

# eucrim

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**THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM**



## **Focus: Threats to the EU's Internal Market**

**Dossier particulier: Menaces pour le marché intérieur de l'UE**

**Schwerpunktthema: Bedrohungen für den EU-Binnenmarkt**

Guest Editorial  
*Heinz Zourek*

The New Market Abuse Directive  
*Dr. Margherita Cerizza*

VAT Carousel Fraud in the EU – The Need for Reform in Italy and on a Supranational Level  
*Giangaspere Donato Toma*

The Associations for European Criminal Law and the Protection of Financial Interests of the EU is a network of academics and practitioners. The aim of this cooperation is to develop a European criminal law which both respects civil liberties and at the same time protects European citizens and the European institutions effectively. Joint seminars, joint research projects and annual meetings of the associations' presidents are organised to achieve this aim.

## Contents

### News\*

#### European Union

##### Foundations

- 74 Enlargement of the EU
- 74 Schengen

##### Institutions

- 74 OLAF
- 75 Europol
- 75 Eurojust
- 76 European Judicial Network (EJN)
- 76 Agency for Fundamental Rights (FRA)
- 76 Frontex

##### Specific Areas of Crime / Substantive Criminal Law

- 78 Protection of Financial Interests
- 79 Money Laundering
- 79 Organised Crime
- 80 Cybercrime
- 80 Environmental Crime

##### Procedural Criminal Law

- 80 Procedural Safeguards
- 80 Data Protection
- 81 Ne bis in idem

##### Cooperation

- 81 Law Enforcement  
Cooperation

#### Council of Europe

##### Specific Areas of Crime

- 83 Corruption
- 83 Money Laundering
- 84 CDPC

### Articles

#### Threats to the EU's Internal Market

- 85 The New Market Abuse Directive  
*Dr. Margherita Cerizza*
- 89 VAT Carousel Fraud in the EU  
The Need for Reform in Italy and  
on a Supranational Level  
*Giamparsare Donato Toma*

### Imprint

\* News contain internet links referring to more detailed information. These links can be easily accessed either by clicking on the respective ID-number of the desired link in the online-journal or – for print version readers – by accessing our webpage [www.mpicc.de/eucrim/search.php](http://www.mpicc.de/eucrim/search.php) and then entering the ID-number of the link in the search form.

# Guest Editorial

Dear Readers,

The entire European Union applies the same customs rules. Customs legislation is fully harmonised and provides for a stable and comprehensive legal system, which aims to ensure the proper and uniform application of the Union's autonomous and international rules. It also sets out the obligations and rights of customs administrations and economic operators in a common and transparent way. Their enforcement, however, remains within the exclusive competence of its Member States.

Despite differences in law enforcement structures, all EU Member States have the same responsibility to enforce EU legislation. This means that the Member States can choose the penalties that seem appropriate to them, with the result that penalties for the same infringement differ in nature and severity among Member States.

Significant national differences in the treatment of customs offences and their penalties may generate extra costs for companies operating in more than one Member State. These differences undermine the conditions of fair competition in the single market.

Indeed, the stakeholders affected most are EU economic operators who deal with customs in their daily business. They are the ones confronted with the lack of legal certainty that arises from the differences in Member States' legal systems with regard to the treatment that is given to infringements of Union customs law. These differences may even provide an unfair advantage to economic operators who break the law in a Member State having lenient legislation for customs penalties compared to those breaking the law in a Member State where even a minor error is treated as a criminal offence.

The differing enforcement of customs legislation makes the effective management of the customs union more difficult and has a serious impact on access to customs simplifications and facilitations or to the process of being granted Authorised Economic Operator (AEO) status, as key criteria for granting AEO status are compliance with customs legislation and the absence of serious infringements. Given the divergent

legal systems, these criteria may be interpreted in a totally different manner, depending on the Member State in which the economic operator is carrying out his activities.

In order to remedy the situation, the European Commission has tabled a proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs

infringements and sanctions (COM (2013) 884 final), which sets out a common legal framework for the treatment of customs offences and penalties, thus bridging the gap between different legal systems and contributing to equal treatment between economic operators in the EU. The proposed directive includes a list of possible offences as well as controversial situations persons may face when dealing with customs authorities. Moreover, it also establishes a common scale of effective, proportionate, and dissuasive sanctions linked to the infringements and, when determining the type and level of sanctions, it states the circumstances to be taken into account under which they would have been committed. The combination of the scope of the sanctions and their circumstances would ensure that infringements are addressed in a proportionate way, with an equal degree of severity – regardless of the Member State in which they take place.

The proposal was adopted by the College on 13 December 2013 and is currently before the Council and European Parliament.

Heinz Zourek  
Director-General, Taxation and Customs Union  
European Commission



Heinz Zourek



## European Union\*

*Reported by Dr. Els De Busser and Cornelia Riehle*

### Foundations

#### Enlargement of the European Union

##### Lithuania Adopts Euro and More Countries Closer to Accession

On 29 July 2014, the Council adopted a decision allowing Lithuania to introduce the euro currency. From 1 January 2015 onwards, euro notes and coins will be issued in Lithuania. It is the 19th Member State to enter the Eurozone.

During the General Affairs Council of 24 June 2014, the Council granted candidate status to Albania. This was endorsed by the European Council on 26-27 June 2014. The next step is the opening of accession negotiations, but this depends on further sustainable reforms in Albania.

The European Council also signed Association Agreements with Georgia and the Republic of Moldova as well as the remaining economic part of the EU-Ukraine Agreement during the summit

of 26-27 June 2014. These agreements aim for a deeper political association and economic integration and have a particular impact at local and regional level. (EDB)

➤ eucrim ID=1403001

### Schengen

#### Court of Auditors Report on Schengen Information System

On 19 May 2014, the European Court of Auditors (ECA) published a special report entitled "Lessons from the European Commission's development of the second generation Schengen Information System (SIS II)." In the report, the ECA examined why SIS II was operational six years later than planned and at a cost that was eight times the initial estimated budget.

The ECA's conclusion was that the overspending resulted from deficiencies in the Commission's management, particularly during the first part of the project up until 2009. At that point, no decision had been made based on the reassessed costs and benefits. Nevertheless, the Commission changed its

approach at a later stage and made the SIS II operational in April 2013 (see eucrim 2/2013, p. 35).

In its report, the ECA also makes concrete recommendations for future management of large-scale IT systems. (EDB)

➤ eucrim ID=1403002

### Institutions

#### Ombudsman Wants More Protection for Whistleblowers in EU Institutions

On 28 July 2014, the European Ombudsman opened an investigation into whether EU institutions are complying with their obligation to introduce internal whistleblowing rules. The newly updated staff regulations in force since 1 January 2014 contain such an obligation.

Nine EU institutions, including the Commission, the EP, and the Council are to report back to the Ombudsman about the rules they already have in place or plan to introduce. (EDB)

➤ eucrim ID=1403003

### OLAF

#### Supervisory Committee Discloses Opinion Referring to OLAF Investigation

On 7 July 2014, the OLAF Supervisory Committee decided to disclose opinion 2/2012, which refers to the OLAF investigation concerning former EU Health Commissioner Dalli (see eucrim 2/2013, p. 35 and eucrim 4/2012, p. 144).

Access to the opinion was granted to the Corporate Europe Observatory (CEO), a research and campaign group

\* If not stated otherwise, the news reported in the following sections cover the period July – September 2014.

aiming to expose corporate influence and lobbying. The CEO had requested access on 22 February 2013. After receiving the opinion and a letter from the Supervisory Committee, both documents were published on the CEO website on 6 July 2014.

Before this date, the report containing the Supervisory Committee's opinion had been treated as confidential. The Committee wrote to the CEO that access was granted to counter fraudulent, inaccurate, or erroneous statements present in the public domain and concerning the OLAF investigation. The Committee also took note of an overriding public interest in the report's release.

OLAF expressed in a press release of 7 July 2014 the hope that the disclosure of the opinion will end all the speculation concerning its content and restore some truth about it. The public will now be able to see that the Supervisory Committee has not found OLAF in breach of any legal provisions. (EDB)

►eucrim ID=1403004

### European Ombudsman's Recommendation to OLAF

On 23 June 2014, European Ombudsman Emily O'Reilly closed the inquiry into a complaint against OLAF lodged in 2012. The case concerned a former employee of the FRA bringing irregularities allegedly committed by FRA staff to the attention of OLAF. After investigating the case, the complainant was informed by OLAF that no further action had been taken but a number of issues were addressed with the FRA management. The complainant requested clarification and, in the absence of a reply, turned to the European Ombudsman, claiming that OLAF should provide him with the reasons for closing the investigation.

Based on a general obligation for EU institutions to state reasons for their decisions and the fact that the independence of OLAF and the confidentiality of its investigators would nevertheless be preserved, the Ombudsman considered OLAF's refusal to state reasons for

its decision to close the investigation to amount to an instance of maladministration.

OLAF responded by stating that no maladministration had been committed in the present case. However, following the entry into force of Regulation 883/2013 concerning investigations conducted by OLAF, it decided to amend its policy and inform whistleblowers of the reasons for closing an investigation. The Ombudsman welcomed this reaction and closed the case by concluding that OLAF had accepted and correctly implemented her draft recommendation. (EDB)

►eucrim ID=1403005

## Europol

### EU Terrorism Situation and Trend Report (TE-SAT) 2014 Published

Europol published the EU Terrorism Situation and Trend Report (TE-SAT) 2014, giving an overview of the situation in 2013.

According to the TE-SAT, seven people died as a result of terrorist attacks in the EU (10 less than in 2012) and 152 terrorist attacks were carried out in EU Member States in 2013 (compared to 219 in 2012). The majority of attacks took place in France (63), Spain (33), and the UK (35) and can be contributed to separatist terrorism. Looking at arrests, 535 individuals were arrested in the EU for terrorist-related offences (two less than in 2012). Court proceedings for terrorism were concluded against 313 individuals, with separatist terrorism being the dominant type of terrorism. The highest number of court proceedings for terrorist offences were concluded in Spain.

Looking at religiously inspired terrorism, the TE-SAT reports no attacks for the 2013 period compared to six attacks defined as terrorism in 2012. Nevertheless, in at least two attacks, the role of religious radicalisation appeared to be evident. Arrests related to religiously

inspired terrorism increased from 159 in 2012 to 216 in 2013. Notably, there was an increase in arrests for recruitment and travelling to conflict zones for terrorist purposes, in particular Syria. Furthermore, religiously inspired terrorist groups continued inciting individuals in the EU to perpetrate self-organised attacks.

In the field of ethno-nationalist and separatist terrorism, the report states that 84 attacks were carried out in 2013, a significant decrease from the 167 attacks in 2012. 180 individuals were arrested in EU Member States in 2013, compared to 257 in 2012. Furthermore, three high-ranking PKK members were killed in the EU.

For left-wing and anarchist terrorism, 24 terrorist attacks were counted in the EU in 2013, putting an end to the previous downward trend. 49 individuals were arrested in six EU Member States. Furthermore, two people were killed by left-wing or anarchist terrorists in Greece.

In 2013, one person was killed and three mosques attacked in the UK due to right-wing terrorism. Three individuals were arrested for right-wing terrorist offences. Xenophobia was the main motivator for right-wing extremist activities.

The downward trend regarding incidents related to animal rights extremism (ARE) also continued in 2013.

In its annexes, TE-SAT offers an overview of the failed, foiled, and completed attacks and on arrests per Member State and per affiliation in 2013 as well as information on convictions and penalties. (CR)

►eucrim ID=1403006

## Eurojust

### Orientation Debate on the Proposed Regulation

On 21 May 2014, the Greek Presidency launched an orientation debate on the question of whether the Commission should be represented in Eurojust's Col-

lege, acting as Management Board, and on the Executive Board, as foreseen in the Commission's initial proposal for a new Eurojust Regulation (see eucrim 2/2013, pp. 41-42). This governance structure was met with some reservation by Member States and Eurojust in terms of how the independence of Eurojust may be perceived.

Following discussions at CATs, the revised text of the proposal now foresees an alternative model, expanding the existing Eurojust Presidency team to include a representative from the Commission and two other National Members (on rotation) to form a new Executive Board. This Executive Board would be responsible for overseeing the day-to-day administration of Eurojust and act as a preparatory body for the non-operational tasks of the College.

The College could then focus on operational and policy work whilst retaining general control over administrative matters linked with operational issues such as the adoption of the budget. This model is expected to support the overall aim of the European Commission's proposal to improve the effectiveness and efficiency of Eurojust and to reduce the administrative burden faced by National Members. (CR)

►eucrim ID=1403007

### **Cooperation Agreement with the Republic of Moldova Signed**

On 10 July 2014, Eurojust and the Republic of Moldova signed a cooperation agreement to enhance their cooperation in combatting serious crime, in particular organised crime and terrorism.

According to the agreement, the parties may participate in each other's operational and strategic meetings, exchange information, and have regular consultations. The agreement designates the Prosecutor's Office of the Republic of Moldova as the competent authority for its execution. Furthermore, the Republic of Moldova may second a liaison prosecutor to Eurojust. In addition, the agreement also foresees the possibility

to decide on posting a Eurojust liaison magistrate to the Republic of Moldova. (CR)

►eucrim ID=1403008

### **Memorandum of Understanding Signed with EMCDDA**

On 15 July 2014, Eurojust and the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) signed a Memorandum of Understanding (MoU) to enhance their cooperation through the exchange of strategic and technical information in drug-related matters, including on drug supply, drug supply reduction, and legislation issues relevant to judicial cooperation. The MoU foresees the implementation of:

- Specific cooperation projects;
- Cooperation in the collection and analysis of relevant data in the drug trafficking field;
- Cooperation in the dissemination of information related to drugs;
- The exchange of technical expertise, participation in meetings, and regular consultations on information strategy issues and matters of common interest.

Under the MoU, Eurojust and the EMCDDA designate one or more contact point(s) for the maintenance of close, direct, and continuing contacts between the parties. (CR)

►eucrim ID=1403009

### **European Judicial Network (EJN)**

#### **Plenary Meeting on the EAW**

On 24-25 June 2014, the EJN held its 42th plenary meeting together with the Hellenic Ministry of Justice, Transparency and Human Rights in Athens. The meeting focused on the better understanding of national laws governing the practical implementation of the European Arrest Warrant (EAW). Discussions included:

- Problems and obstacles that arise due to the different legal wording of certain offences under the laws of the Member States;

- The practical issues of the EAW execution caused by the different national laws of Member States, with reference to the Greek experience;

- The practical implementation of the EAW.

Furthermore, competences and actions of the EJN, as well as its role in assisting in the EAW, were considered. (CR)

►eucrim ID=1403010

### **Agency for Fundamental Rights (FRA)**

#### **FRA Annual Report: Challenges and Achievements in 2013**

On 5 June 2014, the FRA presented its annual report of 2013. The report contains the fundamental rights-related developments of 2013 in ten chapters, including two new chapters: one dedicated to Roma integration and one on the EU Charter of Fundamental Rights, in particular its use before national courts.

Each year, the annual report also contains a section that zooms in on a topic of special interest. This year's focus section is dedicated to "An EU internal strategic framework for fundamental rights: joining forces to achieve better results."

The report outlines the most important legal reforms completed by the EU but also highlights the difference between law in the books and law in practice. (EDB)

►eucrim ID=1403011

### **Frontex**

#### **Fifth Western Balkans Annual Risk Analysis Published**

Frontex published its Western Balkans Annual Risk Analysis 2014. The report presents the situation at the borders of Albania, Bosnia and Herzegovina, FYROM, Montenegro, and Serbia in the year 2013. Next to an annual risk assessment of the main risks affecting the western Balkans and Member States or Schengen Associated Countries, it provides an outlook as well as statistical



data describing the key indicators of irregular migration.

According to the report, 2013 was defined by several records. With regard to detections of illegal border crossings at regional and common green borders (external land borders outside border crossing point areas), at 40,000 detections, the number was 27% higher than in 2012. Remarkably, half of the detections were made at the Serbian-Hungarian border sections between January and July 2013, underlining the massive impact that changes in EU Member States' asylum procedure have.

Looking at the transition of non-European irregular migrants, in 2013, the number of detections remained at the same level compared to the previous year, at 22,000 irregular migrants. However, a significant change occurred with regard to their countries of origin. While the number of migrants from Afghanistan, North Africa, and Somalia declined considerably, the number of West African migrants increased by 316% (18,000) compared to the previous year. Nevertheless, this number is still far below the levels prior to visa liberalisation in 2009 when 62,000 illegal border crossings were detected.

As regards the most common modus operandi for illegal border crossings, the report lists crossing of green borders on foot, followed by onward transport through facilitators.

Among the countries of the Western Balkans, Albanian nationals stood out with a 60% growth in detections of illegal border crossings, a 29% rise in illegal stays detected in the EU, and they constitute 16% of all cases of document fraud detected in 2013. Next to Albanian nationals, six times more persons coming from the territory of Kosovo were detected performing illegal border crossings, and three times as many asylum seekers were counted in 2013 in comparison to 2012. According to the report, this increase was largely driven by a change in Hungarian asylum policy reintroducing detention for asylum seekers.

Another major problem in 2013 was the continued abuse of visa-free travel through subsequent unfounded asylum application in the EU.

Finally, cross-border criminality, such as trafficking of stolen vehicles and smuggling of illicit drugs and weapons, formed yet another threat to border security in the Western Balkans in 2013. (CR)

►eucrim ID=1403012

### Eastern European Borders Annual Risk Analysis Published

Frontex published its Eastern European Borders Annual Risk Analysis 2014. The report presents the situation at the borders between Member States and Belarus, Moldova, Ukraine, and the Russian Federation in the year 2013.

According to the report, the overall regular passenger flow continued to grow in 2013, up roughly 10% from 2012. A continuous major threat to border security was the smuggling of excise and illicit goods, with the smuggling of tobacco products being particularly common. Another remarkable finding for 2013 is the higher number of irregular movements of people across the common borders. Nevertheless, detections of illegal border crossings remained low in 2013, with 1316 cases, which is only 1.2% of all illegal border crossings reported by Member States at the external borders. However, in contrast to the rather low level of threat due to illegal border crossings, the issue of migrants being refused entry and then applying for asylum and absconding from reception centres remained a serious problem at common borders in 2013, with the number of refusals of entry rising to 50,000, i.e., 39% of the EU total. In consequence, the report sees a growing risk of abuse of legal travel channels. The abuse of visas and the use of fraudulent supporting documentation and falsified stamps were also reported.

The report's look at the future of border security reveals the situation in the Ukraine as being the main uncertainty.

However, there are also positive developments such as the implementation of the EU-Moldova visa liberalisation that took place in April 2014. (CR)

►eucrim ID=1403013

### Activists Report on Border Cooperation between Frontex, Greece, and Turkey

The International Federation for Human Rights (FIDH), together with Migreurop (a network of European and African associations and activists aiming to raise awareness of and denounce the increasing detention of migrants and the multiplication of refugee camps in Europe) and the Euro-Mediterranean Human Rights Network (EMHRN), published a report on the cooperation between Frontex, Greece, and Turkey at this EU border and on the impact of this cooperation on the human rights of migrants.

The report has two main objectives. First, it aims to provide information on the deployment of Frontex at the Greece-Turkey border and to examine the impact of its activities on human rights. Frontex activities at the Greek-Turkish border since 2009, such as Operation Poseidon (see eucrim 1/2011, pp. 6-7), the use of Rapid Border Intervention Teams, or its Operational Office, are outlined and assessed.

Secondly, it raises questions regarding the participation of Frontex and the responsibility for illegal actions during Frontex operations, especially in cooperation with Greek coast and border guards and special forces. The report criticises the Greek authorities of committing various violations of rights when operating at the border. A detailed example supporting this allegation is given with regard to Operation Poseidon, where the authors see breaches of international law and a lack of clear responsibility.

In the second chapter, the report outlines the insufficiency of legal reforms in Greece and Turkey. The new Turkish Law on Immigration and Asylum, the detention of migrants and refugee rights in Turkey, and the gaps between

the Greek Action Plan on Asylum and Migration Management and practices at Greek borders are analysed.

In its conclusion, the report accuses the EU of basing its border surveillance policy, embodied by Frontex, on securing borders at the expense of the rights of migrants, making Frontex' Fundamental Rights Strategy merely superficial.

Hence, the report offers numerous recommendations to the EU Council, Commission, and Parliament as well as to Frontex, the EU Member States, the Greek and Turkish governments, and the Council of Europe. According to the report, Frontex shall suspend Operation Poseidon. Furthermore, it shall publish the conclusions of investigations conducted by the various Frontex services on allegations of push-backs and other human rights.

The EU institutions are called on, amongst others, to clearly define the level of liability of Frontex in joint operations, given its coordination role and its obligations under the EU Charter of Fundamental Rights, and to incorporate this definition of liability into a legally binding document. Member States shall ensure that officers deployed in Frontex operations respect fundamental rights and investigate and take disciplinary measures against those that do not.

The Greek government is the recipient of several recommendations, e.g., to cease all push-backs, to prosecute all those responsible for violations of human rights during push backs, and to end the systematic detention of migrants arriving on Greek territory and of undocumented migrants.

The Turkish government has been asked to produce detailed public reports evaluating cooperation between the Frontex agency and Turkey as well on the formal and informal cooperation at the land, sea, and air borders between Turkey and Greece. Ultimately, the Council of Europe shall produce regular reports evaluating the operational activities of Frontex. (CR)

►eucrim ID=1403014

### First Annual Report of the Consultative Forum Published

On 30 July 2014, Frontex published the first Annual Report of its Consultative Forum on Fundamental Rights (see eucrim 4/2012, p. 147). The Annual Report provides an overview of the activities undertaken by the Consultative Forum in 2013 and contains the main recommendations made to Frontex and its Management Board as well as the subsequent impact of them on the Agency's work.

The starting point for the Consultative Forum's work in 2013 was a mapping of Frontex activities in which major fundamental rights concerns may arise. Furthermore, the Consultative Forum commented on Frontex' draft Programme of Work 2014, suggesting that the programme should have a genuine fundamental rights dimension.

The Consultative Forum was also involved in the drafting of the Frontex Code of Conduct for Joint Return Operations (see eucrim 1/2014, pp. 7-8) at a very early stage. Members of the Consultative Forum visited Joint Operation Poseidon at the Greek-Turkish sea and land borders and at the Bulgarian-Turkish land border in July 2013. Delegates looked into the implementation of the principle of non-refoulement as well as the identification and protection of members of vulnerable groups.

Furthermore, the Consultative Forum was involved in the Frontex Annual Risk Analysis Report by providing information of the fundamental rights situation in third countries, verifying that debriefing interviews with migrants were only conducted with their consent, and that no personalised information or any figures relating to their individual nationality, gender, and or age were recorded. In its report, however, the Consultative Forum regrets that it could only provide *ad hoc* input to the Guidelines for Debriefing activities developed by Frontex in 2013.

The Forum is also involved in Frontex training activities. Hence, in 2013,

two members of the forum participated in the European Border Guard Teams Induction Training to review the structure, methodology, and content of the training, the training materials used as well as the composition and profiles of the trainers. (CR)

►eucrim ID=1403015

## Specific Areas of Crime / Substantive Criminal Law

### Protection of Financial Interests

#### Annual Report 2013

On 17 July 2014, the Commission presented its annual report on the protection of the EU's financial interests and the fight against fraud in 2013.

Since this report was the last report under the previous Commission, it encompasses the achievements from 2009 to 2013. Significant steps taken during this period include the multi-annual Anti-Fraud Strategy adopted in 2011 and the new OLAF Regulation in 2013. The criminal law aspect of the protection of the EU's financial interests was underlined by the adoption of the proposed directive on the fight against fraud by means of criminal law in July 2012 and the proposed regulation on the establishment of a European Public Prosecutor's Office (EPPO) in July 2013. On the revenue side of the EU budget, the measures included the quick reaction mechanism against VAT fraud.

In 2013, a total of 1609 irregularities were reported as being fraudulent (including both suspected and established fraud), involving €309 million in EU funds. Differences between Member States still exist, based on different interpretations of the applicable laws or different approaches towards detecting fraud. Trends that have grown stronger in the past two years are the increasing involvement of administrative bodies in detecting fraudulent irregularities and



the use of falsified documentation as the most common way of committing fraudulent acts.

In 2013, the Commission made several decisions to ensure that EU resources are spent according to the principle of sound financial management and that EU financial interests are protected. This included 217 decisions to interrupt payment.

In accordance with Regulation (EU) No. 883/2013, each Member State is required to set up an Anti-Fraud Coordination Service (AFCOS). The AFCOS should facilitate cooperation and exchange information with OLAF. 23 Member States have already finalised this process and appointed an AFCOS. Ireland, Luxembourg, and Sweden have reported that they will do so by the end of 2014, and Spain plans to comply within two years.

The report ends with a set of conclusions and recommendations. These include *inter alia* an invitation for Member States to consider the recommendations included in the anti-corruption report published in February 2014 (see eucrim 2/2014, p. 54) and an invitation for the co-legislators to swiftly complete the legislative process regarding the EPPO proposals. (EDB)

►eucrim ID=1403016

### Italian Presidency Continues Debates on EPPO with Specific Themes

On 27 June 2014, the Italian presidency suggested continuing discussions on the proposed regulation on the establishment of the EPPO, focusing on two themes: judicial control and review, on the one hand, and admissibility of evidence on the other.

The admissibility of evidence had already been discussed under the previous presidency and resulted in a general agreement that the principle of admissibility of evidence will not bind the competent court in its assessment of the value or merit of the evidence. The idea of introducing a procedure requiring certification of evidence in the Member

State in which the evidence is collected found no support among delegations.

According to the Italian presidency, the two aspects of this theme that need further discussion are the legality of the evidence collected and the conditions for the admissibility of evidence. (EDB)

►eucrim ID=1403017

## Money Laundering

### Fourth Anti-Money Laundering Directive – State of Play

On 18 June 2014, the Council agreed on a negotiating mandate for two legal instruments on money laundering and the financing of terrorism. This refers to the proposed directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (also known as the fourth anti-money laundering directive, see eucrim 1/2013, p. 6) and the proposed regulation on information accompanying transfers of funds. Both draft instruments update existing EU legal instruments on money laundering and the financing of terrorism and aim to implement the recommendations issued in February 2012 by the Financial Action Task Force.

The proposed provisions call *inter alia* for evidence-based measures – and guidance by European supervisory authorities – in the so-called risk-based approach and for tighter rules on customer due diligence. The EP adopted its position at a first reading on 11 March 2014. For adoption by the Council, both the directive and regulation will require a qualified majority, in agreement with the EP. (EDB)

►eucrim ID=1403018

## Organised Crime

### Final Implementation Report Internal Security Strategy 2010-2014

On 20 June 2014, the Commission presented the final report on implementation of the 2010 EU internal security strategy

(see eucrim 1/2011, p. 12). The Commission presented reports in 2011 and 2013 (see, respectively, eucrim 2/2012, p. 2 and eucrim 2/2013, p. 44); this last report was planned to be released mid-2014. The report assesses whether the objectives of the strategy have been met in the past four years and considers and identifies future challenges, cross-cutting objectives, and emerging threats in view of a follow-up internal security strategy.

The first objective of the strategy was to disrupt international criminal networks. In this respect, operational support from Europol and Eurojust in JITs, including the financial funding of JITs, as well as cross-border cooperation in general were among the concrete achievements. Setting up Asset Recovery Offices, the proposed fourth anti-money laundering directive (see eucrim 1/2013, p. 6), and the first EU anti-corruption report (see eucrim 2/2014, p. 54) are initiatives that contribute to disrupting the forms of crime that are profit-driven. Also, the strengthening of cross-border information exchange by implementing the Prüm decisions and by proceeding with significant legislative proposals such as the proposed directive on passenger name records for law enforcement purposes, are steps taken in the context of the first objective.

The second objective of the internal security strategy was to prevent terrorism and address radicalisation and recruitment. Achieving the second objective involved the establishment of a Radicalisation Awareness Network (RAN) by the Commission in 2011. The RAN drew up best practice guidelines in a reaction to the phenomenon of foreign fighters travelling to conflict zones. The implementation of the EU-US Terrorism Tracking Financing Programme that was concluded in 2010 is also underlined as a useful tool in tracking terrorist networks and their financing.

Raising levels of security for citizens and businesses in cyberspace was the third objective of the internal security

strategy. In this context, initiatives such as the cybersecurity strategy, the establishment of the Europol Cybercrime Centre, and the adoption of the Directive on attacks against information systems are the main achievements.

The fourth objective of strengthening security through border management was realised by introducing EUROSUR in 2013, a multipurpose system to detect and prevent cross-border crime as well as to contribute to saving migrants' lives at the external borders of the Schengen area. In addition, SIS II became operational in April 2013.

Increasing Europe's resilience to crises and disasters was the fifth objective of the internal security strategy, and the background for setting up a new EU Civil Protection Mechanism as well as the currently discussed implementation of the solidarity clause introduced by the Lisbon Treaty.

Among the challenges ahead, the Commission relied on Europol's Serious and Organised Crime Threat Assessment (SOCTA), which identified environmental crime and energy fraud as new emerging threats. Cybercrime, terrorism, and radicalisation will equally require further action in the coming years. Strengthening border security is pinpointed by the Commission as a further challenge to consider in the near future. As cross-cutting objectives, the Commission first of all listed strengthening the link between internal and external security. This includes strengthening relations with international organisations such as the UN, the Council of Europe, Interpol, and the Global Counter Terrorism Forum (GCTF). The Commission secondly aims to reinforce the respect for fundamental rights as part of a citizen-centred approach and thirdly aims to strengthen the role of research, funding, and training. In autumn 2014 the Commission will start consulting all relevant stakeholders for developing a renewed Internal Security Strategy for 2015-2020. (EDB)

►eucrim ID=1403019

## Cybercrime

### ENISA-Europol Strategic Cooperation Agreement Signed

On 26 June 2014, the heads of Europol and ENISA signed a Strategic Cooperation Agreement at Europol headquarters in The Hague. The agreement aims to facilitate closer cooperation and the exchange of expertise in the fight against cybercrime between Europol, its European Cybercrime Centre, and ENISA.

Cooperation under this agreement includes exchanging specific knowledge and expertise, reports resulting from strategic analyses, and best practice. The exchange of personal data has not been included in the scope of this agreement. (EDB)

►eucrim ID=1403020

## Environmental Crime

### First EFFACE Report on the Damages of Environmental Crime

In July 2014, the European Union Action to Fight Environmental Crime (EFFACE) published its first report "Understanding the damages of environmental crime: review of the availability of data." EFFACE is a 40-month research project joining research institutions and think tanks. The project aims to assess the impact of environmental crime as well as effective and feasible policy options to combat it from an interdisciplinary perspective. EFFACE receives its funding from the EU's Seventh Framework Programme.

The report released in July 2014 focuses on data availability for different types of environmental crime (e.g., illegal waste shipment from Europe, pollution incidents, and illegal trade in chemicals) and should lay the foundation for future research in 2014 and 2015. The main conclusion is that collecting accurate and substantial data is problematic for several types of environmental crime. (EDB)

►eucrim ID=1403021

## Procedural Criminal Law

### Procedural Safeguards

#### General Approach on Protection of Children in Criminal Proceedings

On 6 June 2014, the Ministers of Justice of the Member States reached consensus on a general approach regarding the special safeguards for protecting children involved in criminal proceedings. The proposal had been introduced by the Commission on 27 November 2013 (see eucrim 4/2013, p. 120-121). The proposed directive includes measures such as the assistance of a lawyer for children, separate detention from adults, and a reimbursement regime for children so they do not have to bear the costs of certain procedures. Minimum standards for detention are also provided for in the proposal. The agreement on a general approach opens the door to the trilogue discussions between the Council, the EP, and the Commission under the Italian presidency. The UK and Ireland have a right to opt-in and be bound by the provisions of the proposed directive. Denmark has opted out.

Also on 6 June 2014, the Commission released a new study on children's involvement in criminal proceedings in the EU. The elaborate publication (available free of charge on the EU website) consists of a series of 28 country reports and an EU summary report. It aims to disseminate examples of best practice across Member States and form a basis for evidence-based policy in the context of child-friendly justice. (EDB)

►eucrim ID=1403022

#### Incomplete Implementation on Two Important Framework Decisions

Framework Decision 2008/675/JHA on taking into account convictions in EU Member States during new criminal proceedings has only been implemented by 22 Member States so far. That is the conclusion of an implementation report on this legal instrument published on 2 June 2014. The Framework Decision

obliges Member States to take foreign convictions into account. This is essential for a judge in order for him to make informed and fair decisions on the sentencing of an offender, thereby respecting the fundamental rights of both the offender and the victims. Belgium, Spain, Italy, Lithuania, Malta, and Portugal, however, have not yet implemented the Framework Decision. In addition, of the 22 Member States that have transposed it into national legislation, several have not transposed it fully.

A similar issue was detected after an examination of the implementation status of Framework Decision 2009/948/JHA on the prevention and settlement of conflicts of jurisdiction in criminal proceedings. Only 15 Member States have implemented this legal instrument, and problems with partial implementation have surfaced here as well. As of 1 December 2014, the Commission will be able to launch infringement proceedings for these legal instruments. (EDB)

►eucrim ID=1403023

## Data Protection

### EDPS Opinion on Development of the Area of Freedom, Security and Justice

On 4 June 2014, the EDPS published an elaborate opinion intended to contribute to the future creation of an area of freedom, security and justice by means of fuller integration of privacy and data protection into the activities of all EU institutions.

According to the EDPS, the EU must now adopt policies and laws that are in line with the principles of necessity and proportionality and that are based on the Charter of Fundamental Rights. Restoring trust in its capacity to effectively protect individuals is now a key objective for the EU, especially with regard to legislative initiatives such as the “smart borders” package as well as the various instruments relating to passenger name records. A strong and updated data protection legal framework should

be adopted soon. Finally, privacy and data protection considerations should be integrated into the development of all new policies and legislation in the area of freedom, security and justice.

Cooperation with third states has also been highlighted by the EDPS as an area in which EU measures must respect fundamental rights that cannot be violated by excessive surveillance activities. Mass data transfers should not be legitimised. (EDB)

►eucrim ID=1403024

### EDPS Position Paper on Transfer of Personal Data to Third States

On 14 July 2014, the EDPS published a position paper entitled “The transfer of personal data to third countries and international organisations by EU institutions and bodies.” With this paper, the EDPS provides guidance for EU institutions and bodies in interpreting and applying Regulation (EC) No. 45/2001 within the context of international transfers of personal data.

A considerable part of the paper is dedicated to the meaning of the requirement of adequacy, since recipient third states should provide an adequate level of data protection before data transfers can be made. The assessment of adequacy and possible derogations from the requirement have also been covered in the paper, and they have been illustrated with relevant examples. The annex contains a practical checklist to use before carrying out a personal data transfer. (EDB)

►eucrim ID=1403025

## Ne bis in idem

### ECJ Rules on *ne bis in idem* in Two Cases

As the *ne bis in idem* rule gives rise to many cases before the ECJ, the Court continued interpreting the principle in spring of 2014 in two judgments. On 27 May 2014, the ECJ ruled on the question of enforcement of a sentence in the Spacic case (C-129/14). The Schengen

Implementation Convention stipulates that the *ne bis in idem* rule is applicable only if the penalty imposed has been enforced, is actually in the process of being enforced, or can no longer be enforced under the laws of the sentencing state. Mr. Spacic, a Serbian citizen, had been convicted for fraud in Italy and sentenced with a one-year custodial sentence and a fine of €800. Imprisoned in Austria for other offences, he is now being prosecuted in Germany for the same fraud offence. It was the Higher Regional Court (Oberlandesgericht) of Nürnberg that brought the matter before the ECJ.

The ECJ ruled that where a custodial sentence and a fine have been imposed as principal penalties, the payment of the fine alone is not sufficient to consider the penalty enforced or in the process of being enforced. Since Mr. Spacic only paid the fine, without serving the custodial sentence, the Court concluded that the enforcement condition laid down in Article 54 of the Schengen Implementation Convention has not been fulfilled.

On 5 June 2014, the ECJ decided on case M. (C-398/12) in which the question of preliminary ruling revolved around the decision not to refer a case to a trial court because of insufficient evidence. Such decision was made by the Court of First Instance (*Tribunal de Première Instance*) of Mons, Belgium in a case involving M., an Italian citizen residing in Belgium. Appeal against this decision was dismissed by the Court of Cassation of Belgium.

In parallel, proceedings had been started against M. for the same facts before the Tribunale (District Court) of Fermo in Italy. The examining magistrate of this court committed M. to be tried. When M. invoked *ne bis in idem*, the District Court referred the question to the ECJ. The ECJ had to decide on the effects of a decision that there is no ground to refer a case to a trial court which precludes in the state in which that order was made the bringing of new criminal proceedings. These new proceedings should be in respect of the

same acts against the person to whom that finding applies unless new facts and/or evidence against that person come to light. According to the ECJ, Article 54 of the Schengen Implementation Convention should be interpreted as meaning that such decision must be considered to be a final judgment and preclude new proceedings against the same person in respect of the same acts in another state. (EDB)

►eucrim ID=1403026

## Cooperation

### Law Enforcement Cooperation

#### OSCE Conference on Cross-Border Cooperation

The 2014 OSCE Annual Police Experts Meeting was held in Vienna from 17-18 June 2014. This year, the conference addressed direct cross-border cooperation between law enforcement and the judiciary, with the aim of providing a platform for national authorities to exchange views and to improve the inter-agency mechanisms of cooperation in view of speeding up the joint responses against transnational criminal activities. (CR)

►eucrim ID=1403027

#### Regulation to Boost CEPOL's Role

On 16 July 2014, the European Commission proposed a Regulation to provide for a new CEPOL with broader objectives and modernised governance, repealing and replacing CEPOL as established under Council Decision 2005/681/JHA. The proposed regulation is the result of the European Parliament's and the Council's disagreement with the proposed merger of CEPOL with Europol as foreseen in the initial draft for a new Europol Regulation (see eucrim 4/2013, p. 115).

The new proposal confers two main tasks to CEPOL: first, to deliver relevant EU-level training and exchanges and,

second, to coordinate the implementation of the Law Enforcement Training Scheme (LETS) by conducting strategic training needs assessments and ensuring a common quality framework for law enforcement learning. In order to achieve the first aim, CEPOL's mandate is broadened so that it can support, develop, deliver, and coordinate learning activities for law enforcement officials of all ranks (not only for police officers of senior rank as is the case under the current CEPOL Decision) as well as for officers of customs and other relevant services dealing with cross-border is-

ssues. Nevertheless, the agency remains network-based, bringing together the networks of training institutes of the Member States for law enforcement officials and liaising with a single national unit in each Member State.

The UK and Ireland may take part in the adoption and application of the proposed regulation by notifying the Council in writing that they wish to do so (within three months after the proposed regulation has been presented to the Council). Denmark is not taking part in the proposed regulation. (CR)

►eucrim ID=1403028



## Council of Europe\*

*Reported by Dr. András Csúri*

### Specific Areas of Crime

#### New Council of Europe Convention against Trafficking in Human Organs Adopted by the Committee of Ministers

On 9 July 2014, the Committee of Ministers of the CoE adopted an international convention to make trafficking in human organs for transplant purposes a criminal offence (the convention). It aims to protect victims and to provide for more effective prosecution of those responsible by facilitating cooperation at national and international levels. The convention calls on governments to criminalise the illegal removal of human organs from living or deceased donors, when it is performed without the free, informed, and specific consent of the living or deceased donor or, in the case of the deceased donor, without the removal being authorised under domestic law. In

addition, the convention should apply when, in exchange for the removal of organs, the living donor, or a third party, receives a financial gain or comparable advantage or when, in exchange for the removal of organs from a deceased donor, a third party receives a financial gain or comparable advantage.

With regard to the victims of this crime, the convention provides protective measures and compensation as well as preventive measures to ensure transparency and equitable access to transplantation services. The convention will be open for signature shortly (end of 2014, early 2015) by both Member States and non-Member States of the CoE.

►eucrim ID=1403029

\* If not stated otherwise, the news reported in the following sections cover the period July – September 2014.



## Corruption

### GRECO: Fourth Round Evaluation Report on Norway

On 25 June 2014, GRECO published its Fourth Round Evaluation Report on Norway. The fourth and latest evaluation round was launched in 2012 in order to assess how states address issues such as conflicts of interest or declarations of assets with regard to Members of Parliaments (MPs), judges, and prosecutors (for further reports, see eucrim 2/2013, pp. 47-48; 1/2013, p. 13; 3/2013, p. 87; 4/2013, p. 124; 1/2014, p. 16; 2/2014, pp. 57-58). The report on Norway praised the country's efforts to prevent corruption among MPs, judges, and prosecutors and made only seven recommendations to the country.

The report noted the high levels of public trust enjoyed by these professional categories and highlighted the zero tolerance approach to corruption in a system that relies mainly on openness, trust, and public scrutiny.

GRECO welcomed the transparency of the legislative process and the ethical guidelines adopted with regard to MPs. The guidelines need to be complemented, however, with practical awareness-raising measures.

Though the judiciary enjoys a reputation of independence and competence, the transparency of the appointment of short-term judges and the adoption of a specific code of conduct for prosecutors require further attention and improvement. Additionally, the report called for ethics and awareness training to be developed for lay judges and also for prosecutors.

➤eucrim ID=1403030

### GRECO: Fourth Round Evaluation Report on Albania

On 27 June 2014, GRECO has published its Fourth Round Evaluation Report on Albania. GRECO acknowledged the existence of detailed anti-corruption and conflict-of-interest regulations but stated that the legal framework is highly com-

plex and frequently subject to amendment and contradictory interpretations. Furthermore, the rules mainly focus on restrictions and prohibitions, to the detriment of public disclosure and transparency, which limits their effect. GRECO made a total of ten recommendations to the country.

The position of the judiciary remains weak, as it continuously suffers from a low level of public trust. The judiciary lacks control over the selection of High Court judges, and the right to initiate disciplinary proceedings against district and appeal court judges belongs exclusively to the Minister of Justice. Moreover, as the National Judicial Conference (the principal judicial self-governing body) had not been fully operational for years, this had a negative impact on the selection, training, and disciplinary proceedings against judges.

With regard to MPs, the transparency of their legislative work is hindered by the lack of access to draft legislation prior to formal adoption. The undue influence on MPs is not subject to regulation, the importance of having clear standards of professional conduct is not considered a priority, and there is no case-by-case notification of conflicts of interest. Though amendments to the Constitution limited the MPs' and judges' immunity, the lack of corresponding modifications to the Code of Criminal Procedure has obstructed its practical implementation.

➤eucrim ID=1403031

### GRECO: Fourth Round Evaluation Report on Belgium

On 28 August 2014, GRECO published its Fourth Round Evaluation Report on Belgium, in which it called for reinforcement of the preventive measures concerning corruption within parliamentary and judicial institutions and addressed 15 recommendations to the country.

GRECO noted inter alia the recent establishment of codes of deontology and the introduction of a system for the declaration of donations, official appointments, other positions held, and as-

sets for parliamentarians. However, the regulatory system lacks effectiveness and appears to be unnecessarily complex. Therefore, GRECO recommends more coherent and effective regulations, especially with regard to gifts and other benefits, as well as engaging in relations with third parties such as lobbyists who seek to influence the parliamentary process. Moreover, in the future, the system of declarations should clearly include income and an estimate of the value of the assets of Members of Parliament. To ensure transparency, it should also be easily accessible to the public.

The report characterises the Belgian justice system as independent and decentralised but states that the lack of means and understaffing fosters considerable recourse to lawyers to serve as magistrates.

Furthermore, there is no general system to assess the functioning of the courts and in any way identify the reasons for the apparent disparities in the quality of the work carried out by comparable courts. Therefore, the report suggests reinforcing the auditing role of The High Council of Justice. The managerial function within the courts and the prosecution service should be further developed for the same reasons. Lastly, GRECO noted that, to date, the organisation of the system of administrative justice has not been finalised.

➤eucrim ID=1403032

## Money Laundering

### MONEYVAL: Fourth Round Evaluation Report on Liechtenstein

On 3 July 2014, MONEYVAL published its Fourth Round Evaluation Report on the Principality of Liechtenstein, calling for the strengthening of Customer Due Diligence (CDD) requirements by financial institutions, in particular by minimizing their reliance on trust and corporate service providers for the performance of certain elements of the CDD process.



With regard to compliance with AML/CFT standards, the report states that, while the ML offence as well as the reporting requirements are in line with international standards, it is not implemented effectively by the authorities. The currently fragmented provisions on financial secrecy need harmonised revision, as they impact the FIU's ability to obtain and to share information. Information exchange and MLA are performed in a timely manner by the FIU in regard to its foreign counterparts. Asset recovery is a further strong feature in the Liechtenstein regime, and a systematic use of civil forfeiture and criminal confiscation is being successfully applied.

►eucrim ID=1403033

### **MONEYVAL: Fourth Round Evaluation Report on Romania**

On 29 July 2014, MONEYVAL published its Fourth Round Evaluation Report on Romania, in which it calls for a strengthening of the country's key AML institutions, in particular by addressing important concerns in respect of the FIU and supervisory authorities as well as their enforcement results.

With regard to compliance with AML/CFT standards, the report states that, while the ML offence is broadly in line with international standards and while the number of investigations, prosecutions and convictions has increased positively, there are structural and capacity deficiencies in the law enforcement and judicial processes, which need to be addressed.

Though the ability to freeze, seize, and confiscate proceeds of crime has been improved, law enforcement authorities need to conduct parallel financial investigations proactively alongside the investigation of proceeds-generating crimes.

The report calls for the strengthening of the FIU by divesting the government-appointed board of its decision-making powers on core operational functions. GRECO has serious concerns with regard to the system for the detection of physical cross-border transportation of currency, as the Romanian financial

system is highly vulnerable to cash-based ML.

Additionally, the report expressed several concerns regarding the effectiveness and consistency of AML/CFT supervision and the application of sanctions for non-compliance (with the relevant requirements) by the relevant supervisory authorities. The report generally calls for further efforts in the strengthening of the national coordination mechanism of the AML/CTF system and its effectiveness. With regard to the legal framework of international cooperation by supervisory authorities with their foreign counterparts, the report detected a number of deficiencies that remain to be addressed.

►eucrim ID=1403034

### **CDPC**

#### **CDPC Publishes White Paper on Transnational Organised Crime**

In this White Paper, special attention has been given to identifying the areas in which the CoE could contribute to fighting transnational organised crime (TOC), what actions could be carried out better or more efficiently by the CoE, and what problems have not been

addressed specifically by other international or supranational organisations or should be coordinated with actions of the CoE. The paper identifies three fundamental factors that have influenced the expansion of TOC: the mobility of trafficked goods and persons, institutional/political developments, and technological developments. The paper also identified the following five key areas as crucial for the effective investigation and prosecution of TOC:

- Enhancing international cooperation;
- Special investigative techniques;
- Witness protection and incentives for cooperation;
- Administrative synergies and cooperation with the private sector;
- Recovery of assets.

The paper concluded that the CoE is in a unique position to foster cooperation agreements in specific areas in which its Member States need to co-operate more efficiently. Therefore, it should play a key role in the creation of a new pan-European network on international legal assistance in criminal matters as well as in the development of links among existing networks in order to provide MLA in criminal matters.

►eucrim ID=1403035

#### **Common abbreviations**

CEPOL	European Police College
CDPC	European Committee on Crime Problems
CFT	Combating the Financing of Terrorism
CJEU	Court of Justice of the European Union
ECJ	European Court of Justice (one of the 3 courts of the CJEU)
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
(M)EP	(Members of the) European Parliament
EPPO	European Public Prosecutor Office
FIU	Financial Intelligence Unit
GRECO	Group of States against Corruption
GRETA	Group of Experts on Action against Trafficking in Human Beings
JHA	Justice and Home Affairs
JSB	Joint Supervisory Body
LIBE Committee	Committee on Civil Liberties, Justice and Home Affairs
(A)ML	(Anti-)Money Laundering
MLA	Mutual Legal Assistance
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
SIS	Schengen Information System

# The New Market Abuse Directive

Dr. Margherita Cerizza\*

## **I. Directive 57/2014 and Regulation 596/2014: The New Legal Framework Against Market Abuse in the European Union**

Traditionally, the protection of market integrity and of investors' confidence has been mainly guaranteed through extra-penal measures, such as the infliction of administrative sanctions by independent regulators or the right for investors to raise civil lawsuits against intermediaries. In recent years, the strategic role assumed by financial markets in modern economic life, the frequent crises that originated from this system as well as their catastrophic effects on global economies have led to an increase in the use of criminal law. Criminal law is considered the only measure that can adequately prevent and punish the most serious and fraudulent behaviors on the market. I mainly refer to the so-called *market abuse* offenses, i.e., conduct based on an illegitimate exploitation of corporate information (insider dealing) or on a misleading manipulation of market information (market manipulation), which can seriously threaten free competition and equality of arms among investors.<sup>1</sup>

As far as the EU legislation is concerned, Directive 592/1989/EEC on insider dealing<sup>2</sup> required Member States (MS) to prohibit the most serious insider dealing offenses, without specifying the kind of punishment to be applied,<sup>3</sup> and Directive 6/2003/EU on market abuse<sup>4</sup> required them 'to ensure [...] that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible' of threatening the integrity of financial markets.<sup>5</sup> Only in very recent times has the EU enacted legislative provisions aimed at promoting the adoption of criminal measures against market abuse: Directive 57/2014/EU<sup>6</sup> – replacing, together with Regulation 596/2014/EU,<sup>7</sup> the old Market Abuse Directive (MAD) – provides that, by 3 July 2016, all MS shall ensure that insider dealing and market manipulation 'constitute criminal offences at least in serious cases and when committed intentionally'.<sup>8</sup>

The new European market abuse framework is based on two different instruments: Regulation 596/2014/EU updates the old MAD to include new market developments, such as over-the-counter trading platforms and high-frequency trading, and new market abuse techniques, such as manipulation on derivatives markets and manipulation of benchmarks; it also rein-

forces the investigative and administrative sanctioning powers of regulators and their power to cooperate with EU institutions and with other national regulators. Directive 2014/57/EU complements such regulation, by requiring MS to complement their national legislations with criminal laws.

## **II. Art. 83.2 TFEU: The Legal Basis of Directive 57/2014 on Criminal Sanctions for Market Abuse**

Such a change of perspective in the fight against market abuse has been determined by the combination of both legal and economic factors. The legal ground is the entry into force of the Lisbon Treaty: the new TFEU not only extends the 'third pillar' area, increasing and broadening the 'areas of particularly serious crime with a cross-border dimension' to which 'minimum rules concerning the definition of criminal offences and sanctions' may be applied (Art. 83.1 TFEU), but also enables the EU to adopt similar rules concerning first pillar matters, on condition that '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' (Art. 83.2 TFEU).<sup>9</sup> In its communication 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law',<sup>10</sup> the EU Commission has clarified some issues relating to the new TFEU provision, concluding that 'EU criminal law can be an important tool to better fight crime as a response to the concerns of citizens and to ensure the effective implementation of EU policies' and identifying the financial market as a privileged area of intervention for the new EU criminal policy.

## **III. The Globalization of Financial Crime and the New European Criminal Policies**

The economic ground for the adoption of the new MAD is the increased integration of financial markets and the transnational character of financial crime. Financial markets belong to the economic sector that has been most affected by the processes of globalization of the last decades, determined by the fall of many trade barriers and the development of new communication technologies:<sup>11</sup> as a consequence, financial

crime has followed the paths of globalized economic life and has acquired a transnational dimension. Sovereign states often fail at orientating globalized financial markets towards their economic and social goals; moreover, their democratic processes are widely influenced and conditioned by internationalized global economies. The EU – as well as other international organizations – has been trying to regulate the markets, preventing informative asymmetries and negative externalities, removing obstacles to free competition, and fighting against financial misconduct. In comparison with sovereign states, international organizations have more adequate resources to cope with international financial crime; nevertheless, their action presents serious dangers: firstly, economic and social goals of the weaker states risk being systematically sacrificed to the (often conflicting) interests of the stronger ones; secondly (and particularly relevant as far as criminal matters are concerned), measures adopted risk a lack of democratic legitimization, especially if the international organization concerned applies the ‘majority rule’ in its legislative process – as the EU now does, even in criminal matters.<sup>12</sup>

#### IV. Fighting Against Insider Dealing and Market Manipulation on a Transnational Level: The Story So Far

Insider dealing and market manipulation constitute a crime in many national legislations. Some countries, like the US, have a *corporate-oriented* perspective: market abuse is punished as far as it constitutes a misappropriation of corporate information and a breach of the duties of loyalty and confidentiality towards a company.<sup>13</sup> Some other countries, like EU countries, adopt a *market-oriented* approach: market abuse is punished, since it harms the integrity of financial markets and public confidence in financial investments.<sup>14</sup> Despite these differences, the fraudulent nature of market abuse has been clearly identified in many countries,<sup>15</sup> and therefore many national legislations have adopted criminal sanctions to prevent and punish it. In contrast, international organizations have followed a totally different path: no criminalization treaties have been signed so far in this field,<sup>16</sup> and economic organizations addressing this issue have only required their members to fight market abuse through *adequate, effective, proportionate, and/or dissuasive* measures: as long as the goal of market protection is achieved, the nature of the sanctions applied is left to the choice of any single state.<sup>17</sup> In this respect, Directive 57/2014/EU is a complete novelty in this scenario.

The EU choice to impose penal measures in the field of market abuse is based on the consideration that ‘criminal sanctions [...] demonstrate a stronger form of social disapproval compared to administrative penalties. Establishing criminal offences for at least serious forms of market abuse sets clear

boundaries for types of behavior that are considered to be particularly unacceptable and sends a message to the public and to potential offenders that competent authorities take such behavior very seriously’.<sup>18</sup> As already pointed out in the communication of the Commission ‘Strengthening sanctions for violations of EU financial services rules: the way forward’,<sup>19</sup> inadequate sanctioning regimes in the field of financial services can seriously harm market trust, consumer protection, and fair competition within the EU internal market; in creating a sanctioning system that proves to be proportionate, effective, and dissuasive, criminal measures must also be taken into account, since such ‘sanctions, in particular imprisonment, are generally considered to send a strong message of disapproval that could increase the dissuasiveness of sanctions, provided that they are appropriately applied by the criminal justice system’.

Before Directive 2014/57/EU, MS had no obligation to punish market abuse with penal measures; nonetheless, in the last three decades, the EU has informally encouraged MS to adopt criminal laws in this field. First of all, only criminal sanctions have proved to be sufficiently effective, proportionate, and dissuasive in the sense of the old MAD.<sup>20</sup> Secondly, several national criminal courts have interpreted their market abuse criminal laws by referring to instructions provided by the ECJ.<sup>21</sup> As evidenced by two CESR reports published in 2007 and in 2008, almost all MS have their own market abuse legislation,<sup>22</sup> and the majority of them have adopted criminal sanctions against offenders.<sup>23</sup> Even if EU measures have only operated on an extra-penal level, in most cases they also had an indirect impact on national criminal provisions: for this reason, national legislations adopted in MS show several similarities, especially with regard to the description of illicit market conduct.<sup>24</sup> Nonetheless, such regulations still diverge with regard to other aspects, such as the mental element of crime, the type and level of applicable sanctions, and the regime of liability for legal persons. Notwithstanding the increasing interest in market abuse issues in the EU area, these laws, especially the criminal provisions, have been applied in very few cases.<sup>25</sup>

#### V. Criminal Law Issues Arising from the Entry into Force of Directive 57/2014

After the entry into force of Directive 2014/57/EU, MS shall ensure that the most important forms of insider dealing (trading, tipping, and *tuyautage*)<sup>26</sup> and market manipulation (information-based, action-based, and trade-based manipulations)<sup>27</sup> constitute a criminal offense, even in the form of inciting, aiding, abetting and attempt,<sup>28</sup> ‘at least in the most serious cases and when committed intentionally’; criminal sanctions shall be applied to both natural and legal persons,<sup>29</sup> and effective mechanisms of investigative and judicial cooperation shall be enforced.<sup>30</sup>

Being the first instrument adopted under Art. 83.2 TFEU, Directive 2014/57/EU raises several issues concerning not only the role of criminal law in protecting financial markets but also the function of criminal legislations in the post-Lisbon scenario. I have chosen to briefly analyze the following subjects: the respect of proportionality and subsidiarity principles in the new MAD; market abuse offenses and the codification of European *Rechtsgüter*; the relationship between criminal and administrative measures and the *ne bis in idem* principle.

## 1. Proportionality and subsidiarity in the new MAD

The notions of proportionality and subsidiarity are employed both in EU law and in criminal law but with slightly different meanings. As for proportionality, EU law mainly insists on the idea that the legal response must be adequate for the issue it aims at dealing with;<sup>31</sup> criminal law also stresses the fact that such a response must not be excessive.<sup>32</sup> As for subsidiarity, under EU law, it must be intended in a ‘vertical’ sense (i.e., EU law intervenes only when national laws are not sufficient);<sup>33</sup> under criminal law, it must be intended in a ‘horizontal’ sense (i.e., criminal sanctions intervene only when civil or administrative measures are not sufficient). These two principles have a stronger meaning under criminal law, since the *extrema ratio* expresses not only a need for more efficiency but also a fundamental guarantee for the accused person. Art. 83.2 TFEU only provides that minimum rules must ensure the effective implementation of a Union policy, but it does not require that such rules address only the most serious conducts referring to the policy concerned. These rules protect harmonization directives against the risk of undercriminalization but not against the risk of overcriminalization. It must be said that the new MAD respects the proportionality and subsidiarity principles, not only because many less serious offenses constituting an administrative offense under Regulation 596/2014/EU are not included in Directive 2014/57/EU but also because even insider dealing and market abuse constitute a criminal offense only in the most serious cases. Nevertheless, the new MAD is a ‘minimum rule:’ therefore, the respect for these principles will mainly depend on the criminalization policies of each single MS.

## 2. Market abuse offenses and European *Rechtsgüter*

A related issue is that of the codification of European *Rechtsgüter*. Criminal sanctions should apply only to such conduct that constitutes a threat or an offense to a specific good, such as market integrity, public confidence, and investor’s wealth, while a market abuse directive established on the basis of Art. 83.2 TFEU creates the hazard of an indiscriminate criminalization of all conduct being detrimental to the imple-

mentation of the internal market policy.<sup>34</sup> Such a hazard is increased by the fact that the European policies set out in EU treaties seem to be the only guideline for enforcing a European criminal policy in the former first pillar area. Several ‘criminal’ directives enforced before the Lisbon Treaty did not distinguish between harmful, dangerous, and risky behavior, and precautionary rules also carried criminal sanctions.<sup>35</sup> As mentioned before, the new MAD operates using a selection among market conduct, and only conducts that are harmful or specifically dangerous are sanctioned – even if some illogicality is registered.<sup>36</sup> In any case, since the development of EU criminal law is at its early stages, criminal offenses of Directive 2014/57/EU cannot be classified within a general framework establishing a hierarchy among goods. Developing such a framework could help in establishing the correct measure of sanctions against market abuse, the determination of which is still approximate and not sufficiently motivated in the directive.<sup>37</sup>

## 3. Criminal sanctions, administrative sanctions, and *ne bis in idem*

The old MAD only required MS to adopt administrative measures and sanctions, while the imposition of criminal sanctions was left to the choice of any single country.<sup>38</sup> Since the adoption of administrative measures was, at any rate indefectible, this provision raised a *ne bis in idem* issue for all those countries that decided to exercise their right to impose criminal sanctions against the same conduct.

The *ne bis in idem* principle should apply only to criminal matters, but the ECHR<sup>39</sup> has clarified that even a non-criminal sanction in the formal sense can be treated as criminal if it proves to be very afflictive and/or aimed at punishing and intimidating: as a consequence, all European criminal law principles apply to such ‘criminal’ rules, including the *ne bis in idem* principle, set out under Art. 4 of VII Protocol to the ECHR,<sup>40</sup> and Art. 50 of the Charter.<sup>41</sup>

As recently acknowledged in the *Grande Stevens* decision, market abuse administrative sanctions can be qualified as substantially criminal, and therefore the *ne bis in idem* principle applies to them.<sup>42</sup>

In the majority of MS, the most serious cases of insider dealing and market manipulation constitute both a criminal and an administrative offense. This phenomenon is particularly evident in the German system, in which the violation of the same rule<sup>43</sup> gives rise to both a criminal and a non-criminal sanction.<sup>44</sup> the same offense to the market generates two different penal responses.



In order to avoid the most unfair consequences of such a system – i.e., the accused person being punished twice –, some MS reduce the criminal sanction by an amount equivalent to the administrative sanction that has eventually been already imposed: the French legal system was the first to adopt this rule.<sup>45</sup> However, such a mechanism not only ends up weakening the intimidating force of criminal law but also does not even prevent the individual and the state from bearing the costs of a double proceedings.

The obligation to impose criminal sanctions against the most serious market abuse offenses exacerbated the *ne bis in idem* issue. Following on the recent *Grande Stevens* case, the European law-maker had to deal with the following problem: according to the 23rd 'whereas' of the new MAD, 'in the application of national law transposing this Directive, Member States should ensure that the imposition of criminal sanctions for offences in accordance with this Directive and of administrative sanctions in accordance with the Regulation (EU) No. 596/2014 does not lead to a breach of the principle of *ne bis in idem*.' The directive does not offer solutions to the problem and passes onto MS the responsibility to comply with the

VII Protocol of ECHR and the Charter of Fundamental Rights. Since the 'whereas' only refers to the concrete application of the law, and not to its abstract formulation, the 'French solution' seems consistent with the directive, even if it does not appear satisfactory for the reasons mentioned above.<sup>46</sup>

A more rational solution is suggested by the case law of the European courts: according to the *Gradinger* decision,<sup>47</sup> the fact that the same conduct violates two different laws does not constitute *per se* a breach of the *ne bis in idem* principle, unless these two laws describe an offense to the same good – as market abuse criminal and administrative provisions do: in order to comply with the *ne bis in idem* principle, it would therefore be necessary to differentiate the two regulations. More specifically, the criminal offense should detach itself from a 'regulatory offense model', and address only the most serious and fraudulent conduct. Moreover, the penal sanction should not be fungible with the administrative one, and it should express its punitive and intimidating potential to the highest degree – i.e., imprisonment would be preferable to pecuniary sanctions. Only the enforcement of the new MAD in MS' legislations will show whether or not it will be possible to avoid a breach of the *ne bis in idem* principle.



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\* The opinions expressed are those of the author and not necessarily those of the institution at which she is employed.

1 E. Avgouleas, *The Mechanics and Regulation of Market Abuse. A Legal and Economic Analysis*, New York, Oxford University Press, 2005.

2 Directive 89/592/EEC of the Council coordinating regulations on insider dealing.

3 See Art. 2 and Art. 3.

4 Directive 03/6/EC of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), O.J. L 96, 12 April 2003.

5 See Art. 14.

6 Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), O.J. L 173, 12 June 2014.

7 Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation), O.J. L 173, 12 June 2014.

8 See Art. 3, Art. 4, and Art. 5.

9 The legal basis for the new MAD is Art. 83.2 TFEU. See G. Giudicelli-Delage, C. Lazerges (eds.), *Le droit pénal de l'Union Européenne au lendemain du Traité de Lisbonne*, Paris, Société de Législation Comparée, 2012; J. Öberg, 'Union Regulatory Criminal Law Competence after Lisbon Treaty', in H.-J. Albrecht, and A. Klip (eds.), *Crime, Criminal Law and Criminal Justice in Europe*, (Leiden, Boston, Martinus Nijhoff, 2013, p. 301; E. Herlin-Karnell, 'EU Competence in Criminal Law after Lisbon', in A. Biondi, P. Eeckhout, and S. Ripley (eds.), *EU law after Lisbon*, Oxford, Oxford University Press, 2012, pp. 331–346.

10 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*, COM/2011/0573, 22 September 2011.

11 See M. Bagheri, and M.J.G. Jahromi, 'Globalization and extraterritorial application of economic regulation: crisis in international law and balancing interests', in *Eur J Law Econ*, published online on 11 October 2012; N. Ryder, *Financial crime in the 21st century*, Cheltenham, EE, 2011.

12 On similar issues, see L. Besselink, F. Pennings, and S. Prechal (eds.), *The Eclipse of the Legality Principle in the European Union*, Alphen aan den Rijn, Kluwer, 2011; M. Donini, 'L'armonizzazione del diritto penale nel contesto globale', in *Rivista trimestrale di diritto penale dell'economia*, 2002, p. 482.

13 See, *inter alia*, I. Seredyńska, *Insider dealing and criminal law*, Berlin-Heidelberg, Springer, 2012; F. Consulich, *La giustizia e il mercato. Miti e realtà di una tutela penale dell'investimento mobiliare*, Milan, Giuffrè, 2010; B. Rider, A. Kern, L. Linklater, and S. Bazel, *Market abuse and insider dealing*, Haywards Heath, Tottel, 2009; S.M. Bainbridge, 'Regulating Insider Trading in the Post-Fiduciary Duty Era: Equal Access or Property Rights?', 2012, UCLA School of Law, Law-Econ Research Paper No. 12-08, available at SSRN: <http://ssrn.com/abstract=2054814>.

14 The U.S. were the first legal system to criminalize insider dealing and market manipulation, and are the jurisdiction that has been more active in seeking international cooperation in investigating and prosecuting these crimes; nonetheless, today, the European 'market-oriented' approach prevails. A. Nieto Martin, 'Américanisation ou européanisation du droit pénal économique?', in *Revue de science criminelle et de droit pénal comparé*, 2006, pp. 767–786; K. Hopt, and E. Wymeersch (eds.), *European Insider Dealing*, London, Butterworths, 1991; R.C.H. Alexander, *Insider dealing and money laundering in the EU: Law and Regulation*, Farnham-Burlington, Ashgate, 2007, p. 126; M. Siems, and M. Nelemans, 'The Reform of the EU Market Abuse Law: Revolution or Evolution', in *Maastricht Journal of European and Comparative Law*, 2012, Vol. 19, Issue 1, p. 205.

15 N. Ryder, *Financial crime in the 21st century*, Cheltenham, EE, 2011. See also European Commission Staff, Working Paper, *Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) and Proposal for a directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation*, 25 October 2011. K. Hopt, and E. Wymeersch (eds.),



*European Insider Dealing*, London, Butterworths, 1991; R.C.H. Alexander, *Insider dealing and money laundering in the EU: Law and Regulation*, Farnham-Burlington, Ashgate, 2007, p. 126; M. Siems, and M. Nelemans, 'The Reform of the EU Market Abuse Law: Revolution or Evolution', in *Maastricht Journal of European and Comparative Law*, 2012, Vol. 19, Issue 1, p. 205.

16 The Council of Europe *Convention on insider dealing*, Strasbourg, 20 May 1989, <http://conventions.coe.int/Treaty/EN/Treaties/Html/130.htm> only provides for a definition of 'insider dealing' and asks signatory states to enforce judicial cooperation mechanisms but does not oblige them to implement criminal measures and does not introduce exceptions to the double jeopardy principle.

17 Beyond the above-mentioned ECHR Convention, see also IOSCO, *Objectives and Principles of Securities Regulation*, 2000, Art. 36, § 2, FATF/GAFI, *Money Laundering and Terrorist Financing in the Security Sector*, 2009, p. 48, and OECD, *Principles of corporate governance*, 2004, p. 33.

18 See 6th 'whereas' of the new MAD.

19 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Reinforcing sanctioning regimes in the financial services sector*, COM(2010) 716, 8 December 2010.

20 In this respect, see ECJ, C-68/1988, *Commission v. Greece*, 21 September 1989; ECJ, C-77/1997, *Österreichische Unilever GmbH and SmithKline Beecham Markenartikel GmbH*, 28 January 1999; ECJ, C-176/03, *Commission v. Council*, 13 September 2005, §§ 47–48.

21 See ECJ decisions C-28/99, *Verdonck*, 3 May 2001, C-384/02, *Grøngard*, 22 November 2005 and C-248/11, *Nilas*, 22 March 2012; all these cases were referred to criminal law trials. See J. Hupka, 'Das Insiderrecht im Lichte der Rechtsprechung des EuGH', in *EuZW*, 2011, 22, p. 860, for quite an exhaustive overview of ECJ case law on market abuse.

22 CESR, *Report on Administrative Measures and Sanctions as well as the Criminal Sanctions available in Member States under the Market Abuse Directive*, CESR/ 07-693, 17 October 2007, available at [http://www.esma.europa.eu/system/files/07\\_693\\_\\_2\\_.pdf](http://www.esma.europa.eu/system/files/07_693__2_.pdf).

23 CESR, *Report on Administrative Measures and Sanctions as well as the Criminal Sanctions available in Member States under the Market Abuse Directive*, CESR/ 08-099, 28 February 2008, available at [http://www.esma.europa.eu/system/files/08\\_099.pdf](http://www.esma.europa.eu/system/files/08_099.pdf).

24 F. Consulich, *La giustizia e il mercato. Miti e realtà di una tutela penale dell'investimento mobiliare*, Milan, Giuffrè, 2010.

25 See, for example, Autorité des Marchés Financiers, *Rapport annuel*, Paris, 13 June 2013, [www.amf-france.org](http://www.amf-france.org), Annexe 3, Consob, *Relazione per l'anno 2012*, Milan, 6 May 2013, pp. 195ss., [www.consob.it](http://www.consob.it) or Bundesanstalt für Finanzdienstleistungsaufsicht, *Annual report 2012*, 18 June 2013, [www.bafin.de](http://www.bafin.de).

26 See Art. 3 and Art. 4.

27 See Art. 5.

28 See Art. 6.

29 See Art. 7, Art. 8, Art. 9.

30 See Art. 10.

31 See Art. 5.4 TEU.

32 See Art. 49.3 of the Charter.

33 See Art. 5.3 TEU and Protocol 2. X. PIN, 'Subsidiarité versus efficacité', in G. Giudicelli-Delage, and C. Lazerges (eds.), *Le droit pénal de l'Union Européenne au lendemain du Traité de Lisbonne*, Paris, Société de Législation Comparée, 2012, p. 51; M. Donini, 'Sussidiarietà penale e sussidiarietà comunitaria', in *RIDPP*, 2003, 1–2, p. 141.

34 L. Foffani, 'Verso un'armonizzazione europea del diritto penale dell'economia: la genesi di nuovi beni giuridici economici di rango comunitario, il ravvicinamento dei precetti e delle sanzioni', in AAVV, *Scritti in onore di Franco Coppi*, vol. II, Torino, Giappichelli, 2011, p. 999; M. Poelemans, *La sanction dans l'ordre juridique communautaire*, Paris, and Bruxelles, 2004.

35 For example, Directive 2008/99/EC on the protection of the environment through criminal law, 19 November 2008.

36 The most evident example of such a lack of rationality is Art. 5 on market manipulation: some behavior is sanctioned with criminal measures only if it provokes harm, other behavior also if it just creates a risk for the market.

37 C. Sotis, 'Les principes de nécessité et de proportionnalité', in G. Giudicelli-Delage, and C. Lazerges (eds.), *Le droit pénal de l'Union Européenne au lendemain du Traité de Lisbonne*, Paris, Société de Législation Comparée, 2012, p. 59.

38 See Art. 14.1.

39 See, among many others, ECHR, *Engel and others v. Netherlands*, series A, No. 22, § 81, and *Ozturk v. Germany*, series A, 21 February 1984, No. 73.

40 See ECHR, *Grading v. Austria*, 23 October 1995, §§ 49–51 or ECHR, *Serguei Zolotoukhine v. Russia*, 10 February 2009.

41 See ECJ, C-436/04, *Leopold Henri van Esbroeck*, 9 March 2006, §§ 30–35.

42 See ECHR *Grande Stevens and others v. Italia*, 4 March 2014. Also, the ECJ had hypothesized that market abuse national laws enforcing the new MAD could constitute a violation of the *ne bis in idem* principle; see ECJ C-45/08, *Spector, Van Raemdonck*, 23 December 2009, § 100. See F. Stasiak, "Non bis in idem" et droit pénal boursier', in B. Deffains (eds.), *L'analyse économique du droit dans les pays de droit civil*, Paris, Dalloz, 2002, p. 342.

43 See §§ 14–15 and § 20 WpHG.

44 See §§ 38–39 WpHG. P. Pananis, 'sub WpHG', in W. Joecks, and K. Miebach, *Münchener Kommentar zum Strafgesetzbuch*, Band 6/1, Nebenstrafrecht II, p. 1202.

45 See Art. L 621-16 CMF, introduced in compliance with Cons. const., 28 July 1989, No. 260, in JO, 1 August 1989., M. Didier, E. Dezeuze, and F. Bouaziz, *Les abus de marché. Manquements administratifs et infractions pénales*, Paris, Dalloz, 2012.

46 Nevertheless, it must be remembered that the Italian system, whose Art.

187terdecies TUF is identical to Art. L 621-16 CMF, has been severely criticized by the ECHR in the *Grande Stevens* decision.

47 ECHR, *Grading v. Austria*, 23rd October 1995, §§ 49–51.

## VAT Carousel Fraud in the EU

### The Need for Reform in Italy and on a Supranational Level\*

Giangaspere Donato Toma

What has become known as carousel fraud is a decidedly insidious abuse of the European VAT system and one that is well structured, complex, and that frequently involves many EU Member States. This alarming phenomenon has led to the loss of significant financial resources, has damaged Member States, and, in doing so, indirectly harmed EU institutions.

Carousel fraud influences the financing of the entire EU budget inasmuch as it has an impact on the relationship between gross national income (GNI), based own resources, and other own resources in the budget. The real damage can be seen in the need for the EU to ask Member States for GNI-based own resources to make up for total expenditure that

is not covered by other resources, which can also impact on the EU budget redistribution phase.<sup>1</sup> The European Commission's efforts over the years to use EU state-wide international cooperation initiatives to eradicate tax fraud are deserving of great praise. Of particular note is a document published by the Commission on 27 June 2012: *Communication from the Commission to the European Parliament and the Council on concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries*.<sup>2</sup>

## I. Mechanism

The mechanism by which carousel fraud functions has been clearly laid out by the European Commission in a document published on 16 April 2004: *Report from the Commission to the Council and the European Parliament on the use of administrative cooperation arrangements in the fight against VAT fraud*.<sup>3</sup> The report reads:

'A so-called "conduit company" A, makes an exempt intra-community supply of goods to a "missing trader" B in another Member State. This company B acquires goods without paying VAT and subsequently makes a domestic supply to a third company C, called the broker. The missing trader collects VAT on its sales to the broker but does not pay the VAT to the Treasury and disappears. The broker C claims a refund of the VAT on its purchases from B. Consequently, the financial loss to the Treasury equals the VAT paid by C to B. Subsequently, company C may declare an exempt intra-community supply to company A and, in turn, A may make an exempt intra-community supply to B, and the fraud pattern resumes, thus explaining the term "carousel fraud" [...] In order to distort VAT investigations, the goods will often be supplied from B to C via intermediary companies, called "buffers".'

In order to add to the Commission's definition, we will here-in consider a case in which the bogus trader B, also known as the 'paper company' – as it only exists on paper –, was established in Italy. In this example, company B is properly VAT-registered and is placed between an EU-based cedent – company A – and an Italian buyer – company C – who is not the end user and thus subject to VAT obligations as the cessionary. Other intermediary buffer companies are often created within EU borders between companies A, B, and C. Company B carries out an intra-community acquisition of goods from A and, in accordance with applicable European VAT legislation, registers the invoice issued by A both as a purchase invoice and as a sales invoice, thus nullifying the tax effect of the operation.<sup>4</sup> The goods are then sold to C by B, an invoice is issued, and VAT applied. The Italian buyer C pays the VAT to B via the reverse charge mechanism; however, B then fails to make the payment to the Treasury either during its periodic VAT calculations or at the presentation of its annual tax declaration.

Company B – which, being a paper company, leads to nothing or non-existent persons – disappears and the Treasury no

longer has the ability to claim the VAT credit it holds from any existing company or person. This lack of a VAT payment implies that every buyer in the subsequent commercial circuit is able to buy goods at competitive prices, as the buyer is not burdened by the tax on that first internal operation from the paper company B to the buyer C. In fact, the first internal transaction usually occurs at a price that is lower than what was charged when the 'non-internal' transaction between the EU-based cedent A and the paper company B occurred. This is done so that the latter is able to profit from the future non-payment of VAT or to take advantage of the non-payment related to previous, similar illicit operations. The price that arises is therefore anomalous, along the same lines as the reduced VAT calculated on a limited tax base. The VAT that was not paid is normally split between the parties involved in the fraud, which are placed between B and C, so as to lead the authorities' investigations astray. The Italian buyer C, in turn, deducts the tax that it had previously paid as a result of the refund exercised by the paper company. When periodic or year-end VAT calculations are carried out by the Italian buyer C, it appears to have a VAT credit when the sum of the tax paid on its purchases, including the part it had previously paid to the paper company B, which was not paid to the Treasury, is superior to the VAT collected on its sales. This credit is then either used to offset the VAT debt in successive tax periods or, if all prerequisites are met, to claim a refund. It may also be used to counteract other taxes and charges from the same period according to the Legislative Decree of 9 July 1997, No. 241 Art. 17, using the Italian unified tax return form.

The Italian buyer C, which had previously paid the VAT to the paper company B, declares an exempt intra-community supply to the initial EU-based supplier A or another EU-based operator and, according to applicable legislation, claims a refund for the VAT it had initially paid.<sup>5</sup> At this point, the EU-based operator A sells the goods to the same paper company B, the illicit mechanism starts again, and the VAT non-payment is repeated. This is the origin of the term carousel that is given to this particular type of tax fraud, indicating that a cyclic tax fraud mechanism is created. The damage to the Treasury therefore clearly derives from the entire illicit mechanism; the VAT is not paid to the Italian state by the paper company B during its tax calculations, while it is detracted from the Italian buyer C.

## II. Criminal Offences

Carousel fraud invokes a number of offences that fall under the Legislative Decree of 10 March 2000, No. 74 (that constitutes legislation for applicable income tax and value added tax

offences in Italy). Of these offence types, two are of particular interest to this report: *fraudulent declaration via the use of invoices or other documentation pertaining to non-existent operations* (Art. 2), where, in our example, the offence is considered to have been committed by the Italian buyer C, and *the issuance of invoices or other documentation pertaining to non-existent operations* (Art. 8), when the offence is considered to have been committed by the paper company B.<sup>6</sup>

### 1. Fraudulent declaration via the use of invoices or other documentation pertaining to non-existent operations (Art. 2 Legislative Decree of 10 March 2000, No. 74)

The crime of *fraudulent declaration via the use of invoices or other documentation pertaining to non-existent operations* foresees a term of imprisonment that ranges from one year and six months to six years for a taxpayer who, using invoices or other documentation pertaining to non-existent transactions (by registering said documentation in his compulsory book-keeping or by attempting to use it as evidence in his dealings with the financial authorities), declares one or more fictitious passive operations in one of his annual tax returns in order to evade income or value added taxation.

In this case, a crime is considered to have been committed without any minimum limit to the suspect's liability to punishment. This type of fraudulent conduct is characterised by the fact that the suspect declares a fictitious passive operation in one of his annual income or value added tax returns (the suspect therefore 'falsely increases' a tax deductible in order to decrease taxable income and, subsequently, payable tax). This crime, which is instantaneous in nature, is not considered committed until a successive act, not the mere use of false documentation, has been carried out – in fact, not until the moment in which the declaration is presented. Only in this latter act has the 'supposed, attempted tax evasion and the actual offence with respect to taxation' been committed.<sup>7</sup> The invoices and/or any other pertinent documentation constitute the object of the crime if, and inasmuch as, they refer to non-existent operations. For invoices or other documents pertinent to non-existent operations, we mean any that are 'emitted with reference to operations that are wholly or partially non-existent', any 'that indicate any payment or VAT amount that is higher than the actual figure', as well as any 'that attribute the operation to subjects are not the actual parties'.

As for the concept of falsity that may characterise the crime in question, the current prevailing view taken by the courts is that only an *ideological* falsity is compatible with the intention of the offence at hand.<sup>8</sup> This view is contrasted, however, by the opinion that this type of offence can be considered committed

in the case of an invoice or other document's *material* falsity.<sup>9</sup> As far as the crime of *fraudulent declaration via the use of invoices or other documentation pertaining to non-existent operations* is concerned, carousel fraud was committed by the Italian buyer C as he had detracted the previously paid VAT for a subjectively fictitious operation. In fact, the operation, which was carried out due to the presence of the false subject, paper company B, can be described as subjectively inexistent.

### 2. The issuance of invoices or other documentation pertaining to non-existent operations (Art. 8 Legislative Decree of 10 March 2000, No. 74)

The crime of *the issuance of invoices or other documentation pertaining to non-existent operations* foresees a term of imprisonment that ranges from one year and six months to six years for anyone who issues an invoice or other documentation pertaining to a non-existent operation with the aim of allowing a third party to evade income or value added tax. This type of offence is both in contrast to and correlated to the previously described *fraudulent declaration via the use of invoices or other documentation pertaining to non-existent operations* as it is its natural predecessor.

The peculiarity here is the intended exception in the law for any instance of conspiracy in the crime (Art. 110 of the criminal code), as indicated by Art. 9 of the Legislative Decree of 10 March 2000, No. 74, in which grounds for conspiracy between the issuer and the user of a false invoice or other document are denied. Once again, a crime is considered to have been committed here without any minimum limit to the suspect's liability to punishment being reached. This offence, which is an independent legal entity, excludes the need for any consequential use of the invoice or other falsified documents by third parties and is, furthermore, completely non-dependent on any tax evasion, successful or otherwise, by said third parties. It follows that the offence, not being directly linked to any occurrence of tax evasion, can be considered an offence of mere potential damage, as it functions as a pre-emptive means to protect the Treasury from actions that do not, in themselves, constitute tax evasion but that are carried out in preparation for said offence and which are therefore intrinsically insidious and signify a marked potential damage to the Treasury's interests.<sup>10</sup> More specifically, we are speaking here of an inchoate offence and one which is indirectly committed, as the potential damage depends on the document's use by its recipient and not on the person who committed the offence.<sup>11</sup> The crime is of an instantaneous nature and is committed at the moment that a false invoice, or other documentation, is issued for a non-existent operation; the consummation of the offence coincides with the transfer of said documents to other persons.

As far as the concepts of object and falsity that characterise the crime in question are concerned, the same considerations that were applied above for *fraudulent declaration via the use of invoices or other documentation pertaining to non-existent operations* are still to be considered valid here. In the context of carousel fraud, the crime of *the issuance of invoices or other documentation pertaining to non-existent operations* was committed by the paper company B, whose sole objective was that of issuing a subjectively false invoice with the aim of allowing the buyer C to illegally detract the previously paid VAT.

### III. Conclusions: The Need for Italian Legislators to Create an Independent Criminal Offence

The recent flood of carousel fraud offences has led some in the field<sup>12</sup> to make critical observations – and with good reason – as to capability of the Italian legislator's actions to fight the type of offence in question. In fact, although these actions may be frequent, they often prove to be inadequate and disjointed, as they often focus either on punishing the offence at a criminal level or on fighting the phenomenon at an administrative level and recovering the lost tax income. In focusing on one or the other, there is a lack of systematic response, which, starting from a definition of carousel fraud on a European level, fully appreciates the particular nature of this offence with respect to other tax fraud offences and which concerns itself with joint action, both on a judicial level and as regards to lost tax recovery. In a purely judicial context, one could start with the creation of a legisla-

tive solution outlining the offence of carousel fraud in a way that is independent from the pre-existing laws defined in Art. 2 and 8 of the Legislative Decree of 10 March 2000, No. 74.<sup>13</sup> The particular, unique, and specific nature of carousel fraud, which makes it worthy of a single, unique legislative solution and one separate from *fraudulent declaration via the use of invoices or other documentation pertaining to non-existent operations* and *the issuance of invoices or other documentation pertaining to non-existent operations*, has clearly emerged from the need for action perceived by the EU.

The Italian Court of Cassation was quick to support this need for action and defined the current law, based on the Legislative Decree of 10 March 2000, No. 74, as inadequate. The need for autonomous legislation was highlighted because of the inherent peculiarity of this fraud type, which, due to the way it is structured, can be traced to a chain of companies (paper company, filter, and final recipients). The chain is set up for the specific aim of issuing false invoices and used for large-scale VAT fraud by persons, managers of the companies, with precise roles within that chain based on stable resources and means on an international scale.<sup>14</sup> Taking the wording used by top-level Italian judges as a cue, the supranational nature at the base of carousel fraud requires a legislative solution that must not be restricted to a limited national context; the need for individual state and EU financial interests to be protected now means that criminal sanctions that are 'thorough in their action, not only within national confines but also on a European level'<sup>15</sup> must be put in place.

\* This reviewed and updated report was published on the occasion of the convention entitled 'Tax violations; balance fighting evasion and avoiding excess' held at the Centro di Diritto Penale Tributario – Università degli Studi di Padova, Padova (Italia), 22 June 2012.

1 F. Rapisarda, 'I nuovi strumenti normativi approntati dall'UE contro le frodi sull'Iva intracomunitaria', in *il fisco*, Vol. 36, 5 October 2009, pp. 5956–5969.

2 COM(2012) 351 def.

3 COM(2004) 260 def.

4 Current legislation on European VAT (in Italy found in the Decree Law of 30 August 1993, no. 331, converted, with modifications, from the Law of 29 October 1993, no. 427) foresees a provisional tax implementation regime, by which the tax is paid to the country that receives the goods (Art. 38, comma 7, Decree Law of 30 August 1993, No. 331). This regime was described in the Communication of the European Commission of 16 April 2004 [COM(2004)260 def].

5 The procedure is in line with the provisional regime for EU VAT, according to which intra-community transfers are not taxable (Art. 41, Decree Law of 30 August 1993, No. 331).

6 Other hypotheses for a classifiable crime that falls under the jurisdiction of the Legislative Decree of 10 March 2000, No. 74, which have not been included here for the sake of brevity, are *fraudulent compensation* (Art. 10-*quater*) by the national buyer (C) and *non-payment of VAT* (Art. 10-*ter*) by the paper company (B).

7 Court of Cassation, United Criminal Sections, sentence No. 27 of 7 November 2000.

8 Court of Cassation, Section III criminal, sentence No. 12720 of 26 March 2008; Court of Cassation, Section III criminal, sentence No. 30896 of 8 August 2001; Court of Cassation, Section I criminal, sentence No. 32493 of 26 July 2004.

9 Court of Cassation, Section III criminal, sentence No. 12284 of 23 March 2007.

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10 A. Traversi, and S. Gennai, *I nuovi delitti tributari*, Milan, 2000, p. 252.

11 V. Napoleoni, I fondamenti del nuovo diritto penale tributario nel Decreto Legislativo 10 marzo 2000, No. 74, Milan, 2000, p. 157, in accordance with Court of Cassation, Section III criminal, sentence no. 26395 of 11 June 2004; Court of Cassation, Section III criminal, sentence No. 12719 of 26 March 2008.

12 C. Di Gregorio, G. Mainolfi, and G. Rispoli, *Confisca per equivalente e frode fiscale*, Milano, 2011, p. 221.

13 See inter alia: I. Caraccioli, *Contro le frodi carosello una figura autonoma di reato*, in *Il Sole24 Ore*, 17 December 2007, p. 35.

14 Court of Cassation, United Criminal Sections, sentence No. 1235 of 19 January 2011. Similarly, Court of Cassation, Section V criminal, sentence No. 3257 of 30 January 2007.

15 Court of Cassation, United Criminal Sections, sentence No. 1235 of 19 January 2011. For an in-depth examination of the European integration process described herein, see G. Grasso, L. Picotti, and R. Sicurella (eds.), *L'evoluzione del diritto penale nei settori d'interesse europeo alla luce del Trattato di Lisbona*, Milan, 2011.



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