Certain Questions of the External, Internal and Criminal Investigation of the Criminal Offences Affecting the Financial Interests of the European Union – Results and Conclusions of a Hercule III Project*

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Abstract

The main objective of this paper is to present the most important conclusions and findings of the "Certain questions of the external, internal and criminal investigation of the criminal offences affecting the financial interests of the European Union (fraud, corruption, money laundering and other illegal activities against the financial interests of the EU) with special focus on the role of OLAF, EPPO, Eurojust, and Europol" project which was coordinated by the University of Miskolc, Faculty of Law. In the framework of the project a practice-orientated comparative research was carried out, one international conference, three international workshops, a final international Summer Academy and a closing conference with book presentation were organised, based on the results of which the Hungarian project team formulated several conclusions and recommendations.

Keywords: *European criminal law, protection of the financial interests of the European Union, external, internal and criminal investigation, European Public Prosecutor's Office, OLAF, Eurojust, money laundering, criminal compliance*

I. Introduction – short presentation of the "EUINVESTIGUNIMISKOLC – 101015428" Hercule III Project

The general objective of the HERCULE III PROJECT (– EUINVESTIGUNIMISKOLC[1]) was to clarify the role and methods of external, internal and criminal investigation serving the protection of the financial interests of the EU with special focus on the activities of the EU agencies (EPPO, OLAF, Eurojust, Europol) and local authorities of EU Member States and their cooperation.

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[1] "Certain questions of the external, internal and criminal investigation of the criminal offences affecting the financial interests of the European Union (fraud, corruption, money laundering and other illegal activities against the financial interests of the EU) with special focus on the role of OLAF, EPPO, Eurojust, and Europol", HERCULE III PROJECT (Nr. 101015428 — EUINVESTIGUNIMISKOLC); see the web site of the project: https://euinv.uni-miskolc.hu/en.

The main aim of the project was to pursue a complex, practice-oriented comparative research in connection with the most relevant questions of the external, internal and criminal investigation of the criminal offences affecting the financial interests of the European Union with special regard to the role of OLAF, EPPO, Eurojust and Europol. In connection with this, the main objective of the project was to raise awareness in the branches of legal professions that are involved in the protection of the financial interests of the EU by organizing special trainings and dissemination of studies on the aforementioned issues. In Hungary and in the participating countries, the importance of our topic is not fully known, neither among the practitioners, investigating authorities and academics, nor in legal education. This project was inspired by our former success, which provided the background for our application and helped to build up this present activity. In our former project, HERCULE III[2], we created a network and worked out the structure, methods and organization of our work, which proved useful and efficient.

In connection with this general objective, the specific objectives of the project were the following: improvement of the awareness of the legal professions involved in the protection of the financial interests of the EU through the organization of international conferences, workshops, meetings and trainings; improvement of cooperation between EU agencies and Member States' (MS) local authorities, practitioners and academics; comparative analysis of the legal regulations and practices of the participating MS; exchange of information and best practices; use of the results in legal education; elaboration of proposals for the future activities.

The most important results of the project are the following: to provide a comprehensive overview of the problems of external, internal and criminal investigation of irregularities and crimes affecting the financial interests of the EU and to present the role of OLAF, Eurojust, Europol and EPPO as well as the local authorities of the MS and also to collect best practices; to raise awareness of legal professions (judges, prosecutors, investigative authorities) involved in judging cases against the financial interests of the EU; raising awareness of legal professionals in detecting fraudulent acts and other crimes related to the financial interests of the EU; possible use of the results of our work and best practices in the research and legal education; creation of a scientific network with practitioners and academics of the MS involved in the project to exchange best practices.

The project was coordinated by the University of Miskolc, Faculty of Law. The Hungarian project team included Prof. Dr. Ákos Farkas (university professor, project manager), Prof. Dr. Judit Jacsó (university professor, project coordinator), Prof. Dr. Erika Róth (university professor, project member), Dr. Andrea Jánosi (associate professor, project member) and Dr. Bence Udvarhelyi (assistant professor, project coordinator).

In order to make the work more successful and efficient, practical and academic experts from eight Member States (Austria, Croatia, Germany, Greece, Hungary, Italy, Poland and Romania) were involved in the project: Chief Prosecution Office, HU (Prof. Dr Péter Polt, Chief Public Prosecutor of Hungary), Hungarian Judicial Academy, HU (Dr György Senyei, president), National Tax and Customs Administration of B.-A.-Z. County, HU (Csilla Kovácsné Fecz, director; Tamás Jármai, head of the department), Hungarian Financial Intelligence Unit, HU (Dr Gábor Simonka, head), LeitnerLeitner

[2] "Criminal law protection of the financial interests of the EU – Focusing on money laundering, tax fraud, corruption and on criminal compliance in the national legal systems with reference to cybercrime". HERCULE III PROJECT (Nr. 786253 – HUUNIMISKOLCPFI); see the web site of the project: https://hercule.uni-miskolc.hu/EN.

Partner Budapest, HU (Márta Siklós), University of Heidelberg, DE (Prof. Dr Dr h.c. Gerhard Dannecker), Public Prosecutor's Office of Mannheim, DE (Kai Sackreuther Public Prosecutor), Vienna University of Economics and Business, AU (Prof. Dr Robert Kert, head of institute), University of Linz, AU (Prof. Dr Richard Soyer, head of institute), University of Thessaloniki, GR (Assoc. Prof. Dr Theodoros Papakyriakou), University of the International Studies of Rome (Assoc. Prof. Dr Vincenzo Carbone), University of Oradea, RO (Assoc. Prof. Dr Christian Mihes dean, Assoc. Prof. Dr Diana Cirmaciu), University of Zagreb, CR (Prof. Dr Zlata Durdevic head of the institute, Assoc. Prof. Dr Marin Bonačić, Assoc. Prof. Dr Zoran Burić), Jagiellonian University of Cracow, PL (Assoc. Prof. Dr Beata Baran).

The following professors contributed to the summary sessions: Prof. Dr iur. Frank Meyer (University of Heidelberg), o. Univ. Prof. Dr. Wolfgang Brandstetter (Vienna University of Economics and Business, Institute for Austrian and European Economic Criminal Law, Judge, Constitutional Court Austria), Prof. Dr Dr h.c. mult. Hans-Heiner Kühne (University of Trier), Prof. Dr Kai Cornelius (University of Hamburg).

II. Main events of the project

In order to achieve the aforementioned objectives, we organized *one international conference*, *three international workshops,* a *final international Summer Academy* and a *closing conference with book presentation*. These organizations can be summarized as follows.

The *Opening Conference* of the project with the title *"The Role of Investigation in Criminal Procedure – European Dimensions"* was organized in the University of Miskolc on the 31th May 2021. Due to the COVID-19 pandemic, the Opening Conference was held online via Zoom. The aim of the *Opening Conference* was the practice-oriented discussion of the main questions and various special forms of external, internal and criminal investigation of irregularities and criminal offences affecting the financial interests of the European Union through the presentation of the good practices of the Member States. Almost 200 participants took place at the Opening Conference (members from the academic sphere, judges, prosecutors, lawyers, notaries, persons employed by customs, police forces or other law enforcement agencies, persons employed by local or regional authorities and law students and PhD students).

Following the Opening Conference *two international workshops* were organized. The scope of the workshops was narrower than the Opening Conference, since 30-40 participants (the project partners and some practitioners) participated in them. These events enabled the local practitioners to share their experiences on the subject topics.

The first workshop with the title *"The Criminal Tax Procedure under the Influence of Consensual Elements"* was organized on 15th November 2021 by the University of Miskolc Faculty of Law (Research Centre for European Criminal Law of the Faculty of Law of the University of Miskolc) and the University of Heidelberg. Due to the COVID-19 pandemic, the first workshop was held online via Google Meet System.

The second workshop with the title *"Criminal Investigation of Offences against the Financial Interests of the European Union"* was organized on 11th April 2022 by the University of Miskolc Faculty of Law (Research Centre for European Criminal Law of the Faculty of Law of the University of Miskolc) and the University of Zagreb. Due to the COVID-19 pandemic, the first workshop was held online via Google Meet System.

The originally planned closing event of the project was a *Summer Academy* with the title *"The Institutional and Instrumental Framework of International Criminal Cooperation in order to Increase the Efficiency of Investigation of Criminal Offenses affecting the Union's Financial Interests with special focus on OLAF, Eurojust, Europol and EPPO"* which was held on 19-21th June 2022 at the University of Miskolc. The event was organized by the Faculty of Law of the University of Miskolc (the Research Centre for European Criminal Law of the Faculty of Law of the University of Miskolc) and the National Office for the Judiciary. During the organization of the Summer Academy, the Hungarian project team had several professional discussions with the co-organizer, the National Office for the Judiciary in Budapest about the objectives and the program of the Summer Academy. The aim of the Summer Academy was to discuss basic questions related to the criminal law protection of the European Union's financial interests, primarily through a practice-oriented discussion of the best practices of the Member States. At the conference, the domestic and foreign cooperation partners of the project, as well as domestic and foreign theoretical and practical experts held lectures. The Summer Academy was organized with personal attendance, but online accession was also provided for those who were not be able to attend the conference in person. Judges, public prosecutors, lawyers, persons employed by customs, police forces or other law enforcement agencies, persons employed by local or regional authorities and members of the academic spheres attended at the Summer Academy. With the personal and online attendance, more than 150 participants attended the Summer Academy.

After the Summer Academy, on 21 June 2022, a closing workshop was organised for the cooperation partners. The main aim of the workshop was the overview of the results of the project and to organise a round table discussion for the elaboration of the conclusions and recommendations of the project.

Originally, the action would have been ended with the Summer Academy and the publication of the final volume. However, due to the COVID-19 pandemic, we the fulfilment of these objectives became extremely difficult. Because of the travel and other restrictions prescribed by the national laws and the regulations of the University we cannot organize the Opening international conference and the two international workshops in a personal way, but these events were organized online. From the planned four events, only the final Summer Academy could be organized personally, with great success either. Although the conferences and workshops were successful, the online events could not substitute the advantages of the personal organizations. The lack of the personal meeting made the creation of scientific relations and establishment of scientific networks with practitioners and academics of the Member States involved in the project in order to exchange best practices extremely difficult. Due to these reasons we to request the prolong the deadline of the project with six months, until the end of March 2023 and the European Commission approved our request. However, we did not only want to postpone the termination of project, but we also planned to organize additional events as well.

On the one hand, we have organised a personal international workshop on 4-6th December 2022. The *3rd international workshop* with the title *"Conclusion and recommendation of the Hercule EUINVESTIGUNIMISKOLC project"* was organised in the University of Heidelberg and the Hungarian project staff and the cooperation partners from the other Member States took part. The most important aim of the workshop was to finalize and discuss the final conclusions and recommendations of the projects which is planned to be published in several scientific and other journals.

The second additional event of the project was a *closing conference with book presentation*. The *"Presentation of the final volume of the certain questions of the external, internal and criminal investigations of criminal offences affecting the financial interests of the European Union – Hercule III EUINVESTIGUNIMISKOLC project"* was organized on 13th February 2023, by the University of Miskolc Faculty of Law (Research Centre of European and International Criminal Law) and the National Office for the Judiciary (Hungary), at the National Office for the Judiciary (Assembly Hall). Almost 80 participants took part in the book presentation, both from the academic and the practical sphere.

After the closing conference and book presentation, an additional closing dissemination workshop was organised at the University of Miskolc. The *"Closing event of the Hercule III EUINVESTIGUNIMISKOLC project and the presentation of the volume "External, internal and criminal investigations of criminal offences affecting the financial interests of the European Union"* was organised on 29th March 2023 at University of Miskolc, Faculty of Law. Law students as well as professors and lecturers from the University of Miskolc took part at the event.

The results of the research and the international conferences and workshops was published in English volume by Wolters Kluwer Publisher after the Summer Academy. In the volumes, the extended and edited versions of the lectures at the Opening Conference, the two international workshops and the Summer Academy were published[3].

III. Conclusions of the project

Based on the project results, the consultations between the cooperation partners and the presentations of the international conferences and workshops organized within the framework of the project, as well as after extensive consultations with the foreign cooperatives, we have reached the following conclusions[4].

A) General Conclusion in connection with criminal investigation of the criminal offences affecting the financial interests of the European Union

The Treaty of Lisbon can be considered an outstanding event in the history of the protection of the financial interests of the European Union. Criminal law is now an explicit part of the objective to "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 respect to external border controls, asylum, immigration and the prevention and combating crime" [Art. 3 (2) EU Treaty]. Under Art. 82 of the Treaty on the Functioning of the European Union (TFEU), judicial cooperation in criminal matters is now explicitly based on the principle of mutual recognition. The powers of the EU legislative are broad: Initiatives may, inter alia, "d) facilitate cooperation between

[3] A. Farkas, G. Dannecker, J. Jacsó, (eds.), *External, internal and criminal investigation of the criminal offences affecting the financial interests of the European Union*, Wolters Kluwer, Budapest, 2022. The volume can be downloaded from the website of the project: https://euinv.uni-miskolc.hu/files/20573/Hercule_tanulmanykotet_fedel_beliv_1_502old.pdf.

[4] See: G. Dannecker, A. Farkas, J. Judit, *Conclusion and recommendation of the project*. In: A. Farkas, G. Dannecker, J. Jacsó, (eds.), *External, internal and criminal investigations of criminal offences affecting the financial interests of the European Union*, Wolters Kluwer Hungary, Budapest, 2022, pp. 490-502. (https://euinv.uni-miskolc.hu/study).

judicial or equivalent authorities of the MSs in relation to proceedings in criminal matters and the enforcement of decisions" [Art. 82 (1) a) TFEU].

Since 1 December 2009, when the Treaty of Lisbon entered into force, the Union has adopted many significant measures involving on cooperation in criminal matters. Several framework decisions have been updated as directives, and the EU has also made significant progress in procedural cooperation, such as the Directive 2014/41 on the European Investigation Order and the Regulation EU 1939/2017 on the European Public Prosecutor's Office, which represents a milestone in the investigation of crimes against the EU's financial interests.

B) Special Conclusion in Connection with the EPPO

The appearance of the EPPO was a paradigm change in the EU. Direct enforcement is defined as an enforcement where a Union body has the power to make decisions regarding prosecution and/or sentencing. One relevant form of direct enforcement mechanisms is the European Public Prosecutor's Office. The EPPO does not represent the Member States but takes decisions that are in the best interest of the European Union as a whole. The EPPO co-operates with national authorities, but the latter work in a subordinate position. Decisions are taken at a European level. Establishing an EPPO required that a new criminal system also had to be set up. This is accompanied by a loss of national sovereignty. Therefore, we must respect the decision of the Member States whether they want to participate or retain their sovereignty. We must recognize that the EPPO as such should not be a goal in itself and to remind ourselves why the idea for an EPPO came about. Initially, it was meant to fill the gap in situations in which Member States did not enforce legislation. If the EPPO is to be an answer to that problem, its structure should follow from that. This is the perspective of the European Union.

A contrary perspective is that Member States act independently in the area of criminal law and are loyal to the European Union, but renounce integration and opt for a Europe of different speeds, as intended in the European Treaties. This is the perspective of some Member States of the European Union.

The EPPO is not necessarily the only mean for the protection of the financial interests of the EU. Therefore, the question has to be explored whether it is really just a matter of perspective, European or national, to leave prosecution to the EPPO or national prosecutors' offices, or whether a certain openness with regard to future developments can be beneficial. This requires the development of empirical methods to measure efficiency.

In the following, 10 theses concerning EPPO will be put forward:

For the EU, the protection of financial interests under criminal law is a basic condition for the existence and functioning of the European Union: the credibility of the European Union is at stake! Therefore, the European Public Prosecutor's Office, which is responsible for the prosecution of criminal offenses directed against the financial interests of the European Union, was and is a central concern of the European Union, even if not all Member States are participating in it.

1. The creation of the European Public Prosecutor's Office has two fundamental objectives, which are legitimate:

a) The harmonization of substantive criminal law and criminal procedural law is to be complemented by a single law enforcement agency at the European Union level to address deficits in law enforcement that have resulted from the fragmentation of the European judicial area.

b) Furthermore, the European Union should be freed from its dependence on the Member States and enabled to act on its own to prosecute financial crimes.

2. The creation of a European Public Prosecutor's Office with the agreement of all Member States was politically unachievable. Several countries, Denmark, Ireland, Poland, Sweden and Hungary, were not prepared to partially renounce their national sovereignty in the area of criminal prosecution.

It is not necessary for the non-participating Member States to join the EPPO if there are sufficient methods and instruments to protect the financial interests of the EU and if there is well functioning cooperation between national authorities and the EPPO. The cooperation has to be effective – checks and controls need to be inserted. The efficiency of the cooperation between the EPPO and the non-participating Member States has to be evaluated only after some cases have been closed.

3. Therefore, full integration was abandoned and the path of enhanced cooperation was chosen, which allows at least nine Member States to establish an enhanced cooperation on the basis of a draft regulation.

However, enhanced cooperation under Article 20 of the Treaty on European Union (TEU) is only an "emergency instrument" for different forms and degrees of participation in the European Union. Therefore, it would be wrong to see the EPPO as an example of successful and accomplished integration. The EPPO is probably rather the admission of a deficient protection of the financial interests of the European Union by the Member States.

4. Nevertheless, the EPPO fulfills an important task. It has to work towards integration and help to ensure that

a) the level of law enforcement and sanctions is harmonized throughout the European Union;

b) cooperative forms of collaboration are developed with non-participating states;

c) the EPPO as a special authority develops convincing solutions for law enforcement in the area of EU financial protection law;

d) the European Public Prosecutor's Office initiates and constructively accompanies a moderate system change, taking into account, on the one hand, the needs of EU law and, on the other hand, national peculiarities, traditions or approaches to criminal policy;

e) friction between participating states is avoided and that the cooperation with non-participating states works.

In this respect, the EPPO can act as an important role model and contribute to other member states deciding to join this model.

5. Enhanced cooperation respects the competences, rights and obligations of the non-participating Member States. The non-participating states are not bound by the Regulation on the European Public Prosecutor's Office. However, this does not mean that there would be no cooperation relations between them and the European Public Prosecutor's Office. The non-participating Member States are obliged to cooperate loyally with the European Public Prosecutor's Office in accordance with Article 4 (2) TEU and must support it to the extent necessary to effectively combat Union fraud.

6. A central concern of enhanced cooperation between individual Member States must be that their cooperative ventures be open to all others, insofar as they wish to participate actively in this policy on a smaller scale. So far, the Europe of different speeds has been limited to the fact that Member States can join the pioneers.

7. In addition, it should be considered that Member States that have committed themselves to loyal cooperation and are developing functioning models in this regard can equally serve as role models for other non-participating Member States that do

not yet wish to participate in enhanced cooperation but are willing to engage in effective loyal cooperation. Such action by non-participating states is not legally obligatory, but may be called for from the point of view of legal politics.

8. The establishment of a genuine European criminal prosecution authority is at least a small milestone in the development of European criminal law. However, it is not possible to speak of a supranationality of criminal justice in the narrow sense. For that, the European Public Prosecutor's Office is too closely tied to the national legal systems in terms of substantive and procedural aspects. There is no independent Union criminal law and no independent criminal procedural law. The European Public Prosecutor's Office applies national criminal law and national procedural law. Therefore, the EPPO is not an expression of successful integration, but rather an example of loyal cooperation of non-participating states with an EU institution.

9. However, the discussions about a possible extension of the mandate of the European Public Prosecutor's Office to other transnational offenses, especially in the field of terrorism, indicate that a further expansion of European prosecution cannot be ruled out for the future. Then the non-participating states will have to ask again whether they are willing to participate in the EPPO under the new conditions or prefer to continue a loyal cooperation with the EPPO.

At the same time, the European Union takes over all fields of politics. And here we need strong constitutional concepts when we want to reach a balanced legal order. This speaks for a European Union of different speeds.

C) Special conclusions in connection with other institutions

1. Since 28 June 2022 the European Regulation on the European Union Agency for Law Enforcement Cooperation (Europol) was modified[5] The innovations particularly concern the relationship between Europol and the EPPO.

2. The relationship of Europol, OLAF and Eurojust to the EPPO is regulated in Art. 20a of the Europol Regulation, Art. 12g of the OLAF Regulation and Art. 50 of the Eurojust Regulation respectively. The contents of these provisions are essentially the same: Europol, OLAF and Eurojust maintain close relations with the EPPO, whereby these institutions and the EPPO act within the scope of their respective competences. The aforementioned provisions repeat the content of Article 102 (1) sentence 1 of the EPPO Regulation, which contains the corresponding regulation for the EPPO.

3. The modalities for cooperation between Europol and EPPO must be laid down in a working agreement. Such an agreement has been in force since January 2021, and another agreement has been concluded for secure communication channels between Europol and EPPO. Europol, OLAF and Eurojust cooperate with the EPPO at its request by providing information and analytical support. The cooperation is limited to the duration of the investigation procedure.

4. It is specified how Europol, OLAF and Eurojust respectively have to provide information to the EPPO. The EPPO will be given indirect access to the data processed by Europol, OLAF or Eurojust on offences falling within their competence in the form of a hit/no hit procedure. In case of a hit, Europol is informed and initiates the

[5] Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022 amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation, OJ L 169, 27.6.2022, pp. 1-42.

procedure for the transfer of the information. The relevant information provider, i.e. the Member State, the Union body, the third country or an international organization, provides for restrictions on access or use of the information. Europol, OLAF or Eurojust are bound by these. In addition, only those data triggering a hit that are relevant to the EPPO's request may be disclosed.

5. Europol, OLAF and Eurojust are obliged to report to the EPPO. Any criminal conduct that could fall under the jurisdiction of the EPPO must be reported. The Member State concerned must be informed of such a report. The latter must then contact the EPPO to fulfil its own reporting obligation under the EPPO Regulation.

6. Cooperation between Europol, OLAF and Eurojust is regulated in Art. 21 of the Europol Regulation. Here, Europol's duty to notify OLAF has been extended (Para. 8). If, in the course of processing information relating to a specific criminal investigation or project, Europol discovers that information is relevant to a possible illegal act detrimental to the Union's financial interests, Europol must forward this information to OLAF without delay, unless the supplier of the information has provided for a restriction on its use in accordance with Article 19 (2) of the Europol Regulation. The Member State concerned shall also be informed of such forwarding.

7. Overall, the cooperation between the EPPO, Europol, OLAF and Eurojust is detailed and appropriately regulated.

D) New Development in the fight against money laundering

1. The fight against money laundering is of great importance for the protection of the financial interests of the European Union, since this financial crime can also affect the EU's financial interests. The substantive criminal law is harmonized in this area, which in theory could facilitate prosecution, but in practice there are still many problems.

We can see in the fight against money laundering a good example of the *multi-institutional approach* we need for the effective protection of the financial interests of the European Union.

2. In July 2021, the European Commission presented a package of legislative proposals to strengthen anti-money laundering and countering the financing of terrorism (AML/CFT) rules of the European Union. This proposal of the European Commission is an important step in the field of harmonization of anti-money laundering in the EU. With the adoption of the new "AML/CFT rulebook", the EU regulatory and enforcement framework will be more uniform, more detailed and stricter.

3. Combating money laundering will remain in the hands of EU Member States, but the Anti-Money Laundering Authority (AMLA) will monitor, support and coordinate the application of EU regulations. AMLA will play a central role in supervising the obliged entities' compliance with the AML/CFT rules. It will also enhance cooperation among national Financial Intelligence Units (FIUs)[6]. The new organization will help to ensure that AML/CFT rules are applied more effectively and consistently in the Member States of the European Union[7].

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[6] https://eucrim.eu/news/aml-package-ii-commission-proposes-aml-regulation/ (last visited 9 October 2022).

[7] Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM/2021/421 final.

4. In October 2022, Eurojust published a report on money laundering[8]. Its aim is to support national authorities in the investigation and prosecution of cross-border money laundering offenses. The report[9] gives an overview of the expected legal and practical problems and possible solutions[10]. The report focuses on certain selected issues: (i) predicate offenses; (ii) complex money laundering schemes; (iii) financial and banking information; (iv) asset recovery; (v) cooperation with third countries; (vi) cooperation with the European Public Prosecutor's Office; (vii) potential conflicts of jurisdiction and ne bis in idem issues; and (viii) spontaneous exchange of information. Eurojust identified legal and practical challenges in money laundering cases. The 10 most relevant *legal and practical challenges*[11] and several best practices[12]. were identified in the report ó:

5. Some of the practical problems are related to the substantive criminal law of money laundering. In line with the Eurojust report, we need also to highlight the problem of identifying the *predicate offence* in the case of money laundering, the main important issues are the *dual criminality and self- self-money laundering.* These can lead to difficulties in prosecution and judicial cooperation when money is laundered across multiple jurisdictions. Proof is particularly difficult when the suspected illicit property, presumably acquired through criminal activity, cannot be linked to a specific predicate offence. Another important question is whether the perpetrator of money laundering can compensate the victim of the predicate offence. If compensation is possible, what legal effect it has. We consider that substantive legal harmonization is necessary in these areas as well. EU legislation must take into account international standards, in particular the recommendations of the the Financial Action Task Force[13] (FATF)[14].

6. The *6th AML/CFT Directive* establishes the *definition the predicate offences* ("criminal activity"[15]) of money laundering, it should be sufficiently uniform in all Member States. In addition to the general rule adapted to the penalty clause (deprivation of liberty or a detention order for a maximum of more than one year), the Directive contains a catalog of offences, that qualify as predicate offences. Member States may require that the relevant conduct constitutes a criminal offence under the national law of the other Member State or of the third country where it was committed (*dual criminality*), but this rule does not apply to 6 predicate offences defined in existing Union law (e.g., participation in an organised criminal group or corruption)[16]. Nevertheless, there are differences in national law in relation to the requirements. The

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[8] European Union Agency for Criminal Justice Cooperation: Eurojust Report on Money Laundering Criminal Justice Across Borders October 2022. https://www.eurojust.europa.eu/publication/eurojust-report-money-laundering (last visited 05 November 2022).

[9] https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-report-money-laundering-2022.pdf (last visited 05 November 2022).

[10] The report is based on an analysis of cases registered at Eurojust between 2016 and December 2021. During this period, Eurojust registered 2,870 cases in its case management system, with a steady increase over the years.

[11] Report on Money Laundering Criminal Justice Across Borders October 2022, pp. 2-3.

[12] Report on Money Laundering Criminal Justice Across Borders October 2022, pp. 3-4.

[13] The FATF is an inter-governantal and policy maker body that aim to prevent money laundering and terrorist financing.

[14] International standards on combating money launderinng and the financing of terrorism & proliferatio. The FATF Recommandations adopted by the FATF Plenary n Februar 2012. Udapted March 2022. https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations. html (30.11.2022).

[15] Article 2 Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law. OJ L 284, 12.11.2018, pp. 22-30.

[16] See Article 3(4) Directive (EU) 2018/1673.

crime of money laundering is typically cross-border in nature. The Member States should assist each other as much as possible, and it is necessary to ensure better international cooperation, including with third countries. *"Differences between the definitions of predicate offences in national law should not hinder international cooperation in criminal proceedings regarding money laundering"*[17]*.* Problems can arise, however, especially with *tax crimes* committed in other Member States. The regulation of tax crimes varies among Member States.

7. Furthermore, the use of *cryptocurrencies* in the conntext to money laundering is specific problem that requires further financial expertise and resources. Freezing and confiscating assets acquired through a crimine is an important anti-money laundering tool. Problematically, practitioners are still not sufficiently familiar with regulations and money laundering methods discussed by AML/CFT. Training of practitioners could be useful.

8. Certain Union authorities and bodies have specific tasks or mandates in preventing and combating money laundering. *The cooperation* between *law enforcement, public prosecutors' offices, and financial intelligence units (FIU)* is essential to an efficient system for tackling money laundering, but it is not sufficient. Cooperation among *supervisory, administrative, and law enforcement authorities* is crucial for successfully combating money laundering. The role of supervisory bodies will increase with the establishment of AMLA, a supranational body that will contribute to the *coordinated implementation of AML/CFT* rules. It should be emphasized that the AMLA, as a new supranational authority, will also have the power to impose administrative sanctions and investigative powers. In prevention, *compliance measures* in the legal entity could be an important means.

9. Freezing and confiscation of funds acquired through a criminal offence is an important means of combating (organized) crime. It is essential to emphasize that *freezing or confiscation* orders should be enforced without verification of double criminality in case of money laundering in accordance with the EU Regulation[18].

E) Compliance to Avoid Sanctions against Legal Persons and Enterprises and their Employees

I. Obligation to establish compliance and its scope

1. *Compliance,* which originated in the mother country, the USA, has now also arrived in the European Union and its Member States. There is a *legal obligation to establish and consistently apply compliance*.

2. Compliance primarily comprises the obligation *to observe the applicable law* as well as *the rules created by the company itself*.

3. If the task of regulated self-regulation of companies is not carried out, this establishes the *responsibility of companies under criminal or fine law in the sense of organizational responsibility*.

4. In addition, there is *state–private co-regulation*, through which companies are obliged by law to take over state functions of standardization, policing and sanctioning. Thus, employees must be trained and educated in areas such as anti-money laundering or occupational health and safety.

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[17] Preamble Nr. 9. Directive (EU) 2018/1673.

[18] Article 3, Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders. OJ L 303, 28.11.2018, pp. 1-38.

II. Avoiding criminal, administrative and civil sanctions through compliance

5. A central area of compliance concerns the *avoidance of penal, administrative and civil sanctions* threatening the company and its employees, especially at the management level. In this context, the company management must comply with the statutory provisions and internal company guidelines *(duty of legality)* and work towards their observance by means of organizational precautions at subordinate levels and within the corporate group *(duty of legality control).*

III. Responsibility of the corporate management

6. The management team has to organize compliance. Therefore, the establishment of a compliance department and the delegation of compliance tasks is mandatory.

7. The management team is also responsible for the implementation of self-regulation.

8. The management team is responsible for compliance with and monitoring of the *legal requirements* and the rules that have been established within the framework of *corporate self-regulation*. The same applies to the requirements of state–private co-regulation, especially in the topics (areas) of anti-money laundering and occupational safety.

IV. Responsibility of the legal person and/or the enterprise in addition to the individual person

9. The wrongful and culpable acts and omissions of the company's employees, especially if they belong to the management level, establish the responsibility of the legal person and the enterprise (economic entity) simultaneously.

10. Failures of an employee attributable to the legal person or the enterprise shall result in the sanctioning of the natural person and the legal entity or the enterprise.

11. Corporate crime this way becomes an offence of the organization. Criminal liability or fines thus serve to enforce the legal rules as well as the company rules which have been set within the framework of self-regulation. Violations of state-private co-regulation requirements in anti-money laundering and occupational safety also give rise to corresponding criminal or fine liability.

V. Compliance elements limiting the responsibility of the legal entity and the company

12. If an employee commits a legal violation despite comprehensive compliance measures, it is no longer the company but only the offending natural person who is responsible for the violations.

13. Failure to comply with compliance requirements must also be taken into account as a reason for mitigation in criminal law and the law on fines (Geldbußen). As a result, the unwritten compliance regulations also acquire legal relevance through consideration as a reason for mitigation. It is therefore no longer a matter of soft law, but part of the binding law.

VI. Development of a guideline for the design of an effective and efficient compliance management system

14. Consideration should be given to developing a guide for designing an effective and efficient compliance management system. The aim of such a guide should be to create more transparency and legal certainty for companies.

15. The "Evaluation of Corporate Compliance Programs", published by the Fraud Section of the U.S. Department of Justice on 1 June 2020, can serve as a guide[19]. Due to its high level of detail, this guide provides companies with clear orientation for the design of compliance programs.

F) On the Need for Further Harmonization of Substantive Sanction Law and Sanction Procedures in Accordance with Rule of Law Standards

I. Need for further harmonization of substantive criminal and administrative sanctions law

1. The fight against irregularities detrimental to the financial interests of the European Union concerns a *central area of economic criminal law*. It is therefore a justified and reasonable concern of the European Union to improve and further develop criminal law protection in this area in particular.

2. The European Union has not only related the fight against protecting the European Union's financial interests to *fraud* and *(serious) VAT evasion* but justifiably also to *corruption and money laundering.*

3. The *fight against customs offences,* where the relationship between customs debt and sanctions has been restructured since the revision of the Union Customs Code in 2016, must also be included.

4. In addition to anti-money laundering and occupational safety measures, government–private co-regulation for *data protection* must also be put in place as a new, important focal point.

a) The area of occupational safety is largely covered by the protection of human rights under the law on fines within the framework of chain responsibility. Here, an independent concept is pursued, which is to be fitted into corporate responsibility under fine law.

b) Concerning data protection, it should be ensured that the penalties under the law on fines are applied uniformly in all Member States.

5. Furthermore, *climate and environmental protection under criminal law,* which affects *people's livelihoods,* should occupy a position in the European Union's legal policy comparable to the protection of the financial interests of the European Union.

6. The *individual criminal law of the Member States, criminal sanctions against legal persons and enterprise fines* must be coordinated.

7. *The sanctions under fine law against legal persons and enterprises in the sense of the "economic unit"* should be coordinated.

8. If there is no fixed upper limit for the fines imposed on legal persons and enterprises, the principle of the rule of law requires the enactment of binding sentencing guidelines. These should be issued by the legislature so that they are also binding for the courts.

II. The necessity of further development of the law on criminal and administrative penalty proceedings

9. The law on criminal and administrative fines must be made subject to the *criminal constitutional requirements of the member states, the Charter of Fundamental Rights and the European Convention on Human Rights.*

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[19] https://www.justice.gov/criminal-fraud/page/file/937501/download (last visited 20 December 2022).

10. The *position of legal persons and enterprises (economic units) as subjects of proceedings* against which criminal and administrative penalties are imposed requires that the *guarantees of criminal procedure,* in particular the rights of the accused, the principles of *nemo tenetur*, *ne bis in idem* and the right to file inspection, be guaranteed.

11. Furthermore, *comprehensive and effective legal protection* against state intervention has to be guaranteed.

12. The *imposition of administrative, criminal and civil sanctions* must be *proportionate* overall. Procedural rules must ensure this. This requires an *integrated procedure regulated by statutory law*.

13. The *ne bis in idem* principle does not apply to non-EU countries. Criminal sanctions and fines imposed in third countries must be taken into account in the case of renewed sanctioning in the European Union.

III. Need for Further Development of the Right to Confiscate and the Reimbursement of Damages from Confiscated Funds

14. *Criminal confiscation* is a legal institution that is harmonized concerning the preconditions for confiscation but requires *further legal regulations* with regard to its handling.

15. This legal institution, which is directly related to criminal sanctions and is applied within the framework of the investigation and criminal proceedings, should primarily *benefit the victims* who have a claim for damages. The *process of awarding damages* has so far been inadequately designed.

16. In particular, *special regulations* are needed *for the reimbursement of damages to victims from the confiscated funds,* especially as far as *foreign victims* are concerned. For this purpose, there is a need for specially regulated official procedures for compensation of damages, which lead to the relief of the public prosecutor's office and the criminal courts.

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