UNIVERSITÀ DEGLI STUDI DI TRENTO
Facoltà di Giurisprudenza

John A.E. Vervaele

EUROPEAN CRIMINAL JUSTICE IN THE POST-LISBON AREA OF FREEDOM, SECURITY AND JUSTICE

with a prologue by
Gabriele Fornasari and *Daria Sartori* (Eds.)

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SUMMARY

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EUROPEAN CRIMINAL JUSTICE AND FUNDAMENTAL RIGHTS

PROLOGUE

Gabriele Fornasari & Daria Sartori

In May 2013, John A.E. Vervaele was Visiting Professor at the Doctoral School of Comparative and European Legal Studies of Trento University. His lessons on European criminal law were source of inspiration for PhD candidates, researchers and professors alike: Thanks to his considerable expertise, he successfully enlightened old and new challenges faced by the criminal law after the adoption of the Lisbon Treaty. It has thus been decided to publish the nine essays on which his lessons were based, and to publish the present book in English (language in which the course was taught).

Before introducing the content of this volume, a brief presentation of the Author and of the context in which his course was placed is due.

John A.E. Vervaele is Professor in Economic and European Criminal Law at the School of Law of Utrecht University (Utrecht, Netherlands). He is also Professor in European Criminal Law at the College of Europe (Bruges, Belgium) and president of the World Association of Criminal Law (AIDP). He is a renown expert of European Criminal law, and his work is widely known and appreciated by the Academic community worldwide. He is actively engaged in cooperating with the Italian academia, both as visiting professor and as member of research groups, and many of his contribution are published in Italian. The course he taught at the Doctoral School of Comparative and European Legal Studies of Trento University was focused on European criminal law. Indeed, the importance of the EU dimension for criminal lawyers is steadily growing. The most recent developments of the European process of integration include legislative competencies for the EU in criminal matters, the replacement of Mutual Cooperation with Mutual Recognition, and the creation of a European Public Prosecutor Office. These developments call for a strong protection of the guarantees which are essential to the criminal law, and it is precisely in this context that the work by professor Vervaele is placed.

His contributions highlight the need to take a clear stand on the protection of substantial and procedural guarantees for the criminal defendant. Most of those guarantees have now acquired the status of fundamental rights within the EU; however, their definition and actual relevance is still 'work in progress' (mainly under the Court of Justice's auspice). In every essay, Vervaele demonstrates his support for the European harmonisation process, being, however, perfectly aware of its many flaws. Harmonisation is still an on-going process, and Vervaele stresses the need for it to be accomplished both in substantial and in procedural criminal law, as well as in the field of investigation. He also insists on the need to comply with the general principles of the criminal law, on which domestic legal systems are based.

In *The European Union and Harmonization of the Criminal Law Enforcement of Union Policies: in Search of a Criminal Law Policy?*, the Author firmly underlines the need for the harmonised criminal law to pass the test of proportionality, subsidiarity and necessity, being conceived as *ultima ratio*: Thus, every time a different kind of sanction can be used to prevent and punish illicit activities, criminalization should be avoided.

In the same contribution, the Author complains that Member States of the EU have not shown any interest in elaborating a well-thought enforcement and criminal law policy after the adoption of the Lisbon Treaty. The only exception has been a notice from the Dutch Minister of Justice and Security to the Chamber of Deputies, in which he explains the position and policy of his Department in relation to European criminal law under the Lisbon Treaty. The note, however, is vague and cannot be the ground for a reasoned proposal on the harmonisation of the criminal law. Thus, as the Author concludes: 'The EU is sure about its competence, but still does not know when and how to deal with it: *certus an, incertus quando*.

In *Enforcing the market abuse regime: towards an integrated model of criminal and administrative law enforcement in the European Union?* (wrote by the Author together with Michiel Luchtman), the focus is on the investigation, prosecution and punishment of market abuse, which are analyzed in a wider context than the mere normative one.

In order to realise a proper functioning internal market, the current proposal of market abuse rules lays down norms for the actors of the financial markets and introduces the obligation to enforce these rules through (punitive) administrative and criminal law. In addition, organisational structures for network building and cooperation, investigative powers and sanctions are prescribed at European level. This last requirement, however, faces the typical issues affecting many of the areas invested by the European harmonisation process: The operational rules adopted by domestic authorities are often diverging, making it difficult to achieve an efficient cooperation at the international level, and there are no adequate rules coordinating criminal and administrative sanctions. This means that there is no body ultimately responsible for the system as a whole. Furthermore, there is no attention whatsoever for the development of fundamental rights beyond the context of the nation-state (with the partial exception of the *ne bis in idem* principle). Vervaele's position in this regard is exceptionally important. Notwithstanding his enthusiasm for the creation of a truly European criminal law, he holds as a necessity the respect for fundamental rights, which is often considered as an obstacle to the efficiency of the system.

Finally, the Author(s) complain that there seems to be no common strategy when it comes to the external dimension of the enforcement of the financial markets. This lack is remarkable, as strategies are present, instead, in the area of competition law, where an agreement has been devised to provide for regular bilateral meetings to share information on current enforcement activities and priorities, to discuss policy changes, and to discuss matters of mutual interest relating to the application of competition laws.

In *Gathering and Use of Evidence in the Area of Freedom, Security and Justice, with special regard to EU-fraud and OLAF-investigations*, the Author raises the question of whether the harmonisation of substantive criminal law requires a corresponding harmonisation of criminal proceedings, especially with reference to the gathering and use of evidence. Currently, even in areas which are already under the competence of the EU, common rules for transnational violations are absent. Thus, the Author gives the example of a Spanish fisherman

who, being responsible for a serious infringement within Irish waters, can be confronted with criminal proceedings in Ireland or Spain, as well as with an administrative proceeding relating to the issue of his permit. In this case, the items of evidence may originate from Irish fisheries inspectors and/or from Community inspection. However, the lack of common rules on the use of evidence can lead to the inspection reports of the enforcement authorities of another country not being accepted by the country in which the proceeding is being held. Thus, according to the Author it is very important that the Euro-control system is independent, and that any information obtained within a Member State is considered as admissible evidence in the legal order of any other State (also regarding criminal proceedings). Unfortunately, this need will not be satisfied by the creation of a European Public Prosecutor Office. In fact, whatever institutional design is chosen for the EPPO, it will need assistance by European law enforcement agencies, and the status of their investigative powers, as well as the evidentiary status of their findings, will have to be used in national criminal proceedings.

In *Mutual legal assistance in criminal matters to control (transnational) criminality*, the Author shows his appreciation for the role played by Mutual Legal Assistance in the fight against transnational crime. At the same time, he underlines some flaws, that currently prevent MLA from developing all its potentials. These flaws are due to the fact that Mutual Legal Assistance is shaped on specific phenomena (such as drug trafficking, organized crime and terrorism), which, although very important, do not constitute all forms of serious crimes for which MLA might be needed. In addition, new digital techniques of investigation (like digital surveillance or remote computer searches) are generally absent from MLA instruments, and a modern MLA scheme, updating operational tools and including human rights protection, has yet to be elaborated.

In the EU, the lack of equivalent procedural investigative acts and related procedural safeguards in the Member States has led to distrust, and the efforts under the Lisbon Treaty to harmonise basic fair trial rights are only a first step in the right direction. According to the Author, the path to be followed is the deepening of cooperation on

Mutual Legal Assistance, its integration with human rights protection, and, above all, a much effective independence by national sovereignty.

In *Ne bis in idem: towards a transnational constitutional principle in the EU?*, the Author points out some relevant flaws affecting the European *ne bis in idem*, notwithstanding its recognition under Article 50 of the Charter of Fundamental Rights. The Luxembourg Court applies different notions of *ne bis in idem* in criminal law and in competition law: thus, the Author criticizes the lack of a harmonised approach and, at a more general level, the multiplicity of *ne bis in idem* provisions still in force. Indeed, before being acknowledged by the Charter of Fundamental Rights, the principle was inserted in other instruments, such as Article 54 of the Convention Implementing the Schengen Agreement (CISA), and Article 4 Protocol 7 of the European Convention on Human Rights. As those provisions were not accepted by all Member States of the EU, it is not clear whether Article 50 CFR imposes (as the author argues) its own, inclusive notion of *ne bis in idem*, or not. This state of confusion creates a dangerous lack of foreseeability, as well as contradicting judgments by national judges. In addition, the lack of rules governing the choice of jurisdiction within Member States is deemed to exert a negative influence over the European *ne bis in idem*, which is improperly turned into the means to solve the conflict between the jurisdictions of the Member States. Lastly, two problematic questions are still affecting Article 50 CFR: what is the scope and extension of the Article? And what is its ambit of application?

Looking for answers, professor Vervaele has been focusing on the case law developed by the Court of Justice, which has frequently filled the gaps left by the EU legislator regarding fundamental rights. In *The application of the EU Charter of Fundamental Rights and its* ne bis in idem *principle in the Member States of the EU*, the Author analyses the *Fransson* judgment (C-617/10, Aklagaren v Fransson, 26 February 2013). Two assertions of the Court are considered of great importance: first, the choice of referring the *ne bis in idem* to a notion of criminal law defined under the so-called *Engel-Bonda* criteria; second, the Court's focus on the principles of primacy, unity and effectiveness of EU law. According to these assertions, the Author comes to the

conclusion that the ambit of application of the European *ne bis in idem* is identified by two thresholds: on the one side, the minimum protection afforded by Article 50, as interpreted by the Court of Justice in accordance with the *Engel-Bonda* criteria; on the other side, the need to grant primacy, unity and effectiveness to EU law, representing the 'upper limit' for a State intervention on the topic.

The Author's contribution on *The European Arrest Warrant and applicable standards of fundamental rights in the European Union* helps to understand the consequences of this double threshold. The contribution deals with another relevant decision of the Luxembourg Court, *Melloni*, released on the very same day of *Fransson* (C-399/11, Melloni, 26 February 2013). The decision, concerning the guarantees afforded to criminal defendants in *in absentia* proceedings, clearly endorses the view that fundamental rights can be afforded higher protection by the domestic legal systems than the one afforded by EU law, only insofar as they do not compromise its primacy, unity, and effectiveness. It is in this framework that all guarantees for the criminal defendant (including *ne bis in idem*) are to be read. The Author endorses the choice made by the Court of Justice, stating that this position comes as no surprise in view of its long-standing case law on the topic of primacy, unity, and effectiveness. However, he also foresees problematic situations arising from the fact that, under the Lisbon Treaty, the unanimity voting in criminal matters has been replaced by qualified majorities: in the future, there might be situations in which Member States will be bound to solutions they have not been in favour to.

The attention paid by John Vervaele for the fundamental guarantees of the criminal law inspires, also, his contributions dealing with the creation of a European Public Prosecutor Office (EPPO).

In *The material scope of competence of the European Public Prosecutor's office: a harmonised national patchwork?*, he analyses whether the creation of the EPPO will be able to comply with substantial legality, protected under Article 49 of the European Charter of Fundamental Rights. According to the Author, this result can be achieved only if the EPPO's jurisdiction will refer to substantially harmonized criminal offences, so that all EU citizens will be able to

foresee with reasonable certainty the crime for which they will be prosecuted, as well as the applicable penalties. On the basis of Article 86 TFUE, the EPPO's jurisdiction covers the so-called PIF-offences (i.e., crimes affecting the financial interests of the EU), and, if specifically approved by the European Council, 'serious crimes with transnational dimension'. The harmonisation of the criminal law on PIF-offences relies on a Convention of 1995, which, according to the same anti-fraud unit of the EU (OLAF), has been unable to harmonise the criminal law of the Member States. Thus, the Author analyses whether harmonisation can be grounded on other sources of EU law. Article 83 TFEU is reputed unable to reach this goal: first of all, directives leave too much room for discretion in their implementation; secondly, Member States are allowed to stop the adoption of directive in criminal matters by pulling an 'emergency brake'; lastly, there are Member States which do not even participate to this instrument. As for other Treaty provisions, such as Article 325 TFUE, it is not clear whether they could be of use: the Treaty does not clarify whether Article 83 TFUE should be, or not, the only ground for harmonisation in criminal law. The Author concludes that the only way to grant legitimacy to the EPPO's functioning would be that of harmonising the criminal law of the Member States through regulations. Indirectly, it is suggested that the ground for enacting such regulations would be Article 86 TFEU. Its paragraph 3 allows the adoption of a regulation determining the 'general rules' applicable to the EPPO's office. Even though it is not specified whether this rules may include substantive criminal law, the predecessors of the provision clearly included substantive criminal law in the rules governing the EPPO's functioning, and the author is in favour of this position.

In *European territoriality and jurisdiction: the protection of EU financial interests in its horizontal and vertical (EPPO) dimension*, the Author focuses on procedural legality, protected under Article 52 of the Charter of Fundamental Rights. The Author points out the risks deriving from the lack of rules governing the choice and the conflict of jurisdiction in the EU area of freedom, security and justice. Currently, the choice is left to the national authorities: as a consequence, multiple adjudications are prevented only by the transnational *ne bis in idem*

elaborated by the ECJ. Thus, even in key areas such as the financial services sector, the choice is not inspired by the need to fulfil EU interests, but by a 'first come-first serve' rule. In such a context, the legitimacy of the EPPO's functioning could be compromised by the lack of clear and foreseeable rules governing its choices of jurisdiction in the investigation and in the prosecution phase. In this regard, the Author analyses potential solutions, and comes to the conclusion that the EPPO's choice of jurisdiction should 'contribute to effective proportionate and dissuasive law enforcement in the light of the objectives of the single area of freedom, security and justice', while being 'based on a transparent procedure in which criteria are used that are accessible and foreseeable'. This last requirement is particularly important. On the one hand, it allows citizens to challenge before the ECJ the choice of the adjudicative forum, thus providing for the creation of a 'European justiciability'. On the other hand, it represents the essential precondition for the development of procedural and substantial guarantees in favour of the criminal defendant.

To conclude, professor Vervaele's contributions express the need that the Europeanization of the criminal law does not imply the abandonment of fundamental guarantees for the criminal defendant. In sending this message, the Author manages to strike a good balance between EU exigencies and fundamental rights, never losing sight of the fact that the creation of a 'EU criminal law' is the necessary tool for the protection of the European people and of the European interests. His contributions are never biased by prejudices against the EU, which are common among criminal lawyers; at the same time, they highlight with clarity flaws and grounds for improvement, often looking for solutions within the current legal framework of the EU.

PART I

EUROPEAN CRIMINAL JUSTICE

AND COMBATING CRIME

CHAPTER 1

THE EUROPEAN UNION AND HARMONIZATION OF THE CRIMINAL LAW ENFORCEMENT OF UNION POLICIES: IN SEARCH OF A CRIMINAL LAW POLICY?[1]

1. European Integration and Criminal Law - History of Development[2]

It is no secret that the European Communities founding fathers underestimated the importance of the enforcement of Community law. Apart from a few exceptions in primary Treaty law, such as the obligation for Member States to criminalize violations of Euratom confidentiality or perjury in front of the European Court of Justice, they maintained a resolved silence concerning Community law enforcement. The EC Treaties did not provide for clear legal bases or assign powers for either direct enforcement by the EC (with the exception of the enforcement of European competition rules), or for indirect enforcement of Community law by the Member States. This means that the enforcement of the common agricultural and fisheries policy, the Community customs code, the European financial services regulations, EU subsidy fraud rules, European environmental policy, European rules on law of corporate bodies, was completely left to the autonomy and discretion of the Member States.

The European Commission quickly recognized the enforcement gap in the EC Treaties. An attempt was already made in 1976 to supplement

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[1] This is an actualized version of the same article that is under publication in I. CAMERON, M. ULVANG, *Essays on Criminalisation and Sanctions*, Uppsala, 2014.

[2] For a more detailed analysis, see J.A.E. VERVAELE, *The Europeanisation of Criminal Law and the Criminal Law Dimension of European Integration*, in P. DEMARET, I. GOVAERE, D. HANF (Eds.), *30 Years of European Legal Studies at the College of Europe, Liber Professorum*, Brussels, 2005, p. 277-298 and N. HÆKKERUP, C.R. WAGTMANN, *Controls and Sanctions in the EU Law*, Copenhagen, 2001.

the EC Treaties with two protocols concerning EC fraud and corruption by EC officials. However, neither protocol gained the political approval of the Council of Ministers (Council)[3]. In the period between 1975 and 1990, the Commission was therefore forced to explore instead the political and legal boundaries of the EC Treaties. The Commission, supported by the European Parliament, was already then of the opinion that there was a considerable enforcement deficit on the part of the Member States when it comes to compliance with EC policies. The Commission therefore submitted various concrete legislative proposals to the Council, with the aim of obliging the Member States to use both (punitive) administrative law and criminal law in the enforcement of Community law.

The Council approved many of the Commission's proposals compelling the Member States to impose punitive administrative sanctions, especially in the field of common agricultural policy. The regulations in question provide for fines, forfeiture of financial guarantees, exclusion from subsidy schemes, professional disqualification, etc. This harmonization was not limited to reparatory sanctions, but also expressly concerned punitive sanctions and thus fell within the scope (at least for the contracting parties) of Article 6 of the European Convention of Human Rights (ECHR)[4]. The Member States were obliged to enact these sanctions and apply them. Of course, the Member States were also free to impose these sanctions entirely or partly by criminal law enforcement means, instead of solely or partly using administrative regulation, if this was in conformity with the requirements for enforcement as established by the Court. The growing influence of EU law on the law of punitive sanctions was not well received by all the Member States. Some Member States considered the European Community to be applying the EC Treaties quite extensively or, further, that it had imposed obligations lacking a proper legal basis. In 1990, Germany felt that the limit had been reached. Two regulations on agriculture provided the perfect excuse to bring an action for

[3] J.A.E. VERVAELE, *Fraud against the Community. The need for European Fraud Legislation*, Deventer, 1992, pp. 85 ff.

[4] I refer to the Engel-criteria of the European Court of Human Rights (ECHR), *Engel and Others v the Netherlands*, judgment of 8 June 1976, Series A no. 22.

annulment before the Court. The regulations not only prescribed restitution with a surcharge for unjustifiably obtained subsidies, but also punitive exclusion from subsidy schemes. Germany was of the opinion that the European Community was not competent to prescribe punitive sanctions. What was remarkable in this case was that none of the other Member States intervened to support Germany in its contentions. Germany received a rude awakening when, in 1992, the Court in its judgement in Case C-240/90[5] recognized that the European Community was competent to adopt the measures, including the punitive sanctions. This landmark judgement finally cleared up the controversy surrounding the European Communities' competence to harmonize administrative (punitive) sanctions.

Concerning the criminal law enforcement it is mainly thanks to the ECJ that the enforcement autonomy of the Member States has been somewhat limited. The Member States were bound by the Court's interpretation of Article 10 EC Treaty (the duty of co-operation or loyalty principle). The Court had established that the Member States had a duty to enforce Community law, whereby they have to provide for procedures and penalties that were effective, proportionate, and dissuasive and that offer a degree of protection that was analogous to that offered in the enforcement of provisions of national law of a similar nature and importance (the assimilation principle). It not only fell to the national legislator to fulfil these requirements; they also had to be enforced[6]. From the case law of the ECJ, it is abundantly clear that criminal (procedural) law belongs in the sphere of competence of the Member States, but that Community law may impose requirements as

[5] Case C-240/90, *Germany v Council and Commission*, [1992] ECR I-5383. For a detailed analysis of the EC harmonization of administrative enforcement, see J.A.E. VERVAELE, *Administrative Sanctioning Powers of and in the Community. Towards a System of European Administrative Sanctions?*, in J.A.E. VERVAELE (Ed.), *Administrative Law Application and Enforcement of Community Law in The Netherlands*, pp. 161 ff., http://igiturarchive, J. SCHWARZE, *Rechtsstaatliche Grenzen der gesetzlichen und richterlichen Qualifikation von Verwaltungssanktionen im europäischen Gemeinschaftsrecht*, in *EuZW*, 2003, p. 261, and M. POELEMANS, *La sanction dans l'ordre juridique communautaire*, Bruxelles, 2004.

[6] See Case 66/88, *Commission v Greece*, [1989] ECR 2965 and the Communication from the Commission as a result of this case, OJ C 147/3, 1990.

to the fulfilment and interpretation of this competence within the framework of the enforcement of Community law. Criminal law must not only be set aside when the rules to be enforced turn out to be contrary to Community law (negative interpretation). Community law also unmistakably establishes requirements which national criminal law enforcement has to fulfil if it is applied with the aim of compliance with Community law (positive integration). This duty to enforce in accordance with certain requirements also applies to criminal law if the Member States decide that this is the tool which they will use to enforce Community law[7]. This includes, for example, shaping policy as to when to dismiss a case or indictment, and the exercise of prosecutorial discretion in cases that are relevant from a Community law perspective, where the interests of the EC must also be weighed in[8]. An airtight separation between the criminal law policy of the Member States and that of the EC has never existed. Both de iure and de facto, the process of indirect EC harmonization of national criminal law (mainly concerning the definition of the offences), has been ongoing for decades. The Community legal order and integration also include the criminal (procedural) law of the Member States as a result of which Member State autonomy is restricted. The European integration model is not compatible with a restriction of criminal law to national confines where it would remain out of reach of any Community law influence whatsoever. The key question was, however, whether the EC's competence to harmonize reaches so far as to enable the EC directly to oblige the Member States to criminalize violations of Community rules. Was the EC competent to impose requirements as to the nature and severity of the criminal penalties? Did this possible competence also extend to the scope of application ratione materiae, ratione personae, and ratione loci, to procedural aspects, to the modalities of application (statute of limitation, dismissal, or dismissing charges, etc.)? As regards these questions, there is has been plenty of debate in the literature. The

[7] Case 68/88, *Commission v Greece*, [1989] ECR 2965 and Case C-226/97, *Lemmens*, [1999] ECR 195.

[8] Case C-265/95, *Commission v France*, [1997] ECR I-6959.

majority of criminal law authors[9] in Europe denied that the EC had any power, however minor, to directly harmonize criminal law.

The Commission and the European Parliament have, for decades, been attempting to convince the Council to impose a Community obligation on the Member States to enforce EC policy by means of the criminal law. The legislative proposals to this end, for example in the fields of money laundering and insider dealing, were functional in their approach and only provided for limited harmonization. By and large, these proposals obliged the Member States to criminalize certain intentional acts and thus provide for a criminal penalty and, in the case of serious offences, a prison sentence. The proposals did not contain any concrete provisions as to the substance of these penalties and prison sentences. However, even the limited harmonization approach has never been able to win the Council over. The Council usually approved the proposals, but only after amending them in such a way that the obligations were stripped of their criminal law packaging. Any and all references to the criminal law nature of the obligations were systematically deleted. Criminal law prohibitory or mandatory provisions were changed into prohibitory or mandatory provisions of an administrative nature. Obligations to impose criminal sanctions were replaced by obligations simply to enforce 'sanctions'. The systematic political neutralization of the criminal law harmonization proposals of the Commission might give the impression that there was staunch unity on the part of the Member States in the Council. However, the Member States were internally divided on this question to such an extent that, in 1990, the Ministers of Justice assigned a Council working group consisting of public servants to the task of subjecting the relationship between Community law and criminal law to fundamental discussion[10]. The government experts agreed that Community law can set

[9] The minority position among criminal lawyers was argued, inter alia, by Grasso, Tiedemann, Delmas-Marty, Vogel and Vervaele who all defended a limited functional competence. For an interesting discussion between proponents and opponents, see *ZStW*, 2004, p. 332 and B. SCHÜNEMANN (Ed.), *Alternativentwurf Europäische Strafverfolgung*, Köln, 2004.

[10] For the report of the *ad hoc* working group see J.A.E. VERVAELE, *Fraud against the European Community*, Deventer, 1992, p. 313.

requirements for national criminal law, but could not agree on an unequivocal position concerning the direct criminal law harmonization competence of the EC. The small majority of the Member States that were in favour of such a competence nevertheless wished for certain conditions to apply. Such harmonization could only be the criminal law tailpiece of a Community law policy, i.e., not being criminal law harmonization as such. This harmonization should, furthermore, leave intact a number of principles or guarantees that were considered by (some of) the Member States to be essential for their own criminal (procedural) law. Red flags to functional harmonisation were certainly at that time: prosecutorial discretion, criminal liability of legal persons, minimum penalties and sentencing discretion. The report of the divided working group therefore did not result in a political breakthrough. A fundamental political difference of opinion started to develop[11]. During the intergovernmental conference for the preparation of the Maastricht Treaty, Dutch attempts to integrate aspects of criminal justice, including the power of direct harmonization, into EC law were doomed to failure. The Luxemburg compromise, known as the three pillar structure, organized criminal law co-operation and harmonization into a separate semi-intergovernmental pillar which entered into force as part of the Maastricht Treaty in 1993. With the entry into force of the Treaty of Amsterdam in 1999, the third pillar shed its semi-intergovernmental character and thereby became a fully-fledged EU policy area.

2. Criminal Law Harmonization in the EU: From Political Stalemate to the ECJ-Ruling in Case C-176/03 on Criminal Enforcement of the Environmental Protection

Structuring the third pillar to include the direct legislative competence of the EU in the field of co-operation in criminal matters and criminal law harmonization has not caused the struggle to subside,

[11] For example, the Member States were prepared to criminalize money laundering, based on obligations deriving from the international law made by the UN and Council of Europe, but not by the EC. See intergovernmental declaration to Directive 91/308, OJ L 66/77, 1991.

quite the contrary in fact. After all, the third pillar was a supplementary power that could not undermine or interfere with the array of EC powers. Both Article 2 TEU and Article 47 TEU, in conjunction with Article 29 TEU, were clear on this. Whether or not this power exists does not depend on whether, prior to the EU Treaty's entry into force, any regulation or directive was ever created that imposes a duty to harmonize criminal law. Neither the lack of use of this power, nor the entry into force of the EU Treaty leads to its demise. It is not political will that determines legal competence, at least not without an amendment of the Treaty. Nevertheless, the third criminal law pillar has been defined by many as being exclusive, i.e., excluding any criminal law competence within the first pillar.

It was my belief that it was clear from the outset that the political division of the legal regime between the first and the third pillar would culminate in an institutional battle of competence concerning the position of criminal law within the EU. In the case of many of the legislative initiatives during the period from 1993 to 2005, the Commission came diametrically to oppose the Council. Both have been involved in institutional legislative skirmishes concerning criminal law harmonization. There is no point in repeating every single initiative and counter-initiative here where the EC and the Member States raised the issue in the Council. Altogether different ways of dealing with the legislative conflicts could be distinguished. The first type may be described as 'warding off'. The Commission submitted proposals for criminal law harmonization of Community law which the Council subsequently rejected. At best, the proposal was neutralized and stripped of its criminal law packaging. Here, the Council applies an old legislative tactic that was used in the period before the entry into force of the Treaty on European Union. The Commission proposal for a regulation on official feed and food controls[12] (2003) is an excellent example. The Commission emphasizes the need to provide for a functional harmonization of criminal law enforcement supplementing the existing harmonization of administrative law enforcement. The Commission claims that a basic list of offences committed intentionally

[12] COM(2003) 52 final.

or through serious negligence which could threaten feed and food safety and therefore public health, and for which the Member States must provide criminal sanctions, should be drawn up. The list should not be limited to offences related to actual placing on the market, but include all offences which may eventually lead to the placing on the market of unsafe feed or food. For this list of serious offences, the Member States should provide for minimum criminal standards according to Article 55:

> 1. Member States shall lay down the rules on penalties applicable to infringements of feed and food law and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate, and dissuasive. The Member States shall notify those provisions and any subsequent amendment to the Commission without delay.
> 2. For the purpose of paragraph 1, the activities referred to in Annex VI shall be criminal offences when committed intentionally or through serious negligence, insofar as they breach rules of Community feed and food law or rules adopted by the Member States in order to comply with such Community law.
> 3. The offences referred to in paragraph 2 and the instigation to or participation in such offences shall, as for natural persons, be punishable by sanctions of criminal nature, including as appropriate deprivation of liberty, and, as for legal persons, by penalties which shall include criminal or non-criminal fines and may include other penalties such as exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from engaging in business activities, placing under judicial supervision or a judicial winding-up order.

The fact that serious infringements of food safety might threaten public health has been conclusively proven by the various food scandals in numerous European countries which, in some cases, for example, the rapeseed oil poisoning case in Spain, have resulted in the death of many. Nevertheless, the Member States did not submit a proposal for a framework decision, but rather stripped the Commission

proposal of its criminal law wrappings in the Council. In the adopted regulation[13], Article 55 now reads as follows:

> 1. Member States shall lay down the rules on sanctions applicable to infringements of feed and food law and other Community provisions relating to the protection of animal health and welfare and shall take all measures necessary to ensure that they are implemented. The sanctions provided for must be effective, proportionate and dissuasive.
> 2. Member States shall notify the provisions applicable to infringements of feed and food law and any subsequent amendment to the Commission without delay[14].

The second type of legislative conflict may be described as 'hijacking', whereby the content of a proposal for a regulation or directive is copied into a proposal for a framework decision or vice versa. The competing proposals concerning the criminal law enforcement of the environmental policy is an excellent illustration[15]. In a number of cases, this approach has led to a stalemate, whereas in others it has led to the adoption of framework decisions contrary to the opinion of the Commission and the European Parliament. The third type may be termed 'cohabitation forcée', whereby two proposals are elaborated alongside each other and in harmony with each other. The substantive provisions and, as the case may be, provisions concerning administrative harmonization are included in a directive or a regulation, while the criminal law harmonization aspects are incorporated into a framework decision. A good example of what is known as a double text approach is Directive 2002/90, coupled with Framework Decision

[13] EU Regulation 882/2004, OJ L 165, 30.04.2004, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0882:EN:NOT.

[14] Regulation (EC) No 882/2004 of 29.04.2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health, and animal welfare rules, OJ L 165/97, 2004.

[15] Framework Decision 2003/80 of 27.01.2003 on the protection of the environment through criminal law (OJ L 29, 2003) which was annulled by the Court of Justice and the proposal for a Directive on the Protection of the Environment through Criminal Law, COM(2001) 139 of 13 March 2001, OJ C 180, 2001, as amended by COM(2002) 544, OJ C 020 E, 2003.

2002/946, concerning illegal immigration[16]. Another good example concerns environmental pollution from ships, where both proposals[17] were drafted by the Commission[18]. Article 6 of the proposal for a directive includes the obligation to provide for criminal penalties regarding the illegal discharge of pollutants as defined in the Marpol International Convention for the prevention of pollution from ships, including cases of serious infringements, and custodial sentences, also for natural persons. The proposal for a framework decision directly refers to Article 6 of the Directive and further defines the forms of criminal sanctions. The proposal for a framework decision further includes provisions concerning joint investigation teams, judicial mutual legal assistance, etc. Here too, the criminal law provisions in the proposal for a directive proved ultimately unpalatable to the Council. In the approved Directive, all references to criminal law obligations were eliminated.

In the proposals concerning migration and pollution at sea, the Commission had to accept that it lost, but it did not yet gave up. For example, in 2005, before the landmark case C-176/03, the Commission made a proposal for a directive *and* a framework decision concerning criminal measures to combat intellectual property infringements of[19]. This proposal was the continued development from directive 2004/48

[16] Council Directive 2002/90/EC of 28.11.2002 defining the facilitation of unauthorized entry, transit and residence, OJ L 328/17, 2002, and Council Framework Decision of 28.11.2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, OJ L 328, 2002.

[17] Directive 2005/35/EC 07.09.2005 on ship-source pollution and on the introduction of penalties for infringements, OJ L 255/11, 2005 and Council Framework Decision 2005/667 of 12.07.2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, OJ L 255/164, 2005.

[18] Often, this involves interinstitutional co-operation between the Directorate General responsible for the specific subject and the Directorate General for the third pillar.

[19] Proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and the proposal for a framework decision to strengthen the criminal law framework to combat intellectual property offences, COM(2005) 276 final.

concerning the enforcement of intellectual property rights[20], which obliged the Member States to provide for private law and administrative law measures, and to implement the obligations following from the international TRIPs agreement which makes criminal enforcement mandatory. In the proposal for a directive, the Commission clearly claimed a direct power to impose criminal law harmonization, but, in doing so, restricted itself to the obligation for the Member States to criminalize intentional offences, to provide for certain methods of criminal participation and to impose criminal penalties, including custodial sentences. The further determination of the sanctions (level, etc.), the question of jurisdiction and some aspects of criminal procedure, such as the initiation of criminal proceedings independently of a complaint, were all regulated under the framework decision.

This analysis brings to light several issues. There was no coherent European criminal law policy present where all or any actors were involved. The Member States were not primarily concerned with the enforcement of Community policy, but with the fight against terrorism, organized crime, etc. The fact that the obligation for the Member State to achieve criminal law harmonization was not imposed through a directive or a regulation is not an unbiased conclusion. Framework decisions required unanimity. Directives and regulations were usually adopted by means of co-decision and qualified majority. Furthermore, as opposed to framework decisions, regulations as well as unconditional and clear provisions of directives have direct effects. In the first pillar, the Commission also has many more trumps up its sleeve to oblige the Member States to comply with criminal law harmonization. The Commission may initiate infringement proceedings against a Member State. The Member States may be held financially responsible for non-compliance by means of enforcement duties, and the Member States can even be fined for failing to comply with Court rulings. The Community approach therefore has many advantages, both in terms of legitimacy and in terms of efficiency.

[20] OJ L 157/45, 2004.

The political stalemate could only be broken by a ruling on this issue of principle from the Court. The Commission finally succeeded in provoking such a ruling by raising objections under Article 35(6) EU against the legality of the framework decision approved by the Council on 2003 on the criminal enforcement of environmental law[21]. With this decision, the Council set aside a proposal submitted by the Commission for a directive on the criminal enforcement of environmental law of 2001 with similar substance[22]. On 2005, the Court delivered its long-awaited judgement in Case C-176/03. This judgement is a second landmark ruling concerning the enforcement of Community law as the Court recognized the competence of the EC to harmonize the enforcement by criminal law of Community law. No less than eleven Member States intervened in the proceedings. Ten Member States[23] supported the position of the Council. The Netherlands was the only Member State to argue in favour of a combined criminal harmonization competence under EC law:

[21] That the Commission did not start proceedings before the Court in the matter of EC fraud may be explained by legal reasons. At the time of the approval of the 1995 PIF Convention under the Maastricht third pillar, approval of a criminal law harmonization directive would only have been possible on the basis of Article 209A. This provision did not, however, constitute a legal basis for harmonization. This was only introduced by Article 280 of the Amsterdam Treaty on European Union. On that basis, the Commission in 2001 submitted a proposal for a directive on criminal law harmonization without questioning the legal validity of the Conventions. The proposal for a directive was provoked, however, by the slow ratification procedures and incomplete ratifications of the PIF protocols.

[22] See F. COMTE, *Criminal Environmental Law and Community Competence*, in *European Environmental Law Review*, 2003, pp. 147 ff., in defence of the Community approach. Argued from the contrary standpoint: Y. BURUMA, J. SOMSEN, *Een Strafwetgever te Brussel inzake milieubescherming*, in *NJB*, 2001, p. 795 and I.M. KOOPMANS, *Europa en de handhaving van het milieurecht: een pijler te ver?*, in *NTER*, 2004, p. 127. For a balanced position, see J. ORTLEPP, R.J.G.M. WIDDERSHOVEN, CH.W. BACKES, et al., *Lex Dura, Sed Lex. Opstellen over de handhaving van omgevingsrecht*, Deventer, 2005, pp. 159 ff.

[23] Denmark, Germany, Greece, Spain, France, Ireland, Portugal, Finland, Sweden, and the United Kingdom.

> (…) provided that the penalty is inseparably linked to the relevant substantive Community provisions and that it can actually be shown that imposing penalties under criminal law in that way is necessary for the achievement of the objectives of the Treaty in the area concerned (see Case C-240/90 Germany v Commission [1992] ECR I-5383). That could be the case if the enforcement of a harmonizing rule based, for example, on Article 175 EC gave rise to a need for criminal penalties[24].

The ECJ first of all underlines that the third pillar cannot undermine the competences of the first pillar, as Article 47 TEU provides that nothing in the Treaty of the EU is to affect the EC Treaty. Concerning the criminal law competence in the first pillar the ECJ accept a criminal annex-competence, functional to the substantive policy for ensuring effective enforcement:

> 47. as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (see, to that effect, Case 203/80 Casati [1981] ECR 2595, paragraph 27, and Case C-226/97 Lemmens [1998] ECR I-3711, paragraph 19).
> 48. However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.
> 49. It should also be added that in this instance, although Articles 1 to 7 of the framework decision determine that certain conduct which is particularly detrimental to the environment is to be criminal, they leave to the Member States the choice of the criminal penalties to apply, although, in accordance with Article 5(1) of the decision, the penalties must be effective, proportionate and dissuasive.
> 50. The Council does not dispute that the acts listed in Article 2 of the framework decision include infringements of a considerable number of Community measures, which were listed in the annex to the proposed directive. Moreover, it is apparent from the first three recitals to the framework decision that the Council took the view that criminal penalties were essential for combating serious offences against the environment.

[24] From consideration 36 in the Court's Judgment in case C-176/03.

51. It follows from the foregoing that, on account of both their aim and their content, Articles 1 to 7 of the framework decision have as their main purpose the protection of the environment and they could have been properly adopted on the basis of Article 175 EC.
52. That finding is not called into question by the fact that Articles 135 EC and 280(4) EC reserve to the Member States, in the spheres of customs cooperation and the protection of the Community's financial interests respectively, the application of national criminal law and the administration of justice. It is not possible to infer from those provisions that, for the purposes of the implementation of environmental policy, any harmonisation of criminal law, even as limited as that resulting from the framework decision, must be ruled out even where it is necessary in order to ensure the effectiveness of Community law.

3. The Commission's View on the Harmonization of Criminal Enforcement of EU Policies after Case C-176/03: A First Blueprint for a Criminal Law Policy?

In November 2005 the Commission submitted a communication[25] to the EP and the Council concerning the implications of the Court's judgement in Case C-176/03. The Commission starts off by analyzing the contents and scope of the Court's decision. Article 47 TEU provides that EC law has priority over Title VI TEU, i.e., the first pillar prevails over the third. The Court further holds that Article 175 TEU constitutes a proper legal basis for the matters regulated in Articles 1-7 of the Framework Decision. The Commission subtly points out that Articles 1-7 are criminal law provisions dealing with the definition of offences, the principle of the obligation to impose criminal penalties, the level of penalties, accompanying penalties, and the rules on participation and instigation. The Court goes further than the Advocate General in his Opinion by not only accepting that the EC may oblige the Member States to enforce measures by means of criminal law, but may also lay down in detail what the arrangements should be. The Commission then turns to the scope of the Court's judgement. The Commission highlights the fact that the judgement does not mean that the Court has

[25] COM(2005) 583 final.

hereby recognized criminal enforcement as an area of Community policy. Criminal enforcement is merely the tailpiece of a substantive policy area. However, the Commission does find that the Court's judgement may potentially impact all policy areas of negative integration (the four freedoms) and positive integration, possibly making criminal law methods necessary to ensure effective enforcement. This test of necessity must be defined functionally, on an area-by-area basis. For some policy areas no criminal enforcement is required, but for others it is. The necessity test also determines the nature of the criminal measures to be taken. According to the Commission, the Court does not impose any restrictions there. Here too, the approach is functional. The Commission does not elaborate further, but we may conclude that the Commission obviously wishes to leave the door open where necessary for harmonization of aspects of the general part of criminal law or of criminal procedural law. The Commission further indicates its preference for horizontal measures where possible, i.e., transcending specific policy areas. Here we might think of horizontal criminal measures for the agricultural sector and the structural funds in connection with fighting EC fraud or terrorism or organized crime. The Commission also believes that the judgement puts an end to the double-text approach, i.e., adopting directives and regulations for substantive policy and its administrative enforcement in addition to framework decisions for the criminal enforcement of that same policy. From now on, all this can be laid down in one single directive or regulation.

In the second part of the communication, the Commission discusses the consequences of the judgement more specifically. The Commission first of all indicates that criminal law provisions concerning police and judicial co-operation, including measures on the mutual recognition of judicial decisions and measures based on the principle of availability, fall within the area of competence of the third pillar. This is also true for the harmonization *per se* of the general part of criminal law or criminal procedural law in the framework of co-operation and mutual recognition. The criminal harmonization of policy areas that are not part of the EC Treaty, but that are nevertheless necessary for the objectives of the area of Freedom, Security and Justice are placed

within the third pillar. An interesting point is that, in this second part, the Commission further defines the conditions for criminal harmonization using Community competence under the heading 'Consistency of the Union's criminal law policy'. The Commission clearly indicates that criminal harmonization under EC competence is only possible if there is a clear need to make the policy in question effective. Furthermore, the requirements of the principles of subsidiarity and proportionality have to be met. This means that there is a strict obligation to provide grounds and reasons. The harmonization may concern the definition of offences, the criminal penalties, but also what is called 'other criminal-law measures appropriate to the area concerned'. It is clear that the Commission, from the start, does not wish to pin itself down to merely the harmonization of offence definitions and criminal penalties. The Commission continues by stating that: 'The criminal-law measures adopted at sectoral level on a Community basis must respect the overall consistency of the Union's system of criminal law, whether adopted on the basis of the first or the third pillar, to ensure that criminal provisions do not become fragmented and ill-matched'. Both the Commission, on the one hand, and the Council and the EP, on the other, must take care to ensure this consistency and also prevent that Member States or the persons concerned are required to comply with conflicting obligations.

4. The Judgement in Case C-176/03: Reception in the Member States and in the JHA Council

Despite the unanimous opinions of the various legal services of the EU organs, including that of the Council itself, the Court judgement was greeted with amazement and disbelief by many governments. It is hardly surprising that the Court decision was not embraced by the Member States given their numerous interventions in the proceedings in favour of the Council. However, the governments mainly focused their criticism on the Communication of the Commission and introduced this into the JHA Council. In Denmark, the Minister of Justice wasted no time in informing Parliament of the judgement and submitting a

reservation[26]. The Ministry maintained the view that no legal basis could be found in the EC Treaty, even though it expressed awareness that the Court judgement is not limited to environmental law. In France, the initiative came from Parliament itself. On 25 January 2006, the European Affairs Commission (EAC) of the French *Assemblée Nationale* informed the Speaker of the *Assemblée*[27]. The EAC was of the opinion that the Court acted beyond its competence and demonstrated a certain *fédéralisme judiciaire*. The EAC also stated that it is high time to end the *gouvernement des juges* and restore power to the entities to whom it belongs, namely the governments of the Member States. The EAC therefore proposed to apply the bridging provision of Article 42 TEU and thereby build an emergency brake procedure into the European Council[28]. The EAC was not terribly pleased with the EU Commission's communication in response to the judgement either. It rejected what it considers 'its excessive interpretation'. According to the EAC, it is impossible to conclude from this judgement that there is a Community competence for criminal harmonization in all common policy areas of the EC and the four freedoms of the internal market. Instead, it argued that the Court limited this power to essential, cross-sector, and fundamental objectives.

The EU Commission had meanwhile published a new proposal for a directive on the environment through criminal law, replacing the annulled Framework Decision[29] and the proposal for a directive of 2001[30]. In this area, we can speak of a legal vacuum to be filled. Despite the cautious strategy mentioned above, the Commission did submit a varied set of proposals with criminal law substance, most of which were related to the further implementation and execution of

[26] Memorandum of 13.10.2005, http://www.euo.dk/upload/application/pdf/a16a3e79/2005_sv21.pdf.

[27] http://europapoort.eerstekamer.nl/9345000/1/j9vvgy6i0ydh7th/vgbwr4k8ocw2/f=/vh7rdrlf7yxv.pdf.

[28] This refers to the emergency brake procedure provided for in the proposal for a European Constitutional Treaty in case of criminal law harmonization which poses a threat to essential interests of a Member State.

[29] Council Framework Decision 2003/80/JHA, OJ L 29/55, 09.02.2003.

[30] COM(2001) 139 final.

international law instruments, including criminal law enforcement obligations. The Commission did submit an amended proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights[31]. This proposal was related to the WTO Agreement on Trade-Related Aspects of Intellectual Property (the "TRIPS Agreement") which was approved by means of Council Decision 94/800/EC[32]. The criminal law substance of the proposal was in accordance with that of the proposal for the environmental directive to a high extent. It is interesting to note that, in other proposals, such as the one for a new regulation on the Community customs code[33], which is one of the most harmonized areas of EC law, the Commission did not include any criminal offences or criminal sanctions at all in Article 22 on penalties, even though recital 12 of the regulation underlines the need for dissuasive sanctioning. The same can be said of the draft regulation concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas[34]. Article 29 of the Presidency proposal[35] seemed to go beyond the Commission proposal[36]. However, both stopped short of imposing criminal sanctions for the misuse of data. The least that can be said is that it is not very clear from the proposals when and by which criteria the Commission does in fact opt for criminal law obligations. A blueprint for criminal legislative policy was certainly not guiding the practice yet.

[31] COM(2006) 186 final.

[32] OJ L 336, 23.12.1994, p. 1.

[33] COM(2005) 608.

[34] COM(2004) 835.

[35] Art. 29 of the Presidency Proposal: "Member States shall take the necessary measures to ensure that any misuse of data entered in the VIS is punishable by penalties, including administrative and/or criminal penalties in accordance with national law, that are effective, proportionate and dissuasive".

[36] Art. 29 of the Commission Proposal: "The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation relating to data protection and shall take all measures necessary to ensure that they are implemented (…)".

5. The Second Ruling of the ECJ in Case C-440/05 on Criminal Enforcement of Ship Source Pollution; The Reintroduction of the Double Text Approach

Framework Decision 2005/667 deals with maritime transport issues (and its environmental effects) and contains very specific rules on the harmonization of criminal sanctions. Both the Member States and the Court of Justice considered this case to be a new landmark case. In the proceedings before the Grand Chamber of the Court of Justice, no less than 19 Member States intervened, all in support of the Council of Ministers[37].

Advocate General *Mazäk* in his opinion in Case C-440/05 stressed that, contrary to the view expressed by certain governments, Article 47 TEU establishes the primacy of Community action and law under the EC Treaty over activities undertaken on the basis of Title V or Title VI of the TEU Treaty[38] and that it does not make a difference if the Community, at the time of the adoption of the Framework Decision, had already or not yet adopted legislation with regard to the matters covered[39]. Second, he pointed out that, if the Court were to find that, for one reason or another, there is no such competence under the policy on transport, this finding would not, strictly speaking, be the end of the story. There can be alternatives for the legal basis in the EC Treaty. The AG did, however, reject the argument of the Member States that EC criminal competence should be limited to the environment or to substantial matters with a horizontal approach in the EC Treaty. His approach was mainly that criminal law competence should be a corollary to the general principle of effectiveness of Community law (effet utile principle). For this reason, he accepted that Art. 80(2) EC indeed provides the legal basis for the criminal law enforcement of ship-source pollution, instead of Art. 31(1)(e) and Art. 34(2)(b) TEU,

[37] The following countries were granted leave to intervene: Portugal, Belgium, Finland, France, Slovakia, Malta, Hungary, Denmark, Sweden, Ireland, Czechia, Greece, Estonia, United Kingdom, Latvia, Lithuania, The Netherlands, Austria, and Poland.

[38] Paragraph 53 of the opinion.

[39] Paragraph 57 of the opinion.

and he proposed that the Court should annul Framework Decision 2005/667/JHA. However, he also agreed with the opinion of AG *Ruiz-Jarabo Colomer* in the C-176/03 case: "the Community legislature is entitled to constrain the Member States to impose criminal penalties and to prescribe that they be effective, proportionate and dissuasive, but beyond that, it is not empowered to specify the penalties to be imposed"[40]. He believed that this could otherwise lead to fragmentation and compromises the coherence of national penal systems and that Member States are, as a rule, better equipped than the Community to translate the concept of effective, proportionate and dissuasive criminal penalties into their respective legal systems and societal context.

The ECJ first followed the same reasoning as in Case C-176/03. It considered it to be its task to ensure that acts which, according to the Council, fall within the scope of Title VI do not encroach upon the powers conferred on the Community by the EC Treaty. The ECJ emphasised that the common transport policy is one of the foundations of the Community and that the Council, under Article 80(2) EC, may decide whether, to what extent, and by what procedure appropriate provisions may be laid down for sea transport. Since Article 80(2) contains no explicit limitations, the Community legislature has broad legislative powers under Article 80(2) and is competent to take measures to improve transport safety. Moreover, environmental protection forms part of the common transport policy.

Concretely, the ECJ took a careful look at the objectives and substance of framework decision 2005/667. Its main purpose is indeed to enhance maritime safety and improve the protection of the maritime environment. The Council took the view that criminal penalties were necessary to ensure compliance with the Community rules on maritime safety. The ECJ came to a double conclusion. Articles 2, 3, and 5 of the framework decision must be regarded as being essentially aimed at improving maritime safety, as well as environmental protection, and could have been validly adopted on the basis of Article (80)2. This means that the definition of the offences (actus reus and mens rea), liability issues, the prescription of the obligation to provide for criminal

[40] Paragraph 103 of the opinion.

sanctions for natural persons, and the obligation to provide for criminal or administrative sanctions for legal persons must be dealt with under EC law. However, the ECJ came to the conclusion that the type and level of criminal penalties to be applied does not fall within the Community's sphere of competence. The Community legislator may not adopt provisions as Articles 4 and 6 of the framework decision. This last point comes as quite a surprise. Many EC instruments do in fact contain concrete penalty provisions, including on the type and level and on the liability of legal persons, and including the prescription of administrative or criminal sanctions, defined as administrative penalties or prescribed as administrative *or* criminal penalties. Member States remain free to choose between administrative or criminal sanctions when defining the type and level of sanctions. Nevertheless, the ECJ considered the prescription of the type and level of administrative *or* criminal sanctions a third-pillar competence.

This ruling has several consequences. The EC functional criminal law competence has been confirmed, even outside the horizontal field of environmental protection. If the EC policy is an important policy of the EC, then functional competence can be included in the discretionary powers to take all appropriate measures. However, criminal law harmonization remains necessary and the only way to achieve this objective (i.e., enforcement of that policy). In other words, also in EC law, criminal law is *ultima ratio* and is necessary for the *effet utile.* The functional criminal law competence has therefore been broadly extended, but it is still not clear which EC policies are actually included and which are actually excluded. Concerning the scope of the competence, the ECJ has clearly stipulated that the nature of the criminal sanction can be prescribed under EC law, but that the type of criminal sanction and the level of the sanction must be prescribed under EU law. The ECJ judgement explicitly does not deal with other possible EC criminal law-related issues, such as, for instance, jurisdiction and the designation of contact points for transnational cooperation. As Articles 2, 3, and 5 of the framework decision must have been validly adopted on the basis of Article (80)2, the framework decision infringes Article 47 EU and, being indivisible, was annulled in its entirety. As a result the Commission had to elaborate a new directive

for ship-source pollution and on the introduction of penalties for infringements. The directive was adopted in 2009[41]. The EU Commission had meanwhile published a new proposal for a directive on the environment through criminal law[42], replacing the annulled framework decision[43] and the proposal for a directive of 2001[44]. The new directive on protection of the environment through criminal law, adopted in 2008[45], takes into account the ruling of the ECJ in the ship-source pollution case and contains in Article 5 only an obligation to provide for a criminal law protection in this area, not filling in the type and the level of criminal penalties. In fact the directive only repeats the formula of the Greek maize case, but applied to criminal penalties: Member States must provide for effective, proportionate and dissuasive criminal penalties.

6. Intermediary Conclusions

Although the ECJ recognised in 1991 in case C-240/90[46] that the EC was competent to prescribe and harmonise the administrative law enforcement of EC policies, even including punitive sanctions, it cannot be said that the EC has made exploitive use of this power over the last 20 years. Quite the contrary, in fact: it is remarkable that, in many areas of community law, no initiatives whatsoever have been taken in this direction. One might think of, for example, environmental law, tax law, financial services regulation (banking and securities), customs regulation etc. It is my opinion that the Commission has shown insufficient initiative to give any systematic or consistent shape to the

[41] Directive 2009/123 on ship-source pollution and on the introduction of penalties for infringements, OJ L 280/52, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:280:0052:0055:EN:PDF.

[42] COM(2007) 51 final.

[43] Council Framework Decision 2003/80/JHA, OJ L 29/55, 09.02.2003.

[44] COM(2001) 139 final.

[45] Directive 2008/99 on the protection of the environment through criminal law, OJ L 328/28 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0028:0037:EN:PDF.

[46] Case C-240/90, *Germany v Council and Commission*, [1992] ECR I-5383.

harmonization of administrative enforcement of EC policies. The Commission has failed to make use of its power to outline an EC enforcement policy from which it can be clearly concluded in which area of policy the harmonization of administrative enforcement by the Member States would be needed. Often, an ad hoc approach was applied by the Directorates Generals of the Commission.

The ECJ rulings on the criminal law competence in the first pillar were landmark decisions on the division of labour within the institutional frame of the EU. Their importance was not limited to issues of competence, as they had consequences for the interactions with the Member States' legal order (community method versus third pillar method). Thanks to the ruling the first directives with criminal law substance were voted in the EU. However, their impact was limited as the type and level of criminal sanctions had to be defined in a second third pillar instrument. It is astonishing to see that neither the Member States nor the Commission submitted a third pillar proposal or a proposal for a directive under Article 83(2) of the TFEU, filling in the type and level of criminal sanctions in the environmental field. As it stands there is less harmonisation of criminal law enforcement of the environment under the actual frame than the one adopted by the framework decision, as the latter contained far reaching obligations concerning criminal law sanctions. The result is that the harmonisation in the criminal law field is only aimed at establishing minimum constituent elements in respect of certain criminal offences.

Winding up this part of the article, I can say that neither the Commission nor the Member States have submitted legislative proposals based on a well-thought enforcement and criminal law policy of harmonised EC policies. The Council did already accept in its Tampere Conclusions of 1999 that 'efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance'[47], but the Tampere programme[48] has clearly provided insufficient direction. Even in policy areas of far-reaching integration, such as the internal

[47] Conclusion nr 48.

[48] Most recently updated by COM(2004) 0401.

market, the customs union, or the monetary union, there was no clear enforcement policy. Both in the Council and in the Commission, the approach has been predominantly ad hoc and eclectic. What is striking in this context is that the Commission has not submitted any EC proposal for the criminal protection of the Euro, which is after all 'hardcore' EC monetary policy, and has gone along completely with the Council in the elaboration of a framework decision[49]. It is also striking that, in some policy areas, the Commission has failed to develop any initiative for the harmonization of punitive administrative law or criminal law or has only done so sparingly. In this context, one might think of financial services and securities regulations. It is true that the Market Abuse Directive of 2003[50] obliges the Member States to enforce the provisions administratively, but no mandatory sanctions have been prescribed. Article 14(2) authorizes the Commission to draw a list of administrative measures and penalties, but this list is merely informative. The lack of any well-contemplated criminal law policy is also reflected in the initiatives for criminal law harmonization. Why, for instance, does the Commission press for the criminal law harmonization of environmental law and criminal law protection of the financial interests of the EC, but fails to do the same in the field of competition or fisheries or the financing of terrorism? Why do the Member States press for the criminal law harmonization of terrorism, xenophobia, the protection of victims of crime, but not for the criminal law harmonization of serious violations of food safety rules, intellectual property infringements, or the financial management of businesses?

7. The Council's Criminal Legislative Policy on the Eve of the Entering into Force of the Lisbon Treaty

Both Member States and the Council did feel the need to streamline the content of their legislative work in the criminal law field. As far

[49] Framework Decision 2000/383, on increasing protection by means of criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro, OJ L 140/1, 2000.

[50] Directive 2003/6, OJ L 96/16, 2003.

back as 1992 the Council agreed on an approach regarding approximation of penalties[51]. The Council elaborated a dual approach. In some cases, the Council stated, that it may be sufficient to stipulate that the Member States shall provide that the offences concerned are punishable by effective, proportionate and dissuasive penalties and leave it to each Member State to determine the level and type of the penalties. In other cases, the Council accepted the need for going further and agrees to establish a system of four penalty levels to be used in legislation:

Level 1: Penalties of a maximum of at least between 1 and 3 years of imprisonment
Level 2: Penalties of a maximum of at least between 2 and 5 years of imprisonment
Level 3: Penalties of a maximum of at least between 5 and 10 years of imprisonment
Level 4: Penalties of a maximum of at least 10 years of imprisonment (cases where very serious penalties are required).

In practice the streamlining of the criminal law harmonization through minimum requirements for the maximum level of the penalties to be provided by national law in respect of specified offences has not been very successful and insufficient to elaborate a common approach of criminal law enforcement in the EU legislation. This is certainly the reason why the Council adopted in 2009 conclusions on model provisions[52], guiding the Council's criminal law deliberations. The Council was aiming at the following advantages: a) guidelines and model provisions would facilitate negotiations by leaving room to focus on the substance of the specific provisions; b) increased coherence would facilitate the transposition of EU provisions in national law and c) legal interpretation would be facilitated when new criminal legislation is drafted in accordance with agreed guidelines which build on common elements. The main aim is however that the model

[51] Doc. 914/02 DROIPEN 33, http://eurocrim.jura.uni-tuebingen.de/cms/en/doc/1304.pdf.

[52] http://eurocrim.jura.uni-tuebingen.de/cms/en/doc/1156.pdf.

provisions should guide future work of the Council on legislative initiatives that may include criminal provisions.

The Council's model provisions do integrate the 2002 conclusion on penalties. Moreover the model provisions do refer explicitly to the Lisbon Treaty: "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, as under Article 83(2) of the Lisbon Treaty, it should follow the practice of setting the minimum level of maximum penalty".

The conclusions on model provisions of 2009 are dealing with both the need for criminal provisions as with the structure of criminal provisions itself. Concerning the necessity test the conclusions insist that criminal law enforcement should be introduced only when it is considered essential for the protection of the legal interest, and, as a rule, be used only as a last resort. This double test (essential for the protection of the legal interest and ultima ratio/ultimum remedium) is further concretized by insisting on proportionality and subsidiarity. Criminal law provisions should address clearly defined and delimited conduct (lex certa), which cannot be addressed effectively by less severe measures. These criteria are applied in the model provisions to two areas:

- in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis, or
- 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.

Finally, when defining such a need, a final impact assessment should take into account the expected added value of criminal provision compared to other enforcement measures, the serious and/or widespread and frequent the harmful conduct is and the impact on existing criminal provisions in EU legislation and on different legal

systems with the EU. It is clear that these criteria of assessment of the need for criminal provisions contain general principles of criminal law and criminal policy issues and are addressed at the two substantive areas under Article 83 TFEU, the euro-offences under Art. 83(1) and the criminal law enforcement of harmonised EU policies (annexe-competence) under Art. 83(2).

The second part of the model provisions are dealing with the structure of criminal provisions as such. The model provision's scheme is addressing actus reus, mens rea, inciting\aiding\abetting and attempt, penalties, liability of legal persons and penalties against legal persons. This means that provisions on jurisdiction or on mutual legal assistance or mutual recognition, dealt with in former EU conventions and framework decisions, have not been included in the model provisions.

Concerning the definition of the actus reus following criteria are put forward: lex certa, foreseeability, conduct that causes actual harm or seriously threatens the right or essential interest to be protected. Abstracted danger to the protected right or interest is only possible if appropriate for the protection of interest or right. Concerning the mens rea element, as a general rule EU criminal legislation should only deal with intentionally committed conduct. However, negligence can be included when particularly appropriate for the protection of the interest or right. Strict liability is excluded explicitly. The model provisions impose criminalization of inciting, aiding and abetting, following the criminalization of the main offence. When dealing with attempt, the model rules are rather cautious. They refer to a necessity and proportionality test and to consideration of the different regimes under national law.

When it comes to penalties, the model rules provide for two regimes (let us call them model A and B). In some cases it can be sufficient to provide for effective, proportionate and dissuasive criminal penalties and leave it to each Member State to determine the level of the penalties (model A). In other cases there may be a need for going further in the approximation of the levels of penalties (model B). In these cases the Council conclusions of 2002 on penalties apply. It is striking that the model provisions under model B do not deal with the type of criminal sanctions. When criminal law harmonisation under Art.

83(2) is at stake, it will certainly not be sufficient to limit the harmonization to deprivation of liberty.

Finally, the model provisions contain extended provisions on liability of legal persons and penalties against legal persons. They introduce the obligation to ensure that a legal person can be held liable for criminal offences, but without imposing a criminal liability scheme. Attribution of liability is based on benefit for the legal person and attribution of (vicarious) liability of natural persons to the legal persons. A specific provision deals with the liability for lack or supervision or control, but also in this case there must be benefit for the legal person. The liability of legal persons shall not exclude criminal liability of natural persons. Liability of legal persons is prescribed for entities having legal personality, except for states or public bodies in the exercise of state authority and for public international organizations. When it comes to penalties against legal persons, the model provisions do prescribe a list of different penalties (as exclusion of public benefits, judicial winding-up, placing under judicial supervision, fines). However, these penalties of a criminal or non-criminal nature must meet the standard of effective, proportionate and dissuasive penalties. It is astonishing that the model provisions contain very detailed provisions on liability of legal persons, but stick to the practice under the Maastricht and Amsterdam Treaty and avoid the possibility of mandatory criminal liability in some areas of substantive criminal law.

Although the Council's model provisions were adopted one day before the Lisbon Treaty entered into force (30 November 2009) and were aimed at guiding the future work of the Council on legislative initiatives that may include criminal provisions, they are much more a systematization of the past performance than a prospective criminal policy document. They do not take fully into account the substantive changes under the Treaty of Lisbon. The Lisbon Treaty does provide for a new legal framework for criminal legislation with the aim to prevent and punish crime in the common area of freedom, security and justice. Not only has the substance of criminal law harmonization and the applicable rules been changed by the Treaty of Lisbon, but also the objective of harmonization. Article 3 TEU clearly states that

> The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

Prevention and punishment of crime has become, compared to Article 2 of the Amsterdam TEU, an objective that is related to rights and duties of citizens, not only related to free movement of persons. Bearing in mind the wording of Article 82 TFEU, harmonization of criminal law and criminal procedure is also a necessary tool for strengthening judicial cooperation in criminal matters, based on mutual recognition and mutual trust. From this perspective the model provisions of the Council do not guide us as to the content of criminal policy choices. Which legal interests deserve criminal protection and to which extent? This is certainly the case for Art. 83(2), for which no or very little acquis had been build up in the past, either under the former third pillar, or under the first pillar. The criminal law protection directives in the environmental field are the exceptions to the rule. In the light of Article 2 TFEU which states that, in case of shared competence, the Member States shall exercise their competence to the extent that the Union has not exercised its competence, it becomes more and more necessary to know for which areas and to which extent the EU is willing to fill in its competence. As a mitigating factor we could say that the Council as such has no right of legislative initiative and is thus not very well placed to elaborate legislative police. At the other hand the Council's model provisions are a policy document thoroughly discussed and adopted by the Member States in the Council, and the Member States do have legislative initiative.

8. A Criminal Legislative Policy under the Lisbon Treaty?

Since the coming into force of the Lisbon Treaty the European Commission and particularly DG Justice has taken a proactive stand on

the topic of a criminal legislative policy. On its website[53] DG Justice spells out three specific competences for criminal law in the TFEU. First, the EU can adopt directives providing for minimum rules regarding the definition (constituent elements and criminal sanctions) of Euro offences under Article 83(1). Article 83(1) contains a list of ten particularly serious areas of crime with a cross-border dimension. They include 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. Second, the EU can also adopt directives, under Article 83(2), providing for minimum rules on the definition of offences and criminal sanctions if they are essential for ensuring the effectiveness of a harmonised EU policy. Third, DG Justice refers to the duty to protect the financial interests of the EU, under Articles 310(6), 325, 85 and 86 TFEU, which might include, if necessary protection by means of criminal law. This would mean that Art. 325 TFEU could be used as a proper legal basis for criminal law protection of the financial interests of the EU. It remains unclear if DG Justice is of the opinion that this competence could also include regulations providing for criminal law provisions instead of directives.

The Commission published moreover in September 2011 a Communication titled "Towards an EU Criminal Policy – ensuring the effective implementation of EU policies through criminal law"[54], dealing specifically with the competence under Article 83(2) TFEU. The Commission is aware of the fact that, because of a supposed lack of an explicit legal basis in this respect prior to the Lisbon Treaty, only a very few measures have been taken for the purpose of strengthening the enforcement of EU policies. In a first part the Commission elaborates on the scope for EU criminal legislation. The Commission underlines that Article 83(2) aims at strengthening mutual trust, ensuring effective enforcement and coherence and consistency in European criminal law itself. Article 83(2) does not list specific offences or areas of crime. For that reason the Commission elaborates

[53] http://ec.europa.eu/justice/criminal/criminal-law-policy/index_en.htm.

[54] COM(2011) 573 final http://ec.europa.eu/justice/criminal/files/act_en.pdf.

this communication as guidance for the policy choices whether to use or not to use criminal law as an enforcement tool, also in relation to other enforcement tools, as the administrative one. The Commission also adds Article 235(4) of the TFEU, referring to the protection of the financial interests of the EU:

> 4. 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.

However, the Commission is not making any explicit reference to directives or regulations with a criminal law substance. However, inserting it under the scope of criminal legislation in this document is considering the possibility to do so.

Second, the Commission is dealing with the question which principles should guide EU criminal law legislation. The communication refers to general principles as subsidiarity and respect for fundamental rights, referring explicitly to the EU Charter of Fundamental Rights and the ECHR, but not referring to Article 6(3) of the TEU, and thus not referring explicitly to fundamental rights as guaranteed by the ECHR and 'as they result from the constitutional traditions common to the Member States'. It seems to me impossible to elaborate a criminal policy that would not take into account the constitutional traditions common to the Member States, and I do underline common, as they are a direct source for the general principles of EU law under Article 6(3) TEU. After the reference to the general principles, the Commission follows the two-step approach of the Council's model provisions. Step 1 is the decision on whether to adopt criminal law measures at all (last resort-ultima ratio/ultimum remedium). The proposed necessity and proportionality test is written in a negative way (restrain unless necessary and proportional) without taking into account that there might be positive duties under fundamental rights to investigate, prosecute and punish, also under

Article 83(2). Step 2 is dealing witch the principles guiding the decision on what kind of criminal law measures to adopt. The text refers to the concept of "minimum rules" and excludes full harmonisation, but underlines at the same time the need for legal certainty. The requirements for legal certainty are however not the same as for national criminal law legislation, as the directive has to be implemented in national law and cannot create or aggravate criminal liability as such. It is surprising that the Commission is not further elaborating on the concept of minimum rules, as this formulation was already used in the Amsterdam Treaty. These minimum rules are related to the Treaty objectives, including equivalent protection and common provisions when dealing with cross-border crime or enforcement of EU policies. This means that the concept of minimum rules is functional to the objectives of the Treaty and not an autonomous criterion. Regarding the sanctions the Commission is referring both to the type of sanctions as to the level of sanctions (taking into account aggravating or mitigating circumstances) that should be implemented in national law. The choice of sanctions must be evidence-driven and submitted to the necessity and proportionality test. Interesting is that the Commission insist on tailoring the sanctions to the crime, which has consequences for the choice of type of sanctions and consequences for the choice for criminal liability for legal persons. It thus becomes clear that the Commission does not exclude criminal liability of legal persons and criminal sanctions for legal persons of the competence under 83(2) TFEU. Finally, the minimum rules can also include provisions on jurisdiction, as well other aspects that are considered part essential for the effective application of the legal provision.

Third, the Commission is dealing with the choice of policy areas where EU criminal law might be needed. Criteria are lack of effective enforcement or significant differences among Member States leading to inconsistent application of EU rules. Still in that case the Commission will have to assess case-by-case the specific enforcement problems and the choice for administrative and/or criminal enforcement. However, the Commission is already indicating in this Communication priority fields for criminal law harmonisation under Article 83(2). Three selected areas are mentioned:

- the financial sector, e.g. concerning market manipulation and insider trading[55]
- the fight against fraud affecting the financial interest of the EU
- the protection of the euro against counterfeiting.

The Commission mentions furthermore a set of areas (not an exclusive list) in which criminal law enforcement might play a role:

- illegal economy and financial criminality
- road transport[56]
- data protection[57]
- customs rules
- environmental protection
- fisheries policy
- internal market policies (counterfeiting, corruption, public procurement).

The assessment has to take into account a whole set of factors, including the seriousness and character of the breach and the efficiency of the enforcement system. The choice for administrative enforcement and or criminal enforcement is part of this assessment. The list of topics is not exclusive, but it is rather surprising that counterfeiting and piracy of products, feed and food safety and corruption are not in the prior list of already selected areas. There is already a criminal law acquis for corruption[58]. As already mentioned, as far back as 1995, the Commission had submitted a proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and a proposal for a framework decision to strengthen the

[55] See 'Communication on reinforcing sanctioning regimes in the financial sector', COM(2010) 716 final of 08.12.2010.

[56] See Commission Staff Working Paper SEC(2011) 391 of 28.03.2011, accompanying the White Paper 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system', COM(2011) 144 of 28.03.2011.

[57] See the Communication 'A comprehensive approach on personal data protection in the European Union', COM(2010) 609 of 04.11.2010.

[58] Framework Decision 2003/568/JHA on combating corruption in the private sector.

criminal law framework to combat intellectual property offences[59]. The Commission had already tried in 2003[60], in vain, to get a regulation adopted containing criminal law enforcement obligations in the area of feed and food safety.

The European Parliament adopted in May 2012 a resolution on an EU approach to criminal law[61]. The resolution combines the tests of necessity, subsidiarity and proportionality with the general principles of criminal law (lex certa, nulla poena sine culpa, lex mitior, etc.) and does correspond fully to the 2011 Communication of the Commission. The resolution does not contain any reference to the choice of policy areas that should deserve criminal law protection. More interesting is the procedural approach. The resolution calls for an inter-institutional agreement on the principles and working methods governing proposals for future substantive criminal law provisions and invites the Commission and the Council to establish an inter-institutional working group in which these institutions and Parliament can draw up such an agreement and discuss general matters with a view to ensuring coherence in EU criminal law. As it stands there is a Council Working Party on substantive criminal law (DROIPEN) and a new inter-service coordination group on criminal law at the Commission. Furthermore the Commission has decided in February 2012 to set up a formal expert group on EU criminal policy group. At the EP there is no formal structure at all.

9. Criminal Harmonisation under the Lisbon Treaty in Practice

Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims[62] is the first directive that has

[59] COM(2005) 276 final, http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0276en01.pdf.

[60] COM(2003) 52 final.

[61] http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0208&language=EN.

[62] Directive 2011/36 of 5 April 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF.

been adopted under Article 83(1). It contains the classic content as foreseen under the Council's model provisions and includes specific harmonization of type and level of sanctions (model B of the Council's model provisions), but goes also beyond it, as it deals with aspects of jurisdiction, seizure and confiscation, and some aspects related to investigation and prosecution and of course many aspects of victim protection and victim rights. Directive 2011/92[63] on combating the sexual abuse and sexual exploitation of children and child pornography follows completely the same pattern. Meanwhile the Council also reached a general agreement[64] on a proposal for a directive on attacks against information systems, replacing framework decision 2005/222/JHA. Also in this directive has been opted for the harmonization of type and level of criminal sanctions (the B model). However, these directives do not always follow the four type levels of harmonization of custodial sanctions as elaborated in the 1992 agreement on criminal sanctions, as incorporated in the Council's model provisions. The influence of the EP as co-legislator has resulted, through amendments for more severe repression, in other sanction levels.

The first initiative under Article 83(2) is indeed in one of the three already selected areas in the Communication of September 2011, namely in the financial sector and on criminal sanctions for insider dealing and market manipulation. The Commission has used the policy criteria of Communication of September 2011 for its assessment and has even produced in 2010 a communication on "Reinforcing sanctioning regimes in the financial service sector"[65], based on comparative research by the three Committees of Supervisors (Committee of European Banking Supervisors-CEBS, Committee of European Insurance and Occupational Pensions Supervisors - CEIOPS and Committee of European Securities Regulators - CESR) on the equivalence of the sanctioning regimes in the financial sector in Member States. The review by the Commission in cooperation with the

[63] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:335:0001:0014:EN:PDF.

[64] http://register.consilium.europa.eu/pdf/en/11/st11/st11566.en11.pdf.

[65] COM(2010) 716 final.

Committees of Supervisors spells out substantial divergences and weaknesses in national sanctioning regimes:

- some competent authorities do not have at their disposal important types of sanctioning powers for certain violations
- levels of administrative pecuniary sanctions vary widely across Member States and are too low in some Member States
- some competent authorities cannot address administrative sanctions to both natural and legal persons
- competent authorities do not take into account the same criteria in the application of sanctions
- divergence exists in the nature (administrative or criminal) of sanctions provided for in national legislation
- the level of application of sanctions varies across Member States.

As a consequence the Commission considers that a minimum common standard should be set and that this minimum common standard might include criminal sanctions for the most serious violations. The proposed directive on criminal sanctions for insider dealing and market manipulation[66], submitted in October 2011, is part of a legislative double text package, which includes also a proposal for a regulation on insider dealing and market manipulation (market abuse)[67]. In fact the proposed regulation, based on Article 114 TFEU and aiming at replacing directive 2003/6/EC[68], is the basic regulatory framework. The proposal regulation contains all definitions, obligations, and prohibitions and does also regulate the applicable administrative enforcement regime, including administrative sanctions of a non-punitive and punitive character. This means that the proposed regulation contains very detailed provisions on the definition of the illicit behaviour and on the applicable administrative sanctions, including the type and level of sanctions (such as withdrawal of the authorisation for legal persons, or pecuniary sanctions for up to 10% of

[66] COM(2011) 654 final, 20.10.2011.

[67] COM(2011) 651 final, 20.10.2011.

[68] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:096:0016:0016:EN:PDF.

a legal person's total annual turnover in the preceding business year)[69]. The proposed directive is the result of the assessment of the Commission on the need, proportionality, and subsidiarity of criminal law enforcement in the financial sector. The Commission came to a positive result as far as serious market abuse offences are concerned. The proposed directive is surprising from different angles. Although the proposed regulation and the proposed directive are a regulatory package and contain quite some cross-references, the proposed directive refers only to the definitions of financial instruments and inside information in the proposed regulation, but strangely enough reformulates the definition of insider dealing and market manipulation. These definitions in the proposed directive and regulation are not shaped in the same way; the ones in the proposed directive are written in a more precise style and do not contain further explanations and details. Second, bearing in mind the assessment of the necessity of criminal law harmonisation to ensure effective enforcement of Union policy against market abuse, it is also surprising that the proposed directive chooses from what I have called model A of the Council's model provisions. This means that it is, in this area, sufficient to provide for effective, proportionate, and dissuasive criminal penalties and to leave it to each Member State to determine the type and level of the penalties. This type of criminal law harmonization was already possible under the 1st pillar of the Amsterdam Treaty, even after the ruling of the Court of Justice in the ship source pollution case. And this brings me to the third point. The choice of Article 83(2) as a legal basis is not discussed. There is no consideration as to why Article 83(2) is more appropriate than a legal basis linked to the substantive policy area (financial services). The consequence of the choice of Article 83(2) is at least that Denmark is not taking part in the adoption of this Directive[70] and that the UK and Ireland have an opting in choice, but no obligation to become part of and bound by the directive[71]. In other words it is under Article 83(2) possible that criminal enforcement obligations, considered in line with proportionality and subsidiarity and considered necessary for the

[69] Article 26 of the proposal.

[70] In accordance with Articles 1 and 2 of Protocol no 22.

[71] In accordance with Articles 1, 2, 3 and 4 of Protocol 21.

effective enforcement of a harmonised EU policy, will not be binding in three EU countries, including the EU country with the biggest centre of financial services. In April 2014 the EU institutions came to a tripartite agreement on the draft regulation and draft directive[72].

The second priority area under Article 83(2) concerns the protection of the financial interest of the EU. The acquis in this field dates from the Maastricht Treaty, being the 1995 regulation on administrative enforcement[73] and the 1995 Convention and two protocols[74] on criminal enforcement. The Commission did already submit in 2001 a proposal for a directive on the criminal-law protection of the Community's financial interest[75], but the proposal was never thoroughly discussed at the Council. This file concerns not only the "Lisbonisation" of the Maastricht-acquis, but also some substantial new points, as the broadening of het material scope of the substantive offences, redefinition of jurisdiction criteria and the eventual criminal liability of legal persons. It is clear, in the light of the acquis, that this proposal will be a B model for the harmonisation of sanctions, so including harmonisation of type and level of the mandatory sanctions.

In 2012, the European Commission submitted a new proposal for a directive on the fight against fraud on the Union's financial interests by means of criminal law under the Lisbon Treaty[76]. The proposal not only sought to "Lisbonise" the existing *acquis*, but also included in Article 2-6 two additional offences not covered by previous third pillar instruments, namely fraud in public procurement or grant procedures and misappropriation of funds[77]. The Commission did not include all

[72] Document PE 8 2014 INIT of 4 April 2014 and document PE 8 2014 INIT of 4 April 2014 for the final text of the TRIPARTITE.

[73] Regulation 2988/95 on the protection of the EC's financial interest, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995R2988:EN:HTML.

[74] Convention on the protection of the European Communities' financial interests of 26 July 1995, OJ C 316, 27.11.1995; First Protocol of 27 September 1996 to the Convention, OJ C 313, 23.10.1996 and Second Protocol to the Convention, OJ C 221, 19.07.1997.

[75] COM(2001) 272 final.

[76] COM(2012) 363 final.

[77] The Commission has reflected on including the other offences mentioned in the *Corpus Juris*, namely a specific offence of abuse of office and the breach of

the offences listed in the *Corpus Juris* project, neither did it include criminal liability for legal persons. The provisions on penalties in Articles 7-9 were more innovative. Article 7 required penalties to be "effective, proportionate and dissuasive", but Article 8 set out very innovative imprisonment thresholds. Fraud on the EU, public procurement fraud and misappropriation of funds were to be punishable by a minimum penalty of at least six months imprisonment and a maximum penalty of at least five years imprisonment in cases involving an advantage or damage of at least €100,000. For money laundering and corruption, the same imprisonment thresholds were to apply in cases involving and advantage or damage of at least €30,000. In cases of involvement within a criminal organisation for all PIF-offences the minimum maximum penalty was required to be at least ten years imprisonment. The introduction of mandatory minimum penalties was entirely new. The proposed directive was based on Article 325(4) TFEU.

During the negotiations at Council level, Member States obtained very substantial changes to this proposal. In the agreed general approach in the Council in June 2013 the legal base was changed from Article 325(4) TFEU to Article 83(2) TFEU. From the opinion of the Legal Service of the Council, which were in favour of this change, it is clear that all the limitations (*viz.*, the fact of not being applicable to Denmark, the opting in arrangement for the United Kingdom and Ireland, and the emergency brake procedure) apply. In the event of there being no opt-in by the United Kingdom and Ireland, these would remain bound by the 1995 PIF Convention. Secondly, the Member States have explicitly excluded revenues arising from VAT from the scope the directive. This is astonishing, as the Court of Justice has ruled clearly that VAT revenues are part of the financial interests of the Union[78], and many serious EU fraud cases are related to VAT carousel

professional secrecy. However, the Commission decided not to include a special offence on abuse of office as "it has been considered a superfluous addition to the offence of misappropriation. Similarly, an offence of breach of professional secrecy has not been included in the proposal as the conduct is already covered under the disciplinary-law measures of the EU Staff Regulations".

[78] Case C-539/09 *Commission v Germany*, [2011] ECR I-11235, paragraph 72.

cases. In relation to penalties, Member States deleted from the text any reference to minimum terms of imprisonment. As regards the minimum maximum terms of imprisonment, this was lowered to at least four years in the case of serious offences.

Whether an offence is serious is defined according to national law, having regard to all relevant circumstances, such as the value of any damage done or advantages gained, or the damage to the integrity of or confidence in systems for managing the Union's financial interests (recital 16). The commission of an offence within a criminal organisation is an aggravating circumstance. At the time of writing (the end of March 2014) the proposal is prepared to be submitted to for voting in April in the general assembly in the European Parliament. Both the Committee on Civil Liberties, Justice and Home Affaires (LIBE) and the Committee on Budgetary Control (CONT) of the European Parliament have amended substantially the Council text and agreed on a new version. The scope of the offences has been widened again to include fraud in public procurement and VAT fraud. By doing this, the text has been reoriented in the direction of the original Commission proposal. However a strong lobby of NGO's has changed the mind of the Parliamentary Committees with the result that minimum sanctions will not be reintroduced and that the legal basis will remain Article 83(2). The emergency break procedure is seen by the NGO's as a method to block proposals that does not offer sufficient protection of procedural safeguards.

As far as the third priority area is concerned, the criminal protection of the counterfeiting of the single currency, the file concerns the "Lisbonisation" of the framework decision of 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro[79]. The European Commission submitted a proposal in February 2013[80] in order to replace the framework decision 2000/383/JHA. Also this

[79] http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_counterfeiting/l33090_en.htm.

[80] Proposal for a directive on the protection of the euro and other currencies against counterfeiting by criminal law, http://ec.europa.eu/anti_fraud/documents/euro-protection/directive_conterfeiting_en.pdf.

proposal contained minimum criminal penalties, but did not provide either for criminal liability of legal persons. In February 2014 in the Permanent Representatives Committee (COREPER II) the Member States confirmed in February 2014 the political agreement reached by the Greek EU Council Presidency on February 12 in negotiations with the European Parliament. This allows reaching a first reading agreement after the formal voting in the European Parliament and in the Council. However in this agreement the minimum criminal penalties did not survive the negotiations either.

Concerning the other areas for which the Commission still has to decide if and to which extent harmonisation of criminal enforcement is necessary (like customs policy, illegal economy and financial criminality, data protection, etc.) there are no legislative proposals in the pipeline either. The Commission has published a communication on "A Single Market for intellectual property rights. Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe"[81], dealing also with enhanced fight against counterfeiting and piracy. However, until now there is no legislative proposal in the pipeline, although the Commission submitted already in 1995 a proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and a proposal for a framework decision to strengthen the criminal law framework to combat intellectual property offences[82]. Concerning corruption the Commission has published a communication on fighting corruption in the EU[83]. In some of the mentioned policy areas the Commission has tendered a study, like the one on sanctions in the field of commercial road transport.

[81] COM(2011) 287 final, http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf.

[82] COM(2005) 276 final, http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0276en01.pdf.

[83] COM(2011) 308 final http://ec.europa.eu/home-affairs/news/intro/docs/110606/308/1_EN_ACT_part1_v12[1].pdf.

10. Concluding Remarks

The impact of the European integration process on criminal law has been substantial.

The enforcement deficit of EU policies, both in law and in practice, has resulted in EU enforcement obligations, including punitive administrative and criminal law obligations with the aim to achieve effective application of EU policies in the Member States. Since the coming into force of the Amsterdam Treaty and the creation of an area of freedom, security and justice substantive areas of serious crime (the so-called euro crimes, as organized crime, terrorism, trafficking in human being, cybercrime, etc.) have been harmonised with the aim of strengthening judicial cooperation in criminal matters, based on mutual recognition and mutual trust. The overall aim of both approaches is to prevent and punish crime in the area of freedom, security and justice.

Bearing in mind the shared competence[84] in the field of criminal law, based on shared sovereignty and common goals between the Member States and the EU, it is logical that both the EU and the Member States elaborate criminal policies, also in the area of European criminal law. But the shared competence also means that both European and national criminal policies must and should have a double dimension, a European, and a national one. In fact, European criminal policy has to take account of common traditions in the Member states and the national criminal policies have to take into account the European dimension of their national criminal law enforcement. The prevention and punishment of market abuse, the commercialisation of dangerous food stuffs or of trafficking in human beings, just to give a few examples, can only be achieved through the integration of EU and national criminal policies.

What is needed to offer EU citizens an area of freedom, security, and justice in which free movement of persons is ensured in conjunction with prevention and combating of crime? It is quite clear that we cannot address only serious cross-border crime, but have to deal also with the criminal law enforcement of EU policies, if necessary.

[84] Article 2 TFEU.

What type of legal interests need and deserve criminal law protection? I think that we still can make a difference between

- legal interests of the EU as such (counterfeiting of the single currency, protection of the financial interests of the EU, corruption of EU officials)
- common legal interests in the area of freedom, security and justice (euro-crimes – Article 83(1) TFEU)
- legal interests linked to harmonised EU policies (annex-competence – Article 83(2) TFEU).

Both EU and national criminal policy documents should deal with these three dimensions.

Criminal policy must be principle-based, combining the tests of necessity (ultima ratio), subsidiarity and proportionality and general principles of criminal law. But that is only a part of the story. Criminal policy is of course also about *policy*, meaning that political choices must be made about the interests that deserve and need criminal law protection. This criminal law protection has to be defined in relation with other enforcement regimes, especially punitive administrative enforcement. Criminal policy also includes the elaboration of instruments of integrated enforcement of community policies, including prevention, administrative enforcement, and criminal enforcement. In the light of Article 2 TFEU that states that, in case of shared competence, the Member States shall exercise their competence to the extent that the Union has not exercised its competence, it becomes more and more necessary to know for which areas and to which extent the EU is willing to fill in its competence. The minimum rules concerning the definition of criminal offences and sanctions, as defined in Article 83 cannot be read as minimum harmonization. Once the EU has used its competence, it will be impossible to decriminalize the offence at the national level or even to change substantially the constituent elements of the offences or of the penalties or to over criminalize it. Moreover, it can be seen from the new directives based on Article 83(1) TFEU the minimum rules concerning the definition of criminal offences and sanctions also include related aspects of

jurisdiction, judicial cooperation in criminal matters, victim protection etc. From this perspective of common equivalent standards in the area of freedom, security and justice it becomes less and less evident that Member States can claim that this harmonization should leave intact a number of principles or guarantees that were considered by (some of) the Member States to be essential for their own criminal (procedural) law. As mentioned before, red flags to functional harmonisation have traditionally been: prosecutorial discretion, criminal liability of legal persons, minimum penalties and sentencing discretion. Procedurally the emergency brake under Article 83 TFEU can be used for this purpose, but this instrument is rather a political *ultima ratio*, although it could have a preventive effect during the negotiations. In my opinion national red flags can have only sense if they do not obstruct the European common goals in the area of freedom, security, and justice. Finally criminal policy is not limited to criminal law legislation, but should also address implementation and application in the Member States (in the books and in practice). This means that the administration of justice in the broad sense (from police authorities until criminal courts) in the Member States also has to be addressed from a perspective of effective application with the aim to realise the European common goals.

Prevention and punishment of crime has become an objective that is related to the rights and duties of citizens in the area of freedom, security, and justice (Article 3 TEU). Bearing in mind the wording of Article 82 TFEU, harmonization of criminal law and criminal procedure is also a necessary tool for strengthening judicial cooperation in criminal matters, based on mutual recognition and mutual trust. From this perspective neither the model provisions of the Council, nor the draft resolution of the EP guides us as to the content of criminal policy choices. Which legal interests deserve criminal protection and to which extent? This is certainly the case for Article 83(2), for which no or very little acquis had been build up in the past, either under the former third pillar, or under the first pillar. The Commission Communication of 2011 goes a step further and deals with the policy choices. This is clearly of added value, but it remains unclear on which basis and by which criteria policy areas have been selected or could be selected for criminal law protection. Once it has been decided that a policy area

does need criminal law protection it remains also unclear what the substance should be of it. It is limited to substantive criminal law or should it also include related aspects of criminal procedure? Is it limited to imposing effective, proportionate and dissuasive criminal sanctions (A model) or does it include harmonization of type and level of sanctions (B model)? The Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the EU[85] does offer us in the annexes an interesting inventory and comparison of Member States' legislation, but does, unfortunately, not include specific sanctions as financial penalties, disqualifications, confiscations, withdrawal of licenses, temporary closure of activities. This means that the specific sanctions for the enforcement of EU policies, so important in the area under Article 83(2), have been left out of the inventory and comparison.

Although the European Union is definitely in search of a criminal law policy for the enforcement of EU policies, it is doing it without any inter-institutional coherence. Moreover, the EU has difficulty in finding criteria to make consistent choices as to whether criminal law protection is necessary and if so, what the substance of it should be. The Stockholm programme gives us little to no guidance in relation to Article 83(2). The substantive list of topics in the Commission Communication of 2011 is quite different from the list of EU policies that was selected in the Klaus Tiedemann study on economic criminal law in the EU[86]. In that study the selection was: EU labour policy, EU food stuffs policy, EU competition policy, EU environmental policy, EU policy on corporate bodies and insolvency, EU financial services policy, EU intellectual rights policy (especially patents), EU policy on commercial embargos.

For the moment being the Member States, having a right of initiative under Article 83(2), are not much help either. They do not come up with proposals and have not elaborated criminal policy visions on Article 83(2) at all. This means also that they give no guidance on the

[85] COM(2004) 334 final, http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0334en01.pdf.

[86] K. TIEDEMANN (Ed.), *Wirtschaftsstrafrecht in der Europäischen Union*, Köln, 2002.

matter to their national parliaments either. An exception to the rule is a recent notice[87] from the Dutch Minister of Justice and Security to the Chamber of Deputies, in which he explains the position and policy of his Department in relation to European criminal law under the Lisbon Treaty. In his notice he repeats all the necessity, subsidiarity and proportionality tests that have been mentioned and adds a test on financial consequences and enforceability. However, when it comes to substantive choices in relation to Article 83(2) he is very brief, saying, in effect short: I will assess the proposals taking into account that administrative enforcement might be an excellent tool for some policies. In other words, he is not either coming up with a list of harmonised EU policies that need equivalent standards of criminal law protection in order to offer citizens an area of liberty, security and justice in conjunction with prevention and punishment of crime.

The EU is sure about its competence, but still does not know when and how to deal with it: *certus an, incertus quando*.

[87] http://lecane.com/design/eppodesign/pdf/kst-32317-801.pdf.

CHAPTER 2

ENFORCING THE MARKET ABUSE REGIME: TOWARDS AN INTEGRATED MODEL OF CRIMINAL AND ADMINISTRATIVE LAW ENFORCEMENT IN THE EUROPEAN UNION?[1]

1. Introduction

The European Union has long been an important driver for the integration of financial markets in Europe. While ongoing internationalisation has stimulated the process of European integration, the EU, in turn, has further promoted this development by removing interstate barriers through the four freedoms, common policies and harmonising measures. The European Union sets ambitious goals for itself in the Treaty of Lisbon. As regards the internal market, Art. 26(2) TFEU holds that the internal market will comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties. Article 3(2) TEU offers European citizens an area of freedom, security and justice (AFSJ) without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to the prevention and combating of crime. This means that the enforcement of internal market policies, such as the integration of financial markets, is fully part of the aims of the AFSJ.

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[1] The article will be published in 2015 as part of a collective volume: L. SENDEN e.a. (Eds.), *Regulation and Enforcement of Financial Markets*, Antwerp-Oxford-Portland, 2015.

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This article focuses on the issue of what consequences these ambitions have for the legal framework for law enforcement, in national and transnational cases. Despite the fact that law enforcement powers are considered to belong to the core of the nation-state (and EU law is therefore usually enforced by national authorities), those authorities and their powers are an essential part of the European legal order. They not only need a set of powers in order to effectively enforce the EU laws on their own territories, but must also cooperate with each other in transnational cases or in domestic cases for which mutual legal assistance (MLA) is needed. Moreover, national authorities need to be aware that nowadays their tasks have acquired a European dimension.

There is a wealth of literature on how regulations of the financial markets are best enforced[2]. Within the transnational context of the European Union, theories on regulation need implementation in the specific institutional setting of the European Union itself. While the EU is increasingly defining the scope and parameters of regulatory goals, their implementation and enforcement primarily remain in the hands of the Member States. The latent tension between common EU-wide goals and nationally driven interests has led scholars to focus on the regulatory competition that may occur between different EU Member States, at worst leading to races to the bottom, to the detriment of the common EU goals[3].

As far as we are aware, there is hardly any literature that offers accounts of how complex and integrated legal orders, such as those of the EU, support the operationalisation of regulation theories. Those theories, including Ayres and Braithwaite's authoritative theory of

[2] Cf. inter alia J. BRAITHWAITE, P. DRAHOS, *Global Business Regulation*, Cambridge, 2000; D. VOGEL, R.A. KAGAN (Eds.), *Dynamics of Regulatory Change - How Globalisation Affects National Regulatory Policies*, Berkeley, 2004.

[3] Cf. J. SUN, J. PELKMANS, *Regulatory Competition in the Single Market*, in *JCMS: Journal of Common Market Studies*, 1995; M. EGAN, *Regulatory Strategies, Delegation and European Market Integration*, in *Journal of Public Policy*, 1998; A. OGUS, *Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law*, in *International and Comparative Law Quarterly*, 1999.

responsive regulation[4], provide us with models of which enforcement instruments should be used in varying circumstances. Ayres and Braithwaite's picture of the enforcement pyramid, for instance, presupposes a framework that supports close cooperation between all the enforcement actors involved, as that pyramid entails 'a hierarchy of sanctions, graded from light to hefty, and from horizontal [*compliance*] to vertical [*command and control*]' (our italics)[5]. The adjective 'responsive' indicates that climbing the pyramid towards the levels of sanctions or even withdrawal of licences must be warranted by the attitude and motives of the specific market actor[6].

Any theory or common approach on how best to enforce financial regulations is informed by and needs alignment with the rule of law, the separation of powers and fundamental rights (cf. Articles 2 and 6 TEU). It is fair to assume, for instance, that theories on responsive regulation are best served with well-informed and well-equipped regulative authorities. Nonetheless, concerns in respect of, for instance, the protection of fundamental rights may point in another direction, i.e. towards a division of responsibilities over various authorities or even a prohibition on mutually sharing information. Those conflicting interests and values need to be balanced. The opposite may also be true: the law may impose restrictions on, for instance, the ability of authorities to cooperate, for which the previously mentioned values offer no convincing explanation.

The goal of this article is to map how the current and future legal infrastructure in respect of the investigation, prosecution and punishment of market abuse rules supports the central assumption of the EU legislature that, in order to offer a comprehensive package in the fight against market abuse, a level playing field throughout the EU is necessary. Applying a legal proportionality analysis, we will assess to

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[4] I. AYRES, J. BRAITHWAITE, *Responsive Regulation: Transcending the Deregulation Debate*, New York, 1995; J. BRAITHWAITE, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better*, Cheltenham, 2008.

[5] Cf. A.T. OTTOW, *Mastering the Market? Exploring New Forms of Market Supervision* (inaugural lecture Utrecht), Utrecht, 2008, pp. 11-12.

[6] Cf. H. VAN DE BUNT et al., *Hoe stevig is de piramide van Braithwaite?*, in *Tijdschrift voor Criminologie*, 2007.

what extent the choices made by the European legislature are appropriate to achieve the goals it has set for itself. We will make that analysis on the basis of the following questions:

(1) is there any need for EU enforcement at all? If so,
(2) is it limited to prescriptive jurisdiction[7] or does it also include investigative jurisdiction in the AFSJ (from coordination to supranational enforcement)? And
(3) does it include an integrated approach of administrative and criminal enforcement?

We will start in the next Section with two cases of market abuse which show that, under the present regime, national authorities are by no means fully aware of the European dimension of their tasks, which not only leads to a duplication of work by different national authorities, but also to complications in the legal position of the natural and legal persons concerned. After that, we will provide an overview of the policy agenda of the European legislative bodies and make an analysis of the pending legislative proposals that aim to create a level playing field, not only for economic actors and citizens, but also for law enforcement authorities (Sections 0 and 0). We will make a distinction between measures proposed in the area of administrative law (Section 0) and criminal law (Section 0). In Section 0 we will argue that these proposals still do not fully take into account the central goals of the European Union, as formulated in Articles 3 TEU and 26 TFEU mentioned above. We will conclude with a brief summary of our findings (Section 0). Finally, we should note that this article will focus on the structures for enforcement through public law (administrative law and criminal law). We will therefore disregard law enforcement through private law and private law actors ('the base of the enforcement pyramid').

[7] Prescriptive jurisdiction is the jurisdiction to establish the contents and scope of application of certain norms and prescriptive rules. Executive jurisdiction is the jurisdiction to enforce orders or prescriptive rules emanating from the judiciary or the legislature; cf. European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction*, Strasbourg: Council of Europe 1990.

2. Problem Setting And Problem Analysis

2.1. Fortis Bank: Market Manipulation and Market Abuse

In 2007, just before the financial crisis and meltdown of 2008, Banco Santander, Fortis Bank and the Royal Bank of Scotland obtained control over ABN AMRO bank through a hostile takeover, one of the biggest ever deals in the financial services industry. Fortis Bank, the biggest bank in Benelux, had problems in financing its part of the takeover and decided to go to the capital market for fresh capital and thus to offer new shares. The operation was widely advertised. Although the capital extension was successful, it was not enough to guarantee the financial position of Fortis Bank and also, due to the worsening situation of the financial markets and the increasing distrust in the banking sector, Fortis Bank was about to collapse until the governments of Belgium, the Netherlands and Luxembourg intervened and nationalised, dismantled and partially sold Fortis Bank. This nationalisation and dismantling was certainly not done from the perspective of a common European approach, but rather a typical example of nationally driven interest.

Due to the financial meltdown of the company, doubts were very soon raised about the financial integrity of the company and of the information given to existing and new shareholders. The rules on market manipulation and market abuse, a part of hard core European law on financial markets[8], apply in all EU Member States. However, the enforcement of these rules in the Fortis case was equally driven by national enforcement design and national enforcement agendas, as the European rules leave much discretion to the Member States. Infringements of the market abuse rules are administrative irregularities and criminal offences, both in Belgium and Luxembourg as well as in the Netherlands. Moreover, legal persons can be criminally liable in the three countries for these types of offences. However, in Luxembourg no action was undertaken at all by the domestic administrative or judicial

[8] Directive 6/2003/EC of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ EU L 96/16.

authorities. In the Netherlands, competent administrative enforcement authorities opened investigations against the former Fortis Bank concerning suspicions of market manipulation and market abuse. In Belgium, both the competent administrative as well as judicial authorities opened investigations against the former Fortis Bank and against the CEOs. This led to concurring and parallel investigations and proceedings in Belgium and the Netherlands, but to no investigations at all in Luxembourg.

In February 2012, the Dutch Financial Services Authority (AFM), the administrative enforcement agency, was the first to conclude proceedings and imposed four fines[9] of €144,000 each on the two legal persons that constituted the Fortis Bank corporation/holding, They were found guilty of market manipulation/market abuse (based on the conduct of the same leading persons in the two groups) in two situations:

(1) after the takeover of ABN AMRO, the CEO of Fortis Bank organised a press conference in which he insisted on the strong and sound financial position of Fortis. By doing so he had been misleading the investors;
(2) the European Commission instructed Fortis Bank to sell off some parts of the group. While putting these assets on the market, Fortis Bank decided not to publish negative information about the financial position of the group and by doing so manipulated the trading in its shares on the stock exchange.

The imposition of the administrative fines by the AFM on the two legal persons constituting the holding of Fortis Bank had undoubtedly been coordinated with the Dutch judicial authorities. In the Netherlands, the legal framework imposes a duty upon the administrative and judicial enforcement authorities to choose, at a certain stage, one of the two enforcement regimes, in other words to opt either for administrative sanctions or criminal prosecution (the so-

[9] See <www.afm.nl/~/media/files/boete/2010/fortis-besluit-nv.ashx> and <www.afm.nl/~/media/files/boete/2010/fortis-besluit-sanv.ashx>, last visited on 25.10.2012.

called *una via* principle)[10]. However, this does not preclude criminal proceedings against the former CEOs. The Dutch Prosecutor's Office has not given formal notice of any ongoing judicial investigation in that sphere[11]. It is not known and it is difficult to guess if the authorities took into account the transnational dimension of the case when deciding to go for administrative enforcement, rather than the criminal law route. However, what is clear is that we can talk about unilateral action by the Dutch authorities, without coordinating with the Belgian administrative and judicial authorities.

In June 2012 the Belgian administrative enforcement agency, the Financial Services and Markets Authority (FSMA), found evidence that the company had distributed misleading information and the administrative auditor imposed fines of €500,000 on the former Fortis Bank and fines of €250,000 to 500,000 on three of the CEOs. The sanction commission of FSMA followed the auditor in June 2013, but maximised the fines against the CEOs to €400,000. Finally, in 2013 the Belgian judicial authorities decided to prosecute seven former CEOs for misleading information, market abuse, forgery of documents and deception, but decided not to prosecute the former Fortis Bank or BNP Paribas Fortis (the new owner of the bank).

Beside these administrative and criminal proceedings, victims introduced civil claims against Fortis and its CEOs in several jurisdictions and, where possible (as in Belgium), also played an active role in triggering criminal proceedings as civil parties in criminal proceedings.

2.2. Libor/Euribor: Interest Rate Rigging Scandal

The London Interbank Offered Rate (Libor) is the average interest rate estimated by leading banks in London that they would be charged

[10] This means that the administrative and criminal enforcement authorities have to decide at a certain stage in the investigation to go either for administrative sanctioning or for criminal prosecution.

[11] The Dutch Prosecutor's Office does not, in general, publish communications on the opening or not opening of financial judicial investigations or on ongoing financial judicial investigations. In Belgium, however, this is current practice.

if borrowing from other banks. It is calculated for ten currencies, including the USD and the Euro. Almost 20 world leading banks participate in the Libor panels[12]. Euribor is short for Euro Interbank Offered Rate. The Euribor rates are based on the interest rates fixed by panels[13] of around 40 to 50 European banks. Both Libor rates and Euribor rates are the daily reference rates for mortgages, consumer lending products, futures, options, swaps and other derivative financial instruments and thus have significant effects on consumers and financial markets worldwide.

In 2012 it came to light that the Libor and Euribor panels had been deliberately manipulating the interest rates since 1991, in order to increase bank profits. Several European banks faced cumulative investigations and proceedings, both in the US and in European countries. Banks had not only to deal with civil damages claims (mostly in the US) but also with proceedings by administrative enforcement agencies (financial regulators and competition authorities)[14] and judicial authorities.

One of the banks that was active in both Libor and Euribor panels is Barclays Bank plc, a financial services corporation with headquarters located in London. Barclays Bank plc has banking subsidiaries around the world, including in the US.

In the period 2007-2009, certain Barclays swaps traders requested that certain Barclays Libor and Euribor submitters submit Libor and Euribor contributions that would benefit the traders' trading positions, rather than rates that complied with the definitions of Libor and Euribor. Those swaps traders either proposed a particular Libor or Euribor contribution for a particular tenor and currency, or proposed that the rate submitter contribute a rate higher, lower, or unchanged for a particular tenor and currency. The swaps traders made these requests via electronic messages, telephone conversations, and in-person conversations. The Libor and Euribor submitters agreed to accommodate, and did indeed accommodate, the swaps traders'

[12] http://www.bbalibor.com/disclaimer.

[13] http://www.euribor-rates.eu/panelbanks.asp.

[14] The European Competition Authority and the Swiss Competition Authority opened proceedings for cartel behaviour.

requests for favourable Libor and Euribor submissions on numerous occasions.

In June 2012 Barclays Bank plc admitted to the US Department of Justice misconduct related to submissions for the Libor and the Euribor rate and agreed to pay a penalty of $160 million, by which it avoided criminal prosecution[15]. As part of the agreement with the Department of Justice[16], Barclays admitted and accepted responsibility for its misconduct set out in a statement of facts that is incorporated into the agreement. The non-prosecution agreement applies only to Barclays and not to any employees or officers of Barclays or any other individuals. The Justice Department's criminal investigation into the manipulation of Libor and Euribor by other financial institutions and individuals is ongoing. It is further understood that this agreement does not bind any federal, state, local, or foreign prosecuting authority other than the Fraud Section. The Fraud Section will, however, bring the cooperation of Barclays to the attention of other prosecuting and investigative authorities, if requested by Barclays.

Moreover, also in June 2012, Barclays was fined $200 million by the USA Commodity Futures Trading Commission[17] and £59.5 million by the UK Financial Services Authority[18] for attempted manipulation of

[15] http://lib.law.virginia.edu/Garrett/prosecution_agreements/pdf/Barclays_2012.pdf.

[16] This agreement is part of the effort being undertaken by President Barack Obama's Financial Fraud Enforcement Task Force. President Obama established the interagency Financial Fraud Enforcement Task Force to wage an aggressive, coordinated and proactive effort to investigate and prosecute financial crimes. The task force includes representatives from a broad range of federal agencies, regulatory authorities, inspectors general and state and local law enforcement who, working together, bring to bear a powerful array of criminal and civil enforcement resources. The task force is working to improve efforts across the federal executive branch, and with state and local partners, to investigate and prosecute significant financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, combat discrimination in the lending and financial markets, and recover proceeds for victims of financial crimes. See also V. ACHARYA, T. COOLEY, M. RICHARDSON (Eds.), *Regulating Wall Street. The Dodd Frank Act and the New Architecture of Global Finance*, New York, 2010.

[17] http://www.cftc.gov/PressRoom/PressReleases/pr6289-12.

[18] http://www.fsa.gov.uk/library/communication/pr/2012/070.shtml; http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf.

the Libor and Euribor rates. On June 2012 the UK Serious Fraud Office announced the start of criminal investigations into the Libor scandal, including inter alia investigations into the CEOs of Barclays[19].

Like Barclays, several other banks were facing similar cumulative enforcement actions. On December 2012, the Swiss bank UBS agreed to pay regulators $1.5bn ($1.2bn to the US Department of Justice and the Commodity Futures Trading Commission, £160m to the UK Financial Services Authority and 60 million CHF to the Swiss Financial Market Supervisory Authority) for its role in the scandal. In mid-2012, the Dutch National Bank (DNB) and the Dutch Financial Services Authorities started administrative investigations into the Libor and Euribor scandal[20], but used their confidentiality obligation to refuse further information on concrete investigations. The Dutch judicial authorities are not willing to confirm any formal judicial investigation into the Dutch Rabobank. Meanwhile, Rabobank agreed a settlement with regulators such as the US Department of Justice, the US Commodity Futures Trading Commission and the UK Financial Conduct Authority, including the payment of a penalty of €774 million.

In December 2013 the EU Competition Authority did reach a settlement with six banks and an investment fund (Citigroup, Deutsche Bank, Royal Bank of Scotland, JP Morgan, Société Générale, Rp Martin) for a total amount of €1.71 billion. Barclays and UBS have been granted immunity from any fines as they blew the whistle on the rate rigging. Some other banks, such as HSBC and Crédit Agricole, did not agree to the settlement and will face higher penalties. The settlement is the largest combined penalty ever levied by the European competition authorities.

2.3. Analysis

What can we conclude from these examples? For one thing, even in key areas of the internal market and the AFSJ, the triggering of

[19] http://www.theguardian.com/business/2012/jul/06/serious-fraud-office-libor-investigation.

[20] http://www.rtlnieuws.nl/economie/dnb-en-afm-onderzoeken-manipulatie-libor-rente.

enforcement jurisdiction and adjudicative jurisdiction remains exclusively in the hands of the Member States, as it does when it comes to the stability and integrity of the financial system and the functioning of the internal market. The only exception is related to the enforcement of EU competition rules, where the EU competition authority has administrative enforcement powers. Of course, the triggering of those national jurisdictions is dependent upon the norms being enforced in the legislative framework (prescriptive jurisdiction), but even that is to a large extent a product of the sovereignty of the nation states. We must not forget that in public enforcement law – and this is very different from private law – there is a very strong relationship between the applicable law (substantive norms and procedural law) and the jurisdiction to investigate and to adjudicate. However, whilst in the context of the EU the applicable substantive law on financial markets and products is highly harmonised[21], the enforcement regime is far from harmonised or unified. When it comes to administrative enforcement in the field of the financial markets, admittedly, the Member States have to comply, in some areas, with substantive and procedural enforcement obligations imposed by the EU. This is, for instance, the case with administrative enforcement related to market abuse[22]. Yet in the area of the Libor/Euribor benchmark rates, there are no EU enforcement obligations in place at all (to date, early April 2014), and the Member States have left it to self-regulation and enforcement by the financial sector[23].

In addition, when it comes to criminal law enforcement there are, as yet, no EU obligations at all. Quite a number of Member States have, however, specific and or common offences in place that can be applied to both market abuse and market rigging. The choice of enforcement regime (civil, administrative, and criminal) is thus a mix of minor European obligations and major national policy choices. The result is that the triggering of enforcement jurisdiction and adjudicative

[21] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:096:0016:0016:EN:PDF.

[22] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:096:0016:0016:EN:PDF.

[23] See C. GOMEZ-JARA DIEZ, *Crisis Financiera y Derecho Penal*, Lima, 2013, p. 82.

jurisdiction is to a large extent dependent upon a fragmented patchwork of prescriptive jurisdiction in every single jurisdiction of every Member State. Enforcement models have lagged behind financial globalisation and the reality of integrated financial markets, inside and outside the EU. There is not only a need for an increased enforcement by the EU of harmonisation of national enforcement systems, but also a supranational enforcement model that can coordinate and eventually take individual binding decisions.

The legal consequences of the exercise of investigative and adjudicative jurisdiction by every single Member State in the AFSJ are far from clear. The CEO of the former Fortis Bank was quick to claim that the Dutch fines would bar further administrative and criminal sanctions in other EU Member States, based on the *ne bis in idem* principle[24]. His strategy did not work; as the former Fortis Bank and some CEOs were fined in Belgium and all CEOs face criminal proceedings. The legal question remains, however, whether further administrative fines and/or criminal punishment in Belgium are possible against the same legal persons or if they are barred by the Dutch administrative fines. The cross-border dimension is not limited to double jeopardy, but extends to the transnational protection of fundamental rights, such as the principle of legality, fair trial standards, including the right to silence, the privilege against self-incrimination, etc.[25], as well as in relation to the combination of punitive administrative and criminal enforcement.

All in all, it is obvious, first of all, that the enforcement approach in these cases does not reflect a clear coordination of jurisdiction in the AFSJ, something that does contrast with the policy in the US[26]. Who

[24] J.A.E. VERVAELE, *Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*, in S. GLESS, J.A.E. VERVAELE (Eds.), *Special on Transnational Criminal Justice*, in *Utrecht Law Review*, 2013, pp. 211-229 (Chapter 5 of this book).

[25] See the Special Issue of the Utrecht Law Review, *Law Should Govern: Aspiring General Principles for Transnational Criminal Justice*, volume 9, issue 4, September 2013.

[26] For a critical assessment of the results of that policy, see B.T. BORDEN, D.J. REISS, *Cleaning up the Financial Crises of 2008: Prosecutorial Discretion or Prosecutorial Abdication*, Brooklyn Law School Legal Studies, Research Paper Series, Research Paper no 331, March 2013.

could claim that, in the Fortis case, the Dutch administrative enforcement regime was the most appropriate enforcement mechanism? If not, why was that regime nevertheless able to impose administrative penalties sanctions first? And why could those sanctions possibly bar administrative or criminal punishment against the same legal persons by other authorities in other Member States? In turn, why weren't Belgian authorities concerned with the interests of the legal and natural persons involved, now facing multiple punishments for the same offences in different national jurisdictions, although operating in a single AFSJ?

Second, the sanctions imposed on the legal persons seem to be rather modest, in relation to the magnitude of the victims (several hundreds of thousands), the magnitude of the public interest at stake (integrity of the EU financial market) and the key importance of the financial markets for the goals of the internal market. Despite EU harmonisation of substantive law and partial harmonisation of enforcement law, it still seems possible that the enforcement body that strikes first is the final regulator, as it could bar further proceedings through the *ne bis in idem* principle. There is no European mechanism to give priority based, for instance, on the legal seat of the legal person or the major impact of the damage. But even if further proceedings were not to be barred by the *ne bis in idem* principle, it is very inefficient to cut the enforcement of common European interest into national pieces and to leave it to the full autonomy of the domestic enforcement authorities, with the result that in some countries nothing happens and in others concurrent proceedings are going on for years. It is clear that, currently, we cannot speak of an integrated approach of administrative and criminal enforcement, neither in the Member States nor within the framework of both the internal market and the AFSJ.

Finally, from the Libor-Euribor interest rates rigging scandal, we can also conclude that enforcement policies and strategies play a very important role in achieving the goals of the AFSJ and the internal market. The fact that US regulators and enforcers have also been so active in relation to European financial institutions, is remarkable, particularly in the light of the inactivity of many enforcement agencies in European countries. We conclude from the Libor-Euribor example

that there seems to be no or very little coherent enforcement strategy between the enforcement authorities in the EU. The enforcement practice has also shown that, in some countries, no enforcement jurisdiction is triggered at all, whilst in others there has been a spate of enforcement between several administrative and judicial authorities. From the point of view of the overall AFSJ, the result is a patchwork with pieces of overactivity and pieces of underactivity or no activity at all. Moreover, there is no coherent European strategy towards the US proactive stance either.

In the light of the analysis of our two examples, we can reflect further on the relationship between policy goals, regulation, and enforcement in the area of financial markets. The goals of the internal market include free movement of capital and the protection of the integrity of the financial markets (art 26(2) TFEU). The enforcement in the area of financial markets is clearly part of the AFSJ (Title V of TFEU). This is, for instance, explicitly reflected not only in art. 75 TFEU but also in the goals of the AFSJ contained in article 67(1-3), which include that "the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime". The aims of the internal market and the AFSJ are also combined in article 3 TEU that sets out the main goals of the Union. The link in the Treaties between regulation and enforcement is thus assured. How did the Union use this competence? Did the EU come up with a strategy to harmonise national enforcement? Did the EU establish a supranational enforcement regime? Has the EU used its new competences under the Lisbon Treaty to prescribe enforcement obligations which learn from the failures of the past and which are able to prevent a new meltdown? These questions are of particular relevance in the governance of the financial crisis and the scandals in the banking world and financial markets. We first tackle the questions from a general internal market point of view and then apply it to the financial markets.

3. Is there an EU Enforcement Policy Model for Regulatory Schemes in the Internal Market?

Since the coming into force of the Lisbon Treaty, the European Commission and particularly DG Justice have taken a proactive stand on the topic of a criminal enforcement policy, and in relation to administrative enforcement as well. On its website[27], DG Justice spells out three specific competences for criminal law in the TFEU. First, the EU can adopt directives providing for minimum rules regarding the definition (constituent elements and criminal sanctions) of 'euro offences' under article 83(1) TFEU. Article 83(1) TFEU contains a list of ten particularly serious areas of crime with a cross-border dimension. They comprise 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. Second, the EU can also adopt directives, under article 83(2), providing for minimum rules on the definition of offences and criminal sanctions if they are essential for ensuring the effectiveness of a harmonised EU policy. Third, DG Justice refers to the duty to protect the financial interests of the EU, under articles 310(6), 325, 85 and 86 TFEU, which might include, if necessary, protection by means of criminal law.

Moreover, in September 2011 the Commission published a Communication entitled "Towards an EU Criminal Policy – ensuring the effective implementation of EU policies through criminal law"[28], dealing specifically with the competence under article 83(2) TFEU. In Part 1 the Commission elaborates on the scope of EU criminal legislation. The Commission underlines that article 83(2) aims at strengthening mutual trust, ensuring effective enforcement and coherence and consistency in European criminal law itself. Article 83(2) TFEU does not list specific offences or areas of crime. For that reason, the Commission sets out a scheme for the policy choices concerning whether or not to use criminal law as an enforcement tool,

[27] http://ec.europa.eu/justice/criminal/criminal-law-policy/index_en.htm.

[28] COM(2011) 573 final http://ec.europa.eu/justice/criminal/files/act_en.pdf.

as well as in relation to other enforcement tools, like the administrative one. The Commission also deals with the choice of policy areas where EU criminal law might be needed. Criteria are a lack of effective enforcement or significant differences among Member States leading to inconsistent application of EU rules. Even so, the Commission will then still have to assess on a case-by-case basis the specific enforcement problems and the choice for administrative and/or criminal enforcement. However, the Commission has already indicated in this Communication priority fields for criminal law harmonisation under article 83(2) TFEU. Three selected areas are mentioned:

- the financial sector, e.g. concerning market manipulation and insider trading[29];
- the fight against fraud affecting the financial interest of the EU;
- the protection of the euro against counterfeiting.

The Commission mentions furthermore a set of areas (not an exclusive list) in which criminal law enforcement might play a role:

- illegal economy and financial criminality
- road transport[30]
- data protection[31]
- customs rules
- environmental protection
- fisheries policy
- internal market policies (counterfeiting, corruption, public procurement).

[29] See 'Communication on reinforcing sanctioning regimes in the financial sector', COM(2010) 716 final of 08.12. 2010.

[30] See Commission Staff Working Paper SEC (2011) 391 of 28.03. 2011, accompanying the White Paper 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system', COM(2011) 144 of 28.03.2011.

[31] See the Communication 'A comprehensive approach on personal data protection in the European Union', COM(2010) 609 of 04.11.2010.

Since the publication of the policy document the Commission has also put its contents into practice. The first initiative under article 83(2) TFEU is indeed in one of the three already selected areas in the Communication of September 2011, namely the financial sector and criminal sanctions for insider dealing and market manipulation[32]. The Commission produced a communication on "Reinforcing sanctioning regimes in the financial service sector" in 2010[33], based on comparative research by the three Committees of Supervisors (Committee of European Banking Supervisors (CEBS), Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and Committee of European Securities Regulators (CESR)) on the equivalence of the sanctioning regimes in the financial sector in Member States. The Commission also used the policy criteria of the Communication of September 2011 for its assessment. The review by the Commission in cooperation with the Committees of Supervisors spells out substantial divergences and weaknesses in national sanctioning regimes:

- some competent authorities do not have at their disposal important types of sanctioning powers for certain violations;
- levels of administrative pecuniary sanctions vary widely across Member States and are too low in some Member States;
- some competent authorities cannot address administrative sanctions to both natural and legal persons;
- competent authorities do not take into account the same criteria in the application of sanctions;
- divergence exists in the nature (administrative or criminal) of sanctions provided for in national legislation;
- the level of application of sanctions varies across Member States.

[32] For the other proposals on the criminal law protection of the financial interest of the EU and of the single currency (euro), we refer to J.A.E. VERVAELE, *Harmonised Policies and the Harmonization of Substantive Criminal Law*, in F. GALLI, A. WEYEMBERGH (Eds.), *Approximation of Substantive Criminal Law in the EU*, Bruxelles, 2013, pp. 43-72.

[33] COM(2010) 716 final.

In the impact assessment of a new regulatory package in the area of insider dealing and market manipulation[34], another series of problems are identified:

- not all financial products and markets are covered;
- regulators lack powers to effectively enforce market abuse regulations (access to premises, access to telecoms data, seizure powers, data sharing, etc.);
- substantial divergences in sanctioning powers and in sanctions imposed;
- there is no deterrent effect of enforcement regimes;
- criminal law enforcement does not exist in all Member States.

The existing divergences in the enforcement of market abuse rules may undermine the single market, leave scope for regulatory discretion, and undermine cross-border cooperation of law enforcement authorities. The Commission therefore introduced two new legislative initiatives on market abuse, in October 2011[35]. They are part of a larger reform package for the financial sector. The two initiatives consist of a proposal for a regulation on insider dealing and market manipulation (market abuse) and a proposal for a directive on criminal sanctions for insider dealing and market manipulation. The proposed regulation, replacing directive 2003/6/EC, provides for the basic regulatory framework[36]. It contains all definitions, obligations, and prohibitions and also regulates the applicable administrative enforcement regime, including administrative sanctions of a non-punitive and punitive character. The proposed directive is the result of the assessment of the Commission on the need, proportionality, and subsidiarity of criminal law enforcement in the financial sector[37]. The Commission came to a positive assessment as far as serious market abuse offences are

[34] http://ec.europa.eu/internal_market/securities/docs/abuse/SEC_2011_1218_en.pdf.

[35] For the analysis see Section 4 of this article.

[36] For the original proposal, see COM(2011) 651, amended by COM(2012) 421; for our analysis, we used the final text of document PE 78 2013 INIT, of 4 April 2014.

[37] For the original proposal, see COM(2011) 654, amended by COM(2012) 420; for our analysis, we used the final text of document PE 8 2014 INIT of 4 April 2014.

concerned. The proposed directive will therefore introduce an obligation for the relevant Member States to introduce criminal law sanctions for the most serious violations of market abuse rules.

Whether these proposals will be able to achieve their goals of, inter alia, increasing market integrity and investor protection, as well as of ensuring a single European rulebook and level playing field, remains to be seen. In the following paragraphs we will make an analysis of both proposals, in terms of their proclaimed capacity to set benchmarks for national authorities to realise the European dimension of their tasks (jurisdiction to prescribe and enforce).

4. Market Abuse – Analysis of the Proposed Framework

4.1. General Remarks

The legislative package on market abuse rules rests on two different articles of the Treaty on European Union. The legal basis of the regulation will be Article 114 TFEU, whereas the directive will be based on Article 83(2) TFEU. This dual basis is surprising because it seems to be at odds with the ambition to establish a level playing field for market abuse cases. The choice of Article 83(2) TFEU as a legal basis for the directive implies that Denmark will not take part in the adoption of this directive and that the UK and Ireland have an opting-in choice, but no obligation to become part of and to be bound by the directive[38]. In other words, under the chosen legal basis, it is possible that criminal enforcement obligations which are considered necessary for the effective enforcement of a harmonised EU policy, will not be binding in three EU countries, including the main centre of financial services in the EU. In this sense the proposal is a step backward, rather than forward[39].

[38] The UK opted out, whereas Ireland opted in.

[39] For a comparative analysis of the enforcement design in the Member states, see N. BAENA TOVAR, *La regulación del abuso de Mercado en Europa y en Estados Unidos*, 2002,

As a general rule, the material scope of the EU rules on market abuse will be defined by the proposed regulation. That instrument contains a series of detailed provisions that determine the material scope of the EU package. Compared with the existing Directive 2003/6[40], the scope of the rules is extended, in terms of the covered activities, financial instruments and trading venues. The regulatory framework provided by Directive 2003/6 was considered to be out of date, due to the rise of new trading platforms, over-the-counter (OTC) trading and technologies, such as high frequency trading (HFT). The new legislative package will also cover financial instruments related to spot commodity contracts, as well as products related to emission allowance auctions. As regards the trading venues, the package no longer only covers instruments traded on regulated markets, but also on multilateral trading facilities (MTFs) and other organised trading facilities (OTFs). The regulation will also include any other conduct or action which may have an effect on such a financial instrument, irrespective of whether it takes place on a trading venue (Art. 2(3) proposal). The regulation further specifies that, because trading of financial instruments is increasingly automated, abusive strategies that are carried out by, inter alia, algorithmic and high frequency trading constitute market manipulation. In light of the efforts to keep up with developments in the markets and bearing in mind the central goals of the regulation, this modernisation of the current market abuse rules makes sense. Nevertheless, the original proposals themselves already needed adjustment during the course of the legislative process, in order to include manipulation with benchmarks (like in the Libor/Euribor scandal) in the proposals.

https://www.cnmv.es/DocPortal/Publicaciones/MONOGRAFIAS/ABUSOMERCADO.PDF.

[40] OJ EU 2003 L 96/16.

4.2. Administrative Law Enforcement

4.2.1. Prescriptive Jurisdiction

The widened scope of the regulation means that the scope of the body of prohibitions is also wider than the current Directive 3002/6/EC. The regulation obliges (legal) persons to refrain from – in brief – insider dealing (Art. 8/14) and unlawful disclosure of information (Art. 10/14), market manipulation (Art. 12/15), and to introduce administrative mechanisms in order to detect and prevent forbidden conduct. Certain actors are required to fulfil a series of additional requirements, including disclosure duties for issuers of instruments, the establishment of insider lists, reporting duties for manager's transactions, and duties with respect to investment recommendations (Chapter 3). Once the regulation enters into force, these norms will not only be binding on the actors on the financial markets, but Member States will also be obliged to enforce these norms through a range of punitive and non-punitive measures (Chapters 4/5), including, inter alia, the withdrawal or suspension of the authorisation of an investment firm, temporary or even permanent bans on exercising management functions in investment firms, and considerable pecuniary sanctions up to at least €5,000.000 for natural persons and €15,000.000, or 15% of the total annual turnover, for legal persons, depending on the type of infringement (Art. 30).

The maximum amount of the pecuniary administrative sanctions that must be available according to the regulation led to problems in some Member States. Austrian constitutional law, for instance, does not allow for *administrative* pecuniary sanctions of the amount provided for in the regulation[41]. This is why Art. 30(1) stipulates that Member States may decide not to introduce administrative sanctions for certain infringements, provided that those infringements are already subject to *criminal* sanctions in their national law. The result of that is, as we will see, that mechanisms need to be in place in order to ensure effective cooperation at the interface of administrative and criminal law.

[41] Council document 16512/12 of 10 December 2012.

4.2.2. Enforcement Jurisdiction

Article 2(4) of the regulation stipulates that the prohibitions and requirements in this regulation apply to actions concerning the instruments to which the regulation is applicable, carried out inside and outside the European Union. The regulation therefore does not limit the territorial scope of the substantive norms to a particular national territory. Yet that does not mean that the authorities that are responsible for law enforcement are not bound by borders or have obtained transnational competence on the basis of the regulation. Article 22 stipulates that all Member States designate a single *administrative* competent authority for the purpose of the regulation. Those authorities must ensure that the provisions of this regulation are applied in their own territory, regarding all actions carried out on that territory and certain actions carried out abroad. Transnational cases must be dealt with in cooperation with other national authorities and with the European Securities and Markets Authority (ESMA)[42].

In order to be able to operate effectively and to realise a pan-European level playing field with respect to the enforcement of market abuse rules, national authorities must also be given a certain (minimum) set of powers, including, inter alia, access to documents and other data, the power to acquire information from persons, to carry out on-site inspections and the power to refer matters for criminal prosecution. These authorities must also be given the power to:

- enter premises of natural and legal persons in order to seize documents and other data in any form, where a reasonable suspicion exists that documents and other data related to the subject-matter of the inspection or investigation may be relevant to prove a case of insider dealing or market manipulation;
- acquire existing recordings of telephone conversations, electronic communications or other data traffic records held by investment firms, credit institutions or other financial institutions;

[42] Regulation 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), OJ EU 2010 L 331/84.

- acquire existing data traffic records held by a telecommunication operator, where there is a reasonable suspicion of a breach and where such records may be relevant to the investigation of insider dealing or market manipulation in violation of this Regulation;
- request the freezing and/or sequestration of assets (Art. 23(2)).

All of these types of measures constitute serious interferences with the right to privacy and property; these measures qualify as criminal investigative measures in many countries. Member States may therefore decide to attribute these powers not directly to the competent administrative authorities, but stipulate that these powers are exercised in cooperation with or by application to the competent judicial authorities (Art. 23(1)). As such, this approach is not new[43]. Yet it does raise questions as to the applicable safeguards that should be in place[44]. The regulation refers back to national law on this point. It is suggested in the preamble that '[f]or the exercise of those powers, which may amount to serious interferences with the right to respect for private and family life, home and communications, Member States should have in place adequate and effective safeguards against any abuse, for instance, where appropriate a requirement to obtain prior authorisation from the judicial authorities of a Member State concerned. Member States should allow the possibility for competent authorities to exercise such intrusive powers to the extent necessary for the proper investigation of serious cases where there are no equivalent means for effectively achieving the same result'[45].

In addition to the investigatory powers and sanctioning powers of the authorities, Article 32 provides for procedures on reporting market abuse violations, including provisions on whistle-blower protection. Whistle-blowers should, at the very minimum, receive appropriate protection against retaliation, discrimination or other types of unfair

[43] See also art. 12 of the current Directive 2003/6/EC.

[44] See, for instance, the similar concerns expressed in the Statement by Sweden, Austria, Czech Republic and Germany in Council document 11384/13 of 27 June 2013: 'Any expansion in the access to traffic data outside judicial procedures would set a dangerous precedent for other EU dossiers.'

[45] Recital 66. See also art. 23(2), second subparagraph.

treatment. Member States may also provide for financial incentives to persons who offer relevant information about potential breaches of the regulation, to be granted in conformity with national law where such persons do not have other pre-existing legal or contractual duties to report such information, and provided that the information is new, and it results in the imposition of an administrative sanction or measure or a criminal sanction for a breach of this Regulation.

The level playing field and supervisory convergence that must be achieved necessarily include cases of transnational cooperation. With national authorities still bound by national borders, the help of their counterparts elsewhere inside (or outside) the EU is needed. The designation of a single competent administrative authority in each Member State, all with equivalent tasks and powers, helps to prevent fragmentation of enforcement structures and facilitates the creation of a European network approach. National authorities also work in close cooperation with ESMA (Art. 24). That authority fulfils an important role in the supervision of the administrative supervisory structure, and may on occasion also facilitate the coordination between national authorities, or the settlement of conflicts between them (cf. art. 25(7)). Furthermore, Article 25 of the regulation requires authorities to cooperate closely with their counterparts from other Member States, by exchanging information on request or spontaneously, by performing acts of investigations, by conducting joint investigations, etc.

However, the duty to cooperate does not go so far as to require authorities to cooperate in those cases where they are also conducting investigations or where judicial proceedings have been started in their jurisdiction, as that may harm the national investigation (art. 25(1b/c)). It means that under the new regulation, authorities are not at all encouraged to cooperate in the situations sketched out in Section 0; rather to the contrary. It is also in sharp contrast with article 31(2) of that same regulation which stipulates that: '[i]n the exercise of their powers to impose administrative sanctions and other administrative measures under Article 30, competent authorities shall cooperate closely to ensure that the exercise of their supervisory and investigative powers, and the administrative sanctions that they impose, and the other administrative measures that they take, are effective and appropriate

under this Regulation. They shall coordinate their actions in accordance with Article 25 in order to avoid duplication and overlaps when exercising their supervisory and investigative powers and when imposing administrative sanctions in respect of cross-border cases.'

4.3. Criminal Law Enforcement

As has already been said, the Commission also introduced a proposal for a directive on mandatory criminal law enforcement of the most severe violations of market abuse rules. According to the Commission, the adoption of administrative sanctions by the Member States has proven insufficient to ensure compliance with the rules on preventing and fighting market abuse[46]. Different national approaches undermine the uniformity of conditions of operation in the internal market and may provide an incentive for persons to carry out market abuse in Member States which do not provide for criminal sanctions for these offences. The introduction of criminal sanctions for, at the very least, serious market abuse offences by all Member States is therefore essential to ensure the effective implementation of Union policy on fighting market abuse, according to the EU legislature[47]. The proposed directive will introduce minimum rules for criminal sanctions for insider dealing, unlawful disclosure of inside information and market manipulation (arts. 3-5). It will also oblige Member States to criminalise the incitement, aiding, abetting, and attempting of the prohibited conduct (art. 6). In line with the principle that criminal law should be a means of last resort (*ultima ratio*), only the most serious, core provisions of the market abuse rules are to be criminalised. Member States, however, remain at liberty to use the criminal law route for other violations too (minimum harmonisation)[48].

[46] Preamble, recital 4.

[47] Preamble, recitals 7-8. For a critical assessment of this presumption, see Y. SCHÖNWÄLDER, *Grund und Grenzen einer strafrechtlichen Regulierung der Marktmanipulation. Analyse unter Besonderer Würdigung der Börsen oder Marktpreiseinwirkung*, Berlin, 2012.

[48] Preamble, recital 20.

The directive is closely related to its sister regulation (see art. 2). The implementation of the obligations stemming from it will not mean that Member States are now obliged to enforce all serious violations of market abuse rules *only* via the criminal law. Neither will the directive create obligations regarding the *application* of such penalties or any other available system of law enforcement, to individual cases. Member States are moreover not exempted from the obligation to provide for administrative sanctions and measures for the breaches set out in the regulation, unless they have decided to lay down only criminal sanctions for such breaches in their national law[49]. The package therefore introduces a dual regime (unless a state opts for criminal law alone), which leaves the choice for administrative or criminal law enforcement to the authorities involved. The principle of *ne bis in idem*, contained in Article 50 CFR, should protect the suspected person against double prosecution or punishment[50].

Because the proposed regulation and the proposed directive are a regulatory package, the proposed directive refers to the definitions of financial instruments and insider information in the proposed regulation. The directive obliges Member States to criminalise only the serious cases and when committed intentionally[51]. It thus introduces a moral element (*mens rea*) into the definition of insider dealing and market manipulation which is, as far as primary insiders are concerned, arguably at odds with the case law of the EU Court of Justice and the current practice of those Member States that already enforce market abuse rules through criminal law[52]. The evidential problems that will

[49] Preamble, recitals 14 and 22.

[50] Preamble, recital 23.

[51] Tentative descriptions of what could constitute a 'serious' infringement are found in the Preamble, recitals 11 and 12.

[52] In *Spector Photo Group*, the EU Court of Justice considered that this is because of the specific nature of insider dealing, which enables a presumption of that mental element once the constituent elements referred to in that provision are present and because of the purpose of Directive 2003/6, which is to ensure the integrity of Community financial markets and to enhance investor confidence in those markets. The Community legislature, according to the ECJ, opted for a *preventative mechanism and for administrative sanctions* for insider dealing [our italics], the effectiveness of which would be weakened if made subject to a systematic analysis of the existence of a mental

arise as a result of this are not tackled by the directive and only to a limited degree by the regulation[53].

Finally, with respect to the sanctions that need to be in place, the original proposal for the directive stipulated that criminal sanctions be effective, proportionate, and dissuasive, as far as natural persons are concerned. With respect to legal persons, sanctions must be effective, proportionate, and dissuasive too, although they need not necessarily be of a criminal nature. The Commission thus chose a low profile with respect to the harmonisation of penalties. This modest approach is not only surprising in the light of the Commission's 2011 communication on criminal policy[54], but also in light of the review by the Commission in cooperation with the Committees of Supervisors of the enforcement of the financial markets that spelled out substantial divergences and weaknesses in national criminal sanctioning regimes[55]. By comparison, the Commission proposed a directive on the protection of the euro and other currencies against counterfeiting by criminal law which originally provided for the harmonisation of the type and level of criminal sanctions, including the *imposition* of a *minimum* deprivation of liberty of six months for serious breaches[56]. The reasoning of the Commission in the preamble to that proposal was that the existing level of sanctions is one of the reasons for insufficient deterrence and unequal protection across the European Union of its currency. Minimum sanctions contribute, in the view of the Commission, to deterrence and to a consistent EU-wide system for the protection of the euro. The Commission also indicated other advantages in recital 18 of the preamble to the counterfeiting proposal:

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element; see Case C-45/08, *Spector Photo Group and Van Raemdonck*, [2009] ECR I-12073, paras. 35-38.

[53] Particularly through the investigative techniques that are introduced and the provisions on whistle-blowing protection; section 0. Whether the evidence that is found this way may be used as evidence in criminal proceedings, and under what conditions, is left to national law.

[54] COM(2011) 573 final.

[55] COM(2010) 716 final.

[56] COM(2013) 42 final. This provision, incidentally, has been removed in later versions of the proposal, see Council document 14671/13 of Brussels of 11 October 2013.

> The minimum penalty of six months helps to ensure that equal priority is given by law-enforcement and judicial authorities to the offences of counterfeiting of the euro and other currencies and, in turn, facilitates cross-border cooperation. It contributes to mitigating the risk of forum-shopping. Moreover, it allows that sentenced perpetrators can be surrendered with the help of a European Arrest Warrant so that the custodial sentence or detention order can be executed.

It was the European Parliament that pushed for further steps in the market abuse dossier. On 19 October 2013, the EP Committee on Economic and Monetary Affairs (rapporteur Arlene McCarthy) amended the proposed directive on market abuse and introduced custodial sanctions with maximum terms of imprisonment of at least five (now four) and two years respectively for natural persons (depending on the type of the offence; see art. 7)[57]. However, the text did not introduce minimum terms of imprisonment and also remained silent with respect to the (maximum amount of the) financial penalties and to the other criminal law sanctions that could or may be imposed on natural persons. When it comes to legal persons, the text was limited to liability that is punishable by effective, proportionate, and dissuasive sanctions.

On 7 December 2013 the Justice and Home Affairs (JHA) Council reached a general approach to the text. The amendments by the EP Committee on Economic and Monetary Affairs relating to mandatory minimum levels for the maximum term of imprisonment were maintained. The recitals now explicitly refer to the serious cases of benchmark manipulation (Euribor and Libor) and to the need for common criminal sanction regimes across the Union. Nevertheless, the final text still leaves the liability regime for legal persons open to criminal or non-criminal liability, although it prescribes that financial sanctions must be in place and it contains an optional list of sanctions that may be imposed under both regimes (art. 9). This text also does not contain any obligation concerning the minimum level of criminal sanctions. Although both the Commission (in its policy plans) and the

[57] See the Report on the proposal for a directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, A7-0344/2012.

EP made a plea for common criminal sanctions regimes in this area, it is thanks to the EP that the type and level of criminal sanctions have been harmonised to a certain extent in this directive.

4.4. A Level Playing Field? Remaining Dissymmetries in Enforcement Structures

It is difficult to assess the effects of a system that is not yet in place. Nevertheless, we have already noted that the proposed package does not seem to address all the needs put forward by the Commission itself (cf. Section 0). A European level playing field among law enforcers is, for instance, not helped by diverging national definitions of infringements and procedural powers. Enforcement cooperation will not be promoted, as long as national authorities are in a position to unilaterally protect their own investigations by not cooperating with other authorities. Differences in sanctioning levels will remain, even after the introduction of mandatory criminal sanctions. And introducing moral elements to the definition of criminal offence may perhaps serve the *ultima ratio* principle, but will also imply recourse to, for example, certain investigative powers in order to bypass foreseeable evidential problems.

It is our opinion that the plans of the Commission with respect to the relationship between regulation and enforcement in the financial sector, as well as the EU's ambitions with respect to criminal law, still do not fully take into account what should be the main focal point of EU policies in this area. That focal point is how the package contributes to the realisation of the goals of the internal market and of the AFSJ. Both goals, which are interrelated, strongly promote the free movement of individuals and companies, economically active or not, while simultaneously stressing a framework for protecting the common good, including economic growth and job creation, as well as the prevention and detection of crime. In the remainder of this article, we will argue that it is difficult to achieve these ambitions as long as attention is not being given to three points of interest, which will be further discussed in the following (sub-)Sections.

4.4.1. Effective Transnational Cooperation and Coordination

With the EU being an integrated legal order, loyal cooperation between the law enforcement authorities – either between different national authorities, or between national and EU authorities – is vital. The European Union has long since been active in the facilitation of these structures. We have seen examples of this above, with respect to the transnational cooperation between the competent administrative authorities in market abuse cases. These structures also exist in the area of criminal law, with respect to, for instance, the surrender of persons for the purpose of prosecution or the execution of sanctions[58], or the gathering and transfer of evidence[59]. Those structures are not limited to market abuse, but concern the whole range of criminal law.

The existence of an abundance of international and European arrangements for cooperation does not mean that smooth cooperation is always possible, particularly not at the interface of criminal and administrative law. The current system hinges on the organisational structure of those authorities, instead of on the tasks they fulfil[60]. Public prosecutors and investigative bodies (and those competent to deal with market abuse cases) cooperate via arrangements for mutual legal assistance in criminal matters (MLA) or instruments of mutual recognition (MR); financial supervisory bodies (which have the power to impose punitive sanctions or to refer matters to criminal law bodies), have their own arrangements (mutual administrative assistance (MAA)), as we have seen above. Simultaneously, we have noted that the proposed package on market abuse introduces a dual track regime,

[58] Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ EU L 190/1.

[59] Framework Decision 2008/978/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 EU L 350/72. The Evidence warrant will be replaced in due course by the so-called European Investigation Order which was approved in December 2013 by the EP/LIBE Committee.

[60] J.A.E. VERVAELE, A. KLIP (Eds.), *European Cooperation between Tax, Customs, and Judicial Authorities*, Den Haag, 2002; M.J.J.P. LUCHTMAN, *European Cooperation between Financial Supervisory Authorities, Tax Authorities and Judicial Authorities*, Antwerpen-Oxford, 2008, pp. 128-137.

or, in certain circumstances and under certain conditions, a criminal law regime alone. It may thus occur that in Member State A investigations are conducted by financial regulators, whereas in Member State B the same – or related facts – will attract the attention of the police and the public prosecutor. In those types of situations, the involved authorities will have difficulty in cooperating, now that they are not mutually recognised as 'competent authorities' under the respective MLA/MR and MAA regimes. Particularly in cases of market abuse which involve multiple Member States and different national authorities, those authorities will not be in a position to cooperate with each other directly. Judicial authorities seeking information or assistance from a financial supervisor elsewhere in the European Union, will either have to approach their national financial supervisor and ask her to ask the supervisor of another Member State to cooperate, or ask its judicial counterpart in the other state to approach her national supervisor, and then transfer the acquired data back to her. This is not only time-consuming; it is also problematic in terms of accountability and circumvention of legal safeguards, certainly in cases where required assistance involves interferences with the fundamental rights of the persons concerned.

The joint regulatory package of the regulation and directive is silent on this issue. There are no provisions that specifically deal with these problems, with the exception of the situation where a particular Member State has opted for criminal law enforcement alone. In that situation, that Member State has to ensure that 'appropriate measures are in place so that competent authorities have all the necessary powers to liaise with judicial authorities *within their jurisdiction* to receive specific information related to criminal investigations or proceedings commenced for possible violations of this regulation and provide the same to other competent authorities and ESMA to fulfil their obligation to cooperate with each other and ESMA for the purposes of this Regulation [our italics]' (art. 19(1)). Why this provision lacks systems that use a dual track regime is unclear.

It is also unclear how this system, which regards transnational cooperation between criminal law authorities and administrative authorities as two separate tracks, relates to the principle of *ne bis in*

idem. That principle after all bars a second prosecution for the same offence, provided that the first and the second procedures are both punitive in nature, and concern the same (alleged) offender. Although Article 50 CFR applies to the European Union as a whole, and although the principle also covers combinations of criminal law and administrative law sanctions in the *national* context[61], it is as yet unclear whether the principle also covers combinations of criminal law and administrative law sanctions in a *transnational* context[62]. The preamble of the proposed directive seems to confirm the latter interpretation, stipulating that EU Member States should ensure that the imposition of criminal sanctions on the basis of offences foreseen by the directive and of administrative sanctions in accordance with the regulation must not lead to a breach of the principle of *ne bis in idem*[63]. This interpretation also makes sense in light of the previously mentioned goals of the European Union and in light of the principle of loyal cooperation. After all, a failure to cooperate between administrative and criminal law authorities should not come at the expense of those actors who are doing precisely what the EU tries to stimulate, i.e. using their rights of free movement to promote further

[61] See ECtHR 10 February 2009, *Zolotukhin v Russia*; ECJ 28 February 2013, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*; J.A.E. VERVAELE, *The Application of the EU Charter of Fundamental Rights (CFR) and its Ne bis in idem Principle in the Member States of the EU*, in *Review of European Administrative Law*, Vol. 6, 2013-1, pp. 113-134 (Chapter 6 of this book).

[62] M. LUCHTMAN, *Transnational Law Enforcement in the European Union and the Ne Bis In Idem Principle*, in *Realaw*, 2011; J.A.E. VERVAELE, *Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*, in S. GLESS, J.A.E. VERVAELE (Eds.), *Special on Transnational Criminal Justice*, in *Utrecht Law Review*, 2013, pp. 211-229 (Chapter 5 of this book).

[63] Preamble, recital 15b. The Presidency of the Council also wrote that the Working Party on Substantive Criminal Law (DROIPEN) indicated that "the ne bis in idem principle could present itself if the competent authorities of one (*or more*) Member States applied to the same conduct of a person both the *criminal sanctions* provided for under their national law for that criminal offence *and administrative sanctions* provided by MAR (…). It should be noted, in this context, that the ne bis in idem principle applies *across the borders* of the EU" (italics added), Council document 14598/12 of 17 October 2012.

European integration (and thereby inducing the competences of multiple national authorities).

The potential organisational consequences of such a transnational interpretation of the principle should not be overlooked. A truly transnational *ne bis in idem* principle requires structures to avoid case allocation on an arbitrary 'first come, first served' basis and forum shopping by defendants or authorities. It will strengthen the relationship between criminal law and administrative law and require, at the very least, the possibility of effective coordination of the efforts of all authorities entrusted with tasks in the field of market abuse rules, regardless of their institutional structure. Those rules are currently lacking, as we have already noted. By its very definition, this seems to be a task for the European legislature[64].

4.4.2. Integrated Supervision

Law enforcement in an integrated legal order not only implies a system for swift and efficient cooperation between all national bodies involved, but also the existence of a mechanism or body that keeps watch over the system as a whole, particularly with respect to operational affairs. It is not hard to imagine that different national authorities may have different interests in the performance of their tasks, as the Fortis case demonstrates. This, for instance, leads to situations where requests for cooperation are not executed because the requested authority is also conducting an investigation, or where there is no competent national authority willing to take up an investigation. We can also think of situations where investigations are cut down to specific actors or facts that directly concern national interests. In all of these situations, the question is who keeps an eye on the goals of the regulatory package as a whole and on how the current legislative

[64] Council document 14598/12 of 17 October 2012, pp. 4-5, reveals that it was left to the national authorities to avoid a situation in which, in accordance with the rules of their legal system, the simultaneous application of different types of sanctions violates the right of the person not to be tried twice for the same offence in a concrete case. This interpretation is only correct, when the principle is limited to national cases alone. That same document, however, suggests that this is not the case, *supra* note 63.

package deals with positive and negative conflicts of jurisdiction between national authorities.

It must be noted that substantial improvements have been made in this respect with the coming into existence of ESMA. That agency not only has powers of coordination among national supervisory authorities, but can also impose binding individual decisions in situations that may seriously jeopardise the orderly functioning and integrity of the financial systems in the EU. The market abuse regulation, too, entrusts ESMA with the task of collecting information on all administrative measures, sanctions and fines imposed, and other relevant data (art. 33(1)). Where Member States have chosen to enforce through criminal law alone, then they too have certain reporting duties (art. 33(2)). In addition, ESMA will be given a role in the settlement of conflicts that may emerge between the competent administrative authorities. ESMA is given powers of coordination under the regulation in cases of potential or actual conflicts of interest between national supervisors (cf. art. 25(6) and (7)). Where the competent authorities concerned fail to reach agreement, it may even take a decision requiring them to take specific action or to refrain from action in order to settle the matter in compliance with EU law.

Nevertheless, the administrative-criminal law divide is once again reason for concern. The problem is, first of all, that ESMA's powers of direct intervention apply only to the 'competent authorities', as defined by the regulation. Those authorities are the financial supervisors, mentioned in Article 22 ('competent authorities'), to be established under administrative law (see above Section 0). ESMA has no powers with respect to judicial or police authorities. The second, related concern is that there is no counterpart on the criminal law side that performs similar tasks to ESMA, let alone any consultation or coordination between that counterpart and ESMA. Eurojust *could* play a role in coordinating national investigations and in coordinating the most appropriate choice of adjudicative jurisdiction, but market abuse cases do not belong to the competence of Eurojust yet. Even though

they are included in the recent reform proposal of Eurojust[65], that EU agency will not be in a position to issue binding decisions to national authorities in cases of conflict of jurisdiction. Eurojust's strength lies in the 'peer pressure' it can assert on national judicial bodies[66], but, ultimately, national judicial authorities will decide on whether they will commence criminal investigations or not.

The overall picture that emerges is, once again, that the national choices for administrative and/or criminal law have a direct bearing on the functioning of the system as a whole, and that arrangements for enforcement via the criminal law lag behind those established for administrative law in the area of market abuse. Should conflicts arise, then neither ESMA, nor Eurojust is competent to solve conflicts of jurisdiction at the interface of criminal and administrative law. The result is not only that there still is no mechanism to avoid a multiplication of the burden of prosecution and sanctioning for the individual concerned, but that there is also a potential waste and inefficient use of resources.

4.4.3. The Protection of Fundamental Rights

The regulatory package, the regulation in particular, indicates the powers that should be available to the competent administrative authorities, possibly in cooperation with other national bodies such as judicial authorities. We have already noted that some of these powers are very intrusive in terms of their capacity to interfere with the rights and liberties of citizens and legal persons, whether they are suspects or not. Nevertheless, the regulation itself is almost silent on the safeguards

[65] COM(2013) 535, containing a proposal for a regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust). Insider dealing and financial market manipulation are included in the lists in Annex 1 that fills in the substantive competence as defined under article 3 of the proposal.

[66] Cf. H.-H. HERRNFELD, *Die Rolle von Eurojust bei der Beilegung von Jurisdiktionskonflikte*, in A. SINN (Ed.), *Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität - Ein Rechtsvergleich zum Internationalen Strafrecht*, Göttingen-Osnabrück, 2012, pp. 147, 149, 155-156; V. MITSILEGAS, *EU Criminal Law*, Oxford-Portland-Oregon, 2009, p. 153-154; M. GROENLEER, *The Autonomy of European Union Agencies*, Delf, 2009, pp. 319-320.

which should apply in order to prevent arbitrary and unlawful interference with the position of (natural or legal) persons. Those safeguards are left to national law, for which article 23 of the regulation provides the basis, stipulating that powers are to be available, but must also be in accordance with national law. The only safeguard one finds in the regulation itself is that for certain powers of investigation a reasonable suspicion must exist that the results of the exercise of these powers can be relevant to prove the case or for the investigation. Whether or not an authorisation by a judicial authority is needed, is left to national law (cf. art. 27(2), second subparagraph). The preamble also states that while the regulation 'specifies a minimum set of powers competent authorities should have, those powers are to be exercised within a complete system of national law which guarantees the respect for fundamental rights, including the right to privacy. For the exercise of those powers, which may amount to serious interferences with the right to respect for private and family life, home and communications, Member States should have in place adequate and effective safeguards against any abuse, *for instance*, where appropriate a requirement to obtain prior authorisation from the judicial authorities of a Member State concerned. Member States should allow the possibility for competent authorities to exercise such intrusive powers to the extent necessary for the proper investigation of serious cases where there are no equivalent means for effectively achieving the same result' (our italics)[67].

Once again, the focus of the European legislator is primarily on the application of these rules in the national context. Whether or not adequate safeguards exist and what those safeguards comprise (judicial approval, purpose limitation, the existence of prima facie evidence, etc.) is left to national law. Each of those systems in itself may indeed be fully compatible with the requirements of the European Convention on Human Rights or the EU Charter on Fundamental Rights. Yet that does not mean that these safeguards will also function properly in cases of transnational cooperation. For instance, the authority of one EU Member State may need prior judicial authorisation in order to obtain

[67] Recital 66.

certain traffic data in its own legal order, whereas another authority may not need this because there are other safeguards in place, for instance strict purpose limitation of the data obtained. In cases where the latter authority requests the former to gather and provide traffic data, what will be the role of the authorising judicial authority in the requested state? Will that authority perform an in-depth test of the proportionality and subsidiarity of the foreign request, as it does in national cases, or will it assume – in accordance with the principle of inter-state mutual trust – that such a test has already been performed in the requesting state, although not by a judicial body[68]? Is it even able to perform such an in-depth test, taking into account the limited information that it has on the case itself, which is conducted abroad? And if the authority grants the authorisation and the data are consequently collected and transferred, what about the situation where those data could not have originally been obtained in the requesting state due to its purpose limitation restrictions? Can such a purpose limitation requirement set aside the relevant rules in the regulation that such information must be available for transnational cooperation too? In cases like these, therefore, there is a real risk that the requested authority, assuming that the requesting state respects fundamental rights, will not check whether the conditions and safeguards that are in place in the requesting state are comparable with its own standards. The result is that interferences with the right to privacy are checked by the requesting *and* the requested state ('overprotection') or not at all ('underprotection')[69].

[68] Situations like these have come up in competition law, where the ECJ developed a model for a 'division of labour' between national courts and the ECJ for checking coercive measures; see Case C-94/00, *Roquette Frères*, [2002] ECR I-9011. Such a model is lacking in other areas.

[69] M.J.J.P. LUCHTMAN, *European Cooperation between Financial Supervisory Authorities, Tax Authorities and Judicial Authorities*, Antwerp-Oxford, 2008, pp. 162-169.

5. Conclusions: From a Nation-State Towards a European Perspective

The foregoing analysis of the proposed plans with respect to the enforcement of market abuse rules reveals that there is a tendency by which the European legislature no longer only focuses on a single European rule book with norms for actors on the financial markets, but also on supervisory convergence. This development goes hand in hand with increasing European legislative powers in the area of law enforcement in general, including criminal law. In order to realise a proper functioning internal market and an AFSJ, the proposed package of market abuse rules not only defines the norms for actors on the financial markets, but also introduces the obligation to enforce these rules through (punitive) administrative and criminal law. In order to achieve this, organisational structures for network building and cooperation, investigative powers and sanctions are prescribed at European level.

Although good progress has been made with these proposals, it is our opinion that these proposals still do not sufficiently take account of the fact that highly integrated financial markets also need highly integrated law enforcement structures and powers, regardless of the organisational statute of the national authorities involved (criminal or administrative). In light of the ambitions put forward in the Treaties – particularly those with respect to the creation of a common area of justice for all European citizens – and the principle of loyal cooperation, we are of the opinion that the European legislature should put in place regulations that not only facilitate effective and swift cooperation between national and European authorities, regardless of their administrative or criminal law statutes, but should also make sure that fundamental rights are effectively protected in transnational cases. Our analysis reveals that there are still several flaws in the proposed system for the enforcement of market abuse. First, we have noted that the common definitions of the substantive and procedural norms that define 'the rules of the game' and, thereby, the operational reach of the national authorities still show discrepancies. That means that one can only wait for situations where diverging interpretations of rules hamper the underlying goal of a level playing field for economic actors and law

enforcers. Second, the criminal law aspects of the European enforcement regime, in particular, remain underdeveloped, with respect to both the investigatory powers available, as well as the possibilities for transnational cooperation and, particularly, coordination and oversight. Third, there are hardly any provisions that deal with the relationship between administrative and criminal law measures; this is particularly so in transnational cases[70]. That means that there is no body ultimately responsible for the system as a whole. Finally, there is no attention whatsoever for the development of fundamental rights beyond the context of the nation-state, with the exception perhaps of the *ne bis in idem* principle, which already comprises combinations of criminal and administrative law punitive sanctions and applies in the EU as a whole.

Should the occasion arise and a court – probably the Court of Justice of the European Union – rule that Article 50 CFR (*ne bis in idem*) does apply to these types of combinations, then this will probably lead to new legislative instruments that aim to prevent case allocation on the basis of 'first come, first served.' We have seen a similar development in the area of criminal law, where the Court's landmark rulings on Article 54-58 CISA (*ne bis in idem*)[71], were an important impetus for a new Framework decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings[72]. It would, however, be a missed opportunity to limit the issue of fundamental rights protection to the *ne bis in idem* principle alone. On the eve of a new multi-annual policy programme for criminal justice (the successor of the Stockholm programme), we think it is time for the European legislature to deal with the enforcement of market abuse rules as a matter that not only requires an integrated approach by all law enforcement bodies at national level, but also the legislative bodies involved and not one where the outcome is largely determined by organisational barriers within the Commission and Council.

[70] For suggestions on this, see supra note 60.

[71] That case law started with Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge* [2003] ECR I-1345.

[72] OJ EU L 328/42.

Finally, the enforcement design of the interests that need protection in the internal market and in the AFSJ do not have only an internal EU dimension, but also an external EU dimension. From the Libor/Euribor example there seems to be a pattern of outsourcing the enforcement of a single market issue to US authorities. The EC/EU Competition authority came in with strong penalties, but somewhat on the late side and only related to market distortion. The national authorities either did not play any role or mostly played for a domestic agenda. There seems not to be a common strategy either when it comes to the external dimension of the enforcement of the financial markets. This is remarkable in the light of the existence of such strategies in the area of competition law, where an agreement[73] has been devised to provide for regular bilateral meetings to share information on current enforcement activities and priorities, to discuss policy changes, and to discuss matters of mutual interest relating to the application of competition laws.

[73] Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws - Exchange of interpretative letters with the Government of the United States of America, OJ EU L 095, 27.04.1995, p. 47.

CHAPTER 3

GATHERING AND USE OF EVIDENCE IN THE AREA OF FREEDOM, SECURITY AND JUSTICE, WITH SPECIAL REGARD TO EU-FRAUD AND OLAF-INVESTIGATIONS[1]

1. Introduction

In the process of harmonisation and integration the Union has been very active with "institution building"[2] and the elaboration of the EU into a "regulatory state"[3]. However, the possession of common standards and rules is a necessary, but nevertheless still not a sufficient condition for the functioning of the customs union, the internal market with its four freedoms, the monetary union and the area of freedom, security and justice. The compliance with the substantive policies constitutes an inherent part of their effectiveness[4]. In order to realise compliance by the operators, it is essential that inspection is carried out and that in the case of non-compliance measures are taken either to compel compliance or to sanction for non-compliance. The whole body of rules and acts which are connected to compliance with substantial norms (control, measures, and sanctions) I would define as enforcement. This is, however, a much generalised category which needs to be broken down further. Occupying a central position in Union policies is compliance by the addressees of the norms, in most cases

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[1] This article has been published in C. NOWAK (Ed.), *Evidence in EU Fraud Cases*, Warszawa, 2014, pp. 21-56.

[2] T. DAINTITH, *Implementing EC Law in the UK. Structures for Indirect Rule*, Wiley, 1995.

[3] G. MAJONE, *Regulating Europe*, London-New York, 1996.

[4] F. SNYDER, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, in *MLR*, 1993, p. 19.

citizens and enterprises[5]. Everything which is connected with compliance by them, I would define as first-line enforcement[6]. Second-line enforcement consists of enforcement obligations that serve the enforcement system itself, as for instance duties to cooperate. Within the framework of this article I will focus on one link in the enforcement chain, namely the control phase, which is also designated by the terms research, verification, supervision and investigation. Henceforth, I will make use of the neutral term control because Union law makes no systematic differentiation between administrative law supervision and criminal law investigation. The control phase has several aims:

- verifying compliance with the substantive norms;
 defining the exact amount of debt (tax, customs) or the due amount of subsidy;
 verifying infringements of administrative irregularities;
 verifying infringement of criminal offences (pre-stage).

Only in the last two situations we can speak of investigations with the aim to find evidence in punitive proceedings, which is the core-interest of our contribution. As it stands foremost of these investigations are done by the authorities of the Member States with the aim to enforce Union policies (indirect enforcement). Only in a minority of situations we can speak about direct enforcement by the Union.

[5] See for the sanctions phase: J.A.E. VERVAELE, *Administrative Sanctioning Powers of and in the Community. Towards a System of European Administrative Sanctions?*, in J.A.E. VERVAELE (Ed.), *Administrative Law Application and Enforcement of Community Law in the Netherlands*, Deventer-Boston, 1994, pp. 161-202.

[6] See C. HARDING, *European Community Investigations and Sanctions. The Supranational Control of Business Delinquency*, London-New York, 1993; J.-C. RIVAL, *Les entreprises face aux pouvoirs d'enquête de la Commission des Communautés Européennes*, Paris, 1991; J.M. LELOUP, *Droit de la defense et droits de la Commission dans le droit communautaire de la concurrence*, Bruxelles, 1994; G. DANNECKER, J. FISCHER- FRITSCH, *Das EG-Kartellrecht in der Busslgeldpraxis*, Köln, 1989.

2. Indirect and Direct Enforcement of Union Policies

The fact that compliance with the regulations of the Union Policies has as a natural consequence that the Union is very dependent – not only as regards implementation but also enforcement – on national regulations as well as national implementation and enforcement structures[7]. This does not mean, however, that the Union must wait powerlessly on the side lines in order to determine whether its policy regulations have been given effect. After all, the Union has legal possibilities at its disposal by which it can influence national competence as regards enforcement. Furthermore, it also has at its disposal powers by which to regulate national enforcement. In the Union's independent legal order, consisting of both Union and national components, this does not have to come as a surprise. The Union's competence to regulate national enforcement is double-tracked, which is binding on all the authorities of the national trias politica (the legislative and implementing authorities as well as those charged with the administration of justice). On the one hand, we could speak of regulation by means of the case-law of the European Court of Justice. The Court has transposed the competence regarding enforcement into an obligation which is furthermore subjected to quality requirements (effectiveness, proportionality and assimilation)? The Member States' competence regarding enforcement has been – from a Community law point of view – regulated in an objective-oriented enforcement obligation which must be given actual effect by means of national regulations and their application[8]. On the other hand, we could also speak of a legislative regulation by means of Union Regulations and Directives. By means of a large body of secondary Union legislation, Member States are obliged to adhere to detailed control and sanction obligations. These obligations are not limited to the legislative framework, but are also concerned with enforcement practice and in a number of cases they not only contain obligations to perform to the best

[7] M. ZULEEG, *Enforcement of Community Law: Administrative and Criminal Sanctions in a European Setting*, in J.A.E. VERVAELE et al. (Eds.), *Compliance and Enforcement of European Community Law*, Deventer-Boston, 1999, pp. 349-360.

[8] See f.i., part on Inspection in the Fisheries Regulations 1224/2009 and 404/2011.

of one's abilities but also obligations to guarantee that certain results are attained. From all this it would seem that the principle of indirect enforcement of Community law by the Member States is not absolute. To an increasing extent, by means of legislation and, one can speak of a direct regulation of enforcement by the Union[9], which consists of a Union law harmonization of decentralised enforcement. By means of normative programming the EC is penetrating the institutional and legal aspects of national enforcement systems, which in turn leads to interlocking. This does not detract from the fact that it is in principle the legislative, implementing and judicial authorities of the Member States which give flesh and blood to the enforcement of Union legislation. In this respect the Member States in principle have a freedom of choice and can call upon civil law, self-enforcement, disciplinary law, criminal law or combinations thereof, with specific interpretations as regards organisation, instruments, legal protection, etc. The only limiting condition is that the institution of the particular national enforcement system and the resulting application thereof must adhere to Union requirements of legislative and jurisprudential nature. To put it succinctly, economic operators are confronted with national enforcement regulations, national enforcement authorities, national control practices and decisions on sanctions, but their function and practice is to a large extent filled in by Union obligations.

The exceptions to the rule of indirect enforcement are the areas in which the European Commission itself has enforcement powers. In the competition area the EC has investigative and sanctioning powers. Outside of the competition area we have though several interesting developments. I will limit myself to two illustrative examples. In 1995 the EC dispatched an inspection team to Japan in order to supervise the production and processing of fish products from the point of view of hygiene and risks to public health. Because an acute danger to public health was determined, the Commission decided, by order, on an immediate ban on the import of fish products emanating from Japan. For a number of companies, among which was the Dutch "Affish BV",

[9] J.A.E. VERVAELE, *Harmonised Union Policies and Harmonisation of Substantive Criminal Law*, in F. GALLI, A. WEYEMBERGH (Eds.), *Approximation of Substantive Criminal Law in the EU: The Way Forward*, Brussels, 2013, pp. 43-72.

this meant the complete collapse of their major activity. Their litigation procedures have led to interesting legal developments, wherein the phenomenon of Euro-control has come under discussion[10]. For those who are of the opinion that this example is not associated with enforcement, but is instead a feature of regulating entry into the market because it concerns the relationship between third countries and the internal market, here is a second example. The complete trade embargo on British beef brought into force by the EC because of the mad cow disease in the UK, required considerable efforts in order to ensure that the embargo was enforced. In 1997 it became obvious that this embargo was not water-tight when considerable amounts of beef intended for the Russian market were seized at a Dutch port because there were indications that the meat had not originated from Belgian producers, as was claimed, but in reality from producers in the UK. Investigation did indeed reveal that a Belgian meat-processing plant had illegally imported meat from the UK in order for it then to replace Belgian meat by means of forging labels and health certificates. The extraordinary feature of this investigation was that it was carried out with the cooperation of the Dutch Ministry of Agriculture's General Inspection Service (an administrative inspection and judicial investigation authority) and a European inspection team from UCLAF (the predecessor of OLAF) at that time. UCLAF's investigation proceedings were essential because it had emerged from this investigation that not only was the implicated company already responsible for the meat fraud, but that the Belgian Ministry of Health had also granted an export certificate to this company while the company in question had not adhered to various regulations, and that certain inspectors from the Belgian Institute for Veterinary Inspection (Belgisch Instituut voor de Veterinaire Keuring - IVK) had been involved in the fraud.

These two examples therefore make it clear that over the years the Union has not only developed the competence to regulate national enforcement, but also a direct operational power to enforce as far as it is concerned. Economic operators are therefore not only confronted

[10] See case C-183/95, Affish BV en Rijksdienst voor de Keuring van Vee en Vlees, ECJ 7 July 1997.

with national enforcement rules and practice, but also, and increasingly so, with Union enforcement rules and practice.

2. Problem Setting

2.1. Indirect Enforcement Design and Horizontal Cooperation

The competent authorities for the evidence gathering related to these punitive proceedings are multiple and are of very different legal nature. In the Member States the design of the enforcement architecture does vary a lot, but they do have also some common features. Let us start with the latter. Generally spoken competent specialized administrative authorities, as tax and customs authorities or administrative agencies in the economic field, are competent authorities for their enforcement of their respective administrative regulations. As a rule they do have punitive sanctioning powers and can carry out investigative powers to gather evidence, using some coercive powers (as access to the premises and the business records and freezing or seizure). As a rule they cannot use special investigative techniques or very coercive powers, as search. When dealing with enforcement of the EU financial interest, (PIF) the administrative enforcement design in each Member State is very fragmented, because of the different areas involved (VAT, customs, agricultural subsidies, structural funds contributions, etc.). When it comes to criminal law enforcement of these administrative regulations, competent judicial authorities have the lead. The traditional judicial authorities are the prosecutors, police with judicial powers and investigative magistrates.

In reality we can define the enforcement as being dominated by multidisciplinary investigations, meaning:

- investigations in which various types of administrative authorities are involved, with different scope of competence (e.g. different specialized administrative agencies like tax, customs, etc.) and
- investigations in which both judicial and administrative authorities are involved (e.g. tax authority and prosecution service). The main

differences relate to the powers of the administrative investigators in the judicial setting and the use of evidence obtained during in the administrative investigation in the judicial follow-up. In some countries administrative investigators have a double function (double head) and can switch to their judicial function if they discover that the suspicion of and administrative irregularity turn into the suspicion of a criminal offence (for instance because they find evidence during the administrative investigation). When switching from function, they switch also from applicable law (from administrative to criminal procedure) and from responsible (mostly from a Ministry to a prosecutor). In other countries the administrative investigators have to transfer the file to the prosecutor for the judicial follow up. When it comes to the status of the evidence gathered by the administrative investigators this is admissible evidence in criminal proceedings, as long as no judicial procedural guarantees have been circumvented. In other countries however these evidence is not admissible at all or reduced to starting information for the triggering of judicial investigations or judicial coercive measures. Finally, when it comes to transnational cooperation at a horizontal level between the different competent national enforcement authorities, we also have some common features, severe difficulties and loopholes. As a rule administrative enforcement agencies use the instruments of mutual administrative assistance and judicial authorities use the instruments of mutual legal assistance in criminal matters (MLA) or mutual recognition instruments (MR). However, as administrative punitive enforcement has been increasing some MLA and MR instruments do accept some administrative enforcement agencies as competent authorities. Member States do also have different rules as to if and under which conditions mutual legal assistance can be used when a case is under judicial investigation (thus circumventing MLA and MR). The multidisciplinary character of PIF-investigations is also reflected in the transnational setting, because the various types of administrative authorities that are involved, with different scope of competence (e.g. different specialized administrative agencies like tax, customs, etc.). do use specific instruments of mutual

administrative assistance or do not have them at all (like for the structural funds);
- the mix of judicial and administrative authorities that are involved (e.g. tax authority and prosecution service) results in a complex cooperation regime under MLA and MR.

2.2. Supranational Enforcement Design and Judicial Follow-Up

At first sight this part is easier as we have, as it stands, no supranational judicial investigation at all at EU level. As it stands there is no European law enforcement agency that is empowered with supranational criminal investigation. Article 85(a) TFEU provides however that the initiation of criminal investigation may become part of the tasks of Eurojust. The legal basis for a full supranational system of criminal investigation is however laid down in Article 86 TFEU (European public prosecutor). Neither Europol, nor Eurojust do have actually investigative judicial powers. They do not gather criminal evidence as such. However, both the European competition authority and OLAF do have wide investigative administrative powers (including some coercive powers). The administrative evidence gathering by the European competition authority is mainly aimed at European punitive sanctioning proceedings: fines imposed by the EU at the economic operators. However, OLAF does not have sanctioning powers and its enforcement field is strongly interconnected with criminal law in the Member States. This means that the (judicial) follow-up of OLAF investigations and OLAF-evidence in national (judicial) punitive proceedings is of main interest. Also here we see substantial differences in the legal order of the Member States. Some of them deny any evidential standard to OLAF-evidence. Some of them just apply their national rules applicable to national administrative agencies and a minority has introduced special features to OLAF and accepts also that OLAF can figure as testimony or victim-testimony in the criminal trial.

3. Indirect and Direct Enforcement of the Union's Financial Interests

The points of departure of this analysis are the enforcement obligations of the addressees to whom norms are addressed by Union law, as well as the enforcement competences of the particular enforcement authority. They are indeed decisive in the gathering of evidence. It seems to me to be useful to employ an analytical chart. In the chart the methods of coercion which apply to natural persons (arrest, pre-trial detention, etc.) are not included because these enforcement methods fall exclusively within the domain of the law of criminal procedure[11] and the chart therefore concerns the regulation of enforcement competences and enforcement obligations as regards business records, business premises means of transport, etc. and which in national law are regulated not only by the law of administrative procedure (supervision) but also by the (economic) criminal law and criminal procedure.

Enforcement body	Economic operators/those to whom standards are addressed primary enforcement powers compliance prohibitions, orders and duties secondary enforcement powers duty of administration and/or registration active duty to report or provide information

[11] Although under Lisbon treaty some aspects have been harmonized in the framework of the mutual recognition cooperation instruments.

Information powers - production orders to demand inspection of business details and records	Passive duty of information
Technical powers - to enter premises - to investigate cases - to investigate means of transport and loads - to take samples -seizure - to search places - exceptionally: the power to search homes - to demand cooperation in the exercise of these powers - the power to accompany certain designated persons (e.g. Euro-inspectors)	Duty to cooperate

With this definition of the forms of enforcement control and the description of the enforcement powers and obligations we are now able to analyse how the indirect and direct enforcement control is organised with regard to the EU's financial interests. It is a logical step first of all to look at the regulation of indirect enforcement, considering that this forms the backbone of the enforcement of EU policies. Then I will analyse to what extent and how the Union has provided for direct enforcement with operational competences for the European Commission.

3.1. Union Regulation of Indirect Enforcement by the Member States

By means of Union regulation enforcement obligations are created or strengthened for Member States as well as private addressees. A number of provisions are directly connected with the objectives of enforcement (primary enforcement obligations); a number are connected with supportive obligations (secondary enforcement obligations).

3.1.1. Union Regulation of the Secondary Enforcement Obligations

In many regulations, and also sometimes in directives, obligations are imposed on addressees which can facilitate primary enforcement. Economic operators are confronted with far-reaching duties of administration and registration, have all kinds of duties to report and to provide information and must lend their cooperation in the case of inspection. These secondary enforcement obligations are in a number of cases very detailed and strict. It is indeed conspicuous that Union law only sporadically prescribes sanctions in the case of the non-observance of these obligations. This usually concerns a duty to observe which must be enforced by the Member States by means of suitable measures (reporting duties). The non-observance thereof is mostly sanctioned by the Member States by making use of administrative law or criminal law sanctions (withdrawal of a permit, administrative law fines, and exclusion from the provision of a subsidy, criminal law fines, and light custodial sentences).

Nevertheless, Union regulation of secondary enforcement obligations is not limited to private addressees, mostly economic operators. Member States themselves are subjected to equivalent obligations: administration, reporting/providing information and cooperation. These secondary obligations are concerned with providing an insight into the implementation and enforcement route and are thereby, among other things, supported by the administrative control which is exercised by the Commission. Member States should thereby disclose their regulations and implementation and enforcement structure to Brussels. The secondary obligations are not only limited to

the "law in the books", but are also concerned with the "law in action" (disclosure of enforcement information). There are therefore regulations which are very detailed in describing how national efforts in the field of enforcement must be administered and registered, and of which efforts and results Brussels has to be informed. These notifications may concern enforcement efforts undertaken by the authorities of the Member States regarding control systems, judicial proceedings and sanctions (an enforcement scenario, the amount of control, the number of refund procedures which have been commenced, punitive sanctions handed out, etc.), but also regarding the conduct of the economic operators (mala fide enterprises). Also the duty to cooperate is concretely elaborated in many regulations. This cooperation may be owed to diverse Community institutions, but also to other Member States.

Conspicuous in these regulations is that compliance with these secondary enforcement regulations is not dependent on the enforcement organisation and enforcement systems within the Member States. Information which is connected to this judicial route (the investigation itself, the criminal court) is also included in this field of application. Secondly, an obvious chronological evolution is discernible. In a first phase the obligations were only concerned with "law in the books". In a second phase they were extended to "law in action". In a further third phase obligations were then added as regards certain individual enforcement cases. Thereby, in the agricultural control regulation concerning fraud in the agricultural industry[12] it became compulsory for Member States every three months to send an overview to the Commission containing a list of irregularities whereby a preliminary administrative or judicial report had been compiled. In this list information should be included on infringements, the extent of fraud, the modus operandi of the fraud, etc., as well as the identity of the natural and legal persons involved, so far as this is necessary for combating fraud. That the Union norms are increasingly concerned with aspects of operational enforcement in individual cases is also apparent from the blacklist regulation which has as its objective the

[12] Art. 2 of Regulation 595/91, OJ 1991, L 67.

ensuring of the economic operators' integrity as regards the European agricultural subsidies[13]. In relation to the economic operators which, within the framework of registration, export refunds and the sale of intervention products against a lower price, have received subsidies from the European Agricultural Guidance and Guarantee Fund (EAGGF) and as regards reliability and risk formation, certain enforcement obligations are imposed on the Member States. These "unreliable" economic operators are divided into two categories. Category A consists of economic operators which, as natural or as legal persons, have had a final decision of an administrative or judicial authority rendered against them in which it has been determined that they have intentionally, or by means of gross negligence, committed an irregularity and, as a result of which, have received an unlawful financial advantage or have attempted to do so ("finally and conclusively found to be fraudsters"). Category B concerns the same situation, but here only a preliminary administrative or judicial report has been compiled. Article 1 of the implementing regulation moves this reporting phase forward by determining that "preliminary administrative or judicial report" should also be understood to mean the preliminary, also purely internal, written evaluation by the competent administrative or judicial authority, wherein it has been concluded that as regards certain facts, it would seem that an irregularity has been committed either intentionally or by gross negligence, this being without prejudice to any later amendment ("suspected fraudsters"). It is obligatory for Member States to report category A and B economic operators to the Commission and to take appropriate measures. In relation to category A and B economic operators payments should be deferred and the control systems sharpened. In relation to category A economic operators, furthermore, they must be definitively excluded from the system of subsidies for a certain period of time.

In principle, the Member State's detailed reporting obligations as regards national enforcement in individual records also apply to judicial information concerning investigation. "In principle", that is, because

[13] Council Regulation 1469/95 of 22 June 1995 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF, OJ 1995, L 145 and Commission Regulation 745/96, OJ 1996, L 102.

Art. 4 of the blacklist regulation and certain recent regulations determine that if national provisions provide for the confidentiality of the investigation, then for the purpose of sending the details provided under this blacklist regulation, the consent of the competent judicial authority is here necessary[14]. Being in possession of such a procedure and its institution is left to the national legal system in question. The competent administrative authorities, however, do have an obligation to try and obtain this consent.

3.1.2. Union Regulation of the Primary Enforcement Obligations of Economic Operators and Member States

The fact that Union regulates the primary enforcement obligations of economic operators is not unusual and neither is it new. Since the beginning of European integration, Union law (both primary and secondary) has contained provisions as prohibitions and, due diligence obligations which, in combination with national law, form the actus reus of national administrative irregularities and/or criminal offences. The prohibition of insider trading or money laundering in directives or due diligence clauses in EU regulations regarding the trade in hazardous waste are classic examples.

Since the 1980s, sectoral regulations have also contained primary enforcement obligations as far as the Member States are concerned. I would like to differentiate between 1) Gathering of evidence by enforcement control upon request; 2) Gathering of evidence by imposing qualitative and quantitative enforcement standards and 3) The use of evidence obtained and its probative value.

[14] See, for example, Art. 3 of Regulation 1681/94 of 11 July 1994 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organisation of an information system in this field, OJ 1994, L 178 and Art. 4 of Regulation 1469/95.

Gathering of Evidence by Enforcement Control upon Request

As far as own resources[15] are concerned, as well as agricultural subsidies[16] and payments from the structural funds[17] of the EC, the Commission may instruct the Member States to implement supplementary controls. This system has already existed since the early 1970s[18], but has now been elaborated in more detail in the newer regulations. An example of this is Art. 6 of the agricultural control regulation (595/91), which contains an obligation to institute an investigation upon the request of the Commission. Furthermore, the concept of inquiry or investigation is explicitly defined as follows:

> Inquiry shall be taken to mean any inspection, verification or action carried out by officials of the national administration with a view to establishing whether there has been an irregularity, with the exception of action carried out at the request or under the direct authority of a court.

To put it succinctly, this concerns a request to carry out an administrative law investigation (which is inquisitorial, but is not a judicial function), which is negatively defined. Which investigative activities are to be excluded from the investigation at the request of the Commission are, to a large degree, dependent on the national law of criminal procedure. This law will in any case determine when an activity can be carried out at the request of the judicial authorities or under their direct authority. In any event, what a judicial authority actually is depends on the national law. There are thereby Member States in which the Public Prosecutions Department is not deemed to be part of "the judicial authorities". In some common law countries the criminal law investigation will also be in the hands of the police. Furthermore, there is still the question of what exactly is meant by the

[15] Regulation 1026/1999, OJ 1999, L 126 and Proposal for a COUNCIL REGULATION laying down implementing measures for the system of own resources of the European Union /* COM/2011/0511 final - 2011/0184.

[16] Regulation 595/91, OJ 1991, L 67.

[17] Art. 23 of Regulation 4253/88, OJ 1988, L 374.

[18] See J.A.E. VERVAELE, *Fraud Against the Community. The Need for European Fraud Legislation*, Deventer, 1992.

term direct authority. Many national supervisory authorities also have at their disposal the specific competence to carry out such an investigation. This differentiation is also not always clear-cut in national law and many investigative operations are carried out under the authority of the Public Prosecutions Department, but not always under the direct authority thereof. This negative definition consequently leaves room for an extensive interpretation of the concept of investigation.

Gathering of Evidence by Imposing Qualitative and Quantitative Enforcement Standards

It thereby also occurs that the Community imposes obligations on the controlling efforts of the Member States. Many regulations oblige the Member States to draw up control programs with detailed information on the control criteria, the establishments which must be visited, the frequency of the controls, etc.[19]. A certain number of regulations set out mathematically the frequency upon which the control should take place by, for example, determining that at least 5 % of all subsidised export and agricultural products must be the subject of physical control[20]. A readjustment is later permitted also by means of more specific risk analysis[21].

Also in the case of investigative powers, the Union has remained at the forefront. Article 5 of the regulation concerning controls in the viniculture sector[22] for example, determines the minimum competences of the national inspectors: access to vineyards, company premises, warehouses and means of transport, access to administrative

[19] Council Regulation (EC) No 485/2008 of 26 May 2008 on scrutiny by Member States of transactions forming part of the system of financing by the European Agricultural Guarantee Fund (a-posteriori documentary control).

[20] See Regulations 386/90, OJ 1990, L 42 and 2030/90, OJ 1990, L 186, replaced by Regulation 14/2008 of 17 December 2007.

[21] Commission Regulation (EC) No 438/2001 of 2 March 2001 laying down detailed rules for the implementation of Council Regulation (EC) No 1260/1999 as regards the management and control systems for assistance granted under the Structural Funds.

[22] Regulation 2048/89, OJ 1989, L 202, replaced by Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine.

documents, the right to make copies of such documents, and the possibility of attachment and/or seizure of property before final judgment. The regulation concerning a-posteriori control of trade documents[23] contains the compulsory authority to seize trade documents (Art. 6), but there it is immediately added that this is not to the detriment of national regulations contained in the law of criminal procedure.

The Use of Evidence Obtained and its Probative Value

During the 1980s the first summary provisions concerning the application of obtained evidence appeared in the sectoral regulations. The first regulation concerning controls in the viniculture sector thereby contained in Article 14(2) a specific provision on the use of obtained evidence in national judicial proceedings probative value:

> This Regulation shall not prevent the use, in the course of court proceedings or prosecutions started subsequently for failure to comply with agricultural or financial requirements, of information obtained pursuant to this Regulation[24].

The blacklist regulation, in its Article 4(3), also specifically regulates the relationship between the criminal law autonomy of the Member States and the use of the obtained information as evidence in criminal proceedings:

> The provisions of this Regulation shall not affect the application in the Member States of rules governing criminal proceedings and mutual assistance in criminal matters between Member States. They shall not prevent the use, in the context of judicial proceedings or of proceedings brought subsequently for incompliance with agricultural regulations, of information obtained pursuant to this Regulation. In latter case the

[23] Council Regulation (EC) No 485/2008 of 26 May 2008 on scrutiny by Member States of transactions forming part of the system of financing by the European Agricultural Guarantee Fund (Codified version).

[24] Regulation 2048/89, OJ 1989, L 202, meanwhile repealed by Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine.

competent authority of the Member State which provided such information shall be notified of such use[25].

These evidence provisions have been established in order to apply the obtained evidence transprocedurally within the framework of Community-regulated enforcement investigation. This means that the information obtained can be used as evidence in other proceedings (of a civil, disciplinary, administrative law or criminal law nature). As can be acknowledged these regulations do contain provisions on the admissibility of the obtained evidence in administrative enforcement of Union regulations in the frame of judicial proceedings, but not on the probative value of the evidence. This aspect is left to of national procedural law. These rules of evidence gathering and use of evidence contained in Union regulations concerning EC fraud may be explained by the fact that when it has been determined that EC fraud has taken place, this will lead to diverse judicial procedures, including criminal law prosecutions or punitive administrative law procedures against the perpetrators.

Finally, Union customs law should be mentioned. Substantive customs law, which is the exclusive authority of the Community, has been harmonised in the Community Customs Code[26] which contains rules covering customs tariffs, the origin of certain goods, customs value, etc. Customs enforcement law, however, remains a national concern, but Community customs law does contain many regulations in the field of procedural law[27], with not only implications for implementation practices, but also for enforcement practices. It is thereby described in detail which requirements should be met as regards the various notification procedures, as regards recognition and control over customs warehouses and customs transportation, for example. These basic requirements are also of direct importance to the

[25] Regulation 1469/95, OJ 1995, L 145.

[26] Regulation 2913/92 concerning the enactment of the Community Customs Code, OJ 1992, L 302 and Regulation 2454/93 containing the implementation provisions, OJ 1993, L 253.

[27] I refer, for example, to Arts. 243-246 of Regulation 2913/92 concerning the right of appeal against customs decisions.

issue of evidence. From cases heard before the Court of Justice it would seem that there is no question of a system of unrestricted evidence, but rather a Community system of strictly prescribed legal evidence, which may not be set aside by evidence attained by the actions of national enforcement agencies, not even when supported by an official report from the investigative authority. This means that, for example, except for specially provided exceptions[28], goods of a Union character may only be supplied together with a Union-prescribed notification document. Not having a notification document at hand will lead to an irrefutable suspicion, iuris et de iure, that the goods in question are not Union goods[29]. We are therefore here concerned with far-reaching harmonisation of evidentiary material, which can also work its way into criminal law. The far-reaching harmonisation of material customs law, however, has not yet led to the harmonisation of the enforcement of customs law per se, neither as regards investigative authority, nor the competence to impose sanctions.

3.1.3. Increasing the Union Dimension of National Enforcement Agencies

Union law either implicitly or explicitly defines the enforcement tasks of national enforcement agencies. It is only rarely that these national enforcement agencies are mentioned by name. The actual choice and allocation is left to the Member State. Sometimes, however, regulation does require that the Member State should allocate one contact agency or competent authority. This permits the enforcement organisation in Europe to streamline its operations and to work with a European enforcement network. Nevertheless, Brussels is conscious of the fact that regulating national enforcement does not mean that in practice the enforcement bodies realise that they have been charged with Union tasks. For this reason the Union has, in the past, already taken steps to also realise this Union dimension in practice. After much

[28] For specific rules see Arts. 378-380 of Regulation 2454/93.

[29] For examples see case C-97/95, Pascoal & Filhos Ltd. and Fazenda Publica, ECJ 17 July1997; case C-237/96, E. Amelynck et al. and Transport Amelynck BVBA, ECJ 25 September 1997.

criticism from the Member States that they had to pick up the bill for enforcement, the Union has had to fork out from the European budget. Now, Member States are not only able to retain I 0 % of the recovery costs, but in many cases also 20 % of the reclaimed amounts of subsidies which have been wrongly paid out, provided, of course, that there is no question of the government itself being responsible for the incorrect payment of the subsidy. Should the Member States decide, upon the explicit request of the Commission, to initiate or continue judicial proceedings in order to reclaim subsidies which have been wrongly paid out, then there are possibilities to recover the legal aid and procedural costs from the Union budget[30]. It is also increasingly the case that the Community co-finances personnel and infrastructural improvements in the enforcement system. An example is the regulation on a-posteriori documentation control which has provided considerable personnel and initial financing over a five-year period[31].

3.1.4. Setting up Specialised Enforcement Agencies in the Member States

In a number of policy sectors the Union was confronted with so much fraud that it felt itself obliged to compel Member States to set up specialised enforcement agencies. This is namely the case in the olive oil and tobacco sectors[32]. These agencies function under the national sovereignty of the Member States, but are jointly financed by the Commission and are, to a large extent, streamlined in the Union direction. The tasks of these enforcement agencies are determined by the regulations. In the second part of Art. 1 of both regulations, the retaining of statistical surveys and unannounced inspections of companies are included, among other things. In the tobacco regulation,

[30] Regulation 4045/89 and Implementing Regulation 1863/90, OJ 1990, L 170.

[31] For other examples see Regulations 307/91, OJ 1991, L 37 and 967/91, OJ 1991, L 100 (co-financing control regarding the export of agricultural products) and the cited control regulations concerning wine and olive oil.

[32] See Regulation 2262/84, OJ 1984, L 208, and 593/92, OJ 1992, L 64 for olive oil, replaced by regulation 2292/2001 of 20 November 2001 and Regulation 85/93, OJ 1993, L 12 for tobacco.

moreover, the sharing of eventual administrative law or criminal law procedures, the acceptances of effective investigative competences, as well as the taking of samples, are all included. The agency in question must set up working programs, compile reports and admit Commission officials to staff meetings.

3.1.5. Instruments for Transnational and European Enforcement Cooperation

In specific areas Community law provides instruments for cooperation in the field of enforcement, dealing with mutual administrative assistance between administrative enforcement agencies[33]. For the internal market and for the customs union, however, it is of primary importance that a framework regulation should exist for the purposes of mutual administrative assistance between Member States themselves (horizontal) and between Member States and the Commission (vertical) with a view to the enforcement of the customs and agricultural regulations. The basic regulation from 1981[34], after long negotiations, has been replaced by the new Regulation 515/97[35]. This regulation offers far-reaching possibilities for the exchange of enforcement information, for allowing special supervision to take place, for allowing investigation operations to be carried out and for coordinated investigation, etc. The basic principle is assistance between administrative authorities, upon request or spontaneously. In the regulation there is no definition of the concept of administrative authority, neither organic, nor functional. The criterion is the indication which is provided by the Member State. In this regulation, however, the European Commission, and also OLAF therefore, is defined as an administrative authority (Title III). With regard to the gathering of evidence and investigation, various provisions are of importance. Article 1 defines administrative investigation as all operations on the part of the indicated investigative authorities, with the exception of

[33] See, for example, Regulation 218/92, OJ 1992, L 24 in the field of VAT, replaced by Regulation 904/2010, OJ 2010, L 268/1.

[34] Regulation 1468/81, OJ 1981, L 144.

[35] Regulation 515/97, OJ 1997, L 82/1.

operations which are carried out upon the request or under the direct authority of a judicial authority; a definition which has been adopted from Agricultural Control Regulation 595/91 (see supra). Art. 3 determines that it is not only data which have been obtained in the course of an administrative investigation that are communicated to the requesting authority, but also the essential data obtained during a judicial or investigative inquiry which can necessarily put an end to a particular fraud. If the national law determines that it is obligatory, then the preceding approval of the judicial authority will first have to be acquired. This is obviously an exception to the general principle formulated in Art. 51, namely that the regulation should leave unimpeded the application in the Member States of regulations concerning criminal proceedings and mutual judicial assistance in criminal cases (MLA), including the rules concerning the confidentiality of the investigation. Whenever an administrative investigation is sought in a Member State, for example by the European Commission, by way of mutual administrative assistance, then certain rules are applicable (Art. 9) which also run parallel to the rules provided under Agricultural Control Regulation 595/91, which means that the Euro-inspectors are allowed to be present and operate under the authority of the national enforcement authorities. This formulation allows the European Commission and OLAF, way of mutual administrative assistance, to implement or jointly to implement transnationally coordinated enforcement investigations. Moreover, it is obligatory for Member States, within the framework of horizontal by mutual administrative assistance, to partake in far-reaching reporting obligations to the Commission. Within the framework of economic relations with third countries the Commission has at its disposal the independent competence to carry out an enforcement investigation in third countries (Title IV). These Community enforcement missions are carried out by the Commission itself or by the enforcement authorities of the Member States under the Commission's authority. Finally, the Commission can make use of the Community part of the central data bank, the CIS - Customs Information System (Arts. 24-41), which has as its objective preventing, investigating and combating infringements of the customs and agriculture legislation. The regulation does not only

limit itself to defining the powers of investigation and therefore the possibilities for the gathering of evidence, but also contains provisions concerning the use of evidence. The data obtained (assessments, findings, information, documentation, etc.) from assistance upon request, from voluntary assistance as well as from the Community missions, may be used as evidence by the competent authorities of the Member States (Arts. 12, 16, and 21(2)). This opens up possibilities for the transprocedural and transnational use of the evidence obtained. This is also apparent from Art. 45(3) which determines that the confidentiality of the exchanged, and in the CIS input, data must not form an obstacle to the use of the data in judicial procedures or proceedings subsequently instigated due to the non-observance of the customs and agricultural regulations. The provisions concerning the use of evidence are formulated relatively vaguely. The provisions speak of "may" and there is not a single reference to the force to be attached to such evidence.

To put it briefly, this framework regulation concerning mutual administrative assistance offers very appropriate instruments for the coordination of transnational enforcement investigation. On the other hand, the force to be attached to the evidence obtained is completely left to the national rules of procedure.

3.2. Direct Enforcement by the Commission

3.2.1 From Policy Evaluation to Enforcement

The Commission has a general supervisory function as regards compliance with Union law both by and in the Member States in question. Within that framework the Commission is often charged in secondary Union legislation with evaluating implementation and enforcement in the various policy areas. This program evaluation can be concerned with aspects of legislation, implementation and enforcement. The Commission thereby issues, for example, reports on the application of the control measures in the Community's fisheries policy, the anti-money-laundering policy, the anti-fraud policy, etc. This type of evaluation research draws on information not only from

the reporting obligations of the Member States and their various bodies but also from research in the Member States themselves as to the services in question and, if it should be the case, as to economic operators, so that an insight may be gained into the effectiveness of the system.

It is obvious that this evaluation research is not directed towards observance or the imposition of sanctions for the infringement of certain norms by economic operators. Nevertheless, this research can, to the extent that it is directed towards the enforcement part of the policy in question, take the form of second-line enforcement control, namely control as regards the national enforcement agencies. It also occurs that these kinds of control can form the point of departure for further enforcement control which can also lead to sanctions in relation to the Member State. For example, in the agricultural sector whenever it appears that the enforcement agencies demonstrate structural shortcomings, with substantial consequences for the quality of enforcement, then the Commission can impose fixed cut-backs on agricultural subsidies within the framework of the yearly clearance of accounts procedure[36], which has as its consequence that the subsidies, because of a lack of enforcement, will have to be charged to the national budget. A good example is Regulation 2064/97 on structural funds which itself, in its Art. 3, standardises the evidence which the Member States can employ so as to demonstrate that they have dealt with an irregularity in the right way[37].

[36] See R. BARENTS, *The Agricultural Law of the EC*, Deventer-Boston, 1994; R. MOGELE, *Die Behandlung fehlerhafter Ausgaben im Finanzierungssystem der gemeinsamen Agrarpolitik*, München, 1997.

[37] Commission Regulation (EC) No 438/2001 of 2 March 2001 laying down detailed rules for the implementation of Council Regulation (EC) No 1260/1999 as regards the management and control systems for assistance granted under the Structural Funds.

3.2.2. Enforcement by the European Commission: Investigative Powers for Euro-Inspectors[38]

The independent competences relating to enforcement which Euro-inspectors possess with regard to competition and atomic energy have their legal basis in primary Union law[39]. Within the framework of our analysis concerning the financial interests of the EU the question arises whether Euro-inspection can also be provided without an explicit basis therefore in the EU Treaty, and also when it is not directed at the imposition of sanctions on the Community level. For the time being the necessary competence can be derived from the general supervisory authority which the Commission possesses with regard to the observance of Community law, such as that provided in Art. 17 TEU. In practice, however, this has not occurred, but rather these Euro-control powers, taken as supervisory competences, have been read into the specific bases for Union Community policy, such as, for example, in Arts. 38-44 TFEU (agriculture).

The competence to implement financial enforcement control as regards EU revenue and expenditure has been a settled part of the applicable secondary Union law since the 1970s. The competence to exercise controls in the Member States is attributed to EC officials; such control being applicable to various services in the Member States (second line) and to economic operators (first line). These control measures are therefore a combination of second-line and first-line control. The control measures vary from sector to sector and what is thereby conspicuous is the fact that the Commission was initially ascribed with more possibilities as regards the expenditure aspect (especially agricultural expenditure) than it was as regards the income aspect. The first-line control possibilities have also increased with the

[38] J.A.E. VERVAELE, *Community Regulation and Operational Application of Investigative Powers*, in J.A.E. VERVAELE (Ed.), *Transnational Enforcement of the Financial Interests of the European Union*, Antwerpen-Groningen, 1999. J.A.E. VERVAELE, *Transnational Cooperation and Enforcement of European Community Law*, The Hague -London, 1999.

[39] This here concerns Community powers of control and sanctions contained in Art. 105 TFEU.

passage of time. In 1970 the basic regulation concerning expenditure within the framework of the EAGGF[40] already provided, in its Art. 9, the possibility of on the spot inspections of companies by Euro-inspectors. In Art. 8 the preventive and repressive enforcement obligations of the Member States were determined. Also, Art. 8 contained a re-claim obligation which was imposed on Member States in the case of subsidies which had been wrongly paid out, as well as a regulation on financial liability between the Community and the Member States. Article 8(3) determined that this and that would be further elaborated by the Council by means of an implementing regulation, and this occurred in Regulation 283/72. In this regulation the reporting duties of the Member States were specified, by which a Member State could be requested to initiate an administrative investigation, as a part of which Commission personnel could participate (Art. 6(1)). In the case of an affirmative result, the Member States were indeed obliged to initiate administrative or judicial proceedings so as to reach a formal finding on the irregularity or negligence (Art. 6(3)). In 1991 Implementation Regulation 283/72 was replaced by Regulation 595/91[41]. This regulation also contains extensive reporting duties for the Member States (see supra), which should enable the Commission to determine the question of financial liability (of the Community or the Member State in question). Alongside this, enforcement competences are also provided for the Commission. Here also, the Commission has the authority to request the Member State to instigate an investigation (see supra). If the Euro-inspectors should decide to participate in an investigation, then Art. 6(3) determines that the Member States, in principle, should be made aware of the essential elements of the investigation at least one week beforehand, although in urgent cases this requirement can be dispensed with. Furthermore, in Art. 6(4) it is explicitly determined that the Euro-inspection should take place with the cooperation of the national inspectors and under their authority. In principle, the Euro-inspectors

[40] Regulation 729170, OJ 1970, L 94.

[41] OJ 1991, L 67. This regulation is concerned with all irregularities and reclaims in the framework of subsidies obtained from the Guarantees section of the EAGGF. The Guidance section falls under the regulation of structural funds subsidies.

have the same competences as the national inspectors, except that: 1) the investigation is to be led by national officials; 2) the Euro-officials must not, upon their own initiative, transgress upon the control competences of the national inspectors; and 3) certain control activities are to be reserved for national inspectors. The Euro-inspectors cannot therefore independently and autonomously gain access to company premises, for example. That they can only do in cooperation with the national inspectors. The latter will also always lead the investigation. Furthermore, the Euro-inspectors cannot transgress upon the powers of control which have been specifically granted to the national inspectors; but they do indeed have access to the same locations and to the same documents as the national inspectors. The regulation also contains provisions relating to criminal law competences. What is here striking is the fact that the Euro-inspectors are not excluded from all the investigation activities. They cannot participate in certain activities which are deemed by national criminal law provisions to be reserved by national law for specifically indicated officials. This applies expressis verbis to the search of premises or the formal interviewing of persons. A number of provisions relating to criminal proceedings, and this is also the case in the Netherlands, provide the possibility for the investigating authorities to be accompanied by experts, and these experts can therefore theoretically be foreign experts or Euro-inspectors. Moreover, they have access to all the information, including access to that which has been obtained on the basis of activities in which they are not allowed to participate. Furthermore, it has not here been determined that the confidentiality of the investigation should require that the flow of information should be dependent upon the consent of the competent judicial authorities.

For payments of subsidies out of the structural funds the basic regulation for Euro-control is contained in Art. 23 Coordinating Regulation 4253/88[42]. Article 23 also contains the authority to conduct an enforcement investigation in the Member States, but this provision is much vaguer than that contained in Agricultural Regulation 595/91. Implementation Regulation 1681/9445 does describe in detail the

[42] Regulation 4253/88, OJ 1988, L 374.

enforcement obligations of the Member States, but does not further elaborate upon the Euro-control aspect. To put it succinctly, the standardisation within structural funds' subsidies, when compared to agricultural standardisation, can only be considered as rudimentary.

As far as the revenue aspect is concerned, in 1970 the system of financial contributions by the Member States (the donation system) was replaced by a system of the Community's own resources[43]. From this date the Community has henceforth received customs duties, agricultural levies and a part of VAT as its own income. These resources are collected by the national authorities. The Member States are naturally obliged to exercise control as regards the determination of own resources as well as having them placed at the Community's disposal. In this regulation the competences and obligations of Commission officials who are involved in national control are regulated. It is a first tentative step, because for every control assignment emanating from the European Commission preceding consultation is first necessary as regards the necessary conditions therefore and the control is strictly limited to second-line control, namely to the administration of the government. Only in Regulation 165/74[44], an implementation regulation concerning control over the collection of the Community's own resources, were the first steps taken towards first-line control. It was only in 1989, however, that the discrepancies on this point between the agricultural sector and own resources were removed. This occurred in Art. 18(3) Regulation 1552/89[45] and the principle was also extended to VAT control in Art. 11 Regulation 1553/89[46]. At this moment in time the competences relating to Euro-control are identical as regards both the income and expenditure aspects. In practice the Euro-inspectors work at the competent Directorates-General, such as agriculture and taxation and customs union (Taxud). Within the particular Directorate-General the Euro-inspectors form an anti-fraud cell.

[43] Regulation 2171/2005, OJ 1971, L 3.

[44] Regulation 165/74, L 20.

[45] Regulation 1552/89, OJ 1989, L 155; amended by Regulation 1335/96, OJ 1996, L 175/3.

[46] Ibid.

This overall framework, however, does not provide a complete picture because these regulations do not stand in the way of specific control regulations for certain market sectors. Namely in the agricultural sector there is a veritable patchwork quilt of far-reaching control regulations which also provide the Commission with competences as far as control is concerned. A special feature of these control regulations is that their line of approach is not geared towards the protection of the EU's financial interests, but rather towards the enforcement of substantial norms (classical enforcement control), such as the observance of the wine or fisheries norms, or the veterinary or public health norms[47]. Nevertheless, there is also a question of a gradual process of exclusive control over national control (second line) also becoming first-line control. In view of the Euro-control in the fisheries sector, this development can be nicely illustrated. One of the first provisions for classic enforcement inspections crept into the fisheries legislation in 1982. I say "crept into" because there was no question of a Community inspection as such, merely that Commission officials could participate in a national investigation. The norms concerning the various tasks and competences remained vague. This inspection unit belonging to the Directorate-General for Fisheries (DG XIV) has been active since 1983 and has developed into an outstanding source of information for the European Commission. In 1986 The Netherlands was thereby confronted with a critical control report concerning fisheries enforcement, wherein it seemed that the Community inspection had gathered irrefutable evidence concerning over-fishing – for some species of fish even up to 200 %, concerning insufficient data having been supplied to Brussels and concerning the late closure of fishing. In 1993 a new fisheries control regulation entered into effect[48]. Alongside regulations concerning national inspection, this regulation contains extensive provisions concerning Euro-control. As a matter of fact, in Title VII (Arts. 29-30) aspects of

[47] Observing these norms often involves financial implications. For example, meat which has not been able to come up to veterinary norms can be exported with EC refunds (export subsidies).

[48] Regulation 2847/93, OJ 1989, L 261, replaced by Fisheries Regulations 1224/ 2009 and 404/2011.

first-line as well as second-line control have been incorporated. As far as the second line is concerned the regulation provides for independent control visits by the Commission. Furthermore, the Commission can demand that national inspection programs be set up and can check whether and how these are implemented in practice. Alongside this the regulation does provide first-line control by means of Euro-controllers. The provision which has here been utilized has been borrowed from the Agriculture Regulation 595/91, with the difference being that here the investigation is designated as an "administrative investigation" instead of merely an "investigation", without any further definition, and that the data obtained by means of the investigation, and also data obtained in criminal investigations by national investigation authorities (when premises have been searched or during formal interviews), are subject to the confidentiality principle which pertains to judicial procedures. The possibility of the Commission nevertheless obtaining this information on the basis of a judicial authorization is also not provided for. To put it succinctly, various aspects could still be internally streamlined in the Community regulation. The experiences gained in the fisheries sector have been transposed to other sectors and have been further elaborated upon. In a regulation relating to viniculture52 it is explicitly laid down that – in consideration of the extensive fraud which has been perpetrated in this sector – obligatory Community inspection is essential with a view to the uniform application of legislation in the Member States. The regulation also sets out a Community control structure and elaborates rules for mutual cooperation between the control structures in the Member States and between these and the Community inspection bodies.

3.2.3. Horizontal Legislation and the Creation of a Community Euro-Inspectorate for the Protection of EC Financial Interests

The European Commission and especially the Directorates-General responsible for the various policy sectors have strategic enforcement information at their disposal. On the one hand, they have an inflow of information which concerns not only the enforcement schemes and systems of the Member States, but also concerning individual files. On

the other hand, the Commission has at its disposal independent Euro-control competences which it can call upon for financial and for classic enforcement control, both with regard to the Member States as well as with regard to economic operators. Because of this the European Commission is well placed in order to harmonise the national enforcement systems and efforts with each other. Harmonisation can be a necessity for two reasons. Because in the first place enforcement is the responsibility of the Member States, it is not beyond comprehension that this national enforcement can vary greatly from country to country. It is up to the Community to indicate, by means of legislation, what the minimum standard should be in order to realise the European dimension of national enforcement. National control authorities which do not have a right of access to companies or which are not able to take any provisional measures are fairly powerless.

The question, however, is whether this minimum limit is only concerned with effectiveness, or also with legal protection. In a certain number of regulations attention is therefore also devoted to, for example, the rights of the defence (the right to be heard, the right to have decisions substantiated, etc.). This aspect of harmonisation falls under the notion of Community standardisation of the enforcement obligations of the Member States.

A second point concerns enforcement cooperation in the Community area (the internal market, the customs union). As far as border-crossing enforcement is concerned, the Commission is in a strong position because of the information which it has at its disposal and because it can coordinate the necessary enforcement. In many instances this leads to the formation of networks between national enforcement authorities which have a coordinating role as far as the European Commission is concerned. This does not always mean that a start is made on the formation of Community enforcement authorities, because in certain policy areas there are already national enforcement authorities in existence, which have a tradition of cooperation. The fact that their tasks are to a large extent those of a Community nature, such as customs services, does not therefore mean that within the foreseeable future a Community customs service will come into existence, let alone

a Community customs service possessing supervisory, investigative and administrative sanction powers, such as those provided nationally.

Nevertheless, some aspects, especially in the field of the enforcement of the EU financial interests, should be differentiated. For the time being the European Community has a direct interest in these protected rights. For this reason it does not seem strange that the Commission possesses extensive powers of control in this field. Traditionally, national departments have also had powers of supervision over their policy areas. In the second place, the Member States have no tradition with respect to the interests of Community enforcement. Overall the enforcement practice of the national authorities is essentially national in character. It is precisely in order to render the EC's financial interests secure from transnational fraud that efforts have been made on the Community level to achieve a more decisive Euro-control system with transnational competences in the internal market and in third countries. The powers of financial enforcement, such as those contained in the sectorial regulations concerning EC income and EC expenditure, seem insufficient to be able to conform to this necessity. It is for this reason that during the 1990s horizontal framework regulation has been chosen for the protection of the EU's financial interests. With "horizontal" is meant that the regulation applies to all policy areas of the Union whenever there is a case of EC revenue or EC expenditure. In this way the sectorial approach is supplemented by a horizontal approach. On the one hand, a specific choice has been made to standardise the administrative law and criminal law control of EC fraud by the Member States by means of horizontal regulation. Recently, and namely in the field of sanctions, far-reaching horizontal instruments have been brought into effect, such as a regulation on administrative sanctions[49] and a criminal law

[49] Regulation 2988/95, OJ 1995, L 31. It should here be noted that the Community regulation does not concern VAT constructions. The Member States have as far as the concept of "collecting own resources" is concerned, narrowly interpreted this term in a Council Declaration in the Community's favour, whereby VAT is seen as a source of income which is collected by the Member States and partly transferred to the EC Treasury. The Member States do not therefore view it as collecting Community funds, a

sanctions convention under the third pillar, with protocols[50]. On the other hand, it has been chosen to elaborate an integrated approach as far as the Euro-control powers are concerned. This final process has been reached in two steps.

Setting up Community Euro-Inspection with Regard to EC Fraud

The Euro-control powers were, up until recently, solely regulated in the previously analysed sectorial regulations. The consequence of this was that per Directorate-General there were Euro-inspectors and/or anti-fraud units active and they had diverse powers. An integrated approach was completely lacking. Also under pressure from the European Parliament and public opinion, the European Commission reached the view that it could not go any further with regard to the financial interests of the Community. In 1987 the European Commission published a 42-point report concerning a more intensive combating of fraud[51] and in 1988 it set up the special anti-fraud unit called UCLAF within the Secretariat-General. In 1995 the anti-fraud units belonging to agriculture (DG VI) and customs (DG XXI) were integrated into UCLAF. The Euro-inspectors who were not charged with financial enforcement control, but rather with classic enforcement control such as fisheries inspection and veterinary inspection, have indeed remained at their respective Directorates-General. In other words, in the cases of combating fraud and financial enforcement control one could speak of an integrated approach which has led to one central anti-fraud unit, UCLAF. UCLAF's mandate, however, does not contain any authority to impose sanctions, but does include control powers. In order to answer the question of the range of the control powers we have to differentiate between the situation up to the end of 1996 and thereafter. Up to the end of 1996 UCLAF functioned and exercised competences on the basis of the various sectorial control regulations. With the integration of the agriculture, customs and

standpoint which, in my view, is evidence of the renationalisation of Community competences.

[50] Convention, OJ 1995, C 316; First Protocol, OJ 1996, C 313; Second Protocol, OJ 1997, c 221.

[51] COM(87) Final.

structural funds anti-fraud units, various competences belonging to the sectoral control regulations (see supra) have also been brought within the fold. The control powers can therefore be summarised as follows: 1) enforcement support; 2) enforcement coordination; and 3) financial enforcement control. Enforcement support has a legislative as well as an operational component. Forming part of the Commission, UCLAF is directly concerned with the preparation of the Commission's legislative proposals in the field of the protection of financial interests. In cases of serious and/or border-crossing EC fraud, UCLAF coordinates the efforts of the national enforcement authorities.

On 31 May 1999, the legislation replacing UCLAF with OLAF was published in the OJ[52]. In regulations 1073/1999 (EC) and 1074 (Euratom) the competences of OLAF are defined. In the Commission's Decision 1999/3 of 28 April 1999, OLAF was set up as an office within the Commission. Finally, in the Inter-institutional Agreement of the European Parliament, the Council and the European Commission, a framework model is provided in relation to the necessary conditions and provisions for internal inquiries. It can be stated that all UCLAF competences have been transferred to OLAF. OLAF remains an integral part of the EC, but is independent in its power to conduct internal and external investigations. For that reason the position of the Director has been strengthened and a Supervisory Committee has been established[53].

In 2012 a proposal has been submitted for a Regulation amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing Regulation (EURATOM) No 1074/1999[54] with the aim to further strengthen the independence of the OLAF-investigations and to increase the guarantee the procedural safeguards during the OLAF-investigation.

[52] OJ 1999, L 136.

[53] J.A.E. VERVAELE, *Towards an Independent European Agency to Fight Fraud and Corruption in the EU?*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 1999, pp. 331-346.

[54] COM(2011) 135 final + SEC(2011) 343 final.

Horizontal Legislation for Euro-Control

At the end of 1996 the step towards a horizontal Euro-control regulation was nevertheless taken. This Regulation 2185/96[55] forms a part of the horizontal approach concerning the combating of fraud and is a concrete supplementation to the general Euro-control provisions (Art. 8) from the Administrative Sanctions Regulation (2988/95)[56]. The regulation also bases the vertical cooperation between the Commission and the Member States as regards the implementation of controls on the concept of Community loyalty contained at that time in Art. 5 ECT, today the Union loyalty under Article 4(3) TEU. The Regulation provides minimum horizontal regulation. "Horizontal" means that the provisions apply to all EC policy areas, in as far as there are points of departure with EC finances[57]. "Minimum" means that specific provisions from sectoral regulations which go further than this minimum regulation remain in force and may be applied. This Euro-control regulation is pre-eminently an instrument of financial enforcement control, and not one by which to evaluate implementation and enforcement. The objective is to reach a homogenous approach as regards enforcement in the Member States, as well as on the levels of control, refunds/additional assessments and punitive sanctions. Article 2 Regulation 2185/96 describes the Commission's control mandate. The Commission may carry out on-the-spot checks and inspections:

> for the detection of serious or transnational irregularities or irregularities that may involve economic operators acting in several Member States; or, where, for the detection of irregularities, the situation in a Member State requires on-the-spot checks and inspections to be strengthened in a particular case in order to improve the effectiveness of the protection of financial interests and so to ensure an equivalent level of protection within the Community; or at the request of the Member State concerned.

[55] Regulation 2185/96, OJ 1996, L 292.

[56] OJ 1995, L 312.

[57] With the linkage to the Administrative Sanctions Regulation the VAT-limited funds mentioned in note 55 also apply.

From the description it would seem that the competence criteria have been broadly defined. This concerns not only cases of transnational fraud, but also serious fraud and the Commission can, in exceptional cases, make use of Euro-controls in order to rectify a lack of enforcement in a Member State (the pro-active assimilation principle).

Who can exercise this control mandate? Article 6 determines that the control function can be implemented by authorized officials from the European Commission, who for the first time are also referred to as Commission inspectors. Moreover, detached national experts who have been placed at the Commission's disposal are also authorized to attend to such controls. They therefore increasingly function as experts under the direction of Commission officials. The Commission can also, with the approval of the Member State concerned, call upon the services of officials (inspectors) from other Member States. The Euro-controls are expressis verbis described in Art. 7 as first-line controls: applicable to economic operators upon which the measures or the Community administrative sanctions within the capacity of Art. 7 Regulation 2988/95 may be employed, and to third-parties, if these have relevant information at their disposal. This is a broad description due to the fact that the Administrative Sanctions Regulation does not only concern itself with fraud, 67 but also with unintentional irregularities, such as those defined in Art. 1(2) Sanctions Regulation.

Moreover, there is a substantial difference as regards financial enforcement control, such as has been discussed in the various sectoral regulations. An important innovation in this regulation is indeed the fact that for the purposes of this horizontal mandate the powers of enforcement are exercised under the authority and the responsibility of the Commission itself (Art. 6). For the first time we are therefore confronted with independent powers of enforcement on the part of the Euro-inspectors, which may be compared with those provided at the level of competition in Regulation 17/62.68 This form of Euro-control therefore goes considerably further than the classic and financial enforcement controls within the sectoral regulations. This does not detract from the fact that the Commission must inform the Member State, in a timely manner, of the subject, the objective and the legal

basis of the control. What is precisely meant by "timely" is indeed for the Commission to determine? In the case of an extreme emergency this may be just before the commencement of the control itself. In any case, the Member States are made aware of the results and of every fact or every suspicion which points to irregularities as far as EC funds are concerned (Art. 8.2).

This extraordinary form of financial enforcement control is governed by the applicable Community regulations and is supplemented by "the rules of procedure of the legislation of the member state". This is how Art. 7 regulate the powers of the Euro-inspectors and thereby also the resources for the gathering of evidence. As a basic principle the Euro-inspectors have the same powers as the national administrative inspectors (the principle of assimilation), which they may exercise according to the applicable national law. The regulation subsequently determines that the powers of control may concern namely the administration of an enterprise, computer data, merchandise, the taking of samples, etc. Should any attachment or seizure of property before final judgment be resorted to, then this will occur by means of the national authorities upon the request of the Commission. The Member States must also render necessary assistance to the Commission (in terms of policing) whenever an economic operator resists the Euro-control (Art. 9). With these provisions, however, the preliminary phase of the proceedings, namely the problem of the transition from supervision to investigation, is not adequately regulated, and this is also true as to Art. 1 of the regulation which explicitly determines that the competence of the Member States as to criminal proceedings and the provisions concerning judicial assistance between the Member States in criminal cases must remain unimpeded. Why should this be so? The regulation contains few Community rules relating to this preliminary phase and compels one to resort to a further reading in combination with the relevant national law. The regulation speaks of assimilation with administrative inspectors. According to Dutch law, for instance, this means administrative supervision, such as that is regulated under the General Administrative Law Act or in other particular Acts of Parliament. In concreto this results in a competence which is more limited than those contained in Regulation 595/91

relating to financial enforcement supervision within the framework of agricultural fraud. In this latter regulation it is indeed determined in Art. 6 how the Euro-inspectors – in the case of further enforcement when the supervision, due to a suspicion that a punishable act has been committed, has turned into an investigation – can still operate in cooperation with the national inspectors. Also as regards access to information the principle of assimilation with the administrative supervisors should be followed. This means that the Euro-inspectors have access to the same information, and this also applies to judicial information, as that available to the national supervisors. To put it succinctly, the horizontal control regulation offers the Commission more limited possibilities for investigation than does Regulation 595/91 in that it excludes certain investigative operations, but it does offer the advantage that the Commission can operate independently and under its own authority. Because of the lack of Community rules relating to the preliminary phase, supplementation is extremely dependent on national law and as far as a homogenous approach is concerned, this could only occur to the extent that a Community tradition should exist as regards the administrative-investigative relationship, and that is certainly not the case. One could envisage that the UCLAF, in combating transnational fraud, is rendered, as it were, a prisoner of national procedural rules. Its competences are prescribed on a Community basis, but not the procedural rules which apply to the exercise of these powers. It would indeed be a wise step to elaborate uniform and Community procedural rules within the framework of transnational European enforcement cooperation.

Also of importance is the fact that Art. 8(3) regulate the use of evidence obtained during the course of the investigation:

> Commission inspectors shall ensure that in drawing up their reports account is taken of the procedural requirements laid down in the national law of the Member State concerned. The material and supporting documents as referred to in Article 7 shall be annexed to the said reports. The reports thus prepared shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation

> rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports. Where an inspection is carried out jointly, pursuant to the second sub-paragraph of Article 4, the national inspectors who took part in the operation shall be asked to countersign the report drawn up by the Commission inspectors.

In contrast to the regulation of the national control systems and especially the gathering of evidence and the evidentiary force attached thereto (see supra), Art. 8(3) limits itself to the principle of assimilation. Here also there is, to a great extent, dependence on national law in order to determine which powers the Euro-inspectors may exercise and whether their reports may be used as evidence in judicial proceedings and the subsequent evidentiary force to be attached thereto. An answer should be sought in the national administrative law and criminal procedure systems and one is also aware of the fact that these systems greatly differ from Member State to Member State. This legal mosaic or "hotchpotch" has implications for effectiveness as well as for legal protection.

This regulation goes much further in its definition of mandate, competences and legal consequences than do the sectoral regulations. Nonetheless, many aspects remain unregulated and are left to the procedural rules of the legislation of the Member States (Art. 6(1)). The problem here is that the national rules of procedure on the administrative law and criminal law levels are not yet prepared for Community situations, let alone for the investigative powers of the Euro-inspectors. To summarise, it can be concluded that UCLAF could be considered as a Community enforcement authority with a multi-agency-like construction. In actual fact UCLAF, because of its specialisation (as an anti-fraud unit), is to all intents and purposes a task force.

4. Conclusion

The very strength of the integration is the teamwork which exists between the Community and national components within the integrated

Community legal order. And there is no difference as far as the enforcement of Community law is concerned. This means that also in the future a dual-track policy will have to be employed, consisting of Community-regulated competences relating to indirect enforcement by the Member States and to direct operational competences as far as the Community is concerned.

On the other hand, the horizontal framework rules remain vague at the procedural level, or otherwise they refer back to the applicable national law. What should further be investigated is the question of to what extent does the European integration process compel harmonisation as far as the procedural enforcement regulations of the Member States are concerned. The necessary steps have already been taken within the framework of mutual recognition of implementation operations in the internal market and customs union, but as far as enforcement operations are concerned, there is still a long way to go. The doctrine of evidence is thereby a very good example. Even in the fields falling within exclusive Community authority, such as fisheries, nothing is regulated concerning evidence or the probative value to be attached to the reports of, for example, fisheries inspectors. Nevertheless, fisheries activities are very mobile and we are therefore preeminently confronted with a transnational area of enforcement. A Spanish fisherman can thereby be confronted with criminal proceedings in Ireland in the event of a serious infringement within Irish waters (or indeed the proceedings may be transferred to Spain), as well as Spanish administrative proceedings relating to the issue of his permit. The items of evidence may originate from Irish fisheries inspectors and/or from Community inspection. The lack of Community regulations in this respect can lead to the inspection reports of the enforcement authorities of another country not being accepted as evidence.

Direct enforcement by the Community with the assistance of Euro-inspections is and will remain a supplementary instrument. Nonetheless, the importance of this instrument must not be underestimated because it can fulfill an important role within the framework of extending enforcement networks on a European scale. It is for these reasons that it is important that the Euro-control system should become independent, certainly in the area of the protection of

the financial interests of the EC. The basic condition is indeed that it is completely recognised that the Euro-control powers are in actual fact enforcement competences with legal consequences as far as the citizen is concerned. This includes of course that during the investigation procedural safeguards are applied in such a way that the evidence can be used in the judicial follow-up in the Member States. It also includes that the information obtained in the Member States is admissible evidence in the legal order of the Member States, also in criminal proceedings. The admissibility should not depend on the status of administrative evidence in criminal proceedings, as this status is very different from Member State to Member State. In that sense the proposal for a Regulation amending No 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing Regulation (EURATOM) No 1074/1999[58] sticks to a non-solution in Article 9(2):

> Reports drawn up on that basis shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall have the same evidentiary value as such reports.

OLAF-evidence should be admissible evidence, independent of the national criminal procedure and this should be laid down in the EU regulation and in national criminal procedure.

The Community regulation of the rights and obligations of the Euro-inspectors does not exclude national regulation; in fact it is quite the reverse. Many aspects will and indeed should be left to national procedural autonomy. This is not different as far as the Euro-control powers regarding competition are concerned. In the first place competences should be created for national enforcement agencies, which should then provide assistance, deploy the national police, impose conservation measures or use investigative powers to find an

[58] COM(2011) 135 final + SEC(2011) 343 final.

protect evidence. Furthermore, the Euro-inspectors, as regards rights and obligations, should be equated with national inspecting officials. I am thinking of making punishable the refusal to cooperate, punishing assault and willful injury, etc. On the other hand, the Euro-inspectors themselves could also commit punishable acts, such as violations of professional secrecy or acts of active or passive corruption. There are many who advocate this in order that all these aspects could be regulated in one national implementing act, so that a consistent entirety would exist whereby effectiveness and legal protection could be interweaved with each other. It is only in this way that we could be in a position to be able to intertwine the Community powers of investigation as regards the enforcement of Community Jaw with our enforcement systems and thereby also to be able to provide substance to the principles of subsidiarity and shared government. In that sense the EU regulations with investigative powers should be elaborated in national legislation giving visibility to the EU investigative powers. A good, but recent example is the Dutch law on assistance to be given for on-the-spot-checks based on Regulation 2185/96[59].

The problems analysed will not be solved by the setting up of a European Public Prosecutor's office[60]. In fact, whatever institutional design is chosen for the EPPO it will need assistance by European law enforcement agencies. The status of their investigative powers and the evidentiary status of their findings will have to be used in national criminal proceedings.

[59] Wet van 27 september 2012 op de verlening van bijstand aan de Europese Commissie bij controles en verificaties ter plaatse (Law on assistance to the European Commission in case of on-the-checks and verifications in loco), Staatsblad, 2012, p. 467.

[60] J.A.E. VERVAELE, *The Shaping and Reshaping of Eurojust and OLAF. Investigative Judicial Powers in the European Judicial Area, EUCRIME*, 2008, pp. 80-85. The Commission has submitted a proposal on the establishing of a European Public Prosecutor's Office (EPPO) in July 2013. See COM (2013) 534 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0534:FIN:EN:PDF.

CHAPTER 4

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS TO CONTROL (TRANSNATIONAL) CRIMINALITY[1]

1. Concepts and Terminology

Mutual legal assistance (MLA) in criminal matters deals with the mechanisms for legal assistance in the gathering of criminal evidence[2] abroad, that is in other jurisdictions than the jurisdiction where the investigation, prosecution or adjudication has been triggered (investigative or forum jurisdiction). These mechanisms refer not only to processes and timelines but also to competent authorities and jurisdictional scope (offences, territories). In civil law countries MLA is mostly defined as judicial cooperation in criminal matters. This terminology indicates that MLA is about cooperation between judicial authorities, being the authorities that have competence to investigate, prosecute and adjudicate in criminal matters. It does not, in principle, include mutual assistance between administrative authorities, even if they are dealing with administrative enforcement. The competent judicial authorities for dealing with incoming or outgoing MLA requests are as a rule defined at national level, in line with the design of the domestic administration of justice. This means that the competent authorities can be, for example in the UK, police authorities, while these are excluded in most civil law countries. Competent authorities include authorities competent for criminal investigation and prosecution. Courts can be the competent authority to authorize a

[1] The article will be published in N. BOISTER, R. CURRIE (Eds.), *Handbook of Transnational Criminal Law*, London, 2014.

[2] The service of process in criminal matters is mostly done through administrative or police cooperation.

coercive measure, and in some domestic regimes courts can also order additional investigative measures, even during trial.

MLA is necessary because judicial authorities cannot execute investigative measures outside their State territory, unless provided by international treaties or ad-hoc agreements. In civil law countries investigative authorities need a clear legal basis in order to be competent to exercise investigation. In common law countries they have the competence to act, even abroad, but their scope of action is limited to the sphere of action of every ordinary private citizen. They can interview people, but they cannot take investigative action that infringes privacy or that has a coercive or intrusive character (for instance secret surveillance). MLA can be needed in cases of transnational crime, but also in domestic cases with a cross border dimension. The latter is the case when witnesses or suspects are abroad, when the evidence is not located in the territory of the forum state or when criminal assets have been transferred to foreign territory.

The tools of evidence gathering abroad vary from non-coercive, such as the exchange of judicial information or voluntary interrogation of experts and witnesses, to very intrusive measures, such as search and seizure, tapping, controlled delivery and undercover surveillance of criminal organisations.

In this contribution I will examine the developments of MLA and highlight the challenges that the system is facing.

2. MLA: State Sovereignty and International Obligations (Fora and Sources)

Based on a rule of customary international law, foreign judicial authorities cannot execute investigative acts in the territory of a foreign state, as this would be an infringement of its sovereignty[3]. This means that States have to agree to afford each other assistance for cross-border gathering of evidence in criminal matters. This can be done on the basis of *letters rogatory*, which can be executed solely on the basis of

[3] PCIJ, *SS Lotus Case*, 1927.

comity, or through MLA treaties (MLATs) that contain a duty to cooperate. There is, however, no public international law obligation to subscribe to MLATs. The decisions to establish formal or informal MLATs are based on national sovereignty, although there are legal and political exceptions. The G7/ G20 and its related Financial Action Task Force (FATF) have imposed, via non-binding recommendations[4], a political obligation to sign up to MLATs and implement them. The Security Council has also legally obliged States through Security Resolutions under chapter VII of the UN Charter to comply with all the UN counterterrorism conventions, independent from status of signature or ratification. MLA obligations can also be derived from positive duties under international human rights law, certainly when it comes to the duty to investigate, prosecute, adjudicate, and punish core international crimes.

Nation-states have concluded bilateral agreements on extradition since the end of the 19th century. A similar set of bilateral MLATs do not exist, but some of the older bilateral extradition treaties include provisions on MLA, though these are limited to the seizure of goods and objects linked to the detention of the person. After WWII there was an increasing national, regional and global interest in the gathering of evidence abroad. At the domestic level States began to recognize the increasing importance of MLA. For example in 1986 in the UK a interdepartmental working group recommended that the Home Secretary engage in legislative reform in order to provide the UK with easier access to foreign evidence, which resulted in enactment of the 1990 Criminal Justice International Cooperation Act[5]. Regional organizations, such as the Council of Europe, Organization of American States, European Union, MERCOSUR and ECOWAS, have elaborated specific MLATs. They do have a multilateral character and lay down a specific enhanced regime for MLA in that region. Besides

[4] For the most recent set of Recommendation see FATF, <http://www.fatf-gafi.org/topics/fatfrecommendations/documents/internationalstandardsoncombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html> accessed 5 February 2014.

[5] See http://www.legislation.gov.uk/ukpga/1990/5/contents.

these regional regimes, states of that region still subscribe to new generation bilateral MLA regimes with third countries.

At the global level, the UN's increasing involvement in crime prevention and criminal justice, especially in the area of drugs trafficking, trafficking in human beings, organized crime, terrorism and related money laundering or financing of terrorism has resulted in topical conventions that also include MLA obligations. The 2000 UN Convention on Transnational Crime[6] is a good example thereof. Even though there are no specific binding conventions on MLA at UN level, both the UN and other global and regional organizations have elaborated Model Treaties on MLA, such as the UN Model Treaty on Mutual Assistance in Criminal Matters[7] or Legislative Schemes, such as the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth (Harare Scheme)[8]. Moreover, the UN, sometimes in combination with the IMF, has elaborated specific model provisions for specific areas of crime, which take account of the differences between the common law and civil law legal systems[9]. Finally, the UN, the IMF and the G20 have been very active in the elaboration of international standards of best practices related to specific investigative measures, for instance the freezing and seizure of criminal assets abroad.

[6] The United Nations Convention against Transnational Organized Crime, 15 November 2000, 2225 UNTS 209, in force 29 September 2003.

[7] Adopted by General Assembly Resolution 45/117, subsequently amended by General Assembly resolution 53/112, 1990 and amended in 1998, A/RES/53/112.

[8] Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (Harare Scheme) 1 August 1986, 12 Commonwealth Law Bulletin (1986) 1118 (as amended in 1990, 2002 and 2005).

[9] 2009, *Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime for Common Law Legal Systems*, http://www.imolin.org/pdf/imolin/Model_Provisions_Final.pdf.

3. Global Approach to MLA

3.1. MLA and Tackling Illicit Drugs Trade: The Vienna Convention

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 or Vienna Convention)[10] has been a precursor in what I have called a topical convention dealing with MLA, as it is dealing with all aspects of control of the illicit narcotics traffic. It contains, beside substantive obligations (offences and sanctions), not only obligations concerning jurisdiction but also on extradition, transfer of proceedings and MLA. MLA provisions are not aimed at affecting the existing MLA obligations under any other treaty, but are prescribing minimum obligations related to drugs trafficking offences. Article 7(1) on MLA imposes upon the signatories the duty to afford one another the widest measure of cooperation. MLA includes taking evidence or statements of persons, search and seizure, production orders and assets identification. It does not include Special Investigation techniques (SITS) such as interception of telecommunications, secret surveillance or covert investigations. However, it leaves open other forms of MLA that are allowed by the domestic law of the requested party.

MLA is based on state to state cooperation between the central authorities of the executive power. The judicial authorities have no specific role and the subjects (persons concerned) have no rights at all under the Convention. In terms of Article 7(12) a request shall be executed in accordance with the domestic law of the requested State (*lex loci*), but the law of the requesting State (*lex forum*) can be taken into account to the extent not contrary to the domestic law of the requested state. The requesting state is also obliged to respect the specialty principle, meaning that the requesting state shall not transmit nor use information or evidence furnished by the requested state for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party. The Convention also provides for grounds for refusal, based either on

[10] Vienna, 20 December 1988, 1582 UNTS 95; in force 11 November 1990.

formal issues or on substance. The request may be refused if it is likely to prejudice the sovereignty, security, *ordre public* or other essential interest of the requested state. It may also be refused if the requested investigative measure is not available under the domestic law of the requested state with regard to any similar offence or if it would be contrary to the legal system of the requested state. The request can however not be refused for reasons of protection of banking secrecy or lack of double incrimination. All refusal grounds are optional; a requested state can always grant MLA if the grounds have not been transposed as mandatory grounds under domestic law.

Article 9 prescribes a list of obligations under the qualification 'other forms of cooperation'. States are obliged, but only in appropriate cases and if not contrary to domestic law, to establish joint investigation teams. These teams can only act under the authority of the territory of the State concerned and with full respect for its sovereignty. The Convention does not prescribe, however, the regime of applicable law for the joint investigation team. Article 9 also promotes the exchange of personnel and experts between countries and the posting of liaison officers. Finally, Article 11 deals with controlled delivery. However, the obligations are conditional: on the basis of mutual agreements or arrangements and if permitted by the basic principles of the respective domestic legal systems.

3.2. MLA and Tackling Illicit Drugs Trade: Model Laws and Model Treaties

UN model laws were elaborated to assist governments in translating their obligations under international treaties into national legislative provisions. In relation to MLA they have been elaborated by the UNODC and the UNDCP, i.e. in the frame of policy on drugs and crime. In 1990 the UN General Assembly adopted the UN Model Treaty on Mutual Legal Assistance[11]. It consists of a quite simple framework, derived from the international experience, which can be

[11] Annexed to GA Res 45/117 (1990), 14 December 1990, as amended by GA Res 53/112 (1999), 9 December 1998.

used as a guide for states negotiating bilateral and multilateral MLATs, in particular when they have to deal with different legal systems and traditions. The framework is based on state-to-state cooperation between central authorities and encourages the widest possible MLA cooperation. The investigative acts requested are limited to the classic ones (taking evidence from persons, search and seizure, production orders, etc.) and do not include SITs, such as electronic surveillance, controlled delivery and undercover surveillance of criminal organisations. The additional protocol deals specifically with proceeds of crime. It imposes upon states obligations to locate and trace, to establish specific financial investigative measures in order to recover them and to foresee forfeiture. However, the obligations are stipulated in very general terms and only binding if permitted by domestic law. The UNDCP updated the MLA Model Bill several times. Although the commentary on the 2000 version of the Model Bill[12] states clearly that one of the aims is to reconcile and accommodate the differences between legal systems, the Model Bill is clearly geared for common law systems. A similar Model Bill for civil law traditions has not been elaborated.

The 2000 Model Bill contains very detailed provisions both on the MLA procedures and on freezing and confiscation of proceeds of crime. It is of interest that both the evidence-gathering order and search warrant have to be based on a court decision and justified on the basis of proportionality[13]. The court order can also provide for the way in which the evidence is to be obtained in order to give proper effect to the foreign request. However, if this would infringe the law of the requested State, the latter will take precedence and cannot be overridden by the terms of the foreign request[14]. It is also of interest that the bill provides that a person named in the evidence-gathering order may refuse to answer questions or to produce documents or things

[12] UNDCP Model Mutual Assistance in Criminal Matters Bill, 2000, available at <http://www.unodc.org/pdf/lap_mutual-assistance_2000.pdf>; Commentary available at <http://www.unodc.org/pdf/lap_mutual-assistance_commentary.pdf> (last accessed 7 February 2014).

[13] Clause 8(2) and (3).

[14] Clause 8(4).

where the refusal is based on a law currently in force in the requested state, on a privilege recognized by that law or if the production of evidence would result in committing an offence in the jurisdiction of the requested state[15]. Foreign states can be requested to produce a written declaration to confirm the state of the law in their jurisdiction and such declarations are admissible in the evidence-gathering proceedings. The Model Bill also contains detailed clauses on the privilege for foreign documents (restricted disclosure) in order to preserve the confidentiality and secrecy of documents[16] and on the application of the specialty rule[17]. Astonishingly, the Model Bill does not include grounds for refusal of a request.

The 2000 UN Model Bill on MLA ties in with another UN Model Bill: the 2000 UNDCP Model Foreign Evidence Bill[18]. The latter aims to provide for the admissibility in the forum state of evidence that has been obtained through MLA. It deals mostly with requirements for testimony and with the type of foreign material evidence that may be adduced as evidence in court in the forum state. It includes provisions on exclusion of evidence in case of prejudice to the rights of the defence or to the interest of justice.

3.3. From Drugs to Transnational Crime: UNTOC

The UNTOC consolidates the renewal of MLA in the last decades. It does not replace the existing or future bilateral or multilateral treaties, but complements them. Besides harmonization of substantive criminal law, it contains far-reaching obligations on investigative acts, including SITs. In regard to MLA, it imposes the widest MLA obligations in relation to investigation and prosecution of transnational offences and the related freezing, seizure and confiscation of criminal proceeds, elaborated in the 29 paragraphs of Article 20. MLA remains based on

[15] Clause 8(5).

[16] Clause 17.

[17] Clause 18.

[18] Available at UNODC, http://www.unodc.org/pdf/lap_foreign-evidence_2000.pdf; for commentary see http://www.unodc.org/pdf/lap_foreign-evidence_2000.pdf (last accessed 5 February 2014).

the classic inter-state approach and is dealt with by the central authorities at the executive level. Requests are executed in accordance with the *lex loci*, but may apply specific rules of the *lex fori*, if not contrary to the domestic law of the requested State. MLA must also be afforded in the case where the requests relate to legal persons that are criminally liable in the requesting state only. Article 18(3) lists the investigative acts and purposes for which MLA may be requested under the duty to cooperate. This list is a classic one, going from effecting service of judicial documents, taking evidence or statement from persons to identifying and tracing of object, assets, etc. for evidentiary purposes. The classic coercive measures, such as search and seizure, and the SITs are not mentioned. Article 18(3)(i) mentions however 'any other type of assistance that is not contrary to the domestic law of the requested State Party'. If the requested state duly implements Article 20 it should have the SITs included in its domestic criminal procedure. The UNTOC also includes the spontaneous exchange of information in Article 18(4). MLA must respect the specialty rule and the secrecy of certain information. Certain classic grounds for refusal are excluded, for instance banking secrecy or fiscal matters. UNTOC does however include established grounds for refusal such as sovereignty, security, *ordre public* or other essential interests; double incrimination; investigative action would be excluded in requesting state for similar offences; it would infringe national domestic law. These remain very wide and very much based on the architecture of the domestic legal regime of the requested state. They are all, however, optional. The UNTOC also deals with joint investigations in Article 19, but the text is limited to a 'shall consider' and thus does not contain formal obligations.

In 2001 the UNODC elaborated an extensive report on MLA assistance casework and best practices[19]. It contains very detailed recommendations for enhancing the effectiveness of MLA, dealing with the central authorities, the procedures, the time delay, digitalization, etc. It is however striking that it does not deal with SITs. The document

[19] UNODC, Report, Informal Expert Working Group on Mutual Legal Assistance Casework and Best practice, Vienna, 2001, available at <http://www.unodc.org/pdf/lap_mlaeg_report_final.pdf > last accessed 5 February 2014.

has also been elaborated by experts coming solely from the executive bodies and the law enforcement community. This is perhaps the reason why the document completely avoids aspects of data protection, the speciality rule, defence rights and the standing of suspects and victims under MLA regimes.

3.4. From Drugs to Transnational Crime: The 2007 Model Law on MLA

This model law was elaborated by the UNODC Division for Treaty Affairs, Treaty Affairs and Legal branch and takes account of UNTOC and the older UN model treaties on MLA. The MLA model remains based on state-to-state cooperation and thus on cooperation between central authorities. However, the model law clearly provides for the possibility of spontaneous transmission of information[20]. Although the applicable law is the law of the executing state, the model law contains a very wide *lex fori* principle, as all procedures specified in the request of the forum state will be applied, unless such execution would be contrary to the fundamental principles of the law of that state. In regard to grounds for refusal, the model law provides for two options. The first one is that there is no need to list them as their use is optional and leaves thus much discretion to the executing state. The second one is in line with international treaties on control of crime and sets out the classic grounds for refusal dealing with sovereignty, security, *ordre public*, etc. Banking secrecy is however excluded as such a ground. The model law deals with confidential requests and court orders to limit disclosure of MLA requests or related content or decisions. Persons that illegally disclose such requests, content of the requests or related decisions in case of confidential requests may be punished. The model law deals extensively with freezing, seizure and confiscation orders related to criminal assets. It contains also a special section (Part 4) on MLA in relation to computers, computer systems and computer data, dealing with expedited preservation, productions and search and seizure

[20] Clause 6.

of computer data. It does not, however, deal with SITs or joint investigation teams (JITs).

4. The Regional European Approach to MLA: The Shift from MLA to Mutual Recognition (MR)

4.1. From Council of Europe (CoE) MLA to European Union (EU) MLA

Until the 1999 EU Amsterdam Treaty and the establishment of an Area of Freedom, Security and Justice (AFSJ), the regime for MLA in the European region was laid down in multilateral mother conventions of the CoE. EU member states were thus using regional international public law conventions to gather criminal evidence in the EU. The historic starting point is without any doubt the 1959 CoE mother Convention on MLA (ratified by all EU Member States)[21], and the related 1978 Additional Protocol (ratified by near all EU Member States)[22] and the 2001 second Additional Protocol (with a modest ratification rate by EU Member States)[23]. The 1959 CoE Convention is the mother convention because it introduced on a multilateral level the MLA duty to cooperate and laid down a model for this cooperation. The 1959 CoE Convention was a worldwide *unicum* and not an obvious development at that stage, as the whole tradition of enforcing criminal law was based on sovereignty and bilateral treaties. The obligation to cooperate is an interstate obligation (comity between states) and the Convention can thus be qualified as an international convention of an administrative-executive nature, but dealing with a judicial matter. It must be added that the main obligation to cooperate is not always absolute. There are two reasons for this. First of all, many States have formulated at the moment of signature and/or ratification reservations and declarations, which results in a complex patchwork. Secondly, the 1959 CoE Convention itself contains far-reaching grounds for refusal,

[21] Strasbourg, 20 April 1959, ETS No. 30; in force 12 June 1962.

[22] 17 March 1978, ETS 99; in force 12 April 1982.

[23] 8 November 2001, ETS182; in force 1 February 2004.

linked to political, military and tax offences, but also to sovereignty and public order. Finally, as the Convention is based on interstate cooperation there is a double track procedure, both in the requesting and in the requested state. That means that a request from a judicial authority must be channeled through the central authorities of the Ministries of Justice and Foreign Affairs both in the requesting and requested countries (diplomatic channel) before arriving on the desk of a judicial colleague in the requested state. In other words these central authorities play a key role and the judicial authorities are only triggering and executing the request.

With the deepening of the European integration it became clear that there was an increasing need for a proper MLA regime in the EU. Due to lack of political agreement, Belgium, Luxemburg, Netherlands, Germany and France signed the 1985 Schengen Agreement, which was followed by the Schengen Implementing Convention in 1990, containing provisions (beside migration law, visa policy and police cooperation) on MLA and intended to supplement the 1959 CoE Convention[24]. The Schengen Conventions substantially renewed MLA. They replaced the diplomatic channel by direct cooperation between judicial authorities, which did become competent for deciding, sending, executing and resending. Gradually other EU Member States and non EU Member States acceded to these agreements and they were integrated into the Amsterdam EU Treaty in 1999.

In 1993 it became possible to include MLA in the EU Maastricht Treaty. However, it ended up in the so-called third pillar, with a strong intergovernmental character. Within that framework CoE Conventions were gradually replaced by EU conventions: the 1997 Naples II Convention on Mutual Assistance and Cooperation between Customs Administrations[25] and the 2000 EU Convention on Mutual Legal Assistance in Criminal Matters[26]. The importance of the 2000 MLA

[24] Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders, 14 June 1985, (1991) 30 ILM 68; Convention Implementing the Schengen Agreement of 14 June 1985, signed 19 June 1990, [2000] OJ L 239/19; in force 1 September 1993.

[25] 23 January 1998, OJ C 24/2.

[26] 12 July 2000, OJ C 197/3.

Convention cannot be underestimated. The Convention, inspired by the Schengen Conventions, is conceptually based on direct cooperation between judicial authorities. Direct cooperation between judicial authorities in the EU does not mean that a request from a requesting authority automatically has legal value in the territory of the requested authority. As a rule, these warrants must be converted into a national decision in the requested State through *exequatur* proceedings, against which legal remedies can be used.

The 2000 MLA Convention is also very innovative as far as the investigative tools themselves are concerned. Requests can be sent out to obtain the gathering of evidence through the use of SITs. Article 13 of the 2000 Convention provides the legal basis the setting up of JITs, composed of judicial, police and/or customs officials of the member States and even of Europol. The JITs were later developed in a specific framework decision[27]. Finally, requesting authorities can request authorities to apply provisions of their domestic law with the aim of obtaining admissible evidence before the courts of the requesting state. Requested authorities can apply this *lex fori rule* instead of the *lex loci rule*, if it does not contravene the fundamental rules of their legal order. This can be very useful to deal with differences in procedural safeguards and rights of the defence (assistance of a lawyer, judicial authorization, etc.) and thus with transnational use of evidence in the EU. It is a way to streamline, within the existing legal frameworks, gathering of evidence and use of evidence, as long as the fundamental rules of the legal regimes allow it.

The 2000 MLA Convention was further enriched in 2001 with an Additional Protocol[28] aiming at further improving MLA in the financial sector. It sets aside bank secrecy and introduces obligations to facilitate the transfer of information on bank accounts and banking operations.

[27] Council FD of 13th of June 2002, OJ L 162/1.

[28] Protocol established by the Council in accordance with Article 34 of the *Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union*, OJ 2001 L 326/2.

4.2. The Strengthening of MLA in Practice

The EU has not only focused on the drafting of new EU conventions, but also invested in practical improvements: the establishment of liaison magistrates and the creation of a European Judicial Network. However, only a minority of the EU Member States have established liaison magistrates. They have no operational powers and cannot investigate, but are facilitators. Thanks to their knowledge of both systems and their contacts, they know what has to be done legally and practically to prepare and execute MLA requests. On the other hand the European Judicial network in MLA[29] has been very successful in establishing a horizontal network between judicial authorities responsible for MLA in the EU member states and to elaborate good practices, judicial guides, etc.

4.3. From MLA to Mutual Recognition in the EU

4.3.1. The EU Amsterdam Treaty and the Special Tampere European Council

In 1999 the European Council organized a special meeting on the AFSJ in Tampere. In the Tampere conclusions mutual recognition (MR) became a cornerstone of judicial cooperation and the aim was to replace all MLA conventions by proper EU MR Instruments[30]. The MR concept had been applied by the community legislator in many substantive fields of the internal market with the aim of avoiding

[29] There are several similar regional networks: the Judicial Regional Platforms of Sahel and Indian Ocean Commission Countries, the Commonwealth Network of Contact Persons, the Hemispheric Information Exchange Network for Mutual Legal Assistance in Criminal Matters and Extradition of the Organization of American States, and the Ibero-American Legal Assistance Network (IberRed).

[30] See Presidency conclusion no. 33 of the Tampere special European Council. For in depth analysis, see J. OUWERKERK, *Quid Pro Quo? A Comparative Law Perspective on the Mutual Recognition of Judicial Decisions in Criminal Matters*, Cambridge, 2011; A. SUOMINEN, *The Principle of Mutual Recognition in Cooperation in Criminal Matters: A Study of the Principle in Four Framework Decisions and in the Implementation Legislation in the Nordic Member States*, Cambridge, 2011.

detailed harmonization. However, the possibility of extrapolating it to judicial decisions was not that self-evident, as harmonization in the area of criminal procedure and applicable safeguards was minimal or non-existent. In 2000 the Commission published its Communication on Mutual Recognition of Final Decisions in Criminal Matters[31]. MR would apply to both court decisions and pre-trial decisions, as well as orders or warrants to gather evidence or to arrest and surrender suspects.

To what extent is MR different from MLA? The basic idea was that, despite the differences between the procedural regimes in the member states, they were all party to the European Convention of Human Rights and could thus trust each other. Mutual trust was presupposed and considered sufficient grounds to apply MR, even with little or no harmonization in the field. This means that MR orders or warrants coming from an issuing member state have legal value in the AFSJ and could thus automatically be executed without an *exequatur* procedure. Legal doubts about the order or warrant, linked to for instance the legality of the evidence that served to justify the order or warrant, could only be challenged in the issuing member state.

In 2002 the Council of Ministers adopted the first MR instrument: the European arrest warrant (EAW)[32], replacing the extradition conventions. The EAW was adopted under a fast track procedure, after the 9/11 events and did not include harmonization of investigative acts or procedural safeguards. An EAW, whether meant to bring a suspect to trial or to execute the trial sentence, is based on mutual trust and must thus be recognized and executed, unless mandatory or optional grounds of non-recognition apply. However, the grounds are strongly restricted, compared to the refusal grounds under the MLA extradition treaty, and do not contain grounds that are based directly on a human rights clause.

[31] COM(2000) 495 final, available at <http://eur-ex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0495:FIN:EN:PDF>.

[32] Council Framework Decision 2002/584/JHA on the *European Arrest Warrant and Surrender Procedure between Member States of 13 June 2002*, OJ 2002 L 190, p. 1. The decision has been amended by Council Framework Decision 2009/299/JHA of 26 February 2009, OJ 2009 L 81, p. 24.

4.3.2. Mutual Recognition and Gathering of Evidence: Free Flow of Evidence?

After the introduction of the EAW it was time to deal with the replacement of MLA by MR in the area of evidence. In 2003 the European Commission submitted a proposal for a European Evidence Warrant (EEW)[33] that was finally adopted in 2008[34] after difficult negotiations. The EEW was limited to existing evidence and thus interrogations, interception of telecommunications and body searches were excluded from its scope of application. The EEW applies to orders issued by judicial authorities and to certain extents also by administrative law enforcement agencies. In order to issue an EEW the issuing authority must comply with the proportionality principle (using the least intrusive means available) and reciprocity. The latter means that the objects, documents or data can be obtained under the law of the issuing State in a comparable case if they were available on the territory of the issuing State, even though different procedural measures might be used. The EEW also contains complex provisions on double criminality. Germany negotiated a stand-alone position permitting it to make execution subject to verification of double criminality in the case of the offences relating to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion and swindling. These were offences for which no double criminality requirement exists in the EAW. Moreover, some of them have been harmonised by EU law. Also when coercive measures such as search and seizure are ordered, Member States can impose double criminality requirements that go beyond the ones foreseen in the EAW.

The execution of an EEW should, to the widest extent possible and without prejudice to fundamental guarantees under national law, be carried out in accordance with the formalities and procedures expressly

[33] See J.A.E. VERVAELE (Ed.), *European Evidence Warrant: Transnational Judicial Inquiries in the EU*, Antwerp-Oxford, 2005.

[34] Council Framework Decision 2008/978/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*, 2008, OJ L 350/72, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008F0978:EN:NOT>.

indicated by the issuing State. This means that an enlarged concept of *lex fori* is applied. However, Member States are wary of the differences in criminal procedure between themselves and try to protect against dissymmetry between their systems of criminal procedure and legal safeguards. Moreover, the list of grounds of non-recognition or non-execution in Article 13 is very long and all of them are optional. Although the EEW was adopted in 2008, Member States have not implemented it or don't use it The most common reason was that both practitioners and Member States were not that convinced of its utility. The EEW does not deal with all evidence and leads in practice to very complex procedures. The EEW could be used for freezing existing evidence, but for the execution of it MLA requests were again needed. Practitioners also complain about an overly fragmented and complex regulatory frame.

In the 2009 Stockholm program, the European Council decided that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on MR, should be further pursued. The European Council indicated that the existing instruments in this area constitute a fragmentary regime and that a new approach was needed, based on MR, but also taking into account the flexibility of the traditional system of MLA. It called for a comprehensive system to replace all the existing instruments, including the EEW, covering as far as possible all types of evidence and containing deadlines for enforcement and limiting as far as possible the grounds for refusal.

4.3.3. Draft European Investigation Order (EIO)

Frustrated with the EEW, seven Member States submitted in 2010 a proposal for a directive for a European Investigation Order (EIO)[35]. A political agreement was reached in the Council[36] and in December 2013 an amended text was approved by the LIBE-Commission of the European Parliament (EP)[37]. The EIO has a horizontal scope and

[35] Proposal of April 29th 2010 (COPEN 15), initiative of Belgium, Bulgaria, Estonia, Spain, Austria, Slovenia and Sweden.

[36] General approach, 21.12.2012, 18918/11, COPEN 369.

[37] The text is awaiting approval by the General Assembly of the EP.

therefore applies to all investigative measures aimed at gathering evidence. The proposed EIO also recognizes that this single regime for obtaining evidence will have to be completed by additional rules for some types of investigative measures, such as the temporary transfer of persons held in custody, hearing by video or telephone conference, obtaining of information related to bank accounts or banking transactions, controlled deliveries or covert investigations. The MR regime of the EIO is certainly not the automatic one envisaged at Tampere. Indeed, something akin to 'double procedurality' or 'double lock' has been introduced. The MR regime does not lead to automatic execution, as Article 2(b) stipulates that the execution must not only be in accordance with the EEW but also with the procedures applicable in a similar domestic case. Issuing authorities may assist in the execution of the EIO (as in the MLA regime), but assistance is also conditional on respect for fundamental principles of the law of the executing state and essential national security interests. *Lex fori* principles do apply (Article 8(2)) unless contrary to the fundamental principles of the law of the executing state. The EIO has a quite complex system of grounds for non-recognition and non-execution. The executing authority should, wherever possible, use another type of measure if the requested measure does not exist under its national law or would not be available in a similar domestic case (referral to an equivalent measure under domestic law) and should always apply the least intrusive measure (proportionality principle). The issuing authority should therefore ascertain whether the evidence sought is necessary and proportionate for the purpose of proceedings, whether the measure chosen is necessary and proportionate for the gathering of this evidence, and whether, by means of issuing the EIO, another MS should be involved in the gathering of this evidence. It is interesting that LIBE/EP has obtained the inclusion of a human rights clause in the substantive provisions[38]. Article 2a underlines the duty to comply with Article 6 TEU[39] and insists that it include the rights of defence of persons subject

[38] Earlier MR instruments referred only to human rights in the preamble.

[39] Article 6 TEU imposes the EUCFR as a binding instrument and lays down the legal basis for the application of derived human standards from the European Convention of Human Rights of the Council of Europe and of derived constitutional

to criminal proceedings. However when it comes to the grounds of non-recognition or non-execution in Article 10, both in case there would be substantial grounds to believe that the execution of the investigative measure contained in the EIO would be incompatible with the executing Member State's obligations under Article 6 TEU and the EU Charter of Fundamental Rights (EUCFR) or the execution would infringe the *ne bis in idem* principle, the recognition or execution of the EIO may be refused. However, these grounds for non-recognition of non-execution are, like all the others, optional and dependent upon the implementing legislation. The Member States may transform them into mandatory grounds, but may also leave it to the discretion of the judicial authorities.

It is of interest that the EIO may also be requested by a suspected or accused person, within the framework of applicable defence rights and in conformity with national criminal procedure. This option (Article 2a in the EP draft) is thus very dependent upon domestic law and can lead to very different situations from one Member State to another. Legal remedies available against an EIO should be at least equal to those available in the domestic case against the investigative measure concerned, including the same time limits. However, substantive reasons for issuing the EIO may only be challenged in the issuing State. Transfer of evidence may be suspended pending the decision about the legal remedy.

4.3.4. Bilateral MLATs between EU and Third States

The EU has negotiated a set of bilateral MLATs with third States. In 2010 it signed an MLAT with Japan[40] and then with the US[41]. These

standards of the common constitutional traditions of the Member States as general principles of EU law.

[40] Agreement between the European Union and Japan on Mutual Legal Assistance in Criminal Matters, OJ L 39/20, 12.02.2010, available at http://eur-<lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:039:0020:0035:en:PDF>. The agreement entered into force, after ratification by all EU Member States, in 2010.

[41] Agreement on Mutual Legal Assistance between the European Union and the United States of America, OJ L 181/34, 19.07.2003, available at <http://eur-lex.europa.

MLATs only supplement existing bilateral MLATs between the US and EU member states. In the case of Japan there were not that many bilateral MLATs, so the added value is high, but even in case of the US the added value is high as these MLATs contain modern techniques of evidence gathering including video-conferencing, JITs and financial evidence gathering (identification of bank accounts, financial monitoring, etc.). Moreover the scope includes MLA with administrative law enforcement agencies. Further MLATs with other third states will be concluded in the future.

4.3.5. The Setting Up of a Vertical Framework for MLA: Eurojust & the European Public Prosecutor's Office (EPPO)

At the Tampere Council it was also decided to set up Eurojust, in which prosecutors from every Member State (national members) form a College. In 2002 the legal framework for its mission and empowerment was adopted and reflected a strong intergovernmental approach. Eurojust's aims include promoting and improving MLA between the competent national authorities and providing general support to increase the effectiveness of their investigations[42]. Eurojust acts through its national members or through the College. Even if the powers of a national member are limited to its jurisdiction, they cannot be considered as a requesting authority or less an operational judicial authority. They remain mainly a liaison-officer. The powers of the College have been put into stronger terms, but even then it is legally unclear if they can send out binding MLA requests to the competent authorities of the Member States. Eurojust is mostly involved in coordination of investigative and prosecutorial action and in organizing and sustaining the JITs. In 2009 the Eurojust Decision was amended[43]

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eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:181:0034:0042:en:PDF>. The agreement entered into force, after ratification by all EU Member States, in 2010.

[42] Article 3(1).

[43] Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

in order to achieve greater equivalence powers for the national members in their national legal orders.

Overall the 2009 reform has been very minimal and mostly limited to access to law enforcement data and has not resulted in a common set of powers for the national members, even when dealing with MLA or MR in their own legal orders. Moreover very few Member States have enacted legislation in order to insert the powers for their national member into the national legal order. Many member states are opposed to the idea of delegated competences for national members, even if they can only act in their own jurisdiction. They are afraid of a body with supranational competences and have put forward constitutional reservations.

The Lisbon Treaty laid down in Article 85 TFEU a new legal basis by which Eurojust becomes a European Agency in the AFSJ and gains a new mission. It will remain competent for serious cross border crime but should also deal with serious crime requiring prosecution on a common basis. Eurojust may also initiate investigations, but it is clear from the text that Eurojust cannot become a supranational or federal investigative and prosecutorial office, as all procedural acts must be carried out by competent national authorities. In 2013 the European Commission submitted a proposal for a regulation on the European Union Agency for Criminal Justice (Eurojust)[44]. Beside reforms in Eurojust's organizational structure, the proposal also includes new definitions of the operational powers. However, it has not proposed that the powers of Eurojust College become operational or executive, nor can they be considered as binding requests or orders. It is interesting, however, that it proposes that the national member should be empowered to issue and execute MLA requests or MR orders in his national jurisdiction. Second, in cases of urgency, the national member will also be able to order all types of investigative measures, including coercive ones. It remains to be seen if these extensions of the powers of the national members will survive the negotiations. This proposal suggests that Eurojust has become an EU agency, but that the

[44] COM(2013) 535 final, <http://eur-ex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0535:FIN:EN:PDF>.

Commission has not made full use of the potentialities of the legal basis in the Lisbon Treaty, as its autonomous powers to start investigations and to send out MLA requests and MR orders in the AFSJ are poorly elaborated. Eurojust will remain, as it stands, mainly an agency that coordinates the cross-border activities of the law enforcement agencies of the Member States. So the only real vertical dimension for MLA is the establishment of the European Public Prosecutor's Office (EPPO). After long discussions, going back to the *Corpus Juris* project[45] and the EU Green paper[46], the EU Lisbon Treaty included in Article 86 TFEU a legal basis to establish the EPPO. It will be an independent EU body with the authority to investigate and prosecute offences affecting the Union's financial interests (EU subsidy fraud, EU corruption, EU fraud with custom duties, etc.). This material competence could be extended to other serious transnational offences. Adjudication of these criminal cases does however remain the exclusive competence of the Member States. In other words, the EPPO will prosecute these cases before national courts of the Member States.

In the summer of 2013 the Commission submitted a draft regulation for the EPPO[47]. The Commission financed an academic study with the aim of elaborating Model Rules[48] for the criminal procedure of the EPPO. These Model Rules strived to establish a fair balance between European-wide powers of the EPPO and the rights of the suspect. In the Commission's draft regulation the EPPO is a Union body with a decentralized structure of delegate prosecutors in the Member States. Its task is to direct and supervise investigations, and carry out acts of prosecution. As a rule, the investigations of the EPPO should be carried out by 'European Delegated Prosecutors' in the Member States. In

[45] See M. DELMAS-MARTY, J.A.E. VERVAELE (Eds.), *Implementation of the Corpus Juris in the Member States*, Vol I-IV, Antwerp-Groningen-Oxford, 2000-2001.

[46] COM(2001) 715 final, available at <http://europa.eu.int/comm/anti_fraud/livre_vert/document/en.htm>.

[47] COM(2013) 534 final, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0534:FIN:EN:PDF>.

[48] See, http://www.eppo-project.eu/index.php/EU-model-rules; K. LIGETI (Ed.), *Toward a Prosecutor for the European Union. A comparative analysis, Volume 1*, Oxford, 2012; K. LIGETI (Ed.), *Toward a Prosecutor for the European Union. Draft Rules of Procedure, Volume 2*, Oxford, 2013.

cases involving several Member States or cases which are of particular complexity, efficient investigation and prosecution may require that the European Public Prosecutor also exercise his powers by instructing national law enforcement authorities directly. Although the recitals refer to uniform investigative powers throughout the Union and the proposal states that 'for the purpose of investigations and prosecutions conducted by the European Public Prosecutor's Office, the territory of the Union's Member States shall be considered a single legal area in which the European Public Prosecutor's Office may exercise its competence'[49], it is clear from an overall reading of the text that these powers are fully dependent upon national law and territory[50]. Moreover the text underlines that all coercive measures that can be ordered or requested by the EPPO as investigative measures are subject to authorization by the competent judicial authority of the MS where they are to be carried out[51]. If we examine the EPPO proposal, it is doubtful whether the content is in line with the aim of Article 86 TFEU, as it seems that the content could have been achieved by upgrading Eurojust under Article 85 TFEU. The *proprio motu* investigative and prosecutorial powers, for which he/she would not need to rely on MLA or MR, are absent from the proposal. Moreover the whole concept of European territoriality, as a common jurisdiction to investigate and prosecute, has been watered down in the proposal to a fragmented panoply of national jurisdictions.

The negotiations have just started and it remains to be seen if this proposal will proceed and which amendments will be introduced to the text.

5. Conclusion

Thanks to the increasing efforts of the international community to control transnational crime MLA has become a pivotal issue of global governance and part of transnational criminal justice. This is clearly

[49] Article 25(1).

[50] For instance Article 18(6).

[51] Article 26(4).

reflected in the evolution from the Vienna Convention towards UNTOC. Model laws and model bills have contributed to the standardization of national MLA legislative design and practice. Nevertheless, there are clearly loopholes and weaknesses that can be identified. Most of the efforts are linked up with the paradigm of drug trafficking, organized crime and terrorism and do not cover all forms of serious crimes for which MLA might be needed. Although the UN conventions are global, the reach and effective implementation is certainly not as global as it could be. When it comes to the substance of the Conventions and the model law and bills there are some striking features. MLA remains a model of Sovereign state-to-state cooperation based on the executive model of central authorities. In some countries these central authorities have delegated autonomous powers, but in many this is not the case. The MLATs are highly dominated by the interests of the executive and of the prosecutors. The grounds for refusal are mostly widely defined and reflect the same interest. This is the reason why in most cases they are optional, and thus depend on the discretionary power of the executive. Defence rights or fair trial rights, and human rights issues of flagrant denial of justice, do not seem to belong in the vocabulary of MLA and are not included as mandatory grounds of refusal in any case. When it comes to the MLA tools there is no clear substantive line of division between police cooperation, administrative assistance and MLA. MLA also deals with information exchange and can sometimes include assistance for administrative enforcement agencies. The MLA conventions remain very cautious when it comes to coercive measures and SITs and condition these upon stringent rules and procedures of the domestic law of the executing state. Application of *lex forum* provisions is sometimes submitted to conditions of conformity with domestic law, sometimes only to fundamental principles. Finally, the new digital techniques of investigation, like digital surveillance or remote computer searches, are absent in MLA instruments, with exception of the 2007 Model Law. The UN executive approach to MLA means also that the persons concerned (suspects and victims in particular) remain objects of MLA and cannot derive from the MLA scheme rights to gather evidence. If they have any rights it derives from applicable national law. It remains

also unclear for the persons concerned to if and to which extent they can derive rights from the UN human rights instruments in the area of MLA. In other words, there is a lot to be done at UN level in order to elaborate a modern MLA scheme that updates operational tools and includes human rights protection.

In the EU there has been a very substantive paradigm shift from MLA to MR. The emphasis is on direct cooperation between judicial authorities and the grounds for refusal have been reduced. However, the lack of equivalent procedural investigative acts and related procedural safeguards in the Member States has led to distrust. The efforts under the Lisbon Treaty to harmonise basic fair trial rights through the directive on right to translation and interpretation[52], the directive on the right to information in criminal proceedings and the directive on right to access to a lawyer in criminal proceedings[53], are only first steps and do not resolve all the issues of fairness of the proceedings that might arise when executing MR evidence orders, such as access to the file/disclosure or remedies against the execution of the investigative act or against the transfer of the obtained evidence. The very recent second draft legislative package of the European Commission on procedural safeguards does not tackle these aspects at all[54].

From the negotiations on the EEW and draft EIO we can conclude that the EU Member States are not aiming at a common approach for the AFSJ. They try as much as possible to reduce transnational gathering of evidence to their own territory, their own applicable law and to as far as possible build in requirements from their domestic legal orders. The AFSJ remains to a large extent a patchwork of sovereign jurisdictions that have difficulty in accepting new tools for the gathering of criminal evidence in an integrated territory. When it comes

[52] Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, 2010, OJ L 280/1.

[53] Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, 2013, OJ L 294/1.

[54] Proposal for a directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 0821, available at < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013PC0821:en:NOT>.

to the supranational law enforcement agencies in the AFSJ (Eurojust and EPPO) it is quite clear that the existing law enforcement agencies and the future EPPO are neither designed as operational judicial authorities nor as competent MLA or MR authorities. They remain mostly mediators between national authorities and to the extent that they get investigative powers, these are inserted into the applicable law of the domestic jurisdictions.

To wind up, in order to control transnational crime and to provide effective law enforcement that respects the rule of law and applicable human rights standards there is need for an innovative approach both at UN and European regional level. At the global level instruments must be updated and have to take into account the digital dimension of our societies. The optional grounds for refusal linked to sovereignty should be reduced and mandatory grounds linked to human rights standards included. The MLA regimes also should take into account the dimension of the defence as a legal subject with rights and remedies in the proceedings.

At the regional EU level there is a need for further harmonisation of the investigative tools and procedural safeguards in the Member States, so that MR can function in the common territory of the AFSJ. The regional level should be able to deepen cooperation on MLA, integrate it with human rights protection, and make it less dependent upon national sovereignty.

PART II

EUROPEAN CRIMINAL JUSTICE AND FUNDAMENTAL RIGHTS

CHAPTER 5

NE BIS IN IDEM: TOWARDS A TRANSNATIONAL CONSTITUTIONAL PRINCIPLE IN THE EU?[1]

1. Introduction

Many areas of regulation and enforcement have been substantially affected by the increasing European integration process in the last few decades. The result is not only visible through the implementation, application and enforcement of EU policies in every Member State (the vertical dimension of integration), but also in the creation of common areas such as the customs union, the internal market and the area of freedom, security and justice (the horizontal dimension of integration). Thanks to the four freedoms of the internal market citizens can enjoy a whole set of basic economic and non-economic freedoms. Thanks to the Lisbon Treaty citizens can expect that the Union will offer them free movement, in conjunction with appropriate measures to prevent and combat crime (Article 3(2) TEU) and to offer security in a common area of freedom, security and justice. Both the vertical and horizontal dimension of European integration are part of a EU legal order (with European and national components) in which the rule of law and human rights standards do apply. The Lisbon Treaty has strengthened this in Article 6 TEU by recognizing the EU Charter of Fundamental Rights (CFREU) as a source of binding primary EU law.

When it comes to the enforcement of EU policies in the Member States (the vertical dimension) or the enforcement of EU policies in a transnational setting (the horizontal dimension) there is a double EU

[1] This article was published as J.A.E. VERVAELE, *Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*, in S. GLESS, J.A.E. VERVAELE (Eds.), *Special on Transnational Criminal Justice*, in *Utrecht Law Review*, 2013, pp. 211-229.

interest at stake: effective enforcement and compliance with the EU human rights standards.

With the growing impact of EU regulations at the domestic level and the increasing mobility of goods, persons, services and capital in the EU and the related increasing transnational dimension of domestic criminal justice activities, there is an increasing risk that a person might suffer double jeopardy or be prosecuted and/or be punished twice, at the national level (when enforcing EU policies) or at the EU level by several EU Member States or even by an EU Member State and the Commission, in a field like competition, where the Commission has punitive adjudicative jurisdiction.

In a setting of an integrated internal market and a common area of freedom, security and justice citizens and legal persons might expect equivalent human rights protection between the Member States of the EU and at the European level. They might also expect that this protection complies at least with the common binding standards of the European Convention on Human Rights (ECHR). Today, in the EU, do we have an equivalent transnational protection of *ne bis idem* that applies both in the vertical and horizontal dimension of European integration? Is the domestic regulation of *ne bis in idem* in each EU Member State or is the *ne bis in idem* principle enshrined in public international law (human rights law) able to offer this equivalent protection? Or do we need a proper transnational *ne bis idem* principle in the EU? If so, what are the modalities of this transnational principle in order to comply with equivalent protection for citizens and legal persons?

2. The Rationale and Scope of the Domestic Ne Bis In Idem *Principle*

The *ne bis in idem* principle is a general principle of (criminal) law in many national legal orders, sometimes even codified as a constitutional right such as the clause relating to *ne bis in idem* (prohibiting dual punishment – *double jeopardy*) of the Fifth Amendment of the Constitution of the United States of America or Article 103 of the German Constitution. Historically the *ne bis in idem*

principle only applies nationally and is limited to criminal justice; this means precluding application to punitive administrative enforcement. Recently, some states have widened the scope to punitive proceedings and penalties.

The rationale of the *ne bis in idem* principle is manifold. Traditionally it was very much linked to the sovereignty and legitimacy of the state and its legal system, as well as respect for the *res judicata* (*pro veritate habitur*) of final judgments. The link with *res judicata* and the international recognition of criminal verdicts could of course also give international effect to the *ne bis in idem* principle. However, few countries recognize the validity of a foreign judgment in criminal matters for execution or enforcement in their national legal systems without this being founded on a treaty. Even the recognition of *res judicata* in respect of a foreign criminal judgment is problematic, certainly when it concerns territorial offences. The recognition of foreign *res judicata* means that the prospect of a new prosecution or punishment is no longer possible (the negative effect) or that the decision has to be taken into account in the context of judgements pending in other cases (the positive effect). The majority of common law legal systems do actually recognize the *res judicata* effect of foreign judgments. In civil law systems, the Netherlands has the most far-reaching and liberal provisions. The Dutch Criminal Code contains a general *ne bis in idem* provision that is applicable to both domestic and foreign judgements, regardless of where the offence was committed[2]. However, even the Netherlands excludes punitive administrative penalties from the scope of application.

In every single Member State the *ne bis in idem* principle raises many questions concerning both the *idem* and *bis* element of the principle. In order to consider the meaning of the same/*idem*, it may be asked whether the legal definition of the offences should be considered as the basis of the definition of the term the same (*idem*), or should it be the set of facts (*idem factum*)? Does it depend on the judicial rights protected by the legal provisions and their scope? Are natural and legal

[2] For a commentary on the Dutch *ne bis in idem* in Art. 68 of the Criminal Code, see P. BAAUW, *'Ne bis in idem'*, in B. SWART, A. KLIP (Eds.), *International Criminal Law in the Netherlands*, Freiburg i.Br., 1997, pp. 75-84.

persons different with regard to the application of the principle? Is the reach of the principle limited to double punishment under criminal law or does it include other punitive sanctions that may be imposed under private law or administrative law? What is a firm and final sentence? Does it include settlements with the public prosecutor or with other judicial authorities? Must the sentence have been enforced or executed? In other words, there is no common and equivalent standard of *ne bis in idem* between the EU Member States. This can create a lack of equivalent protection for the citizen or legal person when it comes to the enforcement of EU law in the domestic legal order. Why would a EU citizen or legal person be punished twice with a punitive administrative fine and a criminal penalty for EU subsidy fraud in one EU Member State while he is protected against that type of double punishment in another EU Member State? Second, the domestic *ne bis in idem* principles only has domestic effect and cannot cover transnational situations in the EU. Third, very few EU Member States have a system in place by which to recognize the validity of foreign judgments in punitive matters so that it would bar double punishment. It thus becomes clear that the non-harmonised domestic *ne bis in idem* principle is not able to offer adequate and equivalent protection for citizens and legal persons, either at home, or in the horizontal internal market or the common area of freedom, security and justice.

In the last few centuries the *ne bis in idem* principle also mainly became a principle by which to offer judicial protection for the citizen against the *ius puniendi* of the state and, as such, it forms part of the principles of due process and a fair trial, in other words it was converted into a fundamental right protecting against cumulative criminal punishment[3]. This not only resulted in the elaboration of domestic constitutional *ne bis in idem* principles, but also in *ne bis in idem* provisions in public international law/human rights law (IHRL). Besides, nation states have been increasingly subscribing to bilateral and multilateral conventions on mutual legal assistance (MLA) in

[3] See the excellent PhD thesis by J. LELIEUR-FISCHER, *La règle ne bis in idem. Du principe de l'autorité de la chose jugée au principe d'unicité d'action répressive*, Université Panthéon-Sorbonne (Paris I), Paris, 2005 (not published).

criminal matters. Can these human rights and MLA conventions offer adequate and equivalent protection for citizens and legal persons?

3. Public International Law and Ne Bis In Idem

As a starting point we must underline that there is no general rule of international law that imposes an international obligation to comply with *ne bis in idem*[4]. Its application is conventional and thus depends solely on the content of international treaties. We can find public international law treaty-based *ne bis in idem* provisions in three sources: international human rights law (IHRL), the law regulating international criminal tribunals and multilateral treaties dealing with judicial cooperation in criminal matters, also called mutual legal assistance (MLA).

3.1. IHRL and Ne Bis In Idem

The conversion of *ne bis in idem* into a domestic fundamental right protecting the citizen against the cumulative use of the *ius puniendi* by the state also found its way into IHRL after World War II. The *ne bis in idem* principle has been enshrined as an individual right in international human rights treaties, such as in Article 14(7) of the International Covenant on Civil and Political Rights of 19 December 1966[5]. We must however take into account that some states formulated reservations to the principle[6].

[4] Also underlined by the German Federal Constitutional Court, 2 BVerfG 15 December 2011, 2 BvR148/11, Para. 31.

[5] Art. 14(7) ICCPR: 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.

[6] The Netherlands, for example, has formulated the following reservation: 'The Kingdom of the Netherlands accepts this provision only insofar as no obligations arise from it further to those set out in Article 68 of the Criminal Code of the Netherlands and Article 70 of the Criminal Code of the Netherlands Antilles as they now apply. They read: Except in cases where court decisions are eligible for review, no person may be prosecuted again for an offence in respect of which a court in the Netherlands or the

The ECHR does not contain such a provision and the former European Commission of Human Rights[7] denied the existence of the principle as such under Article 6 of the ECHR, without however precluding in absolute terms that certain double prosecutions might violate the fair trial rights under Article 6 ECHR. The provision has meanwhile been elaborated in Article 4 of the 7th Protocol to the ECHR[8], but it is not a binding instrument for all EU Member States. Neither the Netherlands nor Germany has ratified this Protocol. The UK is the only member of the Council of Europe that did not even sign it. Moreover, countries like France and Luxembourg have formulated reservations when ratifying. Many EU countries also deposited limiting declarations at the moment of signature. It is clear that several EU countries[9], like Austria, France, Germany, Italy and the Netherlands, have limited the scope of application of the principle by precluding its application to punitive penalties outside of the criminal code. Germany, for instance, has done this in line with Article 103 of its Constitution. The *ne bis in idem* principle has also been laid down in the Inter-American Convention on Human Rights in Article 8(4).1[10].

Netherlands Antilles has delivered an irrevocable judgment. If the judgment has been delivered by some other court, the same person may not be prosecuted for the same offence in the case of (I) acquittal or withdrawal of proceedings or (II) conviction followed by complete execution, remission or lapse of the sentence'.

[7] European Commission of Human Rights, 13 July 1970, appl. no. 4212/69, CDR 35, 151.

[8] '1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly *discovered facts, or if* there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3. No derogation from this Article shall be made under Article 15 of the Convention'.

[9] See the overview of declarations and reservations at <http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=117&CM=8&DF=11/01/2013&CL=ENG&VL=1> (last visited 11 January 2013).

[10] 'An accused person acquitted by a non appealable judgment shall not be subjected to a new trial for the same cause'.

What can we derive from the case law of both regional human right courts and from the UN Human Rights Committee? To start with the latter, the Human Rights Committee has[11] made it clear in its case law that Article 14(7) does not apply to foreign *res judicata*, in other words the UN *ne bis in idem* principle only has effect in the domestic legal order of each Member State. Also the regional human rights courts are in line with the IHRL jurisdiction and have given domestic legal effect to the IHRL *ne bis in idem* principles. That means that the persons concerned cannot claim the international or transnational effect of the principle under IHRL.

From the case law of the Inter-American Court on Human Rights it has also become clear that the *ne bis in idem* principle is not an absolute human right. The positive duty to investigate, prosecute and punish serious violations of human rights (that include core international crimes) can result in setting aside fraudulent *res judicata* in criminal matters, because of the symbolic punishment, or because of the way in which evidence was gathered during the investigation and presented in the indictment, or because of the way in which the trial court came to its verdict[12]. This is very much in line with the approach under the law regulating international criminal courts. Although Article 10 of the ICTY Statute and Article 20 of the Rome Statute of the ICC recognize that the *ne bis in idem* principle should apply in the combined jurisdiction of national and international criminal courts, both international criminal courts can activate their jurisdiction, even in the case of final national judgments, if the national court proceedings were not impartial or independent, were designed to shield the accused from

[11] The Human Rights Committee ruled that Article 14(7) does not apply to foreign *res judicata*, see UN Human Rights Committee 2 November 1987. See also its General Comment on Article 14 of the 1966 International Covenant on Civil and Political Rights in 2007 at point 57: 'This guarantee applies to criminal offences only and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of Article 14 of the Covenant. Furthermore, it does not guarantee ne bis in idem with respect to the national jurisdictions of two or more States. This understanding should not, however, undermine efforts by States to prevent retrial for the same criminal offence through international conventions'.

[12] *Loayza-Tamayo v Peru*, 17 September 1997; *Almonacid-Arellano v Chile*, 26 September 2006, Para. 154 and *La Cantuta v Peru*, 29 November 2006, Para. 153.

international criminal responsibility or the case was not diligently prosecuted.

This analysis has made clear that the IHRL *ne bis in idem* principle is unable to offer international or transnational protection for the principle. Has it possibly been able to harmonise, in a praetorian way, the domestic application of the principle? The case law of the Human Rights Committee on *ne bis in idem* is so limited that we can exclude this from the outset. From the case law of the European Court of Human Rights (ECtHR) we can deduce that it has not been easy for the Court to define in a clear way the rationale and the scope of the *ne bis in idem* principle. The Court has been asked in the majority of cases to deal with the definition of *idem*. After some contradictory judgements on the application of Article 4 of the Seventh Protocol, based either on *idem factum* in *Gradinger v Austria* or on the concept that the same conduct may constitute several offences in *Oliviera v Switzerland*[13], in the case of *Franz Fischer v Austria*[14] the ECtHR elaborated an *idem factum* concept based on the 'essential elements' of the two offences, although in the case of *Götktan v France*[15] the Court once again seemed to place its trust in the legal *idem*. In recent years the Court has again relied on the *idem factum* concept based on the 'essential elements' of the offences, such as in the *Bachmaier v Austria* case[16], the *Hauser-Sporn v Austria* case[17] and the *Garretta v France* case[18]. Very recently, in the case of *Zolutukhin v Russia,* the Grand Chamber[19] admitted that its case law lacked legal certainty and guidance and accepted the necessity of a harmonised interpretation. In *Zolutukhin v Russia* the

[13] *Gradinger v Austria*, 23 October 1995, Series A no. 328-C and *Oliveira v Switzerland*, 30 July 1998, Reports of Judgments and Decisions 1998-V, p. 1990. See <http://www.echr.coe.int> for these decisions.

[14] *Franz Fischer v Austria*, 29 May 2001, Series A no. 312 (C), confirmed in *W.F. v Austria*, 30 May 2002 and *Sailer v Austria*, 6 June 2002. The same approach was applied in *Sailer v Austria*, 6 June 2002.

[15] *Göktan v France*, 2 July 2002. The same approach was applied in *Gauthier v France*, 24 June 2003 and *Ongun v Turkey*, October 2006.

[16] *Bachmaier v Austria*, 2 September 2004.

[17] *Hauser-Sporn v Austria*, 7 December 2006.

[18] *Garretta v France*, 4 March 2008.

[19] *Zolotukhin v Russia*, 10 February 2009.

ECtHR also confirmed its case law on the *bis* element of the principle. The Court defines the *bis* element as the commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*[20]. This means that the element of *bis* also includes the combination of two criminal charges in the sense of Article 6, for instance the imposition of a criminal punitive sanction and an administrative punitive sanction[21]. In the case of *Zolotukhin v Russia* the Court qualified the first administrative offence, by using the Engel criteria, as penal for the purposes of Article 4 of Protocol 7, mostly due to the nature of the offence and the severity of the penalty imposed.

On the harmonising effect at the domestic level the conclusion is thus mitigated. First, not all Member States of the EU have ratified the Protocol. Second, some have formulated reservations. This means from the very start that the effect is unequal between the Member States. Third, the case law of the ECtHR has not been abundant and is not, as is recognized by the Court itself, a scholarly example of clarity and guidance. However, the ECtHR has opted for a harmonising interpretation in its recent case law. The problem remains that this harmonising effect is legally not binding on all EU Member States.

To conclude, we can underline that the binding effect of the IHRL is limited to every single jurisdiction and that the effect of the IHRL *ne bis in idem* principles cannot be qualified as offering equivalent protection in the EU.

3.2. Mutual Legal Assistance (MLA) and EU Mutual Recognition (MR) in Criminal Matters

Within the framework of the Council of Europe efforts have been made since the 1950s to introduce a regional international *ne bis in*

[20] *Zolotukhin v Russia*, 10 February 2009, Para. 83.

[21] The double jeopardy clause in the Fifth Amendment is not limited to criminal law, but includes civil and administrative punitive sanctions. However, the leading case, *United States v Halper*, 490 US 435 (1989), has once again recently been restricted in *Hudson v U.S.*, 522 US 93 (1997). See also J.A.E. VERVAELE, *La saisie et la confiscation à la suite d'atteintes punissables au droit aux Etats-Unis*, in *Revue de Droit Pénal et de Criminologie*, 2002, pp. 974-1003.

idem principle when it comes to MLA. This means that *ne bis in idem* can play a role when it comes to the extradition of a person or to the gathering of evidence abroad through coercive measures. However, in this cooperation framework the *ne bis in idem* principle only applies *inter partes*, which means that it can be or must be applied between the Contracting States in case of a concrete request. It is not considered to be an individual right *erga omnes*.

In the MLA conventional instruments the *ne bis in idem* principle is an important mandatory or optional ground for refusal. The *ne bis in idem* principle was included in the milestone multilateral Extradition Convention of the Council of Europe of 13 December 1957. Article 9 provided not only for the classic formulation of the *ne bis in idem* principle dealing with final judgments (*res judicata*), but also included final decisions of a procedural character. The former ground for refusal is mandatory, however, whereas the latter is only optional:

> Extradition shall not be granted if a final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.

Article 8 also provides an optional ground for a *ne bis in idem* refusal in the case of *lis pendens*:

> The requested Party may refuse to extradite the person claimed if the competent authorities of such Party are proceeding against him in respect of the offence or offences for which extradition is requested.

The Extradition Convention deals with *ne bis in idem* in a classic intergovernmental setting between the requesting and requested state, but the Additional Protocol of 15 October 1975 supplements Article 9

of the Convention with Paragraphs 2 and 3 which also cover other Contracting Parties[22].

In the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters, dealing with the gathering of evidence, there is no *ne bis in idem* provision included, either in the Additional Protocol of 1978 or that of 2001. Neither is this the case in the EU Convention of 2000 on Mutual Assistance in Criminal matters or its Additional Protocol of 2001. In other words European states are willing to accept *ne bis in idem* as a ground of refusal in the MLA when it comes to extradition (including the deprivation of liberty), but not for other investigative coercive measures.

Ne bis in idem is a mandatory ground of refusal under the 1970 Convention of the Council of Europe on the International Validity of Criminal Judgements (Articles 53-57) and under the 1972 Convention on the Transfer of Proceedings in Criminal Matters (Articles 35-37). However, both conventions have a rather low ratification rate and contain quite a number of exceptions to the *ne bis in idem* principle. In the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Article 18, Paragraph 1e), which has been more widely ratified, it is optional, but some Contracting States have

[22] '2. The extradition of a person against whom a final judgment has been rendered in a third State, Contracting Party to the Convention, for the offence or offences, in respect of which the claim was made, shall not be granted:

a) if the afore-mentioned judgment resulted in his acquittal;

b) the term of imprisonment or other measure to which he was sentenced:

I) has been completely enforced;

II) has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty;

c) if the court convicted the offender without imposing a sanction.

3. This mandatory refusal ground can however be set aside (optional) by calling in exceptions based on territoriality principle, vital interest in jeopardy or the implication of own civil servants:

a) if the offence in respect of which judgment has been rendered was committed against a person, an institution or anything having public status in the requesting State; if the person on whom judgment was passed had himself a public status in the requesting State;

b) if the offence in respect of which judgment was passed was committed completely or partly in the territory of the requesting State or in a place treated as its territory'.

included it in their ratification declaration as a ground for the refusal of cooperation requests.

With the coming into force of the Amsterdam Treaty on the European Union in 1998 the European Council introduced an ambitious mutual recognition programme with the aim of replacing the Council of Europe MLA instruments with proper MR instruments of the EU. The first flagship was the European arrest warrant (EAW), replacing the extradition regime. In the EAW a mandatory non-execution in case of *ne bis in idem* is included in Article 3(2):

> If the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State.

However, when there is no final judgment, but only prosecution or where the final judgment is from a third state, the *ne bis in idem* provision is optional in Article 4:

> 2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based (…).
> 5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country.

In the European evidence warrant (EEW), the mutual recognition regime which has replaced the mutual assistance system, a *ne bis in idem* provision has been introduced in Article 13(1)(a), but as an optional ground for non-execution. In the European Investigation Order (EIO)[23] in criminal matters, which is currently being negotiated and which should replace the EEW, it remains an optional ground for non-execution in Article 10(1)(e).

[23] <http://register.consilium.europa.eu/pdf/en/11/st11/st11735.en11.pdf> (last visited 30 May 2013).

What can we conclude from this overview from MLA to MR in criminal matters when it comes to the application of *ne bis in idem*? First of all, it is clear that the principle only comes into play when competent authorities (states or judicial authorities) request MLA or order MR. In other words it is not a person's right but a ground of refusal (MLA) or a ground for non-execution (MR) between states (MLA) or between judicial authorities (MR). It bars cooperation between the parties involved and does not give a right to the subject. Second, only in a couple of situations is *ne bis in idem* a mandatory bar to cooperation; in quite a few situations it is optional or is even not foreseen. Third, the MLA-MR regime does not cover the whole field of punitive penalties. Most instruments do not include punitive penalties under administrative law enforcement. We can conclude that the regional cooperation framework in criminal matters, be it MLA or MR, does not provide for a transnational *ne bis in idem* application in the territories of the Council of Europe Member States or in the territories of the EU Member States in the sense that citizens or legal persons can derive a protective right not to be punished or prosecuted twice.

Overall it has also become clear that the so-called international *ne bis in idem* does not offer an international or transnational protection for the subject in question. De facto public international law only imposes obligations in the domestic legal order or conditions the cooperation between the domestic legal orders, without introducing a transnational regional or global right to *ne bis in idem* protection. This protection against double jeopardy has no international reach or transnational reach for the subject.

Does the process of European integration under the former European Community (EC) and the actual European Union (EU) offer us another panorama of needs and solutions?

4. European Integration and Ne Bis In Idem

4.1. Ne Bis In Idem *in Community Law*

It comes as no surprise that the EC stumbled upon the issue of the transnational application of the *ne bis in idem* principle before the coming into force of the Treaty of Maastricht and the justice and home affairs policy. In the field of competition policy both the European Commission and the national competition authorities were competent authorities to impose punitive administrative sanctions[24]. In some countries the criminal courts also had jurisdiction in competition cases. The risk of double punitive penalties was thus more than real for the legal persons concerned. In 1969 the European Court of Justice (ECJ) already had an occasion to address the issue of *ne bis in idem* in the field of competition. The ECJ held in *Wilhelm v Bundeskartellamt*[25] that double prosecution, once by the Commission and once by the national authorities, was in line with Regulation 17/62[26] and did not violate the *ne bis in idem* principle, given the fact that the scope of the European rules and the national rules differed. However, if this would result in the imposition of two consecutive sanctions, a general requirement of natural justice demands that any previous punitive decisions be taken into account in determining any sanction which is to be imposed (*Anrechnungsprinzip*). In the meantime it has become settled ECJ case law to confirm the *ne bis in idem* principle as a general principle of Community law[27] which means that it is not limited to

[24] W. WILS, *The principle of* ne bis in idem *in EC Antitrust Enforcement: a Legal and Economic Analysis*, in *World Competition*, 2003, no. 2.

[25] Judgment of 13 February 1969, [1969] ECR 3.

[26] Regulation no. 17/62, OJ P 013, 21.02.1962.

[27] See for instance Case 7-72, Judgment of 14 December 1972, *Boehringer Mannheim v Commission* (Rec. 1972, p. 1281) (DK1972/00323 GR1972-1973/00313 P 1972/00447 ES1972/00261 SVII/00061 FIII/00059) and Judgment of the Court of 15 October 2002, *Limburgse Vinyl Maatschappij nV (lVM)* (C-238/99 P), *DSM NV and DSM Kunststoffen BV* (C-244/99 P), *Montedison SpA* (C-245/99 P), *Elf Atochem SA* (C-247/99 P), *Degussa AG* (C-250/99 P), *Enichem SpA* (C-251/99 P), *Wacker-Chemie GmbH and Hoechst AG* (C-252/99 P) and *Imperial Chemical Industries plc (ICI)* (C-254/99 P) *v Commission of the European Communities*.

criminal sanctions, but that it also applies in competition matters. However, in *Cement*[28] the ECJ made the application of the general principle of *ne bis in idem* in the area of EC competition law subject to a 'threefold condition' of the 'identity of the facts, the unity of the offender and the unity of the legal interest protected'. This means that the threefold condition of the ECJ to define the *idem* element is not in line with the *idem factum* definition of the ECtHR as established recently in the *Zolutukhin* case[29]. The fact that the ECJ seems to limit the *ne bis in idem* principle to double punishment and still accepts the accounting principle instead of barring the second punishment is another point of conflict with the ECtHR case law. These problems have not been solved by the actual competition Regulation 1/2003 either[30]. This Regulation provides that, besides the European Commission, national competition authorities will also apply European competition rules, including the rules concerning enforcement (Article 35). The European Commission and the national authorities will form a network based on close cooperation. In practice, conflicts of jurisdiction and problems regarding *ne bis in idem* should be avoided through best practices of cooperation, after which competition authorities can suspend or terminate their proceedings (Article 13). There is however no obligation, which means that double prosecution is not excluded as such.

In the field of competition we cannot speak of a fully elaborated transnational *ne bis in idem* principle either. The legislator remained silent and the ECJ has been limiting the rationale of the principle, both when it comes to the definition of *idem* and the definition of double punishment. There has been no legislative action on the harmonization of the application of *ne bis in idem* in the domestic application and enforcement of EU law, such as for instance in areas of EU policies in which punitive penalties have been prescribed, like for instance in the area of common agricultural and fisheries policies.

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[28] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others v Commission*, [2004] ECR I-123 (*Cement*).

[29] See Section 3.1 *supra*.

[30] Regulation no. 1/2003, OJ L 001, 04.01.2003.

4.2. The First Basis for a Regional Transnational Criminal Ne Bis In Idem *Principle: The Schengen Space*[31]

Things started to change with the increasing integration in the field of justice and home affairs after the coming into force of the Maastricht Treaty. *Ne bis in idem* clauses were included in several instruments, imposing upon Member States the duty to respect the principle within their national jurisdiction when dealing with aspects of justice and home affairs. The Convention on the protection of the European Communities' financial interests and its several protocols contain various provisions on *ne bis in idem*[32] as does the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union[33]. These clauses aim at respect for *ne bis in idem* in every single jurisdiction of the EU Member States and do not aim at any transnational regulation of the principle.

In the 1980s, however, the European Justice Ministers of the former European Community (EC) were already fully aware that the deepening and widening of European integration would lead to an increase in cross-border crime and a need for transnational justice in Europe, going beyond the classic concepts of national jurisdiction. Within the framework of the European Political Cooperation[34], before the coming into force of the Maastricht Treaty's third pillar on justice and home affairs, the 1987 Convention on double jeopardy was elaborated between the Member States of the EC. This Convention dealt with the *ne bis in idem* principle in a transnational setting in the EC. The Convention has however been poorly ratified[35], but its substance has

[31] A. WEYEMBERGH, *Le principe ne bis in idem: pierre d'achoppement de l'espace pénal européen?*, in *Cahiers de droit européen*, 2004, pp. 337-375.

[32] OJ C 313, 23.10.1996, Art. 7.

[33] OJ C 195, 25.06.1997, Art. 10.

[34] J.A.E. VERVAELE, *Fraud against the Community. The Need for European Fraud Legislation*, Deventer-Boston, 1992, p. 345 and J.A.E. VERVAELE, A. KLIP (Eds.), *European Cooperation between Tax, Customs and Judicial Authorities*, The Hague, 2002.

[35] The *ne bis in idem* Convention has been ratified by Denmark, France, Italy, the Netherlands and Portugal and is provisionally applied between them.

been integrated into Chapter 3 (Articles 54-58) of the intergovernmental 1990 Convention implementing the Schengen Agreement of 1985 (CISA). These Schengen agreements were the conventional legal basis for enhanced cooperation in the fields of justice and home affairs.

However, they had been elaborated by a minority of the EC states and outside of the legal framework of the EC. Nevertheless, The CISA Convention can be qualified as the first multilateral convention that establishes an international *ne bis in idem* principle as an individual right *erga omnes*, be it limited to the regional Schengen area.

The *ne bis in idem* principle is laid down in Article 54 CISA as follows:

> A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

From this reading it becomes clear that the application of *ne bis in idem* depends on an enforcement clause that refers to the effective application of the penalty in order to avoid impunity.

Article 55 further limits the reach of Article 54 by introducing the possibility for Schengen States to include reservations at the moment of approval or ratification. Reservations can be made in relation to cases

> (a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered;
> (b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party;
> (c) where the acts to which the foreign judgment relates were committed by officials of that Contracting Party in violation of the duties of their office.

It is also clear that the Schengen *ne bis in idem* does not stand in the way of broader national protection, as Article 58 CISA provides that:

> The above provisions shall not preclude the application of broader national provisions on the ne bis in idem principle with regard to judicial decisions taken abroad.

The transnational Schengen *ne bis in idem* principle is an important improvement and clearly shows that the increasing justice integration cannot be based solely and decisively on effective enforcement considerations. However, CISA is an intergovernmental scheme without judicial supervision and is limited to the common territory of the Schengen States and the Schengen States can use, and and indeed have used, Article 55 to limit the scope of the principle by introducing national territoriality clauses or broad interpretations of the essential interests of the national jurisdiction. Not all Schengen States were convinced that CISA was providing rights to citizens, as some of them refused to publish the text as a public source of legislation.

4.3. From a Transnational Schengen Principle to a Transnational Union Principle and a EU Fundamental Right

What was politically still impossible at the intergovernmental conference leading to the Maastricht Treaty became finally a reality with the coming into force in 1999 of the Amsterdam Treaty, albeit that it took until the last meeting of the Heads of State in Amsterdam to push it through. The Schengen intergovernmental agreements of 1985 and 1990 and the related Schengen acquis were incorporated into EU Law through Protocol 19 annexed to the Treaty of Amsterdam on European Union (TEU)[36]. Neither the Protocol, nor the Council Decision on the integration of the Schengen acquis[37] refer to the reservations made under Article 55 CISA. The result was that the Schengen *ne bis in idem* of Chapter 3 CISA became a transnational *ne*

[36] <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/schengen-agreements/index_en.htm> (last visited 31 May 2013).

[37] Council Decision of 20 May 1999 (1999/436/EC).

bis in idem principle for the Union in the area of justice and home affairs (third pillar), being part of the area of freedom, security and justice. Second, the EU Charter of Fundamental Rights (CFREU) also became a binding text, which means that the *ne bis in idem* provision of Article 50 CFREU became a binding fundamental right with a transnational reach in the EU. From the Amsterdam Treaty on the ECJ the ECJ was also entrusted with (limited) jurisdiction in the area.

Article 50 CFREU stipulates:

> No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

Although the wording of the article is very classic and seems to refer only to criminal offences, it is clear that the text has to be interpreted in the light of the case law of the ECtHR. Article 52(3) CFREU states clearly that the meaning and the scope of the Charter rights will be the same as the corresponding rights in the Convention. This means *in concreto* that the application of the Article 6 ECHR criminal charge concept, and the related Engel criteria, to the definition of *ne bis in idem* results in an Article 50 CFREU *ne bis in idem* principle that does apply to double punishment stemming from punitive administrative penalties and criminal penalties. The fact that the ECHR *ne bis in idem* has a domestic application only, and Article 50 CFREU an application within the scope of EU law (which can be domestic, transnational and/or at the European level) does not mean that we do not have a similar right with a similar function. Moreover, under Article 52(3) the EU can provide more extensive protection. That means that the ECJ case law providing for a wider protection than the ECtHR is perfectly compatible with Article 50 CFREU. This means that ECJ case law giving broader protection is fully in line with the Charter.

At the moment of the integration of the Schengen *ne bis in idem* into the Union, the EU and its Member States were not only convinced of the need for a transnational *ne bis in idem* principle in the area of freedom, security and justice, given the diversity of the principle in each jurisdiction of the Member States and its domestic reach, but

stressed also the need for further legislation on the matter. In fact in the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice[38] it is stated that measures will be established within five years of the entry into force of the Treaty 'for the coordination of criminal investigations and prosecutions in progress in the Member States with the aim of preventing duplication and contradictory rulings, taking account of better use of the *ne bis in idem* principle'. In the Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters[39], the *ne bis in idem* principle is included among the immediate priorities of the EU. However, the EU Member States have been struggling and are still struggling until today with both aspects of the problem: What should be the rationale for and the reach of the *ne bis in idem* principle and what system should be put in place in order to settle conflicts of jurisdiction in criminal matters or to provide for mechanisms or criteria on which to make a deliberate choice of jurisdiction?[40] In 2003 Greece came up with a proposal for a framework decision on *ne bis in idem*[41] that had the aim of replacing Articles 54-58 of the CISA by new EU legal rules in order to ensure uniformity in both the interpretation of those rules and their practical implementation. First of all, it is surprising that the proposal aims at codifying in EU law the Schengen reservation exceptions as general exceptions to the principle. Second, the drafters of the proposal have opted for an approach to the *bis* element of the principle that is not in line with the case law[42] of the ECtHR. In fact, the proposal defines criminal offences as offences *sensu stricto*, thereby distinguishing them from administrative offences or breaches punished with an administrative fine on condition that they

[38] OJ C 19, 23.01.1999, point 49(e).

[39] OJ C 12, 15.01.2001.

[40] S. GLESS, *Beiweisrechtsgrundsätze einer grenzüberschreitenden Strafverfolgung*, Baden-Baden, 2006.

[41] Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the *ne bis in idem*.

[42] M. LUCHTMAN, *Choice of Forum in an Area of Freedom, Security and Justice*, in *Utrecht Law Review*, 2011, vol. 7 no. 1, pp. 74-101.

may be appealed before a criminal court. The proposal does prefer the German tradition of administrative criminal law (*Ordnungswidrigkeiten*) instead of applying the Article 6 Engel criteria on punitive sanctions. The initiative was discussed in the Council of Ministers, but the multitude of divergent opinions between Member States rapidly brought to light the unviability of this legislative solution. No new legislative initiatives, neither from the Commission nor from the Member States, have been submitted to the Council. Concerning the avoidance of *ne bis in idem* problems by settling, in due time, conflicts of jurisdiction, in 2005 the European Commission drafted a Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings[43], preparing the way for a framework decision on the matter. Finally the Commission did not come up with a proposal. In 2009 the Czech Presidency submitted a proposal for a framework decision on the prevention and settlement of conflicts of jurisdiction in criminal proceedings[44]. However, the content of the approved framework decision[45] does not really contain any prioritisation of jurisdiction or stringent criteria for centralised prosecutions. It is very much concentrated on information exchange and mediation between Member States concerning jurisdiction issues.

Once again, it fell to the European Court of Justice to assume its praetorian role and to fill the legal vacuum concerning many relevant legal points, related to the rationale and the scope of the principle, but also the transition from Schengen to the EU. In fact, at the very moment of the integration of Schengen into Union law several Schengen States had reservations in place. Finally, the relationship between the Charter

[43] COM(2005) 696 final and Commission Staff working document SEC(2005) 1767. See M. WASMEIER, N. THWAITES, *The Development of Ne Bis In Idem into a Transnational Fundamental Right in EU Law: Comments on Recent Developments*, in *European Law Review*, 2006, pp. 565-578.

[44] Proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings, Council Document 5208/09, 20 January 2009 (hereinafter: original proposal on conflicts of jurisdiction). For the Explanatory Report, see Council Document 5208/09, ADD 2, Brussels, 20 January 2009, 5208/09, Copen 7.

[45] Council Framework Decision of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (2009/948/JHA).

ne bis in idem clause of Article 50 and the Schengen *ne bis in idem* clauses have to be clarified.

4.4. The Rationale and the Scope of the Transnational Ne Bis In Idem *Principle Based on Article 54 CISA*[46]

From the joined cases of *Gözütok* and *Brügge*[47] onwards the national courts have referred constantly to the ECJ for preliminary rulings under Article 35 TEU on the interpretation of Article 54 of the CISA, raising interesting questions[48] on the rationale and scope of the *bis* element (*Gözütok* and *Brügge*, *Miraglia*[49], *Van Straaten*[50], *Turansky*[51]) and the related enforcement clause (*Klaus Bourquain*[52] and *Kretzinger*[53]) and on the rationale and scope of the *idem* element (*Van Esbroeck*[54], *Van Straaten*[55], *Gasparini*[56], *Kretzinger*[57], *Kraaijenbrink*[58] and *Gasparini*[59]).

Due to the extensive case law of the ECJ we can deduce that the ECJ has given an autonomous interpretation to the principle, setting aside the rationale of the Schengen legislator. The new EU context has changed the rationale, scope and function of the *ne bis in idem* principle

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[46] A. WEYEMBERGH, *Le Principe Non Bis In Idem: Une Contribution Essentielle De La CJUE*, in COURT OF JUSTICE OF THE EUROPEAN UNION (Ed.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law*, Den Haag, 2013, pp. 539-561.

[47] Cases C-187/01 and C-385/01 (Request for a preliminary ruling from *Oberlandesgericht Köln* and *Rechtbank Van Eerste Aanleg Te Veurne*); Case C-187/01 *Hüseyin Gözütok* and Case C-385/01 *Klaus Brügge*, [2003] ECHR I-5689.

[48] K. LIGETI, *Rules on the Application of Ne Bis In Idem in the EU*, in *Eucrim*, 2009, vol. no 1-2, pp. 37-43.

[49] Case C-469/03, 10 March 2005.

[50] Case C-150/05, 28 September 2006.

[51] Case C-491/07, 22 December 2008.

[52] Case C-297/07, 11 December 2008.

[53] Case C-288/05, 18 July 2007.

[54] Case C-436/04, 9 March 2006.

[55] Case C-150/05, 28 September 2006.

[56] Case C-467/04, 28 September 2006.

[57] Case C-288/05, 18 July 2007.

[58] Case C-367/05, 18 July 2007.

[59] Case C-467/04, 28 September 2006.

as it became part of the scheme of mutual trust in the EU area of freedom, security and justice. Due to this case law we can speak of a real transnational principle, as its application did not depend on further legislation or substantive harmonisation. Following this approach the ECJ has opted for an extensive application of the principle by not limiting the *bis* situation to final judgments but including out of court settlements on the merits of the case and by opting for a factual *idem* interpretation and not limiting the *idem* to *de iure* definitions of of legal qualifications or *res judicata*. However, the ECJ has elaborated its principle within the area of freedom, security and justice only and has not attempted to elaborate a harmonised approach with the *ne bis in idem* principle in the internal market/competition policy. This means that we cannot speak of a transnational *ne bis in idem* principle of the Union for all policy areas, but that we still have to make a distinction between the area of freedom, security and justice on the one side and the internal market/competition policy on the other.

Nevertheless, the ECJ's case law has had a harmonising impact beyond the EU, as it did inspire the ECtHR on some modalities of the principle. The most striking example can be found in the case *Zolutuhkin v Russia*, in which the Grand Chamber[60] has referred very extensively to relevant comparative international law sources, including the ECJ case law on *ne bis in idem* in the field of competition law and in the field of justice and home affairs as well as the case law of the US Supreme Court on double jeopardy. The Court also admits that: '(…) the body of case-law that has been accumulated throughout the history of application of Article 4 of Protocol No. 7 by the Court demonstrates the existence of several approaches to the question whether the offences for which an applicant was prosecuted were the same'[61]. The Court underlines the necessity of a harmonised interpretation of the *idem* element of the *ne bis in idem* principle, in the light of the variety of approaches in the case law of the Court in order to guarantee legal certainty, foreseeability and equality. The Court expressly opted for the *idem factum* approach: 'Article 4 of Protocol No. 7 must be understood

[60] *Zolotukhin v Russia*, 10 February 2009.

[61] *Zolotukhin v Russia*, 10 February 2009, Para. 70.

as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same (…). The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings'[62]. The harmonised concept of *idem* by the ECtHR is fully inspired by the *idem* definition of the ECJ, as elaborated in the area of freedom, security and justice in the EU.

Thanks to the case law of the ECJ the *ne bis in idem* principle has become a living instrument of transnational protection in the common area of freedom, security and justice. However, due to the lack of binding criteria of choice of jurisdiction in criminal matters, the principle has also been converted into an improper mechanism for a preference of jurisdiction. The first jurisdiction that comes to a decision on the merit bars any further prosecution and punishment in the same case for the same person. As it stands there is no guarantee at all that the first jurisdiction is also the best placed jurisdiction, not only from the point of view of effective justice, but also from the point of view of the protection of the victim and even from the point of view of the suspect. In other words, the *ne bis in idem* principle cannot function properly in a common area without the coordination of jurisdiction and binding criteria on choice of jurisdiction and a proper allocation of cases in the common justice area.

Finally, the ECJ has not been able to clarify all the legal aspects of the principle and there remain some striking differences with the case law of the ECtHR. From the case law of the ECtHR, also confirmed in the case *Zolotukhin v Russia*, we can deduce that the ECtHR defines the *bis* element as the commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*[63]. In other words, in the Strasbourg case law the *ne bis in idem* principle is not limited to double punishment, but also includes double prosecution.

[62] *Zolotukhin v Russia*, 10 February 2009, Paras. 82 & 84.

[63] *Zolotukhin v Russia*, 10 February 2009, Para. 83.

In addition, the element of *bis* also includes the combination of two criminal charges in the sense of Article 6, for instance the imposition of a criminal punitive sanction and an administrative punitive sanction. In the case *Zolotukhin v Russia*[64] the ECtHR qualified the first administrative offence, by using the Engel criteria, as penal for the purposes of Article 4 of Protocol 7, mostly due to the nature of the offence and the severity of the penalty imposed. We have already underlined that the case law of the ECJ, by accepting the accounting principle as compensation for double punishment[65], is not in line with the case law of the ECtHR. There are however signs that the ECJ is aware of the problems and is willing to apply the ECtHR reasoning. Recently the ECJ has followed the ECtHR's reasoning in the *Bonda* case[66], dealing with the accumulation of a criminal sanction and the administrative exclusion of a subsidy in the field of the common agricultural policy. The ECJ applied the Engel criteria to the *ne bis in idem* principle of Article 4 of Protocol 7 and came to the conclusion that the exclusion of a subsidy is not criminal/punitive in nature and does not therefore trigger the *ne bis in idem* principle in this case. This means, however, that in the future the ECJ could come to the conclusion that some punitive administrative sanctions cannot be cumulated with criminal sanctions in EU law as a result of the prohibition of double penalties, an interpretation that would be fully in line with that adopted by the ECtHR.

4.5. The EU Fundamental Right to Ne Bis In Idem *in Article 50 CFREU: Rationale, Limitations and Exceptions*

4.5.1. Applicability of Article 50 CFREU

Due to Article 51(1) CRFREU the Charter applies to the institutions and bodies of the EU and to the Member States only when they are implementing EU law. Due to Article 6 TEU, the Charter has become binding as a primary source of EU law. However, the exact meaning of

[64] *Zolotukhin v Russia*, 10 February 2009, Paras. 52-57.

[65] See Section 4.1, supra.

[66] Case C-489/10, *Lukasz Marcin Bonda*, 5 June 2012.

'when they are implementing EU law' and thus of the scope of application of the Charter *ratione materiae* in the Member States remains open, as the ECJ has not yet expressed a definitive opinion on the matter[67]. In their interventions in cases before the ECJ, however, some Member States are advocating a narrow interpretation, by which 'a connection with EU law, acting in the scope of EU law or in the field of application of EU law', the actual criterion for the application of general principles of EU law, would not be enough to trigger the application of the Charter.

The discussion is important for our topic, as it affects the scope of application of Article 50 CFREU. Some interesting cases dealing with the enforcement of EU policies in the domestic legal order of the Member States and *ne bis in idem* issues have been submitted to the ECJ since the coming into force of the Lisbon Treaty.

In Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, one of the legal points of interest is exactly the field of the material application of the CFREU. The Swedish tax authorities had accused Mr Fransson of VAT irregularities and a related failure to comply with information obligations and in 2007 they had fined him with administrative tax penalties. In 2009 Mr Fransson was prosecuted for the same facts and faced punishment of up to six years' imprisonment. The case was submitted by the Haparanda District Court to the ECJ for a preliminary ruling. In his opinion of 12 June 2012 Advocate General Cruz Villalón[68] elaborated upon the interpretation of Article 51(1) CFREU. What does it mean when it is stated that the Member States are bound by the provisions of the Charter 'only when they are implementing Union law?' The AG pointed rather to continuity with the existing case law on the application of general principles of Community/Union law, which means 'in the field of application of Union law'. This brought him to the following triad: scope-field of application-implementation. In his view, the competence of the Union to assume responsibility for

[67] See also J. KOKOTT, CH. SOBOTTA, *Die Charta der Grundrechte der Europäischen Union nach dem Inkraftitreten des Vertrags von Lissabon*, in *Europäische Grundrechte Zeitschrift*, 2010, pp. 265-271.

[68] Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012.

guaranteeing the fundamental rights vis-à-vis the exercise of a public authority by the Member States, when they are implementing Union law, must be explained by reference to a specific interest of the Union in ensuring that the exercise of public authority accords with the interpretation of fundamental rights by the Union[69]. However, he is of the opinion that the mere fact that such an exercise of public authority, expressly the power of the State to impose penalties in this particular case, if ultimately based on a provision of Union law, is not, in itself, sufficient for a finding that there is a situation involving the implementation of Union law. The result of his reasoning is that the link is not sufficient to transfer the review of any constitutional guarantees applicable to the exercise of that power from the sphere of the responsibility of the Member States to that of the Union[70]. The premise for finding that the Union has an interest in assuming responsibility for guaranteeing the fundamental right concerned in this case is the degree of connection between Union law, which is in principle being implemented, and the exercise of the public authority of the State. He considered the VAT Directive[71] to be an extremely weak link and not, in any event, a sufficient basis for a clearly identifiable interest on the part of the Union in assuming responsibility for guaranteeing that specific fundamental right vis-à-vis the Union[72].

It is interesting to compare the opinion of Advocate General Cruz Villalón with the one of Advocate General Kokott in the similar *Bonda* case[73]. In this Polish case Bonda, accused of an incorrect declaration under the EU agricultural subsidy scheme, was excluded by the administrative Agricultural Restructuring and Modernisation Agency from receiving a EU subsidy for several years and was subsequently

[69] Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, point 40.

[70] Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, points 40 & 54.

[71] Council Directive 2006/112/EC, OJ L 347, 28.11.2006.

[72] Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, point 57.

[73] Case C-489/10, *Lukasz Marcin Bonda*, Opinion of Advocate General Kokott, 15 December 2011, point 16.

convicted and given a suspended custodial sentence by the criminal district court. The appeal court decided, however, that the criminal proceedings against Bonda were inadmissible because of the *ne bis in idem* principle. After an appeal to the Supreme Court in the interest of the law, the Supreme Court referred to the ECJ for a preliminary ruling. In my view the *ne bis in idem* problem is quite similar in the *Bonda* case and *Fransson* case, as in both cases there is a risk of double punitive penalties (administrative and criminal) in one jurisdiction. Is there a different degree of connection with the implementation of EU law? In the case of Bonda, there is a Commission regulation that explicitly imposes the exclusion of subsidies as an administrative sanction. However, criminal enforcement is not specifically prescribed by Union law and is thus only imposed under the general enforcement obligations of the ECJ (*effet utile* and effective, proportionate and deterrent sanctions)[74]. In the case of *Fransson* there is no explicit provision in the VAT Directive, but only a reference thereto in Article 273:

> Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion (…).

In the case of VAT the Member States have in any case the duty to comply with the same enforcement obligations imposed by the ECJ, which means that this 'may' become a must and can include administrative and criminal penalties.

In the *Bonda* case AG Kokott clearly underlined that the *ne bis in idem* principle enjoys the status of a fundamental right of the EU under Article 50 CFREU and that this case is within the scope of the Charter[75], whatever interpretation – restrictive or not – may be given to the material scope of the Charter. Despite several references by AG Kokott to Article 50 CFREU as an applicable human right, the ECJ completely neglected Article 50 CFREU in its analysis and reasoning.

[74] Case 68/88, *Commission v Greece*, 21 September 1989.

[75] Case C-489/10, *Lukasz Marcin Bonda*, Opinion of Advocate General Kokott, 15 December 2011, points 13 & 16.

This is more than striking, as in both cases there is a substantial degree of connection with Union law. The scope and the interest are similar: an effective application and enforcement of the common agricultural policy and the common VAT regime. In case of the ineffective application of both, they potentially affect the budget of the Union. In other words, there is a direct link with the protection of the financial interest of the Union, which is one of the core interests of the Union, as laid down in Article 235 of the TFEU.

From the point of view of the alleged party, in both cases his fundamental right to *ne bis in idem* protection is at stake not only as part of an enforcement policy of a sovereign state, but also as the consequence of the policy and enforcement choices of a Member State in applying and enforcing EU obligations. In other words we are not speaking here of a purely internal case falling outside the scope of the application of EU law. When we are aiming at the effective and equivalent protection of the financial interests of the Union, it is logical that we are aiming at equivalent human rights protection at the same time, as provided for by and under the Charter. This is a sufficient reason to trigger the material application of the Charter and to trigger the jurisdiction of the Court to ensure uniform application through preliminary rulings.

In its judgment of 28 February 2013 in the *Aklagaren v Hans Akerberg Fransson* case the ECJ has excluded from the very start that Member States can act within the scope of EU law, but excluding the application of the Charter:

> 21. Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter[76].

[76] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0617:EN:HTML> (last visited 31 May 2013).

It is clear to the Court that that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute the implementation of EU directives and of Article 325 TFEU and, therefore, of EU law. The mere fact that the national legislation was not formally enacted to transpose the directive is not an argument as it enforces an EU obligation: imposing effective penalties for conduct prejudicial to the financial interest of the EU.

Applied to the concrete case, the ECJ has underlined that the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties. To assess whether tax penalties are criminal in nature the Engel criteria of the ECtHR, also clearly used in the *Bonda* case, are applicable. In this case, contrary to the case of *Bonda*[77], the ECJ considered that it is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties are punitive in character. When it is considered punitive, however, double punishment is barred by Article 50 CFREU.

With its judgment in the *Akerberg Fransson* case the ECJ has confirmed the autonomous interpretation of Article 50 CFREU, its application to the national enforcement of EU legislation and its applicability to all punitive sanctioning in line with the Engel criteria on punitive sanctions. In other words Member States that do limit *ne bis in idem*, when implementing and enforcing EU law, to criminal law *sensu stricto*, will have to widen their scope of protection in order to include punitive administrative sanctioning.

The *Akerberg Fransson* case is a national case of *ne bis in idem* application, but Article 50 CFREU has transnational effect. This means that Member States will have to face the transnational application of *ne bis in idem* for all punitive sanctioning in the EU when implementing and enforcing EU law.

[77] In the *Bonda* case the administrative sanction was prescribed by the EU regulation and the referring court did ask for a ruling on the legal character of the sanction.

4.5.2. Limitations and Exceptions to the Ne Bis In Idem *Principle: Claw-Back Clauses of National Sovereignty?*

Although Article 50 CFREU is a primary source of Union law, it does co-exist with Article 54 CISA, *ne bis in idem* clauses in the MLA and MR regimes, and Article 4 of Protocol 7 ECHR. Although these multiplicity of *ne bis in idem* clauses have different functions, they do not contribute to a comprehensive constitutional legal principle in the Union. Moreover, many of the *ne bis in idem* clauses outside of Article 50 CFREU have a restricted application because of certain exceptions, derogations or reservations. In the MLA and MR regimes the *ne bis in idem* clause cannot only be optional, but is also limited by exceptions if it is mandatory. The same exceptions are also derogations or reservations to Protocol 7 ECHR or Article 54 CISA. In practice some Member States have formulated restricted or no application at all of *ne bis in idem* in the following situations: offences that have been committed on national territory (territoriality clause); the preclusion of punitive administrative sanctions from the scope of application; the interests of national security or other related interests and/or offences committed by national civil servants.

Several national criminal courts have been obliged to deal with this legal patchwork, including the relationship between Article 50 CFREU and Article 54 CISA. In an interesting Italian case the judge of preliminary investigations of the Tribunal of Milan ruled on this matter[78]. In this case he had to decide on a committal procedure against two German suspects of a murder in Italy in 1989, for which they had already been sentenced to 5 years and 6 months imprisonment in Germany. After having served these German sentences and having used their EU right of freedom of movement, they were arrested and charged by the Italian prosecutorial authorities for the same facts. At the moment of ratifying the CISA provisions, Italy had used its prerogative to make a reservation[79] under Article 55 CISA, in order to bar the application of Article 54 CISA when the acts to which the foreign

[78] *Tribunale di Milano*, *Ufficio del Giudice per le indagini preliminari*, N. 12396/92 RG N.R-N. 3351/94 RG G.I.P., 6 July 2011.

[79] Laid down in Article 7 of the Italian *Legge n. 388/1993*.

judgment relates took place in whole or in part in its own territory (the territoriality clause)[80].

The point of departure of the Italian judge was the Union interest in the freedom of movement within the area of freedom, security and justice. In his view Article 50 CFREU and Article 6 TEU that do not contain exceptions to the fundamental right and have direct and immediate application in the legal order of the Member States are *de iure* abrogated by the Schengen derogations. By applying his reasoning to the *ne bis in idem* principle of Article 50 CFREU and Article 6 TEU, he decided not to commit both suspects to trial[81].

It is a pity that the Italian judge did not submit his questions to the ECJ for a preliminary ruling, at least concerning the validity of the CISA reservations after the integration of the Schengen acquis in the Union (given the fact that they were not mentioned in the Schengen Protocol to the Amsterdam Treaty and in the Council Decision on the Schengen integration), the applicability of Article 50 CFREU to the limitation on the freedom of movement and the consequences for the relationship with the CISA provisions on *ne bis in idem*. This can be seen as a missed opportunity to receive uniform answers from the ECJ.

The Greek Supreme Court[82] has ruled in the same sense as the Italian Milan Court judge. Greece had filed a reservation[83] according to

[80] Article 55(a) CISA.

[81] See C. AMALFITANO, *Il principio del ne bis in idem tra Cass. e Carta dei Diritti fondamentali dell'unione Europea*, in *Cassazione Penale*, 2012, 11.

[82] The Greek Supreme Court (*Areopag*) sitting as a full bench, Judgment No. 1/2011 of 9 June 2011.

[83] Ratification Statute No. 2514/1997, OG A 140, 'The Hellenic Republic declares, in accordance with Article 55 of the Convention Implementing the Schengen Agreement, that it shall not be bound by Article 54 of the Convention in the following cases: 1. where the acts to which the foreign judgment relates took place in whole or in part in Greek territory. This exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered; 2. where the acts to which the foreign judgment relates were committed by officials of Greece in violation of the duties of their office; 3. where the acts to which the foreign judgment relates constitute one of the following offenses under Greek law: a. offenses against the State (Articles 134-137quinquies CC); b. acts of treason (Articles 138-152 CC); c. offenses against political institutions and the Government (Articles 157-160 CC); d. offenses against the President of the Republic (Article 168 CC); e. offenses against

Article 55 CISA to exempt *inter alia* drug trafficking offences from the application of the *ne bis in idem* rule. The Hellenic Supreme Court linked the *ne bis in idem* protection to the principle of the mutual recognition of court judgments and orders. The Court considered Article 50 CFREU to be a directly applicable provision that does not need further harmonisation to be triggered and it came to the conclusion that the reservations by Greece under Article 55 CISA had been repealed by the entry into force of the Treaty of Lisbon and the CFREU.

The German criminal courts have had to deal with cases in which a penalty had been imposed against a person, but not enforced or was in the process of being enforced. The enforcement clause is a substantial part of Article 54 CISA, but is not mentioned in Article 50 CFREU. The German District Court of Aachen[84] and the German Federal Court of Justice[85] decided that due to Article 52(1) CFREU the rights enshrined in the Charter can be restricted by laws that respect the essence of the Charter. In their view Article 54 CISA represents such a restriction, by which Article 50 CFREU only applies in accordance with Article 54 CISA. This interpretation has been confirmed by the German Federal Constitutional Court[86]. None of these courts have submitted a preliminary ruling to the ECJ, however.

The interpretation by the Hellenic Supreme Court and the Milan district court aim at the effective protection of the *ne bis in idem* right in a common area of freedom, security and justice, without any restrictions stemming from the intergovernmental cooperation regime

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military service and conscription (Articles 202-206 CC); f. acts of piracy (Article 215 of the Maritime Code); g. offenses against currency (Articles 207-215 CC); h. illicit trafficking in narcotic drugs and psychotropic substances; i. offenses against antiquities and Greek cultural heritage; 4. where the acts to which the foreign judgment relates fall under international conventions signed and ratified by the Greek State'.

[84] 52 Ks 9/08-'Boere', Decision of 8 December 2010. See C. BURCHARD, D. BRODOWSKI, *The Post-Lisbon Principle of Transnational Ne Bis In Idem: On the Relationship between Article 50 Charter of Fundamental Rights and Article 54 Convention Implementing the Schengen Agreement*, in *New Journal of European Criminal Law*, 2010, 1, no. 3, pp. 310-327.

[85] Decision of 25 October 2010 (BGH-1 StR 57/10).

[86] 1 BVerfG 15 December 2011, 2 BvR 148/11 Para. No. 43.

under Schengen. They have opted for an autonomous application and interpretation of Article 50 CFREU. However, they have not dealt with the material scope of the Charter, as defined under Article 51(1) CFREU. What does it mean when Member States are only bound by the Charter when implementing EU law? Is the fact that restrictions to the *ne bis in idem* right affect the freedom of movement within the EU enough to trigger the application of the Charter?[87] At least the question should have been tackled and answered or should have been submitted to the ECJ for a preliminary ruling.

It think that they are right, however, when they consider that the reservations under the CISA, being reservations of sovereign states, and not restrictions decided by EU Member States, make little sense in the common area of freedom, security and justice and should be set aside.

The interpretation by the German Courts is problematic from other points of view, however. First of all, the restrictions on the rights have been made in an intergovernmental context, not in a common context of the area of freedom, security and justice. To which extent does the enforcement clause make sense in the area of freedom, security and justice? The clause is also not included in Article 4 of Protocol 7 ECHR. In any case restrictions to the right are only acceptable under Article 52(1) if they comply with four conditions: legality, respect for the essence of the right protected, necessity and proportionality[88]. Second, the interpretation by the German Courts limits the scope of Article 50 CFREU for the area of freedom, security and justice through Article 54 CISA. This means that the limitation is of no value for other EU areas, such as in the field of the internal market and competition policy. The result is a diverging application of Article 50 CFREU.

Although Article 4 of Protocol 7 ECHR has no transnational application as is the case with Article 50 CFREU, it can lead to conflicting situations for Member States, as Article 50 CFREU can also apply in domestic situations only. What happens if Member States have not ratified Protocol 7 ECHR or have formulated a reservation as to its application and are not willing to accept the application of the *ne bis in*

[87] See for instance, Case C-256/11, *Murat Dereci*, 15 November 2011.

[88] A. WEYEMBERGH, supra note 31, point 3.1.

idem principle to the *bis* combination of punitive administrative and criminal penalties? This is however how the principle has been filled in by the ECtHR and is thus the basic line of Article 50 CFREU. In my opinion Article 50 CFREU de facto sets aside the non-ratification of declarations or reservations, as long as the Charter applies in a domestic situation of the *ne bis in idem* right. In such a case all Member States should apply the substance of Article 50 CFREU, in line with Article 4 of Protocol 7 ECHR. It would be a strange situation that in a common area of freedom, security and justice national reservations could still prevail as a claw-back clause concerning a fundamental right of primary law[89].

5. Conclusion

In the EU do we today have an equivalent transnational protection of *ne bis idem* that applies both in the vertical and horizontal dimension of European integration? We have come to the conclusion that neither the domestic *ne bis in idem* principle, nor the public international law equivalent in human rights conventions or in MLA conventions can offer this protection.

Within the proper EU context we have a multiple set of *ne bis in idem* with a transnational character: a general principle of EU law in competition law; Article 54 CISA in the area of freedom, security and justice; provisions in MLA and MR instruments; and Article 50 CFREU. The ECJ has elaborated Article 54 CISA into a real transnational human rights principle. However, Article 54 CISA does not apply in all fields of EU policy and law, as it is limited to the area of freedom, security and justice and it remains unclear even in that area if the derogations and reservations of the former Schengen States are still of any legal value.

It would be logical if the *ne bis in idem* principle of primary EU law, Article 50 CFREU, would become the overall transnational *ne bis idem*

[89] *A contrario*, Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012.

principle for all EU policies, both at the EU level and in the States, when acting within the scope or field of application of EU law. However, it remains unclear, as it stands, whether the ECJ is willing to follow this interpretation and to use the Charter as an autonomous standard of applicable human rights in the Member States, when acting within the scope of Union law. It also remains unclear whether the ECJ is willing to elaborate a unified and comprehensive *ne bis in idem* principle at the EU level for all EU policies and law. The ECJ should follow the reasoning of AG Sharpston in the *Zambrano* case[90] by which she advocates applying the Charter in all fields of competence that have been conferred upon the EU (exclusive or shared). The applicability of EU fundamental rights would neither be dependent on the direct applicability of a specific Treaty provision nor on the adoption and implementation of EU secondary law[91].

The divergent rationale and scope of the principle in the area of competition policy and criminal justice has been upheld by the ECJ. One may wonder if this is compatible with Article 50 CFREU. Does *ne bis in idem* have another function when enforcing competition rules in the internal market than in the area of freedom, security and justice? I doubt it. Moreover, in both situations *ne bis in idem* and choice of jurisdiction (allocation of cases) are intertwined. In both situations the EU legislator has competence to regulate on conflicts of jurisdiction. However, the ECJ has shown that it is aware of the need for consistency, at least in the area of justice and home affairs. Traditionally, as we have seen under 2.3, *ne bis in idem* can be a (mandatory or optional) ground of refusal or a ground for non-execution within the framework of MLA requests or MR orders. Article 54 CISA does not deal as such with MLA or MR, as the material scope of its application is not dependent on requests or orders. Recently, in the *Mantello* case[92], the ECJ has clearly opted for a converging

[90] Case C-34/09, *Zambrano*, 8 March 2011.

[91] See E. MUIR, A.P. VAN DER MEI, *The "EU Citizenship Dimension" of the Area of Freedom, Security and Justice*, in M. LUCHTMAN (Ed.), *Choice of Forum in Cooperation against Eu Financial Crime*, Utrecht, 2013, pp. 123-142.

[92] Case C-261/09, *Gaetano Mantello*, 6 November 2010. See for comments on the case J. OUWERKERK, *Case C-261/09, Criminal Proceedings against Gaetano Mantello,*

approach, linked to shared objectives in the area of freedom, security and justice:

> In view of the shared objective of Article 54 of the CISA and Article 3(2) of the Framework decision, which is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, it must be accepted that an interpretation of that concept given in the context of the CISA is equally valid for the purposes of the Framework Decision[93].

The result is *in concreto* that the *idem* definition based on *idem factum* is now the standard not only for CISA cases but also for MLA and MR cases and has also become the standard under Article 4 of Protocol 7 ECHR. It is thus clear that Article 50 CFREU can here rely on a common approach in the area of freedom, security and justice. However, the problem remains that this standard does not yet apply to Union policies outside of the area of freedom, security and justice such as the internal market and competition policy.

We do not only have a problem with the scope of application in the EU, but also with the rationale of the principle. In sovereign state interests it seems that in the area of freedom security still prevails over the fundamental rights of citizens and legal persons.

The legal battle on the status and legal value of reservations to the CISA *ne bis in idem* and to Article 4 Protocol 7 ECHR in relation to Article 50 CFREU is a good example. Member States have to accept that the intergovernmental state-orientated approach, excluding the individual as a subject of rights, is no longer compatible with the basic concepts of the area of freedom, security and justice. The model of international cooperation between states in criminal matters has been replaced by a shared policy between the EU and Member States in dealing with transnational criminal justice. The individual has become a subject with rights and obligations in relation to transnational criminal

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Judgment of the Court of Justice (Grand Chamber) of 16 November 2010, in *CMLR*, 2011, 48, no. 5, pp. 1687-1701.

[93] Point 40.

justice in the area of freedom, security and justice[94]. The Article 54 CISA and Article 50 CFREU *ne bis in idem* principles do not depend on the harmonization of substantive procedural criminal law or on applicable schemes of MLA or MR cooperation. It is a fundamental right that is no longer connected to the respective jurisdictions of each Member State and thus creates subjective rights for EU citizens and legal persons in the Union. In transnational cases there is always a clear link with the freedom of movement of persons. That freedom can be restricted for proportionate and justified reasons in concrete cases. It is however unacceptable under EU law that a restrictive interpretation of the material scope of Article 50 CFREU would result in a structural limitation on the freedom of movement because of the risk of double jeopardy. The right to *ne bis in idem* can no longer depend in a single area of freedom, security and justice on sovereign claims of national jurisdiction based on national territoriality clauses. Claw-back provisions inspired by national sovereignty are undermining the basics of a common area.

The fundamental right to *ne bis in idem* is of course not absolute and can be restricted. The restrictions must however be clearly foreseeable and serve a legitimate aim in the area of freedom, security and justice in the EU. It is not enough that they serve that aim in the single jurisdiction of one Member State. For this reason the EU Member States must be compelled to set aside the reservations and to elaborate a common European scheme, and/or the ECJ has to clarify the legal situation from the common EU perspective.

The legal framework of the Treaties (TEU and TFEU) offers a good opportunity to elaborate a transnational constitutional *ne bis in idem* principle that can protect citizens and legal persons at the EU level and in Member States (both in the vertical and horizontal dimension). Given the increasing impact of EU regulation both in the jurisdictions of the Member States and in the transnational EU setting, there is a real need for such a transnational application.

[94] A. ESER ET AL. (Eds.), *The Individual as Subject of International Cooperation in Criminal Matters. A Comparative Study*, Baden-Baden, 2002.

We must however be aware of the fact that the rationale of a transnational *ne bis in idem* principle is not to prevent and settle conflicts of jurisdiction[95], nor to allocate prosecution and adjudication in punitive proceedings in the EU. A proper EU system of prevention and choice of jurisdiction is necessary in the interest of justice, but also in the interest of citizens and legal persons, as it can avoid many problems of double prosecution and punishment.

Finally, the EU has embarked on the task of providing real transnational *ne bis in idem* protection within the common territory. When it comes to *ne bis in idem* problems between EU countries and third countries or outside the EU we fall back on the provisions in MLA treaties or in specific agreements (like in the competition field). In other words *ne bis in idem* protection is regionalizing in the EU, but not globalizing and so it is not yet a general principle of transnational criminal justice.

[95] M. LUCHTMAN, *Transnational Law Enforcement in the European Union and the Ne Bis In Idem Principle*, in *Review of European Administrative law*, 2011, 4, pp. 5-29 and M. LUCHTMAN (Ed.), *Choice of Forum in Cooperation against EU Financial Crime*, Utrecht, 2013.

CHAPTER 6

THE APPLICATION OF THE EU CHARTER OF FUNDAMENTAL RIGHTS (CFR) AND ITS *NE BIS IN IDEM* PRINCIPLE IN THE MEMBER STATES OF THE EU[1]

1. Introduction

With the growing impact of EU regulation and enforcement in the Member States, the increased mobility of persons, goods, services and capital and the related judicial cooperation in criminal matters in the EU, there is an increasing risk that a (legal) person might suffer double jeopardy or be prosecuted and/or be punished twice. This can happen at the national level when enforcing EU policies, at the transnational level when several EU Member States use their jurisdiction or at the vertical level, when jurisdiction is triggered both by a Member State and the European Commission (such as punitive competition proceedings).

The *ne bis in idem* principle is a general principle of (criminal) law in many national legal orders, sometimes even codified as a constitutional right, such as in Article 103 of the German Constitution. Historically the *ne bis in idem* principle only applies nationally and is limited to criminal justice, this means precluding application to punitive administrative enforcement. There is also no general rule of international law that imposes an obligation to comply with *ne bis in idem*[2]. It has a conventional source, thus depends solely on the content of the international treaties. In recent decades the *ne bis in idem*

[1] This article has been published as J.A.E. VERVAELE, *The Application of the EU Charter of Fundamental Rights (CFR) and its Ne bis in idem Principle in the Member States of the EU*, in *Review of European Administrative Law*, 2013-1, Vol. 6, pp. 113-134.

[2] Also underlined by German Federal Constitutional Court, 2 BVerfG 15 December 2011, 2 BvR148/11, par. no. 31.

principle has become an important principle of judicial protection for the citizen against the *ius puniendi* of the state and as such forms part of the principles of due process and a fair trial. The protective scope of the principle was widened from a principle to guarantee legal certainty into a fundamental right protecting against cumulative criminal punishment[3].

We do find international public law treaty-based *ne bis in idem* provisions in three sources: (1) international human rights law (IHRL) and the EU CFR; (2) international criminal tribunal law and (3) multilateral treaties dealing with judicial cooperation in criminal matters, also called mutual legal assistance (MLA) and EU instruments of mutual recognition (MR) in criminal matters[4].

The ECHR did not contain a *ne bis in idem* provision, but it has been elaborated in Article 4 of the 7th Protocol to the ECHR[5]:

> 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case (…).

[3] See the excellent Phd of J. LELIEUR-FISCHER, *La règle ne bis in idem. Du principe de l'autorité de la chose jugée au principe d'unicité d'action répressive*, Paris, 2005 Université Panthéon-Sorbonne (Paris I) (not published).

[4] I will not deal with the MLA or MR ne bis in idem provisions, as they only apply to criminal matters and are only triggered when MLA requests or MR orders have been issued.

[5] "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly *discovered facts, or if* there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3. No derogation from this Article shall be made under Article 15 of the Convention".

The ECtHR has widened the scope of the *ne bis in idem* principle to punitive proceedings and penalties, in fact by applying the Engel-criteria[6] for the qualification of (double) punitive proceedings.

However, the protocol is not binding for all EU Member States. Neither the Netherlands nor Germany has ratified this Protocol. The UK is the only member of the Council of Europe that did not even sign it. Moreover, countries like France and Luxembourg have formulated reservations when ratifying. Many EU countries have also deposited limiting declarations at the time of signature. It is clear that several EU countries[7], like Austria, France, Germany, Italy, and the Netherlands have limited the scope of application of the principle by precluding its application to punitive penalties outside of the area of criminal law. Germany for instance has done this in line with Article 103 of its Constitution. Moreover, the ECHR *ne bis in idem* provision does only apply in the jurisdiction of every single State, excluding transnational effect.

Might citizens and legal persons expect to be protected against *ne bis in idem* in a setting of an integrated internal market and a common area of freedom, security and justice and if so, does the standard of protection also apply in the legal order of one Member State, when EU regulation and enforcement is in play?

It comes as no surprise that the European Community stumbled over the issue of the (transnational) application of the *ne bis in idem* principle before the coming into force of the Treaty of Maastricht and the justice and home affairs policy when dealing with enforcement of community policies. In the field of competition policy we do have a system of direct enforcement by the European Commission, but one that can be combined with indirect enforcement by national competition authorities. Both can impose punitive administrative sanctions[8]. In

[6] *Engel v the Netherlands*, Judgment ECtHR, 8 June 1976 & *Öztürk v Germany*, Judgment ECtHR, 21 February 1984.

[7] See the overview of declarations and reservations at http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=117&CM=8&DF=11/01/2013&CL=ENG&VL=1, status 11.01.2013.

[8] W. WILS, *The Principle of 'Ne Bis In Idem' in EC Antitrust Enforcement: A Legal and Economic Analysis*, in *World Competition*, 2003/2.

some countries criminal courts have jurisdiction in competition cases as well. The risk of double punitive penalties is thus more than real for the legal persons concerned. Meanwhile, the CJEU s case law is clear in confirming the *ne bis in idem* principle as a general principle of Community law[9], which means that it is not limited to criminal sanctions but also applies to punitive administrative proceedings, such as the ones in the competition policy. However, the CJEU has its own interpretation of the principle, as it does not exclude double prosecution, nor the imposition of double punishment. In cases of imposition of two consecutive sanctions, any previous punitive decision has to be taken into account in determining any sanction which it to be imposed (*Anrechnungsprinzip*)[10]. Moreover the CJEU has avoided applying the Engel-criteria to competition sanctions. Furthermore, in *Cement*[11], the CJEU made the application of the general principle of *ne bis in idem* to the area of EC competition law subject to a 'threefold condition' of 'identity of the facts, unity of offender and unity of the legal interest protected. This CJEU definition of the idem element is not in line either with the idem factum definition of the ECtHR as established recently in the Zolotukhin case[12]. In other words, we cannot speak of a fully elaborated *ne bis in idem* principle in the area of competition that is in line with the ECtHR case law. Apart from competition cases indirect enforcement by the Member States is the basic rule. In some of these areas, such as the common agricultural and fisheries policies, the EU has not only prescribed detailed regulation but also enforcement obligations, including detailed punitive penalties.

[9] See for instance Judgment of 14.12.1972, *Boehringer Mannheim/Commission* (Rec. 1972, p. 1281) (DK1972/00323 GR1972-1973/00313 P 1972/00447 ES1972/ 00261 SVII/00061 FIII/00059) and Judgment of the Court of 15 October 2002. *Limburgse Vinyl Maatschappij NV (LVM)* (C-238/99 P), *DSM NV and DSM Kunststoffen BV* (C-244/99 P), *Montedison SpA* (C-245/99 P), *Elf Atochem SA* (C-247/99 P), *Degussa AG* (C-250/99 P), *Enichem SpA* (C-251/99 P), *Wacker-Chemie GmbH and Hoechst AG* (C-252/99 P) and *Imperial Chemical Industries plc (ICI)* (C-254/99 P) *v Commission of the European Communities*.

[10] *Wilhelm v Bundeskartellamt*, Judgment of 13 February 1969, [1969] *ECR* 3.

[11] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123 *(Cement)*.

[12] *Zolotukhin v Russia*, Judgment ECtHR, 10 February 2009.

There has been no EU legislative action to harmonise the application of *ne bis in idem* when it comes to national enforcement of these EU policies. In some exceptional cases the EU legislator has regulated the interaction between administrative and criminal prosecution[13].

The *ne bis in idem* principle in the EU became clearly visible with the CJEU 's new case law in relation to Articles 54-58 of the 1990 intergovernmental Convention implementing the Schengen Agreement of 1985 (CISA), as integrated by the Amsterdam Treaty in the third pillar. The relevance of the case law of the CJEU[14], is limited to the area of freedom, security and justice and is dealing with the transnational *ne bis in idem* in criminal matters, as elaborated in Article 54 of the CISA. It does thus not deal as such with the *ne bis in idem* application related to the enforcement of harmonised EU policies (the former first pillar) into one jurisdiction.

We had to wait for the Lisbon Treaty in order to have a binding *ne bis in idem* principle for all enforcement of EU law, be it direct or indirect, in a single jurisdiction or a transnational one. This principle has been provided for in Article 50 CFR. Pursuant to Srticle 6 TEU, the Charter is now binding as a primary source of EU law. Article 50 CFREU stipulates:

> No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

This provision triggers two main questions. Who are the addressees of the provision and what is exactly the content. Concerning the addressees there is little doubt about the actors of direct enforcement at the EU level, as due to Article 51(1) CFR the Charter applies to the institutions and bodies of the EU. The problem, however, arises when it comes to the application of the CFR and its *ne bis in idem* principle in a

[13] Council Regulation 2988/95 of 18th December 1995 on the protection of the European Communities financial interest, Article 6, OJ L 312, p. 1-4.

[14] J.A.E. VERVAELE, *The Transnational Ne Bis In Idem Principle in the EU. Mutual Recognition and Equivalent Protection of Human Rights*, 5th European Jurist's Forum Budapest, 2010, p. 117-139.

frame of indirect enforcement and thus to domestic enforcement actors, as Article 51(1) CFR stipulates that the Charter only applies to Member States when they are implementing EU law. However, the exact meaning of 'when they are implementing EU law' and thus of the the scope of application of the Charter *ratione materiae* in the Member States is not further defined and leaves room for different interpretations.

Concerning the content of the principle, it seems from a first reading that the wording of the Article is a traditional one, as it refers only to criminal offences. It is however, clear that the text must be interpreted in the light of the case law of the ECtHR, as Article 52(3) CFR states clearly that the meaning and the scope of the Charter rights will be the same as corresponding rights in the Convention. This means that the content of Article 50 CFR has to be interpreted in line with the scope and meaning of Article 4 of the 7th Protocol to the ECHR, as elaborated under the ECtHR case law. *In concreto*, does it mean that the scope of Article 50 CFREU includes, thanks to the Article 6 ECHR 'criminal charge concept' and the related Engel-criteria, all punitive proceedings and sanctions and has thus to be applied to double punishment stemming from punitive administrative penalties and criminal penalties for instance?

Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, deals exactly with these two main questions, and is the reason why the importance of the case goes far beyond the technicalities of the area and can thus be qualified as a landmark CJEU case and reason why the Advocate General states that "behind the apparent simplicity of the case – punishment of a fisherman operating in the Gulf of Bothnia for failure to comply with tax obligations – the present reference for a preliminary ruling raises two particularly tricky issues for the Court and a rather perplexing situation"[15].

[15] Opinion of Advocate General Cruz Villalón, delivered on 12 June 2012, point 1.

2. The Facts of the Case and Proceedings before the National Courts

Mr Fransson is a self-employed worker whose main activities are fishing and the sale of white fish. The Swedish tax authorities (Skatteverket) accused Mr Fransson of failing to comply with the obligation to provide tax information in the fiscal years 2004 and 2005, inter alia concerning VAT taxes. As regards the VAT assessment, the Swedish tax authorities calculated that the information provided by Mr Fransson entailed a loss of revenue to the tax authorities totaling SEK 60,000 in the fiscal year 2004 and SEK 87,550 in the fiscal year 2005. In 2007 the Swedish tax authorities imposed a fine on Mr Fransson for tax offences committed in the fiscal year 2004, of which SEK 4,872 relates to the VAT offence. As concerns the fiscal year 2005, they determined a different fine, of which SEK 3,255 relates to the VAT offence. No appeal was lodged against either the penalty for 2004 or the penalty for 2005 and those penalties became final in 2010 and 2011, respectively.

In 2009 Mr. Fransson was summoned to appear before the Haparanda District Court (Haparanda tingsrätt) on charges of serious tax offences, including the VAT tax offences for 2004 and 2005, for which he had been fined by the Swedish Tax authorities. In accordance with the law on tax offences (Skattebrottslagen), the offence with which Mr Fransson is charged is punishable by up to six years imprisonment. Before the criminal court the question arises as to whether the charges brought against Mr Fransson must be dismissed on the ground that he has already been punished for the same acts in other proceedings, as the prohibition on being punished twice laid down by Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter would be infringed. The Haparanda District Court stayed the criminal proceedings brought against Mr Fransson, finding that there was a link with Union law, specifically Article 50 of the Charter which enshrines the fundamental right of *ne bis in idem*. The preliminary questions referred by the Haparanda District Court are worded as follows:

(1) Under Swedish law there must be clear support in the European Convention of 4 November 1950 for the Protection of Human

Rights and Fundamental Freedoms (ECHR) or the case law of the European Court of Human Rights for a national court to be able to disapply national provisions which may be suspected of infringing the ne bis in idem principle under Article 4 of Protocol No 7 to the ECHR and may also therefore be suspected of infringing Article 50 of the Charter of Fundamental Rights of the European Union of 7 December 2000 ("the Charter"). Is such a condition under national law for disapplying national provisions compatible with European Union law and in particular its general principles, including the primacy and direct effect of European Union law?

(2) Does the admissibility of a charge of tax offences come under the ne bis in idem principle under Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter where a certain financial penalty (tax surcharge) was previously imposed on the defendant in administrative proceedings by reason of the same act of providing false information?

(3) Is the answer to Question 2 affected by the fact that there must be coordination of these sanctions in such a way that ordinary courts are able to reduce the penalty in the criminal proceedings because a tax surcharge has also been imposed on the defendant by reason of the same act of providing false information?

(4) Under certain circumstances it may be permitted, within the scope of the ne bis in idem principle mentioned in Question 2, to order further sanctions in fresh proceedings in respect of the same conduct which was examined and led to a decision to impose sanctions on the individual. If Question 2 is answered in the affirmative, are the conditions under the ne bis in idem principle for the imposition of several sanctions in separate proceedings satisfied where in the later proceedings there is an examination of the circumstances of the case which is fresh and independent of the earlier proceedings?

(5) The Swedish system of imposing tax surcharges and examining liability for tax offences in separate proceedings is motivated by a number of reasons of general interest, which are described in greater detail below. If Question 2 is answered in the affirmative, is a system like the Swedish one compatible with the ne bis in idem principle when it would be possible to establish a system which would not come under the ne bis in idem principle without it being necessary to refrain from either imposing tax surcharges or ruling on liability for tax offences by, if liability for tax offences is relevant, transferring the decision on the imposition of tax surcharges from the Skatteverket and, where appropriate, administrative courts to ordinary courts in connection with their examination of the charge of tax offences?

Given the importance of the case, written observations were submitted by Sweden, the Netherlands, Denmark, the Czech Republic, the Republic of Austria, Ireland and the European Commission and at the hearing before the Court the agents of the Czech Republic, Denmark, Germany, Ireland, Greece, France, the Netherlands and the Commission intervened.

3. The Advocate General's Opinion

3.1. Jurisdiction and Applicability of the CFR

Advocate General (AG) Cruz Villalón first deals with the question of the jurisdiction of the Court linked to the question of applicability of the CFR in this case. The AG is aware of the fact that the Court is again faced with the request for clear criteria to determine the scope of CFR in the Member States, related to the expression 'implementation of Union law by the Member States' and that several other AG's have expressed diverging views on the matter[16]. He also takes into account that several Member States and the European Commission defended in their interventions the non-applicability of the Charter in this domestic case. Problems arise further concerning the fact that the wording of the Charter ('implementation') is different from the wording of the CJEU case law ('field of application' or 'scope') and that all of these wordings have an open meaning. The AG points rather to continuity with the existing case law on the application of general principles of Community/Union law, which means 'in the field of application of Union law'.

This brought him to the following triad: scope-field of application-implementation. In his view, the competence of the Union to assume responsibility for guaranteeing the fundamental rights vis-à-vis the

[16] See, for example, the Opinion of Advocate General Bot in Case C-108/10 *Scattolon* [2011] ECR I-0000; the Opinion of Advocate General Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000; the Opinion of Advocate General Poiares Maduro in Case C-380/05 *Centro Europa 7* [2008] ECR I-349; and the Opinion of Advocate General Jacobs in Case C-112/00 *Schmidberger* [2003] ECR I-5659.

exercise of a public authority by the Member States, when they are implementing Union law, must be explained by reference to a specific interest of the Union in ensuring that the exercise of public authority conforms to the interpretation of fundamental rights by the Union[17]. The AG elaborates reasoning *in abstracto* and reasoning *in concreto*. Under the former he concludes that there is a fundamental right of the Charter at stake. He also agrees that the power to impose penalties, as the exercise of public authority, must be exercised with respect for the general principles of Union law, including the CFR. However, he is of the opinion that the mere fact that such an exercise of public authority, expressly the power of the State to impose penalties in this particular case, if ultimately based on a provision of Union law, is not, in itself, sufficient for finding that there is a situation involving the implementation of Union law. The result of his reasoning is that the link is not sufficient to transfer the review of any constitutional guarantees applicable to the exercise of that power from the sphere of the responsibility of the Member States to that of the Union[18]. *In concreto*[19] the fundamental question, in his view, is to analyse in the present proceedings the connection between Union law and the national law. Directive 2006/112 on the common system of VAT does not prescribe concrete administrative sanctions. There is only a requirement for effectiveness in the collection of VAT. On the other hand, the provision of false information to the tax authorities by taxable persons is punished in a general way, as an essential prerequisite of that system of penalties. It is that part of the Swedish tax system which is used for the purposes of collecting VAT. In his view there is no relationship of immediate or mediate *causa* between the directive and the Swedish tax penalties. He believes that a distinction must be made between the *causa*, whether immediate or not, and the simple *occasio* and the question is whether, as a result of this *occasio*, the Union judicature

[17] Case C-617/10 *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, point 40.

[18] Case C-617/10 *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, point 40 and point 54.

[19] Case C-617/10 *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, points 56-64.

must interpret the scope of the *ne bis in idem* principle in Swedish law, an interpretation which must take priority over the one which is derived from Sweden's constitutional structure and international obligations. His view is clearly that it would be disproportionate to infer from this *occasio* a shift in the division of responsibility for guaranteeing the fundamental rights between the Union and the Member States and that the reference for a preliminary ruling from the referring court must not be regarded as a situation involving the implementation of Union law within the meaning of Article 51(1) of the Charter. The result of his reasoning is that the link is not sufficient to transfer the review of any constitutional guarantees applicable to the exercise of that power from the sphere of the responsibility of the Member States to that of the Union[20]. The premise for finding that the Union has an interest in assuming responsibility for guaranteeing the fundamental right concerned in this case is the degree of connection between Union law, which is in principle being implemented, and the exercise of the public authority of the State. He considered the VAT directive to be an extremely weak link and not, in any event, a sufficient basis for a clearly identifiable interest on the part of the Union in assuming responsibility for guaranteeing that specific fundamental right vis-à-vis the Union[21].

Accordingly, he proposes that the Court should declare that it lacks jurisdiction to give a ruling in these proceedings.

3.2. Scope of Ne Bis In Idem *Protection*

The AG sets aside the fifth question as a hypothetical one and regroups the remaining questions. Questions 2,3 and 4 all concern the content of the *ne bis in idem* principle. He first analyses the imposition of both administrative and criminal penalties in respect of the same facts in the light of Article 4 ECHR-PR 7. The AG refers to the Engel-criteria and comes to the conclusion that they have been applied to tax

[20] Case C-617/10 *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, point 40 and point 54.

[21] Case C-617/10 *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, point 57.

surcharges, including the surcharge provided for in Swedish law at issue in these proceedings[22] and that the ECtHR has confirmed that this type of measure comes under the heading of a criminal penalty within the meaning of Articles 6 and 7 of the ECHR and, by extension, of Article 4 ECHR-PR 7. He also stresses that under the ECtHR case law, once it has been established that a penalty has been imposed in respect of the same acts, all new proceedings are prohibited provided that the first penalty has become final. It is irrelevant if the first penalty has been discounted from the second in order to mitigate the double punishment[23].

In summary, he comes to the conclusion that Article 4 ECHR-PR 7 precludes measures for the imposition of both administrative and criminal penalties in respect of the same acts, thereby preventing the commencement of a second set of proceedings, whether administrative or criminal, when the first penalty has become final. He then analyses Article 50 CFR in the light of Article 4 ECHR-PR 7. Article 52(3) of the Charter provides that where the rights laid down in the Charter correspond to rights guaranteed by the ECHR 'the meaning and scope of those rights shall be the same as those laid down by the said Convention'. Given the fact that Article 4 is not or not fully applicable in all EU Member States and that many Member States do accept the double imposition of punitive administrative and criminal penalties in their legal order, it is his view that the proclamation in Article 52(3) of the Charter acquires its own definition when it is applied to the *ne bis in idem* principle and thus an autonomous interpretation. He concludes[24] that Article 50 of the Charter must be interpreted as meaning that it does not preclude the Member States from bringing criminal proceedings relating to facts in respect of which a final penalty has already been imposed in administrative proceedings relating to the same conduct, provided that the criminal court is in a position to take

[22] See *Västberga Taxi Aktiebolag and Vulic v Sweden*, Judgment of 23 July 2002, no. 36985/97, and *Janosevic v Sweden*, Judgment of 23 July 2002, ECHR 2002-VII.

[23] *Tomasovic v Croatia*, Judgment of 18 October 2011, no. 53785/09.

[24] Case C-617/10 *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, point 96.

into account the prior existence of an administrative penalty for the purposes of mitigating the punishment to be imposed by it.

The first question of the District Court concerns the compatibility with Union law of a criterion laid down in Swedish law, specifically in the case law of the Swedish Supreme Court, pursuant to which a Swedish provision which is contrary to the rights laid down in the Charter and the ECHR can only be set aside if there is a clear support in the provisions of the Charter and the ECHR and in the related case law. The AG makes a clear distinction between compatibility with the ECHR and with the Charter. The first is the compatibility with Union law of a criterion for the application of the ECHR in so far as it is an international agreement containing rights, which constitute general principles of the European Union legal system (Article 6(3) TEU). Secondly, the referring court asks about the compatibility of that criterion when it is extended to the application of the Charter and, therefore, to Union law. The referring District Court seems to be inspired by the different wording of Article 6(3) TEU and old Article 6(2) EU. Article 6(2) EU stated that the Union:

> '[S]hall respect fundamental rights, as guaranteed by the ECHR, whereas the current wording provides that fundamental rights, as guaranteed by the ECHR 'shall constitute general principles of the Union's law'.

Concerning the compatibility with the ECHR, the AG refers to the judgment of the CJEU in Kambera[25], where the CJEU underlines the fact that Article 6(3) TEU simply reflects the Court's settled case law and that the new wording of the provision does not alter the status of the ECHR in Union law and, therefore, nor does it do so in the legal systems of the Member States. For that reason the CJEU cannot carry out an assessment of the 'clear support' criterion, as applied by the Swedish Supreme Court to situations relating exclusively to the interpretation and application of the ECHR.

Concerning the Charter, the AG believes that EU law must be interpreted as meaning that it does not preclude a national court from

[25] Case C-571/10 [2012] ECR I-0000.

assessing, prior to setting aside a national provision, whether a provision of the Charter is 'clear', provided that that requirement does not hinder the national courts in exercising the powers of interpretation and disapplication assigned to them under Union law.

4. The Court of Justice's Ruling

4.1. Jurisdiction and Applicability of the CFR

The CJEU makes it clear from the very beginning that it is not willing to make a difference between "implementing EU law" under Article 51(1) CFR and the Court's case law[26] concerning the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights, including general EU principles, guaranteed in the legal order of the European Union[27]. The requirement to respect fundamental rights defined in the context of the Union is therefore only binding on the Member States when they act in the scope of the Union. It is essential to the CJEU that applicability of Union law and applicability of fundamental rights go hand in hand: the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law; situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of EU law entails the applicability of the fundamental rights guaranteed by the Charter[28].

The CJEU has no doubt about the applicability of EU law in the concrete case. The tax penalties and criminal proceedings to which Mr Fransson has been or is subject to are connected in part to breaches of his obligations to declare VAT and this VAT declarations are not only linked to the VAT directive 2006/112, but also to specific Treaty obligations. The CJEU refers to the Union loyalty under Article 4(3)

[26] Case 5/88 (*Wachauf*), *Jur.* 1989, p. 2609 and case C-260/89 (*ERT*). *Jur.* 1991, p. I-2925.

[27] Point 18.

[28] Point 21.

TEU, by which every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring the collection of all the VAT due on its territory and for preventing evasion[29]. The CJEU refers to Article 325 TFEU that obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests. The CJEU leaves no doubt as to the application of Article 325 to the VAT-area. According to the CJEU, VAT revenue is part of the European Union's own resources[30] and 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[31]. For all these reasons the CJEU considers tax penalties and criminal proceedings for tax evasion, such as those which the defendant in the main proceedings has been or is subject to because the information concerning VAT that was provided was false, constitute implementation of the VAT directive and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter. The fact that the national legislation upon which those tax penalties and criminal proceedings are based has not been explicitly adopted to transpose the VAT Directive cannot, in the CJEU 's opinion, lead to another conclusion, since its application aims to implement and enforce the VAT Directive and the obligations imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union.

The CJEU concludes its analysis by stating that Member States remain free to apply national standards of protection of fundamental rights in cases where action of a Member State is not entirely

[29] Case C-132/06 *Commission v Italy* [2008] ECR I-5457, paragraphs 37 and 46.

[30] Article 2(1-b) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163).

[31] Case C-539/09 *Commission v Germany* [2011] ECR I-0000, paragraph 72.

determined by European Union law. However, the CJEU clearly states that in any event the national standards of protection of fundamental rights must not only be in line with the level of protection provided for by the Charter, as interpreted by the CJEU, but also comply with the primacy, unity and effectiveness of the EU (par. 60 Case C-399/11-Melloni).

Accordingly, the CJEU comes to the conclusion that it has jurisdiction to give a ruling in these proceedings.

4.2. Scope of the Ne Bis In Idem *Protection*

The CJEU follows the AG in relation to the fifth question and declares it inadmissible thanks to its hypothetical character. It also follows the regrouping of the other questions as proposed by the AG. The essence of question 2, 3 and 4 are, according to the CJEU, whether or not the *ne bis in idem* principle laid down in Article 50 CFR should be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts of providing false information.

The CJEU starts by emphasising that Article 50 CFR does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax and criminal penalties. It is only if the tax penalty is criminal in nature for the purposes of Article 50 CFR and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person. Next, the CJEU applies without further delay the Engel-criteria of the ECtHR, criteria that is has recently made its own in the *Bonda-case*[32]: the legal classification of the offence under national law, the very nature of the offence and the nature and degree of severity of the penalty that the person concerned is liable to incur. The assessment of the first tax penalty is criminal in nature in relation with the *Bonda-criteria* is left by the CJEU to the referring court, be it however with guidance. The

[32] Case C-489/10 *Bonda* [2012] ECR I-0000, paragraph 37.

CJEU states[33] that the referring court has to apply the *Bonda-criteria* to the national penalties and the relevant national standards and may come to the conclusion that double prosecution and punishment would violate the *ne bis in idem* principle, provided that the remaining penalties are effective, proportionate and dissuasive[34].

Concerning the first question, the CJEU follows the AG on the conflict between provisions of domestic law with the ECHR but is much more straightforward than the AG when it comes to a conflict between provisions of domestic law and rights guaranteed by the Charter. According to the CJEU, it is settled case law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary 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[35]. The CJEU states furthermore that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of European Union law, by withholding from the national court having jurisdiction to apply such law, the power to do everything necessary at the time of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements, which are the very essence of European Union law[36]. The CJEU concludes that EU law precludes judicial practice which makes the obligation for a national court to set

[33] Point 36.

[34] And the CJEU refers here to the classic effect utile notion in relation to enforcement (see, to this effect, inter alia *Commission v Greece*, paragraph 24; Case C-326/88 *Hansen* [1990] ECR I-2911, paragraph 17; Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 62; Case C-230/01 *Penycoed* [2004] ECR I-937, paragraph 36; and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565 paragraph 65).

[35] Point 45 (Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 and 24; Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 81; and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 43).

[36] Point 46.

aside any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter[37].

5. Case Commentary

5.1. Applicability of the CFR

It is obvious from the judgment that the CJEU insists on a line of continuity between its case law on application of general principles of EU law in the domestic legal order and the Charter. Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union and it does not matter if these rights are enshrined in the Charter or in general principles of EU law. Indeed, the CJEU wants further to exclude the possibility of EU law applying without the applicability of the fundamental rights guaranteed by the Charter. In its judgment the CJEU has fully set aside the reasoning of the AG Cruz Villalón.

It is interesting to compare the reasoning of AG Cruz Villalón with the one of AG Kokott in the similar *Bonda-case*[38]. In this Polish *Bonda-case*, accused of an incorrect declaration under the EU agricultural subsidy scheme, was excluded by the administrative Agricultural Restructuring and Modernisation Agency from receiving a EU subsidy for several years and was subsequently convicted and given a suspended custodial sentence by the criminal district court. The appeal court decided, however, that the criminal proceedings against Bonda were inadmissible because of the *ne bis in idem* principle. After an appeal to the Supreme Court in the interest of the law, the Supreme Court referred to the CJEU for a preliminary ruling.

[37] Point 48.

[38] Case C-489/10, Opinion of Advocate General Kokott, 15 December 2011, point 16.

In my view the *ne bis in idem* problem is quite similar in the *Bonda-case* and *Fransson-case*, as in both cases there is a risk of double punitive penalties (administrative and criminal) in one jurisdiction. Is there a different degree of connection with the implementation of EU law? In the case of *Bonda*, there is a Commission regulation that explicitly states the exclusion of subsidies as an administrative sanction. However, criminal enforcement is not specifically prescribed by Union law and is thus only imposed under the general enforcement obligations of the CJEU (*effet utile* and effective, proportionate and deterrent sanctions)[39]. In the case of *Fransson* there is no explicit provision in the VAT directive, but only a reference thereto in Article 273:

> Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion (…).

In the case of VAT there is a duty for the member states to comply with the same enforcement obligations imposed by the CJEU, which means that this "may" becomes a must and can include administrative and criminal penalties. In the *Bonda-case* AG Kokott clearly stated that the *ne bis in idem* principle enjoys the status of a fundamental right of the EU under Article 50 CFR and that this case is within the scope of the Charter[40], whatever interpretation – restrictive or not – may be given to the material scope of the Charter. AG Kokott comes thus to the opposite conclusion to that of Cruz Villalón.

However, despite several references by AG Kokott to Article 50 CFR as an applicable human right, in the *Bonda-case* the CJEU completely neglected Article 50 CFR in its analysis and reasoning. This is more than striking, as in both cases there is a substantial connection to Union law. The scope and the interest are similar: an effective application and enforcement of the common agricultural policy and the common VAT regime. In case of the ineffective application of both,

[39] Case 68/88, *Commission v Greece*, Judgment of 21 September 1989.

[40] Case C-489/10, Opinion of Advocate General Kokott, 15 December 2011, points 13 & 16.

they potentially affect the budget of the Union. In other words, there is a direct link to the protection of the financial interest of the Union, which is one of the core interests of the Union, as laid down in Article 235 TFEU. The only reason that I can imagine for the exclusion of Article 50 CFR is that the referring Supreme Court did not ask it at all[41], but that is of course a formal and unconvincing argument. With the ruling in the *Fransson-case* the CJEU has set aside any doubts that might exist: no application of EU law in the member states without the application of the Charter. This means that when enforcement of EU law is at stake the rights and guarantees of the Charter come into play. The applicability of Union law does not depend on the way by which Member States comply with their EU obligations. If they have to comply with EU enforcement obligations, be it even based on Union loyalty under Article 4(3) TEU and the related case law[42] of the CJEU, they act within the scope of Union law, even if they apply enforcement mechanism that have not been specifically prescribed by Union law or have not been specifically designed by the Member State to enforce Union law. In my view this is a very wise choice, as otherwise the applicability of Union law and the CFR would depend on national legislative and practical choices and undermine the equivalent protection of the Charter in the EU.

Several Member States have intervened in order to avoid this result. Their aim was to limit the Charter's impact at the domestic level as much as possible as well as avoiding the impact of EU law in tax matters, which is one of the remaining jealously guarded competences. Meanwhile, concerning the latter there is clear-cut case law[43] of the

[41] The only question was: "What is the legal nature of the penalty provided for in Article 138 of Commission Regulation (EC) No 1973/2004 of 29 October 2004 laying down detailed rules for the application of Council Regulation (EC) No 1782/2003 as regards the support schemes provided for in Titles IV and IVa of that Regulation and the use of land set aside for the production of raw materials (OJ 2004 L 345, p. 1) which consists in refusing a farmer direct payments in the years following the year in which he submitted an incorrect statement as to the size of the area forming the basis for direct payments?".

[42] Case C-68/88, Greek maize, *Jur.* 1989, p. 2965.

[43] Case C-539/09 *Commission v Germany* [2011] ECR I-0000, paragraph 72.

CJEU that VAT is fully part of the EU's resources[44] and Member States should let go of this tired idea.

Concerning the impact of the Charter, it seems that these Member States are not particularly in favour of an evolution by which deepening integration goes hand in hand with equivalent protection of fundamental rights, be it in the domestic legal order or in a transnational setting in the EU. Moreover, several Member States are not willing to comply with the ECHR case law on *ne bis in idem* when it comes to multiple punishments by combining punitive administrative sanctions and criminal sanctions. This is why they maintain their reservations or are not willing to sign or ratify the ECHR-PR 7.

This was also reflected in the 2003 Greek proposal for a framework decision on *ne bis in idem*[45] with the the aim of replacing Articles 54-58 of the CISA with new EU legal rules in order to ensure uniformity in both the interpretation of those rules and their practical implementation. The proposal was not in line with the case law of the ECtHR on the applicability of the Engel-criteria to the *ne bis in idem* principle. One of the reasons the proposal failed to be adopted was that the Member States disagreed on the applicability of the criminal charge Engel-criteria to the *ne bis in idem* principle Seen this context it is quite clear that there is a great need for equivalent application of the *ne bis in idem* principle when implementing and enforcing EU law. This equivalent application will not come from the legislator as it stands, but as a result of the praetorian role of the CJEU. At the same time the CJEU has to guarantee that its standards comply with the minimum standards of the ECtHR.

More astonishing is the position of the European Commission and its legal service on the point of the application of the Charter to the Member States. In the *Fransson-case* they defended the same position taken by the minimalist Member States. As the opinion of the legal service of the European Commission is not public, it is difficult to point out what the exact reasons were. It is however clear that the

[44] Article 2(1-b) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163).

[45] Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the *ne bis in idem* principle, OJ C 2003 100/4.

Commission and its legal service have recently taken an increasingly cautious approach when it comes to the procedural autonomy of the Member States. The fact that the VAT Directive does not prescribe *expressis verbis* the sanctions to be imposed might explain this attitude. Fortunately, the CJEU has not followed this approach, as this would undermine the applicability of Charter rights when enforcing EU law in case of non-explicit enforcement obligations in EU directives or regulations.

From the point of view of the party accused, in both cases his fundamental right to *ne bis in idem* protection is at stake not only as part of a sovereign state's enforcement policy, but also as the consequence of the policy and enforcement choices of a Member State in applying and enforcing EU obligations. In other words, we are not speaking here of a purely internal case falling outside the scope of the application of EU law. When we aim for the effective and equivalent protection of the financial interests of the Union, it is logical that we aim for equivalent human rights protection at the same time, as provided under the Charter. This is sufficient reason to trigger the material application of the Charter and to trigger the jurisdiction of the Court to ensure uniform application through preliminary rulings.

The principal decision in the *Fransson-case* will have substantial consequences for the enforcement regimes in the Member States that go far beyond the *ne bis in idem* principle of the CFR. The right to an effective remedy and fair trial (Article 47 CFR), presumption of innocence and defence rights (Article 48 CFR), the principle of legality and the proportionality of criminal offences and penalties (Article 49 CFR) are all CFR rights that apply to national provisions when used to enforce EU law.

5.2. The Autonomous Character of the Charter and National Standards of Fundamental Rights

The AG made a plea for an autonomous interpretation of the Charter and of its *ne bis in idem* principle. However, he used this reasoning to argue for a lower standard than that of the ECHR, given the fact that not all Member States are bound or fully bound by the ECHR's *ne bis*

in idem standard and given their practice of combining punitive administrative and criminal law enforcement regimes. He did plea for a *ne bis in idem* principle, as applied by the CJEU in competition cases. In the case of the imposition of two consecutive punitive sanctions, any previous punitive decision has to be taken into account in determining the level of the second sanction which is to be imposed (*Anrechnungsprinzip*) in order to be in line with the Charter. The opinion of the AG is clearly incompatible with the case law of the ECtHR.

It is important to emphasise that the CJEU has avoided any reference to the limiting binding force of the ECHR *ne bis in idem* principle for some Member States. This is wise, as these problems do not concern the EU legal order as such. Making the application of EU Charter rights dependent upon reservation clauses under public international law leads to the danger of "Charter à la carte". The CJEU has clearly stated that Member States may apply their proper assessment of fundamental rights under national standards, but that the outcome must comply with the standard imposed by the Charter. The Charter is thus a minimum threshold that cannot be put aside, neither by arguments under national law, nor arguments derived from reservations or declarations to public international law, including the ECHR.

The autonomous character of the Charter also gives the CJEU leeway for developing fundamental rights of the EU beyond the minimum requirements of the ECHR case law, as foreseen under Article 52(3) CFR. In my view, this is also the real added value of the Charter. In an integration model the need to protect fundamental rights might need specific answers for creation of a level of equivalent protection and/or when dealing with issues of transnational justice in the single legal area. The fact that the ECHR *ne bis in idem* has a domestic application only and Article 50 CFREU an application within the scope of EU law (which can be domestic, transnational and/or at the European level) does not mean that we do not have a similar right with a similar function. Moreover, under Article 52(3) the EU can provide more extensive protection. That means that the CJEU case law providing a wider protection than the ECtHR is perfectly compatible

with Article 50 CFREU. This means that CJEU case law giving broader protection is fully in line with the Charter.

Last but not least, remains the question of to what extent Member States may suggest national human rights standards when dealing within the scope of Union law. The CJEU deals with this point very briefly in paragraph 29:

> (…) where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 Melloni [2013] ECR I-0000, paragraph 60).

The CJEU seems to leave some room for application of national human right standards in situations such as the one in the *Fransson-case*, but only as long as the level of protection offered by the Charter, as interpreted by the Court, is guaranteed and as long as the primacy, unity and effectiveness of European Union law are thereby not compromised. Member States must in any case apply the Charter, which is a mandatory minimum standard. They can go beyond it as this does not prejudice primacy, unity and effectiveness. In other words these concepts constitute a maximum ceiling. The Member States have a playing field between this minimum threshold and maximum ceiling. Primacy certainly plays an important role in fields of exclusive competence and/or in fields of fully harmonised or unified EU law such as in the case of the European arrest warrant[46] or in the *Bonda-case*. Unity and effectiveness can play a role in the other cases in order to guarantee that Union-loyalty is complied with when enforcing EU law (effective, proportionate and dissuasive enforcement regimes). To summarise, the CJEU leaves room for application of national human

[46] Case C-399/11 *Melloni* [2013] ECR I-0000, paragraph 60.

rights standards but within the boundaries imposed by classic general principles of EU law. This means that for the alleged party a higher national human right standard can only apply in cases within the scope of EU law, when in conformity with the Charter and not infringing upon primacy, unity and effectiveness of EU law.

5.3. The CFR Ne Bis In Idem Principle: Content and Consequences Under EU Law

When does an imposed administrative tax penalty bar a second prosecution under criminal law in the light of the *ne bis in idem* principle? What are the criteria and consequences?

In the *Fransson-case* both the AG and the CJEU fully applied, for the first time, the *Engel-Bonda* criteria to assess the criminal nature of the administrative penalty within the frame of a Charter right, a novelty in CJEU case law. Applied to the case, the CJEU emphasised that the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax and criminal penalties. To assess whether tax penalties are criminal in nature the Engel criteria of the ECHR, also clearly used in the *Bonda-case*, are applicable. In this case, contrary to the case of *Bonda*[47], the CJEU considered that it is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties are punitive in character. When it is considered punitive, however, double punishment is barred by Article 50 CFREU. It is surprising that the CJEU leaves the final answer to the referring court instead of ruling on this matter, as it did in the *Bonda-case*. Although it is true that the VAT Directive does not contain the type and level of sanctions to enforce the EU law, it is quite clear from ECHR case law that this type of administrative fiscal penalties are punitive in Sweden and do have a criminal nature under the Engel-criteria and are thus a criminal charge under Article 6 ECHR[48]. In other words, there

[47] In the *Bonda-case* the administrative sanction was prescribed by the EU regulation and the referring court did ask for a ruling on the legal character of the sanction.

[48] *Application no.* 34619/97 (*Janosevic*), *ECtHR* 2002/88.

can only be one answer and there seems to be no room for other interpretations or for other national human rights standards, as suggested by the CJEU in paragraph 36 of the ruling. In the light of this legal findings it is clear that the *ne bis in idem* principle of the Charter will bar double punishment. It would have been better if the CJEU would have concluded it instead of suggesting room for other interpretation at national level.

The consequences for the Member States are substantial when implementing and enforcing EU law. They can no longer limit the *ne bis in idem* principle to criminal law *sensu stricto* and will have to widen their scope of protection in order to include punitive administrative sanctioning. Moreover, the reach of Article 50 CFR is not limited to the jurisdiction of every single Member States, as it is the case with Article 4 ECHR-PR 7. This means that Article 50 CFR has also transnational effect in the integrated legal order of the EU. This means that Member States will have to face the transnational application of *ne bis in idem* for all punitive sanctioning in the EU when implementing and enforcing EU law. The consequence will be that there will be an increasing need to decide about case allocation in the EU when it comes to investigations and punishment under administrative and criminal law. In other words, the *ne bis in idem* principle cannot function properly in a common area without the coordination of jurisdiction and binding criteria on choice of jurisdiction and a proper allocation of cases in the common justice area.

5.4. Upcoming Legal Points

With this landmark decision the CJEU has not solved all the problems, nor could it have done. Although Article 50 CFR is a primary source of Union law, it does co-exist alongside Article 54 CISA, *ne bis in idem* clauses in the MLA and MR regimes, and Article 4 ECHR-PR 7. Although the multiplicity of *ne bis in idem* clauses have different functions, they do not contribute to a comprehensive constitutional legal principle in the Union.

Moreover, many of the *ne bis in idem* clauses outside of Article 50 CFREU have a restricted application because of certain exceptions,

derogations or reservations. In the MLA and MR regimes the *ne bis in idem* clause cannot just be an option but is also limited by exceptions if necessary. The same exceptions are also derogations or reservations to ECHR-PR 7 or Article 54 CISA. In practice, some Member States have formulated restricted or no application at all of *ne bis in idem* in the following situations: offences that have been committed on national territory (territoriality clause); the preclusion of punitive administrative sanctions from the scope of application; the interests of national security or other related interests and/or offences committed by national civil servants. Several national criminal courts have been obliged to deal with this legal patchwork, including the relationship between Article 50 CFR and Article 54 CISA[49]. Until now, none of them have, unfortunately, referred to the CJEU for a preliminary ruling.

In the *Fransson-case* the CJEU has avoided tackling the relationship between Article 4 ECHR-PR 7 and Article 50 CFR. Although the former has no transnational application, as is the case with Article 50 CFREU, it can lead to conflicting situations for Member States, as Article 50 CFREU can also apply in domestic situations. What happens if Member States have not ratified ECHR-PR 7 or have formulated a reservation to its application and are not willing to accept the application of the *ne bis in idem* principle to the *bis* combination of punitive administrative and criminal penalties? In my opinion, Article 50 CFR de facto sets aside the non-ratification of declarations or reservations, as long as the Charter applies in a domestic situation of the *ne bis in idem* right. In such a case all Member States should apply the substance of Article 50 CFR, in line with Article 4 ECHR-PR 7. It would be a strange situation that in a common area of freedom, security and justice national reservations could still prevail as a claw-back clause concerning a fundamental right of primary law.

Finally, the CJEU 's elaboration of a common *ne bis in idem* principle for all policy areas is long overdue, as there are still substantial differences between the *ne bis in idem* of the area of freedom, security and justice and the internal market/competition policy

[49] See J.A.E.VERVAELE, Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?*, in *Utrecht Law Review*, 2013, Autumn Special on Transnational Criminal Justice (to be published).

area. If member states have to comply with the *Engel-Bonda* criteria, I do not see any reason why these criteria should not be applicable to the enforcement of the competition rules.

CHAPTER 7

THE EUROPEAN ARREST WARRANT AND APPLICABLE STANDARDS OF FUNDAMENTAL RIGHTS IN THE EU[1]

1. Introduction: The Shift from Mutual Legal Assistance (MLA) to Mutual Recognition (MR)

Until the coming into force of the Treaty of Amsterdam and the establishment of an area of Freedom, Security and Justice (FSJ) the regime for judicial cooperation in criminal matters, also called mutual legal assistance (MLA), was laid down in multilateral mother conventions of the Council of Europe. It meant that Member States of the EU had to use regional international public law conventions to gather criminal evidence, to obtain extradition or to execute sanctions such as confiscations or prison penalties. Under the Treaty of Maastricht, Council of Europe Conventions were gradually replaced by proper EU Conventions. These were based on direct cooperation between judicial authorities, instead of the cooperation between governments in the mother conventions. Direct cooperation between judicial authorities in the EU does not mean that an extradition warrant from a requesting State automatically has legal value in the Member State that receives the request. As a rule, these warrants must be converted into a national decision in the requested State through *exequatur* proceedings against which legal remedies can be used. Already at the Cardiff European Council in 1998 the Council of Ministers was asked to identify the scope for greater mutual recognition of judicial decisions of the Member States' courts[2]. The concept of

[1] This article has been published as J.A.E. VERVAELE, *The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU*, in *Review of European Administrative Law*, 2013-2, vol. 6, pp. 37-54.

[2] Presidency conclusion no. 39.

mutual recognition was well-known in community law since the landmark decision of the ECJ in the *Cassis de Dijon* case and has also be applied by the community legislator in many substantive fields of the internal market with the aim of avoiding in detail harmonisation. However, extrapolating it to judicial decisions in criminal matters was not self-evident, as the harmonisation in the area of criminal procedure and applicable safeguards was very minimal or non-existent.

With the coming into force of the Treaty of Amsterdam, the European Council organised a special meeting on the area of FSJ in Tampere in 1999. In the Tampere conclusions mutual recognition (a concept that was not mentioned in the Treaty) had become a cornerstone of judicial cooperation in criminal matters and the aim was to replace all MLA conventions of the Council of Europe by proper EU MR instruments[3]. More specifically, the Council of Ministers and the Commission were asked to adopt, by December 2000, a raft of measures to implement the principle of mutual recognition. In 2000 the Commission published its Communication to the Council and the European Parliament: Mutual recognition of final decisions in criminal matters[4]. MR would apply to both court decisions and pre-trial decisions, as well as orders or warrants to gather evidence or to arrest and hand over suspects. The basic idea was that, despite the differences between the procedural regimes in the member states, they were all party to the ECHR and could thus trust each other. Mutual trust was presupposed and considered a sufficient ground to apply MR, even with little or no harmonisation. This means that MR orders were warrants from an issuing member state which had legal value in the area of FSJ and could thus be automatically executed without an *exequatur* procedure. Legal doubts concerning the order or warrant, linked to for instance, the legality of the evidence that served to justify the order or

[3] See Presidency conclusion no. 33 of the Tampere special European Council. For in depth analysis, see J. OUWERKERK, *Quid Pro Quo? A Comparative Law Perspective on the Mutual Recognition of Judicial Decisions in Criminal Matters*, Antewrp-Oxford-Portland, 2011 and A. SUOMINEN, *The Principle of Mutual Recognition in Cooperation in Criminal Matters: a Study of the Principle in Four Framework Decisions and in the Implementation Legislation in the Nordic Member States*, Cambridge, 2011.

[4] COM(2000) 495 final.

warrant could only be challenged in the issuing member state. Were individual rights completely ignored? Not as such, in point no. 33 of the Tampere Conclusions, the European Council expressed the opinion that enhanced mutual recognition would also facilitate the judicial protection of individual rights. It must therefore need to be ensured that the treatment of suspects and the rights of the defence, would not only not suffer from the implementation of the principle, but that the safeguards could even be improved through the process. The idea was that the Commission and the Council of Ministers should elaborate common minimum standards of procedural law that are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of the member states.

In 2002 the Council of Ministers adopted the first mutual recognition instrument in criminal matters: the Framework Decision (FD) on the European arrest warrant and surrender procedures between member states (EAW)[5]. This instrument was adopted under a fast track procedure following the events of 9/11 in New York and Washington DC, and was not accompanied by proposals on minimum procedural standards or the approximation of procedural safeguards. A European arrest warrant, be it to bring the suspect to trial or to execute the trial sentence, is based on mutual trust and must thus be recognised and executed, unless mandatory or optional grounds of non-recognition apply. The grounds have been strongly restricted in contrast to the refusal grounds under the MLA extradition treaty, and do not contain grounds that are based directly on a human rights clause. Only in the recitals can we find reference to fundamental rights:

> 12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union (7), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal

[5] Council Framework Decision 2002/584/JHA on the European arrest warrant and surrender procedure between Member States of 13 June 2002, OJ 2002 L 190, p. 1. The decision has been amended by Council Framework Decision 2009/299/JHA of 26 February 2009, OJ 2009 L 81, p. 24.

> to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.
> This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.
>
> (13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

The Commission was of the opinion that member states that implemented grounds of non-recognition in their national legislation that went beyond the ones foreseen in the articles were violating EU law. Non-recognition of EAW's based on a fair trial or due process reason were considered as not being in line with EU duties under the EAW FD[6]. Practice showed however that differences in member states' procedural regimes could lead to serious problems with EAW warrants, for instance when it comes to the execution of convictions *in absentia*, an area in which legal traditions of member states can significantly differ. What for one is constitutionally barred and thus *ordre public* is for another current practice. In 2009 the EAW FD was amended and a new article 4a was introduced, with the aim of strengthening mutual trust and to bring the practice in line with case law of the ECHR[7]. Article 4a precludes a refusal to execute the EAW issued for the purpose of executing a custodial sentence or a detention order if the

[6] Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (SEC(2005) 267) - COM/2005/0063 final, point 2.2.1.

[7] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, 2009, OJ L 81/24.

person did not appear in person at the trial resulting in the decision where the person concerned, being aware of the scheduled trial, had given a mandate to a legal counselor, who was either appointed by him or by the State to defend him or her at the trial, and was indeed defended by that counselor at the trial. Practice and negotiation on new MR instruments, as the European Evidence Warrant (EEW)[8] showed that blind mutual trust let to a lack of confidence between judicial authorities and that minimal standards were indeed necessary. In the second FSJ programme (the Hague programme) legislative action was required in order to elaborate on the minimum approximation of procedural safeguards. Member states failed however in agreeing upon the draft framework decision[9] and it was not until the Lisbon Treaty that the first results were seen. In the Lisbon Treaty the mutual recognition principle was codified in article 67(3) and article 82(1) TFEU. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and is a tool for achieving the aim of ensuring security (crime prevention and combating of crime) in the area of FSJ. Article 82(2) also links the MR tool to the harmonisation of minimum rules concerning mutual admissibility of evidence and rights of individuals in criminal procedure. MR and article 82(2) were used as legal basis for the first binding directives on procedural safeguards in criminal matters: the directive on right to translation and interpretation[10], the directive on letters of rights[11] and a draft directive on right to access to a lawyer in criminal proceedings[12]. These results are of course only a first step and do not resolve all the human rights protection issues that

[8] Council Framework Decision 2008/978/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, 2008, OJ L 350/72.

[9] T. SPRONKEN, G. VERMEULEN, *EU Procedural Rights in Criminal Proceedings*, Antewrp-Oxford-Portland, 2009.

[10] Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, 2010, OJ L 280/1.

[11] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, 2012, OJ L 142/1.

[12] Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326 final.

might arise when issuing and executing EAW's, for instance when it comes to deprivation of liberty, access to the file/disclosure or right to a trial within a reasonable time.

2. The Facts of the Melloni Case and Proceedings before the National Courts

In 1996, the Criminal Division of the High Court (Audiencia Nacional) of Spain authorised the extradition of Mr. Melloni to stand trial in Italy for suspicion of bankruptcy fraud. While awaiting extradition he was released on bail and fled justice. The prosecution in Italy continued and Mr. Melloni appointed two bar lawyers for his defence. In first instance (Ferrara in 2000) and in appeal (Bologna in 2003) he was sentenced *in absentia* to 10 years imprisonment. In 2004, the Italian Supreme Court of Cassation dismissed the appeal in cassation. In 2004, the Prosecutor's Office in Bologna issued an EAW for the execution of the sentence of 10 years imprisonment. Following his arrest in 2008, the Central Investigating Court referred the execution of the EAW to the Audiencia Nacional, which decided in the warrant's favour. The Audiencia Nacional ordered the execution of the EAW and was of the opinion that his rights of defence had been respected, since he had been aware from the outset of the forthcoming trial, deliberately absented himself and appointed two lawyers to represent and defend him in that capacity, at first instance, and in the appeal and cassation proceedings. Mr. Melloni filed a constitutional petition (recurso de amparo) against the order of the Audiencia Nacional claiming that his fair trial rights under article 24(2) of the Spanish Constitution has been infringed and that the surrender to Italy would violate Spanish Constitutional case law that makes extradition or surrendering for executions of convictions *in absentia* conditional upon the re-trial of the case. By order of September 2008, the Constitutional Court of Spain declared the petition admissible and suspended enforcement of the EAW. Concerning the merits the Constitutional Court came to the conclusion that a decision of the Spanish judicial authorities to consent to extradition or surrender to countries which, in cases of very serious

offences, allow convictions *in absentia* without making the extradition conditional upon the convicted party being able to challenge the same in order to safeguard his rights of defence, gives rise to an "indirect" infringement of the requirements deriving from the right to a fair trial, in that such a decision undermines the essence of a fair trial in a way which affects human dignity. In the view of the Constitutional Court it is of no importance that FD 2009/29 does not apply, *ratione temporis*, to the main proceedings. The object of the main constitutional proceedings is to determine not whether the EAW of 2008 violated the Framework Decision of 2009, but whether it indirectly infringed the right to a fair trial protected by article 24(2) of the Spanish Constitution. FD 2009/299 must therefore, in the view of the Constitutional Court, be taken into account for determining what part of that right has "external" effects. At the time of the assessment of constitutionality the FD was applicable law and national law is to be interpreted in conformity with FD's. In 2011 the Constitutional Court suspended the proceedings and referred to the ECJ the following questions for preliminary ruling:

1. Must Article 4a(1) of Framework Decision 20022/584/ JHA, as inserted by Council Framework Decision 2009/299/JHA, be interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant?
2. In the event of the first question being answered in the affirmative, is Article 4a(1) of Framework Decision 2002/584/JHA compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter…, and from the rights of defence guaranteed under Article 48(2) of the Charter?
3. In the event of the second question being answered in the affirmative, does Article 53 of the Charter, interpreted schematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from Union law, in order to avoid an interpretation which restricts or adversely affects

a fundamental right recognised by the Constitution of the first-mentioned Member State?

3. The Advocate General's Opinion

Advocate General (AG) Bot first deals with the question of admissibility of the reference as the Spanish Prosecution Service, several member states (Belgium, Germany and the UK) and the Council have maintained that the reference should be considered inadmissible. Their arguments are twofold: the inapplicability, *ratione temporis*, of FD 2009/299 and the Italian deferral under article 8(3) of FD 2009/299, by which the FD is only applicable from January 2014, make the raised questions hypothetical. The AG does not subscribe to those arguments. He considers article 4a a procedural rule that applies to the surrender procedure at issue in the main proceedings, which are ongoing. Article 4a is not a substantive rule and can be applied to situations existing before its entry into force. Concerning the Italian time deferral, the AG is not convinced that it makes the ECJ's reply, for the purpose of resolving the main proceedings, pointless. He moreover indicates that January 2014 is a final deadline. Therefore, a reply from the ECJ will be useful to enable the Constitutional Court and the executing judicial authority to rule on the surrender procedure. In addition, he underlines the particular nature of the constitutional petition and review and is of the opinion that in these circumstances the ECJ would probably agree to reply even if the time limit for transposition of that FD had not yet expired.

On the first question related to the compatibility between the Spanish regime, making extradition/surrender conditional upon retrial in case of *in absentia* proceedings, and article 4a(1)(a) and (b) of the FD, the AG does not share the referring Constitutional Court's doubts. In the AG's view article 4a is clear. There is an optional ground for non-execution of an EAW in case of *in absentia* proceedings, but this is accompanied by four exceptions in which the executing judicial authority may not refuse to execute the EAW in question. The situation of *Melloni* falls within these exceptions as he has been summoned and

presented by a counselor in trial. In this scenario *Melloni* must be regarded as having waived his right to appear at the trial and can therefore not invoke a right to a retrial. To allow the executing judicial authority to make the surrender of the person concerned conditional upon the possibility of retrial would be tantamount to adding a ground for non-recognition of the EAW. In the view of the AG that would go against the EU legislature's stated intention to provide an exhaustive list, for reasons of legal certainty, of circumstances in which it must be considered that the procedural rights of a person who has not appeared in person at his trial have not been infringed and that the EAW must therefore be executed.

By its second question, the Spanish Constitutional Court asks the ECJ to rule on whether article 4a(1) of the FD is compatible with the requirements deriving from the second paragraph of article 47 and article 48(2) of the CFR, corresponding respectively to article 6(2) and article 6(3) ECHR. By applying article 52 of the CFR, the AG refers to the synthesis of general principles concerning judgments rendered *in absentia* that can be found in the ECtHR cases *Sejdovic v Italy*, *Haralampiev v Bulgaria* and *Idalov v Russia*. Proceedings held in the absence of the accused are not always incompatible with the ECHR. The ECtHR has elaborated several general principles by which absence of the accused can nevertheless lead to the fairness of the proceedings as a whole (presence of defence lawyer or retrial on the merits in appeal, etc.). The AG considers that article 4a(1) is a codification of these general standards. The ECJ cannot rely on the constitutional traditions common to the member states to apply a higher level of protection, as FD 2009/299 is the result of an initiative of seven member states and has been adopted by all the member states, by which it can be presumed that a large majority of the Member States does not share the view taken by the Spanish Tribunal Constitucional in its case law. He comes to the conclusion that the validity of article 4a(1) FD is not called into question by the second paragraph of article 47 CFR (fair trial) and article 48(2) CFR (rights of the defence).

The third question is by far the most interesting one, as the Constitutional court asks the ECJ, in essence, to rule on whether article 53 CFR allows an executing judicial authority, in accordance with its

national constitutional law, to make the execution of an EAW subject to the condition that the person who is subject of the warrant is entitled to a retrial in the issuing member state, even though the application of such a condition is not authorised by article 4a(1) FD. The Constitutional Court refers itself to three possible interpretations of article 53 CFR. The first is one is qualifying article 53 as a minimum standards of human rights (as in international human rights law), allowing Member States to apply a higher standard. The second one is that article 53 CFR aims to define the scope of the CFR, by indicating in accordance with article 51 CFR that where EU law applies the CFR applies and that where EU law does not apply a higher or lower standard than the CFR can be applied. The third one would be a variation on the first and second one depending on the specific problem and context. The AG strongly rejects the first interpretation, as it infringes the principle of the primacy of EU law. It is settled case law that recourse to provisions of national law, even of a constitutional order, to limit the scope of EU law would have the effect of impairing the unity and efficacy of that law[13] and thus prejudice the uniform and effective application of EU law within the member states as well as undermining the principle of legal certainty. Finally, the interpretation also deviates from the long-standing tradition of protecting of fundamental rights within the EU, which must be ensured within the framework of the structure and objectives of the EU, including the area of freedom, security and justice. Human rights protection must be adjusted to its context. The necessary uniformity of application of EU law and the construction of the area of freedom, security and justice are specific contextual interests that cannot be taken into account by national constitutional standards and can legitimise adjustments to the level of human rights protection, depending on the different interests at stake. In its view the EAW FD has laid down a uniform mechanism of MR, including procedural guarantees, in the cross-border dimension of the area of freedom, security and justice. The AG subscribes to the second interpretation given by the Constitutional Court and proposes

[13] See, *inter alia*, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3; Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, paragraph 38; and Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 61.

that the ECJ answer the question in the negative. In AG's view this answer would not infringe article 4(2) TEU, by which the EU is required to respect the national identities of the Member States, inherent in their fundamental structures. Fair trial rights and rights of defence of judgments rendered in absentia are not covered, in the AG's opinion, by the concept of the national identity of the Kingdom of Spain.

4. The Court of Justice's Ruling

As to the admissibility of the referral for a preliminary ruling, the ECJ recalls its standing case law, by which the Court is in principle bound to give a ruling and can only set aside the request exceptionally: the interpretation sought by the national court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical. This does not apply, according to the ECJ, to this referral. The very wording of article 8(2) of FD 2009/299 makes it clear that, as from 28 March 2011, that decision shall apply without any distinction prior or subsequently to that date. The ECJ also refers to its settled case law, according to which procedural rules, as with those applicable in *Melloni*, are generally held to apply to all proceedings pending at the time they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force[14]. Finally, the mere fact that the Italian state decided that the FD would enter into force on a later date does not make the request for a preliminary ruling inadmissible, as the national court wished to take into consideration the relevant provisions of EU law to determine the substantive content of the right to a fair trial guaranteed by article 24(2) of the Spanish Constitution. Following all this considerations the ECJ declares the preliminary ruling from the Spanish Tribunal Constitucional admissible.

[14] Joined cases 212/80 to 217/80 *Meridionale Industria Salumi and others*, 1981, ECR 2735, par. 9; case C-467/05 *Dell'Orto*, 2007, ECR I-5557, par. 48 and case C-296/08 PPU, *Santesteban Goicoechea*, par. 80.

On the first question related to the compatibility between the Spanish regime, making extradition/surrender conditional upon retrial in case of *in absentia* proceedings, and article 4a(1)(a) and (b) of the FD, the ECJ recalls the purpose of the replacement of MLA by MR and refers extensively to its interpretation of MR and EAW in its judgment in case C-396/11, *Ciprian Vasile Radu*[15]. The EAW FD seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of a crime, to enhance judicial cooperation with a view to achieving the objectives of the area of FSJ, by basing itself on a high degree of confidence and trust which should exist between the member states. Under article 1(2) of the EAW FD member states are in principle obliged to execute an EAW, unless exceptions are provided as mandatory or optional grounds for non-executions in articles 3, 4 and 4a. Moreover, the execution of an EAW can be made subject solely to the conditions set out in article 5 FD EAW. In order to determine the scope of article 4a(1) the ECJ is examines its wording, scheme and purpose. Concerning the wording, the ECJ fully follows the opinion of the AG and also confirms this through the analysis of the purpose of the provision, the aim of which is the execution of the EAW *in absentia* cases provided certain conditions are fulfilled to guarantee fair trial and defence rights. Finally, the ECJ finds that the objectives pursued by the EU legislature, as expressed in the recitals 2-4 FD EAW also confirm the AG's opinion. The ECJ concludes that the FD EAW solution in relation to *in absentia* decisions does not infringe the rights of the defence. The FD EAW must be interpreted as precluding the executing judicial authorities from making the execution of an EAW, for the purpose of executing a sentence, conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State.

By its second question, the Spanish Constitutional Court asks the ECJ to rule on whether article 4a(1) of the FD is compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in articles 47 and 48(2) CFR, corresponding respectively to article 6(2) and article 6(3) ECHR. The ECJ underlines

[15] C-396/11, *Ciprian Vasile Radu*, Judgment of 29th January 2013.

that the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, but that that right is not absolute. In case the accused did not appear in person, but was informed of the date and place of trial or was defended by a legal counselor to whom he had given a mandate to do so, there is no violation of the right to a fair trial in EU law and that interpretation is in line with case law of the ECHR. The very objective of the FD EAW was to enhance the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States and this has been laid down in article 4a(1)(a) and (b) of the FD EAW. It follows from the reasoning that article 4a(1) is compatible with the requirements under Articles 47 and 48(2) CFR.

As to the third question the ECJ rephrases it slightly, but without changing the content or narrowing it down:

> The national court asks, in essence, whether Article 53 of the Charter must be interpreted as allowing the executing Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution[16].

The ECJ summarises first the interpretation envisaged of article 53 by the Spanish Constitutional Court: article 53 would give general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. This would *in casu* make it possible to apply higher constitutional standards to the EAW than the ones foreseen in article 4a(1) FD EAW and thus to widen the grounds of non-recognition or to impose new requirements for the execution of the EAW. The ECJ rejects this interpretation categorically:

> That interpretation of Article 53 of the Charter would undermine the principle of primacy of EU law inasmuch as it would allow a Member

[16] Point 55.

> State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights by that State's constitution[17].

The ECJ underlines that it is settled case-law that, by virtue of the principle of primacy, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of a Member State. When it comes to the interpretation of article 53 CFR the ECJ recognises that national authorities and courts remain free to apply national standards of protection of fundamental rights. However the ECJ restricts this freedom very clearly, as the level of protection provided by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law cannot be thereby comprised. The ECJ underlines that the adoption of FD 2009/299 was intended to remedy the difficulties associated with the mutual recognition of decisions rendered in absence of accused, arising from the differences in fundamental rights protection in the Member States. The FD 2009/299 effect a harmonization of the conditions of execution of a EAW in the event of a conviction rendered *in absentia*, which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted *in absentia* who are the subject of a EAW. *In casu*, if the Spanish Constitutional Court would apply a higher standard of protection it would cast doubt on the uniformity of the standard of protection of fundamental rights as defined in the FD, undermine the principles of mutual trust and recognition and therefore comprise the efficacy of the FD EAW. The ECJ comes thus to the conclusion that article 53 CFR must be interpreted as not allowing a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State. In other words the FD EAW and article 4a(1) in particular contains an exhaustive and harmonised system of non-recognition grounds and requirements that has strike a balance between due process and judicial efficiency.

[17] Point 58.

5. Case Commentary

In the first two questions the ECJ deals with the compatibility of the *in absentia* requirements under the FD EAW. In line with the AG's reasoning the ECJ comes to the convincing conclusion that the provisions contained in art 4a(1) are fully compatible with the requirements of effective judicial remedy and fair trial under articles 6(2) and 6(3) ECHR and articles 47 and 48(2) CFR. The ECJ refers to relevant decisions of the ECtHR, as ECtHR, *Medenica v Switzerland*, no. 20491/92, § 56 to 59, ECHR 2001-VI; *Sejdovic v Italy* [GC], no. 56581/00, § 84, 86 and 98, ECHR 2006-II; and *Haralampiev v Bulgaria*, no. 29648/03, § 32 and 33, 24 April 2012.

This first step is a very important one, as the FD EAW aims achieve mutual trust and confidence between the judicial authorities not only in order to enhance effective judicial cooperation, but also to enhance the procedural safeguards of suspects involved. The in absentia requirements of the FD EAW are a harmonised compromise that aims to combine crime control and due process. That the ECJ considers it in line with the requirements of the case-law of the ECtHR comes as no surprise given that the content of the amended FD EAW in 2008 is a codified version of the ECtHR case-law to the related subject. The ECJ sees no necessity to go beyond the minimum requirements of the ECtHR. That the ECJ finds the solution is a reasonable balance between judicial efficiency and human rights comes also as no surprise, as the FD EAW was deliberately amended in 2008 for that purpose.

Significantly more complicated and of a more fundamental nature is the third question related to article 53 CFR, certainly taking into account that the EAW has been the object of constitutional review and clashes in several Member States in the past[18]. Article 53 CFR stipulates that:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international

[18] J. KOMARÉK, *European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony*, in 44 *CML Rev*, 2007, pp. 9-40.

> law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Such a reference is a classic one in international human rights treaties. Article 53 ECHR for instance stipulates:

> Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

The aim of article 53 ECHR is clearly to establish a mandatory minimum standard, which means that existing or new higher standards of Contracting Parties are allowed. The main interpretation of the Spanish Constitutional Court did in fact follow this reasoning, but applied to article 53 CFR. This would mean that the Spanish Constitutional Court could apply its more protective human rights protection, which goes beyond the minimum standard of the ECHR and of the equivalent standard under the CFR. This interpretation made by the Spanish Constitutional Court is fully in line with its opinion of 2004[19] on the relationship between the ECHR/CFR and national constitutional law. In its opinion, at the request of the Spanish Government, the Spanish Constitutional Court declared the draft Constitutional Treaty in line with the Spanish Constitution and did not see great difficulties with the CFR as it contained, in its opinion, only minimum standards in the same way as the ECHR[20].

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[19] *Declaración del Pleno del Tribunal Constitucional 1/2004, de 13 de diciembre de 2004. Requerimiento 6603-2004.* http://www.boe.es/boe/dias/2005/01/04/pdfs/T00005-00021.pdf, punto 6. For comments see A. RODRIGUEZ, *¿Quién debe ser el defensor de la Constitución española? Comentario a la DTC 1/2004, de 13 de diciembre*, in *Revista de derecho constitucional europea*, 2005, nr. 3, http://www.ugr.es/~redce/ReDCE3/18 angelrodriguez.htm; A.L. CASTILLO, A.S. ARNAIZ, V.F. COMELLA, *Constitución Española y Constitución Europea, Análisis de la Declaración del Tribunal Constitucional ((DTC 1/2004, de 13 de diciembre)*, Madrid, 2005.

[20] Idem, point 6: "Significa, sencillamente, que el Tratado asume como propia la jurisprudencia de un Tribunal cuya doctrina ya está integrada en nuestro Ordenamiento

The ECJ rejects firmly this interpretation of article 53 CFR. In fact, although the function of article 53 CFR can be compared to the function of article 53 ECHR, it does function in another context. That is also why, in my opinion, article 53 CFR refers to the "respective field of application" of inter alia Union law. This point has been extensively elaborated by the AG, who underlines that the CFR is not to be regarded as a clause designed to regulate a conflict between, on the one hand, a provision of secondary law which, interpreted in the light of the Charter, sets a given level of protection for a fundamental right and, on the other hand, a provision drawn from a national constitution which provides a higher level of protection for the same fundamental right. It is also in his opinion that it is by no means apparent from the wording of article 53 of the Charter that it is to be considered as establishing an exception to the principle of the primacy of European Union law. The words 'in their respective fields of application' were chosen by the drafters of the Charter in order not to infringe the principle of primacy, which was explicitly confirmed in declaration 17 to the Treaty of Lisbon signed on 13 December 2007[21]. From the historical analysis of

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por la vía del art. 10.2 CE, de manera que no son de advertir nuevas ni mayores dificultades para la articulación ordenada de nuestro sistema de derechos. Y las que resulten, según se ha dicho, sólo podrán aprehenderse y solventarse con ocasión de los procesos constitucionales de que podamos conocer. Por lo demás no puede dejar de subrayarse que el artículo II-113 del Tratado establece que ninguna de las disposiciones de la Carta «podrá interpretarse como limitativa o lesiva de los derechos humanos y libertades fundamentales reconocidos, en su respectivo ámbito de aplicación, por el Derecho de la Unión, el Derecho internacional y los convenios internacionales de los que son parte la Unión o todos los Estados miembros, y en particular el Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales, así como por las Constituciones de los Estados miembros», con lo que, además de la fundamentación de la Carta de derechos fundamentales en una comunidad de valores con las constituciones de los Estados miembros, claramente se advierte que la Carta se concibe, en todo caso, como una garantía de mínimos, sobre los cuales puede desarrollarse el contenido de cada derecho y libertad hasta alcanzar la densidad de contenido asegurada en cada caso por el Derecho interno".

[21] See http://eur-lex.europa.eu/en/treaties/dat/12007L/htm/C2007306EN.01025602.htm; by declaration 17 the content of article I-6 of the Draft Constitutional Treaty was kept on board: "The Constitution and law adopted by the institutions of the Union in

the drafting[22] of article 53 CFR it becomes clear that the wording "in their respective fields of application" have been deliberately inserted at the demand of the European Commission with the aim to uphold primacy. The ECJ does not analyse the wording "in their respective fields of application" but jumps directly and in firm wording to the importance of primacy in this respect. The ECJ clearly accepts that member states can, when applying Union law, offer a higher protection than that provided for by the ECHR/CFR. However, this higher level of protection cannot comprise the primacy, unity and effectiveness of EU law. This reasoning can of course only be applied when the EU itself does apply with the minimum standards of the ECHR/CFR (as in the case of *Melloni*). In other words, higher standards are only allowed when compatible with the primacy, unity and effectiveness of EU law, a reasoning that was also used in the ruling of the same day in the case *Åkerberg Fransson*[23]. The question arises how this interpretation should be read in the light of primary and secondary Union law that refers to constitutional traditions.

First of all, article 4(2) TEU stipulates:

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

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exercising competences conferred on it shall have primacy over the law of the Member States".

[22] J. BERING LIISBERG, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? – Article 53 of the Charter: a Fountain of Law or just an Inkblot?*, *Jean Monnet Working Paper* No. 4/01.

[23] Case C-617/10 (Grand Chamber), Judgment of 26th February 2013, see J.A.E. VERVAELE, *The Application of the EU Charter of Fundamental Rights (CFR) and its Ne Bis In Idem Principle in the Member States of the EU*, in *Review of European Administrative Law*, 2013, vol. 6, nr. 1, pp. 113-134 (Chapter 6 of this book).

This article does however not apply in the case *Melloni*. Neither the AG nor Spain qualify the procedural requirement on *in absentia* sentencing as affecting the national identity of the Kingdom of Spain, which is the reason why the ECJ does not deal with article 4 TEU at all in its ruling. In future, the ECJ will however have to face cases in which member states are of the opinion that EU law is infringing upon their national identity. We can thus conclude that not all fundamental rights are covered by the notion of national identity.

The TFEU also deals with constitutional standards in the framework of the Area of FSJ. Article 67 TFEU states clearly:

> The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

Article 82 TFEU, dealing with mutual recognition and harmonisation of criminal procedure, also underlines that the harmonised minimum rules shall take into account the differences between the legal traditions and systems of the member states. Finally, Recital 12 of FD EAW contains an explicit reference to national constitutional rules:

> This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

The AG dealt with these concerns in his opinion[24], but considers them taken into account by the amended FD EAW when introducing the harmonised article 4a(1). Under the third pillar regime approval of every member state was indeed necessary. The ECJ did not deal at all with the articles mentioned and could do so because they do not impose any hierarchy in applicable fundamental rights and are of no direct use for the interpretation. However, given the complexity of the area of conflicting standards of fundamental rights, the ECJ has been quite straightforward in its wording. Some authors qualify the ruling as one

[24] Point 144.

that sacrifices the highest level of fundamental rights protection for the benefit of the primacy and *effet utile* scope of Union law and imposes the supremacy of the CFR[25]. Others are afraid that constitutional plurality will suffer or that the national constitutional courts will rebel and trigger the Solange-clause[26].

I do believe that is it too early to derive these conclusions from the *Melloni* ruling. First of all, as also stated by the AG, article 53 is not an isolated article, but has to be read in the light of articles 51 and 52 CFR, which refer to the existence of the plurality of sources of protection for fundamental rights binding the member states. Art 52(3) makes the ECHR a minimum standard and minimum threshold, as the EU can provide more extensive protection. Article 53 supplements the principles stated in article 51 and 52. The Charter is thus not intended to become the exclusive instrument for protecting those rights.

Second, the ruling of the ECJ in *Melloni* is not particularly surprising when it comes to the relationship between primacy and national law. The ECJ has settled case-law on primacy, including of primacy on rules of national constitutional law. The ECJ refers in *Melloni* to primacy as an essential feature of the EU legal order, by which national rules, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State[27].

Third, the *Melloni* case is a very specific one, in which all member states have agreed upon balanced harmonisation that does not infringe, neither the ECHR, nor the CFR and in which one Constitutional Court does want to apply higher constitutional standards that risk severely

[25] N. LAVRANOS, *The ECJ's Judgments in Melloni and Åkerberg Fransson: Une ménage à trois difficultés*, in *European Law Reporter*, April 2013, no. 4, pp. 133-141.

[26] J.H. REESTMAN, L.F.M. BESSELINK, *Editorial after Åkerberg Fransson and Melloni*, in *European Constitutional Law Review*, 2013, pp. 1-5 and L.F.M. BESSELINK, Fide 2012 "General report", *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, available at www.fide2012.eu; L.F.M. BESSELINK, *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the EU*, in 5 *CML Rev*., 1998, pp. 629-680.

[27] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, par. 3, and Case C-409/06 *Winner Wetten* [2010] ECR I-8015, par. 61.

undermining the concepts of mutual trust and recognition, being Treaty based principles in the area of FSJ. This is the reason why *Melloni* cannot be compared to the *Omega* case[28], where national constitutional standards (*in casu* human dignity) could be used to fill in the exceptions to the freedom of services and goods. It concerns the content of derogations that already existed under EU law.

Fourth, the way in which the ECJ accepts or excludes a margin in the application of national fundamental rights within the EU legal order has not completely changed. Also in relation to other general principles of EU law, such as the principle of effective enforcement or the protection of legitimate expectations, the ECJ has used primacy as an essential feature of Union law and combined it with notions of effectiveness, assimilation and unity. It is surprising that the ECJ does not elaborate on this in the specific framework of the area of FSJ. The AG has rightly underlined that the construction of the area of FSJ is a specific context in which interest are at stake that cannot be taken into account by national constitutional standards and can legitimise adjustments to the level of human rights protection, depending on the different interest at stake[29]. In other words there are situations in which European interests legitimise a proper balance for the common area of FSJ. Unfortunately, the ECJ did not elaborate this and did not take into account either the sensitivity of the issues at stake. The Spanish Constitutional Court, when advising the Government on the draft Constitution Treaty, gave poor legal advice by considering the CFR in all situations as a minimum standard[30]. There can be situations where the CFR is the maximum standard, only of course when in line with the ECHR. It is important for national constitutional Courts to know if and

[28] Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgemeísterin der Bundesstadt Bonn*, [2004] ECR I-9609.

[29] Point 112.

[30] T. PÉREZ, *Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011*, in *European Constitutional Law Review*, 2012, pp. 105 ss.; M.P. MANZANO, *The Spanish Constitutional Court and the Multilevel Protection of Fundamental Rights in Europe; Matters Relating to ATC 86/2011, of 6 June*, in *European Criminal Law Review*, 2013, pp. 79 ss.

to which extent their constitutional standards can play a role in the EU legal order. It is important to underline that under the Lisbon Treaty the unanimity voting in criminal matters has been replaced by qualified majority voting. This means that member states can end up with a binding solution to which they did not agree. However, member states have the possibility of using an emergency break (referral to European Council) when they believe that the adoption of a directive with criminal (procedural) law content would affect fundamental aspects of its criminal justice system. What if they do not use this political tool? Does it mean that they cannot claim any respect under the Treaties for their constitutional traditions? The ECJ will undoubtedly have opportunities to elaborate on this point in future case-law and will have to deal with article 4(2) TEU and let's hope that the ECJ will give us more insight in its reasoning.

As it stands the mutual recognition programme in criminal matters and the EAW will continue to be at the forefront of case-law of the national Constitutional Courts, the ECJ and the ECHR, as the mutual trust is still to a large extent based on confidence and not on harmonisation of applicable procedural safeguards. In that sense *Melloni* was an exception to the rule, as it dealt with a harmonised system of *in absentia* requirements. Member States are negotiating for instance a new mutual recognition instrument on the transnational gathering of evidence, the so called European Investigation order[31] that should replace the unsuccessful European evidence warrant[32]. The text that is currently being negotiated in the trilogue at the European Parliament contains no substantial harmonisation of procedural safeguards and will, once adopted, be one of the MR instruments that will constantly challenge the interaction between the ECHR, the CFR

[31] Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, Brussels 29 April 2010 Inter-institutional File: 2010/0817 (COD) 9145/10.

[32] Council Framework Decision 2008/978/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, 2008, OJ L 350/72.

and the national constitutions, as it deals with coercive measures and rights and liberties of citizens and legal persons.

CHAPTER 8

THE MATERIAL SCOPE OF COMPETENCE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE: A HARMONISED NATIONAL PATCHWORK?[1]

1. Introduction

In any rule of law-based criminal justice system, it is of key importance that state powers to investigate, prosecute, and punish (*ius puniendi)* are not only granted by law, but also subject to command and control by law. This control-restraint is the very essence of the rule of law and the "Rechtstaat", as the nation state has to guarantee both the liberty and the security of citizens. This has not only consequences for the way in which substantive criminal law is enacted, following the maxim of Beccaria, *nullum crimen, nulla poena sine lege*[2], but also for the bridge between substantive criminal law and empowering the use of investigative and prosecutorial powers by judicial authorities, such as prosecutors. A suspect has to know for which offences he can be held criminal liable and which penalties can be applied (substantive legality). These offences and penalties must be laid down in clear, specific and definite terms (*lex certa*) and be foreseeable before the commission of the acts (*lex praevia*).

Moreover, the suspect has to know for which offences and under which legal requirement judicial authorities can use their investigative and prosecutorial powers (procedural legality). Coercive measures, such as search or telecommunication surveillance, cannot be used without procedural thresholds and references to terms of substantive

[1] This is an actualized version of J.A.E. VERVAELE, *The Material Scope of Competence of the European Public Prosecutor's Office:* Lex uncerta and unpraevia, in *ERA Forum Journal of the Academy of European Law*, nr. 2/2014, pp. 1-17.

[2] C. BECCARIA, *Dei delitti e delle pene*, 1764, https://archive.org/details/deidelittie delle00becc or *Beccaria* [2]; *Krey* [5].

law (offences and penalties), as these infringe the right of privacy of persons. The material scope of competence of a prosecutor is thus not a left-over issue. It is an essential part of the design of the criminal justice system, as it triggers the procedural competence of the judicial authorities and the related procedural guarantees for the persons involved in criminal proceedings.

These key requirements, derived from the rule of law, were recognised as human rights and are laid down in Article 7 of the European Convention on Human Rights (ECHR) (substantive legality) and in Article 8 of the ECHR (procedural legality) and in their counterpart under EU law, in Article 49 of the Charter of Fundamental Rights of the European Union (substantive legality) and in Article 52(1) of the Charter (procedural legality).

This reasoning is mandatory not only for the use of *ius puniendi* at the level of the Member States, but also when investigative or prosecutorial functions are vested within a European Public Prosecutor's Office (EPPO). Even if the outcome of the debate on the proposal for an EPPO were that the model mainly or exclusively functioned through the EPPO Deputy in every single national jurisdiction – and thus by applying national law, the suspect would still have the right to *lex certa* and *lex praevia* when it comes to the substantive competence of the EPPO, even were this composed by the composite of several national jurisdictions in the Area of Freedom, Security and Justice (AFSJ).

In this article we will verify if the material scope of competence of the EPPO, as elaborated in the EPPO proposal, complies with the substantive legality principle under the Lisbon Treaty. Our analysis will include the proposed directive on the criminal law protection of the financial interests of the EU. We will conclude with a brief assessment of the compliance with the substantive legality principle of the EPPO proposal.

2. The Treaty Frame

Article 86 TFEU provides a clear legal basis to establish the European Public Prosecutor's Office and also to elaborate the regulatory specificities when it comes to the investigation, prosecution, and adjudication of crimes affecting the financial interest (PIF-crimes) of the European Union. However, Article 86 TFEU is silent on the precise scope of the competence *ratione materiae* of the EPPO, as it contains a limited reference to a basic mandate to combat crime affecting the financial interest of the EU or, after a unanimous decision in the Council, to an extended mandate to combat serious crimes having a cross-border dimension. This divide is the result from the negotiations in Working Group X of the European Convention preparing the draft Constitutional Treaty, where Member States did not agree as to the necessity and added value of an EPPO[3]. Whereas some Member States wanted an EPPO to investigate and prosecute offences against the financial interests of the Union, others had a preference for an EPPO with a scope of action in line with the competences of Europol and Eurojust and also in line with the reach of the so-called euro-offences, which have been harmonised since the Treaty of Maastricht by conventions and framework decisions[4] and are the subject of further

[3] See the Final report of Working Group X "Freedom, Security and Justice", CONV 426/02, http://european-convention.eu.int/pdf/reg/en/02/cv00/cv00426.en02.pdf, page 20: "The Group agrees on the objective of a more efficient prosecution of offences against the Union's financial interests. A significant number of members believe that current instruments are inadequate. The Group considered some proposals made in favour of the creation of a European Public Prosecutor responsible for detecting, prosecuting and bringing to judgment in the national courts the perpetrators of crimes prejudicial to the Union's financial interests. They have proposed that the Treaty should provide a legal basis to that effect. Others have considered that a convincing case was not made for the creation of such a body and that there were strong objections on both practical and accountability grounds. To some other Members, the need exists for a proper European Public Prosecutor's Office with a scope of action going beyond the protection of the financial interests of the Union. They believe that the current Eurojust could evolve towards that Office".

[4] In particular the French *Conseil d'état* demanded that the scope of competence of the EPPO should be enlarged to cover not only offences against the financial interests

harmonisation under Article 83(1) TFEU. This divide resulted in the phrasing of the legal basis for the EPPO in Article III-274 of the draft Constitutional Treaty, which was to a very large extent copied and pasted to into Article 86 TFEU:

Article 86:

> In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust.
> 4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State.

Article 86 TFEU further indicates that the regulation by which the EPPO will be established shall determine the general rules applicable to the EPPO, apart from the specific rules on criminal procedure that are mentioned:

Article 86:

> 3. The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions (…).

It is rather unclear if the phrasing "determine the general rules applicable" refers also to the applicable substantive criminal law or is limited to general principles *sensu strictu.*

The drafting of Article III-274 of the draft Constitutional Treaty and of Article 86 TFEU has predecessors, however and it is interesting to

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of the EU, but also other forms of serious cross border criminality. See: Conseil d'Etat, *Réfections sur l'institution d'un parquet européen*, 24 February 2011, p. 58.

compare these texts with the one of the draft of Article III-175, prepared by the Convention[5]:

Article III-175

1. In order to combat serious crime having a cross-border dimension, as well as crimes affecting the interests of the Union, a European law of the Council of Ministers may establish a European Public Prosecutor's Office from Eurojust. The Council of Ministers shall act unanimously after obtaining the consent of the European Parliament.
2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of and accomplices in serious crimes affecting more than one Member State and of offences against the Union's financial interests, as determined by the European law provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.
3. The European law referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

It is not only surprising that the material scope of competence included PIF-crimes as well as serious crimes having a cross-border dimension, but also that Article III-175(2) clearly indicated that the determination of the substantive criminal law would be part of the regulatory package of the establishment of the EPPO. It is also clear from Article III-175(3) that the general rules are thus something other than substantive criminal law.

It is also interesting to compare the text with the first proposal of the European Commission for a Treaty amendment in order to provide for a legal basis to establish an EPPO, namely the 2000 contribution to the Intergovernmental Conference on institutional reforms (preparing the

[5] CONV 850/03 140.

Treaty of Nice) on "The criminal protection of the Community's financial interests: a European Prosecutor"[6]:

Proposed Article 280a:

> 3. The Council, acting in accordance with the procedure laid down by Article 251, shall lay down the general conditions governing the performance of the functions of the European Public Prosecutor and shall adopt, in particular:
> rules defining the facts constituting criminal offences relating to fraud and any other illegal activity prejudicial to the Community's financial interests and the penalties incurred for each of them;
> rules of procedure applicable to the activities of the European Public Prosecutor and rules governing the admissibility of evidence;
> rules applicable to the judicial review of procedural measures taken by the European Public Prosecutor in the exercise of his functions.

In the Communication, the European Commission clearly insists on the full package and the relationship between substantive criminal law and criminal procedure:

> In conclusion, the Commission proposes that the Conference supplement the current provisions concerning the protection of the Community's financial interests with a legal basis allowing:
> the appointment of an independent European Public Prosecutor exercising the prosecution function in the courts of the Member States in the field of the protection of the Community's financial interests and within the framework of specific rules adopted for this purpose; and
> the subsequent adoption through secondary legislation of:
> the regulations applicable to his office,
> rules of substantive law concerning the protection of financial interests by the European Public Prosecutor (offences and penalties),

[6] Communication from the Commission: *The Criminal Protection of the Community's Financial Interests: A European Prosecutor*, COM(2000) 608 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0608:FIN:EN:PDF; for analysis see also the EC *Green Paper on Criminal-Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor*, COM(2001) 715 final, http://ec.europa.eu/anti_fraud/documents/fwk-green-paper-document/green_paper_en.pdf.

> rules governing criminal procedure and the admissibility of evidence,
> rules concerning judicial review of actions taken by the Public Prosecutor in the performance of his duties[7].

We can thus conclude that Article 86 TFEU is phrased in an ambiguous way when it comes to the legal basis for harmonising the material scope of competence of the EPPO. Its predecessors were much clearer and did include an explicit reference to substantive criminal law as forming part of the EPPO regulatory package. However we cannot conclude that the legislator has deliberately excluded substantive harmonisation from the phrasing under Article 86.

Given this intermediate conclusion it is wise to verify if there are other legal bases in the TFEU that could serve for the purpose of specifying the material scope of competence of the EPPO. In any case, Article 86 TFEU is part of the provisions in title V TFEU on an Area of Freedom, Security and Justice. Within Title V TFEU, there are various legal bases providing for the harmonisation of substantive criminal law, and thus for the harmonisation of the *actus reus, mens rea* of the offences and for the harmonisation of the applicable criminal penalties. The most obvious legal basis for harmonising substantive criminal law is the one provided for under Article 83 TFEU. It contains twin-track possibilities, as Article 83(1) TFEU deals with euro-offences and Article 83(2) deals with criminal law enforcement of harmonised areas:

Article 83 TFEU:

> 1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: 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.

[7] COM(2000) 608 final, p. 8.

> On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.
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> 2. 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.

Article 83 directives are classic directives adopted under the co-decision procedure to which the Community method applies. There are nonetheless some particularities under Article 83. Not only is there an emergency brake[8], but there are Member States which either do not participate (Denmark) or have the privilege of an opting-in position (the United Kingdom and Ireland). When it comes to the criminal law enforcement of hard-core European interests, such as the combat against human trafficking in the AFSJ or the criminal law enforcement of market abuse and insider trading in the financial markets[9], it is strange that some EU Member States do not participate or do not opt-in (as the United Kingdom did for the draft directive on market abuse)[10].

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[8] Article 83(3) provides: "Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure".

[9] M. LUCHTMAN, J.A.E. VERVAELE, *Enforcing the Market Abuse Regime (Insider Dealing and Market Manipulation): Towards an Integrated Model of Criminal and Administrative Law Enforcement in the EU?* (forthcoming in 2014).

[10] For a more in detail analysis of Article 83 TFEU, see J.A.E. VERVAELE, *Harmonised Policies and the Harmonization of Substantive Criminal Law*, in F. GALLI, A. WEYEMBERGH (Eds.), *Approximation of Substantive Criminal Law in the EU*, Bruxelles, 2013, pp. 43-72.

Finally, the question arises (as it did in the past)[11] if and to what extent it is possible to harmonise substantive criminal law on the basis of other articles in the Treaties, outside the framework of Title V TFEU on the AFSJ and thus decoupled from the requirement of 'judicial cooperation in criminal matters' (which is the title of Chapter 4 of Title 5 TFEU). In the area of the protection of financial interests there is a specific provision in the TFEU, namely Article 325 TFEU:

Article 325:

> 1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies. (…)
> 4. 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.

Article 325 TFEU replaced the former Article 280(4) of the European Community Treaty (as inserted by the Treaty of Amsterdam) which contained the sentence "these measures shall not concern the application of national criminal law or the national administration of justice". This wording was deleted by the Lisbon Treaty. Article 235 TFEU is a comprehensive article on the PIF-protection and contains a legal basis for the taking of measures in order to assure an effective and deterrent protection. Given the similar wording (fight against fraud affecting the financial interest of the Union) to that of Article 86 TFEU, these measures are clearly not limited to prevention. Moreover the article aims at affording effective and equivalent protection both at national level and at EU level (para. 3). So there is a certain logic to regarding Article 235 TFEU as a *specialis* in relation to the *generalis* article, Article 83(1-2). This does moreover exclude a couple of

[11] *Ibidem.*

institutional disadvantages of Article 83(1-2) as this does not provide for an emergency break and does not include special positions for Member States (as non-participation or opting-in clauses). Finally, both directives and regulations can be adopted under Article 325. The tricky issue is if Chapter 4 of Title 5 and Article 83(1-2) are the exclusive legal basis in the TFEU for criminal law harmonisation or if this Article can be complemented by specific legal bases, such as that in Article 325 TFEU. The Treaty gives us no guidance on this point and it will be, if the points arise, for the Court of Justice to decide.

3. The EPPO-Proposal of the European Commission

In July 2013, the European Commission submitted its proposal for a Council regulation on the establishment of the European Public Prosecutor's Office[12]. From the recitals and the text it is clear that the Commission is aiming at a limited material scope of competence, and thus only PIF-offences and is excluding serious crimes having a cross-border dimension (recital 21 and Article 4, Article 12). As regards the content of the material scope, the Commission definitely opts for a referral under national law, which criminalises acts or omissions affecting the Union's financial interest and determines the applicable penalties by implementing the relevant Union legislation, in particular through the new 2013 draft Directive, which still under negotiation, on the fight against fraud on the Union's financial interests by means of criminal law[13] (recital 24). Furthermore the proposal extends the competence to offences that technically are not considered as PIF-offences, but that, because of their constituent facts, are identical and inextricably linked with those of the PIF-offences (so-called ancillary competence for mixed cases).

[12] COM(2013) 534 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0534:FIN:EN:PDF.

[13] See point 4.

4. Substantive Harmonisation of PIF-Offences[14]

Do we really know today which offences fall within the ambit of crimes "affecting" the financial interests of the Union? And will the EPPO know tomorrow what the content is of *nullum crimen, nulla poena sine lege praevia*? And will the citizen (suspect, victim, etc.) know tomorrow for which offences the EPPO can search, seize and prosecute, and which penalties could be applied?

The actual harmonisation of PIF-offences goes back to a legislative package of 1995[15], containing a Convention and several Protocols, provided for under the Maastricht Treaty[16]. The Convention does not contain a specific list of PIF-offences, but rather a catch-all definition of fraud. The *mens rea* is clear, although the intentional nature of an act or omission may also be inferred from objective, factual circumstances (Article 1(4)). The *actus reus* is not clearly defined and contains rather a descriptive list of situations:

Article 1:

> 1. For the purposes of this Convention, fraud affecting the European Communities' financial interests shall consist of:
> (a) in respect of expenditure, any intentional act or omission relating to:

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[14] P. ASP, *The Substantive Criminal Law Competence of the EU*, Stockholms, 2012; R. SICURELLA, *Setting Up a European Criminal Policy for the Protection of EU Financial Interests: Guidelines for a Coherent Definition of the Material Scope of the European Public Prosecutor's Office*, in K. LIGETI (Ed.), *Toward a Prosecutor for the European Union*, Vol. 1: A Comparative Analysis, Oxford, 2013, pp. 870-904; K. LIGETI, *Approximation of Substantive Criminal Law and the Establishment of the European Public Prosecutor's Office*, in F. GALLI, A. WEYEMBERGH (Eds.), *Approximation of Substantive Criminal Law in the EU*, Bruxelles, 2013, pp. 73-84.

[15] The package contained also a regulation on administrative PIF-irregularities, regulation 2988/95 on the protection of the EC's financial interests (OJ L 312, 23 December 1995) and the legal basis for the OLAF-regulation 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ L 292, 15 November 1996.

[16] Convention of 26 July 1995, OJ C 316, 27 November 1995; First Protocol of 27 September 1996, OJ C 313, 23 October 1996 and second Protocol of 19 June 1997, OJ C 221, 19.07.1997.

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,
- non-disclosure of information in violation of a specific obligation, with the same effect,
- the misapplication of such funds for purposes other than those for which they were originally granted;

(b) in respect of revenue, any intentional act or omission relating to:

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,
- non-disclosure of information in violation of a specific obligation, with the same effect,
- misapplication of a legally obtained benefit, with the same effect.

Concerning criminal penalties, the Convention provides in Article 2 as follows:

Article 2:

1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1, and participating in, instigating, or attempting the conduct referred to in Article 1(1), are punishable by 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, it being understood that serious fraud shall be considered to be fraud involving a minimum amount to be set in each Member State. This minimum amount may not be set at a sum exceeding ECU 50 000.

It is clear from the outset that this harmonisation neither lays down a common term of imprisonment, nor minimum terms or maximum terms.

The result is that this package has been implemented by the Member States in their national legislation in a very slowly and unconvinced way. The picture is a complete patchwork. Some Member States considered that their legislation did comply under common fraud provisions in their criminal codes; others provided for specific offences

but only linked, for instance, to subsidy-fraud – many did not elaborate specific criminal provisions in the area of structural funds. The result is also that not only the level of imprisonment but also the type of other criminal penalties is fully dependent upon the national legislator and thus does not offer a common set of equivalent standards of penalties in the AFSJ. The Commission's reports on the implementation of the PIF Convention and Protocols show a real patchwork of gaps and pieces as regards implementation[17]. Even the anti-fraud unit of the EU (OLAF) has great difficulty in finding its way through the patchwork of applicable PIF-law in the Member States:

> The fact is that, nearly six years after the PFI convention was drawn up, the harmonisation objective has not been achieved and the whole area of the protection of Community financial interests continues to suffer from a lack of minimum standards of criminal law protection that can actually be applied throughout the European Union[18].

In the 1990s, within the Corpus Juris project[19], academic experts elaborated a concrete set of PIF-offences. Their work inspired the Commission when proposing a directive in 2001 on the criminal law protection of the Communities financial interest, based upon Article 280(4) of the Amsterdam Treaty[20]. The draft directive, aimed at replacing the 1995 Convention and Protocols contained more specific criminal law definitions of fraud, corruption and related money laundering. However in the field of criminal penalties this proposal did not prescribe minimum or maximum penalties or types of penalties

[17] COM(2004) 709 final and COM(2008) 77 final.

[18] Point 1.2 of Explanatory Memorandum to Proposal for a directive on the criminal law protection of the Community's financial interests, COM(2001) 272 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0272:FIN:EN:PDF. See also the two Reports of the Commission on the Implementation of the Convention on the Protection of the European Communities' financial interests and its protocols, of 2004 (COM(2004) 709 final) and 2008 (COM(2008) 77 final).

[19] M. DELMAS-MARTY (Ed.), *Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne*, Paris, 1997; M. DELMAS-MARTY, J.A.E. VERVAELE, *Implementation of the Corpus Juris in the Member States*, Vol. 1-4, Cambridge, 2000-2002.

[20] COM(2001) 272 final.

either. This draft directive became bogged down in negotiations, both due to problems concerning both its content and its legal basis[21] and was thus never adopted.

In 2011 the European Commission insisted in its communication "On the protection of the financial interest of the EU by criminal law and by administrative investigations - An integrated policy to safeguard taxpayers' money"[22] on the importance of substantive law harmonisation in the field:

> 4.2. Strengthening Substantive Criminal Law
> Criminal law is a cornerstone of EU action to prevent and fight damage to the EU budget.
> Due to the remaining loopholes in, and deficient implementation of, the Convention on the protection of financial interests, an initiative on the protection of EU financial interests will be prepared, replacing its pending proposal on the criminal-law protection of financial interests. Any new measure must guarantee consistency and fairness in application of criminal sanctions relating to fraud, depending on the particular way the offence was committed. Definitions of additional core offences, including on embezzlement and abuse of power should be envisaged as a part of the measure, to the extent relevant for the protection of EU financial interests. The approximation of rules on jurisdiction and time limitation will also be further analysed in order to improve criminal investigation results. This proposal may include, to the extent relevant for the protection of EU financial interests, more systematic rules on aiding and abetting, instigation, attempt, as well as on intent and negligence. It may also set out clearer rules on the criminal liability of appointed and elected office holders, and of legal persons regarding the protection of financial interests.

In 2012, the European Commission submitted a new proposal for a directive on the fight against fraud on the Union's financial interests by means of criminal law under the Lisbon Treaty[23]. The proposal not only sought to "Lisbonise" the existing *acquis*, but also included in Articles 2-6 two additional offences not covered by previous third pillar

[21] Article 280 was the predecessor of Article 325 TFEU. By using Article 280 the Commission avoided the criminal law harmonisation in the third pillar.

[22] COM(2011) 293 final.

[23] COM(2012) 363 final.

instruments, namely fraud in public procurement or grant procedures and misappropriation of funds[24]. The Commission did not include all the offences listed in the *Corpus Juris* project, neither did it include criminal liability for legal persons. The provisions on penalties in Articles 7-9 were more innovative. Article 7 required penalties to be "effective, proportionate and dissuasive", but Article 8 set out very innovative imprisonment thresholds. Fraud on the EU, public procurement fraud, and misappropriation of funds were to be punishable by a minimum penalty of at least six months imprisonment and a maximum penalty of at least five years imprisonment in cases involving an advantage or damage of at least €100,000. For money laundering and corruption, the same imprisonment thresholds were to apply in cases involving an advantage or damage of at least €30,000. In cases of involvement within a criminal organisation for all PIF-offences the minimum maximum penalty was required to be at least ten years imprisonment. The introduction of mandatory minimum penalties was entirely new. The proposed directive was based on Article 325(4) TFEU.

During the negotiations at Council level, Member States obtained very substantial changes to this proposal. In the agreed general approach in the Council in June 2013 the legal base was changed from Article 325(4) TFEU to Article 83(2) TFEU. From the opinion of the Legal Service of the Council, which were in favour of this change, it is clear that all the limitations (*viz.*, the fact of not being applicable to Denmark, the opting in arrangement for the United Kingdom and Ireland, and the emergency brake procedure) apply. In the event of there being no opt-in by the United Kingdom and Ireland, these would

[24] The Commission has reflected on including the other offences mentioned in the *Corpus Juris*, namely a specific offence of abuse of office and the breach of professional secrecy. However, the Commission decided not to include a special offence on abuse of office as "it has been considered a superfluous addition to the offence of misappropriation. Similarly, an offence of breach of professional secrecy has not been included in the proposal as the conduct is already covered under the disciplinary-law measures of the EU Staff Regulations". See L. KUHL, *The Initiative for a Directive on the Protection of the EU Financial Interests by Substantive Criminal Law*, in *Eucrim*, 2012, 2, p. 65.

remain bound by the 1995 PIF Convention. Secondly, the Member States have explicitly excluded revenues arising from VAT from the scope the directive. This is astonishing, as the Court of Justice has ruled clearly that VAT revenues are part of the financial interests of the Union[25], and many serious EU fraud cases are related to VAT carousel cases. In relation to penalties, Member States deleted from the text any reference to minimum terms of imprisonment. As regards the minimum maximum terms of imprisonment, this was lowered to at least four years in the case of serious offences.

Whether an offence is serious is defined according to national law, having regard to all relevant circumstances, such as the value of any damage done or advantages gained, or the damage to the integrity of or confidence in systems for managing the Union's financial interests (recital 16). The commission of an offence within a criminal organisation is an aggravating circumstance. At the time of writing (the end of March 2014) the proposal is prepared to be submitted to for voting in April in the general assembly in the European Parliament. Both the Committee on Civil Liberties, Justice, and Home Affairs (LIBE) and the Committee on Budgetary Control (CONT) of the European Parliament have amended substantially the Council text and agreed on a new version. The scope of the offences has again been widened to include fraud in public procurement and VAT fraud. By doing this, the text has been reoriented in the direction of the original Commission proposal. However a strong lobby of NGO's has changed the mind of the Parliamentary Committees with the result that minimum sanctions will not be reintroduced and that the legal basis will remain article 83(2). The emergency break procedure is seen by the NGO's as a method to block proposals that does not offer sufficient protection of procedural safeguards.

[25] Case C-539/09 *Commission v Germany* [2011] ECR I-11235, paragraph 72.

5. Conclusions

The EPPO aims at establishing a coherent European system for the investigation and prosecution offences affecting the Union's financial interest[26]. It also aims to contribute to a further development of an area of justice, and to enhance the trust of EU businesses and citizens in the Union's institutions, while respecting all fundamental rights enshrined in the Charter of Fundamental Rights of the European Union[27].

Once the EPPO established, will a suspect know for which offences his can be held criminal liable and which penalties could be applied (substantive legality)? And will the citizen (suspect, victim, etc.) know for which offences the EPPO can apply coercive measures, like searches and tapping of telecommunications, can prosecute and which penalties could be applied?

We have to take into account that the EPPO will bring suspects of PIF-offences to judgment before national courts, after having used a set of autonomous powers of investigation and prosecution[28]. The choice of the forum court and thus the adjudicative jurisdiction is not predefined and Article 27 of the EPPO proposal contains only discretionary guidance as to the forum choice. This means that the suspect cannot foresee the forum in which he has to stand trial.

The European Commission has chosen to regulate the material scope of competence of the EPPO by harmonising national substantive criminal law through a directive based on Article 82(2). This means that equivalent components of substantive criminal law in the AFSJ for the competence *ratione materiae* of the EPPO depend on the level and content of the harmonisation in the directive and on the quality of the implementation in every single Member State.

As regards the level and content of the harmonisation by the directive, it follows from our analysis in this article that the Directive, like the PIF-Convention and the 1995 protocols, aims only at a very minimalistic degree of minimum harmonisation. The text which the Member States in the Council have agreed upon as a general approach

[26] Point 3.3 of the explanatory memorandum of the EPPO proposal.

[27] Idem.

[28] Recital 7 of the EPPO proposal.

and which is now under negotiation at the European Parliament has further watered down the minimum harmonisation which had been proposed by the Commission. The way the offences are spelled out in the draft directive leaves considerable leeway to the Member States when it comes to implementation. As regards the applicable criminal penalties, the general approach, agreed by the Council, does not at all result in foreseeable imprisonment terms, either as regards minimum levels or as regards precise maximum levels. Moreover the definition of the threshold of seriousness is left to national law. What does this mean as regards the level of implementation? Even when it comes to the common minimum harmonisation, Member States have a broad margin of discretionary power. Some of them will, as in the past, consider that their existing law does already provide for the criminal law protection and does not need any amendments, others will cherry pick, and others will go beyond the minimum level of harmonisation required. The result is twofold. First, the existing fragmentation of the design of the PIF-offences in the legal orders of the Member States will not be ended; apart from there being a legislative patchwork, there will also be gaps in implementation. Secondly, the implementation of the directive will not lead to a clear and precise body of law of PIF-offences and penalties and the differences between the Member States will remain substantial.

This means that the suspect will have great difficulty knowing for which PIF-offences he can be held criminally liable and which penalties could be applied in all jurisdictions where he could stand trial. This means also that the substantive threshold for the triggering of autonomous European investigative measures will vary substantially from one Member State to another. Thus what results will be an unforeseeable *géométrie variable* instead of a clear, specific and definite body of offences and penalties. This harmonised patchwork of national law is not only a substantial threat for the rights of suspects, but also a substantial source of legal problems for the use of coercive powers by the EPPO.

If we set up an EPPO, even with a structure that is strongly embedded in national law, a directive is definitely not the right instrument, as it aims at harmonising national law. What is needed is a

harmonised body of offences and penalties, that are prescribed by a regulation and can be applied and by the EPPO in cross-border investigations and by the EPPO-Deputies in national settings. These offences must obviously correspond to the autonomous definition of PIF in EU law, as defined by the Court of Justice, and thus cover all fields, including, for instance, VAT and structural funds. This body of PIF-offences can be laid down at national level in a specific part of the Criminal Code or in a special criminal act or statute. This regulation can be part of one of the regulations based on Article 86 TFEU[29]. Only by following this path will we arrive at a set of offences and penalties that will comply with the substantive legality principle and thus with the ECHR and Charter of Fundamental Rights of the European Union and that will serve as a common level playing field for the criminal law enforcement by the EPPO. Otherwise, the EPPO is condemned to act as a prisoner of a composite of national arrangements. The added value will be very doubtful and the risk of non-compliance with minimum ECHR and Charter of Fundamental Rights standards will be high.

[29] In the same vein of interpretation, see: L. PICOTTI, *Le basi giuridiche per l'introduzione di norme penali comuni relative ai reati oggetto della competenza della Procura Europea*, in G. GRASSO, G. ILLUMINATI, R. SICURELLA, S. ALLEGREZZA (Eds.), *Le sfide dell'attuazione di una Procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni*, Milano, 2013, pp. 65-108. See also on line: www.penalecontemporaneo.it.

CHAPTER 9

EUROPEAN TERRITORIALITY AND JURISDICTION: THE PROTECTION OF THE EU'S FINANCIAL INTERESTS IN ITS HORIZONTAL AND VERTICAL (EPPO) DIMENSION[1]

1. An Area of Freedom, Security and Justice and European Territoriality

In 1997, the Treaty of Amsterdam introduced a new political and legal concept in the EU treaty, being the area of freedom, security and justice. In 2004, Walker declared it a novel legal brand under whose name a significant volume of law (hard and soft) has already been accumulated[2]. The area of freedom, security and justice was further strengthened in the Lisbon Treaty. There is no doubt that it will increasingly play a role in the constitutional landscape and frame of the EU integration process; it is part of its constitutional Odyssey.

Despite the strengthening of the area of freedom, security and justice in the Lisbon Treaty, we still have great difficulty in defining its scope, its substantial characteristics and its legal consequences. In Article 67 TFEU we can read that the Union constitutes an area of freedom, security and justice without internal borders in which a high level of security is ensured but with respect for fundamental rights at the same time. Crime control and fundamental rights, including due process, are both part of the general provisions of the common area. From Article 82 TFEU we can deduce that judicial cooperation in the common area shall be based on the principle of mutual recognition and

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[1] This article was published as J.A.E. VERVAELE, *European Territoriality and Jurisdiction: The Protection of the EU's Financial Interests in its Horizontal and Vertical (EPPO) Dimension*, in M. LUCHTMAN (Ed.), *Choice of Forum in Cooperation against EU Financial Crime*, The Hague-Portland, 2013, pp. 167-184.

[2] N. WALKER, *Europe's Area of Freedom, Security and Justice*, Oxford, 2004.

that the EU shall (not may!) adopt measures to prevent and settle conflicts of jurisdiction between Member States.

Is the area of freedom, security and justice a territorial or a functional concept? When it comes to judicial cooperation in criminal matters, including the establishment of a European Public Prosecutor's Office (EPPO) under Article 86 TFEU, is the common area the equivalent of a European judicial space (*espace judiciaire européen*) with European territoriality?

Why is it so important to define the scope, the substantial characteristics, and the legal consequences of the area of freedom, security and justice? Let me explain it with a very concrete example of great actuality.

The financial services sector is one the key areas for criminal law policy, both in the internal market and in the area of freedom, security and justice. In a communication from 2010 on 'Reinforcing sanctioning regimes in the financial services sector'[3], the European Commission is pleading for a minimum common standard for administrative and criminal law enforcement in the field. However, the communication is not dealing at all with jurisdiction issues. In its key communication 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law' from 20 September 2011[4], the European Commission refers explicitly to Article 83(2) TFEU, the so-called annex-competence for harmonised areas. One of the priority areas for criminal law enforcement in the communication is the one related to financial markets. The European Commission pleads for the development of a level playing field for financial services within the internal market. However, in this communication there is no reference to jurisdiction issues. Finally, on October 20th 2011, the European Commission submitted a proposal for a new regulation on insider dealing and market manipulation[5] and a proposal for a directive on criminal sanctions for insider dealing and

[3] COM(2010) 716 final.

[4] COM(2011) 573 final.

[5] Proposal for a new regulation on insider dealing and market manipulation (market abuse), COM(2011) 651 final, amended by COM(2012) 421 final.

market manipulation[6]. Neither in the latter, nor in the former proposal are there clauses included about prevention or settlement of conflicts of jurisdiction. The result is that the European Commission is aiming at further substantive harmonisation of the administrative and criminal law enforcement of insider trading and market abuse, without regulating at all in the field of prevention and settlement of conflicts. The result is that the *ne bis in idem* principle is converted into a final regulator of conflicts of jurisdiction, in other words that the first final decision on insider dealing or market abuse can bar all the other ones. Is the 'comes first, serves first' practice really a problem in the internal market and the area of freedom, security and justice? We jump to the promised actual and concrete example to illustrate it.

In 2007, just before the financial crisis and meltdown of 2008, Banco Santander, Fortis Bank and the Royal Bank of Scotland obtained the control over ABN Amro bank through a hostile takeover bid for the amount of euro 72 billion, one of the biggest-ever deals in the financial-services industry. The operation was approved by the European Commission, but Fortis Bank had to sell some activa. They were sold to Deutsche Bank. Fortis Bank had problems to finance its part of the takeover and decided to go the capital market for fresh capital and thus to offer new shares. The operation was widely advertised. Although the capital extension was successful, it was not enough to guarantee the financial position of Fortis bank and also due to the worsening financial situation of the financial market and the increasing distrust in the banking sector, Fortis Bank was about to collapse until governments of Belgium, the Netherlands and Luxembourg intervened and nationalised, dismantled and partially sold Fortis Bank. This nationalisation and dismantling was certainly not done from the perspective of a common European approach, but rather a typical example of national-driven interest.

Competent administrative and judicial authorities opened investigations against Fortis Bank for several suspicions of market manipulation and market abuse, both in Belgium and in the

[6] Proposal for a directive on criminal sanctions for insider dealing and market manipulation, COM(2011) 654 final.

Netherlands. Concurring and parallel investigations were conducted in the two countries, both by administrative and criminal authorities. The administrative enforcement authorities in the field of insider trading and market abuse have a European network, the European Securities and Markets Authority ESMA. In the Netherlands, the legal framework imposes a duty upon the administrative and judicial enforcement authorities to choose at a certain stage for one of the two enforcement regimes, in other words to opt either for administrative sanctions or criminal prosecution (the so-called *una via* principle).

On February 5th 2012, the Dutch Financial Services Authority (AFM), the administrative enforcement agency, has imposed four fines[7] of 144.000 euro each upon two legal persons, being the two legal persons that integrate the Fortis Bank corporation/holding, Fortis NV Brussels and Fortis NV Utrecht. Fortis Bank has been found guilty of market manipulation/market abuse in two situations:

- after the takeover of ABN Amro, the CEO of Fortis Bank has organised a press conference in which he insisted on the strong and sane financial position of Fortis. By doing so he has been misleading the investors;
- the EC imposed upon Fortis Bank to sell some parts of the group. While putting these actives on the market Fortis Bank decided not to publish some negative information about the financial position of the group and by doing so manipulated the trading of the shares of Fortis at the stock exchange.

Both infringements have been made by the same leading persons with instructions to the two groups. The total amount of the fine has been reduced to 50 percent for each part of the holding. These infringements are administrative irregularities both in the Netherlands and in Belgium, but also at the same time criminal offences in both countries. In the Netherlands and in Belgium there is also criminal liability of legal persons.

[7]See <www.afm.nl/~/media/files/boete/2010/fortis-besluit-nv.ashx> and <www.afm.nl/~/media/files/boete/2010/fortis-besluit-sanv.ashx>, last visited at 25.10.2012.

The imposition of the administrative fines by the AFM on the two legal persons composing the holding of Fortis Bank has for sure been coordinated with the Dutch judicial authorities. If the decision to go for the administrative enforcement way instead of the criminal was taken with the European dimension of the case in mind is unknown and difficult to guess. However, what is clear is that we can speak of a unilateral action of the Dutch authorities, without coordinating with the Belgian administrative and judicial authorities. In Belgium the Financial Services Authority (FMSA) recently finished its administrative investigation against the same legal persons for the same facts and submitted the case to its sanctioning committee, which could impose a sanction of 2,5 million euro. In April 2012 the FMSA also reported the case to the Belgian judicial authorities (already investigating the case), as they found indications of criminal offences committed by natural persons involved. Both Belgian authorities, administrative and judicial, have been investigating the case over the past three years.

The legal consequences of the Dutch fines imposed by the AFM are far from clear[8]. AGEAS (former Fortis) CEO was fast to claim that the Dutch fine would bar further sanctions based on the *ne bis in idem* principle. At least we can say that the approach in this case does not show a clear coordination of jurisdiction of choice of allocation of jurisdiction. Moreover the result might be that further administrative fines and or criminal punishment in Belgium have been barred, at least as far as the legal person is concerned.

Who says that the Dutch administrative enforcement regime was the most appropriate enforcement mechanism? The sanctions upon the legal persons seem to be rather modest, in relation to the magnitude of the victims (several hundreds of thousands) and the magnitude of the public interest at stake (integrity in the financial market in the EU). The financial markets are a key area of the internal market. The applicable substantial law is highly harmonised. The administrative enforcement regimes are harmonised as well, and the enforcement harmonisation

[8]See also M. LUCHTMAN (Ed.), *Choice of Forum in Cooperation against EU Financial Crime: Freedom, Security and Justice and the Protection of Specific EU-Interests*, The Hague, 2013, section 4.3.

will soon be extended to administrative and criminal law harmonisation. Nonetheless, it still seems possible that the enforcement body that comes first is the final regulator, as it bars further proceedings through the *ne bis in idem* principle. When the first seems to be an administrative enforcement agency, the question also arises if and to what extent there is national executive steering support.

What can we conclude from this striking example? First of all, even in key-areas of the internal market and the area of freedom, security and justice, the choice of jurisdiction remains exclusively in the hands of the Member States. Their rules and practices concerning jurisdiction are still a product of state sovereignty. Their rules are arms and legs of the substantive body of administrative and criminal law. Even in fields where these substantive norms have been harmonised by EU law, the Member States are using them as if they were purely national. In public law, there is a very strong relationship between the substantive norms on administrative irregularities and criminal (the jurisdiction to prescribe) and the applicable law and jurisdiction (the jurisdiction to enforce and the jurisdiction to adjudicate). In public law – and this is very different from international private law – the applicable law and jurisdiction are interlinked. The choice of jurisdiction determines which law will be applicable, both procedurally and substantively and this applicable law is linked with a Member State's legal regime. In fact, the national rules on jurisdiction are not designed to prevent or to solve a conflict of jurisdiction between countries or in a common area. They are designed to claim competence, authority, *Strafgewalt*, *ius puniendi* in a unilateral way by one State. That means that the administrative or criminal judicial authority dealing with the question of competence is only checking if and to what extent he is competent, applying the classic jurisdiction criteria (*locus delicti*, active or passive personality, etc.). From this national perspective, these authorities are not dealing with the question of the most appropriate jurisdiction in the light of the common interest in the common space (internal market, area of freedom, security and justice). These authorities are not prepared and even not competent to deal with questions of appropriate allocation of cases in the common space. The national authorities are still

functioning within the ratio of the Nation-State as exclusive Sovereign when it comes to *ius puniendi*.

The result is a risk of concurring investigation and prosecutions and a risk of multiple adjudications or the risk of final decisions that bar further proceedings through the *ne bis in idem* principle. The *ne bis in idem* principle is not necessarily the best regulator of conflicts of jurisdiction[9]. The result is also that in some cases nobody wants to trigger its jurisdiction and that the common area is confronted with a negative conflict of jurisdiction. To summarise, even in highly harmonised key-areas of the internal market, we have serious problems with the good and appropriate administration of justice because of lack of rules and steering when it comes to the choice of the most appropriate jurisdiction.

The problem is of course broader than choice of jurisdiction, as there is no common frame for mutual exchange of law information related to judicial investigation, prosecution and bringing to judgment. There is even no duty to inform or duty to report between the national administrative and judicial authorities of the Member States on the ongoing investigations.

2. A Common Area of Freedom, Security and Justice and Joint Responsibility

In a common area of freedom, security and justice, as defined in Article 3(2) TEU, with common goals, common policies and common instruments, it is rather surprising that the chain of criminal justice still functions as if the boundaries of the Nation-States are the gold standard. In 1999 the European Court of Justice decided in case C-9/89, *Spain v. Commission*[10], that in the field of the enforcement of common fisheries policies Member States have a joint responsibility when it comes to information exchange, monitoring of licenses and certified

[9] For solutions, see A. BIEHLER ET AL. (Eds.), *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*, Freiburg i.Br, 2003.

[10] ECJ, 27 March 1990, Case C-9/89, *Spain/Council*, [1990] ECR I-1383.

documents and prosecution of infringements. The joint responsibility can even include that Member States that fail to initiate criminal or administrative proceedings or to transfer such proceedings to the Member State of registration of the vessel can be sanctioned for non-compliance. In the same line of reasoning Advocate General Bot underlines in his conclusion in the *Wolzenburg*-case: '(…) that the opening of borders has made the Member States jointly responsible for combating crime. That is actually why it became necessary to create a European criminal-law-enforcement area, in order that the freedoms of movement are not exercised to the detriment of public security'[11]. He further links it up with the European citizenship to: '(…) the confidence which each Member State and its nationals must have in the justice systems of the other Member States seems to be a logical and inevitable outcome of creating the single market and European citizenship'[12]. Finally, the ECJ has clearly used the mutual trust between the criminal justice systems and in the criminal justice systems in the area of freedom, security and justice to create a transnational *ne bis in idem* principle, applicable between the judicial authorities in the common area of freedom, security and justice[13]. The European Court of Justice did not opt for a dual sovereignty *ne bis in idem* concept, one for the federal level and one for the national level, as in the US, but for the EU-wide application of the same transnational fundamental right in an integrated area of European territoriality. Advocate-General Ruiz-Jarabo Colomer mentions even the concept of 'common market of fundamental rights' in his conclusion[14].

It becomes clear that the shared sovereignty in criminal matters de-territorialise the criminal justice system. When the criminal justice system is acting in relation to European goals, its dimension is also European. This is not only true in relation to crime control, but also in relation to applicable human rights and due process. However, the

[11] A-G Bot, Case C-123/08, *Wolzenburg*, [2009] ECR I-9621, Opinion, para. 105.

[12] A-G Bot, Case C-123/08, *Wolzenburg*, [2009] ECR I-9621, Opinion, para. 138.

[13] ECJ 11 February 2003, Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, [2003] ECR I-1345.

[14] A-G Ruiz-Jarabo Colomer, ECJ 11 February 2003, Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, [2003] ECR I-1345, para. 124.

concept of joint responsibility is not limited to these two aspects; it also includes common criminal policy and common administration of justice, including case allocation, when it comes to the criminal law enforcement of common values and common policies.

We do have to rethink allocation of jurisdiction in the light of the common European interest and in line with the common institutional framework (area of freedom, security and justice). This is especially true for the jurisdiction to investigate and the jurisdiction to adjudicate in relation to a) the so-called euro-offences (the ones mentioned in Art. 83(1) TFEU and the criminal law protection of PIF and the single currency) and to b) the so-called annex-offences, being offences related to harmonised EU policies, as environment, fisheries, financial services, competition, etc., (foreseen under Art. 83(2) TFEU). For all these areas, the question of allocation of jurisdiction (both in relation to investigation and adjudication), prevention of conflicts and settlement of conflicts is of utmost importance.

The framework decision on the prevention and resolution of jurisdictional conflicts of 2009, that should have been fully implemented by June 15th 2012, falls short of the EU's stated objective of creating an area of freedom, security and justice, because it does not provide sufficient legal certainty and foreseeability as to the applicability of competing substantive laws, both for the Member State's judicial authorities and for the suspect. In fact the framework decision contains only a mediation procedure with the aim of consenting on an 'efficient solution' and that can resolute in a reasoned recommendation of Eurojust about which Member State should be the focus of the investigation or about which Member States would be less suited as the potential centre of the proceedings. If a Member State is not following the recommendation it must give reasons for the derogation. In other words, the framework decision does not include binding decisions of Eurojust on matters of choice of jurisdiction. On the other hand, the Member States were unable to agree on a draft framework decision on the transfer of proceedings in criminal matters. It is high time to deal with the duty imposed under Article 82 TFEU: the EU shall adopt measures to prevent and settle conflicts of

jurisdiction between Member States in order to reinforce the principle of mutual recognition[15].

3. Choice of Jurisdiction and the EPPO

3.1. Treaty Design of the EPPO

The Lisbon Treaty has inserted in Article 86 TFEU a legal basis for the establishment of a European Public Prosecutor's Office as an EU body within the area of freedom, security and justice. Its material scope of competence will probably be limited to PIF-offences, but can be extended to serious crimes having a cross-border dimension. This means that it has the potentiality to cover serious offences under Article 83(1) and Article 83(2) TFEU.

The wording of Article 86 TFEU defines the main task of the EPPO. It will be responsible for investigating, prosecuting and bringing to judgment the perpetrators of the offences under its competence. It is also clear from the Treaty provision that the adjudication will be at national level, so the EPPO has to exercise the functions of prosecutor in the competent criminal courts of the Member States. In other words, under this Treaty provision the EPPO will be combining supranational investigative powers with national adjudication in the common area of freedom, security and justice. Article 86 TFEU does not expand the institutional and procedural aspects of the EPPO but refers to regulations that shall have to determine the general rules applicable to the EPPO, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions. Article 86 TFEU does not mention the word jurisdictions or choice of jurisdiction, but it is clear from its general task that the EPPO will have to decide on the its competence to

[15] See A. SINN (Ed.), *Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität – Ein Rechtsvergleich zum Internationalen Strafrecht*, Göttingen, 2012, for a model of statutory or a model of agreed jurisdiction.

investigate (jurisdiction to enforce) and on the choice of the forum to try the offences (jurisdiction to adjudicate). In other words the EPPO regulations will have to deal with the material competence (the norms) and these procedural aspects, including applicable law and jurisdiction.

Article 86(2-3) TFEU contains the parameters for the institutional and procedural design in the EPPO-regulations:

> 2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.
> 3. The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

Dealing with our topic, we have to construct some premises before analysing the substance of the topic. The EPPO will enjoy autonomous powers to investigate, prosecute and bring to judgment. Being a European office it may investigate, prosecute and bring to judgment in the territory of all of those Member States that participate in its establishment (concept of European territoriality).

Each part of its competence (investigating, prosecuting and bringing to judgment) has consequences on related jurisdiction issues. The supranational investigation by the EPPO will not only absorb the national judicial investigation(s), but the execution of some coercive measure by the EPPO will need prior or *a posteriori* judicial authorisation by a judge of freedoms. If the judge of freedoms is inserted in the judiciary of the Member States, there is a forum choice for this function. The other option is to empower the European Court of Justice with this function.

Also this decision to bring to judgment, meaning sending an indictment or accusation before a national court is of course a forum choice for the adjudication of the criminal case.

3.2. EPPO in the Corpus Juris Study[16]

The authors of the Corpus Juris study had already opted for a European judicial area when it comes to investigation and prosecution of PIF-offences. The territories of the Member State of the EU constitute a single space called the European Judicial Space, being the logical extension of the area of freedom, security and justice. One of the basic principles underlying the EPPO in the Corpus Juris study is the one of European territoriality. This means that the EPPO has autonomous investigative powers in the European judicial area. Judicial authorisation of the judge of freedom has legal value in the European judicial area and final decisions of criminal courts or out-of-court settlement have legal value in the European judicial area. The Corpus Juris study has a clear design when it comes to the jurisdiction to enforce/investigate as it spells out a clear vertical relationship in relation to allocation of investigation and division of labour between EPPO and national judicial authorities. The EPPO conducts investigations across the territory of the Union. This means that the EPPO (including its delegated structure) can apply its investigative competence in the European judicial space as a single space. The schemes of mutual legal assistance or mutual recognition are useless under that model. Of course for some coercive measures, the EPPO needs judicial approval by a national judge of freedoms.

However, when it comes to the choice of jurisdiction related to the judge of freedoms and related to the allocation of the choice of the forum to adjudicate, the Corpus Juris study still has some ground to cover. Article 26 Corpus Juris tackles the point by stating that each case is tried in the Member State which seems appropriate in the interest of

[16] M. DELMAS-MARTY, J.A.E. VERVAELE, *The Implementation of the Corpus Juris in the Member States*, Antewrp-Oxford-Portland, 2000, Vol. 1-4.

efficient administration of justice. The principal criteria for the choice of jurisdiction are defined as follows:

a) the state where the greater part of the evidence is found;
b) the State of residence or of nationality of the accused (or the principal persons accused);
c) the State where the economic impact of the offence is the greatest.

The main focus seems to be the proper administration of justice, not the rights of the citizen or the defendant. Why these three jurisdiction criteria have been chosen is not clear from the explanatory text. It is also unclear whether these criteria have a hierarchical order.

It is interesting to compare this choice with the discussions in the Council of Europe on a draft Convention on the settlement of jurisdictions in criminal matters that failed to become reality. In 1965 the Consultative Assembly of the Council of Europe adopted Recommendation 420 on the settlement of jurisdictions in criminal matters, by which it attempted to establish a list of priorities. The starting point in the recommendation was that the State in which the act was committed should have priority to prosecute the offender. Other criteria should be subordinate to this principle. Hence prosecution in the State in which the offender is ordinarily resident would depend on the State where the offence has been committed renouncing prosecution. However, the Legal Committee drew up a text of a recommendation[17], linked to the European Convention on the Transfer of Proceedings, dealing with conflicts of jurisdiction. The Legal Committee came to the conclusion, dissenting from the Consultative Assembly, that the assumption that it is normally most appropriate to prosecute an offence where it has been committed is not justified. Rehabilitation of the offender and securing evidence are other very important considerations. The Legal Committee came to the conclusion that:

> The weight to be given in each case to conflicting considerations cannot be decided by completely general rifles. The decision must be taken in the light of the particular facts of each case. By attempting in this way

[17] <conventions.coe.int/Treaty/EN/reports/html/073.htm>, last visited 25.10.2012.

> to arrive at an agreement between the various States concerned it will be possible to avoid the difficulties which they would encounter by a prior acceptance of a system restricting their power to impose sanctions[18].

The *Corpus Juris* proposal seems to be in line with this opinion, avoiding putting the national territoriality principle on the top of the list[19]. However, the *Corpus Juris* seems to put much emphasis on the effectiveness of law enforcement, by putting the seeking of evidence on the top. What remains clear is that neither the *Corpus Juris* draft nor the Recommendation is dealing with the procedure that could lead to a decision in a particular case.

Finally, Article 28 addresses the competence of the Court of Justice to deal with the choice of jurisdiction, whether on request of the defendant or on request of the national criminal court. Also the EPPO can call in the Court of Justice when conflicts of jurisdiction arise in relation to the jurisdiction to investigate or related to the choice of jurisdiction for the authorisation by the judge of freedoms.

3.3. EPPO and Jurisdiction to Enforce/Investigate under Article 86 TFEU

Given the fact that the European Commission still has to come up with its first draft proposals for an EPPO, scheduled in the second half of 2013, I propose to use the European Model Rules for the Procedure of the future EPPO[20], as elaborated under the Hercule II Programme of the European Commission by a research team under the lead of University of Luxemburg. The advantage of doing so is that we can rely on a concrete design of the procedural framework of the EPPO.

In the general part of the Model Rules, it becomes clear that the EPPO has primary authority for investigations and prosecutions (Rule

[18] <conventions.coe.int/Treaty/EN/reports/html/073.htm>, point 18, last visited 25.10.2012.

[19] On the revision of the territoriality principle: M. BÖSE, F. MEYER, *Die Beschränkung nationaler Strafgewalten als Möglichkeit zur Vermeidung von Jurisdiktionskonflikten in der Europäischen Union*, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 5/2011.

[20] See <www.eppo-project.eu/index.php/EU-model-rules/english>, last visited 25.10.2012.

3). This means that it can take in cases based on a set of priority criteria, as for instance the cross-border dimension or the substantial harm to EU-interest test. This means that the case inflow for the EPPO is based upon prioritising jurisdiction to investigate and prosecute at the European level. This results in a division of labour based on good administration of justice. Once the jurisdiction of the EPPO has been activated, it has also exclusive authority (Rule 5), meaning that the national judicial authorities no longer have competence to investigate and prosecute the case. Finally, the EPPO conducts its investigative and prosecutorial capacity in the European territoriality (Rule 2), which means the territory of the Member States of the EU that constitutes a single legal area.

What can be derived from this general part in relation to the EPPO jurisdiction to investigate and prosecute? First of all, I would say, it gives the EPPO the possibility to overcome negative conflicts of (exercise) of jurisdiction in cases where transnational and/or EU interests are at stake. Second, it creates great opportunities to prioritise investigative and prosecutorial capacity in relation to the interests that deserve criminal law protection. In that sense, it would be wise if the EPPO, once established, elaborates further guidelines in that respect. The primary and exclusive authority of the EPPO does, however, not solve all the problems. It has to be duly informed by national judicial authorities in order to be able to prioritise and there must be mechanisms in place between national judicial authorities and the EPPO to refer the case back to the national investigative and prosecutorial jurisdiction, for instance if becomes clear that the case is minor or too intimately related to other national interests that deserve criminal law protection (Rule 5(2)).

When it comes to the prior authorisation of some coercive measures, elaborated in section 4 of the Model Rules (Rule 47-57), Rule 7 provides that a judge designated by each Member State shall be competent to decide upon this authorisation and that its decision is effective within the single legal area (European territoriality). In other words, the mutual recognition concept applies to the decision of the national judge of freedoms. The Model Rules are, first of all, silent on the criteria for the choice of the forum of the judge of freedoms. It is,

however, clear that this choice can affect the legal position of a defendant, as there are no harmonised or equivalent standards of procedural safeguards in relation to coercive measures in the Member States. Second, it is also unclear what the remedies are of the defendant and if the EPPO can challenge the decision of the national judge before the ECJ (as foreseen in the Corpus Juris study).

3.4. EPPO and its Jurisdiction to Prosecute/Bring to Judgment

When it comes to forum choice for the jurisdiction to try the criminal case (adjudicative jurisdiction), there is no doubt that the EPPO is the responsible authority for the bringing to judgment (Rule 1) of the perpetrators of the offences under its material competence. Rule 64 deals with the forum choice for the trial. The starting point and basic line is the concept of the 'most appropriate jurisdiction', taking into consideration and (in the following sequence):

a) the Member State in which the greater part of the conduct occurred;
b) the Member State of which the perpetrator(s) is (are) a national or resident; and
c) the Member State in which the greater part of the relevant evidence is located.

The listed criteria under a-c are a classic set, if we suppose at least that under a) the damage dimension is also included.

Rule 64(2) provides for a residual jurisdiction in case none of the criteria under a-b-c would apply, which might happen with EU fraud cases committed under EU aid schemes in third countries for example. If the residual scenario is triggered, the case shall be prosecuted in the jurisdiction where the EPPO has its seat.

Rule 64(3) creates a remedy (right to appeal) for the accused and the aggrieved party before the ECJ on the choice of jurisdiction.

3.5. EPPO: From Conflict of Jurisdiction to Choice of Jurisdiction?

In my opinion, it will be very important to extend a mechanism of choice of forum jurisdiction for the EPPO, in order to avoid forum shopping or criticism of *forum conveniens*. The mechanism for the choice of forum to adjudicate could also be useful for the choice of forum for the judge of freedoms, but with some important caveats. The judge of freedoms will be mostly activated in the crucial phase of gathering of evidence, i.e., when coercive measures are necessary. At that stage the EPPO cannot have a full picture of available evidence, of the *locus delicti* or of the main damage or the nationality/residence of all suspects. On the other hand, the procedure for the judicial authorisation by the judge of freedoms (*a priori* or *a posteriori*) can be harmonised under the Article 86 regulations, which is not the case with the merit proceedings at the stage of adjudication.

The EPPO does not have to deal with conflicting jurisdictions for adjudications. It has to make a choice of forum jurisdiction in the light of a number of relevant criteria. The main question is what would be the most appropriate jurisdiction to adjudicate the case from the perspective and legitimate interest of the:

a) good and proper administration of criminal justice in the area of freedom, security and justice;
b) citizen-rights in the area of freedom, security and justice; and
c) procedural guarantees of the suspect and the victim.

These perspectives and legitimate interests combine effective and efficient law enforcement in the single area of freedom, security and justice, but in line with standards of rule of law and due process thus affording appropriate legal protection to those present on the European territory. Both crime control and due process have a European dimension in the single area of freedom, security and justice.

It is also important to see the choice of jurisdiction not as a limitation or imposed obligation to the *ius puniendi* of sovereign states, creating negative or positive duties, but as a mechanism to protect common EU interests (euro crimes or annex competence) in the common area. The judiciaries of the Member States are all 'juges communs' of Union Law, also in the area of criminal adjudication. The

fact that they are organically national is not of so much interest; the important dimension is that they have European functions. Also the judiciaries of the Member States have to apply Union loyalty (Art. 4(3) TEU), including its positive duty of action and its negative duty of abstention.

The good and proper administration perspective of criminal justice in the common area contains several elements. It is not only about efficient use of resources related to investigation, prosecution and adjudication but also about qualitative criteria. It is a task of the EPPO to prosecute suspected perpetrators of offences in a way that fulfils the objectives of the single area of freedom, security and justice. This means that it has to contribute to effective law enforcement under the rule of law. This might affect the choice of jurisdiction. A jurisdiction where the case might be time-barred or where the penalties in law or in practice are not effective, proportionate or dissuasive could play a role in the choice of jurisdiction. In other words the outcome of the choice of jurisdiction must contribute to effective, proportionate and dissuasive law enforcement in the light of the objectives of the single area of freedom, security and justice. The EPPO contributes to the avoidance of concurring prosecutions and trials and must motivate its choice of the forum from the perspective of the quality of the law enforcement.

From the citizen-perspective (be it either the suspect or the victim), there is not such a thing as the right to a forum choice or the right to a natural judge in a specific state. The ECHR does not grant an accused or a victim the right to choose the jurisdiction of a court under Article the 6 ECHR 'tribunal established by law' concept. However, the decision on the forum must be lawful and based on reasonable grounds[21]. The same can be said about Article 47 of the Charter of Fundamental Rights of the EU:

[21] See EComHR, 10 October 1990, *G. v. Switzerland*, appl. no. 16875/90 and EComHR, 2 December 1992, *Kübli v. Switzerland*, appl. no. 17495/90 and ECtHR, 12 July 2007, *Jorgic v. Germany*, appl. no. 74613/01, para. 65. For comments see M.J.J.P. LUCHTMAN, *Choice of Forum in an Area of Freedom, Security and Justice*, in *Utrecht Law Review*, 2011, pp. 74-101.

> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

This means that the EPPO cannot bring the judgment to a tribunal that would not be independent or impartial or would have been established *post factum*.

The right to a natural judge[22] is, however, part of the European common area. As the case can end up in 29 different jurisdictions, and the applicable law is not harmonised, the choice of the forum is a choice that affects citizen rights. For this reason the EPPO's choice of jurisdiction must be based on a transparent procedure in which criteria are used that are accessible and foreseeable. In other words the right of the citizen to legal certainty does not mean the right to a preset natural judge in a particular state, but the right to a transparent procedure with accessible and foreseeable criteria for the forum choice in the European territoriality.

The Article 86 regulatory framework for the EPPO should contain a regulation on choice of jurisdiction, providing for a procedural mechanism under which there are priority rules for adjudication for related cases/related persons (concentration priority rule). Second, the regulation should provide for a basket of principle-based criteria to come to a balanced and reasoned decision. The praetorian Swiss example, when dealing with inter-cantonal choices of jurisdiction, can be of good guidance in that respect:

i. the interests of the place where most of the damaging effects of criminal conduct were felt (including the interests of the victim);
ii. those of the suspect and his counsel to effectively defend himself (including language problems he may experience);
iii. those of the courts, which must be put in the position to obtain, as far as possible, a complete overview of both the person of the accused and his actions; and

[22] See also M. PANZAVOLTA, in M. LUCHTMAN (Ed.), *Choice of Forum in Cooperation against EU Financial Crime: Freedom, Security and Justice and the Protection of Specific EU-Interests*, The Hague, 2013, pp. 143-165.

iv. those of the speedy and efficient administration of justice[23].

This basket seems like a non-hierarchical set of various criteria, which could be qualified as facilitating *forum conveniens* choices. However, a hierarchical set of classic criteria (*locus delicti*, nationality, etc.), if strictly applied, does stand in the way of policy discretion in individual cases and in balancing the different perspectives mentioned. The criteria have to be applied and balanced on a rather flexible case-by-case approach with a scope of policy discretion. Important, in my view, is not the strict application of so-called hierarchical criteria, but a reasoned and foreseeable decision. The statutory regulation must contain the basket of foreseeable criteria, but in a way to allow balanced allocation of cases, taking into account the different perspectives and interest, under court supervision.

The binding decision of the EPPO on choice of forum does affect the legal position of the suspect and the victim. For this reason it must be possible for both of them to challenge the decision before the ECJ. The judicial review of a decision on jurisdiction by the ECJ presupposes that the statutory framework in the Article 85 TFEU regulation is transparent; this means that the suspect or victim can foresee how the judicial authorities will reasonably come to a decision. What would be challengeable is the lack of reasonableness, not the foreseeability of the specific applicable jurisdiction rule. In fact we are not talking here about the foreseeability of applicable law and applicable criminal sanctions (*nullum crimen, nulla poenas sine lege* and the *lex certa* principle). The guarantee of justiciability by the judicial review procedure aims at ensuring a proper, non-arbitrary

[23] On that system, see P. GUIDON et al., *Die aktuelle Rechtsprechung des Bundesstrafgerichts zum interkantonalen Gerichtsstand in Strafsachen*, in *Jusletter*, 2007; E. SCHWERI, F. BÄNZIGER, *Interkantonale Gerichtsstandsbestimmung in Strafsachen*, Bern, 2004; M. WAIBLINGER, *Die Bestimmung des Gerichtsstandes bei Mehrheit von strafbaren Handlungen oder von Beteiligten*, in *ZStr*, 1943. Cf. Bundesstrafgericht, 21 October 2004, no. BK_G 127/04, to be found at <www.bstger.ch/>. For further analysis see also M. LUCHTMAN (Ed.), *Choice of Forum in Cooperation against EU Financial Crime: Freedom, Security and Justice and the Protection of Specific EU-Interests*, The Hague, 2013, sections 4.2.2 and 6.4.

exercise of discretion by the EPPO. This means that the ECJ must test, when the forum decision is challenged, the reasonable use of policy discretion in an individual case and the lawfulness of the decision. Judicial review amounts to adjudication on whether the principles of reasonableness and of due process (including lawfulness) have been respected. The European Court of Justice has a longstanding practice in reviewing process-orientated justice matters[24], as, for instance, in the field of the competition. Under the EU Competition enforcement system under regulation 1/2003, both the European Commission competition authority as the delegated national competition authorities have to take all the time decisions on investigative allocation of forum choices on the adjudication.

If the national forum judge is not willing to activate its jurisdiction, following the decision of the EPPO, the EPPO should have the possibility to call on the Court to decide on the jurisdiction issue[25].

4. Conclusion

In this article, I have analysed the European territoriality and jurisdiction in its horizontal and vertical (EPPO) dimension.

The discussion on the settlement of conflicts of jurisdiction between Member States finalised in a deadlock on prioritisation of hierarchical criteria. The Council of Europe Convention on transfer of proceedings in criminal matters has not been very successful in practice. The reality is that European States establish and claim jurisdiction from a classic Nation-State sovereignty perspective.

Within the frame of European integration and the establishment of a single area of freedom, security and justice, it has not been possible to make progress in the EU either. The content of the Framework

[24] See K. LENAERTS, *The European Court of Justice and Process-Oriented Review*, in *College of Europe/ Research Papers in Law*, no 1/2012, <www.coleurope.eu/sites/default/files/research-paper/researchpaper_1_2012_lenaerts_final.pdf>, last visited 25.10.2012.

[25] As does the Federal Criminal Court in Switzerland when there is a conflict between the Office of the Attorney General and cantonal criminal justice authorities; see art. 28 of Code of Criminal Procedure.

Decision 2009/948 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings has been watered down to a mediation procedure. The Member States were also unable to agree on a draft framework decision on the transfer of criminal proceedings.

Already 40 years ago, in the explanatory report on the European Convention on the transfer of proceedings in criminal matters, we can read the following recommendation and appeal:

> The complexity of these problems is explained by the very nature of traditional criminal law, strongly impregnated with the principle of territorial sovereignty of the State. Criminal courts almost invariably apply their own criminal law. The problems of criminal law are therefore more difficult to solve than those of other fields of law where conflicts of legislation and of jurisdiction may be solved by the application of foreign law by the national court or by harmonising the legal provisions involved.
> In recent years, however, crime has assumed an international character, especially as a result of the extensive development of means of communication. The result is the necessity of closer co-operation among States prompting them to lower their legal barriers and review the traditional consequences of their national sovereignty[26].

In other words, it is more than high time to deal with the duty imposed under Article 82 TFEU: the EU shall adopt measures to prevent and settle conflicts of jurisdiction between Member States in order to reinforce the principle of mutual recognition and to realise the objectives of the single area of freedom, security and justice.

The vertical (EPPO) dimension is not replacing the horizontal dimension, but reconfiguring it to a certain extent. The EPPO is of course not the catchall solution for the choice of jurisdiction in the single area of freedom, security and justice. It probably will have, in an initial stage, very limited material scope (the protection of the financial interest of the Union), and a limited number of participating Member States under the enhanced cooperation regime. The EPPO will moreover not deal with all cases for which conflicts of jurisdiction could arise. This means that with its establishment it will remain

[26] See <conventions.coe.int/Treaty/EN/reports/html/073.htm>, point 9, last visited 25.10.2012.

important to regulate, under Article 82 TFEU, the prevention and settlement of conflicts of jurisdiction and to tackle the problems in the single area from a perspective of joint responsibility between the Member States, taking into account that the joint enforcement must not only meet the criteria of efficiency and effectiveness, but also comply with the applicable human rights standards.

The EPPO, as a European Office, will have great influence on the concentration of jurisdiction to investigate in its field of substantial competence. The elaboration of the division of labour between EPPO and the national judicial authorities will be of utmost importance. Prioritisation will be an important tool of criminal policy and to be elaborated in the perspective of the interests that deserve adequate and proper protection in the single area of freedom, security and justice. This division of labour does not mean that the EPPO is not embedded in the national system: actually, quite the contrary. The EPPO should be fully embedded in the national system, through its deputy structure and should work with the national enforcement community, being it judicial or administrative. The specialised law-enforcement agencies in the PIF-field should form a law-enforcement network with a clear European dimension. This delegated and embedded structure of the EPPO is part of its supranational architecture.

The EPPO will also be very useful to deal with problems of negative jurisdiction conflicts, as it can open investigative proceedings and decide on the adjudicative forum.

When it comes to the choice of the adjudicative forum, there will be a need for a specific regulation under Article 86 TFEU, dealing with the statutory criteria for the choice of jurisdiction. These criteria do not have a hierarchical order, but are criteria to come to a balanced and reasoned decision that complies with the need for foreseeability for the citizen and can be challenged before the ECJ and thus providing for European justiciability in the single area of freedom, security and justice.

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