct:** *– uses the asset in his business activities* *– performs any financial transaction or receives any financial service in connection with the asset*		**Intent:** *– conceal or disguise the origin of the asset*
NEGLIGENT MONEY LAUNDERING (Section 400 of the CC)			
4. Section 400	**Punishable conduct:** *– uses the asset in his business activities* *– performs any financial transaction or receives any financial service in connection with the asset*		

Source: Jacsó 2013, 622.

In *Section 399(2) of the Criminal Code,* the legislator punishes the acquisition, safeguarding, handling, use or consummation of the asset, or the acquisition of other financial assets by way of or in exchange for the asset, or by using the consideration received for the asset. In this case, the Criminal Code does not require special intent; however, the perpetrator has to be aware of the true origin of the asset at the time of commission. This category of money laundering is called *static money laundering* by some authors since these types of conduct do not result in the transfer of property.[51]

The common feature of the types of conduct described in the previously mentioned two subsections of the Criminal Code is that they can only be committed by a per-

[51] Gál–Sinku 2008, 135.

son other than the perpetrator of the predicate offence. However, according to *Section 399(3) of the Criminal Code*, the perpetrator of the predicate offence can also be held liable for money laundering if he uses the asset in his business activities or performs any financial transaction or receives any financial service in connection with the asset in order to conceal the true origin of the asset.[52] The commission of self-laundering also requires specific intent from the perpetrator, i.e. the concealment or disguise of the origin of the asset. This section naturally does not contain the frustration of the criminal proceedings conducted against the perpetrator of the predicate offence as intent.

Although the previous forms of conduct can only be committed intentionally, the Hungarian legislator punishes *negligent money laundering* as well. In the case of negligent money laundering, the punishable conduct is the same as in case of self-laundering: the use of the asset in business activities or the performance of any financial transaction or receipt of any financial service. It is important to emphasise that the punishable conduct can be committed intentionally in this case as well; it is the perpetrator who is negligently unaware of the true origin of the asset.[53]

If we compare the Hungarian Criminal Code with the provisions of the Criminal Law Directive of the EU, it can be stated that the *regulation of the Criminal Code is mostly in conformity with the new EU Directive*. The punishable forms of conduct of intentional money laundering are almost the same; the minor differences are mainly caused by the specialty of Hungarian legal language. The Hungarian legislator also criminalises self-laundering. Furthermore, it can be seen that the Criminal Code even prescribes *stricter rules than the EU Directive* since it punishes negligent money laundering as well, which is not an obligation but only a possibility according to the relevant EU requirements. The broad regulation of the Hungarian Criminal Code fully covers the list of predicate offences defined by the Directive.

3.1.3. Sanctions for money laundering

According to the CC, *intentional money laundering* is punishable by *imprisonment between one to five years*. The penalty shall be *imprisonment between two to eight years* if the money laundering:

(a) is committed on a commercial scale;[54]

(b) involves a particularly considerable or greater amount of money (i.e. more than HUF 50 million);[55]

(c) is committed by an officer or employee of a financial institution, investment firm, commodities broker, investment fund manager, venture capital fund manager, exchange market, central depository, body acting as a central counterparty, insurance company, reinsurance company or independent insurance intermediary, voluntary mutual insurance fund, private pension fund or an institution for occupational retirement

[52] See further Udvarhelyi 2013b, 316–317.

[53] Tóth 2000, 361.

[54] According to Point 28 of Section 459(1) the CC, a crime is deemed to be committed on a commercial scale if the perpetrator is engaged in criminal activities of the same or similar character to generate profits on a regular basis.

[55] Section 459(6) of the CC.

provision, an organisation engaged in the operation of gambling activities or a regulated real estate investment company;

(d) is committed by a public official;[56]

(e) is committed by an attorney-at-law.

Negligent money laundering is punishable by *imprisonment not exceeding two years*, while in cases with aggravating circumstances, by *imprisonment not exceeding three years*. In connection with negligent money laundering, commission on a commercial scale and by an attorney-at-law cannot be considered an aggravating circumstance. In connection with negligent money laundering, the CC contains a special provision: According to Section Section 400(3) of the CC, the perpetrator shall not be prosecuted for money laundering if he *voluntarily reports to the authorities and unveils the circumstances of commission*, provided that the act has not yet been revealed, or it has been revealed only partially. The reason of this provision is that it is more important to uncover unexplored offences than to punish the perpetrator. Furthermore, this preferential possibility can contribute in the detection and the prosecution of the predicate offence as well.[57]

In connection with sanctions, it can be stated that *Hungarian criminal law complies with the provisions of the Directive of the European Union*. Moreover, the Hungarian legislator imposes even *higher penalties* compared to the expectation of the European Union since it punishes intentional money laundering with imprisonment between one to five years or between two to eight years, while the Directive of the EU requires the Member States to sanction money laundering by a maximum term of imprisonment of at least four years.

3.2. Preventive measures against money laundering

After the presentation of the criminal law measures against money laundering, we intend to briefly analyse the preventive means in the fight against this criminal offence. In Hungary, *preventive measures against money laundering* are regulated in a *separate*

[56] According to Point 28 of Section 459(1) the CC, public officials are:
a) the President of the Republic, b) Members of Parliament, spokesmen for the nationality and Members of the European Parliament elected in Hungary, c) constitutional court judges, d) the Prime Minister, other ministers, state secretaries, state secretaries for public administration and deputy state secretaries, government commissioners, e) judges, public prosecutors and arbitrators, f) the commissioner of fundamental rights and his deputy, g) notaries public and assistant notaries public, h) independent court bailiffs, independent bailiff substitutes, and assistant bailiffs authorized to serve process, i) members or councils of representatives of municipal governments and representatives of nationality self-governments, j) commanding officers of the Hungarian Armed Forces, and commanders of water craft or aircraft, if vested with authority to enforce the regulations pertaining to investigating authorities, k) members of the staff of the Constitutional Court, the Office of the President of the Republic, the Office of Parliament, the Office of the Commissioner of Fundamental Rights, National Bank of Hungary, the State Audit Office, the courts, prosecutors offices, central government agencies, the Parliament Guard, Budapest and county government agencies, and persons exercising executive powers or serving at county institutions operation centers or public bodies, whose activity forms part of the proper functioning of the agency in question, l) members of the election committee.

[57] Molnár 2012, 713.

Act[58] that was adopted in order to implement the provisions of the 4th Money Laundering Directive of the European Union. According to the Preamble, the objective of the Act is to effectively enforce the provisions for combatting money laundering and terrorist financing with a view to preventing the laundering of money and other financial means obtained from criminal activities through activities that are considered exposed to potential money laundering operations, as well as helping prevent the flow of funds and other financial means used in financing terrorism.

The AML Act prescribes special duties to the *service providers falling under its scope*.[59] The service providers have two important obligations: customer due diligence obligation and reporting obligation. Service providers shall apply *customer due diligence measures* in the following cases:

(a) when establishing a business relationship;

(b) when carrying out an occasional transaction that amounts to HUF 3.6 million or more;

(c) when, in the case of persons trading in goods, carrying out occasional transactions in cash amounting to HUF 2.5 million or more;

(d) when there is any information, fact or circumstance giving rise to a suspicion of money laundering or terrorist financing, where the due diligence measures have not been carried out yet;

(e) when there are doubts about the veracity or adequacy of previously obtained customer identification data.[60]

The service providers shall *report* without delay any information, fact or circumstance *giving rise to a suspicion of money laundering or terrorist financing or that specific property is derived from criminal activity*. Until the report is dispatched, the service provider shall refrain from carrying out the transaction.[61] The report has to be sent to the *Hungarian Financial Intelligence Unit*, i.e. to the *Office Against Money Laundering and Terrorist Financing*, which is a unit operating within the framework of the *National Tax and Customs Administration*. The Hungarian FIU receives about 8,000–10,000 reports annually. The vast majority of the reports come from the financial sector (banks, financial institutions, insurance companies, investment service providers, currency exchangers, etc.).[62]

If the service provider *intentionally fails to comply with the reporting obligation prescribed by law in connection with the prevention and combatting of money laundering and terrorist financing*, he is guilty of a misdemeanour punishable by imprisonment not exceeding two years. Therefore, the failure of the reporting obligation has criminal law consequences in Hungary.[63]

[58] Act LIII of 2017 on the Prevention and Combating of Money Laundering and Terrorist Financing (hereinafter referred to as: AML Act).

[59] Section 1 of the AML Act.

[60] Section 6 of the AML Act.

[61] Sections 30–32 of the AML Act.

[62] *https://www.nav.gov.hu/nav/penzmosas/eves_jelentesek_feleves_tajekoztatok* (01.05.2019).

[63] Section 401 of the CC. See in details Jacsó 2013, 626–628; Molnár 2012, 713–721.

3.3. Statistical data in connection with money laundering

In Hungary it is a huge problem that there are very *few cases in judicial practice* in connection with money laundering. In 2012, the *National Institute of Criminology* carried out comprehensive research about the practical relevance of money laundering whose results were published in 2016.[64] According to the research, 26 criminal offences have been registered between 2008 and 2011. From these cases, 17 criminal proceedings were finished until 2015. However, it can be regarded as a positive tendency that all these criminal procedures ended with the conviction of the perpetrator.

The research also encompassed the *typical predicate offences of money laundering*. The most typical cases included money laundering involving cash-carriers; money laundering connected to tax fraud; money laundering connected to fraud, embezzlement or misappropriation of funds committed by legal persons; money laundering connected to pandering; and failure to comply with the reporting obligation related to money laundering. The results of the research clearly show that the predicate offences of money laundering in Hungary have been changing over recent years. Originally the most common predicate offences of money laundering were the different type of crimes related to organised criminality (drug trafficking, human trafficking, prostitution, etc.). In the last years, budget fraud, tax fraud, fraud, embezzlement and misappropriation of funds became the typical predicate offences.

In 2015, the *Office of the Prosecutor General* also carried out comprehensive research in connection with money laundering cases after 2010. According to the research, it can be observed that the official criminal statistic system is inaccurate: While it contained only 56 money laundering cases, according to the examination of the criminal documents, 157 criminal cases could be detected that were initiated – at least partly – because of money laundering. Two-thirds of these cases are still pending.[65] From these statistical data, it can be concluded that the *number of money laundering cases is slowly increasing, although their number is still very small*.

4. Closing remarks

In connection with fight against money laundering in Hungary, it can be concluded that the *Hungarian legislator has fulfilled its implementation obligation resulting from EU law*. The regulations of the Criminal Code are mostly in compliance with the Directive of the European Union. Furthermore, due to the fact that the EU Directive only prescribes minimum harmonisation, Hungarian criminal law prescribes even stricter rules than the EU requirements. The biggest problem in the field of combatting money laundering in Hungary is the fact that the number of criminal procedures in connection with this criminal offence is still very small.

[64] See in details Kármán–Mészáros–Tilki 2016, 82–97.
[65] See in details Sinku 2017, 135–153.

Missing judicial practice was also criticised by MONEYVAL in its Fifth Evaluation Round in 2016.[66] According to the recommendation of MONEYVAL, *"the prosecutorial authorities should test in the courts the limits of the evidentiary requirements on the illegal origin of the laundered assets, taking into account the all-crimes scope of the money laundering offence. The evaluators encourage prosecutors to bring more money laundering cases to court in order to develop jurisprudence along these lines"*. Such a paradigm shift would certainly be needed as the fight against money laundering can only become more successful and effective through the establishment of appropriate law enforcement practice.

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[66] *https://rm.coe.int/anti-money-laundering-and-counter-terrorist-financing-measures-hungary/16807161b4* (02.05.2019.).

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CHANGES IN THE REGULATION OF CORRUPTION CRIMES IN THE HUNGARIAN CRIMINAL CODE

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1. Introduction

Hungary's new Criminal Code entered into force on 1 July 2013. The previously effective Criminal Code (Act IV of 1978) filled in the role that was set for it (that is, the protection of society). However, the objective of the legislative branch was to codify a new Criminal Code. But why? It is an undisputable fact that criminal law must also keep abreast of our changing world. Modernisation, the development of technology and the world of the Internet created such new legal subjects needing protection to which criminal law had to react as well. Further, when witnessing the commencement of a new era in Europe in the '50s, which started to integrate certain countries of the continent, nobody could possibly believe that that economic cooperation could evolve into a global European organisation by the beginning of the 21st century called the European Union. Nevertheless, most probably no one ever considered the possibility of the European Union having a fundamental effect on the development of criminal law as well.[1] It could not be imagined that the Member States would have provided the possibility of having a voice in their respective national legal systems in the area of criminal law. Scientific literature also represents the standpoint according to which it is criminal law out of all the legal branches that most powerfully expresses the historical, political and cultural traditions of a nation.[2] Nowadays, criminal law inspired by the European Union evolved into a significantly developing discipline and the legislation of the Member States must comply with the European requirements. During the past decade, all of these have been generating obligations for Hungary in the field of legislation.

Act V of 1961 and later Act IV of 1978 – which were closely related to each other both in the aspect of their social backgrounds and also their respective wordings – provided a solid background for the evolving and strengthening of judicial practice. However, the previously effective criminal code (that is, Act IV of 1978) has been amended on more than one hundred occasions since its entry into force in 1979. Out of these amendments, more than 90 came from legislators during the past three decades (that is, on various occasions every year on average), and more than 10 resolutions

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[1] Albrecht 2000, 17–40.

[2] Ligeti 2004, 15.

from the Constitutional Court affected the Code. These changes amended, introduced or repealed more than 1,600 provisions.[3] The vast number of amendments is the result, on the one hand, of the contradictory criminal law policies of the Governments coming after one another. At the same time, however, changes occurring parallel with technological and scientific development and the obligation of legal harmonisation following our accession to the European Union also resulted in various modifications. This was the primary reason for the codification of the new criminal code. Compliance with international and EU standards, as well as with the requirements of constitutional criminal law – pursuant to which each and every provision of the Criminal Code had to be in harmony with the legal regulations of the EU and the provisions of the Fundamental Law of Hungary – had priority in the course of codifying the new criminal code. However, those who apply the law and the representatives of science had unambiguous fears that the endeavours of the legislators to enforce the intention of renewal would have overcome tradition.[4] These fears, however, have proved to be unfounded, and we may declare that the code is the final product of moderate legislation.[5] The structure and contents of the General Part of the new Criminal Code did not change much. The structure of the Special Part indeed changed significantly, but most of the statutory definitions of crimes also remained unchanged.

In the following, let us briefly review how the codification of the new Criminal Code influenced the chapter containing corruption crimes. The first notable change is the title of the chapter. The previous Criminal Code regulated corruption crimes under the titles "Crimes against public justice" and "Crimes against international public justice". The new code structurally simplified the statutory definitions of crimes, thus regulating such crimes in one chapter. Accordingly, the Code – where necessary on the basis of international treaties and/or the legal regulations of the European Union – refers to the fact at the end of the relevant statutory definition in a separate paragraph that the respective crime is also penalised in respect to international public officers.

The following crimes are regulated under this chapter:

– active corruption;
– passive corruption;
– active corruption of public officials;
– passive corruption of public officials;
– active corruption in court or regulatory proceedings;
– passive corruption in court or regulatory proceedings;
– misprision of corruption;
– indirect corruption;
– abuse of a function.

The Code regulates active and passive corruption under separate sub-titles. The Code determines the order of the different statutory definitions of the different crimes

[3] General reasoning to Act C of 2012 on the Criminal Code.
[4] Kónya 2013, 21–22.
[5] Tóth 2013, 42.

in consideration of the specificity of the protected subject (economic sphere, public official sphere, court and regulatory proceedings) and the applicable sanction.

2. "Economic" corruption

Pursuant to the Hungarian Criminal Code, economic corruption is committed by any person who gives or promises unlawful[6] advantage to a person working for or on behalf of an economic operator, or to another person on account of such employee, to induce him to breach his duties. Minor dogmatic changes were introduced in case of this crime. It shall qualify as a compound case if the crime of corruption is committed in criminal association with accomplices or on a commercial scale. These are new compound cases were not included in the previous Criminal Code. Active economic corruption committed internationally shall be punishable on the basis of para (4) of active economic corruption instead of the previous individual statutory definition.

Passive economic corruption is committed by any person who requests or receives an unlawful advantage in connection with his activities performed for or on behalf of an economic operator, for himself or for a third party, or accepts a promise of such an advantage, or is in league with the person requesting or accepting the advantage for a third party at his behest. It shall qualify as a compound case if the perpetrator – for the sake of receiving the unlawful advantage – breaches his obligations or if the crime of corruption is committed in criminal association with accomplices or on a commercial scale, as well as in the event that the perpetrator is authorised to act in the name and on behalf of the economic operator independently. In the course of codification, the legislators took into consideration the recommendation of GRECO[7] on the basis of which in the new Code it shall be punishable in case of passive economic corruption (similarly to active economic corruption) if the crime is committed in connection with a person carrying out his duties for or in the name of a foreign economic operator.

3. Corruption of public officials

Similar to economic corruption, the new Code firstly regulates active corruption followed by passive corruption. The difference compared to economic corruption is that in the case of active corruption of public officials, the unlawful advantage is linked to a public official while only public officials may be the perpetrators of passive corruption.[8] It is a novelty compared to the previous code that the crime is also committed

[6] For the interpretation of „unlawfulness" see Görgényi 2017, 86–89 and Hollán 2014, 54–56.

[7] The Group of States against Corruption (GRECO) was established in 1999 by the Council of Europe to monitor States' compliance with the organisation's anti-corruption standards.

[8] The sphere of public officers is listed by the Criminal Code in a comprehensive manner among its interpretative provisions. Thus, for example, the president, members of parliament, the prime minister, ministers, judges, prosecutors, policemen etc. all qualify as public officers.

by any person who attempts to bribe a public official by giving or promising unlawful advantage to another person for influencing such an official's actions in an official capacity. It is also a new element that the crime may be committed in respect to foreign public officials as well. Similar to passive economic corruption, it appears to be reasonable to punish concordance with the person accepting the advantage in case of passive corruption of public officials if the advantage is granted or promised to the third party in view of the public official and the public official is in concordance with this. This – compared to the currently effective legal regulation – qualifies as a narrowed interpretation which, however, complies in excess of reasonability with the practices as well. Any public official who is aware of the fact that any of his colleagues have accepted an advantage and provided that such public official agrees with that – that is, he fails to report it to the authorities – will not be punishable for passive corruption of public officials, but he will be charged with misprision of corruption.[9]

4. Corruption in court or regulatory proceedings

The new Criminal Code regulates active and passive corruption in court or regulatory proceedings separately. Any person who promises or gives unlawful advantage to another person for himself or for a third party for him to refrain from acting in accordance with his duty or in the exercise of his rights in court or regulatory proceedings commits active corruption. Any person who requests or receives an unlawful advantage to refrain from acting in accordance with his duty or in the exercise of his rights in a court or regulatory proceedings, for himself or for a third party, or accepts a promise of such an advantage, or is in league with the person requesting or accepting the advantage for a third party on his behest commits passive corruption. It is a new element that the crime may also be committed in the course of or in connection with proceedings of an international criminal court installed under a statutory resolution adopted by the United Nations Security Council, or by the Court of Justice of the European Union.

5. Indirect corruption

Indirect corruption is a new crime in Hungary introduced on the basis of the recommendations of GRECO. Any person who gives or promises unlawful advantage to a person who claims to influence a public official, or to a third person on account of a person who claims to influence a public official, is guilty of a felony punishable by imprisonment not exceeding three years. If the crime is committed in relation to an economic operator, it shall be punished less heavily.

[9] Kónya 2013, 1115.

6. Abuse of a function

This crime is the opposite of indirect corruption. It may be committed by any person who – purporting to influence a public official – requests or receives an unlawful advantage for himself or for a third party, or accepts a promise of such an advantage, or is in league with the person requesting or accepting the advantage for a third party on his behest. It shall also be punishable if it is committed in the interest of an economic operator. If committed in connection with a foreign public official, it shall also be punishable. Finally, we must mention the fact that similarly to the previous Criminal Code, any public official who is aware of any corruption crime and fails to report to same to the authorities commits a criminal offence.

7. Issue of the exemption from criminal responsibility

The change of the previous exemption from criminal responsibility is a new element in case of all crimes mentioned above.[10] Instead of providing grounds for exemption from criminal responsibility, the new Code gives the possibility to reduce the penalty without limitation for perpetrators materially cooperating with the authorities in unveiling the circumstances of the crime. Namely, persons cooperating with the authorities were not punishable pursuant to the previous Criminal Code. In this respect, GRECO recommended that "automatic and full mandatory exemption from punishments granted by the Code for cooperating perpetrators of domestic active and passive corruption committed in the public and private sectors must be analysed and consequently reconsidered".[11] In relation to this recommendation, GRECO identified the following problems of the Hungarian regulation:

– reporting the knowledge of a crime had no temporal limitation; it was enough if it was reported prior to the authorities becoming aware of the criminal offence;
– its application results in the automatic and full exemption from any punishment; that is, considering the individual circumstances was not possible; for example, the reason for which the perpetrator reported the criminal offence to the authorities could not be taken into account;
– there was no room for judicial review; that is, it was not the judge who was entitled to decide whether to apply it or not.[12]

In compliance with the recommendation of GRECO, the new Criminal Code sets forth that the penalty may be reduced without limitation – or dismissed in cases deserving special consideration – against the perpetrator of a criminal offense defined in Paragraphs (1) and (3) if he confesses the act to the authorities first-hand, surrenders the obtained unlawful financial advantage in any form to the authorities and unveils the circumstances of the criminal act.

[10] Polt 2013, 183.
[11] Reasoning attached to chapter XXVII of Act C of 2012 on the Criminal Code.
[12] Reasoning attached to chapter XXVII of Act C of 2012 on the Criminal Code.

Such a solution of the Code on the one hand complies with the recommendations of GRECO and on the other hand still provides a possibility of the perpetrators of active and passive corruption taking into account whether it is worth considering reporting the crime to the authorities.

8. The new directive of the European Union and corruption crimes

One of the new EU directives, including several other crimes, also affects corruption. The Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 was born under title "on the fight against fraud to the Union's financial interests by means of criminal law".[13]

Corruption constitutes a particularly serious threat to the Union's financial interests, which can in many cases also be linked to fraudulent conduct. Since all public officials have a duty to exercise judgment or discretion impartially, the giving of bribes in order to influence a public official's judgment or discretion and the taking of such bribes should be included in the definition of corruption, irrespective of the law or regulations applicable in the particular official's country or to the international organisation concerned.

As regards the criminal offence of passive corruption, there was a need to include a definition of public officials covering all relevant officials, whether holding a formal office in the Union, in the Member States or in third countries. 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" therefore 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.

As Art. 4 para (2) of the Directive regulates: Member States shall take the necessary measures to ensure that passive and active corruption, when committed intentionally, constitute criminal offences.

For the purposes of the Directive, "passive corruption" means the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind, for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests.[14] This crime is regulated in Section 294 of the Hungarian Criminal Code.

For the purposes of the Directive, "active corruption" means the action of a person who promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which

[13] For the interpretation of the Directive see Jacsó–Udvarhelyi 2018, 327–337.
[14] Art. 4 para (2) Point a).

damages or is likely to damage the Union's financial interests. This crime is regulated in Section 293 of the Hungarian Criminal Code.

In both cases, the Hungarian regulation complies with the provisions of the Directive regarding the measure of punishment. According to Art. 7 para (2) of the Directive: Member States shall take the necessary measures to ensure that the criminal offences referred to in Art. 3 and 4 are punishable by a maximum penalty which provides for imprisonment.

Corruption crimes are also punished with imprisonment by Sections 293 and 294 of the Hungarian Criminal Code. Member States shall take the necessary measures to ensure that the criminal offences referred to in Art. 3 and 4 are punishable by a maximum penalty of at least four years of imprisonment when they involve considerable damage or advantage. The damage or advantage resulting from the criminal offences referred to in points (a), (b) and (c) of Art. 3 para (2) and in Art. 4 shall be presumed to be considerable where the damage or advantage involves more than EUR 100,000.[15] Hungarian regulation is not based on the amount of damage or benefit but whether it damages or can damage the financial interests of the Union if the public official is abusing his or her duties.[16]

But who is the official? The directive defines this personal circle:

(A) a Union official or a national official, including any national official of another Member State and any national official of a third country:

(a) "Union official" means a person who is:

– an official or other servant engaged under contract by the Union within the meaning of the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Union laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68, or
– seconded to the Union by a Member State or by any public or private body, who carries out functions equivalent to those performed by Union officials or other servants.

[15] Art. 7 para (3).

[16] Regarding the active corruption of public officials [Criminal Code Section 293 para (2) and (3)]: Any person committing bribery is punishable by imprisonment between one to five years if he gives or promises the unlawful advantage to a public official to induce him to breach his official duty, exceed his competence or otherwise abuse his position of authority. Any person who commits this crime in connection with operation of a foreign public official shall be punishable by the same way. Regarding the passive corruption of public officials: Section 294 para (1). Any public official who requests or receives an unlawful advantage in connection with his actions in an official capacity, for himself or for a third party, or accepts a promise of such an advantage, or is in league with the person requesting or accepting the advantage for a third party on his behest, is guilty of a felony punishable by imprisonment between one to five years. Section 294 para (2): The penalty shall be imprisonment between two to eight years if the criminal offense is committed by a high-ranking public official. Section 294 para (3): The penalty shall be imprisonment between two to eight years in the case provided for in para (1) or imprisonment between five to ten years in the case provided for in para (2) if:

a) for the advantage the public official:

aa) breaches his official duties,

ab) exceeds his competence, or

ac) otherwise abuses his position of authority; or

b) if the offense is committed in criminal association with accomplices or on a commercial scale. A foreign public official shall be punishable by the same way.

Without prejudice to the provisions on privileges and immunities contained in Protocols No 3 and No 7, Members of the Union institutions, bodies, offices and agencies, set up in accordance with the Treaties and the staff of such bodies shall be assimilated to Union officials, inasmuch as the Staff Regulations do not apply to them;

(b) a "national official" shall be understood by reference to the definition of "official" or "public official" in the national law of the Member State or third country in which the person in question carries out his or her functions.

Nevertheless, in the case of proceedings involving a national official of a Member State, or a national official of a third country, initiated by another Member State, the latter shall not be bound to apply the definition of 'national official' except insofar as that definition is compatible with its national law. The term "national official" shall include any person holding an executive, administrative or judicial office at the national, regional or local level. Any person holding a legislative office at the national, regional or local level shall be assimilated to a national official;

(B) any other person assigned and exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries.

The above-mentioned circle of persons is covered by the definition of "public official" or "foreign public official" in the Hungarian Criminal Code, so the Hungarian regulation also complies with the new directive.

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RECENT CHANGES IN THE JUDICIAL FIGHT AGAINST MONEY-LAUNDERING: PRACTICAL ISSUES TO BE SOLVED, ACHIEVEMENTS AND GOOD PRACTICES

Dr. Ádám Péceli[*]

1. Introduction: The growing number of cases

From the criminalization of money laundering in Hungary back in the year 1994[1] until the recent 5th round evaluation of Moneyval[2] by the end of 2015, laundering offences rarely appeared on the radar screen of criminal judicial practice. In the year 2016 however, the number of registered money laundering cases have doubled, and the tendency of rapid growth continued in 2017, clearly indicating a substantial change in the state of play.

A survey based on the examination of case files carried out late 2015 shortly before the 5th round evaluation of Moneyval showed that over a five and a half years period between 2010 and the first half of 2015 only 157 investigations had been commenced for money laundering offences.[3] The next inquiry however that took place in June 2017 only one and a half year later enumerated more than 200 new investigations launched in 2016.[4] According to the statistical data in the Moneyval Report[5] the numbers of investigations were showing a slightly increasing tendency between 2010 and 2015 emerging from 24 to 56 cases a year, while prosecutions were stagnating from 8 to 18 a year in the same period.

Having taken a look into the publicly available annual reports of the Prosecutor General to the Parliament[6] one would find similar statistical figures showing the exponential growth of cases. Back in 2008 money laundering could not be detected at all, while between the years 2010–2014 the average numbers of registered laundering offences were moving around 10–20 a year. By 2015 this number reached 27 while in 2016 it was three times, and in 2017 more than four times as much resulting in 90

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[1] The crime of money laundering had been criminalized from the 15th of May 1994 by Art. 23 of the Act IX of 1994.

[2] The 5th round evaluation report is publicly available on the FATF website, through the following link: *http://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/MER-Hungary-2016.pdf* (21.05.2019)

[3] Prosecutor General's Office Department of High-Profile Cases report nr KF. 9725/2004 on the money laundering cases.

[4] According to the report no. TPK. 1008/2017/11 of the AML/CFT Department of the Prosecutor General's Office, in 2016 all together 206 new investigations have been launched for money laundering

[5] See 5th round evaluation report 58.

[6] Reports are publicly available: *http://ugyeszseg.hu/kozerdeku-adatok/orszaggyulesi-beszamolo/* (21.05.2019)

registered crimes that year. If we combine the statistical data from the Moneyval and the Annual Parliamentary Reports and visualize them on one chart, we get the following results:

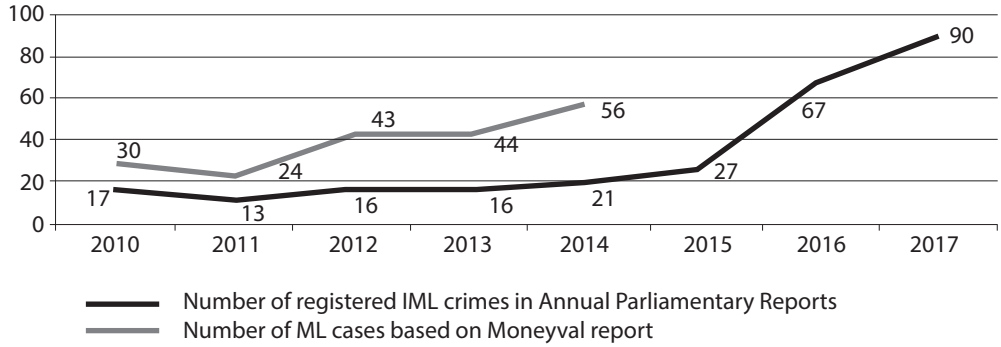

Figure 1: Statistical data from the Moneyval and the Annual Parliamentary Reports
Source: Moneyval 5th round evaluation report and reports of the Prosecutor General to the Parliament

The quickly growing number of identified money laundering offences might be explained on the first hand by the raising awareness of financial institutions to report suspicious transactions to the FIU, as the vast majority of these 'money mule figure'[7] cases were opened upon FIU reports based on STRs.[8]

Another contributing factor to the expanding tendency of cases could have been the internal guidelines issued by the Prosecution Service on asset recovery and money laundering both shortly before and after the 5th round evaluation by Moneyval.[9] These guidelines facilitated the recognition of money laundering, encouraged prosecutors to expand investigations to the afterlife of criminal proceeds and called for an intensive and efficient use of asset recovery powers. Anyhow, the rising number of laundering cases brought new challenges for the judiciary in the fields of tracing and securing proceeds, gathering evidence as well as international cooperation.

On the next few pages, I am trying to give a brief insight of some of the most common issues occurred in the last few years' judicial practice of money laundering cases while sharing my personal thoughts about possible solutions as well. I also focus on some of the positive experiences, good practices and touch upon some foreseeable future challenges.

[7] For a compact descripition on money muling see Europol's page at:
https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/forgery-of-money-and-means-of-payment/money-muling (21.05.2019).

[8] According to the Hungarian FIU's annual reports, there were 3912 suspicious transaction reports (STRs) in 2015, while two years later almost twice as much, 8.585. source (31.05.2019).
https://www.nav.gov.hu/nav/penzmosas/eves_jelentesek_feleves_tajekoztatok (21.05.2019).

[9] Guidelines: no. KF. 9725/2004/379-II, TPK. 1008/2017/37-I., and 37-II., Circulars no. 1/2017 and 2/2017 of the Deputy of the Prosecutor General.

2. Common issues in the practice of money laundering cases

2.1. The predicate offence

From the time of introducing money laundering back in the year 1994, the crime has always been strictly attached to a predicate offence. Practically this means that without showing and proving another specific crime the laundered proceeds are deriving from, one would not be able to successfully prosecute the offender of money laundering in Hungary.[10] The factual elements of the predicate offence must be described exactly and the offence should be legally classified by the acting authorities, therefore showing 'an illegal activity' in general is far from sufficient to successfully build up a laundering case. The lack of the so called 'standalone' or 'autonomous' money laundering figure is an everlasting source of difficulties, as this legal situation often demands authorities to investigate backwards, from the proceeds floating up to the surface of crime detection back to their presumably illegal origins.[11] It needs no further explanation why finding the source of tainted cash, or vast amount of bank deposits seems an impossible mission to accomplish.

A possible solution – amongst others – to cope with this obstacle of legal nature would be to introduce the crime of 'illicit' or 'unexplained' enrichment that could serve as a predicate offence in these cases. The criminal conduct of unexplained wealth would cover situations where the offender is living a lifestyle that is clearly far beyond his legally acquired earnings and assets, and would be based on the fact of the disproportion between the legal revenues and the actual way of living.[12]

The concept of attaching legal consequences to the disproportion between the legally reasonable and the factually existing assets is an already existing legal solution in the Criminal Code. More than two years ago, on the 28th of October 2016, based on the EU Directive 2014/42[13] the new provisions of extended confiscation have been added to the substantial criminal law of Hungary. The sanction's core element is clearly the idea of showing the difference between the legally available financial situation and the

[10] Art. 399 of Act C of 2012 on the Criminal Code stipulates the predicate offence as 'any punishable criminal offence'.

[11] For a short description of standalone ML figure in the UK law, see:
https://www.cps.gov.uk/legal-guidance/proceeds-crime-act-2002-part-7-money-laundering-offences (21.05.2019); to learn how to build a stand alone money laundering case in the UK, see the presentation of Ian Davidson and Martin Gill at: *http://www.police-foundation.org.uk/uploads/holding/annual_conference/follow_the_money.pdf* (21.05.2019).

[12] See a detailed study on how the criminalization of unexplained wealth works by the World Bank's StAR Initiative at:
https://star.worldbank.org/sites/star/files/on_the_take-_criminalizing_illicit_enrichment_to_fight_corruption.pdf
and also a brief yet informative description on the ups and downs by Transparency International at:
https://www.transparency.org/files/content/corruptionqas/Helpdesk_answer_illicit_enrichment.pdf (21.05.2019).

[13] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042 (21.05.2019).

actual lifestyle and assets of the offender.[14] This legal approach could be easily adapted to the new crime of "unexplained wealth" that could serve as a predicate offence of money laundering, and also as a basis to confiscate the values of disproportion.

2.2. The dark side of 'open crime approach'

The Hungarian Criminal Code defines the predicate offence as "any punishable criminal offence" thus does not contain any restriction regarding its nature, gravity, or the financial value involved. The 'open crime approach' certainly provides flexibility as it leaves the floor open to any kind of criminal activity that could result in generating proceeds.

On the other hand though, this solution does certainly has its disadvantage, as it can attach a laundering offence to such a petty crime as even pick pocketing or social engineering fraud causing minimal damage. This would not be a problem itself, but having regarded the fact, that money laundering constitutes a felony punishable by five imprisonment at the maximum which – due to its grave nature – is falling in the scope of the county level courts, the hybrid constellations can easily lead to undesirable results. In case for example a petty fraudster would ask for the help of a co-actor in providing a straw bank account to acquire the proceeds, the laundering offence of his co-actor would shift the small value fraud to the county level courts.

Legislation should finally realize that laundering offences are not necessarily and always committed on a large scale and in a way of organized fashion anymore. Back in the 90's money laundering was regarded as a top notch white collar crime that was always associated with criminal organizations or organized crime activity.

Times have changed however, and laundering offences became just about as common and regular as their predicate offences, showing a growing number of simple and less significant cases that suggest us to separate money laundering from organized crime. Petty predicate offences walk hand in hand with cheap and easy, 'DIY' (do-it-yourself) laundering figures and they should be treated together as such: prosecuted in the same proceedings and tried before the local courts. The label of money laundering – as a red flag that has been the sign of something grave and organized for a long time – is misleading in these 'hybrid' cases, where the laundering offence creates an unnecessary shifting effect in the competence of courts.

2.3. Evidentiary standards: Proving the underlying offence

One of the most sensitive issues in the practice of money laundering cases is obviously the question of evidentiary standards of the predicate offence. The problem has been evoked by the overwhelming number of split jurisdiction 'money mule' cases, where

[14] Art. 74/A (2) of the Criminal Code: […] pending proof to the contrary, all assets obtained by the perpetrator by the following acts shall also be subject to confiscation giving rise to execution of the confiscation order [… list of crimes …] if obtained in the five years preceding the start of the criminal proceedings, if the size assets, and the lifestyle of the perpetrator is considered unreasonably disproportionate relative to his lawful income and personal circumstances.

the predicate offence is committed not only in another jurisdiction, but commonly outside the European continent, moreover in faraway exotic countries. One could never before find so many cases with the pressing need of international cooperation arising from the financial loss of foreign victims coming from the other side of the planet, like countries such as the UAE, India, Vietnam, Hong Kong, New Zealand and Australia to name but a few.

The new typology of cross-continent money mule activity has awoken two major questions in the practice of prosecuting money laundering offences: first, how to get more information and evidence of the predicate offence that had been committed thousands of kilometres away, and second, how and under what conditions should Hungary repatriate the seized or frozen assets in order to compensate the victims of these faraway countries?

The root of the evidentiary problem to be faced with in these cases is coming from the fundamental principle of "in dubio pro reo" and the expectation of proving the crime 'beyond peradventure'[15] – instead of the more permissive and flexible 'beyond a reasonable doubt (BaRD)' or 'preponderance of evidence (PotE)' standards[16] – set up on the same basis by the Act on Criminal Proceedings. Even if the predicate offenses are rarely challenged by the offenders in these scenarios, authorities are still obliged to clarify and precisely establish the circumstances of the underlying criminal act the proceeds are coming from. In most of these cases the only evidence one could get at the start of the investigation is the short message (SWIFT) in the banks' communication indicating the suspicion of a fraudulent conduct, saying that the funds had been transferred either to an unknown party or had been moved without the consent of the victim. Swift messages are no doubt sufficient to ground the suspicion of a crime, but do they constitute proper evidence to press charges and prosecute an offender for money laundering?

One of the most important outcomes of Moneyval's fifth round evaluation was the clear message to try these cases in the courtroom, in order to ascertain whether they meet the standard of proof in the view of judges or not.[17]

Based on the Moneyval recommendation, the Prosecutor General's Office encouraged prosecutors not only to gather evidence any possible ways apart from using the formal channels of mutual legal assistance, but also to press charges even if the out-

[15] Even it is misleadingly translated to BaRD in the domestic law, see Art. 7 § (4) of Act XC of 2017 on Criminal Proceedings: 'Facts not proven beyond a reasonable doubt may not be contemplated to the detriment of the defendant.'

[16] For the description of these evidentiary standards see *http://www.1800attorney.com/standards-of-proof/* (03.03.2019).

[17] See second tick of Immediate Outcome 7 of the Moneyval Report: 'The prosecutorial authorities should test in the courts the limits of the evidentiary requirements on the illegal origin of the laundered assets, taking into account the all-crimes scope of the ML offence. The evaluators encourage prosecutors to bring more ML cases to court in order to develop jurisprudence along these lines.'

come of the evidentiary process is doubtful.[18] One should of course, try to collect additional evidence on the predicate crime by issuing mutual legal assistance request for interviewing the victim or handing over his already filed denouncement, yet the lack of further testimony should not automatically lead to drop these cross-continent laundering cases.

Swifts are written in telegram style as their content is limited to the most essential information and they are only mirroring the victim's statement made in the bank indirectly. Still, if they show that the transaction's result does not meet with the consent of the injured party, and there is no reason to believe the opposite, they might as well serve as a key factor in adjudging the predicate crime.

2.4. The subject of laundering

Another issue of legal interpretation is deriving from the wording of the Criminal Code for specifying the subject of money laundering. Instead of using the broad term of "property" or "assets" that are widely recognized and welcomed by international conventions,[19] the domestic law is still operating with the obsolete element of "object", seemingly restricting the targets of the crime to tangible values. This is all the more surprising, as the official translation of the Code is correcting this mistake by replacing the term of "objects" with "assets".

It is obvious why the restricting term of "object" can be a source of interpretative problems when it comes to solving cases in practice. One of the most common predicate crime of money laundering is definitely social engineering fraud which is often realized by the modus operandi of "bank transfer hijacking" (also known as hijacking, side-tracking, derailment, diversion). The core element of this method is to convince the victim to transfer his money onto a bank account that belongs to either the offender or a straw owner under the offender's control. These crime scenarios of course always involve e-money transferred through bank accounts, instead of three dimensional objects, or physical money as the domestic provision would suggest.

The domestic definition could be easily amended to meet practitioners' needs by replacing the old fashioned term of "object" with the widely accepted and more flexible concept of "assets". This would not only meet with international standards, but would also help to distinguish money laundering from other similar offences such as trading in stolen goods or harbouring a criminal. With "assets" being a more abstract and generic term including incorporeal values compared to the tangible, three dimensional "objects", money laundering could be a general, less specific crime while the offence

[18] Point 43. of Guidelines no. TPK. 1008/2017/37-II by the Head of the AML/CFT Department on the procedural aspects of money laundering cases: 'By taking this into account, the prosecutor even initiates that proof of money laundering and its legal classification be reviewed by the court if assumption of guilt is founded on the consideration of the evidence [Subsection (3) of Section 78 of the Code of Criminal Procedure] or if the positive outcome of taking of evidence otherwise proves doubtful, particularly due to the difficulty of proving the predicate act.'

[19] See Art. 6 of Palermo Convention [UNCTOC], Art. 23 of Merida Convention [UNCAC], Art. 6 of the 90' Strasbourg CoE Convetion or Art. 9 of the CoE Warsaw Convetion [for using the term: 'property'].

would be treated as trading in stolen goods if the assets in the specific case would also meet the narrower legal criteria of "objects".

The old fashioned element in the crime's definition is even more disappointing, as legislation had already recognized the need for a change based on the feedback coming from practitioners. The brand new Act XC of 2017 on Criminal Proceedings which has entered into force on the 1st of July 2018, has broadened the scope of seizure by adding bank account money and e-money to the existing list of tangibles and electronic data.[20]

The reason behind this seemingly subtle yet significant modification was to widen the range of seizure in order to create a more effective tool for asset recovery. The reasoning of the amending law argued that criminal procedure law should follow the developments in the circulation of currency, and using bank account money as a payments method has become just as common as paying by cash over the years. In the civil law approach bank account money is only the balance of a contractual legal relationship, but taking into consideration that bank account money can be converted to physical money anytime and vice versa, the two should be treated in the same way when involved in crimes.

Legal practice follows the exact same interpretation in laundering cases. A cornerstone of arguments for treating money the same way regardless its attributes is coming from a Decree of the Constitutional Court which defines the core element of money in the value and not in its physical appearance. 'Issuing bank notes is merely a technical exercise as it is nothing less than converting bank account balance to cash' the Constitutional Court argues.[21] Despite the fact that e-money and bank account money are recognized as the most common objects of laundering activities by practice, the legal text should also follow this approach.

2.5. Traceability

The criterion of traceability walks hand in hand with the legal requirement to prove a predicate offence yet it is still an additional constraint for practice. Showing the predicate means that the prosecution should be able to describe an underlying criminal offence when prosecuting the offender for money laundering, while 'traceability' means a clear connection between the proceeds generating and the laundering offence.[22] Proving another crime besides money laundering is not enough; one shall also be able to present that the laundered proceeds had been acquired in connection with committing the underlying offence.

The connection that links the laundered assets with the predicate offense leads to yet another criterion that needs to be fulfilled in the course of taking evidence; proceeds should be identifiable assets that are traceable back to their criminal source.

[20] Art. 308. § (3) of Act XC of 2017 on Criminal Proceedings.

[21] Resolution 2/2003. (II. 7.) of the Constitutional Court.

[22] The Criminal Code defines traceability as money laundering can only be committed *'in connection* with an asset obtained from any punishable criminal offense'.

Active assets – that is property enriching the offenders' financial estate with additional value as a result of committing the predicate offence – theoretically mean no problem from the perspective of identification and traceability if we put aside the investigative difficulties arising from broken money trails, intermingled account money, etc. Illegal savings however, such as unpaid tax constantly give a headache for investigators and prosecutors, as they do not generate new property elements for the offender.

Classic examples include various VAT (value added tax) fraud schemes – such as MTIC[23] fraud or carousel – that are well known modus operandi within the EU. If these tax crimes merely target the illegal reduction of VAT to be paid without creating the position to reclaim tax, they result in the benefit of illicit savings for the companies themselves, by which they can cut their prices, thus acquire a better position in business compared to their contestants. Unlawful savings of such are undoubtedly the proceeds of crime,[24] and their equivalent value may be subject to assets confiscation or forfeiture. But even if the value of illegal savings can be confiscated, they still cannot be the subject of money laundering, or any further criminal activity, as they lack corporeality, unique character and, as a result, traceability.

Separating the laundering offence from the predicates would of course solve the issues of traceability as well; if no underlying crime is needed to prosecute the launderer, one does not need to show the exact origin of the proceeds.

Legislation is starting to realize nowadays that the legal need to establish the criminal source of illicit enrichment puts a heavy and sometimes unreasonably difficult burden on the judiciary. On that ground confiscation slowly but gradually evolved into a powerful measure that may be applicable with the support of legal presumptions based on the disproportion of assets, on the fact of participating in an organized crime group, or having been convicted for a listed felony of proceeds generating nature.[25] As money laundering in substantive criminal law might be regarded as the mirror image of asset recovery in criminal procedure, the solution to cope with the problems arising from traceability could be identical to the ones confiscation laws have already introduced.

There are various solutions how to prosecute money laundering without necessarily being able to detect, legally describe and classify or even prosecute the predicate offence. The crime of 'unexplained wealth' is operating on the basis of disproportion such as extended confiscation, while the presumption of 'criminal lifestyle' or 'general criminal conduct' is based on the offenders criminal records and previous convictions,[26] similarly to the legal presumptions applied in the reversed burden of proof confiscation regimes in Hungary.

[23] MTIC – Missing Trader Inter Community, a common way of misusing VAT regulations.

[24] Based on Section 76 of the Criminal Code, 'for the purposes of this subtitle [confiscation], any profits, intangible assets, claims of any monetary value and any financial gain or advantage shall be deemed assets.'

[25] See Section 74/A.§ of the Criminal Code, on reversed-burden and extended confiscation regimes.

[26] For a brief description on the relevant terms of the Proceeds of Crime Act (POCA) see *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/317904/Fact_Sheet_-_Overview_of_POCA__2_.pdf.*

3. Encouraging changes and good practices

3.1. Specialized units

Prior to the 1st of January 2016 money laundering cases were managed by one main department within the Prosecutor General's Office, together with high profile, corruption and organized crime cases. From the beginning of 2016 however the Department of High Profile and Military Crime Cases was split into two, even more specialized units and as a result a classic AML/CFT Department had been set up.[27] One department took responsibility for the high profile, corruption and organized crime cases, also dealing with criminal procedures involving personal immunity, criminal organizations, JITs, or the violation of the EU's financial interests. On the other hand, the Counter-Terrorism, Anti-Money Laundering and Military Cases' Department is acting in economic crime cases such as tax and excise fraud and money laundering, taking part in the judicial fight against terrorist acts and financing of terrorism, dealing with environmental offenses, and also responsible for the matters of international cooperation in the aforementioned cases.[28]

Having set up a new specialized department for AML matters obviously does not mean at all that the Prosecution Service has not focused on the fight against money laundering and asset recovery issues prior to the 1st of January 2016. Only in the previous year the Prosecutor General's Office carried out two internal reviews; one on the 'practice of coercive measures targeting asset recovery in the field of economic crimes' and another on the pragmatic experience gathered in money laundering cases, as part of the preparation for the 5th round Moneyval evaluation. Based on the findings, the Deputy Prosecutor General issued a circular[29] laying down the desirable standards and minimum expectations in the field of asset recovery, which was later followed by an interpretative internal guideline issued by the Head of the AML/CFT Department for unifying practice in money laundering cases.

The newly established AML/CFT Department continued the enhanced monitoring of practice, as well as gathering and compelling the feedback and experience coming from the prosecutorial units on a nationwide screen. As a result, the Deputy Prosecutor General of Hungary has issued two circulars[30] entering into force on the 1st of August 2017 laying down the strategic cornerstones and the new principles of approach in money-laundering cases. One circular covered the substantial criminal law aspects of laundering offences by providing basic guidelines to facilitate the proper interpretation of law by briefly explaining the elements of the legal definition of the crime. The other circular was focusing on the procedural issues and asset recovery matters and was

[27] Section 6 of the Directive 16/2015 (XII.17.) of the Prosecutor General.

[28] Section 17/A § of the Directive 12/2012 (VI. 8.) of the Prosecutor General.

[29] Circular 2/2015. (VI.30.) of the Deputy Prosecutor General of Hungary on Prosecutors' Tasks Relating to Coercive Measures for the Confiscation of Crime-Related Assets.

[30] Circular No. 1/2017 (VII.31.) of the Deputy Prosecutor General of Hungary on the aspects of criminal law of prosecutor practice to be followed in criminal proceedings linked to money laundering.

setting up standards how prosecutors should approach evidentiary difficulties when considering filing an indictment with the court.

To promote the application of the two circulars, the Head of the AML/CFT Department also issued two internal guidelines on the same date, accompanying the circulars and giving an in-depth explanation on their provisions for prosecutors.[31] For a better understanding, the guidelines incorporated extracts from related court decisions so that practitioners could get an insight view on interpretation and legal classification issues, thus encouraging prosecutors to use the guidelines as essential manuals when facing money laundering cases. The compendium of procedural matters promoted the use of extended and reversed-burden confiscation regimes and drew the attention to the applicable sanctions against legal entities but also covered the most common difficulties regarding mutual legal assistance (MLA) requests and international cooperation.

These guidelines from the recent years laid down the basis of legal approach and interpretation in the Prosecution Service for money laundering cases, aiming to alter the practitioners' mindset by encouraging a creative way of thinking in these cases.

3.2. Intensive international cooperation

The modus operandi of using money mules (straw bank account holders) represents a vast majority within money laundering cases. According to this rather simple technique the offenders illegally intrude into the email traffic of commercially active companies, and persuade one of them by a false mail written in the name of the other to carry out a due payment onto a bank account belonging to the perpetrators, usually opened by and held for a straw man (the 'mule') under the offenders' control.

One of the recurring characteristics of these crime scenarios is their cross-border nature as the commission of the predicate offence and the acquisition of bank account money is commonly carried out under different jurisdictions. Fraudsters often remain unidentifiable, while the account holder money mules are usually easy to find with the help of bank documents, swift messages and FIU reports indicating the fraudulent transaction. These split jurisdiction cases convey the same difficulties for prosecutors operating in the country of proceeds; getting additional information and evidence about the underlying offence, trace and secure, then repatriate the proceeds either directly to the victim or to the judicial authorities in the victim's country. Both these tasks require efficient international cooperation, but outside of Europe it is not always that easy to find a sufficient legal basis for such.

Outside the EU and the Schengen borders, the most commonly quoted multilateral convention is the UN CTOC[32] as it has already been ratified or at least approved by most jurisdictions, including even African, Caribbean, Far-Eastern and South-East-

[31] Guidelines Nr. TPK. 1008/2017/37-I and 37-II by the Head of the AML/CFT Department on the substantive and procedural aspects of money laundering cases.

[32] United Nations Convention against Transnational Organized Crime.

ern-Asian countries with just a very few exceptions.[33] In the course of applying the Palermo Convention it is still a major challenge though to meet with the conditions of its limited scope set forth in Art. 3 para 1. Money laundering is undoubtedly a crime fitting into the cited provision of CTOC but only if committed in a transnational nature by an organized criminal group. Again, having regarded the explanation in Paragraph 2 of the same Article, transnational nature is out of question when speaking of money mules. But is the laundering activity of such, involving money mules committed in an organized fashion?

According to the practical experience the Prosecution Service's answer is yes. Money mules are typically used for transferring the proceeds of the predicate crime either to yet another mule or a beneficiary of the underlying offence, often with a twist that aims to break the money trail like cashing out at one point and depositing the money on another. Hence mules are intermediaries between the predicate crime's offender and a third-party beneficiary. Case observation also shows that the simplest form of the technique involves at least three different jurisdictions, as the predicate crime is committed in a country that is different from the one where the mule transacts with the incoming proceeds. In event the launderer succeeds he is most likely to transfer the assets to a third country either using bank accounts or other financial cash-flow services. In this approach there is a good reason to believe that cross border money laundering using mules requires the coordinated activity of at least three people. Even if this group of three is an occasional organization, their operation matches the definition under Art. 2 point (a) of the Convention.

In addition to the formal way of sending MLA requests it is also good to know about informal channels of making contact with faraway jurisdictions. Practice heavily relies on the financial intelligence units' communication (Egmont Group, FIUs), the possibilities offered by law enforcement dialogue through Interpol, but using practitioners' specialized networks like CARIN[34] and other regional correspondents for asset recovery and related issues, or AMON[35] expressively targeting anti-money laundering fight also provides an indispensable support and greatly contributes to effective cooperation. Last but not least investigators tend to ask for the help of diplomatic liaisons through embassies or even, if everything else fails contacting the victims of the predicate offense directly on their website.

3.3. Proactive use of FIU powers

One of the crucial points regarding international cooperation in money laundering cases is obviously detecting and securing the proceeds coming from the predicate offense, before offenders could get their hands on it. As timing is critical and judiciary should outrun criminals in this race investigators and prosecutors have to be aware of all possible legal

[33] See the official website for status of ratification: *https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en* [19.05.15.].

[34] Camden Asset Recovery Inter-agency Network, see homepage at: *https://www.carin.network/*

[35] Anti Money Laundering Operational Network, see article on Europol's page: *https://www.europol.europa.eu/newsroom/news/international-anti-money-laundering-operational-network-amon-launched*

ways to block and hold up the illegally obtained monies. A well-tried beaten track in order to gain extra time for securing criminal assets in a foreign jurisdiction is exploiting the FIUs' postponing or freezing (transaction suspending) powers.

Even though FIUs may differ from each other in terms of their administrative, investigative or hybrid nature, many of them are capable to temporarily postpone the execution of a bank transaction that had been reported or detected as suspicious in the STR.[36] The period of time and the possibility to extend it varies on a very wide range, but it is always worth it to give it a go, as securing the illegal assets abroad within the frame of a criminal procedure requires formal judicial cooperation. Even if this collaboration is based on mutual recognition tools like the EU freezing order,[37] it always takes time to issue a resolution of restraint and having translated it to the language of the Requested Party requires days or even weeks in addition

In Hungary, the currently existing AML/CFT laws regulating the FIUs postponing powers have entered into force on the 26th of June 2017.[38] According to the new Act's provisions service providers are obliged to report not only the indicators of money laundering and terrorism financing, but also any possible sign of a property deriving from criminal activity.[39] The open crime approach in reporting obligation certainly has an advantageous side, as it enables FIUs to suspend the execution of transactions related to domestic crime cases of any kind, which can be a highly useful power when assisting an extended police raid on the offenders. Prior to the new AML/CFT Act, the term of postponement was 2 working days in the case of domestic and 4 working days for foreign transactions with a common extension of additional 4 working days.[40] The new law unified the period of the two and defined it in a time frame of 4 plus 3 working days.[41] One and a half week does not seem a long term in the dimension of formal judicial cooperation, but it can certainly save the day in some urgent cases while chasing criminals' money.

3.4. Repatriation in a simple way

Once assets are secured in a cross-border money mule case, the final – yet none less difficult – step to put an end to a success story is finding a suitable legal way to return

[36] see a detailed study of World Bank on suspending suspicious transactions at:
http://documents.worldbank.org/curated/en/904741468336292131/Suspending-suspicious-transactions,
a Moneyval Research study on postponement powers and account monitoring is also publicly available at:
https://rm.coe.int/research-report-the-postponement-of-financial-transactions-and-the-mon/168071509b.

[37] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

[38] Act LIII of 2017 on the Prevention and Combating of Money Laundering and Terrorist Financing [AML/CFT Act].

[39] Section 30 of the AML/CFT Act: The directors, employees of service providers and their contributing family members shall report without delay any information, fact or circumstance giving rise to a suspicion that specific property is derived from criminal activity.

[40] Section 24. § (4) of Act CXXXVI of 2007 on the Prevention and Combating of Money Laundering and Terrorist Financing [previous AML/CFT Act].

[41] Section 35. § (2) AML/CFT Act.

back the money where it had belonged before the commission of the predicate offense. The common way of doing this in split jurisdiction cases is by applying asset sharing treaties, in which the two affected Parties (the Requesting and the Requested State) enter into an agreement on the sharing of the seized and since confiscated criminal assets.

EU Member States' assets sharing regime is usually based on Council Framework Decision 2006/783/JHA which lays down a simple and reasonable model: in case the amount does not exceed 10,000 Euros the assets will be the property of the State where it had been confiscated, while exceeding the threshold leads to a 50–50% percent asset sharing unless the affected parties would not decide otherwise.[42] Hungary has implemented the framework decision on the 8th of January 2009[43] but created the legal basis for asset sharing with non-EU countries only eight years later on the 1st of January 2017.[44] The asset sharing regime introduced upon implementing the framework decision served as a model for the latter one; the non-EU system is basically identical to the provisions of 2006/783/JHA. Even though it is an important achievement to have the possibility of asset sharing in place, the Prosecution Service has found a faster and simpler way to repatriate assets to the victims.

Throughout the past two decades of the criminal procedure law in Hungary there have been two different coercive measures to secure the proceeds of crime. Seizure resulted in the physical deprivation of property and was used for corporeal and tangible items, while sequestration (freezing) only suspended the possibility to dispose of the assets and was primarily used for incorporeal elements like bank account money, company shares plus real estate property. Another yet important difference is related to the release of the measures: while seized objects might be given to someone different from whom the assets had been seized previously, sequestration is incapable for restoring property rights in such a way.

For a long time practitioners had a kick against seizing e-money, arguing that on a word-by-word interpretation of law, seizure is modelled for materials and not for something abstract of rather contractual nature like bank account money.[45] As time passed by a new breed of crimes appeared in practice and generated yet unheard of difficulties that were demanding proactive and revolutionary legal solutions from prosecutors. Cross border phishing, social engineering fraud and money mules woke up the problem of how to compensate victims in foreign countries as the only legal tool that enabled authorities to take away proceeds from the offender and give them back to the victim before the court's final judgement, was seizure. Having realized this situation the Prosecutor General's Office issued an internal guideline laying down a new

[42] Art. 16 of Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

[43] Art. 7 of Act LXXX of 2008 Amending Act CXXX of 2003 on the cooperation in criminal matters with the EU Member states.

[44] Art. 31 of Act CIII of 2016 on amending Acts of international and EU MS cooperation in criminal matters as well other Acts related to criminal law.

[45] Based on an examination carried out by the Prosecutor General's Office in May 2008, under case file nr. NF. 7931/2007.

approach in interpretation, which moved the emphasis to victim compensation and argued that account money should be treated the same way as cash.[46]

A decade later legislation closed up to this legal approach, and the provisions of the latest Act on Criminal Proceedings have extended the scope of seizure to bank account money.[47] Seizure may be ordered by the investigating authority without any judicial consent or permit, enabling the police and NTCA[48] to immediately secure the proceeds of crime. Once monies have been restrained and there is a clear path and unbroken money trail leading back to the victim, the assets may be released on the basis of an MLA[49] request, and given back either directly to the victim or the acting judicial authority of the victim's country. Reconstructing the route of the money is not always easy, but the application of seizure still seems a much more efficient and faster solution compared to the seemingly rather lengthy combo of confiscation and asset sharing.

3.5. New legal tools for covert monitoring of transactions and crypto currencies

The new Code of Criminal Procedure not only recognized the call from practitioners for a wider scope of application regarding seizure but has also introduced new and promising legal institutions that can be of great benefit in the fight against money laundering.

The Act has added the monitoring of financial transactions to the list of covert operations, which enables authorities to secretly keep financial operations – typically carried out on one or multiple bank accounts – under surveillance and most importantly to learn about an account holder's planned actions in just about real time before they are executed in the future.[50] As the new tool is enriching the list of covert instruments, it needs a judicial approval by the acting prosecutor, yet no further authorization is required from the investigative judge. The monitoring's target can either be one or multiple accounts at the same time and the investigating authority might as well filter transactions to be observed and reported such as cash withdrawals, wire transfers towards a certain person, etc. The deadline for transmitting relevant information to the investigating authority by the service provider should be established in the resolution, and the application can last for a maximum of six months.

A complementary tool that accompanies monitoring is the possibility of temporarily suspend the execution of a financial transaction. Should a certain transfer show the signs of money laundering or refer to a predicate offence the investigating authority that monitors the account may uphold the execution for a while, in order to collect

[46] Internal Guideline nr. NF 7931/2007/37-I of the Department for the Supervision of Investigations and Preparation of Indictment.

[47] Section 308. § (3) of the Act on Criminal Proceedings: The subject of seizure may be moveable items, bank account money, electronic money and electronic data.

[48] National Tax- and Customs Administration, as it also have investigative powers.

[49] Mutual legal assistance request.

[50] Sections 216–218. of the Act on Criminal Proceedings.

more information on the background of the money. If the assets do not show any connection with a crime they shall be released from suspension, otherwise they shall be seized. In case the authority could not exclude the possibility of the monies being the proceeds of crime but was unable to ground the link to a criminal conduct, the assets can still be followed secretly by the means of covert monitoring. Pursuing the proceeds in real time can be hazardous though; the chase might lead investigators to offenders on the next level, but the assets can also disappear in a glimpse of an eye. Still, the additional two or four workdays provided by the possibility to suspend the execution can be very useful in the preparation for a raid as well as in the course of international cooperation.

Another fresh element in the new Code that may serve the future needs of both law enforcement and judicial authorities is the recognition of crypto currencies and the legal possibility to seize them. Using bitcoins (BTC) or other cryptos as part of a laundering figure started to appear recently in some criminal cases, typically for hiding and disguising proceeds from darknet drug sales or social engineering fraud plots. Due to its special, one of a kind nature and the lack of both legal background and methodology, seizing cryptos was a real pain in the back for investigators. Having recognized this insufficiency legislation has expressively created the legal possibility to seize cryptocurrencies and also shaped up a legal frame for the methodology of execution, providing the most essential guidelines for the first BTC cases.

First, the new law had to choose a way how cyptocurrencies should be approached, which are now treated by the new Act on Criminal Proceedings as electronic data that is used for payment.[51] The possibility of seizing data has already existed prior to the new Act, but it was usually carried out by copying, transferring or moving the data from one medium to another one controlled by the investigating authority. These methods would not have been suitable for seizing cryptos, thus the new Act pointed out, that electronic data used for payment might as well be executed by carrying out an operation that results in blocking the right of disposal over the value represented by the data. The wording of the law leaves the floor open for any kind of operation that leads to the suspension of disposal thus seems to be abstract and flexible.

Secondly, legislation has amended the law on the detailed rules for executing seizure and defined multiple ways on how the coercive measure should be performed on crypto currencies.[52] Transferring the data onto another surface such as a virtual wallet could be the most common option but seizing hardware wallets is also a possibility to execute the seizure on bitcoins. Last, but not least cryptos might be sold as well on the spot of seizure immediately, resulting in a swap of seized assets; in this case the sale price will be seized and transferred onto a bank account of the investigating authority instead of the cryptos themselves.

[51] Section 315 (2) of the Act on Criminal Proceedings.

[52] Sections 67–67/B of Joint Decree nr. 11/2003 of the Minister of Justice, Finance and of Internal Affairs on the detailed rules of managing and administering seized objects, and on executing preliminary sale, confiscation and elimination of instrumentalities in the criminal procedure.

As the exchange rates of crypto currencies are changing quickly and unpredictably, one of the first things that needs to be dealt with just after having seized the cryptos, is asking the affected party whether he wants to sell his virtual currencies or not. If so, his decision should be respected, unless seized cryptos are essential for evidentiary purposes, and therefore should remain in the custody of the authorities in their original state. A major issue that needs to be solved in the future is the legal basis of selling seized cryptocurrencies. Even though selling seized property in course of the investigation is a long existing legal tool in the history of criminal procedure law, the conditions set forth in the Act for preliminary sale – such as fast deterioration, unsuitability for long-term storage, diminishing value or expensive safekeeping – are difficult to meet with in terms of cryptocurrencies.

4. Afterword: Future challenges

From a judicial practitioner's view, we have already taken the first steps on a long road that leads to promising results. The growing number of laundering offences had already made its impact on both legislation and everyday work; criminalization is harmonized with international standards and is covering a wide scale of conducts – including self-laundering – that can be the legal basis for prosecution. Criminal procedure law is providing a flexible solution for victim compensation and international cooperation, enabling law enforcement authorities to monitor transactions in just about real time and has prepared its weapons against the possible threat by crypto currencies.

Still, there is a lot of work to be done in the future; cash control instruments – such as the reporting obligation and the possibility of cash seizure in a similar way as laid down in the EU law[53] – should be strengthened in order to reduce untraceable and tainted cash flow. In the meantime, legislative steps should be taken to ease the difficulties arising from proving the predicate offence and traceability, by introducing the crime of 'illicit or unexplained wealth', following the path already taken regarding the evolution of confiscation laws. As low-cost and homespun forms of laundering methods often occur in petty crime cases, a more differentiated, value-tracking figure of money laundering would be highly welcomed by both law enforcement and judicial practitioners. Legislation should also replace the obsolete term of 'objects' with the more flexible definition of assets in the Criminal Code, while setting up a central registration of bank accounts and real beneficial ownership would certainly be of benefit in the course of detecting offenders and revealing their identity.

All in all, Hungary has started its hopeful journey on a way of creating an effective AML regime with some of the basic weaponry already in place, while other arms still need to be forged in the future.

[53] Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community.

THE FIGHT AGAINST CORRUPTION FROM THE PROSECUTOR'S POINT OF VIEW

Dr. János Homonnai[*]

1. Introduction

The general title of this event (Current Questions and Answers Relating to the Criminal Law Protection of the Financial Interests of the European Union) suggests that I am supposed to talk not on corruption in general but rather on a specific kind thereof that is in connection with the violation of the financial interests of the European Union. This supposition moves me to the question of what corruption is at all.

2. Definition of corruption

For a prosecutor or for a professional of criminal law, there is a very simple answer to this question: Corruption is what the Criminal Code defines as corruption crimes. These are active and passive bribery in the private sector, active and passive bribery of public officials, active and passive trading in influence and the failure to report corruption crimes.

However, it is quite clear that the social sciences or public opinion do not limit the notion of corruption to these crimes. There are a number of events that are deemed by the public to be obviously corrupt phenomena that qualify as crimes in the Criminal Code but not as corruption crimes or do not even qualify as crimes.

2.1 Phenomena of corruption

What events can be deemed corrupt phenomena?

– Misuse of public funds is usually considered to be corruption-like crimes, for example when an executive officer of a state institution or a state-owned firm handles the funds in his/her care in an unfavourable manner. A characteristic feature of such crimes is that the real reason for an unfavourable transaction remains unknown, and it cannot be ruled out that in fact it was favourable for the executive officer, not for the firm.

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– The appropriation or use of public funds for private purposes is obviously a crime against property, like embezzlement, misappropriation and unfaithful handling. Still, such crimes are considered corruption cases. A special branch of these kinds of crimes is the fraudulent acquisition of state subsidies, which in Hungarian criminal law qualifies as the so-called budget fraud. To demonstrate that budget fraud in public opinion is a corruption crime, it is a good example to see what the public thinks of the investigations of the European Anti-Fraud Office (OLAF). OLAF makes judicial recommendations to the prosecution service on a regular basis, 5–10 times a year, mainly because of budget fraud. Sometimes OLAF makes recommendations because of crimes against property, but it has never made a recommendation because of bribery. Despite this, among the Hungarian public, each judicial recommendation of OLAF is considered evidence of corruption in the public sector.
– Conflicts of interests and violation of procedural rules are frequently confused with corruption. In fact, misconduct in a public procurement procedure sometimes does not even constitute a crime. It is possible that competitors coordinate their applications and offers. This is a crime in Hungarian criminal law, collusion in public procurement, also referred to as a horizontal cartel. But there are well established methods to avoid criminal liability. For a long time we have been witnessing public officials who are in charge of requesting orders shift the liability from themselves by outsourcing the conducting of public procurement to specialised advisory firms. In this way, the public officials do not even get in touch formally with competitors, but the outcome of the procedure can be as expected.
– Nepotism is also considered corruption. However, it is rarely a proven crime if someone from the acquaintance of public officials obtains a job or gets a contract, though this could be abuse of official function. However, if the perpetrator does not even hold a public official position, e.g. the CEO of a state-owned firm, nepotism itself is not even a crime.
– Finally, the ultimate form of corruption is state capture, when legislation or state decisions are guided by private interests. Since the corrupted decisions are formally legal, it is very difficultor rather impossible, to fight against it with the tools of criminal law.

To sum it up, besides the various forms of bribery, special forms of embezzlement, misappropriation, unfaithful handling, horizontal cartels, budget fraud and abuse of official function can be corruption-like crimes, too. This opinion, that not only bribery but other crimes that harm the public good can be corruption, can be justified from a legal point of view as well, since the United Nation Convention against Corruption – the Merida Convention – has prescribed for the State Parties to establish embezzlement, misappropriation or other diversion of property by a public official, as well as the abuse of functions, as crimes. Therefore, the following ideas to be shared on corruption will refer to these crimes as well.

3. Proving corruption crimes

It is well known that corruption is among those crimes that are the hardest to explore and to prove. In jurisprudence they are called consensual crimes because their main feature is that none of the participants would have an interest in revealing the crime. Besides, there are other elements that make this type of crime distinct from the others and make proving it even harder:

– the act of the crime does not result in any tangible trace or clue;
– therefore, the chances of acquiring material evidence are minimal, the crime scene has no value;
– usually there are no observers who could testify, or if there are, they might also be involved in the crime, so the chances of proving by witness are also limited.

Although proving is hard, there are facts and circumstances that have discoverable effects:

– Communication and movements of the participants involved in the crime – all of these can prove the connection between the participants of corruption
– Manifestation of the purpose of corruption – the corrupted procedure, behaviour or decision that is the aimed for outcome of the corruption
– Transaction of assets. The payment, the illegal benefit, must have a source, a destination and a way between them. All of these can be discovered, even if not in a simple way.

These facts can be proven, and although they are not equal to the fact of corruption, indirectly, by conclusion, they can demonstrate that corruption is the underlying fact behind the scenes.

3.1. Detection of corruption

How can corruption be detected at all? There are not so many ways, either by report or through corruption detection mechanisms.

A report might be filed by those who are affected adversely by corruption. We usually say that in corruption crimes there are no victims. Indeed, in the sense of criminal procedure, corruption has no victim because all involved parties are interested in the act. Still, corruption might have indirect adverse effects on outsiders, e.g. especially in the case of subsidies. Corruption aims at a decision to favour someone at the expense of others. Therefore, a third person might be harmed if someone is favoured by the decision-maker undeservedly in return for a bribe. Still, it is possible that a third party has no interest in reporting if he may expect further harms, e.g. expectation of being disqualified from future public procurement procedures on fabricated grounds.

It is possible to receive reports from whistleblowers. Especially in the case of systematic corruption of public funds, we can expect examples of whistleblowers, insiders who report the abuse to law enforcement either on ethical grounds or as a revenge because of some detriment. However, conflicts of interest may emerge in this case, too. Such an insider might be labelled a betrayer, and his later career, such as chances for employment, might be affected negatively.

To detect corruption crimes, the internal and external control bodies represent a great potential. In Hungarian terms primarily the so-called National Protective Service can be mentioned, which is responsible for the integrity of law enforcement, and some government organisations such as the State Audit Office and the Control Department of the Cabinet Office of the Prime Minister also play a key role. At the EU level, OLAF, the audit bodies of the Directorate Generals and the investigation department of the European Investment Bank can be mentioned.

On the basis of reports, covert operations can be introduced to detect a crime which is still in progress.

Though in the media OLAF gets notable attention, our experiences and statistics show that the local, domestic bodies have the best detection results.

As an explanation I have to give a short description of the National Protective Service, which is the internal crime prevention service of the police and which conducts integrity tests for law enforcement and public administration agencies. Integrity testing is not a criminal procedure but rather a matter of administrative and labor law. The aim of integrity tests is to establish whether the person in focus complies with his official duties. In the course of an integrity test, the examined person is put into a simulated situation without his knowing. The test is a kind of covert operation, a trap which aims to filter out the personnel incline to commit abuses of law. The procedure is based on law, and prior judicial permission is required. Since the procedure can easily result in committing a crime, special attention has to be paid to the lawfulness of the procedure, with particular attention to avoid provocation. A provocation would obviously violate the principle of fair procedure and would lead to the acquittal of the defendant in a later criminal stage. Integrity testing has been conducted for more than six years and has proven to be highly effective; in the range of the tested personnel corruption is suppressed and has become riskier. With respect to the results, the idea of extending the range of the tested personnel has emerged, e.g. regarding those who make decisions on public funds or in public procurements.

3.2 Means of evidence

The means of evidence are listed in the Code of Criminal Procedure. In corruption cases witness testimony, testimony of the defendant, expert opinion and electronic data can be relevant.

In the case of a corruption crime that has already occurred, the only reasonably conceivable means of direct evidence can be the testimony of the defendant. Unfortunately, the prosecutor can hardly expect a confession if he does not have means and ways to break the identity of interests of the participants of the corruption. In most cases, the possible advantages of a confession are disproportionate compared to the advantages. The passive perpetrator especially might lose a lot with a confession, even a whole career built up so far. The range of the possible ways of defence is wide; it extends from refusing to testify, through giving testimony on goodwill and legal lobbying, to fighting back by stating provocation of the law enforcement. However, there are means by which the prosecutor can persuade a corrupt perpetrator to cooperate.

3.3 Legal tools encouraging cooperation

The Hungarian Criminal Code provides for the easing or, in certain cases, the omitting of punishment for a corruption crime if the perpetrator reports the crime before it was detected, gives testimony on all relevant circumstances of the crime and, if he has received any benefit, hands it over to the prosecution. Before 2012 when the present provisions entered into force, the Criminal Code provided for impunity for the same conduct, but the legislation changed due to a misinterpretation of a GRECO recommendation. Now Hungarian authorities lack the means to encourage the perpetrator of active corruption in public life to take part in a criminal procedure as a witness. We are always obliged to see such a reporter of crime as a suspect, which reduces the willingness of such persons to report a crime.

The Code of Criminal Procedure authorises the prosecutor to communicate to the defendant at any time in the course of the investigation that in case of a confession, the prosecutor may apply favourable measures that are better than a normal conviction, e.g. a conditional suspension of the procedure or termination of the procedure if the defendant cooperates and cooperation is of greater importance than indicting the defendant.

In accordance with the Code of Criminal Procedure, the prosecutor may conclude an agreement with the defendant on pleading guilty and on the applicable sanctions.

All of these favourable measures are subject to the cooperation of the defendant. All of these means for encouraging cooperation will not work on their own. The perpetrators will not admit to being guilty automatically, so the will to cooperate should be encouraged further. In general, there is a perception that the passive perpetrator of a corrupt relationship is more harmful since he is the one who abuses his power and whose acts deteriorate the trust in public officials. They can be expected to commit crimes in the future, so it is more desirable to bring the passive perpetrator to justice. On the contrary, the active perpetrator might be an incidental, single participant in corruption and therefore might have less to lose and can be convinced to cooperate. However, even the active briber can be persuaded to cooperate, but only if the investigators use well built up interrogation tactics and can convince the defendant that denial is irrational in light of the evidence.

But what kind of evidence can achieve such a persuasion in the defendant?

- The evidence of communication between the participants of corruption include electronic data proving the electronic communication, call logs from telecommunication providers, cell IDs to localise the place of the participants, emails, chat messages, social media activities, calendar entries and any kind of note that can be retrieved by searching a computer.
- Any evidence that can verify that the acting and decision of the passive perpetrator were under illegal influence, e.g. documents and detailed analysis of a public procurement procedure or expert opinion on the services granted if the evaluation requires special skill, can be useful. Nevertheless, law enforcement and prosecutors are expected to be able to evaluate on their own the rules of administrative procedures and interrogate the defendant so as to confront him with illegal or unfavourable decisions.

– Regarding the benefits from corruption, the examination of the wealth of the defendants, exploration and tracking of unusual financial transactions is possible through banking and contractual documents

Using these classical means, playing out the indirect evidence and evoking the right legal tools of cooperation in the course of the interrogation, there are fair chances to break the identity of interests and convince the defendant to cooperate.

3.4 Tools of covert operation

Beside the classical means of exploration and proving, there is another major set of tools available for prosecution: the tools of covert operations.

The reason for existence of covert operation tools has been acknowledged by national and international courts, including the European Court of Human Rights. In 2018 a new Code of Criminal Procedure in Hungary entered into force, which provides brand new regulation for covert investigations. Regarding corruption, beside interception of phone calls, use of undercover officers and simulated buying seem to be of high importance. Going into the details of the new regulations would take an entire presentation, so I would just like to expound on the main intentions with the new regulations: The aim was to create efficient external judicial control over covert investigation and to regulate the introduction and application of such measures in detail to guarantee the lawfulness of the resulting evidence. Although covert tools can be very efficient in exploring a corruption crime in progress, they can be of limited use in cases of past crimes.

4. Recommendations

Based on what has been said so far, some recommendations can be made for how the financial interests of the European Union could be protected more efficiently. These recommendations reflect the views of a prosecutor, so it might be true that they follow only one track: detection and proving of crimes.

In criminal law:

– I mentioned that there are well established methods to evade criminal liability. Particular acts and behaviours (e.g. agreement between public procurement managers and applicants, the so-called vertical cartel) should be penalised.
– In connection with the shifting of decision making from public officials, the liability of decision makers who are not public officials but whose decisions affect public funds should be made equivalent to public officials.
– To enhance the willingness of suspects to cooperate, exemption (instead of mitigation) from criminal liability in the Criminal Code should be created, of course in a regulated manner.

To foster exploration/investigation:

– Administrative control and supervision mechanisms should be reinforced. Within this area, the scope of subjects of integrity testing should be widened, and integrity testing should be extended to cover managers of public funds.

– The protection of whistleblowers is a recurring problem. Incentive provisions should be made to encourage the reporting of abuses.

To foster proving:

– Access to electronic data should be made more efficient by direct access of law enforcement to certain databases. The preservation period for electronic data should be extended.
– Access to financial data should also be made easier, both in national and international terms.

THE FIGHT AGAINST CORRUPTION IN HUNGARY IN JUDICIAL PRACTICE

Dr. Péter Pfeifer[*]

1. The latest figures and the facts behind them

When we are talking about the fight against corruption in Hungary, it is first good to know the current state of corruption. There are various lists, one of which is the Corruption Perception Index by Transparency International. According to the latest index from 2018[1] Hungary has a better rank than last year. But are these lists accurate enough to measure the real state of corruption?

I think we should take the various corruption lists into account with discretion and rely instead on the exact figures of registered crimes to make an overall view of the current state of corruption in Hungary. Even in this case it is very hard to estimate the real number of committed corruption crimes because of the enormous latency of it.

The overall number of registered corruption crimes:
2017: 1123
2016: 984

The number of registered instances of bribery of public officials:
2017: 945
2016: 835

According to these figures from the Prosecutor General's Office[2] the number of *registered* corruption crimes has increased lately, but it does not necessarily mean that there are more corruption crimes *committed* as new techniques have been developed to detect, explore and investigate them, and these are more effective than the older methods. There are some bigger cases with many defendants, which can also distort the final numbers, so we can only make estimations on the real number of corruption crimes.

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[*] Judge, Tribunal of Veszprém.

[1] *https://transparency.hu/en/news/hungary-bringing-up-the-rear-of-the-region-in-transparency-internationals-most-recent-world-corruption-ranking/ (*07.02.2019.).

[2] Source: *http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2017.pdf* (07.02.2019.).

2. Corruption crimes in the Hungarian Penal Code

The Hungarian Penal Code (Act C of 2012) contains more dispositions for corruption crimes. In its dual system, all corruption crimes except one have an active and a passive version to commit. As one of the latest doctrinal decisions of the Curia[3] refers to it, these are not in full complementarity with each other in the same corruption relationship, but – with a rough approach – we can pair them.

The corruption crimes in the Hungarian Penal Code can be categorized as the following:

Table 1: Structure of the corruption crimes in the Hungarian Penal Code

"Active side"	"Passive side"
Section 290: Bribery	Section 291: Acceptance of bribery
Section 293: Bribery of a public official	Section 294: Acceptance of bribery of a public official
Section 295: Bribery in a judicial or regulatory proceeding	Section 296: Acceptance of bribery in a judicial or regulatory proceeding
Section 298: Indirect bribery ("buying influence")	Section 299: Abuse of an official function ("trafficking in influence")
Section 300: Failure to report corruption crimes	

Source: Dr. Pfeifer Péter, 2019.

3. Solutions worked out by judicial practice in the field of corruption crimes

3.1 A doctrinal decision of the Hungarian Curia from 2018[4] according to the statement of official bribery

In this decision on a single case with doctrinal relevance, the Curia stated that in case of official bribery, the person who accepts the unlawful advantage commits a crime, accepting it either during or after his term of office. After the public official's term, the person who gives the advantage only commits a criminal offence if it is proven that he has decided to influence the public official's activity. In fact, the legislator, with the "strive to influence" element, supplemented the disposition[5] with a forward-looking objective.

If the public official (the "passive briber") breaches his obligations during the term of his operation and the active briber gives unlawful advantage after the office has ended, the perpetrator acting on the active side is not necessarily guilty.

[3] EBH2018. B.13.

[4] EBH2018. B.13.

[5] Section 293. par. 1 of the Penal Code: „Any person who strives to influence a public official by giving or promising unlawful advantage – in connection with his/her operation – to the public official or regarding to him/her to another person, is to be punished for felony with an imprisonment for up to three years."

If it is proven that the active briber has already decided during the operation of the public official to grant an unlawful advantage later and has expressed his intention, then the act of the offender on the active side is factual; otherwise, the voluntary ex-post distribution of the benefit does not constitute a criminal offence.

In contrast, if the public official accepts the unlawful advantage – even if it takes place after his official operation – it is always a crime of passive corruption.

3.2. The Hungarian "Teixeira de Castro" case

Another recent decision of the Curia from 2018[6] was similar to the famous case of the European Court of Human Rights (ECtHR), Teixeira de Castro vs. Portugal,[7] and has procedural importance.

The former prison guard of the penitentiary was convicted by the military court of the tribunal in 2016 for accepting official bribery. Following an appeal by the prosecutor, the court of second instance (the regional court of appeal) acquitted the defendant in 2017 because of the absence of criminal offence. By reason of the opposite decisions of the first and second instance courts, the case was brought to the Curia for third instance revision.

According to the essence of the established historical facts, as a professional member of the penitentiary organisation, the accused person became acquainted with a prisoner, whom he met several times after his release and maintained contact with on Facebook.

The National Protective Service ordered a trust test for the accused. The trust officer contacted the accused person on behalf of the former detainee and arranged a meeting with him. At the meeting, the trust officer told the accused that a business partner whom he wanted to contact was being detained in the penitentiary where the defendant was working. He asked the defendant to help him contact his friend. The defendant told the officer that it is not possible to do so legally. The officer then enquired about the release date of his alleged friend.

The defendant said that he could solve it easily. The trust officer also wanted to send a message to this friend on a piece of paper that was accepted by the defendant. The trust officer finally told the accused that he would not be ungrateful for his action and offered him HUF 100,000[8] that the accused accepted. He transferred the bribe money to the accused, after which the accused was brought under police control, and the money for corruption was seized from him.

According to the court of second instance, the trust officer departed from the execution plan because the target person did not *ask* for financial compensation for the assistance, but the trust officer *offered him* HUF 100,000 with active behaviour. Therefore, the accused person accepted the money upon the initiation of the defence officer, so the procedure was against the ban on unfair proceedings.

[6] EBH 2018. B.1.
[7] No. 25829/94; June 1998.
[8] Approximately 320 EUR.

In this context, the court referred to the judgment of the ECtHR, Teixeira de Castro vs. Portugal, in which the ECtHR found that the behaviour of the two undercover detectives, by not restricting their activity to merely passively observing Teixeira de Castro committing a crime but exercising influence by instigating the offence, constituted a violation of Art. 6 para 1 of the Convention.

In the present case, the same was true according to the court of second instance: The trust officer, rather than creating a situation in which the accused person could have made a decision from his inner confidence – asking or not asking for an unlawful advantage – incited him to commit the crime by offering and immediately transferring the money to him. The court explained that the state should not have any interest in inducing its citizens who tend to commit an offence, to commit crimes. It referred to the lack of specific threat to society, as well.

The Curia examined further relevant decisions of the ECtHR, notably Ramanauskas v. Lithuania[9] and Bannikova v. Russia.[10]

The Curia found – contrary to the position of the court of second instance – that the facts of the Teixeira de Castro case were in many respects inconsistent with the historical facts underlying the present case. In that case of the ECtHR, the undercover detectives carried out official incitement without having a previous operational investigation or criminal proceeding against the defendant. Indeed, as the Court of Human Rights referred to, the defendant of the case had no previous criminal record, and there were no other reasons for the investigators to assume that he was a person with criminal tendencies. Neither judicial nor prosecutorial permission or supervision had been carried out in relation to the action of the undercover detectives. Their activity was therefore identified as illegal by the ECtHR.

Opposite to this, the Curia stated that the reliability test was obviously legitimate. It was subject to a regulated procedure, a prosecutor's permission, and was carried out against a person who was, in the authority's view, by maintaining contact with a prisoner who had been released from the penitentiary, a person with a criminal record. With this in mind, the incitement of the authority was not illegal, and even if the trust officer departed from the investigation plan, his behaviour did not constitute a crime.

The conduct of the trust test also complied with the criteria developed by the ECtHR in the case of Bannikova v. Russia, so the evidence from this procedure is legitimate.

The Curia stated that although the accused is obviously inadequate and unworthy of being a professional member of a law enforcement organisation, this is irrelevant to the existence of criminal liability. At last the court of third instance also referred to the fact that in the present case, the act of the defendant did not pose a specific threat to society and therefore did not constitute a crime.[11]

[9] No. 74420/01; 2008.

[10] No. 18757/06; 2010.

[11] In a newer doctrinal decision (EBH2018. B.16.) a contrary ruling was made by the Curia on partially different facts. So only because someone commits something during a trust test, it doesn't automatically mean, that it cannot be qualified as a criminal act.

For these reasons the Curia has upheld the decision of the court of second instance and acquitted the defendant.

3.3. A Criminal Chamber's Opinion[12] of the former Supreme Court of Hungary upon the confiscation in corruption cases

It is very important to confiscate the illegally acquired properties of the perpetrator. Therefore, the Criminal Chamber of the Supreme Court of Hungary has stated the following:

(a) If the passive briber acquires the financial benefit from the active briber, confiscation shall be ordered against him for this property.

(b) Confiscation also has to be ordered for the *promised* financial advantage. However, no confiscation can be ordered against the passive briber if he has not received the financial gain by committing the offence or in connection therewith. In this case, this measure has to be applied against the active briber for the subject of the promised financial gain. However, this can only be applied if the promised financial benefit was available to the active briber prior to committing the offence, and it is proven that he wanted to give it to the passive briber as a financial advantage.

(c) If the property that was intended to be handed over as bribe is no longer in the possession of the active briber, but it has not yet been acquired by the passive briber, the confiscation has to be ordered against the active briber.

4. Summary, conclusions

It is very hard to detect and investigate corruption crimes because all the perpetrators (both on the active and passive sides) are interested in keeping them hidden from others. Usually there are no witnesses or other independent direct evidence. That is why new techniques have been developed, such as the use of undercover detectives, trust tests, wiretapping, etc.

Judicial practice is ready to face the new challenges with full respect to the fundamental rights of the defendants, as well, as demonstrated above.

Despite all the difficulties, it is very important to pursue and punish corruption crimes. Its negative economic impact is huge (although we are not able to measure it precisely because of the very large latency of this phenomenon), but the fight against corruption is important not just because it has a negative effect on the economy but also because these crimes undermine the public trust (especially in the field of bribery of public officials).

So fighting against corruption in an increasingly effective way is a common interest – and not only in order to reach a better rank on the corruption list.

[12] Nr. 78/2009.

FIGHTING MONEY LAUNDERING IN HUNGARIAN JUDICIAL PRACTICE

Dr. Judit Szabó[*]

1. Introduction

What is money laundering (hereinafter ML)? In a simple way, the definition is the process of disguising the proceeds of crime in an effort to conceal their illicit origins and legitimise their future use. The objective of ML is to conceal the true ownership and origin of the proceeds, a desire to maintain control, a need to change the form of the proceeds. Proceeds means any economic advantage derived directly or indirectly from criminal offenses.[1]

2. The national legal basis

I would not like to bore anybody, but before presenting the main points of this topic, knowing the legal basis cannot be avoided.

In Hungarian legislation the ML was introduced into the former Criminal Code[2] with Act IX of the 1994. Since then it has been subject to several amendments due largely to international changes in legal practice.[3]

The legislation in force is Act C of 2012, para 399–402:

Section 399

(1) Any person who, in connection with an asset obtained from any punishable criminal offense committed by others:

a) converts or transfers the asset in question, or performs any financial transaction or receives any financial service in connection with the thing in order to:

aa) conceal or disguise the origin of the asset, or

ab) frustrate the criminal proceedings conducted against the perpetrator of a punishable criminal offense committed by others;

b) conceals or disguises the origin of the asset and any right attached to the asset or any changes in this right, or conceals or suppresses the place where the asset can be found;

is guilty of a felony punishable by imprisonment between one to five years.

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[*] Jugde, Head of Criminal Departement, Budapest-Metropolitan Regional Court.

[1] Levi-dakolias-Greenberg 2006, 5.

[2] Act IV of the 1978.

[3] Hornyák 2018, 1.

(2) The penalty under Subsection (1) shall also be imposed upon any person who, in connection with an asset obtained from a punishable criminal offense committed by others:

a) obtains the asset for himself or for a third person;

b) safeguards, handles, uses or consumes the asset, or obtains other financial assets by way of or in exchange for the asset, or by using the consideration received for the asset;

if being aware of the true origin of the asset at the time of commission.

(3) The penalty under Subsection (1) shall also be imposed upon any person who, in order to conceal the true origin of an asset that was obtained from a punishable criminal offense committed by others:

a) uses the asset in his business activities;

b) performs any financial transaction or receives any financial service in connection with the asset.

(4) The penalty shall be imprisonment between two to eight years if the money laundering specified under Subsections (1)–(3):

a) is committed on a commercial scale;

b) involves a particularly considerable or greater amount of money;

c) is committed by an officer or employee of a financial institution, investment firm, commodities broker, investment fund manager, venture capital fund manager, exchange market, central depository, body acting as a central counterparty, insurance company, reinsurance company or independent insurance intermediary, voluntary mutual insurance fund, private pension fund or an institution for occupational retirement provision, an organization engaged in the operation of gambling activities or a regulated real estate investment company;

d) is committed by a public official;

e) is committed by an attorney-at-law.

(5) Any person who collaborates in the commission of money laundering as specified under Subsections (1)–(4) is guilty of misdemeanour punishable by imprisonment not exceeding two years.

Section 400

(1) Any person who, in connection with an asset obtained from a punishable criminal offense committed by others:

a) uses the asset in his business activities;

b) performs any financial transaction or receives any financial service in connection with the asset, and is negligently unaware of the true origin of the asset is guilty of misdemeanour punishable by imprisonment not exceeding two years.

(2) The penalty shall be imprisonment not exceeding three years if the criminal act described in Subsection (1):

a) involves a particularly considerable or greater value;

b) is committed by an officer or employee of a financial institution, investment firm, commodities broker, investment fund manager, venture capital fund manager, exchange market, central depository, body acting as a central counterparty, insurance company, reinsurance company or independent insurance intermediary, voluntary mutual insurance fund, private pension fund or an institution for occupational retirement provision, an organization engaged in the operation of gambling activities or a regulated real estate investment company; or

c) is committed by a public official.

(3) Any person who voluntarily reports to the authorities and unveils the circumstances of commission shall not be prosecuted for money laundering as specified under Subsections (1)–(2), provided that the act has not yet been revealed, or it has been revealed only partially.

Failure to Comply with the Reporting Obligation Related to Money Laundering

Section 401

Any person who fails to comply with the reporting obligation prescribed by law in connection with the prevention and combating of money laundering and terrorist financing is guilty of misdemeanour punishable by imprisonment not exceeding two years.

Interpretative Provisions

Section 402

(1) In the application of Sections 399–400, the term 'asset' shall also cover instruments embodying rights to some financial means and dematerialized securities, that allows access to the value stored in such instrument in itself to the bearer, or to the holder of the securities account in respect of dematerialized securities.

(2) In the application of Sections 399–400, financial activities and financial services shall mean financial services and activities auxiliary to financial services, investment services and activities auxiliary to investment services, commodity exchange services, investment fund management services, venture capital management services, exchange services, central depository services, the activities of bodies acting as central counterparties, insurance services, reinsurance services, and the activities of independent insurance intermediaries, voluntary mutual insurance funds, private pension funds and institutions for occupational retirement provision.

We can say that the money laundering provisions of the current Criminal Code are now in line with international expectations, but the practice is not suitable in all aspects.[4]

3. MONEYVAL's latest evaluation report and its conclusions

3.1 The evaluation report

On the other side, the Committee of Experts on the Evaluation of Anti-Money Laundering (AML) Measures and the Financing of Terrorism (MONEYVAL) drafted the fifth round evaluation report[5] on Hungary, adopted by the MONEYVAL Committee at its 51st Plenary Session in Strasbourg, 27–29 September 2016.

The report analysed the level of compliance with the 40 recommendations of the Financial Action Task Force (FATF) and the level of effectiveness of Hungary's AML system and provided recommendations on how the system could be strengthened.

The report's main conclusion was – from the side of the judiciary:

(a) Although the number of investigations and prosecutions of ML are on the rise, law enforcement and judicial practice shows that the fight against ML activity is not considered a priority. Almost all investigations and prosecutions combined the predicate with the money laundering offence, with a clear emphasis on self-laundering cases. Third-party laundering prosecution is sporadic. Professional money launderers are not prosecuted or convicted. No statistical information is available on the types of ML (e.g. self- or third-party laundering, stand-alone laundering). How many of the self-laundering cases were related to foreign predicate offences is also not recorded. The ML prosecutions are not commensurate with the risks and threats identified in the NRA. As the vast majority of the convictions relate to several (predicate) offences to which ML has been added, it is difficult to conclude whether the sanctions for ML are

[4] Hornyák 2018, 1.

[5] *http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-hungary-2016.html* (01.02.2019)

effective, proportionate and dissuasive. The dependence of the ML offence on the identification of a specific predicate offence is a factor that has weighed on the effectiveness of the AML system. However, there has recently been a move towards drawing inferences from facts and circumstances to establish underlying predicate criminality in ML cases, which should be further developed.[6]

(b) The prosecutorial authorities should test in the courts the limits of the evidentiary requirements on the illegal origin of the laundered assets, taking into account the all-crimes scope of the ML offence. The evaluators encourage prosecutors to bring more ML cases to court in order to develop jurisprudence along these lines. To this end, prosecutorial and law enforcement guidelines should be developed, backed up by training for all prosecutors involved in proceeds-generating offences, on the minimum levels of evidence which the courts may require to establish underlying predicate criminality in a ML prosecution.[7]

(c) The mandatory seizure/confiscation regime is legally sound and stringent, although the dependence on the predicate offence is a restraining factor. Although the Office of the General Prosecutor (GPO) considers this aspect a priority, the statistics do not demonstrate the actual effective and successful application of the respective rules. However, some case examples are indicative of large amounts of proceeds susceptible to confiscation. In any event, the low seizure numbers seem partly due to a lack of awareness of and focus by the investigating authorities. The Asset Recovery Office, which fulfils an increasing role in asset-tracing and recovery, has potential to provide support to the investigations which is not fully exploited, and its lack of resources is a matter of concern.[8]

The final conclusions of the report on the effectiveness ratings were that ML investigation and prosecution, and moreover ML confiscation, is "low". Of course, this conclusion affected the judiciary.

3.2 The Hungarian "Action Plan"

As a reply, the Hungarian Government prepared an "Action Plan"[9] in which the Government requested the Prosecutor General and the President of NOJ – with the involvement of the President of the Curia – to contribute in the performance of the indicated task. The task was to review and set up an expert committee – with the involvement of competent practising judges and eventually the heads of criminal divisions and prosecutors – in order to make available the joint assessment of the indictments submitted, the decisions made and the inferences based on typical perpetrator behaviours in the years 2015, 2016 and 2017 in accordance with the MONEYVAL recommendations, as

[6] Executive Summary 14.

[7] Report Chapter 3. Recommended Actions Immediate Outcome 7.2–3.

[8] Executive Summary 15.

[9] Government Resolution 1688/2017. (IX. 22.) on the Action Plan prepared on the implementation of anti-money laundering recommendations for Hungary, specified in the Moneyval country report of the Council of Europe

well as to develop guidance orienting the case law as to what must be proven and to what extent for the establishment of money laundering[10]

Finally, an expert committee has been set up that is co-chaired by the PGO and NOJ. Practicing judges, members of the Curia and prosecutors are also permanent representatives.[11]

The first meeting of the expert committee took place on 3 October 2017 and the last on 14 January 2019. The next one is planned for 1 April 2019.

The expert team made some recommendations for the courts:

– trainings – a special workshop took place at the Hungarian Academy of Justice on 15 January 2019 with speakers who were the members of this expert committee
– legal interpretations (see below) – one of the main topics on the agenda is the discussion and determination of the proof of evidence of the predicate offence at the required level

Furthermore, the expert committee is still working on preparing some recommendations for the legislators, as well.

It must be highlighted that an operational working group of law enforcement was set up (25 October 2017), and these expert committees will consult with each other parallel to the relevant and interconnected issues.

4. The available statistical data

At this point it must be mentioned that – according to the currently available data – between 1 January 2011 and 31 December 2016, so over six years, only 50 ML cases were finalised in the Hungarian courts.

For the statistical data between 1 January 2017 and 31 December 2018, see the table below:

Table 1: Statistic data about money laundering.

Criminal offence	Number of cases	Number of defendants
Felony of money laundering (Art. 399 of the Criminal Code or Art. 303 of the Act IV of 1978)	2017: 8	2017: 8
	2018: 17	2018: 24
Misdemeanour of money laundering (Art. 400 of the Criminal Code or Art. 303/A of the Act IV of 1978)	2017: 4	2017: 12
	2018: 2	2018: 2

Source: NOJ database 05.02.2019.

[10] Action Plan III/F/1.

[11] The judge members of the expert committee: Dr. Székely Ákos (head of the Criminal Department, Curia, Dr. Túri Tamás (Regional Court of Appeal of Pécs), Dr. Fehér Szabolcs (Metropolitan Regional Court), Dr. Budai Vince (head of the Criminal Department, Regional Court of Tatabánya), Dr. Sárközy Szabolcs (head of the Criminal Department, Regional Court of Kecskemét), Dr. Pfeifer Péter (Regional Court of Veszprém), Csizmadiáné dr. Pethő Tímea (Regional Court of Debrecen), Dr. Szabó Judit (head of the Criminal Department, Metropolitan Regional Court).

Table 2: Number of judicial decisions

	Content of decision		
	conviction	acquittal	termination
2017	24	2	0
2018	40	0	3

Source: NOJ database 05.02.2019.

As you can see, the tables are not equal because of the different statistical methods.

It should be interesting to know the average number of days between the day when the criminal charge becomes final and the adoption of a judgment by the criminal courts of first instance:

Table 3: Number of days between criminal charge and judgment by the criminal court

2014	373
2015	1112
2016	533
2017	497

Source: NOJ database 05.02.2019.

5. The final opinion of the expert NOJ & PPO committee

As mentioned earlier, the expert NOJ & PPO committee reviewed the identified material law problems in AML law enforcement and judicial practice.

Those issues were identified and collected that cause difficulties in the practice and might provide legal changes in order to improve the effective procedures in practice.

In its view, the expert team found that the following questions concerning legal regulations are problematic in court practice.[12]

5.1. The delimitation of ML and dealing in stolen goods

The relationship between ML and dealing in stolen goods[13] and the delimitation of these offences is a recurrent practical problem. Both are ancillary offences, which means they are related to a predicate offence.

While ML leaves the scope of possible predicate offences completely open, dealing with stolen goods can only contribute to the crimes listed in the Act (theft, embezzlement, fraud, misappropriation of funds, robbery, plundering, extortion, unlaw-

[12] This part of the presentation is based on the final opinion of the expert comittee of NOJ & PPO, 28/06/2018 (OBH 2017. OBH. XX.T.6.41.) processed by Hornyák 2018, 1–2.

[13] Section 379 Act C of 2012.

ful appropriation, or from another receiver of stolen goods), which is more specific than ML.

In the case of ML, however, there is a wider range of perpetrator acts, and this can take precedence over the other offence because of the much more detailed legal description.-

However, for this topic, the legal thinking is changing, and that can be a reason for the statistical data's increase from 2017 to 2018.

5.2. The accumulation of the acts of dynamic ML

According to ascertainment of dynamic ML[14] there is a practical problem in cases where the elements of facts are incompatible with points (a) and (b): e.g. rotating property from committing a crime in gambling is not a financial service, but it is clearly an act of concealing the origin. The transfer of money originating from fraud to bank accounts can be evaluated as a financial service. The purpose of this action is rather to conceal the identity of the person who owns the money or the secretion of money itself than the concealment of its origin.

5.3. The proof of the intent of the perpetrator

Another problem with the regulation of dynamic ML is the definition of intent.[15] According to the Criminal Code, ML presupposes an intent conduct, so the perpetrator's negligence can therefore only be seen in the knowledge of the origin of the instrument of the offence (or without knowing it). To determine the eventual intention, the explicit knowledge of the guilty origin of the instrument is not necessary. It is sufficient that the perpetrator realises the real possibility that the instrument comes from a criminal offence, and his act is carried out indifferently in spite of this recognition. The relevant legal conclusion about the intent of the perpetrator must be deduced from the facts of the offence.

Compared to the Hungarian law in force, the Warsaw Convention of the Council of Europe (16 May 2005)[16] and Directive 2015/849 of the European Parliament and the Council are also more flexible and more openly defined; according to this, the perpetrator's objective is to assist any person who is involved in the perpetration of the predicate offence in evading the legal consequences of his actions. However, the Directive also states the knowledge, intent or purpose required as an element of the activities may be inferred from objective factual circumstances.[17]

[14] Section 399 (1) Act C of 2012.

[15] Section 7 Act C of 2012: A criminal offense is committed with intent if the person conceives a plan to achieve a certain result, or acquiesces to the consequences of his conduct.

[16] Act LXIII of 2008.

[17] 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, 05.06.2015, 73–117] Art. 1. (6).

5.4. The question of value limit

Practical experiences show that a decisive proportion of the predicate offences of ML are offences classified by value limits (offenses against property, budget fraud). In many cases, it is possible that the perpetrator of a criminal offence against minor value committed on a commercial scale is assisted by others, and the contribution of those persons will accomplish one of the forms of ML.

By now, ML is not classified by a limit of value. The offence committed to the amount of 50 million forints[18] can be punished with imprisonment from one to five years. In matters related to ML associated with crimes against minor valued property, a striking imbalance is created considering threats and legal consequences. In order to avoid disproportionate judgments, it would be appropriate to regulate ML by the value of the offence.

5.5. The legal definition of the "thing" and the "account money"

By now, account money has become one of the typical perpetration objects of the wealth-enhancing offences, but legally it is not considered a thing according to the Criminal Code nor the Civil Code. It is a claim based on a contractual relationship, a pecuniary right. This induces the following practical problems: By using the strictest, legally clear approach in the absence of an explicit extension of the definition of "thing" in criminal law to account money, it cannot be the subject of a criminal offence in which the concept of "thing" is a factual element (e.g. embezzlement, ML). As it is a pecuniary right, no coercive measure against things (e.g. seizure) can be carried out with account money.

The above-mentioned difficulties can be ignored by the current legal practice for practical reasons but without any substantive legal basis. By extending the definition of "thing" in criminal law, these questions could be sorted out, which seems to be more and more urgent because of the rapid spread of virtual payments.

5.6. The question of proving the predicate act

As mentioned earlier, this is one of the main topics of the practical argument. There is a continuous discussion on the required level of the proof of evidence of the predicate offence.

During the statistical period (1 January 2017 and 31 December 2018) all the predicate crimes were fraud.

ML presupposes the existence of a predicate criminal offence. Moreover, these two elements have to be interconnected but only at certain points. The guilt of the defendant in various forms of ML can be established even if no final conviction had been made in the case of the predicate offence, or even if there was no inculpation in this

[18] ~ 152,000,- € (10.02.2019).

regard. However, according to some judicial decisions, the predicate offence as an objective factual element of ML has to be totally proven during the procedure by all authorities. According to this, "totally" evidence should be extended to all the details that are relevant to the decision: evidence of facts, disclosure of grounds for exemption from criminal responsibility, determination of stage or perpetrators, etc.

In comparison, in the cases of ML, it is necessary to examine the predicate act in a much narrower way (similar to dealing in stolen goods): it has to be demonstrated / proved that the source of the object of ML could only be a punishable act.

6. The cycle of money laundering

Finally, the cycle of the ML[19] has to be mentioned:

(a) predicate crimes: corruption and bribery, fraud, organised crime, drug and human trafficking, environmental crime, terrorism and other serious crimes

(b) placement: initial introduction of criminal proceeds into the stream of commerce (this is the most vulnerable stage of the ML process)

(c) layering: distancing the money from its criminal source – movements of money into different accounts, to different countries (increasingly difficult to detect)

(d) integration: the last stage in the laundering process occurs when the laundered proceeds are distributed back to the criminal, creating the appearance of legitimate wealth.

As it is well highlighted, this session's other topic is corruption, the act of which is related to ML. It is a common predicate crime and quite difficult to prove or sit in judgment on.

7. Conclusions and suggestions

At the EU, ML is mainly regulated by the PIF Directive,[20] the fourth[21] and sixth[22] Anti-Money Laundering Directives. The EU's regulation is one of the most important regarding the cross-border nature of ML: in ML cases it can be problematic in practice where the predicate offence and the money laundering were committed in different Member States, but that is not an obstacle to prosecution.[23]

[19] Levi-dakolias-Greenberg 2006, 6.

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

[21] 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, 73–117].

[22] 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, 22–30].

[23] 6th AML Directive Art. 10. jurisdiction.

According to the Hungarian law in force, in order to avoid disproportionate judgments, it would be appropriate to regulate ML by the value of the offence and also to extend the definition of "thing" in criminal law to account money.

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THE ACTIVITY OF THE HFIU AND ITS ROLE IN THE FIGHT AGAINST MONEY LAUNDERING

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1. Introduction

This document is aiming at providing an outline of the framework of the Hungarian Financial Intelligence Unit's (hereinafter HFIU) activities, as well as of its role in the anti-money laundering and combating financing of terrorism (hereinafter AML/CFT) regime. The HFIU has a central position in the AML/CFT regime. According to international standards, each state (jurisdictions) shall designate a financial intelligence unit (hereinafter FIU)[1] as a central authority that receives suspicious activity reports (hereinafter SAR), processes them in the course of its analytical work and disseminates the result of its analytical work for the purpose of combating criminal activities.

The main objective of the AML/CFT regime is to prevent and fight against the laundering of proceeds of criminal activities and prevent the financing of terrorism, as well as detect the sources of the financial support of terrorists.

2. The types of FIUs

Research studies and literature classify FIUs into three basic types and the combinations thereof. Accordingly, there are administrative, law enforcement and judicial types of FIUs. The FIU is considered a hybrid type if the characteristics of the three basic types of FIU appear in a somewhat mixed way. The type of authority can be determined basically on the basis of its organisational location, its activities laid down by the law and the self-determination of the authority itself.

The HFIU, which is the Bureau for Combating Money Laundering and Terrorism Financing of the National Tax and Customs Administration (hereinafter NTCA), identifies itself as a hybrid FIU. The argument behind that is that the HFIU does not per-

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[1] For the sake of clarity it is important to note that the international or EU sources of law use the expression "financial intelligence unit" or as abbreviation "FIU" in English, the legislation at national level calls this central authority as „pénzügyi információs egység" (financial intelligence unit) or as „pénzügyi információs egységként működő hatóság" (authority operating as a financial intelligence unit).

form criminal investigations, and its statutory functions are clearly separated from the criminal proceedings. These features are typical for administrative FIUs. However, the HFIU cannot be considered a purely administrative FIU since it has firm relations with the law enforcement domain of the NTCA even if it does not perform investigating activity as such. The provisions of Act LIII of 2017 on Preventing and Combating Money Laundering and Terrorist Financing (hereinafter AML/CFT Law) regulate the wide range of access of the HFIU to the data managed by law enforcement authorities, and this wide range of access to date also confirms the above-mentioned firm relations. Furthermore, the HFIU is authorised to cooperate with Europol, and such an authorisation is obviously not a characteristic of an administrative FIU.

3. Organisational location of the HFIU

The framework of the FIUs' activities are determined by international standards. Their performance and their organisational framework are constantly monitored by international organisations, international bodies. As regards the latter, it shall be noted that the international standards do not specify the requirements for the organisational location of the FIUs. Accordingly, the FIUs can function in various organisational environments (e.g. in the organisational system of the police, the central bank, one of the ministries, the tax authority or the customs authority), or they may also function as an independent, autonomous authority provided that their activity is discharged effectively.

The explanatory notes of the AML/CFT Law determine that the authority operating as the FIU is "the organisational unit of the National Tax and Customs Administration specified in a law". By virtue of Section 13 (7) of the Act CXXII of 2010 on the National Tax and Customs Administration (hereinafter NTCA Law), the NTCA shall carry out the functions other than acting in its capacity as an investigative authority. The NTCA shall conduct the tasks laid down by the AML/CFT Law in order to facilitate the statutory tasks of the investigative authority, the national security service, the public prosecutor's office, the court, the National Protective Service and the Counter-Terrorism Centre. Furthermore, the Government was authorised by the NTCA Law to designate by decree the authority operating as a financial intelligence unit according to the AML/CFT Law [Section 81 (2) h) of the NTCA Act]. As a consequence, Section 9 of the Government Decree 485/2015 (XII. 29) on the powers and competences of the bodies of the NTCA (hereinafter NTCA Government Decree) designates – under a separate subtitle – the Bureau for Combating Money Laundering and Terrorism Financing within the organisational structure of the Central Management of the NTCA as the authority operates as FIU.

If we look back to history of the HFIU, it is apparent that its organisational location has changed significantly two times. The first organisational change was related to the transposition of the 3rd AML/CFT Directive of the EU. Prior to this change, the Hungarian Police Headquarters was designated by the AML/CFT Law of 2003 to conduct the FIU functions. However, the functions of the FIU were transferred from the police to the competence of the customs authority as a result of a policy decision due

to the promulgation of the AML/CFT Law of 2007, which in fact transposed the 3rd AML/CFT Directive of the EU. The other significant organisational change occurred in 2012. Due to this organisational change, the HFIU left the organisation environment of the NTCA's investigative authority that had been established one year earlier. As a result of this change, the independent functioning of the HFIU gained a much more solid ground.

4. Core functions of the FIU

The core functions of the HFIU are as follows:
– receiving the SARs sent by the obliged entities,
– carrying out analysing-assessing activities,
– disseminating information and
– exchanging international information with other FIUs.

The obliged entities (e.g. banks, the bureaux de change, cooperative savings banks, casinos, auditors, lawyers) subject to the AML/CFT Law shall submit a SAR in the event of noticing any data, fact or circumstance indicating money laundering or terrorism financing or that funds or other assets are the proceeds of criminal activity. To demonstrate the nature of such data, fact or circumstance, the obliged entity will treat the following cases as the obvious reasons for sending a SAR to the HFIU:
– the natural person client made a large cash deposit to the bank account or withdrew a high volume of cash from the bank account, in particular if such cash deposit/withdrawal does not correspond with the client's activity or profession;
– funds in high volume are credited on a bank account that was previously inactive, and the funds are then quickly transferred to a different bank account;
– the natural person (straw man) withdraws cash from a bank account without having information on the reasons and the backgrounds of the transactions.

Section 38 (1) highlights out of the above-mentioned core functions that the priority task of the HFIU is its analysing-assessing activity. It performs this activity with the aim of facilitating the fight against money laundering and terrorism financing, as well as the prevention, detection and investigation of criminal activities. The AML/CFT Law makes a distinction between the two forms of the analysing-assessing activity: operational and strategic analyses.

Operational analysis is considered the classical analysing-assessing activity. Operational analysis implies the processing of a specific case by the HFIU. The cases of the operational analysis – on the basis of international standards – are generated above all by the SARs filed by the obliged entities and the requests for information sent by foreign FIUs.

The operational analysis in fact provides a procedural framework for the HFIU in which it performs risk assessment related to an individual case. It compares the data of the case to the data of directly available databases and, as necessary, obtains data via request from one or more obliged entities and requests information from foreign FIUs.

In practice the HFIU collects those relevant pieces of information and identifies the connection between those that establish, facilitate and support the crime prevention and detection activities of the law enforcement authorities.

The access to various data sources and the use of analytical techniques have a significant role in the operational analysis. Certainly, the role of the human contribution to the analysis shall be also underlined since the missing links in a complex legal structure or the reasons of a financial transaction can only be identified in many cases due to the contribution of a "human" analyst.

The purpose of the operational analysis is to perform the dissemination or international information exchange as it is specified in Section 48 and Sections 49–53 of the AML/CFT Law.

Regarding the Hungarian regime, it is clear that Section 40 of the AML/CFT Law lays down an exhaustive list of reports, information and requests that trigger the operational analysis of the HFIU (SARs sent by the obliged entities, information from foreign FIUs, information sent by the supervisory authorities, information from the customs authority, requests of the possible addressees of the information dissemination and information from the authority in charge of enforcing restrictive measures).

Strategic analysis first came up in the Interpretive Note to FATF Recommendation 29. Accordingly, strategic analysis is the use of the information (including data that may be provided by other competent authorities) available and obtainable by the FIU in order to identify trends and patterns related to money laundering and terrorist financing.

Pursuant to the Hungarian legal framework, which is in line with international standards, the aim of the strategic analysis of the HFIU is to examine the phenomena and characteristics related to money laundering and terrorist financing and to draw meaningful conclusions from them [Section 41 (1) of the AML/CFT Law].

The strategic analysis means systemising the information available for the HFIU on a strategic level, including the collection, review and ongoing monitoring of trends, schematic features, quantitative characteristics and human patterns, in order to ensure that the risk and the exposure to the threat of money laundering (or the predicate offence) or terrorism financing can be assessed according to the information under scrutiny. The HFIU can of course use the data and information received and obtained in the course of the operational analysis for the purpose of the strategic analysis.

The strategic analysis can also be used by other authorities. Transmitting the document of strategic analysis or the findings of this document can assist the recipient authorities in identifying the threats and vulnerabilities related to money laundering and terrorist financing.

5. Independence of the HFIU

Section 38 (2) of the AML/CFT Law explicitly prescribes that "the HFIU operates within the organisation of the National Tax and Customs Administration, but it performs its duties specified in the AML/CFT Law independently".

The issue of the FIUs' independence and autonomy have become extremely prominent recently in the activities of the FATF and the Egmont Group.

The Interpretive Note to the FATF Recommendation 29 and the Charter of the Egmont Group set out identical requirements for the independence of FIUs. The Directive,[1] in a narrower manner, also includes provisions on the independence of the FIU. The standards of the FATF and the Egmont Group, as well as the provisions of the Directive, use the expression "autonomy" along with "independence" as the expression of the *self-determination feature of FIUs.*

The FIU's independence as a requirement can be approached from two aspects: first from the aspect of the operational tasks and second from the aspect of functional independence (financial resources and separate budget, autonomous HR-related decisions, protection of information, independence of IT management, etc.).

Operational independence constitutes above all the requirements that the FIU independently determines the direction and depth of its operational analysis in individual cases and decides if the result of the operational analysis in a specific case needs to be disseminated.

The decision on the need of the dissemination also includes the decision on the authority to which the case is transmitted.

The requirement of the FIU's independence is not limited to the operational analysis and to the dissemination, but it also applies to the strategic analysis. The HFIU decides in an independent manner the subject, methodology and primary objectives of its strategic analysis.

It is important to emphasise that meeting the requirement of FIU independence is not essential because the international organisations are "expecting" it from the certain jurisdiction. This requirement is essential because it is one of the factors that contributes to the effectiveness of the AML/CFT regime, whether we are talking about an analysis of a corruption-related SAR reported by a cooperative savings bank or a money laundering analysis on the proceeds of drug trafficking triggered by one of the foreign counterparts.

6. Other functions of the HFIU

The legislation at the national level freely determines whether the FIU, apart from the core FIU functions, performs other functions that are linked to the AML/CFT regime to some extent. In terms of the Hungarian AML/CFT legislation, those so-called other functions are also attached to the HFIU.

According to Section 59 of the AML/CFT Act, the HFIU shall keep statistics allowing for the monitoring of the effectiveness of the AML/CFT regime.

On the basis of Section 5 f) of the AML/CFT Law, the HFIU carries out supervisory functions over

– obliged entities engaged in activities related to real estate transactions and
– obliged entities that perform accounting, tax expert, certified tax expert or tax advisory activities.

Financial restrictive measures, which are also known as targeted financial sanctions, are a significant part of the Hungarian AML/CFT regime. The body responsible for enforcing financial restrictive measures plays an important role by implementing the targeted financial sanctions, which – according to Section 13(2)l) of the NTCA Law and Section 9 b) of the NTCA Government Decree – also falls under the competence of the HFIU.

7. The dissemination of information

The main objective of operational analysis carried out by the HFIU is to transmit the information, as well as its findings, to certain recipients laid down by the AML/CFT Law. There are two types of dissemination as far as the direction of transmission is concerned: domestic and international disseminations. Stringent legal provisions regulate the dissemination. Accordingly, the AML/CFT Law explicitly lays down the recipients of the dissemination and prescribes the purposes of the dissemination in accordance with the principle of purpose limitation. The HFIU can disseminate the information for the purpose of combating money laundering and financing of terrorism and for the purpose of facilitating the prevention, detection and investigation of criminal offences.

The recipients of the dissemination are the following authorities: investigative authorities, public prosecutor's offices, courts, the Intelligence Bureau, the Constitutional Protection Bureau, the Military National Security Bureau, the National Security Bureau, the Counter-Terrorism Information and Criminal Analysis Centre, the National Protective Service and the Counter-Terrorism Centre.

The dissemination of the HFIU can be classified into proactive and reactive types. In terms of proactive dissemination, the dissemination itself triggers proceedings of the recipient party. Conversely, reactive dissemination constitutes in fact the response upon the request of the investigative authority, public prosecutor, Counter-Terrorism Centre or other authority.

As a result of the dissemination, the HFIU forwards all of the information at its disposal, not only the incoming data but also the data obtained in the course of the operational analysis, as well as the findings and conclusions of the HFIU.

The HFIU may restrict the use of the disseminated information for the sake of the protection of the information obtained via the international information exchange. The reason for restricting the use of data stemming from international cooperation is the way of respecting the restrictions applied by the foreign counterpart FIUs. If the foreign FIU restricts the use of data in terms of the purposes of the dissemination or the recipient authority to which the data can be disseminated, the HFIU will comply with such a restriction and disseminate the case to domestic authorities accordingly. This mechanism is materialised in Hungarian legislation as follows: The HFIU may prohibit, restrict or bind to condition the use of information obtained within the framework of the international information exchange when it comes to domestic dissemination. Limiting the use of information for intelligence purposes (not for evidentiary use) is the most frequent example for this restriction.

8. International information exchange

The international information exchange between the HFIU and its counterparts, i.e. the foreign FIUs, is a crucial element of the AML/CFT regime since the cross-border feature is nowadays an inherent element of most financial transactions. The international cooperation of FIUs can serve as a less burdensome way of obtaining information from overseas than the possibilities available within the context of criminal proceedings. This form of international cooperation is considered as an intelligence-type information exchange since the information obtained in the framework of such cooperation may not be used in most cases directly as evidence in criminal proceedings. The information obtained via this channel indicates on one hand the direction to which the investigative authority should carry out its activities. On the other hand it may assist the investigative authority or the public prosecutor in showing that information that should be obtained in the course of international cooperation pertaining to the investigative authorities/public prosecutors.

It is important to underline that the international cooperation of the HFIU, besides the international information exchange with foreign counterpart authorities, extends to the information exchange with Europol as well [Section49 (1) of the AML/CFT Act].

During the HFIU's operational analysis, the HFIU may come into contact with foreign FIUs in the following cases. One of the most important types of international information exchange is the request for information. In this regard, the HFIU sends a request to a foreign FIU, provided it is needed to obtain certain information in order to proceed with the HFIU's operational analysis. Such information (e.g. the beneficial owner of a bank account or certain law enforcement data) is presumably available to the foreign FIU, or it has access to it indirectly via a request [Section 50 (1) of the AML/CFT Act].

It may occur that the HFIU sends spontaneous information to its foreign counterpart instead of sending a request. The HFIU uses this way of international information exchange if certain information at its disposal may be relevant to the foreign FIU [Section 51 (1) of the AML/CFT Act].

9. Suspension of transactions

Suspension of transactions is a specific legal institution created by the AML/CFT Law based on the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (opening of the treaty: Warsaw, 16/05/2005; published by Act LXIII of 2008 in Hungary).

The purpose of this legal institution is providing a tool for the HFIU to "freeze" the funds or other assets stemming from criminal offences as long as the investigative authority secures the proceeds within the framework of the criminal procedure.

The suspension of the transactions can be triggered by both the obliged entities and the HFIU. The obliged entities shall initiate the suspension if any data, fact or circumstance indicating money laundering, terrorist financing or that a res originates from a

punishable act. Consequently, the constituting grounds for reporting are established, and the immediate measures of the HFIU are required.

As the result of the suspension initiated by obliged entities, the obliged entity does not execute the transaction requested by the client; the obliged entity hinders the execution of the certain transaction on a temporary basis. The suspension of the transactions is a measure that aims at securing, for a period of time, the proceeds from criminal offences prior to the provisional measures of the criminal procedure such as seizure or sequestration.

The obliged entities may use the suspension as regards a specific transaction or service, or it may also be applied by suspending all transactions decreasing the client's funds or other assets.

This way of suspension is a more effective tool for securing funds or other assets deriving from criminal offences because, for instance, it does not allow criminals to remove for funds from a specific bank account.

The duration of the suspension is a period of four working days. The day of submitting the SAR or the day of informing the obliged entity on the suspension shall not be counted in the period of suspension; the period of suspension starts on the following day. The HFIU has the authority to prolong the duration of the suspension once with a further three working days. The HFIU shall notify the obliged entity on the prolongation in writing. As far as the termination of the suspension is concerned, the suspension can also be ceased prior to the statutory deadline if the HFIU notifies the obliged entity on this in writing. The obliged entity has the authority only in this instance to terminate the suspension and to execute the transaction prior to the expiry of the statutory deadline. The obliged entity may execute the transaction only if the deadline expired or it received the written notification of the HFIU.

The HFIU also has the authority to suspend transactions pursuant to Section 35 of the AML/CFT Law. The HFIU applies this tool within the framework of the operational analysis. The reason of this provision is that the HFIU receives the SARs directly from reporting entities, and these SARs contain data, facts or circumstances indicating money laundering or terrorist financing or that funds are the proceeds of criminal activity. Hence, the HFIU, as one of the core authorities of the AML/CFT regime, is the first one that becomes aware of the information that may establish criminal proceedings.

It is necessary for the effective use of the suspension to ensure the comprehensive collection, analysis and assessment of the information and proper communication with the law enforcement authorities. The HFIU also fulfils the role of the communication channel between the obliged entities and the law enforcement authorities in order to ensure the seizure or the sequestration of the asset "frozen" by the suspension.

In practice it is very likely that the HFIU receives information from a foreign FIU, and this information triggers the suspension. In this case the effective international cooperation between the FIUs opens the door to securing the funds or other asset of criminals. The duration of the suspension is four working days. This period starts on the following day of the receipt of the HFIU's notification.

10. Afterword

In the text above, I made an attempt to demonstrate the framework in which the HFIU carries out its functions. This modern framework, as an integral part of the AML/CFT regime, ensures that the activities of the HFIU are in compliance with international standards.

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Italy

TAX OFFENCES, MONEY LAUNDERING AND CORRUPTION IN THE ITALIAN SYSTEM

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1. Money laundering and tax evasion

The devastating effects of the criminal acts cause distortions at the macroeconomic and microeconomic level, hampering the realisation of a fully competitive market. They cause the alteration of important economic indicators, preventing any correct evaluation of the country's economic welfare.

Evasion and corruption are a threat to development, democracy and stability. They distort markets, curb economic growth, scare away foreign investment, erode the public services and deteriorate the relationship between citizens and the State, as stated by the Secretary-General of the UN.[1]

Similar observations were made also by the Governor of the Bank of Italy,[2] who highlighted the need to combat crime *"also and above all in financial terms"*, giving impetus to our economy and *"remove one of the brakes on development"*, specifying that *"society pays a high price for corruption and crime, in terms of worse peaceful coexistence and lack of development"*.

Although it is difficult to analyse the black economy because of the lack of reliable statistical sources, which characterise and quantify the relevance, it is necessary to pay attention to some indicative data to get an idea about the size of the phenomenon.

According to a survey conducted by the Ministry of Finance, it is estimated that in the last three years, tax and social security evasion[3] amounts on average to EUR 108 billion, of which 97 billion is lost tax revenues and almost 11 billion is lost social security contribution.[4]

The high level of evasion places Italy among the top places in the European chart, with an evaded revenue percentage at least 50% higher than the European average.

According to recent estimates by the European Commission, evasion makes Europe lose about EUR 147.1 billion, 12.3% of total incoming VAT.[5]

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[1] Read Speech delivered by Ban Ki-Moon during the international day against corruption. December 9, 2010.

[2] See the speech of Ignazio Visco at Assiom-Forex Congress, 18.02.2012.

[3] Marcheselli–Ronco 2018, 1000.

[4] Read the report Rapporto sui risultati conseguiti in materia di misure di contrasto all'evasione fiscale e contributiva, drafted by the Minister of Economy and Finance.

[5] Read the Study and Reports on the VAT Gap in the EU-28 Member States: 2018 Final Report, realized by the European Commission.

The study, based on *tax gap,* places Italy in third place after Romania and Greece with regard to the value added tax (VAT), with a hidden taxation equal to 22.6% of the amount due, compared to 3% in Spain, 9% in Germany, 12% in France and 10% in the Netherlands.

In absolute terms, the Italian gap is the highest, but in percentage terms we are surpassed by Romania's 36% and Greece's 29%.

Despite the fact that the above-mentioned estimates cannot be considered as an object of potential money laundering, the relationship between the two forms of unlawful conduct is unquestioned.

Whoever holds funds or assets derived from a felony, for obvious reasons, will try to place them on the market by trade, legal acts and perfectly genuine transactions allowed by the legal system, as "typical" as possible.[6]

Indeed, organised crime behaves more and more as a typical enterprise to enter the legal market, trying to conceal the link between money, goods and the crimes committed to get it.[7]

Therefore, the connection between illegal and legal activities is precisely money laundering, often implemented by financial transactions.

It follows that criminal phenomena, first of all money laundering, and tax avoidance are closely linked together.

2. Money laundering in the Italian system

The phenomenon of money laundering consists of a set of activities aimed at concealing the illegal origin of financial and capital resources (or hampering the investigation into it) employed in a *latu sensu* economic operation.[8] Laundering is the necessary and typical consequence of criminal acts.

It should be noted that all laundering operations, even the simplest ones, are structured in three phases to burn the evidence of the illegal origin of money, making future investments profitable.

The first of these phases is called *placement* by American researchers. During this phase, cash of criminal origin and its surrogates are put within the legal system. Thanks to this operation, proceeds from crime are transformed into "scriptural money", a set of surplus towards financial intermediaries. Funds are split by the opening of more accounts in order to avoid identification and reporting obligations required by the anti-money laundering regulations.

The second phase, called *layering*, implies the "stratification" of further transactions that, overlapping among them, cover and make the breakthrough about the origin of the money harder. We are dealing with the so-called "money washing" achieved

[6] Razzante 2011, 4.
[7] Vigna 2012, 3.
[8] Razzante–Arena–Imbergamo 2011, 3; Cerqua 2012, 47; Zanchetti 1997, 140.

by electronic transfers, characterised by their rapidity and often their anonymity. It is during this phase that the documentary trace of transfers is broken, so-called *paper-tracing*.

The third and last phase, known as *integration*, is the entry of money in the national and international payment system, in an apparently lawful way, like commercial activities, financial investments and the purchase of companies or properties.

This procedure is a real "deviated economic cycle". Starting from an illegal economy, in fact, revenues generated converge in the legal economy, where they are reinserted and mixed to be spent again in the illegal market.

In Italian law, the crime of money laundering was introduced by the decree law n. 59 of 21 March 1978, converted in law n. 191 of 1978 by amendments. This law, modifying the Penal Code, introduced the Art. no. 648-*bis*.[9]

In its original formulation, this rule was born under the *nomen iuris* of "substitution of money or values generated by aggravated robbery, extortion, kidnapping for the purpose of extortion". It was restricted to identify only four kinds of predicate offences, excluding the offence of tax evasion. They were drug trafficking,[10] extortion, aggravated robbery and kidnapping.

The certainty of crimes created many interpretative disadvantages and problems of compatibility with the guidelines of international organisations. Furthermore, it was problematic from an operational point of view because, according to this approach, it was necessary to provide the subject's evidence of consciousness about the origin of the utilities of crimes in a very detailed way before making the hypothesis of money laundering concrete.

The inculpatory rule, so structured, was inadequate at an operational level compared to the increasing extent of criminal phenomena within the national and international context.

These considerable problems were overcome by law no. 328 of 9 August 1993 that, modifying Art. no. 648-*bis*, adapted the provisions to the Strasbourg Convention of 8 November 1990, which we will discuss later.[11]

Nowadays, the current text of Art. no. 648-*bis* is no longer affected by an exhaustive list, but it insists on the aspect of concealing the criminal origin of the revenues which are substituted, transferred or hidden in order to hamper the identification of the provenance.

It follows that, in order for incrimination to exist it is enough that the subject has willingly acted with the aim of procuring an advantage for himself or for a third party or that he has helped the authors of the crime to ensure the profits of the crime. In

[9] Placed at the end of Chapter II of Title XIII of the Criminal Code (rubricated Crimes against the patrimony through fraud), it constitutes one of the most debated criminal figures in doctrine, fruit of a complex normative evolution which has been affected, at a national and international level, by the growing need to contrast the most advanced forms of organized and economic criminality.

[10] Law No. 55 of 19 March 1990 introduced among the alleged crimes those connected to the production and trafficking of drugs, in order to contrast what, already then, was becoming one of the most flourishing activities of organized crime.

[11] Liguori 2000, 90.

accordance with this rule, therefore, it is sufficient to verify the existence of the so-called "general intent crime", dispensing with the investigation of the "specific intent crime".[12]

All this shows the heterologous nature of the predicate offences that can deal with all not negligent crimes, firstly tax evasion, from which economic revenues and advantages are gained.[13]

Having said that, Art. no. 648-*ter*, quoted as "Employment of illegally sourced money, assets and profits" is relevant. It was introduced by law no. 55 of 19 March 1990 and, after, modified by the above-mentioned law no. 328 of 1993.

The aim of the above provision is to criminalise the complex process of the re-entering of illicit flows into the financial circuits, so punishing an additional behaviour which happens later than the laundering conduct.

Consequently, the entity that wilfully "employs illegally sourced money, assets and profits in economic or financial activities", in the knowledge of their provenance, commits the crime of the "use of money, assets and profits of illegal origin", except in cases of crime aiding and fencing (*ex* Art. 648 Penal Code) or laundering (*ex* Art. 648-*bis* Penal Code).[14]

The introduction of the above-mentioned Art. 648-*ter* makes autonomous the crime of re-entering, putting it in a special relationship with the crime of laundering, according to the Supreme Court.

As pointed out by highly respected publications,[15] the *ratio* of the rule, designed in residual form,[16] consists of the will to punish the last phase of the laundering process, coincident with the *"integration"* phase mentioned above.

There has, however, been no lack of different approaches. A minor school of thought seems to have transposed the difference between laundering and re-entering (Art. 648-*bis* and *ter*) as descriptive of a unitary phenomenon of "laundering" in a broad sense.

Having said that, in the opinion of the writer, it should be noted that in practice, single laundering operations cannot be easily traced back to the three above-mentioned phases, although the three-part process previously described is considered the most suitable to explain in the abstract the phenomenon of laundering.

Consequently, criminal law with the ambition to punish separately the three forms of conduct (as Italian Law seems to want to do) would hardly be applicable because of the impossibility to distinguish, in certain contexts, the assumptions of "layering" and "integration".

[12] Nanula 2007, 5403.

[13] Supreme Court no.6350/2007, no. 16980/2007.

[14] Nanula 2009, 343.

[15] Pecorella 1989, 369; Zanchetti 1997, 166.

[16] As can be seen from the double clause in the beginning of the provision, "outside the cases of complicity in the crime and the cases provided for by Articles 648 and 648-bis".

2.1. The tax offence as predicate offences of money laundering

The current formulation of money laundering was defined by the law no. 328 of 9 August 1993, which incorporated what was agreed on in the Convention on Laundering signed in Strasbourg on 8 November 1990, modified by the Convention of Warsaw on 16 May 2005.[17]

As governed by Art. 1 point e) of the above-mentioned convention, predicate offence means *"any offence as a result of which proceeds were generated that may become the subject of an offence as defined in Article 9 of this Convention"*.

In Italian legislation, the implementation of this convention has lead, as known, to an enlargement of "predicate offences" whose revenues can be the subject of laundering conduct. For such a crime, in fact, the current discipline, different from the old one detecting only four predicate offences,[18] insists on the aspect of concealment of the origin of revenues.

The enlargement of predicate offences provided the opportunity to include economic and financial crimes.[19] This claim, in spite of the clearly literal tone of the regulation, is not peaceful. There have been, both in doctrine and in jurisprudence, divergent views. Over the years, an approach contrary to consider tax crimes as a predicate offence was born. This claim relied on a different orientation.

First of all, it was noted that it is juridically impossible to configure a relationship between laundering and tax offences because of the reserve clause[20] in Art. 648-*bis* of the Penal Code, according to which the active subject of a crime can be only an individual who has not committed a predicate offence or helped commit it.

As known, in the hypothesis of tax crime, the offender acts in order to get illicit gain, and he is often the one who factually conceals the *"ex delicto"* origin of revenues.

For this reason, according to the principle of consummation, the disvalue of the laundering or re-use conduct of the one who committed the predicate offence is absorbed and punished only this last by setting up a non-punishable *post-factum*.[21] In other words, according to this assumption, the conduct of someone who launders money coming from tax offences consolidates the effects already produced by the crime. This last finds its achievement in his respective laundering post-facts, justifying the application of the penalty expected for the ante-fact.[22]

According to this assumption, the choice of the legislator is dictated by the will to avoid the substantial *ne bis in idem*[23] in favour of the *prior in tempore, potior in iure*.[24]

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[17] De Amicis 2007, 185; Vergine 2012, 15.

[18] Aggravated robbery, aggravated extortion, kidnapping for the purpose of extortion and crimes concerning the production of drug trafficking. The latter were introduced by Law no. 55 of 19 March 1990.

[19] This issue has been strongly *debated in doctrine.* Fiandaca-Musco 2002, 244; Nuzzolo 2003, 690; Assumma 1995, 1779.

[20] For an analysis of the meaning of this reservation clause, Supreme Court, SS.UU., no. 2519/2014.

[21] Buratti-Campana 2012, 45; D'Arcangelo 2011, 332.

[22] On the principle of non-punishability of the post factum Fiandaca-Musco 2002, 632.

[23] Palumbo- Razzante 2014, 214.

[24] Merone 2016 109.

Secondly, the configurability of tax offences as assumption of laundering was ontologically precluded because the tax saving is not included in the concept of "money, goods and other utilities" *ex* Art. 648-*bis* of the Penal Code.

A case law orientation,[25] already overtaken, claimed that relating to laundering, the predicate offence could exclusively consist of crimes aimed to achieve *"evident enrichment, tangible in the perpetrator's resources"*.

According to the restrictive interpretation of the dictated law, therefore the physical asset being the object of the recycling crime must pre-exist with respect to the commission of such a crime and must be specifically identifiable, also for the purposes of its possible confiscation. For this reason, the advantage generated by the tax offence would not give rise to any identifiable revenue in the author's assets. This advantage, in fact, does not consist of appreciable and isolated enrichment of the offender but instead of a lack of the payment of taxes related to the undue deduction of costs or the missing declaration of income.[26] Therefore, mixing up with the overall availability of the offender, it would escape from the possibility of being identified in the subsequent re-use.

In other words, although in fiscal crimes the perpetrator obtains a patrimonial advantage arising from the tax saving, it has been observed that the criminal disposition would not be able to incorporate any economic value but only those suitable to preserve unchanged the wealth of the taxpayer, identifiable by itself and isolatable as coming from illicit activity.

The majority doctrine, which advocates a different approach to the relationship between tax offences and money laundering, adopted totally opposed positions. According to this approach, the concept of "money, goods and other benefits" includes, in its own right, undue tax savings resulting from tax evasion. The legislator, in fact, using the expression "other utilities" intended to expand the list of goods potentially subject to recycling, overcoming the previous mandatory indication of predicate offences that limited the operational scope of the rule.

As stated by the Supreme Court,[27] the very broad and elliptical formula "other benefits" is a kind of residual clause to prevent them from escaping from the mesh of criminal repression benefits of any kind arising from predicate crime of which the offender can take advantage. Consequently, this expression includes all those benefits that assume an economically appreciable value for the perpetrator of the predicate crime, including everything that constitutes the result of those fraudulent activities aimed at preventing a financial impoverishment *"which is what happens when a crime of tax fraud is committed as a result of which the agent, avoiding paying the taxes due, achieves a cost saving that translates, in practice, in a failure to decrease the assets and therefore in a very clear and solar economic utility"*.[28]

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[25] See the judgment of Tribunal of Milan, Ufficio G.i. ord. 19.2.1999. Cerqua 2012, 78; Zanchetti 1997, 398; Manes 2009, 722.

[26] Buratti-Campana 2012, 47.

[27] Supreme Court no. 6061/2012.

[28] Cordeiro Guerra 2016, 322. See also Di Vizio, Problematiche sull'autoriciclaggio, hearing at the Study Group on Self-Money Laundering at the Ministry of Justice in Rome, 24 January 2013, 27 in the annex.

As evidenced by copious jurisprudence of legitimacy,[29] the crime of money laundering can therefore assume as the main crime not only crimes functionally oriented to the creation of illicit capital such as corruption, extortion, corporate crimes and bankruptcy crimes but also crimes that, according to the most rigorous and traditionally received view of the phenomenon, were strangers, such as tax offences.

In a recent ruling the Supreme Court has, moreover, ruled that *"only the fines and the culpable crimes cannot constitute the presupposition of that of recycling; it follows that all the culpable crimes, and therefore also that of fiscal fraud, are suitable to act as presumable crime of recycling"*.[30]

Therefore, according to this assumption, the relevant aspect is that the predicate offence is in itself capable of producing illicit proceeds. The doctrine thus entrusts the selection of criminally relevant behaviours to the concept of "origin", understood not in a materialistic sense but in an economic one. Accessing this interpretative line, it can be deduced that conduct that also causes a failure to impoverish the patrimony can fall within the crimes presupposed by the recycling. Think, for example, of the undue gain arising from the omission of tax reporting obligations.[31]

On the other hand, the fact that the illicit tax saving can be considered a tangible utility and therefore relevant pursuant to Art. 648-*bis* of the Penal Code can also be seen from the circumstance that the profit from tax offences can be subject to confiscation and seizure pursuant to *ex* Art. 12-*bis* of Legislative Decree no. 74 of 10 March 2000.[32] This Article, introduced in 2015 with Legislative Decree no. 158, almost faithfully reproduces the provisions of Art. 1 para 143 of Law no. 244 of 24 December 2007. This provision, known as the "2008 Finance Act", introduced the confiscation of the equivalent of profit in tax offences, identifiable with the amount of withholding tax or tax subtracted from the tax authorities.

In light of the considerations set out above, it is now clear that the proceeds from the commission of tax offences may be the subject of money laundering.

2.2. The self-money laundering

With the Law 15 December 2014, no. 186 concerning the voluntary collaboration (so-called *Voluntary Disclosure*), legislators introduced within Chapter II, Title XIII of our Penal Code Art. 648-*ter*1, aimed at punishing the subject who has carried out a criminal activity from which he has obtained a profit and who intends to make use of it in further activities.[33]

The introduction of the offence in question is undoubtedly one of the most indicative aspects of the recent intervention by the legislator to protect tax justice and the economic order.

[29] Supreme Court: no. 45643/2009; no. 1025/2009; no. 1024/2008.
[30] Supreme Court no. 6061/2012.
[31] Dell'Osso 2017, 120.
[32] Miconi 2017, 266; Mazza 2016, 1013.
[33] Cordeiro Guerra 2016, 316.

The *ratio* of the *novum* of 2014 is to freeze the profit in the hands of the person who committed the predicate offence in order to prevent its more offensive use, which endangers or even harms the economic order.[34]

One of the major innovations introduced by the legislator is the typical subjectivity. The author of the conduct in question, in fact, may be who committed or contributed to committing a non-culpable crime. This is therefore a proper offence[35] where the active subjects of which may be the author of the predicate offence and also its competitors.

As far as typical conduct is concerned, incriminated as general intent, the regulation takes up those already provided for by money laundering and re-use, recalling concepts such as the use, replacement and transfer.

The first course of action (use), in line with the rationale of the rule that aims to protect the economic order, consists of the re-entry of availability of illicit origin in legal economic channels.

The "replacement" and "transfer" conduct, taken over blindly by Art. 648-*bis*, concern respectively the activities aimed at concealing the criminal origin and the activities of transfer of ownership of the assets *ex delicto*. Despite the tacit reference to the rules on money laundering, as some authors have pointed out,[36] the above conduct cannot be considered representative of a free-form crime.[37] Immediately after the list of actions that are criminally relevant, in fact, the legislator has carefully inserted a modal clause, as well as a clause of non-punishability, governed by the fourth paragraph of Art. 648-*ter*1 of the Penal Code.

The law, limiting the conduct relevant to the integration of the case, expressly requires that the commission of the crime is aimed at "*concretely hindering the identification of the criminal origin*" of money, goods or other benefits.

The adverb "concretely" in particular leads to an objective assessment of the facts, to an assessment based on the consideration of all the factors from which to deduce the attitude of the conduct. The latter is classified as a crime of real danger, in accordance with the principle of offensiveness, according to which conduct must concretely endanger protected legal goods in order to be criminally relevant. The adverb, therefore, calls the interpreter to a rigorous exegesis, which imposes to attribute to the term "obstruct" the fullness of its semantic value.

Despite the *littera legis* content, the first commentators have, however, expressed doubts about the scope of the rule, fearing a future as much as debased interpretation of the case law. In their opinion, although the legal text suggests that the three aforementioned forms of conduct are not autonomously capable of hindering the identification of the illicit origin of the proceeds, the different meanings that revolve around

[34] Maugeri 2016, 102.

[35] With this expression, the Italian literature indicates a crime that cannot be committed by anyone, but someone who holds a particular position/has particular qualifications.

[36] Geraci 2015, 8.

[37] The Supreme Court had recently defined money laundering as a free-form crime. The same cannot be said of self-laundering for the reasons given above. Supreme Court no. 43881/2014; no. 36/2013.

the aforementioned adverb may give rise to real interpretative "drifts".[38] The scope of the case, in fact, could vary depending on the scope of that expression, recognising the conduct as *in re ipsa* likely to cause an obstacle and emptying the same of its disguising character.[39] The broad discretion left to the legal professions is therefore not in harmony with the canons of taxation and determination characteristic of a criminal case, on the one hand, as well as with the need to safeguard legal certainty on the other.

The doctrine also questioned the appropriateness of including in the new provision the conduct of self-use, understood as the action of the person who reinvests the proceeds *ex delicto* within his business activity. Think, for example, of the evading entrepreneur who keeps the criminal proceeds in the company's accounts, paying the company's suppliers. The prevailing orientation, of which one of the major exponents is Dr. Francesco Greco, is not in favour of punishing such conduct as it is not aimed at hindering the identification of the criminal origin of the money but at continuing the business activity.

As far as the material object of the crime is concerned, the legislator has not departed from the case provided for by Art. 648-*bis* of the Penal Code, providing also in this case for the formula "money, goods or other benefits", thus making reference to any economic and financial consistency with an exchange value.[40]

Particular concern is raised by the non-punishability clause in the fourth paragraph of this Article. According to the provisions of the law, the person who has used the assets deriving from the crime required for personal enjoyment is not punishable, with the exception of the cases referred to in previous paragraphs. In the view of many,[41] this exemption undermines the rationale behind the new case.

Also for the crime in question, the expression "not culpable crime" has generated many hermeneutic doubts. In order to fully understand the issue we are dealing with, we inevitably need to analyse the jurisprudence on money laundering, a crime that recalls this expression in the legal dictation. In this regard, as established by the Supreme Court, for the purposes of the configurability of the predicate offence, it is sufficient that the existence of the crime is proved during the course of the judgment, since a previous sentence of condemnation which has become final is not indispensable.[42] In short, therefore, all offences other than negligent offences, as well as fines, may constitute a predicate offence for self-laundering. In this regard, according to some authors, the legislator could have listed exhaustively the types of predicate offence by defining the scope of the rule. However, part of the doctrine did not fail to point out that such a listing could have been deficient.[43]

Particular questions have arisen regarding the "origin" of the object of this crime. In particular, the doctrine has questioned, as already discussed for the offence of money laundering (above, § 2.1.), the imputability of the tax savings to the category of crimi-

[38] Capriello 2015, 89.
[39] Geraci 2015, 10.
[40] Piva 2015, 59.
[41] Capriello 2015, 91; Sgubbi 2015, 137.
[42] Supreme Court: no. 28715/2013; no. 7795/2013, no. 26308/2010; no. 2451/2008.
[43] Mucciarelli 2015, 108.

nal proceeds. In order to dispel any doubts, the Ministerial Commission, chaired by Prof. Giovanni Fiandaca, had proposed to specify that *"for the purposes of this Article, proceeds shall mean money, goods or other benefits, including those obtained or derived from a tax or customs offense"*.

However, the current wording of the rule, not taking into account the parliamentary and doctrinal efforts that preceded its arrival, has not clarified this aspect, referring any interpretation to the legal professions.

Although the critical issues[44] raised with regard to Art. 648-*ter*1 of the Penal Code are manifold, there can be no doubt as to the configurability of tax offences as a prerequisite for self-money laundering. Despite the fact that some people have started to have doubts about the matter again, in the opinion of the writer, the proceeds of tax crimes, whether they are a mere tax saving or a tangible good, fall fully within the concept of "other utilities" taken up again in Art. 648-*ter*1 of the Penal Code.

In order to fully understand the issue that concerns us, we must inevitably go back to the *intentio legis* of the crime of money laundering, aimed at combatting a widespread phenomenon with an international dimension. As is well known, it is not easily traceable to a strictly indicated series of behaviours, but it can be identified with any transaction, or set of transactions, suitable for concealing the proceeds of crime. The acknowledgment of the considerable seriousness of this phenomenon in the economic-financial field has made the legislator perceive the absolute inadequacy of the domestic discipline, inducing him to extend the protection with the introduction of the crime of self-laundering *ex* Art. 648-*ter*1 of the Penal Code. This Article is undoubtedly intended to ensure a more effective and incisive fight against the black economy, overcoming the exhausting hermeneutical issues of the previous articles, not excluding those arising from the reserve clause. Art. 648-*ter*1, therefore, changes the terms of the question, imposing a new defining rigor on the interpreter.

It can be observed, in fact, that the conduct of Art. 648-*bis* has been fully translated into Art. 648-*ter*1, which perhaps does not extend the same conduct by much but in any case outlines it better and characterises it in its markedly offensive profile.

To bring back the doctrinal debate on questions widely clarified by copious jurisprudence and authoritative doctrine would represent, in the opinion of the writer, a dangerous involution capable of undermining the ambit of operation of the norm, stripping it of its principal function.

3. Corruption in Italian law

Crimes against public administration have been affected by a multiplicity of reforms, especially over the last 30 years, most of which focused on the problem of corruption, which is central to the whole of Title II of the Penal Code.[45]

[44] Rinaldini 2015, 161; Sgubbi 2015, 137; D'avirro-Giglioli 2015, 135.

[45] Ferrante 2002, 73.

Starting in the 1990s with Law 86 of 26 April 1990, the legislator began a profound rewriting of public officials' crimes against public administration. This is one of the most important novel revisions of the special part of the Code since this reform involves an area where the different powers of the State meet and conflict.[46]

Corruption is a crime provided for by the Italian Criminal Code in the category of offences against public administration, together with embezzlement, extortion and abuse of office. In fact, the *ratio legis* of the law, or rather the purpose it pursues, is to protect the impartiality and good performance of public administration, by contrasting the conduct that damages their functioning and reputation.

The crime of corruption is regulated by Art. 318 of the Criminal Code which states that "a public official who, in the exercise of his functions or powers, unduly receives, for himself or for a third party, money or other benefits, or accepts the promise thereof, shall be punished with imprisonment of from one to six years".

As determined by the law, the offence is considered committed both when an illegal exchange of money takes place and in the case of a "promise"; in practice, only an agreement between a public official and a third party is sufficient to constitute the offence.

Corruption is punishable by a custodial sentence ranging from a minimum of one year to a maximum of six years. However, the Anti-Bribery Act, approved by the chambers on 19 December 2018, provides for a significant tightening of penalties, both imprisonment and ancillary.[47]

The crime of corruption can be prosecuted ex officio, which means that it is prosecuted regardless of the injury of third parties and therefore regardless of the report of the injured party.

As mentioned above, the person who committed the offence of bribery, pursuant to Art. 318 of the Criminal Code, is a public official or a person performing a public service.

Despite the clarity of the provisions of the law, the crime of corruption is of a particular nature since it can be considered both in the category of "own crimes" (committed by subjects established by law) and in that of "common crimes" because whoever offers or promises money or other benefits can be either a public official or a private citizen.

3.1. Difference between owned and not-owned corruption

The crime of corruption can have a dual nature depending on the type of conduct of the agent. The Criminal Code distinguishes between the following hypotheses:

– owned bribery (*ex* Art. 319), or for an act contrary to the duties of office;
– not-owned bribery (*ex* Art. 318), or in the performance of an official act.

In the first case, the agent, i.e. the person in charge of a public service, accepts money or other benefits in order to carry out an act that goes against his official duties,

[46] Lattanzi-Lupo 2010, 139.
[47] Cardenal Montraveta 2018, 13.

which generally takes the form of an omission or delay. This hypothesis is considered to be more serious since it more intensely damages the good functioning of public administration, which is well protected by the law in question.

On the other hand, in the crime of not-owned bribery, the public official or the person in charge of a public service commits the act in the performance of his work duties. In this case, the agent performs a due act, but behind the agreement is a sum of money or other goods. Therefore, the disvalue is not attributable to the conduct itself but only to the compensation received.

4. Concluding remarks

The analysis carried out so far outlines a panorama characterised by a push to extend the operational boundaries of the criminal figures under examination, highlighting some of the controversial aspects of application and interpretation.

The combination of the erosion of the typical case, as well as the choice to free this provision from a hard core of crimes characterised by social alarm, has made these crimes a powerful tool in the fight against the crime of profit.

In this regard, the interrelationships between the offence of self-laundering and the proceeds of tax offences are particularly interesting and, as discussed in detail here, may be seen as a prerequisite for the former.

Art. 648-*ter*1 of the Penal Code, however, identifying the possible predicate offences on the basis of their configuration as non-culpable crimes, seems to lack real delimitative capacity in the field of criminal tax law. Consequently, given the current national regulatory scenario, each tax offence may be followed by a charge of self-laundering.

In the opinion of the writer, it would have been desirable to limit the case of self-laundering to tax offences that are particularly significant in terms of value, such as fraud. In this sense, the supranational regulatory horizon seems to suggest a restrictive solution. The FATF Recommendations of 2012, in fact, refer only to tax offences considered to be particularly serious when considering tax offences as a possible precondition for money laundering.

Although there is no specific reference in these Recommendations that could guide Member States in their selection, they suggest a limitation to situations of greater offensiveness, avoiding an indiscriminate extension of money laundering to the proceeds of any tax crime.

Also, the European Union, with the Directive (EU) 2015/849 of 20 May 2015, expressly declaring the will to conform to the international standards including those elaborated within the FATF, has included the fiscal crimes in the definition of "criminal activity" to which the anti-money laundering discipline introduced therein applies.[48] There is no express limitation here to cases considered to be serious, although the stated willingness to comply with international guidelines might suggest the need for such a limitation.

[48] See the 11th proposal of the abovementioned Directive.

As far as the Directive (EU) 2017/1371 is concerned, the Italian national discipline seems sufficient to cover the hypothesis of money laundering, as outlined by the European source.

With regard to corruption, it should be pointed out that the Italian national provisions seem to be partly aligned with the European provisions. Specifically, Art. 322-bis of the Italian Criminal Code[49] had already transposed the notion of active and passive bribery described in the previous PIF Convention of 1995, in terms almost superimposable to those of the PIF Directive. However, it limits its scope to "international transactions, i.e. in order to obtain or maintain an economic or financial activity". This limitation reduces the operation of the standard, departing from the broad EU provision. It would therefore be desirable to amend this Article in order to achieve full alignment with the Directive.

In the opinion of the writer, it would be desirable to extend the cooperation with third-party countries in fighting money laundering and corruption, improving the exchange of information.

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Romania

FIGHTING CORRUPTION IN ROMANIA

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1. Introduction

Penal illicit in the public sphere has undergone serious mutations in recent years, notably by making criminal responsibility in the sphere of combatting corruption as a social phenomenon, the fight against corruption and, in particular, the corruption of public power agents, a priority in Romania, advocated as a priority at the level of the European Union.

In this respect, under the tutelage of the Council of Europe, the "*Criminal Law Convention on Corruption*" was enacted on 1 July 2002.[1] Also, the Member States of the Council of Europe and the European Community adopted in Strasbourg on 4 November 1999 the "*Civil Law Convention on Corruption*",[2] which defines under Art. 2 "corruption" as "*requesting, giving, giving or accepting, directly or indirectly, an unlawful commission or other unfair advantage, or the promise of such an undue advantage affecting the normal exercise of a function or conduct required of the beneficiary of the unlawful commission or undue advantage or the promise of such an undue advantage*".

2. Short history of corruption criminalisation in Romanian law

The previous Criminal Code of 1968 regulated in Title VI of the Special Part "the offences that are detrimental to activities of public interest or to other activities regulated by the law", the most numerous texts of the Criminal Code being found in this title, which presents a wide range of criminal offences, united by the same generic legal object – the social relations whose existence is ensured by defending social values such as the functioning of state and public entities, the legal interests of persons, the carrying out of justice and the safety of the traffic on the roads.[3]

Considering the evolution of the criminal phenomenon, mostly in the sphere of public servant duties, as well as the international acts in this field to which our state

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[1] Ratified by Romania by Law no. 27/2002.
[2] Ratified by Romania by Law no. 147/2002.
[3] Basarab–Paşca–Mateuţ–Medeanu–Butiuc–Bădilă–Bodea–Dungan–Mirişan–Mancaş–Miheş 2008.

has adhered, the Parliament adopted Law no. 78/2000 on the prevention, detection and sanctioning of corruption. This law has been considered a very important step in constructing an effective legal frame for countering corruption in Romania, since at that moment there was not an agreement between the political factors for the need to adopt a new Penal Code. On the other hand, the law did include a number of procedural aspects necessary to prosecute these criminal offences.

Law no. 78/2000 established in Art. 5 a classification of the offences that are its object of criminalisation, categorising them into four categories:

a) corruption offences - those stipulated in Art. 254-257 from the previous Penal Code, Art. 61 and 82 of Law no. 78 from 2000, as well as the offences provided for in special laws, as specific modalities of these crimes;

b) crimes assimilated to corruption offences - those stipulated in Art. 10-13 of Law no. 78 from 2000;

c) offences in direct connection with corruption offences - those referred to in Art. 17 of Law no. 78 from 2000;

d) offences against the financial interests of the European Union - those stipulated in Art. 18/1 - 18/5 of Law no. 78 from 2000.

Furthermore, after the reform of all fundamental codes of Romania, there was a significant change in the corruption countering pattern. The new Penal Code adopted by Law no. 286/2009, which entered into force, according to the provisions of Art. 246 of Law no. 187/201211, on 14 February 2014, criminalises corruption offences in Title V of the Special Part "Corruption and offences in public position", which is structured in two chapters:

– Chapter I – "Corruption" (Art. 289–294):

Art. 289 – Taking a bribe;

Art. 290 – Giving a bribe;

Art. 291 – Influence peddling;

Art. 292 – Influence buying;

Art. 293 – Acts committed by members of the courts of arbiters or in connection thereto;

Art. 294 – Acts committed by foreign officials or related to them.

– Chapter II – "Offences in public positions" (Art. 295–309), of which two are the most relevant to our subject:

Art. 308 – Corruption offences and service offences committed by other persons;

Art. 309 – Actions that resulted in extremely severe consequences.

Classification – a different perspective. Another classification may be made according to the criteria imposed by Art. 13 from Government Emergency Ordinance no. 43/2002 on the National Anti-Corruption Department, approved by Law no. 503/200217; corruption offences classified as high-profile crimes are those that are given in the criminal prosecution function of the National Anti-Corruption

Directorate,[4] and minor corruption offences were given in the jurisdiction of the prosecutor's offices attached to the tribunals.

Thus, in accordance with the provisions of Art. 13, the competence of the National Anti-Corruption Directorate shall be established according to two criteria, namely:

a) para (1), "the value of the amount or the object of the object of the corruption offence" which must be "higher than the equivalent in lei of EUR 10,000", and, according to the provisions of Art.[5]

b) para (1), the position of the person, "irrespective of the amount or amount of the object of the corruption offence".[6]

Thus, there are crimes of great corruption, those committed by "deputies; senators; the members of the government, state secretaries or sub-secretaries, members of the European Parliament; of judges of the High Court of Cassation and Justice and of the Constitutional Court, other judges and prosecutors, members of the Superior Council of Magistracy, the Chairman of the Legislative Council and its deputy, Presidential Counsellors and State Counsellors from the Presidential Administration, the Prime Minister's State Counsellors, members of the Public Prosecutor's Office, the Governor, First Deputy Governor and Deputy Governor of the Romanian Court of Accounts and of the County Chambers of Accounts, Governors of the National Bank of Romania, officers, admirals, generals and marshals; presidents and vice presidents of county councils; General Mayor and Deputy Mayor of Bucharest; mayors and deputy mayors of Bucharest municipalities; mayors and deputy mayors of municipalities; County Council members; prefects and subprefects; the heads of central and local public authorities and institutions and persons with control functions with them, with the exception of heads of public authorities and institutions at the level of towns and communes and persons with control functions within them; lawyers; the Financial Guard Commissioners; customs staff; directors, including the director, within the autonomous registers of national interest, of the companies and national societies, of the banks and of the commercial companies in which the state is a majority shareholder, of the public institutions having attributions in the process of privatization; and of the central financial and banking units; persons referred to in Art. 293 and 294 C. Pen".

Given the fact that there are a lot of provisions to be covered and, in the meantime, a lot of important aspects to be underlined, and following our presentation within the workshop in Vienna, we addressed certain issues, as follows:

[4] According to Law no. 304 of 28 June 2004 (*republished*) on judicial organization, Art. 88^1, Within the Prosecutor's Office attached to the High Court of Cassation and Justice, a Judicial Criminal Investigation Division is established and functions which has exclusive jurisdiction to prosecute for crimes committed by judges and prosecutors, including military judges and prosecutors, and those who are members of the Superior Council of Magistracy. That means a change of competence as regarding the members of magistrates' body, as regarding corruption offences. In their case, the competence to investigate and prosecute belongs to this new special section.

[5] Art. 13 letter "a" from Government Emergency Ordinance no. 43/2002.

[6] Art. 13 letter "b" from Government Emergency Ordinance no. 43/2002.

3. Legal interests protected by these regulations

The present Criminal Code was restoring the order (importance) of social values protected by the criminal law and therefore restored the order of criminalisation. In order to achieve this goal, the offences were classified by placing in a preferential regulatory position the corruption offence as prescribed in Title V of the Special Part of Penal Code. The changes were generated by the importance given to the process of combatting corruption both in Romania and in the European social and political context.

Still, at this very moment, when you look at the legal frame to combat corruption, one has to take into consideration both laws – Penal Code and Law no. 78/2000 whose provision partially "survived" the 2014 reform.

In this respect, Law no. 78 from 2000, in Art. 2, provides the purpose for this special regulation: *"The persons referred to in Art. 18 are obliged to perform their duties in the exercise of the functions, duties or assignments entrusted, in strict observance of the laws and norms of professional conduct, and to ensure the protection and realisation of the legitimate rights and interests of the citizens without use the functions, duties, or assignments received to acquire for them or others money, goods or other undue benefits".*

Therefore, the legal interest protected is the carrying out of any servant's duties according to the law, irrespective of whether he is a servant in the public or private sector.

Although corruption in public sector is primarily addressed by the provisions exposed previously, we will insist, at this point, on specific regulation extending the criminal responsibility to the private sector in the case of corruption offences: Art. 308 of the Penal Code – Corruption offences and service offences committed by other persons. Under this provision, the stipulations under Art. 289–292, 295, 297–301 and 304 from the Penal Code regarding civil servants shall apply accordingly to acts committed by or in connection with the persons who carry out, on a permanent or on a temporary basis, with or without a remuneration, a duty irrespective of its nature in the service of a natural person of those provided under Art. 175 para (2) or within any legal entity.[7]

4. Notion of unlawful advantage

Unlawful advantage was considered by certain doctrinaires the material object of the offence, while other considered that the unlawful advantage is not mandatory in such offences.[8]

The law does not provide any specific definition of unlawful advantage. The doctrine and jurisprudence[9] do include any advantage, patrimonial or without economic value, besides money, such as the following:

[7] As was the case also under the former Penal Code – Basarab–Paşca–Mateuţ–Medeanu–Butiuc–Bădilă–Bodea–Dungan–Mirişan–Mancaş–Miheş 2008.

[8] Bodea–Bogdan 2018, 400; Mirişan 2017, 93.

[9] Bodea–Bogdan 2018, 405–406.

– presents, grants, paying of gifts or excursions
– new positions, new salary
– any benefit that the subject was not entitled to
– sexual advantages
– favouring in a competition
– granting scholarships or "dedicated" loans

5. Does the crime require a breach of obligation?

The answer is both yes and no. As a general rule, committing corruption offences does require a form of breach of prescribed obligation. For example, in the case of the "taking of a bribe" offence, in most cases it does require a breach of obligation according to law (legal obligation). The conduct of the servant must be different from the conduct prescribed by law.

But the offence is executed even if the money or other benefits are taken even though the conduct of the public servant is according to the law. Previously (in the former Penal Code), there was a specific offence criminalising this conduct, but in the new Penal Code this hypothesis falls under the provisions of Art. 289.

So even lawful conduct followed by receiving any unlawful advantage is criminalised as corruption now.

Also, failure of denunciation of corruption constitutes a criminal offence, and it is punishable in the case of public servants. In this respect, there is "Omission to notify the judicial bodies" (Art. 267): *"(1) The act of a public servant who, becoming aware of the perpetration of an offence criminalised by law in connection with the service where they work, omits to immediately notify the criminal investigation body, shall be punishable by no less than 3 months and no more than 3 years of imprisonment or by a fine. (2) If the act is committed with basic intent, the penalty shall consist of no less than 3 months and no more than 1 years of imprisonment or a fine*".

6. What are the punishable forms of conduct of corruption?

Our Penal Code criminalises several offences as corruption offences, as follows:

IV.1. "Taking a bribe" (Art. 289)

"(1) The action of the public servant who, directly or indirectly, for themselves or on behalf of others, solicits or receives money or other undue benefits or accepts a promise of money or benefits, in exchange for performing, not performing, speeding up or delaying the performance of an action which falls under purview of their professional duties or with respect to the performance of an action contrary to their professional duties, constitutes a violation of the law and shall be punishable by no less than 3 and no more than 10 years of imprisonment and the ban from exercising the right to hold a public office or to exercise the profession or the activity in relation to which they committed the violation.

(2) The action provided under para. (1), committed by one of the persons provided under Article 175 para. (2), shall constitute a criminal offence only when committed in relation with the performance or delaying the performance of an action related to their legal duties or related to the performance of an action contrary to such duties.[10]

(3) The money, valuables or any other benefits received shall be subject to forfeiture, and when such can no longer be located, the forfeiture of the equivalent shall be ordered".

IV.2. "Giving a Bribe" (Art. 290)

"(1) The promise, the giving or the offering of money or other benefits in the conditions provided under Article 289 shall be punishable by no less than 2 and no more than 7 years of imprisonment.

(2) The action provided under par. (1) shall not constitute an offence when the bribe giver was constrained by any means by the bribe taker.

(3) The bribe giver shall not be punishable if they report the action prior to the criminal investigation bodies be notified thereupon.

(4) The money, valuables or any other assets given shall be given back to the person who gave them in the case provided under para. (2) or given following the denunciation provided under para. (3).

(5) The money, valuables or any other benefits offered or given shall be subject to forfeiture, and when such cannot be located anymore, the forfeiture of the equivalent shall be ordered".

IV.3. "Influence Peddling" (Art. 291)

"(1) Soliciting, receiving or accepting the promise of money or other benefits, directly or indirectly, for oneself or for another, committed by a person who has influence or who alleges that they have influence over a public servant and who promises they will persuade the latter to perform, fail to perform, speed up or delay the performance of an act that falls under the latter's professional duties or to perform an act contrary to such duties, shall be punishable by no less than 2 and no more than 7 years of imprisonment.

(2) The money, valuables or any other assets received shall be subject to forfeiture and when such cannot be located anymore, the forfeiture of the equivalent shall be ordered".

IV.4. "Influence Buying" (Art. 292)

"(1) The promise, the supply or the giving of money or other benefits, for oneself or for another, directly or indirectly, to a person who has influence or who alleges they have influence over a public servant to persuade the latter to perform, fail to perform, speed up or delay the performance of an act that falls under the latter's professional duties or to perform an act contrary to such duties, shall be punishable by no less than

[10] Art. 175 (2) At the same time, for the purposes of criminal law, the following shall be deemed a public servant: the person who supplies a public-interest service, which they have been vested with by the public authorities or who shall be subject to the latter's control or supervision with respect to carrying out such public service.

2 and no more than 7 years of imprisonment and the prohibition to exercise certain rights.

(2) The perpetrator shall not be punishable if they report the action prior to the criminal investigation bodies be notified thereupon.

(3) The money, valuables or any other assets shall be given back to the person who gave them if they were given following the denunciation provided under para. (2).

(4) The money, valuables or any other benefits given or supplied shall be subject to forfeiture, and when such cannot be located anymore, the forfeiture of the equivalent shall be ordered".

IV.5. Acts committed by members of the courts of arbiters or in connection thereto (Art. 293[11])

"The stipulations under Article 289 and Article 290 shall apply accordingly also to persons who, based on an arbitration agreement, are called upon to issue a ruling with respect to a case entrusted to them for settlement by the parties to that agreement, irrespective whether the arbitration proceedings are carried out based on the Romanian law or based on another law".

IV.5. Acts committed by foreign officials or related to them (Art. 294[12])

"The stipulations of this Chapter shall apply to the following persons, unless the international agreements that Romania is party to, provide otherwise:

a) officials or persons who carry out their activity based on a labour agreement or other persons with similar duties in an international public organisation that Romania is party to;

b) members of parliamentary assemblies of international organisations that Romania is party to;

c) officials or persons who carry out their activities based on a labour agreement or other persons with similar duties within the European Union;

d) persons who exercise judicial functions within the international courts whose jurisdiction is accepted by Romania, as well as officials working for the registrar's office of such courts;

e) officials of a foreign state;

f) members of parliamentary or administrative assemblies of a foreign state;

g) jurors within foreign courts".

7. The statutory limitation period in case of corruption

The statutory limitation period is calculated according to Art. 154 of the Penal Code ("Statute of limitations for criminal liability").[13]

[11] The stipulations under Art. 293 shall apply, irrespective whether the members of the courts of arbitration are Romanians or foreigners.

[12] Former Art. 8/1 from Law 78/2000.

[13] Mirișan 2017, 93.

In the case of corruption offences regulated by the Penal Code, the period is eight years for Art. 289 (Taking a bribe), Art. 290 (Giving a bribe), Art. 291 (Influence peddling) and Art. 292 (Influence Buying).

In the case of corruption offences regulated by Law no. 78/2000, the period is eight years for Art.10 and five years for Art. 11, 12 and 13.

8. Corruption offences regulated by Law no. 78/2000

The special law (Law no. 78/2000) defines as crimes of corruption, according to Art. 5 of this normative act, the offences stipulated in Art. 289–292 of the Criminal Code, including when they are committed by the persons referred to in Art. 308 of the Criminal Code. Notably, the provisions of Art. 308 do refer to the problem of corruption in the private sector.

According to Art. 6 of the special law, the offences of taking a bribe, stipulated in Art. 289 of the Criminal Code, giving a bribe, provided in Art. 290 of the Criminal Code, influence peddling, provided in Art. 291 of the Criminal Code and buying influence, provided in Art. 292 of the Criminal Code, shall be punished according to the provisions of those laws.

For the purposes of the present law are crimes assimilated to corruption offences, the offences referred to in Art. 10–13 of Law no. 78 from 2000.

The provisions of the present law are also applicable to offences against the financial interests of the European Union provided under Art. 18(1)–18(5), the sanctioning of which ensures the protection of funds and resources of the European Union.

As regards the conduct criminalised under the provisions of this special law, under Art. 10 of the special law, the following deeds are considered crimes assimilated to corruption offences – and shall be punished by imprisonment for three to 10 years and the forbidding of certain rights – if they are committed in order to obtain for themselves or for another money, goods or other undue benefits:

(a) establishing intentionally to a diminished value against the real market value, assets belonging to operators where the state or an authority of local government is a shareholder, committed during privatisation or foreclosure, reorganisation or liquidation or during a commercial operation or property belonging to public authorities or public institutions, in an action in their sales or foreclosure, committed by those responsible for their management, administration, management, enforcement of reorganisation or judicial liquidation;

(b) granting of subsidies in violation of the law or non-compliance, according to the law, with respect to the destination of subsidies;

(c) the use of grants for purposes other than those for which they have been granted, and the use for other purposes of loans secured by public funds or to be reimbursed from public funds.

According to Art. 11, it is considered a crime assimilated to a corruption offence the act of the person who, having the duty of supervising, controlling, reorganising or liquidating a private economic operator, performs for it any task that intermediates or

facilitates the carrying out of commercial or financial operations or participates with capital to such an economic operator, if the act is of the nature of directly or indirectly making an undue advantage, constitutes an offence and is punishable by imprisonment from one to five years and the prohibition of certain rights. If the act provided above has been committed within five years of termination of the task, the sentence is imprisonment from six months to three years or a fine.

Also, according to Art. 12 the following deeds are considered criminal offences and are punishable by imprisonment from one to five years if they are committed for the purpose of obtaining for themselves or for another money, goods or other undue benefits:

(a) performing financial transactions as acts of commerce incompatible with the duties or tasks performed by a person or conclusion of financial transactions, using the information obtained in the performance of his its office, duties or assignments;

(b) using, in any way, directly or indirectly, information that is not intended to be advertised or to allow unauthorised persons access to such information

Furthermore, in Art. 13 from Law no. 78/2000 the law criminalises the act of a person who holds a leading position in a party, in a trade union or patronage or in a legal entity without patrimonial purpose, to use his influence or authority in order to obtain for himself or for another money, goods or other undue advantage, and shall be punished by imprisonment from one to five years.

Under Art. 15 of the aforementioned normative act, attempt of the offences provided in this section shall be punished. However, by Constitutional Court Decision no. 458 of 22 June 2017,[14] the exception of the unconstitutionality of the provisions of Art. 15 of Law no. 78/2000 on the prevention, detection and sanctioning of corruption, referring to Art. 13(2) and the offence of abusive conduct, stated that these provisions are unconstitutional.

Given that the attempt is not possible for omissions,[15] as they are executed entirely at the moment when the action stipulated by the law has not been performed within the prescribed time limit and the legislator has determined that the attempt is punished even if it is not possible, the Constitutional Court admitted an exception of unconstitutionality in this matter.

It should be noted that, in the case of the abuse of service, provided by Art. 297 C. pen., the attempt is not punished even if it is possible for the comic version. The reason for the failure to do so is precisely the fact that the crime of abuse of service can also be done through omission ("does not fulfil an act"). To this end, see the explanations given in the Court's press release.

[14] Published in the Official Monitor no. 890 of 13 November, 2017.

[15] Domocos 2010, 125.

9. Are there any aggravating circumstances in the case of corruption?

Under Art. 7 of Law no. 78/2000, the acts of taking a bribe or influence peddling executed by a person who a) performs a high-official public function; *(ex. Prime Minister, Minister, Prefect, etc);* b) is a judge or prosecutor; c) is a criminal investigating authority or has the attributions of imposing or sanctioning misdemeanour offences; d) is one of the persons mentioned in Art. 293 of the Criminal Code (*members of the courts of arbiters or in connection thereto*) shall be sanctioned with the punishment provided in Art. 289 or 291 of the Criminal Code, the limits of which are increased by a third.

Under Art. 13(1) of Law 78/2000, in the case of the offence of blackmail provided by Art. 207 of the Criminal Code, with one of the persons mentioned in Art. 1, the special penalty limits are increased by a third.

Under Art. 13(2) of Law 78/2000, in the case of offences of abuse of office or of usurpation of the position, if the civil servant obtained an undue advantage for himself or another, the special limits of the punishment shall be increased by a third.

10. Protection of financial interests from the EU perspective

As Art. 5 of Law no. 78 from 2000 prescribes, the provisions of the present law are also applicable to offences against the financial interests of the European Union provided under Art. 18(1)–18(5), the sanctioning of which ensures the protection of funds and resources of the European Union

Section 4(1) ("Offences against the financial interests of the European Communities") of Chapter III was introduced by point 18 of Art. I of Title I, Book II of Law no. 161 of 19 April 2003, published in the Official Monitor no. 279 of 21 April 2003.

The specific offences as regulated by Law no. 78 from 2000 do prescribe heavier punishments, and on the other hand they do not permit any possibility to prescribe sanctions other than criminal sanctions under EUR 10,000, as follows*:*

- *Art. 18/1* – The use or presentation in bad faith of documents or false, inaccurate or incomplete statements (…) is punishable by imprisonment from two to seven years and the prohibition of certain rights;
- *Art. 18/2* – The change in the destination of the funds obtained (…) shall be punished by imprisonment from one year to five years and the interdiction of certain rights;
- *Art. 18/3* – The use or presentation in bad faith of false, inaccurate or incomplete documents or false declarations (…) shall be punished with imprisonment from two to seven years and the prohibition of certain rights;
- *Art. 18/5* – Negligent misconduct of the director, manager or person in charge of decision or control in an operator of duties, failure to comply with it or carrying it defective, if the act resulted in commission by a person who is in his subordination and who acted on behalf of that economic operator of one of the offences provided in Art. 18(1)–18(3) or committing a crime of corruption or money laundering

in connection with the European Union funds shall be punished by imprisonment from six months to three years or by fine.

From the Report for 2017 of NAD we extracted the following data:[16]

In criminal cases pending in the courts having as their object offences against EU financial interests, 66 final convictions were passed in 2017 on 106 convicted defendants, out of which 97 were natural persons and nine legal persons.

The regime applicable to punishment for the 97 individuals was the following:

– 5 punishments in prison, established between three years and six years and four months, respectively;
– 15 penalties with conditional suspension of execution;
– 76 punishments with suspended custodial supervision;
– 1 penalty with postponement for the duration of the surveillance period.
– Of the nine convicted legal persons, they have been fined between RON 10,000 and RON 450,000.
– Also, through final judgments, the courts ordered the payment of indemnities to civil parties in a total amount of RON 28,428,478 (equivalent to EUR 6,223,125). It also ordered the confiscation of the amount of RON 14,700 (equivalent to EUR 3,218).

In conclusion, the results obtained by the National Anti-Corruption Directorate in 2017 in the field of combatting the phenomenon of fraud affecting the integrity of the EU funds allocated by Romania have evolved in relation to the previous years; there are increases in the number of indictments, agreements on the recognition of guilt and cases settled. Measures were taken to recover the damages found by introducing precautionary measures, an extremely important issue in these investigations, which are complex in the aspect of probation with corruption offences, money laundering and forgery in documents.

11. Impact of corruption offences and fraud in public procurement on the absorption of European funds

The impact of corruption offences and fraud in public procurement on the absorption of European funds is of great importance in the current conditions of the Romanian economy and requires very good theoretical and practical knowledge of the mechanisms of public procurement and European funds.

The European Commission has repeatedly highlighted this undesirable phenomenon of fraud in European public procurement in Romania, which is why normative acts have been drafted in line with Community requirements.

Of course, public procurement is an important mechanism for the functioning of the EU internal market, and they are vulnerable to corruption, so taxpayers' money that has or should have a legal destination goes into illicit ways to corrupt individuals.

[16] *http://www.pna.ro/bilant_activitate.xhtml?id=40#cap4_4.*

Even though the corruption phenomenon is difficult to quantify, the negative influence of corruption and fraud is evident in consolidating investor confidence in the economic environment and public systems of corrupt systems, characterised by fiscal unpredictability and lack of stability and sustainability of public procurement systems.

In Romania, the phenomenon of corruption emerged in each phase of the public procurement process. The most common form of corruption associated with public procurement is bribery of a public official or government official in order to obtain a favourable decision to award a given contract in a public action.

In the following, we will highlight the influence of corruption offences on public procurement related to the absorption of European funds. Such situations exist in Romania in recent years. There is relevant practice in this field, which could constitute the object of analysis of another paper, which could be called "Theoretical and Practical Aspects of Corrupt Crimes with Impact on the Absorption of European Funds".

Of course, a paper on this subject would entail a replication of the architecture of the public procurement system in Romania and the possibility of combatting fraud and corruption in purchases at the level of the structural funds.

Also, the paper would require an analysis of the public procurement system in our country, the strengths and weaknesses of the system, the weaknesses of the control system in public procurement, etc.

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Annex 1

Report of the National Anti-Corruption Directorate from 2017[17]

A. Section of countering corruption:

With the 26 indictments and 10 agreements on the recognition of guilt, 103 offences were committed:
57 corruption offences, out of which:
9 offences against the financial interests of the European Union
6 crimes against justice
1 offence of service
11 false offences

[17] *www.pna.ro.*

11 money laundering offences
10 tax evasion offences
5 business crimes
2 crimes against the security and integrity of computer systems and data

B. Section of crimes assimilated to corruption:
With the 70 indictments and the 15 agreements for the recognition of guilt, 381 crimes were committed:

- 132 crimes assimilated to corruption:

1 – provided by Art. 10 letter a) of Law no. 78/2000
2 – provided by Art.10 letter c) of Law no. 78/2000
1 – provided by Art.11 of Law no. 78/2000
2 – provided by Art.12 letter a) of Law no. 78/2000
1 – provided by Art. 13 of Law no. 78/2000
2 – provided by Art.131 of Law no. 78/2000
40 – provided by Art. 132 of Law no. 78/2000
73 – provided by Art.181 of Law no. 78/2000
8 – provided by Art. 182 of Law no. 78/2000
2 – provided by Art.184 of Law no. 78/2000
64 – corruption offences
26 – bribery
17 – bribery
5 – purchase of influence
16 – influence trafficking
185 – offences under the Penal Code and special laws
1 – deception
1 – favouring the perpetrator
2 – Lying testimony
12 – embezzlement
2 – abuse of service
2 – conflict of interest
1 – forgery in official documents
18 – intellectual forgery
10 - forgery in private signature documents
3 – use of forgery
1 – false in statements
22 – the formation of an organised criminal group
1 – offence provided by Law no. 176/2010
80 – offences provided by Law no. 241/2005
29 – offences provided by Law no. 656/2002

Annex II

Good practices: Presentation of a concrete case

The prosecutors within the National Anti-Corruption Directorate – the Section for Combating Crime Related to Corruption Offenders have ordered the defendants to trial:
1. In preventive arrest D.G., legal representative of companies S.C. ROMAGRAFEED 2009 S.R.L and S.C. ROMAGRA OTIS S.R.L, in charge of which competing offences were held:
– *two offences against the financial interests of the European Union,*
– *two bribery offences.*

M.F., legal representative of S.C. CASIOPEIA SPACO S.R.L. and S.C. ANDRASEL SPACO 2011 S.R.L., in charge of which were competing offences:

– four crimes against the financial interests of the European Union, two as an author and two as an accomplice,

– bribe giving.

2. Under judicial control B.F.V., Inspector of the Ministry of Agriculture and Rural Development - General Directorate for Control and Anti-Fraud (MADR-DGCA), charged with competing offences:

– four offences against the financial interests of the European Union, in the form of complicity,

– two bribery offences.

P.G.L., within the County Office for Payments for Rural Development and Fisheries Braşov (OJPDRP Braşov), under judicial control, in charge of competing offences:

– two crimes against the financial interests of the European Union, in the form of complicity,

– bribery.

3. Without preventive measures S.C. ROMAGRAFEED 2009 S.R.L., S.C. CASIOPEIA SPACO S.R.L., S.C. ANDRASEL SPACO 2011 S.R.L., S.C. ROMAGRA OTIS S.R.L., charged with crimes against the financial interests of the European Union.

In the indictment drawn up, the prosecutors noted the following fact: During the period 2011–2014, the defendants of D.G. and M.F., as legal representatives of the aforementioned companies, by using false, inexact and incomplete documents, both on the occasion of the filing of the grant application and subsequently during the execution and financing of the procurement procedures, obtained non-reimbursable funds amounting to RON 12,800,344 (approximately EUR 3 million), as follows: S.C. ROMAGRAFEED 2009 S.R.L – RON 3,436,330; S.C. ROMAGRA OTIS S.R.L. – RON 2,692,719i; S.C. CASIOPEIA SPACO S.R.L. – RON 3,291,619; S.C. ANDRASEL SPACO 2011 S.R.L. – RON 3.379.676.

In order to obtain the respective amounts of money, the defendant D.G. benefitted from the assistance of M.F., in the sense that:

– made available part of the money used to obtain the account statements required to prove co-financing, account statements submitted in April 2011, together with the requests for funding submitted by ROMAGRAFEED 2009 S.R.L. and ROMAGRA OTIS S.R.L.

Using these companies, the two artificially divided their business projects and formulated a grant application on behalf of each company to formally stay below the ceiling imposed by the NRDP.

In order to establish these estimated budgets for the four companies, defendants D.G. and M.F. used a series of counterfeit offers from the same producers/suppliers.

- dealt with the execution of the works on the two farms belonging to ROMAGRAFEED 2009 S.R.L. and ROMAGRA OTIS S.R.L., through controlled companies at overpriced prices.

Subsequently, after the conclusion of the financing contracts, during the implementation phase of the projects, D.G. and M.F. benefitted from the help of the defendants B.F. and P.G., in exchange for receiving various goods and sums of money.

The help given by the defendant BF to the two businessmen D.G. and M.F. consisted of providing information on the status of the requests made by the two and "advice" on the irregularities in the projects of the two and on the way in which these irregularities could be covered.

In return for this help, D.G. and M.F ensured accommodation during the departures of B.F. in the Brasov area, giving him food and sums of money.

The aid given by the defendant P.G. John to the two businessmen D.G. and M.F. consisted in the non-observance of the artificial eligibility conditions for two projects. The latter also provided the two defendants with advice and information on the controls to be carried out and the stage of the payment claims formulated.

In return for the support granted to P.G., John was rewarded by D.G. with the sum of EUR 300 and food products.

FIGHTING MONEY LAUNDERING IN ROMANIA

Prof. Dr. Valentin Mirişan[*] *– Assoc. Prof. Dr. Diana Cîrmaciu*[**]

1. Introduction

The phenomenon of money laundering is less researched in Romanian criminal science from a juridical point of view, although the integrity of the national financial system is very important for the macroeconomic stability of the financial sector, both at the national and international levels.

The effects of money laundering can consist of the following:[1]

– erosion of financial institutions and weakening of the role of the financial sector in the economy's growth;
– reducing productivity by diverting the purpose of investments;
– risk induction, macroeconomic instability and unfair competition;
– decrease in foreign investments;
– price distortion – money laundering could distort exports and imports in some countries because "laundered money" tends to relate to luxury consumption with negative consequences on the payments balance.

We would like to mention that we will not be able to exhaust all of the complex aspects of this phenomenon now, but it can be consulted in the edited/published version of this study.

2. General considerations regarding the regulation of money laundering in Romanian Criminal Law

According to Art. 29 of the Law no. 656/2002:[2] "(1) the following deeds constitute the criminal offence of money laundering and are punished with prison from 3 to 10 years:

(a) the conversion or transfer of property knowing that it originated from a criminal activity, in order to conceal or disguise the illicit origin of such property or to help the person who committed the offence, from which the property originated, to evade prosecution, or execution of the punishment;

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[1] Jurj-Tudoran – Șaguna 2018, 364.

[2] Law no. 656/2002 on the prevention and sanctioning of money laundering, as well as for the establishment of measures of prevention and combating of financing of terrorism, republished in the Official Gazette of Romania no. 702/12.10.2012.

b) concealing or disguise the true nature of the origin, location, disposition, movement or ownership of the property or the rights upon it, knowing that it derived from criminal activity;

(c) the acquisition, possession or use of property, knowing that it derived from criminal activity;

(2) The attempt is punished as well.

(3) If the deed was committed by a legal person, in addition to the fine, the court shall apply, as appropriate, one or more of complementary penalties as provided in article 136, para (3) let. (a) – (c) of the Penal Code.

(4) Knowledge of the origin of property or the intended purpose may be inferred/ deduced from objective factual circumstances.

(5) The provisions of paragraph (1) - (4) are applied without any difference if the criminal activity generating the property was committed on Romanian territory or abroad".

The source of the matter is found in a special law, and the offence is defined according to Art. 6 of the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime[3] starting from dual criteria: a list of criminal activities and the determination of the natural and legal persons through which such activities may be committed.

It is true that Directive 2005/60 /EC of the European Parliament and of the Council for the prevention of the use of the financial system for the purposes of money laundering or terrorism financing has defined the offence in a broader sense but in accordance with the provisions of the Convention. A draft law adopted by the Romanian Government aiming to transpose the European Parliament and Council Directive EU No. 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorism financing is currently under parliamentary debate.

The analysis of the incriminating texts reveals that the money laundering offence is a deliberate and resultant act, which is always accompanied by other crimes, by the means of subscribing to economic crime: tax evasion, corruption, fraud, banking crimes, etc.

2.1. Decision no. 16/2016 of the High Court of Cassation and Justice (HCCJ) regarding the money laundering criminal offence[4]

Through this decision, the Panel for clarifying legal issues within criminal law has issued a preliminary decision in order to clarify some matters of principle with regard

[3] Convention of November 8th 1990, ratified by Law 263/2002 published in the Official Gazette of Romania under no. 353/28.05.2002.

[4] Decision no. 16/2016 regarding the examination of the complaint filed by the Court of Appeal from Alba Iulia – Criminal Section, in the File no. 1.624 / 1/2016, by which, pursuant to Art. 475 of the Code of Criminal Procedure, a preliminary ruling is required to clarify certain points of law, as a matter of principle. The decision of the High Court of Cassation and Justice was published in the Official Gazette of Romania under no. 654 / 08.25.2016.

to the definition of the objective aspect of the money laundering criminal offence, its active subject and its autonomy in relation to the offence from which the property derived.

The decision removed the contradictions in the doctrine and judicial practice in Romania. In essence, it concerns the following issues of law:

(a) Do the deeds listed in Art. 29 para (1) lett. a), b) and c) of Law no. 656/2002 on the prevention and sanctioning of money laundering, as well as the introduction of measures for the prevention and combatting of terrorism financing, republished, as amended (the conversion and transfer or the disguise and concealment or the acquisition, possession or use) represent distinct normative means of committing the money laundering criminal offence, or do they represent alternative variants of the material element of the objective aspect of the money laundering criminal offence?

(b) Can the active subject of a money laundering crime be the same as the active subject of the offence from which the property originates, or should it be different from it?

(c) Is money laundering an offence? Is it an autonomous offence, or is it a subsequent offence to the one from which the property originates?

Our Supreme Court has stated that:

"a) The enlisted actions in Art. 29 para. (1) lett. a), b) and c) of the Law no. 656/2002 on the prevention and sanctioning of money laundering, as well as for the introduction of measures for the prevention and combating of financing of terrorism, republished, as amended, namely, the conversion and transfer or the disguise and concealment or the acquisition, possession or use are alternative modalities of the material element of the single money laundering offence.

b) The active subject of the money laundering offence can also be an active subject of the offence from which the property originates.

c) The money laundering criminal offence is an autonomous crime, and it is not conditional upon the existence of a conviction for the offence from which the property originates".

Recently, the Constitutional Court has debated the exception of unconstitutionality of the provisions of Art. 29 para (1) letter c) of the Law no. 656/2002 on the prevention and sanctioning of money laundering, as well for as the introduction of measures for the prevention and combatting of financing of terrorism as interpreted by the Decision of the High Court of Cassation and Justice no. 16 of 8 June 2016 on the issuing of a preliminary ruling for the resolution of certain legal issues related to the money laundering criminal offence.

Following the deliberations, the Constitutional Court unanimously approved the exception of unconstitutionality and found the provisions of Art. 29 para (1) (c) of the Law No. 656/2002 on the prevention and sanctioning of money laundering, as well as for the introduction of measures for the prevention and combatting of financing of terrorism as interpreted by the Decision of the High Court of Cassation and Justice no. 16 of 8 June 2016 on a preliminary ruling on the active subject of the offence (point 2 of the provision), unconstitutional.

In the recitals of the decision's admissibility, the Court found that the provisions of Art. 29 para (1) letter c) of the Law no. 656/2002 on the prevention and sanctioning of money laundering, as well as for the introduction of measures for the prevention and combatting of financing of terrorism, in the interpretation given by the Decision of the High Court of Cassation and Justice no. 16 of 8 June 2016 regarding the issuing of a preliminary ruling, breaks the requirements of clarity, precision and predictability, as resulting from the principle of the rule of law imposed by the constitutional provisions of Art. 1 para (5), but also the principle of the lawful criminalisation and punishment as stipulated in Art. 23 para (12) of the Constitution.

In order to rule this decision, the Court held, in principle, that the active subject of the offence from which the acquired, possessed or used property derived cannot be the active subject of the money laundering offence covered by Art. 29 (1) c) of Law no.656/2002.

The decision is final and generally binding and produces effects in the future after its publication in the Official Gazette of Romania.

3. Alternative ways to achieve the objective aspects of the criminal offence

The conversion, as an alternative way to achieve the objective aspect of the criminal offence, may consist of the following:

- physical transformation, namely the first appearance is changed, keeping the intrinsic value of the object;
- replacing the product of the offence with another property that is legally possessed by another person, the exchange being made at an equivalent value or at different values;
- conclusion of legal documents under private or authentic signature, without removing the illegal nature of the transaction.

The second alternative – the transfer – can be achieved by the following means:

- moving the property from a place where the illicit origin could easily be deduced to another place where the property would have the appearance of legal origin;
- the movement of capital in different forms, from one country to another or from one economic entity to another, with or without legal appearance (actual or written or electronic movement);
- transfers of inter-bank funds through the Western Union system;
- transfer of funds by check, promissory note or bills of exchange, where such instruments are not based on fundamental legal relationships;
- transfer through fictitious payments made by cards, etc.

4. The subjective aspect of the criminal offence according to the alternative variants on the objective side

As we have already stated in a previous section, the offence is intended in all the alternative variants on the objective side. Doctrine and judicial practice deal with the means of intention (direct or indirect) depending on the means of achieving money laundering. Obviously, a conclusion would only individualise the penalty within the legal limits.

If the offender foresees and follows the outcome of his deed, the intention is direct, and the punishment may be more severe, whereas if he only predicts the outcome and does not pursue it but accepts it, the punishment may be milder.

The alternative way of incrimination by para. 1 of Art. 29 also claims a purpose, therefore some clarification is required.

The aim (as a sub-element of the subjective aspect) of the conversion or transfer of property originating from a main criminal offence must be the concealment or disguise of the illicit origin or to help the person who committed the criminal offence from which the property comes to evade prosecution, trial or execution of the punishment.

The offence is consummated even if this purpose has not been achieved.

It should be noted that, with regard to the purpose, it can be deduced from the objective factual circumstances of both the production of the property and its actual conversion or transfer. In other words, in order to carry out the criminal offence, it is enough that the conversion or transfer operations contain objective factual elements from which the purpose of concealing or disguising illicit origin should result.

The law does not pretend that, in order to consummate the offence, such operations require proof of profit for oneself or for another; to create a credible apparent state of illicit origin of the property, which in fact is the product of the offence, is quite enough.

The subjective aspect of the money laundering criminal offence implies, as an essential requirement, that the perpetrator is aware of the fact that the property comes from committing a crime. However, it is not necessary for the perpetrator (when he or she is not the author of the predicate criminal offence) to know which particular crime was committed and who is its author. It is enough to realise at the moment of committing the money laundering operation that the property comes from committing a crime.

One's awareness of this circumstance is often difficult to prove by classical means of proof, which is why Art. 29 para 4 of Law no. 656/2002, which assumes identical European normative provisions, reads as follows: "Knowledge, intent or purpose, as an element of one of the offences set forth in this paragraph, can be deduced from the objective circumstances of the deed".

Thus, new means of proof are being established in national law, namely the presumption of court and indirect evidence acquire an essential role in this matter, a role imposed, as we have seen, by the supranational provisions according to which the conviction for money laundering should be ordered even when the offence they originate from is not clear, but on the basis of objective circumstances, one can assume that the perpetrator of the money laundering has known or accepted the possibility of the illicit origin of the property.

Indirect evidence is what reveals *supportive evidence*, that is, circumstances that are not directly related to the main fact.

The applicability of indirect evidence in national practice is limited, but a change of attitude of the judicial bodies is desirable and expected in such a way that, while national legislation is harmonised with the European one and the practice becomes unitary, the jurisprudence from other states can be an increasingly important reference.

5. The autonomous nature of the money laundering criminal offence

Although the crime offence of money laundering is conditioned by the existence of a previous offence linked to the first one from an objective perspective, it does not affect the autonomous nature of the money laundering criminal offence. The only necessary and sufficient condition to prove it is that the constituent elements of the criminal offence that is generating the dirty money be found by the judicial body. Having committed the predicate offence abroad is irrelevant. It is also irrelevant if the circumstances of its commission have not been fully elucidated, if the prosecution has not begun or if no final conviction has been pronounced because the perpetrator died, or a case of discharge or impunity has arisen. The absence of a prior or concurrent conviction for the predicate offence is not a necessary condition in light of the EU Council's Convention from Warsaw of 16 May 2005 on the laundering, search, seizure and confiscation of the proceeds from crime or terrorist financing (Art. 9, para. 5).

Also, the autonomous character of the money laundering offence results from the following important consequence: The offence exists even if the author of the predicate offence is unknown.

The predicate offence may be proven in terms of objective circumstantial elements during an investigation regarding the commission of money laundering irrespective of the place it was committed – in the country or abroad.

This is possible precisely because it has been found that many of the investigations into the commission of money laundering by third parties were hampered by the missing conviction of the perpetrators of the predicate offences.

The novelty brought to European and national legislation in this respect is that, with regard to the standards of proving the predicate offence, during the investigation of the money laundering crime, prosecutors are not compelled to prove all the constitutive elements of a predicate offence, the illicit origin of the property being proved in conjunction with any other factual circumstances.

In the judicial literature and practice of different European countries (France, Spain, Holland, Switzerland, Italy, Bulgaria) it was shown that in order to meet the constitutive elements of the money laundering offence, the author must not necessarily know the nature of the offence generating the dirty money and should only realise its existence based on facts.

Also, the French judicial literature and practice has shown that the moral element of the money laundering crime requires that the agent knows that the property comes

from a crime or offence without the need to know the offence or crime that originated the property.

Practice in Spain has shown that *establishing the actual and specific existence of a criminal precedent of a certain nature, the chronology, the participation and the object are not indispensable requirements for the drawing up of the indictment regarding the offence of receiving or laundering money*. *A generic reference to their origin is almost always enough to indicate rational and motivated conclusion about their origin, through indicators or clues*.[5]

Some legislation (in the US, UK, Ireland, Switzerland, the Netherlands, France, Spain, etc.) provides a form of presumption of guilt for money laundering, thus reversing the burden of proof, which lies with the accused.[6]

Art. 9 para. 6 of the Warsaw Convention of 2005, ratified by Romania through Law no. 420 of 22 November 2006, published in M. Of. no. 968 on 4 December 2006, states: "Each Party shall ensure that a money laundering conviction is possible where evidence proves that the proceeds come from a predicate crime without it being necessary to establish which offence".

The same provisions are identical in Art. 1 para. 5 of the Third Directive of the European Parliament and the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, transposed into national law by the adoption of GEO no. 53/2008, amending Law no. 656/2002, based on the two above-mentioned supranational instruments being introduced with Art. 29 para (4) with the following content: *Knowledge, intent or purpose, as elements of the facts provided by paragraph (1) can be deduced from the objective factual circumstances*.

It is precisely for these reasons – the autonomous character of money laundering offence and the unnecessary indication of the predicate offence – that in all European states that have ratified the Warsaw Convention there were significant changes in mentality and judicial practice: the indictment and conviction for the money laundering crime being ordered by making only the direct or indirect proof of the illicit origin of the property and, in particular, the indirect proof, by presumptions that derived from the objective circumstances of the case, of the knowledge of that illicit origin.

Recently, national judicial literature has also expressed the view that, while all European conventions ratified by Romania in the field of money laundering stipulate that intention, knowledge or purpose as elements of money laundering can be deduced from objective factual circumstances, national courts not being allowed to ignore these international standards in the matter and assume that the guilt of the money launderer must be exclusively embodying the form of direct intent and the probation may be done only by direct evidence.[7]

The overthrow of the burden of proof in light of the above-mentioned Convention and the difficulty of establishing the illicit origin of property was also recognised in the recent legal literature.[8]

[5] Decision of 23.02.05 of the Supreme Court in Milan.
[6] Popa – Drăgan 2005, 152.
[7] Bogdan 2009, 112.
[8] Coord. Boroi 2014, 339.

The money laundering offence can be committed with both direct and indirect intent. Second-degree money laundering, although allowed by European law, is not incriminated in Romania (it is in Spain and Germany). The MONEYVAL Expert Recommendations are in the sense of incrimination of money laundering. The intention thus requires the author to know that the undertaken activities hide the origin of the money coming from a crime and to pursue or accept the achievement of this result.

The author commits an act of indirect intention whenever he proceeds with the carrying out of money laundering operations and also by accepting the possibility that the goods under the laundering process come from a crime, thus showing indifference to the origin of the goods. Similarly, there will be indirect intention if the author, in doubt about the provenance of the goods, does not first clarify his doubts but acts despite this doubt, which means that he has admitted the possibility that the goods come from an offence.

One cannot consider that the money laundering offence, in the manner provided by Art. 29 para. 1 lett. a) of the law, is committed only by direct intent, aggravated through the purpose of concealing or disguising the origin or the illicit nature of the product of the offence, or by helping the person who committed the primary offence to evade the criminal prosecution, trial or execution of the punishment. The existence of the special purpose is not incompatible with the indirect intention, and this indirect nature of the intent does not concern the purpose but another element on which the existence of the act depends.

6. Aspects related to specific probation of money laundering criminal offences

The subjective aspect of the money laundering criminal offence implies, as an essential requirement, that the perpetrator is aware that the property comes from committing a crime. However, it is not necessary for the perpetrator (when he or she is not the author of the predicate criminal offence) to know which particular crime was committed and who its author is. It is enough to realise at the moment of committing the money laundering operation that the property comes from committing a crime.

One's awareness of this circumstance is often difficult to prove by classical means of proof, which is why Art. 29 para 4 of Law no. 656/2002, which assumes identical European normative provisions, reads as follows: "Knowledge, intent or purpose, as an element of one of the offences set forth in this paragraph, can be deduced from the objective circumstances of the deed".

Therefore, new means of proof are established by national law, namely the presumption of court and indirect evidence acquire an essential role in this matter, a role imposed, as we have seen, by the supranational provisions according to which the conviction for money laundering should be ordered even when the offence they originate from is not clear, but on the basis of objective circumstances, one can assume that the perpetrator of the money laundering has known or accepted the possibility of the illicit origin of the property.

Indirect evidence is that which reveals supportive evidence, that is, circumstances that are not directly related to the main fact.

The applicability of indirect evidence in national practice is limited, but a change of attitude of the judicial bodies is desirable and expected in such a way that, while national legislation is harmonised with the European one and the practice becomes unitary, the jurisprudence from other states can be an increasingly important reference.

Probative facts that can be determined by indirect evidence of money laundering as retained by courts in different European countries (Spain, France, Italy, Bulgaria, etc.) that have passed conviction can be the following:

– activities of concealment, acquisition, transformation of goods or gains;
– the link with illicit activities or with persons/groups related to them;
– the disproportionate increase in wealth during the period of the person's connection with the above-mentioned activities;
– the absence of legitimate businesses or activities to justify these increases in wealth.

The national practice on money laundering offences is also aligned with the Community legal framework regarding probation by indirect evidence, as well as the lack of a prior or concomitant conviction or a detailed outline of the constituent elements of the predicate offence. In this respect, the following decisions of the High Court of Cassation and Justice considered in the prosecution activity are relevant:

(a) Decision no. 1562 of 28 April 2009 (by which it was ordered the conviction of the defendant of the offences of trafficking of minors and money laundering, removing his defence that was based on the fact that the purchase of the confiscated apartment and cars with money from the first offence was not proved by certain facts, and the defendant claimed that he acquired them paying "black" money from working in Spain, so the prosecutor's office had to show evidence to the contrary).

(b) Decision no. 1386 of 11 March 2004 (convicting the defendants of complicity in bribery and money laundering, retaining that, as deputy directors of the Bihor County Employment Agency, they transferred the amounts received for complicity in bribery to other persons, depositing these amounts in their bank accounts). The Supreme Court has therefore established that the perpetrator of the money laundering crime may even be the author of the main offence, the two offences being concurrent, not being the case of unpunishable self-favouring.

(c) Decision no. 2984 of 25 September 2008 (which convicts the defendants of false statements, tax evasion and money laundering that came from crimes committed several years before by other people who had been convicted for human trafficking; the defendants in the present case acquired apartments and other property and claimed that they were unaware that the sums received from the convicted had an illicit origin).

It has been noticed that since 2012, the Romanian judicial practice of the Supreme Court has been steadily oriented towards the autonomous sanctioning of the money laundering offence without the need to pronounce a decision with regard to the premise offence, even within the same trial. Invoking Art. 9 para. 5 of the Warsaw Convention of 2005 as well, the Supreme Court ruled that the money laundering offence can subsist without the prior conviction of the perpetrators of the primary offence, since the court in charge of the trial for the money laundering offence is compelled, by virtue of the

active role, to verify on the basis of the submitted evidence the existence of guilt with regard to the commission of the offences which produced the money to be laundered.[9]

The juridical object of the money laundering criminal offence is a complex one, namely the protection of the financial sector and other vulnerable activities from the harmful effects of the criminal proceeds, as well as the protection of the social connections that ensure the achievement of justice.[10]

The active subject of the money laundering criminal offence can be, according to Romanian law, any natural or legal person[11] who is responsible for the crime, regardless of whether the money laundering is committed through the financial banking system or outside it, and it is not necessary to notify the Money Laundering Prevention and Combat Office as a condition for the pursuit of the prosecution.[12]

The causal link between the premise offence and the money laundering offence has to be proven, and, in principle, it results from the complex of transactions and operations designed to conceal the criminal origin of the property subjected to laundering.

Judicial practice and literature point out that the following can be included in the category of situations that attest to criminal origin:[13]

– a link to legal investigations of criminal activities;
– seizure of drugs or other substances;
– confiscated documents related to such criminal activities;
– absence of licit businesses to justify operations;
– use of false identities;
– non-existence of commercial relations that would justify financial flows;
– connection to ghost companies, lacking any kind of activity;
– retrieving exceedingly large commissions through intermediaries, operations or simulated business, etc.

The money laundering criminal offence is susceptible to being committed in the form of preparatory or attempted acts, but only the attempt is punished.

The consummation of the money laundering criminal offence occurs when any of the following specific actions are executed:

– conversion
– transfer
– concealment
– disguise
– possession
– use,

and the perpetrator knows the origin of that property.

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[9] Decision no. 609/2014 a ICCJ, criminal division – decision regarding the money laundering criminal offense (Art. 23 of Law no. 656/2002) *https://lege5.ro/Gratuit/gqydcnjsge/decizia-nr-609-2014-privind-infractiunea-de-spalare-de-bani-legea-nr-656-2002-art-23* . See *www.scj.ro*, accessed on June 20th, 2018.

[10] Jurj–Tudoran,–Șaguna 2018, 31 f.

[11] Regarding the legal person – active subject of the money laundering offense, we consider it necessary that all the constitutive elements of the money laundering committed by the legal person – the material element and the subjective element – should be ascertained separately from the finding made in cases of crimes committed by natural persons.

[12] See Decision no. 4072/2008 of the HCCJ, Criminal Division.

[13] Hotca–Neagu–Gorunescu–Sitaru–Galetschi 2015, 107 ff.

If the offence is committed by inaction, consummation takes place when the defendant, who must report suspicious transactions, knows that the goods have a criminal source.

7. Extended confiscation

Law no. 63/2012 amending the Criminal Code of Romania integrates into national legislation the provisions of Art. 3 of the Framework Decision 2005/212/ JHA of the Council for Confiscation of Crime Related Products, Instruments and Goods, by introducing Art. 118^1 of the old Criminal Code regulating extended confiscation.

Therefore, the institution of *extended confiscation was first introduced in the Romanian legislation, establishing its legal nature as security measure*.

The measure of extended confiscation is also maintained in the actual Criminal Code in the category of security measures (Art.112 of the Criminal Code).

Therefore, if the person is convicted of committing an offence for which the law provides four or more years of imprisonment and from which he is likely to obtain a material benefit, the court may also order the confiscation of property other than those referred to in Art. 112 if the following conditions are met:

(a) the value of the property gained by the convicted person within a period of five years before and, where appropriate, after the offence has been committed up to the date of the court notification, clearly exceeds the revenue that this person has unlawfully obtained and

(b) the court is sure that the property concerned comes from criminal activities of the same nature of those who have brought the conviction (by property it is also understood to mean money);

By application of the above-mentioned provisions, the value of the property transferred by the convicted person or by a third party to a family member or a legal person over which the convicted person holds control (Art. 112 para. 3 of the Criminal Code) shall also be taken into account.

Although, apparently, these legal provisions are in conflict with the constitutional provisions of Art. 44 para. 8 on the presumption of the licit nature of property, this contradiction is only apparent.

The recitals of the draft Law no. 63/2012 show that this measure is not incompatible with the presumption of the licit nature of the property, and arguments are brought to support that this presumption is relative, and so it shall be overturned by evidence that will convince the court that the possessions of the convicted person are obtained from committing offences.

The Constitutional Court's Decision no. 78/11 February 2014 notes that, although not conditioned by criminal liability, extended confiscation implies an indissoluble link with the offence, being, by its effects, a cause for the elimination of a state of danger and cause for the prevention of other criminal acts.

The safety measure of extended confiscation is ordered by the court only insofar as it finds, on the basis of concrete evidence (such as an expertise to determine the dif-

ference between the legal income of the person, the standard of living and the property presumed to come from criminal activities similar to those for which a conviction has already been pronounced) being unnecessary for the criminal activities to meet the constitutive elements of the same offence for which the conviction was pronounced. It is enough that the criminal activities fall within the constitutive elements of one of the offences provided by Art. 112 (1) of the Criminal Code.

In the context of establishing that the presumption of the licit nature of the acquisition of property is not an absolute presumption, the relative nature of that presumption does not lead to a reversal of the burden of proof – the principle according to which the burden of proof rests on the party reporting or accusing remains applicable.

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PART IV

HORIZONTAL ISSUES

THE ROLE OF CORPORATE CRIMINAL COMPLIANCE FOR THE PROTECTION OF PUBLIC FINANCIAL INTERESTS*

*Assist. Prof. Dr. Stefan Schumann*** – *Prof. Dr. Richard Soyer****

1. Corporate compliance and the protection of public financial interests: General observations on the Austrian approach

The protection of the financial interests of the EU and the role of compliance are of particular interest in Austria, and their developments are worth being reported. The establishment of compliance structures in the economy of Austria over the last decade is well supported by the implementation of the *Bundesgesetz über die Verantwortlichkeit von Verbänden für Straftaten - Verbandsverantwortlichkeitsgesetz (VbVG)*, the *Act on the liability of legal entities for criminal offences*[1] in 2006. From our experience as professors of criminal law at the Johannes Kepler University Linz and from our work in one of the leading law firms in Austria specialised in criminal law, we can report that many corporations in Austria are well aware of the need to establish effective compliance structures in order to prevent corporate criminal liability.

1.1. The three-step approach of criminalisation, enforcement and effective exit strategies

In fact, the Austrian approach of fighting white-collar crime in general, thereby protecting the financial interests of the EU, is threefold. It consists of (a) criminalisation, (b) enforcement, and (c) exit strategies, such as active repentance as an Austrian specialty – i.e. voluntary disclosure and compensation in order to be exempted from punishment – and diversionary measures or restriction orders.

* This paper includes three presentations given by the authors during the HERCULE project in March 2018 (Soyer–Schumann, Miskolc; section 1 and 2.1. of this paper), June 2018 (Soyer, Vienna, section 2.3. and 3.), and October 2018 (Schumann, Oradea, section 2.2.). In general, the form of a speech is kept upright, some references are added.

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[1] Austrian Federal Gazette BGBl. I No. 2005/151.

1.1.1. Criminalisation

1.1.1.1. Accessibility: Incorporation into the main Criminal Code instead of ancillary acts

It is common knowledge in criminal justice that offences included in the main criminal code are typically more in the focus of law enforcement and judiciary than those codified in other acts. Consequently, in 2015, coming into force in 2016, the offences covering severe violations of financial reporting rules, formerly codified in various specialised codes, were transferred into unified articles in the Austrian Criminal Code (StGB). We will return to these later in this article.

1.1.1.2. New way to efficiency: Establishing corporate criminal liability

The implementation of corporate criminal liability,[2] or, to be exact, "liability of legal entities for criminal offences",[3] in 2006 formed another part of the criminalisation approach. Notwithstanding dogmatic discussions about culpability of legal entities in practice (as well as about various procedural questions), the mere possibility of corporate criminal liability had, and still has, a deep impact on more effectively preventing classic white-collar crimes as well as tax offences. Let us underline that this codification (the VbVG) might be seen as a measure focusing on actively preventing criminal behaviour rather than on punishment. This may be true even more than for the current main Austrian Criminal Code (*Strafgesetzbuch - StGB*). The pressure on corporations to establish effective compliance structures[4] contributes to the protection of assets and property of shareholders and creditors and to the protection of good public administration by minimising corruption. This way it protects also the financial interests of the Austrian Republic and of the EU.

1.1.2. Enforcement: Establishing specialised units in law enforcement and judiciaries

This pressure is triggered by establishing the law on corporate criminal liability and – regards enforcement – by the establishment of the *Public Prosecutor's Office for Corruption Offences (Korruptionsstaatsanwaltschaft - KStA)* in 2008.[5] This institution was extended as the *Specialised Public Prosecutor's Office for Economic and Corruption Offences (Zentrale Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption - WKStA)*[6] *in 2011*.[7] Likewise, centralised police units - such as the

[2] Austrian Federal Gazette I 2005/151; EBRV 994 BlgNr. XXII. GP, 1-2.

[3] See more detailed Schumann 2018. For the sake of accessibility, this paper uses the terminology of 'corporate criminal liability' without thereby taking a decision on the legal nature of those proceedings.

[4] See part 1.2.2., this chapter, in detail.

[5] Austrian Federal Gazette I 2007/109.

[6] *https://www.justiz.gv.at/web2013/wksta/zentrale-staatsanwaltschaft-zur-verfolgung-von-wirtschaftsstrafsachen-und-korruption~2c9484853f386e94013f57e43e3a0bd8.de.html* (19.03.19).

[7] Austrian Federal Gazette I 2010/108.

Federal Anti-Corruption Office (Bundesamt für Korruptionsprävention und Korruptionsbekämpfung - BAK)[8] - were created.[9] Criminalisation and law enforcement went hand in hand.

1.1.3. Effective exit strategies: Active repentance, voluntary self-disclosure, establishing effective compliance systems

In the Austrian Criminal Code, active repentance is an important concept to eliminate effects of criminalisation by stimulating the offender for damage compensation[10] or, where the damage is expected to be in future, by stimulating the offender to stop carrying out their offences or to actively hinder the damage they may cause.[11] Where the first applies to property offences, the latter applies, for example, to forgery of documents. Likewise, in fiscal criminal and administrative criminal law there is the possibility for voluntary self-disclosure.[12] In corporate criminal law, broad discretionary powers to discontinue or close proceedings allow for incentives to prevent re-offending by establishing effective compliance structures as explained in the following section (1.2).

1.2. Criminal proceedings against corporations: Prevention and exit by establishing compliance structures

1.2.1. The Austrian material model of corporate criminal liability

The Austrian Act on corporate criminal liability follows the approach rooted in the Second Protocol on the protection of the financial interests of the EU from 1997.[13] According to this model, corporate criminal liability is established when an offence was committed by a person who has a leading position within the legal entity and acted for the benefit of the legal entity or when the lack of supervision or control by such a person having a leading position within the legal entity has made the commission of an offence possible for the benefit of that legal entity by a person under its authority. Unlike the Second Protocol, § 3 of the Austrian VbVG is not limited to specific offences of decision makers or staff members within a legal entity, thereby all the obligations deriving either from international or EU law are met, including those referring to corporate liability for violations of EU financial interests. There is potential that each individual's offence might trigger corporate criminal liability as long as the offence was committed for the benefit of the legal entity or by violation of legal obligations of the entity. In those cases, a corporation will be held liable if either the individual's offence is done by a decision maker of the corporation, who

[8] Austrian Federal Gazette I 2009/72.
[9] See in detail Vogl 2012, 29–42.
[10] See § 167 StGB.
[11] See e.g. §§ 226, 227(2), 229(2) StGB.
[12] § 29 FinStrG.
[13] EU OJ [1997] C 221/12.

acts under or omits full responsibility (guilt), or an infringement of the duty to take care by (a) decision maker(s) needs to be proved which enabled or eased the commitment of the staff member's offence.[14]

Table 1: The Austrian material model of corporate criminal liability

	Individual suspect	Legal Entity	
		Offence by a decision maker	**Offence by an employee**
Act	Actus reus + Intent/negligence		
		Committed – In favor if the legal entity, or – By violation of obligations of the legal entity	
Liability	Individual' liability		**Infringement of duties by decision makers**

Source: Schumann, unpublished presentation (2015), on fle with the author; published by Soyer–Schumann 2018; adapted by Schumann 2019.

§ 3 VbVG from 2006 can still be considered modern and effective; the Cologne proposal on a Draft code on sanctioning corporations, recently tabled in Germany,[15] broadly refers to it as a reference model, similar to an earlier proposal from 2013.[16]

1.2.2. Establishing effective compliance systems[17]

As said, the Act on corporate criminal liability has a strong focus on prevention by establishing effective compliance structures rather than on punishment. Exit strategies alongside the whole structure of proceedings prove this.

1.2.2.1. The way out of proceedings: Compliance systems and the prosecutor's discretionary power to discontinue investigations

Whereas in criminal proceedings against individuals in Austria there is a strict obligation to investigate, and in general it is mandatory to prosecute if there is sufficient suspicion that a criminal offence was committed, in proceedings on corporate criminal liability the principle of mandatory investigation and prosecution[18] is accompanied by wide discretionary powers for the prosecution. In fact, the prosecution needs to take

[14] For a short comparison of similarities and differences to the U.S. respondeat superior doctrine on corporate criminal liability, see Schumann 2019, 4–5.

[15] Hessler–Hoven–Kubiciel–Weigend 2018, 1.; See Kubiciel–Hoven 2016, 160.

[16] Hoven–Wimmer–Schwarz–Schumann 2014, 161-165, 201-212, 241-246.

[17] See also Schumann–Knierim 2016, 194–202; Soyer–Schumann 2018, 321–326; Soyer 2017, 2017b.

[18] § 13 VbVG.

a discretionary decision whether or not to further implement proceedings.[19] Amongst the decisive factors is whether or not the negligence of the corporation, in relation to the individual offence in the sphere of the corporation, is severe or not. This severity of negligence is predominantly determined by whether or not effective compliance structures where implemented before the offence occurred.

In detail, § 13(1) VbVG orders that "[i]f, on the basis of certain facts, the suspicion arises that an entity might be responsible for a criminal offence that is to be prosecuted ex officio (§ 3), the public prosecutor shall initiate investigations to determine such responsibility or file a petition for imposition of a fine with the court". However, according to § 18(1) VbVG, "[t]he public prosecutor may refrain from or abandon prosecution of an entity if when weighing the seriousness of the offence, the weight of the breach of duty or care, the consequences of the offence, the conduct of the entity after the offence, the amount of the fine to be imposed on the entity which is to be expected, as well as legal disadvantages for the entity or its owners resulting from the offence which have already occurred or are imminent, prosecution or a criminal penalty, appears to be unnecessary. This shall, in particular, be the case if investigations or requests for prosecution would involve an enormous amount of time and money which would obviously be disproportionate to the importance of the matter or to the sanctions to be expected in case of a conviction". § 18(2) VbVG limits this wide discretionary power: "Prosecution may not be refrained from or abandoned if it appears to be necessary (1.) because of a danger, originating from the entity of commission, of an offence with serious consequences for which the entity might be responsible, (2.) to counteract commission of offences in connection with the activity of other entities, or (3.) because of any other particular public interest".

1.2.2.2. Compliance measures as factors for sanctioning decisions and probation

If proceedings are implemented, compliance structures were established before the offence occurred or severe compliance measures were taken afterwards in order to prevent further offending, these explicitly mitigating factors are to be taken into account for the sanctioning decision (§ 5[3]1, 5 VbVG). Both factors also need to be taken into account when it comes to the decision as to whether or not the sanction shall be put on probation (§ 6[1], 7 VbVG). If probation will be granted, it shall be combined with the order to take preventive measures.

1.2.2.3. Post-conviction compliance efforts and sanctions mitigation

Finally, if severe compliance measures were only taken after a conviction and not ordered by a probation decision, a post-conviction decision for mitigating the sanction shall be granted ex officio (§ 12[1] VbVG, § 31a[1] StGB).

[19] § 18 VbVG.

1.2.3. Facts and figures: Corporate criminal proceedings in practice

As the data provided in the following suggests, facts and figures on the application of the law on corporate criminal liability in daily practice seem to indicate the focus on establishing effective compliance structures instead of punishment is effective.

1.2.3.1. Proceedings instead of punishment

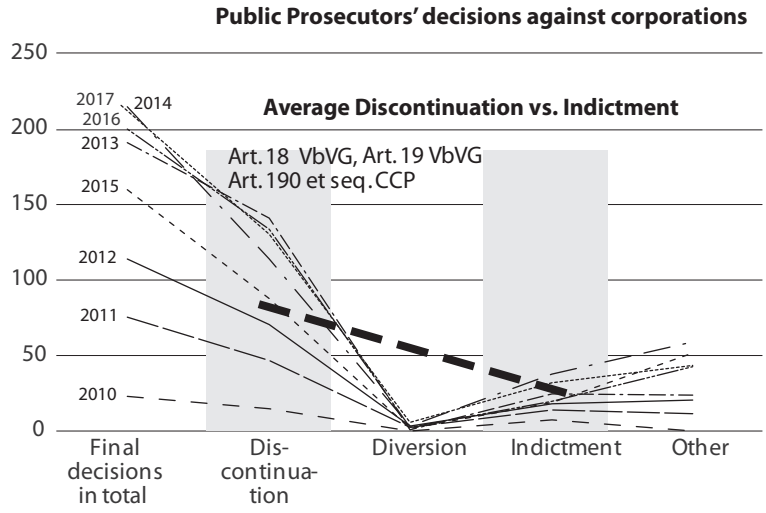

Figure 1: Public Prosecutors' decisions against corporations
Source: Sicherheitsbericht (BMVRDJ) 2015 and 2017; Soyer-Schumann 2018, adapted.

Figure 1 shows the figures on public prosecutors' pre-trial decisions against corporations from 2010 to 2016. It demonstrates that discretionary discontinuation takes place approximately twice as often as an indictment. This is far above the average compared to proceedings against individuals. Regarding the time period 2006 to 2010, pre-trial proceedings in general, which means proceedings against natural persons, are dismissed in nearly 60% and ended by diversion in an additional 13%. It is reported that in these early years of proceedings against corporations, from 2006 to 2010, 80-90% of proceedings against corporations were not continued whereas only 64% of the proceedings against individual suspects in the very same proceedings were closed by dismissal.[20] From 2010 to 2017, on average approximately 80-90% of the public prosecutors' decisions made on the merits were decisions for closure/discontinuation.[21]

[20] Fuchs et al. 2011, 39, 45 (table 5, full set of data), and 74 (table 34, partial set of data). own calculation based on data provided by the Austrian Federal Ministry of Jusice 2015 XX, and data provided by the Ministry in 2017. The share of decisions not on merits (break off or abandonment etc.) is 20-30%.

[21] See Soyer–Schumann 2018, 324.

1.2.3.2. Acquittals of corporations far above average

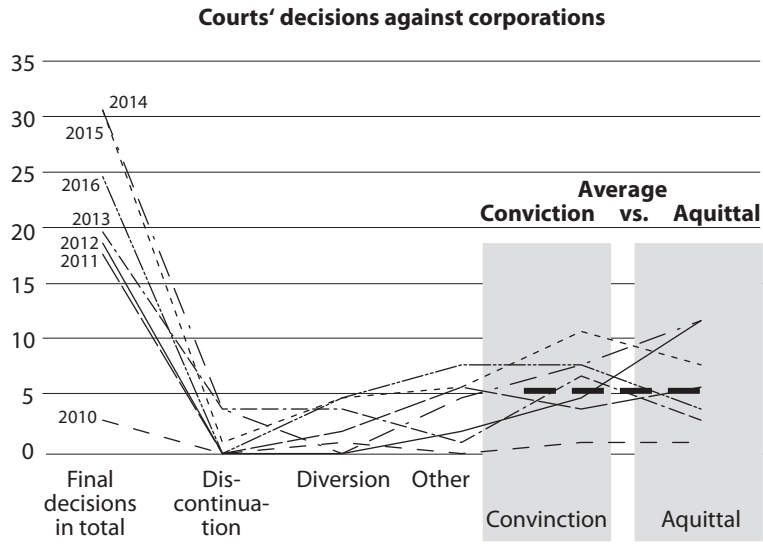

Figure 2: Courts' decisions against corporations at main trial stage
Source: Sicherheitsbericht (BMVRDJ) 2015 and 2017.

And even in those proceedings entering the main trial phase and leading to a court's verdict, the percentage of acquittals of corporations (approx. 50%) is far above average of criminal proceedings against natural persons (approx. 25%).

1.2.3.3. Proceedings against corporations: Chances and many unsolved challenges

However, the quite recently established possibilities for proceedings against corporations also bear procedural challenges including those of weakening procedural standards. This is not the place to continue that in detail, but we would like to quote from the first evaluation report on the practice of criminal proceedings against corporations in Austria (dating back to 2011):

"The corporation got twenty directors; and I don't know who is responsible. Hence, I need to investigate and manoeuvre through this in order to evaluate to suspicion. In that case, I can use the rule on corporate criminal liability, because the corporation is the perpetrator. […] If a corporation offers a financial investment in the Internet, which is in line with the laws, we focus directly the corporation. […] We offer the company a settlement agreement. Instead of me investigating who was in charge for the financial market prospectus, the company shall pay. […] I do not perform the next investigative step by step procedure and question all possible individuals, the whole board, who will make excuses or blame each other. Rather, I focus immediately the corporation".[22]

[22] Fuchs 2011, 113 (translation by the authors).

1.3. Recommendations

Let us summarise our conclusions and recommendations:

(1) The effectiveness of criminal laws is supported by its visibility: The incorporation of core offences into the main Criminal Code instead of ancillary acts is likely to improve its application as well as its preventive effect.

(2) Likewise, the implementation of a specialised Public Prosecutor's Office for Economic and Corruption Offences is likely to increase the enforcement of laws on severe offences against assets and property or corruption.

(3) Notwithstanding dogmatic discussions about culpability and "punishability" of legal entities, as well as a variety of procedural questions, in practice the possibility for corporate criminal responsibility seems to have a deep impact on preventing classic white-collar crimes and tax offences. The awareness for a need for compliance measures definitely increases.

2. Sectoral observations

2.1. Effectuating offences violating financial reporting obligations

2.1.1. Financial reporting offences, corporate criminal liability and the protection of public financial interests

As stated before, financial reporting offences provide a good example of the above-mentioned three-step approach of effectively protecting public financial interests. The offence regarding the violation of financial reporting obligations was rearranged and shifted to the Austrian Criminal Code in 2016.[23] At first glance, one might ask about the connection between financial reporting offences and the protection of the financial interests of the EU. Taking a deeper look into it, financial reporting offences endanger not only the assets and property of stakeholders or creditors of economic corporations but are typically connected to tax evasion and thereby often interfere with the financial interests of the Member States and the EU itself. Furthermore, taking into account that the financial reporting offences are related to certain types of corporations, the link between these offences and the corporate criminal liability becomes obvious. So, it might be of interest to see that from 2006 to 2010, the biggest share of proceedings against corporations focused on crimes against property (on average nearly 40%), and another significant share focused on tax or financial offences (nearly 13%).[24]

[23] Austrian Federal Gazette I 2015/112.

[24] See data provided by Fuchs et al. 2011, 37 table 3a.

2.1.2. Form and content: Reshaping and incorporating financial reporting offences in the main Criminal Code

2.1.2.1. The reform aims and measures[25]

The recent reform of financial reporting offences aimed at three main points: (1) unification of the criminal acts, penalties and rules on active repentance regarding financial reporting offences in Austrian Criminal Law, (2) the differentiation between internal perpetrators and external perpetrators and, finally, (3) the inclusion of extraterritorial acts regarding Austrian organisations. The criminal acts were unified by (a) widening the application of law by including more organisations, (b) harmonising terminology with company and accounting laws and (c) specifying of definitions. These measures also were taken in order to guarantee the ultima ratio principle in criminalisation.

2.1.2.2. The renewed offences aiming to prevent endangerment

The new offences are found in the chapter of offences against property in the main Austrian Criminal Code. It addresses internal decision makers (§ 163a StGB, referring to § 2[1] VbVG) of certain specified types of corporations (§ 163c StGB) on the one hand and external auditors of those corporations on the other hand (§ 163b StGB). Roughly speaking, (1) decision makers are punishable for untenable presentations of fundamental information on the corporation, whereas (2) external auditors are punishable for untenable accounting regarding fundamental information on the corporation. Additionally, a precondition of punishment is that this untenable presentation or accounting is capable of causing a significant detriment to the corporate entity or its shareholders, members, creditors and investors. Preventing the merely abstract endangerment by untenable presentation or accounting of fundamental information is the underlying intention of the legislator.

2.1.2.3. Exit from punishment by active repentance

Hence, these offences structurally leave no room for stopping an attempt of the offence. Therefore, a separate norm provides for active repentance liberating from punishment (§ 163d StGB). However, the timeframe to do so is strictly limited and, in practice, usually will be limited to the context of the commitment of the offence.

This interferes with other exit strategies from criminal offences, namely those of related tax offences (§ 29 Finanzstrafgesetz – FinStrG). As we already mentioned, financial reporting offences often will be connected to tax offences. For instance, VAT evasion often will go alongside false financial reporting. In the case of tax evasion, liberation from punishment by voluntarily disclosure via § 29 FinStrG is available for a long time after the tax offence was committed. A successful disclosure in line with § 29 FinStrG will, according to § 22(4) FinStrG, also have a liberating effect for the specific person with regard to § 163a and 163b StGB if these offences were

[25] In detail see EBRV 689 BlgNr. XXV. GP, 25 et seq.

committed exclusively in connection with the tax offence(s) by presenting material information detrimentally or incompletely. Consequently, successful disclosure according to § 29 FinStrG will only have the desired effect on the offences according to § 163a and 163b StGB if it can be shown that the offences under § 163a and 163b StGB are qualified as mere "byproducts" that were not motivated by other factors (e.g. trying to minimise dividend payouts). So, the voluntarily disclosure of tax evasion still might trigger proceedings for financial reporting offences that are not mere "byproducts", and, contrary to the tax proceedings, active repentance for reporting offences is no longer available.[26] This is likely to decrease the willingness to voluntarily disclose tax evasion.

2.1.3. Recommendations

The shifting of financial reporting offences towards the Criminal Code is likely to put these offences into the focus of law enforcement and prosecution and increase awareness for the financial reporting offences. However, the possibility of active repentance for reporting offences is still limited and is likely to interfere with other approved measures such as voluntary self-disclosure exempting from tax offences.

2.2. VAT fraud and compliance

The next section of the paper focuses on the status and enforcement of VAT compliance in Austria.[27] In its first part, it provides insights based on (rarely available, yet partly detailed) data on VAT (non-)compliance, fiscal criminal proceedings and sanctions in Austria. In the second part it explains two core elements of fiscal criminal proceedings in Austria. Given the figures provided before that, as well as the facts on Austrian (corporate) criminal proceedings provided in the first general section of this paper, both elements – establishing corporate criminal liability and exit from punishment by voluntary self-disclosure – can be considered effective tools to promote tax compliance.

2.2.1. Facts and figures on VAT compliance and enforcement

2.2.1.1. The importance of VAT compliance for Austrian state revenue

VAT compliance is of significant importance for the Austrian state's revenue from taxes and administrative fees.

[26] EBRV 896 BlgNr. XXV. GP, 29 et seq.; Leitner 2016, 23 et seq.

[27] For a brief overview on (judicial and administrative) criminal offence related to VAT evasion and VAT fraud in the Austrian legal system see Kert 2019.

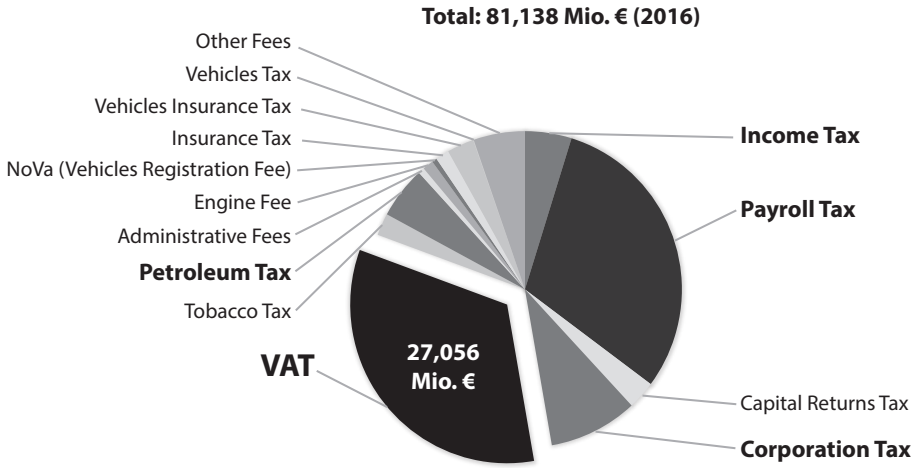

Figure 3: VAT share of Austrian state's revenue from taxes and fees
Source: Federal Ministry of Finance, Budget report 2018/2019, 43., table 6 (2018).

As Figure 3 demonstrates, one third of the Austrian state budget that is actually received from taxes and fees originates from VAT payments. In fact, this EUR 27.1 billion is the biggest share, followed by payroll tax of EUR 24.6 billion. So, VAT compliance truly can be considered a very important topic of public interest in and for Austria.

2.2.1.2. VAT gap amount and ranking: Austria in the EU

Based on this finding, one might ask about the actual situation of VAT compliance in Austria. A recently published study reports of a VAT gap of approximately 7% in Austria,[28] as shown in Figure 4.

A stable, if not slightly decreasing, trend of the VAT gap in Austria is proven. By changing the perspective, one might conclude that there has been a slightly increasing, or at least stable, rate of VAT compliance over the last six years.

In an EU-wide comparison, the Austrian figures for VAT gap can be considered to prove a quite good rate of VAT compliance. Austria is ranked ninth of all EU member states with a VAT gap approximately of 7% in 2016. Overall, the EU-wide median of VAT gap is 9.9%, and half of EU-28 Member States recorded a gap below this line. However, in nominal terms, in 2016 the VAT gap in the EU-28 Member States - slightly falling - amounted to EUR 147.1 billion. So, there still remains a need to answer the phenomena of VAT gap and VAT evasion and, in particular, to combat VAT fraud.

[28] Table 4 refers to VAT data provided by the Budget report of the Austrian Ministry of Finance. Table 5 is based on data provided by the CASE/HIS Report. The former reports of a VAT revenue of € 27056 Mio. whereas the latter reports of € 27300 Mio. Regardless to this difference, for reasons of inner coherency in each of the two tables we use only the data provided by the same source.

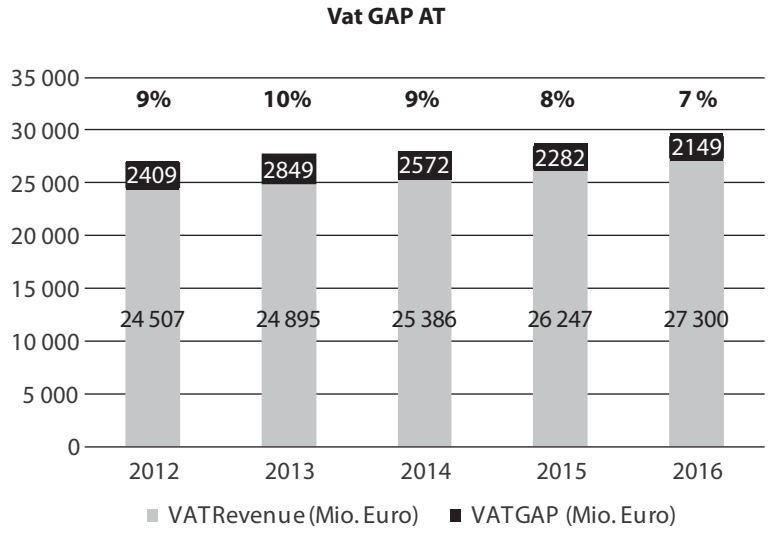

Figure 4: VAT gap in Austria 2012-2016 (rounded to full %).
Source: CASE/IHS Report TAXUD/2015/CC/131 (2018), 42, table 3.20 for 2012–2016.

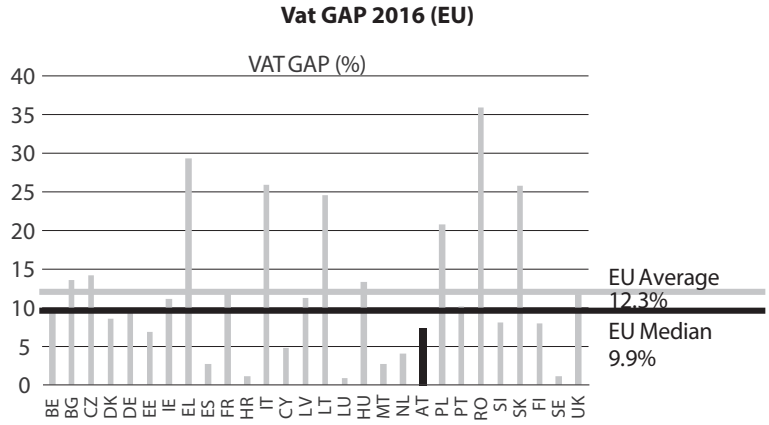

Figure 5: VAT gap in the EU (2016)
Source: CASE/IHS Report TAXUD/2015/CC/131 (2018), 19, table 2.1

2.2.1.3. Fiscal Penal Code application in practice: Some insights

While the Austrian legal framework criminalising (i.a. value added) tax and fees evasion and fraud is explained in another chapter of this collection,[29] it is for this paper to provide some insights on its application in daily practice.

[29] See Kert 2019.

2.2.1.3.1. Preliminary observations

Before doing so, a preliminary observation seems to be necessary: Statistical data on the application of the Fiscal Penal Code in Austria is rarely available. One might guess that this gap of data is i.a. due to the fact that data on criminal proceedings based on the Fiscal Penal Code fall into the competence of the Ministry of Justice, whereas data on administrative criminal proceedings is administered by the Ministry of Finance. However, there seems to be an urgent need for further research and evaluation.

2.2.1.3.2. Fines issued in administrative and judicial criminal proceedings

Some basic data that is available relates to the fines based on Fiscal Penal Code offences.

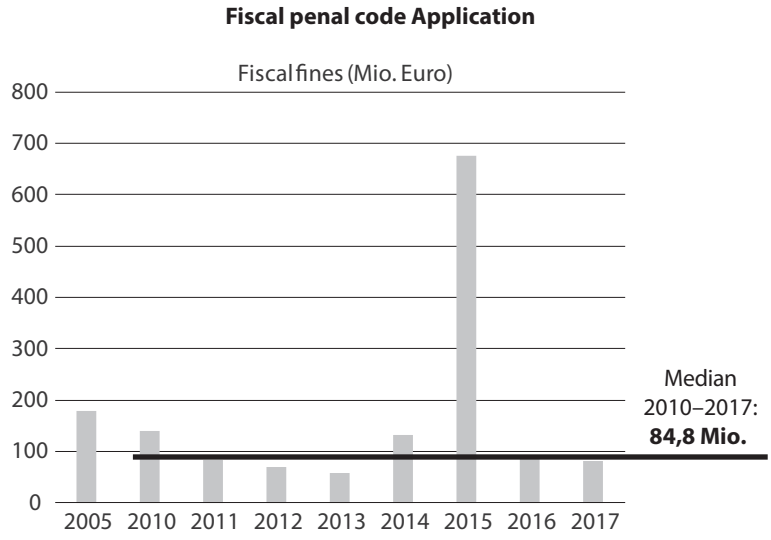

Figure 6: Fines based on Fiscal Penal Code Offences in Austria (2005; 2010–2017)
Source: Austrian Ministry of Finance, Austrian Parliament doc. 558/AB, 05/22/2018, answering the parliamentary request 537/J (XXVI.GP) for 2017; Austrian Ministry of Finance, Austrian Parliament doc. 12059/AB, 05/29/2017 answering the parliamentary request 12586/J (XXV.GP)

An amount of approximately EUR 81.5 million in fines was issued in nearly 8,700 cases in 2017. This includes administrative fines and criminal fines, both of which are based on the Fiscal Penal Code. The division line between administrative criminal proceedings and judicial criminal proceedings is determined by the amount of tax evasion. Tax evasion of more than EUR 100,000 will lead to criminal proceedings – yet, obviously, only if discovered.[30]

[30] See below 2.2.2.2. on voluntary disclosure.

In order to narrow this data down, one might compare it with the judicial data of fines for all criminal offences. It is reported that in 2017 approximately EUR 13.7 million in fines were issued by the judiciary, EUR 8.5 million of it based on the main Austrian Criminal Code.[31] So, one can assume that at maximum the remaining EUR 5.2 million could be – inter alia - based on the Fiscal Penal Code. So, comparing a maximum EUR 5.2 million in judicial fines to EUR 81.5 million in total for judicial and administrative fines based on the Fiscal Penal Code, in can be concluded that most of these fines for fiscal offences are issued in administrative criminal proceedings.

2.2.1.3.3. Annual cases

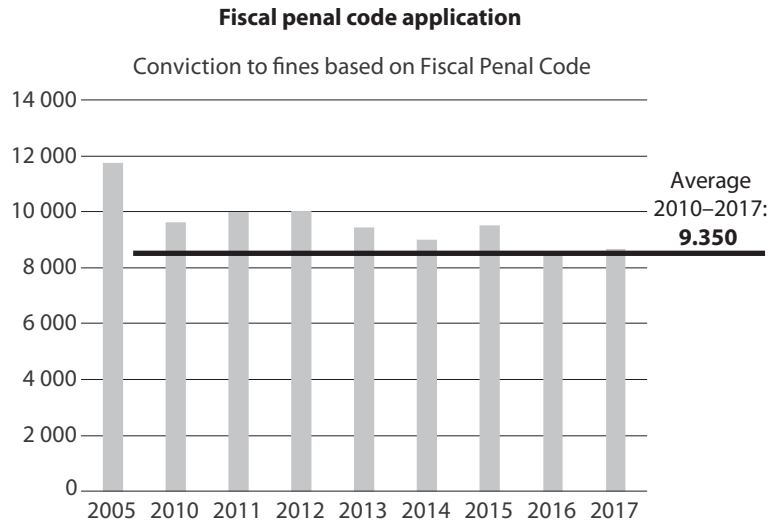

Figure 7: Convictions (in administrative and judicial) proceedings to fines based on Fiscal Penal Code in Austria (2005; 2010–2017)
Source: Austrian Ministry of Finance, Austrian Parliament doc. 558/AB, 05/22/2018, answering the parliamentary request 537/J (XXVI. GP) for 2017; Austrian Ministry of Finance, Austrian Parliament doc. 12059/AB, 05/29/2017 answering the parliamentary request 12586/J (XXV.GP)

The annual number of administrative and judicial criminal proceedings based on the Fiscal Penal Code typically ranges between 8,000 and 10,000. On average, there were 9,350 cases per year between 2010 and 2017, showing a slightly decreasing trend.

2.2.2. Strategies for VAT compliance and enforcement

In the following, two of the core elements of the Austrian Fiscal Penal Code supporting VAT compliance will be discussed.

[31] Austrian Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice 2018, 96.

2.2.2.1. Corporate criminal liability for fiscal offences in judicial and administrative criminal proceedings

Typically, two phenomena of VAT non-compliance occur: VAT evasion, e.g. by illicit work, and VAT fraud by carousel or missing trader intra-Community (MTIC) fraud. Hence, VAT tax non-compliance is a problem often involving corporations, and so corporate criminal liability is a real issue in the case of VAT fraud. According to the general system of corporate criminal liability in Austria, corporations only could be held responsible for those offences falling into the scope of the judiciary. As explained before, most of the proceedings for tax offences are administrative criminal proceedings. In Austrian corporate criminal law, it is a specialty of tax offences that corporations can and will be held liable not only for tax offence falling into the scope of judicial criminal proceedings; corporations can also be held responsible for administrative fiscal offences.[32] Furthermore, the limitation of corporate fines to maximum EUR 1.8 million (plus confiscation, if applicable) is replaced by the sanctions regime of the Fiscal Penal Code.[33]

2.2.2.2 Voluntary disclosure as 'backdoor compliance' lifts criminal liability

A second core element of improving tax compliance - which might be described as "backdoor compliance" - is the opportunity of voluntary disclosure of tax offence in order to lift criminal liability.

2.2.2.2.1. Preconditions of effective voluntary disclosure

Roughly spoken, there are three core elements to be discussed for effective voluntary disclosure[34]: timeliness, content (especially whether there is a requirement for completeness) and actual payment in time.

Voluntary disclosure obviously is not applicable if the offender is caught in the act. On the other end of the timeline, there is no absolute time limit. Voluntary disclosure must be done before investigative measures are implemented against the offender, an accomplice or a receiver. It is excluded once the objective elements of the offence are known by the investigation authorities, and the offender knows about that. In practice, voluntary disclosure in face of a fiscal review often plays a role. In the case of intentional offences, this must be done at the very beginning of the review and is excluded later on. It has to be noted that even effective voluntary disclosure in the face of a fiscal review will lead to a certain element of punishment. Whereas voluntary disclosure typically requires the repayment of the tax, in the case of disclosure before fiscal reviews, a penalty loading will be added.

In order to fully waive criminal liability by voluntary self-disclosure, a requirement for completeness is convincing. Facing the complexity of the tax law system, it is

[32] The extension of corporate liability to administrative offences was extensively discussed at the Austrian Jurists conference (Konferenz des Österreichischen Juristentages) in May 2018; see Hilf–Urtz–Handstanger 2018, 190.

[33] See e.g. § 39(3) FinStrG.

[34] It is regulated in § 29 FinStrG.

questionable. In the Austrian system, a balanced approach is applied: Partial voluntary disclosure is possible but will lift punishment only so far. Furthermore, in order to avoid speculative handling of tax compliance, there is no exclusionary effect in case of re-disclosure (beside VAT pre-payments).

In order to become and remain effective, voluntary disclosure requires actual payment of the due tax amount in time of four weeks after disclosure or notice (the latter applies if a calculation by tax authorities is required).

2.2.2.2.2. Significant role of voluntary disclosure in tax proceedings in general

Voluntary disclosure plays a significant role in daily tax practice in general: In 2017, a total number of 7,239 voluntary disclosures were made to the tax authorities. In nearly 20% (1,409) of these cases, a penalty loading had to be paid, amounting to EUR 3.8 million in total.[35]

As regards the importance of voluntary disclosure, it is interesting to know that in 2016, a total of 7,674 voluntary disclosures were made, and approximately 90% (6,933 disclosures) of these had an exclusionary effect.[36] Compared to the figure of 8,674 convictions in 2016, nearly the same amount of cases was settled based on effective voluntary self-disclosures. Five convictions face four closures of proceedings based on voluntary disclosure. Given the fact that voluntary disclosure will have an exclusionary effect only in case of actual payment of the tax, it proves to be an effective tool to "backdoor tax compliance".

2.2.2.2.3. "Do ut des": A balanced approach to voluntary disclosure

Voluntary disclosure is a kind of "do ut des": It allows for a voluntary return to tax compliance, thereby increasing VAT revenue which is of public interest, whereas the tax offender benefits from exemption from criminal liability. And both the state and the offender will benefit from destroying the "tax evasion trap", meaning that without the possibility for voluntary disclosure, there is often no way back to tax compliance because by doing so the offender himself will factually prove the wrongdoing in the past.

It needs a well-balanced structure in order to not provoke tax evasion by voluntary disclosure as a "fallback strategy" but in the meantime provide incentives for active return to tax compliance. For example, the combination of no requirement for total completeness with exclusion of repeated voluntary disclosure in the same case seems to be a reasonable strategy.

2.2.2.2.4. VAT fraud and voluntary disclosure?

Having no particular data available, one might discuss whether voluntary disclosure will play a significant role in the case of intentional VAT fraud such as MTIC fraud. However, it allows for return to the law when a tax offender changes his mind. Fur-

[35] Source of data: Austrian Ministry of Finance, Austrian Parliament doc. 558/AB, 05/22/2018, answering the parliamentary request 537/J (XXVI. GP).

[36] Source of data: Austrian Ministry of Finance, Austrian Parliament doc. 12059/AB, 05/29/2017 answering the parliamentary request 12586/J (XXV.GP).

thermore, one should keep in mind the change of personnel in corporations, especially on the boards. This opens new chances for changing minds, and voluntary disclosure supports them to act accordingly.

2.2.3. Recommendations

We underlined the importance of VAT for public revenue. Statistical data also demonstrated that the Austrian system of fiscal penal offences in general, and its handling mainly in administrative criminal proceedings in particular, seem to be well-balanced. The extension of corporate criminal liability to administrative offences based on the *Finanzstrafgesetzbuch* (Fiscal Penal Code), as well as possibility for voluntary disclosure lifting criminal liability, prove to be core elements of this effective strategy.

2.3. Some practical insights on economic corruption and compliance

2.3.1. A legislative U-turn: Changing culture by law

About 20 years ago, briberies paid abroad were expenditures deductible from the corporation's tax obligations. Rightly, those legal assessments of briberies changed dramatically. Economic corruption endangers fair competition of all market actors and the properties, growth and profit expectations of those being victimised. However, corruption crimes and the view and problems of law enforcement and prosecution are addressed in separate chapters of this compilation.[37] In this section, the focus is different: How could compliance help to avoid criminal risks and proceedings against corporations?

2.3.2. Strengthening individuals' responsibilities

So, first, this section focuses on the question of how to motivate the instalment of compliance in private business. The motivation for corporations to implement effective compliance structures, either before or, finally, after something has happened, is explained in the general first section already.

But what might motivate the individuals? There seem to be three elements: (1) corporate culture and positive incentives as part of it, as well as the risks of corporations supporting criminal law enforcement against individual perpetrators; (2) the danger of not only individual criminal liability but also civil liability, as ordered in the so-called *Neubürger* verdict in the *Siemens* corruption case (which, however, did not enter into legal effect)[38] – although there is a rule prohibiting regress for corporate fines against individual perpetrators in the Austrian Act on corporate criminal liability,[39] yet this

[37] See Kert 2019.
[38] In detail, see Schumann 2018.
[39] § 11 VbVG.

does not exclude regress for further damages; and (3) individual board members' focus on compliance will be strengthened by the inability to fully exclude the Board's responsibility by nominating a compliance officer.

2.3.3. (De-)motivating effects of legislative changes on compliance in private business

Let us underline the importance of clear legal rules fighting corruption by a practical lawyer's experience. In 2008, the corruption offence in the Austrian Penal Code was massively strengthened. A large corporation asked the law firm to evaluate their selling strategies and practices. It came out that a very 'liberal' invitation practice for foreign customers and their families, including those from the public sector, needed to be critically reviewed, and there seemed to be a strong need for changes. Yet prominent institutions and persons in Austria fought successfully against the new legislation. In 2009, when a new Minister of Justice, *Bandion-Ortner*, came into office, the laws were revised and, according to several evaluations, weakened.[40] What was the effect? The corporation that had asked for advice and the evaluation of their selling practices cancelled the mandate and did not change their practices. It was not until 2012 that the weakened law were "repaired". Since then, consultation mandates rose again and do continue nowadays. Due to the penal rules which fight economic corruption and the legal framework on corporate criminal liability, compliance measures against economic corruption are of the utmost importance in the Austrian economy. They play an important role in the corporation and in the advisory work of lawyers, corporate consultants and auditors. Compliance is not only a legal requirement but also a business sector.

3. Elements of compliance systems

In the final section of this paper, let us summarise the core elements of effective compliance systems.

3.1. In-depth individual corporation's risk assessment

A precondition for the establishment of an effective compliance structure is an in-depth risk assessment for each corporation. This includes (1) interviews with staff members, the board and eventually customers, among others; (2) the screening of all relevant internal processes; (3) the review of existing documentation; (4) the analysis and review of IT and reporting systems; (5) a spot-check of customers' files; (6) the analysis of existing Codes of Conduct (CoC); (7) the evaluation of internal statistics and analysis; and (8) the final discussion with the board.

[40] E.g. Schmoller 2011.

3.2. Developing and implementing compliance structures adjusted to the individual corporation

Based on that analysis, the results need to be developed into an overall compliance policy and established within a Code of Conduct (CoC), as well as within Standard Operational Procedures (SOP). Furthermore, training and legal advice (internal/external) need to be provided, and internal and external control has to be established. Institutionally, a compliance officer has to be nominated, and a whistleblower hotline, eventually accompanied by an amnesty program, has to be implemented.

It is evident that all these topics need to be amplified, and already is done so at several opportunities.[41] As a process, from a procedural perspective, compliance systems and their elements have to be very clearly structured and feasible. However, from a substantive perspective, the determination of the compliance measures needed in the particular corporation often leaves room for discretion.

3.3. Instead of recommendations, some observations and remaining challenges

As explained in the first section of this paper, effective compliance plays an important, if not decisive, role in criminal investigations against corporations. The question on its practicability, i.e. the determinateness of adequate compliance, arises.[42]

This problem increases when the legal framework is uncertain or changes several times. The criminal offences against corruption were changed in Austria several times over the last decade, and often judicial clarification was needed (and still seems to be needed). So, there are also times of legal uncertainty. How should corporations handle this? In practice, and according to our experience, corporations tend to implement the most restrictive approach, often more restrictive than the law requires, in order to ensure being on the safe side.

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[41] Soyer–Pollak 2016.

[42] See Soyer–Schumann 2018, 324.

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MONEY LAUNDERING COMPLIANCE: A MEANS OF PROTECTING THE EU'S FINANCIAL INTERESTS

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Protection of the EU's financial interests and money laundering compliance have not the same legal basis in the Primary law: While the latter is based upon Art. 114 TFEU – the EU's competence to approximate national law in order to establish and maintain the internal market –, the latter mainly rests on Art. 325 TFEU (combatting fraud) as well as on Art. 83 and Art. 86 TFEU as far as substantive criminal law or the EPPO are concerned. Legal acts on the protection of the EU's financial interests do not make explicit reference to money laundering compliance. However, some of the wordings might be understood as covering inter alia money laundering compliance: When Art. 325 TFEU obliges the Union and the Member States to "*counter fraud and any other illegal activities affecting the financial interests*", "*any other illegal activities*" probably includes money laundering (as far as the predicate offence affects the EU's financial interests); to counter such illegal activity goes beyond criminalizing it and might include compliance measures. A similar wording can be found in the Secondary law: Art. 1 (2) Reg 2988/95[1] contains the definition of the term "irregularity", describing the misbehavior the Regulation aims to counter. An irregularity is defined as "*any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities* […]". Although the Reg 2988/95 serves mainly as "general part" of the EU's administrative punitive law and does not require any national transposition, it is noteworthy that this notion of "irregularity" is broad enough to cover money laundering as well. The PIF-Directive[2] on the other hand requires national transposition, demanding exclusively the criminalization of money laundering [Art. 1 (3)] but not the imposition of any money laundering compliance provision.

Money laundering compliance is the subject of other international and EU acts. On the global level, the UNCAC[3] (Art. 14) and the Palermo Convention[4] (Art. 7) contain provisions on money laundering compliance that are legally binding but quite rudi-

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[1] Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ L 312, 23.12.1995, 1–4.

[2] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.07.2017, 29–41.

[3] United Nations Convention against Corruption, Chapter XVIII Treaty 18 UNTS, GA Res 58/4, 31.10.2003.

[4] United Nations Convention against Transnational Organized Crime, Chapter XVIII Treaty 18 UNTS, GA Res 55/25, 15.11.2000.

mental. The FATF Recommendations[5] (Rec. 9–29, 32–35) on money laundering compliance are far more detailed. Although they aren't legally binding, they are politically very effective. The most important legal framework for money laundering compliance is however the EU's 4th AML-Directive[6] (as amended by the 5th AML-Directive[7]). The 4th AML-Directive contains some direct links to the PIF crimes and thus proves that money laundering compliance inter alia can and is meant to help protecting the EU's financial interests: EU fraud ["*where it is at least serious*"; Art. 3 (1) d) and "corruption" (Art. 3 (1) e) count as "criminal activities" (predicate offences)] of the 4th AML-Directive's notion of money laundering, and Art. 3 (1) f adds to the catalogue of predicate offences "*tax crimes relating to direct taxes and indirect taxes and as defined in the national law of the Member States, 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 system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months*". The latter category goes further than the PIF-Directive's definition of EU fraud regarding VAT evasion (Art 2 (2) PIF-Directive), since – depending from the sanctions under national law – it might include evasion of VAT even if the total damage is less than Euro 10 000 000,-. The only PIF crime that is not necessarily a predicate offence of the 4th AML-Directive's money laundering notion is "misappropriation" (Art. 4 (3) PIF-Directive), since it is not mentioned explicitly in the 4th AML-Directive.

The Austrian transposition of both the PIF-Convention[8] and it's Protocols[9] (the PIF-Directive hasn't been transposed yet) and the 4th AML-Directive shows a similar link between the two fields. The PIF-Convention and its Protocols were implemented by criminal law provisions such as Sec. 165 PC,[10] the criminal provision on money laundering. The list of predicate offences to Sec. 165 PC is wide and not restricted to the PIF crimes, since Austria aims to transpose all its international obligations on the criminalization of money laundering by just one criminal provision. The 4th AML-

[5] The FATF Recommendations, February 2012 [*http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf* (21.08.2018)].

[6] 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, 73–117.

[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, 19.06.2018, 43–74.

[8] Convention Drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, OJ C 316, 27.11.1995, 48–57.

[9] Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, OJ C 313, 23.10.1996, 1–10; Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests, OJ C 151, 20.5.1997, 1–14; Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests, OJ C 221, 19.7.1997, 11–22.

[10] Austrian Penal Code, Austrian Federal law gazette 60/1974.

Directive has been transposed by different acts, that are partly horizontal (such as the provision on the FIU[11] or the Austrian Federal Act on the Register of the Beneficial Owners[12]) but mainly of sectoral nature, laying down the customer due diligence obligations for different types of economic operators. The greater part of these sectoral acts refer to the criminal provision under Sec. 165 PC; the rest contains specific money laundering provisions designed according to the money laundering definition of the 4th AML-Directive. Either way, the PIF crimes constitute predicate offences of the respective money laundering definitions. This extends to intentional "misappropriation" (Art. 4 (3) PIF-Directive) as far as it falls under existing provisions of Austrian criminal law and is punishable by deprivation of liberty of more than one year: for example abuse of trust ("Untreue" under Sec. 153 PC) or embezzlement ("Veruntreuung" under Sec. 133 PC), if the damage exceeds Euro 5,000,-.

It might be concluded that despite of the different bases in the Primary law, the protection of the EU's financial interests and money laundering compliance are linked: More important than the PIF-Directive's reference to the 4th AML-Directive's notion of money laundering (Art. 4 (1) PIF-Directive) is the fact, that all PIF crimes (with the possible exception of "misappropriation") constitute predicate offences of the 4th AML Directive's notion of money laundering. As a result, money laundering compliance is (inter alia) meant to protect the EU's financial interests, under EU law as well as under Austrian law.

[11] Sec. 4 para. 2 subpara. 1 Austrian Federal Act on the Federal Criminal Office, Austrian Federal law gazette I 22/2002.

[12] Austrian Federal law gazette I 136/2017.

COMPLIANCE IN THE BANKING SECTOR

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"FBI inspector: Sir, sir… we understand, that's enough. Andrew Madoff: I mean, you're asking me how I didn't know? Well, I'm asking you. You're the FBI, you're the SEC. You investigated him before, so I'm asking you! I'm asking you!" (The Wizard of Lies)

As general counsel and former head of the Compliance division of a commercial bank, the author of this paper undertakes to briefly outline the background of compliance, a function of growing importance in the banking sector, not primarily from the aspect of the criminal law but that of financial and capital market law. She also describes the present role of the compliance and the directions of its development, as well as some of the most important dilemmas relating to the function.

1. Introduction

Bernie Madoff, US businessman, investment consultant and former president of the NASDAQ, the US stock exchange, pleaded guilty in March 2009 to 11 serious criminal acts whereby he turned the investment fund under his management into the largest Ponzi scheme of all time. The victims of the fraud numbered in the thousands, and the total damage caused was then estimated by US prosecutors to amount to nearly USD 65 billion.[1] *Madoff* admitted to setting about building up the scheme in the early nineties, although federal investigators considered the Ponzi scheme had already been in place in the eighties. Indeed, they assumed that the investment fund itself had never operated on the basis of real market conditions.[2] In June 2009 *Madoff* received a 150-year prison sentence.[3]

To the extent one can believe the producers of the film "The Wizard of Lies", neither his wife nor his sons in key positions at the company, or any other of its employees or, of course, the authorities had been aware of Bernie Madoff's pyramid scheme for decades on end. Indeed, all those concerned had been convinced for decades that the company was engaged in real business operations.

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[1] US Prosecutors updated the size of Madoff's scheme from $ 50 billion to $64 billion. See Graybow, 11.03.2009.

[2] Kolker–Kary–Kishan, 23.12.2008.

[3] „Bernard Madoff gets 150 years behind bars from fraud scheme." See CBC News, 29.06.2009.

Similar cases were also unveiled in Hungary a few years ago with the CHF rate unleashed in the wake of the Swiss national bank's unexpected change of its strategy. This was the case in the Questor and the Buda Cash scandals, where it was not long before the outbreak that the Supervision closed their comprehensive audits without unearthing any irregularity of particular concern.

Monitoring and implementing the frequently changing and increasingly exacting statutory requirements, and complying with a plethora of regulatory requirements in the financial sector, is quite a challenge even in "peacetime". This is particularly so in regards to international banking groups whose members are operating in a wide variety of national regulatory environments. An increasing number of companies are setting up special divisions – the so-called Compliance function – to take care of these challenges and make sure, in cooperation with legal divisions, that they comply fully with the effective and applicable statutory regulations and their own internal regulations. Nevertheless, it is nearly always in the wake of reputation scandals such as the one above in the business sector that one reads about Compliance.

2. The history of compliance

Despite the fact that among all industries all over the world, the financial sector has the most extensive and most mature Compliance concept, it is not actually rooted in the banking sector. As quite wittily noted by *John McKessy* in his essay *Knowledge of Good and Evil: A Brief History of Compliance*,[4] Adam's bite of forbidden fruit marked the first recorded compliance violation, but not the last, despite the well-known prohibition.

Today's Compliance concept, however, evolved much later in the Anglo-Saxon, specifically US, practice from the early years of the 20th century, initially in relation to public health and safety after a variety of scandals.[5]

The evolution of Compliance in the financial sector was driven by the increasingly tight regulatory environment after the global economic crisis of 2009 and the increasingly strict approach taken by authorities and supervisory bodies, as well as the huge financial losses caused by the resulting regulatory non-compliance cases.

On the basis of data taken from the annual reports of 20 so-called systemically important European and US large banks, as well as from newspaper articles – how the amounts of supervisory fines applied to banks and the costs of settlement increased between 2009 and 2014 relative to annual sales revenue figures and credit risk costs. The gradual decrease in sales revenue figures and the amounts of lending losses were accompanied by a 45-fold increase in costs associated with authorities.

Let us take three record-setting large fines for example: HSBC, the largest UK bank, breached anti-money laundering rules when it got involved in the laundering of

[4] McKessy 2010.
[5] J.F.Wolf.

Mexican, Saudi Arabian and Iranian funds. In December 2012 the bank paid an OFAC fine of USD 1.9 billion by way of settlement with the competent US authority.[6]

Credit Suisse assisted thousands of US citizens in tax avoidance, for which it paid the largest ever amount charged for such activities, USD 2.6 billion, to the US authorities.[7] BNP Paribas violated certain US sanctions introduced against Iran, Sudan and Cuba, for which it got to pay a hefty amount of USD 8.9 billion, also to US authorities.[8]

The above examples formed the basis of what is known as a "*positive business case*", where figures show potential scale of the non-compliance risk and how it is worth investing in compliance even at the level of individual institutions.

The degree of development of, and the role played by, Compliance still varies considerably today among institutions in Hungary. Financial institutions whose operations are confined to the local market still regard Compliance as something of a "necessary evil", typically focusing primarily on formal compliance. Large international banks, however, have Compliance functions significantly more sophisticated and more robust than what is prescribed by law.

3. Modern compliance functions

Hungarian and European regulations on Compliance are relatively brief and to the point. As to the domestic financial sector, the Investment Firms and Commodities Brokers Act[9] and the Credit Institutions Act[10] contain a few sections concerning the obligation to set up compliance functions. The MNB has – based on EBA and ESMA recommendations[11] – also issued a detailed recommendation concerning the setup and operation of the so-called internal lines of defence (risk management, Compliance and internal control).[12]

The most essential tasks of Compliance today include the mapping and management of compliance risks. Compliance risks include the legal risk, supervisory sanctions, financial losses or reputational risks stemming from with non-compliance with any regulation applying to the activities of a service provider (legal regulations, internal regulations, supervisory recommendations, policies of self-regulatory bodies etc.).

The Compliance function of a financial institution adopts internal regulations and introduces processes as well as controls to manage its compliance risks. It monitors risks on a continuous basis, prepares regular reports to management, develops the em-

[6] Viswanatha–Wolf, Reuters, 11.12.2012.

[7] Forbes, 20.05.2014.

[8] Reuters, 23.04.2015.

[9] Act CXXXVIII of 2007 on Investment Firms and Commodity Dealers and on the Regulations Governing their Activities.

[10] Act CCXXVIIXII of 2013 on Credit Institutions and Financial Enterprises.

[11] *https://www.eba.europa.eu/documents/10180/2164689/Guidelines+on+Internal+Governance+%28EBA-GL-2017-11%29_HU.pdf/dc9cda43-84ae-4b24-8030-4ba35cefc45e* (07.04.2019).

[12] Recommendation 27/2018 (XII. 10.) of the MNB on internal defense lines and the governance and control functions of financial institutions.

ployees' Compliance awareness by risk-oriented training programs and communicates with the competent authorities. Last but not least, it proactively contributes to the continuous development of the technical background of its own operation.

The issues and topics covered by Compliance keep changing, and their range keeps expanding. The most important compliance risks that are also referred to in the above MNB recommendation may crop up particularly in relation to the following: confidentiality and data protection; incompatibility; management of conflicts of interests; segregation of financial and investment services (the so-called Chinese wall); observance of restrictions on information exchange; abusive market practices (insider trading, market manipulation); prevention of external and internal fraud; combatting money laundering and terrorist financing; the financial organisation's, group members' and employees' transactions on their own accounts; consumer protection; official relations; and business conduct risks.

4. Dilemmas and opportunities

As described above, Compliance is quite a new corporate function that has evolved to be a separate profession in the financial sector before our very own eyes. That it is in the financial sector that the most spectacular development has taken place is a result primarily of the fact that this is the sector that has faced the most severe challenges during the last decade or so. The financial sector, however, is linked, directly or indirectly, to a wide variety of other industries, therefore what has been happening here will sooner or later affect other sectors as well.

The most recently introduced regulations that affect the financial sector as well (MiFIDII, PSDII, GDPR) represent a new generation of rules in that their implementation necessitates the development and introduction of new highly digitalised processes and techniques for transparency and effectiveness. Jackman argues that this is momentum that may trigger step-by-step regulatory reform and sudden, revolutionary development in Compliance. This process has only just begun, with the most important steps still around the corner. Jackman says that it is critically important that senior management, the regulator and Compliance staff alike recognise the business interest inherent in the Compliance function. He also notes that without Compliance taking charge of and driving these changes, it may risk losing its existing influencing role and becoming marginalised. The appreciation and success of any support function depends on having a model that can clearly communicate how it can create value for the business and for society as a whole.[13]

In contrast to the above, I wish to emphasise that the existing backward looking regulation together with the also backward looking audit methods and approach underlying external and internal audits and inspections constitute a major impediment to Compliance systems. Historically, Compliance is a reactive type of function.

[13] Jackman 2015, 4.

Although this function has been developing more intensively in recent years than any other support function, its role has often remained operational and mechanical. It is often functioning under bureaucratic overregulation, making it impossible for compliance staff to see and understand broader and deeper relations. Excessively formal rules and framework often overshadow the essence, hinder individual ways of thinking and initiative and sometimes prevent Compliance staff from actually recognising existing risks that need to be responded to.

The above restrictions and limitations are partly the causes and partly the results of the Compliance function's sometimes still lower status and less complete integration in business that should be necessary, and that it is still often regarded as an additional expensive administrative burden and an obstacle to successful business.

5. Conclusions

Above we have briefly referred to the serious risks of non-compliance that are faced not only directly by financial service providers and their customers but ultimately may have a variety of systemic impacts as well. We have seen how Compliance as a special function has been born, developing continuously. However, it is still being far from fulfilling its intended role. It is an opportunity and at the same time a task for the Compliance experts and managers of the financial sector to change this situation. As Jackman says, to have Compliance become a critical function that can efficiently intermediate between business and society in its broader sense, it is indispensable to define and present itself as a key, strategic, value-adding function.[14]

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[14] Jackman 2015, 7.

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WHISTLEBLOWERS' PROTECTION: LEGAL CONSEQUENCES

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In today's world, it is crucial to implement effective methods of fighting against money laundering, insider trading and financial frauds. Whistleblowing is one of the most functional countermeasures.[1] Recent scandals, such as LuxLeaks[2] or the Panama Papers,[3] have shown major malpractice connected with financial issues happening inside companies or organisations. In many cases, those kinds of scandals and the damage done to national or EU public finances have come to light thanks to people speaking up when they encounter wrongdoing in the context of their work.[4]

Those who "raise an alarm" often risk their career and their livelihood, and in some cases suffer severe and long-lasting financial, health, reputation and personal repercussions[5] and/or discrimination.[6] Effective protection for whistleblowers is a must. In April 2018, the European Commission proposed a new law to strengthen whistleblower protection across the EU – the proposal for a Directive of the European Parliament and the Council on the protection of persons reporting on breaches of Union law (hereinafter Directive).[7] The aim of this paper is to present the legal consequences of whistleblower protection in light of the aforementioned act.

Why proceed and implement such an act in the context of fighting against financial fraud? Currently the protection offered to whistleblowers across the EU is fragmented

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[1] Report to the Nations 2018, Global Study on Occupational Fraud and Abuse, Association of Certified Fraud Examiners; *http://www.acfe.com/report-to-the-nations/2018/*, (08.08.2018); Report to the Nations 2016, Global Study on Occupational Fraud and Abuse, Association of Certified Fraud Examiners, *http://www.acfe.com/rttn2016/resources/downloads.aspx* (08.08.2018); Integrity in the spotlight. The future of compliance. 15th Global Fraud Survey 2018, EY, *https://fraudsurveys.ey.com/media/1589/global-fraud-survey-2018.pdf* (08.08.2018); Pulling fraud out of the shadows. Global Economic Crime and Fraud Survey 2018, PwC, *https://www.pwc.com/gx/en/forensics/global-economic-crime-and-fraud-survey-2018.pdf*, (08.08.2018).

[2] *https://www.icij.org/investigations/luxembourg-leaks/* (08.08.2018).

[3] *https://www.icij.org/investigations/panama-papers/* (08.08.2018).

[4] See Grutzner 2014, 184. One of the best-known examples are Coleen Rowley of the FBI, Cynthia Cooper of WorldCom and Sherron Watkins of Enron (Time Person of the Year 2002: The Whistleblowers). See more *http://content.time.com/time/magazine/article/0,9171,1003998,00.html.*

[5] See Bjorkelo 2013, 306 et seq.; Dussuyer–Armstrong–Smith 2015, 34 et seq.; Ellis–Berkowitz 2018, 14 et seq.

[6] See Kaplan–Kleiner 2000, 75 et seq.

[7] The proposal for Directive of the European Parliament and the Council on the protection of persons reporting on breaches of Union law, COM/2018/218 final – 2018/0106 (COD), *https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52018PC0218*, (08.08.2018).

and insufficient.[8] Some Member States have comprehensive legislation in place, but most offer only sectoral protection, e.g. in the fight against corruption or for the public sector only.[9] The aim of the proposed directive is to protect the financial interests of the Union by introducing regulations protecting persons supporting fair trade and helping with the detection of fraud.

Who is the whistleblower under the newly proposed EU regulation? The personal scope of the proposal is defined in Art. 2 of the Directive by use of the notion of the reporting person. It is explicated as someone reporting or disclosing information on violations of EU law which he/she observes in his/her work-related activities. It covers employees as well as self-employed people, freelancers, consultants, contractors, suppliers, volunteers, unpaid trainees, job applicants, shareholders and persons belonging to the management body of an undertaking and even also those persons who acquired information during the recruitment process or during pre-contractual negotiation.

The crucial points are prerequisites for granting protection for a whistleblower. They can be divided into general and specific prerequisites. The general prerequisite says that the reporting person should reasonably believe, in light of the circumstances and the information available to them at the time of the reporting, that the matters reported by them are true. The reasonable belief should be presumed unless and until proven otherwise. By Art. 13(2) of the Directive, specific prerequisites depend on the level of reporting - whether it is internal or external. For a person reporting externally, at least one of the conditions must be fulfilled:

– first an internal channel was used but no appropriate action was taken in response to the report within a reasonable timeframe,
– internal reporting channels were not available for a whistleblower or a whistleblower could not reasonably be expected to be aware of the availability of such channels,
– the use of internal reporting channels was not mandatory,
– a whistleblower could not reasonably be expected to use internal reporting channels in light of the subject matter of the report,
– a whistleblower had reasonable grounds to believe that the use of internal reporting channels could jeopardise the effectiveness of investigative actions by competent authorities,
– a whistleblower was entitled to report directly through the external reporting channels to a competent authority by virtue of Union law.

The same prerequisites should be met by a whistleblower who reports to relevant bodies, offices or agencies of the EU. There are two more preconditions for the person reporting externally to the general public which is stated in Art. 13(3) of the Directive. Such a whistleblower must fulfill these conditions:

– first reported internally and/or externally to relevant bodies but no appropriate action was taken in response to the report within maximum 6 months,

[8] Annexes 1–11 Proposal for a Directive on the protection of persons reporting on breaches of Union law, *https://ec.europa.eu/info/sites/info/files/1-11_annexes.pdf*, (08.08.2018).

[9] Annexes 1–11 Proposal for a Directive on the protection…, (08.08.2018).

– the whistleblower could not reasonably be expected to use internal and/or external reporting channels due to imminent or manifest danger to the public interest, the particular circumstances of the case or a risk of irreversible damage.

It is worth underlining the fact that the protection is not lost where the reporting person made an inaccurate report in honest error.

There are several legal consequences of granting protection for whistleblowers. The first area is connected with implementing measures to prohibit any form of retaliation, whether direct or indirect. The enforcement of EU law requires a broad definition of retaliation encompassing any act or omission occurring in the work-related context that causes detriment.

First, it is mandatory during the employment relationship and can be understood as suspension, dismissal, transfer of duties, reduction in wages and even withdrawal from training or demotion. Also, retaliation connected to the stability of the employment relationship, such as failure to convert a temporary contract into a permanent one should be prohibited. Second is the category of potential retaliation related to the cancellation of a licence or permit (e.g., a stockbroker licence). Also, indirect revenge remains prohibited, namely actions taken against relatives of the whistleblower who are also in work-related connection with the latter's employer or customer/recipient of services or against other employees who have provided support to the reporting person. Furthermore, retaliation related to reputational damages or financial loss should be mitigated. It concerns both natural and legal persons and includes blacklisting, cancellation of contracts or loss of customers. Moreover, steps should be taken to maintain the confidentiality of the identity of a whistleblower since not keeping the privacy of one can have a chilling effect on the next potential reporting person.

To prohibit and mitigate all mentioned forms of retaliation, there are several measures provided, among them preventive, warranty, remedial and procedural measures. They have different functions and extend protection for the whistleblower in different aspects.

The first category comprises preventive measures. They should be taken before any form of retaliation occurs. Preventive measures are provided in the form of information and advice on protection against retaliation of a potential or actual whistleblower. That should be user-friendly, easily accessible and free of charge. Also, effective assistance granted by competent authorities can be classified as a preventive measure.

As for the warranty measures, certification of the fact of qualifying for protection should be pointed out. It means that a whistleblower meets the conditions of the applicable rules. He or she should have effective access to judicial review based on all individual circumstances of the case when he or she meets the prerequisites of the applicable norms. The other warranty measure is the guarantee of not being considered as a person who unlawfully discloses protected information or breach of secrecy – whether protected by contract or any legislation.

There are also procedural measures stipulated in the proposed Directive. They are crucial to providing tools for a reporting person at the stage of the proceedings. Once the whistleblower demonstrates that he or she made a report in line with the Directive's provisions and suffered a detriment, the burden of proof should shift to the person who

took the retaliatory action in case of judicial proceedings based on a detriment suffered by a whistleblower. That person should demonstrate that action was taken by him or her was not linked in any way to the reporting or the whistleblower's disclosure.

Access to remedial measures is also part of whistleblower protection. They should be appropriate in each case and determined by the kind of retaliation suffered. For instance, it can be reinstatement in case of dismissal or demotion. Restoration of a canceled permit or compensation for actual or future financial loss can also be pointed out here.

Interim remedies should also be taken into consideration. They are particularly important for whistleblowers in order to stop threats or continuing acts of retaliation. Their role is to temporarily, and as soon as possible, eliminate already existing retaliation.

Moreover, the category of procedural remedies is included in the scope of the Directive. They are focused on providing legal help in criminal cases and in cross-border civil proceedings. The issue of relevant legal fees should be raised here, as well.

The other point is sanctioning measures, which are indirect protection for a whistleblower. Those measures are imposed on persons who take retaliatory measures against a reporting person. Prerequisites to introduce penalties include hindering reporting, bringing a vexatious proceeding against a whistleblower, taking retaliatory measures or breaching the duty of maintaining the confidentiality of the identity of a reporting person. It is up to the Member States what kind of penalties they implemented – financial, administrative, or criminal. Penalties must meet the conditions of being effective, proportional and dissuasive. This tool allows limiting external causes that may discourage potential whistleblower from reporting misconduct.

One aspect of the protection of a reporting person is to use indicated measures; the other is to evaluate them and make effective attempts to improve them.[10] There are several disadvantages and threats connected with the whistleblowing system that are worth mentioning, such as possibilities of misuse, as well as manipulation of the reporting system. Their aim can be an evasion of perpetration of fraud crimes or a blackout of explaining inter-organisational matters. Also, the issue of conflict of interest should be raised here. It means that the potential or actual whistleblower can face a conflict between serving's one company, co-workers and friends and protecting the public. Also, encouraging the use of a whistleblowing system can include the potential for reputational damage to the business, particularly if the exposure occurs in the public domain.

To conclude, it is worth underlining that the proposed Directive aims at ensuring that all Members States have common high standards of protection for whistleblowers who unveil illegal activities and abuse of law relating to a wide range of EU policy areas, especially anti-money laundering and fiscal fraud. In addition, whistleblower protection can make it easier to detect, prevent and deter fraud, money laundering, corruption and other illegal activities affecting the financial interests of the European Union.

[10] See more on whistleblowing evaluation as a part of compliance program evaluation Singh–busses 2015, 115 et seq.

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NEW DEVELOPMENTS IN THE FIGHT AGAINST CYBERCRIME IN THE EUROPEAN UNION

Claudia Warken[*]

1. Introduction

One of the milestones in an effective fight against cybercrime on the EU level has been the 2013 Directive on attacks against information systems, the so-called "AAIS Directive".[1] It aims at harmonising the Member States' criminal law frameworks in order to allow improved investigations of cross-border cybercrimes – at least within the EU. It does so by establishing common definitions of and minimum penalties for certain cybercrimes such as illegal access to information systems or illegal system interference and by requiring the Member States to set up 24/7 single points of contact for providing effective assistance to other EU law enforcement authorities.

2. The "e-evidence" proposal

Apart from several other cybercrime issues that the European Commission has been tackling since then – e.g. combatting the sexual abuse and exploitation of children,[2] which is frequently shared through the Internet, or combatting non-cash payment fraud[3] – the Commission has been working for over two years on the "e-evidence file". The term refers to the improved access to cross-border electronic evidence in criminal investigations. In April 2018, the Commission proposed new legislation on this topic that I would like to present to you.

The following presentation is structured into three parts: After briefly touching on the relevance of electronic evidence, I will turn to current problems before outlining how the new proposal addresses the core issues.

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[1] Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA [*OJ L 218, 14.08.2013, 8–14]*.

[2] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [*OJ L 335, 17.12.2011, 1–14]*.

[3] See the proposal of 13.09.2017 for a Directive of the European Parliament and of the Council on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, COM/2017/0489 final.

2.1 The relevance of electronic evidence

The significance of electronic evidence for criminal investigations has been increasing over the last few years and is still on the rise. There are mainly three reasons for this phenomenon:

Firstly, more and more electronic data is replacing analogue information. "Digitalisation of our daily lives" is the key phrase in this context. Just think about the last time you wrote a paper letter – and when you have sent an e-mail instead. We have our contacts on our smartphones, use GPS devices, digital cameras and fitness watches, and voice telecommunication is either done on mobile or via WhatsApp or Skype.

Secondly, the sheer amount of available electronic data will grow even more with the rollout of the Internet of Things, smart homes, automated driving and the like. "Big data" is the term used in this context.

The third reason for the increasing significance of electronic evidence in criminal investigations is the fact that it affects all types of crimes. It is no longer limited to classical cybercrimes such as illegal hacking, ransomware or DDoS attacks. Rather, more and more traditional offences are committed on or through the Internet, thus leaving digital traces. Just think of pornography, fraud, industrial espionage or different aspects of money laundering.

2.2 Current problems

2.2.1 Lack of national legal frameworks

Today, in the majority of cases and especially in the beginning of an investigation, electronic data is the only evidence available. Legislators have not been able to keep pace with the technical developments. For that reason, there are only scattered, fragmented legal frameworks in place on the national and EU levels that address the acquisition and proper handling of electronic evidence. In many cases, traditional tools and instruments that have been designed for analogue evidence are applied – also when it comes to cross-border investigations.

2.2.2 The principle of territoriality in cyberspace: Data in the cloud

Allow me a short detour to international law. Following the law of the nations and based on the sovereignty of each country, the principle of territoriality applies. It means, amongst others, that any state authority may exercise investigation powers only within the state's territory. Whenever there is a cross-border aspect, the third country that is affected needs to be involved, usually through the process of mutual legal assistance. Until recently in regards to electronic data, the general understanding has been that the physical location of the data – its actual place of storage – is the relevant factor for determining whether there is a cross-border aspect.

Stored electronic data (in this presentation I am not referring to the interception of live data) can usually be found on the user's device or in the cloud. Do you know

what or where the cloud is? The cloud is a system of connected servers, usually a large number of them, scattered all around different places. The cloud as a concept does not know geographical borders; it exists through the Internet in the virtual cyberspace. For security reasons, a dataset might be split and, at the same time, duplicated. Its physical storage location is often changed within days through automated processing. Without going into too much detail, you can assume that the determination of the physical location of a specific dataset can be difficult – sometimes even for the service provider and certainly for law enforcement.

Thus, the first issue an investigating authority faces whenever it comes to potential data evidence in the cloud is the problem of deciding whether a third country needs to be involved at all, and, if so, which country. Considering what I mentioned before about the principle of territoriality, the file might have to go through the process of mutual legal assistance, or MLA in short.

That has severe consequences: The MLA process usually takes up to several months. Regarding electronic evidence, we are talking about an average of 13 months. Obviously, that does not match the high volatility of electronic data which can be shifted from one country to another with literally one click. In addition, the MLA process is rather non-transparent, cumbersome and resource-intensive. A few years ago, the US Department of Justice was flooded with MLA requests from all over the world because major cloud service providers – for example Apple, Facebook, Google, Microsoft, Twitter and Yahoo! – have their headquarters there. Subsequently, the US adopted a law that now allows foreign authorities to directly contact the domestic service providers, at least for certain types of electronic data. It is left to the discretion of the providers to respond to such requests for data disclosure.

So far it is purely voluntary cooperation, and the service providers have each set their own rules. The process is neither transparent nor reliable. Rejections of data disclosure requests by a service provider are fairly common, and there is neither a possibility to identify the cause for a rejection nor a way to challenge the provider's decision, for example in a court. In addition, there is no accountability, e.g. for wrong or incomplete disclosure of data. The right way of contacting a service provider can be a practical challenge – finding the right person as much as finding a secure way of communication. These are just examples of issues that keep law enforcement authorities from obtaining necessary electronic evidence in an appropriate timeframe under the current system.

2.3 The proposed new approach

The new legislative proposal aims to tackle at least the major issues. It consists of two parts: a regulation and a directive.

2.3.1 *The regulation*[4]

The proposed regulation introduces two new instruments: the "European Production Order" and the "European Preservation Order". While the European Preservation Order refers to preliminary data retention, a "quick freeze", an important yet rather sideline issue, the European Production Order is the core element of the proposal. It allows law enforcement to directly request electronic data from any service provider offering services in the EU, irrespective of where the provider's headquarters are located or where the respective data is stored physically.

All companies offering digital communication, data storage and Internet infrastructure services are covered. Upon request, they have to disclose the data within ten days or, in the case of an emergency, within six hours. The European Production Order may cover all types of communication data – from subscriber to traffic and content data.

In order to protect the fundamental rights of the affected user, a range of conditions and safeguards applies. For example, the European Production Order can only be issued in the cases of serious crimes with a minimum penalty of three years of imprisonment, cybercrimes and crimes of terrorism. In addition, every request has to be approved by the competent judicial authority – in most cases by the prosecutor or the investigating judge.

A comity clause addresses conflicts of law and how to solve them in an appropriate way. Additionally, there are provisions about the – exceptional – right of the provider to refuse the data disclosure. Furthermore, the user mandatorily has to be informed about a disclosure of his/her data once this information no longer hampers the investigation. Finally, the usual judicial remedies – for example reviews by a competent court initiated either by the provider or the affected data subject – are foreseen.

A potential cross-border yet EU-internal aspect can only derive from the place in which the European Production Order is delivered. The third country is not involved in the delivery of the order and the data disclosure. It only comes into play if the provider does not follow its obligation and the order needs to be enforced formally.

2.3.2 *The directive*[5]

Since this enforcement requires some kind of physical existence in order to be effective, the proposal's directive part sets up the obligation for any service provider offering the aforementioned services anywhere in the EU to establish a legal representative.

The legal representative may not only receive the European Production or Preservation Order and act accordingly but is also liable for the proper delivery or preservation of the requested data.

[4] 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.

[5] 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.

2.3.3 Benefits of the proposal

Considering the different elements, the proposal does not only provide more efficient procedures for the acquisition of cross-border electronic evidence but also aims at harmonising rules. Thus, it establishes legal certainty, transparency and accountability while still strongly protecting the fundamental rights of the data subjects. Lastly, it can serve as a role model internationally. In this context, it seems to be a much more elegant approach, especially in comparison to the US CLOUD Act[6] that was adopted in February 2018 and tries to solve the problems mentioned before by bilateral contracts that each have to be negotiated individually.

2.3.4 Conclusions

In a nutshell, the very new, core element of the proposal is the possibility for European law enforcement to directly request electronic evidence from any Internet service provider in the EU, independent of its headquarters or location where the data is stored. Such a request would establish a general legal obligation for the service provider to comply. The country where the request is delivered would only get involved if the order needs to be enforced formally.

3. Outlook

While the feedback to the proposal from law enforcement authorities has been positive because they expect a significant improvement in the context of obtaining cross-border electronic evidence, the Member States in general are more cautious.

Although everyone acknowledges the need for legislative action, there is a lot of discussion about the proposed concept. Member States feel especially uneasy about the idea of getting only involved at the enforcement stage after a legally binding request from a foreign authority has been delivered in their very own territories. Thus, they are discussing possibilities of mandatory notifications from the very beginning on. However that would be implemented in detail, it would completely change the current concept.

Further concerns refer to the types of crimes involved – the call goes for limiting their number even further – and the wide range of affected service providers, especially in regards to the inclusion of even very small ones that might struggle to have a legal representative or respond within the proposed time limits.

The negotiations with the European Parliament and the Council have already started. As you are aware, the next election of the European Parliament will take place in May 2019. That puts some time pressure on the legislator, and we will see whether the current conflicts of interests can be resolved in time.

[6] Clarifying Lawful Overseas Use of Data Act (CLOUD Act) of 2018, *https://www.congress.gov/bill/115th-congress/house-bill/4943.*

THE NEW CHALLENGES IN CYBERSPACE FOR FOLLOWING ILLICIT MONEY FLOWS

Viktor Halász[*]

1. Introduction

Forensic science was always an interdisciplinary field since criminals have always exploited the newest solutions of the most diverse disciplines. Investigators have always been forced to do the same in order to keep up with them. In parallel with the accelerating pace of technological advancement, we are constantly introduced to new forms of criminality or just to new interpretations of old criminal methods – it is especially true for the last two or three decades of the information technology revolution.

With the spread of the Internet, anonymity in criminality moved to the next level, and the distance between the offenders and their acts is greater than ever, all of which results in a new cyber Wild West. Although the new opportunities have been exploited at first by criminals, over the years law enforcement agencies have also found ways to take advantage of new IT solutions in their investigative efforts.

However, over the last few years we have had to face another challenge in the form of cryptocurrencies, which may lead to the next transformation of criminality. These new "assets" (even after a decade we have not reached a consensus on how to look at them from a legal point of view) have all the characteristics that make them perfectly suitable for moving values in an anonymous and untraceable way without worrying about any borders. And since crimes are mostly committed for money, the way in which the illicitly acquired goods are transferred and hidden is a decisive factor in criminality.

It is still a subject for debate how much this phenomenon will shape the ways of criminality. However, for my part I agree with those who think that the source of the greatest challenges law enforcement agencies have to face in the next years lies in the technologies related to cryptocurrencies.

2. Why do criminals use cryptocurrencies to transfer and hide illicit funds?

There are several reasons why cryptocurrencies are attractive tools for criminals to carry out the actions mentioned above.

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First, the creation of Bitcoin[1] (the first cryptocurrency) also meant the birth of a revolutionary technology called blockchain. While in the traditional financial system virtual transactions are executed and recorded by a third party (which may be a financial institution or any other business organisation such as PayPal), in the case of cryptocurrencies the blockchain is responsible for these tasks. However, the blockchain is not maintained by a central entity but by the group of people who voluntarily join the system and share the latest data about the transactions with each other. This public and decentralised structure results in a number of characteristics that make cryptocurrencies perfectly suited to carry out crime-related cash flows.

In addition to these characteristics, there are some other factors, as well, of which the most important is probably the lack of legal regulation of cryptocurrencies.

2.1. Characteristics of the blockchain

Although there may be differences between the properties of different cryptocurrencies and blockchains, a cryptocurrency generally has the following characteristics:[2]

- decentralised;
- anonymous;
- irreversible;
- permanent;
- global;
- easy to access, easy to use;
- fast;
- cheap;
- easy to possess.

The *decentralised* structure from an investigative point of view means that the law enforcement authority is not able to request any information about the transactions from any governmental body or business organisation. If the perpetrators use classical financial intermediaries, they can never be sure about the information a particular body or business collects about them and what kind of data will be handed over to the authorities in the case of a legal request.

Whenever a centralised service is used (even if a business organisation states the opposite) criminals must always take this risk into consideration. When using the blockchain, they do not have anything to worry about: The rules of the cryptocurrencies are clear and apply equally to everyone. Criminals can be completely sure about what kind of transactional data is recorded on the blockchain and that there is no more data than that available to the authorities. All of this greatly facilitates the planning of crimes by eliminating the factor of uncertainty.

[1] In order to avoid misunderstandings it is worth to clarify that in the relevant terminology Bitcoin (with a capital B) is the name of the cryptocurrency as a whole network, while with bitcoin (with small b) people refer to the "coins" sent over this network.

[2] Brill–Keene 2014, 14–15.

Perhaps *anonymity* is the most frequently mentioned factor when we speak about the relationship between criminality and cryptocurrencies. It is sure that keeping their real identity hidden during and after their acts is among the most important interests of criminals.

Offenders are forced to provide their personal information if they want to use classical financial services. Although it is not impossible to trick these systems, it takes effort on the part of criminals and also opens up a lot of possibilities for blunders. In contrast, there is no need to provide any data to create a cryptocurrency address, and it is also possible to create an infinite number of addresses, and all that is needed for this is to download simple software. It is obvious that with this method criminals can save a lot of time that they would otherwise spend on creating false accounts.

It is very important to emphasise, however, that anonymity is only relative in this regard; although the users of the addresses are generally unknown, the exact time, the direction and the amount of the transactions between these addresses are visible to everyone. This is why this system is also referred to as pseudonymous,[3] because if a single address in a chain of transactions can be linked to a real identity in some way, then the entire history of his or her transactions (including future ones) becomes known to the investigators.

It is also important to note that criminals often use so-called mixer services in order to make the chain of public transactions untraceable. The purpose of mixers is to deliberately blend the link between the sender and the recipient addresses by mixing several different transactions, making it much more difficult to follow the path of money.[4] Such services are available in the form of simple webpages, and obviously it makes no sense to expect the application of AML and KYC rules from them.

Irreversibility and *permanence* mean that if the illicit transaction is realised, the criminals do not have to worry that there is a chance of it being turned back by an outside party in any way. When using classical financial intermediaries, there are a number of tools available to recover the victim's lost money, e.g. banks may freeze accounts in the event of a request from a law enforcement agency. However, when sending cryptocurrencies, the offender can be completely sure that if a transaction has taken place, it will never be reversed without his will or blunder (e.g. he loses the private key). He can also be sure that the earned cryptocurrencies will remain on the blockchain forever and will not vanish in any way (like buried paper money or any other perishable good).[5]

The *global* nature of cryptocurrencies causes serious jurisdictional problems in investigations. Criminals can move the illicit founds across borders as easily as sending an email anywhere in the world. In practice, illegal Bitcoin transactions often aim to

[3] See e.g. Möser 2013, 1.

[4] Möser–Böhme–Breuker 2013, 2.

[5] It should be noted, however, that the exchange rate of Bitcoin and other cryptocurrencies has been extremely volatile in the recent years, and these movements cannot be predicted with the classical economic laws. (Ciaian–Rajcaniova–Kancs 2015, 1813–1814). This, of course, is a risk on the criminals' side, even though the exchange rate has been rising over the long term.

addresses that belong to companies abroad – typically cryptocurrency exchanges or vendors who accept Bitcoin as payment.

It is possible to request information from these companies about transactions, but outside Europe a mutual legal assistance treaty is usually needed. In the case of some countries (especially in Asia), the answer will arrive only after several months, if ever. The criminals are all aware of this, and if it is possible, they try to move the cryptocurrencies through countries in which the authorities do not maintain a strong international cooperation relationship with the investigative bodies of their country.

Criminals may also have a realistic expectation that the tool they use is *easily accessible* and *easy to use*. This is the case with cryptocurrencies since to initiate a transaction they only need an easily downloadable client (or, as it is usually called, a wallet) and Internet connection. There are currently many such clients for Bitcoin, many of which exist as mobile applications or in the form of simple websites.[6]

Transactions can therefore be initiated from practically anywhere where an Internet connection is available. And although it requires some research to get familiar with the working method of Bitcoin, these applications are used by millions of ordinary people every day, and it should not be seen as a challenge anymore. It was not necessarily true nearly a decade ago when Bitcoin was mainly a hobby for geeks and there were no user-friendly clients yet.

The *speed* of transactions also prompts criminals to use cryptocurrencies when moving money. It takes 10 minutes on average to complete a transaction on the Bitcoin network, but there are also many cryptocurrencies whose main advantage over Bitcoin is that the transactions are registered immediately.[7] So whether they are done right away or in just a few minutes, it is obvious that the transaction times are far ahead of those of banks (especially when we are speaking about cross-border transfers). This characteristic may be particularly important for criminals who are often forced to race against investigators.

Although it is not the most important characteristic, it is also worth mentioning the relative *cheapness* of the transactions. Though criminals are usually willing to invest a considerable sum to make their financial flows as untraceable as possible, they do not have to spend these extra funds using cryptocurrencies. The transaction fees on the blockchain (compared to commercial banks) are much more favourable; in the case of Bitcoin the cost of a transaction is about USD 1.00 (in the right amount of Bitcoins of course),[8] but there are many cryptocurrencies out there which require close to zero in fees.[9] In addition to this, the amount of the fee does not depend on the amount of the transacted coins but on the data size of the transaction itself (expressed in bytes).

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[6] Perhaps the most famous service is Coinbase from the United States, which already has nearly 15 million users (*https://www.coinbase.com*).

[7] A cryptocurrency like this is Bitcoin Cash which appeared as one of the alternatives for Bitcoin.

[8] It should be noted that the average cost of transactions depends on the workload of the network. There have been extreme periods of times when the average cost of a transaction has reached $ 50 for a short time, but this is not typical in the long run. (See Bitcoin Avg. Transaction Fee historical chart, *https://bitinfocharts.com/comparison/bitcoin-transactionfees.html#6m* [24.04.2018].).

[9] Such a cryptocurrency is Ripple.

For this reason, the transaction fees become extremely negligible for transfers of large amounts.

Finally, it is necessary to emphasise that cryptocurrencies are extremely *easy to possess* since it means all that it needed is the storing of the private key, and there are thousands of ways to store a simple string of characters. They even can be memorised and thus not appear in any electronic or physical form. From the point of view of investigators, it means that it is very difficult to trace and seize the assets acquired through criminal activity.

2.2. Lack of legal regulation

If we check the regulation of cryptocurrencies at the international level, we can see that this it is simply missing from the legal systems of most countries, or the laws in question (if there are any) are quite different in each state.[10] We can safely declare that most of the governmental measures for cryptocurrencies in the last decade have been embodied in warnings issued by central banks and other authorities stressing the risks of these instruments.[11] Naturally, legislation can only follow technological and social advancements with a certain delay, but this issue is particularly noticeable in the case of cryptocurrencies.

The novelty of these instruments has posed a serious challenge to the legislators, which is mainly due to their decentralised nature. Cryptocurrencies are global, cross-border tools that are not supervised by any entity governed by law. It is therefore impossible to prohibit or to limit the simple use of cryptocurrencies at the level of a national legislation (more precisely, it is possible to enact such regulation, but the enforcement of it seems impossible without the total control of the Internet).

However, this does not mean that legislators would not be able to regulate at least some areas. First and foremost (precisely because their use cannot be restricted), it is necessary to determine how cryptocurrencies should be categorised in civil and financial law. There is currently no such regulation in the European Union at a Community level,[12] and even at the level of Member States there are only a few rules dealing with the legal category of cryptocurrencies (mostly in Germany).[13] The only aspect central banks consistently agree on is that cryptocurrencies could not be considered simply as money (among other reasons) because they have no issuers, which is a necessary conceptual element of money.[14]

Unfortunately, Hungary is also one of the Member States where this issue has not yet been addressed with legislation: These instruments (due to the lack of certain legal

[10] Tasco 2015, 43–44.

[11] In recent years, the Hungarian Central Bank has issued nearly a dozen warnings about Bitcoin [MNB press releases *https://www.mnb.hu/sajtoszoba/sajtokozlemenyek* (24.04.2018)].

[12] ENISA Opinion Paper on Cryptocurrencies in the EU. September 2017. 10. *https://www.enisa.europa.eu/publications/enisa-position-papers-and-opinions/enisa-opinion-paper-on-cryptocurrencies-in-the-eu* [24.04.2018].

[13] Vondrácková 2016, 11.

[14] And it is the case not only in Europe (Miseviciute 2018), but also in the other parts of the world (Demchenko 2017, 36.).

conceptual elements) cannot be legally considered money, securities, property rights, commodities or any kind of intellectual property products; Bitcoin and other cryptocurrencies are a phenomenon that legally does not exist yet.[15]

This uncertainty causes issues not only in economic life but also in criminal proceedings. Both criminal law and criminal procedural law are branches of law that tend to borrow legal definitions from other areas of law rather than define them. However, if these definitions do not exist in civil and financial law, then the enforcement of some investigative measures also becomes legally impossible.

In the area of criminal law it could mean that the classification of some offences becomes difficult (e.g. the offence of organising a pyramid scheme in Hungarian law can be committed only by collection and distribution of *money*). Speaking about criminal procedure, the lack of regulation can cause problems especially during seizures. The criminal procedure codes in every country define what the authority can seize during an investigation, and the legislators usually did not have cryptocurrencies in mind when they drafted the rules (mainly because at the time these tools simply did not exist). We have already seen an example when the confiscated (and no doubt illicit) Bitcoins had to be returned to the criminals by the decision of the court on the basis that cryptocurrency is not an existent category under the legal system of that country, thus the confiscation cannot be lawful either.[16]

However, regulation would not only be possible in relation to the legal categorisation of cryptocurrencies. Although the use of these tools cannot be limited, a wide infrastructure of several cryptocurrency service providers has emerged over the years: online exchanges that trade cryptocurrencies for fiat money, online stock-like exchanges that allow the trade of different cryptocurrencies, online cryptocurrency wallet providers, merchants accepting cryptocurrency as payment, ATMs for buying and selling cryptocurrencies for cash, etc.[17] Operators of these services are usually identifiable business entities and thus can be required to comply with anti-money laundering (AML) and know your customer (KYC) rules that apply to other financial intermediaries, as well.

This has long been a reality in the United States; since 2013, businesses providing cryptocurrency-related services are practically under the same regulation as other financial service providers.[18] However, similar legislation in Europe was only recently put into motion when the European Parliament finally adopted the Fifth Money Laundering Directive[19] under which cryptocurrency-to-money exchanges and online wallet providers will be obliged to apply the usual AML/KYC standards in the EU and Member States' financial intelligence units should be able to collect data on the real owners

[15] Szathmáry 2015, 645–646.

[16] South Korean Court Declares Bitcoin Confiscation Illegal: *https://cointelegraph.com/news/south-korean-court-declares-bitcoin-confiscation-illegal* [24.04.2018].

[17] Hileman–Rauchs 2017, 28-86.

[18] Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies. 2013: *https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf* [24.04.2018].

[19] Statement By First Vice-President Timmermans, Vice-President Dombrovskis and Commissioner Jourovà on the adoption by the European Parliament of the 5th Anti-Money Laundering Directive. *http://europa.eu/rapid/press-release_STATEMENT-18-3429_en.htm* [24.04.2018].

of the remaining wallets (of course, the Directive does not provide guidance for how to do this), and it will also be a task to encourage cryptocurrency owners to identify themselves by self-declaration.[20]

It can be seen that the scope of the Directive does not extend to other service providers (e.g. exchanges that make only crypto-to-crypto trades possible), and the future effectiveness of the other two rules is also questionable (so far the identification of owners of suspicious addresses was not difficult because it was not mandatory for FIUs, and the willingness of criminals to self-report their crypto assets will probably not increase significantly as a sole result of the Directive). Furthermore, as this is only a Directive, Member States still have 18 months to implement the rules after publication in the Official Journal.

3. Cryptocurrencies as criminal tools

Criminals use cryptocurrencies as tools basically for those crimes whose essence lies in moving or hiding money. These offences are typically money laundering, terrorism financing and tax fraud.

Money laundering was recognised as a risk factor even in the earliest studies[21] on Bitcoin and is still one of the most frequently mentioned threats in the works dealing with the relationship between cryptocurrencies and criminality. One of the main reasons behind this is that in the last 25 years, the main direction of international actions against money laundering was the burdening of financial intermediaries with obligations to identify their customers and report suspicious financial flows, and cryptocurrencies simply evaded the scope of these rules due to their decentralised structure.[22]

There is no doubt that due to the factors already mentioned several times, it is difficult to imagine a more suitable tool than cryptocurrencies for hiding the origin of wealth, and according to recent studies, criminals in cyberspace are indeed primarily using these tools for this purpose nowadays.[23] With the ever-growing use of cryptocurrencies and the emergence of new services and technologies emphasising anonymity, it can be reasonably assumed that the rate of money laundering with cryptocurrencies will only increase compared to other methods.

Terrorism financing is essentially the reverse of money laundering; while money launderers want to use their illegal income for legal purposes, in the case of terrorist financing the final use of essentially legal goods becomes illegal. However, in both cases

[20] Proposal for a Directive of the European Parliament and of the Council 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 Directive 2009/101/EC – Analysis of the final compromise text with a view to agreement, 6: *http://data.consilium.europa.eu/doc/document/ST-15849-2017-INIT/en/pdf* [24.04.2018].

[21] See e.g. Grinberg 2011, 204.

[22] Stokes 2013, 3.

[23] Cybercriminals turning to virtual currencies, video game currency and digital payment systems like PayPal to convert illegal revenue into clean cash: *https://www.bromium.com/company/up-to-200-billion-in-illegal-cybercrime-profits-is-laundered-each-year-comprehensive-research-study-reveals/* [24.04.2018].

criminals have the same goal: concealing the intermediate steps. For this reason the factors mentioned regarding money laundering are also valid here; not only researchers but also legislators often refer to the risk of terrorism financing while speaking about cryptocurrencies. And even though opinions regarding terrorism financing are more divided by the fact if this is a real danger[24] or more of a remote threat,[25] real-life examples can be found easily of this phenomenon, as well.[26]

In the case of *tax fraud* the storage function of cryptocurrencies becomes more important than the characteristics that lead to untraceable transactions. The essence of this crime is that the offender acquires wealth in some legal way but he does not want to pay the mandatory taxes on this income, so he has to find a way to hide the assets from the eyes of tax authorities. Before the emergence of cryptocurrencies, the perpetrators had to hold their assets in the form of material goods (cash, precious metals, cars, real estate or other physical properties), risking their seizure by authorities, or they kept the money in secret accounts opened by financial service providers, where they had to bear basically the same risk and while also being reliant on third parties.

However, cryptocurrencies can be considered tax havens for criminals due to their anonymity and the fact that the blockchain is not under the control of authorities in any country.[27] The fact that criminals only have to hide their private keys in order to hide their assets makes the work of tax authorities extremely difficult (of course, as long as criminals do not plan to exchange their cryptocurrencies to actual assets). According to studies, the willingness to declare assets held in cryptocurrencies is still extremely low: In the United States only 0.04% of tax returns included income related to cryptocurrencies,[28] although surveys show that about 5% of the adult population regularly uses Bitcoin.[29]

4. The extent of illicit transactions in the European Bitcoin infrastructure

A research study[30] in 2018 sought to find out how certain service providers in the Bitcoin infrastructure (exchanges, mixers, etc.) are involved in criminal transactions with Bitcoins and how they are distributed geographically. Since the traceability of transactions on the blockchain is necessarily interrupted when these providers are involved, we can consider the use of them as a kind of a money laundering method (if they are used with this intention, of course).

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[24] Vovchenko–Tishchenko–Epifanova–Gontmacher 2017, 39.

[25] Goldman–Maruyama–Rosenberg–Saravalle–Solomon-Strauss 2017, 39.

[26] See e.g. Woman arrested for sending $60,000 in bitcoin to ISIS: *http://bitcoinist.com/woman-arrested-sending-60000-bitcoin-isis/* [24.04.2018].

[27] Marian 2013, 42.

[28] Few Americans reporting cryptocurrency trading to IRS for now: report: *https://www.reuters.com/article/us-usa-trump-government/trump-threatens-government-shutdown-in-september-if-no-funding-for-wall-idUSKBN1I0018* [24.04.2018].

[29] Morning Consult National Tracking Poll #169999 December 11–12, 2017. 8.: *https://morningconsult.com/wp-content/uploads/2017/12/169999_crosstabs_BTRD_v1_AP-1.pdf* [24.04.2018].

[30] Fanusie–Robinson 2018.

During the research, direct transactions were scanned from addresses related to known criminal activity (Darknet marketplaces, ransomware, pyramid schemes and other illegal acts) to addresses belonging to exchanges and other services for the time period from 2013 to 2016.

According to the research, after examining the geographical distribution of all legal and illegal transactions, it can be concluded that these targeted mainly Asian (mostly Chinese) service providers. Europe ranked only second in comparison, and service providers of unknown origin could only be linked to a tenth of the transactions.

Even so, if we check only the illegal transactions, we can see that more than a third of these was sent to European service providers (to be exact, 29.76% of all the transactions and despite this 37.33% of the illicit ones), and in this respect only the unknown (ergo probably intentionally crime-supporting) service providers were more infected (9.94% of all transactions and 52.03% of illicit ones). Asian service providers (despite receiving 42.97% of all transactions) were involved in only 3.29% of illegal transfers, while North American service providers were also related to only half of the rate of illegal transactions as they were to all transfers (16.88% of all transactions and 7.12% of illicit ones).

All this means is that European service providers (if not counting the providers of unknown origin) are by far the most infected with Bitcoin-related money laundering. The reason behind this is probably that Chinese economic regulations traditionally make it difficult to export capital out from the country (so they are not popular targets for money launderers), while in the United States (as mentioned above) the service providers have been under strict AML / KYC regulations since 2013. In contrast, in Europe we have an advanced infrastructure, although the regulations are still undeveloped, resulting in local service providers being popular among criminals.

The results are especially worrying knowing that, according to the study, in this timeframe half of all of the exchange-laundered Bitcoins were moved through only two European exchanges (while the whole other half of them were moved through 118 exchanges in the world).

All this confirms that it is necessary to introduce as soon as possible legislation in the European Union that is similar to what has been in force in the United States for many years. Maybe we can see the first steps of this by the amendment of the Anti-Money Laundering Directive. On the other hand, the investigative bodies of the European countries should be prepared in particular to trace money transactions related to Bitcoin.

5. Conclusions

In the form of cryptocurrencies, a new challenge has emerged in the past several years for investigative authorities.

Due to the characteristics of these tools and the lack of regulation in this field, cryptocurrencies are perfectly suitable for criminals to hide illicit funds or move them across borders.

Since the European cryptocurrency infrastructure is relatively advanced but the regulations are clearly undeveloped, criminals use European cryptocurrency services in a significant proportion.

To reduce the rate of money laundering, terrorism financing and tax fraud in the Member States, the European Union should force legislation that is similar to that in the United States, which stipulates that every cryptocurrency-related business should adhere to the same AML/KYC rules as other financial service providers.

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TAX FRAUD AND CYBERCRIME E-INSTRUMENTS IN FRAUD DETECTION: HOW ARTIFICIAL INTELLIGENCE IS CHANGING TAXATION*

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1. Introduction

The current and constant evolution of e-technology creates effects in tax evasion, too. This impact is affirmed both in the field of executing tax evasion, and in the field of fraud detection.[1] The present subject, once opened, appears to be extremely large, giving the multidisciplinary implications that it generates. The paper tries to open the floor for discussions and solutions. Therefore, the purpose of this presentation is to point the issue and subject to further analysis – utilization of advanced software or artificial intelligence (AI), in detecting and investigating VAT.

On the other hand, the intervention of the IT technology in our society is a continuous, progressive process. Neither the technology, either the rules and social perception stays the same, but they evolve. Presently, the problem seems to be more ”Cyber” than ”Law” at this point. Since the ”Cyber” area is updating exponentially, then the ”Law” should respond in a very similar manner, in order to keep up with the social evolution.

One of the challenges will be to regulate the activity and effect of software, machines, automobiles or any other devices that use more developed forms of computer programmes. Probably, the essential problem in this respect would be to have concordance between the material and social progress.

An overall look on the phenomenon tax fraud, with glance to VAT Fraud, can identify certain features that have to be taken into consideration[2]:

– First, tax crime is facilitated by technology, and consequently a technology response is needed, but with respect of law
– Secondly, since practically all of us do have access to the Internet, there is the problem of on line transactions and the control over these transaction
– Thirdly, the problem of software used to keep the books (accountant books)
– Fourthly, there is the problem of detecting and investigating tax crimes especially within online environment of tax fraud (VAT included)
– Finally, can we talk about on-line fiscal inspection? Could it be possible?

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* Synthesis of OECD Report*: ”Technology Tools To Tackle Tax Evasion and Tax Fraud 2017”. The paper consists of a synthesis of this report, all the findings and opinions are the ones included in the report, unless otherwise indicated expressly.

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[1] Vuković 1; Cîrmaciu 2010, 115–117.

[2] OECD Report, 7.

The OECD Report did structure the phenomenon quite precisely, pointing out also the connections between the components of the phenomenon. This structure is described within the Chart of solutions identifies the problems, the areas where the problem does occur and the proposed solution, below[3]:

Table 1: Problems and solutions

Problem	Sector	Solution
Under-reporting of income ting of income	Business – to – consumer e.g. restaurant, bars, taxi, laundry, convenience stores	Data recording technology in electronic cash registers / sales machines
Over-reporting of deductions – False invoicing	Business – to – business e.g. construction	Electronic invoicing and automated reporting to tax offices
Lack of visibility of business activity	Cash and sharing economy: On line bussines; Cash only bussines	Legal, policy and analytics

Source: OECD Report, Table.1.1, 7.

2. Under-reporting of income

It appears that the most common counter-suppression tool used to address electronic sales suppression is data recording technology. Why? Because this tool records and secures the sales data immediately as the transaction occurs and stores.

Consequently, this means the data collected cannot be manipulated. On the other hand, if tampering has occurred, it is traceable and detectable. To achieve this objective, the data should be stored securely and preserved even if there is loss of power.

In this respect, what can be done on order to counter under-reporting of income? The OECD report identified as countering measures the following[4]:

(a) Regulation and certification of cash registers. In our opinion, this is done more in a repetitive manner, that is not effective in practice. The inflation of regulations and constant need to repetitive certification encourages evasive and criminal behaviour.

(b) Data security: Digital signature of receipt, as a label that can be traced anytime.

(c) Data storage as a "black box" of transactions, recorded on an external device.

(d) Online data accessibility: Remote access by the tax administration deters taxpayers from subsequently altering records. However, in our opinion this unlimited access can generated procedural aspects, regarding defence rights as recognized by present legislation. In particular, the fiscal authorities would not need a search warrant issued by a judge in order to conduct an inspection within databases or computers.

(e) Data transmission: Reporting to tax administration automatically, in real time or periodically, without any other formality. Also, in this case, we consider, we have to have a procedure to rectify the errors.

[3] OECD Report, Table 1.1, 7.
[4] OECD Report, 13.

3. Over-reporting of deductions is realised through various methods: One of the most largely used method is false invoicing

False invoicing occurs where a business fabricates or inflates invoices which name the business as the debtor. This allows the perpetrator to fraudulently claim expenses for tax purposes that have not been incurred.

Although, that in theory, a tax authority can verify the validity of each invoice by comparing it to the records of the counterparty to the transaction (cross-inspection), by classical means, the report recognises this method as "consuming" and "resource intensive to do so".[5]

In these circumstances, the counter measures identified by the OECD Report[6] are:

(a) Standardising the requirements of electronic invoices

(b) Digital signature of receipt

(c) Connection of electronic invoicing to sales recording device in order to report the sale in real time

(d) Provision of invoice information to the tax authority

(e) A solution to address the problem of false invoicing is requiring electronic invoicing.

This last countering measure need to be little elaboration:

– In general, taxpayers must retain records of transactions with customers and provide an invoice to a customer, either in electronic or paper form.
– An electronic invoice documents the transaction in electronic format. The electronic invoicing system should have additional features to ensure the integrity of the data and the identity of the creator. This can be done by using a digital signature to ensure authenticity of the invoice and that it has not been altered after its creation.
– Electronic invoicing will be most effective where the invoices must be registered or otherwise provided to the tax authority.
– The detection of false over-reporting of deductible expenses can be achieved by automatic matching of the data for the purchaser and seller.
– Where this is undertaken through periodic or real time data transfers, the tax authority has substantially enhanced visibility of its taxpayers, and can perform audits, analytics and tax return functions in an efficient way.

Also, in other line of thoughts, electronic invoicing can have the additional benefit of replacing paper invoices, eliminating the need to print, send and store invoices.

Recognising the substantial cost savings that arise, the European Union introduced standardised electronic invoicing (Directive 2014/55/EU) for use in public procurement. However, this directive is not transposed in Romanian law, although the deadline was 27/11/2018.

[5] OECD Report, 18.
[6] OECD Report, 19.

4. On-line and cash only activities[7]

The on-line/sharing economy is a relatively new issue. The cash economy and the sharing (on line) economy, while is not considered a forms of tax evasion or fraud *per se*, it does have features that can facilitate tax crime: fungible and untraceable.

This makes it easier for under-reporting and falsification to occur as there is not necessarily a record trail as there might be when credit and debit cards and electronic funds transfers are used.

The solutions identified above – using tamper proof data recording technology and requiring electronic invoicing – will work together to reduce the risks posed by the cash economy.

A number of tax administrations have started to investigate the risks of tax evasion and fraud posed by the sharing economy.

This includes businesses that operate online through community marketplaces, such as private renting of residential premises through sharing platforms such as Airbnb, driving services through online platforms such as Uber and professional selling through online platforms such as eBay.

Price Waterhouse Coopers estimates that the sharing economy generates USD 15 billion in revenue around the world, and this this could grow to USD 335 billion by 2025.[8]

The challenge of the sharing economy that means it can facilitate tax fraud and evasion is that it can be more difficult to identify the existence of business activity. This is particularly true where the person is not registered as conducting a business or is in a foreign jurisdiction.

However, the online nature of these platforms also presents an opportunity to deploy technology to tackle this.

An important chapter of the OECD Report is dedicated to *introducing technology tools*[9]:

– Tax administration has clearly defined its objective. In order to do so, it is important to receive imput from all stake-holders
– Engagement and consultation with the taxpayers
– Collaboration with the private sector providers of the solutions from an early stage
– Tax administrations have adopted a pilot project approach. This approach can introduce the solution for an initial test period, such as in a particular region or a particular business sector which is at high risk of tax fraud and evasion, or introducing it as a voluntary solution coupled with an incentive for businesses that participate in the pilot project.
– Important!
– to advertise the results of technology solutions in recovering public revenue, as these boost taxpayer morale, reinforce the deterrent effect of these solutions and

[7] OECD Report, 22, 23.
[8] OECD Report, 23.
[9] OECD Report 28.

lend support to further expansion of the use of technology tools in preventing and detecting tax fraud.
– Enforcement efforts are also necessary to ensure the effective use of technology solutions.
– These act as a deterrent for businesses in avoiding or misusing the required technology solution as well as penalising any offenders.
– In addition to pecuniary penalties, other examples of penalties that are used include the suspension of a business licence, imposing a period of enhanced supervision by the tax authority, and public "naming and shaming" of non-compliant taxpayers.
– Technology tools are not a single fix to the problem of tax fraud and tax evasion, but if implemented effectively, substantial progress can be made in high risk areas.
– These solutions should always be accompanied by the other necessary tools available to tax authorities, including legislative measures, effective enforcement, taxpayer consultation and international co-operation.

From our point of view, there are no absolute and single solutions. The method of perpetration will evolve, as there should evolve also the methods to counter the tax crimes. A relevant aspect in order to implement the countering measures identified above will be the costs, both for taxpayers and for authorities. The taxpayers will have to acquire and register cash registers and to implement ERP systems, which can impact up to tens of thousands of Euro. The authorities will have to acquire advanced software, hosting capabilities, tools to investigate – that will raise the cost to hundreds of thousands of Euro.

Artificial intelligence is changing taxation?

Advanced software and artificial intelligence is changing taxation and, also, tax crimes. Artificial intelligence is just taking its first steps into the meticulous and complex world of taxation.[10]

What are disadvantages of human work? They can be structured as:[11]
– Unreliability – Two people using the same data can reach different conclusions.
– Slowness – Humans can consider only one decision at a time, often tediously.
– Inaccuracy – Many factors can interfere with positive learned behaviour by humans such as emotions, illness, and fatigue.

In the meantime, advanced software and artificial intelligence computer algorithms are[12] *transparent, and their detailed function can be understood; they have superior speed, consistent results, never fall asleep (well, sometimes they crash), or have "bad days".*

Many AI approaches are recognizable because they add the word "deep" to their name, such as Deep Learning, Deep Search, Deep Query, and Deep Reinforcement.

[10] Vuković 5.
[11] Milner–Berg, 6.
[12] Milner–Berg, 6.

As this trend accelerates, watch for AI to become an increasingly crucial part of progressive – and successful – tax departments. But, will AI/IS uphold the Law in any time? What if ... We will replace accountants and tax officers, as there are models to replace lawyers? If the algorithms are clear, the advanced software is created and implemented, and if the AI could take decisions (independently), then different levels of activity will be replaced:

– First… Basic/primary accountancy
– Then… Financial statements and reports
– Meantime forecasting, classification or clustering is more effective even now when it is carried out by advanced software

Further more.... in certain situations, these systems (AI/IS) can be considered as active subjects of a tax crime.[13] The answer cannot be given in a few closing words, as it is debated intensively also in our country.

Concluding, the role of AI or other forms of advanced software in taxation, is growing as the role of e-technology will increase in everyday life, so a balanced and effective response from theory and practice of Law is needed.

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[13] Hotca 2018, as well as other views. Stănilă 2018; Sandru 2019; Miheş 2018.

MONEY LAUNDERING IN CYBERSPACE

dr. László Dornfeld[*]

1. Introduction

Cybercrime, which has become a global threat due to the digital revolution of the recent years, has emerged as a major new challenge for the European Union and its citizens. In the early days of computing and the Internet, hackers and other criminals were primarily curious professionals and secret service workers, while today almost anyone can become a victim or perpetrator. *David S. Wall* distinguishes three generations of cybercrimes:[1]

(a) old crimes committed with the use of computers,
(b) crimes committed using a network (primarily the Internet) and
(c) true cybercrimes.

Therefore, only a small part of the crimes committed in cyberspace can be considered truly new. The illegal use of new technologies is a logical consequence of the growing dependence of the global economy on information networks.[2] In addition to this structural factor, there are contributing factors which also make information technology (ICT) tools ideal for committing offenses.[3] Examples include the apparent anonymity of users, lack of physical boundaries, easy access and quick transactions,[4] and the very significant fragmentation of the infrastructure that make up the highly complex and dynamic ecosystem of the digital economy.

While a significant knowledge was needed to commit crimes in a digital environment in the past, it is no longer a requirement nowadays. In addition to the simple perpetrators, organised crime's presence is also increasing in the digital domain.[5] According to the Center for Strategic and International Studies' 2014 report, the damage caused by cybercrime was estimated to be between $ 375–575 billion annually.[6] As the

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[1] Wall 2007, 44–48.

[2] Tropina 2014, 70.

[3] Signorato 2015, 204–205.

[4] Van Jaarsveld 2004, 691.

[5] Mezei–Nagy 2016, 144–147.

[6] *https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/attachments/140609_rp_economic_impact_cybercrime_report.pdf* [01/04/2019].

Cybersecurity Strategy of the European Union[7] states creating a digital single market would result in annual GDP growth of around € 500 billion. As a part of the Europe 2020 strategy, the EU attaches great importance to Internet governance in order to build the confidence and security it requires.[8]

In my study, I investigate cybercrime more specifically money laundering that violates the financial interests of the European Union. As part of this, I present the implications of the digital environment's influence on crime, various cyber-money laundering methods, and finally the Union's response to these challenges.

2. The growing role of cyberspace in money laundering

Money laundering has been a well-known phenomenon for many decades, but now it is getting bigger and bigger due to the effects of globalisation. This facilitates cross-border financial flow, the extent of which has increased significantly in recent times.[9] Money laundering is always linked to another base crime, and its purpose is to hide the origin of the wealth so that it appears as if originating from a legitimate source.[10] Therefore, latency is also present twice: We can talk about it in the context of the base crime and money laundering. Modern technologies help to distance the money from its criminal source, making it more difficult for the authorities to combat.[11]

There are three different positions on the classification of cyber laundering. One sees it as one of the branches of cybercrime and places the main emphasis on the technical factor. The second sees it as a new technique for money laundering. The third opinion is that should be regarded as a completely new phenomenon that combines certain elements of cybercrime and money laundering.[12]

Its methods are often linked to cybercrime and online organised crime. Indeed, the online involvement of organised crime groups is an important factor, and money laundering is essential to its operation. At the same time, the extent of cyber laundering goes well beyond this, as the Internet also plays a role in laundering wealth from both online and offline crime. Several factors also favour money laundering in cyberspace. Firstly, there is the structure and functioning of global information networks, which I referred to earlier. Secondly, in the case of non-face-to-face transactions, real identity can be concealed and the use of different accounts can have the effect of making it appear that the money was transferred between different individuals. Thirdly, while the traditional financial system is now heavily regulated and important anti-money

[7] Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace. JOIN/2013/01 final.

[8] European Commission. Europe 2020: A strategy for smart, sustainable and inclusive growth. COM(2010) 2020 final.

[9] Van Jaarsveld 2004, 686.

[10] Varga 2015, 116.

[11] Mezei–Nagy 2018, 26.

[12] Leslie 2014, 61.

laundering mechanisms exist, but are almost absent in online banking and payment services.[13]

There are three stages of money laundering: placement, layering (distancing) and integration, each of which has monitoring mechanisms in the traditional banking system. The use of ICTs can facilitate each of these stages, and not all of them are necessarily present in all cyber laundering cases. For example, there is no need for the placement stage if the money already exists online or in the case of digital currencies, they are already pre-laundered because they are placed in financial institutions. Splitting the money into smaller amounts and then merging them again is a very easy solution to conceal trails and it is a very important tool in the hands of the perpetrators.[14]

3. Methods

Cyber laundering is based on electronic money, the main feature of which is that it does not have physical appearance and instead exists only as data present in a computer's memory.[15] Therefore, it is much easier to manipulate than cash and its origin can be hidden well. The traditional phase of placement was the riskiest for the perpetrator, as the sudden emergence of large amounts of cash of unknown origin can cause suspicion, but in the case of electronic money, there is no such threat.[16] Illegal cash can be easily converted into electronic money through e-payment systems, which are the basis for any cyber laundering methods.[17] These systems can be card or software based. The World Bank has four different models to distinguish them: merchant, bank issued, not bank issued, and peer-to-peer (P2P, direct transfer with no intermediaries).

Tropina has collected the following tools that can be used alone or in combination for money laundering purposes:[18]

(a) use of traditional currencies for online payments and banking
(b) use of digital currencies
(c) trade of virtual goods either with traditional or digital currencies
(d) trade of legal and illegal real goods
(e) use of online services

Here are some of the most typical forms of their use.

3.1. Online banking and payment

Online banking allows customers to make certain transactions without being personally present in the bank. This is beneficial for both the customers who save time and for

[13] Tropina 2014, 71.
[14] Tropina 2014, 71.
[15] Van Jaarsveld 2004, 692–693.
[16] Van Jaarsveld 2004, 694.
[17] Leslie 2014, 64.
[18] Tropina 2014, 73.

the bank who saves money. That is why today the vast majority of the world's banks have become internet-based. However, this has also resulted in this being the best-known and most common way of digital laundering.[19]

In many ways, it is beneficial for criminals to use the online banking system for their own purposes. Such a factor is, for example, that it is easy to open an account without having to confirm their identity, and that the layering phase can be easily accomplished, for example, by placing the money in smaller amounts into multiple accounts. In addition, jurisdictional issues arise, as online services can be used from any country, and there is a possibility for the offenders to open accounts on behalf of a non-suspicious victim of identity theft.[20]

As online banking clients are one of the main targets of cybercrime, the perpetrators are in any case forced to use regulated financial intermediaries to launder the wealth they have acquired. It is common to transfer the money in small amounts to the appropriate accounts while remaining below the reporting threshold. In the case of international transfers, it is easy to create a long and complicated transaction chain that is almost non-traceable.[21] The perpetrators can also acquire the help of money mules, of which there are two types: witting and unwitting. Witting money mules are typically people desperately in need of money. They are contacted and asked to accept transactions into their account, which they then have to forward to another account and they can keep a certain percentage of the amount for themselves. Unwitting money mules are usually victims of fraud: older or lonely people with whom the offender gets in close contact and then exploits them. In both cases, the use of social media is becoming more common. [22] The spread of this phenomenon is illustrated by the fact that some 800 money mules have been identified by the authorities in a joint action by Member States supported by Europol, of which about 300 have been indicted.[23]

Mobile banking services, which are especially popular in developing countries, can also be used for cyber laundering purposes. Mobile banking means that the customer pays with a mobile phone application and the unregistered SIM card required for that can provide a high degree of anonymity. In addition, telecommunications companies are not subject to money laundering but infocommunication rules. Similarly, non-bank e-payment service providers (such as PayPal) are not subject to regulation, which means using them is a quick and cheap way to move money. Certain services also allow P2P money transfers between users, which remain virtually invisible to the authorities.[24]

3.2. Digital currencies

Digital money for small payments is becoming the focus of growing interest. These are currencies that only exist online with no issuing organisation behind them. Users can

[19] Leslie 2014, 76.
[20] Leslie 2014, 77–78.
[21] Tropina 2014, 74.
[22] D'Alfonso–Satti 2014.
[23] Mezei–Nagy 2018, 27.
[24] Tropina 2014, 74–75.

use them between one another or change them for real money. Typically, they provide serious anonymity to users, are accessible anywhere and anytime, and can be quickly transferred, so it is understandable that criminals are using them more and more frequently.[25]

One of the most well-known forms of it is a cryptocurrency called Bitcoin, which uses blockchain technology to record transactions, and since the owner of each bitcoin is unknown, only the transaction chain can point to the current owner.[26] Bitcoin itself is generated data created by a highly complicated mathematical algorithm, after the users' hardware capacity is used for processing and approving other users' transactions (a process called mining). However, Bitcoin cannot be considered electronic money in the general sense, as it has no issuer, no organisation has oversight over it, and there is no asset backing it up.[27]

Bitcoin is used for trading both legal and illegal goods. One of the Deep Web's most notorious illegal trading markets, Silk Road, used it as its primary currency. Here it was possible to buy drugs, child pornography or Crime-as-a-Service (hiring hitmen or hackers, buying malware, etc.).[28] Attempts to regulate Bitcoin-like digital currencies, however, are typically unsuccessful, in particular, due to the fact that their system is fully decentralised; there is no central body that can enforce compliance with the law and there is no single platform where all users can be controlled or every user transaction can be monitored.[29]

3.3. Online casinos

Gambling and casinos have been a tool for money laundering for decades, where money can be laundered with cleverly placed stakes without the risk of any significant financial loss.[30] The reason behind their use can be briefly summarised by the fact that the when casino pays out the winnings from its revenue, it comes as a clean source of income unlike the chips which were previously bought with dirty money.[31]

Online casinos are much easier to access because people do not have to be physically present to gamble. They just connect to their webpage via the Internet. Gambling may be illegal or legal, but the latter is not a guarantee of lawful operation.[32] This is because casinos are very often registered in areas with very lenient legal environments, such as Lichtenstein, Southeast Asia or the Caribbean.[33]

Eight important factors can make online casinos a desirable tool for cyber laundering: virtual products, virtual transactions, the international nature of transactions, com-

[25] Tropina 2014, 75.
[26] Kim 2016, 78.
[27] Lakatos 2017, 29–30.
[28] Mezei–Nagy 2018, 26.
[29] Tropina 2014, 76.
[30] Tropina 2014, 76.; Mills 2000, 78.
[31] Leslie 2014, 73.
[32] Mezei–Nagy 2018, 28.
[33] Mills 2000, 86.

plexity of payment processing, high number of participants, legal uncertainty, high payouts, tax-free winnings.[34]

The use of virtual money and encryption technologies provides users with a new level of anonymity. In casinos accepting Bitcoin as payments that can be accessed via encrypted communication, such as TOR, the route of the money becomes untraceable.[35]

3.4. Video games

Video games of various styles and themes are fun and entertaining for many on the Internet. They can also be played from a mobile phone, a computer or other multimedia devices, and they very often have a specific economy that is tailored to the needs of the users using the game's currency. Massive multiplayer online role-playing games (MMORPGs) such as World of Warcraft and battle royale-like games such as Fortnite are particularly popular, where players can buy various kinds of cosmetic or game-enhancing digital goods with the in-game money they have acquired or purchased with real money. Nowadays, the size of the video game industry has exceeded the combined size of the film and music industry, and very often there are millions of players purchasing digital goods in their games.[36]

As it is almost impossible to trace in-game money transactions, this is a prime field for cyber launderers. The perpetrators create several different user accounts within the game, through which they transfer the in-game currency, and at the end, the last account changes it to real or digital money (such as Bitcoin), leaving no trace of their activity.[37] It is important to note that not all games have the option to purchase in-game money for real, so there can be a black market for those who want to progress faster and are willing to pay illegally for the in-game digital goods (the old version of World of Warcraft is a good example). This means that it is even harder to detect money laundering.

One example of the popular Fortnite game is that the perpetrators buy in-game currency with stolen credit cards and then sell it to players at a discounted price, for example, in exchange for Bitcoin.[38] Another videogame-related method is to sell the activation codes to video games (which are primarily used to identify those who bought the product) on one of the online gray markets such as G2A, for less than the original price. In this case, since the code is paid for with a stolen credit card, for which payment will be retracted, the video game distributor is the one realising losses from the scheme.

3.5. E-commerce

The e-commerce trade of various products and services is one of the fastest growing economic activities of today, involving more and more users. Huge sites like eBay,

[34] Fiedler 2013, 79.

[35] Mezei–Nagy 2016, 158.

[36] *https://metro.co.uk/2019/01/03/video-games-now-popular-music-movies-combined-8304980/* [01.04.2019]

[37] Richet 2013, 12.

[38] *https://www.independent.co.uk/news/fortnite-v-bucks-discount-price-money-dark-web-money-laundering-crime-a8717941.html* [01.04.2019].

Amazon or Alibaba provide millions of users with the opportunity to buy and sell their products, or trade with each other. This provides an opportunity for offenders to take advantage of its potential during the placement and layering stage of laundering. Buying and then reselling a variety of products is a good way to make money with criminal origins appear as if coming from a legitimate source. The more thoughtful version of this is that the perpetrators run a fake, non-functional webshop and conduct fictitious transactions, laundering a good amount of money.[39]

Consumer-to-consumer trading (C2C) is difficult to control, making it easy to be manipulated for money laundering purposes. At the same time, it only allows for a small amount of money legalisation, which is an obstacle to the large-scale application of the method.[40] Examples of such methods include the use of various online services, e.g. booking trips on Uber that never actually happen or booking accommodations on Airbnb in a similar way. In these cases, the service provider and the customer are both simple users who are not obliged to issue an invoice, so the false nature of the bookings is not revealed.

4. Answers to the new challenge

Anti-money laundering tools have evolved over decades, for example through the development and fine-tuning of monitoring mechanisms. These methods are all based on the cooperation of financial institutions. Money laundering in cyberspace is therefore a major challenge, as many of the new financial services do not require the use of traditional intermediaries to conceal the criminal origin of money. Various service providers are subject to very different regulations, sometimes even none at all. According to Tropina, there are three possible ways for the legislator to go forward: prohibiting, regulating and leaving it unregulated.[41] Prohibition as a solution, in most cases, fails to yield results, since the prohibition of technological solutions (such as blockchain or P2P) cannot be justified, just like cash cannot be banned because cash fraud exists. The prohibition of a specific service will only result in the continuation of the activity at a competing company. One of the tools favored by the legislator is the blocking of access to content (so-called internet blocking) with the help of Internet service providers, but it is a rather ineffective and easily dodged solution.[42]

Regulating new challenges coming from cyberspace is an important goal not only at the national but also at EU level.[43] An example of this is the EU's Fourth Anti-Money

[39] Tropina 2014, 77.
[40] Mezei–Nagy 2018, 29.
[41] Tropina 2014, 77–78.
[42] Dornfeld 2018, 26–27.
[43] Herlin-Karnell 2015, 61–62.

Laundering Directive, which has been in force since 26 June 2017.[44] For example, it extended the obligation of customer due diligence to gambling operators. It was the first time that electronic and virtual money were to be included in the scope of the Directive. Equally important is the Fifth Money Laundering Directive,[45] which entered into force on 9 July 2018.[46] It extends the scope to virtual currency platforms and wallet providers, ends the anonymity of bank accounts, and establishes central access mechanisms to bank accounts throughout the EU for FIUs. At the same time, the Directive lowers thresholds for identifying purchasers of prepaid cards and for the use of e-money, so payments above 150 and 50 euros respectively can only be made after the identity of the user has been identified.

In addition to amending criminal law, the EU is also aiming to create the tools and regulations needed at the EU level for national authorities to efficiently combat cybercrimes. Such was the introduction of a European Investigation Order, which, however, is most suitable for acquiring traditional evidence in another Member State. In regard to electronic evidence, a draft Directive[47] and Regulation[48] were proposed in 2018, which were needed because e-evidence is very fragile and easily destroyed or manipulated, so it needs to be acquired as quickly as possible in order to have a successful investigation. The adoption of the Regulation would introduce European Production and Preservation Orders, which would simplify and formalize the acquisition or preservation of electronic evidence in another Member State. By contrast, the Directive seeks to ensure that providers are subject to the same rules when providing services in the EU, regardless of the location of their headquarters. Earlier many large ICT companies had attempted to avoid EU regulation by having their headquarters in the United States and not in Europe. At the same time, the slow and cumbersome process of mutual legal assistance with third countries can be avoided, and instead the authorities may directly request service providers to obtain evidence relevant to criminal proceedings.

Among the answers given by the EU, it is important to highlight Directive 2006/24/EC on data retention,[49] which required the providers of telecommunications services to keep certain data. The declared aim was so that it can be available for the purpose of investigating, detecting and prosecuting serious crimes. Under the fifth article, the

[44] 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, 05.06.2015, 73–117].

[45] For more information consult Jacsó–Udvarhelyi 2018.

[46] 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, 19.06.2018, 43–74].

[47] 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.

[48] 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.

[49] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [OJ L 105, 13.04.2006].

obligation relates to communication and to subscriber data, while not including content data. The length of time for which the service provider may be required to keep the data was determined to be a period from 6 to 24 months from the date of the communication, depending on national legislation and the data was required to be forwarded to the competent authorities upon request. The adoption of the Directive was not free of debate and the European Court of Justice received two submissions from Digital Rights Ireland and Seitlinger concerning a preliminary ruling, which were discussed together (C-293/12 and C-594/12). In its judgment of 8 April 2014, the Grand Chamber declared the Directive invalid as it infringed Art. 7 (privacy) and 8 (right to the protection of personal data) of the Charter of Fundamental Rights of the European Union and the requirement of proportionality.[50]

The lack of uniform EU regulation is still a serious obstacle to effective action against cybercrime. In my opinion, it is necessary to develop new regulation in line with the Court's findings, and in particular the principle of proportionality, as its absence is a weak point in the new electronic evidence drafts. Particular attention should be given to incorporating appropriate safeguards and specifying which authorities have access to the kept data and in which cases.

5. Conclusions

It can be clearly seen how much the digital revolution has changed our daily lives and how it has made criminals' work easier. Though the Internet causes many difficulties and there are often reference to the "dark side" of the Internet, I join Tropina's view that this does not outweigh the benefits of using the global network in our daily lives.[51] This approach is underlined by the European Union in its official communication, which sees the creation of a digital single market as an important tool for economic development.

However, this requires trust from users, which can only be achieved by mitigating the dangers. Cyber laundering is an important tool for laundering wealth on the Internet and offline, and can be considered the engine of online criminality without which the perpetrators would not be able to enjoy the money they illegally obtained. Therefore, effective action against this phenomenon must be taken, which the Union and many Member States have recognised in recent years.

The development of new regulations and methods is the most important step, as the old solutions are not flexible enough to be used. The over-regulation of cyberspace and the seemingly simple but useless tools, such as Internet blocking, should be avoided. In this area, the EU has taken a number of steps in the right direction with the creation of European secondary law instruments already described in the previous chapter.

[50] Signorato 2015, 208–209.
[51] Tropina 2014, 81.

However, the lack of regulation of data retention, which in some ways needs to be resolved in the future, remains a serious problem.

In addition to regulation, it is also important to strengthen practical skills through trainings and practices, and increase the degree of cooperation, for example through Europol or the European Public Prosecutor's Office. Cybercrime, and therefore cyber laundering, is a global phenomenon that Member States cannot fight alone, and only joint action can bring good results.

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EXPERIENCE OF CASE LAW RELATED TO CORRUPTION CRIMES IN HUNGARY

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1. Introduction

The National Institute of Criminology conducted document-based research related to crimes of corruption from 2017–2018. The sample included the documents relating to all corruption crimes cases that ended with a final judgment (closed by a court decision or a termination of the proceeding) in 2016. In the first phase of the research, a full-sample questionnaire survey was carried out, the results of which show the general characteristics and experience of domestic case law in regards to corruption crimes. The exploration of the practice was facilitated by the processing of criminal files generated during criminal proceedings, during which we also examined the internal documents between the authorities and the final decisions.

In the course of the research, we were also interested to find out whether it can be proved based on the data of the empirical study that the financial interest of the European Union is violated by corruption crimes in the country.

2. European Union action against corruption in the context of Directive (EU) 2017/1371

Since the 1990s not only individual states but also various international organisations have been fighting corruption.[1] The EU first acted to protect its own financial interests and only later averted its attention to corruption and expanded its action to the general level of corruption.

The First Additional Protocol to the Convention on the protection of the European Communities' financial interests of 1995 was adopted as the first action against corruption in 1996. In 1997 the Corpus Juris also took action against corruption in order to protect the financial interests of the European Union. The 1997 Convention also targeted the fight against corruption involving officials of the European Communities and European Union's Member States.

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[1] About the activity of the European Union see more detailed: Görgényi 2004, 279–281.; Görgényi 2017, 76–90.

As the primary source of EU law, combating corruption was first introduced in the Amsterdam Treaty, followed by instruments in primary and secondary legislation and Community Law (i.e. Conventions), and was realised in non-legal instruments. It is also clear from the above that this effort has been constantly present in the European Union.

The latest stage in the process was the adoption of Directive (EU) 2017/1371 of the European Parliament and of the Council on 5 July 2017 for the fight against fraud to the Union's financial interests by means of criminal law. The Union regards bribery as a serious threat to the Union's financial interests. The Directive formulates the justification for regulation: *"Since all public officials have a duty to exercise judgment or discretion impartially, the giving of bribes in order to influence a public official's judgment or discretion and the taking of such bribes should be included in the definition of corruption, irrespective of the law or regulations applicable in the particular official's country or to the international organisation concerned*" [Preamble (8)].

The Directive distinguishes between financial fraud affecting the financial interests of the Union in the narrow sense (Art. 3) and other offences affecting the financial interests of the Union. The latter are money laundering, active/passive bribery and misappropriation (Art. 4). Active and passive bribery fall within the scope of the Directive if it is carried out by an official *"in a way which damages or is likely to damage the Union's financial interests*" [Art. 4 para 2 (a)–(b)]. The subject of passive bribery can only be an "official" while the subject of active bribery can be any person. The Directive defines the term "public official" in a broad sense [Art. 4 para 4 (a)–(b)], which should include "*all relevant officials, whether holding a formal office in the Union, in the Member States or in third countries*" (Preamble 10). In addition, individuals are often involved in managing EU funds. For that reason, "*the definition of 'public official' therefore 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"* [Preamble (10)].

3. Data of the empirical study

The research started in 2017 at the National Institute of Criminology and involved the examination of 209 criminal cases due to suspicion of corruption offences. 86% of the cases reached the court stage, approximately half of which (53%) ended with a first instance decision. The remaining 47% went to second instance, at which level 97% of cases were closed and a fraction of the cases (3%) required the use of a tertiary procedure. These figures reflect the fact that if the corruption act becomes known, most of these cases go to the court stage.

3.1. The definition and classification of corruption crimes

According to the academic literature, there is no universally accepted, unified definition of corruption. Our empirical research has also been based on the norms of the

Penal Code that is defined as the legal concept of corruption in literature.[2] However, among the various definitions, it is necessary to take into account the notion of corruption in the broader and narrower senses, both in terms of research and the exploration of corruption affecting the financial interests of the European Union. Based on this sense, these crimes typically include two types of actions: the so-called necessarily (that is, in abstract) and the not necessarily (that is, in concrete) corruption crimes: *"The necessarily (in abstract) corruption crimes means, that not only the committed act, but also the type of offense punishable by the legislator corresponds to the concept of corruption*".[3]

In our criminal law the following forms *of the necessarily corruption crimes* are basically known: corruption (§§ 250–255 and §§ 258/B–D of Act IV of 1978 of Criminal Code[4]), abuse of a function and indirect corruption (§§ 256–256/A, § 258/E old CC). Act C of 2012 of the Criminal Code[5] entered into force on 1 July of 2013 and called the legal facts active corruption (§§ 290, 293, 295 new CC) and passive corruption (§§ 291, 294, 296 new CC). In addition to these, the abuse of a function (§ 299 new CC) and indirect corruption (§ 298 new CC) still go on the facts.

The necessarily corruption crimes are listed in the Criminal Code. They were referred to as crimes against the purity of public life (international public life) in the old CC (Chapter XV, Title VII–VIII of the old CC). Title VII included the prosecution of a whistleblower, but it was not a matter of a corruption crime.[6] The new CC has abandoned the use of the category of crimes against purity of public life; it regulates active corruption, passive corruption, indirect corruption and abuse of a function in Chapter XXVII under the heading "Corruption Crimes".

In a broader sense we can speak about the not necessarily (in concrete) corruption crimes. In these cases, *"only the concrete act has a corruption nature, but the factual situation defining the concept of the crime type does not necessarily imply such an act. With a corruption nature any criminal offense, in principle, may be committed, but there are legal facts (such as abuse of authority, misappropriation of funds, misconduct or anti-competitive agreement in public procurement and concession procedures) of which the element of corruption often appears"*.[7]

3.2. Statistical characteristics of corruption crimes

The figures for criminal corruption are considered to be the minimum for corruption, writes *Ligeti*, partly because *"the corruption crimes known to the authorities are known and discovered from criminal statistics, while most of the crimes of corruption remain hidden. On the other hand, only the crimes of corruption are included in the*

[2] Győri–Inzelt 2016, 474.
[3] Hollán 2014, 35.
[4] Hereinafter referred to as old CC.
[5] Hereinafter referred to as new CC.
[6] The crime was repealed by the Art. 36 para (9) of the Act CCXXIII of 2012 from 1 February 2013.
[7] Hollán 2014, 35.

scope of criminal corruption, among the corrupt practices that implement the crime. For example, corrupt and criminal offenses that are formally non-corruption offenses can be qualified as misappropriation of funds or embezzlement. These acts cannot be attributed to the extent of criminal corruption, because it is not possible to decide by statistical means in which cases the corrupt behaviour was actually realized and in which case not. Thirdly, corrupt phenomena that do not commit a crime are beyond the scope of criminal corruption".[8]

Ligeti is undoubtedly right, but no matter how limited the statistical data is, we cannot set aside their analysis. During the research, we reviewed the ERÜBS-ENYÜBS[9] data, which is the number of cases completed by investigative authorities and prosecutors in the given year and some of its features. Looking back over a long period of time, corruption data show a high degree of stability: The annual frequency fluctuates between 500 and 1000 cases.

Compared to the total number of known crimes, corruption crimes are among the low-frequency offences. They represent a negligible proportion of registered crimes. Based on international examinations, we can conclude that, in addition to known cases, it should be considered that latency is much higher than frequency for this type of crime. However, opinions vary on the degree of latency,[10] although everybody agrees that only a small number of the actual cases become known to the authorities. Thus, by examining the registered corruption crime, we cannot know the full extent of the phenomenon, but we can gather a lot of relevant information that can help understand the nature of this social phenomenon. When examining the frequency of registered cases, we see that the number of cases has been stagnating for almost 30 years. The only exception is the year 2014, when the number of cases suddenly exceeded the level of three thousand but returned to the usual trend in the following two years. In the case of a low number of crimes, there are often significant differences in the number of cases registered between years without any significant change in the underlying causes. Even in the case of corruption offences, we need to look for the reason for sudden growth or decline in the attitude of investigative authorities as in actual frequency. While the frequency of crimes showed a clear increase until the turn of the millennium, the number of corruption crimes is basically oscillating around the 800.

The great majority (73%) of the corruption crimes in the sample were corruption, followed by abuse of a function, but this represented only 14% of the sample. If we break down the crime categories of the sample according to the crime types, we can see the following distributions:

[8] Ligeti 2016, 727–757.

[9] ERÜBS-ENYÜBS is the abbreviation of the Hungarian Uniform Investigation and Prosecution Statistics

[10] The neuralgic point of victimology researches is the examination of cases of corruption, especially in our country, because according to the law, both (or more) parties involved in the act commit a criminal offense and are punishable. That is why the person who admits bribing someone confesses the commission of a crime, so it is difficult to collect trusted data on this subject.

Table 1: Distributions of corruption crimes in the examined sample I.

	Criminal Code	Item number	%
Corruption	293, 253, 254, 255, 294, 290, 252, 291, 251, 295, 296	144	73
Abuse of a Function	299, 256	27	14
Theft	370, 316	7	4
For Unlawful Financial Gain Using Deceit	318	5	3
Abuse of Authority	305	5	3
Perjury	238, 272	3	2
Assault on a Public Official	229	2	1
Defamation, Slander	226, 227	2	1
Forgery	345, 277	2	1
Misappropriation of Funds	319	1	1
Total		198	100

Source: the document-based research.

Table 2: Distributions of corruption crimes in the examined sample II.

	Criminal Code	Item number	%
Active Corruption of Public Officials, Passive Corruption of Public Officials	293, 253, 254, 255	47	24
Active Corruption in Court or Regulatory Proceedings	295	30	15
Abuse of a Function	299, 300, 256	28	15
Active Corruption	290, 252	24	12
Passive Corruption	291, 251	23	12
Passive Corruption in Court or Regulatory Proceedings	296, 296	20	10
Theft	370, 316	7	4
For Unlawful Financial Gain Using Deceit	318	5	3
Abuse of Authority	305	4	2
Perjury	238, 272	3	2
Assault on a Public Official	229	2	1
Defamation	226	1	1
Slander	227	1	1
Falsification of a Unique Identifier	277/A	1	1
Misappropriation of Funds	319	1	1
Use of a Forged Private Document	345	1	1
Total		198	100

Source: the document-based research.

Active and passive corruption (24% and 15%) are the most typical, followed by abuse of a function (14%), then various forms of corruption (12% – 12% – 10%) come. The sample shows that corruption cases that have become known and reach the court stage are basically corruption or abuse of a function.

3.3. Who initiates the procedure?

Citizens typically report the crime, as 45% of the cases examined were reported by the observer (23.9%) or the victim[11] (22.5%). Here it is important to highlight that in more than a quarter of the corruption cases examined (26.3%), the perpetrator was working in law enforcement. This also means that the need for the use of secret investigative tools can be clearly seen in helping such cases come to light: In approximately 25% of the cases, the proceedings were started by the police.

Who initiates the proceedings is a characteristic for offences. The most "colourful" crime is corruption, in which both the natural person and the act of the authority can initiate the proceedings. In the case of corruption and abuse of a function, which are the majority of cases, the willingness of the victim and the person who perceives the crime to initiate proceedings is very high. In addition, it is also the legislator's decision to provide various "discounts" to the person who discovered the unlawful act in the case of corruption acts not yet known.

3.4. The characteristics from the perpetrator's side

Corruption crimes behave differently from other crimes; perpetrators also have other characteristics compared to criminals in general. In the 209 corruption cases examined, we identified 452 offenders.

Many have reported that corruption occurs when there is a conflict of interest between actors. The inherent characteristic of corruption is that it is in the interest of both parties to stay hidden. It is also true, however, that the greater the volume of corruption is, the wider the relationship is, but at the same time it is no coincidence that 46% of the cases examined are characterised by three or fewer parties. Examining the number of offenders based on the number of crimes (N = 209), it can be concluded that 50.2% of crimes are committed by a single offender, 15% are committed by 2 people and a larger number of offenders occur only in a fifth of corruption offences (20.1%).

According to the literature, the perpetrators of corruption are older persons and have a higher level of education than the perpetrators of other crimes. This is also true for the offenders in our research sample. If the age of the offenders is broken down in the data based on quintile, it can be seen that corruption offences are rather the specific type of offence for older offenders. Nearly 50% of the 36 to 55-year-old age group constitutes these types of crime, and even the 55-year-old age group has a high proportion of offenders.

Based on the above data, we can draw a profile of the perpetrators of the corruption offence: The perpetrators typically come from the middle-aged generation. They live with a spouse and have at least a secondary education. They typically are first offenders and commit the corruption act alone. They are persons who are socially well integrated, have a job and live in Budapest or in a city-level settlement.

[11] We use the term "victim", although it is known that this position may mean the active behaviour of "perpetrators" of acts of corruption, and the corruption offence have no natural person victim.

3.5. The nature of the case law

In the case of corruption crimes, the practice of sentencing is also different from the usual practice. Cases of imprisonment in these cases are more than twice as high as general practice, but a significant proportion of them are suspended, so the proportion of those sentenced to imprisonment corresponds to the offences of other crimes. They rarely get other penalties as the offenders.

The stricter practice of the use of the imprisonment penalty and their significant suspension are a sign of the duality of this crime in criminal justice. Strict convictions are being made because the perpetrators of these dangerous and socially damaging acts have to be condemned. At the same time, there is a large number of suspensions of penalties because the criminals generally did not commit crimes previously, and their more favourable social status than the average offenders offers them some kind of "protection" against punishment.

3.6. Issues of cumulative sentence

We examined whether there was any other crime in multiple counts of offences with the corruption act, which also included analysis according to the stages of the procedure. The results showed that, in addition to the crime of corruption in 26.8% of cases, other crimes were prosecuted by the prosecutor, as well. In 24.4% of cases, other crimes were also included in the final judgment, that is one fourth of other cases were associated with the crime of corruption. Most of the corruption crimes are in multiple counts with forgery of documents (23.2%), with a relatively high frequency of some forms of corruption. The latter is true for one fifth of the cases (17.9%). There are also a higher number of theft and fraud (12.5%) counts. Abuse of a function is typical in multiple counts with fraud, and besides theft, other types of corruption are committed. In addition to perjury, there is theft, and assault on a public official and misappropriation of funds occur usually only in corruption crimes in practice.

3.7. Duration of corruption cases

In the course of the research, we examined the evolution of the process timeline with a number of questions. We took into account the time relating to the criminal act, the time of the initiation of the investigation, the time of the completion of the investigation, the time of the indictment and the date on which the judgment became final.

It takes an average of 210 days from committing an offence to the initiation of the investigation (in months more than half a year: 7.5 months). An average of 326 days are between the ordering and closing of an investigation, which is almost a year. The duration of the prosecution is relatively short at 90 days. On average, 709 days are passed from prosecution to final conviction (that is 25 months or approximately 2 years). If we examine the length of time required to complete the two-stage procedure, we find that on average it is 40 months (about 3.5 years), and from the ordering of the investigation to the final judgment it takes 25 months (3 years).

4. Corruption damaging the financial interests of the European Union in the face of a domestic case

In the course of the research, the investigation of 209 criminal cases involved corruption crimes in the narrower sense, the so-called necessarily corruption offences. In one of these cases, the possibility of a criminal offence against the financial interests of the EU was raised in criminal proceedings for suspicion of budget fraud, and later during the proceeding, passive corruption raised suspicion. The essence of the case is as follows:

XY, his wife and eight more persons were members of the association AB. As a public benefit organisation, the association received a total of 50–100 million forints through various tenders, which included false invoices when submitting tenders. Accounts with false content either did not reflect actual investments or contained accounts with inflated values. Association AB submitted applications under Regulation (EC) No 11/2003 (III.5). VM, under the detailed terms and conditions of support for the implementation of cooperation between LEADER regions within the European Agricultural and Rural Development Fund, had concluded a cooperation agreement with three legal entities, including CD. VZ, referring to the membership of the association CD, in order to carry out its tasks within the agreement, promised money to Mrs. XY from a member of the association AB, who accepted the promised amount. These facts were revealed in a telephone conversation conducted by Mrs. XY in the framework of secret information gathering before the investigation was ordered. There was the criminal case under investigation for budget fraud according to Art. 396 par. (1) (a) of the Criminal Code, involving significant financial disadvantage as defined in para (4) (b), then the case against VZ, the member of association CD, for passive corruption according to Art. 291 para (1) of the Criminal Code. The investigative authority segregated the case of passive corruption and, based on Art. 190 para (1) (b) of the Criminal Procedure Code, terminated the investigation into budget fraud due to lack of evidence.

In view of the separation in the case, only the data from the proceedings of the crime of passive corruption were available, so it was not possible to examine the case of budget fraud. In the present case, although corruption offences have been suspected, the relationship between the financial interests of the EU and corruption is considered to be distant.

5. Final remarks

Corruption crimes represent a small proportion of all registered crimes in Hungary. The National Institute of Criminology, in the course of the research of all corruption criminal cases that were finalised in 2016, revealed the essential characteristics of this crime range, of which the perpetrator's side, the practice of sentence and the length of cases were specific. It should also be mentioned that law enforcement corruption occurred in an extremely high proportion (26.3%).

However, corruption appears not only at the national but also the international level. The most recent result of this is the Directive of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's the financial interests by means of criminal law.

In addition to the case described in the study, in one of the corruption offences investigated during the research there was no direct link between corruption crimes and the financial interests of the EU. In this area, the financial interests of the European Union may be harmed if EU-funded grants are involved or even used in corruption (in abstract and in concrete terms). However, based on the research described in the study, that cannot be proved.

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CRIMINOLOGICAL ASPECTS OF THE CRIMINAL OFFENCES AFFECTING THE FINANCIAL INTEREST OF THE EU

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Motto: "... the length of desires is infinite, and so it encourages even those who are well-off as well the holders of social power to commit crimes."
(Stephen Schafer)[1]

With the forming of the European Union and its financial and supporting systems, new types of criminal activities emerged. Despite the fact that these activities, which aim at the Union's establishment directly or through the institutes of the Member States, have serious negative effects on the financial interests of the Union, in some cases losses reaching into the billions of euros; the countermeasures taken against them are still not effective enough.

1. From fundamental rights to infringement

In the Preamble of the Charter of Fundamental Rights of the European Union (CFR) it is stated that *„The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment."*

The exercise of Fundamental Rights, which is included in detail in the document, requires respect for individuals, the human community and future generations.

Many of the Fundamental Rights, such as access to economic services, are given high priority by the Union and are not only recognized, but also supported, in order to ensure social and territorial cohesion.[2] The declaration of freedom of movement and residence[3] in the territory of the Member States is also a fundamental principle.

This logically not only brought behaviour which is a law-abiding and adequate to the principles of the European Union, but several other behaviours, for example certain economical activities, which not only directly or indirectly attacks the establishment of the European Union but also the values and interests it embodies.

Although certain behaviours that violate fundamental rights can be more visible for the public or can generate more serious discussions, like the question of the restricting

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[1] Schafer 1948.
[2] Art. 36. CFR
[3] Art. 45 (1) CFR

freedom of speech regarding directive on the enforcement of copyright in the digital single market,[4] the behaviours threating the monetary interests of the Union are typically much more subtle for the public eye, their negative effects are less visible and so the citizen's sensitivity towards them is also lower.

Therefore, amongst these acts the *level of latency* is high, despite the fact that they have dire negative impacts to the Union and its Member States.

2. Criminological approach

On the criminological aspect of the issue, it is important to clarify, what we mean by the definitions used, and what aspects of criminology can we approach to deal with these crimes.

The *common feature of delicts* that violate the financial interests of the European Union is that they directly or indirectly damage EU citizens.

Paying attention to the fact that the Union's budget is financed solely from the contribution of its Member States, the sources of which are the states' tax money, all of those behaviours that damage the Union's budget either on the income or expense side are considered to be part of this strictly prohibited group. The reason behind this enhanced defence is, that because of the facts stated above, we are talking about public finance, in which connection only total transparency is desirable and over which an assigned Union institute practices supervision while, indirectly, every EU citizen practices right to access.

According to this, *the criminological researches must encompass every norm violating behaviour, which may harm the Union's budget either on the income or on the expense side and which otherwise complies with the corresponding directives*.[5] Amongst these behaviours, some typically have high incidence so, because of their importance, they must be treated with extra emphasis on the criminological approach. These special behaviours are *fraud*, *corruption* and *economic offenses*.

Revealing criminological connections is an important goal as much as the inclusion of criminological approach in researches and the use of criminological and multidisciplinary methods in research. In connection with accomplishing these aims, information gathering and situation assessment can serve to enhance the effectiveness of criminological findings as much as improving the effectivity of the countermeasures taken against these crimes and at the same time, these facts have supporting and expanding functions too.

Criminology is the science, which approaches crime as a phenomenon of the society and studies the criminal act as a unique human behaviour. In accordance with the previous statement, criminology can be split into 6 fields:

[4] The adopted draft directive of the European Parliament's Committee on Legal Affairs on the enforcement of copyright in the Digital Single Market has received more criticism in relation to the restriction of freedom of expression and information as a fundamental right of the Union in its specific form. Among others, Julia Reda was a member of the Group of the Greens / European Free Alliance, along with many other civil organizations (e.g.: Liberties Advocacy, in: Folk 2018).

[5] Jacsó 2017, 44–53.

(a) *Criminal morphology* primarily focuses on describing the criminal behaviour's external features and characteristics with statistical tools;

(b) *Criminal etiological studies* aim at exploring the whys of criminal activities on either societal or personal level;

(c) The research on the *connection between crime and other deviant activities*, like drug abuse, form a separate field;

(d) *Crime control* dwells into the state's and society's reaction against crime and inter alia, institutional research conveys the effectiveness of individual legal consequences;

(e) *Victimology* researches the victims of crimes, their characteristics and the role of interactions;

(f) The last field of criminology is the *crime prevention*, which studies all the possible tools, solutions and methods, which can be used effectively against crime.

Looking through these possible approaches, we can conclude that not every areas are relevant to the project. For example, the connection between the criminal acts harming the Union's financial interests and other deviant activities, like alcohol or drug abuse, has not been proven by previous studies. Similarly, thanks to the specifics of the criminal activity, the victimological approach is also not very relevant and we lack the sources to explore the reaction of social and state given to this type of criminal activity.

So this paper will primarily focus on criminal morphological, criminal etiological and crime prevention approaches.

3. Criminal morphological review: Sources and obstacles

With the use of criminal morphological approach to the crimes threating the financial interests of the EU, we get a picture on the statistical representation, structure, tendencies of criminality as much as on the specifics on the offender's side. We can acquire this information from a couple of different EU sources. One large group of these sources is provided by reports and statistical databases that are derived from the national *crime statistics* of the Member States.

The other group are the data acquired from the EU's central statistics and other relevant organisation's sources, for example the State Audit Office's special report, the Europol's research results, the reports of the Group of States Against Corruption (GRECO), the supervising mechanism of the United Nations Convention against Corruption (UNCAC), the papers of the OECD's workgroup focusing on mitigating losses caused by corruption or the data of the European Anti-Fraud Office (OLAF).

In regards to these sources, during the analysis of the data a few important facts must be stated and taken into account:

– Certain professional bodies only research certain crime groups, so they only have information regarding these groups. Thus, for example, the OLAF, in regards of the criminal behaviours threating the financial interests of the EU, fights against fraud, corruption and other economic offence related attacks so they can only take action in cases that involve the EU's funding.[6]

[6] Szeverényi 2012.

– The exact definition of the same crimes, their elements, can differ in different Member States; thus, during the statistical analysis/interpretation of this national phenomenon, this fact isn't always taken into account.
– Even the legal framework of the investigative and intelligence official work and the other phases of the criminal procedure have differences on the level of the Member States, which can even result in the different legal assessment of the same criminal behaviour.
– Nevertheless, it is also true that the legal relevance of a factual element or of the conduct alleged may vary at different stages of the criminal proceedings in accordance with the interpretation/assessment practice of the determining authority.
– Behaviours damaging the Union's financial interests typically are subject to the authority of several areas of law that have different evaluation practices and standards, so it is possible, that a criminal act, which will be investigated in the future, at the time of its commitment, is subject to different regulations in a different legal field. This can complicate the subsequent taking of evidence during the criminal procedure.
– Certain economical phenomena, from the enterprises' point of view, will always have an effect on its income and assest, and therefore, subject to tax and accounting rules, the documentation of which is necessary. However, typically, if the other actor is natural person, the safekeeping of the documents (e.g.: receipt) is not obligatory because the legislations aiming the enterprise does not apply to them although, in a future criminal procedure, credible evidence with relevance to the procedure can be a key factor regarding the natural person.[7]
– This contradiction is pronounced particularly strongly and is a problem affecting the criminal statistical data in Hungary, in connection with value-added tax fraud. While there have been no significant changes in the criminal procedural approach, the tax administration practices has seen serious changes. The background of this is the difference in the nature of international expectations. Since 2012, the European Court of Justice made several condemning decisions regarding Hungary that resulted in the increase of the burden of authorities' objective justification in regards the guiltiness of potential norm or law violating person. The European Court ordered, that the Member States' tax authorities can only make ascertainment incriminating the receiver of the invoice, only if they can justify with objective evidence that the recipient was aware, or should have been reasonably aware, that he is participating in tax evasion committed by the issuer of the invoice or the participant upstream in the commercial chain.[8]
– Similarly, the distinction between unlawful and lawful (tolerated) behaviour is sometimes a problem, especially with regard to the activities of the OECD and the EU, which prefer to fight against money laundering and tax fraud. The border between *tax evasion*, *tax avoidance* or *tax planning* is very thin.

The crime of *tax fraud* – that is, fiscal fraud in the criminal sense – is precisely defined in the Penal Code. This is also the case, for example, when someone is abusing a tax allowance or is misusing the money from the budget for an activity not addressed

[7] See Kenyeres 2017, 63–72.
[8] Újhelyi 2017, 83.

to it. In contrast, the other two behaviours are not punishable by criminal law or even occasionally supported. For example, nation-states are able to direct either economic actors or individuals towards specific activities by transforming their own tax systems or incorporating certain benefits.

Tax evasion is the targeted behaviour of market participants, supported by professionals, to help them to cope with the deficiencies of a tax system that is not always able to keep up with the ever-changing economic/financial environment. A special form of tax evasion is the so-called *aggressive tax evasion*, which typically only involves large multinational companies, which are present in several countries, with sufficient structure and expert support and an information base to exploit the differences in tax rules of individual nation-states. Although there is no unlawful act, in this case, both the nation-states (at least the „losers") and the various international organizations[9] consider these attempts as undesirable.

– For some offenses, it is difficult to distinguish between bad business practices resulting from economic illiteracy or deliberate abuse. In the latter case, there is a well-structured strategy behind reckless investment or false financial reporting.
– Certain crimes, such as corruption, may have different national anti-corruption standards or anti-corruption strategies. All this can be reflected in the objective conditions of the action (for example, lack of the necessary human or institutional background), or even in regulatory gaps. This is partly due to the fact that not all EU Member States have sufficient experience in dealing with corruption.
– The high rate of hidden crimes is a particular problem. This is due to a number of reasons, including the lack of confidence in public/social bodies, as well as the fact that it is not possible to identify a direct victim in a significant portion of the acts. That is, seemingly, every actor is well off with the offending behaviour.

4. Criminological outlook

Although the European Union's criminal statistics data enables the traceability of other crimes (e.g. homicide, theft, robbery), other sources can also provide an insight into the crime groups and specific behaviours that are typically present in the subject we are investigating.

Crimes can be categorized into *4 distinct groups*:

– violent crimes (e.g. homicide, rape, robbery)
– blue collar crimes (e.g. vandalism, rowdyism, theft)
– other crimes (e.g. traffic crime) and
– white-collar crime.

The *white-collar crime* has a special features in connection with the offenders, the forms of criminal activities and the low interest of victims.

[9] Crystal Worldwide Group: Adótervezés? Adóelkerülés? Adócsalás? Mi különbség?, 2016.07.11, online: *http://crwwgroup.net/adotervezes-adoelkerules-adocsalas-mi-kulonbseg/.*

Some of these specialities especially on the field of the international corruption are the following traits:

– the perpetrators are well educated, come from high social standing and have high ranking jobs at their workplaces,
– the criminal behaviour is a rational decision from an economical aspect and
– there is a connection between the function of state and criminality (white-collar criminality is coded in the procedures of the state – in connection with the regulatory failure and operational deficiency of state).

The tools of committing white-collar crime are sometime the *corruption*=offences, but it is an independent form of crime too.

But what is the *definition of corruption* from a criminological aspect?[10] Defining the concept is the first task, which is not easy among the disciplines. The *general term* by the Transparency International is *„abuse of power for personal gain"*. The *sociological aspect* of the definition from Csaba Gombár is: „*... The corruption is a political phenomenon, ... Is the enemy of public interest and common good* ..". It means, that corruption can be an officials, economic or political corruption. The *economic approach* of corruption matches the criteria of *„principal-agent-client model"* from Lambsdorff. The *legal definition* according to the Hungarian Criminal Code prohibits and punishes some forms of corruption, like bribery, influence buying or racketeering (influence peddling).

The *corruption* from criminological aspect is *deviant behaviour,*[11] but the definition depends *on the level of corruption*:

– General level („it unfolds its corrective-distorting effects in the socially accepted order of the distribution of produced goods")
– Special level (transition; conduct of certain groups, which due to their particular life-style commit corruption offences either on the perpetrator or the passive side")
– Custom level (at least 2 persons, decisional possibility on the passive side, double satisfaction demands/needs, cooperation of sides, mutual benefits and mutual obligations, masking with legal activities, deception (to the society), secrecy and conspiracy)

While Western Europe and the European Union are doing better than other parts of the globe, they still have a long way to go to tackle corruption effectively. A lack of prioritizing anti-corruption reforms alongside rising populist rhetoric, combined with the weakening democratic institutions in many countries to make a strong case for renewed efforts.

The average score of Corruption Perceptions Index in the European Union is 66/100.[12] The results paint a sadly familiar picture: more than two-thirds of countries score below 50, while the average score is just 43.

Perhaps most disturbing is that the vast majority of the assessed countries have made little to no progress. Only 20 have made significant progress in recent years. It is

[10] See about the different criminological questions of corruption: Borbíró – Gönczöl – Kerezsi – Lévay 2016.
[11] Tóth 2017.
[12] Transparency International: Corruption Perceptions Index 2018. 2019, 12.

very important, that the high number of the Corruption Perceptions Index comes from the „petty corruption" or the „grand (large) scale" corruption.

The petty corruption is the corruption among low-level civil servants or workers and citizens. This is the so-called "everyday-life-corruption" with a small amount (smallest chums), which has different ratio in the corruptional (unlawful) acts committed in the Member States. The typical offenders of the grand scale corruption are high-level civil servants, business people, politicians. In connection with these facts, this type of corruption could influence the operation of state institutions or economic operators in order to enforce their own interests.

The „*2017 Serious and Organised Crime Threat Assessment*" highlights a number of *fraud areas* that are of particular concern to Europol and law enforcement in the Member States. The most typical forms of fraud are investment fraud, mass-marketing fraud, payment-order fraud, insurance fraud, benefit fraud, EU subsidy fraud, procurement rigging, and mortgage fraud.[13] Investment fraud relies on social engineering techniques – the use of deception to manipulate individuals into divulging confidential or personal information that may be used for fraudulent purposes – making it particularly hard to counter. This type of fraud can be highly lucrative, with one investigation revealing that an organised crime group generated estimated profits of up to EUR 3 billion from the activity.

The issue of *economic crime* is dealt with separately by Europol, encompassing unlawful behaviour by individuals or groups that have been realized in order to gain financial or professional benefits. In all cases, however, *economic benefits* are the main motive. This category includes fraud, including the criminalization of added value tax rules, which, incidentally, causes the Member States to lose billions of euros each year. Exceptional fraud (including tobacco smuggling and money laundering) has been particularly highlighted by the EU in the area of economic crime.

A *common feature* of behaviour is that it is precisely because of the identity of interest and in the absence of a direct natural person, that a relatively low risk of loss can be gained. The dangers of these acts have increased in the recent past by opening up the possibility of committing on the Internet and the availability of a global market that has thus evolved. These behaviours, which are capable of violating the financial interests of the EU in the ways listed here, are often associated with an internationally organized group of offenders who, by their nature, are able to take advantage of the divergent regulations of each country and the fact that potential victims are less conscious, especially in the case of cybercrime, recognize and do everything to reduce the risk factor. As opposed to the fact that in the case of criminal offenses, the proportion of forms of offense where there is no direct natural person is offended. This is true even if we believe that owing to the specificities of the EU budget, all citizens must indirectly suffer the negative consequences of crime.

[13] European Union: Serious and Organised Crime Threat Assesment. Crime in the age of technology. European Police Office 2017.

Given that these behaviours can cause significant financial losses, even for specific institutions, they are able to undermine business confidence and thereby destabilize otherwise well-functioning economic processes.

An important criminological issue in relation to crimes affecting financial interests of the EU is (criminal) prevention. However, criminal sanctions are not always an effective response! A Hungarian study[14] analysing convictions for corruption offenses has yielded interesting results. According to this *two different levels of corruption* could be distinguished in Hungary: the "small-scale" corruption and the "high-profile cases".

Then the so-called *"small-scale" corruption* includes crimes that are low risk for society occurring frequently in everyday life, for example bribing a police officer to avoid a ticket for speeding, drunken driving or other road traffic offenses, etc.

The so-called corruption of *"high-profile cases".* These are typically crimes committed by several persons over several years in an organized method. Therefore, these crimes are particularly dangerous to society. These are for example credit administration, unauthorized issuing of green cards, facilitation of smuggling of Hungarian unlabelled tobacco products, to facilitating the smuggling of alcoholic products not bearing the Hungarian tax stamp or seal, facilitating access to unauthorized social security contributions.

The two different types of corruption are very different in terms of the circle of perpetrators, their characteristics, the degree of the organization and the duration of the offense, and the extent of the damage caused, thus placing law enforcement agencies with different tasks.

The study concluded that criminal law could not effectively prevent the first group, the so called "small-scale" corruption. The most important reason for this is that the corruptional acts are generally accepted, and the society condones their existence. Therefore, the first and most important step would be to change the perception of society. Such a solution could be, for example, education, courses and training - starting from gradual schools. A good solution might be an "educational lesson" in primary and secondary schools, where children are made aware of the harmful effects of corruption through specific cases in the school environment. This will also develop the next generation more aware, for example, of managing their finances and will also help to raise their tax awareness.

Non-governmental organizations can also play a role as a tool of prevention and tackling corruption. Bringing together police, prosecution and civil society can help increase the number of public interest announcement.

There are many reasons for the appearance and persistence of corruption, which are inseparable from the general economic level of society, the existing regulatory environment, and the moral standards of society. These can also be important circumstances in connection with the second group of the corruptional crimes that are very dangerous for the society.

[14] Kerezsi–Inzelt–Lévay 2014, 47–48.

Such reasons may include for example obtaining an economic competitive advantage; in this case, both individuals and economic actors can be involved in the corruption act. Corruption (hidden party funding) can also be used to gain and maintain a political competitive advantage. So-called livelihood corruption can result from the difficulty or lack of access to services (e.g. in the area of housing, permits, loans, care). However, corruption can also be caused by the intention to avoid punishment (such as traffic offenses) or to obtain lighter punishment. The second group of corruption cases requires strong action. In this case, other state agencies and institutions should also assist law enforcement investigations. Internal and external control have to increase, strengthening integrity. Cooperation with, for example, the State Audit Office, the Hungarian Competition Authority, the National Bank of Hungary, the Government Audit Office or the Public Procurement Council should be improved.

The results of domestic research can also be used to combat crimes affecting the financial interests of the European Union. In doing so, it would be important to learn about good practices that have been developed, for example, in different countries in the field of prevention. As an institution, the European Union is incomprehensible to a large part of its citizens. Sensitizing citizens is also a difficult task in connection with unlawful acts damaging or violating the national budget. This is an even more challenging task for the EU institutions.

5. Good practices[15]

A more effective action against offenses harming the financial interests of the European Union – as has been seen in the context of the issues outlined above – requires a strong and coherent policy on the part of the EU Member States.

To this end, more active cooperation between Member States' law enforcement agencies and the Member States is a necessary condition as well as a much more coherent, coordinated, broader operational response, which can now give a sufficient response to these threats. A good practice initiative to achieve this is the *EU Policy Cycle on Organized and Serious Crime*. The method was adopted as a new system in 2010 and was fully established in 2013. The most important player in the policy cycle is Europol, the European Union's law enforcement body, which has set itself the goal of more effective action, especially against internationally significant crimes, organized crime and terrorism.

This initiative promises more effective action against offenses against the financial interests of the European Union, even with the previously reported problem, especially with regard to the reported crime group.

The four-step, four-year long new cycle of starting a cycle is based on the foundations/assessment/analysis – strategy-making/decision-making, and control/adjustment through a classical decision-making mechanism.

(a) As a first step, a detailed in-depth analysis of criminal intelligence (such as Frontex, Eurojust or the EMCDDA) will be carried out, with a focus on the most serious

[15] Europol: EU Policy Cycle. SOCTA. EMPACT (*https//europol.europa.eu*).

crimes against the EU and involves all human and material resources of Europol, and its knowledge base will be integrated. The result of *SOCTA* – the *Serious and Organized Crime Threat Assessment* – is a set of recommendations that can be a guideline for joint and coordinated work. The opportunity to do so is created by the Council of Justice and Home Affairs Ministers deciding on the priorities of the next cycle (first case between 2013–2017) for crime prevention and prosecution for individual Member States.

(b) The second step is to formulate a four-year strategic plan the *MASP*, a *Multi Annual Strategic Action Plan*, in the light of these priorities, while precisely defining strategic goals. All resources available at Member State and EU level will be taken into account during implementation.

(c) The third stage is the launch of *EMPACT* ("*European Multidisciplinary Platform Against Criminal Threats*"). This defines the specific action plans – the *OAPs* (*Operative Action Plans*) – against the major threats.

(d) The fourth step is to examine the *effectiveness* of each specific action plan, and through this, the effectiveness of the entire activity or action, and in particular, to assess the OAP's impact on each threat. The annual reports submitted by the priority managers as well as the ongoing interim evaluations by Europol represent a major opportunity for, inter alia, interim corrections, to preserve the "up-to-date" nature. The Commission reports annually to *COSI* (*Standing Committee on Internal Security*), the Standing Committee on Operational Cooperation on Internal Security, on developments of implementation. The policy cycle is concluded by an independent and in-depth evaluation.

Interim reviews provide the opportunity to *correct* or *supplement* the steps taken so far, while the findings and conclusions of the final evaluation are taken into account when planning the next policy cycle.

6. Conclusion

All international investigations aimed at countering the attacks on the financial interests of the EU state that pushing criminological aspects into the background and the inadequate knowledge of the behaviour that harms the financial interests of the Union makes it difficult to identify the characteristics of the phenomenon, to understand the underlying processes and thus to prevent them effectively.

In the special report of the European Court of Auditors,[16] several critical observations have been noted. It states that *„(T)he Commission does not have comprehensive and comparable information on the detected fraud level in EU spending. The Commission's own reporting of detected fraud in areas managed directly by it is not complete. Within shared management, the methodologies Member States use to prepare their official statistics on detected fraud differ, and the information reported in the Commission's Irregularity Management System (IMS) is incomplete. The Commission does*

[16] European Court of Auditors: Special Report. Combating fraud with EU spending: action is needed. VI.

not carry out comprehensive checks to ensure the quality of data reported in the IMS; nor does it ask Member State authorities to provide assurance as to the reliability of the data reported. The spending DGs perform partial checks on irregularity reporting systems at national level within the framework of system audits."[17]

The action taken is not effective enough despite the fact that OLAF introduced two new indicators in 2015: the *„Fraud Detection Rate"* (FDR) and the *"Fraud Frequency Level"* (FFL). FDR represents the value of fraud detected, presumed or established in a Member State as a percentage of all payments made in that country during a given period, while FFL is the number of fraudulent, perceived or established fraud in a Member State as a percentage of the total number of irregularities detected in that country during that period.

IDR is the "*Irregularity Detection Rate*" and IFL is the "*Rate of Irregularity (Irregularity Frequency Level)*". According to the indicators, there are significant discrepancies in the level of irregularities and fraud detected and reported by the Member States.[18] A similar problem is that the Commission's analysis of fraud patterns and fraud risk is inadequate, as well as the causes of fraud.

The effectiveness of action against crimes affecting the financial interests of the European Union also depends on the level of trust in connection with their governments and with the Union' institution. Confidence in national political institutions (parliament and government) and in the EU institutions declined significantly between 2007 and 2011 in most EU countries during the economic crisis.[19] For example, Greece, Romania, Slovakia had the most significant decline, while in a number of countries such as Sweden, Germany, the United Kingdom, Hungary or Poland, confidence did not or only slightly decreased. However, the decline in trust in political institutions was not permanent in most Member States, and between 2011 and 2016, confidence in the government and parliament started to increase again. In many countries, however, growth has been more subdued than in the previous period, leaving confidence in political institutions below the 2007 level in 2016. This circumstance also affects the effectiveness of governments' political messages in the field of crime prevention.

While there are more research and information available on other crimes, such as corruption, it can be concluded that there are serious shortcomings at EU level in this area. Comprehensive and wide-ranging statistical reporting, criminological background testing, and central success without a central database cannot be achieved. „*Quite recently, there have been calls for "an evidence-based policy" at a national and international level, or, in other words, the application of experience and scientific methods to decision-making at each phase of the preparation of norms. The starting point of evidence-based Criminal policy is, without a doubt, the existence of reliable data."*[20]

[17] European Court of Auditors: Special Report. Combating fraud with EU spending: action is needed. VI.

[18] For example, ten Member States reported fewer than 10 suspected fraud cases for the entire 2007–2013 programming period and twelve Member States had a fraud rate below 0.1%. Eight Member States classified more than 10% of all reported irregularities as fraudulent cases, while in 14 other Member States this figure did not reach 5%.

[19] Medgyesi–Boda 2018, 420.

[20] Cepeda 2016, 23.

This is despite the fact that the Union is committed to taking action against financial offenses against its financial interests, and not only supports the 2018–2021 policy cycle in many ways but has already designated its next period from 2022–2025.

Ralf Dahrendorf, the famous sociologist wrote: "The political system could be changed in six months, for the transformation of the economy we need six years, but to form a society following appropriate ethical norms and patterns maybe six decades are not enough!"[21] This process needs criminological aspects of research.

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[21] Tóth 2017, 28.

THE PROBLEMS OF COLLECTING AND EVALUATING EVIDENCE OF CROSS-BORDER CRIMES IN THE EU

Prof. Dr. Ákos Farkas[*]

1. Criminal procedure and evidence law

One of the tasks of the modern sovereign state while practicing its right to punish is to investigate crimes and sanction perpetrators by its judicial organs. In the course of these activities, the state has to respect constitutional guarantees, human rights and the autonomy of the individual, which protect the defendant from the despotism of the judicial authorities and make the judicial process fair and work under the rule of law.

The EU is based on the ideas of freedom, security and justice. In this space, the effort of unification from the side of the EU and the diversity of states coexist. Concerning the diversity the Treaty on the Functioning of the European Union (TFEU), Art. 67 para. 1 makes it unambiguous that the EU respects the fundamental rights, different legal systems and traditions of the Member States (MS).

With these MS who have different legal systems, legal traditions exist not only side by side but cooperate with one another. The main object of the cooperation as Art. 67 para. 3 of TFEU declares is to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

2. The law of evidence as national law

To guarantee high-level security in the EU means that the EU citizens shall live their lives in such a social and legal environment where

– the law making processes are unambiguous, the legal rules are clear and understandable, their effects are predictable and foreseeable and the authorities who make the law work (judiciary, public administration) function under the rule of law;
– the level of criminality and the fear of crime is acceptable.

The establishing of high-level security is moving on in an EU where the judicial systems, the rules of criminal law and procedure of the MS are not only independent

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but remarkably different from each other. Among the differences I would like to stress the law of evidence.

The explanation of this choice is hidden in the very importance of these rules. It is impossible to decide on criminal responsibility, which is the grounds and main goal of a fair trial, without lawfully investigating crimes and defendants and collecting and evaluating evidence.

The committing and the clearing up the so-called EU crimes (terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime) necessarily arc over the national borders, which raises problems for the application of rules of evidence.

If an EU crime concerns two or more MS, three questions has to be answered:
– which MS has jurisdiction;
– which MS's rules for clearing up crimes and evidence have to be applied;
– is the evidence collected in another MS admissible before the court which has jurisdiction in the criminal case.

Each MS arising from its sovereignty shall apply its independent rules of criminal procedure and rules of evidence. This fact will not cause problems till the MS needs assistance in criminal matters. There are two types of cooperation in criminal matters.

The first one is vertical cooperation, namely the tools of traditional mutual legal assistance. They were characterised by what can be called the "request principle":[1] One State submits a request to another State, which is more or less free to determine whether it will comply with it or not, but this process is circumstantial, long-lasting and needs diplomatic channels. Therefore, the outcome of a request under the traditional system could be rather uncertain. Additionally, practical problems such as deficient language skills and missing contact between the national authorities would frequently occur. Furthermore, there used to be numerous bilateral and multilateral international agreements defining different formal and material prerequisites for the granting of mutual legal assistance. Due to this fragmentation, it was not always easy to determine which rules were to be applied when deciding on a request.[2] This is why the EU dispensed with this form of legal assistance and since 2000 it has been out of the criminal cooperation system of the EU.[3]

At the end of the 1990s in place of the vertical cooperation system appeared the need for a horizontal cooperation system, which means the form of immediate, operative cooperation between the Member States. The last convention from 2000 was dedicated to this form of legal assistance.

On 15–16 October 1999 in Tampere, Finland, the Council of the EU declared mutual recognition the cornerstone of mutual legal assistance in criminal matters. Mutual

[1] COM (2000) 495 final, 2.

[2] See Zimmermann–Glaser–Motz 2011, 56–80.

[3] The form of vertical cooperation is the conventions. The last convention in criminal matters in the EU was the Convention of 29th of May 2000 on the Mutual Assisantce in Criminal Matters between the Memeber States of the European Union. This is in force todays.

recognition is not a new principle in EU law. For a long time it has existed as a decisive rule (mutual recognition of diplomas, the quality of goods). When it was initially being applied to the field of criminal matters, the principle of mutual recognition did not have any foundation in European treaties. Instead, it was merely based on political will.

3. The principle of mutual recognition

Although till 1 December 2009 and the coming into force of the Treaty of Lisbon the principle of mutual recognition was not the part of the EU Treaty, it appeared in several framework decisions, the best known among them being the European Arrest Warrant.[4]

The definition of mutual recognition as it stands in the Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters is the following: "Mutual recognition is a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are accepted as equivalent to decisions by one's own state. Mutual trust is an important element, not only trust in the adequacy of one's partner's rules, but also trust that these rules are correctly applied".[5]

Within mutual recognition – as Schunke notes – "it is presumed that all Member States have functioning criminal legal systems with due process rights, and this mutual trust is the fundamental basis of the system". On the other hand, most of the EU instruments for mutual recognition contain some principal provisions – often contained in the recitals – on the protection of fundamental rights. A common phrase which is found says, for example, that the legal instrument in question "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Art. 6 of the Treaty of the European Union".[6] The mutual recognition system allows Member States' criminal laws to diverge, but they must trust in the validity of each other's procedures. Member States are hence expected to duly recognise decisions taken by another State's authorities and enable the swift execution thereof.

The three main features of mutual recognition are therefore the following:

(a) mutual trust in the adequacy of the rules applied in other Member States, even though they might – and normally will – differ from one's own norms and regulations which are applied in a comparable case in the domestic legal order;

(b) mutual trust in the correct application of these rules in the other Member States by the courts and other law-executing bodies and – as a consequence –

(c) acceptance of the results achieved in the other Member State on the basis of its laws and regulations as applied by its courts and other law-executing bodies without the result being checked against domestic laws and regulations.

[4] Council Framework Decision 2002/584/JHA 13 June 2002 on the European Arrest Warrant and the surrender procedure between the Member States.

[5] COM/2000/0495 final 4, Brussels 26.07.2000.

[6] See Schunke 2015, 45–53.

Consequently, the Commission rightly concluded: "Based on this idea of equivalence and the trust it is based on, the results the other state has reached are allowed to take effect in one's own sphere of legal influence. On this basis, a decision taken by an authority in one state could be accepted as such in another state, even though a comparable authority may not even exist in that state, or could not take such decisions, or would have taken an entirely different decision in a comparable case".[7]

As *Satzger* notes: "At first glance it becomes apparent that this is a big step in fostering European integration. The almost natural and traditional mistrust of everything which is 'foreign', 'alien' and 'unknown', is to be replaced by trust – an inversion ordered by law for the good of the creation of a common European judicial space".[8]

Despite all appropriateness and every positive effect of the principle of mutual recognition, this principle can be viewed as a tearing test of sovereignty, while it requires the unconditional trust in the constitutional order, the recognition of the respect of human rights and the rule of law in a foreign MS.

I would like to note that in the last two decades this kind of trust was not unconditional, and it seems to be more fragmented today than earlier as the examples of the economic crisis of Greece, Brexit, migration and the problems of border control and the rise of modern nationalism show.

The first break through the wall of unconditional acceptance and execution of European arrest warranst based on mutual recognition was the Joint Cases of Aranyosi and Căldărau, where the CJEU approved the decision of the Court of Bremen, Germany, which denied the surrender of the above-mentioned two persons to Hungary and Romania. The reason of denial was that there is a danger of breaching the rules of the convention against torture and other cruel, degrading and inhumane treatment in the prisons of these two MS.[9] The CJEU with these decisions made it possible to insert the human rights aspect into the decisions that are based on the principle of mutual recognition.

4. The principle of mutual recognition and the law of evidence

The concept of mutual admissibility of evidence subsequently emerged in the programme of measures to implement the principle of mutual recognition (which states that the aim of orders for the purpose of obtaining evidence is to ensure that evidence is admissible) and in the Green Paper of 2009 on obtaining evidence and securing its admissibility. At the time, however, the idea of mutual admissibility of evidence was more wishful thinking than a realistic concept. As Kusak notes:[10]

[7] COM/2000/0495 final, 4 Brussels 26.07.2000.

[8] See Satzger 2018, 318.

[9] Joined Cases of Aranyosi and Căldărau C-404/15 and C-659/15 PPU; Mutual confidence is not a blind trust. Fundamental rights protection and execution of the European Arrest Warrant: Aranyosi and Căldărau. CMLR (2016) 1675–1704.

[10] See Kusak 2019, 394.

(a) All differences deriving from differing legal systems and approaches to evidentiary issues still exist between Member States in the field of evidence gathering. This may lead to situations where, given the differences between national procedures, evidence gathered in one Member State will not be admissible in another Member State because the way the information was obtained does not fit the latter's procedural requirements. These differences, therefore, may have a negative impact on mutual trust between Member States, raise questions as to the status of evidence gathered in the course of EU cross-border cooperation and make the concept of mutual admissibility of evidence simply unrealistic.

(b) It is doubtful whether the forum regit actum principle is in line with the philosophy of mutual recognition and capable of accommodating admissibility concerns in the EU.

The Treaty of Lisbon brought changes in the dimension of mutual recognition. With this rule a new side of the mutual recognition became visible: the mutual recognition/admissibility of evidence.

The first instrument that implemented the principle of mutual recognition in the field of obtaining evidence was the FWD on the execution of orders in the European Union for freezing property and evidence of 22 July 2003 (EFW).[11] It addresses the need for immediate mutual recognition of orders intended to prevent the destruction, transformation, moving, transfer or disposal of evidence. To this purpose, it allows Member States to issue so called freezing orders to secure evidence or facilitate the subsequent confiscation of property, art. 3. The FWD thus aims to maintain pieces of evidence that are already available in one State so that they may be used by other States, as well. It does not, however, provide ways for the Member States to exchange the secured pieces of evidence. For this transfer, the prosecuting States still have to revert to the traditional system of mutual legal assistance as basically laid down in the conventions on mutual assistance of 1959 and 2000. If the freezing order is transmitted correctly (as provided by Art. 4), the judicial authority of the executing State is obliged to execute it without any formality and legal scrutiny (Art. 5). A provision of particular relevance is Art. 3(2): It abolishes the requirement of double criminality for a catalogue of 32 roughly defined categories of offences such as "terrorism", "sabotage" or "computer-related crime".

The FWD on freezing orders left the subsequent transfer of the secured evidence to the traditional, time-consuming and barely efficient system of mutual assistance. In order to fill this gap, the Council adopted – after long debates – the FWD on the European Evidence Warrant (EEW)[12] for the purpose of obtaining objects, documents and data for use in criminal proceedings. Its main objective was to replace the traditional system of assistance in criminal matters and to further enhance mutual recognition in

[11] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196.45.

[12] Council Framework Decision 2008/987/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350/72.OJ 2003 L 196/45.

the field of gathering evidence. However, the scope of the FWD for the EEW is limited to pieces of evidence that already exist [Art. 4 (3)]. Therefore, the issuing State cannot require the executing State to produce new evidence, for instance by means of interrogations or other types of hearings, bodily examinations, interception of telecommunications or covert surveillance. Art. 11 provides that the executing authority shall recognise an EEW without any further formality and execute it in accordance with its domestic procedural rules [Art. 11(2)]. However, the issuing authority can request that formalities which it considers important for the further proceeding are taken into account (forum regit actum principle, Art. 12). The issuing authority must be satisfied that the obtaining of the objects, documents or data is necessary and proportionate [Art. 7(a)] and that it could obtain the respective pieces of evidence in a comparable case on its own territory [Art. 7(b)]. In conformity with the general idea underlying the recognition principle, it is thus the issuing State's duty to ensure that these requirements are met.

The newest legislative measure in the field of collecting evidence in the EU is the European Investigation Order (EIO), which is believed to be more efficient than the EFW and the EEW. An EIO is to be issued for the purpose of having one or several specific investigative measures carried out in the state executing the EIO with a view to gathering evidence. The instrument applies to all investigative measures aimed at the gathering of evidence, as well as at obtaining evidence that is already in the possession of the executing authority [Art. 1(1) of the EIO Directive].

The question of how to address the admissibility of evidence gathered in a cross-border context is long-standing both within the European Union and in the context of the Council of Europe's cooperation in criminal matters. The 1959 Convention,[13] which was originally the sole legal basis for mutual legal assistance between the EU Member States, relied on the locus regit actum principle (Art. 3), The locus regit actum principle assumes that the decisive element in determining the applicable law is the location of the evidence or the investigative measure. This concept, however, is incapable of overcoming differences between national procedures, as a result of which sometimes information gathered in a requested Member State cannot be used in the requesting state because the way the information was obtained in the former does not fit the national procedural requirements of the latter.

Therefore, in order to maximise the chances of evidence gathered abroad being admissible, a new 2000 EU Mutual Legal Assistance Convention[14] provides a new approach – the forum regit actum principle (Art. 4 of the 2000 Convention). According to this principle, a requested Member State that is executing a request must comply with the formalities and procedures expressly indicated by the requesting Member State. According to Kusak, the reason for this provision is to facilitate the use of information gathered by mutual assistance as evidence in subsequent proceedings in the requesting

[13] European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20.04.1959, European Treaty Series No. 30.

[14] Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, 12.07.2000, OJ C 197.1, hereinafter: the 2000 EU MLA Convention.

Member State.[15] The words "formalities and procedures" should be interpreted in a broad sense and may include, for example, the situation where a request indicates that a representative of the judicial authorities of the requesting Member State or defence representative must be permitted to attend the collection of evidence from a witness.

In academic literature the following conceptual flaws and weaknesses of forum regit actum have been reported:

- forum regit actum does not involve a commitment to accepting the admissibility of evidence gathered in accordance with the principle, which means that a request to take certain formalities or procedures into account does not ensure that the effort applied in gathering evidence will be rewarded with admissibility;
- it has a very limited effect on the level of admissibility due to the fact that it applies only in a one-on-one relationship and has no potential to ensure admissibility within the entirety of the EU;
- it lacks transparent rules in terms of the lawfulness of the way evidence is gathered;
- the forum regit actum principle applies only in the case of gathered evidence, meaning that already existing evidence cannot fall within its scope.[16]

The TFEU has offered an alternative to forum regit actum. Art. 82 para. 2 point a of the TFEU makes it possible for the European Parliament and the Council by means of directives to establish minimum rules which can concern, among others, the mutual admissibility of evidence between Member States.

The greatest added value of the concept of common minimum standards, as Kusak notes, is that, in contrast to the forum regit actum principle, it has the potential to finally tackle admissibility concerns in the EU. First of all, common EU minimum standards correspond with the mutual recognition philosophy by enhancing mutual trust between Member States as to how evidence is issued and gathered. Moreover, minimum standards have the potential to accommodate the weaknesses of forum regit actum. First, the gathering of evidence under commonly agreed minimum standards would be complemented with per se admissibility, which resolves the problem of uncertainty of forum regit actum and facilitates cooperation since the rules would not vary depending on the Member States concerned. Secondly, due to the fact that common standards would be applicable within the entirety of the EU, the evidence gathered in accordance with these would enjoy per se admissibility status in all Member States, not only in one-to-one relations as in the case of forum regit actum. Thirdly, minimum standards would consist of transparent rules as to the way evidence is gathered, which could do away with dilemmas regarding lawfulness.[17]

[15] Kusak 2019, 393.
[16] Vermuelen 2011.
[17] Kusak 2019, 396

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COLLECTION AND EVALUATION OF EVIDENCE IN THE CONSTITUTIONAL MULTI-LEVEL SYSTEM: THE HIDDEN EFFECTS OF EU LAW

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1. Introduction

The protection of its financial interests is a core task of the European Union (EU). Many legislative and executive measures have this aim, among them the institution of the European Public Prosecutor's Office (EPPO)[1] and the Directive on the fight against fraud to the Union's financial interests (so-called PIF Directive).[2] Thereby, the protection of the financial interests of the EU has become a motor for European criminal law and criminal procedure.

Nonetheless, the field of EU criminal law and criminal procedure also faces particular challenges. This is because the EU operates in a multi-level constitutional system where different constitutional guarantees apply and could potentially conflict. Although these different levels of constitutional guarantees are not a unique feature of EU criminal law and criminal procedure, this is an area of law where problems often occur because the protection of fundamental rights is particularly important.

The following paper will take a closer look at some of the issues deriving from having different constitutional levels in the area of criminal procedure law, the "hidden effects of EU Law" as they are called here. The paper will first start by giving a brief overview on the constitutional multi-level system in the EU, then it will explain what the hidden effects of EU Law are. Two examples will show the impact of the multi-level constitutional system on national procedure law before the paper ends with a brief conclusion.

2. The constitutional multi-level system

In the context of EU Law, there are three levels of constitutional protection: EU Fundamental Rights, the European Convention on Human Rights and national fundamental rights. These levels partly overlap but can also contradict each other.

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

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

The EU constitutional system is mainly embodied in the Charter of Fundamental Rights, but it also includes fundamental freedoms and other important individual guarantees. In this context, it should be noted that the EU has enacted several directives on procedural guarantees[3] that can be regarded as shaping EU fundamental rights and which, accordingly, are part of the EU constitutional system despite being secondary law.[4] In principle, the Member States are bound by EU Law. However, the scope of the applicable rules can differ: the Charter of Fundamental Rights has a different scope than the procedural guarantees contained in EU Law.

The European Convention on Human Rights is an international treaty that has been signed by 47 states. The Contracting Parties have to make sure that their law and procedure respect the human rights contained in the Convention (Art. 1 ECHR). In some states, e.g. Austria, the European Convention on Human Rights has been given constitutional value; in others, such as Germany, it is merely on the same level as ordinary law, although it is still given particular importance in the interpretation of the law.[5] The EU is not – yet – party to the Convention. However, the fundamental rights in the EU Charter are mostly interpreted in conformity with the European Convention on Human Rights, which means that they are not intended to offer less protection than the Convention [see Art. 52 (3) Charter of Fundamental Rights (CFR)].

Each Member State also has national constitutional guarantees, which may differ considerably from the European Convention on Human Rights and the EU fundamental rights.

Experience has shown that most conflicts arise between national constitutional law and EU Law.[6] The European Convention on Human Rights does not give rise to as many conflicts because both other legal orders aim at respecting the Convention, and the Convention does not prevent higher standards of fundamental rights protection (Art. 53 ECHR). Therefore, this paper will focus on EU Law. This also goes well with the overarching topic of this volume, which is the protection of financial interests of the EU by means of criminal law.

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[3] Directive (EU) 2010/64 of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [OJ L 280, 26.10.2010, 1–7]; Directive (EU) 2012/13 of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [OJ L 142, 1.6.2012, 1–10]; Directive (EU) 2013/48 of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [OJ L 294, 06.11.2013, 1–12]; Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [OJ L 65, 11.3.2016, 1–11]; Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [OJ L 119, 4.5.2016, 89–131]; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [OJ L 132, 21.5.2016, 1–20].

[4] See, on this argument, Schneider 2019, 623 f.

[5] Satzger 2018, § 11, margin no. 8 ff.

[6] See, for example, Case C-399/11 Stefano Melloni v Ministerio Fiscal (Court of Justice, Grand Chamber, 26 February 2013); Case C-105/14 Criminal Proceedings against Ivo Taricco and Others (Court of Justice, Grand Chamber, 8 September 2015). See, also, Dannecker 2015, 27 f.

3. Obvious and hidden effects of EU law

As the title already indicates, this paper is about the hidden effects of EU Law. What is meant by that? The answer is simple but tautological: Hidden effects are the ones that are not obvious. What, then, are obvious effects of EU Law? Obvious effects are those effects that EU Law intends to have.

For example, there is fairly new EU legislation on procedural guarantees.[7] Most of it is in the form of directives. The Member States are obligated to transpose these directives into national law [see Art. 288 (3) TFEU]. Accordingly, the obvious effect of the directives is to harmonise national law [see Art. 83 (2) TFEUG]. This is what is intended by EU Law.

Another example: The most common form of procedure before the European Court of Justice is the preliminary ruling.[8] The decision by the Court is intended to give guidance on the interpretation of EU Law in the case in question and in similar cases (see Art. 267 TFEU). This is the obvious effect. In the following, the paper will give some examples of effects of EU Law that are less obvious or hidden.

4. The relevance of CJEU jurisprudence in competition law for (ordinary) national criminal procedure

The first hidden effect is the impact that CJEU jurisprudence in competition law has on ordinary national criminal procedure, which means criminal procedure in non-competition cases.

4.1 CJEU jurisprudence on defence rights, particularly on Legal Professional Privilege

There is a lot of jurisprudence by the CJEU on EU Competition Law. This jurisprudence is particularly interesting for the field of criminal law because competition law proceedings are punitive in nature and therefore a good model for criminal proceedings. Many judgements had to deal with problems that related to the collection and use of evidence in competition law cases in which a company was to be fined.[9] The CJEU has developed procedural safeguards in this context.[10] One safeguard that has been shaped in competition law cases is the Legal Professional Privilege, LPP in short. The LPP guarantees the confidentiality of the communication between lawyers and their clients. It is therefore of particular importance in the area of evidence. Accordingly, it can serve as an example here.

[7] See fn. 1103.

[8] In 2017, out of 739 new cases there were 533 questions for preliminary rulings, see CJEU 2017, 36.

[9] See, e.g., Case C-550/07 P (GC) Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission [2010] ECR I–08301; Case 374/87 Orkem v Commission of the European Communities [1989] ECR-03283.

[10] For a concise overview on procedural guarantees in EU competition law, see Scholten – Simonato 2017, 36 ff. For more information, see Schubert 2009, 163 ff.

The European LPP has been the focus of several cases, among them *AM & S Europe*[11] and *Akzo Nobel*.[12] The findings of these cases can be summed up as follows:[13]

First, European Law only protects the relationship between the client and independent lawyers.[14] Correspondence and other documents shared with in-house lawyers do not fall within the scope of LPP. Secondly, the LPP covers documents that have been generated 'in the context and interest of the client's right to a defence'.[15] The definition is rather broad and includes correspondence between the lawyer and the client that has taken place after the proceedings under competition law have been initiated;[16] correspondence from before the proceedings have started;[17] internal notes about the correspondence with the lawyer, even if they were not meant for exchange with the lawyer;[18] and documents that have been generated in order to obtain legal advice on defence matters, again even if they were not (yet) part of correspondence.[19] Moreover, the LPP applies not only in sanctioning proceedings but also in preliminary proceedings.[20]

This European LPP might be different from national LPP. For example, national law might offer better protection for in-house lawyers.[21] On the other hand, at least in German criminal law, documents are less protected, particularly if they were drafted before criminal proceedings were started.[22] Therefore, the question must be raised about whether the broader protection in European LPP has an effect on ordinary national criminal procedure.

In most cases where EU Law offers better protection, this question can be answered in the affirmative. The reasons for this are first that the CJEU jurisprudence in competition law shapes the EU Fundamental Rights and secondly that the Charter of Fundamental Rights applies in many national criminal cases.

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[11] Case 155/79 AM & S Europe Ltd. v Commission [1982] ECR 1575.

[12] Joined Cases T-125/03 and T-253/03 Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission (CFI, 26 February 2007); Case C-550/07 P (GC) Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission [2010] ECR I–08301.

[13] The summary is an abbreviated version the one in Schneider 2019a, point 3.

[14] Case 155/79 AM & S Europe Ltd. v Commission [1982] ECR 1575 para 21; Case C-550/07 P (GC) Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission [2010] ECR I–08301 paras 27ff.

[15] Case 155/79 AM & S Europe Ltd. v Commission [1982] ECR 1575 para 21.

[16] Case 155/79 AM & S Europe Ltd. v Commission [1982] ECR 1575 para 23.

[17] Case 155/79 AM & S Europe Ltd. v Commission [1982] ECR 1575 para 23.

[18] Case T-30/89 Hilti v Commission [1990] ECR II–165 paras 16ff.

[19] Joined Cases T-125/03 and T-253/03 Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission (CFI, 26 February 2007) para 123.

[20] Joined Cases T-125/03 and T-253/03 Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission (CFI, 26 February 2007) para 120.

[21] For example, this is the case in the Netherlands. See Duijkersloot–de Vries–Widdershoven 2019, point 2.3.

[22] An overview on the German law on search and seizure in criminal proceedings can be found in Schneider 2019a, point 2.3.

4.2 The importance of CJEU jurisprudence in competition law for EU Fundamental Rights

Art. 47 (2), 48 (2) CFR grant the right to defend oneself.[23] This shows that EU Law regards defence rights as fundamental rights. The same goes for Art. 6 ECHR, which is respected by all Member States and also in EU Law. Even before the Charter of Fundamental Rights became binding, defence rights were recognised in competition law. They were mainly shaped by case law, as has been shown with the example of the LPP (supra 4.1). Considering that defence rights are also fundamental rights, the question must be asked whether this case law is only applicable in competition law cases or whether it can be regarded as the Court's interpretation of the fundamental right to defence as laid down by the Charter.[24]

This question will be answered by use of the example of the LPP. The LPP is regarded as a 'principle and concept common to the laws of those states [the EC Member States]'.[25] This statement becomes clear in the opinion of Advocate General Kokott in the *Akzo Nobel* case:

'In EU law, the protection of legal professional privilege has the status of a general legal principle in the nature of a fundamental right. This follows, on the one hand, from the principles common to the legal systems of the Member States: legal professional privilege is currently recognised in all 27 Member States of the European Union, in some of which its protection is enshrined in case-law alone, but in most of which it is provided for at least by statute if not by the constitution itself. On the other hand, the protection of legal professional privilege also derives from Art. 8(1) of the ECHR (protection of correspondence) in conjunction with Art. 6(1) and (3)(c) of the ECHR (right to a fair trial) as well as from Art. 7 of the Charter of Fundamental Rights of the European Union (respect for communications) in conjunction with Art. 47(1), the second sentence of Art. 47(2) and Art. 48(2) of that Charter (right to be advised, defended and represented, respect for rights of the defence)'.[26]

This quotation makes clear that the protection of LPP is considered a general principle that is acknowledged in the legal orders of the Member States, in the ECHR and in EU Law. Accordingly, it is not a defence right that is specific to competition law but that belongs to the core of European Criminal Procedure Law. The same is true for other procedural guarantees that have been accepted by the Member States in principle and are recognised in the Charter of Fundamental Rights and the European Convention on Human Rights.

Consequently, EU jurisprudence, i.e. the case law of the Court of Justice and the General Court, does not only apply in competition law, but it also shapes the interpre-

[23] This argument has already been developed in Schneider 2019a, point 4.2, which in turn refers to Schneider 2019b, ch 5 B. II. 6. b.

[24] See, also, Schneider 2019a, point 4.2.

[25] Case 155/79 AM & S Europe Ltd. v Commission [1982] ECR 1575 para 18.

[26] Case C-550/07 P (GC) Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v Commission [2010] ECR I–08301, Opinion of AG Kokott, para 47.

tation of EU fundamental rights.[27] The same reasoning pertains to procedural guarantees in secondary EU Law such as Directive (EU) 2013/48 on the right of access to a lawyer.[28] These directives are also meant to shape EU fundamental rights and thus serve to interpret the Charter of Fundamental Rights.

4.3 The applicability of the Charter of Fundamental Rights in national criminal cases

Having determined that the CJEU jurisprudence in competition law has an impact on the Charter of Fundamental Rights, it remains to be seen why this affects national criminal procedure in non-competition cases. Generally, the CJEU jurisprudence becomes important whenever the Charter of Fundamental Rights applies in national criminal procedure law.

Art. 51 (2) CFR clarifies that the Charter of Fundamental Rights applies when the Member States are implementing EU Law.[29] According to the CJEU, EU Law is implemented when the application of a national law provision is part of the fulfilment of an obligation under EU Law.[30] So far there are not many explicit obligations concerning criminal procedure law. Examples for explicit obligations are Art. 4 of the Directive (EU) 2013/48 on the right of access to a lawyer (confidentiality) and Art. 7 of the Directive (EU) 2016/343 (privilege against self-incrimination).

However, even in the absence of explicit obligations, national criminal procedure law can serve to fulfil an obligation under EU Law. This is because there is a general obligation to provide for effective, proportionate and dissuasive sanctions whenever EU Law is violated.[31] These sanctions do not have to be criminal. Nonetheless, if EU Law has been implemented in criminal law provisions, the implementing Member State must make sure that these sanctions are applied effectively. This requires an effective criminal procedure, and this, in turn, means criminal procedure law must enable effective sanctioning.[32]

Consequently, criminal procedure law is an implementation of EU Law whenever EU Law requires an effective sanction and the Member State has chosen to provide a criminal sanction.[33] This is the case if national criminal law has been harmonised or if the financial interests of the EU are protected by national law. An example is the national law implementing the PIF Directive. In this case, the CJEU jurisprudence on procedural guarantees in competition law applies whenever national criminal proceedings take place.

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[27] See the similar conclusion in Schneider 2019a, point 4.2.

[28] See, also, Schneider 2019, 623 f.

[29] The following reasoning is taken from Schneider 2019a, point 4.4, which refers back to Schneider 2019b, ch 5 B. II. 1. a) aa).

[30] See, e.g., Case C-206/13 Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo (ECJ, 6.3.2014) paras 24ff.

[31] Case 68/88 Commission of the European Communities v Hellenic Republic [1989] ECR-02965, para 24.

[32] Timmermann 2016, 779.

[33] Gaede 2016, 91; Schneider 2019a, point 4.4.

5. The effectiveness of national criminal law and procedure

The second "hidden effect" that will be discussed here also has to do with the effectiveness of national criminal law and procedure. Whereas the "hidden effect" of CJEU jurisprudence in competition law is that it applies to some extent to national criminal procedure and that higher procedural guarantees might have to be provided, the "hidden effect" of the principle of effectiveness is that national procedural guarantees, even constitutional ones, might be inapplicable.

This effect has been shaped by the Court of Justice's *Taricco* decision.[34] The *Taricco* case was about an Italian law provision on limitation periods for tax fraud. The effect of this provision was that the limitation period had usually expired before the perpetrator could be convicted. According to the Court of Justice, this result was in breach of the obligation to provide for effective sanctions, which is laid down in Art. 4(3) TEU. This was true regardless of whether limitation periods were regarded as part of substantive criminal law, as is the case in Italy, or criminal procedure law, as is the case in the European Convention on Human Rights.[35]

The effect of the *Taricco* decision is far-reaching. If national law has to provide for an effective, proportionate and dissuasive sanction in the sense of EU Law, the Member State has to guarantee that the law can be effectively applied. This means that any rule that could be an impediment to effective criminal procedure has to be justified vis-à-vis the principle of effectiveness.[36] In the context of the collection and use of evidence, this reasoning applies to any rule that prevents the collection or the use of evidence, in particular to procedural safeguards.[37]

For example, the requirement of a warrant for searches and seizures or the defendant's right to have a lawyer participate in interrogations are circumstances which pose encumbrances on the effective collection of evidence. The same could be said for the prohibition of torture – torture might be an effective means to get the defendant to confess. Even though the evidential value of such a confession might be limited, there are other ways to investigate crime that have been qualified as torture in the past, such as forced emesis in cases where the defendants had swallowed drugs.[38]

The provocative example of torture shows that, of course, there must be limits on what can be demanded by the EU as effective sanctioning.[39] Procedural guarantees that are laid down in the Charter of Fundamental Rights or in secondary law shaping the Charter must be respected by EU Law.[40] This means that the Member States are

[34] Case C-105/14 Criminal Proceedings against Ivo Taricco and Others (Court of Justice, Grand Chamber, 8 September 2015) para 47, in this respect confirmed in Case C-42/17 Criminal Proceedings against M.A.S. and M.B. (Court of Justice, Grand Chamber, 5 December 2017) paras 31ff.

[35] This point gave rise to much controversy and led to a second decision by the Court of Justice in Case C-42/17 Criminal Proceedings against M.A.S. and M.B. (Court of Justice, Grand Chamber, 5 December 2017) paras 31ff.

[36] Gaede 2016, 93. This argument has already been developed in Schneider 2019b, ch. 5 B. IV.

[37] Caianiello 2016, 8.

[38] See ECtHR (Grand Chamber), judgement of 11 July 2006, Application no. 54810/00 – Jalloh v. Germany.

[39] Dannecker 2015, 27.

[40] See Schneider 2019b, ch. 5 B. IV. 2; Wegner 2017, 146.

justified in granting these rights, even if the effectiveness of prosecution is hampered. Therefore, the prohibition of torture is justified by Art. 1 Charter of Fundamental Rights, the right of access to a lawyer by Art. 47, 48 of the Charter and the corresponding Directive (EU) 2013/48 and so on.

The main problems arise with procedural safeguards that have not been explicitly recognised in EU Law. An example is the right of some witnesses to refuse to testify or even the prohibition to interrogate certain witnesses. In EU Law, there is only one rule about these privileged witnesses: Art. 4 of Directive 2013/48/EU on the right of access to a lawyer guarantees the confidentiality of lawyer-client communication. However, there are indications that other forms of professional privilege are recognised, for example in Art. 34(2) of the 4th Directive on money laundering.[41] Even so, there are no rules about witness privilege for relatives or clergyman – witnesses that do not have to testify under German Law or Hungarian Law.[42]

There might be a conflict between EU Law and national law in the future. For example, in tax fraud cases, the testimony of the spouse or common-law partner could be of high value for the prosecution, meaning that a right to refuse testimony hampers or even prevents effective prosecution. It is unclear how these cases will be decided in the future. One could argue that immunities and rights that are recognised in the Member States can justify the impediments to effective sanctioning. However, it is easy to build a case where the right in question is not recognised in all Member States. For example, the right to refuse testimony does not generally apply to partners living together without being married, although it does in some Member States.[43] Does such a right hinder the effectiveness of sanctioning in tax fraud cases? These are questions that will increasingly be put before the Court of Justice in the future.

The hidden effect of the *Taricco* case is therefore that national procedural guarantees might be challenged anew. It can be prophesied that this effect will lead to more clashes in the multi-level constitutional system in the future.

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[41] 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 (Text with EEA relevance) [OJ L 141, 5.6.2015, 73–117].

[42] See §§ 52, 53 (1) sentence 1 No. 1 German Code of Criminal Procedure; sections 81 (1) lit. a, 82 (1) lit. a Hungarian Code of Criminal Procedure.

[43] Cf. the comparative information given by the ECtHR in van der Heijden:

„Cohabitees who are not married, engaged to be married or in a registered partnership with the suspect appear to be dispensed from giving evidence unconditionally only in Albania, Andorra, Lithuania and Moldova. By contrast, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, "the Former Yugoslav Republic of Macedonia", Hungary, Iceland, Italy, Liechtenstein, Montenegro, Norway, Portugal, Serbia, Slovakia, Spain, Sweden and Switzerland require proof of the marriage-like nature of the relationship, usually in the form of children born of it, demonstrable financial arrangements or length of cohabitation. It would appear that the other Council of Europe member States do not permit a person merely cohabiting with the suspect to withhold his or her evidence." ECtHR (Grand Chamber), judgement of 3.4.2012, Application no. 42857/05, van der Heijden v. The Netherlands.

6. Conclusion

This paper has identified two hidden, or probably it would be better to say "rather hidden", effects of EU Law. The first is that the jurisprudence on EU procedural guarantees in competition law applies to national criminal procedure when the procedure is part of the effective sanctioning mechanism required by EU Law. The second is that, in the same cases, the principle of effectiveness requires a reevaluation of procedural safeguards. Both aspects are of particular relevance when the collection and use of evidence is at stake. Both will therefore lead to an increase in proceedings for preliminary questions in the future.

It should be noted that the same problems arise in the context of mutual recognition. The European Investigation Order grants the right to refuse the execution of an Order if the execution would be contrary to the Charter of Fundamental Rights [Art. 11(1) (f) Directive (EU) 2014/41[44]]. Effectively, such an execution must be refused because the Member State would otherwise violate Charter Rights.[45] The right has thus become obligatory.[46] On the other hand, execution of a European Investigation Order can be refused if privileges prevent the execution in the Member State [Art. 11 (1a) Directive 2014/41/EU]. This, however, can only apply if these privileges are not contrary to the principle of effectiveness laid down in EU Law. Accordingly, Member States might be obliged to enhance effective prosecution by not making use of this ground for refusal.

It is still unclear how these conflicts will be solved. However, it is clear that effective protection of the financial interests of the European Union requires unambiguous rules on these issues. It is up to the EU legislator or, in the absence of legislation, the CJEU to provide such rules.

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[44] Directive (EU) 2014/41 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, 1–36].

[45] Schneider 2019, 624 f.

[46] See Böse 2017, 759; Schneider 2019, 624 f., both on in absentia trials and Directive (EU) 2016/343.

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COLLECTION AND EVALUATION OF EVIDENCE IN THE EU MULTILEVEL SYSTEM: THE IMPACT OF INADMISSIBILITY OF EVIDENCE

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1. Introduction: EU mutual recognition in evidence law

Mutual recognition has long been identified as the cornerstone of EU co-operation in criminal law.[1] The Framework Decision of 13 June 2002 on the European arrest warrant tested the implementation of the principle. Consequently, the Directive regarding the European Investigation Order (EIO Directive)[2] extended EU mutual recognition to the collection of evidence. The European Investigation Order (EIO) in general requires Member States to accept the decision by the Member State issuing the EIO that evidence should be obtained, whereas the executing State applies its own national rules of criminal procedure for the collection of evidence (*lex locus regit actum*). The new Regulation on the European Prosecutor's Office (EPPO Regulation)[3] is the first European act of law to stipulate guidelines for the use of evidence. Pursuant to Art. 37(1) EPPO Regulation, the evidence presented by the EPPO or the defendant in court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State. Thereby, the EPPO Regulation presents a model for mutual recognition with regard to the use of evidence in the EU.

However, in the EU neither the law on collecting evidence nor the law on admitting or excluding evidence are fully harmonised, even though the 2009 roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings took the first steps in that direction.[4] Hence, concerns that the incoherence of law regimes might diminish the rights of defence have been raised. The European Criminal Bar Association (ECBA) suggested adopting an updated version on the Roadmap for 2020 including legislation by means of Directives or Regulations (cf. Art 82 TFEU)

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[1] European Council, Tampere Conclusions, 15.16.10.1999; Council Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12, 15.01.2001, 10.

[2] Directive 2014/41/EU of the European Parliament and of the Council of 03.04.2014 regarding the European Investigation Order in criminal matters.

[3] Council Regulation (EU) 2017/1939 of 12.10.2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

[4] Council, 30.11.2009, 2009/C 295/01.

inter alia on the "*Admissibility and Exclusion of Evidence and other Evidentiary Issues*", e.g. the right to confrontation in the pre-trial stage.[5]

Against this background, the role of inadmissibility or exclusion of evidence in the Member States for the mutual recognition principle as defined by the EPPO Regulation shall be discussed further in this article.

2. Scale of use of illegally gathered evidence tests in the EU

The whole matter of the taking and presentation of evidence in court is *inter alia* determined by the use of illegally obtained evidence. Simplifying greatly, one could place the national law on admissibility of evidence on a scale from flexible inclusion (e.g. Austria) to narrow exclusion models (e.g. Belgium until 2003).[6]

In Austria, for example, collecting evidence illegally does not necessarily imply the exclusion of evidence at the trial. Instead, the exclusion of evidence is generally assessed on a case-by-case basis.[7] However, e.g. the exclusion of illegal evidence obtained through optical and acoustic monitoring was introduced into the Austrian code of criminal procedure in 2002.[8]

In Belgium, a principle of broad evidence inclusion applies since 2003 when the Belgian *Cour de Cassation* reversed the former Belgian – contrary – rule that all illegally obtained evidence was inadmissible.[9] According to the *Cour de Cassation* decision of 2003, illegally obtained evidence may only be inadmissible if (1) the evidence has been obtained in violation of formalities that are prescribed under the penalty of being null and void, or (2) the way the evidence has been obtained undermines the reliability of the evidence, or (3) the use of the evidence would imply a breach of the right to a fair trial. In October 2013, this use of evidence test was laid down in the Belgian codes for the criminal procedure.[10]

In Germany – as in Austria and Belgium – in general all evidence may be presented before the court. However, the jurisprudence shaped some exceptions along the lines of constitutional rights violations.[11] The use of evidence is prohibited when it was col-

[5] *http://www.ecba.org/extdocserv/20180424_ECBA_Agenda2020_NewRoadMap.pdf.* See also Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility 11 Nov 2009, COM(2009) 624 final, 5: "There is therefore a risk that the existing rules on obtaining evidence in criminal matters will only function effectively between Member States with similar national standards for gathering evidence."

[6] See for overviews CFR-CFD Opinion on the status of illegally obtained evidence in criminal procedures in the Member States of the European Union 30.11.2003; Thaman 2013.

[7] Austria: CFR-CDF 9; OGH, 08.08.2007, 15 Os 57/07g.

[8] § 149e Abs. 4 und 149h Abs. 2 und 3 öStPO idF BGBl. I Nr. 134/2002, today § 140 öStPO BGBl. I Nr. 19/2004; see also § 166 öStPO related to torture or similar means. See also with regard to financial crimes § 98(4) FinStrG.

[9] Court of Cassation, 14.10.2003 ("Antigone"), see in detail with regard to Belgian law Beernaert–Traest 2013, 161 et seq.

[10] Art. 32 Loi contenant le Titre Preleminaire du Code de Procedure Penale. Example of penalty of being null and void e.g. Art. 86bis §4 code d'instruction criminelle (re anonymous witnesses).

[11] E.g. BVerfG, 07.12.2011 – 2 BvR 2500/09, 2 BvR 1857/10. See also statutory exclusion rule in case of torture § 136a StPO; English version of German Code of Procedure: *https://www.gesetze-im-internet.de/englisch_stpo/.*

lected in violation of the "absolutely" protected core area of private life (e.g. complete and seamless residential surveillance). If the gathering of evidence violates other rights of the accused, the jurisprudence weighs both the public interest in the investigation and the individual interest, especially taking into account an objection of the accused.

A similar – but at least historically somewhat more restrictive – evidence law applies in Ireland. Irish jurisprudence distinguishes between evidence that was obtained illegally and evidence that was gathered in breach of constitutional rights. Only evidence obtained violating a constitutional right is excluded *per se* unless there are extraordinary excusing circumstances justifying its admission.[12] In a new 2015 landmark decision, the Irish Supreme Court amended the use of evidence test by adding a deliberate and conscious violation requirement.[13]

Overall, it is very interesting to note that in many Member States national jurisprudence and legislation continue to rebalance evidence laws. In addition, there is no consensus within the EU to exclude the use of evidence that was obtained in violation of national laws or in breach of human rights under all circumstances. Hence, evidence law does not only focus on the protection of fundamental rights (deterrent rationale). Instead, evidence rules also serve as a – preformed – guidance to courts for how to assess the evidence and to establish the facts of the case. Even though the more flexible evidence test gives more latitude to the public prosecutor's office and the police,[14] evidence law does not give a free ride to violate rights. The criminal offence of perversion of justice (*Rechtsbeugung*) is designed to prevent intentional and deliberate violations of the law. The discretionary scope in pre-trial proceedings is hence in general limited to unsettled legal questions and disputed facts of the case and limits the effects of errors or simple deficiencies in the process.

3. Rationale for more leniency for use of evidence in cross-border contexts

While prosecutors may have more discretion when collecting evidence in cross-border contexts, this is not a new issue. Even though in many Member States no specific (codified) test for the admission of (illegally collected) evidence in a foreign state exists, some studies established that some Member States tend to be more lenient in the validation of foreign evidence.[15]

[12] CFR-CDF18; Cras–Daly 2013, 33 et seq. Leading case: Irish Supreme Court, People (A.G.) v O'Brien, 14.12.1964.

[13] Irish Supreme Court DPP v JC, 15.04.2015. Similarly, the traditional common law rules against hearsay in all its applications were recalibrated. Statutes introduced in 1984 and 2006 allow the use of statements made to the police in the trial provided inter alia there is a fair trial and the option to cross-examine was available (Criminal Justice Act, 1984 Section 21; 2006 Criminal Justice Act Part III Section 16). Thereby, Irish legislators reacted to the collapse of murder trials, because the witnesses refused to give consistent evidence in court.

[14] See e.g. the dissents in ECtHR Khan v. the United Kingdom, cited above.

[15] Vermeulen–De Bondt–Van Damme 2010, 153; Kusak 2016, 206.

This does not come as a surprise. A more flexible approach to cross-border evidence can rebalance the difficulties of cross-border investigations. In many cases, the accused – intentionally – takes advantage of national limits and borders. If the accused transfers money in fraud cases to another Member State, the prosecutor has to establish its use to the detriment of the injured parties. An accused may intentionally employ foreign aids or choose missing traders with a flexible residential situation. For instance, a witness can hide by deregistering his/her place of residence to France without opening a bank account or paying taxes in France; France does not have a comprehensive register of residents. Hence, more leniency in cross-border contexts is consistent with the concept of weighing the legitimate interest in criminal prosecution and the rights of the accused.

In Germany, for example, under § 244(5) sent. 2 of the criminal procedure code (*StPO*), the court may decline the motion to hear a witness living in a foreign country under reduced requirements compared to a national witness. A step in the same direction was a ruling by the German Federal Court (BGH) in 2012, which accepted electronic communications from the Czech Republic as evidence while refusing to examine in detail whether the investigative measure was fully compliant with Czech law.[16]

4. Limits of use of evidence in cross-border contexts: Lack of corresponding rules

However, a strict mutual recognition rule may create a new conflict of applicable laws to the detriment of the accused. Drawing from international private law concepts, a "lack of corresponding rules" (*Normenmangel*) can occur. If evidence authorities from a Member State with few rules on gathering evidence and high standards for the use of evidence in trial executes an EIO, the use of such evidence in a Member State with a flexible approach to the use of evidence can be to the disadvantage of the defense. For example, on the one hand, a witness statement obtained in the executing Member State without the option of cross-examination is not supposed to be used for reading out in court. On the other hand, in the issuing Member state, a pre-trial interview always requires cross-examination, so that there are no immediacy rules for the trial.[17]

Both the EPPO Regulation as well as the EIO Directive provide safeguards to deal with a lack of corresponding rules:

[16] BGH, 1 StR 310/12 – 21.11.2012; see also with regard to the right to cross-examine: BGH, 23.01.1985 – 1 StR 722/84.

[17] However, it should be noted that the mix of applicable laws does not necessarily discriminate the accused. If evidence is collected in Member States with strict rules on gathering evidence and low standards for the use of evidence in trial, the use of such evidence in a Member State with a strict approach will be to the disadvantage of the prosecutor. In some Member States, the public prosecutor could be required to send a summons or to notify the suspects or their defense counsel about the time and place of the questioning of a witness. While this provides the accused with the opportunity to influence the witness, the written statement may not be used as such in Member States that apply a strict version of the immediacy principle.

Firstly, on the level of collecting evidence in cross-border investigations, the prosecutor may ask the other Member State's authority to comply with certain formalities and procedures (Art. 32 EPPO Regulation, Art. 9(2) EIO Directive). The executing authority shall comply with these formalities and procedures. Member States may prescribe to their prosecutor's offices if they need to include such supplements in EIOs.

Secondly, European criminal law allows and demands overriding evidence rules on a case-by-case basis. In Recital 80 of the EPPO Regulation, the use of cross-border-evidence is only required if the trial court considers its admission to respect the fairness of the procedure and the suspect or accused person's rights of defence *inter alia* under Art. 6 ECHR. Also, Art. 14(7) EIO Directive requests the issuing state to take into account a successful challenge against the EIO and the rights of the defence as well as the fairness of the proceedings. Hence, both the EPPO Regulation and the EIO Directive reference the jurisprudence of the European Court of Human Rights (ECtHR), which applies a fair trial test to determine whether illegally obtained evidence may be admitted at trial. The ECtHR repeatedly held that Art. 6 ECHR does not *per se* exclude the use of evidence that was obtained in violation of national law or in breach of human rights but requires both the public interest in the investigation and the individual interest to be weighed.[18] This fair trial approach also applies to the immediacy principle as the ECtHR rules that the use of statements as evidence obtained at the pre-trial stage is not in itself inconsistent with human rights.[19]

Thirdly, Recital 80 of the EPPO Regulation also states that the use of cross-border evidence is only required if the trial court considers its admission to respect the Member States' constitution and fundamental principles of national law on fairness of the procedure. Therefore, the EPPO Regulation allows the Member States' jurisprudence to adopt the mutual recognition rule incorporating their own use of evidence tests. The overview of some jurisdictions above shows that the national jurisprudence seems flexible enough to adapt their evidence law. The more flexible the use of evidence law of a Member State, the easier it will be to accept cross-border evidence collected in another Member State in court.

Some Member States' courts could use Recital 80 of the EPPO Regulation to adapt the respective national rules for illegally gathered evidence (see above II.) and apply these rules to cross-border evidence (whether gathered legally or illegally under the rules of the other Member State). In Germany, for example, evidence that has been collected abroad in breach of a German core constitutional right could be excluded in

[18] E.g. Schenk v. Switzerland, 12.07.1988 no. 10862/84; Khan v. the United Kingdom, 12.05.2000, no. 35394/97 para 34 et seq. Except the very essence of defence rights (evidence obtained by torture or – in some cases – in violation of the privilege against self-incrimination), e.g. Jalloh v. Germany, 11.07.2006, no. 54810/00, para. 104 et seq; Heaney and McGuinness v. Ireland 21.12.2000, no. 34720/97 para 47 et seq.

[19] E.g. Isgro v Italy, No 11339/85, 19.02.1991, para 34; Sievert v Germany No 29881/07, 19.07.2012, para 58 et seq. However, as a general rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings, Unterpertinger v Austria No 9120/80, 24.11.1986, para 33 ("Admittedly, it was for the Court of Appeal to assess the material before it as well as the relevance of the evidence which the accused sought to adduce; but Mr. Unterpertinger was nevertheless convicted on the basis of "testimony" in respect of which his defence rights were appreciably restricted."); Kostovski v Netherlands No 11454/85, 20.11.1989, para 38 et seq. (anonymous witnesses), Saidi v France No 14647/89, 20.09.1993 para 44.

court pursuant to Recital 80 of the EPPO Regulation. In Ireland, it may be possible to exclude evidence gathered in another Member State deliberately and consciously violating Irish constitutional rights. In Belgium, evidence could be considered inadmissible if the way the evidence was obtained undermines the reliability of the evidence or the use of the evidence would imply a breach of the right to a fair trial.

Last but not least, the national courts are free to assess the evidential value of any cross-border evidence pursuant to Art. 37(2) EPPO Regulation. Hence, courts may assign a lower evidential value to cross-border evidence – also under fair trial tests and in consideration of national law on fairness of the procedure.[20]

There will be cases between the obvious situations of lack of corresponding rules on the one hand (no use of evidence under Recital 80 EPPO Regulation) and the full admission of foreign evidence, which slightly deviates from national formalities such as official seals on the other hand (use of evidence pursuant to Art. 37(1) EPPO Regulation). In case of doubt, not only the Member States' constitutional courts but also the ECJ will be competent under Art. 42(2)(b) EPPO Regulation to draw the line between mutual recognition and fair trial rights.

5. Conclusion: Need for new directives on collecting or excluding evidence?

In summary, it is possible that mutual recognition of cross-border evidence as provided for in the EPPO Regulation can work in practice. The jurisprudence in many Member States continues to rebalance the national evidence laws anyway (see above II.). Moreover, in some Member States courts were already more lenient with the admission of cross-border evidence, so mutual recognition is the logical development of existing rules (see above III.).

Should a lack of corresponding rules occur in some criminal cases, national courts could refer to Recital 80 of the EPPO Regulation, which in turn allows for the application of Art. 6 ECHR, as well as the application of national illegally gathered evidence tests (for all cross-border evidence whether gathered illegally under the law of the other Member State or not) or assign a lower evidential value to cross-border evidence.

Notwithstanding the practical feasibility, further harmonisation of evidence law would enhance the acceptance of mutual recognition in the Member States and further increase legal certainty. For example, a standardised "product information sheet" developed by each Member State for each investigation measure could provide the basis for courts to develop overriding mandatory rules and enable the defence to argue for a fair trial inadmissibility of evidence. Furthermore, Recital no. 14 of the Council Framework Decision on the European evidence warrant mentioned the harmonisation

[20] E.g. for Germany BGH 1 StR 169/00 – 25.07.2000; BGH 1 StR 495/04 – 27.01.2005.

of recording of times and dates to create a chain of evidence,[21] nevertheless neither the EIO Directive nor other EU directives include a follow-up. Also, even though almost all cornerstones of the right to a fair trial principle are already enshrined in multiple EU directives,[22] there is no EU directive on the right to cross-examine witnesses (Art. 6(3) (d) ECHR).[23]

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[21] Council Framework Decision 2008/978/JHA of 18.12.2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

[22] Art. 6(2) ECHR – Directive 2016/343/EU; Art. 6(3)(a) ECHR – Directive 2010/64/EU, Directive 2012/13/EU; Art. 6(3)(b) ECHR – Directive 2013/48/EU, Directive 2016/343/EU; Art. 6(3)(c) ECHR – Directive 2013/48/EU, Directive 2016/1919/EU; Art. 6(3)(e) ECHR – Directive 2010/64/EU.

[23] E.g. a pre-trial hearing before a judicial authority shall be held with the opportunity for the accused and/or the defence lawyer to be present and to cross-examine, if there is a concern that the witness will not be available during the trial. The accused and/or the defence lawyer shall have the opportunity to cross-examine witnesses either pre-trial *or* during trial, unless there are extraordinary excusing circumstances justifying the omission (e.g. sexual offences, minor witnesses, death of the witness before trial, witness illegitimately refuses to testify in court). Moreover, a duty to appear as a witness before a court in the EU (provided they are not privileged to decline to give evidence under the laws of the state of residence and of the court) would minimize the issue of using written statements as final evidence.

CRITICS AND ALTERNATIVES TOWARDS AN ENHANCED PROTECTION OF THE FINANCIAL INTERESTS OF THE EU

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1. Introduction

After lengthy negotiations, the European Public Prosecutor's Office, the EPPO, was established in 2017, but its establishment was not free of controversies.

The first Draft Regulation on the establishment of the EPPO issued on 17 July 2013 by the Commission,[1] and the follow-up proposals did not lead to the necessary consensus. It soon turned out that opinions differ not only on the implementation of the centralised model favoured by the Commission and of the College model supported by the Council but also on several other substantive and formal issues as well.

As a result, the Council concluded on 7 February 2017 that there was no unanimity on the Draft Regulation. In view of this, the 17 Member States that particularly encouraged the establishment of the EPPO indicated on the basis of Art. 86 para (1) of the Treaty on the Functioning of the European Union (hereinafter TFEU)[2] that they intended to establish the EPPO within the framework of enhanced cooperation. This led to Council Regulation 2017/1939/EU of 12 October 2017, which I shall hereinafter refer to as the EPPO Regulation.

Next, my presentation will focus on the results achieved by this Regulation and on the critiques its provisions received. I will address these issues, so that for the protection of the financial interests of the EU a rational, effective solution complying with reality could come into existence.

2. Facts and Results in the EPPO Regulation

It is a generally accepted view by the majority of the Member States that the EPPO Regulation has improved a great deal compared to the original Draft Regulation of the Commission. Although the Commission did not give serious consideration to the yellow card warnings of the parliaments of the Member States, the presidencies following

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[1] See the text of the original Draft Regulation at COM/2013/0534 *http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20130534.do.*

[2] OJ C 326, 26.10.2012, 47–390.

each other and the Council have much refined the original text of the Regulation. Accepting the '*college model*' as opposed to the '*office model*' represented by the Commission could be considered one of the most significant changes. This is a concession made formally in favour of sovereignty since in the 'college model' European Prosecutors nominated by the Member States get a much more important and bigger role in strategy making. It must be kept in mind, however, that within the European Public Prosecutor's Office, these European Prosecutors do not represent their own Member States but instead are considered to be staff members of the European Union. But in this way, the 'college model' of the European Public Prosecutor's Office fundamentally differs from the 'college model' of the Eurojust, in which the College consists of national members delegated by the Member States who continue to represent the prosecution service of their respective Member State.

It can undeniably be regarded as an achievement that in accordance with the Regulation, the prosecution of PIF crimes[3] no longer falls into the exclusive jurisdiction of the European Public Prosecutor's Office. The jurisdiction is divided between the EPPO and the national authorities of the Member States. Thus, Member States may continue to exercise jurisdiction over cases where the maximum penalty for the PIF crime and that for the accessory crime linked thereto are the same.

It is also a concession made to those who are concerned about the violation of sovereignty that transaction is only possible within the framework of national legislation.

In my opinion, provisions regulating the admissibility of evidence, however, turned out to be a bit controversial. No doubt that in accordance with the Regulation, evidence gathered by the European Public Prosecutor's Office cannot be assessed as admissible evidence merely on the grounds that it was gathered in another Member State and in accordance with the law of that other Member State. The national court shall also determine if the admission of the given evidence satisfies the requirements of the fair trial principle and if the right of the suspects and accused to defence as defined by the Charter of Fundamental Rights of the European Union have been respected. At the same time, it is also essential that, in compliance with the fundamental rights guaranteed by national constitutions, the different legal systems and traditions of the Members States have to be respected and that no provisions of the Regulation should be interpreted in a way that would forbid the trial court to apply principles of fair trial set forth in the national law that they enforce in their national legal system.

It can be regarded as an achievement as well that, in line with subsidiarity, decisions can be delegated; certain decisions can be made by the Permanent Chambers upon the proposal of the European Delegated Prosecutors, and the European Prosecutor of the Member State concerned in the given case can participate and vote in the decision making of the Permanent Chambers. This is important because the most essential and key decisions are made by the Permanent Chambers.

Apart from the fact, however, that the rights of the European Prosecutors have strengthened, this cannot be considered as absolute truth. Thus, European Prosecutors

[3] OJ 1995 C 316, 1995. 11.27.48. The abbreviation "PIF" comes from the French title of the Treaty: La protection des interets financiéres de l'Union Européenne.

who have deeper knowledge about national laws do not exert the required influence yet. This is primarily true for delegated decision-making. This is also true for indicted and terminated cases where the damages caused are less than EUR 100,000 and where the gravity of the case and the complexity of the proceeding also allow and reason for this. It can also be criticised that European Prosecutors exercising supervision do not always have a voting right for decisions made by the Permanent Chambers.

Despite the mentioned positive elements, there are a lot of serious concerns that can still be raised in connection with the Regulation. From a professional point of view, the application of the Regulation does not seem to achieve one of the main objectives, which is the creation of uniform law concerning how crimes affecting the financial interests of the European Union are to be handled. The basic reason for the regulation thereof can be found in the dispute between the Commission, Council and Parliament of the EU. Originally, the Commission would have used Art. 325 (4)[4] while the Council and the Parliament would have used Art. 83 (2) of TFEU[5] as the constitutional basis for the PIF Directive,[6] which serves as substantive law basis for the European Public Prosecutor's Office. Art. 325 (4) of TFEU expressly provides for community legislative power to counter fraud, whereas Art. 83 (2) creates such power for cooperation in the area of freedom, security and justice. The view that the former implies a wider while the latter a narrower Europe is rather simplifying, but evidently it is the former that better serves unification. Art. 325 rather concentrates on countering fraud, and in this way it could have created a unique policy area. Accordingly, it would have provided special tools for legislators with the purpose of securing effective and equivalent protection.[7] To this end, Art. 325 (4) contains mandatory provisions both for the Member States and the EU institutions, and unlike Art. 83, it does not allow for any exceptions. Art. 83 (3), at the same time, only allows Member States to set forth minimum standards. The EU legislator, however, does not stipulate such restrictions in Art. 325 (4). In other words, based on this legal provision, concrete legal norms with the same content and setting forth the same sanctions could have been adopted, which is the most fundamental requirement for equivalent protection.[8] As criminal laws of the Member States especially differ in what kind of minimum and maximum penalties they prescribe, the PIF Directive, by using this solution, is not necessarily able to provide the EPPO with the conditions of uniform and in this way effective protection, so

[4] Art. 325 (4) of TFEU stipulates: "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".

[5] Pursuant to Art. 83 (2) of 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. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.".

[6] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, *OJ L 198, 28.07.2017, 29–41.*

[7] Miskolczi 2018, 59.

[8] Miskolczi 2018, 60.

uniformity of law is at risk. One of the consequences can be the application of *forum shopping*[9] in addition to risked uniformity of law.

Extending material jurisdiction to VAT crimes, however, is a great development. In this respect, opinions sharply differed throughout the entire debate. Originally, the majority of the Member States did not intend to include VAT crimes in PIF crimes. The reason for this evidently is that although a minor part of the VAT also goes to the EU budget, most of it goes to the Member States. In order to ensure full functioning of the EPPO, it is essential and necessary, however, to include these crimes – take carousel frauds for example – for the primary reason of the cross-border nature of these crimes. Finally, partly due to the influence of the so called *Taricco case,*[10] the PIF Directive includes VAT crimes as well, and in this way the EPPO also has jurisdiction over these crimes, although not exhaustively. This decision can be regarded as a milestone because a qualified majority voting was needed for the adoption of the PIF Directive, and abstaining votes would have practically meant a nay vote.

Uniformity of law is adversely affected by provisions of the Regulation on judicial review. National courts exercise judicial review over the EPPO, so no European-level court system exists. Prosecutors of the Visegrad Four Countries highlighted it already in their Balaton Declaration in 2014 that Art. 86 of TFEU does not provide for the establishment of a uniform criminal jurisdiction, and – as a consequence – all EPPO cases are to be tried by national courts. The possibility of forum shopping is one of the main risks in this respect. Therefore, clear criteria of the choice of the trial court shall be set up, and decisions taken by the European Public Prosecutor should be subject to judicial review. Applicable and relevant provisions have not been adopted yet.

Investigations can be conducted by the national investigation authorities under the supervision of the European Delegated Prosecutors, and cases are indicted by the national courts. The European Public Prosecution Office basically links and coordinates cross-border proceedings and decides on the question of indictment.

3. An example of the conflict between the European Delegated Prosecutors and the national criminal procedural regimes

Based on the EPPO Regulation, individual investigations have to be conducted by the European Delegated Prosecutors, who have functional and legal independence, but

[9] If in a country "the level of protection against fraud is lower, many companies will "move" into that country by exercising the freedom of establishment from among the four freedoms, so the level of economic resources in that country will "critically" rise, because not market mechanisms but rather a legal policy decision (or – if it is a result of a conscious planning, a legal and economic policy decision) will shape the economic environment. It is very important to re-call attention to the fact that not only "criminal" companies but also companies interpreting weaker strictness of control, licensing and regulatory authority as a friendlier business environment will exercise the freedom of establishment. In this way, a special type of forum shopping will come into existence whose participants are mainly not criminals, companies or enterprises which as legal entities may be criminally liable but are actors of the formal, "white" economy." Miskolczi 2018, 185.

[10] C-105/14 – Taricco and others. ECLI:EU:C:2015:555.

in line with the double-hat system, they remain members of their national prosecution services. This latter one is needed so that European Delegated Prosecutors could freely exercise their rights guaranteed for them by their national laws. The question is, what does the requirement that investigations have to be conducted by the European Delegated Prosecutors imply? In the present case it implies prosecutorial investigation or supervision of the investigations carried out by others. The EPPO Regulation looks at the question by analysing the aspect of responsibility as the European Delegated Prosecutor acting under Art. 2 (5) is responsible for the investigations and prosecutions opened by him, assigned to him or taken over by him pursuant to Art. 27. As far as specific activities of the European Delegated Prosecutors are concerned, Art. 27 (6) shall be applicable, which, in connection with assisting European Delegated Prosecutors, mentions that these European Prosecutors carry out investigative or other measures for the handling by European Delegated Prosecutors.

When looking at the current Hungarian practice, one can see that in most cases, investigations ordered to be conducted by prosecutors into crimes affecting the financial interests of the EU are generally conducted by other investigation authorities such as the National Tax and Customs Administration of Hungary or the police. Less frequently, in fact, in exceptional cases prosecutors have the power to investigate the cases. Even in such cases, prosecutors use and involve financial experts or investigators from other investigation authorities.

In the majority of cases, the new Criminal Procedure Code, which entered into force on 1 July 2018, raises questions with regard to the investigations of the European Public Prosecutor's Office. The Criminal Procedure Code divides this pre-trial part of the procedure into two phases: detection and investigation under prosecutorial supervision. In accordance with Section 348 of the Criminal Procedure Code, unless otherwise provided for by the Criminal Procedure Code, the criminal proceeding starts with the investigation. Unlike previously, the investigation consists of the phase of detection and the phase of investigation conducted under prosecutorial supervision. During the detection phase, the crime and the perpetrator need to be investigated to the level of reasonable suspicion, and evidence needs to be located and secured. In the second phase, which is carried out under prosecutorial supervision, the prosecutor – if necessary, by means of collecting and examining the evidence – decides on the question of the termination of the ongoing proceeding in view of the suspicion. In such cases, the investigation ends either with the termination of the proceeding or with the prosecutor filing an indictment in court. Pursuant to Section 31 (2) of the Hungarian Criminal Procedure Code, during the preliminary proceeding and the detection phase of the case, the investigation authority acts autonomously, while in the course of the investigation carried out under prosecutorial supervision, the investigation authority acts under the direction of the prosecutor. Prosecutors only have restricted supervisory power over the investigation in the detection phase.

In this way, the restricted supervisory power does not extend to determining the key elements of the investigation or giving instructions in their respect. Prosecutors may basically examine the legality of the proceeding in such cases.

On the other hand, prosecutors have real power to direct the investigation in the second phase in accordance with Section 26 (3).

Suspicion divides the two phases of the investigation from each other. With the act of suspecting, the phase of investigation under prosecutorial supervision begins. Looking at all these provisions of law, it can be concluded that in Hungary it is only in the course of prosecutorial investigations where requirements of investigations conducted by prosecutors are actually met. This can be changed by modifying part of the Criminal Procedure Code that provides for cases that can only be handled by European Prosecutors, by placing all such investigations into prosecutors' jurisdiction or by making the European Public Prosecutor's Office accept the regime of the Hungarian Criminal Procedure Code. Any of these solutions is possible, but actually only the first and the last ones seem to be appropriate. By modifying the Hungarian Criminal Procedure Code, prosecutorial control over the cases falling into the jurisdiction of the European Public Prosecutor's Office – which is ultimately under national prosecutorial control – can be guaranteed, but even if the European Public Prosecutor's Office accepts the Hungarian criminal procedural regime, until the act of suspecting, the national investigation authority would be the exclusive *dominus litis*.

4. Barriers to effective operation

European Delegated Prosecutors need to report on the status and progress of cases to the Permanent Chambers and the European Prosecutors. Their instructions are binding on European Delegated Prosecutors, but if the instructions do not comply with national law, the European Delegated Prosecutors can turn to the European Chief Prosecutors. Decisions of the Permanent Chambers are also prepared by European Delegated Prosecutors, and decisions are adopted on the basis of draft decisions of the European Delegated Prosecutors. With all this, the aim to have fast and effective decision-making seems to come to a failure.

The system of Permanent Chambers also negatively affects the speediness and efficiency of decision-making. Language barriers and differences between the legal systems also need to be taken into consideration. Makers of the Regulation must have had some kind of court in mind, but this has nothing to do with deciding the cases. Instead, it is about strategic and, if needed, operational management. In practice, the role of the Permanent Chambers will presumably be completely formal, and the European Prosecutor of the respective Member State will be the real master of the case. He will determine the proceeding, and he will refer his decisions to the respective Permanent Chamber. In the majority of cases, the Chamber, as a matter of course, will delegate its power to the European Prosecutor of the respective Member State without knowledge of the documents written in the language of the respective Member State and without knowledge of the procedural law of that Member State. It will basically handle only cases which fall into its decision-making jurisdiction, where decisions will also be prepared by the European Prosecutor of the respective Member State.

The provision of the Regulation stipulating that cases are allocated between the Permanent Chambers on a system of random distribution does not seem to increase

efficiency either. For reason of expediency, one can deviate from this provision of law. The latter seems to be justified as opposed to the former. It can easily be understood that the allocation of cases on a system of random distribution, which is a general rule, automatically reduces efficiency. Obviously, actions of the European Delegated Prosecutor should be supervised by a Chamber whose members also include the European Prosecutor of the respective Member State.

5. First alternative: The network model of EPPO

There was a reason for developing the network model of EPPO, which is suggested as an alternative model for EPPO, as well. The network model, complying with Art. 83 of TFEU and proposed to be established from Eurojust, would have increased the added value of already existing network cooperation; it is based on the experiences thereof. Some elements of the model could be used as a backup solution even after the adoption of the EPPO Regulation. One of the biggest advantages of the network model, namely, is that it does not mean exclusivity but consists of supplementary elements that are acceptable for all partners; they do not violate national interests or EU expectations.

I first introduced the so-called "Network Model" in October 2014 at the 7th plenary meeting of the Network of *Public Prosecutors or Equivalent Institutions* at Supreme Judicial Courts of the Member States of the European Union held in Trier in the autumn of 2014. So the model was developed while the Regulation was being drafted, and it primarily responds to conflicts arising in the drafts made by the Commission and the Presidency. I consider it worth evoking its content here, however, as with the passage of time and the introduction of enhanced cooperation, it has still remained to be a viable alternative even if we just think of the individual components of the model.

The major characteristic of the "Network Model" is that it rather relies on national structures and legal systems while also creating enhanced cooperation in the field of protecting the financial interests of the European Union. This would have enabled the exercising of a wider competence than the current, potentially narrowed down circle of PIF crimes.

This model could have replaced the already existing mechanisms based on requests for legal assistance between Member States even when only two Member States are concerned. This model could have also solved the question of legal assistance requests to third countries since specialised public prosecution offices as national authorities can request mutual legal assistance based on existing international instruments (conventions).

I am aware that the Regulation adopted in 2017 opted for another direction than the model I have just mentioned. Still, this model has got elements which the EU could use, and by doing so, it would find a solution for the remaining controversial questions at the same time.

I especially consider the strengthening of Eurojust and the institutionalising and developing of JIT cooperation to be such usable elements. In addition, such a network-based model would provide a solution for the cooperation with opt-out and third countries.

Why do I consider forms of network-based cooperation of the EU significant? Primarily because experience of several decades shows that the EU knows its ways around with forms of coordinated, network-based cooperation.

By today the European Union has developed a diversified judicial cooperation system, which is a great help for the Hungarian administration of justice. Currently, more than a dozen so-called decentralised cooperation frameworks are functioning in the European Union that are based on the idea of the network model of cooperation. Such forms of cooperation increase mutual trust between Members States to a great extent and in this way contribute to the faster administration and handling of cases.

At every international forum, both in the EU bodies or in the Council of Europe, in bilateral or multilateral relations, I advocate the view that the value of this network-based cooperation is invaluable for us in the fight against cross-border crimes. In my opinion, these less bureaucratic systems, relying on the active involvement of the Member States and for this reason giving them motivation, can perform their tasks more effectively than single-centred, international cooperation. In addition, unlike in the case of hierarchical systems, which give the impression of mistrust,[11] the most fundamental condition of network-based cooperation is the *strengthening of mutual trust between the members*.

Direct judicial relations have never been as important as nowadays when the implementation of Directive 2014/41/EU on the European Investigation Order in criminal matters has ended, and in the majority of the Members States the new cooperation regime setting forth strict deadlines for case management where consultation between the issuing authority and the executing authority has a key role has been introduced. Consultation requires stronger cooperation than the former ones, and during consultations the concerned parties need to find the most suitable channel for the case forming the subject of the cooperation in order to make their communication effective and efficient. This channel should be one that could lead to the soonest possible elimination of barriers to cooperation and that could help to find a solution acceptable for everyone in the quickest possible way.

6. The second alternative: The European Public Prosecutor's Office and supplementary private prosecution

It can be treated as a fact that in spite of several unanswered questions and difficulties, the European Public Prosecutor's Office will start its work in 2021 or 2022. As far as we know, 22 Member States will be members of the EPPO within the framework of enhanced cooperation. Not counting on Great Britain anymore, Ireland, Denmark, Sweden, Poland and Hungary will not be part of the EPPO either.

[11] "Does this not imply that not only EU citizens are distrustful of the less and less humanized attitude and institutions of the EU, but that this is a mutual thing, and the EU bodies have also developed in themselves a great deal of mistrust towards the Member States and national authorities? Which one is justified? Is either one justified at all? Nevertheless, if this is so, it envisages a very dangerous vision – alienation from EU citizens." Miskolczi 2018, 174.

The current rejection of participation is justified by constitutionality and subsidiarity reasons. These reasons were explained in detail by the Hungarian government during the negotiations held after the establishment of the EPPO and by the Hungarian National Assembly when a yellow card was given as a warning.

The view of the opt-out countries may certainly change in the future. A Member State can join and be part of enhanced cooperation at any time. A precondition of this is that acts adopted within the framework of enhanced cooperation need to be respected.[12] The Preamble of the Regulation also stipulates that the Member States that participate in enhanced cooperation on the establishment of the EPPO should ensure that they promote participation by as many Member States of the European Union as possible.[13] A comforting legislative solution of unresolved problems and the analysis of practical functioning will evidently be questions to consider. With regard to the latter, the European Public Prosecutor's Office needs to prove that it represents real added value over the current national solutions. *The occurrence, collection and analysis of this experience, however, take time.*

The judicial authorities of Hungary will be in a new and different situation after the European Public Prosecutor's Office starts to operate. Possibilities for cooperation in the course of investigations and convictions of criminal offences falling into the EPPO's jurisdiction best ensure common interests have to be found.

When finding common ways, our starting point is the full coincidence of interests. Effective investigation and suppression of crimes affecting the financial interests of the EU equally serve the interests of the EU, the EU institutions and Hungary as an EU Member State as well.[14]

The European Union would like to establish the European Public Prosecutor's Office because of problems with efficiency set forth in Preamble (3) of the EPPO Regulation.[15] It does not aim at creating uniform law because in such case

– not the procedure of the national courts but the procedure of a *common European court* would be needed, which court would adjudge crimes affecting the financial interests of the EU committed in various countries
– *by applying the same procedural rules*,
– *by imposing the same minimum and maximum punishments*.

By contrast, the EU aims at standardising those phases of criminal proceedings that precede judicial proceedings. The European Public Prosecutor's Office established by the Regulation serves this purpose. So the European Union does not find it sufficient to

[12] Art. 328 (1) TFEU.

[13] Preamble (9) of the EPPO Regulation.

[14] Preamble (3) of the EPPO Regulation.

[15] Miskolczi points out the difference between the endeavour of the EU shown in the field of criminal law and the EU regulation of other branches of law: "No one says that EU agricultural law or EU competition law are needed because national agricultural law, competition law or their institutional systems are not "effective" enough. The reason why not is because practitioners of these branches of law realized that EU-level regulation has a different task than those of national agricultural or competition laws. In this way, no conflicts of law occur between the national or EU regulation, because EU law does not "complete" national law, and it is not to "fill in" the legal gaps left by national law, but it regulates totally different subject matters." Miskolczi 2018, 178.

have harmonised substantive law, which also took place in 2017.[16] It follows from all this that by leaving the jurisdiction of national courts unchanged and by harmonising substantive law, the European Union expressed its conviction that with the establishment of the EPPO, the efficiency of the investigating, indicting and prosecuting authorities need to be increased in relation to handling crimes affecting the financial interests of the EU. In this way, the EPPO will take over this kind of activity from the national prosecution offices, and it will carry out this activity with a kind of uniform approach.

What conclusions can be drawn from this for Hungary, a country which has not joined in on enhanced cooperation? The question of whether the European Public Prosecutor's Office operates more effectively than the national prosecution offices could only be decided after several years' experience, but it is possible to imagine a method which, while preserving constitutionality, can provide a possibility for the EPPO to replace the national prosecution offices in Hungary in some cases when crimes affecting the financial interests of the EU are handled. This possibility may lie in supplementary private prosecution.

Supplementary private prosecution was introduced into the Hungarian legal system by Act XIX of 1998 of the Hungarian Criminal Procedure Code. The legal policy reasons for re-introducing supplementary private prosecution have been explained by Tibor Király: "*The State has the power for criminal conviction and the right to inflict punishment, but the right to initiate a proceeding aimed at achieving these shall not be reserved exclusively for the State as several historical examples and private prosecution also indicate. What is important is that the power to make the final decision shall be vested into the national court representing society, the community. Prosecutors' inaction, if it is based on the incorrect assessment of the facts of the case or on bias, prevents the administration of justice. Supplementary private prosecution, which opens the way to judicial proceedings for the victim, who is most directly affected by the crime, remedies this, while the accused is entitled to have the accusation against him decided by the court. The victim, at the same time, is entitled to the counterpart right, to the mirror image of this right. This is the right to supplementary private accusation, in other words, the right to have the court decide about the offence against him".*[17]

Supplementary private prosecution has certainly proved to be a reform in the system of Hungarian criminal proceedings. Its appropriate regulation and application can contribute to substantive justice, the full development of victim rights.[18]

The new Hungarian Criminal Procedure Code, which entered into force on 1 July 2018, also provides for supplementary private prosecution. Chapter CV of the new Code contains provisions on the supplementary private prosecution proceeding. In accordance with Section 787 (2) of the new Hungarian Criminal Procedure Code, the victim may act as a supplementary private prosecutor if

(a) the prosecution office or the investigation authority has dismissed the criminal complaint,

[16] In accordance with Directive 2017/1371/EU of the European Parliament and of the Council investigation and prosecution against perpetrators of crimes affecting the Union's financial interests and of crimes inextricably linked thereto shall be the task of the European Public Prosecutor's Office.

[17] Király 2003, 183.

[18] Polt 2010, 391.

(b) the prosecution office or the investigation authority has terminated the procedure,

(c) the prosecution office has dropped the charges.

In event of crimes affecting the financial interests of the EU, the European Union is evidently the victim, the injured party. Therefore, the new Hungarian Criminal Procedure Code allows it, at least in principle, to act as a supplementary private prosecutor in general. It is evident that the question is far more complex than this, but it has to be described in more detail. On the one hand, the theoretical difference between supplementary private prosecution and public prosecution has to be taken into consideration. Already at the beginning of the 2000s, the Constitutional Court formulated its position that when the State's right to prosecute arises and is exercised, the victim's request to have the perpetrator punished may only play a restricted role.[19] At the same time, the Constitutional Court also explained that constitutionally it is not allowed that supplementary private prosecution, a tool aimed at strengthening the victim's procedural status, would serve as a means for public bodies to bypass the prosecution service and thereby weaken the constitutional status of the prosecution service. The Constitutional Court also pointed out that crimes upset and violate the legal order of society, and the exclusive power to impose punishment is vested into the State, which has public authority.

In line with the quoted position of the Constitutional Court, the law does not allow supplementary private prosecution when, inter alia, the victim or injured party is the State or a public body,[20] or the crime has not directly violated or risked the victim's or injured party's right or legitimate interest.[21]

These problems, however, can be eliminated by legislation. It is evident, on the one hand, that if the European Union is considered to be the victim or injured party, under Section 487 Subsection (3) Point e) of the new Hungarian Criminal Procedure Code, it is regarded to be a victim which is not the State of Hungary or a public body of the State of Hungary. Hungarian legislation could create the condition that the European Union as a victim or injured party would be represented as a legal person defined in the Regulation by the European Public Prosecutor's Office. It can also be eliminated by further legislation that the European Union is not a victim of specific crimes in accordance with the presently effective legislation, although Directive 2017/1371/EU of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law defines those crimes as crimes for which the European Public Prosecutor's Office has jurisdiction. Such crimes include corruption crimes as well. Even in those cases, however, supplementary private prosecution has a theoretical basis, as these crimes serve as some kind of predicate offences for the commission of crimes affecting the financial interests of the EU. The situation may be the same with criminal organisations.

[19] ABH [Constitutional Court] 2001. 177–187.

[20] Section 487 (3) e) of the Hungarian Criminal Procedure Code.

[21] Section 487 (3) d) of the Hungarian Criminal Procedure Code.

It is evident that in order for the European Public Prosecutor's Office to act as a supplementary private prosecutor, further conditions also need to be provided. Such conditions include the need to regulate national authorities' obligation of notification in each case when they handle crimes that the EPPO has jurisdiction over and the criminal complaint is dismissed, the criminal investigation is terminated or charges are dropped. Basically, all crimes listed by Art. 22 of the Regulation fall into this category. This obligation of notification could only be prescribed in accordance with Art. 24 of the Regulation. Sections 790 and 796 could also be adapted to the supplementary private prosecution role of the European Public Prosecutor's Office.

If the European Public Prosecutor's Office could take on the role and act as a supplementary private prosecutor, the EU objective would be met. This EU objective is that every case which is considered to constitute a crime in view of the EU institutions and violates the financial interests of the EU and thus needs to be decided by court could get before the national court. The difference would be that in case of opt-out Member States not joining the EPPO – such as Hungary, for example – cases could get before the respective national court via two channels. One of the channels would be the national prosecution service, whose procedure the European Union could take the role of a victim in, while the other channel would be supplementary private prosecution, where the European Union could assert the interests of the EU via the European Public Prosecutor's Office, without the national prosecution service, directly before the court. Although this solution would require several changes of law, it could be solved constitutionally. Its theoretical bases exist even today, and they comply with the EU's activity aimed at creating uniform law, as well as with the fundamental financial interests of the EU. Giving a detailed description of this solution, however, would go beyond the limits of this study. Still, I am convinced that this solution should be further reflected on, and it could be treated as a possible alternative.

7. Conclusions

Summing up the above, it can be stated that with the start of the EPPO, we will witness the beginning of a new era which will not be free of difficulties. For us, actors of scientific life, researchers and legal practitioners, it will give highly important tasks so that we can achieve our common aims together more effectively. In order to achieve this, unique and traditional features, methods and objectives of criminal law will continuously need to be taken into consideration.

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THE EUROPEAN PROSECUTOR'S OFFICE – A FACT: THE POSITION OF ROMANIA ON ESTABLISHING THE EUROPEAN PROSECUTOR'S OFFICE

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1. Introduction

The European Public Prosecutor's Office is already a certainty.[1] The European Prosecutor's Office is a meeting point between the national criminal law and the legislation and criminal law regulations of the European Union.

The idea was born following a disastrous balance sheet showing that the damage that European citizens experience annually through intra-Community VAT fraud amounts to about 50 billion Euros. EPPO was thought of as an independent EU body with the authority to investigate and prosecute fraud to the detriment of the EU and other crimes affecting the EU's financial interests.[2]

On 17 July 2013, the Commission adopted a proposal for a Council Regulation establishing the European Prosecutor's Office – which was finalized as Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

2. The idea of a European Prosecutor's Office: A meeting point between the national criminal law and the penal normative activity of the European Union

The idea of a European Prosecutor's Office is not new at all, and even has come to be treated as a theoretical illusion by some important voices in the field of national criminal law. It is not a novelty in the field of the European Union's criminal policy, for the first time mentioned in 1996, according to Klaus Hansch, then President of the European Parliament.

In 2000, at the Intergovernmental Conference prior to the adoption of the Treaty of Nice, the Commission resumed this proposal under another name, namely that of the European Prosecutor. Obviously, at that time, Britain and Ireland opposed categori-

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[1] Radu 2013, 15; Pătrăuș-Tătar 2018, 266–274; Mirișan 2017, 85–95; Mirișan.
[2] Mirișan.

cally the fact that the accusatory system that characterizes these states does not know the institution of the Public Ministry.[3]

Although in 2001 the European Commission issued the Green Paper on the Criminal Law protection of the Community's financial interests and the establishment of a European Prosecutor's Office,[4] a document which reiterates the attention of the European legislator and the debates on the drafting of a European constitution, but which is finally abandoned.

The Treaty of Lisbon, in art. 86, brings back the European Prosecutor's Office, but a less ambitious project, this time. Thus, "*in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulation in accordance with a procedure, may establish a European Prosecutor's Office, starting with Eurojust. The Council shall act* unanimously after obtaining the consent of the European Parliament."[5]

The possibility of establishing a new body through a regulation was adopted by the European legislator by unanimous vote (!).

The objective of the European Prosecutor's Office is to investigate offences, to prosecute offenders against the financial interests of the Union.

The EPPO will be established as a Union body with a decentralized structure, which for most of its activities would be based on national investigation and prosecution authorities as well as on national law. The basis of the model proposed by the Commission is the principles of efficiency, independence and accountability. The proposal is based on respect for the national legal traditions and judicial systems in the Member States and aims at the coherence and speed of actions.[6]

The main elements of the EPPO Regulation place the European Public Prosecutor's Office within the activities of coordinating and supervising the investigation and undertaking of criminal prosecution. The European Prosecutor's Office will be able to bring actions *before the competent courts of the Member States*, including the indictment or other appeals, until a final judgment is given.

The Regulation establishing the European Public Prosecutor's Office provides that its main objective is "to create an entity that will have the necessary powers and resources to investigate, prosecute and bring to trial the persons accused of committing the offenses of fraud from other illicit activities affecting the financial interests of the Union, both at national and cross-border level. The European Prosecutor's Office will coordinate and supervise the investigations and undertake criminal prosecution."

Returning to the present moment, 22 Member States that have decided to participate in the enhanced cooperation on the creation of the European Public Prosecutor's Office agreed on the conditions for the legislation laying down the details of the operation and its role.

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[3] Gorghiu; Mirișan.

[4] The European Commission Green Paper on Criminal Protection of the Community's Financial Interests and the Establishment of a European Prosecutor presented by the Commission in Brussels on 01.12.2001, *https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/green_paper_en.pdf.*

[5] Millitaru 2011, 116; Schutze 2012*,* 198; Pătrăuș 2018, 111.

[6] Mirișan 2017, 85–95.

The European Prosecutor's Office will be able to bring actions before the competent courts of the Member States, including the indictment or other appeals until a final judgment is delivered.

A major benefit of establishing the European Prosecutor's Office is to create a common Union criminal *investigation* policy that addresses significant divergences between the different Member States as to how criminal fraud against the financial interests of the Union is investigated and prosecuted.

The unitary criminal prosecution at EU level of crimes against EU financial interests, can best be achieved at Union level in an unitary system by setting up this new organism. The principle of proportionality is also respected because the scope of this proposal is limited to what is strictly necessary to achieve the objectives, this being a minimal prejudice to the legal systems and institutional structures of the Member States.[7]

The national courts will carry out judicial control, meaning that the European Prosecutor's decisions will be challenged before a national court.

The way in which cross-border evidence is to be administered is another element that points to the significant added value that the new body will bring.

Evidence administered under the legislation of a Member State would be admissible in the proceedings unless their admission would adversely affect the right to a fair trial and the right to a fair hearing even if national law the Member State in which the court is located shall make different rules on the collection or presentation of such evidence (Recital 80 and Art. 37 EPPO Regulation).

Enforcing the EPPO Regulation would strengthen the procedural standards by providing a catalogue of procedural safeguards and research measures at Union level for which a prior judicial authorization is required from national courts in accordance with Union law, with regard to mandatory provisions under national law.

One sensitive area is the standard of proofs. Art. 37 "Evidence" and Recital (80) are very important in this line of thoughts[8]:

1. Evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State.

2. The power of the trial court to freely assess the evidence presented by the defendant or the prosecutors of the EPPO shall not be affected by this Regulation.

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[7] Bořkovec 2011, 18–20;

[8] Recital (80): *"The evidence presented by the EPPO in court should not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State, provided that the trial court considers its admission to respect the fairness of the procedure and the suspect or accused person's rights of defence under the Charter. This Regulation respects the fundamental rights and observes the principles recognised by Article 6 TEU and in the Charter, in particular Title VI thereof, by international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by Member States' constitutions in their respective fields of application. In line with those principles, and in respecting the different legal systems and traditions of the Member States as provided for in Article 67(1) TFEU, nothing in this Regulation may be interpreted as prohibiting the courts from applying the fundamental principles of national law on fairness of the procedure that they apply in their national systems, including in common law systems."*

Thus, EPPO will, under certain conditions, have the power to investigate and prosecute fraud at the level of the European Union, but also other offenses that affect its financial interests.

The central office of the European Prosecutor's Office will be in Luxembourg, following a proposal by the European Chief Prosecutor, the European Commission to set the date when EPPO will assume its investigative and prosecution tasks, but not earlier than three years after the entry the Regulation in force.

In practice, things "will change well" when the new structure is in place, as only national authorities can now investigate and prosecute the acts of fraudulent union financial interests, and national powers stop at the national border.

3. Brief considerations regarding the need for constitution, competence, role, structure and start date for the activity of the European Public Prosecutor's Office

In April 2017, 16 Member States agreed to work harder to better combat fraud against the EU. They agreed to establish a European Prosecutor's Office (EPPO) using the "enhanced cooperation" procedure.

Later, other countries have decided to join these efforts to protect the EU budget against fraud: there are currently 22 participating Member States.

Once it is operational, the EU Prosecutor's Office will have the competence to investigate and prosecute the perpetrators of the offences that affect the EU financial interests (Directive EU 2017/1371), such as: fraud, corruption, money laundering, cross-border VAT fraud

A number of states 22 Member States Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Luxembourg, Italy, Malta, Portugal, Romania, Slovenia, Slovakia, Spain, Netherlands are included in this new branch of a judicial system.

3.1. Why do we need an EU Prosecutor?[9]

Member States lose at least EUR 50 billion in VAT revenues each year due to transnational fraud. They also reported that around € 638 million of the EU Structural Funds were misused only in 2015. Only national authorities could investigate such offenses.

However, their jurisdiction stops at national borders, leaving national prosecutors with limited tools to tackle financial crime at a scarce cross-border level.

Similarly, existing EU bodies, such as OLAF, Eurojust and Europol, are not mandated to conduct criminal investigations.

The European Prosecutor's Office will help to overcome these shortcomings and to suppress crimes that harm the EU's financial interests. "*The European Prosecutor's*

[9] Bořkovec 2011, 18–20.

Office will close this institutional gap. It will have exclusive jurisdiction at the level of the participating states to address the suspicions of criminal behaviour falling within its sphere of competence."[10]

3.2. The role and structure of the EU Prosecutor's Office

The mission of the EU Prosecutor's Office will be to combat fraud against EU finances. It will have the competence to investigate and prosecute crimes that harm the financial interests of the EU. The European Prosecutor's Office will carry out cross-border investigations in cases of fraud involving EU funds of over € 10,000 or in cases of VAT fraud at cross-border level involving over € 10 million. The EU Prosecutor's Office will work in close collaboration with national law enforcement authorities. It will also work closely with other bodies such as Eurojust and Europol.

3.3. Structure

The EU Prosecutor's Office will have a two-level structure. The strategic level will be composed of:

– a European Chief Prosecutor responsible for managing EPPO and organizing its work
– a college of prosecutors responsible for decision-making on strategic issues

The operational level will include:

– European Delegated Prosecutors responsible for conducting investigations and prosecutions
– Permanent Chambers that will monitor and direct investigations and make decisions on operational issues

Designated as a decentralized structure, the European Public Prosecutor's Office would be a single, two-level organization: *"a central unit to oversee, coordinate and [...] conduct criminal investigations and prosecutions in Member States and delegated European prosecutors in general, would carry out these investigations and prosecutions autonomously"*.[11]

Delegated European prosecutors would be part of both the European Prosecutor's Office and the national prosecution bodies.

The European Prosecutor's Office would therefore easily integrate into national judicial systems and could rely on procedural rules in national law, national courts and national law enforcement resources, while pursuing effectively the European common objective of combating fraud to the detriment of the Union budget.

[10] Mirișan *www.universuljuridic.ro.*
[11] Pătrăuș-Tătar 2018, 266–274.

3.4. When will the EU Prosecutor's Office begin the activity?

The Commission will set the date of commencement of EPPO operations as soon as it is established. For this, it will be based on a proposal from the European Chief Prosecutor. The EU Prosecutor's Office should take up its duties by the end of 2020, given that it foresees the establishment phase will last two to three years.

Since the adoption of the EPPO Regulation, the Commission has regularly sent ministers of justice information on its establishment.

The Commission has already begun to work on a series of steps towards the creation of the Prosecutor's Office, namely:

– appointing an interim administrative director
– the selection of the European Chief Prosecutor
– the selection of European prosecutors
– budgeting

3.5. How has consolidated cooperation been launched?

The Commission presented its proposal to set up the European Prosecutor's Office in 2013. To be adopted, the Council had to agree unanimously and get the approval of the European Parliament. After more than three years of negotiations, the Council failed to reach a unanimous agreement on the proposal. The lack of unanimity was registered by the Council in February 2017 and was confirmed by the European Council in the following month.

In these situations, enhanced cooperation may be undertaken by a group of at least nine Member States in accordance with the EU Treaties.

Enhanced cooperation with the European Prosecutor's Office was therefore launched in April 2017. Two months later, the participating Member States reached agreement on the regulation on 8 June 2017. Parliament gave its approval on 5 October 2017. Subsequently, the Council adopted the EPPO regulation on 12 October, which came into force on 20 November 2017.

4. How to exercise the powers of the European Public Prosecutor's Office?

As regarding the initiation of investigations, the European Public Prosecutor or the European Public Prosecutors acting on his behalf will initiate an investigation by a written decision if there are reasonable grounds to believe that the offense falling within the competence of the European Prosecutor's Office is or has been committed.

If no delegated prosecutor is notified, a Permanent Chamber of Deputies will appoint the delegate prosecutor responsible for the investigation.

When the investigation is initiated by the European Public Prosecutor, he will assign the case, through a Permanent Chamber, to a European Public Prosecutor, unless

he wishes to carry out the investigation himself, a decision which will need to be notified by the Permanent Competent Chamber.

In any case, outside the control personally conducted by the head of the European Prosecutor's Office, the Permanent Chamber will appoint one of its members to closely monitor the conduct of the investigation, and it will provide the necessary instructions to the delegated European prosecutors whose activities they will coordinate.

These delegated prosecutors will directly work under its authority with regard to offenses falling within the competence of the European Prosecutor's Office and will continue to be an integral part of the judicial system of their Member State.

The European Public Prosecutor may either carry out the necessary investigative acts or instruct the national authorities to execute them.

Thus, investigative acts will often be executed by law enforcement authorities, acting on the instructions of the European Prosecutor's Office. The Rules of Procedure provide as follows: "*The procedural documents of the European Public Prosecutor's Office which are intended to produce legal effects vis-à-vis third parties shall be subject to the control of the competent national jurisdictions in accordance with the requirements and procedures laid down by national law"*.

The delegated prosecutor may, when the maximum penalty imposed on the perpetrators of the facts investigated exceeds a certain threshold, make available on his / her own initiative search, confiscation, blocking of offenses, etc.

It will also be able to draw on the powers of other delegated European prosecutors in case of cross-border investigations. Similarly, national authorities, without hindering the investigation, may take any necessary measures to ensure the success of the investigation, in particular about the deprivation or restriction of liberty.

In addition, the national courts will remain free to refer the Court of Justice of the European Union to questions concerning the interpretation or validity of the European Union legal provisions on judicial review of investigative and prosecution acts adopted by the European Parliament.

Respect for fundamental rights. Naturally, the European Prosecutor's Office will have to ensure respect for the rule of law at all stages of investigations and prosecutions, the rights enshrined in the Charter of Fundamental Rights of the European Union, plus the rights laid down in European Union law. Finally, investigations and prosecutions by the European Prosecutor's Office will have to be guided by the principles of proportionality, impartiality and fairness to the suspect or the person being prosecuted. This includes the obligation to look for "*all pertinent evidence*, both incriminating and disinclined".

5. Romania's position on the need to set up the European Public Prosecutor's Office

Romania's position on the establishment of the European Prosecutor's Office was a singular one because it was the only Member State to have expressed both a positive view of the Senate and a negative one from the Chamber of Deputies. Not only Ro-

mania voted negatively on the new body, but also many other countries, and most of these negative responses aimed at applying and respecting the principle of subsidiarity.

The impact of adopting this regulation on the Romanian judicial system would be straightforward, because as a legal instrument of the EU, the regulation is directly applicable and transposition into domestic law is not necessary.

6. Conclusions

The European Prosecutor's Office, which will be launched in Luxembourg in 2020, is the result of a long and difficult journey. Some consider it very complex and, in the end, too inefficient, and others worry because of the renunciation of the sovereignty of the Member States and of a disguised reference to federalism whose name it would not want to say.

The European Prosecutor's Office is like many other bodies created over the past twenty years within the European Union: much less ambitious and the victim of seeking the widest possible unanimity or majority.

We need to think about what was once written about Eurojust or Europol, whose utility or efficiency no one is currently contesting.

And we, the authors of this material, along with many specialists in the field, felt the urgent *need* for a European Investigation and Tracking Institution.

Of course, the European Prosecutor's Office that was set up today is not perfect and *can legitimately be criticized*. But it will, like all the other European institutions, become the result of the work of some specialists in the field who will face the battle against the most serious offenses listed in the previous sections.

Please be aware that the dramatic events with which Europe is currently facing *accelerate* the extension of the competence of the future European Prosecutor's Office and, why not, the European Prosecutor's Office to investigate and combat other serious crimes such as, for example, terrorism or other cross-border organized crime.

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EUROPEAN COOPERATION IN THE FIELD OF ANTITRUST

Dr. Gábor Gál[*]

1. Introduction

The purpose of this study is to present an example for alternative means of the protection of the European Union's financial interests: (a) the EU dimension of the prosecution of cartels, in particular procedural measures and sanctions and (b) the cooperation between Member States' authorities in this area in the European Union.[1]

2. The concept of a cartel

The cartel is perhaps the most commonly known concept of competition law enforcement. The European Commission defines cartels as agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Art. 101 of the TFEU.[2]

There are many variations of cartels. Perhaps the most widespread and most commonly known are those price-fixing cartels in which the cooperation between cartel members concerns prices; in other cases they distribute customers, geographic areas or products. Allocation of production or sales quotas, collusion in the bidding process, the exchange of market information, import or export restrictions, as well as cooperation with other competitors, may also be the subject of cartels. A combination of these behaviours is also common.

According to the impact analysis[3] of the 2014 Damages Directive,[4] the social impact of cartels is extremely harmful. Based on conservative estimates, the prices of

[*] Member of the Competition Commission, Hungarian Competition Authority.

[1] Hereinafter EU or Union.

[2] Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11), OJ C 298, 08.12.2006, 17–22.

[3] Impact Assessment Report SWD(2013) 203 final, 11.6.2013, Section 3.4.2

[4] Directive 2014/104 / EU of the European Parliament and of the Council on certain rules governing actions for damages under national law based on infringement of the competition rules of the Member States and the European Union (OJ L 349, 05.12.2014, 1).

the cartelised products may increase by at least 10–15%, but higher estimates exist in academic literature (30–50%).[5]

In addition to price increases, companies involved in cartel infringements cause significant loss of efficiency by restricting competition and eliminating the external constraints that could lead to product development and the use of more efficient production technologies. Such behaviour may ultimately lead to a loss of competitiveness and a reduction in employment, negatively affecting the development of the whole economy.

Cartels affecting public procurement are those that are the most closely linked to the theme of the conference (the protection of the financial interests of the European Union), as it is often the case that public procurement is financed by the European Union. A public procurement cartel is a cartel affecting a public procurement procedure. There are several variants (including, for example, sham bids or bid retention,[6] but in all cases the result is that public procurement becomes more costly and the efficiency of the use of public funds deteriorates.

The recognition of the increased harm of public procurement cartels is also reflected in that, in addition to their prohibition under competition law, in Hungary participation in such a cartel qualifies as a criminal offence punishable by imprisonment pursuant to the Criminal Code.[7] In addition the Hungarian Competition Authority (HCA) publishes on its website a list of companies that have been found to infringe laws and have been fined for cartel activities in public procurement procedures.[8]

Nevertheless, public procurement cartels unfortunately constitute a significant part of the cartels prosecuted by the HCA and the majority of complaints (approximately 60–65%) concerns public procurement procedures. A concrete example is the so-called "surgical sutures" cartel (VJ/79/2013). In this case, five companies participated in a cartel restricting competition in a public procurement procedure, announced by four hospitals carried out in 2011–2012 for the purchase of surgical sutures for sewing machines, in which they influenced the tender specification (specification was tailored to cartel members), shared the market and fixed prices.[9]

In the following, the substantive rules and procedural framework for the prosecution of cartels at the EU level is presented with reference to the relevant Hungarian regulatory framework.

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[5] See impact assessment of Directive 1/2019 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (11.12.2018.) (OJ L 11, 14.01.2019.) *http://ec.europa.eu/competition/antitrust/nca.html* (05.04.2019.).

[6] For further informations see the Hungarian Competition Authority's webiste:
http://www.gvh.hu/data/cms1036296/GVH_VKK_kiadvanyok_oktatasi_anyag_kozbesz_kartell_2017.pdf

[7] Pursuant to Section 420 para (1) of the Criminal Code "Any person who enters into an agreement to fix prices, fees, other contractual terms or to divide the market in order to influence the outcome of a public procurement procedure or an open or private tender for concession-driven activity, or other concerted practices; and thereby restricts competition is punishable by a term of imprisonment ranging from one year to five years."

[8] Pursuant to Art. 8 (l) of Government Decree No. 321/2015 (X. 30.) on proof of suitability and grounds for exclusion in public procurement procedures and definition of public procurement specifications, tenderers may verify the decisions establishing an infringement under the Hungarian Competition Act and Art. 101 TFEU can be checked from the database containing the final decisions on the website of the HCA.

[9] See *http://www.gvh.hu/dontesek/versenyhivatali_dontesek/dontesek_2013/vj_79_2013_692.html* (04.05.2019).

3. Institutional framework for the prosecution of cartels: Substantive and procedural rules

The substantive legal grounds for the pursuit of cartels at the European level was created by Art. 81 of the Treaty of Rome establishing the European Economic Community in 1957 with the prohibition of agreements restricting competition.

At present, Art. 101 (1) TFEU contains the same prohibition, which states that "*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market".* The competition law of the Member States also contains provisions on cartel prohibitions.

Under this article, cartels qualify as agreements between undertakings and constitute a hardcore restriction of competition, which clearly contradicts this article (restricting competition by object).

For the sake of completeness, it should be noted that, apart from cartels, Art. 101 (1) TFEU also covers a number of other anti-competitive practices (for instance vertical agreements between non-competitors) and Art. 101 TFEU itself is only one of the tools of European competition policy (which also includes merger control and state aid control).

In Hungary the cartel prohibition is included in Art. 11 (1) of Act XLVII of 1996 on the prohibition of unfair and restrictive market practices (hereinafter: Hungarian Competition Act) – and it is essentially identical to Art. 101 of the TFEU.

Until 2004, enforcement of Art. 101 TFEU was a monopoly of the European Commission, but with its reform, the enforcement of European competition law was decentralised and its application also became the responsibility of Member States' competition authorities under Council Regulation No. 1/2003 (hereinafter Regulation 1/2003).[10] This Regulation introduced an enforcement system based directly on the full application of EU competition law. In addition to the European Commission, it empowered national competition authorities and national courts to apply all aspects of EU competition law. Regulation 1/2003 also established new methods of close cooperation between the Commission and the competition authorities of the Member States, in particular within the framework of the European Competition Network (hereinafter ECN).

Subsequently, the Commission and the competition authorities of the Member States have consistently prioritised and dealt with the most serious and most harmful anti-competitive practices, namely cartels. They make up a significant proportion of their enforcement cases.[11]

As regards procedural rules, the procedures of the European Commission and the Member States are not harmonised, and different rules apply. There has been some de-

[10] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, 1).

[11] Communication from the Commission to the European Parliament and the Council of enforcing the antitrust rules under Regulation 1/2003 / EC of the decade: Achievements and Future Prospects (COM (2014) 453, 09.07.2014).

gree of spontaneous harmonisation concerning procedural aspects through the ECN (for example on the use of the model leniency programme, interim measures, commitments and other recommendations[12]), but there remained non-harmonised areas, which was an obstacle to effective law enforcement (such as the diverse rules on inspections, fines and leniency). The European Commission has therefore proposed further harmonisation of procedural rules.[13]

4. Detecting cartels

4.1. Leniency

Paradoxically, the most important tool for detection is based on the cartel participants themselves. The EU and the Member States have put into place so-called leniency programmes through which companies participating in a cartel may be exempted from a fine to be imposed if they cooperate with competition authorities during the investigation.

According to the 2014 Damages Directive, a 'leniency programme' means a programme concerning the application of Art. 101 TFEU or a corresponding provision under national law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority by voluntarily providing presentations regarding that participant's knowledge of and role in the cartel in return for which that participant receives, by decision or by a discontinuation of proceedings, immunity from or a reduction in fines for its involvement in the cartel.[14]

Leniency is a key tool for the detection of secret cartels. In the EU its legal basis is the 2006 Leniency Notice[15] and in the Member States their respective leniency programmes. In Hungary, the institution of leniency also exists.[16] In practice, in the EU, this is one of the most important tools for detecting cases (about 80% of cartel decisions taken by the Commission since 2014 have been triggered by a leniency application), while in Hungary ex officio detection remains more important.

The most important feature of the leniency programme operated by the European Commission is that, under certain conditions, the first applicant may receive total immunity from fines if the evidence provided allows the carrying out of a targeted inspection or the finding of an infringement under Art. 101 of the TFEU (if the procedure is already ongoing). The second and subsequent applicants may receive a re-

[12] See *http://ec.europa.eu/competition/ecn/documents.html* (07.04.2019).

[13] See Section 8.4 below.

[14] See recital 15 of Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law based on infringement of the competition rules of the Member States and the European Union (OJ L 349, 05.12.2014, 1).

[15] Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, 17).

[16] See Notice 14/2017 of the President and the President of the Competition Council of the HCA.

duction of the fine if the evidence provided represents significant added value to the value of the evidence already available to the Commission.[17] The Hungarian leniency programme operates under essentially the same conditions.

4.2. Other means of detection

If no leniency application has been filed, detection is much more difficult, but the Commission and Member States' competition authorities also have other detection tools and information sources, notably complaints by market participants, the information provided by other Member States' authorities, information gathered ex officio and information provided by individuals (whistleblowing).

Many competition authorities operate whistleblowing tools with which alleged infringements can be reported to the European Commission even anonymously through an application specifically developed for this purpose.[18]

The cartel chat operated by the HCA is a similar tool.[19] In addition, however, there is another tool in Hungary that does not exist at the EU level. This is the so-called informant programme, in the framework of which certain natural persons notifying about a cartel, under certain conditions, may receive a reward in cash.[20] The fee is awarded if key written evidence or information is provided. The evidence is considered key if it makes it possible to find an infringement or allows the HCA to acquire permission for inspection leading to the collection of such key evidence. The informant's fee is 1% of the fine imposed but not more than 50,000,000 HUF.

5. Investigative powers

The detection of cartels is followed by the discovery of the facts and the collection of evidence.

One of the most important tools available for this is the so-called inspection or dawn raid. European Commission staff have the right to enter any premises, territory and means of transport of companies; review business-related books and other records, irrespective of the means on which they are stored; make copies of them; seal any business premises and books or records for the time and to the extent necessary for the inspection; and request an explanation of any fact or document related to the purpose and subject matter of the inspection from any representative or employee of the company and record the answer. If a reasonable suspicion exists that books or other records related to the business and to the subject matter of the inspection, which may be relevant to prove a serious violation of Art. 101 TFEU, are being kept in any other premises, land or means of transport, including the homes of directors, managers

[17] Reduction in predefined bands (first 30–50%, second 20–30%, then up to 20%).
[18] *http://ec.europa.eu/competition/cartels/whistleblower/index.html* (01.04.2019).
[19] *https://www.gvh.hu/kartellchat/kcfaq* (01.04.2019).
[20] *http://gvh.hu/fogyasztoknak/informatori_dij* (01.04.2019).

and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.[21]

Requests for information are also an important tool in the investigation of the facts, and they are typically used after processing the data obtained during the inspections to clarify them.[22]

Finally, the European Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.[23]

Providing false, incomplete or misleading information, or in case of breaking the seal affixed to the inspected premises, may lead to the imposition of a procedural fine not exceeding 1% of the company's total turnover in the preceding business year.[24]

The HCA has similar investigative powers and sanctions.[25]

6. Competition enforcement procedure

Competition law enforcement procedure is an administrative procedure with criminal law characteristics. Following clarification of the facts, if in its preliminary opinion an infringement can still be assumed, the European Commission will prepare a so-called Statement of Objections summarising the alleged infringement and supporting evidence. The parties may comment on the statement of objections and have the right to full access to the file and to request a hearing. The Commission may then adopt a prohibition decision and impose a fine.

The so-called settlement institution makes the procedure faster. Its essence is that the parties receive a 10% reduction of the fine if they acknowledge the facts, their legal assessment and cooperate in the proceedings. This alternative path introduced in 2008 for cartels is a success,[26] and many companies use this option.

The possibility of settlement was also introduced in Hungary in 2014 and allows for a reduction of fines in the range of 10–30%.

7. Penalty (fine)

The European Commission, as competition authority, may impose fines on companies as an administrative sanction. Criminal sanctions – such as in the United States – are not available.

[21] Council Regulation No 1/2003, Art. 20 and 21.
[22] Regulation 1/2003, Art. 18.
[23] Regulation 1/2003, Art. 19.
[24] Regulation 1/2003, Art. 23 para (1).
[25] See Art. 64/A–65/D, Art.61 of the Hungarian Competition Act.
[26] See Art. 64/A–65/D, Art. 61 of the Hungarian Competition Act.

Under the competition rules of the European Union, the calculation of fines is a multi-stage process. The starting amount is the proportion of the relevant turnover of the last business year affected by the infringement (up to 30%), depending on the gravity of the infringement. This is multiplied by the number of years elapsed, and in the case of cartels, an additional amount (15–25% of the turnover involved) is added. This amount will be adjusted by aggravating and mitigating circumstances, and there may be an increase in deterrence. Leniency arrangements and settlement reduction may decrease the amount of the fine, the maximum of which cannot exceed 10% of the company's revenues in the previous business year.[27]

The Hungarian system is not exactly the same but is similar to the EU method; the starting amount is determined for the whole duration of the infringement based on the turnover affected by the infringement (to a maximum of 30% of the relevant turnover or the tender amount with infringements in connection with tendering procedures), which is then adjusted in several steps, taking into account further criteria, in particular aggravating and mitigating circumstances.[28]

In relation to the theme of the conference, it should be emphasised that according to relevant Hungarian rules, the gravity of an infringement concerning public procurement is considered to be very high and may also be an aggravating factor as it is fundamentally contrary to social expectations related to the rational use of public funds.[29]

The following tables represent the highest EU and Hungarian cartel fines:

Table 1: Top 10 fines imposed by the European Commission in cartel case

Case	Year	Amount of fine (€)
Trucks	2016/2017	3 807 022 000
TV and computer monitor tubes	2012	1 409 588 000
Euro interest rate derivatives (EIRD)	2013/2016	1 310 039 000
Carglass	2008	1 185 500 000
Automotive bearings	2014	953 306 000
Elevators and escalator	2007	832 422 250
Vitamins	2001	790 515 000
Airfreight	2010/2017	785 345 000
Yen interest rate derivatives (YIRD)	2013/2015	669 719 000
Gas insulated switchgear	2007/2012	675 445 000

Source: European Commission statistics, *http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.*

[27] *Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation (EC) No 1/2003*, 2006/C 10/2 (OJ C 210, 01.09.2006).

[28] Notice 11/2017. of the HCA on Fines („Hungarian Fines Notice").

[29] Points 28 and 33 of the Hungarian Fines Notice.

Table 2: The 10 highest fines imposed by the HCA in cartel cases

Case	Year	Amount of fine (HUF)
1. Train cartel	VJ/174/2007	7,178,000,000
2. Road construction cartel	VJ/27/2003	7,043,000,000
3. Insurance cartel	VJ/51/2005	6,814,000,000
4. Mortgage cartel	VJ/20/2017	4,905,000,000
5. Road construction cartel	VJ/130/2006	2,906,000,000
6. Concrete cartel	VJ/29/2011	2,790,200,000
7. Medicines cartel	VJ/28/2013	2,443,207,400
8. Mill cartel	VJ/69/2008	2,294,300,000
9. Publishing cartel	VJ/23/2011	2,164,869,000
10. MIFs	VJ/18/2008	1,922,000,000

Source: The database of HCA's decision, *http://www.gvh.hu/en/resolutions/resolutions_of_the_gvh.*

8. Cooperation between European Competition Authorities (ECN)

As already mentioned in Section 3 above, the European Commission and the national competition authorities of the Member States are working closely together within the European Competition Network (ECN) to enforce EU antitrust rules. This network provides a good basis for the authorities to apply EU antitrust rules in a coherent manner. More than 1000 decisions have been made by the Commission and national competition authorities since 2004, and more than 85% of decisions applying EU antitrust rules were made by national competition authorities.[30]

The legal basis of the ECN is Regulation 1/2003 and the Commission Communication on Competition within the Network of Competition Authorities (hereinafter ECN Communication).[31]

In particular, the cooperation covers the following areas: (a) initiation of proceedings and allocation of cases, (b) exchange of information and procedural assistance, (c) ensuring of coherent application of competition rules.

8.1. Initiation and allocation of cases

There may be a single competition authority in charge of the case, more national competition authorities may conduct parallel proceedings, or the European Commission may take the case.

In most cases, the authority receiving a complaint or starting an ex officio procedure will remain in charge of the case. An authority is regarded as being well placed to act where there is a material link between the infringement and the territory of the EU country on which the authority depends in order for it to effectively bring the entire infringement to an end. Re-allocation of a case would be envisaged only at the outset

[30] See the European Commission's press release: *http://europa.eu/rapid/press-release_IP-17-685_en.htm* (04.04.2014).

[31] Communication from the Commission on cooperation within the network of competition authorities, OJ C 101, 27.04.2004.

of the procedure where either the authority concerned considered that it was not well placed to act or where other authorities also considered themselves well placed to act. In addition, even if several authorities can be considered well placed to act, the action of a single authority is sometimes appropriate in that it is sufficient to bring the entire infringement to an end.

Parallel action by two or three national competition authorities may be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and where the action of only one authority would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately. The authorities dealing with a complaint as part of a parallel action will endeavour to coordinate their actions to the greatest extent possible.

By contrast, the Commission is particularly well placed if one or more agreements or practices affect competition in more than three EU countries. It is also particularly well placed to deal with a case if the case is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission or if the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement.

Regulation 1/2003 established a mechanism for the mutual notification of competition authorities in order to ensure effective and timely transfer of cases. Art. 11 (3) of the Regulation obliges national competition authorities to notify the Commission without delay if they act on the basis of Art. 101 or 102 TFEU before the first formal investigative step or after they start the investigation.

Finally, where several competition authorities deal with the same agreement or conduct, Art. 13 of the Regulation provides a legal basis for suspending proceedings or rejecting a complaint on the grounds that another authority is dealing with the case or has dealt with it.

8.2. Exchange of information and assistance with this procedure

A key element of the functioning of the network is the power of all the competition authorities to exchange and use information that has been collected by them for the purpose of applying the relevant competition provisions. Art. 12 of Regulation 1/2003 provides that – subject to the conditions specified therein – the Commission and the competition authorities of the Member States may provide each other with any factual or legal information and use it as evidence, including information of a confidential nature for the purposes of the application of Art. 101 and 102 TFEU.

In addition to the exchange of information upon request of the Member States' competition authorities, the competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State and assist the European Commission in its inspections.[32]

[32] Regulation 1/2003, Art. 22 para (1) and (2).

8.3. Ensuring the coherence of the application of EU competition law

Due to the existence of parallel powers, safeguards built into the system serve to preserve the coherence in the application of EU competition rules.

On one hand, at least thirty days before the adoption of a decision requiring that an infringement be brought to an end, competition authorities of the Member States shall inform the Commission, which examines the measure to be adopted and, if it considers it necessary, makes comments in order to ensure consistent application of the law.[33]

On the other hand, if the Commission initiates proceedings under Art. 11 (6) of Regulation 1/2003, the powers of the EU competition authorities to initiate proceedings in the same case on the same legal basis cease to exist. If the competition authority of one Member State is already acting on the case, the Commission may initiate proceedings only after consulting the national competition authority under the conditions specified in the ECN Communication.[34]

Finally, the Commission and the Member States regularly consult each other within the framework of working group meetings and for advisory committees composed of representatives of the competition authorities of the Member States.[35]

8.4. The ECN Plus Directive

As already mentioned in Section 3 above, the competition authorities of the Member States enforce EU competition law in accordance with their national procedural rules, which in some cases decreases the efficiency of competition law enforcement.[36]

Recognizing this, the ECN Plus Directive adopted in December 2018 aims in particular to ensure that national competition authorities[37]

(a) act independently when enforcing EU antitrust rules and work in a fully impartial manner, without taking instructions from public or private entities,

(b) have the necessary financial and human resources to do their work,

(c) have all the powers needed to gather all relevant evidence, such as the right to search mobile phones, laptops and tablets,

(d) have adequate tools to impose proportionate and deterrent sanctions for breaches of EU antitrust rules and

(e) have coordinated leniency programmes which encourage companies to come forward with evidence of illegal cartels.

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[33] Regulation 1/2003, Art. 11 para (4).

[34] See para 54 of the ECN Communication.

[35] Art. 14 of Regulation 1/2003.

[36] *The Commission Communication on the ten years of enforcement of antitrust rules under Regulation (EC) No 1/2003* (COM (2014) 453) identified a number of potential areas of action to enhance the efficiency of national competition authorities' enforcement powers.

[37] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ L 11, 14.01.2019).

PART V

CONCLUSIONS & RECOMMENDATIONS

CONCLUSIONS AND RECOMMENDATIONS

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[1] came to the following conclusions.

1. General conclusions in connection with the criminal law protection of the financial interests of the European Union

(a) 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 Art. 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.

(b) 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).[2] Although the European Union legislator could have adopted the Directive based on Art. 325(4) TFEU, the legal basis of the Directive finally became Art. 83(2) TFEU. According to Art. 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*

[1] 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] 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, 29–41].

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.

(c) 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.

(d) 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,[3] 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.
– The Directive on combating money laundering by criminal law (6th Anti-Money Laundering Directive)[4] provides for an obligation to introduce a criminal offence

[3] 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, 73–117].

[4] 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, 22–30].

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.

(e) 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.

(f) In 2017, the European Union adopted a Regulation on the establishment of the European Public Prosecutor's Office (EPPO Regulation).[5] 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.

(g) 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.

(h) 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.

[5] 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, 1–71].

2. Special conclusions focusing on VAT fraud

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

(b) 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 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.

(c) 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.

(d) 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.

(e) 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.

(f) 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.

(g) 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.

(h) 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.

3. Special conclusions focusing on money laundering

(a) 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).[6] Since the Treaty of Lisbon, money laundering is among the ten particularly serious crimes with a cross-border dimension, i.e. the so-called euro-crimes referred to in Art. 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.

(b) 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.

[6] 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, 43–74].

(c) 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.

(d) 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.

(e) 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 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.

(f) 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.

(g) 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.

4. Special conclusions focusing on corruption

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

(b) 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.

(c) 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.

(d) 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.[7]

5. Special conclusions in connection with criminal procedural questions and the protection of fundamental rights

(a) 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.

[7] 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].

(b) 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.

(c) 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.

(d) 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.[8]

(e) 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.

6. Special conclusions in connection with cybercrime

(a) 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

[8] 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].

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.

(b) 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.

(c) The proposed E-Evidence Regulation and the proposed European Union Directive[9] can be considered as an important development. The European Investigation Order[10] 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.

(d) 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.

(e) 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.

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[9] 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].

[10] 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, 1–36].

7. Special conclusions in connection with criminal compliance

(a) 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.

(b) (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.

8. Special conclusions in connection with criminological questions

(a) 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.