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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.

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Guest Editorial

Dear Readers,

At the present time, the topics of fraud and tax evasion and, in general, the integrity of the single market are at the heart of the political agenda. Many of the issues under discussion concern my portfolio in one way or another.

Firstly, I wish to mention the fight against fraud and tax evasion. This debate is not new. We can all recall the G20 meeting in London in 2009, where an ambitious political agenda was launched for the fight against tax havens and tax evasion in a broader sense. Recent reports have shown that the phenomenon is still present in Europe, undermining public finances and citizens' trust in our single market. According to the most up-to-date estimates, the Union loses the equivalent of €1000 billion in revenues every year due to fraud and tax evasion, which is six times the annual budget of the Union.

This subject was at the heart of the discussions at the European Council on 22 May 2013 and at G8 and G20 meetings in recent months. It is indispensable that political will is maintained at the European level as well as in the Member States, with the aim of achieving the objectives announced. In this respect, I welcome the work of the European Parliament on the matter, particularly the reports of Ms. Kleva and Ms. Gall-Pelcz, which were adopted recently.

Since 2011, the Commission has presented a series of initiatives aimed at preserving the integrity of the single market by fighting all forms of crime and especially financial crime. One of these key initiatives is the fight against money laundering. According to an estimate by the United Nations Office for Drugs and Crime, profits of close to €2000 billion are to be gained from criminal activities on a yearly basis, of which €1500 billion is laundered. These figures show how immense the task is and how necessary it is to take action. Like the fight against tax evasion and tax fraud, this issue has come to the attention of heads of state and government. I am pleased that the European Parliament is also acknowledging this phenomenon. I am thinking in particular of the report by Mr. Iacolino, which the Special Committee for Organised Crime, Corruption and Money Laundering has adopted, and the forthcoming report on the proposed review of the anti-money laundering directive that was tabled by the Commission in February 2013.

Michel Barnier

It is essential that the work on the directive be completed under this legislature. The international standards were modified more than a year ago, and it is our aim to make them effective and binding in the EU as soon as possible. We want to equip the EU with a robust and modern anti-money laundering framework that ensures the integrity of our financial system and the good functioning of the single market.

In order for our actions to be as effective as possible, it is essential that we stand together and assume joint political leadership. Tax fraud, money laundering, corruption, counterfeiting, and piracy represent scourges to the integrity of the single market and the trust of our citizens.

I have no doubt that all the actors at the European level, in particular the European Parliament and the Council, can and will make a decisive contribution to the fight against these crimes. I will stand by their side in this fight.

Michel Barnier
Commissioner in charge of the Internal Market and Services

In Memoriam Joachim Vogel

Prof. Dr. Dr. h.c. mult. Ulrich Sieber

At the age of only 50 years, Prof. Dr. iur. *Joachim Vogel* lost his life in a tragic boating accident in Venice on 17 August 2013. With his unexpected death, the European criminal law community has lost an outstanding researcher and teacher who also ideally combined research and practice in his position as a judge at the *Oberlandesgericht*. We are deeply saddened by the passing of one of the inspiring criminal law scholars and leading personalities of our time.

Joachim Vogel * 2.6.1963 † 17.8.2013

Joachim Vogel's exceptional abilities were already apparent at an early age. He completed secondary school with the year's highest marks in Baden-Württemberg, earned the top score of those with whom he sat the first state examination in law in Freiburg, and achieved a similar result on his second state examination in Stuttgart; he also received numerous other distinctions. As an academic assistant, he demonstrated his keen mind early on in the seminars of his mentor Prof. Dr. *Klaus Tiedemann*, where he displayed a special gift for criminal law doctrine, economic criminal law, and European criminal law. The cornerstone of his remarkable career was laid in 1992 with his superb doctoral thesis on norms and obligations in the context of "impure" crimes of omission *[Norm und Pflicht bei den unechten Unterlassungsdelikten]*, followed in 1999 by his innovative professorial dissertation on problems of legitimacy in the criminal law of fraud *[Legitimationsprobleme im Betrugsstrafrecht – Wege zu einer diskurstheoretischen Legitimation strafbewehrter Verhaltensnormen im Besonderen Teil des Strafrechts]*.

Immediately after receiving his university lecturing qualification, he was appointed associate professor of criminal law, philosophy of law, and legal informatics at the University of Munich. One year later, he became a full professor of criminal law and criminal procedure at the law faculty of the University of Tübingen, where he also served as vice dean and dean from 2003 to 2008. After twelve productive and happy years in Tübingen, he returned to the University of Munich in 2012 as a full professor of criminal law, criminal procedure, and economic criminal law. Parallel to his academic activities, *Joachim Vogel* served as a judge at the *Oberlandesgericht* in Stuttgart from 2001 to 2012 and, commencing in 2012, at the *Oberlandesgericht* in Munich. His influence led the third senate and, after 2009, the first senate of the Stuttgart *Oberlandesgericht* to render several landmark decisions, especially regarding legal assistance in Europe in criminal matters. *Joachim Vogel's* pleasant manner and his interest in international cooperation quickly led him to assume numerous additional responsibilities, such as chairman of the German national section of the International Association of Penal Law (AIDP), board member of the International Society of Social Defence (SiDS), editor of the *Zeitschrift für die gesamte Strafrechtswissenschaft* (ZStW), co-editor of the *JuristenZeitung*, and member of the advisory board of the journal *Strafverteidiger*. In June 2013, he was elected a full member of the Academy of Sciences and Literature in Mainz.

In the fulfillment of all his tasks, *Joachim Vogel* impressed everyone with his great intellect but also with his friendliness, helpfulness, and humor. His students in Tübingen and Munich appreciated his clearly structured lectures, his attention to practical relevance, and his deep insight. At international conferences, he easily captivated the listening audience with his interests and theories, quickly attracting scholars from around the world to his research teams in Tübingen and Munich. The innumerable impressive letters of condolence addressed to the international associations to which he belonged as well as the large attendance of his colleagues from Germany and abroad at his funeral were a personal tribute to him and indicate the high academic standing he enjoyed worldwide as a youthful, dynamic teacher of criminal law with a compelling character and creative approach to his work.

The philosophy of law, constitutional law, criminal law doctrine, and comparative law underpin *Joachim Vogel's* com-

prehensive body of academic work. He forged close links between these various disciplines, resulting in a wealth of new insights. His contributions are marked by innovation and originality; in addition, they are characterized by their focus on issues of vital import for the future, their depth of thought, regard for practical application, and concise style. *Joachim Vogel* rejected a dogmatic, ivory tower-based and publically inaccessible approach to criminal law science on account of its lack of transparency and insufficient democratic legitimacy. Together with *Donini*, he called for a *democrazia penale* instead of an *aristocrazia penale*. His theoretical work product of the past 20 years forms an impressive oeuvre that fuses the above-mentioned tenets and principles of economic criminal law and European criminal law with many questions of practical importance and inventive answers.

The importance of *basic research* to his work is evident not only in his doctoral thesis and his professorial dissertation but also in his textbook on legal methodology *[Juristische Methodik]* (1998) and in the discerning lecture he gave at the conference for teachers of criminal law in Bayreuth on the influence of national socialism on criminal law *[Einflüsse des Nationalsozialismus auf das Strafrecht]* (Berliner Wissenschaftsverlag 2004). He also dealt with fundamental aspects of doctrine in the Leipzig Commentary *[Leipziger Kommentar zum Allgemeinen und zum Besonderen Teil des Strafrechts]*. Furthermore, he wrote many innovative articles on German and European criminal law doctrine and criminal policy, on the harmonization of criminal law, on the influence of German constitutional law as well as of fundamental rights and human rights on the criminal law, and on substantive criminal law and the law of criminal procedure.

A second focus of *Joachim Vogel's* work is on *economic criminal law*. The teachings of his mentor are reflected in his contributions to important handbooks and commentaries, including Economic Criminal Law in the European Union *[Wirtschaftsstrafrecht in der Europäischen Union]* (ed. *Tiedemann*), the Commentary on the Securities Trading Act *[Kommentar zum Wertpapierhandelsgesetz]* (eds. *Assmann/Schneider*), and the Munich guide for defense lawyers in matters of economic criminal law and the law on revenue offenses *[Verteidigung in Wirtschafts- und Steuerstrafsachen]* (ed. *Volk*). His writings on current matters of economic criminal law are of equal significance, most recently those on share price manipulation and market rigging, investor protection, and corporate responsibility. His last work in this area was on a new and effective corporate criminal law that guarantees the rule of law and proportionality and safeguards against arbitrariness. In just a few sentences, he was able to explain why traditional doctrinal concepts such as the principle of culpability do not conflict with ideas of corporate criminal responsibility and to show why a law of corporate sanctions designed to achieve "prevention by way of economic rationality" is necessary from a criminal policy standpoint as well (see, for example, his concise one-page summary in the editorial to JA 2012, Issue 1).

The third – and especially significant – research focus pursued by *Joachim Vogel* was *international* and, in particular, *European criminal law*, including the related areas of comparative criminal law, harmonization of criminal law, international criminal law doctrine, and the competences of the EU in criminal matters. His pioneering work in this field can be found in the most prominent commentaries and collections, such as the Commentary on the Law of International Legal Assistance in Criminal Matters *[Kommentar zum Gesetz über die Internationale Rechtshilfe in Strafsachen]* (ed. *Wilkitzki)*, the publication on the laws of the European Union *[Recht der Europäischen Union]* (ed. *Grabitz* et al.), and the handbook on European criminal law *[Europäisches Strafrecht]* (ed. *Sieber* et al.). His extensive comments and annotations are supplemented in these as in other areas by leading publications, e.g., articles on international legal assistance and the European arrest warrant, on a supranational law of sanctions, and on the protection of European financial interests.

On the subject of European criminal law, *Joachim Vogel* called for sector-by-sector harmonization instead of a blanket approach. His vision was based solidly on democratic legitimacy, the restriction of criminal law to the boundaries permitted by basic and human rights, as well as judicial review. He critically questioned national doctrines, especially if they appeared in only a few legal orders. A brilliant scholar of criminal law theory, he was far too familiar with the major foreign legal systems and their legal and philosophical roots to endorse the generalizations sometimes offered on the professed superiority of any one national legal system (see JZ 2012, 25 ff). He also did not react to the increasing international dissemination of Common Law ideas by lamenting the demise of German criminal law – as did others – and instead – based on a European understanding of humanitarian ideals – developed new, future-oriented concepts constructively and confidently, e.g., regarding corporate responsibility and international criminal procedure.

The groundbreaking work of *Joachim Vogel* attests to an inspiring thinker who was often far ahead of his time. His astute analyses of fundamental interdisciplinary and comparative legal issues, of German and foreign economic criminal law, as well as of European and international criminal law will remain valid for many years to come. Similarly, his innovative ideas will enrich European criminal law far into the future. We are grateful for *Joachim Vogel's* vast legacy, but his formative thinking as well as his cheerfulness and warm personality will be sorely missed.

European Union*

Reported by Dr. Els De Busser (EDB), and Cornelia Riehle (CR)

Foundations

Informal JHA Meeting on the Follow-Up to the Stockholm Programme

In December 2009, the Stockholm Programme was adopted, outlining the measures to take in view of the development of an area of freedom, security and justice for the years 2010-2014. On 18-19 July 2013, an informal JHA Council was held by the current Lithuanian Presidency to start discussions on the implementation of the Stockholm Programme, the lessons learned, and the contents of the next programme.

The EU justice ministers agreed that the key priorities in the area of justice after 2014 should be:

- the implementation of already adopted EU legal acts in the Member States;
- safeguarding fundamental rights, including data protection;
- more efficient judicial cooperation among Member States;
- wider use of IT in the justice field.

On 24 June 2013, the European Council (EC) obliged all Member States holding EU Presidencies of the Council till 2014 to start discussions on the basis of which the Commission will develop priorities in the freedom, security and justice area for the post-2014 period.

Debates were also held on the ongoing data protection reform process and cyber security issues. (EDB)

➤eucrim ID=1303001

Enlargement of the European Union

Bosnia and Herzegovina Behind on Enlargement Efforts

On 22 July 2013, the Council expressed its regret on the lack of progress shown by Bosnia and Herzegovina towards EU membership. The Council highlighted the urgency for the country to bring its constitution in line with the ECHR and to implement the 2009 ruling of the ECtHR in the *Sejdić/Finci* case. In this case, the two applicants' ineligibility to be candidates in the elections for the House of Peoples and the Presidency was considered to be a violation of the non-discrimination principle of Art. 14 ECHR in conjunction with Art. 3 of Protocol No. 1, respectively Art. 1 of Protocol No. 12. On 28 June 2013, the Council decided to open negotiations on a Stabilisation and Association Agreement with Kosovo. After the first agreement of principles governing the normalisation of relations between Kosovo and Serbia was reached in April 2013, the accession negotiations were also opened with Serbia on 28 June 2013.

With regard to Turkey, the Council decided on 25 June 2013 to open Chapter 22 of the accession process that deals with Regional Policy. (EDB)

➤eucrim ID=1303003

Institutions

Council

UK and Denmark Opt-Outs from Cooperation in Criminal Matters

On 24 July 2013, the permanent representative of the UK wrote a letter to the Lithuanian Presidency of the Council in reference to the UK opting out from several aspects of the EU justice and home affairs policy. The UK government's position is to opt out of all EU legal acts in the area of police and judicial cooperation in criminal matters that were adopted prior to 1 December 2009 (entry into force of the Lisbon Treaty). In accordance with Art. 10(4) of Protocol No. 36 to the TEU and the TFEU, the UK does not accept the powers of the Commission and the ECJ with respect to these acts. This means that these acts will cease to apply to the UK from

* If not stated otherwise, the news reported in the following sections cover the period July – September 2013.

1 December 2014. The UK government also announced its intention to opt back into 35 measures regarding EU cooperation in the same field. In the fall of 2013, the UK's parliamentary committees will report on this matter.

As agreed in Protocol No. 36, the UK has until June 2014 or six months before the aforementioned legal acts come under the jurisdiction of the ECJ, to decide on the opt-outs. The Danish government may decide to organise a referendum in 2014 on their opt-outs. (EDB)
➤eucrim ID=1303002

JHA Programme of the Lithuanian Presidency

On 1 July 2013, Lithuania took over the Presidency of the Council of the EU from Ireland. With respect to criminal law, the Presidency announced that priority is being given to the protection of the EU's financial interests. The negotiations on the proposed Directive on the fight against fraud by means of criminal law and the proposals regarding the European Public Prosecutor's Office as well as the reform of Eurojust will therefore be key topics for the coming months. Further, the Presidency expects to reach a general approach in the Council on the proposed Directive on the protection of the euro and other currencies against counterfeiting by means of criminal law. Substantial progress is also expected with respect to the negotiations on the European Investigation Order. With regard to the proposed Directive on confiscation and freezing of proceeds of crime, to aim is the reach final agreement.

The reform of the data protection legal framework, improved cooperation between law enforcement agencies, the Schengen Information System and cybersecurity are other topics that will be shaping the discussions during the second half of 2013. Lithuania expects to start discussion regarding the future strategic guidelines for legislative and operational planning within the area of the freedom, security, and justice, taking into account the results of the Stockholm programme. The Presidency will continue the implementation of this programme (EDB)
➤eucrim ID=1303004

European Court of Justice (ECJ)

ECJ Rules on Ne Bis in Idem Regarding Administrative Sanctions

On 26 February 2013, the ECJ ruled in the *Fransson* case (C-617/10), in which the scope of the EU Charter of Fundamental Rights and Freedoms was discussed. The case concerned a request for a preliminary ruling on the interpretation of the ne bis in idem principle in European Union law. The Court ruled that the ne bis in idem principle laid down in Art. 50 of the Charter does not preclude a Member State from successively imposing, for the same acts of non-compliance with declaration obligations in the field of value added tax, both a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature. The latter is a matter for the national court to determine. (EDB)
➤eucrim ID=1303005

OLAF

OLAF Reform Regulation Enters into Force

On 1 August 2013, the new regulation reforming the investigations conducted by OLAF entered into force after receiving the green light from the EP. At a second reading on 3 July 2013, the EP agreed on the proposal regarding the reform of OLAF aimed at strengthening its capacity to combat fraud (see eucrim 1/2013, p. 3). The proposal concerns the regulation of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No. 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No. 1074/1999. Firstly, the procedural guarantees of any person under investigation by OLAF (e.g., the right to be informed, the right to use language of choice, etc.) are significantly strengthened by the new regulation. Instead of being integrated into the internal rules of procedure, the procedural guarantees are now fully incorporated in EU law, giving them the proper legal basis.

A second point is the improved cooperation and information exchange with the national authorities. This is regulated by, e.g., designated contact points in every Member State.

The regulation further clarifies the roles of the OLAF Director General and the Supervisory Committee. In the light of recent allegations addressed to OLAF regarding their investigations (see eucrim 2/2013, p. 35), the EP decided not to amend the agreed text to give more control to the supervisory body over closed OLAF investigations. The Commission has announced that it is also ready to develop a second tier of reforms for OLAF. These should be seen in the context of the proposal for a EPPO (see eucrim 2/2013, pp. 41-42). (EDB)
➤eucrim ID=1303006

Communication on OLAF's Governance and Procedural Safeguards in Relation to EPPO Proposal

On 17 July 2013, the Commission presented the Communication improving OLAF's governance and reinforcing procedural safeguards in investigations: a step-by-step approach to accompany the establishment of the EPPO (COM (2013) 533 final).

The legislative proposal establishing the EPPO (see eucrim 2/2013, p. 41 ff) introduces the exclusive task for the European Public Prosecutor to investigate, when necessary, prosecute, and bring to judgment those crimes that affect the EU budget. In view of these investigations, the Commission proposed to strengthen procedural guarantees for the persons under investigation, e.g., the right to translation and interpretation and the right of access to a lawyer.

The communication includes, in particular, the introduction of an independent Controller of Procedural Guarantees to strengthen the legal review of OLAF investigative measures. Additionally, a specific authorisation by this Controller would be required for more intrusive investigative measures (e.g., office searches and document seizures), which OLAF may need to carry out in the EU institutions.

When the EPPO is established, OLAF will remain responsible for the administrative investigations that do not fall within the scope of the EPPO's mandate, e.g., investigations regarding irregularities affecting the EU's financial interests and serious misconduct or crimes committed by EU staff without a financial impact. (EDB)

➤eucrim ID=1303007

Europol

Operation against Hells Angels

On 23 July 2013, 31 simultaneous house searches were carried out by the Spanish Guardia Civil and National Police on Mallorca, where Hells Angels recently opened a new charter. In total, 25 Hells Angels Motorcycle Club (HAMC) members or affiliates of the club were arrested. They were suspected of being involved in several crimes, including drug trafficking, trafficking in human beings, extortion, money laundering, and corruption. The operation was based on a two and a half year investigation coordinated between Spain, Germany, Luxembourg, the Netherlands, and Austria, with the support of Europol and Eurojust. (CR)

➤eucrim ID=1303008

Operation against the Maritime Trafficking of Drugs and Illicit Firearms

At the beginning of July 2013, an international operation led by Interpol and supported by Europol resulted in the seizure of nearly 30 tons of cocaine, heroin, and marijuana with an estimated value of USD 822 million. Operation "Lionfish" targeted the maritime trafficking of drugs and illicit firearms by organised criminal groups across Central America and the Caribbean.

From Europol's side, a mobile office and a senior analyst were deployed to the command centre in Martinique. Furthermore, real-time and systematic cross checks were made against Europol's intelligence databases, supported by operational analysis from Europol headquarters in The Hague. (CR)

➤eucrim ID=1303009

Operation against Credit Card Fraud

On 27 June 2013, an international operation took place at 38 airports in 16 European countries against criminals using fraudulent credit cards to purchase airline tickets. On the international level, the operation was coordinated by the European Cybercrime Centre (EC3) that coordinated the international activities and facilitated communication between all parties involved. Other partners included Visa Europe and a number of European and international airlines. In addition, Europol deployed four mobile offices at airports in Amsterdam, Frankfurt, London (Heathrow), and Madrid, which allowed live access to Europol's centralised intelligence databases.

As a result of the operation, more than 200 suspicious transactions were reported by the industry (e.g. banks and other financial institutions), and 43 individuals were detained. (CR)

➤eucrim ID=1303010

Russian Mafia Money Laundering

According to a report on 25 June 2013 by Council of Europe investigator and Swiss Member of Parliament, Andreas Gross, Europol took part in an operation against money laundering in EU banks by the Russian mafia.

Europol is apparently coordinating the investigation by anti-money-laundering experts of a number of countries concerned by transfers of funds originating in the tax reimbursement fraud denounced by Sergei Magnitsky. Magnitsky is a Russian auditor who, in 2007, exposed a bogus tax refund of $230 million organised by the so-called "Kluyev group." He died in pre-trial detention in 2009. Europol declined to comment, citing confidentiality rules. (CR)

➤eucrim ID=1303011

Common abbreviations

CEPOL	European Police College
CFT	Combatting the Financing of Terrorism
CJEU	Court of Justice of the European Union
COREPER	Committee of Permanent Representatives
ECJ	European Court of Justice (one of the 3 courts of the CJEU)
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EIO	European Investigation Order
(M)EP	(Members of the) European Parliament
EPPO	European Public Prosecutor Office
GRECO	Group of States against Corruption
GRETA	Group of Experts on Action against Trafficking in Human Beings
JIT	Joint Investigation Team
JHA	Justice and Home Affairs
JSB	Joint Supervisory Body
LIBE Committee	Committee on Civil Liberties, Justice and Home Affairs
(A)ML	Anti-Money Laundering
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
SIS	Schengen Information System
TFEU	Treaty on the Functioning of the European Union

Croatia Becomes Member of Europol

On 1 July 2013, the Republic of Croatia became the 28th Member State of the EU and hence, a full-fledged member of Europol and participant in all official Europol activities. (CR)
➤eucrim ID=1303012

New Threat Assessment on Italian Organised Crime Published

On 24 June 2013, Europol published a threat assessment on Italian organised crime, explaining the nature and structure of the four Italian Mafias:

- the Sicilian Mafia;
- the Calabrian 'Ndrangheta;
- the Neapolitan Camorra;
- the Apulian Organised Crime.

The assessment analyses the international dimension of these Mafias, the different approaches they take when operating outside their territory, the well-practised and new modi operandi used in their criminal operations, and their trans-national strategies. Finally, the threat assessment also attempts to anticipate their next moves, to identify possible vulnerabilities, and the course of actions necessary to successfully combat Mafia activity.

Currently, their main criminal activities outside of the Italian territory (inside Italy, Italian organised criminal groups hold a quasi-monopoly over the perpetration of crimes) focus on drug trafficking, money laundering, the use of corruption (e.g., for public tenders), product counterfeiting, and the trafficking of waste/toxic waste. Remarkably, when acting outside of their territory, Italian Mafias keep a very low profile, quietly infiltrating the economies by offering their goods and services at lower prices. Overall, the assessment concludes that Mafia-type Italian organised crime is a clear and present threat to the European Union, with a recent trend towards infiltration in the legal economy, e.g., by engaging in the alternative or green energy market and by exploring the possibilities of cybercrime. The assessment sets out a number of recommendations, suggesting the following:

- to identify and dismantle the families and clans;
- to criminalise being a member of a Mafia-type organisation;
- to consider regional/continental intelligence;
- to consider specific EU funding to support international law enforcement cooperation in priority investigations, the introduction of new and more effective provisions to realise third-party confiscation, extended confiscation and non-conviction based confiscation, parallel financial investigations about criminal investigation of families and clans;
- to develop a comprehensive approach at the EU level in order to connect financial information with criminal intelligence collected by competent law enforcement authorities;
- to require Member States to also make EU priorities national priorities. (CR)

➤eucrim ID=1303013

Cooperation Agreement with the Principality of Liechtenstein

On 7 June 2013, Europol signed a new cooperation agreement with the Principality of Liechtenstein. The agreement on operational and strategic cooperation will enter into force once ratified by Liechtenstein's Parliament. In addition, a Memorandum of Understanding on Confidentiality and Information Assurance was signed. (CR)
➤eucrim ID=1303014

Eurojust

New National Member for Germany

On 18 July 2013, Annette Böringer was appointed as the new National Member for Germany at Eurojust, replacing Mr. Hans-Holger Herrnfeld.

Prior to joining Eurojust, Ms. Böringer was Head of the International Legal Cooperation Division at the Federal Ministry of Justice in Berlin. Before working for the German Ministry of Justice, Ms. Böringer worked as Senior Public Prosecutor at the German Federal Court of Justice, dealing with terrorism cases, as National Correspondent to Eurojust, and as EJN contact point. She has also been a Liaison Magistrate at the French Ministry of Justice in Paris. (CR)
➤eucrim ID=1303015

Cooperation Agreement with Liechtenstein Concluded

On 7 June 2013, Eurojust and the Principality of Liechtenstein signed a cooperation agreement providing for closer cooperation, such as:

- the exchange of operational information, including personal data;
- the possibility for Liechtenstein to second a Liaison Prosecutor to Eurojust that may participate in operational and strategic meetings;
- the possibility for Eurojust to post a Liaison Magistrate to Liechtenstein. (CR)

➤eucrim ID=1303016

Memorandum of Understanding between Eurojust and INTERPOL Signed

On 15 July 2013, Eurojust and INTERPOL signed a Memorandum of Understanding (MoU) with the purpose of establishing, defining, encouraging, and improving cooperation between Eurojust and INTERPOL in the fight against serious crime, particularly when it is organised. Common areas of interest identified include maritime piracy, drug trafficking, trafficking in human beings, terrorism, genocide, and combatting fraud.

Under the MoU, each organisation will establish a contact point to coordinate their cooperation. The MoU provides for the exchange of strategic and technical information. Furthermore, Eurojust and INTERPOL will inform and consult each other regarding issues of common interest and may conduct joint training activities. (CR)
➤eucrim ID=1303017

Meeting to Discuss Eurojust Reform

On 14 and 15 October 2013, Eurojust held a meeting in The Hague to discuss

the Commission's proposal for a Regulation on Eurojust, published on 17 July 2013 (see eucrim 2/2013, pp. 41-42). Representatives of the Member States, EU institutions, and academics were invited. (CR)
➤eucrim ID=1303018

Large-Scale Investment Fraud

For the first time, a coordination centre at Eurojust has dealt with financial crime of an enormous scale and complexity, tackling an organised criminal group recruiting investors. Operation "Ponzi 14" led to a joint operation carried out on 17 June 2013 in France, Malta, Germany, Portugal, Luxembourg, Belgium, Switzerland, Italy, Cyprus, and Seychelles and resulting in the arrest of 16 persons, the freezing of around €700,000 in bank accounts, and significant seizures such as boats, villas, luxury cars, valuable paintings, and jewellery.

The coordination centre set up at Eurojust was run by the French National Desk, with the assistance of other involved National Desks and Eurojust's Case Analysis Unit, providing analytical support prior to and throughout the joint action. (CR)
➤eucrim ID=1303019

News Issue on Joint Investigation Teams

In June 2013, Eurojust published its eighth news issue, this time dealing with Joint Investigation Teams (JITs).

Next to an introductory article on the foundation of the JIT concept, the issue contains an interview with EU Counter-terrorism Coordinator Gilles de Kerchove who sees a great benefit in using JITs for terrorism cases. Further interviews were held with the JITs Network Secretariat Coordinator, Anna Baldan, the National Member for Bulgaria, Mariana Lilova, former Seconded National Expert at the UK Desk, Ian Welsh, and Belgian Federal Prosecutor, Thomas Lamiroy. Reports deal with the JIT funding project and JITs in practice. (CR)
➤eucrim ID=1303020

Agency for Fundamental Rights (FRA)

Independent External Evaluation of Five Years FRA

On 4 June 2013, Maija Sakslin, Chairperson of the FRA Management Board presented conclusions regarding the independent external evaluation of the FRA to Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding. The final evaluation report covering the first five years of the FRA was discussed during Management Board meetings in December 2012 and May 2013. In accordance with its founding regulation (Regulation (EC) No. 168/2007), the Management Board presented to the Commission in a letter of 4 June 2013, the recommendations for improving the FRA's work, based on the aforementioned evaluation.

Three themes could be distinguished in the Management Board's discussions: the FRA's engagement on a national level; organisational questions, including working procedures and issues requiring amendments to the FRA founding regulation. With regard to the latter, the Management Board recommends adapting the founding regulation to the changes introduced with the entry into force of the Lisbon Treaty, in particular the legally binding status of the EU Charter of Fundamental Rights. Other recommendations include allowing the FRA to deliver its own motion opinions on legislative proposals that raise fundamental rights issues and enlarging the agency's tasks so they include the possibility for Member States to request its assistance and expertise.

The Management Board also announced that the FRA's strategic priorities will be reviewed and a Strategy Plan will be adopted in December 2013. (EDB)
➤eucrim ID=1303021

FRA Presents Annual Report 2012 to LIBE Committee

On 8 July 2013, Maija Sakslin, Chairperson of the FRA's Management Board, and Morten Kjaerum, the FRA's Director, presented the FRA Annual Report for 2012 to the EP's LIBE Committee, giving also the members of the LIBE Committee the opportunity to ask questions.

The report covers key EU initiatives that affect fundamental rights. This was one of the ten themes that was part of the launched reform of the data protection legal framework. Other chapters include the rights of crime victims; border control and visa policy; access to efficient and independent justice and equality; and non-discrimination. (EDB)
➤eucrim ID=1303022

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

2012 Annual Report on Protection of EU's Financial Interests

On 24 July 2013, the Commission presented its 2012 annual report on the fight against fraud and the protection of the EU's financial interests (COM(2013) 548 final).

The report concludes that fraud against the EU budget increased slightly compared to 2011. On the expenditure side, a total of €315 million in EU funds were affected by fraud in 2012 compared to €295 million in 2011. On the revenue side, the total of suspected or confirmed fraud amounted to €77.6 million in 2012 compared with €109 million in the previous year.

Four legislative initiatives prepared in 2012 are highlighted in the report:
- The proposal to set up a European Public Prosecutor' Office (see eucrim 2/2013, pp. 41 ff.);
- The new OLAF Regulation, which will create a stronger EU anti-fraud office (see p. 77 and eucrim 1/2013, p. 3);
- A Communication on how to further improve the governance of OLAF, building on the agreed reform of the Of-

fice and taking into account the EPPO proposal (see p. 77-78);
- The proposal on the protection of the financial interests of the EU by criminal law (see eucrim 2/2013, p. 42 ff).

In addition, the report highlights the adoption of a Protocol to Eliminate the Illicit Trade in Tobacco Products appended to the World Health Organisation Framework Convention on Tobacco Control as well as anti-fraud provisions in international agreements and administrative cooperation arrangements.

The Commission acknowledged that significant work has been done in some areas; however, there is still a need to further harmonise and strengthen Member States' approaches, in order to ensure a consistent fight against fraud across the EU. (EDB)
➤eucrim ID=1303023

EU Strategy against Cigarette Smuggling and Other Forms of Illicit Trade in Tobacco Products

On 6 June 2013, the Commission presented a communication and an action plan for stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products (COM(2013) 324 final and SWD(2013) 193 final).

Every year, over €10 billion of revenue in terms of unpaid taxes and duties is lost due to this form of crime, which is almost exclusively committed by organised criminal groups operating internationally. To enhance the fight against this type of illicit trade, the Commission's strategy outlines a number of coordinated measures on national, EU, and international levels. The proposal contains measures in four key areas:
- Measures to decrease incentives for smuggling activities;
- Measures to improve the security of the supply chain;
- Stronger enforcement of tax, customs, police and border authorities;
- Heavier sanctions for smuggling activities.

The action plan lists concrete measures and actions with a specific timeline.

The role of OLAF is *inter alia* to assist and support law enforcement authorities of the Member States, Europol, Eurojust, Interpol, and the World Customs Organisation in their investigations into this form of crime and to manage CIGINFO, an EU-wide reporting module on illicit cigarette trade that is part of the OLAF Anti-Fraud Information System.

The Commission invites the EP and the Council to discuss the measures proposed in this package, consisting of the communication and action plan. The measures should be implemented by the end of 2015. (EDB)
➤eucrim ID=1303024

Non-Cash Means of Payment

ECB Reports Decline in Card Fraud and Increase in Euro Banknote Counterfeiting

On 16 July 2013, the European Central Bank (ECB) presented its second report on card fraud. Between 2007 and 2011, the total amount of card fraud decreased by 7.6%, while the total value of all transactions grew 10.3%, reaching almost €3.3 trillion per year.

The main conclusion of the report is a declining trend in fraud using different kinds of cards. Nonetheless, this type of fraud is migrating towards more vulnerable markets where technology is less advanced. The report is produced by the ECB and the 17 national central banks of the euro area, including data from 25 card payment schemes.

On 19 July 2013, the ECB reported an increase in the number of counterfeit euro banknotes for the first half of 2013 in comparison to the same period in 2012. Since the first half of 2012 showed a particularly low level of counterfeit banknotes, the reported number for January-June 2013 is comparable to the levels of previous years. The €20 and €50 denominations continue to be the most counterfeited banknotes. (EDB)
➤eucrim ID=1303025

Counterfeiting & Piracy

General Approach Reached on Criminal Law Protection of Euro Counterfeiting

During the JHA Council of 7-8 October 2013, a general approach was reached on the proposed directive on the protection of the euro and other currencies against counterfeiting by means of criminal law (see eucrim 1/2013, pp. 7-8). The proposal aims to improve cross-border investigations and to establish minimum rules concerning the definition of criminal offences and sanctions in the area of counterfeiting of the euro and other currencies in the EU. Ireland has decided to take part in the adoption of the directive. The UK and Denmark will not participate. (EDB)
➤eucrim ID=1303026

Organised Crime

EP Asks Commission for Proposals on Certain Forms of Organised Crime

After requesting a legislative proposal on match-fixing and corruption in sports (eucrim 2/2013, p. 43), the EP asked the Commission to draft proposals on other forms of organised crime in a resolution put to the vote on 11 June 2013.

To effectively fight corruption, the EP wants better protection of whistleblowers by developing an EU protection programme covering whistleblowers, witnesses, and informers. The EP also wants a common definition of organised crime, including its business-oriented nature, the methods of intimidation, and the crime of participating in a mafia-style organisation.

Bank secrecy should be lifted according to the EP, facilitating information exchange with, e.g., banks and credit institutions, thus making it more difficult for offenders to hide illegal money.

A third aspect highlighted by the EP in this resolution is the idea of excluding persons convicted for serious crimes against human interests (e.g., money laundering or child exploitation) from

public tender procedures in the EU for a minimum of five years. The same minimum period of exclusion would apply to any person convicted for corruption who wants to stand for election to a public office in the EU.

The Special Committee on Organised Crime, Corruption and Money Laundering elaborated upon the aforementioned proposals in a mid-term report. A comprehensive strategy to step up the fight against cross-border criminal activities is planned to be ready in October 2013. (EDB)

➤eucrim ID=1303027

Council Conclusions on Priorities for the Fight against Serious and Organised Crime for 2013-2017

During the JHA Council of 6-7 June 2013, priorities were set out for the fight against serious and organised crime between 2014 and 2017. These priorities include:

- Disrupting organised criminal groups involved in the facilitation of illegal immigration and operating in the source countries at the main entry points to the EU on the main routes and, where this is based on evidence, on alternative channels;
- Reducing these groups' abuse of legal channels for migration, including the use of fraudulent documents;
- Disrupting organised criminal groups involved in intra-EU human trafficking and human trafficking for the purposes of labour exploitation and sexual exploitation, including those groups using legal business structures to facilitate or disguise their criminal activities;
- Disrupting organised criminal groups involved in the production and distribution of counterfeit goods violating health, safety and food regulations and those producing sub-standard goods;
- Reducing the production of synthetic drugs in the EU and disrupting the organised criminal groups involved in synthetic drug trafficking;
- Combatting cybercrimes committed by organised criminal groups and generating large criminal profits, e.g., online and payment card fraud, cybercrimes that cause serious harm to their victims;
- Reducing the risk of firearms to the citizen, including combatting illicit trafficking in firearms.

The COSI is instructed by the Council to, within its mandate, coordinate, support, monitor, and evaluate, as set out in the EU policy cycle, the implementation of Multi-Annual Strategic Plans (MASPs) and annual Operational Action Plans (OAPs) for each of these priorities. The COSI should also ensure consistency with the implementation of the Internal Security Strategy and also with other policy areas, such as the EU's external action. (EDB)

➤eucrim ID=1303028

Cybercrime

Directive on Attacks against Information Systems Adopted

On 22 July 2013, the Council adopted the Directive on attacks against information systems. This directive repeals Framework Decision 2005/222/JHA.

The new directive includes the penalisation of illegal access, illegal system interference, and illegal data interference – and introduces a number of new elements, e.g., penalising the use of certain tools (like so-called botnets) and making illegal interception a criminal offence. Furthermore, cooperation and coordination is enhanced and the existing structure of 24/7 contact points strengthened, including an obligation to answer urgent requests within 8 hours.

The directive shall enter into force on the twentieth day after its publication in the Official Journal. (EDB)

➤eucrim ID=1303029

Council Conclusions on Cybersecurity Strategy

As one of the five policy objectives of the EU Internal Security Strategy (see eucrim 2/2013, p. 44 ff.), the Council adopted conclusions on the EU Cybersecurity Strategy on 25 June 2013. The document on which these conclusions are based, the joint communication of the Commission and the High Representative of the EU for Foreign Affairs and Security Policy, was released on 7 February 2013 (see eucrim 1/2013, p. 9).

In its conclusions, the Council emphasised *inter alia* the importance of developing an EU Information and Communication Technology (ICT) and ICT Security Sector with regard to the reinforcement of cybersecurity and the importance of a national Critical Information Infrastructure Protection mechanism. Furthermore, the value of ENISA's work was mentioned: supporting Member States and Union efforts in achieving a high level of network and information security, in particular by supporting Member States' capacity building, and developing strong national cyber resilience capabilities. The Council also invited the Commission to support the Member States, at their request, in identifying gaps and strengthening their capability to investigate and combat cybercrime and to continue cooperation with Europol and its EC3 centre. (EDB)

➤eucrim ID=1303030

EDPS Opinion on Cybersecurity Strategy

On 14 June 2013, the EDPS published his opinion on the EU Cybersecurity Strategy (see eucrim 1/2013, p. 9).

According to the EDPS, the strategy fails to fully consider the role of data protection law and the current EU proposals in promoting cybersecurity, including the legislative proposals reforming the data protection legal framework.

The concepts of "cyber-resilience" and "cyberdefence" are used in the strategy as justifications for certain intrusive measures and should therefore be clearly defined, while the definition of "cybercrime" should be more restrictive.

Furthermore, the EDPS stresses the role that data protection authorities play in the context of cybersecurity. They should thus be explicitly involved. (EDB)

➤eucrim ID=1303031

Procedural Criminal Law

Procedural Safeguards

EP and Commission Agree on Right of Access to a Lawyer

On 10 September 2013, agreement was reached between the EP and the Commission on the proposal for a directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (see eucrim 2/2013, p. 45). After a first reading, the EP approved the text with a number of amendments, which the Commission agreed to.

The next step is the formal adoption of the text by the Council. After adoption, the Member States will have three years to transpose the measures into national legislation. (EDB)

➤eucrim ID=1303032

Data Protection

Fourth AML Directive Lacks Appropriate Data Protection

According to the European Data Protection Supervisor (EDPS), the proposed directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing shows significant deficiencies when it comes to data protection. In an elaborate opinion of 4 July 2013, the EDPS lists the shortcomings of the so-called fourth anti-money laundering directive as well as a proposed regulation on information on the payer accompanying transfers of funds.

Personal data of the customer are used for the purpose of reporting suspicious financial transactions and investigating them. The customer should thus be ensured that he is not subject to decisions based upon data that should not have been collected, that have been unduly stored, or that are not or no longer accurate. The EDPS stresses that a mere reference to data protection principles in the preamble of the proposed directive is not sufficient and should be replaced by a clear mention of the applicable data protection law in a substantive provision to the proposal. Since the exchange of personal data between competent authorities is provided for, the proposed directive should also include a definition of what is meant by competent authorities.

The purpose limitation principle should be complied with in the proposed directive. This means that personal data should not be further processed for incompatible purposes. The EDPS also recommends strengthening the proportionality requirement when transfers of personal data to third states are concerned.

The publication of sanctions included in the proposed directive should be further specified or replaced by less intrusive options. With regard to data retention, the EDPS recommends providing for a maximum period of retention.

In general, the EDPS states that data protection should not be perceived as an obstacle to AML obligations but as a basic requirement necessary to achieve this purpose while respecting the fundamental right to the protection of one's personal data. (EDB)

➤eucrim ID=1303033

Data Protection in the Smart Borders Proposals

On 19 July 2013, the EDPS published his opinion on the two Commission proposals for creating so-called Smart Borders (see eucrim 2/2013, p. 35). The Article 29 Data Protection Working Party also published its opinion on these proposals on 17 June 2013. They include a proposed regulation establishing an Entry/Exit System (EES) to register entry and exit data of third-country nationals entering the EU (COM(2013) 95) and a proposed regulation establishing a Registered Traveller Programme (COM(2013) 97).

The EDPS and the Article 29 Data Protection Working Party both high-

Report

The Challenges of Setting up a European Public Prosecutor's Office: Definition of Common Rules and Their Impact on National Legal Systems

Centro di Diritto Penale Europeo di Catania, together with the University of Catania, the University of Bologna, and OLAF (Hercule II Grant Programme 2012, Training, Seminars and Conferences – Legal Part)

Catania/Italy, 20-22 June 2013

The conference contributed to the lively debate about the establishment of the EPPO, which requires in-depth reflection on the definition of an adequate legal and operational framework to ensure the fundamental balance between effectiveness of repression, on the one hand, and legal safeguards and personal liberties, on the other.

The following main conclusions were reached at the conference, following discussion among renowned speakers:

- The setting up of the EPPO needs a thorough harmonization (beyond that provided for in the PIF Proposal) of relevant substantive criminal law provisions falling within its material scope of competence; efficient action could even require a certain unification of offences and of specific aspects of the general part.
- A set of EU-wide common procedural rules is essential to cover: the status of the EPPO as an independent Office; the rules of procedure and those governing the investigation and the admissibility of evidence, as well as common rules on procedural safeguards and defense rights; the criteria for the choice of jurisdiction; the rules on judicial control of the acts of the EPPO.
- Close cooperation between the EPPO and Eurojust should be established in addition to operational synergies with OLAF and Europol.

For further information: G. Grasso/G. Illuminati/R. Sicurella/S. Allegrezza (eds.), Le sfide dell'attuazione di una Procura Europea: definizione di regole comuni e loro impatto sugli ordinamenti interni, Milano, Giuffrè, 2013.

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lighted the lack of proportionality and necessity when introducing the EES, since other recently created systems could solve the problem of the slow and unreliable mechanism that is in place now. Moreover, the proposals seem to anticipate that law enforcement authorities would gain access to the EES at a later stage, and the necessity is also not clear in this respect.

Additionally, the EDPS stated that the legal consequences of applying such automated border procedures and the transfer to third states should be studied more closely. (EDB)

➤eucrim ID=1303034

Proposal for EU-Canada PNR Agreement Adopted by Commission

On 18 July 2013, the Commission adopted two proposals for Council decisions: one on the signature and one on the conclusion of an Agreement between Canada and the EU on the transfer and processing of PNR data.

In 2005, the EU had already concluded such an agreement with Canada following a decision on the adequacy of the level of data protection in Canada. This decision expired in 2009. The entry into force of the Lisbon Treaty made the consent of the EP necessary for a new agreement. However, the EP demanded specific requirements that were later adopted by the Commission in a "PNR package" (see eucrim 4/2011, pp. 146 ff.).

On 2 December 2010, the Council had adopted a decision, together with a negotiation directive, authorising the Commission to open negotiations. Following negotiations, the Agreement was drawn up on 6 May 2013. The text of the agreement is consistent with the criteria laid down in the Commission's PNR package and the negotiating directives given by the Council.

With regard to the content of the agreement, the purpose of processing of PNR data is strictly limited to preventing, detecting, investigating, and prosecuting terrorist offences and serious transnational crime. The retention period is limited to five years, and the data will be "depersonalised" after a period of 30 days. Data subjects have the right to access, correction, redress, and information. In accordance with the agreement, the data will be transferred exclusively using the "push" method, which means that air carriers transfer the required PNR data to the Canada Border Services Agency rather than the latter retrieving it (the "pull" method) from air carrier's databases. (EDB)

➤eucrim ID=1303035

LIBE Committee and Commission Discuss US Data Collection

On 20 June 2013, the LIBE Committee met with Commissioner for Justice Viviane Reding MEPs to debate revelations in the media regarding the US Internet surveillance programme called PRISM. Reding announced that a transatlantic group of experts will be set up to address concerns and stressed the clear need to make progress on the reform of the EU data protection legal framework.

One point of discussion related to the data protection reform concerned the provisions in the proposed directive and regulation on the transfer of personal data to third states.

On 4 July 2013, a resolution was adopted by the EP on the US National Security Agency surveillance programme, surveillance bodies in various Member States, and their impact on EU citizens' privacy. With the resolution, the EP urges the LIBE Committee to conduct an in-depth inquiry into data collection by the US and to report back by the end of this year. The US authorities are called upon to provide the EU institutions with full information on all programmes collecting data on EU citizens and violating the right to privacy and data protection. Additionally, the resolution states that the EU institutions and Member States should give consideration to the possible suspension of the PNR and terrorist finance tracking programme (TFTP) agreements, if necessary, in order to achieve these objectives. Lastly, the EP asks that the transatlantic expert group, as announced by Commissioner for Home Affairs Cecilia Malmström and in which the EP Parliament will participate, be granted an appropriate level of security clearance and access to all relevant documents in order to be able to conduct its work properly and by a set deadline. (EDB)

➤eucrim ID=1303036

EP Plenary Sends PNR Proposal Back to LIBE Committee

On 10 June 2013, the proposed directive on the use of passenger name record data (PNR) for the prevention, detection, investigation, and prosecution of terrorist offences and serious crime was discussed in the EP plenary.

Even though the 24 April 2013 vote by the LIBE Committee on this proposal resulted in a rejection (see eucrim 2/2013, p. 45), the request from the rapporteur was followed to return the file to this Committee in order to pursue further compromises. This decision was met with criticism from other MEPs who considered it undemocratic to ignore the first vote in the LIBE Committee. (EDB)

➤eucrim ID=1303037

Freezing of Assets

Proposed Directive on Confiscation and Freezing of Proceeds of Crime – State of Play

On 20 May 2013, MEP Monica Luisa Macovei presented the report on the proposed directive on the freezing and confiscation of proceeds of crime (see eucrim 1/2013, pp. 10-11).

The rapporteur generally supports the Commission proposal. Nevertheless, the rapporteur aims to strengthen the provisions of non-conviction based confiscation and extended confiscation. The objective is to make them more efficient in order to actually serve the purpose of preventing the use of proceeds of crime for committing future crimes or their reinvestment into licit activities. (EDB)

➤eucrim ID=1303038

Kadi Removed from Terrorist Lists after ECJ Dismisses Latest Appeal

On 18 July 2013, Mr. Yassin Abdullah Kadi's name was removed from the EU and UN lists of persons and entities allegedly associated with terrorism after the ECJ dismissed the appeal against the so-called Kadi II judgment (joined cases C-584/10 P, C-593/10 P and C-595/10 P; see eucrim 4/2010, pp. 141-142).

Mr. Kadi's legal battle started in 2001 when, shortly after the terrorist attacks in the US, his name was included in the UN list of persons and entities whose assets were frozen due to alleged association with Al-Qaeda. The EU adopted a regulation copying the list and ordering the freezing of Kadi's funds and other financial resources.

In 2008, the ECJ ruled on the appeal against the decision by the General Court, stating that obligations imposed by an international agreement cannot prejudice the principle that EU measures must respect fundamental rights. Since the evidence relied on against Mr. Kadi had neither been disclosed to him nor had he learned the reasons for his inclusion on the lists, the ECJ ordered his name to be removed from the lists. This was the first ECJ ruling in the *Kadi* case. The Commission maintained the freezing measures against Mr. Kadi by means of a new regulation. The annulment of that regulation by the General Court (see eucrim 4/2010, pp. 141-142) was challenged by the Commission, the Council, and the UK and finally resulted in a dismissal on 18 July 2013.

The ECJ decided to confirm the annulment based on the lack of evidence for his involvement in acts of terrorism. The second ECJ judgment in the *Kadi* case states that "contrary to the analysis of the General Court, the majority of the reasons relied on against Mr. Kadi are sufficiently detailed and specific to allow effective exercise of the rights of the defence and judicial review of the lawfulness of the contested measure." Because no information or evidence has been produced to substantiate the allegations, roundly refuted by Mr. Kadi, of his involvement in activities linked to international terrorism, the ECJ concluded that the allegations are not such as to justify the adoption, at the EU level, of restrictive measures against him. (EDB)

➤eucrim ID=1303039

Council Amends EU Terrorist List

On 25 July 2013, the Council decided to add the Hezbollah Military Wing to the EU's list of entities, groups, and persons involved in terrorist acts, as agreed at the Foreign Affairs Council three days earlier. Persons, entities, and groups included in this list are subjected to measures freezing their funds.

The Council stressed that this decision is no impediment to the continuation of dialogue with all political parties in Lebanon and does not affect the delivery of assistance to the country. (EDB)

➤eucrim ID=1303040

Cooperation

Customs Cooperation

Best Practice for Customs Cooperation in Criminal Matters

The German delegation published a draft report on best practice for customs cooperation in criminal matters. The report is based on Action 5.10 of the Fifth Action Plan to Implement the Strategy for Customs Cooperation in the third pillar.

For the action, a project group was set up to develop an overview describing which legal basis for cooperation in criminal matters should best be used in certain situations and how possible obstacles may be overcome. The group was also to draw up recommendations to serve as a basis for practical guidelines that are to be established in a Best Practice Guide. It consisted of representatives from Austria, Belgium, Cyprus, Estonia, Finland, Hungary, Luxemburg, the Netherlands, Poland, the United Kingdom, and Germany (lead country). Eurojust joined the project group as an observer.

In its conclusions, the group finds that the Naples II Convention is the core legal instrument for cooperation between customs administrations of the Member States. A second instrument is the Swedish Framework Decision. However, the report finds that applying the Naples II Convention has several advantages in comparison to applying the Swedish Framework Decision such as, e.g., the obligation of the requested Member State to undertake investigative measures or the special forms of cooperation (hot pursuit, etc.) and requests (for surveillance, etc.) offered under the Naples II Convention. Choosing the Naples II Convention as a legal basis also offers practical benefits compared to the 1959 MLA Convention and 2000 MLA Convention, e.g., less time-consuming and cumbersome due to the possibility of direct contacts.

According to the draft report, databases providing particular methods of communication for mutual assistance in criminal matters are the Customs Information System (CIS) and the Customs File Identification Database (FIDE). Finally, practical issues derive from the different competences between the customs authorities and the judicial authorities in the Member States.

The last chapter of the draft report sets out recommendations on when to use the Naples II Convention or the Swedish Initiative and the CIS or FIDE, on the proper legal basis for customs cooperation in criminal matters as opposed to customs cooperation for administrative purposes, and some general practical recommendations.

In a separate annex to the report, the project group sets out a comparative study of:

- the Naples II Convention;
- Council Regulation (EC) No. 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission

to ensure the correct application of the law on customs and agricultural matters;
- the CIS Decision;
- the Swedish Framework Decision;
- the 1959 and 2000 MLA Conventions.

Furthermore, the annex contains a case study outlining the practical obstacles in applying the existing legal instruments of customs cooperation in criminal matters. (CR)

➤eucrim ID=1303041

European Arrest Warrant

ECJ Judgments Related to Charter of Fundamental Rights

In two different cases, the ECJ was confronted with interpretation issues of the Framework Decision on the EAW related to matters covered by the EU Charter of Fundamental Rights and Freedoms.

In the *Radu* case (C-396/11), the question that was dealt with concerned the grounds of refusal included in the Framework Decision on the EAW. When the human rights of the person subject to surrender have been breached or will be breached by the surrender procedure, the execution of a EAW should not be refused according to the ECJ. The court ruled on 29 January 2013 that the executing judicial authorities cannot refuse to execute a EAW issued for the purpose of conducting a criminal prosecution on the grounds that the requested person was not heard in the issuing Member State before that arrest warrant was issued.

In the *Melloni* case (C-399/11), the ECJ ruled on 16 February 2013 that Article 53 of the Charter must be interpreted as not allowing a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State. According to the Court, allowing such condition could create an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution. (EDB)

➤eucrim ID=1303042

Council of Europe*

Reported by Dr. András Csúri

Foundations

Reform of the European Court of Human Rights

Thematic Factsheets on the Court's Case Law Available in Romanian

On 12 July 2013, some factsheets on ECtHR case law were made available on the Court's website in Romanian, in addition to English, French, German, Russian, Italian, Polish, and Turkish.

The factsheets have been published since September 2010 and give an overview of the Courts case law on a number of issues, sorted by topic. They also aim to promote the protection of human rights at the national level. (For translation-related news, see eucrim 4/2012, p. 152, 3/2012, p. 106, 2/2012, p. 61, 4/2011, p. 151)

➤eucrim ID=1303043

60th Anniversary of Entry into Force of ECHR

On 2 September 2013, the ECtHR celebrated the 60th anniversary of entry into force of the ECHR, which was described by President Spielmann as "the finest European undertaking to date." Since 1953, the Court has dealt with over 500,000 applications, which led to approximately 16,500 judgments.

➤eucrim ID=1303044

* If not stated otherwise, the news reported in the following sections cover the period July – September 2013.

Other Human Rights Issues

European Countries and the EU Called for Accountability in CIA Torture Cases

On 11 September 2013, Nils Muižnieks, the CoE Commissioner for Human Rights, released a highly critical report regarding serious human rights concerns with regard to the anti-terrorist response adopted by the USA and Europe after the 2001 terrorist attacks. The report stresses that European governments, CoE Member States, and the EU itself have achieved or initiated little to ensure accountability for the "unlawful program of extraordinary renditions" involving the ill-treatment of suspected terrorists to date. The report described the CIA program as a grave political mistake and a serious violation of fundamental human rights. Therefore, the Commissioner welcomed the ECtHR's judgment in the *El-Masri v. the Former Yugoslav Republic of Macedonia* (13 December 2012) case, which broke the silence in this matter. For the first time, a judgment holds a CoE Member State responsible for torture, inhuman treatment, ineffective investigation, and lack of remedy to the complainant with regard to the country's participation in the sordid CIA program. The Commissioner called for political and judicial initiatives in the Member States and by the EU. So far, only Italy has handed down sentences. Germany issued several arrest warrants against CIA agents, and the UK has awarded very costly compensation. Nevertheless, the respective governments did not comply, and therefore the

German demand for extradition was refused, and the compensation awarded by the UK court was denied by the government. In the other countries, even less has been achieved or initiated.
➤eucrim ID=1303045

Specific Areas of Crime

Corruption

GRECO: Fourth Evaluation Round on Slovenia

On 30 May 2013, GRECO published its Fourth Round Evaluation Report on Slovenia with 19 recommendations addressed to the country. The fourth and latest evaluation round was launched in 2012 to assess how states address issues such as conflicts of interest or declarations of assets with regard to Members of Parliament, judges and prosecutors (for further reports, see eucrim 2/2013, pp. 47-48, 1/2013, p. 13). The report acknowledged the existence of clear rules regarding the acceptance of gifts and the incompatibilities of certain functions. The newly introduced online asset declaration system also seems to offer guarantees for the future. Nevertheless, significant deficiencies remain, in particular with regard to the mechanism of supervision and sanction for misconduct. In addition, GRECO raised special concerns with regard to the fact that the responsibilities over the prosecution service have been transferred from the Ministry of Justice to the Ministry of the Interior, which may lead to a reduction in independence of the prosecutors.
➤eucrim ID=1303046

GRECO: 2012 Annual Report

On 13 June 2013, GRECO published its thirteenth annual report. In connection with its fourth round evaluations, GRECO had called on the European states to bolster the legal and institutional capacity of their parliamentarians, judges, and prosecutors in order to prevent and address corruption in their everyday work. The report states that corruption has a devastating effect on citizens' trust towards democratic institutions and that citizens depend on these three professional groups in tackling corruption. Therefore, there is a special need for precise and transparent codes of conduct reinforced by credible mechanisms of supervision and sanctions with regard to these professions.

Furthermore, the report presents statistics on 45 of the 49 Member States and their compliance with the regard to the first and second evaluation rounds. The statistics show that, some three years after they were first evaluated, more than three quarters of the Member States have complied with GRECOS's recommendations. Nevertheless, the report states that full compliance with the recommendations of the third evaluation round needs more commitment on the part of the respective governments.
➤eucrim ID=1303047

GRECO: Fourth Evaluation Round on Luxembourg

On 1 July 2013, GRECO published its Fourth Round Evaluation Report on Luxembourg, which addressed 14 recommendations to the country. The report welcomes the introduction of rules of conduct concerning the integrity of parliamentarians, judges, and prosecutors. GRECO also supports the proposals to adopt a code of conduct with regard to gifts and other benefits, conflicts of interest, and the declaration of assets as the current system lacks effectiveness and is taken seriously by parliamentarians to variable degrees. The report stresses that the future declaration system needs to provide for more precise data as well as for effective sanctions in case of non-compliance. GRECO acknowledged the compendium of ethical rules adopted with regard to judges and prosecutors. Nevertheless, the statutory provisions solely cover non-professional judges and prosecutors. Furthermore, they do not cover all courts homogeneously with difficult interpretation for both public and practitioners.
➤eucrim ID=1303048

GRECO: Fourth Evaluation Round on the Netherlands

On 18 July 2013, GRECO published its Fourth Round Evaluation Report on the Netherlands and addressed seven recommendations to the country. The report assessed the Dutch system as being fairly effective. It welcomed the comprehensive integrity program of the judicial institutions of the country. One of the few areas requiring more attention concerned the guidance for substitute judges on possible conflicts of interests. The approach of the prosecution service, which involves ongoing discussions on integrity challenges, was praised by the report as well as the swift reactions when misconducts occur.

The report pointed out the achievements of the judicial institutions and the prosecution service as examples for parliamentarians to follow. Therefore, GRECO suggests developing codes of conduct and a review of the current declaration requirements in order to ensure proper supervision and enforcement of the rules.
➤eucrim ID=1303049

Money Laundering

MONEYVAL: Fourth Round Evaluation Report on Poland

On 26 June 2013, MONEYVAL published its Fourth Round Evaluation Report on Poland, addressing the progress made following MONEYVAL's recommendations in its Third Round Evaluation Report. The report welcomed that Polish legislation had identified money laundering and terrorist financing as one of the strategic priorities set in the National Programs for combatting organised crime for the years 2012-2016. The report also welcomed that, since the last evaluation, Poland has introduced the independent and autonomous offence

of terrorist financing into its penal code. Nevertheless, the statutory provision fails to be fully in line with international standards. The report further stressed that technical deficiencies identified in the third evaluation have not yet been addressed and that the number of investigations, prosecutions, and the level of confiscations still appears to be low. Ultimately, the report assessed the Polish supervision system as well developed and the legal framework for mutual legal assistance as well established.
➤eucrim ID=1303050

MONEYVAL: 2012 Annual Report

On 26 June 2013, MONEYVAL published its annual report in which it urged European governments to improve the implementation of AML measures in the legal, financial, and law enforcement fields. The report stated that the evaluated countries had broadly improved their technical compliance with international standards by reforming their laws and regulations, in particular with regard to the prevention of ML/TF offences. However, the report also stated that law enforcement and prosecution services need to do more in achieving serious ML convictions and producing confiscation orders with a deterrent effect.

The annual report also stressed that, in 2012, MONEYVAL contributed significantly to the visibility of the CoE. The publication of the first assessment of the Holy See in 2012 attracted global media coverage for the work of the organization as it was deemed to be the first independent review of the Holy See ever undertaken. While presenting the annual report, the Chair of MONEYVAL, Mr. Bartolo, emphasised two important opinions. First, while Europe is emerging from a global financial crisis, it is increasingly important for financial institutions to know who they are dealing with and the source of the funds they are handling. Second, funds proceeding from crime pose risks not just to their own reputations and those of their countries but also to the global financial system, which relies so much on the confidence placed in financial institutions.
➤eucrim ID=1303051

MONEYVAL: Typologies Reports

On July 19 2013, MONEYVAL published two Typologies Reports. One on the postponement of financial transactions and the monitoring of bank accounts and a second one on online gambling for ML and the financing of terrorism purposes.

The first report concluded that the monitoring of bank accounts proved to be one of the most effective investigative instruments in tracing criminal assets. The second report provides an overview of the online gambling sector in the MONEYVAL countries, their extent and types, the associated ML/FT risks, and the methods of payment used. The report concluded that online gambling is conducted anonymously, in a cross-border manner, and with the use of alternative payment systems, all of which augments the risk of ML/FT. According to the report, the regulation and supervision of online gambling remain the most important factors in order to prevent related abuse.
➤eucrim ID=1303052

Organised Crime

CDPC: Ad hoc Drafting Group on Transnational Organised Crime

CDPC stated that transnational organised crime (TOC) poses a direct threat to the internal integrity of all European states, which cannot be efficiently addressed by each state on its own and thus requires a targeted and comprehensive approach. Though several international frameworks have already proven their worth, a truly pan-European framework and a common European strategic approach are still lacking. Therefore, in 2012, CDPC set up an ad hoc drafting group on TOC, which had its first meeting on 24-26 June 2013. At the meeting, the drafting group identified and agreed upon the main areas of transnational organised crime requiring attention in a "White Paper report," which shall be presented at their next meeting. The White Paper shall address inter alia the possibilities of enhancing international cooperation in criminal matters, questions regarding assets and confiscation, witness protection programs, the improvement of special investigative measures, and the synergies between the administrative authorities and criminal law units.

In other news, the CDPC approved the Draft Convention against Trafficking in Human Organs and its Draft Explanatory Report, which was transmitted to the Parliamentary Assembly for opinion.
➤eucrim ID=1303054

Procedural Criminal Law

CEPEJ: Guidelines on the Creation of Judicial Maps to Facilitate Access to Justice

At its 21st plenary meeting (20-21 June 2013), CEPEJ adopted guidelines on the creation of judicial maps to support access to justice. The document intends to identify important factors to be taken into account by national policy makers when deciding the size and location of particular courts. According to the document, justice represents one of the most important human rights and pillars of civil society. However, in times of permanent and profound technological changes in addition to the global economic crisis, an optimal level of quality in this field needs to be ensured through the optimization of resources and the reduction of operational costs.

The document lists some key factors that are essential to know as well as additional factors that increase the completeness of the analysis with regard to (re)design the national judicial maps. Key factors are clearly quantitative and objective (such as population density, size of court, and infrastructure) while some of the additional factors are not easily measurable (like cultural sophistication and availability of legal advice).
➤eucrim ID=1303053

The Reform of the Fight against Money Laundering in the EU

Alexandre Met-Domestici, PhD

Money laundering is a major threat to the integrity of the financial system and the stability of the EU's economy. It is moreover one of the means used to finance terrorism – often through the laundering of small amounts of money. In order to combat it, the EU favours a holistic approach encompassing money laundering and terrorist financing. Hence, the fight against money laundering in the EU relies on the legal framework set by the successive directives, in the wake of the FATF's recommendations.

Money laundering is one of the few criminal offences defined at the EU level. It consists in "the conversion or transfer of property, knowing that such property is derived from criminal activity […] for the purpose of concealing or disguising the illicit origin of the property," or "the concealment of the true nature, source, location, disposition, […] ownership of property, knowing that such property is derived from criminal property," or "the acquisition, possession or use of property, knowing at the time of receipt that such property was derived from criminal activity," or "participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission"[1] of these actions. However, there is no complete harmonisation, since the predicate offences leading to money laundering may vary from one Member State to another.[2] The European Banking Federation even calls for increased harmonisation.[3] Nevertheless, the EU is at the forefront of the fight against money laundering, and its directives and national legislation implementing them account for some of the most stringent anti-money laundering (AML) standards in the world. Hence, all Member States have set up financial intelligence units (FIUs), which are responsible for receiving suspicious transaction reports (STRs) from the professionals required to fight money laundering (the obliged entities).

The core element of the AML mechanism lies in the risk-based approach (RBA). It aims at tracking money flows and uncovering the identity of concealed beneficial owners of the funds. According to this approach, obliged entities are required to assess the level of risk of the transactions planned by their customers. They then report suspicious transactions on the basis of their own judgment. The RBA was introduced in 2005 by the third AML directive and clearly departed from the previous rule-based approach. Previously, professionals had to systematically report whenever the criteria defining suspicious transactions were met.

Although the FATF did not call for drastic changes to the RBA in its 15 February 2012 recommendations,[4] the latter amounts to a major overhaul of the rules and will lead to a new directive. Hence, the Commission issued a proposal for a new AML directive on 5 February 2013,[5] alongside a proposal for a regulation on fund transfers.[6] The proposed reform therefore consists in an evolutionary approach. The Commission aims at strengthening the requirements imposed on obliged entities and fostering cooperation between FIUs. It also focuses on better coordination between the fight against money laundering and the fight against other financial offences such as tax evasion. The proposed reform will enlarge the scope of the directive and strengthen the risk-based approach.

I. Enlarging the Scope of the Directive

Since the adoption of the first directive in 1991,[7] the scope of EU AML legislation has been steadily increasing. Although it is not as drastic an increase as the second directive,[8] the Commission's proposal provides for yet another enlargement. The scope of the directive is to be extended both ratione materiae and ratione personae.

1. Ratione Materiae: More Predicate Offences

The criminal offences whose proceeds are transferred into the real economy by money launderers are called predicate offences. Their definition is crucial, since only money from such offences can be legally characterised as being laundered and therefore be combated. The list of predicate offences has been extended by each new AML directive. The Commission's proposal is no exception in this respect, placing emphasis on tax crimes.

The approach adopted in the successive directives does not compel Member States to harmonise predicate offences. Even though harmonisation of substantive criminal law is provided for in Art. 83 TFEU,[9] it is still very limited. This might lead to discrepancies in the implementation of AML rules among

Member States. Moreover, the corresponding sanctions may vary. In this respect, a step forward may consist in the Commission's July 2012 proposal for a directive on the fight against offences to the Union's financial interests by means of criminal law, which may lead, for instance, to a harmonised definition of corruption.[10]

The first AML directive mainly focused on drug trafficking.[11] The scope of predicate offences was then extended by Directive 2001/97/EC. Major offences such as corruption, offences committed against the EU's financial interests and serious crimes were added. According to the proposal, predicate offences are: terrorist acts – as defined in Framework Decision 2002/475/JHA,[12] drug trafficking,[13] the activities of criminal organisations, fraud affecting the financial interests of the EU,[14] corruption, and all offences punishable by deprivation of liberty for a maximum of more than one year – the definition of the latter is left to national law.

Remarkably, the proposal provides for the systematic inclusion of tax crimes. Although they were already part of the predicate offences under the previous directive based on national legislations punishing them as serious crimes, tax crimes will formally be designated as predicate offences.[15] This regards offences related both to direct and indirect taxes. Stemming from the FATF's recommendations,[16] this inclusion contributes to the tougher stance against financial crimes adopted by the EU. Such an approach may help deter tax evasion, since it can make it more difficult for tax criminals to use the proceeds of their crimes. However, this may well raise the number of STRs being filed, thus increasing the workload of FIUs. It might also hamper the achievement of one of the stated goals of the most recent AML directives, i.e., to prevent FIUs from being overwhelmed in order to increase the efficiency of the mechanism. This might prevent them from focusing on the worst offences committed by organised criminal networks such as drug trafficking and terrorism. In this respect, the European Banking Federation calls for a slight shift in the Commission's approach. It suggests that minor tax offences be excluded from the reporting obligation in order to avoid overwhelming FIUs.[17]

Practical issues may also hinder the efficiency of this approach. There is often a time lapse between the moment when a transaction is reported and the effective tax payment. This can make the transaction look suspicious even though the required tax will eventually be paid. Moreover, tax law can be very complex. Professionals may not always be fully aware of foreign tax rules. Their customers often walk a tight rope, trying to avoid paying taxes without actually breaking the law. Sometimes, they achieve this goal and use the loopholes that are characteristic of tax rules. This situation makes it all the more difficult for professionals to analyse transactions and to assess risk level of money laundering.

2. Ratione Personae: More Obliged Entities

The persons involved in the fight against money laundering are both those fighting it and those taking part in it. The scope of the obliged entities is to be further extended by the forthcoming directive. As regards the people being targeted, the category of politically exposed persons (PEPs) will be broadened.

The list of obliged entities has grown with each new directive. Whereas Directive 91/308/EEC was limited to bankers and financial institutions, the second AML directive added legal professionals, casinos, remittance offices, and insurance companies. The much debated situation of lawyers with regard to their duty to report suspicious transactions needs to be discussed before analysing the few additions brought about by the Commission's proposal.

a) To what extent should lawyers report?

The case of lawyers is highly specific. They have been required to file STRs since the entry into force of Directive 2001/97 EC. Its preamble states that "there is a trend towards the increased used by money launderers of non-financial business."[18] Therefore, "notaries and independent legal professionals […] should be made subject to […] the Directive."[19] However, the same directive provides for an exception. Lawyers are not required to report information obtained "in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in […] judicial proceedings, including advice on instituting or avoiding proceedings."[20] These principles are carried over in the Commission's proposal, in line with the FATF's recommendations.[21] Hence, lawyers "should be subject to the provisions of the Directive when participating in financial or corporate transactions, including providing tax advice, where there is the greatest risk of the services of those legal professionals being misused for […] laundering the proceeds of criminal activity or for […] terrorist financing."[22] In fact, lawyers have a duty to report only when they take part in financial, real estate, or corporate operations.

Moreover, where lawyers are required to report suspicious transactions, they should report to their own professional self-regulatory bodies and not to FIUs. This rule aims at safeguarding their independence and the confidentiality of their relationships with their clients. To this end, Member States should "nominate the bar association or other self-regulatory bodies

for independent professionals as the body to which reports on possible money laundering cases may be addressed."[23] These bodies may then forward STRs to FIUs, accordingly to "the appropriate forms of cooperation between the bar associations or professional bodies and these authorities."[24] The rules governing such cooperation are to be adopted by Member States.

The obligations imposed on lawyers have been further specified in the famous ECJ ruling Ordre des barreaux francophones et germanophones.[25] The Court – as well as the French Conseil d'Etat[26] – stated that the obligation to report suspicious transactions should not apply to lawyers acting within the scope of legal counselling or judicial proceedings. The ECJ rejected the applicants' arguments that the duty to report was in breach of lawyers' professional confidentiality and of Art. 6 of the ECHR, as well as Arts. 47 and 48 of the Charter of Fundamental Rights of the EU and Arts. 10 and 11 of the Belgian Constitution. Moreover, the derogation provided was, according to the applicants, insufficient to safeguard lawyers' relationships with their clients as well as the clients' rights of defence. On the contrary, the Court held that "the obligations of information and of cooperation with the authorities responsible for combating money laundering […] do not infringe the right to a fair trial as guaranteed by Art. 6 of the ECHR and Art. 6 (2) EU."[27]

Furthermore, in its *Michaud vs. France* ruling,[28] the ECtHR held that lawyers' duty to report complies with the ECHR, especially Art. 8 protecting privacy and the confidentiality of correspondence. All correspondence between lawyers and their clients benefits from enhanced protection. Indeed, "lawyers cannot carry out" their task "if they are unable to guarantee to those they are defending that their exchanges will remain confidential." The Court added that the right to a fair trial is "indirectly but necessarily dependent"[29] on the protection of this correspondence. Hence, Art. 8 ECHR contributes to the protection of professional legal privilege.[30] The Conseil d'Etat had found that the duty to report complied with the fundamental right to professional confidentiality.[31] After stressing the role played by legal professional privilege in the lawyer-client relationship and in the proper administration of justice, the ECtHR explained that it can give way to other rights. Moreover, the AML directive and French law provide for safeguards limiting interference with legal professional privilege. In fact, lawyers are compelled to file STRs only when they take part in business transactions on behalf of their clients and when they assist them in preparing or carrying out related transactions. Thus, "the obligation to report […] only concerns tasks performed by lawyers which are similar to those performed by the other professions subjected to the same obligation, and not the role they play in defending their clients."[32] Consequently, "the obligation for lawyers to report suspicions, as practiced in France, does not constitute disproportionate interference with the professional privilege of lawyers."[33]

Apart from the case of lawyers, the proposal provides for an extension of the list of obliged entities. It will include professionals from the "gambling sector"[34] and no longer only "casinos," in order to take into account online gambling. It will also comprise persons dealing in goods or providing services for cash payment of € 7,500 or more.[35] This broadening of the scope of the directive goes beyond the FATF's requirements. Recommendation No 22 only provides for "casinos," and the threshold for cash payments is set at € 15,000.[36]

b) A broader scope for PEPs

The extension of the ratione personae scope of the directive also concerns the persons being watched by obliged entities. Strikingly, the provisions dealing with politically exposed persons are to include national (and EU) PEPs. The definition of PEPs stems from a specific directive, Directive 2006/70/EC,[37] thus demonstrating the importance of the issue. The drafting of this directive was called for by users expressing the need for a more accurate definition of this key concept. The FATF also issued a specific guideline[38] concerning PEPs.[39] They are defined as "natural persons who are or have been entrusted with prominent public functions."[40] Such functions include: heads of state, heads of government, ministers, members of parliament, members of courts whose decisions are not subject to further appeal, members of courts of auditors or the boards of central banks, ambassadors, and high-ranking officers in armed forces and executives of state-owned enterprises. These functions include positions held at the EU level or at the international level. These persons' family members – spouses, partners, and others – are also considered PEPs. Their close associates are also to be included if they share the beneficial ownership of legal entities or have any kind of close business relationships. Moreover, when PEPs are no longer granted prominent public functions, they should still be considered as such one year after the termination of their functions.

As regards foreign PEPs, the proposal carries over the mechanism set up by the third directive. Not only are the obliged entities required to apply customer due diligence (CDD), but they also have to implement additional measures. The latter include appropriate risk-based procedures to determine whether customers or beneficial owners are PEPs as well as the origin of their wealth and of the funds being transferred. More strikingly, professionals must seek approval from their senior management to establish or continue business relationships with PEPs. This very specific obligation indicates the sensitive nature of the latter. It ensures that they are supervised by professionals who are well aware of compliance issues and fully

trained to apply AML regulations. This also helps reduce the liability of lower-level professionals in handling AML requirements with PEPs.

In line with the FATF's recommendations,[41] the Commission's proposal extends the scope of the directive. Hence, when entering a business relationship with "domestic politically exposed persons or a person who is or has been entrusted with a prominent function by an international organization," obliged entities must apply the specific enhanced CDD designed for PEPs. This is a noteworthy change from Directive 2005/60 under which domestic PEPs were excluded from the scope of the EU's AML mechanism. This change is part of the strengthening of the obligations imposed on professionals. It is a welcome improvement, since domestic officials and those appointed by international organisations can be used by money launderers given their prominent positions. This new obligation may nevertheless further contribute to the difficulty of the professionals' task. They will have to assess the level of risk characterising transactions performed by domestic officials, having therefore to deal with very sensitive issues. The required approval from senior management is a necessary condition in this respect. The European Banking Federation calls for the adoption of a list of PEPs in different jurisdictions.[42] This may of course prove useful, but one must bear in mind that such lists would need to be frequently updated.

The Commission's proposal thus provides for a further extension of the scope of EU AML legislation. It also provides for enhanced rules governing the way money laundering is fought, aiming at strengthening the risk-based approach.

II. Strengthening the Risk-Based Approach

The RBA has been at the heart of the EU's AML mechanism since the entry into force of the third directive. In its proposal, the Commission does not plan to depart from this approach, which has proven more efficient than the former rule-based approach.[43] It nevertheless calls for some improvements in light of the ever-changing nature of criminal activities. Hence, the proposal provides both for stricter obligations vested upon professionals fighting money laundering and for more duties imposed on other stakeholders.

1. Stricter Obligations Vested upon Professionals: Due Diligence Is a Tight Rope to Walk

Directive 2005/60 had achieved a breakthrough by relying on professionals to effectively fight money laundering. Since then, they have been in charge of monitoring transactions. They are in fact granted a remarkable margin of discretion. They are required to assess the risk level of each transaction. In doing so, they should apply CDD. Furthermore, they are required to always do their best to identify the beneficial owner of the funds. The latter is the "natural person on whose behalf a transaction or activity is conducted." The words "on behalf" encompass all kinds of links binding the client to the beneficial owner. Such a broad definition is meant to help in the detection of more suspicious transactions. It should furthermore allow the mechanism to be applied to future money laundering techniques. Money launderers – and their advisors – keep designing new ways of concealing the source of money. This flexible approach has been retained and even reinforced by the Commission in its proposal.

In compliance with the FATF,[44] EU and national regulations provide guidelines for the professionals. According to their assessment of the level of risk, they are required to apply enhanced CDD or simplified CDD.

a) Simplified customer due diligence

In Arts. 15 and 16 of its proposal, the Commission calls for stricter rules applying to simplified CDD. It does not provide for any exception. Decisions on whether to apply such a simplified diligence will have to be justified on the basis of lower risk characterising transactions or customer relationships.[45] There is no detailed description of the measures to be taken under such circumstances. The European supervisory authorities are to adopt guidelines on simplified CDD within two years of the entry into force of the directive.

Under the current regime, Directive 2005/60 provides for an automatic derogation where the customers are credit or financial institutions. Member States can furthermore allow professionals not to apply CDD to companies "listed on a regulated market" within the scope of Directive 2004/39/EC,[46] domestic public authorities, and other customers who represent a low risk of engaging in money laundering or terrorist financing. Customers who are public authorities or bodies can benefit from simplified CDD under specific conditions.[47] Those who are not public entities should comply with the directive; their identity should be publicly available, transparent, and certain. They should be subject to a mandatory licensing requirement under national law for the undertaking of financial activities, and they should be subject to supervision within the scope of the directive.

b) Enhanced customer due diligence

Enhanced CDD is provided for in Arts. 16 through 23 of the proposal. The mechanism designed by the successive directives and carried over in the proposal aims at discovering the

identity of the beneficial owner of the funds, no matter what his contractual – or informal – links with the professional client are. All kinds of contracts are therefore subject to AML requirements, no matter what the national law governing them is. In response to the creative techniques used to conceal the beneficial owner's identity, EU legal provisions have been drafted in a very broad manner. One can only be in favour of this pragmatic approach, which takes into account economic situations and not only legal instruments. The same approach takes precedence over the FATF's recommendations.[48]

Apart from contracts, legal structures can be used to conceal the identity of the beneficial owner. They encompass all kinds of legal persons as well as bodies not benefiting from a legal personality. Professionals need to search for the identity of beneficial owners hiding behind multi-layered corporate structures. Such a task is very time-consuming and can prove next to impossible. Moreover, some of the relevant corporate structures are often registered abroad and sometimes even in jurisdictions which do not comply with OECD standards. This makes the hunt for the beneficial owner a very difficult task, to say the least.

If the customer is an incorporated company, the beneficial owner is the person controlling its capital or its board. Two main criteria are used in order to determine the beneficial owner's identity: control of the capital of the company and control over its board or executives. The first criterion implies that a person who owns or controls directly or indirectly not more than 25% of the shares of a company should be regarded as the beneficial owner. The criterion concerning the control of the board is not precisely defined. In this case, the beneficial owner is the person who ultimately controls the company, no matter whether he or she plays an official part or a covert one. This broad criterion allows various situations to be covered. The 25% ownership threshold has been carried over in the proposal. It is a clear and easy-to-apply guideline for obliged entities, which is widely used by European institutions. The FATF uses it as well. The Commission advocates the use of the same criterion in cases in which such control is indirect. The European Banking Federation opposes this extensive use of the 25% ownership threshold, calling instead for a unified approach from both the EU and the FATF. In fact, the latter does not use a specific threshold in the case of indirect ownership, referring only to "control" of an entity.[49]

c) Online banking

The proposal provides that non face-to-face banking relationships shall no longer be systematically considered as consisting in high risks of money laundering. This change stems from the development of online banking and dematerialised transactions which do not require customers to be physically present. Although such transactions are not per se suspicious, e-banking should be monitored. Breaking away from old-style banking, it creates a new kind of banker-customer relationship which seldom implies face-to-face encounters. Such banking techniques might facilitate money laundering, since their dematerialised nature makes it easier for beneficial owners to conceal their identity, thus offering almost risk-free means of money laundering and terrorist financing. Moreover, prepaid cards – which can be purchased online – pose a new threat. They offer an easy way to transfer funds while maintaining anonymity. The European Banking Federation welcomes this improvement, since it appears well suited to new e-banking techniques. It nevertheless calls for the use of qualified documents, which would facilitate the identification of customers and beneficial owners, thus helping meet the requirements of CDD.[50] The Commission issued proposals on e-identification in June 2012, aiming at improving this situation.[51]

2. More Duties Imposed on Other Stakeholders

The Commission's proposal is more innovative in this respect. Besides CDD performed by obliged entities, it provides for reinforced – and sometimes new – duties imposed on other stakeholders.

Legal persons will be required to clearly identify their beneficial owners and keep registers. They will have to gather and "hold adequate, accurate and current information on their beneficial ownership."[52] The same obligation will apply to trustees.[53] They will have to make the information available to competent authorities such as FIUs and obliged entities performing CDD. This new requirement stems from the FATF's recommendations.[54] It seems to be a major step forward, although it will be very difficult to comply with in practice. Legal entities are often used by money launderers as a means to conceal their identity and especially that of the actual beneficial owner. Such legal persons may well hold registers listing false beneficial owners. Nevertheless, this provision is useful as it will provide a legal basis for criminalising such behaviour.

Although it is not provided for in the Commission's proposal, public authorities might further contribute to the efficiency of the AML mechanism by maintaining central registers of beneficial owners. This would facilitate the professionals' task while performing CDD. It would also facilitate international cooperation among FIUs. Transparency International calls for the creation of such registers.[55] It asks that Member States "agree to mandatory public registers of beneficial owners," which would "help banks and other financial institutions do their work properly."[56] The EU has in fact already paved the

way for the creation of such centralised registers by adopting Directive 2012/17/EU on the Interconnection of central, commercial and companies' registers,[57] advocating the creation of a "European business register." It would provide information about registered companies online, thus offering direct access to each participating country's official register. The same approach could be used in the field of AML and perhaps lead to the creation of a Europe-wide register of beneficial owners. There is no provision allowing financial institutions to access information in public registers on companies in the proposal. This would probably foster transparency, thus facilitating the search for the beneficial owner's identity.

As it is currently the case,[58] third parties will still be allowed to monitor the obliged entities' customers and their transactions.[59] The same categories of professionals can act as third parties and perform CDD instead of others. Moreover, they must be "subject to mandatory professional registration, recognized by law." They are required to perform CDD, under supervision from national authorities in Member States or in third countries that impose equivalent requirements.

Finally, the Commission proposes bolstering cooperation between national FIUs.[60] Such cooperation already exists at the international level thanks to the Egmont group.[61] However, it needs to be further improved at the EU level, given the differences between national AML mechanisms. In some Member States, FIUs are independent administrative bodies, whereas in others they are departments within a ministry or in yet others they are embedded within national police forces. Such differences, though not an impediment to the efficiency of the AML mechanisms at the national level, may hamper European cooperation. For instance, FIUs within the police may not be allowed to exchange information with their European counterparts without prior authorisation from a prosecutor. A more efficient fight against money laundering requires the speedier exchange of information between FIUs. Such legal obstacles should be lifted.

III. Conclusion: Increased Efficiency

The Commission's proposal amounts to welcome improvements. Its overall goal is of course to step up the efficiency of the fight against money laundering, both by extending the scope of the directive and by strengthening the RBA.

All in all, the development of the EU's anti money-laundering legislation can be considered a success story. Despite some differences in national definitions of criminal offences and some implementation issues – e.g., compliance with lawyers' legal professional privilege –, Member States tend to transpose and comply with AML directives.

The forthcoming directive will probably increase the efficiency of the EU's AML mechanism, thus implementing the latest FATF recommendations. This improvement will of course not prevent criminals from designing new ways to launder money and to conceal the identity of the actual beneficial owners. Nevertheless, stricter AML legislation might pave the way for more harmonisation of criminal law at the EU level and a better coordination of the fight against other financial crimes such as corruption. In this respect, the creation of the European Public Prosecutor's Office[62] may well be another step towards a safer Europe for citizens and a tougher and more coordinated fight against financial crime throughout the EU.

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1 Directive 2005/60 EC of the European Parliament and the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of money Laundering and Terrorist Financing, OJ L 309/15, 25 November 2005, Art. 1 (2).

2 For instance, the third AML directive mentions "serious crimes" as predicate offences. Such crimes are punishable by a minimum maximum prison term of one year. However, the corresponding offences in all Member States may not be exactly the same.

3 European Banking Federation, EBF Position on the European Commission Proposal for a 4th Anti-Money Laundering Directive, 22 April 2013, http://www.ebf-fbe.eu/uploads/EBF001279-2013%20-%20EBF%20Position%20on%20the%20EC%20Proposal%20for%20a%204th%20EU%20AML%20Directive.pdf, p. 1 (further: EBF).

4 FATF, International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation, the Recommendations, Paris, 15 February 2012, http://www.fatf-gafi.org/topics/fatfrecommendations/documents/internationalstandardsoncombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html.

5 European Commission, Proposal for a Directive of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, COM (2013) 45 final, 5 February 2013 (further: the Proposal).

6 European Commission, Proposal for a Regulation of the European Parliament and of the Council on Information accompanying Transfers of Funds, COM (2013) 044 final, 5 February 2013.
7 Council Directive 91/308/EEC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering, OJ L 166, 28 June 1991.
8 Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, OJ L 344, 28 December 2001.
9 Art. 83 TFEU provides for the possibility for the European Parliament and the Council to adopt harmonised substantial rules of criminal law in order to "establish minimum rules concerning the definition of criminal offences and sanctions in the area of particularly serious crime with a cross-border dimension" dimension.
10 European Commission, Proposal for a Directive of the European Parliament and of the Council on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law, COM (2012) 363 final, 11 July 2012.
11 As well as other criminal activities defined as such by Member States, Council Directive 91/308/EEC, Art. 1.
12 Council Framework Decision of 13 June 2002 on Combatting terrorism 2002/475/JHA, OJ L 164/3, 22 June 2002.
13 As defined in the United Nation's Convention against Trafficking in Narcotic Drugs and Psychotropic Substances.
14 As defined in the Convention on the Protection of the Financial Interests of the EU (OJ C 316, 27 November 1995).
15 Proposal, Art. 3.4.(f)
16 FATF recommendation No. 3 and its interpretative note.
17 EBF, p. 5.
18 Directive 2001/97, recital 14.
19 Directive 2001/97, recital 16.
20 Directive 2001/97, Art. 6.3.
21 FATF recommendation No. 23 and its interpretative note.
22 Proposal, recital 7.
23 Directive 2001/97, recital 20.
24 Directive 2001/97, recital 20.
25 ECJ, Grand Chamber, case C-305/05, *Ordre des barreaux francophones et germanophones, Ordre français des avocats du barreau de Bruxelles, Ordre des barreaux flamands, Ordre néerlandais des avocats du barreau de Bruxelles v. Conseil des Ministres,* 26 June 2007.
26 In its 2008 ruling: *Conseil d'Etat,* cases No. 296845 and 296907, *Conseil national des Barreaux et al.,* 10 April 2008.
27 ECJ, *Ordre des Barreaux*, 37.
28 ECtHR, case No. 12323/11, *Michaud vs. France*, 6 December 2012.
29 ECtHR, *Michaud vs. France*, 118.
30 ECtHR, *Michaud vs. France*, 119.
31 The interference with this right was justified by the general interest attached to fighting money laundering and the exclusion of information obtained by lawyers in the course of legal proceedings. Contrary to common law countries, France grants professional confidentiality to relationships between lawyers and their clients. The main difference lies in the fact that legal professional privilege is considered a subjective right and can therefore be waived by the client. Professional confidentiality amounts to an objective right – i.e., a right conferred by a general rule and benefitting society as a whole. The client cannot waive it. Given the different kinds of legal systems characterising the Member States of the Council of Europe, the ECtHR has to design global rules encompassing these various situations.
32 ECtHR, *Michaud vs. France*, 128.
33 ECtHR, *Michaud vs. France*, 131.
34 Proposal, Art. 2.1.(3) f.
35 Proposal, recital 6 and Art. 2.1(3.) e.
36 FATF, recommendation No. 22 and interpretative notes to recommendations 22, 23, and 32.
37 Commission Directive 2006/70 EC of 1 August 2006 laying down implementing measures for Directive 2005/60 of the European Parliament and of the Council as regards the definition of "politically exposed person" and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis, OJ L 214/29, 4 August 2006.
38 Described as « guidance » by the FATF.
39 FATF Guidance Politically Exposed Persons (Recommendations 12 and 22), 15 February 2012.
40 Directive 2006/70, Art. 2.
41 FATF, recommendation 12.
42 EBF, p. 3.
43 European Commission, Report from the Commission to the Parliament and the Council on the Application of Directive 2005/60 EC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, COM (2012) 168 final, 11 April 2012.
44 FATF recommendation No. 10.
45 Arts. 13 and 14 of the proposal provide for the need to ascertain the low risk level of such situations.
46 Directive 2004/39 EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22 EEC, OJ L 145/1, 30 April 2004.
47 They must fulfil all the following criteria: the customer has been entrusted with public functions; its identity is publicly available, transparent and certain; its activities are transparent; and the customer is accountable to a Community institution or the authorities of a Member State.
48 FATF recommendation No.10 (b).
49 EBF, p. 2.
50 EBF, p. 3.
51 European Commission, Proposal for a Regulation of the European Parliament and of the Council on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market, COM (2012) 238 final.
52 Proposal, Art. 29.1.
53 Proposal, Art. 29.2.
54 FATF recommendation No. 24.
55 Transparency international, The 4th Anti-Money Laundering Directive: Brussels hears what we want to talk about, 18 March 2013, http://www.transparencyinternational.eu/2013/03/the-4th-anti-money-laundering-directive-brussels-hears-what-we-want-to-talk-about.
56 Transparency International, EU Leaders must end Financial Secrecy, 21 May 2013, http://www.transparency.org/news/pressrelease/eu_leaders_must_end_financial_secrecy.
57 FATF, recommendation No. 10 and its interpretative note.
58 Directive 2005/60, Art. 14.
59 Proposal, Art. 25.
60 Proposal, recital 39.
61 http://www.egmontgroup.org.
62 European Commission, Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office, COM (2013) 534 final, 17 July 2013.

The Revision of the EU Framework on the Prevention of Money Laundering

Delphine Langlois*

On 5 February 2013, the Commission adopted a proposal to update the Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.[1] As a complement to the criminal law approach, this directive sets up the basis of a preventive system relying on the vigilance of some private actors (banks, financial institutions, but also lawyers, accountants, or gambling providers) who are requested to analyse the risk of money laundering presented by their client's transactions.[2]

The inventiveness of criminals is without limit. Therefore, the Anti-Money Laundering Framework needs to be constantly updated. The revision of the directive aims at addressing new threats as well as reflecting the latest recommendations that the Financial Action Task Force (FATF, the international standard setter in the area of the fight against money laundering and terrorist financing) adopted last year.

I. Ongoing Negotiations in the Council and Parliament on the Commission Proposal – Reaching a First Step towards Political Agreement before the European Elections in May 2014

Discussions are progressing well in the European Council and Parliament. The Council, under the Irish – and, later, the Lithuanian – Presidency, has devoted its interest to the topic by starting discussions as soon as in April 2013.[3] In times of financial crisis and budgetary constraints, money laundering, together with the fight against tax fraud and tax evasion, is a topic high on the political agenda. The European Council highlighted this priority at its summit on 22 June 2013, when it called for adoption of the revision of the third Anti-Money Laundering Directive before the end of 2013. Although this objective will likely not be achieved, a first important step will have been reached when the Greek Presidency begins its work in January 2014.

The topic has not attracted less attention in the European Parliament. The Committee on Economic and Monetary Affairs (ECON) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE) will both share the responsibility of this portfolio. The focus on different angles may enrich the debate. ECON pays attention to the efficiency of EU legislation (with regard, in particular, to the administrative burden on businesses) while LIBE focuses more on the citizen and the proper balance between the fight against crime and the protection of fundamental rights. Rapporteurs have not yet delivered their reports, but debate has already taken place within the Committees. The first reading in the plenary of the Parliament is expected to take place in March 2014, just before the end of this legislative period.

II. Broad Support in the Council and Parliament on the General Approach Proposed by the Commission – Key Substantial Issues Still under Discussion

There is broad support in the Council and in the Parliament on the need to revise the Anti-Money Laundering Framework and on the general approach proposed by the Commission. A number of key substantial issues are nevertheless under discussion, *relating to* the scope of the directive, the right balance between an approach based on real risks and the level of harmonisation across Member States, cooperation between Member States, fundamental rights, and administrative sanctions.

1. The General Approach of the Directive: a Risk-based Approach

The Commission's approach follows the new FATF recommendations and focuses on a reinforced risk-based approach, an approach relying on a clear understanding of the risks and adoption of measures tailored to address them rather than dependence on prescriptive rules. This risk-based approach, coupled with a minimum harmonisation principle, triggers some challenges so as not to lead to the fragmentation of the internal market through divergent national rules. Member States will need to agree on a balance between these two objectives and on the level of harmonisation to achieve them.

2. The Need to Facilitate Cooperation between Member States

Another aspect of the Commission's proposal relates to the proposed strengthening of cooperation between the different national Financial Intelligence Units (FIUs). FIUs' tasks are

to receive and analyse reported suspicions of money laundering and to disseminate them to other competent national authorities, such as judicial authorities. Good cooperation within Member States, particularly through cooperation between these FIUs, is a key factor in the effectiveness of the fight against money laundering, since money laundering cases often involve several Member States or third countries. The Commission proposes to reinforce their powers and facilitate their cooperation.

3. The Extension of the Scope of the Directive

Another important issue under discussion concerns the scope of the proposed new directive: while all Member States seem to agree on the extension of the obligations of the directive to gambling services beyond the mere casino sector, the exact scope of services to be included remains to be agreed upon (the Commission proposed including all gambling services). A proposed extension of the scope to letting agents has also raised some questions among several Member States. Another issue that has been raised is the proposed inclusion of traders in goods or service providers if they conclude a cash transaction exceeding €7500 (the current threshold is €15,000), which some Member States consider to be an inappropriate limitation of the use of cash.

4. The Balance between the Need for Security and the Protection of the Fundamental Rights

The right balance between security and the protection of fundamental rights is a sensitive issue, in particular with regard to the protection of our personal data. The preventive system of the Anti-Money Laundering Directive indeed requires the processing and exchange of personal data in order to be able to detect a criminal who might hide behind the customer of a person subject to the vigilance obligations of the directive, e.g., financial institutions but also legal professionals like lawyers. Fundamental right issues will have to be scrutinised by the members of the LIBE Committee in the European Parliament.

5. The Strengthening of Administrative Sanctions

The Commission's proposal to strengthen administrative sanctions raises some concerns among some stakeholders who fear that the maximum sanctions would be set at a very high level (up to €5 million for a natural person), especially when compared to the criminal sanctions imposed on the perpetrators of the primary offence. The Commission proposes to harmonise the maximum range of sanctions since there is currently a huge divergence across Member States (maximum sanctions across Member States currently range from a few thousands euros to tens of millions of euros).

III. Feeling the Impact of the Political Context of the Fight against Tax Fraud and Evasion on Key Issues of the Revision of the AML Directive

There is some complementarity between the fight against money laundering and the fight against tax fraud and tax evasion – in particular because tools designed to combat money laundering can help detect and prevent tax evasion.

1. An Explicit Reference to Tax Crimes to Specify the Scope of the Directive

The proposed directive introduces an explicit reference to tax crimes as a predicate offence of money laundering. Although this reference does not, strictly speaking, extend the scope of the directive (since tax crimes are currently already included insofar as they constitute serious crimes punishable by deprivation of liberty of more than one year),[4] this explicit reference reveals a new political impetus in the fight against tax fraud and tax evasion.

Yet, it has to be noted that the directive does not provide for any definition of tax crimes; Member States remain free to determine which offence, in their view, constitutes a tax crime.[5] As a complement to this preventive approach, the Commission is considering action in the area of criminal law. It is currently assessing the need to criminalise and harmonise the definition of money laundering. A definition of what constitutes a tax crime would in any case not be provided. It is interesting to note that, once again, the protection of the European Union financial interests has played a precursor role. The second protocol to the 1997 Convention on the Protection of the European Communities' Financial Interests (the PIF Convention),[6] which entered into force in May 2009, requires the criminalisation of money laundering of the proceeds of serious fraud or corruption affecting EU financial interests.

2. An Increased Transparency Regarding Beneficial Owners

The Commission's proposal to reinforce transparency on the real beneficial owners of companies or legal arrangements (such as trusts) can also help to fight tax fraud and tax evasion and is of interest for the protection of EU financial interests. Beneficial owners are the natural persons on whose behalf a transaction or activity is being conducted. Criminals may not hide behind a complex chain of companies or behind legal instruments allowing for anonymity, such as trusts. Therefore, the European Commission proposes to require all EU companies, as well as trusts or foundations, to hold and maintain up-to-date information on their beneficial owners and to make this information available to public authorities and to the private entities subject to vigilance obligations. Voices are calling for

more ambition and, in particular, for public registries of beneficial owners. This will also be an important issue for the European Parliament in the context of the fight against tax fraud and tax evasion. In order to be an efficient tool, the information would nevertheless need to be continuously updated and controlled so that it is reliable, a requirement which is not easy to achieve.

In times of economic difficulties, the political impetus given to the fight against tax evasion since 2008 has inevitably had some repercussion on the context of negotiations regarding the revision of the Anti-Money Laundering Directive. The inclusion of tax crimes in the list of predicate offences as well as enhanced transparency, however, follow their own rationale and are essential tools towards increasing the effectiveness of the fight against money laundering. While being ambitious, the reform needs to follow a balanced course and to carefully define the concepts in order to implement new objectives assigned to the fight against money laundering.[7]

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* The views expressed in this Article are the personal views of the author and may not be interpreted as stating an official position of the European Commission.
1 Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (COM/2013/045). The Commission also adopted a proposal to revise the Regulation of the European Parliament and of the Council on information accompanying transfers of funds (COM/2013/044 final), which ensures traceability of transfers of funds.
2 The Anti-Money Laundering Directive is part of a broader set of legislative measures aimed at the prevention of money laundering and terrorist financing, including Regulation 1781/2006, which ensures traceability of transfers of funds (a proposal for a revised Regulation was also proposed on 5 February 2013 and is being negotiated in the Council together with the AML Directive), Regulation 1889/2005 on cash controls (which requires persons entering or leaving the EU to declare cash sums they are carrying if the value amounts to €10,000 or more), EU Council Decision 2000/642 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information, and a number of EU legal instruments imposing sanctions and restrictive measures on governments of third countries or non-state entities and individuals.
3 The first working group meeting of the Council, with experts from national administrations, took place on 24 April 2013.
4 The Directive follows an "all serious crimes approach," which means that any serious crime must be considered as a predicate offence to money laundering.
5 Divergent definitions of tax crimes across Member States make the cooperation between Member States more difficult as regards the fight against tax fraud and tax evasion and the money laundering of the proceeds of these tax crimes. However, harmonisation of this definition would require as a legal basis the use of Art. 113 of the Treaty on the Functioning of the European Union (harmonisation of tax legislation) rather than Art. 114 (harmonisation of internal market legislation) which forms the legal basis for the Anti-Money Laundering Directive.
6 Second Protocol to the Convention on the protection of the European Communities' financial interests, O.J. C 221 of 19.07.1997.
7 In this respect, it is interesting to note that the development of the fight against money laundering is characterised by a constant broadening of the crimes in which money laundering of their proceeds is tackled as well a constant broadening of the private actors from whom vigilance is requested. When the first legal instrument was put in place in 1988, only drug trafficking was included (United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances). Later came the objectives to also fight against the laundering of proceeds of all kinds of organised crime, to fight against the financing of terrorism after 11 September 2001, and, from now on, to fight against the laundering of proceeds of tax fraud.

Civil Asset Recovery: The American Experience

Stefan D. Cassella*

In the United States, federal prosecutors routinely employ asset recovery as a tool of law enforcement. The approach takes two forms. In criminal cases, the prosecutor may seek to recover or "forfeit" property as part of the defendant's sentence, if the defendant is convicted. Alternatively, the prosecutor may commence a civil proceeding, naming the property as the defendant and seeking to forfeit the property independent of any criminal proceeding. This article discusses the American ex-

perience with civil, or non-conviction-based, asset recovery. It discusses the prosecutor's motivations for seeking to forfeit assets, the types of property that may be forfeited, the procedures that govern civil asset forfeiture, the advantages of civil or non-conviction-based asset forfeiture over criminal forfeiture, and the ways in which the United States, through judicial decisions and legislation, has reconciled the non-conviction-based approach with the requirements of basic human rights and civil liberties.

I. Terminology

In the United States, the term "civil forfeiture" refers to non-conviction-based forfeiture proceedings. It contrasts with "criminal forfeiture," which requires a criminal conviction and is imposed as part of a criminal sentence. Experience shows, however, that the term "civil forfeiture" can be confusing when employed in the international context. To avoid the confusion and the unnecessary distraction created by the use of the term "civil forfeiture" when discussing asset recovery in the international context, I will use the term "non-conviction-based" forfeiture from this point forward.

II. Why Do Forfeiture?

The prosecutor may have multiple reasons for seeking to recover the assets involved in the commission of a criminal offense. Indeed, it would be the rare case if only one of the following motives were to apply. Frequently, they are overlapping and mutually reinforcing.

- First, forfeiture serves the non-punitive purpose of taking the profit out of crime.[1] Whatever benefit the wrongdoer obtained or retained as a consequence of his offense is simply forfeited to the Government.
- Second, forfeiture is seen as a form of punishment. Incarceration is a form of punishment but so is forcing the wrongdoer to disgorge the accouterments of the lavish lifestyle he acquired through his criminal acts. Indeed, many prosecutors relate that it was the loss of the luxury items acquired through a life of crime, not the period of time to be spent behind bars, that most distressed defendants.
- Third, forfeiture serves as a deterrent. If one fraudster, child pornographer, corrupt politician, or drug dealer is not permitted to retain the fruits of his crime, perhaps the next person will be less likely to travel the same road.
- Fourth, forfeiture is used as a form of prevention; it allows the Government to deprive wrongdoers of the tools of their trade and the economic resources they would employ to commit similar or more serious crimes in the future.[2] In drug trafficking cases, for example, the prosecutor does not want the drug dealer to keep the airplane that might be used again to smuggle drugs or the land where he could produce another load of marijuana. The benefit of using the forfeiture laws to intercept the flow of guns to Mexico or the export of a flight simulator to a government that sponsors terrorism is obvious.
- Fifth, another form of prevention is the disruption of criminal organizations.[3] Money is the glue that holds organized criminal enterprises together; they have to recycle the money in order to keep the scheme going to lull more victims into the fraud scheme, to buy more drugs, to finance acts of terrorism, or to pay bribes to corrupt officials. Moreover, it is often noted that it is harder for a drug organization to replace the money seized by law enforcement after the drugs have been distributed than it is to replace the drugs if they are seized beforehand. Thus, taking the money does more to interrupt the cycle of drug distribution than any number of buy/bust arrests of street dealers or seizures of drugs as they are being imported.
- Sixth, forfeiture is used in the United States as a means of recovering property that has been taken from victims and of restoring it through processes known as "restitution" and "restoration." The United States has a robust set of restitution laws, but for procedural reasons, forfeiture is a more effective way of recovering money for victims than ordering the defendant to pay restitution.
- Seventh, forfeiture is used to protect the community and to demonstrate to the community that law enforcement is working in its interest. If the police are able to use the forfeiture laws to shut down a crackhouse and turn it into a shelter for battered women, they have at once removed a hazard to public health and safety, provided a much-needed resource to a community, and created a visible demonstration of the effectiveness of the local law enforcement agency's efforts.
- Finally, forfeiture is used as a way of encouraging cooperation between state and federal law enforcement agencies and of focusing their resources on the economic aspects of crime. Through a program called "equitable sharing," state and local law enforcement agencies that assist federal law enforcement in investigating and prosecuting federal offenses leading to the forfeiture of assets are allowed to use a portion of those assets to supplement their budgets. They are not, however, allowed to pay the salaries of the agents or officers who handle the cases and thereby are given an incentive to dedicate resources to matters that have the highest federal priority.

III. Non-Conviction-Based Forfeiture

All of these motives apply equally to criminal and non-conviction-based forfeiture. The difference between the two approaches is procedural. In a criminal case, forfeiture is part of

the defendant's sentence.[4] After the defendant is found guilty beyond a reasonable doubt, the court determines on a balance of the probabilities whether the property the Government is seeking to forfeit was derived from, used to commit, or was otherwise connected to the crime in a way that would allow it to be forfeited to the Government. If the property is unavailable, the Government may obtain a personal money judgment against the defendant and may satisfy that judgment out of any assets of equal value that the defendant may own – property known as "substitute assets."[5] Finally, the Government must give notice of the forfeiture order to any third parties with an interest in the forfeited property and afford them an opportunity to contest the forfeiture on the ground that it belongs to the third party and not to the defendant.

In a non-conviction-based forfeiture proceeding, there is no requirement of a criminal conviction or even of a criminal investigation.[6] The Government brings the action against the property as the defendant *in rem*, and any person seeking to oppose the forfeiture action must intervene to do so. This is why, in the United States at least, non-conviction-based forfeiture cases have such unusual names, such as *United States v. $65,000 in U.S. Currency* or *United States v. 2005 Mercedes Benz E500*. The forfeiture process is straightforward and is described in detail in statutes and rules.[7] Basically, the Government seizes the property and must provide notice to the owner and any other interested party of the forfeiture action and the right to intervene.

If the property owner, universally referred to at this stage as the "claimant," chooses to intervene by filing a proper claim, the case proceeds through various stages in which the parties can conduct discovery to obtain evidence, the claimant may move to suppress evidence or to dismiss the Government's case, and the Government may move to strike the claim for lack of standing (i.e., the lack of a sufficient interest in the property). Finally, if the case goes to trial, the Government has the burden of establishing on a balance of the probabilities that a crime occurred and that the property was derived from, used to commit, or was otherwise involved in the offense in terms of the particular statute authorizing forfeiture. If the Government meets that burden, the claimant then has the burden of establishing that he or she was an "innocent owner," or that the forfeiture of the property would be "grossly disproportionate to the gravity of the offense" on which the forfeiture is based.

1. What Can Be Forfeited

Forfeiture actions in the United States may be brought against contraband, the proceeds of crime, and any property that is used to commit or facilitate the commission of a criminal offense. There are, however, statutes that sweep more broadly. In money laundering cases, for example, the Government may forfeit all property involved in a money laundering offense, including untainted property that was commingled with the criminal proceeds at the time the money laundering offense took place.

2. Advantages of Non-Conviction-Based Forfeiture[8]

We now turn to some examples in which asset recovery would not be possible were it not for the availability of non-conviction-based forfeiture proceedings or in which non-conviction-based forfeiture is at least the superior option.

a) Where the forfeiture is uncontested

If the Government files a forfeiture action directly against the property, and no one files a disputing claim, the property may be forfeited to the Government directly without any judicial forfeiture proceeding. In the United States, 80 percent of forfeiture cases – involving as much as $600 million in a recent year – are resolved in this fashion.

b) Where the defendant has died

The Government can only obtain a forfeiture order as part of the sentence in a criminal case if the defendant lives long enough to be tried, convicted, and sentenced. If the defendant dies before his conviction is final, as in the case of Kenneth Lay, head of the Enron Corporation, non-conviction-based forfeiture becomes the principal means of recovering property traceable to the underlying crime.

c) Where the wrongdoer is unknown

In the United States, law enforcement agents commonly find criminal proceeds in the hands of a courier – a person who was not himself involved in the commission of the crime. It is often clear from the circumstances that the money at issue is criminal proceeds, but neither the Government nor (in most cases) the courier knows who the money belongs to or who committed the underlying criminal offense. In such cases, there is no chance of bringing a criminal prosecution, yet it is still desirable for the Government to recover the money. Thus it is not unusual in the United States to file a forfeiture case against a very large sum of currency that was seized from a courier. Many of these are drug cases, but the scenario appears in other contexts as well (the financing of terrorism being one prominent example).

d) Where the property belongs to a third party

It is quite common for a person to commit an offense using property that belongs to a third party. For example, a robber may carry out a robbery using someone else's gun. In a criminal case, the Government cannot forfeit property that belongs to a third party if the third party has been excluded from the proceeding, as this would violate the third party's right to due process. In fact, criminal forfeiture laws have a procedure specifically designed to *exclude* the property of third parties from a criminal forfeiture order, even if the third party knew about or was even complicit in the commission of the crime. Yet if the third party was aware that his property was being used for a criminal purpose – or was willfully blind to that fact – he should be made to forfeit the property. The procedural device for forfeiting property held by a non-innocent third party is non-conviction based forfeiture.

e) Where the interests of justice do not require a criminal conviction

There are many cases where the interests of justice do not require a criminal conviction on the offense giving rise to the forfeiture. Some of them involve relatively minor crimes, while others involve property owned by a person who played a minor role in the offense. In such cases, the forfeiture of the property in a separate non-conviction-based forfeiture action – and not criminal prosecution – is probably the best way to recover the property. Finally, there are very serious cases in which the criminal defendant will admit to committing a particular offense but will not admit to other conduct that gave rise to the lion's share of his criminal proceeds. In such a case, non-conviction-based forfeiture is needed to recover the much larger body of assets involved in the scheme.

In all of these instances, the point is the same: because criminal forfeiture is imposed as part of the defendant's sentence, there can be no forfeiture if no one is convicted or if the property belongs to a person who was not convicted. So, where the interests of justice do not require a conviction, non-conviction-based forfeiture provides a means of imposing a punishment that fits the crime.

f) Where the wrongdoer is a fugitive

Criminal forfeiture is available only when there is a conviction, but there can be no conviction as long as the accused is a fugitive from justice. Non-conviction-based forfeiture, however, allows the Government to file an action against the assets that the fugitive left behind. The fugitive retains the right to contest the forfeiture, but only if he is willing to surrender to face the criminal charges; he cannot ignore the process of the court in the criminal case and ask the court to protect his property interests in the civil one.

g) Where the criminal case is prosecuted by another sovereign

Finally, federal prosecutors use non-conviction-based forfeiture when the defendant has already been prosecuted elsewhere (in one of the 50 states or in a foreign country) and thus will not be prosecuted federally, but there are assets related to the crime that may be recovered under federal law. For example, if someone commits an offense in Norway or Nigeria and conceals the proceeds of the crime in the United States, a federal prosecutor can use the non-conviction-based forfeiture laws to recover that property, even though the defendant has already been convicted of the criminal offense in a Norwegian or Nigerian court. This can often be a more efficient way of recovering the property than trying to register and enforce a foreign confiscation order.

3. Civil Liberties and Due Process Concerns

In most instances, the protection afforded to property owners' civil liberties in non-conviction-based forfeiture cases is the same as it is in criminal cases. In both proceedings, for example, the property owner can seek to suppress evidence obtained in violation of the Fourth Amendment protection against unreasonable searches and seizures; is entitled to fair notice and an opportunity to be heard as guaranteed by the Fifth Amendment Due Process Clause; is entitled to cross-examine witnesses and insist on the application of the Rules of Evidence; and is protected from the imposition of a forfeiture that is grossly disproportionate to the gravity of the offense under the Excessive Fines Clause of the Eighth Amendment. There is also a right to a trial by jury, which is actually more robust under the Seventh Amendment in the non-conviction-based context then it is in the criminal context. In neither case is the defendant or the property owner entitled to use property subject to forfeiture to finance his defense.[9]

For other purposes, however, the non-conviction-based proceeding does not contain the same constitutional protections for basic human rights that are available in a criminal proceeding. In non-conviction-based proceedings, the Government's burden is to establish the forfeitability of the property by a balance of the probabilities (not beyond a reasonable doubt); there is no right to remain silent and there is no right to the provision of counsel at Government expense if the claimant is unable to afford counsel of his or her own choosing. As the Supreme Court has held, non-conviction-based forfeiture proceedings are not criminal proceedings for purposes of invok-

ing the provisions of the Bill of Rights that are reserved for the protection of criminal defendants whose liberty is placed in jeopardy by the filing of criminal charges. The process of determining which constitutional protections would apply in non-conviction-based forfeiture proceedings and which would not has evolved piecemeal over many years. The procedures governing civil forfeiture practice were borrowed from 18th Century admiralty practice and needed to be modified to fit modern usage and the concept of due process. Many of the constitutional issues were addressed by the Supreme Court in the decade from 1992-2002; others were addressed legislatively in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). The following is a brief discussion of how some of the most prominent issues were resolved.[10]

a) Presumption of innocence and the burden of proof

The practice in admiralty included a reverse burden of proof: once the Government showed that it had a reasonable basis to believe the property was subject to forfeiture (what the courts in the United States call "probable cause"), the burden was on the property owner to prove that it was not. The Supreme Court repeatedly held that this was constitutional: the presumption of innocence embodied in the Bill of Rights applies only in criminal cases. But the presumption of innocence is so ingrained in American practice and culture, and in the expectations of the jurors who will decide civil cases if they go to trial, that it made sense to modernize the procedure by placing the burden on the Government to establish the connection between the property and a criminal offense in the first instance. This was accomplished with CAFRA.

In practice, placing the burden of proof on the Government has made very little difference in the outcome of cases. Generally, the Government's evidence is fairly strong, and the number of cases in which the evidence was evenly divided, such that the allocation of the burden of proof mattered, were few. Indeed, the amount of property forfeited has more than tripled since CAFRA was enacted.

b) The innocent owner defense (*Bennis*)

Finding a way to deal with innocent third parties who have an interest in the property subject to forfeiture was more controversial. In *Bennis v. Michigan*,[11] the Supreme Court affirmed two centuries of precedent and held that imposing strict liability on third parties does not violate their due process rights. But in CAFRA, the Justice Department proposed, and Congress enacted, a uniform innocent owner defense. By statute, the defense gives third parties the opportunity to protect their property from forfeiture, even if it was derived from or used to commit a crime, if (1) they did not know of, or took all reasonable steps to prevent, the illegal use of the property; or (2) they acquired the property interest as a bona fide purchaser for value without reason to know that it was subject to forfeiture.[12]

c) Due process and notice (*Dusenbery*)

There was also a great deal of litigation over the steps the Government must take to provide notice of the forfeiture action to interested parties. In an *in rem* action, it is not always immediately apparent that the property owner is aware that a forfeiture action has been commenced. The rule that emerged, and was eventually codified, is that the Government must send written notice to any person who appears to have an interest in the property within 60 days of its seizure and must also publish notice on the Internet on an official Government website.[13]

d) The Eighth Amendment and the Excessive Fines Clause (*Bajakajian*)

Another controversial issue – and the subject of three separate Supreme Court cases in the 1990s – involved the proportionality of the forfeiture to the seriousness of the crime. A forfeiture may potentially be large enough to implicate the Excessive Fines Clause of the Eighth Amendment, making the forfeiture unconstitutional. Thus, in *United States v. Bajakajian*,[14] when a traveler leaving the Los Angeles airport with $347,000 concealed in his luggage committed the relatively minor offense of not reporting the currency on his Customs form, the Supreme Court held that the forfeiture of the entire $347,000 was unconstitutional because it was "grossly disproportional to the gravity of the offense." However, the Court did not say how much could be forfeited without being unconstitutional; lower courts have been wrestling with this question ever since.

Generally, the forfeiture of the actual proceeds of a crime is never problematic – it is difficult to envision how the forfeiture of a crime's proceeds could disproportional, let alone grossly disproportional, to the gravity of the offense. But the situation may be different when valuable property, such as a person's home, is used to facilitate the commission of an offense. At what point, for example, does the forfeiture of the home become disproportional to the offense of collecting or producing child pornography, or subjecting children to sexual abuse?[15]

e) Self-incrimination, the right to a stay, and adverse inferences

Another set of issues arises when there is a non-conviction-based forfeiture action and a parallel criminal investigation or trial. Under the Fifth Amendment to the Bill of Rights, a criminal defendant has the right to remain silent and put the Government to its proof. When the Government files a paral-

lel civil forfeiture action, however, the defendant is presented with a Hobson's choice: does he invoke his right to remain silent so that what he says cannot be used against him in his criminal case but in doing so foregoes his opportunity to defend his property, or does he give evidence in the forfeiture case? There are various ways to deal with this problem, but the choice that was made in CAFRA was to allow the defendant who is subject to criminal liability in a related case to ask that a related non-criminal case be stayed until the criminal case is over, thus making it unnecessary for him to make the choice between his property and his right to remain silent.

f) The Sixth Amendment right to counsel

A criminal defendant has the right to court-appointed counsel in a criminal case under the Sixth Amendment but, as mentioned earlier, that right does not extend to civil cases. In CAFRA, however, Congress created a limited right to court-appointed counsel if the property subject to forfeiture is the claimant's primary residence. The view was that no one should be at risk of losing his home without having counsel to defend him. The right to counsel also arises when the defendant in a criminal case claims that he needs property that the Government has seized or restrained under the forfeiture laws to pay for counsel of his choice in the criminal case. The Supreme Court has held that there is no constitutional right to exempt criminally derived property from forfeiture so that a defendant may use it to hire counsel;[16] but criminal defendants who first demonstrate that they lack other funds with which to retain counsel do have a right to a pre-trial hearing at which the Government must establish probable cause to believe that the property is likely to be forfeited.

IV. Conclusion

The American experience with civil, or non-conviction-based, asset forfeiture spans more than two centuries. In that time, it has become an essential tool of law enforcement, resulting annually in the recovery of over $2 billion is assets derived from or used to commit federal crimes. As the use of non-conviction-based forfeiture has expanded, enormous attention has been given to the protection of individual rights and civil liberties by the courts and the national legislature, with the result that litigants now have a high level of confidence that their rights will be protected regardless of what form the Government's forfeiture action may take.

The process of refining the forfeiture laws and procedures is not yet complete. Matters of significance are litigated daily, and new cases are pouring in from the trial and appellate courts. But the major issues having been resolved, it is certain that non-conviction-based forfeiture will continue to play a significant role in efforts to deprive criminals of the fruits of their crimes and to take the instruments of crime out of the hands of those who would use them to violate the law. Indeed, with the globalization of the financial system and the resulting ease with which criminals of all persuasions are able to move criminal proceeds across international borders, it is highly likely that non-conviction-based forfeiture will assume an even greater role in recovering the proceeds of crime that are generated in one nation and transferred to another, particularly where the Government has little likelihood of bringing the wrongdoer to justice through a traditional criminal trial.

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* The views expressed in this chapter are solely those of the author and do not necessarily reflect the views of the United States Department of Justice or any of its agencies. This chapter is an expanded version of a presentation made by the author at the seminar entitled "Civil Asset Forfeiture: Exploring the Possibilities for an EU Model", sponsored by the Max Planck Institute for Foreign and International Criminal Law and the University of Tromso, Sommaroy, Norway, 1 June 2012.

1 See *United States v. Ursery*, 518 U.S. 267, 291 (1996) ("[*Forfeiture*] *serves the additional non-punitive goal of ensuring that persons do not profit from their illegal acts*").

2 *See* von *Hofe v. United States*, 492 F.3d 175, 184 (2d Cir. 2007) ("Like imprisonment, which incapacitates convicted criminals, forfeiture may be said to incapacitate contraband".).

3 See *Caplin & Drysdale v. United States*, 491 U.S. 617, 630 (1989) ("[*A*] *major purpose motivating congressional adoption and continued refinement of the racketeer influenced and corrupt organizations (RICO) and [continuing criminal enterprise] forfeiture provisions has been the desire to lessen the economic power of organized crime and drug enterprises*").

4 See *Libretti v. United States*, 516 U.S. 29, 39 (1995) ("[*C*]*riminal forfeiture is an aspect of punishment imposed following conviction of a substantive criminal offense*".).

5 See, e.g., *United States v. Vampire Nation*, 451 F.3d 189, 201-203 (3d Cir. 2006) (rejecting the argument that a forfeiture order must order the forfeiture of specific property; as an *in personam* order, it may take the form of a judgment for a sum of money equal to the proceeds the defendant obtained from the offense, even if he no longer has those proceeds, or any other assets, at the time he is sentenced).

6 See *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 361-362 (1984) (holding that acquittal on gun violation under 18 U.S.C. § 922 does not bar civil forfeiture under 18 U.S.C. § 924(d); *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 234-35 (1972) (*per curiam*) (determining that acquittal on criminal smuggling charge does not bar later civil forfeiture).

7 See 18 U.S.C. § 983 (2009); Fed. R. Civ. P. Rule G (Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions). The process is also described in detail in Chapters 3-14 of Stefan D. Cassella, Asset Forfeiture Law In The United States, Second Edition, Juris Publishing (New York 2013).

8 The advantages and disadvantages of criminal and non-conviction-based

forfeitures under U.S. federal law are discussed in more detail in Chapter 1 of Asset Forfeiture Law, *supra* note 7. See also Stefan D. Cassella, The case for civil forfeiture: Why in Rem proceedings are an essential tool for recovering the proceeds of crime, 11 J. of Money Laundering Control 8 (2008).

9 See Caplin & Drysdale, 491 U.S. at 630.

10 For a complete discussion of the development of asset forfeiture law in the United States, including the application of constitutional protections embodied in the Bill of Rights to non-conviction-based proceedings, see Chapter 2 of Asset Forfeiture Law, *supra* note 7.

11 516 U.S. 442, 446 (1996).

12 See U*nited States v. One 1990 Beechcraft*, 619 F.3d 1275, 1278 (11th Cir. 2010) (explaining that § 983(d) was enacted in response to the Supreme Court's decision in *Bennis*, holding that an innocent owner defense is not constitutionally required, and to bring uniformity to federal forfeiture law which contained a variety of inconsistent innocent owner provisions prior to CAFRA). The uniform innocent owner defense, codified at 18 U.S.C. § 983(d), is discussed in detail in Stefan D. Cassella, The Uniform Innocent Owner Defense to Civil Asset Forfeiture, 89 Ky. L.J. 653 (2001).

13 See *United States v. Dusenbery,* 534 U.S. 161, 167, 172-173 (2002).

14 524 U.S. 321, 322-23 (1998).

15 The case law on the application of the Excessive Fines Clause to civil and criminal forfeiture is discussed in detail in Chapter 28 of Asset Forfeiture Law, *supra* note 7.

16 See *United States v. Monsanto*, 491 U.S. 600 (1989).

Confiscation by Equivalent in Italian Legislation

Massimiliano Mocci

I. Introduction

The extent of the phenomenon of tax evasion in Italy is now at such a level that,[1] unfortunately, the legislative tools for control and repression, which are limited to administrative sanctions, are inadequate to effectively contain or to tackle such a massive subtraction of resources. Tax evasion affects direct national taxation, VAT, and, consequently, the European Union budget. Thirteen years after its adoption,[2] the "new discipline of crimes relating to income and valued added taxes," having at the time replaced the previous legal provisions constituted by Law No. 516 of 1982, is showing signs of age. Renewed on several occasions with the addition of Arts. 10-bis in 2005 (omission to pay retention tax on employment income) and Arts. 10-ter and quater in 2006 (omission to deposit VAT and improper reimbursement), fiscal crimes are currently undergoing a new period of severity under the current wording, having been renewed by recent amendments implemented by the Legislative Decree of 13 August 2011, No. 138, converted by the Law of 14 September 2011, No. 148.[3]

Within the context described, as a supplement to the penal tools provided by the aforementioned legislative decree, the legal provision of Art. 1, paragraph 143 of Law No. 244 of 2007 was inserted, introducing into our legal system "confiscation by equivalent," governed by Art. 322-ter of the penal code. Moreover, it is already being used for other circumstances in relation to crimes against the public administration (embezzlement, corruption, bribery, etc.) and other entities (fraud, etc.). As such, with regard to the above-mentioned Art. 322-*ter*, "the confiscation of goods which constitute a profit or price is always ordered, unless they belong to a person who was totally unrelated to the crime, otherwise, when this is not possible, the confiscation of goods available to the offender is carried out, corresponding to the value of such a price." This compulsory confiscation was then extended to the tax offences foreseen by Legislative Decree No. 74/200, with the exception of Art. 10 (crime of concealment or destruction of accounting documentation), stating that "in cases foreseen by articles 2, 3, 4, 5, 8, 10-bis, 10-ter and 10-quater, the provisions of article 322-ter of the penal code are observed where applicable."

Confiscation by equivalent, or by value, represents a distinct circumstance with respect to that governed by Art. 240 of the penal code, the intention being to intervene directly as regards those goods that constitute the profit or proceeds of the crime: property of a value corresponding to the profit or proceeds which are in the material possession of the offender. The objective of the legislator is that of depriving the offender of the financial benefit obtained by committing the tax offence attributed to him. In the event, therefore, that the original good or financial benefit obtained by committing the offence is not retrievable from the property of the guilty party, the application of the new confiscation legislation allows goods or property of an equivalent value to that of the original goods or property to be taken.

One of the most singular characteristics of the provision under discussion is the fact that, for it to be applied, no link of pertinence is required or rather no direct, current, and instru-

mental connection between the offence and the goods being confiscated. The absence of such a link between the goods and the offence itself, initially subject to precautionary sequestration and, subsequently, to confiscation, confers to the institution a mainly preventive function. It attributes a sanctioning nature to confiscation by equivalent, as recognised moreover by the jurisprudence of the United Sections of the Court of Cassation No. 41936 of 2005. The Court affirmed that confiscation adheres to a logic of sanctions, as a form of prevention and as a strategic tool of criminal policy aimed at tackling the systemic phenomena of financial crime and organised crime, further adding that "constituting a form of public withdrawal as compensation for illegitimate withdrawals, confiscation by equivalent assumes a predominantly sanctioning nature."

Considering this characteristic, it is the jurisprudence of legitimacy itself that enables the principle of non-retroactivity to be applicable to confiscation by equivalent. It is therefore applicable only to offences that took place after January 2008, in respect of the well-known principle which can be found in Art. 2 of the penal code.[4] The provision can only be applied to the perpetrator directly responsible for the tax offence and someone who operated directly alongside him or her, as identified in Art. 110 of the penal code. Other individuals not directly involved in illegal conduct are therefore excluded.

It must be considered, on the basis of general principles, that the concept of *availability* is intended to bear a reference to all those juridical situations, even those concerning ownership, which permit the full enjoyment of the goods in question.[5] In practice, a number of critical elements regarding applicability have nevertheless been detected, which are mentioned neither in legal doctrine nor in jurisprudence. The reference is in relation to all those cases, occurring with significant frequency, in which the notice of precautionary sequestration with a view to confiscation issued by the judicial authority is addressed to a credit institute where the person under investigation for tax offences has deposited funds (e.g., current accounts, securities accounts, safety deposit boxes) directly connected to the confiscation notice in question. An unexpected event therefore occurs, showing cracks in a relationship of trust that links the bank with its client. It is not uncommon that bank overdrafts received by the person under investigation and, in turn, the lines of credit available to him are immediately proposed for renegotiation on the part of the credit institute. In these particular cases, the sanctioning nature of the provision is amplified, causing obvious business problems for the individual in question. An example of such a situation would be that in which there is only one account available, which is used for the management of a firm and in which the sum required by the provision is to be found.

II. The Orientation of Legitimacy of the Italian Court of Cassation

Four and a half years after the legislative provision in question came into force, there is no doubt as to how it has largely lived up to expectations. It seems clear that its introduction, made necessary by the extent of the tax evasion phenomenon – although unpopular with the business world –, has proven worthwhile from other points of view. This occurred despite the fact that the legislative provisions, with reference to paragraphs 1 and 2 of Art. 322-ter of the penal code, immediately presented problems of interpretation, both in terms of the correct definition of the "proceeds" and "profit" of the crime as well as with regard to the unequivocal criteria that must be conformed to in the event of criminal circumstances traceable to the individual rather than the company.

The Court of Cassation, in its function of upholding the law attributed to it by legislation, was called upon more than once to deliberate on the guarantee of the application of the law in concrete situations and to provide "uniform" interpretational guidelines to maintain, where possible, the unity of the juridical order. This approach was therefore followed, at the time, by a substantial production of jurisprudence that fixed fundamental principles of law. Without any pretence of exhaustiveness, a review of recent sentences by the Court of Cassation related to the subject of confiscation by equivalent will be undertaken in the following. In May 2013, the Court explained how, with the so-called plea bargain regarding the punishment,[6] the applicability of the confiscation is not excluded, given that the agreement does not restrict the judge, who is only legitimated to adhere to the decision regarding the instruction of the sequestration provision. In its comment on the sentence, the Court also considered the correspondence of the evaded tax with the "profit" subject to confiscation by equivalent, not upholding the necessity of a means test in the cross-examination between the parties with reference to its quantification.[7]

The orientation that it is impossible to sequestrate company assets for conduct constituting a tax offence attributable exclusively to the legal representative was already expressed in previous rulings.[8] This holds unless it is proven that the company structure is merely a fictitious screen serving only the commission of tax offences.[9] The third penal section of the Court of Cassation declared legitimate the sequestration of the assets of an entrepreneur who has not paid the declared VAT, even if that VAT has not yet been received. The ruling further highlights the impossibility of circumscribing profit to merely the sum received, without considering the benefit inherent to the "financial saving" deriving from not paying the tax. Value was therefore placed on the assumption that the profit deriving from a tax offence can be identified as being in an undoubted

patrimonial advantage directly originating from illicit conduct. Such a principle had previously been expressed in sentence No. 1199/2012.[10] The profit from the offence for which the regulation has intervened cannot be the subject of confiscation by equivalent. Removing the illicit circumstance makes the sequestration measure inapplicable. The judges specified that "the very nature of the sanction prevents the confiscation by equivalent from being able to find an application in relation to the proceeds or the profit deriving from an offence extinguished by prescription."[11]

The Court confirmed that sequestration with the aim of confiscation by equivalent has the nature of a sanction rather than that of a security measure, in as much as it reflects the intention of depriving the offender of a profit unjustly acquired through the commission of a crime.[12] In April 2013, the Court confirmed that, with regard to tax offences, precautionary sequestration with a view to confiscation by equivalent of the assets of an individual person does not require the precautionary exclusion of the assets of the entity. Therefore, when the responsibility of the legal representatives subsists or that of the person who acted on behalf of the legal entity that may be subject to precautionary sequestration, the sequestration can affect – at the same time as and without distinction – the assets of the entity that has drawn advantage from the said crime, but also those of the individual who actually committed the crime.[13]

The judge responsible for the precautionary sequestration, in view of confiscation by equivalent, has the burden, but not the obligation, of indicating the sum corresponding to which the measure can be executed. Only when he has evidence that can establish such a sum, must the said judge specifically indicate which assets are securable. In the event that such evidence does not exist, the identification of the assets is entrusted to the public prosecutor, as an entity empowered with the execution of the sequestration.[14] Sequestration in view of confiscation by equivalent of the assets of an entrepreneur accused of tax evasion is admissible, even if some companies attributable to the said entrepreneur are already involved in bankruptcy procedures. In substance, this confirms that the interests of credit protection override those, albeit legitimate, concerns of the creditors.[15] The Court ruled on the legitimacy of sequestration, in view of confiscation by equivalent, of the assets of the fiscal representative of the company having committed tax offences in the interests of the entity, even when the latter has been involved in bankruptcy procedures.[16]

In February 2013, the Court considered the sequestration in view of confiscation by equivalent issued by a criminal judge towards a taxpayer for omitting to pay VAT legitimately, even when the judge competent in tax matters has suspended the procedure regarding the payment.[17] Also in February 2013, the Court ruled against the sequestration of company assets for conduct attributable to the director of the company. The Court recalled that, for consolidated orientation, "despite not being able to exclude that the conduct" of the director "was to the advantage and in the interests" of the company, the said company "cannot be directly held responsible for such offences."[18] Confirming the orientation of the Supreme Court of Cassation, the Court specified that confiscation by equivalent can be ordered both in relation to the "proceeds" and the "profit" of the offence.[19] The judges underlined how, in doctrine and in jurisprudence, the provision of non-retroactivity of confiscation by equivalent has immediately led one to affirm that confiscating assets belonging to the offender in proportion to the enrichment following an illicit act constitutes a genuine sanction. This sanction is characterised as a consequence of the commission of an offence, as is the case with penal sanctions, regardless, however, of the preventive function that is inherent to security measures.[20] Given the fictitious nature of the companies involved, the Court permits sequestration in view of confiscation by equivalent towards assets registered in the company's name, confirming the decision of the judge for preliminary investigations The judges, with regard to legitimacy, further recalled that it is legitimate to confiscate assets, regardless of the "dangers" and "period of acquisition," because what is relevant is that the assets are "available to the offender" and have "a value corresponding to the illegitimate profit obtained."[21]

The Court considers that sequestration is also legitimate regarding items conferred to the offender's patrimonial fund.[22] The reason, as stated by the judges, is that "the items constituting the said fund remain available to the owner; with the consequence that they continue to belong to the owner and that they can be, therefore, subject to sequestration or confiscation as a consequence of the offences ascribed to the said owner."[23] The Court established a principle of law regarding the impossibility of ordering a provision of sequestration in view of confiscation by equivalent towards the legal entity if this would occur in violation of the principle of legality.[24]

The Court permitted precautionary sequestration in view of confiscation by equivalent by confirming, essentially, that the assets of the company should be confiscated following a fraudulent declaration made by its representatives, even in the event that such fraud is substantiated in the use of "subjectively non-existent" invoices. The tax that was unlawfully deducted therefore constitutes the "profit" of the offence attributed to the offenders.[25] The court affirmed that "In the event of tax crimes confiscation is justified up to the moment in which the recovery of the evaded taxes is completed in favour of the financial administration body with the corresponding *'deminutio'* of the funds of the tax-payer. Once such a moment has

passed, the precautionary sequestration no longer has any reason to exist".[26]

The Court approved the confiscation of the assets of an entrepreneur and tax evader to a value equal to the evaded tax plus the sanctions and interest arising from the tax inspection. This in as much as "it is observed that sequestration in view of confiscation by equivalent should refer, in fiscal offences, to the amount of tax evaded, which constitutes an undoubted financial advantage deriving directly from illicit conduct and, as such, attributable to the notion of 'profit.' constituted by financial saving from which the effective subtraction of the amounts evaded from their fiscal destination consequently follows, from which the person responsible for the offence certainly draws benefit".[27] The Court establishes how tax settlement[28] directly influences, by reducing it, the profit of the fiscal offence subject to sequestration and consequent confiscation by equivalent.[29]

The judicial guideline was reiterated according to which, with regard to offences committed in the interests of the legal entity, precautionary sequestration with a view to the confiscation of the assets of an individual does not require preventive exclusion from the assets of the entity for it to be legitimate."[30] Applying the principle expressed on several occasions with regard to the "penal sanctioning nature" of the confiscation, the Court deemed that such a sanction was not applicable "towards an individual other than the one responsible for the offence, regardless of, the so-called employment relationship between the offender and the legal entity of which, the said offender, assigned with various tasks and powers, is part."[31]

The Court confirmed the legitimacy of precautionary sequestration in view of confiscation even in the event of instalment payments of the evaded tax agreed upon with the financial administration body. This is in view of the fact that an agreement to pay in instalments does not imply that the offence is extinguished and that sequestration is legitimate until the payment of the final instalment.[32] The Court deemed sequestration ordered regarding the assets of the entrepreneur to be legitimate, regardless of the prior judgment concerning the company assets.

This is due to the fact that, in the case of multiple offenders there is no criterion of time identifying the offender in relation to whom the measure should be carried out.[33] The Court affirmed that, in the context of an investigation into carousel fraud, it is legitimate to confiscate the credit claimed by the company under investigation from another company. With no relevant link of pertinence between the assets to be confiscated and the crimes attributed to the individual who has access to such assets, the scope of the type of assets that can be the subject of confiscation is confirmed.[34] The Court declared admissible the sequestration in view of the confiscation of the entire amount of the invoice in the event of non-existent operations, in so far as it coincides with the profit of the offence.[35]

In February 2012, the Court confirmed two principles: First, confiscation by equivalent is legitimate regarding the assets of the entrepreneur, even if these assets are only jointly in his/her name, for an amount equal to the VAT evaded by the company. Second, the adoption of the measure does not assume the demonstration of a relevant link between the offence and the amount sequestered.[36]

III. Conclusions

For the punishments outlined above, one can infer principles of law of a general scope that are applicable in the area of precautionary sequestration with a view to confiscation by equivalent. The recipient of the real precautionary measure must be investigated for one of the crimes for which confiscation by equivalent is permitted as per article 322-ter Criminal Code No. (relevant link is necessary between the offence and the assets which are sequestered). Moreover, precautionary sequestration is not retroactive, as such measures are designed as penal sanctions.

The proceeds or profits of the offence for which the proceedings are ongoing does not have to be found on/among the property of the person under investigation, but its existence must be certain. The assets to be sequestrated need not belong to a person who is not connected to the offence, i.e., a person who not only did not participate in the event and did not commit criminal acts related to it, but who has also gained no advantage from the illicit act. Finally, company assets can only be sequestered in cases in which it is proven that the company structure is only a smoke screen for committing fraud.

Massimiliano Mocci
Guardia di Finanza

1 The statistics indicate that this phenomenon is at least 5% of annual gross domestic product of our country.
2 Legislative Decree No. 74/2000 entered into force 15 April 2000, in implementation of Art. 9 Act No. 205 of 25 June 1999.

3 In summary, remember the amendments to Articles. 2, 3, 4, 5, 8, 12, 13, 17 with the elimination of the less severe cases, significant lowering of thresholds of criminal law, the circumstances of the application of additional penalties with the addition of paragraph 2-bis, 'article 12, the application of the mitigating circumstances, the lengthening of prescription of offenses.
4 See in the same sense the rulings of the Supreme Court of 28 May 2008 and No. 21566 No. 943 of 24 September 2008
5 Prof. Avv. Ivo Caraccioli, in review "Guide to fiscal controls" No. 3, 2008.
6 Art.444 of the Code of Criminal Procedure, in the section "Application of the penalty on the request of the parties".
7 Sentence No. 22975 of 28 May 2013.
8 Sentences No.1256/2013, No. 33371/2013 and No. 25774/2012.
9 Sentence No. 22980 28 May 2013.
10 Sentence No. 19099 of 3 May 2013.
11 Sentence No. 18799 of 29 April 2013.
12 Sentence No. 17610 of 17 April 2013.
13 Sentence No. 15050 of 2 April 2013.
14 Sentence No. 12643 of 18 April 2013.
15 Sentence No. 12639 of 18 March 2013.
16 Sentence No. 10782 of 7 March 2013.
17 Sentence No. 9578 of 28 February 2013.
18 Sentence No. 9576 of 28 February 2013.
19 Sentence No. 6309 of 08 February 2013.
20 Sentence No. 5506 of 4 February 2013.
21 Sentence No. 3407 of 23 January 2013.
22 In Italian civil law, the patrimonial fund is a complex grouping of assets (buildings, registered moveable goods, bills of credit) constituted in order to satisfy the needs of the family. It can be constituted by spouses, possibly during the wedding, or it may be constituted by a third party. It is currently regulated by Art. 167 ff, Civil Code.
23 Sentence No. 1709 of 14 January 2013.
24 Sentence No. 1256 of 10 January 2013.
25 Sentence No. 204 of 7 January 2013.
26 Sentence No. 46726 of 3 December 2012.
27 Sentence No. 45849 of 23 November 2012.
28 Tax settlement allows the taxpayer to define the taxes owed and thus to avoid the emergence of a tax dispute. It is foreseen by Legislative Decree No. 218 of 1997.
29 Sentence No. 45847 of 23 November 2012.
30 Sentence No. 36050 of 20 September 2012
31 Sentence No. 33371 of 29 August 2012.
32 Sentence No. 31040 of 24 July 2012.
33 Sentence No. 17485 of 10 May 2012.
34 Sentence No. 15156 of 19 April 2012.
35 Sentence No. 14066 of 13 April 2012.
36 Sentence No. 4956 of 8 February 2012

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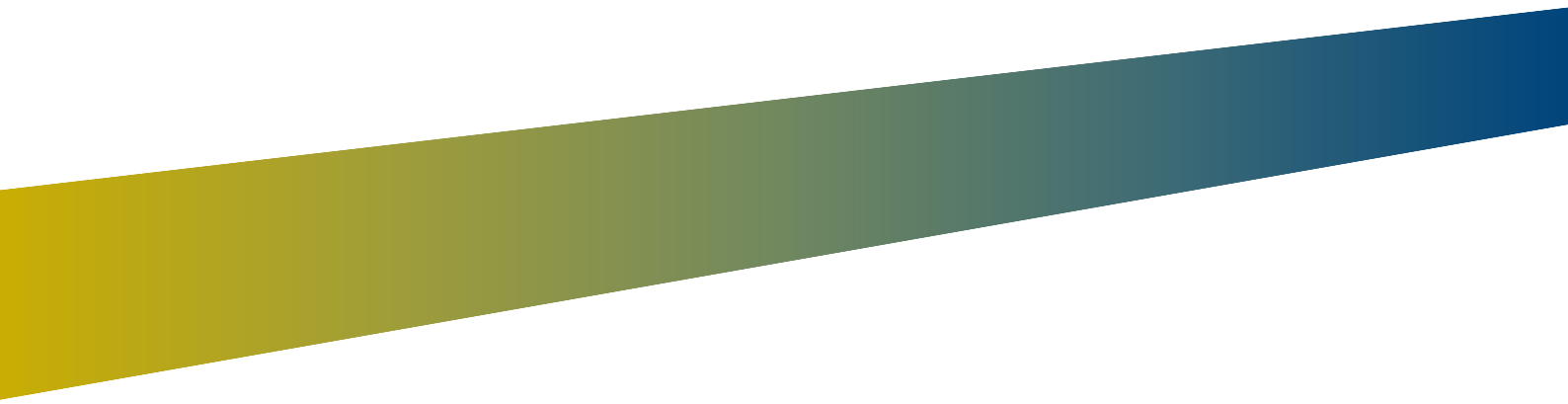
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