

## Articles

# EU Security Governance and Financial Crimes

By *Els De Busser\** & *Ester Herlin-Karnell\*\**

### A. Introduction

This special issue aims to investigate the regulatory challenges facing the EU with regard to security governance in the broad area of the fight against financial crimes and by adopting a wider outlook on how to map and understand these phenomena in their salient contexts. In recent years, security as a key word can be witnessed as increasingly penetrating policies on a national, international, and supranational level. This development is also visible in EU policies, inter alia in the EU's policy concerning the area of freedom, security, and justice (AFSJ). Coupling the word security to the concept of governance in the somewhat thought-provoking phrase "security governance" prominently cements its position in the entirety of processes and mechanisms that steer people as well as corporations or markets. Security in the EU internal context concerns to a great extent the fight against terrorism and its financing as well as the policing of EU borders. Security in this regard concerns the structure of EU law and how it can be justified at the macro-level.

Security governance at the micro-level, though, concerns the behavior of individuals. Coercing a natural person in the right direction can—but does not need to<sup>1</sup>—be done by the deterrence of punishment, for example in law.<sup>2</sup> Steering corporations or markets in the right direction, however, is a particularly testing endeavor due to the different set of mechanisms and interests that are at stake when dealing with these actors. For instance, risk regulation,<sup>3</sup> supply chains,<sup>4</sup> reporting mechanisms,<sup>5</sup> and commercial interests

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<sup>1</sup> See Alberto Alemanno & Alessandro Spina, *Nudging Legally: On the Checks and Balances of Behavioral Regulation*, 12 INT'L J. CONST. L., 429–56 (2014) (providing example theories on the use of nudging in administrative law).

<sup>2</sup> See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD., 661–91 (1998).

<sup>3</sup> See Peter Mülbart & Ryan Citlau, *The Uncertain Role of Banks' Corporate Governance in Systemic Risk Regulation* (European Corp. Governance Inst., Working Paper No. 179, 2011), <https://ssrn.com/abstract=1885866>.

<sup>4</sup> See J.M. Denolf et al., *The Role of Governance Structures in Supply Chain Information Sharing*, J. ON CHAIN & NETWORK SCI., 83–99 (2015).

significantly influence the governance of security in relation to corporations and markets. With a particular focus on financial crimes as the connection between security on the one hand and the EU internal market on the other hand, this special issue zooms in on new security governance concerns in this context. An additional hurdle is posed by the double role that corporations can play in investigations into financial crimes. Companies can find themselves on both sides of such investigations: As a data supplier on the one hand and as a potential liable actor on the other hand. Also, this dichotomy and its effect on EU security governance is thoroughly examined by the authors contributing to this special issue.

### **B. The Questions Covered**

The EU is a prominent actor regarding both security governance within the policy area of AFSJ and financial crimes regulation. The EU is particularly interested in financial crime regulation, as it has the ambition of achieving an honest market place as well as protecting the EU budget against irregularities. Security regulation in this internal context is connected to the EU's promise of establishing an area of freedom, security, and justice. Against the backdrop of the wider governance issues with the EU as a supranational organization and the sensitive question of security governance, which is to a large extent a national competence when it concerns the Member States' own security (Article 4 TEU), this special issue sets out to zoom in on a number of pertinent questions. Throughout the papers, four groups of questions can be distinguished.

First, the AFSJ is in itself a broadly defined area of law dealing with inter alia security issues, criminal law, border control, migration, and civil law cooperation. Furthermore, many of the AFSJ policies have a clear internal market dimension. Therefore, the juncture of these policy areas can be difficult to clearly define and different EU measures are often enacted in both policy areas regulating the same questions. The special issue focuses on the interrelation of the AFSJ and the EU internal market by exploring questions such as the EU fight against terrorism financing, money laundering, and trafficking, which have both a market focus and a security rationale. The Financial Action Task Force (FATF) and its '40 Recommendations on Money Laundering' is a particularly significant actor in the global war against money laundering and an important trendsetter for the EU in these matters. The main justification for extended EU powers in the area of anti-money laundering has been the need to update EU law in light of the FATF and norms set by the UN Security Council for fighting terrorism worldwide. Questions that are covered by the authors refer to the EU's legislative approach in general but also to the EU's legislative approach to specific crimes.

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<sup>5</sup> For example, the recently adopted (fifth) anti-money laundering directive: 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, 2018 O.J. (L 156).

The question on the reach of EU legislative competence can be described as cross-cutting through our main focus of EU security governance and the internal market. Several authors touch upon this—for the EU institutions and for the member states—sensitive subject of marrying the protection of national sovereignty with the need for supranational legislation and cooperation. Due to this search for legislative competence and the complexity of financial crimes, authors have looked into other jurisdictions—especially the US—as well as into other disciplines, to rely on lessons learned for the efficient development of EU legislation and practice.

Second, the special issue looks at what happens in the digital sphere and how data protection can be upheld when the EU sets out to ensure a high level of security. The security aspect and the question of the EU's jurisdiction to rule on questions partially or wholly outside the EU territory are also highlighted by the high profile cases in the Court of Justice of the EU concerning the transfer of data to the US.<sup>6</sup> We emphasize the role of data and privacy in the area of transnational crimes with financial aspects and financial crimes. Gathering information to be used as evidence in criminal proceedings for these crimes means obtaining personal data within the EU and outside the EU that may be protected by the right to a private life but also by the right to data protection. Recent momentous cases include the Digital Rights case<sup>7</sup> and the aforementioned Schrems cases. The contributing authors therefore explore the scope of regulation on cross-border digital evidence and go as far as rethinking the concept of data collection by drawing inspiration from other scientific disciplines.

Third, EU practices when fighting financial crimes and related activities are discussed. Financial crimes are those crimes that have the illicit gain of money or property as the main goal but can still cover a range of different offenses, including money laundering, terrorism financing, fraud, and even market abuse and trafficking in human beings.<sup>8</sup> The crime of terrorism, and related activity, is an offense that can have many forms and therefore always lacked a uniform international definition.<sup>9</sup> Financing can be needed to

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<sup>6</sup> See Case C-317/04 *Parliament v. Council*, 2005 E.C.R. I-02457; Case C-318/04, *Parliament v. Council*, 2005 E.C.R. I-02467; and Case C-362/14, *Schrems v. Data Prot. Comm'r*, ECLI:EU:C:2015:650; see also *Data Prot. Comm'r v. Facebook Ireland Ltd. & Schrems*, [2018] No. 4809 P. (H. Ct.) (Ir.) (discussing the most recent referral of the follow-up *Schrems II* case by the Irish High Court to the CJEU and the appeal against this referral); *Data Prot. Comm'r v. Facebook Ireland Ltd & Schrems*, 2018 No. 2018/68 (SC) (Ir.).

<sup>7</sup> See Case C-293/12 *Dig. Rights Ir. et al. v. Minister for Comm'n, Marine & Nat. Res.*, ECLI:EU:C:2014:238.

<sup>8</sup> For the definition offered by the Financial Conduct Authority, see FINANCIAL CONDUCT AUTHORITY, FINANCIAL SERVICES AUTHORITY HANDBOOK (2001), <https://www.handbook.fca.org.uk/handbook/glossary/G416.html>.

<sup>9</sup> The EU has a more concrete attempted definition, Directive 2017/541 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. See e.g., MYRIAM FEINBERG, SOVEREIGNTY IN THE AGE OF GLOBAL TERRORISM (2016); Sara Poli, *The EU External Anti-Terrorism Policy in Its External AFSJ Policy*, in THE EUROPEAN UNION AS AN AREA OF FREEDOM, SECURITY AND JUST. 389, 389–416 (Maria Fletcher, Ester Herlin-Karnell & Claudio Matera eds. 2016); CIAN MURPHY, EU COUNTER-TERRORISM LAW: PRE-EMPTION AND THE

carry out attacks. Trafficking in human beings is an offense that is mostly committed for financial gain, a form of modern slavery. The laundering of these proceeds, as well as the trafficking of human beings in the global supply chain, shows financial elements that need specific attention. The EU has, of course, relevant legislation in place, *inter alia*, with the New Counter Terrorism Directive, the establishment of a European Public Prosecutor Office,<sup>10</sup> and the Fifth Money Laundering Directive<sup>11</sup> being recent examples of EU measures in this area. In addition, the EU also has a Directive against the trafficking of human beings in place.<sup>12</sup> Questions covered by the authors include the legitimacy of a prosecution service on EU level and the limits of criminal, administrative, and civil liability for corporate crime.

Fourth, the focus on EU security governance and internal market generates a twofold perspective on the role that companies play. Companies are at the receiving end of a massive amount of data—personal and non-personal—handed over to them by consumers while conducting daily activities, such as communicating, purchasing items, or surfing the internet. This data—in digital form or otherwise—can be vital for the companies in developing advertising approaches, pricing strategies, and offering personalized services to customers. As a consequence, companies are also at the supplying end of this data because specific information could reveal criminal activity by their customers and require further analysis by law enforcement authorities. That is when companies become important actors in criminal investigations, especially into financial crimes. The papers by Els De Busser and Anne de Hingh zoom in on the specific aspects of regulating companies delivering raw data or suspicious activity reports to law enforcement authorities for the purpose of criminal investigations, in particular, investigations into financial crimes. The papers also explore the dynamic area of data protection. When companies themselves are suspects of criminal offenses, their role in the investigation obviously changes. The regulatory approach to corporate liability, prosecuting, and sentencing of companies for financial crimes and even for trafficking in human beings, provoke questions in to the European-wide prosecution of fraud against the EU budget by the European Public Prosecutor's Office and the legitimacy thereof, the EU's approach to criminal liability and corporate sentencing, as well as the potential for applying reflexive law to human trafficking in global supply chains. Maria O'Neill, Carlos Gómez-Jara Díez, Ester Herlin-

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RULE OF LAW (2012); MARIA O'NEIL, *THE EVOLVING EU COUNTER-TERRORISM LEGAL FRAMEWORK* (2011); and CHRISTINA ECKES, *EU COUNTER-TERRORIST POLICIES AND FUNDAMENTAL RIGHTS* (2009).

<sup>10</sup> Council Regulation 2017/1939 of 12 October 2017, Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office, 2017 O.J. (L 283).

<sup>11</sup> Case C-293/12 *Dig. Rights Ir. et al. v. Minister for Comm'n, Marine & Nat. Res.*, ECLI:EU:C:2014:238.

<sup>12</sup> Directive 2011/36, of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims, and Replacing Council Framework Decision 2002/629/JHA; Directive 2017/541, on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

Karnell, and Vanessa Franssen study these and other questions in their respective papers. Maria Bergström and Nicholas Ryder discuss the connection between the anti-money laundering framework and that of counter terrorism financing and the involvement and dangers of private actors, such as banks, in the monitoring process and the outsourcing of responsibility.

### C. Outline of the Special Issue

In the first part of this special issue the focus is turned to the analysis of specific crimes that can be labeled as financial crimes. Money laundering, financing of terrorism, and trafficking in human beings in global supply chains all have strong relations to corporations and markets. At the same time, they all fall under the wider definition of financial crimes. By starting with a study of these particular crimes, the special issue aims to highlight a number of concerns that should be considered when developing new regulation in the field without losing sight of relevant human rights questions.

We will start with Teubner's ideas on a reflexive law approach to steering behavior in the right direction, as it is applied in **Maria O'Neill's** paper. She provides a transnational law perspective on combatting trafficking in human beings in global supply chains and specifically the laundering of proceeds of human trafficking.<sup>13</sup> Using these two key points of intersection between the commercial and the criminal world, she explores the use of reflexive law in the UK's Modern Slavery Act 2015 and in anti-money laundering regimes. The paper concludes that reflexive law shows promise particularly in extending the reach of the command and control state into the areas where the transnational criminal world bisects the transnational commercial/banking world. This raises a number of human rights issues.

In just over thirty years, a global Anti Money Laundering (AML) regime has developed that is constantly being updated and expanded, not only geographically, but most importantly in both width and depth. Today, it affects a large part of modern society, including both private and public actors, and is key in a steadily growing number of interconnected areas. In her Paper, **Maria Bergström** provides an overview of the variety of purposes and interests involved in the global and EU regional AML regimes, while at the same time pointing out some of the most pressing legal concerns in AML regulation. These concerns include blurred accountability in the cooperation between public and private actors, the protection of individual rights and fundamental freedoms in administrative and criminal law contexts, data retention and privacy, as well as decreasing state sovereignty. Also, in the context of anti-money laundering, but with a focus on the countering of financing of terrorism, **Nicholas Ryder** introduces a critical analysis of the appropriateness and

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<sup>13</sup> See e.g., Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, in *THE LAW AND SOCIETY CANON* 75, 75–122 (Carroll Seron, ed., 2006).

effectiveness of the so-called “profit” reporting model towards the financing of terrorism by focusing on the UK and the US in particular. By assessing the policy of the UN, FATF, and the EU in using reporting mechanisms for the prevention and investigation of money laundering, the article concludes that this approach is not successful in preventing and investigating the financing of terrorism. As he explains, balancing the low cost of terrorist attacks with the variety of financial tools significantly raises the difficulty in combatting terrorism financing. The paper draws lessons from the US’s war on terror before concluding on the effectiveness of both the EU and the UK counter-terrorism strategies, including these reporting mechanisms.

Subsequently, the focus shifts to investigation and prosecution of financial crimes with one of the most contested EU criminal law measures in recent years, the idea of the creation of a European Public Prosecutor Office (EPPO). **Carlos Gómez-Jara Díez** and **Ester Herlin-Karnell** discuss the establishment of the EPPO as a federal agent and the effects of this agent for establishing a robust EU financial crimes regime. Comparisons with the US system of US Attorneys (federal prosecutors) are drawn to show that this institution has been quite effective at enhancing the protection of the US financial market. Additionally, attention is paid to the federalization taking place at the European level through the enhanced powers of, for example, the European Securities and Markets Authority (ESMA).

Financial crime is very often, though not exclusively, committed in a business setting. **Vanessa Franssen** argues that the current EU approach to corporate financial crime does not sufficiently take into account the specific features of both criminal liability and corporate entities, as opposed to individuals, nor does it fully exploit the potential strengths of a criminal law approach. Instead of assimilating criminal liability to administrative or civil liability, the EU should more carefully consider the different objectives of those different enforcement mechanisms. Moreover, when it comes to corporate sentencing, the EU lacks ambition and creativity. Ultimately, this may undermine the effectiveness of the EU’s fight against corporate financial crime.

In the final part of this special issue, we explore the role of data exchange and privacy, especially with companies being the supplier of data for the purpose of criminal investigations into financial crime. Joining the particular nature of digital data—often disconnected from a state’s territory and jurisdiction—with cross-border criminal investigations and the involvement of companies, **Els De Busser** argues for the necessity of exchange mechanisms that operate fast enough to be functional for the purpose of cross-border criminal investigations but also respect the sovereignty of the states involved. **Anne de Hingh** continues on the legal aspects of the commercial use of personal data as part of online business models. By viewing personal data as a commodity, she demonstrates that the phenomenon of commercial entities transforming aspects of our being and everyday lives into merchandise is more than a privacy challenge alone. She examines the feasibility of an alternative route, i.e. human dignity. An analogy with bio-medical regulations on the

prohibition of the trade of human body parts is explored to see whether the non-commercialization principle in these laws is applicable to commercial big data practices.

#### **D. Acknowledgments**

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