EDITIONS DE L'UNIVERSITE DE BRUXELLES

Do labels still matter?

Blurring boundaries between administrative and criminal law
The influence of the EU

EDITED BY
FRANCESCA GALLI AND ANNE WEYEMBERGH

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Foreword

This book is the result of the international conference "Do labels still matter? Blurring boundaries between administrative and criminal law" organised by ECLAN (European Criminal Law Academic Network) and the Institute for European Studies (Université Libre de Bruxelles) on 17 May 2013.

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Introduction

Anne Weyembergh

The subject of this collective book is very topical.

Criminal law has undergone tremendous changes in the past decades.

A number of new trends have been challenging the traditional features of "modern criminal law" as founded by Cesare Beccaria in the 18th century and developed thereafter. Some authors describe a process of "disengagement" from the fundamental principles upon which "modern criminal law" is based. They point to its corollary, the rise of the ideology of pragmatism, which, in the name of efficiency, is gradually transforming the whole philosophy underpinning the criminal justice system. Some of them thus refer to the "post-modernisation" of criminal law [1].

Among the new trends affecting criminal justice systems, one of them has attracted considerable academic attention in the last few years. This is the so-called "Europeanisation process", which is the result of the growing intervention of the EU in the area of criminal law. Criminal law and criminal procedure are deeply rooted in national sovereignty [2] and had therefore been developed at national level only. However, since the entry into force of the Amsterdam Treaty, the EU has taken a lead in the approximation of criminal legislation [3] and has developed new and closer cooperation mechanisms based on principles such as the mutual recognition of decisions in criminal matters [4]. With the entry into force of the Lisbon Treaty, the EU's scope for intervention in this field has been considerably broadened and its

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[1] M. Massé, J.-P. Jean and A. Giudicelli (eds.), *Un droit pénal postmoderne ? Mise en perspective des évolutions et ruptures contemporaines*, Paris, PUF, 2009.

[2] M. Henzelin and R. Roth (eds.), *Le droit pénal à l'épreuve de l'internationalisation*, Paris, Bruxelles, Genève, LGDJ, Bruylant, Georg, 2002.

[3] See F. Galli and A. Weyembergh (eds.), *Approximation of substantive criminal law in the EU: The way forward*, Brussels, Editions de l'Université de Bruxelles, 2013.

[4] A. Weyembergh, *L'harmonisation des législations: condition de l'espace pénal européen et révélateur de ses tensions,* Brussels, Editions de l'Université de Bruxelles, 2004.

supranational nature strengthened, thereby challenging the narrow and profound link between criminal law and the nation state even more.

Another new trend which criminal law and other legal disciplines are facing is the increasingly blurred dividing lines between legal categories. Several authors have highlighted the existence of a general blur [5]. Various dimensions of this blur have been identified in legal literature [6]. As will be highlighted by other authors in this book [7], the verb and the noun "blur" have rather negative connotations. As a verb, it is defined as the action of making or becoming vague or less distinct, of making less clear, of smearing or smudging. As a noun, "blur" means vague, hazy or indistinct [8]. Law and lawyers are not at ease when faced with vagueness and lack of clarity. This is especially true for criminal law and criminal lawyers, as is demonstrated by the well-known principle of legality in its substantive dimension. As will be underlined by some authors in the following contributions, these blurred dividing lines can, however, also have a positive impact or at least give rise to a multitude of consequences that cannot all be categorised as negative. This is clear, for instance, when one thinks of the application of criminal procedural guarantees by administrative law or of the so-called *Engel* line of case law of the European Court of Human Rights [9](ECtHR).

A growing blur can be observed between criminal and administrative law. Both fields of law have received numerous different definitions [10]. The dividing line between them has never been clear [11]. Their respective scope and/or the criteria dividing their respective jurisdiction can vary depending on the country concerned [12] and on the "approach" followed. The criminal nature of proceedings and of penalties can indeed be considered in a formal or substantial manner. As it is well known in its abovementioned *Engel* ruling, the ECtHR follows the second approach when considering whether national proceedings constitute a criminal charge in the sense of Article 6 ECHR [13].

The blur between criminal and administrative law has different manifestations and has a wide variety of origins. The scope of both administrative and criminal law tends to expand. Criminal law is being introduced in fields in which the legislator traditionally adopted administrative measures and vice versa. Fields such as terrorism or trafficking in human beings, which have traditionally been governed by criminal

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[5] See, among others, F. Ost and M. van de Kerchove, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Brussels, Publications des Facultés universitaires Saint-Louis, 2002.

[6] M. Delmas-Marty and Teitgen-Colly, *Punir sans juger? De la répression administrative au droit administratif pénal*, Paris, Economica, 1992.

[7] See, for instance, P. Caeiro's contribution to this book.

[8] See *Collins English Dictionary*.

[9] See ECtHR, 8 June 1976, *Engel and Others v. The Netherlands*. About this, see especially P. Caeiro's contribution to this book.

[10] About the different definitions of criminal law, see especially F. Kuty, *Principes généraux du droit pénal belge*, Bruxelles, Larcier, 2009, Tome 1, p. 17 and f.

[11] See for instance K. Šugman and M. Jager's contribution to this book.

[12] *Ibid*.

[13] See fn 9.

law, are increasingly sprinkled with administrative measures or are becoming fields where administrative actors are increasingly involved. In some domains, a double enforcement/sanctioning system (administrative/criminal) has developed. However, by themselves, these trends do not necessarily result in a blur. A blur occurs when the scope of intervention and the division of functions between both kinds of measures, systems, actors or frameworks are not clear enough; when the two sets of applicable rules become indistinct and/or when there is cross-contamination whereby the interactions between both types of measures, actors or frameworks is not organised and overlaps are neither avoided nor regulated. So, in order to identify a blur, the following questions are of key importance: Are there clear criteria setting out when one or the other actor/framework, or both, should be involved? Are the rules applicable to one or the other framework/actor clearly defined and is there some kind of approximation between them? Is a system of double administrative and penal repression foreseen?

Reflecting on the reasons for the growing blur between administrative and criminal law is quite interesting. As will be highlighted in the different contributions to this book, various factors arise, including the advantages of each of the different regimes [14], the need to find an effective way of dealing with certain kinds of crime that are becoming ever more complex, the need to develop a multidisciplinary/holistic approach towards some crimes, particularly trafficking in human beings, and the will and/or need to prevent crime, especially terrorism, etc.

The purpose of this book is to study the combination of both of the abovementioned trends affecting criminal justice systems. The blur between administrative and criminal law has, of course, been around for a while and exists independently of the European Union. It is, for instance, embodied in the blurred line between measures belonging to punitive administrative law and criminal law measures [15]. Up until now, this trend has mainly been analysed at the national level. However, it is interesting to reflect on the interaction between the Europeanisation of criminal law on the one hand and the increasingly blurred line between administrative and criminal law on the other hand. In this regard, the main question that arises is whether and to what extent the EU contributes to the blurred line; if it tries to limit it, control it and/or organise it.

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[14] About these advantages see for example para. 74 of Advocate general's opinion M. Pedro Cruz Villalon, 12 June 2012, in C-617/10, *Hans Åkerberg Fransson*: "That lack of agreement can be traced back to the importance of measures imposing administrative penalties in a large number of Member States, in addition to the special significance also afforded to criminal prosecution and penalties in those Member States. On the one hand, States do not wish to abandon the characteristic effectiveness of administrative penalties, particularly in sectors where the public authorities seek to ensure rigorous compliance with the law, such as fiscal law or public safety law. On the other hand, the exceptional nature of criminal prosecution and the guarantees which protect the accused during proceedings incline States to retain an element of decision-making power as regards actions which warrant a criminal penalty. That twofold interest in maintaining a dual – administrative and criminal – power to punish explains why, at the moment, a significant number of Member States refuse, by one means or another, to be bound by the case-law of the European Court of Human Rights, which, as I shall now go on to examine, has developed in a direction which practically excludes that duality".

[15] See P. Caeiro's contribution to this book.

Several authors have highlighted that the EU has, at least in fields such as the protection of the financial interests of the EU (PIF), largely contributed to this blur [16]. This research aims to go beyond a sector-by-sector approach to the topic and to set a systematised assessment of the situation in motion. Tackling all fields of EU action/intervention was nevertheless impossible in the framework of this collective book. The idea was thus to select, in the first part of the book, some case studies: different types of crimes where the EU plays an essential or increasing role, namely trafficking in human beings, terrorism, competition, PIF, market abuse, environmental offences and competition. These offences were chosen because of their specificities. They are of course quite different in nature and the role and intensity of the EU's intervention is also different. In some fields, the EU has (limited) enforcement powers (*e.g.* PIF), whereas in others it has none (organised crime, trafficking in human beings, terrorism). Some are serious transnational crimes (*e.g.* trafficking in human beings and terrorism), some directly protect EU interests (PIF) and others sanction the non-respect of EU policies (offences covered by the so-called annex competence: *e.g.* environmental offences, market abuse, etc.). The combination of criminal and administrative law is examined and the existence of blurring boundaries between the two "circuits" tested in each of these fields. This analysis reveals that the significance, purpose and role of administrative and criminal measures vary in the different fields; that the level, nature and scope of the blurred lines differs and that the EU's influence on the existence or development of the blurred lines also changes from one field to the other. This "variable geometry" renders any generalisation or categorisation extremely difficult.

It is, however, possible to break down the abovementioned case studies into four different categories on the basis of a typology based on how broad and significant the intervention of administrative measures/actors is to the fight against crime. This attempt at classification must, however, be handled with extreme caution.

In a first category, criminal law remains the main tool for fighting crime and the intervention of administrative measures is limited. This is the case, for instance, in the fields of organised crime or trafficking in human beings. With regard to the former, among the administrative measures taken one can mention the recourse to administrative authorities to prevent public procurement contracts from falling into the hands of mafias and organised crime [17]. As to trafficking in human beings, one can mention the growing involvement of administrative authorities competent in the field of irregular immigration, the participation of border guards, consular services, labour inspectorates or local authorities to tackle this phenomenon [18].

In a second category, the level of intervention of administrative measures is intermediate. This is especially the case with regard to terrorism, terrorism financing

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[16] J. Vervaele, *The Europeanisation of Criminal Law and the Criminal Law Dimension of European Integration*, European Legal Studies, College of Europe, Brugge, 2005, p. 10.

[17] In the case of organised crime, see Article 45, Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, providing that contracting authorities must exclude candidates found guilty of organised crime offences.

[18] See C. Brière's contribution to this book.

and money laundering. As a form of serious crime, terrorism is traditionally dealt with through criminal law. However, the need to develop a preventive approach and improve efficiency has led to blacklisting groups and individual terrorists whose assets are then frozen. Although such measures are traditionally considered administrative in nature, some of their features strongly resemble criminal law measures. As to terrorism financing and money laundering, the collaboration and role of financial intelligence units (FIUs) has become extremely important. Their powers can be particularly strong. For instance, the Belgian FIU can order the freezing of a transaction for a period of a maximum of five working days, even upon request of a foreign FIU [19] [20].

A third category encompasses, for instance, PIF offences, where an administrative and a criminal enforcement regime have been gradually introduced at EU level, albeit without an integrated enforcement strategy. The field of market abuse is characterised by the coexistence of a double administrative-criminal enforcement regime. This is evident when considering the new comprehensive package of measures in the field and especially the Directive on criminal sanctions for market abuse (the so-called MAD), which requires EU Member States to introduce criminal sanctions, and Regulation 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse Regulation, the so-called MAR) which foresees the introduction of administrative sanctions by EU Member States [21]. A double enforcement regime has also been established in the field of infringements of environmental law. In this latter sector, the interrelation between administrative and criminal law is already present in the criminalisation process itself. Directive 2008/99 of 19 November 2008 on the protection of the environment through criminal law does not criminalise any behaviour independently of administrative law. All environmental crimes rely on the existence of a (pre-established) administrative infringement [22].

Finally, a fourth and last category corresponds to the unique case of EU competition law. As is well known [23], competition law has long been regarded as pertaining to administrative law. However, its quasi-criminal character has been gradually recognised due to the influence of two main factors, namely the increase in the amounts of fines and the influence of the *Engel* case law of the European Court of Human Rights. As will be shown later, this field perfectly illustrates the gradual blurring of boundaries between both fields of law [24].

The second part of this collective book is of a more transversal nature. Its main purpose is to assess the influence of the EU on the existence and development of the blur between administrative and criminal law.

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[19] Article 23, para. 2, of the Belgian Law of 11 January 1993 on the prevention of the use of the financial system for money laundering and terrorist financing purposes.

[20] See P. De Koster and M. Penna's contribution to this book.

[21] See R. Kert's contribution to this book.

[22] See M. Fauré and A. Gouritin's contribution to this book.

[23] See, for instance, G. Gaulard, "Le principe *non bis in idem* en droit de la concurrence de l'Union", *Cahiers de droit européen*, 2013, p. 703 and f.

[24] See A. Bailleux's contribution to this book.

It opens with an article concerning the organisation at national level of the coexistence of administrative and criminal law. It maps out the various solutions/models and discusses their advantages and disadvantages.

The other contributions focus on the EU level. Most of them show that the EU somehow contributes to the blurred lines. Among the elements leading to this conclusion, the EU's integrated/holistic approach to the fight against certain types of crime (trafficking in human beings, terrorism, corruption) must be mentioned as well as its tendency to mobilise all the means available to reinforce the effectiveness of the prevention and repression of crime. It also appears that the EU has a multiplying effect on the blurred lines when it takes into consideration the coexistence of different national laws, of different systems of distribution of tasks between the competent actors and of diverse legal traditions. The distinction between criminal and non-criminal measures as well as between administrative and judicial actors varies from one EU Member State to another, which makes it extremely difficult for the EU to preserve/organise a clear distinction in this respect [25].

On occasions, the EU does not formally distinguish between administrative and criminal measures. It sometimes covers both aspects in one single text adopted in the framework of Chapter 4 of Title V of Part III of the Treaty on the Functioning of the EU (TFEU) relating to judicial cooperation in criminal matters. This is, for example, the case of instruments approximating national substantive criminal laws as, for instance, Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims [26]. This is also the case for some instruments strengthening judicial cooperation in criminal matters, especially mutual recognition instruments, a representative example of which is the Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, which covers administrative fines under specific conditions [27]. However, on other occasions, the EU seems to apply a much more formal approach to the distinction between both regimes. The European Court of Justice (CJ) seemed, for instance, to adopt this approach in its ruling of 6 May 2014, C-43/12*, Commission v. Parliament and Council,* in which it annulled Directive 2011/82/EU of the European Parliament and of the Council of 25 October 2011 facilitating the crossborder exchange of information on road safety related traffic offences [28]. Adopted on the basis of Article 87(2) TFEU concerning police cooperation, that directive set up a system of crossborder exchange of information regarding vehicle registration data in order to determine the person liable for the road traffic offence regardless of whether the offence is of an administrative or a criminal nature under national law. The Court ruled that, both in respect of its aims and its content, the directive is a measure to improve transport safety and should have consequently been adopted on the basis of Article 91(1)(c) TFEU. Whereas the CJ does not strictly reproduce it [29], it seems

[25] See V. Jamin's contribution to this book.

[26] *Ibid*.

[27] See Article 1(a) and (b) of the Framework Decision. For a non-formal interpretation of some elements of these articles, see CJ, 14 November 2013, *Baláž*, C-60/12.

[28] *OJ*, no. L 288, p. 1 and f.

[29] However, see paras. 33 and 47-49 of the Court's decision.

to rule in favour of one of the Commission's arguments, according to which Article 87 TFEU is reserved for police cooperation related to offences qualified as criminal in the internal law of the EU Member States. Considering that road traffic offences pertain sometimes to criminal law and sometimes to administrative law, Article 87 could not constitute a valid legal basis for the directive [30]. Such a formal approach seems also to be the one followed by the Commission in its Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings. The explanatory notes indeed state that the directive does not apply to proceedings that the domestic law does not formally label as criminal [31].

The EU does not really contribute to the establishment of a clearly distinct set of rules for each framework either. On the contrary, it rather contributes to approximate and confuse them. The application by the CJ of the *Engel* case law of the European Court of Human Rights in the context of the implementation of the *ne bis in idem* principle [32] is one example. Another example worthy of mention is Regulation 883/2013 governing the work of the European Anti-Fraud Office (OLAF), which establishes a catalogue of procedural safeguards for administrative investigations in PIF cases that is largely inspired by the rights set out in Article 6 of the European Convention on Human Rights (ECHR) [33]. Another example of the development of criminal procedural guarantees to administrative measures is found in the field of blacklisting, where the CJ's case law has exerted considerable influence and extended beyond the EU [34]. All these examples are positive in the sense that they lead to a reinforcement of the procedural safeguards applicable to administrative proceedings and inspired by criminal procedural safeguards. However, the "fairly fair trial" that seems to be emerging in the field of competition law [35] is another example to be mentioned and one that reveals that the blurred line between the two sets of rules does not always favour the defendant.

The advantages offered by multidisciplinary approaches and double enforcement mechanisms to fight crime should be highlighted [36]. However, they also give rise to serious concern. To be really effective, the multidisciplinary approach and the coexistence of an administrative and a criminal regime need to be managed and organised. For the time being, the EU is failing to organise the relations, interactions and cooperation mechanisms between both tracks sufficiently well. This legal loophole

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[30] For a rejection of such an argument, see the conclusions of Advocate General Yves Bot, 10 September 2013 (paras. 54 and f.). For a criticism of the ruling of the CJ in this regard, see especially G. Bachoué Pedrouzo, "Cédez le passage? Quand la Cour de justice freine la route de la coopération policière", 9 mai 2014, disponible sur le site http://www.gdr-elsj.eu.

[31] COM (2013) 822/2, part 3, Legal elements of the proposal, para. 16.

[32] See P. Caeiro's and C. Wong's contributions to this book.

[33] See also the Commission communication (COM (2013) 533 final), which announces a reinforcement of procedural safeguards in OLAF's investigations. See K. Ligeti and M. Simonato's contribution to this book.

[34] See F. Galli's contribution to this book.

[35] See A. Bailleux's contribution to this book.

[36] In this regard, see K. Sugman and M. Jager's and M. Fauré and A. Gouritin's contributions to this book.

is consistently denounced in both parts of the book. The lack of an integrated strategy to combine the administrative and criminal law regimes is especially underlined in the field of PIF[37]. The lack of serious reflection on the interaction between the two enforcement regimes in the field of market abuse is also underlined[38]. The need to organise/clarify the "grey zone" of competition law is another example that will be developed later on[39]. What is striking is that this lack of organisation is both detrimental to the person's fundamental rights and to the effectiveness/efficiency of the fight against crime.

From the point of view of individual safeguards, one of the problems concerns the risk of resorting to administrative measures and procedures in order to avoid the procedural safeguards accompanying criminal law measures and procedures. The proper application of the principle of *ne bis in idem* is, of course, especially crucial as well[40]. Another problem relates to the confusion of the different actors' roles and, particularly in the field of environmental protection, the problem of the impartiality of certain authorities.

Concerning the potentially negative impact for the effective fight against crime, problems arise because of the lack of bridges between both tracks and the lack of mechanisms structuring and organising cooperation between the different actors involved in the multidisciplinary approach adopted at EU level. The negative consequences of this lack of organisation is evident, for instance, in the field of admissibility of evidence[41].

Given its complexity and technical nature, the topic of this collective book is extremely difficult and raises sensitive questions. One of them concerns the advantages of criminal law and criminal measures on the one hand and of administrative law and administrative measures on the other hand. The choice of one or the other discipline is, of course, crucial. Some authors, like Francesca Galli, insist on the advantages of the criminal path whereas others underline the advantages of developing administrative law/measures, albeit combined with the development of appropriate principles and values[42]. Many have advocated the need to embed criminal procedural safeguards into administrative law, which is of course a good thing from the point of view of individuals. However, a crucial and related question is how to raise the level of procedural safeguards in administrative proceedings without losing the efficiency advantages of the administrative circuit[43]. This question is clearly at the heart of the discussion.

This book seeks to identify and clarify these and other questions that are highlighted in the following contributions. Finding answers to these questions is essential if one is to understand the evolution and the role of criminal law today and especially of EU criminal law. They are all the more necessary in view of their implications for upholding the main features and checks and balances of criminal law, for the protection of fundamental rights and for efficiency in dealing with unlawful conduct.

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[37] See K. Ligeti and M. Simonato's contribution to this book.

[38] See R. Kert's contribution to this book.

[39] See A. Bailleux's contribution to this book.

[40] In this regard, see R. Kert's, M. Luchtman's and C. Wong's contributions.

[41] See especially K. Ligeti and M. Simonato's, R. Kert's and M. Luchtman's contributions.

[42] See, for instance, L. Zedner "Preventive justice or pre-punishment?", *Current Legal Problems*, 2007, 60, p. 174 and f.

[43] See M. Fauré and A. Gouritin's contribution to this book.

PART I

Case studies on the intervention of administrative law in the criminal law domain

Combatting trafficking in human beings: moving beyond labels with the EU's multidisciplinary, integrated and holistic approach

Chloé Brière

1. Introduction

The realisation of an Area of Freedom, Security and Justice, in which a high level of security is ensured for all EU citizens, presupposes that the European Union (hereafter the EU) takes measures to fight cross-border and serious criminal phenomena affecting all of the EU's Member States. Trafficking in Human Beings (hereafter THB) is one of these criminal phenomena and has been addressed with a considerable array of measures in the past decade.

Although precise and exhaustive data enabling us to establish the scale of THB do not exist, it is understood to affect thousands of victims in the EU [1] and millions worldwide [2] and continues to be a low risk-high profitability activity for criminals [3]. Its gravity, the serious violations of the victims' human rights that it implies, together with its frequent cross-border nature [4], have led to the adoption of several anti-

[1] According to the Eurostat Report on Trafficking in Human Beings (2013, p. 30), EU Member States reported a total number of 9,528 victims in 2010. The report published by the UNODC (Global Report on Trafficking in persons, 2012, p. 53) mentions that 32 countries in Western and Central Europe reported the profile of about 22, 000 victims detected.

[2] The International Labour Organisation estimated in 2012 that 20,9 million people are victims of forced labour globally, out of which 4,5 million (22%) are victims of forced sexual exploitation and 14,2 million (68%) are victims of forced labour exploitation (ILO, 2012 Global estimate of forced labour, Executive Summary, p. 1). It is important to stress that for the ILO "human trafficking can also be regarded as forced labour, and so this estimate captures the full realm of human trafficking for labour and sexual exploitation".

[3] Europol, Serious and Organised Crime Threat Assessment, 2013, p. 24.

[4] Contrary to smuggling of human beings, THB does not require that a border should be crossed and can take place within the territory of a single State.

trafficking measures. While the Member States remain the main actors responsible for their concrete implementation, common rules and definitions adopted at international and regional levels have had a significant impact on national legislation and policies.

At international level, a specific United Nations instrument, which is attached to the Convention against Transnational Organised Crime, was adopted in 2000: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children [5]. This instrument focuses on the repressive dimension of the fight against THB. It contains the first internationally agreed definition of THB [6] and has given renewed impetus to the fight against THB on a transnational basis. Within Europe, this impetus has taken concrete form through the adoption of the Council of Europe's Convention on Action against THB in 2005 [7]. This Convention intends to counter-balance the focus of the UN Protocol on the repressive dimension of the fight and thus gives greater focus to the human rights dimension of the fight against THB.

The EU institutions, and especially the European Commission, have developed numerous initiatives, policies and strategies detailing their objectives and envisaged actions to prevent and combat THB [8]. Three legislative instruments were adopted between 1997 and 2011 [9]:

– Joint Action 97/154/JHA of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children [10];
– Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings [11];
– and more recently, Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [12].

While the form of these instruments follows the changes in the EU Treaties and the increased competences given to the EU to fight crime, their content also reflects

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[5] United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime, signed in New York, 15 November 2000, United Nations, *Recueil des Traités*, vol. 2237, p. 319.

[6] Before 2000, international conventions only addressed parts of the trafficking phenomenon, such as the1949 UN Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others, which refers to "prostitution and the accompanying evil of the traffic in persons for the purposes of prostitution", or the ILO Convention against Forced Labour, which refers to forced labour.

[7] Council of Europe, Convention on Action against Trafficking in Human Beings, signed in Warsaw, 16 May 2005, no. ETS 197.

[8] The most recent is: Commission, Communication, The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, 19 June 2012, COM (2012) 286 final.

[9] See list below. A fourth instrument, the Directive 2004/81/EC of 29 April 2004 must also be mentioned as it organises the deliverance of residence permits to third-country nationals who are victims of THB and who collaborate with law enforcement authorities.

[10] *OJ*, no. L 63, 4 March 1997, p. 2.

[11] *OJ*, no. L 203, 1 August 2002, p. 1.

[12] *OJ*, no. L 101, 15 April 2011, p. 1.

the changes in the approaches adopted to address THB: a clearer distinction between the smuggling of and trafficking in human beings (change between the Joint Action and the Framework Decision); and giving up a criminal justice approach that focuses on repressive measures (change between the Framework Decision and the Directive). On this latter aspect, the EU approach has evolved and has been defined since 2004 [13] through three key adjectives: *multidisciplinary, integrated and holistic*. To provide a clear understanding of this approach, it is worth briefly setting out the details of each of its dimensions.

– The "multidisciplinary" dimension relates to cooperation and coordination between all the actors and stakeholders concerned, including law enforcement agencies, relevant administrative actors, NGOs, labour organisations, etc.
– The "integrated and holistic" dimensions refer to the need to strive for a balance between the objectives of preventing THB, protecting its victims and prosecuting the traffickers. In other words, protection strategies targeted at the provision of adequate remedies to trafficked persons and at the protection of their fundamental rights should be considered as important as the repressive crime control strategies. The latter, which are targeted at the prosecution and punishment of the traffickers, should also be implemented carefully, in particular to avoid unintended and undesirable side effects that might increase vulnerability to trafficking [14]. Finally equal attention should be given to prevention strategies conducted not only in source and transit countries but also in destination countries.

This approach has a crucial influence on the function and role traditionally reserved for criminal law and law enforcement actors. It implies that all relevant measures and all relevant actors have to be involved in the fight against THB as long as they can contribute to achieve the goal of eradicating this crime. The types of measures that can be taken are not only criminal law measures but they can also be, for instance, labour law or migration law measures. The measures should mobilise all the actors whose competences can contribute to the prevention and repression of THB. In that context, their qualification as traditional actors of crime control policies is not what matters most. Policymakers and practitioners from different ministries and sectors with specific expertise on, for instance, crime, labour issues, migration, child protection and human rights are thus involved [15].

The EU multidisciplinary, integrated and holistic approach thus seems to depart from traditional policies to prevent and combat serious cross-border crimes. This contribution intends to demonstrate that the fight against THB is not necessarily an area where the EU influences the development of blurring boundaries between administrative and criminal law (2). However, the EU is taking part in a move beyond

[13] It was first mentioned in: European Commission, Report of the Experts Group on Trafficking in Human Beings, 22 December 2004, p. 9.

[14] *Ibid.*

[15] OSCE, Office for Democratic Institutions and Human Rights, National Referral Mechanisms. Joining Efforts to Protect the Rights of Trafficked Persons, A Practical Handbook, Warsaw, 2004, quoted in ICAT, The International Legal frameworks concerning trafficking in Persons, p. 10.

labels through the development of innovative policies at national and EU levels. It supports the increasing involvement of administrative actors in the fight against THB as well as their close cooperation with law enforcement authorities (3).

2. Criminal law as the main tool to fight THB

As a preliminary remark, it must be stressed that the EU instruments relating to THB provide for the clear criminalisation of the behaviour that they define as THB. There is thus no doubt about the classification of the offence or its criminal nature. Concerning the sanctions to be imposed, whereas a difference appears between sanctions imposed on individuals and those imposed on the legal entities found guilty of THB, such a difference does not seem to have an impact on the boundaries between criminal and administrative law and sanctions.

Before analysing the liability of individuals (A) and legal persons (B) in detail, it is important to recall the traditional distinction between administrative sanctions. According to this traditional distinction, while administrative sanctions would have the nature of sanctions that are *réparatrices* or *restitutives*, criminal sanctions would be of repressive or punitive nature [16]. Nevertheless, European courts have considered that administrative repression and criminal repression both belong to criminal law [17]. The European Court of Human Rights (hereafter ECtHR) has defined an autonomous notion of "any criminal charge". In its *Engel* judgment [18], it identifies three criteria: the domestic classification of the offence, the nature of the offence, and the severity of the potential penalty, triggering the application of Article 6 guarantees. They serve as a test and, when cumulated, they led to the qualification of administrative offences as "criminal charges" [19]. A similar approach has been incorporated by the CJ into the EU legal order [20].

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[16] F. Ost and M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Bruxelles, Facultés Universitaires Saint-Louis Bruxelles, 2002, p. 238.

[17] For more details, see M. Delmas-Marty, *Code pénal d'hier, droit pénal d'aujourd'hui, matière pénale de demain*, Dalloz, 1986, p. 27

[18] See the criteria it defined in *Engel* (ECtHR, 8 June 1976, *Engel and others v. the Netherlands*, App. no. 5100/71, paras. 81-82).

[19] See for instance ECtHR, 21 February 1984, *Öztürk v. Germany*, App. no. 8544/79, in which the Court stressed the autonomy of its criteria (para. 50) and considered that a "regulatory offence" (road traffic offence) should be qualified as a criminal charge (para. 53). For a more recent application, see ECtHR, 10 February 2009, *Sergey Zolotukhin v. Russia*, App. no. 14939/03, paras. 52-53.

[20] For a recent example, see CJ, 5 June 2012, *Bonda*, C-489/10, para. 37. The case answered negatively to the question of whether a measure excluding a farmer from receiving any aid after being convicted for fraud was of criminal nature. It must be recalled that the Court has previously held that penalties laid down in rules of the common agricultural policy, such as the temporary exclusion of an economic operator from the benefit of an aid scheme, are not of a criminal nature (see CJ, 18 November 1987, *Maizena and Others*, 137/85, para. 13; CJ, 27 October 1992, *Germany v. Commission*, C-240/90, para. 25; and CJ, 11 July 2002, *Käserei Champignon Hofmeister*, C-210/00, para. 43).

A. Liability of individuals

All instruments, either international or European, provide for the criminalisation of THB as a criminal offence. The UN Palermo Protocol states very clearly that each State Party "shall adopt legislative and other measures to establish as *criminal offences*" the conduct defined as THB, together with the establishment as *criminal offences* secondary behaviours, *i.e.* an attempt, participation as an accomplice and the instigation of the offence [21]. Similarly the Council of Europe's Convention provides for the criminalisation of THB [22] and of attempt, aiding or abetting [23]. EU instruments, especially the most recent one, Directive 2011/36/EU, also explicitly pursue the aim of establishing "minimum rules concerning the definition of criminal offences and sanctions in the area of THB" [24]. The "main" behaviour, defined through three constitutive elements, *i.e.* the conduct of an action, the use of coercive means and the pursuit of an objective of exploitation [25], is criminalised, as well as secondary behaviours (incitement, aiding and abetting, and attempt) [26].

With regard to sanctions, the deepest integration of the EU legal order enables the EU legislator to be more precise. Whereas the UN instrument only provides for the definition of sanctions "that reflects the gravity of that offence" [27] and the CoE's Convention only provides for "effective, proportionate and dissuasive sanctions", the EU instruments contain clear provisions establishing the type and the level of the sanction to be imposed, respecting the system of "the minimum level of the maximum penalty" [28]. The "main offence" is punishable by a maximum penalty of at least five years of imprisonment and of at least ten years of imprisonment when the offence is committed with aggravating circumstances [29]. The provision for imprisonment is a clear indicator of the criminal nature of the sanction. It entails a deprivation of liberty of the person concerned, which interferes with his/her right to liberty and security, a right of the highest importance "in a democratic society" [30]. Lawful detention after

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[21] Article 5 UN Trafficking Protocol.

[22] Article 19 CoE Convention.

[23] Article 21 CoE Convention.

[24] Article 1 Directive 2011/36/EU.

[25] For more details about the different constitutive elements, see for instance, A. Weyembergh and C. Brière, "L'Union européenne et la traite des êtres humains", *in* D. Bernard, Y. Cartuyvels, C. Guillain, D. Scalia and M. van de Kerchove (eds.), *Fondements et objectifs des incriminations et des peines en droit européen et international*, Limal, Anthémis, 2013, p. 77-78.

[26] Article 3 Directive 2011/36/EU.

[27] The UN Palermo Protocol is silent about sanctions and the relevant provision is Article 11 of its parent Convention (*United Nations Convention against Transnational Organised Crime*, 10 November 2000, UN Doc A/RES/55/25).

[28] A. Weyembergh (in collaboration with S. de Biolley), "Introduction – Approximation of substantive criminal law: the new institutional and decision-making framework and new types of interactions between EU actors", *in* F. Galli and A. Weyembergh (eds.), *Approximation of substantive criminal law in the EU: The way forward*, Bruxelles, Editions de l'Université de Bruxelles, 2013, p. 77-79.

[29] Article 4, paras. 1 and 2, Directive 2011/36/EU.

[30] ECtHR, 29 March 2010, *Medvedyev and others v. France*, App. no. 3394/03, para. 76.

conviction by a competent court is one of the few exceptions allowed by Article 5 of the ECHR and is also strictly controlled by the ECtHR [31]. For secondary offences, *i.e.* incitement, aiding and abetting, and attempt, the Directive only states that Member States shall ensure that these offences are punishable by effective, proportionate and dissuasive penalties. However Paragraph 12 of the Directive's Preamble, provides that the reference to surrender should be interpreted in accordance with the European Arrest Warrant Framework Decision (hereafter the EAW FD) [32]. In this instrument, the threshold to surrender a person is established for acts punishable "by a custodial sentence or a detention order for a maximum period of at least 12 months" [33]. A reasonable interpretation of the specific provision of the Trafficking Directive, in the light of the EAW FD, can thus be that the EU legislator invites Member States to punish secondary offences of a maximum penalty of at least 12 months of imprisonment. The criminal nature of the sanction is once again obvious.

B. Liability of legal persons

Trafficking in human beings belongs to those types of serious crime that can be committed and imputed to legal entities. However, the establishment of their liability and the sanctions that should be imposed on them are sensitive issues, which vary considerably from one national legal system to another. Whereas some Member States allow for their criminal liability, others, such as Germany or Greece, exclude it and only foresee their administrative liability. Consequently "in existing legislation, Member States have always been left with the choice concerning the type of liability of legal persons for the commission of criminal offences, as the concept of criminal liability of legal persons does not exist in all national legal orders" [34].

The instruments dealing with THB do not distinguish themselves from other criminal law instruments providing for the liability of legal persons and give Member States a wide margin of discretion. Both the UN and the CoE instruments remain vague, only providing that their liability may be criminal, civil or administrative [35]. Similarly, the Joint Action of 1997 did not take a position on the type of law and sanctions that should apply as it only provided that legal persons may be held "administratively liable" or "criminally responsible" for such offences [36]. The Framework Decision and

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[31] For a summary of the ECtHR rulings, see Council of Europe/ECHR, Guide on Article 5, April 2012, p. 10-11, available at: http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf.

[32] Council Framework Decision 2002/584/JHA, of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States, *OJ*, no. L 190, 18 July 2002, p. 1.

[33] Article 2, para. 1, Framework Decision 2002/584/JHA.

[34] Commission, Communication, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, 20 September 2011, COM (2011) 573 final, p. 9.

[35] The UN Palermo Protocol is silent about the liability of legal persons and the relevant provision is Article 10 of its parent Convention, and the relevant provision in the CoE Convention is Article 22, especially its para. 3.

[36] Title II A c) Joint Action 97/154/JHA.

the Directive both contain similar provisions, organising the liability of legal persons [37] and leaving a broad margin of discretion to the Member States. The latter are obliged to subject legal persons to "effective, proportionate and dissuasive sanctions". The EU legislator provided few examples of sanctions that could be imposed, such as criminal or non-criminal fines or a series of measures [38]. Member States thus have the freedom to pick and choose the type of liability and the sanctions that they wish to impose on legal persons. A brief analysis of the transposing national legislations [39] reveals the diversity among national regimes. While in many Member States, such as Slovenia [40], Poland [41], Spain [42] or the United Kingdom [43], the criminal liability of legal persons is foreseen, other Member States only provide for their administrative liability. In Germany for instance, legal persons are liable under the Regulatory Offences Act [44], according to which the courts can impose administrative fines (of up to €1 million) on a legal person in case of a criminal offence. Nevertheless, the fine is not a criminal sanction *stricto sensu* [45]. Similarly, in Greece, legal persons involved in THB cases shall only incur administrative sanctions [46]. These examples demonstrate that the choice made by national legislators when transposing THB instruments does

[37] Article 4 Framework Decision 2002/629/JHA and Article 5 Directive 2011/36/EU. Legal persons may be prosecuted when the offence committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, or when they failed to supervise or control a person and thus rendered possible the commission of the offence

[38] Article 5 Framework Decision 2002/629/JHA and Article 6 Directive 2011/36/EU. These measures are the exclusion from entitlement to public benefits or aid, the disqualification from the practice of commercial activities, the placement under judicial supervision, the judicial winding-up, or the closure of establishment that have been used for committing the offence.

[39] On the basis of the study realised by ECLAN in 2009 and focusing on the transposition of the Framework Decision: A. Weyembergh and V. Santamaria (eds.), *The evaluation of European criminal law*. *The example of the Framework Decision on combating trafficking in human beings*, Bruxelles*,* Editions de l'Université de Bruxelles, 2009.

[40] M. Ambroz, and M. M. Plesnicar, "Slovenia", *in* A. Weyembergh and V. Santamaria (eds.), *op. cit*., p. 309.

[41] A. Lazowski, "Poland: implementation without transposition", *in* A. Weyembergh and V. Santamaria (eds.), *op. cit.*, p. 291.

[42] GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Spain, September 2013, p. 58, paras. 247-248. See also F.J. de León, "Spanish legislation against trafficking in human beings: punitive excess and poor victims assistance", *Crime Law Society Change*, 2010, 54, p. 399-400.

[43] J. Spencer and G. Gamberini, "Le Royaume-Uni", *in* A. Weyembergh and V. Santamaria (eds.), *op. cit.*, p. 353.

[44] *Ordnungswidrigkeitengesetz.*

[45] M. Böse, "Trafficking in human beings in Germany", *in* A. Weyembergh and V. Santamaria (eds.), *op. cit.*, p. 116.

[46] M. Kaiafa-Gbandi, N. Chatzinikolaou, A. Giannakoula and T. Papakyriakou, "The FD on combating trafficking in human beings, Evaluating its fundamental attributes as well as its transposition in Greek criminal law", *in* A. Weyembergh and V. Santamaria (eds.), *op. cit.*, p. 157.

not depart from the national position concerning the type of liability of legal persons. The fight against THB does not lead to any change on this issue.

We must thus conclude that, in the field of THB, contrary to what may happen in other fields such as the fight against terrorism [47], there is no indication of a recent movement towards blurring boundaries between criminal and administrative law. THB remains a criminal offence punishable by criminal sanctions. The margin of discretion granted to the Member States regarding the liability of legal persons and the organisation in some of them of their administrative liability does not overcome this finding.

3. The increasing involvement of administrative actors in the fight against THB

In this section, we analyse how administrative actors contribute to the fight against THB within the scope of their powers. As it would be impossible to provide an exhaustive presentation, we have made a selection. Firstly the role granted to administrative actors in policy making will be analysed (A). We will then turn to their involvement in the different dimensions of the fight against THB (B). A distinction will be drawn here between those who are generally called to contribute to the establishment of a high level of security in the EU and those who receive a role relating directly to the fight against THB.

A. Involvement of administrative actors in policy-making

The approach followed by the EU and especially its multidisciplinary dimension "requires the involvement of a more diverse group of actors than before in policy-making" [48]. Traditionally left to politicians and/or specialised civil servants, the elaboration and adoption of public policies designed to fight THB now involves a larger number of actors.

At European level, the openness of the policy-making process is reflected by the establishment of a Group of Experts on Trafficking in Human Beings [49]. Those tasks include, notably, advising the Commission on matters related to THB or assisting it in assessing the evolution of policies at national European and international levels. It is composed of 15 members, who are individuals with expertise and experience in the prevention and the fight against THB and the protection of its victims. The Group of Experts played, for instance, an important role when the Commission was reflecting on the revision of the Framework Decision. Its members recommended, for instance, the adoption of a definition of the offence that includes all elements contained in the UN Protocol and for consideration to be given to extending the definition to a more

[47] See in that regard F. Galli's contribution to the present book.

[48] European Commission, Communication, The EU Strategy towards the Eradication of Trafficking in Human Beings, *op. cit*., p. 9.

[49] The Group was initially set up in 2003, by Decision 2003/209/EC (*OJ*, no. L 79, 26 March 2003, p. 25). After the expiry of the 3-year period of validity of Decision 2007/675/EC (*OJ*, no. L 79, 20 October 2007, p. 29), a new Decision, Decision 2011/502/EU (*OJ*, no. L 207, 12 August 2011, p. 14) now organises the composition and competences of the Group.

detailed breakdown of different forms of exploitation (organised begging, committing petty crimes, etc.)[50].

The role played by national rapporteurs in policy-making is also worth mentioning. They were established several years ago in some Member States, such as the Netherlands or Belgium. The adoption of the 2011 Directive created a new obligation for Member States to set national rapporteurs or equivalent mechanisms. The precise status of these rapporteurs varies a lot from one Member State to another: administrative independent agency in the Netherlands, equivalent mechanisms integrated in a ministry or the police force in Austria, Germany, France or United Kingdom or a combination of these elements as in Belgium. Yet these bodies perform similar tasks, such as measuring the results of anti-trafficking actions and reporting regularly to the government, which puts them in a privileged position to make policy recommendations. The EU institutions support their contribution to national policy-making but also to EU policy-making. The regular meetings of the informal EU Network of National Rapporteurs or Equivalent Mechanisms on Trafficking in Human Beings, which was set up in 2009, offer opportunities to exchange good practices to be implemented at national level and to discuss with the Commission the EU policy against THB.

B. Involvement of administrative actors in policy implementation

The EU may not take part in blurring the boundaries between criminal and administrative law but it nevertheless plays a role in the evolution of the role played by administrative actors. The latter are generally more and more involved in security matters (1), but some of them can play a very particular role with regard to the fight against certain forms of exploitation (2).

1) Actors generally involved in security matters

In this section, we present administrative actors that are generally involved in security matters. These actors contribute, within the scope of their powers, to ensuring a high level of security within the AFSJ and they deal, alongside THB, with other types of transnational cross-border criminal activities. We will focus on consular services and border guards on the one hand (a), and financial intelligence units on the other hand (b).

a) Role of the actors involved in the fight against irregular immigration – Border guards and consular services

With the establishment of the Schengen area, the suppression of internal border controls and the development of an EU approach to the management of its external borders, the role played by consular services and border guards has evolved considerably. Indeed, “migration and border control have been increasingly integrated

[50] Group of Experts on Trafficking in Human Beings, Opinion no. 1/2008 on the revision of the Council Framework Decision of 19 July 2002 on combating Trafficking in Human Beings, 16 October 2008, p. 4.

into security frameworks that emphasize policing, defence and criminality" [51] and the EU treats "migration management and the fight against crime as twin objectives of the integrated border management strategy" [52]. This integrated approach led notably to the enhancement of interoperability between European immigration-related databases (Visa Information System and Eurodac) [53] and to the possibility (under certain conditions) for authorities responsible for internal security to access these databases [54]. It also led to the creation and update of the Schengen Information System, a database accessible to all authorities responsible for border control and other police and customs checks within a given Member State as well as to judicial authorities. This database, established by two separate instruments, supports not only operational cooperation between police authorities and judicial authorities in criminal matters [55] but also the implementation of asylum, immigration and return policies [56].

In the framework of their general involvement in security matters, border guards and consular services also contribute to the fight against THB, and the European Commission has highlighted more particularly their crucial role in the identification of victims of THB [57]. To support them in this task, increase coherence and avoid duplication of effort, EU institutions and agencies have founded and developed numerous documents and projects on the identification of victims targeting consular services and border guards [58]. Nevertheless, the involvement of other actors active

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[51] UN General Assembly, Report of the Special rapporteur on the human rights of migrants, F. Crépeau, Regional study: management of the external borders of the EU and its impact on the human rights of migrants, A/HRC/23/46, 24 April 2013, p. 11, para. 42.

[52] European Commission, Communication, The EU Internal Security Strategy in Action: five steps towards a more secure Europe, COM (2010) 673, 22 November 2010, p. 11.

[53] European Commission, Communication on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs, COM (2005) 597, 24 November 2005,

[54] See in this regard the possibility organised under Regulation 603/2013 (26 June 2013, *OJ*, no. L 180, 29 June 2013, p. 1) for the police and Europol to compare fingerprints data with Eurodac date for the purposes of preventing, detecting or investigating terrorist offences or other serious criminal offences (Preamble, Recital 5).

[55] Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System, *OJ*, no. L 205, 7 August 2007, p. 63. See in particular its Preamble, Recital 5.

[56] Regulation 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), *OJ*, no. L 381, 28 December 2006, p. 4. See in particular Preamble, Recital 21, and the provisions dealing with alerts issued in respect of third-country nationals for the purpose of refusing entry and stay.

[57] European Commission, DG Home Affairs, Guidelines for the identification of victims of trafficking in human beings, especially for Consular Services and Border Guards, available at: http://ec.europa.eu/dgs/home-affairs/e-library/docs/thb-victims-identification/thb_identification_en.pdf.

[58] In addition to the general guidelines elaborated by the Commission (Commission, Guidelines for the identification of victims of trafficking in human beings, especially for Consular Services and Border Guards), can also be mentioned the Anti-trafficking Training for Border Guards – Trainer's Manual (mentioned in *ibid*., p. 4, and elaborated by Frontex) and the

in the field of migration must be noted: those in charge of reviewing demands for international protection, or asylum procedures, as well as those in charge of the implementation of forced return procedures [59]. Both can also identify THB victims.

Still, the involvement of all these actors is limited to the detection of potential victims. Border guards and consular services must afterwards refer the case to law enforcement authorities, which will then ensure further follow-up on the investigation and assistance to the victims. In practice, the assessment of these initiatives to foster detection of THB victims is difficult. The statistical report on THB reveals that police services are still the main source of information on victims and immigration authorities and border guards have provided information on THB in only three and two countries respectively [60].

b) Role of actors involved in the fight against money laundering – Financial Intelligence Units

The closer integration of the EU has created increased opportunities for money laundering and financial crime. In addition to the criminal law approach, specific instruments, the Anti-Money Laundering Directives, have been adopted and regularly updated since 1991 [61]. The current text prohibits money laundering and terrorist financing and imposes obligations on national credit and financial institutions. It also provides for the creation of Financial Intelligence Units (FIUs) [62], which are in some Member States specialised administrative bodies [63], responsible for receiving,

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Handbook for diplomatic and consular personnel on how to assist and protect victims of human trafficking (elaborated by the Council of the Baltic Sea States Secretariat).

[59] European Migration Network Study, Identification of victims of THB in international protection and forced return procedures, March 2014.

[60] Eurostat, Trafficking in Human Beings, Figure 1, p. 29. This statistic should not hide the active role played by these immigration and border authorities in some States, such as France or United Kingdom. Moreover in some Member States, like Malta or Finland, data for Immigration and Border Guards are not available since they are incorporated with those provided by the police.

[61] The AMLD currently in force is Directive 2005/60/EC of the European Parliament and of 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*, no. L 309, 25 November 2005, p. 15). Last year the Commission presented a new proposal (COM (2013) 45, 5 February 2013), which is currently being negotiated by the Council and the Parliament.

[62] FIUs in Europe are established in different ways and under different legal statuses. The term "Financial Intelligence Unit" is applicable for all central Member States' units collecting financial information from Reporting Entities (obliged to report unusual or suspicious transactions under Directive 2005/60/EC) on the basis of the national Anti Money Laundering/ Counter-Financing of Terrorism legislation. Within the European Union, there are administrative FIUs, law enforcement FIUs, judicial FIUs or combinations of these types. (*Source*: European Commission, Study on "Best practices in vertical relations between the Financial Intelligence Unit and (1) law enforcement services and (2) Money Laundering and Terrorist Financing Reporting entities with a view to indicating effective models for feedback on follow-up to and effectiveness of suspicious transaction reports", 2008, p. 45).

[63] These countries are: Greece, Malta, The Netherlands, The Czech Republic, Spain, Romania, Bulgaria, France, Belgium Sweden, Latvia and Slovenia.

analysing and disseminating disclosures of information concerning potential money laundering and terrorist financing or information required by national legislation [64].

Their powers can contribute to the efforts to combat THB. It is essential to reduce the attractiveness of THB, which is still perceived by criminals as a "low risk/high profit" activity. In this regard, while the increased prosecution and conviction of perpetrators may reduce the feeling of impunity, the development of financial investigations followed by the freezing and confiscation of criminal assets is essential in diminishing the financial attractiveness of the crime. These financial investigations are also a tool for gathering evidence: "Evidence gathered from money trails might provide the necessary additional proof, particularly in high-risk sectors (...), thus relieving victims of the burden of testifying in court" [65]. The role of FIUs can thus include investigations on request of judicial or law enforcement authorities but also the detection of fraudulent transactions linked to THB. Exploiters launder the money that they have obtained and criminal assets could be identified and traced on this occasion. In order to assist them, the Financial Action Task Force (hereafter the FATF) [66] has outlined [67] particularly widespread types of money laundering processes used by traffickers [68] and presented case studies with examples of indicators [69]. The EU plays an important role in these developments [70], notably through its advocacy within the FATF or the strengthening of instruments relating to money laundering [71] and to the freezing and confiscation of proceeds of crime [72].

Moreover, the cooperation between FIUs and law enforcement authorities may also be fruitful in improving cross-border financial investigations, which are crucial in

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[64] Article 21 Directive 2005/60/EC.

[65] European Commission, Communication, The EU Strategy towards the Eradication of Trafficking in Human Beings, *op. cit*., p. 10.

[66] An inter-governmental body which promotes the "effective implementation of measures for combating money laundering and other related threats to the integrity of the international financial system".

[67] FATF, Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants, July 2011.

[68] *Ibid.*, p. 39. In European countries, it appeared that the traffickers have great use of cash-intensive businesses, money service businesses, cash couriers, *hawala* (informal banking) systems, front companies, and investments in high value goods such as cars and real estate.

[69] *Ibid.*, p. 31-35.

[70] Presentation of M. Roudaut, European Commission, DG Home, Fight against Organised Crime Unit, "Financial investigation: a key tool in the fight against Trafficking in Human Beings", during the Expert Seminar on Leveraging Anti-Money Laundering Regimes to Combat Human Trafficking, Vienna, November 2011, available at: http://www.osce.org/cthb/85823?download=true.

[71] 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, February 2013.

[72] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, *OJ*, no. L 127, 29 April 2014, p. 39.

combatting transnational criminal groups often involved in THB [73]. It has been noted that, despite the widespread recognition of the importance of financial investigations, their realisation suffers from structural problems and deficiencies such as a lack of capacity in terms of time, resources or expertise or the difficulties in identifying and tracing illegal assets (partially because of the use of alternative remittance systems and cash couriers), especially when transferred to other countries [74]. In this regard involving FIUs in such financial investigations can represent real added value. In addition to their expertise, they also have specific tools to cooperate among themselves in cross-border cases. In addition, the rules they apply may be more flexible and easy to use than the ones applicable to cross-border police and judicial cooperation.

As an example of best practice and in order to illustrate how FIUs join forces to combat THB, we chose to present the situation in one Member State: Belgium. In this Member State, the FIU has taken the form of an independent administrative body: the *Cellule de Traitement des Informations Financières* (hereafter the CTIF), which is responsible for analysing suspicious financial transactions (reported by individuals and organisations) and transmitting this information to the judicial authorities if analysis reveals serious indications of money laundering [75]. This authority has considerable powers, which can be exercised quickly and smoothly, such as the possibility to block a suspicious transaction without the customer being informed [76]. In its annual reports, the CTIF presents statistics about the number of cases detected and transferred to judicial authorities as well as information about the identified flows towards and/or from Belgium [77]. Its level of involvement in the detection of THB cases is clear from the statistics. Between 2010 and 2012, no less than 177 cases, involving sums of 18,62 millions euro, have been detected and transferred to the judicial authorities [78]. The CTIF also contributes to the fight against THB by providing intelligence about the modus operandi of the exploiters. In its last annual report, it was able to establish that money flows related to THB feature a considerable amount of cash or payment by cards and national transfers and that international transfers have been carried out

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[73] Europol, EU Serious and Organised Crime Threat Assessment (SOCTA), 2013, p. 24.

[74] Eurojust, Strategic Project on Eurojust's action against THB, Final Report, October 2012, p. 31-32.

[75] Centre pour l'Egalité des Chances et de Lutte contre le Racisme, Annual Report 2011, English version, J.-C. Delepière, External contribution: the financial approach to human trafficking, p. 28-30.

[76] For more details on the FIUs' powers, see P. De Koster and M. Penna's contribution to the present book. See also J.-C. Delepière, P. de Koster and M. Penna, "Les flux financiers illégaux de blanchiment de capitaux en relation avec le traffic d'êtres humains, de migrants et l'exploitation de main d'œuvre clandestine", *Droit Pénal de l'Entreprise*, 2014, 1, p. 3-14.

[77] Those cases are detected notably on the basis of the red flag indicators of money laundering from human trafficking, elaborated by the Financial Action Task Force (FATF). See FATF, Money laundering risks arising from Trafficking in Human Beings and Smuggling of Migrants, July 2011. See also CTIF, 2011 Annual Report, p. 87-92 and 2012 Annual Report, p. 85-88.

[78] These numbers may be completed by those relating to cases of money laundering linked to the exploitation of prostitution: for the same period 108 cases, representing 13,71 million euro, have been detected and transferred to judicial authorities.

towards well-known countries of origin (*e.g.* Bulgaria, Romania and Pakistan) [79]. The importance of its work has been acknowledged and led to the dismantling of major networks, such as the so-called "Brazilian network" [80].

Finally, it is important to note that anti-money laundering legislation also contributes to the involvement of credit and financial institutions in the fight against THB. They also cooperate closely with law enforcement authorities, for instance during a financial investigation to examine transactions made by traffickers [81]. They can also participate in the detection of THB cases, as it has, for instance, been promoted by the Bankers' Alliance against Human Trafficking, which has recently published a list of indicators enabling the identification of transactions potentially linked to THB [82].

2) Actors involved in tackling a specific dimension of THB

In this section, we will focus on administrative actors that are involved in security matters because of their specific powers and the role that they can play in tackling a specific dimension of THB. This criminal phenomenon is multi-faceted and it is better to have specific tools to tackle certain forms of exploitation more efficiently. We will analyse how labour inspectorates contribute to the fight against labour exploitation (a) and how local authorities take part in preventing sexual exploitation by implementing the administrative approach (b).

a) Fighting labour exploitation via the involvement of labour inspectorates

Several reasons may explain why labour inspectorates play a crucial role in fighting labour exploitation. Firstly this form of exploitation entails the violation of laws relating to work, *i.e.* working conditions, working time, obligations to declare workers or to pay social charges, etc. In each Member State, specific bodies have been established and are in charge of controlling the application of these work regulations. They have the power to sanction irregular work situations and detect potential THB cases while executing their "traditional tasks". Secondly this form of exploitation receives more and more attention, as it is reported to be increasing and innovative solutions are envisaged to prevent, detect and fight it effectively. As a consequence, numerous studies have shown that new actors, especially labour services or

[79] CTIF, Annual Report 2012, p. 85-88.

[80] CTIF, Annual Report 2009, p. 71. Numerous cases were involving Brazilian nationals residing irregularly in Belgium, who were employed by Belgian companies working as subcontractors for other companies in the construction sector. See also Centre pour l'Egalité des Chances et de Lutte contre le Racisme, Annual Report 2009, p. 26 and p. 58 (judgments).

[81] Eurojust, Strategic Project on Eurojust's action against Trafficking in Human Beings, Final report and action plan, October 2012, p. 24.

[82] Presentation of B. Koch, Senior Vice President, Chief Compliance Officer, on behalf of the Bankers' Alliance against Human Trafficking, "White Paper Offers Guidance to Financial Institutions, Law Enforcement Agencies in Identifying Financial Transactions Linked to Human Trafficking", Vienna, February 2014, slides available at: http://www.osce.org/cthb/115618?download=true.

inspectorates and entities related thereto, are now increasingly involved in the field of combating labour exploitation [83].

The involvement of labour inspectorates may take two forms: contribution to the detection of THB cases on the one hand and cooperation with law enforcement authorities for investigation and prosecutions on the other hand. In both situations, the national context plays an important role. The EU has been increasing its involvement. In its 2012 strategy, the Commission announces that it will "strengthen cooperation with labour, social, health and safety inspectors (…) by including (THB) on the agenda of EU networks" [84]. Moreover, its efforts to approximate labour (market) legislation and laws regulating migrants working in the EU [85] support an increased awareness of problematic situations that can potentially be described as being THB.

Concerning the detection of THB situations, the competences of labour inspectorates enable them to contribute to that task. As part of their work, they carry out frequent checks on working places [86]. Labour inspectorates may also enter all rooms in which employees might work, which may in certain cases include the private home of the employer [87]. Such inspections enable them to gather information regarding identity, wages and payments, working permits, etc., which may lead to signs of THB and to follow up investigations. In some countries, such as the Netherlands or Belgium, units specialised in THB issues have been set up and focus exclusively on the detection of THB cases in labour situations.

However, addressing THB issues may be new for labour inspectorates and there is therefore a requirement to create awareness about exploitative situations. "Furthermore parties that may come across indicators of THB may be under the impression that THB lies outside their mandate and will not act on the detected indicators" [88]. Even in countries considered as being at the forefront of the fight against THB, such as the Netherlands, where monitoring of labour laws is divided over many divisions, "it is difficult to identify cases of exploitation because the information reaches the

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[83] C. Rijken, "Challenges and Pitfalls in Combating THB for Labour Exploitation", *in* C. Rijken (ed.), *Combating Trafficking in Human Beings for Labour Exploitation*, Nijmegen, Wolf, 2011, p. 404. The study analyses the situation in Austria, the Netherlands, Romania, Serbia and Spain.

[84] European Commission, Communication, The EU Strategy towards the Eradication of Trafficking in Human Beings, *op. cit*., p. 15.

[85] See for instance Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (*OJ*, no. L 168, 30 June 2009, p. 24), and especially its Article 9, para. 1, (c), which incriminates the behaviour of an employer "who uses work or services exacted from an illegally staying third-country national with the knowledge that he or she is a victim of THB".

[86] In the Netherlands, for instance, labour inspectorates visit approximately 11,000 working places per year (M. Heemskerk and C. Rijken, "Combating Trafficking in Human Beings for Labour Exploitation in the Netherlands", *in* C. Rijken (ed.), *op. cit.*, p. 96).

[87] See the example of Austria, detailed in J. Planitzer and H. Sax, "Combating Trafficking in Human Beings for Labour Exploitation in Austria", *in* C. Rijken (ed.), *op. cit.*, p. 25-26.

[88] C. Rijken, "Challenges and Pitfalls in Combating THB for Labour Exploitation", *in* C. Rijken (ed.), *op. cit.*, p. 404.

inspectors in a fragmented way" [89]. Moreover, inspectors carry out their inspections in branches that are at risk of violating labour laws and they have items prepared that they have to focus on. They may thus prefer to retain violations of labour laws as such violations can be established directly and without any need for testimonies from the victims. THB indicators may be neglected as the qualification of the facts as THB may suppose further investigation measures, referral to police services and securing the victims' cooperation.

Concerning the second aspect, in some countries, such as Belgium, cooperation between labour inspectorates and law enforcement authorities works smoothly, notably thanks to the organisation of coordination meetings, bringing together judicial actors, law enforcement actors, social inspection services and services in charge of the control of social laws [90]. Practitioners have stressed that these meetings constitute a privileged framework for the informal exchange of information (for example on the situation of THB in the sector or on pending investigations) and that they are essential for organising joint operations, which can bring together not only police forces but also social inspection services or tax services [91]. However, in other countries, cooperation between labour inspectorates and law enforcement authorities, especially with regard to the exchange of information, may be problematic. Information exchange between the various actors is not legally formalised (based on personal contacts) or mentioned in national plans and not implemented yet. Cooperation may also be slowed down because of a kind of competition between authorities as to who is the best equipped to deal with cases of THB or because of a lack of feedback once information was shared with other authorities [92].

The national context and national public policies seem to influence the extent to which labour inspectorates are involved in the fight against THB and contribute to the anti-trafficking efforts. The EU should use levers other than its anti-trafficking legislation and policy more extensively to sustain changes in national practices.

b) Fighting sexual exploitation – administrative approach to THB and new tasks conferred to local authorities

In the mid-1990s, facing the overload of "traditional" law enforcement authorities to prevent and combat crime, the "administrative approach to crime prevention" was developed. Under this approach, public administrations, and more particularly local authorities, were given more responsibilities in order to help in the fight against

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[89] *Ibid.*

[90] These meetings are foreseen by the Circular no. COL 1/2007 of the Board of General Prosecutors relating to investigations and prosecutions of acts of trafficking establishes coordination structures in each of the 27 Judicial Districts, under the chairmanship of the Reference Prosecutor.

[91] For more details about the Belgian anti-trafficking policy, see A. Weyembergh, C. Brière and I. de Ghellinck, National Report on Belgium, realised in the framework of the CooptoFight project (HOME-2010-ISEC-AG-54), forthcoming.

[92] C. Rijken, "Challenges and Pitfalls in Combating THB for Labour Exploitation", *in* C. Rijken (ed.), *op. cit.*, p. 405.

crime [93]. They were, in other words, invited to take actions involving the exercise of their specific powers and responsibilities in order to hinder or frustrate the organised crime activities [94]. The measures that they may take range from monitoring and control to screening to information exchange to policy with regard to the granting and withdrawal of permits or registration mechanisms.

This administrative approach has been advocated as an efficient mechanism to fight against THB. It contributes to the increasing involvement of administrative actors in this field and incorporates itself into the multidisciplinary dimension of the fight against THB as it is envisaged as a complement rather than as an alternative to actions against criminal groups under criminal law.

The European Union supports the development of this approach to tackle organised crime and more particularly THB. The Council of the EU has invited the Member States to "develop (…) a common approach aimed at raising awareness of administrative authorities on their role in preventing and combating trafficking in human beings" [95]. In addition, an informal network of national contact points on the administrative approach to fight against crimes has been set up. In May 2013, its 4th meeting focused on THB and constituted a privileged forum for discussion and for exchange of good practices between Member States [96].

Several countries implement this approach in the EU, such as the United Kingdom, Ireland or the Netherlands [97]. In the Netherlands, this approach has been used in particular to implement the prostitution policy. In 2000 the Parliament adopted a law that made it legal to own and manage sex establishments. Prostitution was decriminalised by making the business of prostitution subject to administrative law, which regulates the operation of sex establishments, and labour law, which regulates the worker rights and workplace conditions of prostitutes [98]. The key element in the implementation of that law was a licensing and monitoring system for sex facilities with the implementation devolved to municipalities [99]. The latter can now run an

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[93] W. Huisman and M. Koemans, "Administrative measures in crime control", *Erasmus Law Review*, 2008, 1, 5, p. 122.

[94] Centre for Crime Prevention and Safety, Manual for the administrative approach to organised crime, p. 2.

[95] Council of the EU, Council conclusions on the new EU strategy towards the Eradication of THB 2012-2016, 3195th JHA Council meeting, Luxembourg, 25 October 2012, p. 4.

[96] EUCPN, Newsletter, June 2013, p. 2.

[97] W. Huisman and M. Koemans, *op. cit.*, p. 122.

[98] Criminal law elements were restricted to the criminal activities that accompany some types of prostitution. for more details, see H. Wagenaar, S. Altink and H. Amesberger, Final Report on the International Comparative Study of Prostitution Policy: Austria and the Netherlands, Platform 31, p. 67.

[99] A Municipality can make use of various permits and bye-laws to counter crime, as they enable them to require permits for certain industries, allowing them to screen these industries and if necessary refuse or revoke a permit. Other measures can be a removal order for a designated area or the possibility of preventive body searches and placement of cameras in prostitution zones. They can also rely on a Decree, the BIBOB Act (Public Administration Probity in Decision-Making Act, 216 Bulletin of Acts, Orders and Decrees (2003)) that allows them to realise preliminary screening, in order to prevent municipalities to inadvertently

effective prostitution policy in close cooperation with the police and the public prosecution service. Nevertheless, due to the growth of the "secret prostitution sector" (*e.g.* escort practices, massages salons and internet prostitution), local authorities are invited to pay particular attention to signals that may suggest illegal prostitution activities [100]. The impact of the "administrative approach" is difficult to ascertain, and the involvement, or rather the differences in the involvement, of municipalities led to "a shift from locations and municipalities where there is a strong enforcement to locations and municipalities where this is not the case (to such an extent)" [101]. It has also been reported that traffickers rapidly circumvented the administrative measures set up under this approach. They made, for instance, more use of fake documents and fake marriages in order to allow foreign prostitutes to enter the legal prostitution sector [102]. Finally, concerns were also expressed concerning the diffusion of information about *mala fide* proprietors of sex establishments, who, after receiving a "warning" in one municipality, move to another municipality and start a new establishment there [103]. More recently, the Dutch National Rapporteur on THB was still critical about the administrative enforcement of prostitution policy as she noted that there "is no uniform policy towards the prostitution sector, [and] many municipalities also fail to properly formulate and manage the prostitution policy and its administrative enforcement" [104].

Despite these loopholes, similar measures have been put in place in neighbouring countries. In Belgium, where prostitution is only "tolerated" [105], municipalities also have the option to adopt local regulations, which may indirectly ensure a certain regulation of prostitution activities [106]. In Liège for instance, a local regulation of police relative to the exploitation of places of debauchery provides that the exploiter of such a place must declare any new worker prior to his/her beginning of work [107]. In Schaerbeek, (one of Brussels' municipalities), the local Council adopted two new

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facilitate or support criminal activities. For more details, see Dutch National Rapporteur on THB, 7th Report, p. 263-271.

[100] Such signals could be finding illegal or under-age prostitutes, street children, reports from citizens about escort services or reports from victims.

[101] Dutch National Rapporteur, Third Report on Trafficking in Human Beings, The Hague, 2005, p. 90.

[102] *Ibid.*, p. 91.

[103] *Ibid.*, p. 95.

[104] Dutch National Rapporteur, Seventh Report on Trafficking in Human Beings, The Hague, 2009, p. 289

[105] "Indoor and outdoor prostitution in Belgium are tolerated rather than prohibited. (…) Notwithstanding this, in practice indoor and outdoor prostitution are not treated in the same way. In fact, indoor prostitution, due to its invisibility, is much less tolerated than outdoor prostitution. This is because: a) there is tolerance towards "organisers that do not gain excessively at the expense of the prostitute"; b) police raids are much more frequent on the streets than indoors". Source: Transcrime, Study for the European Parliament on National Legislation on Prostitution and the Trafficking in women and children, August 2005, p. 79.

[106] Under Article 1, para. 2 of the Law of 21 August 1948, municipal councils, for the purpose of preserving public moral and order, can issue complementary regulations.

[107] Ville de Liège, Règlement de police relatif à l'exploitation de bars à serveurs-serveuses, de clubs à hôtesses et d'établissements érotiques, 26 April 2005, modified on 31 May 2010.

regulations: one on urbanism focusing on places of prostitution in windows and imposing minimum standards on space and amenities [108]. The other regulation on police organises, in particular, the requirements to exploit a window and provides for the obligation to declare all workers [109]. Moreover Article 134*quinquies* of the Municipal Law [110] gives all Belgian mayors the power to close an establishment when there is substantial evidence that trafficking in human beings is taking place. The mayor takes that decision after prior consultation with the judicial authorities and after hearing the manager of that establishment [111]. Even though such measures are not labelled as implementing an administrative approach, their content and potential impact on criminal activities are similar to measures adopted and implemented by the Dutch municipalities.

Finally, whereas such measures seem for the moment reserved to the prostitution sector, one could imagine that they can be extended to other sectors that are also vulnerable to trafficking and other forms of exploitation. Preliminary screening could, for instance, be applied before awarding subsidies and/or public contracts to construction enterprises and administrative sanctions could be imposed on those found employing workers in conditions amounting to labour exploitation [112]. Similarly, administrative measures such as local regulations may serve to regulate begging activities and potentially prevent forced begging, a form of exploitation under the Directive.

4. Conclusion – Involvement of private actors as the main specificity of the fight against THB

The EU's multidisciplinary, integrated and holistic approach does not only lead to the involvement of administrative actors in the efforts to fight THB. Private actors, *i.e.* civil society organisations and businesses, are also called on to join these efforts and this may constitute the specificity of the fight against THB when compared to the fight against other criminal activities. In our conclusion, we thus analyse the involvement of civil society organisations (1) as well as the involvement of business actors (2).

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[108] Commune de Schaerbeek, Règlement communal d'urbanisme sur les lieux de prostitution en vitrine, 27 June 2012.

[109] Commune de Schaerbeek, Règlement de police relatif à la prostitution en vitrine, 27 February 2013.

[110] Introduced by the Law of 1st July 2011, *Moniteur Belge*, 28 December 2012. It entered into force on 7 January 2013.

[111] Original version of the provision: "*Lorsqu'il existe des indices sérieux selon lesquels se déroulent dans un établissement des faits de traite des êtres humains tels que visés à l'article 433*quinquies *du Code pénal ou des faits de trafic des êtres humains tels que visés à l'article 77*bis *de la loi du 15 décembre 1980 relative à l'accès au territoire, au séjour, à l'établissement et à l'éloignement des étrangers, le bourgmestre peut, après concertation préalable avec les autorités judiciaires et après avoir entendu le responsable dans ses moyens de défense, décider de fermer cet établissement pour une durée qu'il détermine. (…)*".

[112] In the Netherlands the application of the BIBOB Act is limited to a selection of branches of industry, including construction and transport (W. Huisman and M. Koemans, *op. cit.*, p. 133), sectors particularly vulnerable to THB. However there is no indication on whether the implementation of this approach concerned sectors other than prostitution.

A. Involvement of civil society organisations

The involvement of civil society organisations in the fight against THB can take very diverse forms: contribution to policy developments, conduct of awareness raising campaigns on THB or protection of and assistance to detected and identified victims. We will see how the EU supports their increased participation in these activities.

The involvement of civil society organisations is crucial in elaborating public policies that contribute effectively to prevent and fight THB. Their very specific experiences and expertise are essential in the elaboration, adoption and implementation of policies that have an effective impact on the ground. The 2011 Directive therefore invites national authorities to encourage and work closely with them [113] and provides for the close cooperation of civil society organisations with national rapporteurs or equivalent mechanisms [114]. In practice, such cooperation is effective even though it can take place through formal [115] and/or informal mechanisms [116]. In order to reflect the involvement of civil society organisations in the elaboration of national policies, the Commission has recently launched an EU Civil Society Platform, which aims in particular at enabling the EU institutions to engage in constructive dialogue with civil society organisations [117].

Civil society organisations also play a significant role thanks to the numerous awareness raising campaigns that they carry out. The 2011 Directive also invites Member States to carry out such prevention actions "in cooperation with relevant civil society organisations" [118]. Sponsored by public funding or private funds [119], awareness raising campaigns may concern THB in general, a specific form of exploitation or more recent (and maybe more controversial) forms of exploitation [120]. The role of trade unions, which is probably less well known, is also worth mentioning. They are key actors in raising awareness about THB as they do not restrict themselves to

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[113] Preamble, Recital 6, Directive 2011/36/EU.

[114] Article 19 Directive 2011/36/EU. See also Commission, Communication, The EU Strategy towards the Eradication of Trafficking in Human Beings, *op. cit.*, p. 11.

[115] See the example of the United Kingdom, where several NGOs are part to the National Referral Mechanism Oversight Group [Source: GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom, GRETA (2012) 6, September 2012, p. 18, paras. 38-39].

[116] See the example of Belgium: specialised reception centres – public-funded NGOs entrusted with the protection and assistance of THB victims – are not (yet) part of the Inter-Departmental Coordination Unit for Action against Trafficking in and Smuggling of Human Beings, but are nevertheless regularly consulted on policy developments [*Source*: A. Weyembergh, C. Brière and I. de Ghellinck, National Report on Belgium, realised in the framework of the CooptoFight project (HOME-2010-ISEC-AG-54), forthcoming].

[117] Commission launches EU Civil Society Platform against THB, 31 May 2013, IP/13/484.

[118] Article 18, para. 2, Directive 2011/36/EU.

[119] An example is the "Stop child prostitution" campaign, in which, among others, the NGOs Child Focus, ECPAT and Foundation Samilia, the FPS Defence, Belgian Railways Company (SNCB) and the Belgian Federation of transporters participated.

[120] On the latter aspect, see the "Football against trafficking" campaign currently being carried out in Belgium aiming at raising awareness about the risk of THB among professional football players.

informing vulnerable workers of their rights but they also inform their members about the reality of THB. Trade unions active in transport and logistics have, for instance, trained and sensitised workers to be better equipped to identify potential cases of THB [121]. Trade unions can also cooperate with labour inspectorates, in particular by informing them of workplaces where they suspect severe exploitation [122].

Finally, with regard to the protection of and assistance given to victims, States have often delegated some of these tasks to civil society organisations, which are, because of their independence from public authorities, in a privileged position to gain the trust of the victims. In Belgium, for instance, the government has officially entrusted specialised reception centres with the tasks of providing assistance to adult victims of trafficking in and smuggling of human beings [123]. These centres provide accommodation in a secure reception facility or in transit flats; social assistance (*i.e.* social benefits); linguistic guidance; psychological aid and medical assistance as well as legal assistance to THB victims [124]. Similar mechanisms are also applied in many EU Member States such as the United Kingdom [125], France [126] or Romania [127]. In some countries, those tasks may be handed over to religious communities. In Spain for instance, such communities, such as the religious association called Adoratrices, run shelters providing assistance to victims [128].

In addition to these tasks linked to the assistance of identified victims, civil society organisations also play a key role in detecting victims. A current trend is to develop initiatives to boost the detection of THB cases via people working in the health sector. Such initiatives may be conducted at national level such as in Belgium, where the Interdepartmental Coordination Unit has developed a leaflet that has been distributed to hospital staff. It contains a tailored list of identification indicators [129]

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[121] J. Beirnaert, "A Trade Union Perspective on Combating Trafficking and Forced Labour in Europe", *in* C. Rijken (ed.), *op. cit.*, p. 489.

[122] *Ibid.,* p. 482.

[123] Arrêté royal du 18 avril 2013 relatif à la reconnaissance des centres spécialisés dans l'accueil et l'accompagnement des victimes de traite et de certaines formes aggravées de trafic des êtres humains et à l'agrément pour ester en justice, *Moniteur belge*, 22 May 2013.

[124] In this latter aspect, the recent Royal Decree opens up the possibility of launching the procedure provided for within the framework of the system of residence permits and of being authorised to bring legal proceedings to uphold those victims' rights.

[125] GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom, *op. cit.*, p. 19, paras. 46-49.

[126] GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by France, GRETA (2012) 16, January 2013, p. 16, paras. 36-38.

[127] GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Romania, GRETA (2012) 2, May 2012, p. 14, paras. 38-39.

[128] *Ibid*., p. 43, para. 170.

[129] The incapacity of the person to talk in one of the national languages, its absence of registration to a health insurance fund, the fact that the patient is always accompanied by a person, possibly playing the role of interpreter and who seems to exercise a control over the

and contact details of specialised reception centres for victims of THB, which will then analyse the credibility of the trafficking situation and, if relevant, contact the competent public prosecutor to launch the procedure of the "formal identification" of the victim. A similar initiative has been conducted in the framework of an EU-funded project [130] and led to the development of practical tools [131] and the organisation of training sessions.

B. Involvement of the business sector

The business sector brings together a very diverse range of profit-oriented actors, including, for instance, travel or employment agencies as well as hotels, motorway restaurants, transnational corporations and small and medium enterprises. Their involvement in the fight against THB is more recent.

As a preliminary remark, it must be highlighted that these actors can be held liable (administratively or criminally) only if THB is committed for their benefit. However, establishing their direct liability is difficult and there is no provision criminalising their indirect contribution to the realisation of the offence, *e.g.* when they fail to adequately supervise their sub-contractors. In one Belgian case, because of its very specific factual circumstances, revealing that the firm had knowingly turned a blind eye to the way in which its sub-contractor was treating its employees, the main contractor was condemned for THB as an accomplice [132]. But this exceptional example does not suffice to overcome the need to find other ways to make them aware of their responsibilities and promote their involvement in the effort to fight THB.

It is true that the Directive 2011/36/EU invites Member States to envisage/consider "taking measures to establish as a criminal offence the use of services, which are the objects of exploitation, with the knowledge that the person is a victim of (THB)" [133]. According to the preamble of the Directive [134], such further criminalisation could notably cover the behaviour of employers of legally resident third-country nationals

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patient, the presence of injuries, not credibly explained and which can be signs of mistreatments, etc.

[130] See in this regard, G. Biffl, T. Pfeffer and A. Trnka-Kwiecinski, Handbook for professionals at the interface of police and health authorities, realised in the framework of an EU funded ISEC project. http://www.joint-efforts.org/home/.

[131] Practical Guide for Healthcare providers (available at: http://www.joint-efforts.org/websites/53/uploads/files/documents/2014-payoke-guide-payoke-usb-low_23-4-2014_10_47_04.pdf) and a Handbook for professionals at the interface of police and health authorities (available at: http://www.joint-efforts.org/websites/53/uploads/file/2014_PAYOKE_TRAINING_MANUAL_USB_low.pdf).

[132] Correctional Tribunal of Ghent, Judgment of 5 November 2012. For more details, see Centre pour l'Egalité des Chances et Lutte contre le Racisme, Rapport Annuel 2012, p. 71-72.

[133] Article 18, para. 4, Directive 2011/36/EU. Article 19 of the CoE convention reads as follow: "Each Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences under its internal law, the use of services which are the object of exploitation as referred to in Article 4 paragraph a of this Convention, with the knowledge that the person is a victim of trafficking in human beings".

[134] Preamble, Recital 26, Directive 2011/36/EU.

and Union citizens [135]. It would only constitute the logical extension of the obligation on Member States to envisage the sentencing of employers of people from third countries in an illegal situation who are victims of trafficking in human beings [136] and allow for prosecution in situations in which European legal rules are sidestepped [137]. However this innovative provision is only soft law in nature and Member States retain a wide margin of discretion to decide either to implement it or to leave it as a dead letter.

Nevertheless, several initiatives (both global and European) have been launched, relating especially to corporate responsibility in relation to combating human trafficking. Within the United Nations, several actions have been undertaken to promote what corporations can and should do to prevent involvement in human rights infringements [138]. One of them is the adoption in 2006 of the "Athens Ethical Principles" [139] after a meeting organised under the auspices of the Greek Ministry of Foreign Affairs, in which business leaders and CEOs from the private sector took part. The final result of this meeting was the proclamation of seven principles [140], which have been criticised because they focus on responsibilities down the supply chain and do not mention responsibilities for the corporations' own activities [141].

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[135] It must be noted here that the Explanatory report of the CoE convention (para. 232) also refers to these two possibilities: the establishment of a criminal offence for the owner of a business to knowingly use trafficked workers made available by the trafficker and for the client of a prostitute who knew full well that the prostitute had been trafficked. It also refers to a third possibility: the establishment of a criminal offence for someone who knowingly used a trafficker's services to obtain an organ).

[136] See Directive 2009/52/EC of 18 June 2009, providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, *OJ*, no. L 168, 30 June 2009, p. 24.

[137] See for instance the cases in Belgium in which victims of trafficking are legal residents by virtue of the Posting Directive (Directive 96/71 of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, *OJ*, no. L 18, 21 January 1997, p. 1). See in this regard, Centre pour l'Egalité des chances et la Lutte contre le Racisme, *Une apparence de légalité,* Annual Report 2009, p. 70-99.

[138] Adoption in 2008 of the "Protect, Respect, Remedy" Framework, and adoption in 2011 of the UN Guiding Principles on Business and Human Rights, both resulting from the appointment and the work carried out by the UN Special Representative of the Secretary-General who was especially in charge of the issue of Human Rights and Transnational Corporations and Other Business Enterprises.

[139] AEPs are policy setting, public awareness raising, strategic planning, personnel policy enforcement, supply chain tracing, government advocacy and transparency. The full version of the text is available at http://www.ungift.org/docs/ungift/pdf/Athens_principles.pdf. The Luxor Protocol, which includes implementation guidelines, has later complemented them. Its full text is available at: http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/Luxor_Implementation_Guidelines_Ethical_Principles.pdf.

[140] For a more detailed analysis of these principles, see N. Jägers and C. Rijken, "Prevention of Human Trafficking for Labour Exploitation: The Role of Corporations", *Northwestern Journal of International Human Rights*, 2014, 12/1, p. 60, para. 46.

[141] *Ibid.* p. 60, para. 47.

Within the European Union, the Commission is also trying to push corporations to adopt and implement a policy more in line with the notion of corporate social responsibility, which is defined as the responsibility of enterprises for their impact on society, and is encouraging enterprises to set up a process to integrate ethical human rights in particular into their business operations [142]. In addition, in its strategy, the Commission intends to foster prevention of THB, in particular by promoting the establishment of a European Business Coalition against THB. Such a coalition is envisaged as a privileged framework to develop models and guidelines about reducing the demand for services provided by victims of THB, in particular in high-risk areas [143]. The Global Business Coalition against Human Trafficking could be used as a source of inspiration [144].

Concrete examples illustrate how enterprises have been involved in THB cases. These examples are to be found in specific sectors, which are unwillingly involved in THB. Hotels are, for instance, particularly likely to be used for prostitution and hence sexual exploitation purposes. With the development of the "secret prostitution sector", the modus operandi of the perpetrators change: they advertise sexual services online and arrange meetings in rented accommodation, directly at the clients' place or in more anonymous hotel rooms. In the latter case, hotel staff can detect suspicious situations and refer the case to law enforcement authorities. For this reason, the Dutch authorities have held workshops for several hundreds of hotel staff members to train them about how to recognise victims of THB and in this way have improved their awareness about potential THB victims [145]. Similar initiatives have also been carried out in the United Kingdom [146].

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[142] European Commission, Communication, A renewed EU strategy 2011-2014 for Corporate Social Responsibility, 25 October 2011, COM (2011) 681 final,

[143] Commission, Communication, The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, *op. cit.*, p. 8.

[144] For more information see http://gbcat.org/.

[145] Eurojust, Strategic Project on Eurojust's action against Trafficking in Human Beings, Final report and action plan, October 2012, p. 18.

[146] For a concrete example illustrating the impact of trainings: http://www.thisiswiltshire.co.uk/news/10927536.Gang_of_traffickers_used_town_hotel/?ref=rss.

The freezing of terrorists' assets: preventive purposes with a punitive effect [1]

Francesca Galli

1. Introduction

Traditionally, serious crime has been a domain where the legislator used to adopt criminal law measures but it is now becoming a field where recourse to administrative law or administrative measures is more commonplace. The significance, purpose and role of administrative law and measures change with respect to the type of serious crime concerned [2].

So what is the reason for this increasing use of administrative measures, either as an addition or as an alternative to criminal law, to counter terrorism?

There has, first and foremost, been a general shift in the criminal justice approach towards serious crime (including terrorism) towards prevention. Policymaking and crime-fighting strategies are increasingly concerned with predicting and preventing future risks (in order, at least, to minimise their consequences) rather than prosecuting past offences [3]. There is thus a shift towards a society "in which the possibility of forestalling risks competes with and even takes precedence over responding to

[1] The author wishes to thank Professor Anne Weyembergh for her valuable comments and inputs on a previous version of this contribution.

[2] A. Ashworth and L. Zedner, "Defending the Criminal Law", *Criminal Law and Philosophy*, 2008, 2/1, p. 21; W. Huisman and M. Koemans, "Administrative Measures in Crime Control", *Erasmus Law Review*, 2007-2008, 1, p. 121; Council of Europe, Preventive Legal Measures against Organized Crime, Strasbourg, Council of Europe, 2003; C. Fijnaut (ed.), *The administrative approach to (organized) crime in Amsterdam Public Order and Safety Department*, Amsterdam, City of Amsterdam, 2002.

[3] L. Zedner, "Fixing the Future?", *in* S. Bronnit *et al*. (eds.), *Regulating Deviance*, Oxford, Hart Publishing 2008.

wrongs done" and where "the post-crime orientation of criminal justice is increasingly overshadowed by the pre-crime logic of security" [4].

In order to explain the shift toward prevention, authors have described the emergence of: a "risk society" where risks and damage control modify the means and legitimisation of state intervention [5]; a "new penology" paradigm for the administration of criminal justice targeting and classifying a suspect group of individuals and making assessments about how likely they are to offend in particular circumstances or when exposed to certain opportunities [6]; and a "culture of control" counterbalancing the expansion of personal freedom with a reconfiguration of the response to crime and the sense of criminal justice [7].

Counter-terrorism legislation enacted since 9/11 has certainly expanded all previous trends towards anticipating risks. The risk in terms of mass casualties resulting from a terrorist attack is thought to be so high that the traditional due process safeguards are deemed unreasonable or unaffordable and prevention is becoming a political imperative [8]. Thus, the aim of current counter-terrorism measures is mostly that of preventive identification, isolation and control of individuals and groups who are regarded as dangerous and allegedly represent a threat to society [9].

The shift is all the more important given the catalysing effect of terrorism on criminal justice systems and the normalisation of extraordinary means. Terrorist incidents have often been used as a catalyst for the implementation of other measures relating to security at large (including means for the prevention, investigation and prosecution of minor offences), which would have not been accepted otherwise [10]. In addition, the subsequent introduction of extraordinary anti-terrorism measures has been regarded as exceptional and legitimised by the fact that such measures are temporary and targeting only terrorism-related activities and specific groups of people. The problem is that, via the so-called "normalisation of extraordinary means", the powers that are introduced are unlikely to remain limited to the context of the fight against terrorism or they have a tendency to be applied beyond their original scope

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[4] L. Zedner, "Pre-crime and post-criminology?", *Theoretical Criminology*, 2007, 11, p. 261, at p. 261.

[5] U. Beck, *Risk Society: Towards a New Modernity*, London, Sage, 1992.

[6] M.M. Feeley and J. Simon, "The new penology", *Criminology*, 1992, 30/4, p. 449.

[7] D. Garland, *The culture of control*, Oxford, OUP, 2001.

[8] A. Ashworth and L. Zedner, "Prevention and Criminalization: Justifications and Limits", *New Criminal Law Review*, 2012, 15, p. 542.

[9] L. Amoore and M. de Goede (eds.), *Risk and the War on Terror*, London, Routledge, 2008; L. Amoore, "Risk before justice: when the law contests its own suspension", *Leiden Journal of International Law*, 2008, 21/4, p. 847 ; C. Aradau and R. Van Munster, "Governing terrorism through risk: taking precautions, (un)knowing the future", *European Journal of International Relations*, 2007, 13/1, p. 89; U. Beck, "The terrorist threat: world risk society revisited", *Theory, Culture and society*, 2002, 19/4, p. 39.

[10] C. Cocq and F. Galli, "The Catalysing Effect of Serious Crime on the Use of Surveillance Technologies for Prevention and Investigation Purposes", *New Journal of European Criminal Law*, 2013, 4, p. 256.

and, thus, become part of, and impact upon, the "ordinary" criminal justice system and law enforcement policies in a broad sense [11].

The shift towards prevention may be best understood with reference to the development of a number of trends in criminal justice, which are further influenced by the evolving terrorist threat (*i.e.* the parallel phenomena of home-grown terrorism and lone wolf terrorist actors) [12]. Two major trends have already been subject to in-depth analysis: the introduction of inchoate offences and the development of anticipative criminal investigations.

Firstly, subsequent reforms led to the introduction of inchoate offences and the (over)criminalisation of preparatory activities – even where these stand several steps away from the actual perpetration of the harm – which are often coupled with a shift of the burden of proof onto the defendant. The boundaries of what constitutes dangerous behaviour are highly contentious and problems arise with the assessment of future harm. Not only do inchoate offences expand criminal liability but they also allow the use of enhanced preventive powers and police interventions before the commission of any substantive crime [13].

Secondly, counter-terrorism policies have fostered the development of anticipative criminal investigations (criminal investigations with a preventive focus and function) as a consequence of approaches that combine the objective of the prevention of terrorism with the objective of prosecuting and punishing terrorists at some point in the future. "Suspicion" has replaced an objective "reasonable belief" in most cases

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[11] O. Gross, "Chaos and rules", *Yale Law Journal*, 2003, 112, p. 1011, at p. 1090; D. Dyzenhaus, "The permanence of the temporary", *in* R.J. Daniels *et al.* (eds.), *The security of freedom*, Toronto, University of Toronto Press, 2001; A.W. Neal, "Normalization and Legislative Exceptionalism: Counterterrorist Lawmaking and the Changing Times of Security Emergencies", *International Political Sociology*, 2012, 6/3, p. 260.

[12] On home-grown terrorism see *e.g.* K.L. Thachuk *et al.*, *Homegrown Terrorism. The Threat Within*, Washington DC, National Defense University, 2008; T. Precht, *Home grown Terrorism and Islamist Radicalisation in Europe*, Copenhagen, Danish Ministry of Justice, 2007. On the guidelines that ground the action of the EU to counter the roots of this phenomenon see *e.g.* Council of the European Union, *The European Union Strategy for Combating Radicalisation and Recruitment to Terrorism*, 14781/105, 2005. On lone wolves see *e.g.* R. Pantucci, "A Typology of Lone Wolves: Preliminary Analysis of Lone Islamist Terrorists", London, ICSR, 2011. On the role of the internet in this context see *e.g.* UNODC (eds.), *The use of the Internet for terrorist purposes*, Vienna, United Nations, 2012; P. Brunst, "Terrorism and the Internet: new threats posed by cyberterrorism and terrorist use of the Intemet", *in* M. Wade and A. Maljevic (eds.), *A War on Terror?*, New York, Springer, 2009; M. Conway, "Terrorism and the Internet: New Media – New Threat?", *Parliamentary Affairs*, 2006, 59/2, p. 283; Council of Europe, *Cyberterrorism – the use of the internet for terrorist purposes*, Strasbourg, Council of Europe, 2008.

[13] See K. Sugman Stubbs and F. Galli, "Inchoate offences. The sanctioning of an act prior to an irrespective of the commission of any harm", *in* F. Galli and A. Weyembergh (eds.), *EU counter-terrorism offences: What impact on national legislation and case-law?*, Brussels, Editions de l'Université de Bruxelles, 2011, p. 291. Child and Hunt concisely point out the lack of justification for the existence of the special part inchoate offences. See J. Child and A. Hunt, "Risk, pre-emption, and the limits of the criminal law", *in* K. Doolin *et al.* (eds.), *Whose Criminal Justice?*, Hook, Waterside Press, 2011, p. 51.

in order to justify police intervention at an early stage in terrorism cases without the need to envisage evidence gathering with a view to a prosecution. Because of the attribution of a preventive function to criminal investigations, the role of the criminal justice system in providing security has been repositioned. This entails new forms of cooperation and a new division of responsibilities between law enforcement and intelligence authorities [14].

The two trends are often overlapping and intertwined and tend to mutually reinforce each other. They thus foster the centrality of (a poorly defined level of) risk in threat assessment and the key role of suspicion as justification and rationale for the intervention of law enforcement authorities to protect the public from (anticipated) future harm [15]. The paradigm shift towards preventive action exemplified by the two trends poses critical challenges for the protection of individual rights [16].

This contribution addresses a third major trend, namely the extensive use of administrative measures for terrorism prevention purposes. After a brief overview of the characteristics and reasons allegedly justifying such extensive use (2), the contribution will specifically tackle the (proactive) nature of terrorist blacklisting (3). Reference will be made to the use of security service information as a basis for listing decisions (A) and the punitive effect of administrative measures (B). The question will then be whether elements of blacklisting witness a blur of boundaries between administrative and criminal law (4); the issue will be explored through the analysis of the scope of intervention of the two frameworks (A); the division of functions between the actors involved (B); the contamination between the set of applicable rules (C). Further analysis will be devoted to subsequent reforms introduced both at the EU and the international level as a consequence of various factors including the need to comply with the requirements of the Luxembourg courts' case law in terms of procedural rights (5). In particular, the contribution will evaluate the impact on the existing framework of the new legal bases introduced by the Lisbon Treaty (6). In the end, an assessment of such reforms aims, *inter alia*, at establishing whether they can be seen as attempts to frame the blur between administrative and criminal law or rather contribute to deepening such blur and foster the overlap and intertwining of the two frameworks (5) [17].

2. Administrative measures for terrorism prevention purposes

In the last few years, there has been an increase in the number of measures with a prospective value, designed to prevent individuals who may represent a threat to

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[14] See M.F.H. Hirsch Ballin, *Anticipative criminal investigations. Theory and Counterterrorism Practice in the Netherlands and the United States*, New York, Springer, 2012.

[15] See *e.g.* A. Ashworth, L. Zedner and P. Tomlin, *Prevention and the limits of criminal law*, Oxford, OUP, 2013.

[16] See *e.g.* F. Galli, "Freedom of thought or thought crimes ? Counter-terrorism and freedom of expression", *in* A. Masferrer and C. Walker, *Counter-terrorism, Human rights and the rule of law. Crossing legal boundaries in defence of the State*, Cheltenham, Edgar Elgar, 2013.

[17] J. Almquist, "A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions", *ICLQ*, 2008, 57, p. 303.

society from committing terrorist offences rather than to enable them to be punished for having done so. These include the introduction of new measures – or the enhancement of already existing measures – to allow more flexibility in the detention, expulsion and deportation of immigrants, administrative detention, control orders and listing [18].

The use of administrative measures may be explained by the need to identify a quick (although at times only short term) solution to the issues at stake whereas the criminal law option would involve the cumbersome complexity of a lengthy criminal justice process. Besides, they are often justified by an alleged shortage of evidence, which could hold up in court in support of the prosecution case, particularly in the context of preparatory activities [19]. Governments can thus act on the lower standard of "possibility of future harm" rather than the higher standard of "proof of past criminal activities" that is required for a criminal prosecution. Often based on intelligence information that the law does not permit to be used in criminal proceedings or that cannot be disclosed to the public, it seems that well-established and more onerous evidentiary requirements are being to some extent bypassed by a network of procedures found in administrative law. In ordinary criminal cases, suspects and defendants would have an opportunity to identify and possibly challenge the evidence against them, to report on any wrongdoing by the authorities and then to have an impartial authority adjudicate any contradictory claims. By contrast, where administrative measures are used in terrorism cases, there is a limited possibility for judicial review and a restricted amount of information available to detainees and their lawyers to effectively challenge administrative measures. Hence terrorist suspects' rights are affected as a result of an administrative process assessing the dangerousness of an individual, often on the basis of closed evidence, rather than of a public hearing and trial [20].

3. Preventive and proactive nature of blacklisting and asset freezing

As highlighted above, administrative measures, which are predominantly proactive in nature, are valuable methods for preventing terrorism and are in fact the cornerstone of existing counter-terrorism policies both at the national, European and international levels. Within the general prioritisation of pre-emptive security strategies and techniques in the so-called "war on terror", blacklisting and preventative asset freezing have been widely used but not without significant controversy [21]. They

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[18] T. Ojanen, "Administrative counter-terrorism measures – a strategy to circumvent human rights in the fight against terrorism?", *in* D. Cole, F. Fabbrini and A. Vedaschi (eds.), *Secrecy, national security and the vindication of constitutional law*, Cheltenham, Edgar Elgar Publishing, 2013, p. 249.

[19] *E.g.* intercept evidence in the United Kingdom or material covered by state secrecy.

[20] M. De Goede, "The Politics of Preemption and the War on Terror in Europe", *EJIR*, 2008, 14, p. 16.

[21] See *e.g.* I. Cameron (ed.), *EU Sanctions: Law and Policy Issues concerning Restrictive Measures*, Antwerp, Intersentia, 2013; G. Sullivan and B. Hayes, *Targeted sanctions, preemptive security and fundamental rights*, Berlin, ECCHR, 2010; C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford, OUP, 2009; F. Fabbrini, *Fundamental rights in Europe*, Oxford, OUP, 2014, ch. 2; T. Tridimas and J.A. Gutierrez-Fons, "EU Law, international law and economic sanctions against terrorism: the judiciary in distress?", *Fordham International Law Journal*, 2008, 32/2, p. 660; C. Eckes, "The

are perceived by policymakers and legislators as a cutting-edge method of tracing, intervening and disabling terrorist networks at an early stage.

The legal framework for freezing terrorist assets involves a complex combination of UN Security Council Resolutions, Common Positions taken by the Council of the EU, EC Regulations and national authorities' decisions and enforcement actions against the assets of terrorist organisations and those suspected of having connections with such groups. Whereas certain European and national blacklisting measures are autonomous, others are adopted for the purpose of implementing sanctions under international law. This has led to the interweaving and at times simultaneous intervention of different legal frameworks (international, European and national). The institutional and procedural complexity poses difficult questions with regard to the integrity and the coherence of the system and, in a broader sense, creates a situation of legal uncertainty and thus a potential fragmentation of legal protection [22].

In addition, sanctions' regimes engage a range of human rights but the protection of such rights is often rather weak. With regard to designating terrorists (*i.e.* listing and de-listing procedures) and due process rights, the issue to be explored is two-fold: the use of sensitive and undisclosable security service information as a basis for listing decisions and the punitive effect of administrative measures.

A. The use of security service information

Human rights concerns surrounding sanctions regimes are intensified by the extensive use of secret intelligence gathered by security services.

Listing is adopted on the basis of a proposal by the competent national authority; legal provisions stipulate that "a decision should be based on serious and credible evidence or clues or condemnation" [23]. As prior communication would jeopardise the effectiveness of the freezing of funds and resources, it is allegedly neither possible to communicate grounds nor hear the appellant before the names are included in the list for the first time [24].

However, the right to effective judicial protection implies that judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances used to adopt the contested decision and of the information on which the assessment is based. In principle, the statement of reasons – provided at the

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case for the resilience of the EU constitutional foundations", *European Public Law*, 2009, 15/3, p. 351; E. Guild, "The uses and abuses of counter-terrorism policies in Europe: the case of the "terrorist lists"", *Journal of Common Market Studies*, 2008, 46/1, p. 173.

[22] S. Gless and D. Schaffner, "Judicial review of freezing orders due to a UN listing by European Courts", *in* S. Braum and A Weyembergh (eds.), *Le contrôle juridictionnel dans l'espace pénal européen*, Brussels, Editions de l'Université de Bruxelles, 2009, p. 163; D. Halberstam and E. Stein, "The United Nations, the European Union, and the King of Sweden: Economic Sanctions and individual rights in a plural world order", *Common Market Law Review*, 2009, 46, p. 13.

[23] Article 1(4), Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, *OJ*, no. L 344, 28 December 2001, p. 93.

[24] As confirmed by the General Court of the EU in Judgments T-174/12 and T-80/13, *Syrian Lebanese Commercial Bank v. Council*, 4 February 2014, nyr.

very least as swiftly as possible after that decision [25] – should not consist merely of a general, stereotypical formulation but authorities should rather state the matters of fact and law which led to the adoption of the decision [26].

Nevertheless, defence rights are observed in the most superficial sense and the information provided to the listed individual or entity often takes the form of general assertions and does not include the real fundamental reasons leading to the inclusion in a list. In fact, proposals for listing do not need to include evidence itself if inclusion would potentially threaten national security concerns.

Besides, even in case of an appeal, the State responsible for the initial designation is reluctant to fully disclose and share with the suspect and his/her lawyer or with the court valuable intelligence on which the blacklisting decision is based. With a view to protecting the public interest, secrecy often allows the authorities to shield sources and methods used to collect intelligence. Failure to disclose all the relevant information to the judiciary and those sanctioned has repeatedly led to the annulment of sanctions' decisions by the Council of the EU [27].

As highlighted later in this contribution, the Luxembourg courts have ruled on the necessary disclosure of the grounds for a blacklisting decision but have been more circumspect in relation to the disclosure of the evidence that supports those grounds [28]. Interestingly, in his recent Opinion in the 2013 *Kadi* case, Advocate General Bot has suggested that courts should afford much discretion to EU institutions in making blacklisting decisions [29]. However, the Court disregarded the advice of the Advocate General and ruled that secrecy and confidentiality of the material cannot serve as a general excuse for the Member States or institutions to withhold it from the Court [30]. It would be the task of the Court to apply, in the course of judicial review, techniques to accommodate legitimate security concerns and the respect of individual rights. Ultimately the Court will have to decide whether the information may be disclosed to the person concerned.

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[25] See CFI, 12 December 2006, *Organisation des Modjahedines du people d'Iran v. Council and UK*, T-228/02, *ECR*, p. II-4665.

[26] See CFI, 23 October 2008, *People's Mojahedin Organization of Iran v. Council*, T-256/07, *ECR*, p. II-3019 and CFI, 4 December 2008, *People's Mojahedin Organization of Iran v. Council*, T-284/08, *ECR*, p. II-3487. For an analysis on the statement of reasons requirement implications see *e.g.* C. Eckes, "Sanctions against individuals – Fighting terrorism within the European legal order", *European Constitutional Law Review*, 2008, 4, p. 205.

[27] See *e.g.* CJ, 21 December 2011, *France v. OMPI/PMOI*, C-27/09 P.

[28] By analogy, in a recent request for preliminary ruling in the context of UK immigration law, the CJ had to rule on the use of secret evidence in the Special Immigration Appeals Commission. The Court considered that it is for national courts to strike an appropriate balance in relation to disclosure when this may prejudice security by exposing particular persons involved in operations or by revealing the methods that those operations use. CJ, 4 June 2013, *ZZ v. Secretary of State for the Home Department.*

[29] Advocate General Bot, Opinion in C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom v. Kadi*, 19 March 2013, nyr.

[30] See CJ, 18 July 2013, *Commission, Council and United Kingdom v. Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, nyr, paras. 125-129.

In this context, with reference to desirable reforms, it would be interesting to study whether the UK Special Advocate, a security cleared lawyer involved in the UK in terrorist cases, could be a desirable model to solve the issue of access to sensitive information grounding a listing decision [31].

As the situation currently stands, there is as yet very little openness and transparency about the origin of relevant information, which is not designed to hold up in court and is often gathered for other purposes than criminal investigation and prosecution. Thus, methods for collecting intelligence are not directed by the same evidentiary standards and standard of proof as the collection of evidence for criminal proceedings.

Due to this problem of secrecy, the use of intelligence information to ground listing decisions poses specific challenges in terms of people's rights to a fair trial [32]. On the one hand, the reliance on intelligence makes it more difficult for an individual to contest the administrative measure. On the other hand, the ability of the court to adjudicate on whether intelligence information is factually accurate and reliable is also crucially limited [33].

In addition, the use of intelligence as the basis of blacklisting decisions may raise the issue of illegally obtained evidence, *e.g.* through torture or other forms of ill treatment. This feature can only intensify the human rights concerns with regard to the use of intelligence as a basis for sanctions.

B. Administrative in nature, punitive in effect

Although blacklisting and asset freezing are adopted under the label of mere preventive administrative measures, the consequences of the sanctions attached to the listing (and the additional "collateral damages" which they may engender) are clearly punitive in effect [34].

The aim of asset freezing is to deny the listed individuals or entities the means to support terrorism by ensuring that no funds are available to them as long as they remain on the blacklists. Because of the preventive aim, it is not necessary to be the suspect of a crime or for the authorities to have started a criminal procedure against the individual or entity. Indications that one may be a terrorist, or that there are links

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[31] The suggestion has been first put forward by Advocate General Sharpston. See AG Sharpston, Opinion in C-27/09 P, *France v OMPI/PMOI*, 14 July 2011. For a detailed discussion of the issue see C. Murphy, "Secret evidence in EU security law: special advocates before the Court of Justice?", *in* D. Cole *et al.* (eds.), *op. cit*., p. 268; A. Tomkins, "National security and due process of law", *Current legal problems*, 2011, p. 1.

[32] It must be highlighted, however, that the entitlement to disclosure of relevant evidence is not an absolute right. See ECtHR, 27 October 2004, *Edwards and Lewis v. UK*, App. nos. 39647/98 and 40461/98.

[33] See K. Roach, "Managing secrecy and its migration in a post-9/11 world", *in* D. Cole *et al.* (eds.), *op. cit*., p. 115.

[34] See *e.g.* K. Nuotio, "How, if at all, do anti-terrorist blacklisting sanctions fit into (EU) criminal law?", *in* I. Cameron, *EU sanctions*, p. 117; P. Asp, "Blacklisting sanctions and principles of criminal law", *ibid*., p. 131.

to suspected terrorist organisations or individual terrorists may be sufficient to include a person or entity on the blacklist and have his/her assets frozen [35].

The consequences of listing can, however, often be more severe and far-reaching than those of traditional criminal sanctions. Such consequences may be legal, social, reputational, and financial. They have specific, restrictive and far-reaching effects on the life and livelihood of those listed, those associated with a listed organisation and those related to someone listed. Listed individuals – who are never formally accused or charged beforehand – cannot work or have a job, they cannot receive financial support from friends, they cannot travel and the impact on their family life is substantial [36].

Sanctions may constitute a disproportionate interference with property rights although the Sanctions Committee has argued that freezing funds is a temporary and precautionary measure which does not amount to the deprivation of a person's property (which is instead the consequence of confiscation measures) [37]. Yet, in the absence of an independent and impartial tribunal, the existing procedures do not entail an effective remedy against sanctions, de-listing is by no means an automatic process and de facto blacklisting is not a temporary measure as there is no limit to available renewals [38].

4. Blurring boundaries between administrative and criminal law?

The question is whether the increased recourse to administrative measures in this context leads to a blurring of the boundary between administrative and criminal law. The analysis may be conducted with reference to: the scope of intervention; the division of functions between the actors involved; and contamination between the set of applicable rules.

A. Scope of intervention: are administrative measures akin to criminal charges?

Firstly, in relation to the scope of intervention, it has been discussed whether blacklists amount to a criminal charge [39] within the meaning of Article 6 ECHR, becoming *de facto* punitive sanctions because of the devastating effect on those listed.

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[35] See, for example, Security Council Committee established pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and associated individuals and entities, Guidelines of the Committee for the Conduct of its Work, 22 July 2010, which states [at Article 6(c)] that "A criminal charge or conviction is not a prerequisite for listing as the sanctions are intended to be preventive in nature".

[36] See *e.g.* M. De Goede, "Blacklisting and the ban: contesting targeted sanctions in Europe", *Security dialogue*, 42/6, p. 499; International Commission of Jurists, Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and human rights, 2009.

[37] UN Doc. S/2004/1039, at para. 24.

[38] See C. Eckes and J. Mendes, "The right to be heard in composite administrative procedures: lost in between protection?", *European Law Review*, 2011, 36, p. 651.

[39] The concept of charge has to be defined within the meaning of the Convention. In several cases the Court held that it may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence". See for instance: ECtHR, 27 February 1980, *Deweer v. Belgium,* App. no. 6903/75, at paras. 42 and 46; ECtHR, 15 July 1982, *Eckle v. Germany*, App. no. 8130/78, at para. 73.

Does the punitive effect prevail over the preventive aim? Scholars' opinions differ widely in their assessments [40].

According to the case law of the Strasbourg Court, there are three criteria to determine the nature of a criminal charge ("Engel Test") [41]: the domestic classification of the proceedings (does the adoption of a sanction follow the ordinary process of a conviction?) [42], the nature of the offence (who is the target of the sanction?) [43], and the severity of the sanction (how can one assess the length and intensity of the interference with the rights of the charged person?) [44].

On the basis of these criteria it is as yet unclear whether asset freezing can be qualified as a criminal charge within the meaning of Article 6 ECHR [45]. The severity of the sanction argues in favour of considering targeted sanctions as a criminal charge. Although they do not entail imprisonment, sanctions impose far-reaching restrictions on personal freedom, such as constraints on private and professional life. Besides, these sanctions intervene paradoxically prior to any condemnation, where a conviction is normally the point distinguishing a preventive/administrative measure from a repressive/criminal sanction. Finding a standard of procedural safeguards for an entirely atypical kind of sanctions is a challenge.

Finally, in the case law of the European Court of Human Rights (ECtHR) there seems to be no indication of qualification of blacklisting and asset freezing as a criminal charge. A relevant parallel may be established with the ECtHR case law on seizure and confiscation: the ECtHR has held, on different occasions, that preventive measures such as confiscation do not constitute a criminal charge [46]. Since asset freezing is a comparable instrument, it is unlikely that the assessment of the ECtHR would be altered [47].

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[40] For a detailed analysis see *e.g.* M. van den Broeck, M. Haelhorst and W. de Zanger, "Assets freezing: smart sanctions or criminal charge?", *Utrecht Journal of International and European Law*, 2010, 27/72, p. 18; C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights*, p. 150-165; I. Cameron, Report to the Swedish Foreign Office on targeted sanctions and legal safeguards, Swedish institute of international law, 2002.

[41] ECtHR, 8 June 1976, *Engel and Others v. the Netherlands,* App. nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, at paras. 82, 83.

[42] This criterion is of a relative weight: even if national law does not classify an offence as criminal, it may still be regarded as to fall under the notion of a criminal charge.

[43] ECtHR, 23 November 2006, *Jussila v. Finland,* App. no. 73053/00, at para. 38.

[44] ECtHR, 28 June 1984, *Campbell and Fell v. the United Kingdom*, App. no. 7819/77 and 7878/77, at para. 72; ECtHR, 27 August 1991, *Demicoli v. Malta,* App. no. 13057/87, at para. 34.

[45] See *e.g.* I. Cameron, *The ECHR, Due Process and UN Security Council Counter-Terrorism Sanctions*, Strasbourg, Council of Europe, 2006.

[46] See *e.g.* ECtHR, 22 February 1994, *Raimondo v. Italy*, App. no. 12954/87; ECtHR, 24 October 1986, *Agosi v. United Kingdom*, App. no. 9118/80.

[47] See I. Cameron, Report to the Swedish Foreign Office.

When adjudicating on terrorist smart sanctions and the rights of a listed individual, the CFI and CJ have never made reference to the term "criminal charge" but rather used the concept of "criminal sanction"[48].

It emerges from the case law of the Luxembourg courts that effective judicial protection must apply in cases regarding smart sanctions. This was made explicit by the Court of Justice in *Kadi*, which states that authorities are obliged to communicate the grounds on which the inclusion is based[49]. Even though, for reasons of effectiveness, this authority cannot be required to communicate these grounds before inclusion on a list, a "sufficient measure of procedural justice" must be accorded to the individual, including a right to be heard[50]. In the *OMPI* cases, the Court of First Instance developed the question of procedural rights in relation to asset freezing more thoroughly for the purpose of defining the elements of an effective judicial review[51].

By distinguishing between criminal and administrative sanctions, the CJ acknowledges that this difference has consequences for the procedural rights of the subject. However, it has long been ambiguous whether the courts are of the opinion that targeted sanctions are criminal or administrative in nature.

In its 2005 judgement in the *Kadi* case, for instance, the CFI held that asset freezing does not affect the very substance of the right (right to property in their financial assets) but only the temporary use of assets. It is thus to be considered a temporary precautionary measure (unlike confiscation) that is administrative in scope rather than a more permanent punitive measure akin to a criminal charge[52].

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[48] K. Ligeti, "European Criminal Law: Administrative and Criminal Sanctions as Means of Enforcing Community Law", *Acta Juridica Hungarica*, 2000, 41/3-4, p. 199.

[49] As underlined above, a slight difference can be made between grounds, which must be communicated, and evidence on which those grounds are based, upon which there is not yet an obligation of disclosure. An important distinction is also to be done between an obligation to disclose to the court and an obligation to disclose to the concerned individual or group.

[50] See CJ, 3 September 2008, *Kadi v. Council*, C-402/05 P and C-415/05 P, *ECR*, p. I-6351. For comments see *e.g.* C. Eckes, "Judicial review of European anti-terrorism measures – The Yusuf and Kadi judgments of the Court of First Instance", *European Law Journal,* 2008, 14, p. 74; V. Azarov and F.C. Ebert, "All done and dusted? Reflections on the EU standard of judicial protection against UN blacklisting after the CJ's *Kadi* Decision", *Hanse Law Review*, 2009, 5, p. 205; M. Avbelj, F. Fontanelli, and G. Martinico (eds.), *Kadi on trial: A multifaceted analysis of the Kadi judgment*, London, Routledge, 2014; M. Cremona, "EC Competence, "Smart Sanctions", and the Kadi Case", *Yearbook of European Law*, 2009, 28/1, p. 559; G. de Búrca, "The European Court of Justice and the International Legal Order after Kadi", *Harvard International Law Journal*, 2009, 51/1, 1; M. Scheinin, "Is the CJ ruling in Kadi compatible with international law?", *Yearbook of European Law*, 28/1, 2009, p. 637; T. Tridimas, "Economic sanctions, procedural rights and judicial scrutiny: post-Kadi developments", *Cambridge Yearbook of European Legal Studies*, 2011, 13, p. 455.

[51] See OMPI I (2006), OMPI II (2008) and OMPI III (2008). See *e.g.* A. Johnston, "The European Union, the ongoing search for terrorists' assets and a satisfactory legal framework: getting warmer or colder?", *Cambridge Law Journal*, 2007, 66/3, p. 523.

[52] See Argument of the Council in CFI, 21 September 2005, *Kadi v. Council and Commission*, T-315/01, *ECR*, p. II-52, at paras. 149, 167 and 299.

The distinction was made more explicit in the CFI judgment in *El Morabit* (2009)[53]. Asset freezing was viewed as a precautionary measure imposed within an administrative procedure with a preventive aim. It is not considered a sanction, as it does not entail a statement of guilt for an infringement that has taken place but is merely imposed within an administrative procedure, which is purely preventive.

At first it was unclear whether the CJ viewed blacklisting as a straightforward administrative measure or as a measure equivalent to criminal sanctions because, in its 2008 judgement in *Kadi*, the Court did not qualify the targeted sanctions at stake but merely referred to them as "restrictive measures"[54].

On the occasion of the 2010 *Kadi II* judgement, the General Court noted that the description of blacklisting as "temporary" may need to be revised and that the question remains open as to the classification of these measures as preventative or punitive, protective or confiscatory, administrative or criminal[55].

However, in *Fahas* (2010), the General Court has returned to the refrain that the sanctions are precautionary and do not imply any accusation of a criminal nature[56]. Similarly, in his Opinion on the *Kadi II* case (2013)[57], Advocate General Yves Bot observes that fund freezing measures constitute temporary precautionary measures in that funds are frozen but not confiscated. In addition, those measures do not constitute criminal sanctions but were adopted in order to maintain peace and security at the global level. It is, however, interesting that the Court, when explaining why judicial review is indispensable, highlights in its judgement that "[n]otwithstanding their preventive nature, the restrictive measures at issue have, as regards those rights and freedoms, a substantial negative impact related, first, to the serious disruption of the working and family life of the person concerned due to the restrictions on the exercise of his right to property which stem from their general scope combined, as in this case, with the actual duration of their application, and, on the other, the public opprobrium and suspicion of that person which those measures provoke"[58]. Although the Court still considers blacklisting as a preventive measure, it acknowledges how far-reaching its consequences are.

The position that considers asset freezing as a temporary precautionary measure is very difficult to sustain. In the absence of an independent and impartial tribunal, the existing procedure does not entail an effective remedy against sanctions, de-listing is by no means an automatic process and de facto blacklisting is not a temporary measure as there is no limit to available renewals or termination clauses[59]. Individuals have

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[53] General Court, 2 September 2009, *El Morabit v. Council*, T-37/07 and T-323/07, *ECR*, p. II-3649.

[54] *Kadi v. Council* (2008).

[55] General Court, 30 September 2010, *Kadi v. European Commission*, T-85/09.

[56] General Court, 7 December 2010, *Fahas v. Council*, T-49/07.

[57] Advocate General Bot, Opinion in C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom v. Kadi*, 19 March 2013.

[58] See CJ, 18 July 2013, *Commission, Council and United Kingdom v. Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, para. 132.

[59] A number of states have urged over time the UN Security Council to improve its procedure by introducing a "sunset clause" of 36 months for all listing. See Improving fair and

been listed for periods of up to over ten years. A clarification of the CJ's assessment of the nature of the regime has become urgent. The classification as an administrative measure or criminal sanction has a significant effect on the degree of rights protection that is appropriate. While the inclusion on a list of terrorist suspects is not considered a criminal charge, the standard of protection may be lower than that required under criminal law [60]. Nevertheless, despite an eventual assessment of the Court, as long as the nature of such measures remains uncertain, the existence of a blur between administrative and criminal law is clear!

B. Distribution of functions between actors: towards greater governmental discretion?

The blurring boundaries between administrative and criminal law may also be assessed with reference to the distribution of functions between the actors involved. In fact, the increasing use of administrative measures allows a shift towards greater governmental discretion on national security grounds at the expense of judicial scrutiny, a fundamental element in a criminal justice system [61].

No precise substantive criteria are defined a priori to identify entities and individuals that should be listed and there is no need for individualised proof of wrongdoing. The critical decision is left to the discretion of administrative authorities (as the "competent authority" in charge of the decision need not be judicial). The government can thus exercise control over suspicious individuals through a general weakening of judicial scrutiny. By circumventing the normal setting of criminal procedure, the power to designate an individual or group as "terrorist" is in the hands of the executive and national courts are prevented from fully exercising judicial review of those designations. Terrorist blacklisting regimes have thus created structural mechanisms for the production of both increasing executive (and effectively unaccountable) powers over individuals and novel means of bypassing domestic fundamental rights protection mechanisms.

Government representatives stress the need to take effective measures where intelligence sources show that an individual represents a risk to national security but this information is not admissible in criminal proceedings. In this context, the executive has accrued more discretionary powers in its alleged duty to protect the public. This trend side-lines the criminal justice system in cases involving national security and weakens the judiciary in its scrutiny role against abuses of power.

From a civil libertarians' perspective, the strongest argument in favour of maintaining the primacy of criminal prosecution is that it requires formal proof before

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clear procedures for a more effective UN sanction system, 30 March 2011.

[60] Such is, for instance, the view of the UN Monitoring Team. See Letter dated 2 September 2005 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, S/2005/572, 9 September 2005.

[61] It is remarkable that the role of the judiciary in times of emergency evolves dynamically over time. F. Fabbrini, "The role of the judiciaries in times of emergency: Judicial review of counter-terrorism measures in the US Supreme Court and the European Court of Justice", *Yearbook of European Law*, 2010, 28/1, p. 664.

an individual can be charged and sanctioned for any offence. By contrast, for risk-averse home secretaries, the avoidance of the "problems" of obtaining evidence and formal proof are the strongest argument in favour of replacing criminal justice with a system of administrative sanctions. The use of administrative measures allows the government to incapacitate allegedly dangerous individuals on the basis of mere suspicions or risks.

In relation to preventive measures, further practical questions arise. Do governments really have any means to assess whether an individual poses a risk to the public? Are they able to appraise the likelihood that an (otherwise only potential) harmful act will occur?

C. Contamination between sets of applicable rules: the influence of blacklisting on national criminal investigations, prosecutions and trials

A third element which may witness the blurring of boundaries between administrative and criminal law in the context of terrorist blacklisting is its impact on national criminal investigations, prosecutions and trials.

In fact, a particularly controversial matter has been the tendency to use, as evidence in support of pre-trial measures (or in relation to a charge of "*association de malfaiteurs* for terrorist purposes"), the fact of a group's appearance on a list of terrorist groups published by international organisations or other governments [62]. In Italy, for instance, the use of such lists has been considered acceptable to encourage further investigations into the activities of a certain group deemed as terrorist.

However, as argued by the Italian *Corte di Cassazione*, any further use is inadmissible and certainly the inclusion on a banned list cannot constitute evidence of terrorist purposes as required by Article 270*bis* of the Italian *Codice Penale* [63]. The Court has highlighted that blacklisting merely has an administrative value and is only meant to legitimise targeted sanctions without having any further impact on evidence. If it became evidence in criminal proceedings, listing decisions grounded on intelligence information gathered in the absence of any form of judicial scrutiny would thus bypass the higher standard of proof requirements of criminal investigations and prosecutions. In addition, how could a defendant challenge such evidence where little or no access is provided to the secret service information grounding the listing decision?

The reliance on listing in this framework would introduce an anomalous piece of evidence and lead to a violation of the separation of powers, questioning the freedom of the judge in the assessment of evidence [64]. The risk is also that, if it is interpreted too broadly, Article 270*bis* becomes a blanket criminal law provision violating the principle of legality and legal certainty.

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[62] Trib Brescia 31 January 2005 in (2005) 6 Dir Giust 92.

[63] As in Cass pen 30 September 2005 in (2005) 44 Dir Giust 78 ; Cass pen 11 October 2006 in (2007) Cass pen 1469 and in (2006) II Foro it 77. Cass., Sez. I, 15 giugno 2006 in (2006) 40 Guida dir 60. See G. Armone, case-note, *Foro Italico*, 2006, 2, c. 648.

[64] A. Pioletti , "Terrorismo, quelle black list di ONU e UE. Stop al rischio di prove legali anomale", *Diritto e Giustizia*, 2006, 37, p. 82.

From a different perspective, it is noteworthy that the CJ has also considered the question of the interaction between blacklisting and criminal proceedings. It established that a criminal conviction as terrorist or member of a terrorist group should be taken into consideration for the purpose of listing. According to the Court, the association with a blacklisted organisation cannot ground a criminal prosecution where the listing is unlawful. Yet the court has not excluded that where the inclusion of an individual/group in a terrorist list is lawful, it could constitute evidence for the purpose of criminal proceedings [65].

5. Reform attempts for the purpose of establishing clearer and more transparent procedures

A. Reforms introduced at the EU level to comply with judgements' requirements

As already mentioned, through a series of major judgements, the Court of First Instance and the Court of Justice of the European Union have pinpointed significant weaknesses in the listing procedure and paved the way for an improvement in the protection of the rights of targeted individuals. The establishment of a clearer and more transparent procedure has sought to reduce the level of governmental discretion in listing and de-listing procedures with a view to increasing judicial scrutiny and transparency within the process.

Two waves of reforms are worth mentioning: the first one (2007) concerns the EU autonomous regime of blacklisting, whereas the second one (2009) dealt with the framework implementing UN listing measures.

In June 2007, the Council of the EU conducted a thorough review [66] of its procedures for the listing and de-listing of persons, groups and entities pursuant to Common Position 2001/931/CFSP and Council Regulation 2580/2001 (EU autonomous regime) [67].

Firstly, an EU "Working Party on the Implementation of Common Position 2001/931/CFSP" was established, replacing the "clearing house" that had previously been used to evaluate potential nominations for the autonomous EU blacklist. The functions of the Working Party include: examining and evaluating information used to list and delist individuals and groups; assessing whether that information meets the relevant criteria; preparing regular reviews of the EU blacklist; and making recommendations for listings and delisting.

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[65] CJ, 29 June 2010, C-550/09, *E and F*. For a comment see C. Murphy, "Case C-117/06, Proceedings brought by Gerda Möllendorf and Christiane Möllendorf-Niehuus, Judgment of the European Court of Justice (Second Chamber) of 11 October 2007, [2007] ECR I-8361; Case C-340/08, M & Others v. Her Majesty's Treasury, Judgment of the European Court of Justice (Fourth Chamber) of 29 April 2010, nyr; Case C-550/09, Criminal Proceedings Against E & F, Judgment of the European Court of Justice (Grand Chamber) of 29 June 2010, nyr", *Common Market Law Review*, 2011, 48/1, p. 243.

[66] See Council Document, 10826/1/07, 28 June 2007.

[67] Council Regulation 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, *OJ*, no. L 344, 28 December 2001, p. 70.

The Working Party also operates as a Focal Point for delisting applications as those included in the autonomous EU blacklist can now submit a request to the Council at any time asking for their designation to be reconsidered.

Member States have to share information on listing decisions and this improves the degree of reciprocal scrutiny. The existence of a specialised committee examining and evaluating the information leading to a listing decision on the basis of criteria (in relation with the involvement in terrorist activities) [68] introduces a certain degree of objective assessment in the process and limits governmental discretion slightly [69]. The Working Party is also meant to check whether the proposal complies with fundamental rights and the rule of law. Although the decisions adopted are not binding, regular reviews and recommendations on delisting challenge the *de facto* permanent nature that blacklisting decisions have acquired.

However, in order to safeguard the confidentiality of the information provided by intelligence services, the Working Party's meetings are held in a "secure environment" where the date, agenda, organisational details and all of the proceedings are kept completely secret. In addition, and contrary to the principle of legality, listing criteria remain blurry and the level of scrutiny is ambiguous [70].

Secondly, following the decision of the CFI in the 2006 *OMPI* judgement, for each person, group and entity subject to targeted sanctions, the Council provides a statement of reasons which is sufficiently detailed to allow those listed to understand the reasons for their listing and to allow the Luxembourg courts to exercise their power of review where a formal challenge is brought against the listing. The statement of reasons, made available as soon as reasonably possible, must clarify how the listing requirements have been met, *i.e.* how the listed individual or group has been involved in terrorist activities (terrorist acts committed; nature or identification of the competent authority which took a decision, type of decision taken).

In the 2008 *OMPI* judgment, the CFI, after having established a clear requirement for a statement of reasons in 2006, defined and specified what is entailed by this obligation. In particular, an EU listing decision cannot be based on secret information which cannot be placed before a court for judicial scrutiny and review [71].

The statement is essential as those reasons alone form the basis for a right to effective judicial review and thus offer an opportunity to respond to allegations. For this purpose it should be sufficiently detailed. If the Council believes that there is new evidence justifying the maintenance of individuals or entities on the list, then the parties have the right to be notified and heard before any further decision is taken.

Thirdly, after a listing decision has been taken by the Council, the Secretariat informs each person, group and entity subject to restrictive measures by sending a letter of notification to their address wherever this is practicably possible. The letter

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[68] Common Position 2001/931/CFSP lays down the criteria for listing persons, groups or entities involved in terrorist acts and identifies the actions that constitute terrorist acts.

[69] The CP 931 Working Party replaces the informal consultation mechanism among Member States that has been in place since 2001.

[70] For a critical assessment of the listing requirements see Advocate General Sharpston, Opinion in C-27/09 P, *France v. OMPI/PMOI*, 14 July 2011, paras. 118-120.

[71] *OMPI II* (2008).

includes, *inter alia*: a description of the restrictive measures taken and a mention of the humanitarian exemptions available.

This notice is important to inform the person/group of the possibility for them to ask for their listing to be reconsidered and also makes reference to the possibility of an appeal to the Court of First Instance.

Fourthly, the Council reviews and updates the EU blacklist at regular intervals (at least every six months) in order to determine whether the grounds for blacklisting are still valid.

The review procedure also allows the targeted individuals or groups to make their views known. In addition, it requires the Council to carry out a thorough assessment as to whether the grounds for each listing are still valid. It takes into account all relevant considerations, including the person's, group's or entity's past record of involvement in terrorist acts, the current status of the group or entity and the perceived future intentions of the person, group or entity.

Further procedural and due process reforms were introduced in April 2009 [72]. Most importantly, following the 2008 *Kadi* case, European institutions could no longer automatically implement UN blacklists but have to consider their compatibility with fundamental rights.

This shift from automatic compliance to controlled compliance is significant also because, before the final decision is taken, individuals or groups to be blacklisted are informed and requested to express a view. An Advisory Committee of experts must also be consulted at this stage.

B. Additional factors which have led to reforms of the existing framework

Although the role of the CJ has been remarkable in pursuing a more balanced approach in the EU's fight against terrorism with a view to better complying with due process rights and limit governmental discretion, other factors have also influenced changes in the terrorist blacklisting regime.

1) UN Level

The UN do not yet offer legal guarantees to the blacklisted individuals and groups [73]. However, proposals that States have presented to the UN General Assembly as well as EU courts decisions have encouraged the Security Council to modify the targeted sanctions regimes substantially in order to overcome the current human rights deficits.

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[72] Council Regulation 1286/2009 of 22 December 2009 amending Regulation 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, *OJ*, no. L 346, 23 December 2009, p. 42.

[73] M. Bothe, "Security Council's Targeted Sanctions against Presumed Terrorists', *JICJ*, 2008, 6, p. 541; J. Genser and K. Barth, "When due process concerns become dangerous: the Security Council's 1267 Regime and the need for Reform", *Boston College International and Comparative Law Review*, 2010, 33/1, p. 24.

For instance, the introduction of an Ombudsperson by Resolution 1904 (2009)[74] has been welcomed as a significant reform in this context, at least in terms of transparency[75]. However it does not amount to an independent and impartial review. The Ombudsperson can independently collect and provide information but can neither decide nor even recommend delisting. In the end, as first introduced, it failed to address the two fundamental problems of the blacklisting regime: the lack of an independent and effective judicial remedy and the non-disclosure of confidential information to the individual concerned.[76]

On 6 May 2011(and then again in November 2012), a "Group of Like-Minded States" – including Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland – addressed a letter to the Security Council to launch their proposals for reforming the UN blacklisting system. The reforms proposed include, *inter alia*: the introduction of a sunset clause and time limit for all terrorist listings (*e.g.* three years); access to information on the grounds for listing to the individuals concerned so that they can effectively challenge the listing decision; the Ombudsperson's power to recommend delisting – if states do not object in 30 days to a de-listing recommendation by the Ombudsperson then the listing would automatically expire; Ombudsperson's access to all relevant information "regarding the listing" (the proposal does not investigate how this could be done); Sanctions Committee's de-listing decisions by majority vote, rather than consensus[77].

Remarkably, in 2011 the Ombudsperson's mandate was enhanced and its recommendations strengthened making them final and automatic in 60 days unless overturned unanimously by the Sanctions Committee or a vote by the Security Council[78]. However, Ben Emmerson, the UN Special Rapporteur on Counter-terrorism and Human Rights, considered that the mandate still fell short of due process requirements and urged reforms, including making the Ombudsperson's reccomendations binding and increasing the transparency of the process[79].

Further reforms in 2012 addressed concerns about adequate due process and human rights protections and urged states to provide relevant evidence and information, even

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[74] S/RES/1904 (2009), 17 December 2009.

[75] A.J. Kirschner, "Security Council Resolution 1904 (2009): A Significant Step in the Evolution of the Al-Qaida and Taliban Sanctions Regime?", *Heidelberg Journal of International Law*, 2010, 70/3, p. 585.

[76] G. Sullivan and M. De Goede, "Between Law and the Exception: The UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise", *Leiden Journal of International Law*, 2013, 26/4, p. 833.

[77] See Letter dated 28 September 2010 from the 1267 Chair to the President of the Security Council, S/2010/497 at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/549/27/PDF/N1054927.pdf?OpenElement and Letter dated 1 November 2012 from the Permanent Representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway and Sweden and Switzerland, addressed to the President of the Security Council, UN Document A/67/557–S/2012/805 at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/805.

[78] S/RES/1989 (2011), 17 June 2011.

[79] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 26 September 2012, A/67/396.

if confidential, to the Ombudsperson to help with de-listing inquiries. It also calls on countries to regularly update or provide information about listed entities and hold reviews every six months "to decide whether they remain appropriate" [80].

2) European level

Also of great significance has been the case law of the Strasbourg Court regarding due process rights in the context of targeted sanctions and particularly *Nada v. Switzerland* [81]. In September 2012, the Grand Chamber of the ECtHR addressed the legality of measures implementing targeted sanctions stemming from the UN Security Council and, relying on the *Kadi II* decision of the CJ, found a violation of the rights enshrined in the ECHR. Most importantly, the Strasbourg Court affirmed that the requirement for judicial review is not removed by the fact that contested measures are implementing UN Security Council resolutions. Nothing prevented Swiss authorities from introducing mechanisms to verify whether the measures introduced at the national level managed to strike a fair balance between the protection of fundamental rights on the one side and national security on the other side.

3) National level

Another case is worth mentioning as an example of how some national courts, in order to protect fundamental rights, exercised tighter jurisdictional control than the community courts over EU measures taken to implement UN SC Resolutions. In *Ahmed et al. v. HM Treasury* case [82], defendants challenged executive orders enabling the fast-track implementation of UN Security Council resolutions concerning the financing of terrorism. They allowed the indefinite freezing of a person's assets on the basis of executive suspicion alone. Such orders were made without parliamentary scrutiny; they were laid before parliament for its information only, not for scrutiny of their merits or for debate. The UK Supreme Court ruled that the orders were ultra vires, among other things because those affected were not permitted to see – and hence unable to challenge – the evidence supporting that suspicion, violating their right to a fair hearing. In the end, the Court has stated that restrictions upon individual rights always need parliament's express consent; while parliament can choose to legislate contrary to fundamental rights, it can also decide that certain measures required by a UN SC Resolution are too onerous to be given effect in the UK.

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[80] S/RES/2083 (2012), 17 December 2012, paras. 23 and 39.

[81] ECtHR, 12 September 2012, *Nada v. Switzerland*, no. 10593/08. See F. Fabbrini and J. Larik, "Global Counter-Terrorism Sanctions and European Due Process Rules: The Dialogue Between the CJEU and the ECtHR", *in* M. Avbelj, F. Fontanelli and G. Martinico (eds.), *op. cit*., p. 135.

[82] *Ahmed et al v. HM Treasury* [2010] UKSC 2, [2010] 2 WLR 378. For a comment see A. Johnston and E. Nanopolous, "The new UK Supreme Court, the separation of powers and anti-terrorism measures", *Cambridge Law Journal*, 2010, 69/2, p. 217.

6. A more comprehensive and substantial reform of the existing EU framework?

Having mentioned the reforms introduced to comply with the requirements of the CFI and CJ case-law, it is now appropriate to assess what the impact of a recourse to the new legal bases introduced by the Lisbon Treaty would be on the existing framework.

The Lisbon Treaty has introduced two new legal bases, Articles 75 [83] and 215(2) [84] TFUE, which give the EU the competence to adopt sanctions against private individuals and legal entities for the first time.

The existence of two legal bases may, however, be problematic [85].

Yet the choice between the two provisions should not be underestimated as they differ significantly in terms of the applicable legislative procedure. On the one hand, Article 75 TFEU requires the ordinary legislative procedure, according to which the Council and the European Parliament are co-legislators [86]. On the other hand, under Article 215(2) TFEU, the European Parliament only has the right to be informed.

In practice it is unclear which article should be used under which circumstances and this is likely to lead to much inter-institutional litigation [87].

The European Parliament has already brought a case before the CJ challenging EU Regulation 1286/2009 with a view that it was adopted on the wrong legal basis (*i.e.* Article 215(2) TFEU, rather than under Article 75 TFEU) given the counter-terrorism objective of the measure at stake. The EP argued, *inter alia*, that in the Area of Freedom Security and Justice (AFSJ) there is a need for stronger protection of

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[83] Article 75 – "Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities. The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph. The acts referred to in this Article shall include necessary provisions on legal safeguards".

[84] Article 215(2) – "Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities".

[85] On the challenging choice of the correct legal basis see C. Eckes, "EU Counter-Terrorist Sanctions against Individuals: Problems and Perils", *European Foreign Affairs Review*, 2012, 17/1, p. 113.

[86] The European Parliament would not be involved in the adoption of operational measures against specific individuals, it would however have a considerable role in establishing the overarching framework for the adoption of targeted sanctions.

[87] P. Van Elsuwege, "The Adoption of "Targeted Sanctions" and the Potential for Inter-institutional Litigation after Lisbon", *Journal of Contemporary European Research*, 2011, 7/4, p. 488.

individual rights, which could be guaranteed only thanks to an improved democratic legitimacy involving parliamentary scrutiny [88].

Since the enactment of the Treaty of Lisbon, the provisions belonging to the AFSJ are, in principle (although subject to a number of restrictions), subject to the jurisdiction of the CJ. Yet, one restriction is still in force. Pursuant to Article 75, the Court holds full jurisdiction: measures adopted under this legal basis are subjected to judicial review (ex Article 253 TFEU). In addition, Article 263(4) TFEU grants the right of appeal to any natural or legal person and this represents a considerable improvement – together with the extension of the CJ jurisdiction within the AFSJ – for the protection of individual rights.

The TFEU retains the former exclusion of the Court's jurisdiction over the Common Foreign and Security Policy (CFSP); yet there are significant exceptions to this general rule. Pursuant to Article 40 TEU, the CJ can rule on proceedings relating to institutional conflicts concerning CFSP measures. Moreover, Article 275 TFEU explicitly gives the Court the power to rule on proceedings brought against decisions providing for restrictive measures adopted by the Council on the basis of Chapter 2 of Title V of the TEU. Thus, the Court of Justice of the European Union can now review the legality of legislative acts and decisions, imposing restrictive measures against natural or legal persons.

In October 2012, the EU Commission adopted an initiative entitled: "Framework for administrative measures for the freezing of funds, financial assets and economic gains of persons and entities suspected of terrorist activities inside the EU". Building on the new legal basis introduced by Article 75 TFEU, the initiative aimed at allowing for the freezing of assets of persons/entities related to terrorist activities inside the EU, supplementing Regulation 2580/2001, which covers terrorist activities outside the EU and thereby closing the current legislative gap [89]. Although it was listed as a Commission priority for 2013 [90] and an impact assessment had been planned, the initiative was not introduced in the end.

7. The impact of the reforms

From a human rights perspective, the adequacy of the reforms introduced at the EU level before the entry into force of the Lisbon Treaty and in order to comply with the requirements of the Luxembourg courts' judgements is as yet questionable and a more comprehensive and substantial reform is desirable. The most important flaw remains the failure to fully disclose relevant information to the defence, which makes it impossible to properly exercise the right of effective judicial review before EU courts. In the 2010 *Kadi* decision, the CJ confirmed that defence rights were only

[88] In the end the CJ rejected the Parliament's argument and dismissed the action. CJ, 19 July 2012, *European Parliament v. Council* (Grand Chamber), C-130/10. For a case note see A. Ott, *Maastricht J. Eur. & Comp. L.*, 2012, 19, p. 589.

[89] The initial roadmap may be found at the following link: http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2011_home_002_asset_freezing_en.pdf

[90] Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2013, 23 October 2012, COM (2012) 629 final, p. 8.

observed in the most superficial manner. On the one hand, the Commission strictly adhered to the UN Sanctions Committee finding and never questioned them in the light of the applicant's observations. On the other, it did not provide the applicant with any access to the evidence against him [91]. In this respect, it will be particularly interesting to see what reforms will be introduced in order to satisfy the most recent 2013 ruling in *Kadi* on the need to disclose to the court (although not to the concerned individual) security information providing the basis for a listing decision.

The reforms at the UN level also constitute a partially successful attempt to improve suspects' rights to an effective remedy as well as to introduce a certain form of impartial assessment of the sensitive information, which cannot be disclosed to the individual concerned.

Both the Strasbourg and the UK Supreme Court cases are significant as they reassert the need for full judicial scrutiny and parliamentary control against extended governmental discretion in the context of terrorists' blacklisting. Courts affirm their function of preventing abuses of executive authority. Yet such assertiveness may itself have implications for the delicate constitutional balance between the EC legal order and its implementation at the national level.

Before the drafting of the Lisbon Treaty, with reference to the institutional structure of the EU and in the context of blacklisting, a number of flaws clearly emerged: the lack of a clear legal basis, the exclusion of the European Parliament from decisions affecting individual rights (whereas the Council was attributed a major role) and the limited competences of judicial review attributed to the CJ. Remarkably, autonomous sanctions based on pre-Lisbon instruments could only be challenged in preliminary rulings and not in direct actions. The blur between administrative and criminal law was clearly demonstrated for instance by the little democratic control and judicial scrutiny over decisions adopted by the Council.

The introduction of unambiguous legal bases is, *per se*, a crucial development in terms of legal certainty considering the difficulties encountered under the TEU to find an adequate legal basis for individual restrictive measures. In addition, the new provisions clearly constitute an improvement with regard to the existing deficiencies in terms of protection of fundamental rights, enhancements in relation both to the jurisdiction of the CJ and to the law-making powers of the European Parliament. Besides, the Treaty of Lisbon makes the Charter of Fundamental Rights legally binding [92].

The establishment of a fully autonomous EU blacklisting legal regime is in principle highly desirable. The question is whether, over time, it will guarantee sufficient procedural rights at the EU level. This will very much depend on the interpretation of the new Treaty provisions. In particular, as argued above, it will depend on which provision is used as legal basis as the degree of democratic control and judicial scrutiny changes accordingly (this is clearly the case with reference to the new role attributed to the EP).

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[91] *Kadi v. European Commission* (2010), paras. 171-173.

[92] S. Douglas-Scott, "The European Union and Human Rights after the Treaty of Lisbon", *Human rights law review*, 2011, 11/4, p. 645.

A number of further developments are also desirable. Firstly, the objective of each measure should be clearly stated and recalled in the introductory paragraphs of specific legislation. Secondly, the legal safeguards for individuals listed and sanctioned need to be determined in legally binding form. Thirdly, listing criteria must ensure a sufficient level of precision and predictability as well as flexibility.

The impact of subsequent reforms on the blur between administrative and criminal law is the most relevant issue for the purpose of this contribution.

A higher level of legal protection of individual rights is required if formally administrative measures are *de facto* punitive sanctions. In addition the existing shift towards governmental discretion can be countered only thanks to greater democratic control and judicial scrutiny. The reforms introduced seem to provide major improvements in relation to both elements.

Nevertheless, the abovementioned reforms do not contribute to frame the blur between the two legal frameworks and to re-establish firm boundaries between the respective scopes of intervention. They do not exclude recourse to administrative measures, imposing the pursuit of criminal investigations and prosecutions instead, in cases where it would be traditionally considered more appropriate. On the contrary, they lead to a further deepening of the blur. For example, the use of administrative measures requires higher standards of fundamental rights protection and a greater level of judicial scrutiny, which are typical features of criminal law. Thus, some measures are still qualified as administrative although their impact are similar to the consequences of a criminal sanction and the applicable legal framework (including individual rights protection) is that of criminal law.

The contamination of administrative law by criminal law standards is not a negative development as such and is, in fact, rather to be welcomed. However, the feeling than the two frameworks are alike may lead to dangerous misunderstandings. Such misunderstandings could entail the application of preventive measures in a broader range of cases whereas the scope of their use should remain specifically limited to certain circumstances only. In fact the applicable legal framework is not yet alike (particularly in terms of individual rights protection).

For instance, the application – to a certain extent – of criminal law standards to the use of administrative measures in the context of terrorist blacklisting has been the result of a long and challenging development and is not to be taken for granted.

The use of administrative measures instead of criminal law measures would not lead to the automatic implementation of equivalent features. There is not yet a standard set of procedural rights available to persons subject to preventive coercive measures. As argued in the contribution, preventive measures tend to be, in many cases, akin to criminal charges and thus difficult to distinguish in terms of their impact from a criminal law measure. They impose substantial constraints and detriments to those subject to them. And yet substantive limitations and procedural safeguards tend not to apply. Although the safeguards and thresholds may be lower in respect of purely preventive measures, the burdens imposed are not necessarily less punitive. Would it instead be desirable that all safeguards applicable in criminal cases apply? What if the right to liberty, a right of a fundamental nature, is at stake as a consequence of the imposition of a preventive administrative measure?

In addition, the blur raises further questions: are there intelligible distinctions between punishment and prevention? And what limits might properly be placed on the pursuit of prevention?

The problem is also that the issue has largely become a political one and the assesment of which preventive measures are necessary is often the consequence of a political judgement and influenced by public demand for increased protection.

8. Conclusion

As a modern form of indefinite banishment [93] on the basis of largely secret evidence and in a pre-crime logic, targeted sanctions are not followed by criminal trials but operate in advance of potential wrongdoing and on the basis of secret evidence and political decisions. They act on a present or future threat rather than by reference to past conduct. Targeted sanctions shift the temporal perspective to anticipate and forestall that which has not yet occurred and may never do so.

The creation of this "shadow system" of criminal justice is taking place together with the introduction of far-reaching police powers designed to prevent attacks. There appears to be greater reliance on preventive administrative measures instead of their being seen as exceptional and temporary and necessarily linked to a genuine emergency. Preventive measures encompass a larger number of activities and affect a broader range of people. Such trend is not limited to the terrorist context but, for instance, civil orders against individuals for harm or crime prevention purposes exist in different fields to address anti-social behaviours, sexual offences, etc. [94].

The concern arises as to whether it is justifiable in any circumstance for the state to incapacitate an individual ahead of any wrongdoing and hence by definition in the absence of prosecution and conviction [95]. If so, then long-established principles of criminal justice and individual rights would have to be side-lined in the interest of public protection [96].

The most obvious conclusion would then be that it is necessary to re-establish the primacy of the criminal justice system. The use of preventative measures might be justified as an extraordinary measure to address current major threats. However, as for the future, surely criminal prosecution should remain the primary response to serious offences, including terrorism [97]. States should make minimal use of administrative measures at the discretion of the executive.

First, the criminal justice system allows legitimate restrictions on individual rights only where necessary, in specific circumstances and for legitimate purposes (*i.e.* protection of the public from future harm and deterrence of further offences).

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[93] G. Agamben, *State of exception*, University of Chicago Press, Chicago, 2008.

[94] See *e.g.*, in the UK, Crime and Disorder Act 1998; Sexual Offences Act 2003; Criminal Justice Act 2003; Serious Crime Act 2007.

[95] L. Zedner, "Seeking Security by Eroding Rights", *in* L. Lazarus and B. Goold (eds.), *Security and Human Rights*, Oxford, Hart Publishing, 2007.

[96] A. Ashworth, "Criminal Justice Reform", *Crim LR*, 2004, p. 516.

[97] L. Zedner, "Securing liberty in the face of terror", *Journal of law and society*, 2005, 32/4, p. 507, at p. 529-531; C. Walker, "Terrorism and criminal justice", *Crim LR*, 2004, p. 311.

Secondly, it minimises the risk of abuses and of "slippery slopes" as its functioning is mostly transparent. Detailed provisions on due process rights allow the individual whose rights have been limited to defend him/herself against the charges and to challenge the decision taken by the public authority (for example through a more or less developed appeal or judicial review system). In ordinary cases, any limitation of individual rights has to be supported by a reasoned ruling from the judicial authority; the individual (suspect or defendant) has the right to be informed of the charges and of the evidence supporting the prosecution case and to be brought promptly before a judge. Thirdly, judicial authorities cannot normally pursue a fight in the name of a right to security for the neutralisation of dangerous individuals. In fact, judicial discretion is limited by the continuous necessity to justify any decision taken on the basis of reasonable grounds. Finally, a charge will be applied in relation to a specific offence and not because of an individual belonging to a specific category of people. Thorough investigations allow the gathering and selection of appropriate evidence to support the prosecution's case at trial.

An alternative but deeply questionable approach is that of Zedner. She points out that the recourse to preventive administrative measures is not at all uncommon: in reality it has now become a central feature of the legal landscape, which could not be readily removed [98]. In her view, insisting on the conventional tool of prosecution and punishment within the criminal justice system would only lead to a further expansion of inchoate offences (with the consequent expansion of the scope of criminal law beyond the borders of what is harmful behaviour) and a distortion of due process rights. Instead of attempting to re-establish the primacy of prosecution, legal writers should develop appropriate principles and values to frame the continuing expansion of preventive measures.

There is no doubt that the state has a duty to protect the people from harm and such duty might justify an array of preventive measures. However, while the rationales and justifications for state punishment have been extensively explored, the scope, limits, and principles of preventive justice have not received the same attention. What are, then, the legal or moral limits the legislator has to place upon the use (and possible abuse) of preventive measures? It is difficult to provide clear guidance on what may justly be done in the name of prevention and how to calibrate proportionality. In sum, if preventive measures are in effect penal in character and thus better understood as forms of pre-punishment, their use would require the application of higher standards of proof than "suspicion" even where there is a threat of serious harm [99].

In the case of terrorist blacklisting and asset freezing, we are witnessing the development of a similar approach. Firstly, from a law enforcement perspective, the recourse in itself to preventive measures is not challenged. It seems unlikely that blacklisting and asset freezing will be replaced by criminal investigations and prosecutions. Secondly, no principles have been developed to frame the expansion as such of preventive administrative measures. However, as a consequence of

[98] L. Zedner "Preventive justice or pre-punishment?", *Current Legal Problems*, 2007, 60, p. 174, at p. 203.

[99] A. Ashworth and L. Zedner, *Preventive justice*, Oxford, OUP, 2014.

subsequent reforms, the characteristic features of such measures are changing and the conditions for their use become closer to what would be required for the application of a criminal law measure. In the context of an ever deepening blur between the two legal frameworks, the trend is that of a positive and welcome contamination of administrative law by criminal law. On the one hand the level of fundamental rights protection is increasing, including the gradual development of an effective remedy to challenge inclusion on a list. On the other hand, the level of judicial scrutiny is growing, thus reducing the danger of a large amount of governmental discretion. As a consequence, from the point of view of the available safeguards the blur between administrative and criminal law is desirable.

Two approaches are thus available in theory: re-establishing the primacy of the criminal justice system or framing the expansion of preventative measures. The problem is that, as argued in the introduction, the danger of using preventive justice as an acceptable feature of a modern criminal justice system could be that it becomes the norm. In that line of thinking, preventive administrative measures will no longer constitute an extraordinary way of dealing with potential criminals/terrorists but a permanent one. Given the downfalls of preventive measures and pre-punishment (despite the present significant change in features) highlighted in this contribution, should legal writers continue to oppose their expansion? The worst case scenario is, in any case, the present one where there is a parallel development and dangerous overlap of inchoate offences, anticipative criminal investigations and preventive administrative measures.

The case of money laundering Real administrative procedure used in the detection of fraudulent transactions

Philippe de Koster and Marc Penna

1. Introduction

The commitment to combat money laundering preventively began more than twenty years ago when, in 1989, a group of industrial countries, including Belgium, decided to create the Financial Action Task Force (FATF).

The FATF [1] is an international organisation based at the OECD in Paris, which aims to combat money laundering and, more recently, terrorist financing activities as well as other related threats to the integrity of the financial system.

The FATF's main purpose is to set up international standards to prevent money laundering and terrorist financing activities [2]: in 1990, it has adopted a series of recommendations which have been revised several times (in 1996, 2001, 2003 and 2012).

These 40 recommendations are now more or less implemented in most of the world's industrial countries.

They mainly include:

- know your customer due diligence measures;
- measures to identify beneficial owners and beneficial ownership of legal structures;
- constant due diligence measures regarding the transactions of customers;
- suspicious transactions reporting obligations;
- AML/CFT supervision of the financial sector and the designated non-financial businesses and professions;

[1] www.fatf.gafi.org.

[2] Its mandate also covers the fight against proliferation of weapons of mass destruction. But this will not be covered in this contribution.

– vigilance with regard to the NPO sector;
– measures with regard to the freezing of terrorist assets, ...

FATF Recommendation 29 requires countries to create a central and independent body in charge of receiving, analysing and disclosing financial information relating to money laundering and terrorist financing.

This body can be administrative, judicial or be part of the law enforcement authorities.

Many countries in the world have now set up Financial Intelligence Units (FIUs) and imposed AML/CFT measures to prevent the use of their financial system for money laundering and terrorist financing purposes.

The Belgian Financial Intelligence Unit CTIF-CFI[3], which was set up in 1993[4], is the Belgian central body that has been designated to apply recommendation 29.

CTIF-CFI is supervised by the ministers of justice and finance but is operationally independent.

CTIF-CFI acts as a filter between on the one hand the financial sector and a list of Designated Non-Financial Businesses and Professions (DNFBPs) and on the other hand the law enforcement authorities.

CTIF-CFI manages a huge database composed of different types of financial data collected from suspicious transactions' reports[5] (STRs), currency transactions' reports[6] (CTRs), cross-border transactions' reports[7] (CBTRs) and cross-border cash transactions' reports[8] (CBCTRs).

CTIF-CFI shares this intelligence with law enforcement authorities, tax authorities and intelligence services in case of serious indications of money laundering or terrorist financing.

2. General context

Nowadays, criminals use increasingly complex and international schemes to carry out their criminal activities and to launder the proceeds of these activities. They have abandoned the traditional banking system in favour of new payments methods, offshore financial centres and opaque offshore structures.

All these facilities are used by criminals but also by taxpayers misusing transfer pricing, trade misinvoicing and tax disparities between different countries.

As a consequence, criminal and financial investigations are now more complex.

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[3] http: //www.ctif-cfi.be.

[4] Law of 11 January 1993 on the prevention of the use of the financial system for money laundering and terrorist financing purposes.

[5] STRs: any kind of suspicious transaction reported to the FIU and based on a subjective analysis of the suspicious transactions with regard to the profile of the customer.

[6] CTRs: transactions in cash automatically reported to the FIU when exceeding a given threshold (in general: EUR/USD 10,000).

[7] CBTRs: international transactions (wire transfers) automatically reported to the FIU when exceeding a given threshold (in general: EUR/USD 10,000).

[8] CBCTRs: declaration made by travellers when they travel with more than EUR 10,000 in cash.

A. The globalisation and interconnection of our economies and financial systems

The globalisation and interconnection of our economies and financial systems associated with the development of information technology (*e.g.* via the internet and e-money) make criminal and financial investigations more difficult.

It is a fact that, nowadays, criminals and terrorist financiers can move their dirty money from one country to another in less than two hours while criminal investigations take two years or so.

If correctly and efficiently applied, the preventive AML/CFT legislation is the right answer to money laundering and criminal activities.

FIUs now have extensive experience in financial analysis. Locating assets belonging to criminals is one of the FIU's assignments.

The FIU's capacity to respond is also much greater than law enforcement and the judicial authorities. FIUs have the capacity to take action sooner than law enforcement authorities because they only need indications of money laundering, instead of real evidence that could be used in court. Administrative information can be exchanged with foreign counterparts in just a few days as opposed to it taking months for evidence used in court to be exchanged.

In some countries FIUs can also, for a limited number of days and without a court order, freeze a suspicious transaction or funds suspected of being the proceeds of crime (see *infra*).

B. The transparency of legal persons and arrangements

In today's world, opaque and complex corporate structures are easy to acquire because they are provided "ready-made" and at very low cost by some local legal professionals but also by professionals in tax havens where the opacity of the structures provided is even greater.

Such corporate structures can be created as part of a multi-layered chain of inter-jurisdictional structures whereby a corporation in one jurisdiction may control or be controlled by other companies in another jurisdiction, making it harder to identify the real beneficial owner of the structures.

Services helping to conceal the identity of the beneficial owners of corporate structures, such as being nominee managers for corporations and limited companies and trustees for trusts as well as mailing or postal addresses for shell companies, are provided by many Trust and Company Services Providers.

Improving the transparency of corporate structures is crucial both to the financial sector that has obligations with regards to the beneficial owners and FIUs and law enforcement authorities.

Since 2008 the international community has been taking steps to deal with offshore financial centres and countries with legal professionals providing opaque legal structures.

These efforts have resulted in better international cooperation. But improving transparency is a difficult and ongoing task.

Even though FIUs have acquired experience in exchanging information with FIUs in offshore financial centres and the quality of the replies has improved, it is difficult

and can be even impossible to combat money laundering if the beneficial owner of the corporate structure is hidden and therefore unknown.

It is also worth mentioning that opaque corporate structures are not only available in tax havens but that legal professionals from certain prominent FATF country members, which claim to be "fit and proper", also provide such opaque corporate structures.

These countries have areas or zones (Jersey, Guernsey, Gibraltar, Delaware...) that can be considered to be tax havens as they have preferential tax rates or legal professionals providing opaque structures, facilitating tax fraud and the money laundering of criminal proceeds.

C. The overemphasis of tax havens

Some tax haven experts estimate that, today, more than 50% of the financial flows of money pass through structures or bank accounts in offshore financial centres.

It is a fact that many financial institutions around the world, and especially financial institutions active in the city of London and on the New York stock exchange, have branches and subsidiaries in offshore financial centres.

The globalisation of our economies contributes to greater opacity in the international financial markets, especially when transactions related to criminal activities are mixed up with legitimate and genuine financial transactions and when offshore subsidiaries of well-known financial institutions are used to move assets from one part of the world to another.

Bank accounts and investments in offshore financial centres and via offshore structures are, nowadays, also easily accessible to ordinary people as well.

Research results recently published by The International Consortium of Investigative Journalists showed that, in Belgium, not only rich people invest in tax havens but that mainly ordinary people use the offshore financial system for the purpose of tax evasion.

We must also be aware that the facilities provided by these offshore structures are not only used for tax evasion but that they are also used by criminals to launder the proceeds of their criminal activities.

The financial web formed by all these branches and subsidiaries and their parent companies makes it ever more difficult to distinguish illicit transactions from all the transactions circulating inside the international financial system.

D. Poor international cooperation

Today criminal activities, especially money laundering activities, have no borders and borders are not a problem for criminals but an advantage. Criminals skilfully use borders to avoid disruption by law enforcement.

This means that appropriate international cooperation is important to combat criminal activities effectively and to trace financial flows, identify the origin or the destination of the funds and seize them if possible.

In the field of international cooperation we are nowadays increasingly faced with the "counterproductive" objection claiming that "I do not cooperate because the others do not cooperate". This objection is becoming increasingly common nowadays.

However it is crucial to combat this taboo and to put an end to one of the main obstacles to effective international cooperation.

With regard to administrative cooperation, CTIF-CFI never refuses a request for assistance but provides full assistance to foreign counterparts: law enforcement information, financial information and information from commercial databases are always provided on request. There are no legislative impediments that could restrict exchange of information with other FIUs. However, full administrative cooperation is not the case in many countries and the "fiscal alibi" is currently still used by many "offshore countries" to refuse international cooperation.

As it will be mentioned later on, in some Member States, FIUs have efficient tools/powers in their hands. This is for instance the case of the CTIF-CFI to freeze a bank account or to order the postponement of a suspicious transaction during a period of maximum five working days, and including upon request made in due form by a foreign FIU [9].

This best practice is not yet implemented in many countries in the world. This has an impact on the FIU's capacity to follow the flow of funds and on law enforcement's capacity to identify and seize criminal assets.

With regard to judicial cooperation, experience shows that some obstacles still exist:

- the requirement to start a police investigation in order to exchange information, especially to obtain bank information;
- ill will;
- a lengthy process to carry out international letters rogatory;
- no response, a late response or an incomplete response;
- no response in case of a fiscal dimension;
- insufficient available human resources;
- use of bank secrecy as justification for a refusal to cooperate;
- issues with certain countries in carrying out judicial seizures;
- as already mentioned, "fiscal alibi" to justify the lack of transparency of legal structures located in their jurisdiction to avoid responding to international requests regarding money laundering investigations.

E. The race to obtain bigger profits

The race to obtain bigger profits, especially in times of financial crisis, is sometimes more important for financial institutions than complying with the FATF's AML/CFT standards, as recent cases involving Standard Chartered, HSBC, ... or ING have proved.

These financial institutions have recently been involved in AML/CFT cases and have been punished in the United States with huge fines or settlements (between USD 600 and 2,000 million).

It is no longer possible today to apply full AML/CFT measures to every single financial transaction and it is generally accepted that a risk-based approach is fundamental.

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[9] See Article 23, para. 2, of the abovementioned Law of 11 January 1993.

This is why the FATF asks financial institutions to analyse their ML/TF risks and apply risk-based policies to lower the identified risks.

This means that the AML/CFT measures applied will depend on the level of risk associated with a customer type or a product type.

Some customers, like PEPs [10], could entail higher risk than an ordinary citizen.

As the aforementioned AML/CFT cases prove, in practice, some financial institutions do not fully and properly apply the FATF risk-based approach recommendations.

Some financial institutions do not analyse their customer and product ML/TF associated risks but analyse their own risks of being involved in a money laundering or terrorist financing case and the financial consequences for them and for their reputation.

F. Serious tax crimes

Capital flight, including tax evasion, is facilitated by tax systems that are vulnerable to harmful tax practices.

Various cases have recently come to light involving companies such as Apple, British Tobacco, Arcelor Mittal or Amazon, to name but a few. These show that, nowadays, large industrial groups are quick to take advantage of tax disparities between jurisdictions.

Legal professionals do not consider these mechanisms as tax crime but as "tax optimisation".

However, the voluntary use of multiple opaque shell companies or shell companies in offshore financial centres as well as the use of foreign legal professionals as front men (representatives) and the use of manipulated transfer prices (to avoid paying corporate taxes anywhere in the world except in the country offering the lowest income tax rate) should perhaps be considered as tax crimes and not as "tax optimisation".

But it is difficult for a country alone to combat these corporate tax evasion mechanisms because they are a result of protectionist measures decided by some (offshore) countries.

Nowadays, some countries still misuse the "professional secrecy principle" to protect their banking sector and legal professionals provide opaque corporate structures, which also creates unfair competition.

Protectionism is also one of the "unacknowledged" reasons why these (offshore) countries are reluctant to cooperate with foreign law enforcement authorities and FIUs.

Experience shows that handling cases regarding tax fraud or with potential tax connections is generally more complex and some countries do not or are reluctant to grant authorisation to use or report the information to the judicial authorities in case there is a fiscal dimension (see *supra* the "fiscal alibi").

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[10] PEPs: Politically Exposed Persons (former prime minister or minister, ambassadors, ...).

3. How can the financial sector (and DNFBPs) and Financial Intelligence Units help criminal investigations?

A. Have up-to-date national cooperation

Adequate cooperation between all national competent authorities (regulators and supervisors, FIU, law enforcement, judicial authorities, tax authorities, customs...) in charge of combating money laundering and terrorist financing is a valuable instrument to trace, disrupt and confiscate funds of illicit origin.

It is imperative for countries to use financial intelligence upstream and downstream within their value chain. This means that the flow of financial intelligence between regulators, supervisors, FIUs, law enforcement and other competent authorities should be free-flowing to and from all entities in accordance with existing domestic laws, policies and procedures [11].

Cooperation between these authorities is important not only for ML/TF cases (operational cooperation) but also to identify and analyse new trends, risks and vulnerabilities relating to money laundering or terrorist financing.

The FATF standards now formally request Member States and other countries that they assess their risks of and vulnerabilities to money laundering and terrorist financing [12] and, based on the risks identified, have national up-to-date AML/CFT policies. This includes designating a national coordination authority (or another coordination mechanism) responsible for such AML/CFT policies [13].

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[11] FATF Operational Issues – Financial Investigations Guidance, June 2012, www.fatf.gafi.org.

[12] Countries should identify, assess, and understand the money laundering and terrorist financing risks for the country, and should take action, including designating an authority or mechanism to coordinate actions to assess risks, and apply resources, aimed at ensuring the risks are mitigated effectively. Based on that assessment, countries should apply a risk-based approach (RBA) to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified. This approach should be an essential foundation to efficient allocation of resources across the anti-money laundering and countering the financing of terrorism (AML/CFT) regime and the implementation of risk-based measures throughout the FATF recommendations. Where countries identify higher risks, they should ensure that their AML/CFT regime adequately addresses such risks. Where countries identify lower risks, they may decide to allow simplified measures for some of the FATF recommendations under certain conditions. Countries should require financial institutions and designated non-financial businesses and professions (DNFBPs) to identify, assess and take effective action to mitigate their money laundering and terrorist financing risks. (FATF recommendation 1), www.fatf-gafi.org

[13] Countries should have national AML/CFT policies, based on the risks identified, which should be regularly reviewed and should designate an authority or have a coordination or other mechanism that is responsible for such policies. Countries should ensure that policy-makers, the financial intelligence unit (FIU), law enforcement authorities, supervisors and other relevant competent authorities, at the policymaking and operational levels, have effective mechanisms in place which enable them to cooperate, and, where appropriate, coordinate domestically with each other concerning the development and implementation of policies and activities to combat money laundering, terrorist financing and the financing of the proliferation of weapons of mass destruction. (FATF recommendation 2), www.fatf-gafi.org.

B. Collecting and analysing financial information related to criminal conduct

The FIUs, which act as a filter between the financial sector and the law enforcement authorities, manage huge databases composed of different types of financial data collected from suspicious transactions' reports (STRs), currency transactions' reports (CTRs), cross-border transactions' reports (CBTRs) and cross-border cash transactions' reports (CBCTRs).

Not sharing this intelligence with other competent authorities is unwise and counterproductive.

Sharing this intelligence with law enforcement authorities only on request of law enforcement authorities is also counterproductive.

It is essential that FIUs proactively analyse the STRs, CTRs, CBTRs and CBCTRs received to detect potential unknown money laundering and predicate offences activities.

This means that, when, during the FIUs analytical process, FIUs identify serious indications of money laundering or terrorist financing activities, FIUs must immediately share this intelligence with law enforcement, with tax authorities and with intelligence services.

Most FIUs now have the legal power to request (additional) information from:

- the reporting entity itself;
- other reporting entities;
- law enforcement, prosecutor offices, intelligence services;
- tax authorities, social security services.

However, an administrative FIU has no legal power to intercept and interrogate criminals, to execute house searches and to arrest and take criminals into custody.

C. Freezing assets belonging to criminals

As underlined previously, some FIUs have been equipped with important powers and tools. The Belgian law of 11 January 1993 on the prevention of the use of the financial system for money laundering or terrorist financing purposes allows CTIF-CFI, in case of indication or suspicion of money laundering or terrorist financing, to freeze, for a period of a maximum of five working days, the execution of a financial transaction or any transaction on a specific bank account. If the CTIF-CFI deems that this measure must be extended, it immediately refers the matter to the competent Public Prosecutor or to the Federal Public Prosecutor.

In case of serious indications of money laundering, the judicial authorities may freeze the funds for a longer period of time and will cooperate with the judicial authorities from the requesting country to repatriate the criminal funds.

4. Conclusions

A. Main weaknesses and obstacles

It is a fact that the fight against money laundering, predicate offences and terrorist financing lacks effectiveness.

According to estimates by the United Nations, only 1% of the proceeds of crime is seized and confiscated annually in the world.

Even though the legal systems and AML/CFT legislation of certain countries are rather effective, their effectiveness is badly affected by the lack of effectiveness or by the weaknesses of their neighbours. It is difficult for one country alone to be effective in fighting criminals and criminal activities if, in the meantime, (offshore) countries continue to provide criminals with facilities to launder the proceeds of their criminal activities.

Amongst these facilities we have:

i) Opaque corporate structures

Financial investigations are crucial in fighting money laundering and terrorist financing, yet the transparency of the financial structures used to launder money or finance terrorism is also very important, both for FIUs and law enforcement to identify the actual beneficial owners of corporate structures. Many countries in the world still allow legal professionals to set up legal structures with a high level of anonymity.

The fight against offshore financial centres is a long and difficult ongoing task for the international community.

Initiatives taken at national level are important but must be supplemented by initiatives taken by the international community.

For several years now Belgium has requested that every citizen mentions on his/her tax return if he/she holds a foreign bank account. More recently, Belgium requests that every citizen mentions on his/her tax return if he/she has links with a structure in an offshore financial centre.

These initiatives can improve transparency but must be coordinated at international level.

ii) Our legal systems are not yet sufficiently harmonised

The different legal systems are not yet fully harmonised (including within the 28 EU Member States), which sometimes makes financial investigations more difficult or impossible.

In Belgium, the AML/CFT legal framework[14] authorises the FIU to request financial information from all reporting entities, also upon request from a foreign counterpart. The FIU can obtain information such as the contact details of a bank account holder, the references of bank accounts held by a suspect or details of transactions on a bank account. The FIU can analyse and share this information with a foreign counterpart upon request and without any prior consent or a court order.

In other countries, the FIU is not allowed by law or by other regulations to request this financial information upon request of a foreign counterpart. As a result, the ability of the requesting FIU to trace the flow of suspicious funds and the ability of law enforcement authorities to confiscate the proceeds of crime are affected or the confiscation becomes impossible.

Unlike the Belgian FIU (CTIF-CFI) (see *supra*) many foreign FIUs are still not allowed to freeze money upon the request of a counterpart FIU.

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[14] Article 33 of the Law of 11 January 1993 on preventing the use of the financial system for money laundering or terrorist financing.

iii) Protection from the state still helps some countries to provide these opaque offshore structures and bank accounts without any risk, consequence or repercussions

The protection that offshore countries provide to their financial sector (principle of professional secrecy and the "fiscal alibi") and their legal professionals (opaque corporate structures) is no longer acceptable.

B. What can be done to disrupt criminal activities, tax evasion and money laundering?

First of all, it is crucial that solutions to the problem of tax evasion and to the problem of capital flight (illicit financial flows from tax evasion and from illicit and criminal activities) are found.

To achieve this objective, every country in the world, and especially tax havens, must effectively and efficiently apply all the FATF's international standards and abolish tax disparities.

If a solution is not found to both issues (tax rates disparities and capital flight), criminals, tax evaders and money launderers will continue to move their assets into the countries that are most appealing in terms of tax rates and opacity.

In addition, it is also crucial to have:

i) Well-informed (risk-based) and coordinated intelligence-led policies and actions

The cooperation between law enforcement, FIU and intelligence services… is important not only for a specific criminal activity investigation or for a ML/TF case but also to identify and analyse new trends, risks and vulnerabilities.

As mentioned previously (see *supra*), the FATF standards formally require States to assess their risks of and vulnerabilities to money laundering and terrorist financing and, based on the risks identified, have national up-to-date AML/CFT policies.

This national ML/TF risk assessment must receive input from a specific risk assessment made by the law enforcement authorities, by the supervisory authorities of the financial institutions and DNFBPs, by their professional associations, by the intelligence services and Customs and Excise administration.

The FATF recommendations include the designation of a national coordination authority (or another mechanism of coordination) responsible for the national risk assessment and the AML/CFT policies.

However, currently, only a few countries already have such mechanisms in place. The concerned FATF recommendations should be better implemented

ii) More intelligence-sharing

Different law enforcement departments or law enforcement, tax authorities and intelligence services are still, for objectionable reasons (self protectionism), reluctant to exchange information and to act following consultation.

Looking beyond this taboo is crucial for a country to be effective. Experience has shown that coordinated actions are the actions that have generated the best results.

Intelligence obtained from other law enforcement departments, from local police, from the tax authorities, from customs or from foreign counterparts can be essential in targetting specific controls and targetting seizure and confiscation measures.

Cooperation between all the competent authorities is also crucial in terrorist financing cases because the nature of transactions related to terrorist financing make them more difficult to detect and to intercept.

Terrorist financiers use terrorist financing techniques that conceal terrorist financing transactions from law enforcement authorities:

– funds financing terrorism sometimes have a (apparent) legal origin;
– official and legitimate non-profit organisations are sometimes used as a vehicle for terrorist financing purposes so that legal and illegal financing transactions are mixed up;
– the funds are sometimes sent to countries where it it is difficult for law enforcement authorities to prove the illicit use of the funds;
– apparent legal wire transfers (payments made in favour of a school for the education of the children of a terrorist) could be a compensation for the contribution to a terrorist act or plot.

The use of intelligence from intelligence services or foreign counterparts is sometimes the best approach to disrupt terrorist financing activities.

iii) More and faster international cooperation

More and faster unlimited international cooperation is one of the main conditions needed to fight criminal activities, money laundering and terrorist financing effectively.

However many obstacles still affect or hamper international cooperation. These need to be identified and overcome.

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Nowadays, a criminal investigation is not the only approach to disrupt criminal activities effectively because criminals attach more value to the proceeds of their criminal activities (the benefits of their criminal activities) than to a jail sentence.

Intercepting the proceeds of crime is therefore important to disrupt criminal activities.

Depriving criminals of the proceeds of their criminal activities and using more effective and coordinated investigation techniques is also crucial in times of financial crisis and huge state deficits.

For all these reasons it is now appropriate to add or attach a financial investigation to each investigation into criminal activities generating potential pecuniary benefits.

If the law enforcement authorities have the ability and skill to carry out these financial investigations, all the intelligence collected by FIUs from STRs, CTRs... must also be used by law enforcement authorities to identify and disrupt criminal activities and to seize illicit assets.

Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept

Katalin Ligeti and Michele Simonato [1]

1. Administrative and criminal law enforcement of EU policies in general

With the exception of very few policy areas such as competition law, the original EC Treaty was silent on the enforcement of Community policies. The obligation to enforce Community law lay with the Member States that were free in exercising this power. It was up to the Member States whether to use private law, disciplinary law, administrative law, or criminal law for sanctioning violations of EC obligations.

The autonomy of the Member States led to considerable enforcement deficits in complying with EC policies. In order to address the emerging gap in the enforcement regime of common policies, the Commission developed legal instruments obliging Member States to enforce Community obligations. However, the possibilities of the Commission were limited by the Treaty: on the one hand it declared that criminal law enforcement belonged to the sovereignty of the Member States, whereas on the other hand it was unclear whether Community law could prescribe punitive administrative sanctions.

From the 1970s onwards the Commission drafted, in many policy areas, instruments that compelled the Member States to impose punitive administrative sanctions for violations of EC obligations. The regulations in question provide for fines, forfeiture of financial guarantees, exclusion from subsidy schemes, professional disqualification, etc. Member States had difficulty accepting the mission of the EC to harmonise administrative enforcement of EC policies and some of them even challenged the respective competence of the EC. In response, the CJ, in its

[1] Both authors participated in the "Study on impact of strengthening of administrative and criminal law procedural rules for the protection of the EU financial interests" mandated by the European Commission. The views expressed here represent the personal views of the authors.

landmark judgment in Case C-240/90 [2], recognised that the European Community was competent to adopt measures necessary for the equivalent and effective enforcement of Community policies including punitive administrative sanctions. Thereby the Court resolved the controversy in relation to punitive administrative law and paved the way for an EC administrative enforcement regime.

The Commission was, however, convinced from the beginning that in order to guarantee effective and uniform enforcement of common policies, administrative enforcement alone would not be sufficient in several policy areas. The attempts of the Commission to include criminalisation duties into directives foundered at the EU Council, which systematically stripped the proposals of their criminal law content and reduced the original obligation to apply criminal law to the milder obligation to apply administrative sanctions, only. The only limit to the autonomy of the Member States' criminal law enforcement was the obligation stipulated by the CJ in another landmark judgment requiring the Member States to offer a degree of protection for EC obligations that was analogous to that offered in the enforcement of provisions of national law of a similar nature and importance (the assimilation principle) [3]. Thereby the Court established a positive obligation to criminalise infringements of EC law under the same conditions as those applicable to the sanctioning of similar infringements in national law [4]. The assimilation principle was codified into the Maastricht Treaty that opened for the first time the possibility to adopt criminal law at EU level. After Maastricht a scheme of criminal law enforcement of EU policies started to emerge.

The struggle to curtail the discretion of the Member States when it comes to enforcing EC policies has resulted in a patchwork of administrative and/or criminal law enforcement depending on the Member State and the policy area concerned.

The present article shall focus only on one policy area, the enforcement of the protection of the financial interests of the EU. This area is characterised by the parallel development of several sectoral administrative regimes which were only later extended by horizontal administrative enforcement powers of the Commission as well as national criminal law enforcement schemes. The combination of administrative and criminal law regimes does not build an integrated enforcement strategy, but rather

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[2] CJ, 27 October 1992, C-240/90, *Germany v. Council and Commission* [1992], *ECR*, p. I-5383. For a detailed analysis of the EC harmonisation of administrative enforcement, see J.A.E. Vervaele, "Administrative Sanctioning Powers of and in the Community. Towards a System of European Administrative Sanctions?", *in* J.A.E. Vervaele (ed.), *Administrative Law Application and Enforcement of Community Law in The Netherlands*, Deventer, Kluwer Law International, 1994, p. 161 et s.; J. Schwarze, "Rechtsstaatliche Grenzen der gesetzlichen und richterlichen Qualifikation von Verwaltungssanktionen im europäischen Gemeinschaftsrecht", *EuZW*, 2003, p. 261 et s.; M. Poelemans, *La sanction dans l'ordre juridique communautaire. Contribution à l'étude du système répressif de l'Union européenne*, Bruxelles, Bruylant, 2004.

[3] See CJ, 21 September 1989, C-68/88, *Commission v. Greece* [1989], *ECR*, p. 2965; and the Commission notice concerning the judgment of the Court of Justice of 21 September 1989 in Case 68/88, *OJ*, no. C 147, 16 June 1990, p. 3.

[4] The case-law of the Court of Justice sparked vivid debate whether the EU had the competence to define criminal offences and impose criminal sanctions. See V. Mitsilegas, *EU Criminal Law*, Oxford and Portland, Hart, 2009, p. 65 et s.

a patchwork of different national and supranational powers raising great practical difficulties. The effective and uniform protection of the financial interests of the EU should be ensured by cooperation between the various national and European administrative and judicial authorities by way of "multidisciplinary investigations'. Multidisciplinary investigations refer to investigations that involve different types of authorities; *i.e.* national and supranational administrative authorities and national judicial authorities. This text shows the inherent limits and practical restraints of such multidisciplinary investigations and argues in favour of an integrated enforcement regime at EU level.

2. The enforcement of the protection of the financial interests of the EU

Anti-fraud activities are the joint responsibility of the Commission and of the Member States. The respective obligations are laid down in Article 310, paras. 5 and 6, and Article 325 TFEU. Accordingly, the Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union [5]. To this end the Member States shall coordinate their actions by organising, together with the Commission, close and regular cooperation between the competent authorities [6]. With regard to administrative cooperation, Article 197 TFEU states that the Union may support efforts of Member States to improve their administrative capacity to implement Union law because the effective implementation of Union law by the Member States is regarded as a matter of common interest. Such actions may include the exchange of information and of civil servants as well as supporting training schemes.

It derives from the Treaty that both the Commission and the Member States have roles to play when it comes to countering fraud and other illegal activities affecting the financial interests of the EU. The respective legal framework that has developed over the past decades is, however, fragmented and complex.

The protection of the EU budget became a real priority on the EU agenda in the 1970s [7], when own resources were allocated to the EEC (*e.g.* common agricultural policy, structural funds, etc.). The consequent need to protect these resources led to sectoral regulations [8] providing for administrative investigations into irregularities in the various EC policy areas concerned. The sectoral regulations developed independently from one another and aimed at addressing the specific policy needs of a particular policy area (such as the common agricultural or fisheries policy, customs, tax, etc.). Consequently, these sectoral regulations contain differing provisions as regards both the powers of the Commission and the relationship between the Commission and national authorities.

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[5] Article 310(6) TFEU.

[6] Article 325(3) TFEU.

[7] J.F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office*, Groningen, Europa Law Publishing, 2011, p. 7.

[8] The most renown instruments – later amended – concern, as for instance, the common agricultural policy (Regulation 1848/2006), the common fisheries policy (Regulation 1224/2009), as well as the mutual administrative assistance on customs and agricultural matters (Regulation 515/1997).

Although the Commission was of the opinion, from the 1970s, that administrative enforcement is insufficient for the protection of the financial interests of the EC, it was not until the adoption of the Maastricht Treaty that the PIF enforcement regime could be strengthened. In 1995 a package of legislative instruments was adopted (the so called "PIF-package") consisting of (i) Regulation 2988/95 on the protection of the European Communities financial interests [9]; (ii) the Convention on the Protection of the Financial Interests of the EU (hereafter PIF Convention) [10] and its three Protocols [11] and (iii) Regulation 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities" financial interests against fraud and other irregularities [12]. This legislative package affected both administrative and criminal law enforcement and was horizontal in nature, *i.e.* the provisions apply to all EC policy areas where these have a connection with EC finances.

The centrepiece of administrative enforcement is Regulation 2988/95 that provides for general powers of the Commission as regards administrative checks and as regards administrative measures and penalties concerning irregularities of Community law [13]. Regulation 2988/95 did not replace the pre-existing sectoral rules, but provided "a general framework for the anti-fraud activities of the EC" [14]. Accordingly, the different sectoral rules remained in force and were extended by the more general framework laid down in Regulation 2988/95.

The most visible aspect of the new administrative enforcement framework was the independent operational powers of supervision and investigation vested in the Commission [15] by Regulation 2185/96 [16]. Based on this Regulation the Commission (OLAF) may request Member States to start an administrative investigation and have its

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[9] *OJ*, no. L 312, 23 December 1995, p. 1 et s.

[10] *OJ*, no. C 316, 27 November 1995, p. 49 et s.

[11] First Protocol of 27 September 1996, *OJ*, no. C 313, 23 October 1996, p. 2 et s. Second Protocol of 19 June 1997, *OJ*, no. C 221, 19 July 1997, p. 12 et s. Finally, the Protocol of 29 November 1996, *OJ*, no. C 151, 20 May 1997, p. 2 et s.

[12] *OJ*, no. L 292, 15 November 1996, p. 2 et s.

[13] According to the Regulation, "irregularity" shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.

[14] J.F.H. Inghelram, *op. cit.*, p. 19.

[15] The Commission's anti-fraud Unit UCLAF was established in 1988 (see J.F.H. Inghelram, *op. cit.*, p. 10-11) and later replaced by the Anti-fraud Office OLAF (Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF), *OJ*, no. L 136, 31 May 1999, p. 20 et s.). See J.A.E. Vervaele, "Towards an Independent European Agency to Fight Fraud and Corruption in the EU?", *European Journal of crime, criminal law and criminal justice*, 1999, 7/3, p. 331 et s.

[16] It should be mentioned that Regulation 2185/96 concerning on-the-spot checks was adopted before the creation of OLAF. This may explain why the legal framework for carrying out external investigations is incomplete. See S. White, " EU anti-fraud enforcement: overcoming obstacles", *Journal of Financial Crime*, 2010, 17/1, p. 83.

own inspectors participate in this investigation, furthermore OLAF also has the power to investigate in the Member States independently [17]. The powers and competences as well as the functional independence of OLAF have been further specified by Regulation 1073/1999 (EC) and Regulation 1074/1999 (Euratom). These Regulations, after long negotiations, have been recently repealed by the new Regulation (EU, Euratom) no. 883/2013 of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office [18] (hereinafter, "new OLAF Regulation").

The third element of the PIF-package deals with criminal law enforcement. Although the Commission launched a proposal already in 1976 to modify the existing treaties to intervene in the criminal law field for the protection of financial interests [19], it took almost twenty years – until the adoption of the PIF Convention – to achieve this objective. The PIF Convention defines the offence of EU fraud and requires the Member States to sanction it with effective, proportionate and dissuasive criminal penalties. Most of the PIF Convention is dedicated to substantive law issues; it contains only a few rules on procedural law. If a fraud constitutes a criminal offence and concerns at least two Member States, the Member States concerned must cooperate effectively in the investigation, the prosecution and the enforcement of the penalties imposed by means, for example, of mutual legal assistance, extradition, transfer of proceedings or enforcement of sentences passed in another EU country [20]. The Second Protocol of the PIF Convention [21] establishes rules on the vertical cooperation between the Commission and the Member States, as well as on data protection. According to its Article 7, the Commission and the Member State shall cooperate with each other in the fight against fraud, active and passive corruption and money laundering. To that end, the Commission shall lend such technical and operational assistance as the competent national authorities may need to facilitate cooperation of their investigations; and the competent authorities in the Member States may exchange information with the Commission so as to make it easier to establish the facts and to ensure effective action against these crimes. Although this article allows the Commission (OLAF), in principle, to participate in national criminal investigations into offences against the EU budget, it does not tackle the details of information exchange, the organisation of the cooperation between the Commission and the Member States, and the use of the results of the investigations.

The overall consequence of this fragmented legal framework is that (i) the Commission has horizontal enforcement powers in the PIF area, albeit limited ones in comparison to other policy fields; (ii) national authorities remain responsible for a large part of the PIF enforcement and have to cooperate with each other and with the Commission in ensuring this task. In practice, this often requires multidisciplinary investigations.

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[17] Article 5, Regulation 2185/96.

[18] *OJ*, no. L 248, 18 September 2013, p. 1 et s.

[19] COM (76) 418, *OJ*, no. C 222, 22 September 1976.

[20] However, besides such a general obligation to cooperate between Member States, it does not provide for concrete rules harmonising the powers of authorities involved in the investigations.

[21] *OJ*, no. C 221, 19 July 1997, p. 11.

3. The powers of the Commission in PIF investigations: prisoner of national law?

The coexistence of several sectoral regulations with the horizontal PIF-package results in a rather complex legislative framework on on-the-spot checks and administrative investigations, performed by the Commission, in the course of external investigations within various EC policy areas. Article 3 of Regulation 883/2013 provides for the general legal basis for external investigations of OLAF. This general legal basis refers, however, to Article 9(2) of Regulation 2988/95, which refers again to the various sectoral rules. The provisions contained in these regulations differ as regards both the powers of the Commission and the relationship between the Commission and the Member States. One may distinguish in general between three types of investigations.

First, the Commission (OLAF) may join a national administrative investigation that is *de facto* opened by the Member State, although on request of the Commission (OLAF) itself. In this case, the Commission (OLAF) acts as seconded expert or joint investigator, and the powers of the Commission are assimilated to the ones of the national authorities of the Member State concerned. Such investigations are foreseen in the enforcement of the common agricultural policy, the common fisheries policy and the customs union [22].

Second, the Commission (OLAF) can exert autonomous powers. The Commission (OLAF) carries out on-the-spot checks, thereby opening an investigation *proprio motu*. Therefore, no requests to open an investigation are sent to the Member States. These powers are provided both by Regulation 1073/99 – now replaced by the new OLAF Regulation 883/2013 [23] – and Regulation 2988/95. According to the latter instrument the Commission may carry out on-the-spot checks [24], the details of which are further elaborated in Regulation 2185/96. According to this Regulation, the Commission may carry out on-the-spot checks and inspections [25] that shall be prepared and conducted in close cooperation with the Member States concerned. The officials of the Member

[22] Article 6, Regulation 595/91; Article 18(4), Regulation 515/97; Article 98(6), Regulation 1224/2009.

[23] See Article 3 Regulation 883/2013, replacing Article 5 Regulation 1073/99.

[24] According to Article 9 Regulation 2988/95 the Commission may carry out on-the-spot checks on the "conformity of administrative practices with community rules," the "existence of the necessary substantiating documents and their accordance with the Communities's revenue and expenditure", the "circumstances in which such financial transactions are carried out and checked," as well as other checks and inspections "under the conditions laid down by sectoral rules".

[25] According to Article 2, Regulation 2185/96, "The Commission may carry out on-the-spot checks and inspections pursuant to this Regulation: for the detection of serious or transnational irregularities or irregularities that may involve economic operators acting in several Member States; or where, for the detection of irregularities, the situation in a Member State requires on-the-spot checks and inspections to be strengthened in a particular case in order to improve the effectiveness of the protection of financial interests and so to ensure an equivalent level of protection within the Community; or at the request of the Member State concerned".

State may participate in them [26] but the on-spot-checks and inspections are carried out under the Commission's authority and responsibility by its officials or other servants [27]. The Commission (OLAF) should have access to all information and documents on the operations concerned under the same conditions as the competent authorities of the Member State concerned [28]. However, OLAF inspectors themselves cannot use force or coercion [29]. Therefore the duty to cooperate requires the Member State to take all the necessary measures to guarantee the application and effectiveness of EU law [30].

Third, the Commission (OLAF) can also participate in national criminal investigations opened by national authorities on their own initiative. Although not clarifying all its concrete aspects, Article 7 of the Second Protocol to the PIF Convention affirms that the Commission and the Member States shall cooperate with each other in the fight against fraud, active and passive corruption and money laundering. Nevertheless, as mentioned above, this provision does not clarify the details of the cooperation between national judicial authorities and the Commission.

Observing the EU regulatory framework as regards the powers of the Commission to investigate fraud and irregularities against the EU budget reveals a twofold weakness. First, the Commission's powers in the PIF area are much weaker than enforcement powers in other EU policy areas. Why can the EU Competition Authority use certain coercive measures such as searches, even home searches of CEOs, and OLAF not [31]? Why does the EU impose on national administrative bodies the use of certain coercive measures (under judicial authorisation if necessary) and exclude them for OLAF? The relatively weak enforcement powers in the PIF area are the outcome of a political compromise where Member States were not ready to vest more and stronger powers in the Commission. The Member States once again restated their restrictive attitude in the new OLAF Regulation that confirms the existing powers of OLAF as regards external investigations without granting any additional powers [32].

Second, the Commission's enforcement powers in the PIF area are weakened by their variable geometry. The administrative law framework (*i.e.* the sectoral regulations) assimilates the powers of the Commission to those of national authorities. By referring back to the national laws of the Member States, the powers of the Commission (OLAF) depend not only on different national laws, but also on the specific policy field (VAT, customs duties, agriculture, structural funds, humanitarian aid etc.). Specialised investigative services (*e.g.* customs, tax, etc.) have different

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[26] According to Article 3, Regulation 2185/96, the Commission "shall ensure that checks are not being carried out at the same time for the same fact on the basis of Community sectoral regulations" and "shall take into account the inspections in progress or already carried out in respect of the same facts with regard to the economic operators concerned, by the Member State on the basis of its legislation".

[27] Article 6, Regulation 2185/96.

[28] Article 7(1), Regulation 2185/96.

[29] Article 9, Regulation 2185/96.

[30] Article 7, Regulation 883/2013.

[31] See Article 20 of Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[32] See Article 3, Regulation 883/2013.

powers under national law. OLAF investigators will have, therefore, different powers even within the same Member State depending on the policy area concerned [33].

The reference to national law leads to the paradoxical situation that OLAF has more powers in certain Member States under joint investigation (investigations upon request of the Commission) than in the on-the-spot checks *proprio motu*. This is in particular the case where national authorities have a double set of powers allowing them to switch from administrative to judicial investigation when there is a suspicion of an offence. In such cases members of the Commission (OLAF) can stay, but they are excluded from the use of certain coercive powers such as, for example, searches or criminal interrogations. OLAF can, however, access the outcome of the investigation [34].

4. Multidisciplinary investigations and the lack of a specific legal framework

Besides the relatively weak enforcement powers of the Commission in the PIF area, the current *status* of the combination of administrative and criminal law regimes raises great difficulties in the cooperation between different types of national administrative authorities, on the one hand, and between administrative and judicial authorities on the other hand.

Whereas national laws of the Member States usually pronounce norms for cooperation between various types of administrative authorities (*e.g.* tax, customs, etc.), there are very few rules, if any, on the cooperation between administrative and judicial authorities at the national level [35]. The legal situation is even more unclear

[33] During the "Study on impact of strengthening of administrative and criminal law procedural rules for the protection of the EU financial interests" mandated by the Commission, JUST/A4/2011/EVAL/01, the harmonisation of the investigative powers of the Commission in PIF cases was considered. It was argued that such uniform investigative powers should include the right to request information and documentation from public or private bodies, the right to review documentation such as books and electronic databases of those subject to investigation, the right to access premises in on-the-spot investigations, the right to request information and explanations by employees on the spot, the confiscation of goods and documentation, the taking of samples, the sealing of premises, and, finally, the use of enforcement measures such as fines and physical force to pursue rights of inspection. In light of the lack of will of the Member States to accord further powers to OLAF during the nearly one decade of the negotiation on the OLAF reform, such harmonisation and reinforcement of powers was not considered further.

[34] See Regulation 595/91 (CAP).

[35] From the national reports collected within the project on "EU model rules of evidence and procedural safeguards for the procedure of the proposed European Prosecutor's Office" (published *in* K. Ligeti (ed.), *Toward a Prosecutor for the European Union*, vol. 1, Oxford and Portland, Hart, 2013) it emerges that in most countries there are no clear and comprehensive provisions regulating diagonal cooperation (some specific rules, although in some cases sectoral, can be found for instance in FR, DE, IT, UK, HU, SE, FI, LU). However, the following general rules may be drawn up in respect of the national framework: (i) there is a hierarchy between judicial and administrative authorities in the sense that judicial authorities can always obtain information from administrative and law enforcement authorities (unless classified information or information deemed to be a state secret); (ii) administrative authorities have the obligation to report crimes to judicial authorities, as well as to cooperate with them; and (iii) if acts of criminal proceedings are covered by secrecy, they cannot in principle be sent to administrative authorities.

in transnational cases as there are no rules (neither national nor supranational) regulating cross-border cooperation between administrative and judicial authorities (*e.g.* the exchange of information between an administrative authority of Member State A and judicial authority of Member State B). Consequently, there are no clear-cut rules for multidisciplinary investigations in PIF cases. Instead, cooperation in the investigation stage is regulated by two sets of legal instruments, mutual assistance in administrative matters (*i.e.* between administrative authorities of different Member States; hereinafter, MAA) and mutual assistance in criminal matters (*i.e.* between judicial authorities of different Member States; hereinafter, MLA). The two sets of legal instruments not only differ as to the nature of the authorities concerned, but also as to the objectives of the cooperation, the instruments which can be employed as well as the legal safeguards and control mechanisms which apply in order to protect the citizen. The situation is further complicated by the fact that there is no uniform definition of "administrative authority", which differs greatly in the Member States, *i.e.* the same specialised investigation service may be considered administrative in one Member State and judicial in the other Member State [36].

Multidisciplinary investigations are hampered not only because of the lack of a single legal regime, but also because the parallel application of MAA and MLA requires two sets of rules to interact. In comparison to MLA, the legal framework of MAA is extremely fragmented [37] and is still confined to the logic of traditional interstate cooperation instead of mutual recognition.

Currently there is no horizontal EU legal instrument on mutual administrative assistance, but only sectoral regulations providing for cooperation between the same types of administrative agencies of various Member States, *e.g.* customs or tax. These sectoral EU rules governing MAA have developed on the basis of the specific needs of the individual policy field: this explains why different instruments have been developed for administrative assistance in customs matters and agricultural/fisheries matters, on the one hand, and in tax matters, on the other hand. In 2004 the Commission put forward a proposal for a Regulation on mutual administrative assistance for the protection of the financial interests of the European Community against fraud and any other illegal activities [38], which was amended in 2006 incorporating amendments of

[36] See A. Klip, J.A.E. Vervaele, *European Cooperation between Tax, Customs and Judicial Authorities*, Kluwer Academic Publisher, 2002, p. 12, who mention as examples the reporting centres for the purposes of anti-money laundering legislation, the stock exchange regulators, and even the police authorities that in some countries have also powers of investigation.

[37] See for instance Council Regulation 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; Council Regulation 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation 218/92; Convention on mutual assistance and cooperation between customs administrations (Naples II) of 18 December 1997.

[38] COM (2004) 509.

the European Parliament and suggestions made by the Member States [39]. However the instrument has never been adopted [40].

Furthermore, international cooperation in administrative investigations is less developed than mutual legal assistance in criminal matters. Horizontal mutual administrative assistance obligations arise out of specific legal acts of the EU [41], they have been developed in the CJ's case law on the basis of general principles of law [42], or are stipulated by conventions between Member States [43]. Though these mutual assistance arrangements contain extensive obligations on information sharing, more modern forms of operational assistance that are known within judicial cooperation cannot be seen. For instance, there are no general provisions on "joint administrative investigation teams". Joint administrative investigations may be established only in the field of customs where the Convention on Mutual Assistance and cooperation between customs administrations (Naples II) provides for it [44]. Therefore in PIF cases, joint investigation teams can be set up only by mutual legal assistance. However, this poses a problem in relation to the participation of the Commission (OLAF) as MLA allows only national judicial and police officers to be members of a joint investigation team and to perform investigative acts according to framework decision 2002/465/

[39] COM (2006) 473.

[40] Interestingly, the Commission's Anti-Fraud Strategy does not contain a reference to this instrument. See the Communication from the Commission on the Commission's Anti-Fraud Strategy of 24 June 2011, COM (2011) 376.

[41] Originally, in the 1970s two conventions had been concluded between the Member States of the then EEC to regulate mutual assistance. These have been replaced over time with policy-specific secondary legislation. As one example from many: Council Directive 76/308 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties, *OJ*, no. L 73, 19 March 1976, p. 18, the matter now being regulated in Council Directive 2010/24 of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, *OJ*, no. L 84, 31 March 2010, p. 1; Council Regulation 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and co-operation between the latter and the Commission to ensure the correct application of the law on customs or agriculture matters, *OJ*, no. L 144, 2 June 1981, p. 1, that matter now, however, addressed by Council Regulation 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, *OJ*, no. L 82, 22 March 1997, p. 1, as last amended by Regulation 766/2008 of 9 July 2008, *OJ*, no. L 218, 13 August 2008, p. 48.

[42] Joined Cases 46/87 & 227/88, *Hoechst v. Commission* [1987], *ECR*, p. I-2859, paras. 19 and 33; Case C-94/00, *Roquette Frères*, [2002], *ECR*, p. I-9011, paras 22-29.

[43] An example is the Convention on mutual assistance and cooperation between customs administrations (Naples II), *OJ*, no. C 24, 23 January 1998. See especially Articles 6-15.

[44] See Article 24 of the Convention on Mutual Assistance and cooperation between customs administrations (Naples II).

JHA. The Commission (OLAF) may participate only in an informal way or as a seconded expert [45].

Moreover, as opposed to mutual assistance in criminal and civil matters which are both based on the principle of mutual recognition [46], administrative assistance still relies on the traditional mechanism of enforcement cooperation between a requesting and requested authority [47].

5. The inadmissibility of evidence gathered through multi-disciplinary investigations

Information gathered by multidisciplinary investigations often remains unused in national criminal proceedings due to the above-described incomplete legal framework. National criminal procedural law is autonomous in stipulating evidential standards and deciding whether to admit the results of administrative investigations or reject them. Potential inadmissibility affects both the results of the external investigations of the Commission (OLAF) and of national administrative authorities.

Whereas the explicit purpose of the external investigations of the Commission (OLAF) includes detecting fraud, or corruption to the detriment of the EU budget, the admissibility of the information gathered by OLAF in national criminal proceedings is not ensured. There is an inherent tension between the nature and the purpose of OLAF's investigations. The administrative investigations of OLAF do not only aim at detecting (administrative) irregularities, but also at collecting information to establish if a criminal offence (*i.e.* fraud or corruption) has occurred [48]. The Commission (OLAF) has, however, no sanctioning powers in the PIF area, nor is it a prosecution service. Therefore, at the end of its investigations OLAF draws up an investigation report and if there is suspicion of fraud or corruption, transmits the report to the competent national authorities. The national authority must then decide whether to initiate (administrative or judicial) proceedings of its own.

For channelling OLAF's findings into national proceedings, Article 11 of the new OLAF Regulation – restating its predecessor [49] – stipulates that OLAF's final reports "constitute admissible evidence in administrative or judicial proceedings of the Member States in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors". The admissibility of the final reports of OLAF is assimilated to the admissibility of reports drawn up by national authorities and thereby left to the variable geometry of the criminal procedural laws of the Member States. Each Member State attributes different evidential value to information gathered during administrative

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[45] Like Europol and Eurojust, the Commission (OLAF) can also play a supportive and advisory role in JITs.

[46] Articles 81 and 82 TFEU.

[47] See A. Klip, J.A.E. Vervaele, *op. cit.*, p. 39 et s.

[48] In order to tackle this inherent conflict between nature and purpose of the investigations, Article 11 of the new OLAF Regulation, replacing Article 9(2) of Regulation 1073/1999, proclaims that "in drawing up (the investigation) reports and recommendations, account shall be taken of the national law of the Member State concerned".

[49] Article 9 of OLAF Regulation 1073/1999.

investigations. Several Member States allow for the admission of information gathered by administrative authorities only if the rules of national criminal procedure for gathering evidence have been observed. However, some Member States follow a more liberal approach to evidence and generally allow the admission of the results of administrative investigations [50].

The practice of OLAF shows that, in the majority of its cases the investigative acts of the Commission (OLAF) are repeated by national judicial authorities for the sole reason that the information obtained by administrative investigations of the Commission is *per se* not recognised as admissible by national judicial authorities [51]. This results in a duplication of the investigation which is detrimental to procedural economy in general and even more severely to the rights of the person under investigation in particular.

The situation is not better in relation to information gathered by national administrative authorities. In practice, such information is hardly used in foreign criminal proceedings [52]. In order to remedy the current framework, already the 2004 Proposal on mutual administrative assistance [53] contained that "[f]indings, certificates, information, documents, certified true copies and any intelligence communicated to a competent authority in the course of assistance (...) shall constitute admissible evidence in administrative or judicial proceedings in any Member State, in the same way as if they had been obtained in the Member State where the proceedings take place". In essence, the 2004 proposal endeavoured to introduce the principle of mutual recognition to administrative cooperation and to cooperation between administrative and judicial authorities at least as regards the products of inquiries (findings, certificates, information, documents, certified true copies).

Extending mutual recognition to administrative law seems to be logical. Its implementation to cooperation between administrative and criminal investigative authorities, however, requires careful consideration. The experience of mutual recognition in criminal law demonstrates that ensuring effective protection of fundamental rights is already a pre-requisite to the functioning of mutual recognition of criminal decisions. To address this need, the EU adopted legislation aiming at

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[50] See the national reports contained in K. Ligeti (ed.), *op. cit*. These differences have been confirmed during the interviews conducted for the "Study on impact of strengthening of administrative and criminal law procedural rules for the protection of the EU financial interests", *op. cit*.

[51] See the Commission Staff Working Paper accompanying the Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations, SEC (2011) 621; and the Fourteenth report of the European Anti-Fraud Office, 1 January to 31 December 2013, p. 22 et s.

[52] Also this aspect has been confirmed by the interviews conducted for the "Study on impact of strengthening of administrative and criminal law procedural rules for the protection of the EU financial interests", *op. cit*.

[53] See Article 14 of the Amended Proposal for a Regulation on mutual administrative assistance for the protection of the financial interests of the European Community against fraud and any other illegal activities, 14 September 2006, COM (2006) 473.

harmonising procedural guarantees [54]. The recognition in judicial proceedings of information gathered through administrative inquiries raises even more fundamental rights concerns.

The level of protection offered to persons affected by administrative inquiries diverges considerably from the procedural guarantees accorded to suspects in criminal proceedings. Procedural guarantees are not always specified (*e.g.* access to the file or the right to be heard) and administrative authorities enjoy a certain flexibility in preserving them. Moreover, the scope and content of particular defence rights differ from one Member State to another [55].

The lack of attention to procedural guarantees has been subject to criticism already in the context of OLAF's investigations [56] and led to litigation before the CFI [57]. Following the criticism, the new OLAF Regulation aims at strengthening the procedural rights of persons concerned by OLAF's investigations [58]. The new Article 9 stipulates that OLAF's investigations must be conducted in accordance with the principle of the presumption of innocence. In particular, Article 9 addresses the information to be given by OLAF prior to an interview to a person concerned by the investigation and the taking of the minutes of the interview, the right to be assisted by a person of one's choice at the interview, the right not to incriminate oneself, the right to make one's views known before concluding the investigation, the right to be given a summary of the matters under investigation and to be invited to comment on these matters and the right to use an EU language of one's choice. The new OLAF Regulation constitutes a uniform body of procedural safeguards for administrative

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[54] See the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, *OJ*, no. C 295, 4 December 2009, p. 1 et s. So far the following Directives have been adopted: Directive 2010/64 of 20 October 2010 on the right to interpretation and translation in criminal proceedings, *OJ*, no. L 280, 26 October 2010, p. 1 et s.; Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings, *OJ*, no. L 142, 1 June 2012, p. 1 et s.; and Directive 2013/48 of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, *OJ*, no. L 294, 6 November 2013, p. 1 et s.

[55] See O. Jansen, P.M. Langbroek, *Defence Rights during Administrative Investigations*, Cambridge, Intersentia, 2007, p. 53 et s.

[56] See the Special report of the Court of Auditors no. 1/2005 concerning the management of the European Anti-Fraud Office (OLAF), *OJ*, no. C 202, 18 August 2005, p. 1 et s.; and the Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Anti-Fraud Office in complaint 2485/2004/GG. See also V. Stojanovski, "Procedural Rights of Persons under Investigation by OLAF", *Eucrim*, 2011, 3, p. 127 et s.; G. Kratsas, "A Case for OLAF: The Place and Role of the anti-fraud Office in the European Union Context", *European Public Law*, 2012, 18/1, p. 74 et s.; L. Balagová, " The Developments in the Case Law of the Community Courts with Regard to OLAF Investigations", *Eucrim*, 2008, 3-4, p. 142 et s.; J.F.H. Inghelram, *op. cit.*, p. 129 et s.

[57] See for example the cases C-521/04, *Tillack v. Commission*, 19 April 2005; T-215/02, *Gómez Reino v. Commission*, 18 December 2003; T-29/03, *Comunidad Autónoma de Andalucía v. Commission*, 13 July 2004.

[58] See in particular Article 9 of the new OLAF Regulation 883/2013.

investigations in PIF cases and establishes a standard that goes far beyond the level of safeguards applied in national administrative proceedings. In fact, the catalogue of rights enshrined in Article 9 of the new OLAF Regulation restates many of the rights contained in Article 6 ECHR. This should facilitate in the future the admissibility of OLAF's investigation reports as evidence in national criminal proceedings.

In order to make mutual recognition work between administrative and judicial authorities it seems that similarly high procedural standards need to be introduced.

6. The need for a coherent enforcement concept

The practical problems of multidisciplinary investigations illustrate that there are lacunae in the legislative framework leading to lack of cooperation and blockages (inadmissibility of investigation results, repetition of investigations, etc.). In order to foster the cooperation of national administrative and judicial authorities in the fight against EU fraud it is necessary to develop an integrated enforcement concept including prevention, administrative enforcement and criminal law enforcement.

Recent legislative developments at EU level aim at improving criminal law enforcement by introducing a new EU judicial actor, the European Public Prosecutor's Office [59]. Once established, the EPPO will be in charge of investigating offences against the financial interests of the EU. This might alleviate the difficulties experienced by OLAF in its investigations. It will not, however, address the complexity of problems linked to multidisciplinary investigations. Finding the most suitable solution to these problems requires further efforts in terms of research and discussion among experts and practitioners. Though, for the time being, no reliable tendency can be established, it appears most promising to think about a regime of mutual recognition for administrative cooperation and for cooperation between administrative and judicial authorities.

[59] Proposal for a Regulation on the establishment of the European Public Prosecutor's Office, 17 July 2013, COM (2013) 534 final. For an analysis of the proposal see K. Ligeti, A. Weyembergh, "The European Public Prosecutors Office: certain constitutional issues", *in* L. Erkelens, A.W.H. Meij, M. Pawlik (eds.), *The European Public Prosecutor's Office: an extended arm or a two-headed dragon? Legal and policy analyses of the European Commission proposal on the EPPO*, T.M.C. Asser Press, 2014, forthcoming.

The relationship between administrative and criminal sanctions in the new market abuse provisions

Robert Kert [1]

1. The development of a new EU sanctioning system in the field of Markets in Financial Instruments

On 20 October 2011 the Commission presented a proposal for a Directive on criminal sanctions for insider dealing and market manipulation (Market Abuse Directive, hereinafter referred to as MAD) [2]. This proposal forms part of a comprehensive package of measures related to the financial market to which three more legal instruments belong, namely the Markets in Financial Instruments Directive (MiFID) [3], the Markets in Financial Instruments Regulation (MiFIR) [4] and the Market Abuse Regulation (MAR) [5]. This package aims to renew the basis for European

[1] Thanks to Kathrin Haubeneder, Verena Brunner and Raphaela Bauer for helping to write this text.

[2] Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM (2011) 654, 20 October 2011.

[3] Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39 of the European Parliament and of the Council, COM (2011) 656, 20 October 2011; see for more detail G. Granner, "Eckpunkte und Einschätzung des Richtlinienvorschlags zur MiFiD II", *Zeitschrift für Finanzmarktrecht*, 2012, p. 2.

[4] Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments an amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories, COM (2011) 652, 20 October 2011; see for more details N. Raschauer, "MiFiR – Eckpunkte der neuen Verordnung über Finanzinstrumente", *Zeitschrift für Finanzmarktrecht*, 2012, p. 6.

[5] Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), COM (2011) 651, 20 October 2011.

market abuse law. The MAD and the MAR replace Directive 2003/6 and contain rules to sanction breaches of market abuse provisions. Whereas the MAD provides obligations to introduce criminal sanctions in EU Member States, the MAR foresees administrative sanctions which have to be introduced by the Member States.

Negotiations on the texts of the legal instruments led to an agreement at first reading on 10 December 2013. On 4 February 2014, the European Parliament approved the Directive. The Council adopted the Directive on 14 April 2014. Both legal instruments were published in June 2014 [6].

2. The legal basis is the reason for the existence of different legislative acts

It might seem strange that the Commission uses four different legislative acts for one single regulatory area and even two legislative acts on sanctions for breaches of the market abuse provisions. The reason for this approach is the legal basis of the Treaty on the Functioning of the European Union (TFEU). In this context, only the Market Abuse Directive and the Market Abuse Regulation will be discussed in detail. The latter is based on Article 114 of the Treaty on the Functioning of the European Union (TFEU) (approximation of laws in the internal market), which governs the approximation of laws, regulations and administrative provisions of the Member States in connection with the establishment and functioning of the internal market. The Market Abuse Directive is based on Article 83(2) TFEU, which constitutes the legal basis for the approximation of substantive criminal law.

According to Article 114 of the TFEU, the Commission is free to adopt a regulation or a directive. It appears that the Commission strives to induce full harmonisation and to keep the scope for implementation by the Member States in the field of substantive administrative law as narrow as possible. The Commission chose a regulation as the legal instrument to establish a more uniform interpretation of the EU market abuse framework (which defines the rules applicable in all Member States more clearly) and to determine the legislative framework in the field of market abuse to "ensure uniform conditions by preventing diverging national requirements as a result of the transposition of a Directive" [7]. The Commission takes the view that the direct applicability of a regulation reduces the level of regulatory complexity and offers greater legal certainty for those subject to the legislation across the Union and introduces a harmonised set of core rules. As a consequence, this shall be a contribution to the functioning of the internal market [8].

The Market Abuse Directive is based on Article 83(2) TFEU, which now explicitly contains the legal basis for approximation in the field of substantive criminal law if it "proves essential to ensure the effective implementation of a Union Policy in an area which has been subject to harmonisation measures". That is how

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[6] *OJ*, no. L 173, 12 June 2014, p. 84 and p. 179.

[7] See recital 5 in the preamble to the MAR.

[8] Explanatory Memorandum of the proposal for a MAR, p. 6. See for more detail M. Gruber, "Von der Marktmissbrauchsrichtlinie (MAD) zur Marktmissbrauchsverordnung (MAR)", *Zeitschrift für Finanzmarktrecht*, 2012, p. 50.

the so-called "annex-competence" [9], which had been discussed for a long time and had already been recognised by the European Court of Justice in its two well-known judgements concerning environmental criminal law [10], is anchored in primary EU law. A precondition for this "annex-competence" is that this area has been subject to harmonisation measures. The MAD is the first legislative act which is based on Article 83(2) of the TFEU. Whereas for approximation, according to Article 114, regulations or directives can be adopted, the approximation of substantive criminal law can only take place through the adoption of directives in accordance with the ordinary legislative procedure [11].

Since the Commission aims at a full harmonisation in the field of capital market law by adopting regulations on the one hand and given that the approximation of substantive criminal law can only be done by using the legislative instrument of a directive on the other hand, the use of two different legislative acts was the only feasible solution.

3. The Market Abuse Regulation (MAR)

A. Scope and definitions

The Market Abuse Regulation (MAR) follows the Market Abuse Directive 2003/6 but goes beyond its scope [12]. The MAR shall apply to all financial instruments traded on a Multilateral Trading Facility (MTF), admitted to trading on a MTF or for which a request for admission to trading on a MTF has been made and financial instruments traded on an Organised Trading Facility (OTF) as well as to any transaction, order or behaviour concerning any financial instrument irrespective of whether or not such transaction, order or behaviour takes place in a trading venue. In addition, emission allowances and spot commodity contracts shall also fall within the scope of this Regulation.

The MAR contains definitions of inside information (Article 7), insider dealing (Article 8), unlawful disclosure of inside information (Article 10) and market manipulation (Article 12) [13]. Following these definitions, it contains prohibitions of

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[9] See A. Weyembergh, "Approximation of substantive criminal law: The new institutional and decision-making framework and new types of interaction between EU actors", *in* F. Galli and A. Weyembergh (eds.), *Approximation of substantive criminal law in the EU: The way forward*, Brussels, Editions de l'Université de Bruxelles, 2013, p. 9.

[10] CJ, 13 September 2005, *Commission v. Council*, C-176/03, *ECR*, p. I-07879, and 23 October 2007, *Commission v. Council*, C-440/05, *ECR*, p. I-9097; for more details see V. Mitsilegas, *EU Criminal Law*, Oxford, Hart Publishing, 2009, p. 70 and f.

[11] See H. Satzger, *Internationales und Europäisches Strafrecht*, 4th ed., Baden-Baden, Nomos, 2010, para. 9, marginal number 32; J. Vogel *in* Grabitz/Hilf (eds.), *Das Recht der Europäischen Union*, München, Beck, Article 3 AEUV, marginal number 28 and f.

[12] See regarding the elements of offence "inside information" and "market manipulation" L. Teigelack, "Insiderhandel und Marktmanipulation im Kommissionsentwurf einer Marktmissbrauchsverordnung", *Betriebs-Berater*, 2012, p. 1361, at p. 1361 and f.

[13] Regarding the proposal of the Commission F. Zeder, "Erster Vorschlag zur "Annexkompetenz": Insider-Geschäfte und Marktmanipulation", *Journal für Strafrecht*, 2012, p. 38; regarding the elements of offence M. Viciano-Gofferje and C. Cascante, "Neues

insider dealing (Article 14a and b), unlawful disclosure of inside information (Article 14c) and market manipulation (Article 15).

B. Administrative measures and penalties

Regarding sanctions for infringements of these prohibitions, the MAR contains provisions on administrative measures and penalties. Member States shall provide administrative measures and penalties in relation to infringements of the provisions contained in the Regulation (*inter alia* insider dealing, market manipulation, unlawful disclosure of inside information). Although it is a Regulation, which is in principle directly applicable, it obliges Member States to "lay down the rules on administrative sanctions" (Article 30(1)). Article 30(1) foresees that the Member States must "provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures" for any breaches of this Regulation. There is therefore an obligation for Member States to transpose these provisions of sanctions into national law [14].

As administrative sanctions are foreseen: the order requiring the person responsible for the infringement to cease the conduct and to desist from a repetition of that conduct; the disgorgement of the profits gained or losses avoided due to the infringement insofar as they can be determined; the public warning which indicates the person responsible for the infringement and the nature of the infringement; the withdrawal or suspension of the authorisation of an investment firm or a temporary ban of a person discharging managerial responsibilities within an investment firm or any other natural person who is held responsible for the infringement from exercising management functions in investment firms; or a temporary ban from dealing on own account. In the event of repeated infringements of Articles 14 or 15, a permanent ban from exercising management functions in investment firms is foreseen. Finally administrative pecuniary sanctions of at least three times the amount of the profits gained or losses avoided because of the infringement, where those can be determined, are foreseen. In respect of natural persons, maximum administrative pecuniary sanctions of at least EUR 5 Million for insider dealing, unlawful disclosure of inside information and market manipulation shall be foreseen. For less serious infringements, fines of at least EUR 1 Million shall be foreseen. Additionally, the Regulation provides for administrative pecuniary sanctions for legal entities of at least EUR 10 Million or 15% of the total annual turnover of the legal person [15] [16].

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aus Brüssel zum Insiderrecht – die Marktmissbrauchsverordnung", *Neue Zeitschrift für Gesellschaftsrecht*, 2012, p. 968, at p. 969 and f.

[14] See for more detail M. Gruber, "Von der Marktmissbrauchsrichtlinie (MAD) zur Marktmissbrauchsverordnung (MAR)", *Zeitschrift für Finanzmarktrecht*, 2012, p. 52.

[15] According to the proposal of the Council, such a percentage of the total annual turnover should only be foreseen, "if specifically provided for in national law". In the adopted MAR this limitation is not contained.

[16] See for more detail F. Walla, *Betriebs-Berater*, 2012, p. 1360; R. Veil, M. Lerch, "Auf dem Weg zu einem Europäischen Finanzmarktrecht: die Vorschläge der Kommission zur Neuregelung der Märkte für Finanzinstrumente – Teil II", *Zeitschrift für Wirtschafts- und Bankrecht*, 2012, p. 1605, at p. 1613.

Whereas, with respect to the behavioural norms, full harmonisation is intended, with regard to sanctions the Regulation just aims at a minimum harmonisation. According to Article 30(2) MAR, Member States may provide that competent authorities under national law have powers in addition to those referred to in the Regulation and may provide for higher levels of sanctions than those established in the MAR. With the proposal of the Regulation the Commission aimed at imposing a common minimum standard since the existing divergent sanctioning regimes among Member States would foster regulatory arbitrage and impair the ultimate objectives of market integrity and transparency within the Single Market for financial services [17].

Besides the sanctions, the MAR contains rules on sentencing. Member States shall take into account all relevant circumstances when determining the type and level of administrative sanctions – in particular the gravity and duration of the infringement, the degree of responsibility of the person responsible for the infringement, the financial strength of the responsible person, the importance of the profits gained or losses avoided by the responsible person, the level of cooperation of the responsible person with the competent authority, previous infringements by the responsible person or measures taken by the responsible person to prevent a repetition (Article 31). In the proposal of the Commission, Member States were empowered to ensure that the decisions taken by the competent authority in accordance with this Regulation are subject to the right of appeal (Article 28 of the Proposal), but this provision was deleted without substitution by the Council.

4. The Market Abuse Directive (MAD)

A. Overview

The Market Abuse Directive shall complement the Market Abuse Regulation. It shall assure the implementation of the provisions regulated in the MAR [18]. The MAD aims at a minimum harmonisation, therefore Member States may establish more far-reaching criminal offences [19]. It is the aim of the Directive that, in all Member States, at least for serious cases of insider dealing, market manipulation and unlawful disclosure of inside information, criminal sanctions are imposed. Under the new directive, a common definition will exist across the EU for insider dealing, unlawful disclosure of information and market manipulation.

The initial draft of the Commission for a MAD was – compared to the proposal for the MAR – kept very short. Due to the amendments of the Parliament and the Council, numerous definitions were added and the definitions of offences were described in more detail. With regard to the definitions, the legal instruments frequently make cross references to other instruments of the package such as to the MiFIR, *e.g.* concerning

[17] Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), COM (2011) 651, 20 October 2011, p. 12.

[18] See explanatory statement of the grounds for the Proposal of the Commission for a Directive on criminal sanctions for insider dealing and market manipulation, COM (2011) 654, 20 October 2011, p. 3 and f.

[19] H. Hinterhofer, "Auf dem Weg zu einer neuen EU-Richtlinie über strafrechtliche Sanktionen gegen Marktmissbrauch", *Zeitschrift für Finanzmarktrecht*, 2012, p. 9.

the definitions of "financial instrument" or "regulated market", or to the MAR, *e.g.* concerning "inside information", "benchmark" and "spot commodity contract".

The MAD provides specific statutory definitions of offences, even if they are also regulated in the MAR as well as in the MAD. There are statutory definitions of the "insider dealing" and "market manipulation" offences both in the MAR and in the MAD. In the original proposal, these two were the only offences foreseen in the MAD. In the proposals the definitions of offences in the MAR and the MAD partly coincided, but in some significant parts they differed. In subsequent Council and European Parliament proposals, the definitions of offences were enlarged, partly reconciled and some new ones were added such as "Recommendation or inducement to engage in insider dealing" (proposal of October 5, 2012: Article 3a, now Article 3(6)) or "Unlawful disclosure of inside information" (Article 4), mostly adaptations of already existing provisions contained in the Market Abuse Directive 2003/6.

In the legal instruments that were finally adopted, the definitions were aligned. The MAD contains statutory definitions of the "insider dealing, recommending or inducing another person to engage in insider dealing" (Article 3), "unlawful disclosure of inside information" (Article 4), and "market manipulation" (Article 5) offences. For these offences, the Member States have to ensure that inciting, aiding and abetting are punishable (Article 6)[20].

B. Sanctions

1) Obligation to establish criminal offences

The existing Market Abuse Directive 2003/6 requires Member States to prohibit insider dealing and market manipulation and to provide appropriate administrative measures or to impose administrative sanctions. These measures must be effective, proportionate and dissuasive. There is no obligation for Member States to impose criminal sanctions. Instead, Member States have the choice of whether they want to foresee criminal sanctions or not ("Without prejudice to the right of Member States to impose criminal sanctions, …", Article 14(1) MAD 2003/6).

With regard to the sanctioning, a new approach has been adopted in the new MAD. It provides for criminal sanctions for the offences regulated in the Directive, whilst the MAR obliges Member States to introduce administrative measures and penalties.

During the legislative proceedings, there was intensive discussion about the conditions under which criminal sanctions have to be provided for and, as a consequence, when only administrative sanctions according to the MAR are sufficient. The Commission's proposal only foresaw that the offences had to be committed intentionally. According to the proposal by the Council and the general approach, Member States should be under the obligation to provide for criminal sanctions at least in serious cases when they are committed intentionally. Indeed, numerous Council compromise proposals proposed that not only the persons who know that

[20] For more details see R. Kert, "Vorschläge für neue EU-Instrumente zur (strafrechtlichen) Bekämpfung von Insiderhandel und Marktmanipulation", *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 2013, 7, p. 252, at p. 254 and f.

the information they possess constitutes inside information should be punished as an insider, but also persons who ought to know that.

Whereas, according to the Council's proposal, only intentional behaviour should constitute a criminal offence, the proposal of the Parliament for the MAD provided that a breach which is committed "recklessly" should also be punishable with criminal sanctions [21]. A restriction on serious cases was not foreseen in the Parliament's proposal.

Finally, the adopted Directive provides that criminal sanctions shall be provided "at least in serious cases" and when the offence is "committed intentionally" (*e.g.* Articles 4(1), 5(1) MAD). The Directive does not regulate when it is a serious case. The Council's proposal from October 2012 [22] contained a list of more or less concrete cases in which insider dealing and market manipulation at least should be considered serious: for instance when the value of the financial instrument acquired or disposed is considered high by Member States in accordance with their national law; when the actual or potential profit is high; when the agent has obtained the inside information as a result of carrying out his employment, profession or duties; when the agent has obtained the inside information as a result of the exercise of a public office or of a profession in a regulatory or supervisory body, or of a position directly connected to a public office or regulatory or supervisory body; or when the inside information has been obtained as a result of criminal activity of the agent. In the finally adopted Directive, these references are not provided for in the legal text, but are contained partly in recitals 11 and 12 of the Directive.

As a consequence of this lack of a definition of serious cases, Member States will have the possibility to determine the criteria and limits for serious cases. Since these criteria are important in drawing a distinction between criminal penalties and administrative sanctions, the absence of a provision of Union law can lead to differences in the scope of the definitions of criminal offences in the individual Member States.

As it concerns minimum harmonisation, Member States may impose criminal sanctions not only in serious cases but also in other cases of insider dealing, market manipulation and unlawful disclosure of inside information.

2) Sanctions provided for in the MAD

Interestingly, the proposals of the Commission and the Council were limited to foreseeing the general obligation of imposing effective, proportionate and dissuasive criminal sanctions [23]. This obligation can be derived from primary law as the European

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[21] European Parliament, Committee on Economic and Monetary Affairs, Report on the proposal for a directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM (2011) 0654-C7-0358/2011-2011/0297 (COD), 19 October 2012.

[22] Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation – Presidency Compromise Text from 5 October 2012, DROIPEN 133, Articles 3(6) and 4(3).

[23] See for more detail F. Zeder, "Erster Vorschlag zur "Annexkompetenz": Insider-Geschäfte und Marktmanipulation", *Journal für Strafrecht*, 2012, p. 39.

Court of Justice decided in its *Greek maize* case in 1989 [24], even though mostly it is expressly stressed in acts of secondary law. However, the proposal did not contain any provisions on minimum maximum sanctions. According to the Commission, the introduction of such minimum levels concerning the height and nature of the penalty should be decided after an evaluation, which would take place four years after the implementation of the Directive. This was surprising, since European instruments regulating substantive criminal law have usually provided minimum maximum sanctions to guarantee a consistent standard of penalties in Member States [25].

On the contrary, the Parliament's proposal put forward minimum maximum sanctions. Regarding serious offences (insider dealing, market manipulation) minimum maximum sanctions of five years were proposed. In reference to less serious cases (abuse of insider information through a secondary insider) a minimum maximum term of imprisonment of two years was proposed. The committee responsible for the subject matter mentioned, as a reason for the proposal to implement minimum thresholds, that, if the cause of the introduction of such a new instrument is the weak and inconsistent system of penalties of Member States, the penalties should be harmonised to a certain degree [26].

Finally, the European Parliament succeeded in ensuring provisions on such minimum levels of maximum sanctions. Article 7(2) and (3) MAD provides that the offences of insider dealing, recommending or inducing another person to engage in insider dealing, and market manipulation shall be punishable by a maximum term of imprisonment of at least four years, and the improper disclosure of privileged information shall be punishable by a maximum term of imprisonment of at least two years.

Aside from the criminal responsibility of natural persons, the Directive provides for liability of legal persons. These regulations are similar to the provisions in other legal acts, which leave it to the Member States to decide whether or not a criminal or non-criminal liability of legal persons will be established. Regarding the sanctions for legal persons, the sanctions shall include fines and may include other sanctions such as exclusion from entitlement to public benefit or aid, temporary or permanent disqualification from the practice of commercial activities or the temporary or permanent closure of establishments which have been used for committing the offence.

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[24] See CJ, 21 September 1989, *Commission v. Greece*, 68/88, *ECR*, p. I-2965, marginal number 24; CJ, 10 July 1990, *Hansen*, C-326/88, *ECR*, p. I-2911, marginal number 17; CJ, 30 September 2003, *Inspire Art*, C-167/01, *ECR*, p. I-10155, marginal number 62; CJ, 15 January 2004, *Penycoed*, C-30/01, *ECR*, p. I-937, marginal number 36; CJ, 3 May 2005, *Berlusconi et al.*, C-387/02, C-391/02, C-403/02, *ECR*, p. I-3565, marginal number 65.

[25] See *e.g.* Directive 2011/92 of the European Parliament and the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, *OJ*, no. L 335, 17 December 2011, p. 1.

[26] Committee on Economic and Monetary Affairs, "Report on the proposal for a directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation", A7-0344/2012, 19 October 2012, recitals 12a.

5. Relation of administrative sanctions in MAR and criminal sanctions in MAD

A. Administrative and criminal sanctions for the same offences?

As pointed out above, definitions of offences in the MAD and in the MAR largely lead to an overlap. This parallel regime raises the question of the relationship between the systems of administrative and criminal sanctions in the two legislative acts [27]. In principle, both the Directive and the Regulation require Member States to introduce both sanctioning systems. Neither legislative instrument contains any explicit provisions governing this relationship and in principle assumes that administrative sanctions as well as criminal penalties should be imposed in parallel [28].

Since the definitions of offences are more or less the same in both legal instruments, most behaviours fall within the scope of administrative sanctions and within that of criminal penalties. The main difference between the statutory definitions is that the MAD requires intentional behaviour whereas the MAR also applies in cases where the perpetrator ought to know that it is inside information, meaning that negligent behaviour is also to be punished. However, this does not really help to solve the problem because there is no doubt that the administrative sanctions of the MAR shall also be applied to infringements of the provisions of the MAR which are committed intentionally [29].

The MAD requires criminal sanctions "at least in serious cases" (Articles 3(1), 4(1) and 5(1)). Apart from the fact that it is not precisely defined what is a serious case, such a formulation leaves it up to Member States to provide criminal sanctions also for less serious cases. And even if criminal sanctions are provided for only in serious cases, the question arises as to whether these serious cases are also to be sanctioned by imposing administrative sanctions. The MAR does not contain any rule which provides that administrative sanctions only should apply to less serious cases so that, in line with the wording, administrative sanctions are applicable to all cases.

B. Problem of *ne bis in idem*?

These parallel provisions on criminal and administrative sanctions for the same offences could cause constitutional problems in the Member States and problems with fundamental rights. The parallel rules on sanctions may lead to one and the same behaviour being punishable under administrative (penal) law and under criminal law.

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[27] F. Zeder, "Erster Vorschlag zur "Annexkompetenz": Insider-Geschäfte und Marktmanipulation", *Journal für Strafrecht*, 2012, p. 40; R. Kert, "Vorschläge für neue EU-Instrumente zur (strafrechtlichen) Bekämpfung von Insiderhandel und Marktmanipulation", *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht,* 7/2013, p. 259.

[28] See Article 30(1) MAR: "Without prejudice to any criminal sanctions and without prejudice to the supervisory powers of competent authorities in accordance with Article 23, Member States shall, in accordance with national law, provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures in relation to at least the following infringements: (…)".

[29] M. Gruber, "Von der Marktmissbrauchsrichtlinie (MAD) zur Marktmissbrauchsverordnung (MAR)", *Zeitschrift für Finanzmarktrecht*, 2012, p. 52, who cites as an instance that also the attempt of insider dealing and market manipulation, should be punishable.

In the end it might transpire that the same behaviour is sanctioned twice, which can lead to a *ne bis in idem*-problem. The relationship between the sanctions of these two legislative instruments was not regulated at all. The Commission's proposals for the MAR and the MAD did not even mention this problem of double jeopardy and did not contain any hints as to how this question should be solved. Obviously the Commission thought that the proposed administrative sanctions are not criminal sanctions and therefore that a *ne bis in idem* problem would not arise.

The European Court of Justice (CJ) has not yet decided on the classification of such administrative sanctions as provided for in the MAR in relation to the prohibition of double jeopardy according to Article 50 of the Charter of Fundamental Rights and Article 54 of the Schengen Convention. In the *Åkerberg Fransson* case, the CJ decided that administrative sanctions which are of a criminal nature and have become final preclude criminal proceedings in respect of the same acts from being brought against the same person.[30] According to the CJ, three criteria are relevant for the purpose of assessing whether a sanction is criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur[31]. However, in the *Åkerberg Fransson* case the court left the classification open and ceded the decision to the Member States[32].

By looking at the jurisprudence of the European Court of Human Rights (EctHR), it emerges that at least the proposed administrative financial penalties are to be regarded as criminal sanctions within the meaning of the European Convention on Human Rights (ECHR)[33]. As a result, the imposition of such administrative sanctions as well as criminal penalties would violate Article 4 of the 7th Additional Protocol to the ECHR which regulates the national prohibition of double jeopardy. Whether this also has to be qualified as a breach of Article 50 of the Charter of Fundamental Rights and Article 54 of the Schengen Convention if, for the same act, in one Member State an administrative sanction is imposed and in another Member State a criminal penalty is imposed, has not yet been decided in the existing case law but it might be assumed to be the case. Administrative fines in European anti-trust law are also regarded by European courts as sanctions which are not criminal penalties. However, in procedures where these sanctions are imposed, the principles of criminal procedure,

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[30] CJ, 26 February 2013, *Akagare/Åkerberg Fransson*, C-617/10 (yet unpublished), marginal number 34.

[31] CJ, 5 June 2012, *Bonda*, C-489/10 (yet unpublished), marginal number 37.

[32] For more details see *inter alia* A. Rosas, "The Applicability of the EU Charter of Fundamental Rights at National Level", Year Book Human Rights 2013, Vienna, NWV, 2013, p. 97; R. Camacho Palma, "Aklagaren v Hans Akerberg Fransson: charter(ing) new territory"; *British Tax Review*, 2013, 2, p. 137; Th. Kingreen, "Ne bis in idem: Zum Gerichtswettbewerb um die Deutungshoheit über die Grundrechte", *Europarecht*, 2013, p. 446; F. Zeder, "Sanktionen des EU-Beihilfenrechts, Steuerzuschläge: ne bis in idem zu Betrug?", *Österreichische Juristen-Zeitung*, 2014, p. 494.

[33] See ECtHR, 21 February 1984, *Öztürk v. Germany*, Series A, no. 73, *EuGRZ*, 1985, p. 62, marginal number 55; ECtHR, 25 August 1987, *Lutz v. Germany*, Series A, no. 123, *EuZW*, 1987, p. 399, marginal number 55.

especially the principle of *ne bis in idem*, have to be respected [34]. In this context, the CJ itself referred to the judgements of the ECHR in the *Öztürk* and *Lutz* cases [35]. The administrative sanctions that are contained in the MAR are similar to the penalties that are concerned in these decisions. That is why, in any case, these sanctions can be qualified as criminal sanctions in a broader sense, to which criminal guarantees must be applied. This can also apply to other administrative sanctions which are of a repressive nature.

Article 50 of the Charter of Fundamental Rights is undoubtedly applicable to the rules of Member States, which serve to implement EU legislative acts. This is also applicable to national rules which had already been in force before the EU legislative instrument came into force if they serve to sanction infringements of a provision of a directive [36].

That makes it clear that, sooner or later and particularly in cross-border cases, questions concerning the principle of *ne bis in idem* will arise if no EU-wide regulation of the relationship between criminal and administrative sanctions in market abuse law is provided for since administrative authorities in one Member State and courts in the other Member State are unlikely to coordinate their approach. This can lead to a very unsatisfactory situation, for instance if an administrative authority from Member State A imposes an administrative sanction while in Member State B judicial authorities investigate the same act and could impose a criminal penalty. If the administrative sanction in one Member State has already been imposed, the criminal prosecution in the other Member State would not be possible. Co-ordination between administrative and judicial authorities of different Member States seems unrealistic. As a result, this coexistence of administrative sanctions and criminal penalties could lead – contrary to the objective of the new instruments – not to a more consequent and stricter punishment of infringements, but rather to the result that intentional infringements of the market abuse provisions cannot be punished under criminal law.

During the negotiations about MAR and MAD, different models as to how the relationship between administrative and criminal sanctions should be governed were discussed. Interestingly, the group of Member States which saw the problem of *ne bis in idem* in this way was not very significant [37]. It seemed that most Member States were in favour of an approach which leaves it to the Member States to solve the problem. Obviously, most Member States were interested in their financial market supervisory authorities being able to investigate for as long as possible. It seems that they are expected to investigate more thoroughly than judicial prosecuting authorities. If cases

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[34] See T. Liebau, "Ne bis in idem in Europa", *in* G. Dannecker, F. Höpfel and C. Schwarzenegger, *Schriftenreihe Sanktionenrecht in Europa*, Wien, Neuer Wissenschaftlicher Verlag, 2005, p. 37 and 405 and f.

[35] See CJ, 8 July 1999, *Hüls*, C-199/92 P, *ECR*, p. I-4287, marginal number 150; CJ, 8 July 1999, *Montecatini*, C-235/92 P, *ECR*, p. I-4539, marginal number 176.

[36] See CJ, 26 February 2013, *Akagare/Åkerberg Fransson*, C-617/10, marginal number 28 (yet unpublished).

[37] See F. Zeder, "Erster Vorschlag zur "Annexkompetenz": Insider-Geschäfte und Marktmanipulation", *Journal für Strafrecht*, 2012, p. 40.

just fall within the scope of criminal law and are therefore subject to investigations by criminal prosecution authorities, in many Member States the financial market supervisory authorities have no investigative power. In these Member States, the investigative activities of the financial market supervisory authorities are excluded from criminal procedures [38]. It was feared that this could have a negative impact on investigations and especially on intergovernmental cooperation.

Finally, MAR and MAD leave the decision as to how to solve the problem to the Member States. According to recital 23 of the MAD, Member States should ensure that – in the application of national law transposing the Directive – the imposition of criminal sanctions for offences in accordance with the MAD and of administrative sanctions in accordance with the MAR does not lead to a breach of the principle of *ne bis in idem*. The MAR states, in Article 30(1), that Member States may decide not to lay down rules for administrative sanctions where the infringements are already subject to criminal sanctions in their national law within 24 months after the date of entry into force of the MAR. Where Member States so decide, they have to notify, in detail, the Commission and the European Securities and Markets Authority (ESMA), of the relevant parts of their criminal law. Contrary to former proposals where the relevant date was the time of entry into force and therefore only covered criminal provisions that already existed when the European instrument came into force, this provision enables Member States to provide only criminal sanctions for specific serious cases and to introduce administrative sanctions for less serious cases. Such a provision would make it possible to avoid national *ne bis in idem* problems. However, in crossborder cases this would be no solution, since it is up to the Member States to provide for only criminal sanctions or both criminal and administrative sanctions.

To solve the problem of two prosecutions for the same offence, the MAR provides comprehensive rules on cooperation. According to Article 31(2), "competent authorities shall cooperate closely to ensure that the exercise of their supervisory and investigative powers, and the administrative sanctions that they impose (…) are effective and appropriate under this Regulation. They shall coordinate their actions in order to avoid duplication and overlaps when exercising their supervisory and investigative powers and when imposing administrative sanctions in respect of crossborder cases". Where Member States have chosen to lay down criminal sanctions for infringements of the provisions of the MAR, they shall ensure that appropriate measures are in place so that competent authorities have all the necessary powers to liaise with judicial authorities within their jurisdiction to receive specific information related to criminal investigations or proceedings commenced for possible infringements and to provide the same to other competent authorities and ESMA (Article 25(1)).

However, it is doubtful whether the problems which are caused by having parallel regimes for administrative and criminal sanctions can be solved by the Member States themselves and by an obligation to cooperate in crossborder cases. If criminal and administrative sanctions for the same offences are foreseen by EU law, it should have

[38] On the contrary, in Austria the Financial Market Authority (FMA) basically has to be charged with investigations in criminal proceedings and has a position as a prosecution authority in the criminal procedure (Section 48i Börsegesetz).

been the task of EU legislative bodies to govern the relationship between these two regimes.

6. Conclusions

The MAD is the first directive to have been based on Article 83(2) TFEU. It makes sense to have approximated criminal provisions on infringements of the market abuse provisions. However, it seems to be overly complicated that the EU chose two instruments to provide the definitions of offences and sanctions for infringements of these provisions. This coexistence of two EU legal instruments which both have to be implemented into national law seems to be complicated and could lead to several problems in cross-border cases since the provision in Article 30(1) can only give the national legislator the possibility to provide criminal sanctions.

If the EU wants an approximation of the definitions of criminal offences and sanctions, it is not reasonable to provide administrative sanctions for the same acts at the same time. This duplication does not only lead to the aforementioned fundamental rights' problems (and in some Member States also to constitutional problems because of the division of powers between administrative and judicial authorities), but there is no further additional preventive effect to be expected. Instead, an unclear legal situation has been created for Member States and for citizens.

The "annex competence" according to Article 83(2) TFEU requires that criminal provisions refer to approximated administrative provisions of EU law but it is doubtful whether it makes sense to adopt two different legal instruments which contain overlapping provisions at the same time. If all the provisions were regulated in one directive, the legislation would be clearer. This would also make it possible to regulate the relationship between administrative and criminal sanctions. Even if these are different sanctions which are imposed by different authorities, these sanctions have to be considered as a whole. It would have been a possibility to have provided a subsidiary clause between administrative and criminal offences, according to which serious cases would fall within the jurisdiction of courts and less serious cases within the jurisdiction of administrative authorities. For this distinction, clear criteria could have been provided for. This would have ensured more clarity and helped to avoid administrative and criminal double jeopardy.

Blurring boundaries between administrative and criminal enforcement of environmental law

Michael Faure* and Armelle Gouritin

1. Introduction

Traditionally, environmental law in most legal systems has been enforced through criminal law. However, the way in which the criminal provisions were shaped showed a strong relationship with administrative law. When the first new environmental statutes emerged [1], an administrative law system was usually set up whereby the statute managed a particular environmental component (for example a statute aiming at the protection of surface waters). This management usually contained the allocation of powers to administrative authorities (for example a water authority) that received powers to award permits (for example allowing the discharge of waste water in the surface waters) and set permit conditions. In other words: the administrative system aimed at regulating the conditions under which ecological interests could be endangered (for example the protection of the surface waters). Within this traditionally administrative law framework, criminal law had a modest role to play. Usually, criminal law literally only turned up at the end of the statute roughly providing that "anyone who violates any provisions of this statute shall be punished with a fine and/or imprisonment". The function of criminal law in those traditional environmental statutes that emerged in many legal systems in the 1960s and 1970s was hence largely

* This research has been executed within the framework of the FP7-project EFFACE (European Union action to fight environmental crime).

[1] With the new statutes in this context, we refer to statutes aiming at the protection of particular specific components of the environment such as surface waters, ground waters, air or soil. It could be held that older "environmental" statutes already existed in the 19th century when statutes aiming at the protection of workers obliged enterprises to apply for licences or permits. These permits often held conditions that could also, to some extent, have benefitted the environment. However, environmental protection was usually not the aim of those statutes. That is why it is usually held that the new environmental statutes only emerged in the second half of the 20th century.

to back up prior administrative decisions. It is this model that is referred to as the administrative dependence of environmental criminal law.

Both the exclusive focus on criminal enforcement of environmental law as well as the administrative dependence of criminal environmental law were criticised for a variety of reasons. Those criticisms in turn led to some evolutions regarding the relationship between environmental administrative law and environmental criminal law.

As a first set of criticisms, the exclusive focus on criminal law was criticised for not being proportional or effective. The strong focus on criminalisation led, on the one hand, to a big number of criminal provisions on paper, but on the other hand to a lack of enforcement in practice. Given budget constraints (and other priorities), prosecutors often dismissed the large majority of environmental crimes[2]. This was the case in many legal systems, *inter alia* also in the UK. Consequently, some English scholars asked the following question: "Sanctions for pollution: do we have the right regime?"[3]. They and other scholars held that criminal law enforcement should be supplemented with a system of administrative penalties, more particularly administrative fines, which could be used for minor violations of environmental regulations. Meanwhile, these arguments have been set out in the literature and consequently, in the last decade, many European legal systems (including the various regions competent for environmental policy in Belgium, France and the United Kingdom) have introduced administrative sanctions (more specifically administrative fines) to enforce a range of violations that do not merit criminal prosecution but merit some kind of enforcement. Germany and the Netherlands already had administrative sanctions as the main enforcement tool for environmental regulations and continued to use those[4]. As a result of that shift, a major blurring of the boundaries between administrative and criminal enforcement has taken place, for example in the Flemish and Walloon Region in Belgium: particular environmental offences can both constitute an environmental crime and an administrative infringement, leading to separate (but of course not cumulative) procedures.

The second problem mentioned, the administrative dependence of criminal law, has also led to particular shifts at the policy level. Whereas environmental crimes were originally limited to a mere enforcement of prior administrative decisions (when the first environmental statutes emerged in the 1960s and 1970s), the way in which legislation formulates environmental crimes has in many legal systems become much more nuanced. Instead of focusing only on punishing prior administrative decisions, in some cases criminal law punished unlawful emissions and in some cases

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[2] *E.g.* in the Flemish Region of Belgium, more than 65% of all violations of environmental statutes were dismissed from enforcement. See M. Faure and K. Svatikova, "Enforcement of Environmental Law in the Flemish Region", *European Energy and Environmental Law Review*, 2010, 19/2, p. 60-79.

[3] Being the title of the contribution by A. Ogus and C. Abbot, "Sanctions for Pollution: Do we have the Right Regime?", *Journal of Environmental Law*, 2002, 14, p. 283-300.

[4] For an overview see M. Faure and K. Svatikova, "Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe", *Journal of Environmental Law*, 2012, p. 1-34.

the so-called "autonomous crimes" (where severe environmental pollution could be punished irrespective of administrative law) were introduced as well. Hence, the shift moved towards a stronger independence of criminal law vis-à-vis administrative law, which was deemed necessary for criminal law to provide an adequate protection of the environment.

In addition to these two major evolutions as far as the shifting boundaries between administrative and criminal enforcement of environmental law is concerned, a third important development should be mentioned: the EU promulgated, on 19 November 2008, Directive 2008/99 on the Protection of the Environment through Criminal Law (hereafter referred to as Directive 2008/99)[5]. This Directive harmonises and strengthens the role of criminal law in environmental protection, obliging the Member States to enforce a large number of EU environmental directives through criminal law. The type and level of sanctions are at the discretion of the Member States, with one important condition: the sanctions implemented into national law have to be effective, dissuasive and proportional[6].

The approach followed in Directive 2008/99 seems to conflict with the tendencies we just described with regard to the blurring of the boundaries between administrative and criminal enforcement of environmental law. First, the Directive relies strongly (and in fact exclusively) on criminal law. This is in contrast with the trend mentioned above and witnessed in several legal systems where the use of administrative fines is gaining more and more in importance. Second, the way in which Directive 2008/99 formulates environmental crimes relies on the traditional administrative dependence of criminal law: criminal provisions rely upon administrative provisions. Directive 2008/99 rejects the notion of an independent and autonomous crime that would provide a protection of ecological values independently of the violation of a regulation or administrative decisions.

The peculiarities of Directive 2008/99 raise a number of interesting questions concerning the European approach. We will analyse them in this chapter. Our central argument will be that there are good reasons for the shift from an exclusively criminal law approach towards a more balanced combination of administrative and criminal law enforcement and that there are equally good arguments not to limit the criminal law protection exclusively to a supplementary role of enforcing prior administrative decisions. In addition, we will argue that, with the increasing importance of administrative enforcement in environmental law as a guarantee of the quality of law, enforcement and due process have become increasingly important as well. However, incorporating human rights into administrative law enforcement (which has been one of the central elements of the evolution of the case law of the European Court on Human Rights) can lead to an adequate and effective use of administrative enforcement within a framework that respects due process requirements. The incorporation of

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[5] Directive 2008/99/EC of 19 November 2008 on the Protection of the Environment through Criminal Law, 2008, *OJ,* no. L 328, 6 December 2008, p. 28.

[6] See on this notion further M. Faure, "Effective, Proportional and Dissuasive Penalties in the Implementation of the Environmental Crime and Ship-Source Pollution Directives: Questions and Challenges", *European Energy and Environmental Law Review*, 2010, 19, p. 256-278.

those human rights requirements into administrative enforcement increasingly leads, so we will argue, to a blurring of the boundaries between administrative and criminal law enforcement.

We will use various approaches to make these points: in order to analyse the specific role of administrative and criminal law enforcement (and their optimal combination) within the enforcement of environmental law, we will use an economic approach to law enforcement. In order to analyse the optimal structure of environmental criminal law, we will use an environmental legal dogmatic approach. Finally, to explain how administrative enforcement of environmental law can add to an effective enforcement framework respecting due process requirements, we will use a human rights approach.

The remainder of this chapter is set up as follows: we start with a theoretical framework explaining where criminalisation is needed and where administrative enforcement may suffice (2); next, we sketch out how an ideal environmental criminal law system would look, arguing that it should consist of a combination of different models of criminalisation (3). Then, we will move to the European level. We will identify how the blurring boundaries between administrative and criminal law enforcement are articulated in Directive 2008/99 and how the Directive relates to the theoretical starting points mentioned in the previous sections (4). Finally, the problems that follow from the blurring between environmental administrative law and environmental criminal law will be identified. Subsequently, the question will be asked to what extent a human rights approach could be considered as an appropriate remedy to problems created by the blurring boundaries between administrative and criminal law enforcement (5). Section 6 concludes.

2. Criminalisation of environmental pollution: an economic perspective

In order to answer the question of whether environmental pollution should be criminalised and what the specific role of criminal versus administrative enforcement should be, the first question to be asked is whether public or private enforcement is appropriate (A). The next question to be answered is to what extent public enforcement is necessary. More specifically, should public enforcement take place through administrative or criminal law enforcement? (B) Those questions will lead us to particular criteria for criminalisation (C).

A. Public or private enforcement?

One argument in favour of public enforcement is that private law remedies will not sufficiently deter the potential offender[7]. The arguments are well-known: environmental pollution often has no individual victim who could file a liability suit; causation may be difficult to prove and the long periods of time involved may make it impossible to recognise that, for example health damage has been caused through environmental pollution, let alone that a tort claim could still be successfully brought.

[7] See for example M. Wilde, *Civil Liability for Environmental Damage. A Comparative Analysis of Law and Policy in Europe and the United States*, The Hague/London, Kluwer Law International, 2002, p. 307-310.

These are arguments that are traditionally advanced in favour of regulation [8]. This at least explains why public regulation and enforcement may be necessary from an economic perspective to cure the externalities caused by environmental pollution.

A second reason traditionally advanced in economic theory in favour of public regulation and to explain the use of criminal law is the low probability of detection [9]. In many cases of environmental pollution the probability of being caught may not be 100%, but in fact much lower. Consequently and according to the Becker model, the efficient sanction for deterring the potential polluter should be correspondingly higher. In general, this effect cannot be achieved with tort law, since in principle tort law only forces the injurer to compensate the victim for the amount of damage suffered and no more. This again shows the inappropriateness of civil law in cases where the probability of detection is less than 100%. For optimal deterrence a higher sanction has to be imposed in order to compensate for this low detection rate. This cannot be provided through private law and hence explains the need for public sanctions that compensate for the lower detection rate [10].

B. Administrative or criminal law?

So far we have presented the traditional economic arguments to explain why environmental pollution cannot merely be remedied via private law and why public enforcement is appropriate. The main reason is the low probability of detecting environmental crime.

However, this does not necessarily explain why one should use criminal law. Indeed, imposing a high fine on the polluter could compensate for the low probability of detection. Fines have always been considered the preferred sanction in economic theory for the simple reason that the costs of imposition are low and fines generate money for the public budget [11]. Monetary sanctions can in principle be both of a criminal and of an administrative nature. All things being equal, the administrative procedure has the major advantage that it is far less costly than the criminal procedure. Administrative fines can sometimes be referred to as "administrative penal law": they are imposed by administrative authorities after a relatively simple procedure and usually require a relatively low threshold of proof. Compared with the criminal procedure, the costs of the administrative procedure are substantially lower. All things being equal, it can therefore be argued that, if optimal deterrence can be achieved

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[8] See S. Shavell, "Liability for Harm versus Regulation of Safety", *Journal of Legal Studies*, 1984, p. 357-374 and S. Shavell, "A Model of the Optimal use of Liability and Safety Regulation", *Rand Journal of Economics*, 1984, p. 271-281.

[9] R. Posner, "An Economic Theory of the Criminal Law", *Columbia Law Review*, 1984, 85, p. 1193-1209, and S. Shavell, "Criminal Law and the Optimal Use of Non-Monetary Sanctions as a Deterrent", *Columbia Law Review*, 1985, 85, p. 1232-1262.

[10] See G. Skogh and C. Stuart, "An Economic Analysis of Crime Rates, Punishment and the Social Consequences of Crime", *Public Choice*, 1982, 171-179 and G. Skogh, "A Note on Gary Becker's Crime and Punishment: An Economic Approach", *Swedish Journal of Economics*, 1973, p. 305-311.

[11] See for example S. Shavell and R. Posner, "Optimal Sentences for White-Collar Criminals", *American Criminal Law Review*, 1980, p. 400-418.

through fines, it seems desirable to use the less costly administrative law instead of the relatively more costly criminal procedure. Accordingly, many scholars argue that the imposition of relatively modest fines through the criminal procedure is inefficient since a similar result could be achieved at lower cost through administrative law. More particularly, Ogus and Abbot have argued that, in the UK, more use should be made of administrative fines (and other administrative sanctions for that matter) to enforce violations of environmental regulations [12]. A clear normative conclusion from this literature is therefore that in many more instances than is the case today, administrative law could be used to deter environmental pollution. This is particularly the case when the penalties consist of relatively low fines or other (not too harsh) administrative sanctions.

However, there are two important reasons why administrative law cannot impose all the most efficient penalties to deter environmental pollution and why criminal law therefore remains necessary. The first reason is that, since the probability of detection of environmental pollution can in practice often be very low, the optimal sanction to deter pollution may become very high as well. The likelihood that this optimal fine might outweigh the individual wealth of an offender is relatively high. Environmental polluters are often organised as corporate entities that benefit from limited liability. Hence, there is always a risk that environmental harm may cause costs that are higher than the assets of the firm or, in the criminal law context, that the optimal fine (to outweigh a low detection rate) will be much higher than the assets of the firm. Indeed, the optimal monetary sanction required for deterrence so frequently exceeds the offenders' assets that non-monetary sanctions such as imprisonment are necessary. The major advantage of the fine (lower administrative costs) therefore only leads to favouring this type of sanction when the risk of insolvency can be controlled. It should also be recalled that the probability that an administrative fine will be imposed will be much higher (given a lower procedural threshold) than that of a criminal fine. As a result, the administrative fine should not necessarily be nearly as large as the criminal fine. This can, again, reduce the insolvency problem.

It should be recalled that the fact that the detection rate of environmental pollution is often less than 100% was one of the reasons why criminal law was introduced in the first place. The insolvency problem explains why increasing the amount of compensation due by a tortfeasor (for instance by introducing punitive damages as in American tort law) will not eliminate the need for criminal sanctions. Indeed, the insolvency problem that arises if monetary sanctions are imposed would make the injurer insolvence. Thus, non-monetary sanctions will often be needed to achieve deterrence.

C. Criteria for criminalisation

So far, the *analysis* leads to the conclusion that, from an economic perspective that is based on the perspective of deterrence, administrative sanctions (and more

[12] See A. Ogus and C. Abbot, "Pollution and Penalties", *in* T. Swanson (ed.), *An Introduction to the Law and Economics of Environmental Policy: Issues in Institutional Design*, Elsevier, 2002, p. 493-516; A. Ogus and C. Abbot, "Sanctions for Pollution".

particularly administrative fines) may suffice in the case where the prospective gain for the insider will be relatively low, where the probability of detection will be reasonable, and where, accordingly, deterrence can be achieved with moderate administrative fines. If, however, the gain obtained by the violation (in our case environmental pollution) would be quite high and the probability of detection would be very low, this automatically means that the monetary sanction to optimally deter the polluter would have to be quite high as well. In that case, there may be a risk that the optimal fine would be higher than the assets of the perpetrator. That would be a strong argument in favour of non-monetary sanctions. Since non-monetary sanctions (especially a type of social incapacitation consisting of imprisonment) can potentially lead to high costs in terms of errors, this is a type of sanction that should be imposed via criminal law. Indeed, the latter can benefit from all the guarantees of the criminal procedure in order to avoid sending the innocent to prison.

The policy lesson from this economic literature is therefore rather straightforward: in cases where optimal deterrence of environmental polluters can be achieved through relatively modest sanctions (such as not excessively high administrative fines or other administrative sanctions), the use of the less costly administrative criminal law may be warranted. However, in cases where the probability of detection is relatively low, social harm and the potential gain to the polluter is high and thus a more severe sanction is needed, it may be warranted to use the more costly criminal procedure in order to reduce the costs of errors. This is certainly the case when the optimal fine would reach the insolvency limit and non-monetary sanctions are thus needed for deterrence. This would also be the case where, for the same reason, very high administrative fines would have to be imposed. In fact, in many legal systems, there are now possibilities to use either criminal law or administrative penal law for particular environmental offences or in some cases even a combination of those.

Consequently, an optimal system of enforcement of environmental law will consist of an ideal combination of criminal and administrative enforcement. A system that would only rely on criminal law could amount to mere window dressing whereby, *de facto*, many violations are dismissed. Empirical studies so far point to the fact that the level of enforcement of environmental offences through criminal law is relatively low in terms of the number of prosecutions by comparison with the number of established violations [13]. The main reasons are the high administrative costs of the criminal justice system, the heavy workload that courts are faced with, the fact that prosecutors and judges are giving priority to what they deem to be "real crimes" and a lack of expertise in the assessment of environmental harm.

Given the high costs of criminal enforcement, administrative enforcement has been proposed as an alternative. As a result of the high costs of criminal procedures, public prosecutors allocate their scarce resources to what they consider as the "most important" cases. As a result, many environmental offences may not be prosecuted

[13] See for example C.M. Billiet and S. Rousseau, "Zachte rechtshandhaving in het bestuurlijke handhavingsspoor: de inspectiebeslissing en het voortraject van bestuurlijke sancties. Een rechtseconomische analyse", *Tijdschrift voor Milieurecht*, 2005, p. 1; A. Ogus and C. Abbot, "Sanctions for Pollution", p. 283.

while there is a range of cases that deserve sanctions, as the empirical literature also indicates [14]. The use of administrative penalties to handle those cases will increase the effectiveness of enforcement as a deterrent and, accordingly, the overall effectiveness of the enforcement system.

3. Optimal structure of enforcement of environmental law

However, a question that equally arises within this framework is how the relationship between criminal law and administrative law is regulated in an enforcement system where criminal law was traditionally used to back up prior administrative decisions. In the developments that follow we report on the traditional administrative dependence of environmental criminal law (A) and subsequently present an optimal model of environmental criminal law that distinguishes between four models (B).

A. The traditional administrative dependence of environmental criminal law

There is a big difference in the way in which criminal law is used to protect traditional interests such as life, health or property and the way in which the environment is protected through criminal law. Traditional interests enjoy far-reaching protection and each infringement is criminalised as manslaughter, assault or theft. The environment does not enjoy a similar type of far-reaching protection as these traditional interests. The economic reason is that many "polluters" equally exercise socially beneficial activities. An environmental criminal law that would simply prohibit all pollution would therefore be socially wasteful. This explains the interweaving of criminal law with administrative law, which was already mentioned in the introduction. Most environmental statutes provide powers to administrative agencies to decide upon the permitted degree of pollution. It is thus these administrative authorities that determine the scope of environmental crime provisions.

Additionally, no general rule of criminal law prohibits polluting. Polluting only constitutes a crime when it violates an administrative norm, and even if a general prohibition existed, compliance with a permit is usually a sufficient justification. Because most environmental crimes consist of a violation of these administrative norms, the administrative agency that sets the (emission) standards determines what kind of behaviour is criminal.

This type of structure may be economically sound because the administrative authorities have an informational advantage over a judge in an individual criminal case. The alternative would be to consider any pollution a crime, leaving it for the judge to decide which acts warrant punishment. In most cases, a regulatory agency has either a superior knowledge of, or far better access to, the relevant ecological and technological information than a judge does. Requiring a judge to acquire expert knowledge of chemical and toxic substances and to keep up to date with recent developments in the field of environmental science would be very inefficient, if not impossible. Moreover, administrative agencies acquire information that benefit a large number of people and this therefore diminishes the costs of research for society.

[14] See for the Flemish Region in Belgium *inter alia* M. Faure and K. Svatikova, "Enforcement of Environmental Law in the Flemish Region", p. 60.

Accordingly, the current structure of criminal environmental law that primarily relies on administrative agencies to determine environmental crimes appears economically sound. Administrative law, however, cannot be the sole source of environmental criminal law since some serious cases of environmental pollution should be directly punishable even if no violation of administrative provisions is at hand. This obviously raises a lot of questions as to how to formulate environmental criminal law from a legal perspective.

B. An optimal model of environmental criminal law

It is possible to develop an optimal model of environmental criminal law based on German legal dogmatics. They make a distinction between the nature and the type of the infringement and the corresponding penalty [15]. This literature distinguished four different types of models of environmental crimes.

Model I is referred to as "abstract endangerment". Under this model, environmental pollution is not directly punished, but the criminalisation enforces prior administrative decisions (like permits or other administrative rules). The criminal law typically applies in these kinds of cases as soon as the administrative provision has been violated even if no actual harm or threat of harm to the environment occurs. It is held that these abstract endangerment crimes mainly focus on vindicating administrative values, although punishing the administrative violation indirectly furthered ecological values as well [16].

Model II concerns concrete endangerment crimes with administrative predicates: here not only unlawfulness (to be interpreted in various ways) is required, but also proof that the unlawful activity caused threat of harm to the environment. This moves the model closer to a vindication of environmental values than was the case for model I. There can be such a(n) (presumed or actual) endangerment in case of an emission of a substance into the environment: actual harm is not required, a mere (presumed or actual) endangerment is required (for example through an emission).

Model III refers to concrete harm crimes with administrative predicate: in this case unlawfulness is still required (violation of an administrative rule), but a proof of actual environmental harm is also required. Again, it would be logical to impose higher penalties for those crimes in model III than the crimes in model II, since in this case actual environmental harm occurs and not merely an endangerment.

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[15] See M. Faure and M.J.C. Visser, "How to Punish Environmental Pollution? Some Reflections on Various Models of Criminalisation of Environmental Harm", *European Journal of Crime, Criminal Law and Criminal Justice*, 1995, p. 316-368 and S.F. Mandiberg and M. Faure, "A Graduated Punishment Approach to Environmental Crimes: Beyond Vindication of Administrative Authority in the United States and Europe", *Columbia Journal of Environmental Law*, 2009, 34, p. 447-511. For a summary of these models see also M. Faure, "Towards a new model of criminalisation of environmental pollution: the case of Indonesia", *in* M. Faure and N. Niessen (eds.), *Environmental law and development. Lessons from the Indonesian experience*, Cheltenham, Edward Elgar, 2006, p. 202-203, at p. 195-201.

[16] The reason is that an entity that follows administrative rules is likely to harm the environment as well and following administrative rules allows the agency to monitor the entity's operation to ensure that harm is less likely to occur.

Model IV applies to serious environmental pollution. This model eliminates the administrative link: these crimes aim to punish very serious pollution regardless of whether there is an underlying regulatory violation. Accordingly, in this model, following the condition of a licence cannot constitute a defence. The "permit shield" does not apply. The reason for breaking the administrative link in those cases is that the environmental harm at issue is of a magnitude beyond that contemplated by the administrative rules with which the entity complied. Since there would be more extreme harm in these cases, a more severe punishment would also be indicated.

The normative consequence that flows from dividing crimes according to this model is that it allows the various environmental crimes to be differentiated according to the seriousness of the offence. This would precisely fit with the proportionality principle [17]. The literature suggested adopting a graduated system of environmental crime (in accordance with the proportionality principle) according to, *inter alia*, the mental state of the actor (acting knowingly or negligently) but also looking at the protected interest at stake and the way in which these are endangered by various crimes.

Taking those principles as a starting point it can be held that the abstract endangerment crimes of model I vindicate directly only administrative values. Accordingly, this allows the four models to be placed along a continuum that represents the seriousness of the offence and the severity of the authorised punishment. As mentioned, abstract endangerment (model I) comes at the lowest end of the continuum. They could be punished with milder sanctions than crimes in the other three models, which vindicate more important interests. It is also easy to conclude that the concrete harm model (model III) crimes are more serious than the concrete endangerment (model II) crimes for the simple reason that real harm is more serious than the threat of harm. These should therefore carry more severe punishments. Model IV requires that the harm should be extreme, which suggests that these crimes are more serious than those in model III.

A further subdivision is possible in models II and III based on whether there is only presumed or actual harm (II) and on whether the crimes involve harm to the environment only and crimes involving harm to both the environment and to human health (III). The latter subdivision would be useful for model IV as well.

This subdivision could lead to the following ranking of environmental crimes with the seriousness of criminality increasing when moved from left to right and from bottom to top [18].

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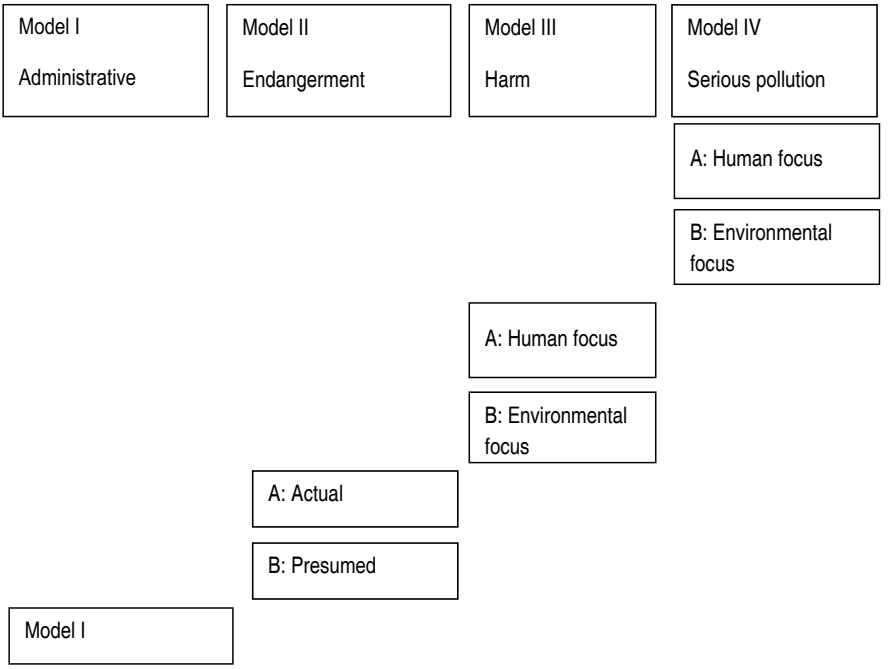
[17] So was argued by M. Faure and M.J.C. Visser, "How to Punish Environmental Pollution?", at p. 324, p. 332 and p. 343-344 and see generally J. Dressler, *Understanding Criminal Law*, 4th edition, LexisNexis, 2006 at chapter 6, discussing proportionality in criminal law.

[18] The diagram is taken from F. Mandiberg and M. Faure, "A Graduated Punishment Approach to Environmental Crimes", at p. 47.

Figure 1. A Graduated-Punishment Approach



This type of ranking allows the punishments to be distinguished according to various degrees of severities and corresponding penalties. In addition, a differentiation according to the mental state (acting knowingly and wilfully or merely negligently) could be introduced as well. Such a graduated punishment approach would make it possible to have penalties that would correspond to the seriousness of the crime. This would thus meet the proportionality principle. To some extent, this model can already be found in current environmental law in some Member States. Moreover, the Council of Europe Convention on the protection of the environment through criminal law of 4 November 1998 also largely followed this model.

4. The EU level. Directive 2008/99: from blurring boundaries to dependence

We have explained above how environmental offences can be categorised according to four models.

The four models reflect different "graduations" regarding the boundaries between environmental administrative law and environmental criminal law. We will analyse Directive 2008/99 on the protection of the environment through criminal law [19] according to this ranking. Directive 2008/99 has been adopted after a fairly conflictual legislative process that may explain the shape of the adopted text. We will briefly report on these conflicts that occurred during the legislative process (A). At a second stage

[19] Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law, *OJ*, 6 December 2008, no. L 328, p. 28-37.

we will present the elements of the offences defined in Directive 2008/99 and pinpoint the offences according to the ranking presented in the former section. As a conclusion of that exercise, the ranking will make clear that blurring between environmental administrative law and environmental criminal law occurs in Directive 2008/99 (B).

A. Background to Directive 2008/99

With a view to understanding Directive 2008/99 on the protection of the environment through criminal law, it is useful to take into account two elements (among others).

First, the EU legislator largely took into account the Convention on the protection of the environment through criminal law adopted under the auspices of the Council of Europe [20]. The differences between the models endorsed in the Directive and the models endorsed in the Convention will be underlined in the subsequent developments. The second element that can be useful with a view to understanding the adopted Directive is the legislative process at the EU level. The legislative process that resulted with the adoption of Directive 2008/99 on the protection of the environment through criminal law has been fairly hectic. The institutional conflict between the Council and the Commission resulted in a landmark case of the European Court of Justice: case C-176/03 [21]. This conflict and the ruling of the European Court of Justice have been commented on at length elsewhere [22].

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[20] Council of Europe, Convention on the protection of the environment through criminal law, Strasbourg, 4 November 1998, CETS no. 172. The Convention did not enter into force for it lacks the sufficient ratifications and will probably not enter into force.

[21] CJ, 13 September 2005, *Commission v. Council*, C-176/03, ECR, p. I-7879.

[22] See for example A. Gouritin and P. De Hert, "Directive 2008/99/EC: A new start for criminal law in the European Community?", *Environmental Law Network International*, 2009, 1, p. 22-27 ; P.-Y. Monjal, "Les compétences pénales communautaires et la CE", *Revue Européenne de Droit de l'Environnement*, 2008, 2, p. 223-235; F. Comte, "Criminal Environmental Law and Community Competence", *European Energy and Environmental Law Review*, 2003, p. 147-156 ; M. Faure, "European Environmental Criminal Law: Do we really need it?", *European Energy and Environmental Law Review*, January 2004, p. 18-29; L. Krämer, "Environment, Crime and EC Law", *Journal of Environmental Law*, 2006, 18, p. 277-288; M. Faure, "The continuing story of environmental criminal law in Europe after 23 October 2007", *European Energy and Environmental Law Review*, 2008, p. 68-75; R. de Bellescize, "La communautarisation silencieuse du droit pénal. A propos de l'arrêt de la CJCE, 23 Octobre 2007", *Droit pénal – Revue mensuelle Lexisnexis Jurisclasseur*, 2008, p. 8-11; M. Wasmeier and N. Thwaites, "The battle of the pillars: does the European Community have the power to approximate national criminal laws?", *Environmental Law Review*, 2004, 29/5, p. 613-635; J.-F. Castillo Garcia, "The Power of the European Community to Impose Criminal Penalties", *EIPASCOPE*, 2005, 3, p. 27-29; R. Pereira, "Environmental criminal law in the first pillar: a positive development for environmental protection in the European Union?", *European Energy and Environmental Law Review*, 2007, p. 254-268; M. Hedemann-Robinson, "The EU and Environmental Crime: The Impact of the ECJ's Judgment on Framework Decision 2005/667 on Ship-Source Pollution", *Journal of Environmental Law*, 2008, 20/2, p. 279-292; F. Comte and L. Krämer (eds.), *Environmental crime in Europe, Rules of Sanctions*, Europa Law Publishing, 2004; F. Comte, "Crime contre l'environnement et police en Europe: panorama et pistes d'action", *Revue Européenne de Droit de l'Environnement*, 2005, 4, p. 381-447 ; X. Loubert-

In a nutshell, the European Commission was arguing that the legal basis for the adoption of a text on the protection of the environment through criminal law was to be found within the first pillar in the form of a Directive. The Council rather argued that the correct legal basis was to be found within the third pillar as a Framework-Decision. Two parallel legislative processes were set in motion: a proposal for a Directive (initiative of the European Commission) and a proposal for a Framework Decision (initiative of the Kingdom of Denmark). The legislative process under the first pillar was going on when the Council adopted the Framework-Decision on the protection of the environment through criminal law on 27 January 2003. As a consequence, the Commission brought a case against the Council before the European Court of Justice on 15 April 2003. What was at stake here was the competence of the Community legislator to adopt a text on criminal matters in the environmental area. The European Court of Justice released its judgment on 13 September 2005. In this judgment, the Court first recalled the general rule: "neither criminal law nor the rules of criminal procedure fall within the Community's competence"[23]. The Court then establishes an exception to this rule: the Community legislator is competent "when the application of effective, proportionate and dissuasive criminal penalties by the competent authorities is an essential measure for combating serious environmental offences"[24]. Two conditions have to be met for the Community legislator to use criminal law: necessity (the need to make the community policy in question effective), and consistency (the criminal law measures adopted at sectoral level must respect the overall Union's system of criminal law)[25]. The Court found that both regarding aim and content this instrument served the purpose of the protection of the environment. Hence, the Framework Decision encroached upon first pillar competences. Accordingly, the proper legal basis should have been Article 175 of the ECT. Consequently, the Court annulled the Framework Decision based on the third pillar law.

The European Commission proposed, on 9 February 2007, a second version of a Directive on the protection of the environment through criminal law based upon Article 175 ECT, a first pillar text[26]. This proposal was largely inspired by the text of the annulled Framework Decision. But the final version of the Directive has a significant difference by comparison with the proposed Directive. Later on, the European Commission left the provisions that regulate the quantum of criminal penalties (rules on the type and level of criminal penalties) out of the scope of the proposed Directive. The European Commission left those provisions out of the scope as a consequence of another ruling of the European Court of Justice. In case C-440/05

Davaine, "Beaucoup de bruit pour rien: les insuffisances de la décision-cadre n° 2003/80/JAI du Conseil de l'Union Européenne relative à la protection de l'environnement par le droit pénal", *Revue Européenne de Droit de l'Environnement*, 2004, 2, p. 142-150.

[23] CJ, 13 September 2005, *Commission v. Council*, C-176/03, *ECR*, p. I-7879, para. 47.

[24] *Ibid*., para. 48.

[25] See M. Faure, "The continuing story of environmental criminal law in Europe after 23 October 2007", *European Energy and Environmental Law Review*, 2008, 17/1, p. 68-75, at p. 72.

[26] COM (2007) 51 final.

released on 23 October 2007[27], the European Commission challenged a Council Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship-source pollution, a third pillar measure[28]. Similarly to the former case the European Commission was arguing that the proper legal basis was to be found in the first pillar. In this ruling, the Court affirmed its former ruling and granted competence to the Community legislator to harmonise criminal law. However, the Court specified that this competence does not extend to the provisions that regulate the quantum of sanctions. The quantum of sanctions is to be regulated by a third pillar measure.

Consequently, the Commission modified the proposed Directive and left out of its scope the provisions that set the quantum of criminal penalties. The 2008/99 Directive on the protection of the environment through criminal law was eventually adopted on 19 November 2008 and published on 6 December 2008.

Hence, the Convention of the Council of Europe was a source of inspiration for the Community legislator. On the other hand, the institutional conflict between the European Commission and the Council and the corresponding rulings of the European Court of Justice shaped the legal basis and content of the harmonisation of criminal offences at the EU level.

B. Elements of the offences

The influence of the Convention of the Council of Europe on the protection of the environment through criminal law and the case-law of the European Court of Justice have influenced the content of Directive 2008/99 on the protection of the environment through criminal law. The Directive requires that the Member States provide that most serious infringements of EU environmental law are criminalised. The nine offences will be presented according to the models explained in the previous section.

1) Rejection of the autonomous offence ("model IV")

From the outset, the fourth model ("autonomous offence") identified above is not endorsed in the Directive. As seen above, in this model, the administrative link is removed. In this model, criminal law is independent from administrative law. The offence is defined irrespective of an underlying regulatory violation. However, according to the Directive, all the types of conduct (actions or omissions) must be unlawful if they are to be criminalised.

To fulfil the "unlawfulness" condition and be qualified as an offence the conduct must infringe the legislation listed in the annexes, *i.e.* EU environmental law, or "with regard to activities covered by the Euratom Treaty, the legislation adopted pursuant to the Euratom Treaty and listed in Annex B", or "a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Community legislation referred to" in the annexes (Article 2(a))[29].

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[27] CJ, 23 October 2007, *Commission v. Council*, C-440/05.

[28] Council Framework Decision 2005/447/JHA, 12 July 2005.

[29] Article 2(a) provides: ""unlawful" means infringing: (i) the legislation adopted pursuant to the EC Treaty and listed in Annex A; or ii) with regard to activities covered by the Euratom Treaty, the legislation adopted pursuant to the Euratom Treaty and listed in Annex B; or (iii)

It can be observed that an autonomous offence was provided in the Directive's Proposal but was rejected after the trilogue between the Council's Presidency, the European Commission and the European Parliament that took place in April and May 2008. In other words, the rejection of the autonomous offence stems from a compromise reached between the Presidency, the European Commission and the European Parliament.

Also, unlike the Directive, the Council of Europe Convention on the protection of the environment through criminal law endorses the autonomous offence in Article 2(1)(a). Article 2(1)(a) provides: "Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which (i) causes death or serious injury to any person, or (ii) creates a significant risk of causing death or serious injury to any person".

The explanatory report of the Convention makes clear that administrative lawfulness shall not preclude criminal liability: "Administrative consent must not be available, or if granted, irrelevant in those cases where environmental use causes death or serious injury to any person or which creates a significant risk thereof. (…) An "autonomous" offence should accordingly be established, *i.e.* where the behaviour causes, or creates a significant risk of, death or serious injury to any person, when committed intentionally or with negligence".

2) Blurring boundaries: nine environmental offences all linked to administrative law

Since the fourth model has been rejected, the set of nine types of conduct that should be considered as criminal offences provided that they are unlawful belong to the first, second or third models identified in the previous section.

From the outset, the nine offences share two common features. First, the intentional element is similar for the nine offences. The Directive targets crimes that are committed intentionally or with "at least serious negligence" (Article 3)[30]. It can be specified that the European Court of Justice provided a definition of "serious negligence" in the *Intertanko* case. Serious negligence is defined as "an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation"[31]. The second feature common to the

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a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Community legislation referred to in (i) or (ii)".

[30] Article 3 provides: "Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence".

[31] CJ, 3 June 2008, *The Queen on the application of International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register, International Salvage Union v. Secretary of State for Transport* ("Intertanko" case), C-308/06, point 77.

nine offences is that inciting, aiding and abetting the unlawful conducts will also be considered as a criminal offence (Article 4).

As seen in the previous section, model I is referred to as "abstract endangerment". Criminal law applies in these kinds of cases as soon as the administrative provision has been violated even if no actual harm or threat of harm to the environment occurs. These abstract endangerment crimes mainly focus on vindicating administrative values, although punishing the administrative violation indirectly furthered ecological values as well. Directive 2008/99 defines a set of two offences that belong to the first model.

The first offence independent of any damage or risk of damage, abstract endangerment, is the unlawful shipment of waste that falls within the scope of Article 2(35) of Regulation 1013/2006. The shipment "must be undertaken in a non-negligible" quantity. This quantity can be appraised in a single shipment or in several shipments which appear to be linked (Article 3(c))[32]. No condition related to damage has to be met.

The unlawful production, importation, exportation, placing on the market or use of ozone-depleting substances is the second offence that is defined independently of any damage. Only the unlawful conduct is criminalised (Article (3)(i))[33].

Model II refers to concrete endangerment crimes with administrative predicates. Unlawfulness and proof that the unlawful activity caused threat of harm to the environment are required. Directive 2008/99 endorses a set of four such offences.

The first concrete endangerment crime is the unlawful operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are used or stored (Article 3(d))[34]. The unlawful operation of a plant is criminalised if it causes *or is likely to cause* outside the plant "death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants".

The second concrete endangerment crime is the unlawful "manipulation" of waste that has been criminalised. Unlawful collection, transport, recovery or disposal of

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[32] Article 3(c) of Directive 2008/99 provides: "Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence: (…) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) no. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked".

[33] Article 3(i) of Directive 2008/99 provides: "Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence: (…) the production, importation, exportation, placing on the market or use of ozone-depleting substances".

[34] Article 3(d) of Directive 2008/99 provides: "Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence: (…) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants".

waste (including the supervision of such operations and the aftercare of disposal sites and action taken as a dealer or a broker) is criminalised if such an unlawful conduct causes *or is likely to cause* "death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants" (Article 3(b))[35].

The third concrete endangerment crime is the unlawful production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other radioactive substances when it causes *or is likely to cause* damage. Damage is defined as death or serious injury to any person or substantial damage to the quality of the air, the quality of soil or the quality of water, or to animals or plants (Article 3(e))[36].

The fourth concrete endangerment crime is the unlawful discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water and is criminalised when the conduct causes *or is likely to cause* damage. Damage is defined similarly as death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants (Article 3(a))[37].

As seen above in the previous section, Model III refers to concrete harm crimes with administrative predicate: administrative unlawfulness is required and a proof of actual environmental harm is also required. In this case actual environmental harm occurs and not merely an endangerment. Directive 2008/99 contains three such offences.

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[35] Article 3(b) of Directive 2008/99 provides: "Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence: (…) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants". It can be specified that the European Court of Justice has a broad interpretation of the notion of waste (for example, see CJ, 24 June 2008, C-188-07, *Commune de Mesquer*, points 38-45, and M.-C. Desjardins, "La notion de déchet: vers une solution adéquate pour combler les lacunes du droit européen en matière de sols pollués?", *Revue Européenne de Droit de l'Environnement*, 2006, 2, p. 145-152) and to the recently adopted Waste Framework Directive 2008/98 (Waste Framework Directive 2008/98/CE, 19 November 2008, *OJ*, no. L 312, 22 November 2008, p. 3-30).

[36] Article 3(e) of Directive 2008/99 provides: "Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence: (…) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants".

[37] Article 3(e) of Directive 2008/99 provides: "Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence: (…) the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants".

The first concrete harm crime is the unlawful killing, destruction, possession or taking of specimens of protected wild fauna or flora species and is criminalised (Article 3(f)). The condition for such a type of conduct to be criminalised is that it must concern a non-negligible quantity of such specimens and have a non-negligible impact on the conservation status of the species (Article 3(f) *a contrario*) [38].

The second concrete harm crime is the unlawful trading in specimens of protected wild fauna or flora species or parts or derivatives thereof (Article 3(g)) [39]. The notion of protected wild fauna and flora species are the species listed in Annex A or B to the Regulation on the protection of species of wild fauna and flora by regulating trade therein (Article 2(b)(ii)) [40]. Similarly to the above, the condition for such a conduct to be criminalised is that it must concern a non-negligible quantity of such specimens and have a non-negligible impact on the conservation status of the species (Article 3(g) *a contrario*).

The third concrete harm crime is any unlawful conduct causing the significant deterioration of a habitat within a protected site and is criminalised (Article 3(h)) [41]. The notion of habitat within a protected site refers to the special protection area according to the Birds Directive or any natural habitat or a habitat of species for which a site is designated as a special area of conservation according to the Habitats Directive (Article 2(c)). It should be noted here that the offences relying on the birds and habitats directives could lead to distinct approaches between Member States since those directives call for administrative measures. But it should be stressed that the Court of Justice's settled case law limits the Member States' margins of appreciation for implementing the directives in question [42].

From this classification and the rejection of the offence independent of administrative unlawfulness (the "autonomous offence"), it emerges that Directive

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[38] Article 3(f) of Directive 2008/99 provides: "Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence: (…) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species".

[39] Article 3(g) of Directive 2008/99 provides: "Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence: (…) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species".

[40] Council Regulation no. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, *OJ*, no. L 61, 3 March 1997, p. 1.

[41] Article 3(h) of Directive 2008/99 provides: "Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence: (…) any conduct which causes the significant deterioration of a habitat within a protected site".

[42] See, for example CJ, 10 May 2007, *Commission v. Austria*, C-508/04, points 76-89; and more recently, CJ, 8 March 2011, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, C-240/08, Opinion of the Advocate General Kokott, point 71.

2008/99 defines some crimes that refer to administrative environmental law. The blurring could be rather defined as a dependence of environmental crimes on environmental (administrative) law. This dependence is identified and criticised in the subsequent section.

5. Critical appraisal and the human rights approach as a potential solution

The nine offences defined in Directive 2008/99 illustrate the phenomenon in which there is blurring between environmental criminal law and environmental administrative law, which is the central subject of this book. EU (administrative) environmental law is a component of all the offences defined (the "unlawfulness condition"). In the case of environmental crimes, the blurring can shift to a dependence of EU environmental criminal law on environmental administrative law. A problem illustrates the blurring phenomenon: the implementation of EU administrative environmental law (A). Another problem flows from the dependence phenomenon: the blurring of the authorities involved in the prosecution of environmental crimes. This contribution's focus will now be directed towards the human rights approach with a view to finding out whether this approach can be perceived as a solution (B).

A. Dependence on the problematic implementation of EU environmental law

The blurring between administrative environmental law and environmental criminal law in the definition of environmental offences relates to the implementation of the administrative part of the offence. All the offences defined in the Directive have in common that the conduct (or omission) has to be unlawful if it is to be criminalised. The conduct or omission must infringe the legislation listed in the annexes, namely EU environmental law, or "with regard to activities covered by the Euratom Treaty, the legislation adopted pursuant to the Euratom Treaty and listed in Annex B", or "a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Community legislation referred to" in the annexes (Article 2(a)). The criminalisation of environmental offences depends on a proper implementation of EU environmental law.

Indeed, it will not be possible for the criminal authorities to launch the criminalisation process regarding an operator whose conduct (or omission) is unlawful according to EU environmental law but lawful under national law because of a failure on behalf of the state to properly implement EU environmental law into national law.

It is set out in case law that if, within the allowed time, the Member State has not assured the full transposition of a Directive which is being relied upon with a view to launching criminal proceedings, a public authority of that state may not rely on that Directive [43]. In that respect, it can be stressed that EU environmental law is a field of law that particularly suffers from a recurrent deficit in terms of implementation.

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[43] See for example CJ, C-168/95, *Arcaro*, 26 September 1997, *ECR*, 1996, p. I-4705, para. 37: "In that same line of authority the Court has also ruled that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive".

The latest report of the European Commission on the implementation of EU law[44] confirms this for the year 2012: "Similar to 2011, citizens, businesses and organisations reported irregularities especially in connection with environment, justice and internal market & services"[45]. The environment was the most infringement-prone area in 2012: one fifth of the infringements were related to the environmental field[46]. The European Commission concludes on p. 12 of the report: "Environment, transport, taxation and internal market remained the policy areas where the Commission initiates infringements most frequently".

The poor implementation of EU environmental law is not the only problem that can deprive EU environmental criminal law of a useful effect because of the blurring. Another problem is also the blurring that occurs regarding the criminal authorities. This blurring mirrors the blurring in the definition of offences.

B. The blurring of environmental criminal authorities

1) Illustration of the blurring: the French case

The blurring between criminal and administrative law in the definition of environmental crimes has an effect on the authorities that set responsibility into motion. The blurring also occurs with those authorities. Indeed, administrative and criminal authorities can be involved in the prosecution of environmental crimes. Blurring in the roles of authorities can prove problematic since it would deprive the criminalisation of a significant added value. This would run counter to the purpose of Directive 2008/99, which does not provide any guidance regarding the prosecution of environmental offences. Recital 13 of the preamble states: "Experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law".

An example of this can be given in French law. In French environmental criminal law, "classical" prosecution services are the ones that have competence.

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[44] European Commission, *Report from the Commission, 30th annual report on monitoring the application of EU law (2012)*, Brussels, 22 October 2013, COM (2013) 726 final.

[45] *Ibid.* See also *Ibid*. p. 6: "Complaints that led to bilateral discussions were most frequently related to environment, internal market & services and taxation & customs union". And p. 7: "Petitions by citizens to the European Parliament as well as questions from Members of Parliament could also raise perceived deficiencies in the way Member States apply EU law. Most frequently, these concerned environmental issues". *Ibid.*, p. 7: "From the point of view of policy areas, environment remained the leading field with 400 open dossiers before internal market & services (176) and justice & fundamental rights (125)" and "Environment, internal market and services and transport were the three policy areas where the most potential infringements were identified (386, 196 and 164 new files, respectively)". *Ibid.*, p. 9: "The Court delivered 46 judgments under Article 258 TFEU in 2012 (…). Environment (16), taxation & customs union (11) and internal market & services (6) were the three policy areas with the most judgments delivered by the Court during 2012".

[46] *Ibid.*, p. 9.

Administrative authorities are also granted criminal competence in Article L173-12 of the Environmental Code [47]. Administrative authorities can block public prosecution. Administrative authorities have the competence to propose to the offender a criminal settlement for a broad range of environment-related offences. Article L173-12 of the Environmental Code stipulates two conditions that must be fulfilled for the proposed criminal settlement to be valid. The public prosecution cannot be underway and the Public Prosecutor ("*Procureur de la République*") must agree with the proposal. This illustrates the blurring phenomenon regarding authorities.

The French case also illustrates the problems that can flow from this blurring. Let us consider water law as a specific case. Law no. 2006-1772 introduced the possibility for the administrative authority (the prefect) to block public prosecution. The prefect is also the responsible authority to grant both the authorisations (*i.e.* the "permit") and to set administrative liability in motion [48]. There are many potential problems. On the one hand, studies and case law at the national level report that the departmental prefects tend to largely favour the operators. Administrative judicial authorities have cancelled huge proportions of authorisations granted to farmers in Brittany (in 2007, 54% of livestock farming authorisations were voided). [49] Doctrine points out (among other things) the shortcomings of impact assessments and the bias of some departmental authorities, which clearly favour farmers. In addition, the partiality of the prefect can be questioned. Indeed, the prefect is the pivotal authority in terms of

[47] Article L173-12 of the Environmental Code provides: "*I. – L'autorité administrative peut, tant que l'action publique n'a pas été mise en mouvement, transiger avec les personnes physiques et les personnes morales sur la poursuite des contraventions et délits prévus et réprimés par le présent code. La transaction proposée par l'administration et acceptée par l'auteur de l'infraction doit être homologuée par le procureur de la République. II. – Cette faculté n'est pas applicable aux contraventions des quatre premières classes pour lesquelles l'action publique est éteinte par le paiement d'une amende forfaitaire en application de l'article 529 du code de procédure pénale. III. – La proposition de transaction est déterminée en fonction des circonstances et de la gravité de l'infraction, de la personnalité de son auteur ainsi que de ses ressources et de ses charges. Elle précise l'amende transactionnelle que l'auteur de l'infraction devra payer, dont le montant ne peut excéder le tiers du montant de l'amende encourue, ainsi que, le cas échéant, les obligations qui lui seront imposées, tendant à faire cesser l'infraction, à éviter son renouvellement, à réparer le dommage ou à remettre en conformité les lieux. Elle fixe également les délais impartis pour le paiement et, s'il y a lieu, l'exécution des obligations. IV. – L'acte par lequel le procureur de la République donne son accord à la proposition de transaction est interruptif de la prescription de l'action publique. L'action publique est éteinte lorsque l'auteur de l'infraction a exécuté dans les délais impartis l'intégralité des obligations résultant pour lui de l'acceptation de la transaction. V. – Les modalités d'application du présent article sont fixées par décret en Conseil d'Etat*".

[48] This administrative competence is the result of the French implementation of Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (*OJ*, no. L 143, 30 April 2004, p. 56), amended by Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 (*OJ*, no. L 102, 11 April 2006) and Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 (*OJ*, no. L 140, 5 June 2009).

[49] See for example V. Inserguet-Brisset, "Responsabilité de l'Etat, Prolifération d'algues vertes sur le littoral breton", *Revue Juridique de l'Environnement*, 2011, 2, p. 281-306, at p. 292.

authorisations, environmental liability and criminal liability. The prefect is in contact with the potential offender when he makes use of his competences.

This French case shows a more general issue, *i.e.* that administrative authorities are increasingly (not only in France but also in other Member States) called upon to enforce environmental regulation. However, in some cases those administrative authorities have also played a role in standard setting and have hence built up a more collaborative relationship with the enterprise. This may indeed raise questions as to the adequacy of administrative law enforcement, especially when it would be carried out by the same authorities that also granted the permit.

This begs the question: can human rights requirements in terms of impartiality fill the potential problems that flow from the blurring of competences? More particularly, can the law of the Council of Europe Convention on Human Rights [50] provide a safety net with respect to the blurring of authorities? The European Court of Human Rights has never had to adjudicate on the situation of the prefect as an authority that has criminal competence. In the subsequent developments it is argued that the impartiality and independence requirements are safeguards that counterbalance the possible negative effects that flow from the blurring between administrative and criminal authorities.

2) Requirements of the European Court of Human Rights in terms of impartiality and independence

The right to a fair trial (Article 6 of the Convention) [51] and the right to an effective remedy (Article 13 of the Convention) [52] apply to criminal prosecution services. Accordingly, these rights apply to the prosecution services that set environmental criminal responsibility in motion pursuant to Directive 2008/99. As seen above, the prefect can have criminal competences.

The case law of the European Court of Human Rights ("the Court") establishes what the impartiality and independence requirements encompass. A wealth of judgments relate to the impartiality requirement. In the recent *Micallef v. Malta*

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[50] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, CETS no. 005.

[51] Article 6(1) of the Convention provides: *"*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

[52] Article 13 of the Convention provides: *"*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". In practice, the Court has recognised that Article 6 embodies a "right to Court". This renders the boundaries between Articles 6 and 13 fairly blurred. The right to court embodied by Article 6 is made crystal-clear in the *Cudak v. Lithuania* case (23 March 2010, Grand Chamber), at para. 54: "The Court reiterates that the right to a fair hearing, as guaranteed by Article 6(1) of the Convention, must be construed in the light of the principle of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights (...) Everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way Article 6(1) embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only…".

case, the Court recalled its settled case law regarding the content of the impartiality requirement [53]. Impartiality is defined as "the absence of prejudice or bias" [54] and is assessed according to two tests: an objective one and a subjective one. With respect to the subjective test, "regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case" [55]. Regarding the objective test, it must be ascertained "whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality" [56]. The content of the objective test has been defined by the Court and is settled case law: the Court concentrates on hierarchical "or other links" between the judge and "other actors" in the proceedings that would "objectively justify misgivings as to the impartiality of the tribunal and thus fail to meet the Convention standard under the objective test" [57]. The Court will take into account the nature and degree of the hierarchical or other links between the judge and other actors in the proceedings as indicators of a lack of impartiality [58].

The independence requirement applies to the parties concerned and to the executive. It is settled case law that the independence requirement also focuses on hierarchical links, and more particularly focuses on the nature of the hierarchical authority. As a principle, if a judicial authority or prosecuting service is subordinate to the executive, the independence requirement has presumably not been fulfilled [59]. Independence of prosecuting services from the executive was also at stake in the *Moulin v. France* case [60]. The Court concluded that public prosecutors in France did not satisfy the independence requirement from the executive. More particularly, the Court considered three criteria regarding the public prosecutors. Firstly, they depend on a hierarchical superior who is a member of the government and hence the executive power. Secondly, they are not irremovable. Thirdly, they are placed under the

[53] ECtHR, 15 October 2009, *Micallef v. Malta*.

[54] *Ibid.*, para. 93.

[55] *Ibid.*

[56] *Ibid.* According to the Court the distinction between the objective and subjective test is not always very workable: "However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (...) Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (…)", *ibid*., para. 95.

[57] *Ibid.*, para. 97.

[58] *Ibid.*

[59] This settled case law was recalled, for example, in the *Pantéa v. Romania* case: "since prosecutors in Romania act as members of the Prosecutor-General's Department, subordinate firstly to the Prosecutor-General and then to the Minister of Justice, they do not satisfy the requirement of independence from the executive". See ECtHR, 3 June 2003, *Pantea v. Romania*, para. 238.

[60] ECtHR, 23 November 2010, *Moulin v. France*.

supervision and control of an authority within the State Council Office ("*parquet*"), and under the authority of the Ministry of Justice [61].

Against that background, does the prefect offer guarantees of independence and impartiality when (s)he handles the criminal settlement procedure?

3) The prefect and the impartiality and independence requirements: concerns

Let us consider the independence requirement. First, the prefect is appointed by a Decree signed by the President of the Republic and following a decision adopted by the Council of Ministers [62]. Hence, the executive is responsible for the appointment of the prefect. Second, the prefect is not irremovable. Third, there are no guarantees that the prefect will not suffer pressures: the prefect remains under the supervision of the executive. Fourth and regarding the prefect's appearance of independence, the subjective element is assessed on a case-by-case basis. There are good grounds to believe that any NGO or citizen contesting the decision of the prefect not to set the criminal responsibility in motion would perceive the prefect as not being independent from the executive.

All in all, there are reasonable grounds to consider that the prefect is not independent from the executive when (s)he has to handle environmental criminal responsibility. In this respect, it is interesting to point out that the Commission's Proposal for a Directive on the protection of the environment through criminal law, dated 9 February 2007, also mentioned that relying on criminal authorities to set liability in motion was a guarantee of independence when compared to the administrative authorities that also "grant exploitation licences and discharge authorisations" [63].

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[61] *Ibid.*, para. 56.

[62] Article 13 of the Constitution of the French Republic dated 1958 reads as follows: "The President of the Republic shall sign the Ordinances and Decrees deliberated upon in the Council of Ministers.

He shall make appointments to the civil and military posts of the State.

Conseillers d'Etat, the Grand Chancelier de la Légion d'Honneur, Ambassadors and Envoys Extraordinary, Conseillers Maîtres of the Cour des Comptes, Prefects, State representatives in the overseas communities to which Article 74 applies and in New Caledonia, highest-ranking Military Officers, Recteurs des Académies and Directors of Central Government Departments shall be appointed in the Council of Ministers".

[63] European Commission Proposal for a Directive on the protection of the environment through criminal law, COM (2007) 51 final, 9 February 2007. Recital 5 provides: "By entrusting judicial authorities, rather than administrative authorities, with the task of imposing sanctions, responsibility for investigating and enforcing the respect of environmental regulations falls to authorities which are independent of those which grant exploitation licences and discharge authorisations". This Recital has been deleted as a compromise during the first informal trilogue (European Commission – Council – European Parliament) dated 24 April 2008, as appears from the document entitled "Table of amendments – (amendments adopted by JURI Committee). Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law. Co decision procedure – First Reading (COM (2007) 51 final), internal document" (copy with the author). On a side note, the European Commission expressed that it "would prefer to keep this recital but could in the spirit of compromise accept its deletion – the content is not essential" (*Ibid.*). This deletion had been initially required

Regarding the impartiality of the prefect, the prefect must offer sufficient guarantees with a view to excluding any doubt regarding his/her impartiality. The prefect is the responsible authority to both grant the authorisations (*i.e.* the "permit") and set a criminal transaction. As seen above, studies and case law at the national level illustrate that the prefects tend to largely favour the operators. Consequently, there are grounds to believe that the prefect could be partial. In addition, the previous findings also apply here: the independence of the prefect is no less questionable than the Public Prosecutor's independence set out above. The appointment of the prefect, the duration of the prefect's office, guarantees against outside pressures and whether the prefect presents an appearance of independence (this subjective element is considered on a case-by-case basis) can be questioned. Practices illustrated in studies and case law at the national level report that the departmental prefects tend to largely favour the operators when granting authorisations.

All in all, it appears that blurring the line between administrative and criminal law (or mutual dependence) in the definition of environmental offences can be mirrored with blurring between administrative and criminal authorities. This blurring could deprive environmental offences of a major added value: "By entrusting judicial authorities, rather than administrative authorities, with the task of imposing sanctions, responsibility for investigating and enforcing the respect of environmental regulations falls to authorities which are independent of those which grant exploitation licences and discharge authorisations" [64]. This possible problem can be solved if human rights requirements are brought into play and if it is ascertained that the administrative authorities that have some criminal competences respect those requirements.

6. Concluding remarks

In this contribution we looked at the blurring of boundaries between administrative and criminal law in the domain of environmental criminal law. Our starting point in the introduction was that, apparently, especially at the European level, a lot of trust is put in criminal law enforcement. However, we showed that one can ask the question as to what extent criminal law enforcement is necessary to enforce environmental regulations. From an economic perspective we argued that one has to take into account the high costs of criminal law enforcement. These costs could thus result in some offences not being prosecuted. It is precisely for that reason the alternative of administrative law enforcement is necessary.

This already shows that, as far as the practical enforcement of environmental law is concerned, some intelligent mix of administrative and criminal law may be necessary and hence necessarily also some form of cooperation between administrative and judicial authorities in order to determine in which cases administrative enforcement may suffice and where criminal law enforcement may be indicated. Some regions, like

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by the European Parliament's Report in first reading dated 15 April 2008 (2nd amendment, <Commission>{JURI}Committee on Legal Affairs. </Commission>, Rapporteur: Hartmut Nassauer).

[64] European Commission, Proposal for a Directive on the protection of the environment through criminal law, COM (2007) 51 final, 9 February 2007, Recital 5.

the Flemish and Walloon Region in Belgium, have put in place those collaborative mechanisms.

However, we also showed that blurring boundaries between administrative and criminal law enforcement not only plays a role at the practical level of enforcement but also as far as the formulation of offences is concerned. Theoretically we argued (above in section 3) that there may indeed be reasons to punish non-obedience with administrative obligations but that those violations are often of a regulatory nature, do not often cause major harm to society and may therefore not always require criminal law. In other cases, more particularly when there is concrete endangerment (or even endangerment with harm), there can still be a relationship with administrative law, but it could be looser by punishing unlawful emissions. However, we equally argue that, in some serious cases, for what we defined as serious pollution, intervention via criminal law should become necessary even if the conditions of the administrative permit are complied with. We then showed that, in a Convention of the Council of Europe of 1998, such a model for the optimal enforcement of environmental law was indeed incorporated. However, in the EU Directive 2008/99, the environmental offences are all linked to administrative law. Hence, administrative law will remain important in order to determine the scope and limits of the criminal law. This undoubtedly has, as we argued, advantages; a major disadvantage is, however, that in this way the scope of criminal law is also seriously limited as far as its ability to provide adequate protection for the environment is concerned.

Discussing the case of France, we also showed that, even though (as we argued in section 2) there may be an important task for administrative law enforcement as well, one has to be careful as far as the independence of administrative law enforcement authorities is concerned. Precisely for that reason one can increasingly notice that the case law of the European Court of Human Rights also imposes important conditions on the quality of administrative law enforcement.

With the examples that we have discussed in this contribution it has hence become clear that there are, also as far as environmental enforcement is concerned, indeed increasingly blurring boundaries between administrative and criminal law: both are used in the enforcement of environmental regulations and administrative law plays an important role in shaping the scope of environmental law. A different issue is, of course, to what extent those blurring boundaries are problematic or can be considered as positive. We provided some indications in that respect, but the precise conditions under which intelligent mixes between administrative and criminal law enforcement can be worked out undoubtedly merits much more research. One question that will, for example, undoubtedly arise is how it would be possible to on the one hand increase the quality of administrative law enforcement in accordance with the requirements of the case law of the European Court of Human Rights but on the other hand still safeguard the major advantages of administrative law enforcement, especially when compared to criminal law. Some have indeed argued that the traditional economic argument that administrative law enforcement has the major advantage of being less costly than criminal law enforcement may no longer hold if administrative law enforcement *de facto* has to comply with the same requirements as the criminal law. It therefore undoubtedly merits much more research to look into how the blurring of the

boundaries between administrative and criminal law can, both as far as criminalisation, but also as far as enforcement is concerned, be shaped in such a way that requirements of due process and an effective protection of the environment are equally safeguarded.

The fiftieth shade of grey
Competition law, "criministrative law" and "fairly fair trials"*

Antoine Bailleux

1. Introduction

The evolution of EU competition law is a perfect illustration of the progressive blurring of the boundaries between criminal and administrative law. EU competition law has long been regarded as pertaining to the domain of administrative law. Enforced by an administrative body which imposed relatively low levels of fines on companies, this field of law did not seem to have much in common with the criminal prosecutions and trials taking place at Member State level. In addition, the European Community's lack of criminal competence made it logically impossible for an EC policy to fall within the field of criminal law. That conclusion was confirmed by Article 15(2) of Regulation no. 17[1], which provided that decisions imposing fines on account of a breach of competition law are not of a criminal law nature.

However, it seems that two factors have progressively undermined this widespread consensus on the non-criminal law nature of competition law.

First, penalties for breaches of competition law have been increasingly toughened up. At EU level, the amounts of fines imposed on undertakings have increased dramatically over the last fifty years with the stated aim of inflicting real harm on the companies concerned so as to dissuade them from re-offending. At national level, the toughening up of competition law penalties went even further, leading a number of legislatures to provide for sanctions such as imprisonment or other freedom-restricting measures applicable to the individuals responsible for infringements of competition law.

* This paper has been written in the framework of the Interuniversity Attraction Pole (IAP) *The global challenge of human rights integration – towards a user's perspective.*

[1] *OJ*, no. 13, 21 February 1962, p. 204-211.

Second, the "criminal law" category has been given an autonomous and extensive meaning in the case-law of the European Court of Human Rights (hereinafter, ECtHR). In its seminal judgment *Engel v. The Netherlands*[2], the Strasbourg Court has considered that, for the purposes of application of Article 6 of the European Convention on Human Rights (hereinafter, ECHR), even State measures which are not expressly characterised as "criminal" can nonetheless fall into that category depending on the nature of the offence concerned and the degree of severity of the penalty that they provide for.

These two developments paved the way for a timid recognition of the criminal or at least "quasi-criminal" character of penalties imposed in the framework of EU competition (more specifically, anti-trust) law[3]. This evolution, however, has not simply resulted in the transfer of competition law from the familiar sphere of administrative law to the equally well-defined field of criminal law. Quite to the contrary, competition law today seems to be stranded somewhere in the middle of these two spheres, in a grey zone which, for want of a better word, could be called "criministrative law".

It is submitted that this awkward position is not a temporary stage that competition law will progressively leave as it continues its journey toward the core of criminal law. Neither is it an unfortunate accident in the legal universe, as if competition law was an isolated meteorite straying amidst the orbits of the administrative and criminal law planets.

It is suggested that this shift of competition law toward the intermediary sphere of "criministrative law" is not only long-lasting, but that it signals a change in the perception of the criminal law – administrative law divide. Looking at it in that perspective, the "criminalisation" of competition law questions the very existence of a clear-cut divide between the supposedly watertight precincts of administrative and criminal law. More specifically, this phenomenon draws attention to the growing spectrum of grey areas in between the white zone of purely administrative law measures and the black core of indisputably criminal measures.

Once identified (part 2 of this paper), this drift of competition law into the "criministrative" area raises a number of questions. Most crucially, it calls for the establishment of a new legal regime made up of standards which reflect the medium position of "criministrative" law on the punitive scale – standards which would be both stricter than those prevailing in administrative law and lower than those curtailing the

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[2] ECtHR, 8 June 1976, *Engel v. The Netherlands*, series A, no. 22, para. 82.

[3] For a discussion of the criminal character of competition law, see *e.g.* D. Slater, S. Thomas, D. Waelbroeck, "Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?", GCLCWorking Paper, 04/08; C. Smits, D. Waelbroeck, "Le droit de la concurrence et les droits fondamentaux", *in* M. Candela Soriano (ed.), *Les droits de l'homme dans les politiques de l'Union européenne*, Brussels, Larcier, 2006, p. 135-162; A. Bailleux, "Le salut dans l'adhésion? Entre Luxembourg et Strasbourg, actualités du respect des droits fondamentaux dans la mise en œuvre du droit de la concurrence", *RTDE*, 2010, p. 31-54; W. Wils, "Is Criminalisation of EU Competition Law the Answer?", available at http://www.eui.eu/RSCAS/Research/Competition/2006(pdf)/200610-COMPed-Wils.pdf.

enforcement of "traditional" criminal law. We will see that such a grey legal regime is currently emerging in the case-law of both the European Court of Justice (CJ) and the ECtHR, taking the form of what one might call "fairly fair" trial standards (part 3 of this paper).

Finally, a few concluding remarks will challenge the desirability of such a trend. It will be argued that grey zones are replete with danger and that the rule of law can easily get lost in these foggy grey zones. It will be further submitted that, at any rate, should the invasion of grey prove unavoidable, competition law should at least be classified in the darkest shade of grey, namely as close as possible to the black zone of pure criminal law.

2. A new label : "criministrative" law

A. Competition law as criminal law

There has long been a broad consensus that fines imposed under EU competition law do not amount to criminal sanctions. After all, the EU authorities had raised and settled the question themselves in Article 23(5) of Regulation 1/2003 [4], which provides that: "Decisions [imposing fines for competition law breaches] shall not be of a criminal law nature".

However, this reference started to lose ground as soon as EU competition lawyers became aware of the landmark *Engel* judgment of the ECtHR [5]. In that case, the Strasbourg court famously held that the concept of criminal law is vested with an autonomous meaning for the purpose of Article 6 (right to a fair trial) and 7 (*nullum crimen sine lege*) of the ECHR. In that respect the Court ruled that, in order to determine whether a given "charge" must be regarded as criminal, "it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States. The very nature of the offence is a factor of greater import. (…) However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring" (para. 82).

In other words, the Court considered that, even where a specific sanction or procedure was not explicitly labelled as "criminal" under the relevant legal system, it could still be regarded as criminal for the purpose of the guarantees afforded by the ECHR.

It took about nine years for the Strasbourg human rights bodies to apply the *Engel* criteria to competition law enforcement. In *Société Stenuit v. France*, the European Commission on Human Rights considered that the enforcement of French competition law in the case at issue unambiguously fell under the criminal head of

[4] Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ*, no. L1, 4 January 2003, p. 1.

[5] See fn. 2.

Article 6 ECHR. In that respect, the Commission noted that, insofar as it sought to preserve free competition, the measure at stake aimed to safeguard the general interest of society, which is usually protected through criminal law. The Commission also took into account the fact that the financial sanction imposed on the company by the French Minister for Economy was an alternative to the transmission of the file to the criminal prosecutor. Finally, the Commission considered that the sanctions provided for "obviously" had a dissuasive character insofar as they could amount to a maximum of 5% of the company's turnover [6].

The criminal character of French competition law enforcement was confirmed by the ECtHR in its decision *Lilly v. France* [7]. It is remarkable that the French government itself reached the same conclusion as the Court in spite of the fact that competition law was not classified as criminal law under French law.

French competition law is not the only one that has been characterised as criminal for the purposes of the ECHR [8]. In *Menarini v. Italy* [9], the Court held that a fine of EUR 6 million imposed pursuant to Italian competition law fell under the criminal head of Article 6 ECHR. The Court took into account the goal of the legislation that gave rise to the imposition of the sanction (*i.e.* maintenance of free competition) as well as the nature (dissuasive and repressive) of the sanction. The Court also emphasised the severity of the sanction.

The Strasbourg Court has not yet ruled on the criminal law nature of EU competition law. The few cases that were brought against fines imposed by the Commission on account of breaches of EU competition law failed at the admissibility stage [10]. Since then, the *Connolly* decision [11] – a staff case – has made it clear that the Court has no jurisdiction to rule on decisions adopted by the Commission. This situation is not likely to change until the formal accession of the EU to the ECHR.

This lack of an explicit ruling of the ECtHR regarding EU competition law has enabled the EU courts to turn a (half-)blind eye to the *Engel – Stenuit – Lilly – Menarini* string of cases.

To be fair, it is worth noting that the EU courts are being put in an awkward position. On the one hand, the case-law of the ECtHR clearly points towards the recognition of the criminal character of the fines imposed pursuant to EU competition law. On the other hand, Regulation 1/2003 [12] – as well as its predecessor, Regulation

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[6] Eur. Comm. HR, Report (31), 30 May 1991, *Société Stenuit v. France*, paras. 62-65.

[7] ECtHR, 3 December 2002 (decision), *Lilly France SA v. France*.

[8] See however ECtHR, 3 June 2004 (decision), *OO Neste v. Russia*, in which the Court considered that, based on the *Engel* criteria, a decision ordering the confiscation of the profit gained through anticompetitive practices did not fall under the criminal head of Article 6.

[9] ECtHR, 27 September 2011, *A. Menarini Diagnostics S.R.L. v. Italy*, paras. 40-42.

[10] ECtHR, 9 February 1990, *Melchers & Co. v. Germany*, D.R. no. 64, p. 146, in which the Commission nonetheless seems to consider that the principles that govern national competition rules could in theory also apply to EC competition law (p. 152); ECtHR, 6 March 2004, *Senator Lines. v. [15 Member States of the European Union]*.

[11] ECtHR, 9 December 2008, *Connolly. v. [15 Member States of the European Union]*.

[12] Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ*, no. L1, 4 January 2003, p. 1.

no. 17 –, which organises the enforcement of EU competition law, explicitly provides that "[d]ecisions [imposing fines for competition law breaches] shall not be of a criminal nature" (Article 23(5)).

In that context, it is not very surprising that, after having briefly been receptive to the ECtHR's position [13], the Court of Justice and the General Court (then Court of First Instance) – unlike some Advocate Generals [14] – bluntly rejected the criminal law nature of EU competition sanctions based on a reference to a legal text. In the *Volkswagen* case, for example, the Court of Justice simply referred to the fact that "Article 15(4) of Regulation no. 17, moreover, provides that decisions imposing such a fine are not of a criminal law nature" [15] in order to reject the claim that the intentional nature of the breach cannot be established without identifying the (natural) persons responsible for it.

Similarly, in *Compagnie maritime belge*, the General Court found that the principle of retroactivity *in mitius* did not apply to competition law infringements. In support of that conclusion, it held that "[t]he applicant's argument that substantive Community competition law is criminal in nature and that the Commission was therefore required to take into account in the contested decision the evolution in such law which is alleged to be favourable to the applicant must also be rejected. In effect, the premiss of that argument is incorrect. It follows from the wording of Article 19(4) of Regulation no. 4056/86 that even the fines imposed under that provision are not of a criminal law nature" [16].

However, it appears from the reasoning of the EU courts that the wording of the relevant regulations is not the only reason why they refuse to recognise the criminal-law nature of competition law sanctions. Indeed, as both courts put it in the abovementioned judgments, "[t]he effectiveness of Community competition law would be seriously affected if the argument that competition law formed part of criminal law were accepted" [17].

This statement is undoubtedly surprising. It cannot be disputed that one of the main effects – if not one of the main goals – of due process rights is to curtail the exercise of the State's punitive power. The presumption of innocence, the equality of arms principle, the non-retroactivity principle and the like can all be regarded as

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[13] CJ, 8 July 1999, judgment C-199/92 P, *Hüls v. Commission*, *ECR*, p. I-4336, para. 150: "It must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, in particular the judgments of the European Court of Human Rights of 21 February 1984, *Öztürk*, Series A, no. 73, and of 25 August 1987, *Lutz*, Series A, no. 123-A)".

[14] See *e.g.*, the Opinion of Judge Vesterdorf acting as Advocate General in T-1/89, *Rhône-Poulenc v. Commission*, *ECR*, p. II-867, at p. 885; Opinion of Advocate General Léger in C-185/95 P, *Baustahlgewebe v. Commission*, *ECR*, p. I-8422, para. 31.

[15] CJ, 18 September 2003, *Volkswagen v. Commission*, C-338/00 P, *ECR*, p. I-9219, para. 96.

[16] GC, 1 July 2008, *Compagnie maritime belge v. Commission*, T-276/04, *ECR*, p. II-1277, para. 66.

[17] See *Volkswagen*, fn. 15, para. 97; *Compagnie maritime belge*, fn. 16, para. 66.

obstacles to the effective enforcement of criminal law. To be sure, this is not a good reason to jettison these principles – quite to the contrary.

It is submitted that the EU courts" blunt statement can only be understood by some sort of defiance toward the companies targeted by competition law. This defiance is best illustrated by the following statement of Advocate General Jarabo-Colomer in *Volkswagen*: "[t]he body of safeguards developed in the field of criminal law, which has as its protagonists the penalising State, on the one hand, and the individual charged with the offence on the other, is not transferred en bloc to the field of competition law. Those safeguards are designed specifically to compensate for that imbalance of power. In the case of free competition, those parameters are altered, since it is sought to protect the community of individuals which constitutes society and is composed of groups of consumers against powerful corporations with significant resources. To accord such offenders the same procedural safeguards as those accorded to the most needy individuals, apart from being a mockery, would entail, essentially, a lower degree of protection, in this case economic protection, for the individual as the main victim of anti-competitive conduct" [18].

It is an understatement to say that this cut-and-dried opinion is questionable, as a matter of both principle and facts. As a matter of principle, making the array of procedural safeguards depend on the presumed size and power of the entity being the subject of repression would take the EU down a very slippery road. In terms of the facts, it is doubtful whether the undertakings that are the subject of antitrust proceedings are necessarily wealthy and powerful. The Commission regularly imposes fines on ailing companies, which are on the verge of bankruptcy. In any event, it is simply misleading to portray competition law proceedings as trials pitching powerful corporations and needy individuals against each other. One cannot lose sight of the fact that the enforcement of competition law lies with the Commission and the national competition authorities [19], which are backed by the *imperium* of the Member States.

B. Competition law as criministrative law

Thirty years after its *Engel* judgment, the ECtHR found it necessary to refine its extensive reading of the "criminal law" category. In *Jussila v. Finland*, regarding the imposition of tax surcharges, the Court suggested that a distinction should be made, within the criminal law category, between a "core" and a "periphery': "It is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly "criminal charges" of differing weight. (…) Tax surcharges differ from the hard core of criminal law" [20].

This introduction of shades of grey within the black zone of criminal law seems at first sight sensible. It is pretty clear that the imposition of a fine for a breach of

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[18] Opinion delivered on 17 October 2002 in *Volkswagen*, fn. 15, para. 66.

[19] I leave aside the private actions for damages brought by (or on behalf of) consumers before domestic courts against companies that are claimed to have breached competition law, as nobody would argue that such "civil" actions fall within the scope of criminal law.

[20] ECtHR, 23 November 2006, *Jussila v. Finland*, para. 43.

economic laws cannot be compared with the conviction to a lifelong prison sentence for an assault committed on a person.

In that respect, it should be noted that, well before *Jussila*, the Court had already considered that minor offences could call for a more relaxed application of the fair trial standards [21].

However, the problem starts when one tries to draw a general line between the so-called core and periphery of criminal law. The ECtHR's case law does not provide clear guidance as to the criteria governing the demarcation between criminal and "criministrative" law. It appears from this piecemeal case-law that the type of sentence at stake [22] (imprisonment v. fine), the severity of the sanction [23] (the amount of the fine) and the type of court having jurisdiction over it [24] (criminal v. administrative court) can be taken into account by the Strasbourg Court in order to determine the existence of a "significant degree of stigma" leading to the hard core of criminal law.

The ECtHR has never ruled on the question as to whether competition law fines pertained to the core or to the periphery of criminal law. In its abovementioned (post-*Jussila*) *Menarini* judgment, the Court simply held that the sanction imposed by the Italian authorities was of a criminal nature without going into further details on this general finding.

In spite of this cautious silence, the emergence of a "criministrative law" category was enthusiastically embraced by a number of Advocate Generals at the EU Court of Justice in order to characterise the fines imposed within the framework of EU competition law. In its Opinion in *Schenker*, Advocate General Kokott stated, for example, that "[a]lthough antitrust law is not part of the core area of criminal law, it is recognised as having a character similar to criminal law" [25]. In the same vein, Advocate General Sharpston considered that "I have little difficulty in concluding that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in Article 81(1) EC falls under the "criminal head" of Article 6 ECHR as progressively defined by the European Court of Human Rights. (...) If the fining procedure in the present case thus falls within the criminal sphere for the purposes of the ECHR (and the Charter), I would none the less agree that, in the words of the judgment in *Jussila*, it "differ[s] from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency"" [26].

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[21] See for example ECtHR, 29 October 1991, *Fejde v. Sweden*, para. 33.

[22] ECtHR, 29 September 2009, *Talabér v. Hungary*, para. 27.

[23] ECtHR, 12 May 2010, *Kammerer v. Austria*, para. 29.

[24] *Ibid.*, para. 28.

[25] Opinion delivered on 28 February 2013, in C-681/11, *Schenker*, not yet reported, para. 40.

[26] Opinion delivered on 10 February 2011, in C-272/09 P, *KME Germany e.a. v. Commission*, not yet reported, paras. 64 and 67. See also, albeit more ambiguously, the opinion delivered by Advocate General Bot on 26 October 2010 in C-201/09 P and C-216/09 P, *ArcelorMittal Luxembourg SA v. Commission*, *ECR*, p. I-2239, para. 41: "While that procedure is not strictly speaking a criminal matter, it is none the less quasi-penal in nature".

Not all Advocate Generals share this view, however. In *AstraZeneca*, Advocate General Mazak considered that the applicant's line of reasoning "constitutes an attempt to apply criminal evidential standards to a procedure which the Court of Justice has stated is administrative rather than criminal in nature and is somewhat incoherent with Article 23(5) of Council Regulation (EC) no. 1/2003, which provides that fines imposed pursuant to that provision shall not be of a criminal law nature" [27].

The Court of Justice itself has not yet referred to competition law as belonging to so-called "quasi-penal" or "criministrative" law. However, the *Jussila* case-law of the ECtHR may have reconciled the Court with the idea that EU competition law could be regarded as falling within the periphery of criminal law for the purposes of due process rights. Evidence of this can be found in *Weichert v. Commission* where, instead of bluntly stating that competition has nothing to do with criminal law, the Court considered that it was not "necessary to examine whether a fine such as that imposed on the appellant by the contested decision is of a criminal law nature for the purposes of Article 6(2) of the ECHR" [28]. Even more tellingly in *Schindler v. Commission* [29], the Court referred to the *Menarini* judgment, implicitly endorsing the view that high fines for breach of competition law could fall within the criminal sphere.

In view of the above, it seems that the brand new "criministrative law" category could help the Luxembourg and the Strasbourg courts to achieve a compromise for the purposes of characterising competition law enforcement. On the one hand, it signals the ECtHR's will to somewhat mitigate the *en bloc* extension of the criminal law sphere initiated in *Engel.* On the other hand, it makes the "criminalisation" of competition law more palatable for the Court of Justice.

It nonetheless remains to be seen whether both courts will ever come to an agreement on this topic. One should not forget that, in *Menarini*, the Strasbourg Court refrained from deciding whether high fines designed to punish cartel offenders fell within the core or the periphery of criminal law. Conversely, the EU courts are obviously afraid of openly using the term "criminal" to designate competition law lest this would open the door to a flood of claims for new rights and guarantees, which would further impair the effectiveness of anti-trust enforcement.

3. A new standard – "fairly fair trial'

At this stage, many a reader will probably consider this dispute over labels as much ado about nothing. After all, do not the EU courts already grant to undertakings most guarantees applicable to criminal proceedings? And does not the Strasbourg Court already agree that some of these guarantees do not fully apply to cases, which do not belong to the core of criminal law? Therefore, cannot we already consider that, in spite of their disagreement on *words*, both courts are already in agreement over the *substance* of the law governing competition law proceedings? Or to put it in the words of this conference's title: do labels still matter?

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[27] Opinion delivered on 25 May 2012 in C-457/10 P, *AstraZeneca v. Commission*, not yet reported, para. 50.

[28] CJ, 16 November 2010, *Weichert v. Commission*, C-73/10 P, *ECR*, p. I-11535, para. 53.

[29] CJ, 18 July 2013, *Schindler v. Commission*, C-501/11 P, *ECR*, not yet reported, para. 33.

It is submitted that they do and for two reasons. First, we will see that the way the European courts conceive of competition law ("peripheral criminal law" (Strasbourg) as opposed to "hard administrative law" (Luxembourg)) does indeed have a bearing on the rights and guarantees that they are willing to give to the undertakings concerned. Second, it is argued that the emergence of a legally recognised grey zone, *i.e.* "criministrative law', is a risky process, which in itself may represent a threat to the rule of law.

A. "Fairly fair trial" standards in Strasbourg

In its *Jussila* judgment, the ECtHR held that "tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency". As this quote illustrates, the "invention" of "criministrative law" was directly connected to a relaxation of the standards provided for by the ECHR.

It should, however, be recalled that the application of lower requirements can already be found in cases pre-dating the formal recognition of a "peripheral" criminal law. For example, the Court has long considered that "[c]onferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6" [30]. In the same vein, the Court considered in two judgments delivered on 29 October 1991 that the "special features of the domestic proceedings" [31] or "the minor character of the offence" [32] justified the lack of an oral hearing before an appellate court.

It nevertheless seems that the creation of a "quasi penal" category has paved the way for an extension and a systematisation of this flexible approach. Looking at it in that perspective, one could fear that the recognition of a grey legal category, *i.e.* "criministrative law" leads to the creation of a similarly grey legal standard, *i.e.* "fairly fair trial".

It appears from the current case-law that this relaxed standard entails a number of deviations from the classic Article 6 ECHR fair trial guarantees.

First, this "fairly fair trial" standard is less strict than the wording of Article 6(1), which provides that "[i]n the determination of (…) any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

As explained above, the Court accepts that peripheral criminal cases can be dealt with in the first instance by an administrative authority, which is directly at odds with the wording of Article 6. Admittedly, the Court makes this derogation conditional upon the possibility of appealing the administrative authority's decision before a genuine appellate court which must have full judicial review [33], *i.e.* "the power to

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[30] ECtHR, 21 February 1984, *Öztürk v. Germany*, series A, no. 73, para. 56 (and references cited therein).

[31] ECtHR, 29 October 1991, *Helmers v. Sweden*, para. 36.

[32] ECtHR, 29 October 1991, *Fejde v. Sweden*, para. 33.

[33] For a case where this requirement was not met, see ECtHR, 2 September 1998, *Lauko v. Slovakia*.

quash in all respects, on questions of fact and law, the decision of the body below. It must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it"[34]. The problem is that the Court does not seek to ascertain whether the appellate court *actually* exercises its power of judicial review or whether it blindly relies on the factual and economic findings made by the administrative authority, thereby granting it a wide measure of discretion. The "fairly fair trial" requirement seems to be met as soon as an independent court has, *in theory*, a power of full judicial review.

In the same vein, the "fairly fair trial" doctrine admits of restrictions to the right to an oral hearing. In cases like *Jussila v. Finland*[35] and *Suhadolc v. Slovenia*[36], the Court found that "the obligation to hold a hearing is not absolute (…) the character of the circumstances which may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be dealt with by the competent court – in particular, whether these raise any question of fact or law which could not be adequately resolved on the basis of the case file. An oral hearing may not be required where there are no issues of credibility or contested facts which necessitate an oral presentation of evidence or cross-examination of witnesses and where the accused was given an adequate opportunity to put forward his case in writing and to challenge the evidence against him (…). In this connection, it is legitimate for the national authorities to have regard to the demands of efficiency and economy." In order to gauge the acceptability of dispensing with an oral hearing, the Court "has also had regard to the minor sum at stake or the minor character of the offence", stressing the fact that the above considerations "do not mean that a refusal to hold an oral hearing might be justified only in rare cases".

The guarantees of Article 6(1) are further undermined by the "fairly fair trial" case-law when the Court considers that an accused may not necessarily have the right to be present at the hearing. In *Kammerer v. Austria*, the Court found that a EUR 72 fine order for non-compliance with the obligations of registered owners to have their cars duly inspected "did not carry any significant degree of stigma", as a result of which the Court could not conclude that "the administrative criminal proceedings against the applicant had been unfair on account of his absence from the hearing before the [Independent Administrative Panel]"[37].

To date, the "fairly fair trial" case-law has not had a direct impact on the presumption of innocence enshrined in Article 6(2) ECHR. One may however wonder whether such presumption is not indirectly affected by the relaxation of the Article 6(1) standards and more specifically by the possibility to have one's case dealt with at first instance by an administrative body. It should indeed be noted that this case-law leads to a reversal of the burden of proof: a person sanctioned by an administrative body becomes the appellant once it seeks judicial review of such a sanction. Accordingly, following the formula *actori incumbit probatio*, it is for the accused to demonstrate

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[34] ECtHR, 21 March 2006, *Valico v. Italy*.

[35] See fn. 20 above.

[36] ECtHR, 17 May 2011, *Sudaholc v. Finland*.

[37] ECtHR, 12 May 2010, *Kammerer v. Austria*, paras 28-30.

the flaws of the accusations made against him. Everyone will agree that this task is considerably more onerous than merely having to sit and wait until the prosecuting authority has adduced evidence of guilt "beyond reasonable doubt".

At first sight, the "fairly fair trial" case-law has not yet undermined the guarantees offered by Article 6(3) either. This finding calls, however, for a number of qualifications. First, in *Kammerer*[38], the Court left the door open to a lowering of such guarantees in "criministrative" cases by holding that "[t]he approach adopted in the *Jussila v. Finland* case, namely to apply the criminal head guarantees of Article 6 in a differentiated manner depending on the nature of the issue and the degree of stigma certain criminal cases carried, is, in the Court's view, not limited to the issue of the lack of an oral hearing but may be extended to other procedural issues covered by Article 6 (…)". Second, it appears from the recent case-law that the Article 6(3) guarantees already seem to have lost their absoluteness even in "classical" criminal matters, with the Court substituting an "overall fairness assessment" to the application of a "blunt and indiscriminate"[39] guarantee. Third, it goes without saying that this trend is also discernible in "criministrative" cases[40].

B. "Fairly fair" competition proceedings in Luxembourg

It appears from the above that the ECtHR has progressively developed a "fairly fair trial" doctrine which admits of restrictions to the guarantees afforded by Article 6 ECHR. It should, however, be added that this flexibility is not without limits. On various occasions, the Court has emphasised that deviations from the Article 6 guarantees were only acceptable under "exceptional circumstances"[41]. It therefore seems that the full fair trial guarantees remain the general rule, the "fairly fair trial" case-law being doomed to remain the exception.

It is questionable whether the EU courts share this state of mind when dealing with competition law proceedings. It is true that the Court of Justice and the General Court have recognised that the right to a fair trial applies to the enforcement of competition law. However, beyond this general statement, the courts have not only embraced but also expanded on the "fairly fair" trial doctrine of the ECtHR.

Let us start with two exceptions to the fair trial guarantees explicitly acknowledged by the EU courts.

The first exception is related to the combination, by the Commission, of the functions of prosecutor and judge. The Court has consistently held that the right to

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[38] See fn. 37.

[39] See ECtHR, 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom*, para. 146.

[40] ECtHR, 31 July 2007, *Zaicevs v. Lettonia*, paras. 46-49. See, however, ECtHR, 20 September 2011, *Yukos v. Russia*.

[41] See ECtHR, 29 September 2011, *Flisar v. Slovenia*, para. 33. See also, *e.g.*, ECtHR, 29 September 2009, *Talaber v. Hungary*, para. 25, and *Sandor Lajos Kiss v. Hungary*, para. 22: "in the determination of criminal charges, the hearing of the defendant in person should nevertheless be the general rule. Any derogation from this principle should be exceptional and subjected to restrictive interpretation. The absence of an oral hearing at second instance has led to violations in several criminal cases". See also ECtHR, 10 April 2012, *Popa and Tanasescu v. Romania*, para. 46.

be heard by an impartial tribunal could not be invoked against the Commission on the ground that the latter is not a tribunal [42]. This rather circular argument was later reinforced through references to the abovementioned ECtHR's case-law according to which "provided that the right to an impartial tribunal is guaranteed, Article 6(1) of the Convention does not prohibit the prior intervention of administrative bodies that do not satisfy all the requirements that apply to procedure before the courts" [43]. According to the EU Courts' line of reasoning, the imposition of fines for a breach of competition rules does not amount to a violation of the right to a fair trial given that the decision of the Commission can be appealed before the General Court, which enjoys full jurisdiction in that respect.

The position of the EU courts is apparently in line with the case-law of the Strasbourg Court. It could even be argued that it is more restrictive than the latter since it seems to require the General Court to effectively exercise its review rather than simply relying on the assessments made by the Commission [44]. However, one cannot overlook the fact that, far from being an exception related to minor infringements, the "fairly fair trial standard" is applied as the rule by the EU courts. In other words, the EU courts rely on what seems to be an irrebuttable presumption that competition law sanctions necessarily call for the application of less harsh procedural requirements than what is mandated under Article 6 ECHR. Yet this automaticity runs counter to the spirit of the "fairly fair trial" doctrine.

The second exception does not directly rest on any explicit precedent in Strasbourg. Both the Court of Justice and the General Court consider that "the right to examine or have examined witnesses against him" contained in Article 6(3)d) does not apply to competition law proceedings before the Commission [45]. Neither of the EU courts have explained the reason why this fundamental guarantee of criminal trials did not apply to competition law proceedings. Once again, this lack of a proper justification sits uneasily with the idea that "fairly fair trial standards" only apply in exceptional circumstances.

It is submitted that the above two exceptions are only the tip of the iceberg. It appears from a number of cases that the EU courts are reluctant to treat undertakings being the subject of competition law enforcement in the same way a criminal court

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[42] See already CJ, 29 October 1980, *van Landewyck v. Commission*, C-209/15 *e.a.*, para. 81; CJ, 7 June 1983, *Musique diffusion française v. Commission*, C-100-108/80, *ECR*, p. 1825, paras. 7-11.

[43] GC, 11 July 2007, *Schneider Electric v. Commission*, T-351/03, *ECR*, p. II-2237, para. 183. In the same vein, see CJ, 18 July 2013, *Schindler v. Commission*, C-501/11 P, not yet reported, paras. 34-37.

[44] In that respect, see CJ, 8 December 2011, *Chalkor v. Commission*, C-386/10, not yet reported, para. 47; CJ, 8 December 2011, *KME v. Commission*, C-389/10, not yet reported, para. 129. On the other hand, see GC, 2 February 2012, *Dow Chemical v. Commission*, T-77/08, not yet reported, para. 148. On that issue, see the very interesting opinion of Advocate General Wathelet in the case *Telefonica SA v. Commission*, C-295/12 P, paras. 107-173, not yet decided.

[45] CJ, 7 January 2004, *Alborg Portland e.a. v. Commission*, C-204/00 P *e.a.*, *ECR*, p. I-123, para. 200; GC, 27 June 2012, *Coats Holdingv. Commission*, T-439/07, not yet reported, para. 174.

would treat an indicted person. Illustrative of that approach is the General Court's statement that it "must reject the applicant's assertion that the Commission must adduce proof "beyond reasonable doubt" of the existence of the infringement in cases where it imposes heavy fines" [46]. Once again, one is left to wonder what justifies such a terse statement, which is clearly at variance with the ECtHR's finding that it is "a basic requirement of criminal justice that the prosecution has to prove its case beyond reasonable doubt" [47].

The judgments of the Court of Justice in *Otis* and *Ziegler* are likewise questionable. In *Otis* [48], the Commission, acting on behalf of the European Community, claimed damages before a domestic court for the losses suffered by the EC as a result of Otis's participation in a price-fixing agreement. The Commission argued that, pursuant to the principle of the primacy of EU law, the domestic court was bound by the legal findings made by the Commission in the decision whereby it imposed a fine on Otis for participating in that same cartel. Otis replied that such a conclusion breached the right to a fair hearing and the equality of arms principle. The Court of Justice disagreed, noting that the Commission decision had been open for review before the EU courts. This reasoning is hardly acceptable. It means that undertakings must anticipate that the Commission will use its legal findings in subsequent civil proceedings and must challenge such findings in advance in the framework of an action for annulment before the EU courts.

Similarly, in *Ziegler* [49], the claimants challenged a fine imposed by the Commission on the ground that it lacked "objective impartiality". In support of this claim, Ziegler argued that the Commission had openly expressed the view that it had been one of the main victims of the anti-competitive conduct that it now sought to sanction. The Court dismissed that argument. It first noted that such a line of reasoning would amount to depriving the Commission of the power to investigate any anticompetitive conduct that might have affected the European Union. Interestingly, such a line of reasoning demonstrates that, according to the Court, the fight against cartels at EU level [50] may justify certain limitations on the undertakings" due process rights. The Court considered further that the Commission departments responsible for the enforcement of competition law were different from those affected by the cartel at issue. This argument seems hard to reconcile with the Court's position that fines for a breach of competition rules can only be adopted by the Commission as a whole,

[46] GC, 8 July 2008, *BPB v. Commission*, T-53/03, *ECR*, p. II-1333, para. 64.

[47] ECtHR, 13 December 2011, *Ajdaric v. Croatia*, para. 51. See also the dissenting opinion of Judge Zupancic in *Sievert v. Germany*, 19 July 2012 : "The presumption [of innocence] authorises final decisions in cases where there is otherwise insufficient evidence as to what the plaintiff or the prosecution is actually asserting. In civil procedure preponderance of evidence will suffice, whereas in criminal procedure, we require proof beyond reasonable doubt".

[48] CJ, 6 November 2012, *Europese Gemeenschap v. Otis e.a.*, C-199/11, not yet reported.

[49] CJ, 11 July 2013, *Ziegler v. Commission*, C-439/11 P, not yet reported. Honesty requires to say that the author of the present article acted as counsel for Ziegler in this case.

[50] The case could have been dealt with at national level.

and cannot be attributed to one particular Commissioner or department [51]. Finally, the Court reasoned that "Commission decisions may be subject to review by the European Union judicature". This last argument is no more convincing than the others since it amounts to considering that any procedural flaw at Commission level can be redressed before the EU courts – which is irreconcilable with the ECtHR's case-law [52].

The question is not whether the cases discussed above are right or wrong. The point is simply that the EU courts have a somewhat ambiguous position towards the enforcement of EU competition law. Several of their judgments seem to be underpinned by the (correct) view that any additional right granted to the undertakings will necessarily come at the expense of the effectiveness of EU (competition) law.

Against that background, it is to be feared that the fast developing "fairly fair trial" doctrine of the ECtHR will be seized by the EU courts as an opportunity to freeze or even diminish the protection afforded to the companies facing competition law fines. This concern is fuelled by a statement of Advocate General Kokott in *Schenker* [53], which seems to turn the *Jussila* case-law on its head. After recalling that antitrust law "is recognised as having a character similar to criminal law", Ms. Kokott concludes that "regard must be had in antitrust law to *certain* principles stemming from criminal law which can ultimately be traced back to the rule of law and the principle of fault" (emphasis added). It is perhaps reading too much into it but this statement seems to suggest that, as a matter of principle, criminal law guarantees do not apply to "criministrative" law such as competition proceedings, subject only to "certain" limited exceptions, thereby reversing the principle/exception relationship established by the ECtHR.

4. A critical conclusion – lost in a foggy grey

The above developments make it clear that grey has invaded the administrative – criminal law divide. This evolution is probably inevitable to some extent. It is also hard to dispute that an overly generous approach to fair trial requirements in the case of truly minor infringements (say, a EUR 25 fine for not having one's car duly inspected) may not strike the right balance between the interests of the individual and those of society.

The problem, however, is to find a working criterion. As judge Loucaides wrote in his dissenting opinion in *Jussila*, "I find it difficult, in the context of a fair trial, to distinguish, as the majority do in this case, between criminal offences belonging to the "hard core of criminal law" and others which fall outside that category. Where does one draw the line? (…) To accept such distinctions would open the way to abuse and arbitrariness".

But the problems do not end in the determination of what exactly falls within the sphere of "criministrative" law. Even assuming that one could draw a safe line between the core and periphery of criminal law, one would then be confronted with the

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[51] CJ, 23 September 1986, *Akzo Chemie v. Commission*, C-5/85, *ECR*, p. 2585, para. 30; CJ, 15 June 1994, *Commission v. BASF*, C-137/92 P, *ECR*, p. I-2555, paras. 67-70.

[52] See in that respect ECtHR, 6 January 2010, *Vera Fernández-Huidobro v. Spain*, para. 109 and the references cited therein.

[53] Opinion delivered on in C-681/11, *Schenker*, not yet reported, para. 59.

daunting task of distinguishing between the essential and the disposable guarantees of Article 6 ECHR. This conundrum could be even more intricate than the first one, not least because the need to preserve the individuals from an omnipotent administration has probably never been so pressing.

In that respect, it is difficult not to concur with Judge Pino de Albuquerque when, dissenting in *Menarini*, he writes : "*L'acceptation d'un "pseudo-droit pénal" ou d'un "droit pénal à deux vitesses", où l'administration exerce sur les administrés un pouvoir de punition, imposant parfois des sanctions pécuniaires extrêmement sévères, sans que s'appliquent les garanties classiques du droit et de la procédure pénale, aurait deux conséquences inévitables: l'usurpation par les autorités administratives de la prérogative juridictionnelle du pouvoir de punir et la capitulation des libertés individuelles devant une administration publique toute-puissante*".

Be that as it may, the "criministrative law" sphere seems to have a bright future ahead of it. Therefore, if we cannot get rid of "legal grey', we should at least try to organise it. In that respect, it is submitted that, at any rate, competition law proceedings belong to the darkest, "fiftieth shade of grey" insofar as they share more similarities with the prosecution of robbery than with the enforcement of administrative obligations.

Various elements can be adduced in support of that contention. First, competition law rules consist of general prohibitions that apply to all undertakings, regardless of their wealth, field of activity or legal status.

Second, the Commission and the national competition authorities enjoy extensive investigative powers, including the right to search companies' premises and the homes of people suspected of hiding evidence.

Third, there is no doubt that the sanctions imposed on competition offenders are aimed at deterrence. The fines imposed on competition offenders can be huge, rising up to 10% of an undertaking's turnover and the offence's lack of effective impact on the market does not affect the level of the fines. In addition, the findings made by the Commission in a decision adopted against an undertaking can be used by national competition authorities in other jurisdictions where competition law provides for imprisonment and other personal sanctions.

Finally, it cannot be disputed that competition fines are vested with a certain degree of stigma. As Advocate General Kokott acknowledged, there is a "condemnation ("stigma') associated with the imposition of cartel (…) penalties against the undertaking"[54]. Former Commissioner Monti called cartels the "cancer of market economies"[55] while US Supreme Court Justice Scalia characterised them as the "supreme evil of antitrust"[56]. It is hard not to see in such statements a moral condemnation which brings competition offences to the verge of the "dark core" of criminal law.

This attempt to show the peculiarity of competition law is revealing of the dangers lying behind the blur between criminal and administrative law. The creation

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[54] Opinion of Advocate General Kokott cited in fn. 53, para. 59.

[55] "Monti committed to taking on cartels", *European Voice*, 7 February 2002.

[56] *Verizon Communications, Inc. v. Trinko, LLP*, 13 January 2004, 540 U.S., p. 8.

of a so-called "criministrative law" category will probably create more problems than it will solve. Law relies on fictions. One of these fictions is the clear-cut divide between "white" administrative and "black" criminal law, to which are associated different legal regimes and procedural guarantees. It is the task of lawyers to organise and "process" the "real world" – which is and has always been made of grey – by translating it into stable and simplifying categories.

It is certainly legitimate and indeed necessary to try and adapt the law to the complexity of our times. But it would be foolish to entertain the idea that law is able – or indeed is intended – to reflect all the intricacies and peculiarities of the world "out there". Devising new categories designed to reflect the endless shades of grey that make up the criminal-administrative law divide would not only be an enterprise doomed to failure. By generating expectations that law cannot live up to, such a project would undermine the credibility and authority of the law itself.

Part II

Cross-cutting issues on the interplay between criminal and administrative law

The organization of administrative and criminal law in national legal systems: exclusion, organized or non-organized co-existence

Katja Šugman Stubbs and Matjaž Jager

1. Introduction

The theoretical division between the fields of administrative and criminal law has never been clear, neither in theory nor in practice [1]. Numerous definitions and various concepts have been developed in the attempt to define it [2], but, as is frequently the case, the efforts of theory have failed to bring more coherence to reality. The problem is made more complicated by the different criteria different countries use to define what falls under the jurisdiction of criminal law and what is covered by that of administrative law [3]. These diverse criteria arise from a number of factors: these include

[1] As Advocate General Stick-Haxl pointed out specifically for penalties: "… a comparison of the legal systems of the Member States… reveals, in particular, that the boundary between criminal and administrative penalties is a fluid one" (CJ, 11 July 2002, *Käserei Champignon Hofmeister*, C-210/00, *ECR*, p. I-6468.)

[2] H. Packer, for example, has offered the following criteria for deciding what conduct should be criminalised, rather than regulated through other law fields: "(1) most people view the conduct as socially threatening; (2) the conduct is not condoned by a significant section of society; (3) criminalisation is not inconsistent with the goals of punishment; (4) suppressing the conduct will not inhibit socially desirable conduct; (5) it may be dealt with through even-handed and non-discriminatory enforcement; (6) controlling the behaviour will not expose the criminal justice system to severe qualitative or quantitative strains; (7) there are no reasonable alternatives to the criminal sanction for dealing with it; (8) the costs of enforcement are not prohibitive" (H.L. Packer, *The Limits of the Criminal Sanction*, Stanford, Stanford University Press, 1968). See also Ashford's reflections on what is criminal in A.J. Ashworth, "Is the Criminal Law a Lost Cause?", *Law Quarterly Review*, 2000, 116, p. 230-237.

[3] Smith and Hogan, noting "the difficulty frequently encountered in defining the subject-matter of a particular branch of the law" go on to point out that "… nowhere has this been more greatly felt than in the criminal law". J. C. Smith and B. Hogan, *Criminal Law*, 7th ed., London, Dublin, Edinburgh, Butterworths, 1992, p. 15. Fletcher has come to a similar conclusion: "Yet

anything from strictly legal factors (*e.g.* severity of infraction, differences in liability [4], procedural standards [5], and in the nature and harshness of penalties [6], different goals [7]) to the idiosyncrasies of certain legal cultures regarding their criminal policies [8]. As a result "hazy areas" of something-in-between criminal law and administrative law are being created [9]. It seems that recent developments in EU law have not helped answering this question [10]: if anything, the boundaries between the two domains are becoming even more blurred [11].

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the truly difficult problems in determining the scope of the criminal law are left unresolved. We may share an intuitive sense that deportation, expatriation, tort damages, customs fines, and impeachment are not cases of criminal punishment, yet it is by no means easy to explain why" (G.P. Fletcher, *Rethinking Criminal Law*, Oxford, New York, Oxford University Press, 2000, p. 412).

[4] See for example Romero's discussion of the difference between punitive damages (another sanction of mixed nature) and criminal penalties in US law in L.M. Romero, "Punishment for Ecological Disasters: Punitive Damages and/or Criminal Sanctions", *University of St. Thomas Law Journal*, 2009, 7, p. 154-181.

[5] Faure and Heine report that in many countries (*e.g.* Austria and Germany) there are specific features in the administrative procedure, which are absent from that of criminal law. M.G. Faure and G. Heine, *Criminal Enforcement of Environmental Law in the European Union*, The Hague, Kluwer Law International, 2005, p. 49.

[6] Traditionally criminal law sanctions are considered denunciatory and educational, carrying moral outrage, whereas administrative penalties do not. See *e.g.* J. Feinberg, *Doing & Deserving: Essays in the Theory of Responsibility*, Princeton, Princeton University Press, 1970; R. Duff, *Trials and Punishment*, Cambridge, Cambridge University Press, 1986.

[7] Richardson compares the goals of criminal as opposed to those of administrative. She argues that whereas "the sole purpose of the criminal trial is to reach an accurate finding of guilt or innocence (...) there may be no uniquely correct outcome..." in administrative procedure (G. Richardson, "The Legal Regulation of Process", *in* G. Richardson and H. Genn (eds.), *Administrative Law and Government Action, The Courts and Alternative Mechanisms of Review*, Oxford, Clarendon Press, 1994, p. 111).

[8] The theoretical attempts to distinguish between administrative and criminal law seem particularly difficult in common law systems, where criminal law is still dominated by judge-made doctrines. Ashworth's observation to this effect is well illustrated by the fact that "there are probably more than 8,000 criminal offences in English law" (A. Ashworth, "General Principles of Criminal Law", *in* D. Feldman (ed.), *English Public Law*, Oxford, Oxford University Press, 2004, p. 1211).

[9] Widdershoven also notices that in the Netherlands: "there is a development where the administrative law and criminal law are slowly edging towards each other" (R. Widdershoven, "Encroachment of Criminal Law and Administrative Law in the Netherlands", *Electronic Journal of Comparative Law*, 6, 2002, p. 460).

[10] "In the past, opaqueness in the qualification of sanctions served a purpose. Criminal law was not part of the competence of the EC, and therefore any hint that a sanction might be qualified as a criminal charge had to be avoided" (A. De Moor-van Vugt, "Administrative Sanctions in EU Law", *Review of European Administrative Law*, 2012, 5, p. 41).

[11] Vervaele, for example, discusses the emergence of EU administrative punitive sanctions: sanctions with mixed nature – criminal and administrative. Further on he mentions that the EU Commission's investigating powers to supervise companies and third parties, namely the administrative inspection strongly resembles criminal law search concluding that it is "apparent

However, although criminal and administrative law combine (or fail to combine) with considerable diversity across different national systems in Europe, a number of overall patterns may still be recognized. The key aim of this chapter is thus to map out those prevailing trends, and clarify them in a manner which might allow some action to be taken to rationalize the confused relationship between criminal and administrative law. The chapter therefore proceeds by categorizing the solutions by which national legal systems currently tackle the puzzle of making criminal and administrative law coexist. It will present some model examples for each solution it considers, and discuss their flaws and advantages.

2. What possible models?

On the theoretical level it is possible to imagine two different ways of distinguishing and co-ordinating the fields of criminal and administrative law: the first being the model of (a) exclusion and the second one of (b) parallel (co)existence.

A. Exclusion model

In the exclusion model, there may only be either a criminal or administrative jurisdiction for sanctioning infractions in a certain legal field. If we take, for example, the field of environmental infringements, it is possible to imagine that a certain legal system would sanction environmental infractions either *via* criminal law exclusively or *via* administrative law exclusively [12]. The exclusion model is simple and clear and there is a definite beauty to it: there are no overlaps in jurisdiction, the powers of different authorities are clearly defined, and problems with the transfer of evidence from one domain to the other are avoided, all of which leads to a clear and coherent system. There are, however, certain flaws to this model, whichever of the two solutions we choose. In a scenario where all infringements are handled exclusively by the criminal law system there will be either an overburdening of the criminal courts with relatively minor criminal offences [13] or milder offences will go unpunished altogether due to protective mechanisms peculiar to criminal law (*e. g.* the opportunity principle) [14]. The criminal law system is also more time-consuming and thus more

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that the dividing line between administrative law supervision and criminal law investigation is beginning to fade" (J.A.E. Vervaele, *The Europeanisation of Criminal Law and the Criminal Law Dimension of European Integration*, Brugge, European Legal Studies, College of Europe, 2005, p. 10).

[12] Watson, for example, claims that by 2005 the English legal system was using of purely criminal law sanctions in the field of environmental law (M. Watson, "The enforcement of environmental law: civil or criminal penalties?", *Environmental Law and Management*, 2005, 17, p. 3-6).

[13] One of the problems which arises with enlarging the scope of criminal law is a resulting problem of overcriminalization; a phenomenon addressed by Kadish in the 1960s. See more in S.H. Kadish, "The Crisis of Overcriminalization", *American Criminal Law Quarterly*, 1968, 7, p. 17-34 and later works from J.C. Coffee, Jr., "Does "unlawful" mean "criminal"?", *Boston University Law Review*, 1991, 71, p. 193-246 and D.N. Husak, *Overcriminalization: The Limits of the Criminal Law*, Oxford, Oxford University Press, 2008.

[14] Farmer reports on another flaw of the English system: despite the fact that all the cases were handled by criminal courts, the sentences for environmental criminal acts were still

expensive in comparison to the administrative [15]. Any country's criminal law system must set priorities in handling its caseload, which again leads to minor infractions going unpunished [16]. Disproportionate resources, meanwhile, can be lost by handling minor cases with the due care demanded by criminal law standards [17]. If the legislator decides that *e.g.* tax cases will be handled through the administrative system only, the solution will hit another barrier: there are limits to the kinds of sanctions which may be passed in administrative procedures and severe cases would certainly not be punished with proportionate and dissuasive sentences. The procedural safeguards of administrative law are also not sufficiently protective for handling serious breaches of tax norms. As a result, serious cases requiring severe punishment can go either unpunished, since the administrative system is not "equipped" to handle such offences [18], or can escape with disproportionately low and ineffective sanctioning. Despite its elegance and simplicity the exclusion model therefore suffers from serious flaws.

B. The parallel model

Another possible way of defining the relationship between criminal and administrative systems is to place them in a parallel co-existence in a way that regulates the distribution of cases between them (in a certain legal field). By this some infractions could be handled by administrative authorities, some channelled into criminal law, and in certain instances might even be dealt with both. Parallel existence can take many different forms: (a) with clear divisions and no overlaps between criminal and administrative interventions or (b) with areas where criminal

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disproportionately low. This was probably due to the system having to handle mild cases which would have been dealt with better in the administrative system, and a low level of awareness of the importance of protecting the environment (A. Farmer, *Handbook on Environmental Protection and Enforcement: Principles and Practice*, London, Earthscan, 2007, Case 5-17).

[15] Faure and Svatikova argue that it is more cost-effective to: "complement criminal law enforcement by administrative law rather than to allow for a single (criminal) sanctioning instrument" (M.G. Faure and K. Svatikova, "Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe", *Journal of Environmental Law*, 2012, 24, p. 253).

[16] Widdershoven also points out that the specialized administrative agencies are much better equipped with specialist knowledge about certain fields than criminal courts (R. Widdershoven, *op. cit*., p. 447).

[17] With respect to this problem it is informative to consider law and economic studies on advantages of handling environmental infringements via both administrative and criminal law channels. See *e.g.* K. Svatikova, *Economic Criteria for Criminalization: Optimizing Enforcement in Case of Environmental Violations* (Doctoral thesis), Rotterdam, Erasmus Faculty, 2011, R. Bowles, N. Garoupa, M. Faure. "The Scope of Criminal Law and Criminal Sanctions: an Economic View and Policy Implications", *Journal of Law and Society*, 2008, 35, p. 389-416.

[18] Watson, for example, reports that in England before the introduction of civil and administrative penalties, when all the environment infractions were handled only through the criminal law system, only about 700 cases out of about 50,000 were penalized (M. Watson, *op. cit*., p. 3).

and administrative interventions overlap. Solution (b) tends to break down into one of two scenarios: it can either attempt to impose some order on the overlaps or, on the other hand, leave them to continue more or less chaotically.

As with any parallel solution a lot can go wrong even when there is an attempt at organizing, let alone when the partnership between the domains is undesired and/or uncontrolled. There can be lacunas or overlaps in jurisdiction, mix-ups with investigative powers, problems with admissibility of evidence in criminal court, etc.

1) Clear-cut division of jurisdiction: no overlap

In an ideal world the fields of criminal and administrative law would be arranged in a well-planned and well-run co-existence. Minor or medium infractions in certain legal fields (*e.g.* tax, market manipulation) would be processed through the administrative channel and serious infractions through that of criminal law. For such a division to be successful, legislation would be needed to separate jurisdiction clearly between different authorities. In the most elaborate scenario, different cases would be handled by different authorities, leading *e.g.* to administrative infractions being investigated through inspections by relevant agencies and criminal offences by the police, public prosecutors and later on criminal courts. This being said, even the most elaborate legislative division cannot prevent overlaps in practice; there would always be cases of a "mixed" nature. The precondition for a clear and well-functioning system would therefore be efficient cooperation between all authorities involved. If a case is to be processed justly and efficiently, only collaboration at the outset can eliminate the problems of jurisdiction which might arise.

For such a solution to be effective, the investigative powers of administrative and criminal law authorities should be designed carefully to ensure that (a) there is no overlap in their power to act, (b) the principle of proportionality is respected. Ideally, the investigative powers of administrative authorities would be less invasive (*e.g.* administrative search) as compared to those of criminal law investigators (*e.g.* house search). There should be elaborated rules of evidence regarding the transfer of data between the administrative and criminal law channels.

In practice, it is extremely difficult to bring about a completely clean-cut division. Firstly, such a solution would have to be planned well ahead already on a legislative level, making comprehensive use of realistic information on actual practice. Secondly, it is only possible to imagine a given legal system achieving such a clear division within one legal field or the other. In reality most states have fragmented legislation adopted consecutively (through amendment) which is therefore "fluid" rather than systematically pre-designed. That being the situation in reality, it is nearly impossible to design a transparent division which approaches the ideal. Thirdly, since this ideal would require well-organized, well-meaning institutions communicating and collaborating openly and efficiently, reality might also often leave a lot to be desired. We can therefore conclude that there are many reasons why most legal systems cope

with a more or less chaotic parallel arrangement, with the spheres administrative and criminal law working together as best they can [19].

2) Parallel system with overlaps

As stated above, most systems willingly or unwillingly end up with some kind of parallel organization with powers of administrative and criminal authorities overlapping [20]. These, the commonest solutions, also take different forms, from the more systematic to the more confused. Some of the systems involving parallelism decide to solve the problem of possible overlaps by creating rules governing priority in cases where overlaps might occur. Some legal systems therefore decide to enact the so-called *una via* mechanism by which it is determined already at the legislative level, for example, that in a case where certain facts can be considered either a criminal offence or an administrative offence, one of the systems will take priority. Sometimes the same case can take the other path if the first one proves to be, for whatever reasons, unsuccessful. If criminal prosecution, for example, fails, the case can still be processed in administrative procedure [21]. Sometimes *una via* is not provided for in the legislature, but practice solves the problems of overlaps by creating a *de facto una via* solution. There is an explicit or *tacite* agreement among the authorities that certain cases will only be dealt with in a certain way (either administrative or criminal) [22]. And sometimes case law decides this question.

Una via systems have some definite advantages over the more chaotic ones. Overlaps are successfully resolved in a way that allows both legal fields to serve their purposes: minor infractions being dealt with by administrative authorities and severe

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[19] So much for the level of existing legislation and actual practice. At a jurisprudential level of argument, the theoretical problems of defining what is a criminal and what an administrative case, which we pass over here, do not help either.

[20] Faure and Heine point out that in the field of environmental law: "Establishing a side system to criminal law, which allows different kinds of repressive sanctions by administrative bodies is a European-wide tendency" (M.G. Faure and G. Heine, *Criminal Enforcement of Environmental Law in the European Union*, The Hague, Kluwer Law International, 2005, p. 65).

[21] This is the case in Slovenian tax law, which provides for three types of procedures (1) determination of tax levy; (2) administrative procedure to impose a fee; (3) criminal procedure for serious offences. The tax levy procedure can always run parallel to an administrative and a criminal one, while criminal procedure always takes priority over administrative, if a certain act constitutes both a criminal and administrative offence. The administrative procedure is suspended until the criminal procedure ends. However, if the criminal case is dropped, the administrative may then take place. In a case where an administrative procedure, by any chance, takes place first, a criminal procedure may also still follow (H. Jenull, "Uveljavitev načela ne bis in idem v prekrškovnem in kazenskem postopku", *Pravosodni bilten*, 2007, 28, p. 99-113, H. Jenull, "Razmejitev med kaznivimi dejanji in prekrški v veljavni zakonodaji", *Dnevi prekrškovnega prava*, 2011, 6, p. 16-26).

[22] Faure and Heine mention the German and Belgian example of administrative agencies having a legal duty to refer a serious environmental case to the Public prosecutor, thus resigning their right to settle the case through an administrative procedure. (M.G. Faure and G. Heine, *op. cit.*, p. 65).

ones by criminal courts. Good cooperation and clear divisions also help respect the *ne bis in idem* principle. Criminal courts are not overburdened with minor offences and can serve their purpose of sanctioning the most serious offences better (*ultima ratio*). Since administrative offences are handled by quicker and simpler procedures, more of them can be successfully processed; the result being that more wrongdoings are punished one way or another. Such a system also helps develop a better understanding of what is an administrative matter on one hand and what is a criminal one, on the other.

In certain systems the same case can be processed by both tracks; an example of true parallelism. The same facts can therefore be processed in an administrative and criminal procedure, each following their own rules and each ending up with certain consequences (*e.g.* administrative prohibition and a criminal sanction). Such systems can only work if the cooperation between different bodies and the feed-back provided on the measures taken and cases handled is excellent. Clear rules and good practice on culmination of penalties passed in different procedures in order not to breach the *ne bis in idem* principle should also exist in such a system [23].

It is much more likely that such a system produces many problems, especially if it is accompanied with fragmented or obsolete legislation and bad cooperation and feed-back between different authorities [24]. The same case can be dealt with by different authorities, causing potential problems with the *ne bis in idem* [25]; on the other hand some cases can be completely overlooked due to weak communication between the different bodies involved. As a result such a solution tends to be unpredictable, unstable and does not provide for legal certainty or transparency.

C. Hazy areas

The solutions discussed so far stem from the presumption that differences between criminal and administrative law in certain legal system actually exist and that criminal justice is designed to fight crime and administrative justice is intended to handle administrative affairs. However, even these simple presumptions seem to be less and less true in reality. On one hand, the classical administrative bodies with their administrative authorizations based on administrative procedural solutions

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[23] In the case of Slovenian tax law, as mentioned above (n. 21), if an administrative procedure takes place first, criminal procedure can still follow; however, an administrative sentence already passed must be deducted from the criminal one (H. Jenull, "Uveljavitev..." *op. cit.*, p. 99-113; H. Jenull, "Razmejitev...", *op. cit.*, p. 16-26).

[24] Faure and Heine report that in some countries: "it has been well-documented… that there has been a kind of "civil-war" between the criminal prosecutor and the administrative agency in respect of the adequate kind of reaction in the case of environmental pollution" (M. G. Faure and G. Heine, *op. cit*., p. 65).

[25] Gorunescu reports such problems in the Romanian legal system. She notes that no clear criteria to distinguish between criminal offences and administrative infringements have been set either by legislation or jurisprudence. In her opinion the current vague legal regulation in Romania contradicts the *ne bis in idem* standard established by the ECtHR (M. Gorunescu, "Considerations about overlapping criminal and administrative liability for the same offense", *Challenges of the Knowledge Society*, 2011, 1, p. 169-175).

are increasingly being used to fight crime. We can therefore observe overextension of some administrative law authorizations into areas which would traditionally be viewed as belonging to criminal law.

On the other hand, there are increasingly more legal concepts and solutions which cannot be indisputably classified under just one of these two categories. This is true not only for legal definitions of certain infringements, but also for the nature of certain institutions, for some investigative acts [26], the nature of sanctions [27] and all in all – for entire procedural solutions. On one hand we are witnessing the downgrading of criminal law standards to better fit a tendency for efficiency, and on the other hand there is a drift towards overextending administrative law solutions to enclose some previously traditional criminal law areas. In such a case it is basically impossible to discuss the existence and co-existence of the two legal disciplines: it seems more adequate to address the question of both disciplines merging into a new one.

As Huisman and Koemans succinctly point out: "New administrative sanctions have been created here as well, such as the administrative fine, but existing measures under administrative law are also used now for a new purpose: to fight crime" [28]. In our understanding these authors are pointing out trends in both the merging world of crime and administration [29]: the former illustration being a tendency for the

[26] See different concepts of division between a criminal investigation and an administrative one and rules on the transfer of evidence between those two procedures in the Netherlands, Germany, France, and England and Wales in J.A.E. Vervaele and A.H. Klip (eds.), *European Cooperation Between Tax, Customs and Judicial Authorities*, The Hague, Kluwer Law International, 2002, p. 91-93, 163-168, 211-213, 235-239.

[27] See for example elaborated discussions on a form of responsibility for administrative irregularities in the CJ *Käserei Champignon Hofmeister* case (CJ, 11 July 2002, *Käserei Champignon Hofmeister*, C-210/00, *ECR*, p. I-6453). At the end of an extensive debate on the nature of sanctioning in criminal and administrative procedure, the court decided that general applicability of the fault principle to penalties of an administrative nature cannot be derived from the legal tradition of the Member States. This was not the first CJ case to decide on the nature of penalties laid down in rules of the common agricultural policy and determine they are not criminal in nature. See as well CJ, 18 November 1987, *Maizena and Others*, 137/85, *ECR*, p. 4587, para. 13, deciding that the special arrangement involving advance release of security is not a criminal penalty, and CJ, 27 October, 1992, *Germany v. Commission*, C-240/90, *ECR*, p. I-5383, para. 25, discussing exclusion and deciding that it is not a penal sanction. In the recent *Bonda* case a Polish court asked for a preliminary ruling on a question of a legal nature of the penalty provided for in Article 138 of Regulation no. 1973/04 which refuses a farmer direct payments in the years following the year in which he submitted an incorrect statement. The question was relevant for the possible breach of the *ne bis in idem* principle since *Bonda* was first punished on the basis of this Regulation and afterwards as well in criminal procedure for the same facts of the case. The CJ again decided that the punishment is not of a criminal nature (CJ, 5 June 2012, *Bonda*, C-489/10, *ECR*, p. 217/2).

[28] W. Huisman and M. Koemans, "Administrative Measures in Crime Control", *Erasmus Law Review*, 2008, 1, p. 123.

[29] Faure and Heine point out that legal doctrine in many countries has: "as a result to the so-called administrative dependence of environmental criminal law it is often the administrative authorities that determine the content of environmental criminal law", thus giving us another example of the merging of the field. (M.G. Faure and G. Heine, *op. cit.*, p. 73).

creation of "criministrative" law and the latter being an example of the trend towards overextension of the administrative law into a criminal law domain [30].

We can illustrate the case of administrative authorities being used to fight crime with the Dutch solution. In the Netherlands sworn officials of the Tax and Customs Administration have not only the power to conduct a criminal investigation following the standards of their Criminal Code in respect of all criminal offences in their jurisdiction; these powers even extend to ordering the detention of suspects in police custody [31]. The classical organization of powers by which Police, Public Prosecutor or a criminal pre-trial judge are the sole authorities with criminal investigative authorizations and especially the sole authority to infringe the right to liberty, is therefore completely lost. A solution, unthinkable even a few decades ago, of administrative authority possessing the most essential invasive criminal law authorisation, is therefore very much real and alive nowadays.

Without attempting to be exhaustive we will enumerate just a few solutions of a mixed, criminal and administrative nature. We can witness solutions which downgrade criminal law standards pushing them closer to what was traditionally considered administrative law: simplified criminal or vaguely criminal procedures compensating for less rights with lower penalties (*e.g.* petty offence solutions, out-of court sanctioning (cautioning) [32], compounding (UK, France)) [33], on one hand. On the other hand increasing the rising harshness of penalties issued and severity of infringements dealt with in administrative procedures shows the tendency to engulf an area previously reserved for criminal law. An example for this can be the so-called punitive administrative sanctions, such as surcharge [34] or exclusion. In case

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[30] See Antoine Bailleux's contribution in this book.

[31] This solutions being thoroughly unacceptable in the countries following stricter separation of power principle *e.g.* France, Slovenia. Vervaele points out that the French system is following different goals, namely judicature serving as a true counterweight for the executive, while in Netherlands the primary consideration is the most effective cooperation between different authorities. (J.A.E. Vervaele and A.H. Klip (eds.), *op. cit.*, p. 77 and 181).

[32] M. Jasch, "Police and Prosecutions: Vanishing Differences between Practices in England and Germany", *German Law Journal*, 2004, 5, p. 1207-1216.

[33] In France for example, compounding of tax cases is in the hands of administrative authorities, which decide not to hand the case to the prosecution if the investigated party, accepts to pay a certain sum (usually a fixed tax levy and an administrative fee and a tax fine). As Vervaele points out, the decision not to prosecute is an administrative procedure which strongly resembles a criminal law decision, since it serves to disable both criminal and administrative procedures. In England and Wales extrajudicial disposal of tax cases is also possible in form of compounding. This is a certain form of diversion, an administrative act under which further criminal prosecution is waived under the condition that a certain amount of money is paid (J.A.E. Vervaele and A.H. Klip (eds.), *op. cit.*, p. 200-201, at p. 231).

[34] As the ECtHR decided in *Jussila*: "Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency". The ambiguous nature of the procedure in question (tax levy) and consequently the penalty is obvious from the fact that the court discussed their nature at length. What is interesting is the need of the court to emphasize the existence of "hard core" criminal law, therefore admitting that there are more "hard-core" criminal law cases and the ones less so; thus

of surcharge a punished subject is required not only to reimburse the sum owed (*e.g.* unduly paid or owed), but also has to pay an additional charge which is obviously penal in nature [35]. Therefore, surcharge entails, besides the administrative element of a sanction (namely restitution) a punitive effect as well. The same is true of the administrative sanction of exclusion [36].

There is a danger to both solutions. Despite the fact that engaging administrative agencies in fighting against crime can seem a good way of de-burdening criminal justice and fighting crime more efficiently, it has negative side-effects. It not only blurs the boundaries between the disciplines with effects that are vastly far-reaching for the possible breach of human rights, but it also extends the area of criminalization. What at first glance seems a preventive strategy has hidden repressive effects [37]. It allows an invasion of lower (administrative) procedural standards into criminal law without the protection of criminal law guarantees [38]. As an end result we witness the *net-widening* of the criminal law [39], namely a greater number of individuals being controlled by the criminal justice system.

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pointing out the non-exclusive nature of division between a criminal law and administrative law field (ECtHR, 23 November 2006, *Jussila v. Finland,* App. no. 73053/01). As Judge Loucaides pointed out in his partly dissenting opinion: "I find it difficult, in the context of a fair trial, to distinguish, as the majority do in this case, between criminal offences belonging to the "hard core of criminal law" and others which fall outside that category. Where does one draw the line? (…) To accept such distinctions would open the way to abuse and arbitrariness" (Loucaides, partly dissenting opinion in *Jussila*).

[35] See the case law of ECtHR regarding the question of when a surcharge requires the protection of Article 6 rights in *Bendenoun* (ECtHR, 24 February 1994, *Bendenoun v. France*, Series A, no. 284), *Janosevic* (ECtHR, 23 July 2002, *Janosevic v. Sweden*, App. no. 34619/97), *Morel* (ECtHR, 12 February 2004, *Morel v. France,* App. no. 43284/98) the already mentioned *Jussila case* (ECtHR, 23 November 2006, *Jussila v. Finland,* App. no. 73053/01).

[36] In *Germany v. Commission* (CJ, 27 October 1992, *Germany v. Commission*, C-240/90, *ECR*, p. I-5383) Germany claimed that the sanction of exclusion from Regulation EEC no. 1279/90 of 15 May 1990 (*OJ*, no. L 126, 1990, p. 20) and its predecessors are criminal in nature. The CJ with a rather brief explanation concluded that exclusion is not penal in nature.

[37] As Huisman and Koemans convincingly show by means of examples of the introduction of ASBO in Dutch law (W. Huisman and M. Koemans, *op. cit.*, p. 142).

[38] Such as privilege against self-incrimination, presumption of innocence etc. As Duff and Green point out: "Presumption of innocence has been progressively eroded by broad offence definitions, shifts in burdens of proof, and the use of strict liability..." and warn of the various "hybrid civil-criminal proceedings" (R. A. Duff, S.P. Green, "Introduction: Searching for Foundations", *in* R. A. Duff and S. P. Green (eds.), *Philosophical Foundations of Criminal Law*, Oxford, Oxford University Press, 2011, p. 11-12).

[39] Ashworth says that: "Normalization of crime permits a routinization of crime control that licenses the removal of lesser offences from the hallowed bastions of the criminal trial to the instrumental channels of civil and administrative law" (A. Ashworth and L. Zedner, "Defending the Criminal Law, Reflections on the Changing Character of Crime, Procedure, and Sanctions", *Criminal Law and Philosophy*, 2008, 2, p. 39).

3. Examples

A. Flemish Region tax law

The first example we will use to illustrate the above-described theoretical models is the Flemish Region in Belgium and its law against environmental violations. Until mid-2009 the system was rather chaotic, according to Raedschelders, namely demonstrating most of the characteristics of the chaotic parallel system where no authority is clear as to what their authorizations are: (1) fragmented legislation [40], (2) lack of harmony between different enforcement actors as a result of (3) no clear rules on which authority will take on a certain case [41] which all (4) caused inefficiency in this field [42]. As predicted, such a system also could not provide equality before the law and legal certainty [43].

As a result of this confusion the system largely relied on public prosecutors, therefore using only criminal law as a means of fighting environmental violations [44]. A Chaotic parallel system therefore resulted in a *de facto* exclusion model, namely criminal law taking basically all the cases. And again, the result is what we predicted in the theoretical model: (1) a limited case load being processed by the prosecutors resulting in (2) only few environmental cases being processed due to (3) overburdening of the prosecutor's office [45]. A surprising result was also relatively low penalties imposed and a less surprising one a largely inefficient system [46].

However, the Flemish legislator decided to change the approach completely. With the introduction of the Environment Enforcement Act the option of a parallel system was chosen, with the criminal law system handling only severe cases, all the rest being processed *via* the more efficient administrative approach. They tried to organize a parallel system with clear divisions, by defining precisely the difference in (1) legal definition of administrative environmental infringements on one hand and criminal

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[40] S. Raedschelders, "Interrelations between Administrative and Criminal Sanctions in Environmental Law: New Legislation and Actual Practice in Flanders", *Ninth International Conference on Environmental Compliance and Enforcement*, 2011, p. 617.

[41] "Enforcement was not evident and often no precedence was provided for the effective sanctioning of offences" (*Ibid*., p. 617).

[42] "In addition to this fragmentation, there was a lack of harmony between the different enforcement actors, which caused the efficiency of the environmental policy to remain very limited" (*Ibid*., p. 617).

[43] "Moreover, there were significant differences in approach and prioritisation at the public prosecutor's offices of the various districts" (*Ibid*., p. 617).

[44] A similar situation is described by Watson in English law in the field of environmental law infringements. The system has relied on the use of criminal law to deal with environmental infractions resulting in a vast number of wrongdoings not being punished at all (M. Watson, *op. cit.*, p. 3-6).

[45] "The sanctioning of environmental offences largely remained the responsibility of prosecutors and criminal courts. The limited sanctioning of environmental offences is probably also due to the overburdened public prosecutor's offices" (S. Raedschelders, *op. cit*., p. 617).

[46] "Given the high administrative cost of criminal law, the rather limited prosecution and the relatively low penalties imposed, the efficiency of environmental criminal law as an enforcement tool could be called into question" (*Ibid*., p. 617).

environmental offences on the other [47]. This difference consequently determines the (2) type of sanctioning: administrative infringement can result in an administrative fine or deprivation of advantage, while a criminal environmental offence can result as well in criminal sanction being passed. Despite the fact that environmental offences are established by the police or even administrative supervisors, they are always handed over to the Public Prosecutor to decide how to act. The system therefore also established a clear division on (3) who makes the final decision on how to handle the case: administrative cases are dealt with by supervisors and the criminal ones by Public Prosecutors [48]. Interestingly, if the latter does not start the criminal proceedings, the procedure for imposing an alternate administrative sanction (*e.g.* fine) must be initiated [49]. In this way coherence and much greater efficiency were achieved.

For certain wrongdoings, namely those which can be qualified as environmental offences, the system obviously adopted *una via* solution: despite the fact that criminal offences are (mostly) also established by administrative authorities it was a decision of the legislator that their faith later on depends on the decision of the Public Prosecutor. He can decide whether he will consider a case a criminal offence in which case he must report this decision to the administrative authority which can no longer impose an administrative fine: criminal charge and sanctioning take over. Administrative procedure is also prohibited in case the Public Prosecutor does not make a decision at all. He can also decide not to insist on criminal prosecution and refer the case back to the administrative authority which can impose a fine [50]. *Una via* solution helps reduce double or even multiple conflicts of jurisdiction and solves the problem of priorities avoiding problems of cumulating the sanctions and possible *ne bis in idem* conflicts. Raedschelders reports that the system works well: (1) it accelerated handling of cases [51], and (2) the system is clearer and much more coherent [52].

This case proves that an *una via* parallel system works much better than a (chaotic) parallel system or a system based on an exclusion (*de facto* exclusion of administrative law channel in favour of criminal law one). As it was predicted, few conditions have to be met for this to be true: (1) legislator has to sort out the whole field at once (2) good communication between authorities is necessary; (3) strict rules on division of authorizations.

B. French tax law

In French tax law there is a parallel co-existence (with overlaps) between an administrative tax procedure and a criminal law one: criminal law being used for serious tax fraud, while administrative procedures handling most cases of minor irregularities [53]. Both systems are divided as well regarding (1) the powers of different authorities: tax authorities have only administrative supervisory powers regarding the

[47] *Ibid*., p. 618.
[48] *Ibid*., p. 618-619.
[49] *Ibid*., p. 619.
[50] *Ibid*., p. 620.
[51] *Ibid*., p. 621,
[52] *Ibid*., p. 625 and p. 626.
[53] J.A.E. Vervaele and A.H. Klip (eds.), *op. cit.*, p. 185.

tax levy and do not entail prosecutorial powers or powers of (criminal) investigation which are reserved for the Public Prosecution Service [54], (2) investigative powers and rules of evidence [55], and (3) penalties: tax fines in administrative procedure and criminal penalties in criminal procedure [56]. Interestingly though, it is the administrative authorities which decide which cases will be referred to criminal procedure. This decision is therefore not on the Public Prosecutor, but on the administrative body [57]. However, even such referral does not prevent a parallel administrative procedure regarding the tax levy and the imposition of any tax fines. There is therefore no *una via* system [58] but there are rules on culmination of penalties: the maximum tax fine (up to 80%) can be combined with a criminal sentence.

We can, therefore, conclude that the French tax system is an example of a relatively well-organized parallel system which solves the problem of overlap by (1) allowing for parallel procedures based on a rather clear division between the powers of different bodies and (2) one of the authorities (in this case tax administration one) deciding which case will be handed over to the other track, thus preventing chaos [59]. Rules on culmination of penalties prevent the problems of *ne bis in idem*.

C. The Slovenian case of prosecuting hard-core cartels

In Slovenia there exists since 1970s a parallel administrative/criminal law prosecution of hard core cartels [60]. Administrative procedure is led by the Slovenian Competition Protection Agency (CPA) according to its own substantive and procedural rules. The other option is the standard criminal law enforcement for the criminal offence of "Abuse of monopoly position" against natural and legal persons led by the state prosecutor.

Both state bodies are bound by the principle of legality which means that they have to introduce the procedures *ex officio* as soon as reasons for suspicion exist. In cases where a certain act fulfils elements of both an administrative and a criminal offence, the law stipulates a clear rule: criminal law route has priority. If the criminal procedure begins after the administrative one has already started, the CPA must, by its own initiative, suspend the administrative procedure until the final judgement of the criminal court(s).

But interestingly enough the administrative/judicial practise does not follow this clear rule of criminal law priority. In fact, in practice exactly the opposite is the case. The entire enforcement of illegal hard core cartels is in the hands of the administrative

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[54] *Ibid*., p. 193 and p. 200.

[55] *Ibid.*, p. 212.

[56] *Ibid.*, p. 203.

[57] *Ibid.*, p. 203.

[58] *Ibid.*, p. 205.

[59] In practice, the administrative authorities take care that the number of cases admitted to criminal courts is as big as the courts can actually handle: approximately 1,000 cases of major fraud *per annum* (*Ibid.*, p. 203).

[60] See in greater detail in M. Jager, "Too many cooks spoiling the broth: parallel administrative/criminal law enforcement against "hard core" cartels in Slovenia", *New Journal of European Criminal Law*, 2011, 2, p. 287-300.

agency – CPA [61]. Criminal procedure route is *de facto* regarded as theoretical only and in practice almost never takes place. This *contra legem* practice has been consistently criticised in theory but with no effect; it remains to be well established.

Thus in the system of two parallel procedures in which administrative and criminal investigative bodies (the CPA, the police and the state prosecutor) are all bound by the principle of legality of prosecution and cannot resort to a designated body that could decide on priority on a pragmatic case by case basis as we saw in the Flemish case above, the Slovenian practice established its own pragmatic rule which happens to be just the opposite of what the legislator wanted it to be. The enforcement of hard core cartels remains firmly within the administrative procedure in the hands of CPA – the state agency with expert personnel and most experiences in these frequently complex investigations. We can therefore see that the practice adopted a *de facto una via* system in favour of administrative procedure. From the perspective of *praxis* does it simply make more sense that complex anti-cartel investigations are carried out by a specialized agency with expert personnel and accumulated experience than by a "generalist" police?

4. Conclusion

The topic discussed in this chapter turned out to be very difficult to analyze, since it is sometimes not even clear what the subject of analysis is. The reasons for this are numerous. Firstly, the division between the criminal law and an administrative law fields is most frequently not clearly and coherently defined, not even in the theory of a certain national legal system, let alone it its practice. There is an even greater chaos when these systems, with different understandings of what is criminal and what is an administrative, collide. The EU contributed to the confusion with its history (before the Lisbon Treaty) of not being able to adopt criminal law measures for protecting its legitimate goals and therefore reaching for solutions of adopting (too) far-fetching administrative penal measures. These solutions were then imported into national systems and sometimes changed the nature of their understanding of what is criminal and what is administrative affair [62].

However, on a national level, as the study above shows, it is far better to organize a certain field which possibly falls under both criminal and administrative jurisdiction, in such a way that there is no exclusion: in other words, that both procedures coexist. Such a system has numerous advantages. In brief: it "deburdens" the criminal law system by allowing petty infractions to be dealt with much more efficiently by specialized administrative agencies. However, for such a parallel system to be successful (at least) two conditions must be fulfilled: (1) comprehensible rules

[61] Something similar is reported by Widdershoven for Netherlands, where the (in practice inefficient) criminal law expansion till the end of the 80s was followed by a different trend of referring cases to administrative track for more efficiency (R. Widdershoven, *op. cit.*, p. 446).

[62] De Moor-van Vugt analyzes the emergence of the mixed-natured administrative sanctions introduced by the EU (*e.g.* loss of a deposit, the administrative fine, the surcharge, the exclusion from subsidies and blacklisting) which did not exist in the Dutch law before and studies their legal nature by applying ECtHR standards (A. De Moor-van Vugt, *op. cit.*, p. 5-41).

(substantive and procedural) should exist defining clearly what is a criminal case and what is an administrative one and who is responsible to deal with it and in what way; (2) even the best legal framework cannot solve the conflicts of jurisdiction which will necessarily appear in practice, this is why good cooperation between the authorities is an absolute necessity.

The best solution for the parallel systems is a clearly defined *una via* system, where it is defined in advance which of both systems takes priority if there is a collision. When both systems exist in parallel, either because the administrative one is a condition for criminal or because they are pursuing different goals (and punishments), rules on priority and accumulation of sentence should exist. There should also be clear rules on when an administrative procedure transforms into a criminal one, since problems with the rights of the accused person [63] and the transition of evidence may otherwise arise [64].

However, some important principles need to be respected if the main purpose of the criminal law system is to be preserved: administrative procedure should not be used as a shortcut circumventing criminal procedure standards to search for criminal evidence and it must not serve a need to secure easy convictions (circumventing criminal procedure standards) in serious cases. Otherwise, the system of criminal law guarantees built through the centuries will no longer make any sense.

[63] See an analysis of ECHR rights application in administrative procedures in A. De Moor-van Vugt, p. 5-41.

[64] This problem is obviously much more pressing when evidence "travels" from an administrative procedure to the criminal one, since rules on evidence are much stricter in criminal procedure.

The influence of the EU on the "blurring" between administrative and criminal law*

Pedro Caeiro

1. What exactly does *blurring* mean in this context?

A. If I understand the topic correctly, the "blurring" of administrative and criminal law can have two meanings.

It might mean that the concepts of administrative and criminal law have become fuzzy *as a whole* because they are being used indistinctly and in a way that deprives them of their particular features. As a consequence, it might become hard to say whether any given prohibition or sanction is either of an administrative or criminal nature. In short, we would not be able to discern between the two notions anymore. While the situation may well be complex, this does not seem to be the case.

B. Blurring can also mean that the *boundaries* between administrative law and criminal law are becoming hazy because there are instances where they take on some of each other's elements.

From this perspective, which will be adopted in the following considerations, the blurring presupposes two separate but contiguous entities that can be distinguished from one another save for the area on the border between them. In the background, we have the prototypical notions of criminal law and administrative law (as ideal and more or less traditional models):

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– Criminal law is the branch of law that protects the most important legal interests, both individual and collective, against conduct that seriously harms or endangers them, when such conduct cannot be effectively prevented through other means of state intervention. To that effect, criminal law establishes penalties with a punitive purpose (be it deterrence, retribution or positive prevention), which are applied by a court following a due procedure. In many countries, punishment requires "guilt / culpability" (*Schuld*, *culpa*), whereas other systems accept instances of "objective responsibility" (strict liability, *infractions matérielles*).

In addition to the sanctions, it is commonly understood that some measures taken by the authorities in the course of a penal procedure (*e.g.* pre-trial detention, seizure of objects, freezing of assets etc.) or after the trial (security measures) also pertain to the criminal law area. Such a normative environment should afford a higher level of protection to the guarantees affected by those measures by providing a set of procedural rights that are not necessarily present in administrative proceedings.

– Administrative law is the branch of the law that regulates the activity of the public authorities, especially the State's and its bodies' activity, when they carry out the tasks assigned to them, namely the protection of collective safety against more or less unspecified dangers, as well as fostering and promoting general well-being, by actively supplying public goods and subsidies in various domains (production, education, health, etc.).

In that context, the administration applies measures and sanctions (for the time being, both terms will be used interchangeably, even if they may have different meanings under European law) that might impinge upon individual rights irrespective of whether or not they result from the perpetration of a concrete act or omission.

C. It is submitted that the basic distinctive feature of criminal law is that it prohibits *acts* under the threat of sanctions – distinctive only in the very narrow sense that there can be no *criminal sanctions* proper without an *offence*, *i.e.*, an unlawful violation of a norm that provides for a penalty. This is not to say that the violation of criminal norms cannot attract sanctions that are administrative in nature [1], nor does it mean – obviously – that all public law sanctions for certain acts or omissions are of a criminal nature [2]. However, even if it has a limited value, the proposed definition allows for the affirmation that the "offence", as a concrete unlawful act or omission, is not only a core element of any understanding of criminal law / procedure / sanctions, but is also located at its very centre.

It follows that a given measure / sanction can only be labelled as criminal if it reacts to the commission of an unlawful act, or is part of the procedure undertaken

[1] Arguably, security measures applicable to unaccountable offenders are penal from a formal point of view but administrative in nature (see M.J. Antunes, "O passado, o presente e o futuro do internamento de inimputável em razão de anomalia psíquica", *Revista Portuguesa de Ciência Criminal*, 2003, 13, p. 361 and f.). The same can be said of some instances of extended confiscation: see P. Caeiro, "Sentido e função do instituto da perda de vantagens relacionadas com o crime no confronto com outros meios de prevenção da criminalidade reditícia (em especial, os procedimentos de confisco *in rem* e a criminalização do enriquecimento 'ilícito')", *Revista Portuguesa de Ciência Criminal*, 2011, 21, p. 267 and f.

[2] See *infra*.

for the investigation of that act or for the prosecution or trial of its perpetrator. In fact, all the restrictions of individual rights along the procedure aim at the ultimate target of imputing the unlawful act to the defendant, which will take concrete form as an allocation of responsibility (a sanction proper) and / or a security measure to prevent the danger of the future commission of similar acts.

As a consequence, administrative proceedings / measures / sanctions can only lead to a blurring with criminal law in the same circumstances, *i.e.*, when they suppose the commission of a concrete unlawful act, which will lead to a limitation of the infringer's rights, either as a response, by the public power, to that violation, or as a means of ascertaining it.

Other kinds of administrative measures, which pursue the prevention of danger in a more general manner, cannot be held accountable for the blurring of borders with criminal law even where they assume similar material content and cause severe restrictions of individual rights (*e.g.* the deprivation of freedom or of property rights). This is the paradigmatic case of preventive detention and freezing of assets when they do *not* arise from a (suspected or proven) concrete offence and thus are not part of proper criminal proceedings [3]. Irrespective of the extent to which they might be (il)legitimate under human rights law (namely, the rights to liberty and property) [4], those measures (and the proceedings where they are applied) do not result from the proven or suspected perpetration of a concrete unlawful *act*, but are adopted to prevent someone from committing an offence, or, more generally, engaging in unlawful activities. Consequently, in spite of their material content, they cannot contribute to the blurring between criminal and administrative law.

D. The administrative measures and sanctions that suppose the commission of an unlawful act can be split into three basic groups, according to their *purpose*:

1) Restorative measures aim to bring things back to the *statu quo ante*, *i.e.*, the situation in which the concrete public interest affected was before the failure to comply or collaborate (*e.g.* restitution of unduly obtained advantages accruing interests, loss of securities or deposits paid as compensation for the risk).

2) Preventative measures aim to prevent danger from turning into damage. The particular feature of these measures is that they are based on an unlawful act or omission which causes an (actual or potential) danger to the public interest. Hence, preventative measures bear a close connection to the danger that they intend to

[3] In this vein, the European Court of Human Rights (ECtHR) ruled that, in the absence of a "sufficient causal connection" between the conviction for an offence and the application of preventive detention as a (criminal) security measure ("*Sicherungsverwahrung*"), the deprivation of liberty inherent in the latter cannot be justified under Article 5, para. 1(a) ECHR, as "detention after conviction" (although it might be valid, in the abstract, under the other sub-paragraphs regulating preventive detention). This means that the Court makes a distinction between the deprivation of freedom *resulting* from an offence (either as a penalty or as a security measure) and the other forms of detention: see ECtHR, 17 December 2009, *M. v. Germany* and the commentary in C. Michaelsen, ""From Strasbourg, with Love" – Preventive Detention before the German Federal Constitutional Court and the European Court of Human Rights", *Human Rights Law Review*, 2012, 12, 1, p. 148 and f.

[4] See, in this respect, ECtHR, 19 February 2009, *A. and others v. United Kingdom*.

react against and thus have their scope and duration limited to the persistence of the situation (*e.g.* the temporary withdrawal of a permit needed for the functioning of a factory which is not complying with certain safety rules).

3) Punitive measures are admonitions, pursuing general and individual deterrence, in contrast to *criminal* punishment, the particular feature of which lies in the purpose of reassuring society at large as to the validity and effectiveness of the norms protecting valuable legal interests (the so-called "positive prevention"). They also pursue a punitive purpose (*lato sensu*) in the sense that, contrary to the previous categories, they are intended as a response *caused by the act itself*, not by the damage or by the dangerous situation produced by the act.

2. Bearing in mind this general framework, let us now analyse which administrative measures can actually be held liable for blurring administrative and criminal law.

Restorative measures clearly do not belong to this group, because they are subject to a whole different logic, closer to commutative justice.

As for *preventative measures*, the situation is not so clear, because they might assume the same material content of measures and sanctions of a different nature. Take, for instance, the example of temporarily suspending the functioning of a factory: depending on the case at hand, it might be a *true* preventative measure (because it simply reacts to the failure to comply with the safety rules that condition the activity), a punitive administrative measure (if there is a specific provision in administrative law attaching that *sanction* to that particular failure) or even a penalty *stricto sensu* (if the law punishes such failure with penal *sanctions*). The identification of the type of measure at stake requires a thorough analysis of its regime (competent authorities, procedure, duration of the measure, etc.). In any case*, true* preventative measures should not induce any confusion with criminal law because they do not aim to allocate responsibility for the unlawful act but rather pursue a *prophylactic purpose regarding a given situation*.

Finally, it is obvious that *administrative punitive measures* are the category which can easily lead to blurring between administrative and criminal law because they share the content of some penal sanctions (mostly, the payment of an amount of money, the deprivation of the right to apply for grants or public tenders and the temporary ban on exercising a given profession, and, in some systems and to a lesser extent, the deprivation of freedom for a short period of time), as well as a punitive purpose (*lato sensu*). Moreover, the norms that provide for administrative punitive measures have virtually the same structure as penal norms: they threaten with punishment conduct that is established in a more or less precise fashion. Additionally, they regulate areas that are also subject to criminal law (economic activity, public health and other collective interests).

In short, the blur with criminal law *is* the very history of administrative punitive law, starting, at least, from the moment when the administration became subject to the law. In this sense, the blur has always been there: regardless of the content we might give to the concept "administrative punitive law", it is safe to say that the boundaries between the two branches were always permeable, especially in the fields where the administration is more active (production and consumption, public health, taxing, financial markets, etc.).

This blur exists both in the systems that extend their penal law to some infringements against administrative interests (*contraventions et peines de police*, the nature of which is disputed, and which are in any case different from the *sanctions administratives* and the *sanctions administratives n'ayant pas un caractère pénal*[5]) and in the systems that handle those infringements within administrative law, which explicitly defines itself as "non-criminal" (as the German *Ordnungswidrigkeiten*, punishable with *Geldbussen*[6], and the Portuguese law that took inspiration from them[7]). In the latter case, the administrative nature of the law does not prevent it from borrowing many features from criminal law and there is a steady "flow" of prohibited conduct between the two, in both directions. For instance, driving under the influence of alcohol and evading taxes might be criminal or rather mere administrative offences depending on more or less contingent political decisions (*e. g.* concerning the rate of blood alcohol content or the amount of the fraud) that will ultimately establish the border between the two branches.

In this sense, the blur is a structural part of the picture and it will certainly stay there as long as there is a need to apply punitive measures outside the framework of a formal penal system.

3. The first dimension of the blurring described above is an interesting field of work for lawmakers and the academia but might not work in favour of individual freedoms. With the knowledge that criminal law and criminal sanctions are circumscribed by several limits and guarantees, both at the domestic and the international level, the States might be tempted to manipulate their domestic definitions by giving penal intervention a different name (*e.g*. administrative law) so as to evade those limits and guarantees[8].

In order to ward off such a possibility, the ECtHR has established autonomous notions of "criminal charges" and "criminal offences" to the effects of the application of the Convention [ECHR], namely Articles 6 and 7. The practical consequence is that the guarantees of the Convention might extend to offences and procedures that are considered as administrative – and remain as such – in the domestic legal systems, which means that national authorities must deal with them *as if* they were of a criminal nature inasmuch as the said guarantees apply (including the ones laid down in the protocols to the ECHR)[9]. Hence, the purpose of protecting individual rights is the second cause of the blurring between administrative and criminal law.

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[5] For an overview, *e.g*, of the French system, see E. Breen, "Country Analysis – France", *in* O. Jansen (ed.), *Administrative Sanctions in the European Union*, Cambridge, Intersentia, 2013, p. 197.

[6] See G. Dannecker, "Country Analysis – Germany", *ibid.*, p. 221.

[7] See P. Caeiro and M.Â. Lemos, "Country Analysis – Portugal", *ibid.*, p. 470.

[8] See F. Ost, "The original canons of interpretation of the European Court of Human Rights", *in* M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions*, The Hague, Martinus Nijhoff, 1992, p. 306.

[9] See ECtHR, 7 June 2007, *Sergey Zolotukhin v. Russia*, paras. 29 and f., establishing the applicability of the principle *ne bis in idem* to an accumulation of administrative punitive sanctions and criminal sanctions *stricto sensu*. The Court found that the "words 'in criminal

The relevant jurisprudence in that respect is well-known and it will suffice to point out the most important aspects: according to the ECtHR's case law, the qualification issue only arises when the domestic system at hand unequivocally considers the offence or the charges as *non-criminal* [10]. In those cases, the Court applies certain criteria related to the nature of the offence and the severity of the penalty to confirm whether or not the qualification as non-criminal by the State of origin is admissible [11]. Over time – actually: as early as 1984, in the *Öztürk* judgment [12] –, the Court modified the second criterion, shifting the analysis of the nature of the offence from the socio-ethical relevance of the charges to the aim of the applicable sanctions: the offence is deemed to be criminal in nature if the applicable sanctions are deterrent and punitive [13]. By the same token, the Court put forward the requirement that the norm violated be "general in character", which was later applied in a number of cases [14].

This approach and its consequences will be analysed in more detail later in this study. At this point, it suffices to point out that the current case law of the ECtHR

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proceedings' and 'penal procedure' used in the text of Article 4 of Protocol no. 7 – rendered in the French text as '*pénalement*' and '*procédure pénale*' – must be interpreted in the light of the general principles concerning the corresponding words 'criminal charge' ('*infraction pénale*') and 'penalty' respectively in Articles 6 and 7 of the Convention"; see also the Judgment of the Grand Chamber in the same case, of 10 February 2009, paras. 94 and f., para. 120, and the commentary of J.A.E. Vervaele, "*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?", *Utrecht Law Review*, 2013, 9/4, p. 211 and f. In the same direction, see the recent judgment ECtHR, 4 March 2014, *Grande Stevens and others v. Italy*.

[10] ECtHR, 8 June 1976, *Engel and Others v. The Netherlands*, para. 81.

[11] *Ibid*., para. 82: "In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States. The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. In this respect, the Court expresses its agreement with the Government. However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so".

[12] ECtHR, 21 February 1984, *Öztürk v. Germany*.

[13] *Ibid*., para. 53.

[14] *Ibid.*; ECtHR, 22 May 1990, *Weber v. Switzerland*, para. 33; ECtHR, 27 August 1991, *Demicoli v. Malta*, para. 33; ECtHR, 23 March 1994, *Ravnsborg v. Sweden*, para. 34; and ECtHR, 11 January 2001, *Inocêncio v. Portugal*.

considers as criminal, for the purposes of the Convention, the offences that meet one of the following conditions [15]:

– are qualified as such by the national system of origin;
– are punishable with sanctions that pursue a deterrent and punitive aim, except if the norm does not have a general character;
– are punishable with sanctions that, due to their severity, are analogous to penal sanctions / criminal penalties.

4. To this extent, we can conclude that blurring between administrative punitive law and criminal law is caused by a number of different factors:

– they share some common areas of social activity as the object of their regulation;
– some prohibited acts "travel" between the two branches in time and space: depending on the moment and the country, they might be administrative violations or criminal offences;
– some sanctions with similar content are applicable in both systems;
– the minimum individual rights and guarantees that can be used to oppose State intervention are virtually the same in both branches, under the influence of the ECtHR case law.

How can the EU influence the existence and development of this blur?

5. To answer the main question of this study, it is necessary to sketch the way in which the EU might intervene in the sanctions field. Actually, its role can be seen as twofold.

In the first place, the protection of the interests of the EU requires that Member States apply effective, proportionate and dissuasive sanctions to those who prejudice or endanger them even where EU law does not explicitly call for sanctioning instruments (principle of loyal cooperation) (*infra*, ***A.***).

In the second place, the EU can legislate on sanctions, which should be applied either by EU bodies or national authorities, either preceding or not a legislative intervention by the Member States (*infra*, ***B.***).

A. The principle of loyal cooperation does not specify which branch of law should be used by the Member States, allowing for a situation where the various States might adopt sanctions and procedures of a different nature to protect the same interests against the same conduct. Does the generic formulation of the principle enhance the blur?

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[15] In ECtHR, 23 November 2011, *Jussila v. Finland [GC]*, paras. 31 and f., after having acknowledged some fluctuations in its case-law (namely in *Morel*), the Court clarified that the second and third criteria are "not necessarily cumulative", because the qualification as criminal will obtain if either one is met. Nevertheless, "this does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge". Adding to the oscillation of the criteria commented upon *infra*, 6, one might also recall what seems to be the abandonment of the comparative test put forward in *Engel* and *Öztürk* (which, by the way, was never performed in a very deep fashion: see, in this respect, the *Dissenting Opinion of Judge Matscher* in the *Öztürk* Judgment, A, 2).

Obviously, there will be no increased blur at the level where the protection is actually enacted – that is to say, the national level. In each Member State, the means chosen will be administrative, or criminal, or of any other kind that complies with the European requirement.

But can we say the same with respect to the European level? From an EU perspective, is there not a certain blur when the required protection can be adequately provided, regardless of whether it is through administrative or criminal law?

One might be tempted to ask whether or not the interchangeability between the two branches indicates that criminal law is not really necessary (*ultima ratio*). The answer should be that, when the EU does not specify the branch of law to be used (either because it lacks the competence to do so or because it is unwilling to exercise it), the responsibility for the choice – *and thus the establishment of the criteria that differentiate the use of administrative and criminal law* – lies with each Member State and the type of intervention deemed appropriate might differ from one State to the other according to each one's particular circumstances. Hence, the general rule on the duty to apply effective, proportional and dissuasive measures causes no blur, either at the national or at the European level.

A similar issue can be found in the way in which the EU exercises its competence over the liability of legal persons for criminal offences, in the cases where it imposes on MS the duty to *incriminate* certain acts.

Due to the resistance shown by some Member State vis-à-vis the *criminal* liability of legal persons, European instruments invariably state that it is the duty of the States to ensure that legal persons "can be held liable" for those offences and are subject to "effective, proportionate and dissuasive sanctions". The particular feature presented by the insertion of this command into acts providing for the mandatory *criminalisation* of conduct is that, by contrast with the use of the general formula, such legislation apparently disrespects either the *ultima ratio* principle (since administrative law seems to suffice if the offence is perpetrated by a certain kind of offender) or the principle of effective protection (because criminal law is deemed necessary to prevent and punish that kind of conduct, but the European legislator opens the door to mere administrative intervention if the offence is perpetrated by a certain kind of offender).

Arguably, a way out of this conundrum can be the assertion that, regarding legal persons (as opposed to individual offenders), the effectiveness of the two kinds of measures does not differ significantly.

B. In another direction, and as one might expect, the possible influence of the EU on the blur between administrative and criminal law concerns the administrative "measures" and "penalties" laid down in some European regulations.

Regulation 2988/95 draws a distinction between the two, which has some consequences, namely in terms of the subjective element: intent or negligence are required only for the application of (administrative) penalties, not measures, and the latter are not to be regarded "as penalties" (Articles 4 and 5)[16]. Other regulations

[16] On this, see A. DE MOOR-VAN VUGT, "Administrative Sanctions in EU Law", *Review of European Administrative Law*, 2012, 5/1, p. 12 and f.

explicitly state that the sanctions that they provide for "shall not be regarded as criminal penalties" [17].

Additionally, the Court of Justice has found a number of times that some administrative penalties, albeit pursuing a deterrent aim, are not "criminal sanctions". That was the case in *Internationale Handelsgesellschaft* [18] and *Maizena* (forfeiture of securities and deposits) [19], *Germany v. Commission* (exclusion) [20], *Käserei Champignon*

[17] See, *e.g.*, Article 3(5) of the Commission Regulation 150/2001 of 25 January 2001 laying down detailed rules for the application of Council Regulation 104/2000 as regards the penalties to be applied to producer organisations in the fisheries sector for irregularity of the intervention mechanism and amending Regulation 142/98 (repealed by Commission Implementing Regulation 1420/2013 of 17 December 2013); and Article 25(3) of the Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ*, no. L 1, 4 January 2003, p. 1.

[18] CJ, 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermitte*l, C-11/70, *ECR*, p. 1161, paras. 17 and f.: "The plaintiff in the main action also points out that forfeiture of the deposit in the event of the undertaking to import or export not being fulfilled really constitutes a fine or a penalty which the Treaty has not authorized the Council and the Commission to institute. Para. 18. This argument is based on a false analysis of the system of deposits which cannot be equated with a penal sanction, since it is merely the guarantee that an undertaking voluntarily assumed will be carried out".

[19] CJ, 18 November 1987, *Maizena Gesellschaft mbH and others v. Bundesanstalt für landwirtschaftliche Marktordnung (BALM)*, C-137/85, *ECR*, p. 4587, paras. 13 and f.: "(…) Thus in a system involving advance release of the security, the penalty constitutes the corollary of the system of security and is intended to achieve the same objectives as the security itself. That sanction is imposed at a flat rate and is independent of any culpability on the part of the trader. It is therefore an integral part of the system of security at issue and is not criminal in nature. Para. 14. Consequently, in a system of security such as that described above, the two principles typical of criminal law referred to by the national court, namely the *principles nulla poena sine culpa* and *in dubio pro reo*, are not applicable. Para. 15. However, the Parties are not for that reason deprived of legal protection. As the Court has held (...), a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis. Moreover, the Court has always emphasized that fundamental rights are an integral part of the general principles of community law, which it is called upon to enforce. Finally, it is settled law (...) that the provisions of community law must comply with the principle of proportionality (...)".

[20] CJ, 27 October 1992, *Germany v. Commission*, C-240/90, *ECR*, p. I-05383, para. 25: "the exclusions at issue do not constitute penal sanctions", although the person concerned by exclusion and surcharges "suffers a financial loss greater than the mere reimbursement, perhaps with interest, of the aid improperly received".

(reduction of refunds)[21] and, more recently, *Bonda* (partial exclusion)[22].

[21] CJ, 11 July 2002, *Käserei Champignon Hofmeister GmbH & Co. KG v Hauptzollamt Hamburg-Jonas*, C-210/00, *ECR*, p. I-6453, paras. 38 and f.: "As the Court pointed out in paragraph 19 of the judgment in *Germany v. Commission*, cited above, temporary exclusion from the benefit of a scheme of aid, like surcharges calculated based on the amount of aid unduly paid, are intended to combat the numerous irregularities which are committed in the context of agricultural aid, and which, because they weigh heavily on the Community budget, are of such a nature as to compromise the action undertaken by the institutions in that field to stabilise markets, support the standard of living of farmers and ensure that supplies reach consumers at reasonable prices. Para. 39. In the same vein, the ninth recital in the preamble to Regulation 2988/95 states that Community measures and penalties laid down in pursuance of the objectives of the Common Agricultural Policy form an integral part of the aid systems and that they pursue their own ends. Para. 40. Regulation 2945/94, which amended Regulation 3665/87, states in the first recital in its preamble, that the Community rules provide for the granting of export refunds on the basis of solely objective criteria, in particular concerning the quantity, nature and characteristics of the product exported as well as its geographical destination; whereas in the light of experience, measures to combat irregularities and notably fraud prejudicial to the Community budget should be intensified; whereas, to that end, provision should be made for the recovery of amounts unduly paid and sanctions to encourage exporters to comply with Community rules. Para. 41. In explaining the nature of the breaches complained of, the Court has emphasised on several occasions that the rules breached were aimed solely at traders who had freely chosen to take advantage of an agricultural aid scheme (see, to that effect, *Maizena*, para. 13, and *Germany v. Commission*, para. 26). In the context of a Community aid scheme, in which the granting of the aid is necessarily subject to the condition that the beneficiary offers all guarantees of probity and trustworthiness, the penalty imposed in the event of non-compliance with those requirements constitutes a specific administrative instrument forming an integral part of the scheme of aid and intended to ensure the sound financial management of Community public funds. (...) Para. 43. Lastly, it should be pointed out that the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation 3665/87 consists of the payment of a penalty, the amount of which is determined on the basis of the amount which would have been unduly received by the trader had an irregularity not been detected by the competent authorities. It is, therefore, an integral part of the export refund scheme in question and is not of a criminal nature. Para. 44. It follows from all of the foregoing considerations that point (a) of the first subparagraph of Article 11(1) of Regulation 3665/87 cannot be said to be of a criminal nature. It follows that the principle *nulla poena sine culpa* is not applicable to this penalty. (...) Para. 48. Contrary to the submissions of KCH, the fact that Hansen concerned national penalties does not make it completely irrelevant for the purposes of describing the state of Community law. The Court was asked about the interpretation of Community law and, moreover, explicitly concluded, in paragraph 20 of its judgment, that the general principles of Community law do not preclude the application of national provisions under which an employer whose employees infringe a Community regulation may incur strict criminal liability. (...) Para. 51. Secondly, although Article 5(2) of Regulation 2988/95 provides that irregularities which are not intentional or negligent may give rise only to those penalties laid down in Article 5(1) which are not equivalent to a criminal penalty, there is no indication that, when examining that condition, criteria are to be applied which differ from those used by the Court in paragraphs 35 to 44 of this judgment. Para. 52. Lastly, it should be recalled that the fact that the principle *nulla poena sine culpa* is not applicable to penalties such as those at issue in the main proceedings does not leave the person subject to the regulation without legal protection. The Court has held in this connection that a penalty, even of a non-criminal nature, cannot be imposed unless it

It seems that, in this context, the Court uses the word "criminal" in a very narrow sense, deeply marked by the quarrel over the competence of the EC to pass criminal law, which has experienced one of its most intense episodes in the *Germany v. Commission* (1992) case. This is confirmed by the judgments in which the Court ruled that the competence to pass criminal legislation remained, in principle, with the States [23], as well as the notorious decision in *Commission v. Council* (2005), where the Court ruled that the Community legislature could take measures related to the criminal law of the Member States when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities was essential for the full effectiveness of the protection of the environment [24].

It is clear that, in those decisions, the CJ used a concept of criminal law / penalties *stricto sensu*, since the *competence* of the EU to establish administrative penalties was not being disputed. In the same vein, the framework decisions and directives through which the EU directs Member States to ensure that a given conduct "is punishable" create a duty to *incriminate* such conduct, providing for criminal sanctions proper (in the eyes of domestic law). That duty would not be fulfilled if the States adopted administrative punitive sanctions – even if they would qualify as "criminal" in the light of the ECHR.

To those effects, the use of a narrow concept is justified. It is in fact a way of *avoiding* the blur in the sense that it is crucial to distinguish accurately, at the competence level, between the requisites for the adoption of each kind of sanction.

6. However, it is also clear that the CJ draws more consequences from the non-criminal nature of the penalties than the competence of the EU to pass them. It allows the Court, for instance, to assert the admissibility of strict liability for those administrative penalties (*Maizena* and *Käserei*), as well as the inapplicability of the principles *in dubio pro reo* (*Maizena*) and *ne bis in idem* to the effect of preventing criminal penalties (*Bonda*).

The question is whether, while assessing the nature of those sanctions in a context where the protection of individual rights is at stake [25], the CJ is bound to strictly follow the case-law of the ECtHR, namely by applying the *Engel* criteria [26], or, at least, whether there are good reasons to do so – and what impact the answers have on the blur between the two legal branches.

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rests on a clear and unambiguous legal basis. Moreover, it is settled case-law that provisions of Community law must comply with the principle of proportionality".

[22] CJ, 5 June 2012, *Criminal proceedings against Łukasz Marcin Bonda*, C-489/10 (yet unpublished) paras. 26 and f.

[23] See, *e.g.*, CJ, 11 November 1981, *Criminal proceedings against Guerrino Casati*, C-203/80, *ECR*, p. 2595, para. 27.

[24] CJ, 13 September 2005, *Commission v. Council*, C-176/03, *ECR*, p. I-07879, para. 48.

[25] Arguing for a dual qualification of criminal sanctions in EU law, according to the purpose it should serve (competence issues *versus* procedural guarantees), see also J. Öberg, "The definition of criminal sanctions in the EU", *European Criminal Law Review*, 2014, 3/3, p. 273 and f.

[26] In *Bonda*, the CJ has applied explicitly and in a detailed manner the *Engel* criteria for the first time, following the lead of the opinion of Advocate General Kokott.

A. Article 52(3) of the Charter of Fundamental Rights of the European Union (CFREU) provides that, in so far as the rights contained therein correspond to rights guaranteed by the ECHR, "the meaning and scope of those rights shall be the same as those laid down by the said Convention" although this "shall not prevent Union law providing more extensive protection". The interpretation of the actual scope of this norm exceeds the purpose of the present study, but it does not seem possible to avoid some reflections on the issue, even if perfunctory.

It has been suggested that this norm would imply *ipso jure* the reception, in EU law, of the case law of the ECtHR regarding the construction of homologous rights in the ECHR [27]. This would have the practical consequence that the CJ would be bound to apply, *e.g*. the *Engel* criteria (or any other that the ECtHR might use in the future), to determine the *scope* of the rights attached to a "criminal charge" or a "criminal offence" (namely, those contained in Articles 48, 49 and 50 CFREU).

This would arguably mean a self-imposed *de facto* subjection of EU authorities (CJ included) to the *decisions* of the ECtHR. Although it is a viable interpretation of that norm, it might be hard to adopt it in the absence of a specific provision to that effect, if we bear in mind that the accession of the EU to the ECtHR is in the process of being negotiated, whatever the result of such a negotiation might be. In short, such a construction might be an unwarranted anticipation, at the normative level, of a political decision that is yet to come. Hence, as far the as the CJ is concerned, it is submitted that the respect for the first limb of Article 52(3) means that: 1) the CJ cannot interpret the CFREU in a way that would be incompatible with the text of the Convention [28], which is, in some instances, more detailed than the Charter (compare, *e.g.*, Articles 47 and 48 of the former with Articles 6(1) and 6(3) of the latter); 2) the CJ must take into due consideration the jurisprudence of the ECtHR, as well as the legal literature, so as to determine, pursuant to its own jurisdictional powers, the scope (and meaning) of the rights laid down in the Convention. At most, there might be a sort of presumption in favour of the constructions upheld by the ECtHR; but the formal obligation to follow them will emerge only with the accession of the EU to the Convention – in the terms that will be defined in the accession agreement.

B. The second question is whether, even in the absence of a strict duty to adopt the constructions established by the ECtHR, the CJ *should* follow the *Engel* criteria in the determination of what "criminal charges" and "criminal offences" are, as opposed to their administrative counterpart.

1) The irrelevance, for this purpose, of the label of the charges / offences / sanctions under EU law (first criterion) is a sound starting point, and the same can be said of the analysis of the severity of the penalty (third criterion). In this sense, the "blur" created by the ECtHR for the sake of protecting individual rights against possible manipulation of the labels by the holder of the *ius puniendi* is certainly well-founded and should be adhered to by the CJ.

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[27] J.A.E. Vervaele, *op. cit*., p. 220.

[28] It does not seem necessary to stress that such incompatibility could only result from a *lower* level of protection since a higher level of protection could hardly be seen as incompatible with an instrument that guarantees individual rights, at least in the public law field.

In fact, the problem here might be, not the divergence of the formal criteria, but rather the difference in their contents. As the CJ does not seem to apply the severity criterion very often (see *infra*), it remains to be seen whether it is prepared to acknowledge the criminal nature of a sanction on the basis of its severity in the possibly few cases where a severe penalty does not meet the second criterion (*i.e.* where it does not act as a deterrent or is not punitive).

2) As a matter of fact, the CJ has applied more often the second criterion put forward by the ECtHR in its post-*Öztürk* jurisprudence and has assessed the nature of the offence through the aims of the sanctions at stake, excluding from the scope of punitive sanctions those which are not of general application. Such an approach systematically leads to the conclusion that EU measures applied in the ambit of the common agricultural policy and similar sectors, especially surcharges / reduction of refunds and exclusion / blacklisting do not have a punitive aim and, moreover, are not of general application.

This would seem in line with the case law of the ECtHR. However, under the formal convergence of the criteria, there is considerable divergence between their contents: it is not clear that a reduction of export refunds and a tax surcharge are different enough to be characterised in opposite ways [29]. In both cases, the application of *the law* to the actual facts (the true situation of the individual regarding the aid or his fiscal duties, regardless of his false declarations) leads to the legitimate expectation that his property is valued X. It is therefore the law that gives rise to legitimate expectations, not the actual decision taken by the authorities: such a decision (respectively) grants the right to the aid or quantifies the amount of the tax due. If the false declaration leads to a decrease of the said value X by the means of a reduction or a surcharge, the financial loss *caused* by the irregularity is similar (although not exactly the same, as the value X is potential in the former case and actual in the latter).

In the opposite direction, it has been held that "with regard to this prospect of aid, there is no legitimate expectation of aid where a beneficiary of aid has knowingly made false declarations: he knew from the start that he would not get any aid which was not reduced if he made false declarations" [30]; as a consequence, in the absence of a legitimate expectation, there could be no severe penalty. I respectfully disagree. In the first place, the lack of a legitimate expectation would not contend with the severity of the penalty, but rather with its very existence: the sanction would really have no content. In the second place, that argument would also lead to denying the punitive nature of tax surcharges or financial penalties in general: the very fact of perpetrating an offence would, *ipso jure*, cancel out the legitimate expectations of the offender to his property in its actual configuration, since he knows, or should know, that he incurs a penalty entailing a financial loss. Such an argument cannot be accepted: it is the actual imposition of the reduction that cancels out the legitimate expectation to receive the refunds corresponding to the true situation.

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[29] Compare *Maizena*, para. 13, and ECtHR, 23 July 2002, *Janosevic v. Sweden*, para. 68.

[30] Opinion of Advocate General Kokott, 15 December 2011, *Łukasz Marcin Bonda*, C-489/10, para. 71.

Thus, the possible divergence between the case law of the two courts in this respect enhances the blur between administrative and criminal law: sanctions with the same or similar contents, which are administrative in their law of origin, might be qualified, *to the same effect of protecting individual guarantees*, as either criminal or administrative, depending on whether or not they are under the jurisdiction of the CJ (*rectius*: on whether or not they are provided for by EU law [31], because, if they pertain to national law, the CJ will refer their qualification back to the national courts [32]… which are bound to apply the ECtHR criteria!).

It is hard not to see this result as odd and undesirable because the scope of the guarantees set out in the ECHR should not depend on the circumstance that the sanctions are provided for by domestic rather than EU law – especially when the CJ and the very Charter of Fundamental Rights defer so vehemently to the Convention. In a way, the problem will be solved by the accession, if the ECtHR be conferred the power to rule ultimately on the alleged violation of human rights by EU bodies and agencies. However, if that might avoid the blur caused by dual jurisdiction over the same issues, it will not solve, but rather expand, the unwarranted blur inherent in the construction of the "second criterion" by the current case law of the ECtHR.

3) In fact, there are additional and separate problematic issues in the "second criterion" as established by the CJ in *Öztürk* and the case law thereafter.

As said [33], the construction of "criminal charges" and "criminal offences" as autonomous concepts began in a case where *disciplinary* sanctions were applied (*Engel*), whereas their ulterior development addressed mostly common administrative (regulatory) offences. This might explain the evolution of the Court's case law after *Engel* and *Campbell and Fell* [34]. In fact, in spite of often reciting its faithfulness to the *Engel* criteria, the Court has elaborated further (and modified) those criteria over time. Already in *Öztürk*, the Court referred to the two aspects that are of direct interest to our subject: in the first place, it assessed the criminal nature of the offence through the deterrent and punitive aim of the applicable sanctions [35]; in the second place, it

[31] See J.A.E. Vervaele, *op. cit.*, p. 225.

[32] CJ, 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, C-617/10, para. 37.

[33] *Supra*, 3.

[34] ECtHR, 28 June 1984, *Campbell and Fell v. The United Kingdom*, para. 71.

[35] According to S. Stavros, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights*, The Hague, Kluwer, 1993, p. 24, explaining the disparity between *Öztürk* and the previous jurisprudence of the Court in this regard is a "daunting" task.

explicitly underlined the requirement – only implicit, if at all, in *Engel* [36] – that the rule violated be "general in character", which was later applied in a number of cases [37].

a) Concerning the former issue, it is submitted that assessing the *nature of the offence* through the *aims of the sanctions*, instead of examining the socio-ethical relevance of the acts and the interests protected, amounts to mixing up different aspects and might lead to some shortcomings.

Firstly, finding a punitive aim in the sanctions, as different from "mere" deterrence, can be a tricky task, because it cannot be done without a general definition of the purpose of (criminal) punishment, which in turn is not available – or, at least, does not seem to have been spelt out by the ECtHR. A punitive aim cannot be equated exclusively to retribution ("*zweckgelöste Majestät*") or blunt repression ("just deserts"). To the view of some, punishment *is* deterrence. To others', the functionalisation of the sanctions to the *protection* of a certain social sub-system of high relevance, to which they are an integral part [38], would not be incompatible with criminal law, but would rather be a sign of the legitimacy of its use [39]. The diversity of constructions in this realm leads also to the circumstance that the "punitive aim" might not be an exclusive feature of criminal sanctions, even if only for the purpose of protecting human rights [40]. Whereas other criteria point to a more clear-cut definition of the epitome of criminal offences (need for an act or omission; strong socio-ethical resonance; severity of the penalties), it seems adventurous to exclude that administrative law might also entail a punitive aim.

As a result, this parameter is vulnerable to uncertainty and arbitrariness. At the end of the day, it might be ascribing the same guarantees to (mere) administrative punitive law *via* the deterrent and punitive aim of the sanctions (including pure administrative "light" fines), which is precisely what national legislators wish to avoid in many processes of decriminalisation. By rendering the resort to administrative law much

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[36] Apparently, in *Engel*, the Court was satisfied that the offence (the violation of a military rule by a serviceman) was disciplinary / administrative in nature and proceeded immediately to the third criterion (the severity of the sanctions applied to the plaintiff): "When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law" (*ibid*., para. 82).

[37] *Öztürk*, para. 53; *Weber v. Switzerland*, para. 33; *Demicoli v. Malta*, para. 33; *Ravnsborg v. Sweden*, para. 34; and *Inocêncio v. Portugal* (see *infra*).

[38] See the case law of the CJ quoted in note 18 and f.

[39] Actually, the ECtHR has somehow acknowledged the functional dimension of criminal law *stricto sensu* in *Grande Stevens*, para. 96: "*Quant à la nature de l'infraction, il apparaît que les dispositions dont la violation a été reprochée aux requérants visaient à garantir l'intégrité des marchés financiers et à maintenir la confiance du public dans la sécurité des transactions. La Cour rappelle que la CONSOB, autorité administrative indépendante, a comme but d'assurer la protection des investisseurs et l'efficacité, la transparence et le développement des marchés boursiers (...). Il s'agit là d'intérêts généraux de la société normalement protégés par le droit pénal*".

[40] In this direction, correctly, the Joint Partly Dissenting Opinion of Judges Costa, Cabral Barreto and Mularoni joined by Judge Caflisch, paras. 8 and f., appended to *Jussila*.

less attractive, this approach might (albeit unwillingly) put in jeopardy the policies of decriminalisation [41].

Furthermore, this line of reasoning, as it is, leaves undesirably uncovered by the Convention the public imputation, by the State, of acts that bear an unequivocal criminal connotation, in the cases where national law qualifies them as administrative infringements and the sanctions provided are not severe enough to meet the third criterion. For instance: the current construction of the *Engel* criteria would probably exclude from the ambit of Articles 6 and 7 the (hypothetical) case where national administrative law sanctioned women suspected of committing illegal abortion with mandatory attendance on a course on parenting or psychotherapy sessions (no punitive aim). Nevertheless, it seems that the mere assertion, by the State, that an individual has committed acts with this kind of ethical "weight" should entitle him / her to the guarantees provided for by the Convention for "criminal charges" and "criminal law", irrespective of the aim pursued by the sanctions or of their severity.

It is important to stress that the object of the enquiry should be the *concrete acts* charged (or for which the person was convicted) and not their abstract label (*e.g,* fraud, tax evasion, false declarations, careless driving). A false declaration regarding taxes does not have the same ethical connotation as a false declaration by a doctor that someone is fit to drive a train. The deliberate violation of a rule ensuring the safety conditions of a vehicle does not have the same weight as unknowingly infringing upon the same rule, punishable under strict liability [42]. Actually, that is precisely the reason why most offences are punishable (as criminal offences!) only if committed with intent.

The ethical resonance of the acts (and the inherent social unrest) should be assessed in the context of the jurisdiction of origin because it is in that environment that the

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[41] The objections raised by Judge Matscher in his Dissenting Opinion, B, 3, in the *Öztürk* Judgment, seem still valid.

[42] This is not the place to perform an in-depth analysis of the case-law of the ECtHR regarding strict liability (which seems in any case pressing, especially concerning the particular issue of its compatibility with the Convention). The Court is right when it states that strict liability cannot exclude, *per se*, the criminal nature of the prohibition to the effects of the Convention: ECtHR, 7 October 1998, *Salabiaku v. France*, para. 27 ("(…) In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States") and ECtHR, 23 July 2002, *Västberga Taxi Aktiebolag and Vulic v. Sweden*, para. 79 ("It is true that the tax surcharges were imposed on the applicants on objective grounds without the need to establish any criminal intent or negligence on their part. However, the lack of subjective elements does not necessarily deprive an offence of its criminal character; indeed, criminal offences based solely on objective elements may be found in the laws of the Contracting States (…)"). However, this assertion is primarily directed to ensuring that a State *does not deviate* from the duties under the Convention by creating offences of strict liability. It cannot counter the obvious fact that intentional and even negligent infringements are generally considered to be graver, from a socio-ethical perspective, than those where the offender acts unknowingly and cannot be blamed for that, which might lead to a qualitative difference in terms of the nature of the prohibition.

disrespect for the individual's rights (*e.g.*, not being able to deny the facts in a public hearing or not being informed of the charges in a language he understands) might have grievous consequences. The meaning and the *formal* scope of Articles 6 and 7 of the Convention must be uniform – but the *content* of the scope inevitably varies, because there is no material definition of criminal offences in the ECHR. Indeed, that is the reason why the criteria are needed. As a consequence, it is possible, and even likely, that this criterion leads to the result that the same act, qualified as administrative in two jurisdictions, gives rise to a criminal qualification by the ECtHR in one case, due to its social relevance therein, but not in the other. This is not surprising: already under the current jurisprudence of the ECtHR, if one jurisdiction explicitly qualifies a given act as criminal, it will immediately attract the guarantees of the Convention, with no further enquiry by the Court; whereas its qualification as administrative in another jurisdiction might well be upheld by the Court and the application of Articles 6 and 7 denied.

The logic behind assessing the nature of the facts confers more relevance to the indications provided by national law. It is not usual that acts bearing a significant negative socio-ethical connotation are mere administrative offences. Therefore, one might accept a sort of presumption in favour of the qualification performed by national law. Again, it should be borne in mind that the *extension* of the guarantees of the Convention regarding criminal law was meant as a way of controlling manipulations of criminal law by the States – not as a twisted way of extending those guarantees to *administrative* law.

The result of this assessment might also lead to situations of *non liquet*. In such cases, the Court should proceed with the analysis of the severity of the penalties, arguably applying a less strict standard than in the cases where the conduct is clearly not criminal in nature. This solution would be in line with the stance taken in *Jussila* regarding the appropriateness, in some cases, of a "comprehensive" assessment of both criteria [43].

Finally, if the ECtHR reinstated the analysis of the acts as a relevant criterion, it is unclear that the assessment of the aim pursued by the sanctions would still bring any added value. It would serve to capture cases of little or no socio-ethical relevance, which are punished with penalties that are not severe. In those cases, the sole remaining interests might be the rights affected by the measures taken during the procedure, which can amount to serious restrictions of rights and which might indeed (also) be taken into consideration by the Court in the interpretation of "criminal charges". Apart from them, it is hard to see how the punitive aim of the sanction on its own (*i.e.* disconnected from the negative connotation of the acts and the severity of the penalties) might impact on individual guarantees.

b) In the second place, the requirement that the norm be of *general scope* was clearly introduced as a necessary compensation for the (new) criterion of assessing the nature of the offence by determining the aims of the sanction: under a certain understanding of *punishment*, disciplinary and criminal law share the aims of deterring and punishing the perpetrator, and the intended exclusion of disciplinary sanctions (save for the most

[43] See *supra*, note 14.

severe ones) from the ambit of Articles 6 and 7 ECHR could only be achieved by stressing the need for the general character of the norm infringed [44]. It is, in this sense, a "negative" requisite.

However, not only has the application of this criterion not always been consistent, but it is also doubtful that it should be applied at all.

In *Inocêncio*, the Court found that

> "[w]ith regard to the nature of the offence, it would appear that the requirement to obtain a permit before carrying out construction work should be regarded as a means of controlling the use of property for the purposes of a balanced town-planning policy. A penalty for failing to comply with such a requirement cannot constitute a punitive criminal measure of general application to all citizens. This aspect is therefore not sufficient in itself for the penalty in issue to be regarded as inherently criminal".

Apparently, this reasoning should apply to all the cases where individuals are sanctioned for not complying with the duty to have a permit or a licence for carrying out a certain activity, which are in turn mere instances of the broader category of infringements that suppose the breach of a special duty, that limits the scope of the norm. Nonetheless, the Court found, in *Öztürk*, that the traffic norm violated by the plaintiff (which punished "careless driving") was "directed towards all citizens in their capacity as road-users", and, in *Jussila* [45], concerning the failure to pay the VAT by a registered entrepreneur, that the applicant "was liable in his capacity as a taxpayer" [46]. Arguably, the norm violated by Mr. Inocêncio was directed to all citizens in their capacity as house owners wishing to refurbish their houses. It is also interesting to observe that, in the recent *Grande Stevens et al. v. Italia* case, the Court did not hesitate in affirming the criminal nature of the administrative sanctions punishing certain acts of market manipulation [47]. True, the Italian norm has a general scope ("*chiunque*") and is not restricted to those who operate in the stock market. However, taking into consideration the reasoning followed by the Court [48], one fails to see why a hypothetical limitation of the scope of the prohibition to market operators should lead to a different decision.

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[44] See *Öztürk*, para. 53.

[45] *Jussila*, para. 38.

[46] For further inconsistencies in this regard, see P. VAN DIJK and G.J.H. VAN HOOF, *Theory and Practice of the European Convention on Human Rights*, 3rd ed., The Hague, Kluwer, 1998, p. 411.

[47] *Grande Stevens*, para. 96.

[48] *Ibid.*: "*Quant à la nature de l'infraction, il apparaît que les dispositions dont la violation a été reprochée aux requérants visaient à garantir l'intégrité des marchés financiers et à maintenir la confiance du public dans la sécurité des transactions. La Cour rappelle que la CONSOB, autorité administrative indépendante, a comme but d'assurer la protection des investisseurs et l'efficacité, la transparence et le développement des marchés boursiers (...). Il s'agit là d'intérêts généraux de la société normalement protégés par le droit pénal (...). En outre, la Cour est d'avis que les amendes infligées visaient pour l'essentiel à punir pour empêcher la récidive. Elles étaient donc fondées sur des normes poursuivant un but à la fois préventif, à savoir de dissuader les intéressés de recommencer, et répressif, puisqu'elles sanctionnaient une irrégularité (...)*".

Basically, the requirement for the "general" scope of the norm, inserted in the *Engel* criteria with the pragmatic goal of excluding disciplinary sanctions, except where they are severe (third criterion), seems an unfortunate development. Contrary to the other criteria, it does not help to frame the *specificum* of criminal punishment better: indeed, there is no incompatibility between the two terms, as there are many criminal offences *stricto sensu* that have a limited scope (*echte Sonderdelikte*), the criminal nature of which cannot be doubted (*e.g.* misconduct in public office).

c) In the last place, this construction of the second criterion practically renders the third criterion redundant. The severity of the penalties will play an autonomous role only to the extent of ensuring that the guarantees provided for by the Convention are applicable to disciplinary sanctions (which are in principle excluded by the requirement of the general scope of the norms), because otherwise it is hard to conceive of a severe penalty that is not deterrent *and* punitive (although the reverse is obviously not true).

C. The transposition of these considerations to the context of the EU would also imply a change in the perspective of the adjudication by the CJ.

Taking the example of *Käserei* and *Bonda*, it is clear that false declarations to the State, in general, are a criminal offence. However, the circumstance that they were made in the particular field of subsidy law – analogous to tax law, where administrative law always played a central role in the sanctioning of failure to "tell the truth" – and that the plaintiff acted unknowingly would be strong signs in favour of the non-criminal nature of the offence. It would then be for the Court to assess whether the sanctions imposed (reduction of refunds) were severe enough to qualify as a criminal penalty.

7. It is now time to draw some conclusions from the above considerations.

"Blurring", in general, carries a negative connotation, especially when it comes to the legal field: adapting Lord Coke's famous quote, *justum est per legem discernendum*.

However, the blur between the borders of criminal and administrative punitive law seems inevitable due to the fact that they share similar purposes and discipline the same fields of social life. Moreover, to some extent, such a blur is a positive development in that it allows for a more extensive protection of individual guarantees and human rights in the criminal area. In that sense, the autonomous notion of criminal offences / charges / sanctions purported by the ECtHR is warranted so as to include therein administrative measures / procedures that bear an analogous impact on human rights (namely freedom, honour and property) as a public response to an unlawful act or omission.

Until now, the EU has used the expression "criminal" in a narrow sense, referring to what the Member States deem to be criminal in their own jurisdictions, both when the CJ adjudicates on the sanctioning competence of the EU as well as when the European legislator orders Member States to make certain acts "punishable". When the EU directs the States to enact the protection of its interests through measures that are proportionate, effective and dissuasive, the apparent indifference between criminal and administrative does not enhance the (existing) blur, either at national or European level, because the option to use measures of either nature is explicitly

committed to the States and no European pattern (other than the mandatory features of the protection) is applicable.

The definitions of criminal offences / sanctions resulting from the case law of the CJ and the ECtHR do not seem to coincide entirely. The former still bears the visible marks of the discussion of the concept to the effects of determining the legislative competence of the EU and, up until now, has not clearly differentiated the assessment of the notions in the context of the protection of individual rights.

Recent CJ case law suggests that it will be willing to follow the jurisprudence of the ECtHR more closely, namely as regards the application of the *Engel* criteria, although it has no strict duty to do so until the EU formally accedes to the ECHR (in the terms that the agreement will provide). Nevertheless, this does not mean that, in the meantime, further blurring of the notions will be avoided, as the contents of the criteria might continue to differ. In that respect, the presumption of conformity of EU law with human rights established by the ECtHR (*Bosphorus*) and the irrelevance, in the EU legal ambit, of national constitutional guarantees that prevent the uniform application of a European instrument (*Melloni*) make the CJ the *maximum pontifex* of human rights within EU law.

On the other hand, the relative autonomy of the CJ in this field could provide the opportunity to contribute to reviewing the current formulation of the *Engel* criteria by reinstating the analysis of the socio-ethical relevance of the acts – which seems to be almost abandoned by the ECtHR – as the "second criterion" and relegating the enquiry into the aims pursued by the sanction to a marginal position.

Such a move might even lead both courts to a common, comprehensive approach, more adapted to the current sanctioning schemes in place, with a clearer definition of the scope of the notions "criminal charges / offences", which might also entail (as hinted at by the ECtHR in *Jussila*) a differentiated application of the guarantees contained in the Convention.

Inter-state cooperation at the interface of administrative and criminal law

Michiel Luchtman [*]

1. Introduction

This contribution deals with transnational cooperation at the interface of criminal law and administrative law and the influence of the European Union on it. The aim is to present an oversight of the interaction between the two dominant forms of cooperation – mutual assistance in administrative matters (MAA) and mutual legal assistance in criminal matters (MLA) – and their interaction in the legal order of the European Union. As has become apparent from other contributions to this volume, the relationship between criminal law and administrative law is already complicated at the national level [1]. It raises serious questions and sometimes concerns with respect to, *inter alia*, the respect for fundamental rights (*e.g.* the *nemo tenetur* principle and *ne bis in idem* principle). One does not need to have a lot of imagination to see that these problems will increase in transnational relationships where national authorities cooperate on the basis of divergent national rules. How are these authorities able to do this? How are fundamental rights and legal safeguards protected? What should the EU's ambitions be in this respect? All those issues will be addressed in this contribution.

I will start in Section 2 with a brief overview of the two main instruments for cooperation (MAA and MLA) and their specific role in the European Union. I then wish to demonstrate how these forms overlap and why this is problematic (Section 3). I shall not restrict myself to a description of the *status quo*. The dynamics of European integration, certainly after the Lisbon Treaty, beg the question as to what else the

[*] This article was concluded on 1st September 2013.

[1] Cf. for instance to Katja Šugman Stubbs' contribution and the other case studies in this same book.

European Union could do in order to tackle the problems that have been identified. I will deal with this question by taking recent developments in the area of market abuse as an example. Although these proposals contain a series of interesting measures in the context of efforts to establish a level playing field across Europe to tackle market abuse, they still pay relatively little attention to transnational cooperation on the border between criminal and administrative law. A series of problems which are likely to arise as a result of this will be discussed in Section 4, with special attention to the role of fundamental rights in cases of transnational cooperation. The question is whether the European Union is willing and able to deal with these problems. Considerations relating to institutional autonomy at the national level and sovereignty may explain why further action is not being taken at this time. In Section 5, I intend to demonstrate that these considerations do not fit well with the EU's ambitions, to which EU Member States have committed themselves. There is therefore more work that needs to be done by the legislator. On the eve of the development of new multi-annual policy programmes in the area of criminal law, I will identify three topics that are of particular concern at this stage and that should be included in new policies. I will conclude with a few final remarks in Section 6.

2. The role of transnational cooperation in an integrated legal order

A. Indirect enforcement and loyal cooperation

European Union law is generally enforced through the legal orders of EU Member States. EU Member States are under the obligation to refrain from actions (or inaction) that interfere with primary or secondary EU law (negative integration). They may also need to transpose European Union norms into their legal order, if so required, and to enforce those norms (positive integration). Member States still have a fair amount of room for manœuvre in the way in which they carry out these tasks. As a general rule, they are allowed to choose the enforcement instruments that they prefer most: the choice of enforcement through private law, administrative law and/or criminal law is largely up to them. The advantages of this system are clear. EU norms are thereby smoothly integrated into existing national enforcement structures and the enforcement of EU law is relatively cost-effective. Yet the pitfalls are also well known: Member States may tend to prefer to serve competing national interests first or they may lack adequate structures for effective enforcement of (national and EU) law. This is why the Court of Justice of the European Union (CJ) has consistently refused to give Member States *carte blanche* but stated that they "must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive"[2]. This is also why we note the EU's ever increasing interest in the systems and organisation of national law enforcement regimes. I will come back to that later[3].

[2] CJ, 21 September 1989, *Commission v. Greece*, C-68/88, [1989], *ECR*, p. 2965, para. 24.
[3] *Infra* section 4.

A system of indirect enforcement in itself is not enough to address the concerns and needs of the European Union's legal order. With the powers of national authorities being limited to the territory of their states, cooperation between the national authorities, as well as between the national authorities and European Union authorities, is vital. It is therefore safe to say that the principle of loyal cooperation (Article 4(3) TEU) is a principle of crucial importance for the European Union's legal order. Without effective cooperation, one can only wait until individuals discover the gaps and inconsistencies in the legal framework of the European Union and its Member States and will start to exploit or even abuse those differences to their benefit, at the expense of the common good.

Loyal cooperation is a principle which will guide the interpretation of existing rules and regulations and which will inspire the national and European Union legislator in the process of developing new rules, but it cannot set aside existing rules on, for instance, the professional secrecy of law enforcement authorities. The principle therefore needs to be supported by legal rules, which define the modalities within which such cooperation is to take place. At present, the ground rules for that are found in two forms of transnational cooperation. Whereas authorities involved in administrative law enforcement use channels for mutual administrative assistance (MAA), judicial authorities use channels for mutual legal assistance in criminal matters (MLA). Both types of cooperation precede the European Union and its predecessors. Multilateral instruments were already drafted by the Council of Europe which introduced the European Convention on Mutual Assistance in Criminal Matters in 1959[4] and the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters in 1978[5].

Although not their inventor, the European Union did make a considerable effort to adapt these instruments of intergovernmental cooperation to the specific needs of the European integration process. Via the Schengen agreements and the 2000 EU MLA Convention[6], the traditional system of international cooperation in criminal law is in the process of being replaced by a system of mutual recognition, within which judicial authorities take decisions ("warrants", "orders"), the validity of which must be accepted by the authorities of other EU states and executed as if they were their own.

The course of action with respect to administrative law is quite different. A general approach towards administrative cooperation is lacking in the European Union. I assume that the small number of ratifications of the aforementioned 1978 Convention is an important explanation for the fact that many directives and regulations that were drafted on the basis of Article 114 TFEU (previously: Article 95 EC) include separate

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[4] European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959, ETS 30.

[5] European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters, Strasbourg, 15 March 1978, ETS 100. The latter was supplemented by the Convention on Mutual Administrative Assistance in Tax Matters, Strasbourg, 25 January 1988, ETS 127, and its Protocol, Strasbourg, 25 January 1988, ETS 208.

[6] Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 25 May 2000, *OJ*, no. C 197, 12 July 2000, p. 1.

rules on administrative assistance [7]. The result of this is that – as we will see – this type of cooperation lacks a uniform and coherent framework, particularly if we compare it to the rules on mutual legal assistance (MLA). And although "borrowed" from the internal market, mutual recognition as a founding principle of interstate cooperation in criminal law is by no means the current standard in administrative cooperation. On the contrary, cooperation still mainly takes place on the basis of the traditional request model, by which a request for assistance is transformed into a national decision of the requested party to grant assistance. It is therefore a decision by the requested authority which provides the title for gathering evidence (*exequatur proceedings*) [8].

B. The potential overlap between MAA and MLA

The fact that interstate cooperation takes place through different regimes, under the influence of different developments, could particularly lead to problems where both forms of cooperation overlap. Before addressing those problems, we need to explore first if and how these instruments overlap. At first sight, the relationship between MAA and MLA instruments does not confront us with too many problems. With MAA being used for "administrative purposes" by "administrative authorities" and MLA for "criminal law purposes" by "judicial authorities", there does not seem, *a priori,* to be any overlap between the two. The current system apparently establishes a clear and workable distinction between both forms of cooperation. The problem, however, is that both the definition of the purposes, as well as the identification of the ("administrative" or "judicial") authorities, is left completely to national law [9]. Under those circumstances, we have to take into consideration at least four possible sources of overlap [10].

1) Indirect enforcement

With EU Member States still largely in charge of the way in which they implement EU law, the result can only be that they will make different choices with respect to the applicable enforcement regime. State A may, for instance, opt for administrative law whereas State B may opt for criminal law. State C may leave both options open. Where investigations concern multiple EU Member States, it is not that difficult to

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[7] Examples are found in, for instance the areas of direct taxes (Directive 2011/16/EU of 15 February 2011, *OJ,* no. L 64, 11 March 2011, p. 1), competition (Regulation 1/2003 of 16 December 2002, *OJ*, no. L 1, 4 January 2003, p. 1), consumer law (Regulation 2006/2004 of 27 October 2004, *OJ*, no. L 364, 9 December 2004, p. 1), financial services (Directive 2004/39/EC of 21 April 2004, *OJ*, no. L 145, 30 April 2004, p. 1, which is currently being revised). There are many more.

[8] This is not to say that important innovations are not taking place at all. New MAA instruments like the directive on direct taxes, mentioned in the previous note, for instance provide for the establishment of joint teams and coordinated actions. In those types of assistance, the request-based model is effectively abandoned.

[9] Cf. J. Vervaele and A. Klip (eds.), *European Cooperation between Tax, Customs, and Judicial Authorities*, The Hague, Kluwer, 2002, in particular p. 283-285.

[10] See also M.J.J.P. Luchtman, *European cooperation between financial supervisory authorities, tax authorities and judicial authorities*, Antwerp/Oxford, Intersentia, 2008, p. 89-100 and p. 128-142.

imagine that this diversity may cause problems, either because the competent national authorities are not in a position to cooperate directly with each other – the one using MAA, the other MLA – or because safeguards of, for instance criminal law, are circumvented by using the MAA route (or *vice versa* – where MLA is used in order to have access to powers of, for instance search and seizure, which are usually lacking in administrative law). We should note here that the EU's current efforts under the heading of Article 83(2) TFEU will only increase this problem now that mandatory criminal law enforcement usually does not mean that administrative law enforcement is off limits [11].

2) Punitive administrative law

We should also note that the role of punitive administrative law may differ from one EU Member State to another. All Member States have such systems in place. The German model of *Ordnungswidrigkeitenrecht*, although introduced as a means of decriminalisation, is closely aligned to German criminal law and procedure. This is a different model than the Dutch *punitief bestuursrecht* (punitive administrative law), which is in essence administrative law and procedure, but with a series of additional safeguards which follow from Article 6 European Convention on Human Rights (ECHR) and other Convention rights, including the *nemo tenetur* principle [12]. A third model, popular in countries such as Austria and Switzerland, is the *Verwaltungsstrafrecht*, which is considered to be part of criminal law but enforced by administrative authorities.

These differences between the national systems have consequences for transnational cooperation. Authorities that perform equivalent tasks – at least according to the case law of the European Court of Human Rights (ECtHR) – may nonetheless not be able to cooperate, or their powers may be so different that this will block cooperation. It is, for instance, highly doubtful that, under the present dichotomy between MAA and MLA, Dutch administrative authorities are able to use MLA mechanisms to investigate administrative "offences" even though administrative fines are "criminal" within the meaning of Article 6 ECHR [13]. By contrast, German authorities are able to do so because the scope of MLA instrument has been widened over the years to include "proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters" (Article 3(1) EU MLA Convention). Incidentally, it is precisely this latter practice that caused great difficulties in the negotiations for the European Evidence Warrant due to the somewhat understandable reluctance of

[11] See for instance the Recital 8 of the Preamble of Directive 2009/123/EC of 21 October 2009 on ship-source pollution, *OJ*, no. L 280, 27 October 2009, p. 52; see also the new regulations on markets abuse, discussed below.

[12] See Article 5:10a of the Dutch General Administrative Law Act/GALA (or *Algemene wet bestuursrecht*).

[13] See M.J.J.P. Luchtman, *European cooperation*, p. 133.

some states to accept that administrative authorities from State A issue "warrants" to judicial authorities from State B. [14]

3) Proactive policing

A problem that is related to the previous one is that national systems may set different parameters as to when criminal law investigations can be opened. The Netherlands, for instance, have excluded any degree of suspicion in their definition of what constitutes a criminal law investigation (*opsporingsonderzoek*) [15]. If I am not mistaken, the presence of a certain degree of suspicion is still a constituent part of criminal law investigations in many other countries. Yet, in order to arrive at that level of suspicion, proactive policing and information gathering is necessary, particularly in the area of EU fraud, which does not usually have direct victims or casualties. This is why Germany, for instance, has set up a special investigative body under tax law, which is part of the fiscal authorities but which has broader powers of investigation and which also has a series of powers under criminal law once reasonable suspicion has been established and criminal investigations have been opened (the *Steuerfahndung*/ Steufa). The partly administrative statute of this body does not prevent it from performing tasks which, in the Netherlands, could qualify as a criminal investigation under different rules, safeguards and procedures [16]. Once again, differences between national legal systems may thus prevent national authorities that are performing similar tasks, but under different legal regimes, from cooperating with each other directly. The reverse may also be true: if the current separation between MAA and MLA proves to be too restrictive for practice without there being a proper explanation for it, practice will try to seek a way out.

4) Parallel investigations

A fourth problem relates to the possibility of so-called parallel or mixed investigations. In many areas of EU policy, investigations tend to have multiple purposes. They are not only conducted in order to claw back taxes, to prevent financial malpractitioners from doing further harm or to repair damage that has been caused to the environment but also to punish the wrongdoers for their actions. Such investigations have multiple purposes, implying – once again – that different routes for transnational cooperation may be used depending on the statute and tasks of the authority that seeks cooperation. The problem is, of course, that, after that information has been obtained from abroad, it is available to that authority, raising difficult questions as to the use it may make of that information for other purposes than the one for which MAA or

[14] The same goes for the current negotiations for the European Investigation Order; cf. Council document 8369/1/11 REV 1 of 7 April 2011, p. 4; Council document of 21 October 2010, 15329/10.

[15] Cf. Article 132a of the Dutch Code of criminal procedure. Of course, investigation techniques that interfere with fundamental rights do require some degree of suspicion as a threshold depending on the particular power at hand and the type of crime involved.

[16] The Steufa is, *inter alia*, entrusted with "*die Aufdeckung und Ermittlung unbekannter Steuerfälle*" (para. 208 of the German *Abgabenordnung 1977*), a task which is generally considered to belong to the area of fiscal law, not criminal law.

MLA was obtained. Particularly in these types of "mixed" cases we should note that the applicable safeguards and defence rights may differ, depending on the purpose at stake. The European Court of Human Rights has, for instance, constantly stressed that the requirement that preparatory investigations or non-punitive investigations should be subject to the guarantees of a judicial procedure as set out in Article 6 ECHR would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities. Yet, at the same time, should that same taxpayer be the subject of criminal investigations – under the autonomous meaning of Article 6 ECHR – then that taxpayer/suspect enjoys certain rights which need to be respected [17]. The question is what the role and impact of this case law will be for cases where transnational investigations are being conducted.

3. Problems and pitfalls of the current system

A. Ineffective transnational cooperation and responses to it

On the basis of the above, we may conclude that there is indeed an overlap in the scope of MAA and MLA instruments. This leads in essence to two types of problems. First of all, the current system may be too restrictive in terms of its capacity to allow authorities which are in essence performing similar [18] tasks to cooperate with each other in the fulfilment of these tasks. The current dichotomy in essence boils down to a system which limits the possibilities for cooperation to the greatest common denominator [19]. Particularly in light of the principle of loyal cooperation, it is difficult to accept a system that is dependent on so many coincidences for it to function properly. This is why current practice is already – and rightly so – trying to remove the sharp edges from the current system. There are a number of ways in which this can be done, both by national and European authorities:

1) Double hats

The issue of who is a "competent" authority under MAA or MLA schemes is a matter for national law. This means that national law may decide to give a certain authority powers under both under MAA as well as MLA schemes. This is in line with many national systems, within which those authorities also perform a variety

[17] Cf. ECtHR, 17 December 1996, *Saunders v. the United Kingdom*, Appl. no. 19187/91, para. 67; ECtHR, 21 April 2009, *Marttinen v. Finland*, Appl. no. 19235/03, para. 68. The Court noted in the latter case that the new Finnish mechanism prohibiting the use of incriminating information in order to circumvent provisions on testimony or in order to have the debtor charged with a criminal offence came too late in this case.

[18] What are "similar" tasks of course depends on one's definitions. National distinctions between criminal law and administrative law are not suitable for this, as I demonstrated in the above. In section 5, I will argue that there already is a common European standard which is helpful for providing the necessary degree of guidance, *i.e.* the autonomous concept of "criminal charge", as defined by the ECtHR and later the CJ, see ECtHR, 21 February 1984, *Öztürk v. Germany*, Appl. no. 8544/79 and CJ, 5 June 2012, *Łukasz Marcin Bonda*, C-489/10, discussed by A. De Moor-van Vugt, "Administrative sanctions in EU law", *Review of European Administrative Law*, 2012, p. 5-41.

[19] M.J.J.P. Luchtman, *European cooperation*, p. 128-142 and p. 146-150.

of functions. They perform tasks under administrative law (sometimes including administrative fines) but they may also be active in criminal law, either as a special investigative body or as a prosecuting authority (as under the *Verwaltungsstrafrecht*) [20]. This means that these authorities – depending on how they qualify the purpose of their request – are in a position to choose the path that is most convenient for them. Obviously, this is as efficient to them as it is difficult to control for individuals, who are the subject of an investigation.

2) Expansion of the scope of application of instruments

Over the years, we have witnessed both MAA as well as MLA instruments being widened in scope, thus increasing the possibilities for cooperation on the border between administrative and criminal law. We already mentioned the example of the *Ordnungswidrigkeiten*, which may be the subject of MAA requests [21], but which may also be routed through criminal law procedures for cooperation. Conversely, many arrangements for MAA have been broadened to include the early stages of criminal investigations. EU directives and regulations on administrative assistance often explicitly refer to the purpose of preventing, investigating and even prosecuting fraud against the EU [22]. MAA requests therefore have a particularly useful function in the early stages of criminal investigations. Yet it also means that there is a risk that MAA instruments are used for a "*strafrechtliche Verwertung von verwaltungsrechtliche Zufallsfunden*" [23].

3) Restricting professional secrecy

Duties of professional secrecy are a common feature of MAA instruments. They are less common for MLA. Those duties have a twofold function: their intention is to guarantee a certain willingness of individuals and companies to provide information to authorities and they are designed to enhance cooperation by giving assurances that information will only be used for the purpose for which it was provided and will in principle not be provided to third parties (except with the permission of the providing authority). Recent instruments tend to widen the purposes for which information may be used. Particularly where administrative information proves useful

[20] For an overview, see *ibid*., p. 90-100.

[21] Cf. the German declaration with respect to the 1978 MAA Convention: "The Convention shall apply for purposes of requests addressed to the Federal Republic of Germany to any proceedings in respect of offences the punishment of which does not fall within the jurisdiction of the judicial authorities at the time of the request for assistance. In the Federal Republic of Germany such proceedings include proceedings for fines under the Administrative Offences Act (*Gesetz* über *Ordnungswidrigkeiten*) (…)".

[22] See for instance Regulation 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, *OJ*, no. L 268, 12 October 2010, p. 1.

[23] A much heard criticism in Germany; cf. for instance M. Nietsch, *Internationales Insiderrecht*, Berlin, Dunckler & Humblot, 2004; K. Müller, "Insiderrechtliche Mitwirkungspflichten der Kreditinstitute im Lichte des nemo-tenetur-Grundsatzes", *Wistra*, 2001, 5, p. 167-171; J.W. Habetha, "Verwaltungsrechtliche Rasterfahndung mit strafrechtlichen Konsequenzen?", *WM*, 1996, p. 2133-2140.

for criminal investigations into related offences, instruments increasingly allow the use and provision of information without further formalities [24]. This is particularly useful in cases where an administrative investigation turns into a criminal case at a later stage or where MAA requests serve multiple purposes ("mixed cases"). As long as a genuine "administrative" purpose is demonstrated by the requesting party (which is not too difficult), MAA will have to be provided and the information obtained may consequently be used in the parallel criminal investigation too.

4) The wish to keep all options open

Finally, it should be mentioned that the European Union is very reluctant to limit the options of national authorities. On the contrary, various instruments state that any regulation in the area of criminal law is without prejudice to instruments of administrative law that may be applicable in parallel [25], or *vice versa* [26]. Moreover, we have already noted that legislative instruments and initiatives in the area of mandatory criminal law enforcement of EU policies are not a replacement for administrative law enforcement structures but come in addition to these structures. With respect to transnational cooperation, this means that all EU states are obliged to have competent criminal law authorities, which on occasion may need help from their foreign counterparts, in addition to their national administrative law colleagues who will also need to cooperate with administrative bodies elsewhere in the EU. The result is a duplication of the regimes for transnational cooperation.

B. Concerns with respect to applicable safeguards and fundamental rights

The above shows that the European Union is certainly not blind to the need to have adequate structures in place for transnational cooperation. Yet the initiatives that aim to broaden the common denominator for cooperation may have an adverse effect on the legal position of the individuals concerned. This is the second type of problem, as mentioned above. By broadening the options for transnational cooperation, the current system increases the margins of manœuvre that competent authorities have to choose their preferred means of cooperation. This will not only increase the risk of multiple authorities investigating the same offence and alleged offender, but the position of the individual is complicated further by the fact that the safeguards and rights of the individual easily cease to function properly on the interface of administrative and criminal law. A recent case concerning administrative and criminal law investigations into irregularities in the process of the takeover of Dutch ABN Amro Bank by a consortium of Banco Santander, Royal Bank of Scotland and Fortis by Dutch and Belgian authorities shows the complications which may arise as a result

[24] See for instance Article 16 (1) of Directive 2011/16/EU (direct taxes), *supra* note 7.

[25] Cf. Article 2(2) Framework decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, *OJ*, no. L 328, 15 November 2009, p. 42.

[26] Cf. Article 2(3) Regulation 2004/2006 (consumer protection law); Article 23(5) Regulation 1/2003 (competition law), *supra* note 7.

of this [27]. First of all, it emerged that the Dutch financial regulator, AFM, imposed several fines on Fortis holdings for – in brief – wrongful provision of information and market manipulation, related to its financial position and the takeover [28]. However, the same conduct, against the same legal and natural persons was apparently investigated in Belgium too. Obviously, the question that arises in these types of situations is whether these parallel investigations are compatible with the *ne bis in idem* principle, enshrined in, *inter alia*, Article 50 CFR. Fortis's lawyers were quick to claim that the administrative fines of the AFM would bar further prosecution in Belgium. Nevertheless, the Belgian financial supervisory authority, FSMA, recently imposed administrative fines on the legal successor of Fortis and three top executives too, claiming that, with appeal proceedings against the Dutch fines still pending, there was no violation of the *ne bis in idem* principle [29]. Moreover, Belgian judicial authorities also opened proceedings against the same (and other) top officials.

This example is interesting for various reasons. First of all, while Dutch authorities were apparently not too concerned with coordination with their Belgian counterparts, the latter in turn were not too concerned with reducing the burden of multiple investigations for the natural and legal persons involved. Despite the principle of loyal cooperation and the existence of EU mechanisms for transnational cooperation and coordination in the area of market abuse, the Dutch authorities imposed fines unilaterally, thereby possibly barring further prosecution in Belgian. It was only because Fortis itself appealed that these decisions did not become final. This allowed the Belgian authorities to proceed as they have done. Secondly, the case also shows how complicated the position of economic actors is at the interface of the administrative and criminal laws of different EU Member States. Currently, we do not know whether the *ne bis in idem* principle would bar further prosecution. The result of this is that the current EU approach of keeping all options open is left unaffected. Yet it also leaves companies and citizens facing the risk of simultaneous proceedings for the same conduct in multiple countries.

The *ne bis in idem* principle is not the only factor of concern in cases like these. Depending on the circumstances of the case, the question may also be how the privilege against self-incrimination is to be respected. This applies, for instance, to the situation where punitive proceedings in one state run in parallel with non-punitive proceedings in another or where information of the latter proceedings is later used in the former type of proceedings [30]. After all, as long as an obligation to provide information to authorities or perhaps to civil parties exists in one country, the information obtained

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[27] The case is described in more detail by VERVAELE, p. 168-171, *in* M. LUCHTMAN (ed.), *Choice of forum in cooperation against EU financial crime – Freedom, security and justice & the protection of specific EU-interests*, The Hague, Boom/Lemma, 2013.

[28] See <http://www.afm.nl/~/media/files/boete/2010/fortis-besluit-sanv.ashx> and <http://www.afm.nl/~/media/files/boete/2010/ageas-sanv.ashx> (site last visited on 30 July 2013).

[29] See <http://www.tijd.be/nieuws/ondernemingen_financien/Boetes_voor_Ageas_en_ex_toplui_Fortis.9362398-3097.art > (site last visited on 30 July 2013).

[30] Article 25 of the proposed new regulation on market abuse, discussed below, for instance obliges Member States to have in place various non-punitive responses in cases of market abuse; see Article 26. Cooperation in these types of investigations is obligatory.

may later be provided to and used in punitive proceedings in another country. Current MAA regimes provide no obstacles to this.

In answer to the question as to whether this is problematic, one line of reasoning could be that the actors in the Dutch proceedings are not responsible for what happens in Belgium. Given the importance of what is at stake in the Netherlands (*i.e.* investigating possible market abuse practices) and the autonomous responsibility of the Belgian authorities under Articles 6 ECHR and 47 CFR, it is up to the latter party to respect the privilege against self-incrimination, for instance by not using the information as evidence in punitive proceedings. Obviously, that information will then be available to those authorities who could use it to discover new materials and use that as evidence even though that may *de facto* compel the person concerned to make statements which he would otherwise not have made.

It is also conceivable to start from a different point of view. From the perspective of the goals of the European Union to actively promote free movement of economic actors and citizens [31], one may question the starting point that national authorities are held accountable for their own actions only. Don't the system of indirect enforcement and the principle of loyal cooperation rather stress their (and the EU's) joint responsibility for the enforcement of EU policies on the European territory? The European Court of Human Rights has ruled, in a national context, that duties to provide information in non-punitive proceedings may substantially affect the position of the same person in parallel punitive proceedings, particularly where it cannot be excluded that that information may be used in the latter type of proceedings. Those types of situations are capable of destroying the essence of the *nemo tenetur* principle [32]. A comparable situation exists for those economic actors or citizens that are active on the European markets and do exactly what the Treaties aim to achieve, *i.e.* using their rights of free movement and thereby contributing to the internal market and the Area of Freedom, Security and Justice (AFSJ). Free movement will almost by definition invoke parallel investigations in different states. Where multiple authorities from different EU Member States therefore investigate a case and (are supposed to) cooperate loyally, those actors and citizens will find their legal position also substantially affected by a (possible) later use of the information that they provide under compulsion in another state, for punitive purposes. In light of the aforementioned EU goals and its powers of legislative intervention, the question then is whether the EU's system of indirect enforcement and the leeway it still leaves to states, the complexity of transnational fraud or the overall interest of sound financial markets in the EU can justify a departure from principles as important as *nemo tenetur*. Shouldn't the EU, as long as the achievement of its goals is at stake, rather make sure that information obtained under compulsion in an EU Member State for non-punitive purposes may not be used in punitive proceedings in another state?

At present, such developments are not taking place. Developments in the field of the harmonisation of procedural rights and safeguards are usually confined to specific policy areas of the European Union. The EU's roadmap for strengthening procedural

[31] Cf. Article 3(2) TEU; Article 26(2) TFEU.

[32] See for instance ECtHR, 21 April 2009, *Marttinen v. Finland*, Appl. no. 19235/03.

rights of suspected or accused persons in criminal proceedings [33] and the legislation resulting from it is, for instance, limited to criminal law *sensu stricto*, with all relevant instruments having Article 82(2) TFEU as their legal basis. Those instruments grant European citizens a series of minimum rights which can be invoked all over the AFSJ, but they are not concerned with, *inter alia*, respecting the *nemo tenetur* principle (or the *ne bis in idem* principle) in transnational cases. Moreover, they are limited to criminal law alone, leaving all other punitive sanctions, as well as the phase before the criminal charge (during which defence rights may be seriously prejudiced) out of their scope. In the area of administrative law, the harmonisation of safeguards with a view to transnational cooperation is almost non-existent [34].

4. Transnational cooperation in the "post-Lisbon" phase: Enforcing market abuse rules

The current framework for transnational cooperation in the European Union leaves us with a fragmented picture. It is safe to say that there is indeed a "blur" between administrative and criminal law in cases of transnational cooperation but whether this leads to limited cooperation on the basis of the greatest common denominator or to a (deliberate) circumvention of fundamental rights and legal safeguards, or to a situation in between, depends to a large extent on chance and on the statute of the authorities that seek cooperation and the instruments they use. The problems related to *ne bis in idem* or *nemo tenetur* are specific examples of how these safeguards may cease to function properly in transnational cases, but there are many other examples [35].

The question that is of particular interest to us now is how the EU should deal with the relationship between administrative and criminal law, in particular in cases of transnational cooperation. One dossier where that relationship is a concern is the future framework for fighting market manipulation and insider dealing. At this moment, negotiations are taking place on a dual package, consisting of a proposal for a regulation, on the basis of Article 114 TFEU [36], and a directive [37], on the basis of Article 83(2) TFEU. The directive will oblige EU Member States to criminalise certain violations of market abuse regulations. Yet it will not create obligations regarding the

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[33] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, *OJ*, no. C 295, 4 December 2009, p. 1.

[34] On this, see also O.J.D.M.L. Jansen and Ph.M. Langbroek, *Defence rights during administrative investigations*, Antwerp, Intersentia, 2007. A rare example of partial harmonisation of (some) safeguards is found in Council Regulation (EC, Euratom) no. 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, *OJ*, no. L 312, 23 December 1995, p. 1 (*PIF*). See also the recent Communication on Improving OLAF's governance and reinforcing procedural safeguards in investigations: A step-by-step approach to accompany the establishment of the European Public Prosecutor's Office, COM (2013) 533, 17 July 2013.

[35] See also M.J.J.P. Luchtman, *European cooperation*, p. 156-169, with further references.

[36] COM (2011) 651 final, 20 October 2011. For the latest version, see Council document 11384/13 of 8 July 2013 (site last visited on 1 August 2013).

[37] COM (2011) 654 final, 20 October 2011. For the latest version, see Council document 17642/12 of 12 December 2012 (last visited on 1 August 2013).

application of criminal law penalties in individual cases. The directive will not exempt Member States from the obligation of providing for administrative sanctions, except where they have decided to lay down only criminal law sanctions for breaches. The new framework therefore creates a dual track regime, obliging EU Member States to have criminal sanctions available and allowing them to use administrative law in parallel.

Both proposals aim to create a level playing field for financial services in Europe [38] not only for economic actors but also for supervisory authorities (*supervisory convergence*). The proposed regulation contains a series of detailed provisions on the composition and tasks of the national supervisory authorities and the powers that these authorities need to have, including, *inter alia*, the power to enter premises in order to seize documents and other data, the power to refer matters for criminal prosecution and the power to require existing recordings of telephone conversations held by financial institutions and – if national law so permits – traffic data in the possession of telecommunication operators (Article 17) [39]. The regulation also contains detailed provisions of mutual administrative assistance with other states (Article 19) and the European Securities and Markets Authority/ESMA (Article 18). The proposed directive is limited to the definition of offences and says nothing about issues of criminal procedure (powers and safeguards) even though Article 82 TFEU provides a basis for this. Judicial authorities must rely on the existing structures for MLA, including Eurojust [40].

With respect to the impact of these initiatives on transnational cooperation, a few things are worth mentioning. First of all, harmonised investigative powers will reduce the risk of U-turns and silver platter situations in transnational investigations. With law enforcement bodies all having comparable powers, there is less risk that one authority will try to circumvent restrictions that are placed on it by its own legal order by seeking help from another authority that is not bound by those restrictions. However, we should also note that this finding applies only to the availability of the powers as such and not to the applicable safeguards. The proposed regulation is careful not to intervene with a national law here and only makes a few suggestions in its

[38] The United Kingdom, incidentally, has opted out for the directive.

[39] See also the Preamble, Recitals 30-31a.

[40] At present, Eurojust has no specific competences for market abuse. This will change once the new Eurojust Regulation comes into existence; see the Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust), COM (2013) 535, 17 July 2013.

preamble, Recital 31a, as far as interferences with the right to privacy are concerned [41]. The *nemo tenetur* principle, incidentally, is not even mentioned [42].

The result of this will be that all national systems as such may be perfectly in line with Article 8 ECHR and Article 7 ECHR but that the right to privacy and other fundamental rights may still fall between stools in transnational cases [43]. For instance, the authority of one EU Member State may need prior judicial authorisation in order to obtain certain traffic data in its own legal order, whereas another authority may not need this because there are other safeguards in place, for instance strict purpose limitation of the data obtained. In cases where the latter authority requests the former to gather and provide traffic data, what will the role of the authorising judicial authority in the requested state be? Will that authority perform an in-depth test of the proportionality and subsidiarity of the foreign request, as it does in national cases, or will it assume – in accordance with the principle of inter-state mutual trust – that such a test has already been performed in the requesting state, although not by a judicial body [44]? Is he even able to perform such an in-depth-test, taking into account the limited information that he has on the case itself, which is conducted abroad? And if the authority grants the authorisation and the data are consequently collected and transferred, what about the situation where those data could not have originally been obtained in the requesting state due to its purpose limitation restrictions? Can such a purpose limitation requirement set aside the relevant rules in the regulation that such information must be available for transnational cooperation too? I doubt it. In cases like these, therefore, there is a real risk that the requested authority, assuming that the requesting state respects fundamental rights, will not check whether the conditions and safeguards that are in place in the requesting state are comparable to its own standards. States may use different test moments and test standards to assess the lawfulness and proportionality of measures that interfere with the right to privacy. The result could be that interferences with the right to privacy are checked by the requesting *and* the requested state ("overprotection") or not at all ("underprotection"). The proposed regulation has nothing to say about this issue.

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[41] That recital states: "While this Regulation specifies a minimum set of powers competent authorities should have, these powers are to be exercised within a complete system of national law which guarantees the respect for fundamental rights, including the right to privacy. For the exercise of those powers, which may amount to serious interferences with the right to respect private and family life, home and communications, Member States should have in place adequate and effective safeguards against any abuse, *for instance*, where appropriate prior authorisation from the judicial authorities of a Member State concerned. Member States should allow the possibility for competent authorities to exercise such intrusive powers to the extent necessary for the proper investigation of serious cases where there are no equivalent means for effectively achieving the same result" [italics added, ML].

[42] Article 26(1)(a) of the regulation does however oblige Member States to have sanctions in place in cases of non-cooperation.

[43] M.J.J.P. Luchtman, *European cooperation*, p. 162-169.

[44] Situations like these have come up in competition law, where the CJ developed a model for a "division of labour" between national courts and the CJ for checking coercive measures; see CJ, 22 October 2002, *Roquette Frères*, C-94/00, [2002], *ECR*, p. I-9011. Such a model is lacking in other areas.

Second, the proposed regulation leaves room for those EU Member States that have problems with the maximum amount of the administrative fines that are foreseen in Article 26 of the regulation. In those cases, EU Member States are allowed to use criminal law measures only instead of the dual track regime. The obvious problem that may arise here is that, in that situation, the judicial authority that is conducting the information is not able to share its information with supervisory bodies in other states. Article 19(1) of the proposed regulation therefore provides that those administrative bodies "have all the necessary powers to liaise with judicial authorities within their jurisdiction to receive specific information related to criminal investigations or proceedings commenced for possible violations of this Regulation and provide the same to other competent authorities and ESMA to fulfil their obligation to cooperate with each other and ESMA for the purposes of this Regulation". The provision is interesting because it is a rare example of a mechanism that does address the subject of this contribution. Instead of allowing for direct cooperation between the judicial and administrative authorities that are conducting investigations in different states, it introduces the national supervisor as an intermediary body. This provision will also be helpful in preventing *ne bis in idem* situations because it allows the network of supervisors and ESMA to keep oversight. Yet the reverse provision is lacking: there is no right for the competent judicial authorities to receive information from their national administrative colleague and forward it to foreign colleagues. Moreover, it only applies in cases where EU Member States refuse to use a dual track of administrative and criminal law enforcement.

Third, we should note that the dual track regime that is introduced should not lead to *ne bis in idem* situations. The preamble of the proposed directive states that EU Member States should ensure that the imposition of criminal sanctions on the basis of offences foreseen by the directive and of administrative sanctions in accordance with the regulation must not lead to a breach of the principle of *ne bis in idem*[45]. The European legislator is apparently of the opinion that combinations of criminal and punitive administrative law sanctions are covered by this principle, an opinion which was later confirmed by the CJ in *Åkerberg Fransson*[46], but which was controversial at the time that these proposals were originally made.

In order to prevent an arbitrary "first come, first served" conflict rule as a result of *ne bis in idem*, one would have expected that the European legislator would have simultaneously introduced rules for case allocation between judicial authorities and supervisors. This, however, did not happen. It was left to the national authorities to avoid a situation in which, in accordance with the rules of their legal system, the simultaneous application of different types of sanctions violates the right of the person not to be tried twice for the same offence in a concrete case[47]. The latter viewpoint is remarkable because the Presidency of the Council also wrote that the Working Party on Substantive Criminal Law (DROIPEN) indicated that "the *ne bis in idem* principle

[45] Proposal, Recital 15a.

[46] CJ, 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, C-617/10, as discussed in Valsamis Mitsilegas' contribution in this book.

[47] Council document 14598/12 of 17 October 2012, p. 4-5.

could present itself if the competent authorities of *one (or more) Member States* applied to the same conduct of a person both the criminal sanctions provided for under their national law for that criminal offence and administrative sanctions provided by MAR, when these are of such severity to be substantially considered punitive under the "Engel criteria". *It should be noted, in this context, that the ne bis in idem principle applies across the borders of the EU*" [italics added, ML] [48]. Apparently, the applicability of the principle to combinations of criminal and punitive administrative law sanctions, even in transnational cases, is considered a real possibility within the Council, and, I think, rightly so. In light of the goals of the European Union to promote, *inter alia*, the AFSJ and the internal market and in light of the principle of loyal cooperation, a failure to cooperate between administrative and criminal law authorities should not come at the expense of those actors who are doing precisely what the EU tries to stimulate, *i.e.* using their rights of free movement to promote further European integration [49].

The consequences of such a wide scope of Article 50 CFR could be far reaching. It implies, first of all, that the existing approach towards transnational cooperation at the interface of administrative and criminal law will no longer be sufficient. "Keeping all options open" will lead to a situation in which the administrative or judicial body that happens to come first bars further prosecution anywhere in the EU. A truly transnational *ne bis in idem* principle therefore requires structures to avoid forum shopping and will thus strengthen the relationship between criminal law and administrative law. I assume that this will ultimately force the European legislator to intervene in a similar fashion as in the area of criminal law after the first cases of the CJ on Articles 54-58 CISA [50]. At the very least, it would require the possibility of direct coordination between the authorities concerned, regardless of their statutes. In order to enhance the proper administration of justice, legislative interventions could then also deal with the substantive criteria and procedures to prevent case allocation on a "first come, first served" basis. In addition, it would be wise to decide on who should keep watch over the joint system of transnational cooperation. At present, should conflicts arise, then neither ESMA nor Eurojust is competent to solve conflicts of jurisdiction at the interface of criminal and administrative law. ESMA may issue binding instructions only to the supervisors, not judicial bodies [51], whereas Eurojust may only issue (non-binding) opinions to judicial authorities.

In addition to mechanisms to enhance direct coordination and cooperation, the question is how such a transnational *ne bis in idem* principle would influence the grounds for refusal in MAA and MLA instruments. Here too, convergence between

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[48] *Ibid.*, p. 4.

[49] Cf. M. Luchtman (ed.), *Choice of forum*, p. 12-19, 38-40; J.A.E. Vervaele, "Ne bis in idem: towards a transnational constitutional principle in the EU?", *Utrecht Law Review*, Special issue on principles of transnational criminal justice, 2013.

[50] That case law, starting with CJ, 11 February 2003, *Gözütok and Brügge*, C-187/01 and C-385/01, [2003], *ECR*, p. I-1345, ultimately led to the introduction of FWD 2009/948/JHA, *supra* note 25.

[51] See Article 43(5) and (6) of the market abuse regulation; Articles 17 and 19 of Regulation 1095/2010 (ESMA), *OJ*, no. L 331, 24 November 2010, p. 84.

MAA and MLA is a likely development should Article 50 CFR be taken to cover combinations of criminal and administrative law sanctions in transnational cases. For instance, a prior sanction in one state may then not only bar other states from starting a second punitive procedure for the same offence, it may also bar their ability to provide assistance to other states starting a second prosecution. The current instruments for MAA and MLA show a considerable amount of variety in the way in which the *ne bis in idem* principle is included in the framework for cooperation [52]. The current proposal for the market abuse regulation, for instance, provides somewhat halfheartedly for an optional (!) refusal ground in case a final judgment has already been delivered in relation to such persons for the same actions in the EU Member State addressed (Article 19(1a)(d)). That refusal ground is thus limited to prior judgments in the "addressed" state, thereby excluding: a) other final decisions than "judgments", and b) final decisions from other EU Member States. Under the new situation, the legislator would have to answer the question of whether there is a responsibility for the requested party to uphold the principle by refusing assistance, even if it is "only" helping another authority. The same debate – but limited to criminal law – is now going on in the negotiations on the European Investigation Order [53].

5. The need for an integrated approach

The market abuse regulations explicitly refer to *ne bis in idem* in the preamble of the proposed directive [54]. By doing so, the legislator confirms that the principle is applicable to combinations of administrative and criminal law sanctions. Whether we may deduce from this that Article 50 CFR is also applicable to those types of combinations in transnational cases is a moot point. Although I think it is in line with current developments, we will have to wait and see how courts will answer this question.

The question therefore is to what extent these developments in the field of market abuse are also of relevance for other policy areas, such as customs, agriculture, fisheries or perhaps even consumer law. It is perfectly plausible to defend the position that the guarantee of Article 50 CFR must have a transnational scope in those areas too. But there is a clear downside to it as well [55]. Where European legislation to achieve a proper administration of justice lags behind, a transnational interpretation of *ne bis*

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[52] Compare the different wordings in the following instruments: Article 16 of the current market abuse Directive 2003/6, *OJ*, no. L 96/16, 2003 (optional ground for refusal); Article 15(3)(c) Regulation 2004/2006 (consumer protection law), *supra* note 7 (optional ground for refusal); and Directive 2011/16/EU (direct taxes), *supra* note 7, which contains no provisions at all.

[53] See for instance the Council document of 20 July 2010, 12201/10.

[54] Incidentally, we may also point to the Preamble, Recital 31, of the proposed Regulation on the establishment of the European Public Prosecutor's Office, COM (2013) 534, 17 July 2013: "The closure of a case through a transaction in accordance with this Regulation should not affect the application of administrative measures by the competent authorities, *as far as* those measures do *not* refer to penalties that could be equated to criminal penalties" [italics added].

[55] On this, see also V. Mitsilegas, *EU criminal law*, Oxford/Portland/Oregon, Hart, 2009, p. 143-153; M. Luchtman (ed.), *Choice of forum*, p. 43-48.

in idem could harm the common European interest. An ambitious interpretation of the principle will presumably require the legislator to act very swiftly to prevent, *inter alia*, forum shopping, and probably more swiftly than we may realistically expect. Courts may therefore be very reluctant to take this step and will probably consider it to be a task for the legislator [56]. I assume that it is also for this reason that in its case law on Article 54 CISA, the CJ consistently attaches its interpretation that Article 54 CISA fosters free movement to the fact that the EU legislator itself integrated the Schengen *acquis* into the former third pillar and apparently did not consider it necessary to introduce accompanying measures, in order to tackle the negative side effects of a transnational *ne bis in idem* principle [57].

Therefore, in those policy areas where there are no signs that the EU legislator wants to go in that direction or where that direction cannot be discerned from the system as such, the CJ's argument that *ne bis in idem* fosters free movement will not be convincing *per se*: free movement as a goal of the EU is not absolute and may, where harmonisation is absent, be submitted to a rule of reason test, allowing EU Member States to limit the principle in order to protect their vital interests, including law enforcement interests. We should recall at this stage that a series of existing instruments explicitly state that instruments for MAA leave instruments for MLA unaffected [58] and *vice versa* [59]. These instruments could be interpreted as indicating to individuals or economic actors that any appeal to Article 50 CFR in transnational situations is beyond reasonable expectation and therefore outside the scope of the *ne bis in idem* principle [60].

The above analysis can be used for other fundamental rights too. I have already mentioned the *nemo tenetur* principle. There are at present no indications whatsoever, in any EU policy area, that the legislator is concerned with this problem in national cases, let alone transnational cases. Still, as I hope to have illustrated above, the position of the individual may become complicated as a result of this. Is he allowed to refuse to cooperate with authorities in State A for non-punitive purposes, claiming that the information he provides may or will be used in State B for punitive purposes? And what happens with that information if he decides to cooperate in State A; how will this affect his position in State B? It is safe to say that this is a true dilemma for any economic actor or individual and one that I believe should not be his problem, but that of state actors. Once again, we may seriously doubt that any court will rule on the basis of Article 47 CFR that the possibility of punitive sanctions in State B substantially affects the position of the individual also in State A and destroys the essence of his right to non-self-incrimination there. It would confront the authorities of State A with a serious problem and one that it cannot fix without the help of the European legislator. Extending the scope of the principle to these transnational cases

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[56] In CJ, 21 September 1999, *Wijsenbeek*, C-378/97, 1999, *ECR*, p. I-6207, paras. 40, 44, the CJ refused to disconnect free movement rights from accompanying legislative measures.

[57] See for instance its reasoning in CJ, 11 February 2003, *Gözütok and Brügge*, C-187/01 and C-385/01, [2003], *ECR*, p. I-1345.

[58] See *supra*, note 26.

[59] See *supra*, note 25.

[60] M. Luchtman (ed.), *Choice of forum*, p. 38-41 and p. 43-45.

could be interpreted as the judiciary writing cheques that the European legislator will not be able to cash.

We can only speculate about what will happen in the years to come. At this point, it should be stressed that the above is mainly an explanation of why the judiciary is not likely to intervene. It certainly does not prevent the EU legislator from proceeding in the direction advocated here. Yet that legislator has to become active on its own initiative. The European Commission recently launched its Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union [61]. That document says virtually nothing on the subject of transnational cooperation. On the eve of a new multi-annual programme, the successor of the Stockholm programme, I think that it is high time to include the issue of transnational cooperation and its relationship to fundamental rights in those new policy initiatives. What should be leading in this regard are the objectives that the European Union has set for itself in Article 3 TEU. Although it is beyond the ambitions of this contribution to go into this in detail, three general remarks may indicate the general direction that I think developments should go in:

A. The need for cross-sector initiatives for transnational cooperation

Loyal cooperation in the European Union is a principle of vital importance. We need to pay attention to the issue of transnational cooperation as such. New multi-annual programmes should not restrict themselves to criminal law alone, or only to financial services, or otherwise. They should include cross-pillar issues too, for which the initiatives in the area of market abuse may be taken as a good example although they are in need of a series of modifications. In my opinion, the current system, which hinges upon the formal statute of the relevant authority ("administrative" or "criminal"), does not do justice to the needs of the European Union. To a certain extent, this finding is acknowledged by the legislator too now that numerous changes have already been inserted in the system in order to facilitate cooperation. We need to go a step further in order to make sure that authorities that perform equivalent tasks are in the position to cooperate. We should do away with the organic criterion for cooperation and allow direct cooperation between authorities performing functionally equivalent tasks in a certain area of EU policy. That means that the qualification under national law that a certain authority or power is "administrative" or "criminal" can no longer be the deciding factor in cases of transnational cooperation. In principle, an administrative authority from State A should be in the position to request information or the application of a power that is of a criminal law nature in State B, or *vice versa*. One important factor for establishing such equivalence is already in place, *i.e.* the notion of a criminal charge that applies in all EU Member States.

B. The need to include fundamental rights and legal safeguards in that framework

The principle of direct contact between authorities needs guidance in the form of EU rules. As questions of effective law enforcement and legal protection are

[61] COM (2010) 573 final, 19 October 2010.

intrinsically connected, the EU should address the latter issue too. The assumption that every system in itself is in line with the relevant human rights standards does not guarantee that, for instance, the right to privacy or the *nemo tenetur* principle are also upheld in transnational situations. In particular, the EU is in need of mechanisms that:

a) prevent the authorities from asking things that are beyond their own powers in order to do away with silver platter problems and U-turns;
b) actually guarantee that the interstate rule of non-inquiry or mutual recognition does not prevent a test of lawfulness and proportionality that is equivalent to the level of protection offered by any particular legal order in order to prevent systemic flaws; and
c) ensure full respect for the *nemo tenetur* principle, in transnational cases too.

There are already examples of studies that offer ways forward as to how this might be done [62]. These studies propose, *inter alia*, that certain intrusive measures of investigation, including coercive measures and covert methods of investigation be subject to harmonised rules at the EU level and that the common European notion of the "criminal charge" is used as the relevant yardstick to protect the *nemo tenetur* principle in transnational cases. I will not go into further detail here. The main point for now is that these issues need attention at European level too and cannot be left to national law.

C. The need for cross-sector coordination and supervision

Any system of cooperation needs mechanisms for dealing with conflicts of jurisdiction. At present, the European Union has set up mechanisms for this, for instance in the area of financial services, but these mechanisms are, once again, sector specific. They are not able to deal with conflicts between judicial authorities and administrative authorities. Ultimately, we are in need of mechanisms that address this problem too.

I am well aware that what is required from the EU and its Member States goes beyond the current system and probably beyond the political will of many of the actors involved. Yet, in my opinion, they are necessary to achieve the goals that the European Union has set for itself. The Charter of Fundamental Rights should also guide the EU's legislative agenda in matters of transnational cooperation. In turn, new legislation will contribute to the further development of human rights in horizontal and interstate relationships. This will do justice to the legal order of the European Union, which is dependent on the loyal cooperation of national authorities.

There is one final remark to be made. An open question at the moment is what the EU's planned accession to the ECHR will mean. While it is understandable that national courts and the CJ may be reluctant to give the relevant guarantees of the Charter of Fundamental Rights transnational application without an accompanying legislative framework, the ECtHR has a different role. Its primary task is to assess whether ECHR rights have been violated. In the past, the ECtHR has shown some understanding for the argument that international cooperation is cumbersome and that

[62] See J. Vervaele & A. Klip (eds.), *op. cit.*, p. 285 et s.; M.J.J.P. Luchtman, *European cooperation*, p. 192 et s.

this may lead to a certain mitigation of ECHR standards [63]. Yet will it also do so when it takes into account the "post-Lisbon" specifics of the European Union, in particular its ambitions stemming from Article 3 TEU and its instruments for achieving that (cf. Article 114 TFEU and Articles 67 and f. TFEU)? Within the context of nation states, the ECtHR has always been impatient with submissions of EU Member States that a particular interpretation of ECHR rights would block effective law enforcement and would harm the common good [64]. It has ruled on many occasions that it is up to the state to deal with these problems and that it is not a task for the ECtHR. It could adopt the same approach with respect to the EU and its Member States by ruling that – where a certain issue is within the competence of the EU – the Member States and the EU are jointly responsible for law enforcement while simultaneously fully upholding human rights standards, not only in national cases, but also in cases of vertical cooperation between the Member States and European institutions, as well as in cases of transnational cooperation for the realisation of EU policies. It is then up to those actors to design a system that meets those standards. Obviously, should the ECtHR proceed in that way, then that will lead to new legislation to re-balance the opposing interests at stake, as has happened many times in the past for nation states. We will have to wait and see what actually happens.

6. Concluding remarks

Loyal cooperation is an essential building block of the EU's legal order. The current division between mutual administrative assistance and mutual legal assistance is to a large extent the result of developments which preceded the process of integration that the EU has set in motion. The EU has, however, integrated these instruments into its legal order and, on occasion, adapted them to its specific needs. The Treaty of Lisbon led to a further transfer of powers from the EU Member States towards the European level. The goals set out in the Treaties are ambitious. Still, these findings have not yet led to a rethinking of the structures for transnational cooperation. The central argument of this contribution is that the division between administrative and criminal law fails to do justice to the fact that, on the one hand, the EU sets ambitious goals for itself and fosters free movement as a powerful instrument for European integration, but on the other is still largely dependent on the legal orders of EU Member States and transnational cooperation for effective law enforcement. Free movement will inevitably induce parallel investigations in multiple states. Yet differences between those legal orders are inevitable and will remain, despite current tendencies such as "supervisory convergence". Guidance from the EU is needed here.

In order to achieve effective transnational cooperation, mechanisms for cooperation need to be put in place that overcome these differences. The current dichotomy

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[63] Cf. ECtHR, 26 June 1992, *Drozd and Janousek v. France and Spain*, Appl. no. 12747/87, discussed by A.A.H. Van Hoek and M. Luchtman, "Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights", *Utrecht Law Review*, 2005, p. 37.

[64] Cf. *Marttinen v. Finland*, *supra*, note 17, para. 74: "the Court (…) found [that] the argument of the respondent government that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could not justify such a marked departure from one of the basic principles of a fair procedure".

between MAA and MLA is based mainly on an organic criterion ("administrative" or "criminal") and does not achieve this goal. Consequently, it is already mitigated in many ways. Yet simultaneously, this process takes place without attention being paid to the accompanying legal safeguards and fundamental rights. Those are left at national level. That means that – even where those national safeguards do not come into conflict with EU law and must therefore be set aside – their proper functioning in cases of cooperation is left to national law too. The result is a systemic flaw in the current system of transnational cooperation that needs urgent attention. The European Union is currently considering its course of action with respect to a number of policy areas, including criminal law and the financial markets. It would be a good thing to include the issue of transnational cooperation on the border between administrative and criminal law in those initiatives, and to give legal safeguards and fundamental rights the attention that they deserve at European level too.

Blurring boundaries between administrative and criminal law:
from the perspective of an EU agency

Vincent Jamin

The purpose of this contribution cannot be to provide the "point of view of European Union agencies", since it does not necessarily represent the position of Eurojust or other agencies in the field of Justice and Home Affairs. Moreover, it cannot pretend to have any scientific value. It does, however, based on a few examples, reflect the impressions of a practitioner with a privileged position of observation and may be seen as a contribution to a critical assessment of the evolution of criminal law within the European Union in light of the practice of coordination of investigations and prosecutions.

One of the most visible effects of this evolution resides in the global, horizontal or so-called "integrated" approach to the fight against crime that inspires almost all recent international and EU legal instruments in this field. The development of such thematic instruments, having as an ambition the tackling of specific forms of crime by using a full range of measures – both of preventive and repressive nature – is in my view generated (or reinforced) by two factors.

Firstly, this evolution is triggered by the growing complexity of *modus operandi* of organised crime groups, which justifies the systematic integration of prevention and detection tools in all strategies against organised crime. This may be observed in particular in relation to crime types that are based on strict confidentiality between the perpetrators – such as trafficking in human beings and corruption – or on a high degree of dissimulation of the fraud scheme – such as money laundering. The evolution of criminality itself requires one to go beyond the classical distinction between administrative and criminal law to improve the effectiveness of EU policies in this field.

Secondly, the line of separation between criminal and non-criminal measures often varies from country to country. Therefore, the distinction is not particularly relevant at EU level.

In this context, the legal basis offered by the Treaties – which define most often in restrictive terms the scope and purposes of Union policies – do not easily fit with such an integrated approach. Before the Lisbon Treaty, CJ rulings on protection of the environment through criminal law and maritime pollution provided a symptomatic example of these limits [1].

The issue was not clarified by the entry into force of the new Treaty. Moreover, recent instruments based on provisions of the Treaty related to approximation of criminal law often include preventive and administrative measures [2].

Therefore, my answer to the question, "does the EU contribute to the blur between administrative and criminal law?", submitted by Anne Weyembergh in the introduction to this book, would certainly be in the affirmative. Criminal law is indeed more and more impacted by EU legislation and the distinction between administrative and criminal law is very difficult to preserve at EU level, because there is no common understanding on the part of Member States on where to place the boundary. In addition, EU instruments themselves reflect this horizontal approach by "expanding" criminal law legal basis to their maximum extent.

This trend is not limited to substantial law, and impacts, to a large extent, the field of cooperation, in an effort to bring together all actors potentially involved in the fight against organised crime and terrorism: administrative authorities, law enforcement authorities, judicial authorities and sometimes even the private sector and civil society [3].

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[1] In its ruling of 13 September 2005, the Court annulled Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law on the ground that it should have been adopted on the basis of the European Community Treaty (legal basis on protection of the environment) and not the Treaty on European Union (legal basis of approximation of criminal law). According to the Court, the Community may take measures in relation to the Member States' criminal law where the application of criminal penalties is an essential measure for combating serious environmental offences. See CJ, 13 September 2005, *Commission v. Council*, C-176/03, *ECR*, p. I-7879. Similar reasoning has been followed in relation to Framework Decision 2005/667/JHA of 12 July 2005 on maritime pollution. See CJ, 23 October 2007, *Commission v. Council*, C-440/05, *ECR*, p. I-9097. In these decisions, the Court implemented to the full extent an integrated approach to Community policies, which may include – among other implementing measures – enforcement by way of criminal law. The Court considered, to a certain extent, that criminal law measures in the areas concerned were only one element of a more global European Community policy.

[2] See, *e.g.*, Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, *OJ*, no. L 101, 15 April 2011, p. 1.

[3] The European Cybercrime Centre opened by Europol in January 2013 is a good example of this "holistic" approach. One of the objectives is to "[work] closely with the private sector, research community, civil society, academia and Computer Emergency Response Teams to detect and respond comprehensively to cybercriminal activity". See https://www.europol.europa.eu/ec3.

In a number of recent policy documents and action plans in the field of Justice and Home Affairs, this multidisciplinary approach is indeed presented as the most adequate response to combat organised crime and to overcome limitations inherent in a purely criminal law approach, in particular by targeting criminal activities in all possible areas of vulnerability [4].

When it comes to cooperation between judicial, law enforcement authorities and other relevant actors or bodies, the multidisciplinary approach to cooperation can be understood in two different manners.

The first manner consists in assigning to these authorities or bodies – in particular supervisory bodies or public bodies granting permits, licenses or procurement – a mission of prevention, detection and reporting of specific forms of crime to law enforcement and judicial authorities. This option is very often reflected in the thematic instruments referred to above [5].

The second manner consists in involving specific administrative authorities directly in the criminal investigation in a supporting role, so that the investigation can benefit from their expertise in a defined area. This so-called "multi-agency approach" is based on the assumption that a high degree of specialisation is required to tackle modern forms of crime and that interested public or semi-public authorities must join their efforts to achieve this common purpose.

This assumption is often verified in practice. I do not intend to challenge it here. However, I must emphasize that the so-called "multi-disciplinary approach" also has its limits and presents certain risks.

One of these risks is the confusion in respective roles in the conduct of criminal investigations. Only judicial and law enforcement authorities are eventually accountable for the independence, confidentiality and fairness of criminal proceedings, as they act under specific procedural safeguards, including legal remedies. In some

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[4] See, *e.g.*: (a) the Stockholm programme (section 4.3.2): "The best way to reduce the level of crime is to take effective measures to prevent them from ever occurring, including promoting social inclusion, by using a multidisciplinary approach which also includes taking administrative measures and promoting cooperation between administrative authorities, citizens of the Union that have similar experiences and are affected in similar ways by crime and related insecurity in their everyday live[s]"; (b) The Internal Security Strategy (objective 1 Action 2) on administrative approaches to organised crime): "Policies to engage governmental and regulatory bodies responsible for granting licences, authorisations, procurement contracts or subsidies should be developed (the "administrative approach") to protect the economy against infiltration by criminal networks. The Commission will give practical support to Member States by establishing in 2011 a network of national contact points to develop best practices, and by sponsoring pilot projects on practical issues"; (c) The Handbook on complementary approaches and actions to prevent and combat organised crime, adopted in May 2011, presents a catalogue of cooperative initiatives taken at national or EU level. Eurojust and the Danish Presidency co-organised a strategic seminar on this topic in Copenhagen from 11-13 March 2012. The seminar contributed to an analysis of the cross-border aspects of the integrated approach and the solutions offered at European level, in particular by EU agencies (http://www.eurojust.europa.eu/press/PressReleases/Pages/2012/2012-04-27.aspx).

[5] See, *e.g.*, Article 27 of the United Nations Convention against transnational organized crime and Articles 5 to 14 of the United Nations Convention against Corruption.

instances, in particular those subject to media scrutiny (*e.g.* maritime piracy, cases involving public health issues, etc.), authorities in charge of setting policies or standards in the concerned area may wish to take part in operational discussions, even without having any recognised role in the investigation. Ultimately, this desire for involvement could generate a risk of political interference in the handling of the case and be detrimental to the procedure. To mitigate this risk, clear legal frameworks need to be in place before considering any direct involvement of administrative authorities in the criminal investigation.

Another risk concerns the admissibility in criminal proceedings of material collected during the administrative phase of the investigation. This risk appears every time the procedure is split between an administrative phase – focusing on "irregularities" – and a criminal investigation, which will be opened once the commission of a criminal offence is suspected. In most jurisdictions, the standards of admissibility in criminal proceedings are higher than or at least different from those applying in the administrative phase, and, therefore, information and evidence collected during an administrative investigation may not be admissible before a criminal court. In some cases, the administrative investigation may even hamper the subsequent prosecution of the offences if critical investigative measures (such as hearings of suspects or searches of premises) are carried out prior to the opening of a criminal investigation, according to standards that are not compatible with those required in criminal proceedings.

Possible solutions might be to postpone the most intrusive measures to the criminal phase of the investigation and to involve law enforcement and judicial authorities as early as possible, even where appropriate during the administrative phase of the investigation. At EU level, OLAF, for instance, might consider involving Europol and Eurojust as soon as suspicion of a criminal offence exists. Prosecution should never be seen as a simple "follow-up" of the investigation, as is often heard, but as its ultimate goal, to which all actors of the process concur. I can only subscribe here to the views expressed by Raoul Ueberecken at the conference organised by ECLAN and the Institute for European Studies (ULB) on 17 May 2013: administrative and criminal law approaches should supplement rather than oppose each other. The administrative approach is not a way to circumvent criminal procedure, taking into account that, at least in the most serious cases, prosecution before a criminal court is ultimately necessary to impose "effective, proportionate and dissuasive" sanctions.

However, in practice, channels of cooperation still remain strictly separated, due in particular to the lack of a global and consistent approach at EU level.

Over the years, the European Union has set up and offered to practitioners various channels and networks of cooperation, allowing them to exchange operational information and cooperate efficiently with their counterparts in other Member States. These networks and channels are based on specific legal frameworks and operate according to a vertical approach: customs cooperation, cooperation between Financial Intelligence Units (FIUs), police and judicial cooperation, etc.

Individual EU agencies (Frontex, OLAF, Europol, Eurojust) have been set up to support cooperation between national authorities in these different fields. Unfortunately, agencies operating in the field of Justice and Home Affairs have

developed in parallel, without receiving any guidance from EU legislators as to their mutual interaction and cooperation. The mandates and missions of these agencies are specific, their scopes of competences are different, and their legal frameworks are sometimes incompatible, especially concerning data protection regimes.

Furthermore, national authorities tend to rely on their "own" cooperation channels, even in situations in which a more horizontal approach would be essential to the efficient handling of the case. Indeed, for practitioners, trusting only their "natural" counterparts, with whom they share the same professional background, is easier.

In fields such as VAT fraud, cigarette smuggling and even drug trafficking, the same criminal organisation is often simultaneously the subject of a criminal investigation in one or more Member States, and an administrative investigation in another one or more Member States. However, cooperation between the different national authorities involved takes place only on an informal basis. In such circumstances, the lack of coordination can seriously compromise the success of the case.

Some solutions exist. In customs matters, the "Naples II" Convention offers an alternative between judicial an administrative cooperation, which is very effective in practice [6]. And, again, JHA agencies can contribute to a more coherent approach, in particular by involving other potentially interested agencies each time such involvement is practicable.

In the absence of legislative guidance, however, this cooperation is based on instruments concluded by these agencies themselves on an *ad hoc* basis. Some of these agreements have already been signed or are under negotiation, but much remains to be done.

For example, Frontex and Eurojust are currently discussing a draft memorandum of understanding that does not entail the exchange of personal data. As a consequence, no operational cooperation currently exists between Eurojust and Frontex, although Eurojust deals with many cases of smuggling of migrants.

Eurojust and OLAF signed an arrangement in 2008 [7], which foresees in particular the exchange of "case summaries", with the objective of defining cases of common interest. In addition, participation of representatives of the other organisation is possible in operational meetings organised by both agencies, which has happened on several occasions [8]. Involvement of both agencies in joint investigation teams is also foreseen, but unfortunately has not yet occurred.

Cooperation between Europol and Eurojust, which is based on a Cooperation Agreement signed in 2009 [9], is more advanced, *i.e.* attendance at operational

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[6] Article 3.2 of Convention of 18 December 1997 on mutual assistance and cooperation between customs administrations.

[7] Practical Agreement on Arrangements of Cooperation, signed on 24 September 2008: http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/agreements/Practical%20Agreement%20on%20arrangements%20of%20cooperation%20between%20Eurojust%20and%20OLAF%20(2008)/Eurojust-OLAF-2008-09-24-EN.pdf.

[8] In 2012, OLAF participated in five coordination meetings organised by Eurojust.

[9] Agreement between Eurojust and Europol, signed on 1 October 2009: http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/agreements/Agreement%20between%20Eurojust%20and%20Europol%20(2010)/Eurojust-Europol-2010-01-01-EN.pdf.

meetings, involvement of Eurojust in Europol "Focal Points" [10], and participation of both Agencies in joint investigation teams. These forms of cooperation are largely effective. However, cooperation between Eurojust and Europol needs to be further enhanced. This is one of the topics under discussion in the framework of the revision of both agencies' legal frameworks [11].

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The "blurring" of administrative and criminal law is already a reality for practitioners at EU level. It results very often in an increase in the number of actors and bodies that can play a role in the coordination of the case. This situation may generate complexity and, to a certain extent, competition between these different bodies that cannot be entirely addressed through cooperation agreements. As is often the case, the appropriate response needs to come from the legislator.

[10] Eurojust is currently involved in 20 of the 24 Europol Focal Points.

[11] Proposal for a Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA, COM (2013) 173 final, 27 March 2013: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0173:FIN:EN:PDF); Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust), COM (2013) 535 final, 17 July 2013: http://ec.europa.eu/justice/criminal/files/regulation_eurojust_en.pdf.

Criminal sanctions and administrative penalties: the *quid* of the *ne bis in idem* principle and some original sins

Christoffer Wong

1. Introduction

It is quite clear that both criminal sanctions and equivalent administrative penalties are subject to protection against *ne bis in idem*. This protection is available in national legal systems, through different international human rights instruments as well as under EU law. The content of this protection differs, however, depending on which instrument is being considered. In this paper, the *ne bis in idem* principle as expressed in different sources is examined, but mainly when this principle is applied in the context of criminal proceedings. The paper begins, however, with a reminder of the concept of *res judicata* and its relationship with the principle of *ne bis in idem*. The discussion then moves on to the development of the principle in the case law of the European Court of Human Rights. In this context, a considerable amount of space is given to the early development of this case law, including the adoption of the so-called *Engel* criteria for the purpose of *ne bis in idem*. The reason for dwelling on this early development of case law is that the positions taken at this early stage actually set the path for the subsequent development of the case law, and the present author argues that the Court has not given sufficient reasons for taking some of these positions. After examining the jurisprudence of the Strasbourg Court, a brief account is given on the development of the same principle under various provisions of EU law. This account is not meant to be comprehensive; it aims rather to highlight the approach of the Court of Justice of the European Union based on the special consideration of EU law. Before the conclusion of this paper with some comments on the coherence of the European legal order, the application of the *ne bis in idem* in areas outside the context of criminal proceedings is touched upon briefly.

2. *Ne bis in idem* as a consequence of a final judgment

When all legal remedies against a judgment [1] have been exhausted – typically when it is no longer possible to take the case before an appellate instance – the judgment acquires final force (finality) and is described as having the status of *res judicata* [2]. This judgment, as has been described rather succinctly, "disposes once and for all of the fundamental matters decided, so that (…) they cannot be re-litigated between persons bound by the judgment" [3]. The epithet "bound by the judgment" articulates two important aspects of *res judicata*: (1) it is now the judgment – a judicial fact – that is to hold between the litigating parties, whether this is a correct reflection – or not – of reality [4], but (2) the judgment has *res judicata* effect only insofar as a person is bound by it [5]. These aspects can be said to constitute the "positive" element of *res judicata*.

As a corollary to the "positive" element, *res judicata* can also be said to have the "negative" effect of *barring* re-litigation. In criminal proceedings, this preclusive effect of a final judgment is often referred to under the heading "*ne bis in idem*"; in civil proceedings, a final judgment in a case is said, in English law, to constitute "etsoppel of *res judicata*" [6]. As mentioned above, the negative force of a final judgment affects only those bound by the judgment. Thus, a final judgment in a criminal case under public prosecution – *i.e.* a case between on the one side the accused, and on the other side the State, the prosecutor or some other competent public authority – will not, in many if not most legal systems, preclude a civil law suit, *e.g.* for restitution, compensation or damages in tort. This is not only the case when the final judgment

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[1] See the joined cases referred to in note 99 below for examples of other decisions, whether judicial or otherwise, having equivalent effects as court judgments.

[2] *Cf.* the following description of "final force" in the Explanatory Report to Council of Europe's Convention (ETS no. 70, 1970) on the International Validity of Criminal Judgments: "A decision is final if, according to the traditional expression, it has acquired the force of *res judicata.* This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them" (Commentary on Article 1).

[3] K.R. Handley and G.S. Bower, *Res Judicata*, 4th ed., London, LexisNexis, 2009, p. 1. Although stated in a treatise on (primarily) English law, this description is clearly applicable to other legal systems, including the continental civil law systems. There is no need either *ab initio* to distinguish, in this context, between different subject matters (civil, administrative, criminal law etc.) when discussing the question of *res judicata*.

[4] A party is entitled to act on this judicial fact, *e.g.* by seeking enforcement of the judgment in a civil case. In a criminal case, the judgment convicting the defendant of a crime is the basis for enforcement measures such as the imposition of a fine or imprisonment. The judicial fact that substitutes the state of affair previously in dispute is a "positive" aspect of *res judicata*.

[5] Generally speaking, a civil judgment *in personam* binds only the parties while a judgment *in rem* is binding on all who has to do with the object (the *res*) of the litigation – see Handley & Spencer Bower (note 3 above), chapters 9 and 10. It is more difficult to characterise the binding effects of a criminal judgment. Whereas it is (with few exceptions) only the convicted who is "bound" to undergo the punishment imposed, a criminal sentence may also entail obligations to act by parties not involved in the criminal proceeding; in this sense, third parties may also be said to be "bound" by the judgment.

[6] See K.R. Handley and G.S. Bower, *op. cit.*

results in a conviction – in which case, the judicial fact established through a criminal sentence may be used as the ground for the plaintiff's civil cause – but also when the accused is acquitted of the criminal charge. In the latter case, a civil proceeding can still meaningfully be brought against the defendant since a civil wrong may exist even though the conduct in question does not amount to a crime. Moreover, the standard of proof in civil proceedings is often lower than that for criminal proceedings. However, it is another matter if civil remedies – *e.g.* recovery of loss of public revenue – are sought by a public authority, *e.g.* the tax authority. An argument can be made for the claim that actors belonging to different branches of government are nonetheless part of the machinery of State, which would entail that all State actors are to be bound by a final judgment in a criminal proceeding and are thus precluded from re-litigating the matter. From the point of view of the law of *res judicata*, it is crucial to examine both part of the final judgment: *viz.* the *res* and what is considered *judicata*. Different approaches to this problem exist in national legal systems and this area of law belongs to one of the classical problems of the study of procedural law. Although procedural law *per se* does not fall within the EU's field of competence [7], EU law does affect the application of the law of *res judicata* in its Member States; but this topic cannot be pursued in the present paper [8].

The preclusive effect of a final judgment in a criminal proceeding – or force of *ne bis in idem* – has however been separated from the complex of issues concerning *res judicata*, and treated as an independent principle of law. Thus, the *ne bis in idem* principle is said to have an ancient basis and has been described as

> a fundamental norm which exists in order to protect identical legal rights in respect of the same unlawful conduct and prevents a person from being subject to more than one penalising procedure and, possibly, being punished repeatedly, in so far as that duplication of procedures and penalties involves unacceptable repetition of the exercise of the *ius puniendi* [9].

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[7] With the exception of matters now falling under the umbrella of the area of freedom, security and justice.

[8] See, however, X. Groussot and T. Minssen, "Res judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality?", *European Constitutional Law Review*, 2007, 3, p. 385-417.

[9] W. Schomburg, "Criminal matters: transnational *ne bis in idem* in Europe – conflict of jurisdictions – transfer of proceedings", *ERA Forum*, 2012, 13, p. 311-324, at p. 312. A study of the principle including a detailed presentation of the principle's historic origins can be found in M. Mansdörfer, *Das Prinzip des ne bis in idem im europäischen Strafrecht*, Berlin, Duncker & Humblot, 2004. The rationale behind the *ne bis in idem* principle has been described in J.A.E. Vervaele, "*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?", *Utrecht Law Review*, 2013, 9, p. 211-229. On the current status of the principle of *ne bis in idem*, see also E. Sharpston and J.M. Fernández-Martín, "Some Reflections on Schengen Free Movement Rights and the Principle of *Ne Bis In Idem*", *Cambridge Yearbook of European Legal Studies*, 2007-2008, 13, p. 413-448, at p. 416-417 and A. Weyembergh, "La jurisprudence de la CJ relative au principe *ne bis in idem* : une contribution essentielle à la reconnaissance mutuelle en matière pénale", *in* A. Rosas, E. Levits and Y. Bots (eds.), *La Cour de Justice et la Construction de l'Europe : Analyses et Perspectives de Soixante ans de Jurisprudence*, The Hague, T.M.C. Asser Press, 2013, p. 539-559, at p. 540 with accompanying notes.

In this light, the normative justification behind the principle of *ne bis in idem* is based on the need of protection against the State's abuse of its *ius puniendi*; reasons relating to the integrity of the system of procedural law may have a role to play, but they are not the primary justifying ground for *ne bis in idem*. A principle based on the protection of individual rights will also entail that a second proceeding that, for one reason or another, is to the advantage of the accused/sentenced person need not be ruled out. The present paper will subscribe to the protective view on the normative background of the *ne bis in idem* principle.

Before moving on to the discussion of *ne bis in idem* in criminal and non-criminal proceedings, it should be noted that the principle applies only to the ordinary course of justice; it does not preclude measures that involve the setting-aside – on grounds of exceptional circumstances such as new evidence in extraordinary cases or grave judicial errors – of judgments that have attained final force.

3. Application of the principle of *ne bis in idem* in criminal proceedings

A. National and international rules on ne bis in idem

In this section, an overview is given of the *ne bis in idem* principle applicable to criminal proceedings. This is, in its original form, a national principle in the sense that it relates to the preclusive effect of a final criminal judgment within a given legal system. There may or may not be written provisions on this in the criminal or procedural law legislation of the legal system, but there is general consensus that *ne bis in idem* is applicable in any case as a general principle of law [10]. The importance of this national principle has been reflected in the inclusion of the principle in different international instruments. In this paper, the principle as it appears in Protocol no. 7 to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereafter "ECHR") is discussed as the primary example of an international rule on the *ne bis in idem* principle. After the examination of Protocol no. 7 ECHR, this section turns to the application of the principle in an entirely different context, *viz.* when a final criminal judgment in one State is given preclusive effect in another State. As there is no rule of public international law that compels a State to recognise a judgment passed by the court of another State [11], the preclusive effect of a foreign criminal judgment is derived from an agreement between States. The rules on *ne bis in idem* in the Convention Implementing the Schengen Agreement are discussed as an example of international *ne bis in idem*. Finally, the provision on *ne bis in idem* in the Charter of Fundamental Rights of the European Union will also be discussed. The Charter provision is similar to a "national" rule if one treats the European Union as one single legal order, but it also has an "international" character in the sense that the provision is applicable to criminal proceedings in different Member States of the EU. In addition to the provisions dealing with the prosecution and punishment of crimes, the principle of *ne bis in idem* also features in a number of instruments on mutual

[10] See the literature referred to in note 9 above.

[11] Naturally, this does not prevent a State from unilaterally, or voluntarily, recognising the effect of foreign judgments under conditions that it sees fit.

assistance in criminal matters, in which the principle is used as a ground for non-cooperation [12], but this latter type of instrument will not be examined in this paper.

B. In principio erat angelus

Before taking a look at some of the international rules on *ne bis in idem* it is necessary to make a detour and examine the interpretation given by the ECtHR of the concept "criminal" for the purpose of an individual's fair-trial rights, as it turns out that this interpretation would have a crucial role to play in the development of the law on *ne bis in idem*.

The right to a fair trial according to Article 6 ECHR – of all the articles of the Convention – has generated the highest number of individual complaints and numerous textbooks, commentaries as well as scholarly articles and monographs have dealt with, at length and in detail, the established position of law that, for the assessment whether the right of an individual faced with a criminal charge to have a fair trial has been violated, the ECtHR applies an "autonomous" conception of what is considered "criminal charge' [13] in the context of the ECHR [14]. The concept is "autonomous" in the sense that the same standard applies for the purpose of the Convention, independent of the definition or classification of offences and procedures in the legal systems of the State Parties to the ECHR [15]. This standard is captured by the so-called "*Engel* criteria", established by the ECtHR in a judgment [16] with respect to a series of complaints against the Netherlands lodged in 1971. The ECtHR ruled on a number of issues concerning, *inter alia*, various aspects of Articles 5 and 6 ECHR; but for the purpose of the present paper, only the discussion concerning the meaning of the term "criminal" in Article 6 ECHR needs to be taken up.

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[12] See, *e.g.*, J.A.E. Vervaele, *op. cit.* and A. Weyembergh, *op. cit*., at p. 541.

[13] The term "criminal charge" appears in Article 6(1) ECHR whereas "charged with a criminal offence" appears in Articles 6(2) and (3) ECHR. The word "criminal" must have the same meaning in both of these terms on linguistic grounds. Logically speaking, a "criminal charge" presupposes a "criminal offence"; an offence is something abstract and relates to a general norm whereas a charge is a contestation in an actual case. The term "criminal proceeding" – not used in the Convention text itself – is the proceeding whereby the criminal charge is determined. In the remainder of this paper, it is taken for granted that the terms "criminal offence", "criminal charge" and "criminal proceedings" all revolve around the same concept of what is "criminal" according to the Convention.

[14] It may be added that although the following discussion deals only with Article 6 ECHR, the argument will apply equally to Article 7 ECHR (the principle of *nullum crimen/nulla poena sine lege*). The ECtHR has stressed the necessity of an autonomous interpretation of the concept "criminal" in both Article 6 and Article 7 ECHR, because, the Courts argued, if States were able "at their discretion to classify an offence" as criminal or otherwise, "the operation of the fundamental clauses of Articles 6 and 7 (…) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention" (ECtHR, 8 June 1976, *Engel and others v. The Netherlands*, Series A, no. 22, para. 81).

[15] Incidentally, a separate line of case law has developed concerning the autonomous concept of "civil rights and obligation" in Article 6(1) ECHR.

[16] *Engel*.

The applicants were members of the Dutch armed forces and had all been subject to disciplinary sanctions and undergone proceedings pursuant to the Regulations on Military Discipline and/or the Military Penal Code of the Netherlands. They complained that their rights to a fair trial – *e.g.* that there was no public hearing [17], that some of the applicants had been "proved guilty according to the law" [18] and that they had not had adequate time and facilities for the preparation of the defence [19] – had been breached. The right to a fair trial – *i.e.* that the trial proceeding has the *quality* of being fair – presupposes that there exists a right to *a trial at all* under Article 6 ECHR. For such a right to exist with respect to an individual, the case must concern "the determination of his civil rights and obligations or of any criminal charge against him" [20]. The applicability – in this case – of Article 6 ECHR depended crucially, then, on whether the disciplinary sanctions and proceedings could be seen as "criminal charges" in the sense of the Article [21].

It was at this point that the ECtHR took a step beyond its previous jurisprudence and laid down, in a more general manner, its "*Engel* criteria", consisting of three separate elements.

In the first place and as "no more than a starting point", the ECtHR would examine "whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law (…)" [22]. Thus, if the offence is classified as criminal according to the national legal system, it will also be considered a criminal one for the purpose of Article 6 ECHR, even though the State could have classified it as a disciplinary or administrative offence. This is what the ECtHR meant, when it said that "autonomy" of the concept of "criminal" operated "one way only' [23].

In the second place, "the very nature of the offence" is to be considered as "a factor of greater import" [24]. In *Engel*, the ECtHR did not expound on the meaning of "the nature of a criminal offence", but it did refer to the "aim of repressing through penalties", which was "an objective analogous to the general goal of the criminal law" [25].

In the third place, the ECtHR will take into consideration "the degree of severity of the penalty that the person concerned risks incurring" [26]. In this respect, the ECtHR provided in *Engel* some slightly more detailed guidelines for the determination of "severity" than what it had said concerning the "nature" of a criminal offence:

> In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by

[17] *Engel*, para. 89.

[18] *Engel*, para. 90.

[19] *Engel*, para. 91.

[20] The subordinate clause in the first sentence of Article 6(1) ECHR.

[21] In fact, some of the applicants also based their allegations on the determination of their civil rights, but the Court did not examine these allegations separately. See *Engel*, paras. 86-87.

[22] *Engel*, para. 82.

[23] *Engel*, para. 81.

[24] *Engel*, para. 82.

[25] *Engel*, para. 79.

[26] *Engel*, para. 82.

> their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so (…)[27].

These three criteria remain to be applicable to this day. This is not the place to discuss – or even to describe – the subsequent jurisprudence of the ECtHR, which seeks to refine the criteria first established in *Engel*[28]. It suffices to note that these criteria are intended to be used to ascertain whether a person is "the subject of a "criminal charge" within the meaning of Article 6 para. 1"[29]. However, as will be discussed presently (3.C below), the *Engel* criteria have been applied in situations even beyond the context of an individual's right to a fair trial.

A. The principle of ne bis in idem *according to Article 4 of Protocol no. 7 to the ECHR*

1) General Remarks

Article 4 of Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[30] (hereafter "Article 4 – P7") prohibits multiple trials and punishment of a person for the same criminal offence. For the present paper, the focus is put on paragraph 1 of that Article, which provides the following:

> No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

This prohibition is applicable – as the above wording shows – only to criminal proceedings and is restricted to prosecution and punishment in one and the same State. Much of the discussion on this provision has centred on the interpretation of the term "offence" and the ECtHR jurisprudence has been inconsistent on this point. The present paper will ignore, however, the debate concerning this particular interpretation as the Grand Chamber of the ECtHR is said to have settled the question in its judgment from 2009 in *Zolotukhin*[31]. What this paper will examine, instead, is the seemingly less controversial question of what is to count as a criminal offence/charge/proceeding. It is the purpose of sub-section 3.C.2 below to show that the

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[27] *Ibid.*

[28] Readers are referred to standard commentaries to the ECHR such as D. Harris *et al., Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, 2nd ed., Oxford, Oxford University Press, 2009; J. Meyer-Ladewig, *Europäische Menschenrechtskonvention – Handkommentar*, 3. Aufl., Baden-Baden, Nomos, 2011; P. van Dijk *et al.* (eds.), *Theory and Practice of the European Convention on Human Rights*, 4th ed., Antwerpen – Oxford, Intersentia, 2006 and R.C.A. White and C. Ovey, *Jacobs, White & Ovey. The European Convention on Human Rights*, 5th ed., Oxford, Oxford University Press, 2010.

[29] *Engel*, para. 83. See, however, note 14 above concerning the equal applicability of criteria to Article 7 ECHR.

[30] Strasbourg, 22 November 1984, CETS no. 117.

[31] ECtHR, 10 February 2009, *Zolotukhin v. Russia*, App. no. 14939/03.

ECtHR has simply transposed the notion of "criminal" from its case law related to the interpretation of Article 6 ECHR to the quite different context of Article 4 – P7. Criticisms are raised against the ECtHR for the absence of argument for treating the notions of "criminal" in these different provisions as the same. It is conceded, however, that the case law in this area is so entrenched that one simply has to live with this fault. Sub-section 3.C.3 will then provide a *de lege lata* account of the law after the ruling of the Grand Chamber in *Zolotukhin*. In this regard, it is just as interesting to examine the methodology of the ECtHR as to describe the actual findings of the Court. Some of the themes touched upon in the discussion of *Zolotukhin* will resurface in the final concluding section (5 below).

2) The development up to Zolotukhin

Gradinger[32] is one of the first cases decided by the ECtHR directly addressing issues arising from Article 4 – P7. In this case, the complainant alleged violation of both Article 6 ECHR and Article 4 – P7. The first question that the Court had to decide was whether the complainant – with respect to a "sentence order" (*Straferkenntnis*) issued by an administrative authority for "driving under the influence of alcohol", subsequent to a criminal proceeding for "causing death by negligence" (*fahrlässige Tötung*) – had had access to a "tribunal" in the sense required by Article 6(1) ECHR. The question was to be answered in a context where the "sentence order" was treated as a "criminal charge" for the purpose of the applicability of Article 6 ECHR. In this case, there was no dispute that the "sentence order" was indeed a criminal charge and the Court simply reiterated the *Engel* criteria for its classification although no explicit mention was made to *Engel* itself[33]. After reviewing the character of the various bodies that had dealt with the complainant's case in Austria, the ECtHR found that examination of the "sentence order" by these bodies did not fulfil the requirement of a fair hearing before a "tribunal" in the sense required by the ECHR. Hence, there was a violation of Article 6(1) ECHR. The next question for the Court to decide was whether there was also a violation of Article 4 – P7. After dismissing some preliminary issues concerning Austria's reservation in respect of Article 4 – P7 and the applicability *ratione temporis* of the Article, the ECtHR proceeded immediately to the question of compliance with Article 4 – P7. In this connection, the Court arrived, without much detailed discussion, at the conclusion that there was a breach of Article 4 – P7 as "both impugned decisions [*viz.* the criminal conviction and the "sentence order'] were based on the same conduct"[34]. The point that I want to make here does not concern, however, the merit of the Court's conclusion regarding the same conduct; what I wish to point out is, rather, the fact that the Court did not re-examine the classification of the "sentence order" as a "criminal charge". For Article 4 – P7 to be applicable at all, the "sentence order" had to be qualified as a second criminal proceeding, but the conclusion to this effect was simply carried over – without argument – from the context of Article

[32] ECtHR, *Gradinger v. Austria*, 23 October 1995, App. no. 15963/90.

[33] See *Gradinger*, para. 30. The Court referred, instead, to ECtHR, 21 February 1984, *Öztürk v. Germany*, App. no. 8544/79 ; ECtHR, 27 August 1991, *Demicoli v. Malta*, App. no. 13057/87.

[34] *Gradinger*, para. 55.

6 ECHR to that of Article 4 – P7. There was thus an implicit assumption, rightly or wrongly [35], that the same concept of "criminal charge" was applicable to Article 6 ECHR and to Article 4 – P7. Given the fact that the issue whether a "sentence order" was a "criminal charge" was not under dispute, the implicit assumption of the ECtHR could be said to be excusable.

In *Oliveira* [36], a case decided a little less than three years after *Gradinger*, the ECtHR adopted another approach and found that there was no violation of Article 4 – P7 as this provision, in the opinion of the Court, only prohibited "people [from] being tried twice for the same offence whereas in cases concerning a single act constituting various offences (*concours idéal d'infractions*) one criminal act constitute[d] two separate offences". But again, I shall not discuss the merit of this conclusion. I merely wish to note that, in this case, dealing solely with Article 4 – P7, there was no need to examine whether the second proceeding constituted a "criminal charge" in the sense of the Protocol, as the "penal order" (*Strafbefehl*) in the second proceeding – issued by the Public Prosecutor's office for negligently causing physical injury contrary to the Swiss Penal Code – was clearly concerned with a "criminal charge' [37]. This case is therefore silent on the question whether the concept of "criminal charge" is the same in Article 6 ECHR and in Article 4 – P7.

An opportunity for the ECtHR to address the issue of "criminal charge" arose in *Ponsetti and Chesnel* [38]. This case was concerned with criminal proceedings brought for tax evasion subsequent to the imposition by the tax authorities of tax surcharges after a failure to file income tax returns. France, the respondent State, argued specifically, that the tax surcharges were not "criminal charges'. It maintained that, where two decisions were made based on the same conduct,

> the first of those decisions had to have been delivered by a criminal court applying rules of procedure classified as penal under the domestic law (there was nothing to suggest that the provision in issue was applicable *ipso facto* to all offences coming within the scope of "criminal proceedings" for the purposes of Article 6 of the Convention) [39].

The respondent State maintained, furthermore, that

> In any event, the decision taken (…) in the tax proceedings could not be equated with a criminal decision: surcharges for delay under Article 1728 of the General Tax Code were not so much intended to punish negligent taxpayers as to compensate for

[35] I should emphasise that I am only questioning the correctness of the *assumption* and not the actual determination, in *Gradinger*, that the "sentence order" is a "criminal charge" in the sense of Article 4 – P7. There are, on the contrary, very good arguments for the ECtHR conclusion in the case in question, had the Court chosen to make these arguments.

[36] ECtHR, 30 July 1998, *Oliveira v. Switzerland*, App. no. 25711/94.

[37] It may be added that the first proceeding was concerned with an offence under the Swiss Road Traffic Act for a failure to adapt the driving to the road condition (*Nichtbeherrschen des Fahrzeuges infolge Nichtanpassens der Geschwindigkeit an die Strassenverhältnisse*) and a fine issued by the Police Magistrate – see *Oliveira*, para. 10.

[38] ECtHR, 14 September 1999, *Ponsetti and Chesnel v. France*, App. no. 36855/96 and 41731/98.

[39] *Ponsetti and Chesnel v. France*, para. 3.

> the loss sustained by the Treasury – indeed, the tax authorities would have no right to seek damages on that account before the criminal courts – and the penalties imposed (…) had been relatively modest [40].

However, this argument regarding the nature of tax surcharges in the context of Article 4 – P7 was ignored completely by the ECtHR. The Court chose instead to focus on what it regarded as an essential difference between the constitutive elements of the fiscal offence and the criminal offence, and on this ground alone, the application was found to be manifestly ill-founded and was rejected pursuant to Article 35 ECHR [41].

It may be questioned whether the "silent treatment" of the ECtHR with regard to the respondent State's argument can be taken as an implicit rejection of the claim that the concept of "criminal proceedings" developed under Article 6 ECHR should not automatically be applied in the context of Article 4 – P7. As it turned out, subsequent case law of the ECtHR would show that the absence of an argument for a uniform interpretation of the notions "criminal charge", "criminal proceeding" etc. had not adversely affected the Court's adoption of this approach. However, it should be noted that *Ponsetti and Chesnel* is a decision on admissibility and not on the merit of the case; the Court is entitled to reject an application on any ground that would make the application inadmissible. Against this background, it is submitted that it is ill-advised – to say the least – to base an important conclusion about a fundamental matter on what the Court has not said in the admissibility decision.

After *Ponsetti and Chesnel*, the issue of the applicability to Article 4 – P7 of the concept of "criminal proceedings" developed from the case law of Article 6 ECHR did not come to the fore as the Court was preoccupied for some time with a series of Austrian traffic-offence cases following the pattern of *Gradinger* and *Oliveira*. The ECtHR was again faced with a tax case in *J.B.* [42]. Arguments similar to those put forward by France in *Ponsetti and Chesnel* were made in *J.B.*, but once again the ECtHR avoided the question when it stated that the issue did not need to be resolved since the complaint was in any event inadmissible on other grounds. In *Franz Fischer* [43], the ECtHR did refer to *Ponsetti and Chesnel* on the interpretation of what was meant by the *same* offence [44] but the issue of the characterisation as a "criminal charge" did not arise in that case.

The otherwise unremarkable case of *Luksch* [45] (concerning the characterisation of disciplinary proceedings under the Austrian Accountants Act) is interesting in the present context since the ECtHR made a specific reference to the "criteria established by the Court's case-law" [46] when determining whether there was a "criminal charge" in the context of a complaint based on Article 4 – P7. By such criteria, the ECtHR was referring to the criteria developed through the case law associated with Article 6

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[40] *Ibid.*

[41] *Ponsetti and Chesnel v. France*, para. 5.

[42] ECtHR, 6 April 2000, *J.B. v. Switzerland*, App. no. 31827/96.

[43] ECtHR, 29 May 2001, *Franz Fischer v. Austria*, App. no. 37950/97.

[44] *Franz Fischer*, para. 22.

[45] ECtHR, 21 November 2000, *Luksch v. Austria*, App. no. 37075/97.

[46] *Luksch*, para. 3.

ECHR[47]. In *Luksch*, the ECtHR found that the first proceeding was indeed merely disciplinary in nature since the offence at issue merely concerned the infringement of the accountancy profession's reputation and the penalties were not so severe as to render the prosecution of this offence a "criminal charge". In the context of the present discussion, it is not important which outcome the Court actually arrived at. The points to note here are rather: (i) that the Court did apply the criteria established through Article 6 ECHR, (ii) that explicit reference was made to these criteria and (iii) that the ECtHR offered no reason why the Article 6 ECHR criteria were applicable.

In *Göktan*[48], the complainant alleged violation of Article 4 – P7 arising from a French court's order of "imprisonment in default" for failure to pay the customs fines (*la contrainte par corps, en exécution du paiement des amendes douanières*) originally imposed in a criminal proceeding, in which the sentence for drug trafficking was a hybrid penalty consisting of both a customs fine and imprisonment. Before answering the question as to whether there had been *double* punishment, the Court had to determine whether "imprisonment in default" as such was a "penal sanction" as opposed to merely a *means of execution* of a penal sanction. In this connection, the Court referred to *Jamil*[49] in which the ECtHR found that "imprisonment in default" was a "penalty" within the meaning of Article 7 ECHR. The Court stated that "[t]he notion of what constitutes a "penalty" cannot vary from one Convention provision to another", and for this reason it concluded that "imprisonment in default" was a "criminal sanction" also for the purpose of Article 4 – P7. To recapture the point, the ECtHR has, in *Göktan*, made use of the concept of "penalty" developed in the Court's jurisprudence on Article 7 ECHR – as opposed to Article 6 ECHR in the cases discussed earlier – for the interpretation of the concept of "criminal sanction" under Article 4 – P7; the reason offered being that the notion of what constitutes a penalty cannot vary between the different provisions in the ECHR and its protocols. The ECtHR did not explain, however, why there should not be a variation in meaning between the different provisions.

An appeal to the uniform interpretation of notions featured in the ECHR and its protocols was made in the ECtHR's decision in *Rosenquist*[50]. In a series of other Swedish (pre-*Rosenquist*) cases[51], the ECtHR had already established that the "tax surcharge" applied under Swedish law constituted a "criminal sanction" for the purpose of Article 6 ECHR. What remained to be decided, in the Court's own words, was "whether the proceedings relating to the (…) tax surcharge could be viewed as

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[47] For some reason the ECtHR referred to ECtHR, 23 March 1994, *Ravnsborg* v. *Sweden*, App. no. 14220/88 rather than the more well-known cases associated with the criteria in question.

[48] ECtHR, 2 July 2002, *Göktan v. France*, App. no. 33402/96.

[49] ECtHR, 8 June 1995, *Jamil v. France*, App. no. 15917/89.

[50] ECtHR, 14 September 2004, *Rosenquist v. Sweden*, App. no. 60619/00.

[51] See ECtHR, 23 July 2002, *Janosevic v. Sweden*, App. no. 34619/97 on violation of Article 6(1) ECHR; ECtHR, 23 July 2002, *Västberga Taxi Aktiebolag and Vulic v. Sweden*, App. no. 36985/97 on violation of Article 6(1) ECHR; and ECtHR, 8 April 2003, *Manasson v. Sweden*, App. no. 41265/98 on the admissibility of the claim based on Article 6(1) ECHR and the inadmissibility of the claim based on Article 4 – P7.

"criminal" *for purposes of Article 4 of Protocol no. 7*" (my emphasis)[52]. However, having made this statement, the Court then went on – as the Court itself had put it – to "reiterate" the ECtHR's previous finding in Article 6 ECHR cases that "the proceedings (…) were "criminal" although the surcharges cannot be said to belong to criminal law under the Swedish legal system"[53]. After this reiteration, however, the Court also mentioned, "in its judgment in the case *Göktan v. France* (…) concerning Article 7 of the Convention and Article 4 of Protocol no. 7, the Court held that the notion of penalty should not have different meanings under different provisions of the Convention"[54]. Thus, *Göktan* was adduced as support for the proposition that notions used in the Convention and its protocols should always have the same meaning.

After the 2004 decision in *Rosenquist*, the uniformity issue concerning the interpretation of concepts used in the ECHR and its protocols had arisen in few cases decided by the ECtHR on Article 4 – P7. *Storbråten*[55], decided in 2007, can be noted as an expression of the status quo in the ECtHR jurisprudence: the notion "criminal" has been given an "autonomous meaning" under Article 4 – P7 and this notion "must be interpreted in the light of the general principles concerning the corresponding words "criminal charge" and "penalty" respectively in Articles 6 and 7 of the Convention"[56].

The ECtHR did, however, suggest in *Haarvig*[57], an admissibility decision, that the interpretation of what is "criminal" in the context of Article 4 – P7 might be different from that related to other provisions of the ECHR. The "second proceeding" in *Haarvig* concerns the suspension of the licence to practise medicine following the conviction of the complainant in a criminal proceeding. To determine whether this second proceeding was criminal in nature, the ECtHR stated the following:

> This notion must be interpreted in the light of the general principles concerning the corresponding words "criminal charge" and "penalty" respectively in Articles 6 and 7 of the Convention [references to case law omitted]. Hence, the Court will have regard to such factors as the legal classification of the *offence* under national law; the nature of the offence; the national legal characterisation of the measure; its purpose, nature and degree of severity; whether the measure was imposed following conviction for a criminal offence and the procedures involved in the making and implementation of the measure [references to case law omitted]. *This is a wider range of criteria than the so-called "*Engel *criteria" formulated with reference to Article 6 of the Convention* [my italics in this sentence][58].

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[52] *Rosenquist*, p. 9 of the pdf-version of the decision available at HUDOC.

[53] *Ibid.*

[54] *Rosenquist*, p. 10 of the pdf-version of the decision available at HUDOC.

[55] ECtHR, 1 February 2007, *Storbråten v. Norway*, App. no. 12277/04. See also ECtHR, 1 February 2007, *Mjelde v. Norway*, App. no. 11143/04; ECtHR, 11 December 2007, *Haarvig v. Norway*, App. no. 11187/05 and ECtHR, 17 June 2008, *Synnelius and Edsbergs Taxi AB v. Sweden*, App. no. 44298/02.

[56] *Storbråten*, p. 17 of the pdf-version of the decision available at HUDOC.

[57] *Haarvig*.

[58] *Haarvig*, p. 11 of the pdf-version of the decision available at HUDOC. Although the ECtHR elaborated this wider range of criteria, in light of which the Court came to the conclusion that the suspension of the licence was not equivalent to a criminal sanction, the Court could, arguably, have arrived at the same result simply using the *Engel* criteria.

Using this wider range of criteria, it is thus possible to arrive at a result where on the balance a set of proceedings is considered not to be criminal in nature while the use of the more limited *Engel* criteria would suggest the contrary. If this is the case, then logically, there will be situations where a "second proceeding" is not *per se* objectionable according to the principle of *ne bis in idem*, while what is at stake at this "second proceeding" is nonetheless seen as being serious enough – equivalent to a "criminal charge" – as to deserve a proceeding conducted in accordance with the fair-trial standards provided by Article 6 ECHR. This, in my view, is not an unreasonable position. After all, the rationale for the right to a fair trial (which is equally applicable to civil proceedings) is quite different from that for the rights stemming from the principle of *ne bis in idem* (which is applicable only to criminal proceedings or their equivalence). Without endorsing the "wider range" formulated in *Haarvig*, my contention is that the criteria for "criminal" according to Article 4 – P7 need not be exactly the same as the *Engel* criteria, even though there may be overlaps, or even substantial overlaps [59]. The burden of argumentation for an autonomous and uniform conception of what is "criminal" throughout the ECHR and all its protocols lies on the proponent of such a view. However, no such argument – as opposed to statement or proclamation – can be found in the case law of the ECtHR.

No use of the "wider criteria" formulated in *Haarvig* has been made in the subsequent case law of the ECtHR. The Grand Chamber did cite *Haarvig* in its judgment in *Zolotukhin* (see below 3.C.3), but there *Haarvig* was only one in a series of many cases following the *Engel* criteria. Thus, by the time of *Zolotukhin*, the *Engel* criteria have been firmly established as *the* criteria to apply for the determination of the notion "criminal" for the purpose of Article 4 – P7. It really is a moot point whether the ECtHR has offered any convincing argument for this – I may say – dogma. Thus, it is not difficult for the present author to share the sentiment expressed by van Bockel when he wrote:

> Although this [the extension of the *Engel* criteria to Article 4 – P7] may attract criticism it must be said that the Engel-line of jurisprudence itself is by now well-established, and it is difficult to see how the Court could have any other approach in the context of Article 4 of Protocol no. 7 to the European Convention on Human Rights [60].

3) The Grand Chamber's judgment in Zolotukhin v. Russia

In the above section (3.C.2), I have focused on the interpretation of the term "criminal" for the application of Article 4 – P7. The present section will examine the merits of complaints about the violation of the principle of *ne bis in idem*. The *Zolotukhin* judgment is ground-breaking with regard to the "*idem*" element of the

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[59] See B. VAN BOCKEL, *The* Ne Bis In Idem *Principle in EU Law*, Alphen ann den Rijn, Kluwer Law International, 2010, p. 181-182 for a discussion of *Haarvig*. This case deals however with proceedings in Norway even though the author refers to Swedish authorities and courts in his presentation.

[60] B. VAN BOCKEL, "The *ne bis in idem* principle in the European Union legal order: between scope and substance", *ERA Forum*, 2012, 13, p. 325-347, at p. 341.

ne bis in idem principle, but for completeness's sake the "*bis*" element will also be dealt with in this section. The discussion may begin, however, with a recapture of the *Engel* criteria as formulated by the Grand Chamber as the *ne bis in idem* principle is actualised only if the proceedings involved are criminal in character. These criteria, as expressed in *Zolotukhin*, are:

> The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge [61].

In the present case, the first set of proceedings was concerned with "minor disorderly acts". Subsequent *criminal* proceedings would be barred for the same offence if the first proceedings were "criminal" in character. Applying the *Engel* criteria, the ECtHR had no difficulty in finding that "the nature of the offence of "minor disorderly acts", together with the severity of the penalty, were such as to bring the applicant's conviction … within the ambit of "penal procedure" for the purposes of Article 4 of Protocol no. 7" [62].

Having established that Article 4 – P7 was applicable, the next question for the Court to address was whether the "minor disorderly acts", which are already subject to administrative proceedings, constituted the same offence (*idem*) as those for which the applicant was being prosecuted in accordance with the Criminal Code.

At this point, the ECtHR admitted that the existence of a variety of approaches to the question of *idem* [63] "engenders legal uncertainty incompatible with (…) the right not to be prosecuted twice for the same offence" [64]. It was for this reason that the Court would set out to "provide a harmonised interpretation of the notion of the "same offence" – the *idem* element of the *ne bis in idem* principle – for the purposes of Article 4 of Protocol no. 7" [65]. The Court did not explain what it meant by a "harmonised interpretation", but its reasoning demonstrated that such an interpretation was certainly not restricted to a harmonisation of the different lines of reasoning given by the various sections and chambers of the ECtHR in its own jurisprudence. In its reasoning, the ECtHR made references to the following international instruments [66]:

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[61] *Zolotukhin*, para. 53. It is remarkable how closely the first sentence resembles the criteria as originally stated in *Engel*. The second and third sentence can be said to reflect the result of the application of the criteria in the Court's case law since *Engel*.

[62] *Zolotukhin*, para. 57.

[63] These approaches are not presented here as they have already been competently discussed and analysed in an abundance of work on this topic, some of which have already been mentioned above, *e.g.*: B. van Bockel, *The* Ne Bis In Idem *Principle in EU Law*, p. 190-201; W. Schomburg, *op. cit*. ; M. Mansdörfer, *op. cit*.; E. Sharpston and J.M. Fernández-Martín, *op. cit*.; and A. Weyembergh, *op. cit*.

[64] *Zolotukhin*, para. 78.

[65] *Ibid.*

[66] *Zolotukhin*, para. 79. In addition to international instruments the ECtHR also made reference to the jurisprudence of the Supreme Court of the United States under the heading

– Protocol no. 7 to the ECHR,
– United Nations Covenant on Civil and Political Rights,
– Charter of Fundamental Rights of the European Union,
– American Convention on Human Rights,
– Convention Implementing the Schengen Agreement (hereafter "CISA"),
– Statute of the International Criminal Court.

The ECtHR seemed to favour the approach of the Court of Justice of the European Union (hereafter "CJ", previously Court of Justice of the European Communities, or "CJ") and the Inter-American Court of Human Rights (IACtHR), which "based strictly on the identity of the material acts and reject[ed] the legal classification of such acts as irrelevant" [67]. Furthermore, the ECtHR preferred these other courts" approach as it found that "both tribunals emphasised that such an approach would favour the perpetrator, who would know that, once he had been found guilty and served his sentence or had been acquitted, he need not fear further prosecution for the same act" [68].

There is, however, a fundamental difference between the ECtHR and the CJ [69]. Whereas the former court deals with cases concerning the American Convention on Human Rights, according to which a person shall not be subjected to a new trial for the same cause within the same State Party to the Convention, the latter court, when interpreting Article 54 CISA, is concerned with the *ne bis in idem* effect of a final judgment in one Member State on a subsequent proceeding in another Member State. I shall shortly return to the significance of this difference, but first, a presentation should be given of the ECtHR's reasoning and conclusion with regard to this "material act" approach.

For a State, which wishes to exercise a more extensive *ius puniendi*, the preference will be to interpret the *idem* element as restrictively as possible. A narrowly-defined *idem* entails a lower risk of violation of the *ne bis in idem* principle. A pure "material act" approach defines *idem*, on the contrary, very widely indeed, as the legal classification or any other factors such as the protected interest or intention of the offender are absolutely irrelevant as limiting factors.

It was the ECtHR's view that "the use of the word "offence" in the text of Article 4 of Protocol no. 7 cannot justify adhering to a more restrictive approach" [70]. As support for this view, the Court reiterated that "the Convention must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory" [71]. The Court then came up with a tautology when it "noted" that "the approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual, for if the Court limits itself to finding

"relevant and comparative international law" (paras. 41-44) and recognised that the *ne bis in idem* principle was, according to EU case law, a fundamental principle of EU law (paras. 35-36).

[67] *Ibid.*

[68] *Ibid.*

[69] As to the case law of the CJ, the ECtHR focused primarily on the jurisprudence related to Article 54 CISA.

[70] *Zolotukhin*, para. 80.

[71] *Ibid.*

that the person was prosecuted for offences having a different legal classification it risks undermining the guarantee enshrined in Article 4 of Protocol no. 7 rather than rendering it practical and effective as required by the Convention" [72].

The result of the Court's "reasoning" is that Article 4 – P7 would prohibit "the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same" [73]. For the determination of whether facts are identical or substantially the same, the Court has given certain guidelines:

> [the] Court's inquiry should (…) focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings [74].

The opinion of the ECtHR was clearly inspired [75] by the jurisprudence of the CJ in matters related to the interpretation of Article 54 CISA. The ECtHR was also more thorough in its analysis of the CJ's case law than it was with other international instruments [76]. It is submitted that there are unfortunate drawbacks when CJ jurisprudence in this area is transposed to the context of Article 4 – P7.

To state the most obvious criticism first, it is extremely naïve to assume unreflectively that what makes sense in an international – or rather a transnational context – will make sense in the context of a single national legal system. It should be recalled that while the *ne bis in idem* principle according to Article CISA is to apply between Member States, Article 4 – P7 is applicable to proceedings conducted in the same Party State to the Protocol.

Less obvious, but may be for that reason more pernicious, is the implicit import of certain ideology from CJ jurisprudence to the framework of protection of human rights, which is the task of the ECHR and its protocols. Article 54 CISA will be discussed presently (3.D below), so it suffices here to say that the determination of "*idem*" in the CJ case law is very much influenced by the ideology of an internal market, the freedom of movement of persons as well as the supremacy of EU law. None of these is part of the human rights regime that the ECHR represents.

I shall return to these issues concerning the link between the ECHR and CISA (and EU law in general) in a concluding analysis (5 below). To complete the discussion of *Zolotukhin*, some words will be said about the "*bis*" element of the *ne bis in idem* principle, even though the Court only reiterated what had already been established – or "entrenched" [77] as the Court put it – according to its own case law. In this regard, the

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[72] *Zolotukhin*, para. 81. It is submitted that besides stating a tautology, the Court committed the fallacy of *tertium non datur* in that it ignored the possibility where the legal characterisation of an offence could be taken into consideration although not emphasised.

[73] *Zolotukhin*, para. 82.

[74] *Zolotukhin*, para. 84. Note the similarity between the EctHR's wordings and the CJ's judgments in, *e.g.*, CJ, 9 March 2006, *Van Esbroeck*, C-436/04, *ECR*, p. I-2333; and CJ, 18 July 2007, *Kretzinger*, C-288/05, *ECR*, p. I-6470, para. 34.

[75] Some may even say "fully inspired"; see J.A.E. Vervaele, *op. cit*., at p. 222.

[76] *Zolotukhin*, paras. 37-38.

[77] *Ibid.*, para. 107.

Court only took up three questions. Firstly, it restated that the application of the *ne bis in idem* principle was dependent on the existence of a *final* decision, and that a decision was "final" "when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them" [78]. Secondly, the Court restated the fact that a person was *acquitted* – hence not punished – and the second set of proceedings was irrelevant, thus confirming the established interpretation that Article 4 – P7 not only prohibited double punishment but also double prosecution [79]. And thirdly, the Court ruled that the *acquittal* of the applicant did not deprive him of his status as a victim of the alleged violation of Article 4 – P7 [80]. The three questions that the ECtHR took up did not, however, really address the core of the issue of the "*bis*" element.

The key question on the "*bis*" element can be re-formulated as follows: whether two (or more) proceedings concerning the same facts can be seen as different parts of one and the same proceeding, or whether two (or more) different sanctions based on the same facts can be seen as different components of one and the same punishment. However, to illuminate this question it is necessary to go beyond *Zolotukhin*, so the remainder of this sub-section will be an excursus.

The jurisprudence of the ECtHR is scarce on the "*bis*" element of the *ne bis in idem* principle. In an admissibility decision, the Court found that the imposition by different authorities of a suspended prison sentence, a fine and the withdrawal of driving licence did not mean that criminal proceedings were repeated against the applicant [81]. It is however difficult to read from that decision what the reasons were behind this finding of the Court. Moreover, in this case the criminal sanction was imposed before the decision to withdrawal the driving licence became final and Article 4 – P7 might therefore be inapplicable on this ground. In *Nilsson* [82], another admissibility decision, the Court found that the withdrawal of the applicant's driving licence following his conviction for a traffic offence did not amount to new criminal proceedings against him. This time, the Court actually provided a more detailed justification, stating:

> [while] the different sanctions [*viz.* the criminal sanction and the withdrawal of driving licence] were imposed by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, in substance and in time, to consider the withdrawal to be part of the sanctions (…) for the offences of aggravated drunken driving and unlawful driving" [83].

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[78] *Ibid.* The ECtHR referred in particular to ECtHR, 20 July 2004, *Nikitin v. Russia*, App. no. 50178/99. *Cf.* note 2 above on the meaning of "final force".

[79] *Zolotukhin*, para. 110. This interpretation has also been given in *Nikitin*, which the Court cited.

[80] *Zolotukhin*, paras. 112-115. This point – based on the reasoning in *Zigarella* (ECtHR, 2 October 2002, *Zigarella v. Italy*, App. no. 48154/99) – was really a non-argument, but the Court needed to address it since it had been raised by the respondent State.

[81] ECtHR, 30 May 2000, *R.T. v. Switzerland*, App. no. 31982/96.

[82] ECtHR, 13 December 2005, *Nilsson v. Sweden*, App. no. 43661/01.

[83] *Nilsson*, p. 11-12 of the pdf-version of the decision available at HUDOC.

In *Maszni*[84], where the factual circumstances were similar to *Nilsson*, the ECtHR did decide on the merit and stated:

> *Or, en l'espèce, force est de constater que l'annulation du permis était la conséquence directe et prévisible de la condamnation pénale du requérant. En effet, la Cour relève que, bien que l'annulation litigieuse ait été décidée par une autorité administrative, elle n'est intervenue qu'en raison de la condamnation définitive prononcée par le juge pénal et sans l'ouverture d'une nouvelle procédure*[85].

Thus, it appears that different "consequences" of an offence may be treated as being components of one and the same punishment if these consequences are direct and foreseeable as a result of the criminal conviction. Furthermore, if the second proceeding is based on the definitive findings of the first proceeding, this second proceeding may not amount to a new proceeding based on the same facts.

B. Article 54, Convention Implementing the Schengen Agreement

Title III of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (hereafter CISA)[86] deals with various issues concerning police and judicial cooperation in criminal matters. A special chapter is dedicated to the application of the *ne bis in idem* principle. The main provision under this chapter is given in Article 54:

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

One difference between Article 4 – P7 and Article 54 CISA that one will note immediately is that whereas the Protocol deals with domestic *ne bis in idem*, the provision in CISA is applicable when more than one State Party is involved. There are also some other differences such as the use of the word "offence" in Article 4 – P7 to identify the *idem* element, and "same acts" in Article 54 CISA. The present discussion will focus on this last-mentioned difference.

In the first case before the CJ where the *idem* element was a crucial question – *van Esbroeck*[87] – the Court recognized that Article 54 CISA was different from other international agreements concerning the same principle; it stated:

> Unlike Article 54 of the CISA, Article 14(7) of the International Covenant on Civil and Political Rights and Article 4 of Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms use the term "offence", which implies that the criterion of the legal classification of the acts is relevant as a

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[84] ECtHR, 21 September 2006, *Maszni v. Romania*, App. no. 59892/00 (the judgment is available only in French and in Romanian).

[85] *Maszni*, para. 68.

[86] Done at Schengen, 19 June 1990, reprinted in *OJ*, no. L 239, 22 September 2000, p. 19.

[87] *Van Esbroeck*.

> prerequisite for the applicability of the *ne bis in idem* principle which is enshrined in those treaties [88].

This, the CJ contrasted with the wording "the same acts" in Article 54 CISA, which the Court understood as referring "only to the nature of the acts in dispute and not to their legal classification" [89].

As part of the Court's reasoning, a reminder was made of the fact that CISA did not presuppose the harmonisation of criminal law in the Member States [90], and it was a necessary implication of the *ne bis in idem* principle that "the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied". [91] Under these premises, the CJ was able to arrive at the following conclusions: (1) "the possibility of divergent legal classifications of the same acts in two different Contracting States is no obstacle to the application of Article 54 of the CISA" [92] and (2) "the criterion of the identity of the protected legal interest cannot be applicable since that criterion is likely to vary from one Contracting State to another" [93].

These conclusions were rationalised – or "reinforced" as the CJ put it – by reference to the context of freedom of movement within the Schengen area. The CJ emphasised, in particular, that

> [b]ecause there is no harmonisation of national criminal laws, a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States [94].

And it was for this reason that the Court concluded that

> the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together [95].

It is submitted that, in principle, this conclusion is perfectly logical. Criminal offences are defined in the Member States independently of each other and the exact formulation of offence definitions will invariably differ from one Member State to another in a way that reflects how the penal code is structured or what legal interests are being protected by a particular provision. A notion of *idem* based on the legal

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[88] *Ibid.*, para. 28.

[89] *Ibid.*, para. 27.

[90] *Ibid.*, para. 29.

[91] *Ibid.*, para. 30.

[92] *Ibid.*, para. 31.

[93] *Ibid.*, para. 32. *Cf.* the argument in E. Sharpston and J.M. Fernández-Martín, *op. cit.*, p. 429-430 based on the fact that *ne bis in idem* in the Schengen context, when contrasted with EU competition law, is *not* about "one *single* legal order governed by one *uniform* set of rule".

[94] *Van Esbroeck*, para. 35.

[95] *Ibid.*

classification of conducts will inevitably frustrate the purpose of the principle and will be absolutely unworkable.

That having said, there is nothing illogical if *some* consideration based on the legal classification and/or the legally protected interest is taken into account when resolving the *idem* question. Thus, it is submitted that the CJ's conclusion that identity of the material acts is "the *only* relevant criterion" (my emphasis) for the application of Article 54 CISA is too categorical. However, in its subsequent case law [96], the CJ has in fact treated the identity of material acts as the only criterion and in *Kretzinger*, this approach is stated clearly and explicitly; the Court went beyond saying that factual identity was the only relevant criterion to providing guidelines on what the national courts had to confine themselves to and what considerations were irrelevant:

> The competent national courts which are called upon to determine whether there is identity of the material acts must confine themselves to examining whether those acts constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter (…), and considerations based on the legal interest protected are not to be deemed relevant [97].

The notion of *idem* as expressed in the *Kretzinger* judgment can be said to represent the CJ's understanding of *idem* in current law, and it is to this notion that the ECtHR has aligned its approach in *Zolotukhin* [98].

The CJ has been asked to deliver preliminary rulings in a number of cases – besides those already mentioned – on the interpretation of Article 54 CISA dealing with issues not directly relevant for the purpose of this paper and there is no need to take up these cases. Nonetheless, the principle established in *Gözütok and Brügge* [99] must at least be mentioned because this principle considerably expands the scope of application of Article 54. According to this Article, the prohibition of subsequent prosecution is applicable to a person "whose trial has been finally disposed of". It is by no means obvious, from the wording alone, that an out-of-court settlement would qualify as a trial that has finally been disposed of. In the joined cases in question, public prosecution was discontinued after the accused had paid a fine imposed by the prosecution authority without the involvement of a court. According to domestic law, discontinuance of prosecution on these grounds would bar further prosecution in that State. The CJ ruled that "following such a procedure, further prosecution is definitively barred", therefore "the person concerned must be regarded as someone whose case has been "finally disposed of" for the purposes of Article of the CISA in relation to the acts he is alleged to have committed" [100]. Furthermore, the CJ stated explicitly that "[the] fact that no court is involved in such a procedure and that the decision in which

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[96] See CJ, 28 September 2006, *Van Straaten*, C-150/05, *ECR*, p. I-9327; CJ, 28 September 2006, *Gasparini*, C-467/04, *ECR*, p. I-9199; CJ, 18 July 2007, *Kraaijenbrink*, C-367/05, *ECR*, p. I-6619.

[97] *Kretzinger*, para. 34.

[98] *Zolotukhin*, para. 84.

[99] CJ, 11 February 2003, *Gözütok and Brügge*, C-187/01 and C-385/01, *ECR*, p. I-1345.

[100] *Ibid.*, para. 30.

the procedure culminates does not take the form of a judicial decision does not cast doubt on that interpretation" [101].

Finally, it must be pointed out that Schengen *ne bis in idem* has not been rendered obsolete by the provision on *ne bis in idem* in the EU's Charter of Fundamental Rights (to be discussed presently). Whereas the Charter is applicable to the Member States "only when they are implementing Union law" [102], Schengen *ne bis in idem* is applicable to criminal proceedings involving all sorts of crimes in the Member States. To give just one simple example, the question whether Member State B may prosecute a person for "homicide through gross negligence" after that person has already been acquitted for the offence of "murder" in Member State A must be answered by reference to Schengen *ne bis in idem* since the crime does not contain an EU element that would trigger the application of the Charter of Fundamental Rights.

C. Article 50, Charter of Fundamental Rights of the European Union

According to Article 6 TEU, the Charter of Fundamental Rights of the European Union (hereafter CFR) [103] shall have the same legal value as the Treaties. Under Title VI of the Charter entitled "Justice", the *ne bis in idem* principle is articulated in its own provision:

> **Article 50 – Right not to be tried or punished twice in criminal proceedings for the same criminal offence**
>
> No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has been finally acquitted or convicted within the Union in accordance with the law.

According to its wording, it is abundantly clear that this provision is applicable only to criminal proceedings. The area of application of Article 50 CFR differs from that of Article 4 – P7 and of Article 54 CISA in that the scope of Article 50 encompasses the whole EU, or, more precisely, all [104] final criminal judgments delivered "within the Union". Thus, this prohibition has effect in relation to both judgments delivered within one and the same Member State, and judgments delivered in different Member

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[101] *Ibid.*, para. 31.

[102] Article 51(1) CFR provides the following: "The provisions of this charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties".

[103] Proclaimed by the European Parliament, the Commission and the Council on 7 December 2000, and adapted on 12 December 2007 at Strasbourg. The consolidated text of the Charter is available at EUT C 326, 26 October 2012, 391-407.

[104] This is, according to the only case law on the matter, subject to the requirement of a link with the implementation of EU law – see Article 51(1) CFR and CJ, 26 February 2013, *Åkerberg Fransson*, C-617/10, nyr, paras. 17-22. *Cf.* the discussion on the continued relevance of Schengen *ne bis in idem* in section 3.D *in fine*.

States [105]. *Åkerberg Fransson* [106] is at the moment of writing the first and only case in which the CJ has expressed its view on Article 50 CFR. This case is concerned with criminal proceedings brought by the Swedish prosecution authority for tax fraud subsequent to the imposition by an administrative authority of a "tax surcharge" for the failure to account for the value added tax (VAT) payable. It is the VAT element that renders the dispute within the ambit of EU law and thereby also under the jurisdiction of the CJ [107]. On the substantive question of the interpretation of Article 50 CFR, the CJ's approach differed somewhat from that of the ECtHR's in relation to Article 4 – P7 [108]. First of all, the CJ "noted" that

> (…) Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties [109].

Taken at face value, this is a mere platitude stating that there is nothing in the text of the Article to prevent the imposition of a combination of different sanctions. At a deeper level, this may be understood as a more general statement on the "*bis*" elements in the *ne bis in idem* principle and points to a discrepancy between the CJ and ECtHR case law [110].

The first proper step towards answering the questions of the referring national court was to determine whether the tax surcharges in this case were "criminal', and the CJ stated:

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[105] Article 50 CFR can thus be said to give expression for the principle of European territoriality, or a single European judicial space, or one single European area of freedom, security and justice.

[106] *Åkerberg Fransson*. Many commentators have remarked on the wider implications of this case – together with *Melloni* (CJ, 26 February 2013, *Melloni*, C-399/11, nyr) decided on the same day – on the interplay between different sources of fundamental protection. The remarks here are limited simply to the narrow question of the *ne bis in idem* principle. See however section 5 below on the multiplicity of sources and coherence of the *ne bis in idem* principle. On 27 May 2014, the CJ (Grand Chamber) delivered its judgment in case C-129/14 PPU, *Spasic*, a case which dealt very much with Article 50 CFR. Account can however not be taken of this case as the judgment was delivered at the final proofing stage of this volume.

[107] *Åkerberg Fransson*, paras. 16-31. The CJ has thereby ruled that the application in this case of the Swedish legislation on tax fraud charges and tax surcharges constitutes an implementation of EU law, which is a prerequisite for the applicability of Article 50 CFR to Member States, even though said legislation was enacted independently of any EU provisions and at a time when Sweden was not even a Member State of the EU. See Article 51(1) CFR, which states: "[t]he provisions of this Charter are addressed to Member States only when they are implementing Union law".

[108] This, however, may be the consequence of the questions posed by the referring court rather than a reflection of the CJ's logic in this matter.

[109] *Åkerberg Fransson*, para. 34.

[110] On this last point see, *e.g.*, J.A.E. Vervaele, "The Application of the EU Charter of Fundamental Rights (CFR) and its *Ne bis in idem* Principle in the Member States of the EU", *Review of European Administrative Law*, 2013, 6, p. 113-134, at p. 116.

> It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person [111].

The criteria adopted by the CJ in determining whether a penalty is criminal in nature were exactly the same as the *Engel* criteria used by the ECtHR, which the CJ formulated in the following way:

> The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur [112].

But having identified the applicable criteria, the CJ then eschewed the question whether the tax surcharges in this case were of a criminal nature by stating that

> [i]t is for the referring court to determine (…) whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards (…), which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive [113].

This formulation by the CJ differs somewhat from the case law of the ECtHR in that in *Åkerberg Fransson*, the CJ speaks of the combination of penalties whereas the ECtHR jurisprudence has consistently examined the character of each of the penalties on its own [114]. It is unclear how the combination effect should relate to the (*Engel*) criteria that the Court has just reiterated. Furthermore, the phrase "effective, proportionate and dissuasive" appears odd in the present context. The requirement that a sanction shall be effective, proportionate and dissuasive stipulates that Member States must give effect to EU law and as such can be seen as being based on the protection of the EU's – *i.e.* not the Members States' or the individuals' – interests. Does it mean that when looking at the (*Engel*) criteria and the combination effect of different penalties, regard shall also be had to the interests – not least the financial interests – of the Union? It is unfortunate that the CJ has left these questions to the referring court to answer [115].

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[111] *Ibid.*

[112] *Åkerberg Fransson*, para. 35. Interestingly, the CJ only referred to its own decision in *Bonda* (CJ, 5 June 2012, C-489/10, *Bonda*, nyr) and did not mention the ECtHR case law.

[113] *Åkerberg Fransson*, para. 36.

[114] Thus, it may not be a coincidence that the CJ prefaced the substantive argument by its statement in para. 34 (*cf.* note 110 above). These remarks of the CJ may open up the discussion again on the applicability of the *Anrechnungsprinzip* and *Erledigungsprinzip*, a discussion of which cannot be pursued here – but see B. VAN BOCKEL, *op. cit.*, p. 32-36, for an explanation of these principles.

[115] It has been surmised by some that "the judgment seems to suggest that the Court did not consider that the *ne bis in idem* principle as protected by Article 50 of the Charter was violated in Mr Åkerberg Fransson's case" (B. VAN BOCKEL and PETER WATTEL, "New wine into old wineskins: the scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson", *European Law Review*, 2013, 38, p. 866-883, at p. 871–872); although these authors find this "surprising" (*ibid.*).

This is really all the CJ has to say on the principle of *ne bis in idem* in the version given in Article 50 CFR since the Court declared one of the two remaining questions in *Åkerberg Fransson* as inadmissible for being hypothetical [116] and the other question that the Court did answer concerns the more general questions of the position of the ECHR in EU law and the supremacy of EU law on fundamental rights *vis-à-vis* a national judicial practice that requires "clear support" in EU or ECHR law for the "disapplication" of national law that might be in breach of human rights standards [117].

Åkerberg Fransson is thus completely silent on the substantive issues that have occupied the ECtHR in its jurisprudence on the *idem* element of the *ne bis in idem* principle. It follows, then, that *Åkerberg Fransson* is silent too on the question whether the ECtHR's judgment in *Zolotukhin* has any effect on the interpretation by the CJ of the *idem* element in Article 54 CISA. For the purpose of this paper, then, *Åkerberg Fransson* does not provide the illumination of Article 50 CFR that one may expect.

4. Application of the principle of *ne bis in idem* in non-criminal proceedings

The focus of this paper is on criminal proceedings. Yet, final judgments of non-criminal proceedings – such as civil suits and administrative cases – also have preclusive effect. This is the "negative" aspect [118] of *res judicata*. It is not uncommon that, in a legal system where different codes of procedure exist for civil and criminal cases, the issue of *res judicata* is dealt with differently, often by separate lines of case law. In particular, the notion of the *res* that has been finally adjudged may well differ between a civil and criminal case [119]. This paper will not discuss the concept of *res judicata* in criminal or non-criminal cases any further. However, when the term *ne bis in idem* is used, one has usually in mind criminal proceedings only. As mentioned in section 2 above, the normative import of *ne bis in idem* is the protection of an individual who has undergone a criminal proceeding, an instance of the exercise of public power. The jurisprudence of the ECtHR shows very clearly that the protective *ne bis in idem* principle is applicable when the level of public interference in the individual is equivalent to the interference of a criminal proceeding. Within the system of the ECHR, the *ne bis in idem* principle is found to be applicable in cases qualified as non-criminal according to national law by virtue of the proceeding's intrusive effect on the individual; the ECtHR does not appear to have given any special consideration to the precise type of non-criminal proceedings in question – although administrative proceedings concerning traffic fines and revenue law proceedings concerning tax surcharges feature rather frequently in the case law.

Within the EU, but in an area outside the field of application of the Schengen *acquis*, the protective *ne bis in idem* principle is applicable when EU measures have

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[116] *Åkerberg Fransson*, paras. 38-42.

[117] *Ibid.*, paras. 43-49.

[118] See the discussion of *res judicata* in section 2 above.

[119] Under Swedish law, for instance, the extent of the preclusive effect of *res judicata* is different for civil and criminal judgments even though there is a common code of judicial procedure for both civil and criminal proceedings. This difference may partly be explained by the different rules concerning the adjustment of claims/charges in the different categories of proceedings.

or have had an effect on an individual that is equivalent to a criminal proceeding. Article 50 CFR, discussed in section 3.E above, will – despite its wording referring specifically to criminal proceedings – certainly be applicable to any proceedings that are "criminal" in nature in the sense developed through ECtHR case law. In *Bonda* [120], the CJ referred explicitly to the ECtHR's *Engel* and *Zolotukhin* jurisprudence in relation to the application of the *ne bis in idem* principle in a case concerning "irregularities" concerning declaration of the agricultural area eligible for the single area payment, even though the Court found no infringement of the *ne bis in idem* principle in this particular case since the penalties imposed under the agricultural regulation was deemed not to be "criminal" in character [121].

But long before the CFR's acquisition of a status on par with the treaties, *ne bis in idem* has been applied as a general principle of EU law. Although the application of this principle can be traced back to the CJ's early staff cases [122], it is in the field of competition law that the principle has received the most attention. It is in the so-called *Cement Cases* [123] that the CJ formulated its threefold test in this field:

> As regards observance of the principle *ne bis in idem*, the application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under that principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset [124].

This threefold test to identify the *idem* in competion law matters is clearly distinct from the *idem*-test specified in the ECtHR's *Zolotukhin* jurisprudence. This state of affairs has been much criticised and it has even been argued that "[t]o interpret and apply the *ne bis in idem* principle so differently depending on the area of law concerned is detrimental to the unity of the EU legal order" [125]. There was hope that the CJ would alter its course and harmonise its case law in competition law area with the ECtHR's *Zolotukhin* jurisprudence. In *Toshiba* [126], the CJ had an opportunity to take note of the ECtHR's recent case law and it was also the Advocate General's conclusion that the *Zolotukhin* criteria be adopted even in EU competition law cases [127]. The CJ (Grand Chamber), however, simply reiterated the threefold test of the *Cement Cases* and did not engage in a dialogue, so to speak, with the ECtHR on the application of the *ne bis in idem* principle in the area of competition law [128]. There is much criticism of *Toshiba*

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[120] *Bonda*.

[121] *Ibid.*, paras. 36-37 and 42.

[122] CJ, 5 May 1966, *Gutmann*, 18 and 35/65, *ECR*, p. 149.

[123] CJ, 7 January 2004, *Aalborg Portland v. Commission*, C-204, 205, 211, 213, 217 and 219/90 P, *ECR*, p. I-123.

[124] *Aalborg Portland v. Commission*, para. 338.

[125] Opinion of Advocate General Kokott, delivered on 8 September 2011, in *Toshiba* (CJ, 14 February 2012, *Toshiba*, C-17/10, nyr).

[126] *Toshiba*.

[127] Opinion of Advocate General Kokott in *Toshiba*, para. 124.

[128] *Toshiba*, para. 97. In the case in question, the outcome would have been the same even if the *Zolotukhin* criteria for *idem* were applied since the Court had come to the conclusion that there was no identity of fact (para. 98).

in the literature but this not the place to engage in this debate; suffice it to say that the main lines of criticism have been directed at the lack of coherence within the EU legal order caused by the differentiated approach of the CJ to a general principle of EU law and the uncertainty that the current state of affairs has created [129].

To recapture the main points raised in this section, it may be recalled that, for the ECtHR, the classification of the proceeding within a legal system is a *non sequitur* for the purpose of the application of the *ne bis in idem* principle; the case law of the ECtHR shows that the Court would make the necessary "reclassification" in order to trigger the *ne bis in idem* principle using the *Engel* criteria whenever the impact of the proceeding on the individual is equivalent to that of a criminal proceeding. The situation with respect to the EU legal order is less clear. The case law based on Schengen *ne bis in idem* has hitherto only dealt with criminal cases. It is an open question whether the CJ will follow the *Engel* criteria if such a case should arise in the future [130], and if the *Engel* criteria are used, thus expanding the scope of application of Schengen *ne bis in idem*, whether the CJ would find some ways to limit the widened scope by modifying other elements of the principle. For the application of Article 50 of the Charter of Fundamental Rights, it appears that the notion of "criminal proceeding" is to be interpreted in accordance with the *Engel* criteria or perhaps the *Bonda* criteria since the CJ has, in its recent jurisprudence, made reference only to its own case law without mentioning the provenance of these criteria from the ECtHR's *Engel* jurisprudence [131]. The scope of Article 50 CFR is, however, limited, as there is a requirement of a link to EU law. *Toshiba* shows that the *ne bis in idem* principle in the field of competition law has its own special set of criteria including the element of "unity of the legal interest protected'. It is still unclear whether Article 50 CFR is directly applicable in competition law cases, thus by-passing the case law developed based on the understanding that *ne bis in idem* is a general principle of EU law.

5. Concluding Remarks: Coherence of the *ne bis in idem* principle in the European legal order

This paper started with a look at *res judicata*, which is a central concept in procedural law having both positive and negative aspects; *positive* in the sense that a final judgment is recognised on the basis of which different legal consequences may ensue and *negative* in the sense that a final judgment precludes further litigation concerning the same matter (*res*), a sense expressed in maxims such as *contra rem iudicatem non audietur*. Both these aspects are important for the maintenance of the integrity or coherence of the legal system, not only at an abstract or theoretical level but

[129] In addition to the numerous commentaries on *Toshiba*, the generality of general principles of law is discussed in W. Devroe, "How General Should General Principles Be? *Ne Bis in Idem* in EU Competition Law", *in* U. Bernitz, X. Groussot and F. Schulyok (eds.), *General Principles of EU Law and European Private Law*, Alphen ann den Rijn, Wolters Kluwer, 2013, p. 401-442.

[130] An example of such a case is where criminal charges are brought in Member State B against an undertaking, based on the same conduct that has led to a fine by the competition authority of Member State A or by the Commission.

[131] See *Åkerberg Fransson*, para. 35.

also at the very practical level of managing litigations that a legal system may handle. The negative aspects of *res judicata* have however been given special consideration when it comes to criminal proceedings as one of the parties to such proceedings is the State exercising public power. In the context of criminal proceedings, the negative aspects of *res judicata* are usually discussed under the heading of *ne bis in idem*. With the consecration of the *ne bis in idem* principle in a number of human rights instruments, the principle has been seen – mainly, if not exclusively – as a protective principle for the benefit of individuals against the exercise of State power. The link to the central functions of *res judicata* in a legal system has more or less been severed in the continued development of the principle of *ne bis in idem*. In the case law of the international courts – the ECtHR and CJ – the protective element of *ne bis in idem* is the sole aspect that has underlined the development of the principle.

This paper has pointed out that there are certain gaps in the reasoning of the ECtHR as the case law develops – gaps [132] that eventually lead to a denouement in the understanding of Article 4 – P7, which is unsatisfactory in the opinion of the present author. One of these gaps consists of the lack of reasoning offered by the ECtHR for applying the concepts of crimes, criminal sanctions and criminal proceedings developed through its fair trial jurisprudence to the context of Article 4 – P7. As fair trial rights and the protective purpose of *ne bis in idem* are quite different rights, there is a burden of argumentation on the ECtHR if it considers that good reasons exist for treating the concepts of criminal proceedings etc. as the same in both contexts. Another gap is the lack of explanation offered by the ECtHR when it adopts the conclusions of the CJ's case law on the interpretation of the provision on *ne bis in idem* according to CISA. Two main criticisms can be raised against the ECtHR's approach. To begin with, the ECtHR has failed adequately to take into account the fact that while CISA deals with international *ne bis in idem*, Article 4 – P7 is clearly confined to legal proceedings in the same legal system. As has been discussed in subsection 3.D above, one of the more compelling reasons for endorsing the CJ's approach is the fact that criminal law and criminal procedure in the Member States are not harmonised and an interpretation of *idem* based on legal classification or protected interests will be unworkable. This is hardly the case when a single legal system is concerned. The substantive and procedural provisions in different areas of law should form a coherent system. In particular, legal classifications and procedural provisions can be "harmonised" within one legal system so that the *effect* of *ne bis in idem* be avoided when different parts of the legal system interact coherently and in harmony: it may be the case that, if the *idem* element in a legal system is understood in a certain way, the *bis* element must be interpreted in a manner that will lead to an overall result that respects the principle of *ne bis in idem*. The other criticism that can be raised against the ECtHR is its failure to acknowledge that the CISA case law is based on a convention that has totally different purposes by comparison with the ECHR. It is clear that the CJ case law is motivated by the overriding goal of CISA to ensure free movement with the Schengen area. The Contracting State' mutual trust in each

[132] This is what I mean by an "original sin" alluded to in the title of this paper. It can be likened to a character flaw of a tragic hero that will inevitably lead to his downfall.

other's criminal justice systems has also been given as a reason for focusing on the factual circumstances rather than legal classifications etc. when interpreting the *idem* element. This kind of consideration is completely alien to the system of human rights protection offered by the ECHR and its additional protocols. In the opinion of the present author, the ECtHR – through "harmonising" its case law on *ne bis in idem* with that of the CJ – has ironically disturbed the coherence of the European legal order by the import of conclusions based on a consideration of elements that are alien to the system of human rights protection according to the ECHR.

Looking more closely at the European Union only, a separate issue of coherence has been raised. As mentioned earlier, the CJ has maintained a separate interpretation of the *idem* element in the area of competition law [133], while there is a clear trend towards convergence in the areas of CISA rights, the European arrest warrants and administrative sanctions (outside the field of competition law). This is seen by some critics as being highly unsatisfactory. If there is no good reason for treating competition law differently, the current state of affairs can certainly be described as being incoherent. However, this matter has not been discussed sufficiently in this paper to suggest a conclusion. Suffice it to say that part of the debate on this issue must address the question of who has the burden of argumentation that the same *ne bis in idem* principle – or more narrowly, the same concept of *idem* – must apply uniformly in all fields of EU law.

[133] See section 4 above in connection with the discussion of *Toshiba*.

Concluding remarks

Robert Roth

The phenomenon of "blurring boundaries" between administrative and criminal law (private law could have been included in the list) is in no way specific to European Union law. A historical account of mutual influences between domestic and European law concerning the coexistence of criminal and administrative law in the last three decades could have been an additional topic in this book. However, its scope was the present state of play on this issue with a look ahead into the future. Whichever way one looks at the issue, its main line of questioning can be formulated as follows: is the European Union *the patient or the doctor*?

Before providing some elements in response to this question I will try to put together a summary of and shed a critical eye on the rich previous contributions by answering the three following questions: What is the phenomenon? Why has it come about? What is the way ahead for this phenomenon?

1. What is the phenomenon ?

A variety of situations have been considered, from the fight against criminal organisations to the much milder issue of antitrust legislation. A first quite obvious conclusion, having heard a range of situations and legislative and political actions, is that it is almost impossible to generalise. For example, the conditions for the involvement of agents from the criminal justice system in administrative actions may be admissible when the target is a criminal organisation but not when antitrust agencies are at work. Furthermore, the procedural and substantive conditions of such an involvement, if allowed, are completely different, as are their evidentiary consequences.

To describe the phenomenon, some contributions have taken the actor's perspective, some a legal perspective and some both perspectives.

A. From the actor's perspective

Some actors perform too many tasks. A good example has been provided by Faure and Gouritin on the multiple (sometimes at least potentially contradictory) competences assigned to the French *préfets* in the environmental sector [1]. The critical assessment is yet not perfectly symmetric: the tenor concerning administrative agents is that it is dangerous – for civil liberties – to invest them with repressive competences; on the agents within the criminal justice system the tone is more that of a loss of dignity: these agents are at risk of losing their identity when performing too many tasks or tasks that are too strictly administrative.

B. From a legal perspective

It is from this perspective that the word "blurring" is particularly appropriate. According to the overall assessment, there is more (too much) criminal law in administrative procedures and there is more (too much) administrative law in criminal procedures. It must be underlined that blurring is a *normative* and not a *descriptive* concept and it implies a negative assessment on the evolution of both criminal and administrative law: clarity in terms of concepts and boundaries is part of the Western post-enlightment vision of the world and law. The Rousseauian well-ordered society (*société bien ordonnée*) and the Benthamian *pannomion* both postulate a rationale categorisation of the rules following the emerging model of the sciences of nature.

2. Why has it come about?

It seems to me that the variety of explanations for the evolution towards increased blurring can be boiled down to three main reasons.

A. The importance of *prevention*. Whilst the blurring phenomenon predates 9/11, in the post 9/11 world, preventive actions are, to say the least, viewed differently. They have penetrated Western societies in a variety of ways, which go far beyond the subject discussed here. The debate on their legitimacy has also changed. Prevention is a portmanteau word. Debates on prevention are as old as criminal law. But the issues have been reshaped. According to Feuerbach (to take but one of the major figures of the theories of prevention) imposing criminal sanctions would prevent unknown crimes. Contemporary prevention, as it has been discussed in this book, aims at addressing known and well identified sources of potential crime. Therefore "preventive" action is geared towards specific actors. Preventing is policing. And policing, as is well known, is an activity in which criminal law aspects and administration coexist and interfere with each other.

B. As Galli has put it, the idea has forced its way into people's thinking that "*due process rights* are not affordable" in a series of situations [2]. Here the most serious situations and the mildest ones meet. In the first case, the scale of supposed dangers makes the classical due process, or more generally individual rights, appear as an unrealistic luxury**.** International criminal justice has experienced such a temptation in its first decade, before, in the early years of this century, the necessity of providing

[1] Cf. M. Faure and A. Gouritin's contribution to this book.

[2] Cf. F. Galli's contribution to this book.

the most comprehensive rights to the accused (the victims would come even later) would be accepted as a constitutive part of its very existence and legitimacy [3]. For less serious (with respect to the importance of the values or interests infringed) offences the argument is often the state of necessity regarding evidence – what the German literature calls *Beweisnotstand*: affording all classic guarantees to the supposed offender entails the danger of a drain of the material elements capable of proving the offence being put to one side.

C. This leads to the most paradoxical cause of the blurring: the specific necessities of *evidence*. For instance, there is a strong temptation to gather evidence in an allegedly administrative proceeding in order to circumvent the more formal requirements of a criminal procedure. This issue, because of its core importance in the development of the "blurring", will be specifically addressed later [4].

3. What is the way ahead?

A. The initial question of the book was phrased: "*Do labels still matter*?" In terms of the guarantees and the protection of individual rights they certainly do not. The protection of the "accused" in the broad meaning of that term imposed by the jurisprudence of the European Court of Human Rights depends *not* upon the label chosen by the legislator – administrative or criminal – but upon the very substance of the proceedings and of the sanction to which it may lead. "Universal protection" does not however necessarily concur with "uniform protection". The legal arsenal of protection of individual rights provided by more than fifty years of case law has already suffered several derogatory regimes, deemed necessary because of the subtleties of the matters involved. The expansion of "quasi criminal" laws is not the only reason for such regimes – one needs only to think of the controversies around the privilege against self-incrimination in road traffic offences. But it has contributed in no small part to the erosion of the core guarantees. Bailleux has thus rightly introduced in this conference the notion of "*criminastrative* law" (equally linguistically barbaric in English and in French!) and brought into the debate the question of the appropriateness of supplementing the instruments on the protection of individual rights with a specific charter shaped according to the needs of such criminastrative offences [5]. The difficulty will then be to separate such a code from the necessary charter on proceedings directed against legal persons or to merge both. A model for such a code has been in existence for more than forty years in Europe with the German *Ordnungswidrigkeitsgesetz (OWiG)*, to which regular references have been made in the book. The quasi-Orwellian approach of this legislation (new words for old things – *Vorwerfbarkeit* instead of *Schuld*, *Busse* replacing *Geldstrafe*) and the difficulties encountered with its application at the outset can be a good template for what to do and what not to do in such an action.

B. Evidence is at the core of any proceeding that is designed to produce a concrete result. Almost all contributions to this book have touched on the issues related to the

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[3] See some additional reflections on this in R. Roth, "De l'indocilité", *Journal des Tribunaux*, 2012, p. 617-618.

[4] *Infra* 3.B.

[5] Cf. A. Bailleux's contribution to this book.

gathering and above all the use of evidence in blurred proceedings. Two discrete types of problems arise: the non-respect of individual rights/rights of the accused in the gathering and the difficulties in admitting – or seeking admission of – the evidence in the adjudicating phase of the proceeding.

The issue on gathering is related to the previous one. The blurring certainly creates a certain amount of discomfort concerning the transfer of material (documents, declaration) obtained by administrative authorities in their "prudential" capacity, either to the same authority exercising jurisdictional or quasi-jurisdictional punitive competences, or to judicial authorities. Here again, the implementation of antitrust policy provides for significant examples.

Where it is flawed or even only lame, the process of collecting evidence is at risk of falling apart when confronted with the rules on admissibility of evidence in criminal trials. Under the influence of common law, these rules have become stricter in most continental laws and jurisprudences. This tendency contradicts the consequences of the blurring of competences and rules in the gathering phase. The manoeuvre of choosing the administrative track with the aim of circumventing the formal requirements on admissibility of evidence can thus create a backlash and make the use of evidence all the more difficult.

4. The European Union: doctor or patient?

More than any individual state, the European Union runs policies, which ignore the formal distinctions [6]. It is the case as regards organisational subdivisions since these differ from one Member State to another. It is also the case as regards the substantive disciplines since they also differ and they should not be an obstacle to the policies. The very idea of "blurring" and even more of "boundaries" contradict comprehensive policies. The efficiency-driven philosophy of these policies has been mentioned on various occasions in the book. On all this points, the European Union is certainly a patient rather than a doctor. Its influence on the evolution of national criminal justice systems is epitomised by the removal of the former para. 4 of Article 280 EC-Treaty in the corresponding Article 325 TFUE, as reshaped by the Lisbon Treaty [7]. Under Article 280 EC-Treaty, the measures to combat fraud affecting the financial interests of the Union could not "concern the application of national criminal law and the national administration of justice". The deletion of the clause has an impact which could in my view go beyond the concrete object at stake [8].

On the other hand, the European Union can certainly provide for innovative legislation and renewed guarantees. In expectation or instead of the Code, the envisaged instruments of EU law can provide some certainty. The *ne bis in idem* issue,

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[6] Reference to V. Jamin's contribution to this volume

[7] See V. Mitsilegas, *EU Criminal Law*, Oxford, Hart, 2009, p. 109. Para. 4 of Article 280 stated that the measures adopted in the fields of prevention of and fight against fraud affecting the financial interests of the Community "shall not concern the application of national criminal law or the national administration of justice".

[8] On the basis for action of the EU under the TFEU (under Article 325 alone or with a need to have recourse to Article 83(2)), see Mitsilegas, *ibid*.

as thoroughly discussed in Luchtman's and Wong's contributions [9], may speed up the process. The contrast between the expanding network of instruments and guarantees surrounding mutual assistance in criminal matters with the poor regulation on administrative assistance may prove intolerable and fuel the need for a comprehensive set of rules covering matters located on both sides of the boundary.

5. The next research project?

I will end these remarks with a personal reflection. Years of participation in such research projects or conferences have often led me to one naïve question: what do we expect from criminal law? As a participant in the criminal justice system and an observer of what criminal law means and is in practice, I wonder why so many actors consider again and again, and whatever the difficulties are, that recourse to criminal law is indispensable. Why is there this fascination with punishment, including in fields vested with a tradition of negotiation between authorities and actors? I propose that next time the concluding remarks be entrusted to an anthropologist. I would be eager to hear his or her comments.

[9] See M. Luchtman's contribution to this book.

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