

# eucrim

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**THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM**



## **Focus: European Criminal Law and Human Rights**

**Dossier particulier: Droit pénal européen et droits de l'homme**

**Schwerpunktthema: Europäisches Strafrecht und Menschenrechte**

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

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### Imprint

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# Guest Editorial

Dear Readers,

The main concern of the European Court of Human Rights is of course to succeed in its mission to protect fundamental rights in Europe. Criminal law, substantive or procedural, is a domain where the need to protect society, whether at the level of the individual state or that of the organisation of European integration – at the quasi-federal level of the Union – must necessarily be confronted and associated with the need to protect fundamental rights.

Such is the imperative arising from the irreversible choices made by European States in acceding to the European Convention on Human Rights – and for 28 of them, to the European Union. Being a party to the Convention presupposes that the contracting state puts pluralistic democracy into practice, upholding the rule of law and respecting human rights. The Union too is built upon values of democracy and human rights protection; its action must now also be compliant, under the supervision of the Court of Justice, with the requirements of the European Charter of Fundamental Rights.

Criminal law is thus a particularly important area of intervention for the European Court of Human Rights, which has developed a wealth of case law. This holds particularly true for Article 7 of the Convention, on the rule that criminal matters must be strictly defined by law, and for Article 4 of Protocol No. 7, on the *ne bis in idem* principle. As regards procedural aspects, under Article 6 of the Convention, it has developed key principles concerning questions such as fair proceedings, the importance of an independent tribunal and impartial judges, the right to be presumed innocent, and various restrictions on defence rights covered by paragraph 3 of Article 6.

The European Union's action in criminal matters has developed considerably over the past few years, and it is now for the Union to decide, among other things, on the choices of criminal policy underlying the criminalisation of relevant conduct when it comes to protecting the interests of the Union. This gives rise to concerns in the context of the never-ending reflection on the Union's "democratic deficit." One cannot but pay tribute to the sensitivity of the Court of Justice, which immediately assumed its responsibilities in this area, even before the entry into force of the Lisbon Treaty in 2009 and the full incorporation of what used to be called the "third pillar" of the

Union's competence. Let us not forget that the Luxembourg Court, in its fundamental *Pupino* judgment, had already – prior to Lisbon – also laid down a duty of consistent interpretation in relation to "third pillar" measures.

What then is the responsibility of the European Court of Human Rights, the Strasbourg Court, *vis-à-vis* the criminal law competence of the Union? For the time being, acts emanating from the Union's institutions and organs fall outside the Court's examination. Any application against the Union would be declared incompatible *ratione personae* with the Convention, the Union not being a party to that instrument.

In relation to measures adopted by the Union's institutions and organs, however, the Court has developed a body of case law, established mainly in 2005 with the *Bosphorus v. Ireland* case, of which the key points had already been heralded in its *M. v. Germany* decision of 1990.

According to that case law, while it is true that the assignment of a contracting state's competence to an international organisation such as the EU does not release the Court from its duty to supervise Convention observance – in so far as the Union has its own judicial organ, the Court of Justice of the European Union, which protects human rights in a manner that is equivalent to the protection provided by our Court –, the latter need not intervene unless it finds such protection to be *manifestly deficient* in a given case.

The Strasbourg Court therefore has a duty to continue protecting fundamental rights in accordance with its mission. The doctrine of equivalent protection was significantly clarified by the 2012 judgment in *Michaud v. France*, which ruled out the application of the *Bosphorus* presumption that the Luxembourg Court had not had the opportunity to examine the relevant question.



Guido Raimondi

Since the Lisbon Treaty entered into force in December 2009, there have been great expectations as to the possibility of the European Union's accession to the European Convention on Human Rights – a development which, apart from its symbolic value, would eliminate any risk of conflicting case law between the two European courts.

Now, after opinion 2/13 of the Luxembourg Court, that has become a more distant prospect. What can be done about this? Can any solutions be found to break the deadlock? I believe that the answer to this question rests with the negotiators, or even with the political leaders, rather than with the judicial bodies.

For my part, I remain convinced that the two European courts should continue to act in the spirit of the 2011 declaration made by their two Presidents at that time, Presidents Costa and Skouris, and thus persevere in developing harmonious case law, avoiding any conflict, and listening to each other.

It goes without saying that the need for the case law of the two Courts to be harmonious is of particular importance when it comes to an area that is as sensitive for human rights as that of criminal law.

Guido Raimondi,  
President of the European Court of Human Rights

## News

Actualités / Kurzmeldungen



### European Union\*

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

#### Foundations

##### Human Rights in the EU: Resolution and Action Plan

On 20 July 2015, the Council presented the Action Plan on Human Rights and Democracy for 2015-2019. The plan aims at implementing the EU Strategic Framework on Human Rights and Democracy that was adopted in 2012 in response to new emerging challenges. It contains a list of measures including the following:

- Enhancing ownership of local actors

such as national human rights institutions, law enforcement agencies, and anti-corruption bodies;

- Addressing human rights challenges such as non-discrimination, freedom of expression online and offline, and developing capacity and knowledge on the implementation of Business and Human Rights guidelines;
- Ensuring a comprehensive human rights approach to conflicts and crises, e.g., ending impunity, strengthening accountability, and promoting and supporting transitional justice;
- Fostering better coherence and con-

sistency, regarding, e.g., trade and investment and counter-terrorism;

- A more effective EU human rights and democracy support policy, including ensuring the effective use and the best interplay of EU policies, tools, and financing instruments.

The Action Plan covers the period 2015 to 2019 and will be the subject of a mid-term review in 2017. The review will coincide with the mid-term review of the external financing instruments in order to ensure greater coherence.

In conjunction with the Strategic Framework on Human Rights and Democracy, on 8 September 2015, the EP also adopted a resolution on the situation of fundamental rights in the EU (2013-2014). Among the points made under the title of freedom and security, the EP called on the Member States and institutions to create effective instruments to combat corruption and to regularly monitor the use of public (European or

\* If not stated otherwise, the news reported in the following sections cover the period July–September 2015.

national) funds. In this context, the EP also urged the Commission to adopt an anti-corruption strategy complemented by effective instruments. Furthermore, the EP suggested launching a European anti-corruption code and a transparent system of indicators regarding corruption levels in the Member States as well as progress made in eradicating corruption. It also suggested an annual comparative report on the extent to which this major problem has taken hold at the European level.

Under the heading of freedom of expression and media, the EP highlighted that EU institutions and Member States have responded to terrorism attacks by intensifying their anti-terrorist and counter-radicalisation measures. The EP therefore urged the EU and national authorities to adopt such measures in full respect of the principles of democracy, the rule of law, and fundamental rights. This concerns especially the right to a legal defence, the presumption of innocence, the right to a fair trial, and the right to respect for privacy and protection of personal data. Referring to its resolution of 12 March 2014 on the US NSA surveillance programme, the EP also called on the national authorities to ensure that their intelligence services' activities are consistent with fundamental rights and subject to parliamentary and judicial scrutiny. In this context, the EP stressed the need for targeted, strictly necessary, and proportionate surveillance measures rather than blanket surveillance as well as the need for the EU and the Member States to adopt whistleblower protection systems.

The resolution will be presented to the Council and the Commission. (EDB)  
 >eucrim ID=1503001

## Schengen

### Member States Decide on Increased Checks on Trains

On 29 August 2015, a European Transport and Home Affairs Ministerial meeting on

cross-border cooperation against terrorism and rail security was held in Paris. The meeting was organised in the aftermath of the thwarted attack on a Thalys train between Amsterdam and Paris and aimed at exchanging experiences and identifying possible security measures on the national and European levels.

The Commissioner for Migration and Home Affairs, Dimitris Avramopoulos, and the Commissioner for Transport, Violeta Bulc, attended the meeting together with Affairs and Transport Ministers from several Member States as well as Gilles de Kerchove, the EU's Counter-Terrorism Coordinator.

The adopted statement stresses that security should be proportionate to the threat, but the Commission will work together with Member States and industry experts on enhancing cross-border rail security. Next steps include the adoption of the PNR Directive, initiatives related to detention and to the disabling of weapons, and the establishment of a European Counter-Terrorist Centre within Europol. In its efforts against radicalisation, the Commission will organise the first European Forum with Internet service providers aiming to enhance cooperation on counter-terrorism. (EDB)

>eucrim ID=1503002

## Enlargement of the EU

### EU-Bosnia and Herzegovina: Structured Dialogue and FYROM

On 10 September 2015, a ministerial meeting took place in the context of the EU-Bosnia and Herzegovina Structured Dialogue on Justice. Since the dialogue was launched in 2011, the objective was to bring the functioning of the judiciary in Bosnia and Herzegovina in line with EU standards.

The result of this meeting was the signing of a protocol by ministerial representatives from Bosnia and Herzegovina who committed themselves to pursuing the reform of the judiciary on the state level as well as that of the

High Judicial and Prosecutorial Council. The efforts of the EU Commissioner for European Neighborhood Policy and Enlargement, Johannes Hahn, in the former Yugoslavian Republic of Macedonia in July and in September 2015 resulted in an agreement and a list of urgent reform priorities. The agreement includes the opposition's return to Parliament, the appointment of a special prosecutor with full autonomy to lead investigations surrounding and arising from the interception of communications, the appointment of new Ministers and Deputy Ministers in key portfolios, and the entry into office of a new government. Elections are to be held in April 2016.

The list of reform priorities includes *inter alia*:

- De-politicizing the appointment and promotion of judges and prosecutors;
- Publication of all court rulings;
- Speedy execution of all relevant ECtHR judgments;
- Clearer separation of the mandates and regulations concerning the interception of communications for criminal investigation, on the one hand, and for security purposes, on the other;
- Ensuring sufficient autonomy of independent regulatory, supervisory, and oversight bodies;
- Establishing a credible track record on high-level corruption and generally reinforcing the fight against corruption;
- Establishing a new, comprehensive whistleblowing protection mechanism in cooperation with GRECO experts.

A Commission progress report is planned for autumn 2015. (EDB)

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## Institutions

### Commission

#### Increased Budget for Judicial Training Projects

The European Commission launched a call for action grants to support trans-

national projects that contribute to the increased development of a European area of justice based on mutual recognition and mutual trust. This is in line with the specific objective of supporting and promoting judicial training, including language training on legal terminology, with a view to fostering a common legal and judicial culture. The aim of the call is to contribute to the effective and coherent application of EU law, notably in the areas of civil law, criminal law, and fundamental rights. The call also aims to foster mutual trust between legal practitioners. In the field of criminal law, priorities include procedural rights in criminal proceedings and victims' rights. In the field of fundamental rights, the priority is the scope and application of the EU Charter of Fundamental Rights. The Commission has raised the budget to €5.5 million. (EDB)

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## European Court of Justice (CJEU)

### Ruling on Time Limits in EAW Procedure

On 16 July 2015, the Court of Justice ruled in the case *Minister of Justice and Equality vs Lanigan* (Case C-237/15 PPU). Francis Lanigan was arrested in January 2013 in Ireland, based on an EAW issued by British authorities, following charges of murder and possession of a firearm with intent to endanger life. Due to several procedural incidents, the case could not be examined until 30 June 2014. Mr. Lanigan had remained in custody since his arrest. In December 2014, he argued that the time limit within which a decision on the EAW should be taken (maximum 90 days after the arrest) had expired.

The Irish High Court therefore submitted a request for preliminary ruling to the Court, asking whether the expiry of the time limit precludes it from taking a decision on the EAW and whether Mr. Lanigan may continue to be held in custody.

The Court of Justice referred to the

objective of accelerating and simplifying judicial cooperation and ruled that, regardless of the expiry of the time limit, the national authorities are required to continue the execution procedure for the EAW and to take a decision on its execution. With regard to keeping Lanigan in custody, the Court states that the Framework Decision on the EAW does not stipulate that the person in custody must be released once the time limit has expired. However, in reference to the Charter of Fundamental Rights and Freedoms, the duration of the custody may not be excessive. This is for the Irish High Court to assess, taking into consideration all circumstances. The Court of Justice points out that, if the assessment were to result in a provisional release, the Irish High Court should provide any measures it deems necessary to prevent the person from absconding and to ensure that the material conditions necessary for his surrender continue to be fulfilled. (EDB)

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### Court Says Italian Law Liable to Affect Financial Interests of the EU

On 8 September 2015, the Court of Justice ruled in the so-called *Taricco* case (Case C-105/14) revolving around a fraudulent VAT carousel allegedly set up by Mr. Taricco and others between 2005 and 2009. In accordance with Italian law, some of the charges against the persons involved are time-barred, whereas other charges will be time-barred by 8 February 2018 at the latest. Since an extension of the limitation period is allowed by only a quarter of its duration, this would potentially lead to *de facto* impunity for a case of VAT evasion amounting to several million euros.

The Tribunale di Cuneo (District Court, Cuneo, Italy) therefore asked the Court of Justice whether Italian law, by effectively granting impunity to persons and enterprises that commit criminal offences, has created a new VAT exemption not provided for in EU law.

In its decision, the Court of Justice relied on Art. 325 TFEU, which obliges

#### Common abbreviations

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

Member States to counter illegal activities affecting the EU's financial interests through effective deterrent measures and, in particular, to take the same measures to counter fraud affecting the EU's financial interests that they take to counter fraud affecting their own financial interests. The EU's budget is financed *inter alia* by revenue from this harmonised tax. The Italian system of time limitations thus falls under the scope of application of EU law.

The Court concludes by stating that the Italian court must assess whether the law at issue allows the effective and dissuasive penalisation of cases of serious EU fraud. This could mean that the Italian law on limitation periods is contrary to Art. 325 TFEU in two ways:

- First by allowing for *de facto* impunity in serious fraud cases;
- Second by imposing longer limitation periods for fraud affecting the national interests of Italy than for cases of EU fraud.

When Art. 325 TFEU is infringed, the national court must ensure that EU law is comes into full effect and that the contested national rules on limitation periods are not applied. (EDB)

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## OLAF

### OLAF Deals Appropriately with Whistle-Blower's Report

On 8 August 2015, the European Ombudsman ruled in a case concerning OLAF's handling of a whistle-blowing report linking the European Aviation Safety Authority (EASA) to the alleged manipulation of an aviation security inspection report. OLAF had dismissed the case after examination and referred it back to the EASA. It is the action taken by OLAF that is the subject of the case, not the substance of the complainant's report.

The Ombudsman concluded that OLAF had carefully considered whether to open investigation or not and had

based this decision on objective criteria. She also established that OLAF in fact had not dismissed but rather transmitted the matter to the EASA for assessment, reserving its right to open an investigation at a later date. In doing so, OLAF never requested or invited the complainant to turn to the EASA with his whistle-blowing report but properly anonymised the information in order to protect the whistle-blower's identity. According to the Ombudsman, it is, however, unfortunate that OLAF did not make it clear enough to the complainant that the case had not been dismissed.

With regard to the alleged delay in OLAF dealing with the whistle-blowing report, OLAF has in the meantime acknowledged the delay and apologised for it. The Ombudsman thus found no grounds on which further pursuing the matter would be justified. (EDB)

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### Cooperation Agreements with Senegal and Angola

On 8 July 2015, OLAF administration signed cooperation agreements with the Office national de lutte contre la fraude et la corruption (OFNAC) from Senegal and the Office of the Inspector General (IGEA) from Angola. The agreements will facilitate information exchange with OLAF and enable the carrying out of joint investigations with both partners. (EDB)

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## Europol

### Memoranda of Understanding Signed with ING Group and FireEye

In August 2015, Europol's European Cybercrime Centre (EC3) signed two new Memoranda of Understanding (MoU), one with ING Group and one with FireEye.

ING Group is a Dutch multinational banking and financial services corporation. The MoU allows for EC3 and ING Group to exchange strategic informa-

tion, information on trends, and statistical data.

FireEye is a purpose-built, virtual machine-based security platform providing real-time threat protection to enterprises and governments worldwide against the next generation of cyber-attacks. The MoU between the EC3 and FireEye allows for the exchange of knowledge and expertise on cybercrime, mainly in the areas of early detection of cybercrime threats and statistics on trends. (CR)

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### Joint Cybercrime Action Taskforce Extended

The Joint Cybercrime Action Taskforce (J-CAT) – initially launched for a period of six months – has been extended following its success. J-CAT is mandated to proactively drive intelligence-led, coordinated actions against key cybercrime threats and top targets. It is composed of cyber liaison officers from EU Member States, non-EU law enforcement partners (Australia, Canada, Colombia, and the USA) as well as Europol's EC3, all located at the EC3 to ensure effective communication.

At the moment, J-CAT is looking into extending its cooperation with other partners, notably from law enforcement and judicial authorities such as Eurojust as well as from the private sector. (CR)

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### EU Internet Referral Unit Launched

On 1 July 2015, Europol launched the European Union Internet Referral Unit (EU IRU), a dedicated unit with the objective of reducing the level and impact of terrorist and violent extremist propaganda on the Internet. The unit shall identify and refer relevant online content to concerned Internet service providers and support Member States with operational and strategic analysis.

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### Operation against Wildlife Crime

In June 2015, the international law enforcement operation COBRA III re-

covered a huge amount of wildlife contraband, including elephant ivory, rhinoceros horns, dead and live specimens, timber, plants and animal parts as well as traditional Asian medicine pills. Furthermore, several individuals were arrested and investigations are continuing in many countries. The EU is a destination, source, and transit region for trafficking in endangered species involving live and dead specimens of wild fauna and flora or parts of products made from them.

Operation COBRA III was supported by law enforcement from 62 countries in Europe, Africa, Asia, and America. Europol supported the operation across Europe by facilitating operational information exchange and coordinating the activities of police, customs, forestry, and other law enforcement authorities from 25 participating EU Member States. The operation was organised by the Association of Southeast Asian Nations Wildlife Enforcement Network (ASEAN-WEN) and the Lusaka Agreement Task Force (LATF), and supported by numerous international agencies and organisations such as Interpol. (CR)

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## Eurojust

### Evaluation Report Published

On 4 September 2015, the second evaluation report on the implementation of the 2008 Eurojust Decision was published. The independent report – commissioned by Eurojust to a consulting firm under Article 41a of the Eurojust Decision – pursues three objectives:

- To provide an independent assessment of the implementation of the 2008 Eurojust Decision;
- To evaluate its impact on the performance of Eurojust in terms of achieving its operational objectives;
- To assess the effectiveness and efficiency of Eurojust's activities.

With regard to the first objective, the report finds that practical implementa-

tion at the Member State level remains a work in progress in which Eurojust should continue to play an active role.

Looking at the decision's impact on Eurojust's effectiveness, the report confirms some notable improvement, e.g., regarding the harmonisation of the powers and status of National Members. However, it also notes that some measures have not been fully established such as, for instance, the Eurojust National Coordination System or the enhanced information exchange with Member States and between national members under Article 13 of the Eurojust Decision.

Looking at Eurojust's activities, the report notes that – next to its casework – Eurojust is increasingly recognised as centre of expertise. Hence, it is recommended that Eurojust should reinforce the strategic clarity of its policy work, in particular the Centres of Expertise and the work of the College Teams, by prioritizing a limited number of high added-value strategic priorities and by mobilising Eurojust resources to address these priorities. With regard to Eurojust's governance, the report sees a clear deficiency in the fact that this was not reformed under the 2008 Eurojust Decision. Hence, it is recommended that the legislator should more clearly specify the roles and responsibilities assumed by the different actors at Eurojust. Furthermore, clear mandates and objectives should be defined for the different substructures such as College Teams, Tasks Forces, and Working Groups.

In a limited number of areas, greater convergence between the working practices of the National Desks would increase the agency's efficiency. Furthermore, Eurojust should enable its administration to provide more homogeneous support.

On a positive note, the report finds Eurojust's work towards implementing a results-based management approach and cost accounting system highly commendable. Ultimately, the report encourages Eurojust to continue to play a pro-

active role in the areas identified by the Council as operational priorities whilst maintaining the underlying demand-driven approach of the organisation's operational activities. (CR)

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### Eurojust's Commitment to the European Agenda on Security 2015-2020

On 16 June 2015, the European Agenda on Security 2015-2020 was endorsed by the Council and the European Parliament.

Concerning Eurojust, the agenda suggests intensifying cooperation between the Justice and Home Affairs agencies of the EU, especially with regard to establishing more operational cooperation between Eurojust and Europol. Furthermore, under the Agenda, Member States have been asked to use Eurojust more often to coordinate cross-border investigations and prosecutions. Eurojust should also be more involved in complex mutual legal assistance requests with countries outside the EU. Regarding counterterrorism, the agenda aims for Eurojust to be involved in the activities of the planned European Counter-Terrorism Centre within Europol. It also foresees a stronger role for Eurojust regarding the fight against financial crime as well as Internet-facilitated crime. Finally, according to the agenda, trafficking in human beings should become a priority for Eurojust. (CR)

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### Special Meeting of the UN Counter-Terrorism Committee

On 27-28 July 2015, Eurojust participated in a special meeting of the Counter-Terrorism Committee of the United Nations Security Council. The meeting was also attended by representatives of Member States as well as international and regional organisations. The meeting aimed at gaining an in-depth understanding of the operational considerations involved in stemming the flow of foreign terrorist fighters. (CR)

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## Frontex

### Annual Report on Consultative Forum Published

On 9 July 2015, Frontex published its second Annual Report on the Frontex Consultative Forum on Fundamental Rights (see eucrim 4/2012, p. 147). The report provides an overview of the activities of the Consultative Forum in 2014, conclusions for the year 2014, recommendations on changes to the working methods of the forum as well as an outlook for the Consultative Forum's work in 2015.

Activities carried out by the Consultative Forum in the year 2014 include the following:

- Cooperation with and support of the Frontex Fundamental Rights Officer;
- Discussions with the Management Board and Frontex staff;
- A follow-up visit concerning the Poseidon (Land) and Poseidon (Sea) joint operations as well as a visit regarding the joint operations Poseidon and Attica;
- Reaction to the drowning of refugees off the Greek coast in January 2014;
- Contributions to the VEGA Children initiative (see below);
- Analysis of screening and debriefing activities at the borders;
- Discussion on the European Ombudsman's recommendation to set up a mechanism for dealing properly with complaints brought forward by individual persons;
- Contribution to Frontex' key training activities. (CR)

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### VEGA Handbook 'Children at Airports' Published

In August 2015, Frontex published a handbook as part of its VEGA Children concept to raise awareness on the phenomena of child trafficking among all stakeholders involved in the control and protection of children crossing the external EU air borders. It was designed for border guard officers in order to raise their awareness as regards children (mi-

nors) who cross the external air borders of the EU, whether unaccompanied or not.

In the first part, the guide provides the definitions of several terms, e.g.;

- Child;
- Children on the move at risk;
- Accompanied and unaccompanied as well as separated children;
- Child trafficking and child smuggling;
- The best interests of the child.

The core part of the handbook gives operational guidelines on how to deal with accompanied, separated, and unaccompanied children at the different stages of the border, i.e., at the first-line control, at the second-line control, and at transit areas and gate checks. Lastly, the handbook recommends a number of principles to be taken into account for any referral mechanism concerning children. (CR)

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## Specific Areas of Crime / Substantive Criminal Law

### Protection of Financial Interests

#### Commission's Annual Report on Protection of Financial Interests

The Commission published its annual report on the protection of financial interests on 31 July 2015. A key conclusion of the report is that Member States have become more efficient in fighting fraud. In comparison with 2013, 2% more cases were detected and prosecuted in 2014, involving €538 million in EU funds. The Member States accomplished this result by taking a series of measures to ensure that EU funds are well-protected from fraud, both on the expenditure and on the revenue sides. For example, five Member States have adopted national anti-fraud strategies. In addition, the so-called Joint Customs Operations (JCOs) were successful. JCOs are joint operations carried out

by OLAF in cooperation with customs authorities from the Member States as well as third countries. The JCOs focus on specific areas that susceptible to the risk of fraud, e.g., the counterfeiting of goods.

Member States' applications of definitions related to irregularity reporting (fraudulent and non-fraudulent) and the timing of the reporting are, however, still inconsistent. The report provides an in-depth analysis of this issue and the Commission will continue to encourage harmonisation in this area. (EDB)

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### Draft PIF Directive Discussions Still in Deadlock on Inclusion of VAT Fraud

During the informal JHA Council of 10 July 2015, the chairman and Luxembourg's Minister of Justice, Félix Braz, addressed the difficult discussions on the proposed Directive on the fight against EU fraud by means of criminal law. He stated that the EP and the Commission are arguing for the inclusion of VAT whereas the Council opposes it because Member States take the view that VAT revenue is primarily a national issue.

The impasse in this procedure risks causing an impasse in other areas as well, such as the EPPO proposal; therefore, Member States' experts have been requested to continue working on a solution.

The Commissioner for Justice, Consumers and Gender Equality, Věra Jourová, stressed the need to convince Member States to include VAT in the proposed directive. (EDB)

►eucrim ID=1503019

### European Public Prosecutor's Office (EPPO) – State of Play

On 10 July 2015, during the informal JHA Council, the chairman and Luxembourg's Minister of Justice, Félix Braz, was quoted as calling the EPPO proposal a priority of the presidency.

Two issues were discussed at this Council:

- First, the need to obtain judicial au-

thorisation in respect to cross-border investigations from both states in question;

■ Second, judicial review of acts carried out by the EPPO by the CJEU.

Based on mutual trust, the Presidency recommended that the first issue be solved by relying – in principle – on the judicial authorisation of one Member State to be responsible for cross-border investigations. According to Minister Braz, the majority of Ministers would be in favour of this approach.

In light of the right to an effective remedy and the competence of the CJEU regarding EPPO acts, Minister Braz proposed that the jurisdiction of the CJEU be extended to cover actions for annulment and references for a preliminary ruling in respect of a limited number of clearly identified procedural measures. According to Minister Braz, this proposal would again be endorsed by the majority of the Ministers.

During the JHA Council of 8-9 October 2015, the Council reached a provisional agreement on Arts. 24–37 of the draft regulation on the establishment of the EPPO. Arts. 34 and 36 on transactions and judicial control are exempted from this agreement so far. (EDB)

►eucrim ID=1503020

### Fight against Customs Fraud Enhanced by New Tracking Tools

On 8 September 2015, the EP adopted an amendment to Regulation 515/97 on mutual assistance between the administrative authorities of the Member States as well as cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters.

The amendment gives OLAF and national customs authorities a new tool by creating centralised databases containing information on container movements and on the goods entering, leaving, and transiting the EU. It was the Commission's own Joint Research Centre (JRC) that delivered the scientific evidence on the importance of analysing the elec-

tronic records on cargo container traffic.

Ocean carriers have online access to so-called Container Status Messages (CSM), electronic records describing the logistics and the routes followed by cargo containers. Such information can be vital for investigations into fraud as well as for risk analysis. The CSM data can, for example, reveal that a cargo container started in country X, making it suspicious for an importer to declare country Y as dispatch/origin of the transported goods.

The technology, know-how, and experience developed by JRC will be used by OLAF to implement the new legislation in effect from 1 September 2016. (EDB)

►eucrim ID=1503021

### Money Laundering

#### Investment-Based Crowdfunding and Money Laundering

On 1 July 2015, the European Security and Markets Authority (ESMA) released a Q & A report aiming to consistently and effectively apply rules on anti-money laundering and terrorist financing to investment-based crowdfunding platforms. The document is aimed at competent national authorities in order to assist them in their supervisory tasks. Some investment-based crowdfunding platforms fall under the scope of the Markets in Financial Instruments Directive (2004/39/EC) and are therefore subject to the third anti-money laundering directive. Other platforms are, however, regulated under national law. (EDB)

►eucrim ID=1503022

#### Europol Report Says Criminals Prefer Cash for Money Laundering

On 8 July 2015, Europol released a strategic report called “Why is cash still king?”. The report deals with the question of why paying in cash may not be popular with consumers but is still a preferred money laundering method for the proceeds of crime.

Suspicious transactions of cash represent around one third of all Europol cases in the area of money laundering. For law enforcement, the use of cash by criminals is a significant challenge; it hinders investigations and later prosecution, since the link between cash and criminal activities is extremely difficult to prove since the link between cash and criminal activities is extremely difficult to prove, especially since most Member States' law enforcement agencies are required to demonstrate the predicate offence in order to prosecute money laundering.

The new Europol report ends with a list of recommendations reflecting the findings. According to Europol Director Rob Wainwright, the recommendations aim at providing practical solutions that could assist in preventing the use of cash for criminal purposes as well as enabling investigators to achieve higher rates of successful convictions. (EDB)

►eucrim ID=1503023

### Organised Crime

#### EU to Accede to Council of Europe Terrorism Prevention Convention and Protocol

On 15 June 2015, the Commission adopted two proposals for Council Decisions authorising the Commission to sign, on behalf of the EU, the Council of Europe Convention on the Prevention of Terrorism and its Additional Protocol. As part of the European Agenda on Security, the adoption of both decisions should also be seen in the context of the upcoming impact assessment of the Framework Decision on combating terrorism to be updated in 2016. This framework decision already implements some of the provisions of the Council of Europe's Convention and Protocol, yet the signing and ratifying of both legal instruments will especially enhance efforts against the threats posed by foreign terrorist fighters. (EDB)

►eucrim ID=1503024

## Cybercrime

### Directive on Attacks against Information Systems in Force

4 September 2015 marked the implementation deadline for Member States to transpose the provisions of the Directive on Attacks against Information Systems into national law. On that date, only ten Member States had confirmed the full transposition of the directive and two had partially transposed it.

The directive introduces illegal access, system interference, and interception as criminal offences across the EU. Another novelty is that creating “bot-nets” and other types of malware can lead to criminal prosecution. Further provisions of the directive enhance cooperation between national law enforcement authorities. (EDB)

►eucrim ID=1503025

## Procedural Criminal Law

### Data Protection

#### CJEU Declares Safe Harbor Decision Invalid

On 6 October 2015, the CJEU decided on the invalidity of Commission Decision 2000/520/EC in Case C-362/14. Decision 2000/520/EC is a decision adopted by the Commission on the basis of Art. 25(6) of Directive 95/46/EC dealing with transfers of personal data to third states. Such transfers are only allowed after an assessment is made of the third state’s level of data protection. This should be adequate. Decision 2000/520/EC also covered personal data transfers to the US, declaring that, for all activities falling within the scope of Directive 95/46/EC (commercial activities), the principles listed in the annex to the decision are considered sufficient to ensure an adequate level of data protection for data transferred from the EU to US companies. The principles are known as the Safe Harbor framework. More than

3000 companies committed to applying the Safe Harbor principles when processing personal data originating from the EU.

In 2014, Maximilian Schrems, an Austrian citizen, lodged a complaint with the Irish Data Protection Commissioner. Schrems claimed that personal data of Facebook users that are transmitted from Facebook’s European servers in Ireland to its servers in the US are not sufficiently protected from surveillance by US intelligence agencies based on the 2013 revelations by Edward Snowden on the mass data collection by US intelligence agencies from private companies. The Irish Data Protection Commissioner decided not to investigate, relying on Decision 2000/520/EC that labels the level of data protection offered by companies who subscribed to the Safe Harbor principles as adequate.

Schrems took his case to the Irish High Court, which brought the case before the CJEU for preliminary ruling. The CJEU ruled that, even if the Commission adopts a decision on the level of data protection of a third state, the national supervisory authorities may examine whether a data transfer to that third state complies with applicable EU legislation. Examining the Safe Harbor framework, the CJEU concludes that it enables interference by US public authorities with the fundamental rights of persons. Legislation that allows public authorities to gain access to the content of communications on a generalised basis must be regarded as compromising the essence of the fundamental right to respect for private life. The CJEU ultimately declared the Safe Harbor decision invalid. (EDB)

►eucrim ID=1503026

#### MEPs Endorse EU PNR Exchange System

The LIBE Committee endorsed the proposed Directive on the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, on 15 July 2015.

MEPs inserted additional safeguards into the proposed text, however, which was approved by 32 votes to 27.

One of the amendments made was that the directive would not apply to “intra-EU” flights between EU Member States. The directive would thus only apply to air carriers and non-carriers (such as travel agencies and tour operators) operating flights to and from the EU. The material scope of the directive includes terrorist offences and certain types of serious transnational crime. According to the MEPs, the list of serious transnational crime includes trafficking in human beings, sexual exploitation of children, money laundering, and cyber-crime.

In protecting the necessity and proportionality of data processing under the draft directive, MEPs ensured that only Passenger Information Units should be entitled to process PNR data for limited purposes and that all processing should be logged. The units should also appoint a data protection officer. MEPs also formulated amendments restricting data transfer to third states.

With regard to data retention, the PNR data processed under the terms of the proposed directive should be stored for 30 days, after which they have to be “masked out.” Masking out refers to disconnecting the identifying factor from the data. In this configuration, the data can be stored for a maximum of five years.

During the meeting of 8-9 October 2015, the JHA Council was briefed by the presidency on the progress made in this dossier. Negotiations between the institutions on the proposed PNR directive are ongoing. (EDB)

►eucrim ID=1503027

#### Progress on EU-US Umbrella Agreement

On 8 September 2015, the Commissioner for Justice, Consumers and Gender Equality, Věra Jourová, announced that negotiations on the data protection standards for EU-US law enforcement

cooperation had been finalised. The text is referred to as the umbrella agreement because it covers all personal data to be exchanged between the EU and the US for the purpose of prevention, detection, investigation, and prosecution of criminal offences, including terrorism. Differences in data protection standards of the EU and the US prompted the EU delegation to require strong safeguards in terms of limitations on the use of data and data retention. In particular, the lack of rights for EU citizens to seek judicial redress in the US in the case of privacy infringements is a critical point. Therefore, the adoption of the agreement has been made dependent on the adoption of the Judicial Redress Bill by the US Congress. (EDB)

►eucrim ID=1503028

### New Eurobarometer on Data Protection

On 24 June 2015, a new Eurobarometer study was published on data protection. The study was requested by the Commission, Directorate-General for Justice and Consumers. It was co-ordinated by the Directorate-General for Communication. Approximately 28,000 face-to-face interviews were held across the whole EU for the purpose of this study.

It is concluded that most respondents accept that data collection is a part of modern life, as long as it remains within appropriate boundaries. Seven of ten respondents think their approval should be given before any kind of information is processed. However, only 15% of all respondents feel that they have control over the information they provide online. Trust in online companies remains low, and two thirds of those who reported feeling that they did not have control admit to being concerned about this lack of control. When asked about risks, most respondents mention fraud and online identity theft as the main reasons for concern.

The survey aims to support the finalisation of the data protection reform by studying the perceptions of EU citizens in this area. A previous study on data protection was carried out in 2010. The

new report thus also includes comparisons with the results of the previous survey. (EDB)

►eucrim ID=1503029

### Mexico-EU PNR Agreement Talks Launched

On 14 July 2015, negotiations started between the EU and Mexico on an agreement for the exchange of PNR data for the purposes of preventing terrorism and transnational organised crime.

The Head of the Tax Administration Service (SAT), Aristoteles Nuñez, and the Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, met to formally propel the negotiations towards such a bilateral agreement. At the present time, 17 major European airlines have regular operations with Mexico.

In 2012, Mexico established the legal obligation for air, maritime and railway international passenger transport companies to transmit to the Mexican customs authorities the data of passengers and crew prior to the arrival of the means of transport to its national territory. The Council gave a mandate to the Commission to negotiate an agreement on behalf of the EU on 23 June 2015. (EDB)

►eucrim ID=1503030



## Council of Europe\*

Reported by Dr. András Csúri

### Commissioner Publishes Comment on Situation of Irregular Migrants

On 20 August 2015, Nils Muižnieks, CoE Commissioner for Human Rights, published a comment on the situation of migrants in irregular situations. The

## Cooperation

### Police Cooperation

#### EUPOL Report Published

On 8 July 2015, the European Court of Auditors (ECA) published a report on the EU police mission in Afghanistan (EUPOL). EUPOL was mandated to strategically advise the higher echelons of the police force and create links to a wider rule of law. According to the report, EUPOL has partly achieved its aim of helping to establish a sustainable and effective Afghan-owned civilian police. On the positive side, EUPOL managed to contribute to a reform of the Ministry of the Interior and to professionalization of the country's police in the face of severe obstacles such as the absence of a trained, fully-functioning Afghan police force, high illiteracy rates, and widespread corruption in the Afghan police and justice systems. On the negative side, however, the report also finds shortcomings relating to the mission itself such as its limited size as well as competition from other European and international efforts. In conclusion, the report puts into question the project's sustainability in the coming years. (CR)

►eucrim ID=1503031

comment emphasizes that having no papers does not mean the deprivation of human rights. Member States need to be aware of the fact that basic social rights are universal and are to be provided to everyone under their jurisdiction, includ-

ing irregular migrants. The comment further states that repressive policies create a general climate of rejection and suspicion against irregular migrants. In this context, law enforcement officials and those who are supposed to provide social services might find it difficult to recognize an irregular migrant as a victim of a human rights violation who is in need of protection. A recent FRA study on the impact of the crisis of access to fundamental rights in the EU identified fear of having to leave the country as the main reason for victims of exploitation not reporting their cases to the police. The criminalization of migration through the establishment of an “offence of solidarity,” however, is also unacceptable, as basic service providers should not be placed under an obligation to report irregular migrants to law enforcement authorities. Additionally, under the European Social Charter – as emphasized by the European Committee of Social Rights, the minimum guarantees for the right to housing and emergency shelter apply to irregular migrants too.

In full compliance with Art. 4 of the ECHR, everyone, including irregular migrants should be protected from labor exploitation and human trafficking, and this guarantee should not be made conditional on their cooperation in criminal proceedings.

The Commissioner concluded that Member States should not just refrain from criminalizing migration but should also consider policies that prevent migrants from stumbling into an irregular situation. Member States should:

- Ratify and implement international and European treaties;
- Inform irregular migrants of their rights;
- Enable NGOs and trade unions to defend the basic social rights of irregular migrants (including before courts);
- Ensure irregular migrants equal access to victim support;
- Never use the expression illegal migrants but promote alternatives to this expression.

► eucrim ID=1503032

### Election of the ECtHR New President and Two New Vice-Presidents

On 21 September 2015 The European Court of Human Rights has elected Mr. Guido Raimondi (Italy) as its new President and Mr. Işıl Karakaş (Turkey) and Mr. András Sajó (Hungary) as its two new Vice-Presidents. They will take up their respective duties on 1 November 2015.

► eucrim ID=1503033

## Specific Areas of Crime

### Corruption

#### GRECO: Fourth Round Evaluation Report on Malta

On 23 June 2015, GRECO published its Fourth Round Evaluation Report on Malta. The fourth and latest evaluation round was launched in 2012 in order to assess how states address corruption prevention in respect of MPs, judges, and prosecutors (for further reports, see eucrim 3/2014, p. 83; 4/2014, pp. 104-106; 1/2015, p. 11; 2/2015, pp. 43-45). The latest report welcomes the reforms designed to reduce the scourge of corruption in Malta, but states that these reforms do not always make it obvious to the public that unethical practices are unacceptable. Though acknowledging that handling interpersonal relationships in a small community such as Malta is a critical challenge, the report points out that the current complexity of and delays in the Maltese judicial system mean that cases often take many years. GRECO addressed the implementation of nine recommendations to Malta.

With regard to MPs, the report recommends a thorough review of the current provisions of the Code of Ethics as well as the appropriate enforcement and supervision of rules on the declaration of assets, financial interests, and outside activities. This presupposes a range of effective, proportionate and dissuasive sanctions. The report also recommends

the establishment of a dedicated source of confidential counseling to provide MPs with advice on related questions.

Regarding judges, GRECO recommends the introduction of objective criteria and evaluation procedures for judicial appointments, which should also apply to the appointment of boards and tribunals exercising judicial functions. Additionally, the system of judicial accountability should be significantly strengthened by extending the range of disciplinary sanctions and by improving the transparency of complaints procedures.

As to prosecutors, measures should be taken to further strengthen their role in written law, notably by ensuring transparent systems of appointment, discipline, and dismissal of prosecutors. Furthermore, a code of ethics needs to be developed and properly enforced.

► eucrim ID=1503034

#### GRECO: Fourth Round Evaluation Report on Serbia

On 2 July 2015, GRECO published its Fourth Round Evaluation Report on Serbia. The report states that, although Serbia has come a long way in providing for a stable framework to fight corruption, much remains to be done to close the gap between the law and practice.

Regarding MPs, the transparency of the legislative process needs to be improved by adequate timeframes for submitting amendments and by the application of urgent procedure as an exception and not as a rule. The rules on public debates need to be developed; the Code of Conduct has to be adopted swiftly with easy access for the public. Moreover, rules need to be introduced on how MPs should interact with lobbyists and other third parties influencing the parliamentary process.

With regard to judges, the report urges changing the composition of the High Judicial Council, with at least half of its

\* If not stated otherwise, the news reported in the following sections cover the period July – September 2015.

members being elected by peers and excluding the National Assembly from the election of its members. Additionally, the report recommends reviewing the system of appraisal of judges' performance by introducing more qualitative criteria and by abolishing the rule that unsatisfactory evaluation results systematically lead to dismissal of the judges concerned.

GRECO suggests similar measures with regard to prosecutors by recommending the exclusion of the National Assembly from the election of members of the State Prosecutorial Council. It also places emphasis on qualitative indicators for the review of the system of appraisal of prosecutors.

In addition, the report recommends strengthening the role of the Anti-Corruption Agency, e.g., by immediate access to data from other public bodies in the prevention of corruption and resolution of conflicts of interest with respect to MPs, judges, and prosecutors.

► [eucrim ID=1503035](#)

### **GRECO: Fourth Round Evaluation Report on Hungary**

On 22 July 2015, GRECO published its Fourth Round Evaluation Report on Hungary. The report praised Hungary for the steps taken to reduce corruption in the legislative, judicial, and prosecution sectors but urged the country to continue improving anti-corruption measures in all three areas.

Regarding MPs, the report recommends ensuring that all legislative proposals are processed with an adequate level of transparency and consultation. Additionally, rules should be introduced on how to interact with lobbyists and other third parties seeking to influence the parliamentary process. Moreover, the report recommends the introduction of ad hoc disclosure rules if personal conflicts of interest were to emerge during parliamentary proceedings. GRECO stresses that the obligation to disclose outside occupations and activities of a non-financial character be applied in

practice and that the related declarations be submitted in a format that allows for adequate public scrutiny. Ultimately, GRECO underlines that procedures lifting the immunity of MPs should not hamper criminal investigations into corruption-related offences.

With regard to judges, the report encourages the review of the powers of the President of the National Judicial Office to intervene in the process of appointing and promoting candidates for judicial positions and encourages giving the National Judicial Council a stronger role instead. Additionally, the power of the President of the National Judicial Office to reassign 'ordinary' judges without their consent should be reduced to a minimum and only for specific reasons of a temporary nature. Ultimately, the report recommends that the immunity of 'ordinary' judges be limited to functional immunity, i.e., to activities relating their participation in the administration of justice.

As to prosecutors, both the possibilities to re-elect the Prosecutor General and to keep him/her in office after the expiry of his/her mandate if a minority in Parliament blocks the election of a successor shall be re-considered. Furthermore, the removal of cases from subordinate prosecutors should be subject to strict criteria and be justified in writing. The report also recommends a functional immunity for prosecutors.

► [eucrim ID=1503036](#)

### **GRECO: Fourth Round Evaluation Report on Montenegro**

On 26 August 2015, GRECO published its Fourth Round Evaluation Report on Montenegro. The report calls for tougher anticorruption measures for parliamentarians, judges, and prosecutors.

The standards of the Code of Ethics for MPs should be both promoted and enforced. Ad hoc disclosure rules are to be introduced should personal conflicts of interest emerge during parliamentary proceedings. The report recommends appropriate measures being put in place

to streamline the financial disclosure system with a view to ensuring its proportionality and effectiveness. Ultimately, clear and objective criteria have to be applied when deciding on requests to lift the inviolability of MPs.

Regarding judges, the report calls for additional measures in order to strengthen the independence of the Judicial Council against undue political influence, including the abolishment of ex-officio participation of the Minister of Justice. This is to be achieved by providing that at least half of its Members are elected by their peers, with the presiding function given to one of the judicial members, and by means of objective and measurable selection criteria for non-judicial members. The report also recommends further developing the disciplinary framework for judges with a view to strengthening its objectivity, proportionality, and effectiveness and to publishing information on complaints received, disciplinary action taken, and sanctions applied against judges.

With regard to prosecutors, the report calls for the same measures as in the case of judges in order to strengthen the disciplinary framework and with regard the publishing of specific information. Additionally, GRECO recommends setting place operational arrangements to avoid an overconcentration of powers in the same hands as regards the different functions performed by members of the Prosecutorial Council. The report urges Montenegro to significantly increase the transparency of the work of the prosecution service, notably by adopting a public communication strategy and by developing relevant training.

► [eucrim ID=1503037](#)

### **Money Laundering**

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

On 23 June 2015, MONEYVAL published its Fourth Round Evaluation Report on Montenegro and called for more

proactive investigation and prosecution of ML offences.

The report found the money laundering (ML) offence broadly in line with international standards (such as the Vienna and Palermo Conventions), with the liability of legal persons having been put in place. However, the authorities are still not effective in convicting offenders.

The financing of terrorism (FT) offence was extended to cover financing not linked to the commission of a specific terrorist act. However, the offence definition still fails to cover all acts foreseen by anti-terrorism treaties. No investigations and prosecutions were carried out and no adequate regime for freezing terrorist assets has been put in place.

The legal framework governing confiscation and provisional measures is both incomprehensive and not actively applied. The FIU is operationally independent; the legal basis for its functioning is sound and it performs its analytical function effectively. However, the report calls for an improvement in the manner in which the FIU disseminates notifications to law enforcement authorities.

The system of detection of physical cross-border transportation of currency is significantly impaired, inter alia by the lack of power of the authorities to obtain further information in case of a false declaration or a non-declaration.

The financial sector has adequate knowledge of preventive measures, although the requirement to report suspicions of ML and FT is not applied

effectively. The non-financial sector, however, has a very low awareness of preventive measures, which needs to be further improved. Financial supervisory authorities have adequate powers – even if they are not used effectively – to monitor and ensure the compliance of financial institutions, but the supervisory framework for the non-financial sector needs to be further improved.

► **euclid ID=1503038**

### **MONEYVAL: 2014 Annual Activity Report**

On 21 July 2015, MONEYVAL published its Fourth Annual Activity Report.

Of the 33 jurisdictions evaluated by MONEYVAL at the start of the year, 22 were subject to active monitoring processes in 2014, with five full evaluation reports being adopted. The evaluations show a consistent improvement in technical compliance with international standards in the Member States but also the lack of effective implementation of said standards. More needs to be done to achieve serious ML convictions of third parties laundering on behalf of others and to obtain deterrent confiscation orders. The fifth round of evaluations will focus on effectiveness in these important areas. Therefore, 2014 was also a year during which the fifth round of evaluations was prepared. This was achieved in innovative ways, e.g., the in-country training of domestic AML/CFT players by explaining the expectations of the evaluators in the new round.

In 2014, MONEYVAL also conducted its first survey of the extent to which financial inclusion is currently taken into account by the Member States. The report was adopted and published under the title “Strengthening Financial Integrity through Financial Inclusion”. MONEYVAL plans to carry out similar surveys on a biannual basis to measure the real impact that greater financial inclusion is having on AML/CFT regimes.

A high-level mission took place in Bosnia and Herzegovina, as the country failed to enact previously required legislative amendments to the AML/CFT Preventive Law and the Criminal Code in order to meet international standards. Due to further insufficient progress, MONEYVAL issued a Public Statement on 1 June 2014. Preventive legislation was passed thereafter, but the required amendments to the Criminal Code were still outstanding throughout 2014. Therefore, the Public Statement remained in place and will be subject to review at the next plenary session.

As the fight against terrorist financing is one of the primary missions of MONEYVAL, it also swiftly reacted to the rise of the Islamic State (IS). A special monitoring procedure was introduced to confirm that Member States had put in place the necessary procedures for financial sanctions against a range of persons added to the list of terrorists associated with AL Quaida (Resolution 2170(2014) of the United Nations Security Council).

► **euclid ID=1503039**

# Judicial Concepts of Trust in Europe's Multi-Level Security Governance

## From Melloni to Schrems via Opinion 2/13

Prof. Dr. Valsamis Mitsilegas

European integration in the field of security and criminal law has been largely based on the establishment of mechanisms of inter-state cooperation. Inter-state cooperation has both an internal and an external dimension. The internal dimension consists of the establishment of mechanisms of inter-state cooperation via the application of the principle of mutual recognition in the field of criminal law, ensuring that cooperation takes place on the basis of limited formality, automaticity, and speed. The external dimension consists of the establishment of cooperation mechanisms, most notably at the level of transatlantic counter-terrorism cooperation, ensuring the transfer of a wide range of personal data from the European Union to the United States. At both levels of cooperation, mutual trust is central. Cooperation mechanisms are based on mutual trust based on presumptions of compliance of the parties with cooperation arrangements on fundamental rights. However, this model of cooperation based on presumed trust is increasingly being challenged on fundamental rights grounds, most notably after the entry into force of the Lisbon Treaty and the constitutionalisation of the Charter of Fundamental Rights it entailed. The aim of this article is to map the evolution of the relationship between mutual trust and the protection of fundamental rights post-Lisbon, by focusing on the development of the case law of the Court of Justice in the field. The article will address three distinct but interrelated dimensions of this relationship: the EU-Member State dimension; the EU/ECHR dimension; and the EU/US, transatlantic dimension. The conclusion will aim to cast light on key findings, trends, and inconsistencies in the Court's case law as well as assess the significance of these seminal rulings on the future of the protection of fundamental rights in Europe's area of criminal justice.

### I. EU Law and National Constitutions: *Melloni*

The Court of Justice examined the relationship between EU law and national constitutional law in the context of the operation of the principle of mutual recognition in criminal matters in the case of *Melloni*.<sup>1</sup> In *Melloni*, the Court effectively confirmed the primacy of EU third pillar law (the European Arrest Warrant Framework Decision as amended by the Framework

Decision on judgments *in absentia*, interpreted in the light of the Charter) over national constitutional law, providing a higher level of fundamental rights protection. In order to arrive at this far-reaching conclusion, the Court followed a three-step approach.

The first step for the Court was to demarcate the scope of the Framework Decision on the European Arrest Warrant as amended by the Framework Decision on judgments *in absentia* (and, in particular, Art. 4a(1) thereof) in order to establish the extent of the limits of mutual recognition in such cases. The Court adopted a teleological interpretation of the European Arrest Warrant Framework Decision and stressed that, under the latter, Member States are, in principle, obliged to act upon a European Arrest Warrant.<sup>2</sup> This reasoning backed up literal interpretation of Art. 4a(1), confirming that this provision restricts the opportunities for refusing to execute a European Arrest Warrant.<sup>3</sup> This interpretation is confirmed, according to the Court, by the mutual recognition objectives of EU law.<sup>4</sup>

The second step was to examine the compatibility of the above system with fundamental rights and, in particular, the right to an effective judicial remedy and the right to fair trial set out in Arts. 47 and 48(2) of the Charter. By reference to the case law of the European Court of Human Rights,<sup>5</sup> the Court of Justice found that the right of an accused person to appear in person at his trial is not absolute but can be waived.<sup>6</sup> The Court further stated that the objective of the Framework Decision on judgments *in absentia* was to enhance procedural rights whilst improving mutual recognition of judicial decisions between Member States<sup>7</sup> – it found Art. 4a(1) to be compatible with the Charter.

Having asserted the compatibility of the relevant provision with the Charter, the third step for the Court was to rule on the relationship between secondary EU law in conjunction with national constitutional law, which provided a higher level of protection. The Court rejected an interpretation of Art. 53 of the Charter as giving general authorisation to a Member State to apply the standard of protection of fundamental rights guar-

anted by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law.<sup>8</sup> Such an interpretation of Art. 53 would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules *which are fully in compliance with the Charter* where they infringe the fundamental rights guaranteed by that state's constitution.<sup>9</sup> Art. 53 of the Charter provides freedom to national authorities to apply national human rights standards, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the *primacy, unity, and effectiveness* of EU law are not thereby compromised.<sup>10</sup> In the present case, Art. 4a(1) of Framework Decision 2002/584 does not allow Member States to refuse to execute a European Arrest Warrant if the person concerned is in one of the situations provided for therein.<sup>11</sup> The Framework Decision on judgments *in absentia* is intended to remedy the difficulties associated with the mutual recognition of decisions rendered in the absence of the accused person at his trial arising from the differences among the Member States in the protection of fundamental rights. It reflects the consensus reached by all Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted *in absentia* who are the subjects of a European Arrest Warrant.<sup>12</sup> Consequently, allowing a Member State to avail itself of Art. 53 of the Charter to make the surrender of a person convicted *in absentia* – conditional upon the conviction being open to review in the issuing Member State in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision – *would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.*<sup>13</sup>

In *Melloni*, the Court has once again given priority to the effectiveness of mutual recognition based on presumed mutual trust.<sup>14</sup> Secondary pre-Lisbon third pillar law, the primary aim of which is to facilitate mutual recognition, has primacy over national constitutional law, which provides a high protection of fundamental rights. In reaching this conclusion, the Court has interpreted fundamental rights in a restrictive manner. It has emphasised the importance of the Framework Decision on judgments *in absentia* for the effective operation of mutual recognition, a framework decision which, as the Court admitted, restricts the opportunities for refusing to execute a European Arrest Warrant. This sits uneasily with the Court's assertion that the *in absentia* Framework Decision also aims to protect the procedural rights of the individual. By privileging the teleology of mutual recognition and upholding the text of the

Framework Decision on judgments *in absentia* as well as the subsequently amended Framework Decision on the European Arrest Warrant – via the adoption also of a literal interpretation – over the protection of fundamental rights, the Court has shown a great – and arguably undue – degree of deference to the European legislator.<sup>15</sup> The Court's reasoning also seems to deprive national executing authorities of any discretion to examine the compatibility of the execution of a European Arrest Warrant with fundamental rights in a wide range of cases involving *in absentia* rulings.<sup>16</sup> This deferential approach may be explained by the fact that the Court was asked to examine the human rights implications of measures that have been subject to harmonisation at the EU level, with the Court arguing that the Framework Decision reflects a consensus among EU Member States regarding the protection of the individual in cases of *in absentia* rulings within the broader system of mutual recognition.<sup>17</sup> The Court's deferential approach gives undue weight to essentially intergovernmental choices (the choices of Member States adopting a third pillar measure without the involvement of the European Parliament), which sit even more uneasily in the post-Lisbon, post-Charter era. The emphasis of the Court on the need to uphold the validity of harmonised EU secondary law over primary constitutional law on human rights (at both the national and EU levels) constitutes a serious challenge for human rights protection.<sup>18</sup> It further reveals, in the context of EU criminal law, a strong focus by the Court on the need to uphold the validity of a system of quasi-automatic mutual recognition in criminal matters, which will enhance inter-state cooperation and law enforcement effectiveness across the EU.

## II. EU Law and the ECHR: Opinion 2/13

The Court's emphasis on the central principle of mutual trust as a factor privileging the achievement of law enforcement objectives via mutual recognition over the protection of fundamental rights has been reiterated beyond EU criminal law in the broader context of the accession of the European Union to the European Convention of Human Rights. Opinion 2/13 has included a specific part dealing with mutual trust in EU law. The Court has distilled its current thinking on mutual trust stating that “it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law” and adding that when implementing EU law, the Member States may, under EU law, be required to presume that funda-

mental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.<sup>19</sup>

From the perspective of the relationship between EU criminal law and fundamental rights, this passage is striking. The passage follows a series of comments on the role of Art. 53 of the Charter in preserving the autonomy of EU law, with the Court citing the *Melloni* requirement of upholding the primacy, unity, and effectiveness of EU law.<sup>20</sup> The Court then puts forward a rather extreme view of presumed mutual trust leading to automatic mutual recognition. It thus represents a significant challenge to our understanding of the EU constitutional order as a legal order underpinned by the protection of fundamental rights. The Court elevates mutual trust and endorses a system whereby the protection of fundamental rights must be subsumed to the abstract requirements of upholding mutual trust, instead of endorsing a model of a Union whereby cooperation on the basis of mutual trust must be underscored by an effective protection of fundamental rights. The Court asserts boldly that mutual trust is not only a principle, but also a principle of fundamental importance in EU law. This assertion, however, seems to disregard the inherently subjective nature of trust and the difficulties in providing an objective definition that meets the requirements of legal certainty. It is further clear that, although mutual trust is viewed by the Court as inextricably linked with the establishment of an area without internal borders (at the heart of which are the free movement principle and the rights of EU citizens), it perceives mutual trust as limited to trust “between the Member States” – the citizen or individual affected by the exercise of state enforcement power under mutual recognition is markedly absent from the Court’s reasoning.

This approach leads to the uncritical acceptance of presumed trust across the European Union: not only are Member States not allowed to demand a higher national protection of fundamental rights than the one provided by EU law (thus echoing *Melloni*), but also, and remarkably, Member States are not allowed to check (save in exceptional circumstances) whether fundamental rights have been observed in other Member States in *specific* cases. This finding is striking as it disregards a number of developments in secondary EU criminal law aiming to grant executing authorities the opportunity to check whether the execution of a judicial decision by authorities of another Member State would comply with fundamental rights.<sup>21</sup> It also represents a fundamental philosophical and substantial difference in the protection of fundamental rights between the Luxembourg and Strasbourg Courts.

This difference has been highlighted in the Strasbourg ruling in *Tarakhel*,<sup>22</sup> a case involving transfers of asylum seekers under the Dublin system, in which the Court stressed the obligation of states to carry out a *thorough and individualised examination* of the fundamental rights situation of the person concerned.<sup>23</sup> The requirement of the European Court of Human Rights for states to conduct an individualised examination of the human rights implications of removal to another state goes beyond the “exceptional circumstances” requirement set out by the Luxembourg Court in Opinion 2/13 and quoting both Dublin and European Arrest Warrant case law.<sup>24</sup> The Court of Justice has limited inter-state cooperation only on the basis of the high threshold of the existence of systemic deficiencies in EU Member States. This threshold was set out in the case of *N.S.*,<sup>25</sup> which followed the ruling of the Strasbourg Court in the case of *MSS v. Belgium and Greece*,<sup>26</sup> in which the Strasbourg Court found for the first time that the presumption of respect for fundamental rights in the intra-EU, inter-state cooperation mechanism set out in the Dublin Regulation was rebuttable. In *N.S.*, the Court of Justice translated *MSS* into the Union legal order via the introduction of a high threshold of systemic deficiency that has since been translated into EU secondary law via the adoption of the so-called Dublin III Regulation.<sup>27</sup> In *Tarakhel*, however, the Strasbourg Court goes a step further. Rather than requiring a general finding of systemic deficiency in order to examine the compatibility of a state action with fundamental rights, the Strasbourg Court reminds us that the presumption of compliance with fundamental rights is rebuttable<sup>28</sup> and that effective protection of fundamental rights always requires an assessment of the impact of a decision on the rights of the specific individual in the specific case before the Court.<sup>29</sup> In *Tarakhel*, this reasoning resulted in the finding of a breach of the Convention with regard to specific individuals, even in a case where generalised systemic deficiencies in the receiving state had not been ascertained.<sup>30</sup> The Strasbourg Court’s approach on the judicial examination of state compliance with fundamental rights in systems of inter-state cooperation in *Tarakhel* is strikingly at odds with the approach of the Court of Justice in European Arrest Warrant case law and, in particular, in Opinion 2/13. The willingness of the Court of Justice to sacrifice an individualised case-by-case assessment of the human rights implications of the execution of a mutual recognition order in the name of uncritical, presumed mutual trust is a clear challenge for the effective protection of fundamental rights in the European Union and runs the risk of resulting in a lower protection of fundamental rights in systems of inter-state cooperation within the EU compared to the level of protection provided by the Strasbourg Court in ECHR cases. This difference in approaches increases the real prospect of a conflict between ECHR and EU law, especially in cases of inter-state cooperation between EU Member States under the principle of mutual recognition. Eeckhout has commented

that Opinion 2/13 confirms a radical pluralist conception of the relationship between EU law and the ECHR.<sup>31</sup> In the case of mutual recognition, this “outward-looking,” external pluralist approach, which can be seen as an attempt to preserve the autonomy of Union law, is combined with the parallel strengthening of an internal, intra-EU pluralist approach, which stresses the importance of mutual trust, elevated by the Court to a fundamental principle of EU law. Both internal and external pluralist approaches undermine the position of the individual in Europe’s area of criminal justice by limiting the judicial avenues of examination of the fundamental rights implications of quasi-automatic mutual recognition on a case-by-case basis.

### III. EU Law and the Transatlantic Security Agenda: *Schrems*

The relationship between mutual trust and the protection of fundamental rights in the context of the establishment of transatlantic cooperation was tested by the Court in the case of *Schrems*.<sup>32</sup> In *Schrems*, the Court of Justice annulled the Commission adequacy decision, finding that the level of protection of personal data provided by the United States was adequate for the purposes of the EU-US Safe Harbor Agreement. In assessing the validity of the adequacy decision, the Court of Justice began by providing a definition of the meaning of adequacy in EU law and by identifying the means of its assessment. The first step for the Court was to look at the wording of Art. 25(6) of Directive 95/46 on data protection, which provides the legal basis for the adoption by the European Commission of adequacy decisions concerning the transfer of personal data to third countries. The Court stressed that Art. 25(6) requires that a third country “ensure” an adequate level of protection by virtue of its domestic law or its international commitments, adding that, according to the same provision, the adequacy of protection ensured by the third country is assessed “for the protection of the private lives and basic freedoms and rights of individuals.”<sup>33</sup> The Court thus expressly linked Art. 25(6) with obligations stemming from the EU Charter of Fundamental Rights: Art. 25(6) of Directive 95/46 implements the express obligation laid down in Art. 8(1) of the Charter to protect personal data and *is intended to ensure that the high level of that protection continues where personal data is transferred to a third country*.<sup>34</sup> The Court thus affirms a continuum of data protection when EU law authorises the transfer of personal data to third countries and places emphasis on the positive obligation of ensuring a high level of data protection when such transfer takes place. The Court recognises that the word “adequate” does not require a third country to ensure a level of protection identical to that guaranteed in the EU legal order. However, the term “adequate level of protection” must be understood as requiring the third country, in fact,

to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is *essentially equivalent* to that guaranteed within the European Union by virtue of Directive 95/46 read in the light of the Charter.<sup>35</sup> The Court explained that, if there were no such requirement, the objective of ensuring a high level of data protection would be disregarded, and this high level of data protection could easily be circumvented by transfers of personal data from the European Union to third countries for the purpose of being processed in those countries.<sup>36</sup> The Court has thus introduced a high threshold of protection of fundamental rights in third countries: not only must third countries ensure a high level of data protection when they receive personal data from the EU, but they must also provide a level of protection which, while not identical, is essentially equivalent to the level of data protection guaranteed by EU law.

But how will equivalence be assessed in this context? The Court of Justice emphasised that it is clear from the express wording of Art. 25(6) of Directive 95/46 that *it is the legal order of the third country covered by the Commission decision that must ensure an adequate level of protection*. Even though, in this connection, the means to which that third country has recourse for the purpose of ensuring such a level of protection may differ from those employed within the European Union in order to ensure that the requirements stemming from Directive 95/46 read in the light of the Charter are complied with, these means must nevertheless *prove, in practice, effective* in order to ensure protection essentially equivalent to that guaranteed within the European Union.<sup>37</sup> This finding is extremely important, not only because it confirms the responsibilities of third countries to ensure a high level of protection but also in requiring data protection to be effective in practice. The emphasis on ascertaining the effectiveness of the protection of fundamental rights in practice strongly reflects the approach of the European Court of Human Rights on the subject. While differences in the means of protection between the EU and third countries may not, as such, negate such protection, third countries are still under an obligation to ensure the provision of a high level of data protection, essentially equivalent to that of the EU, in practice.

This approach places a number of obligations on the European Commission when assessing adequacy. The Commission is obliged to assess both *the content* of the applicable rules in the third country resulting from its domestic law or international commitments *and the practice* designed to ensure compliance with those rules.<sup>38</sup> Moreover, and in the light of the fact that the level of protection ensured by a third country is liable to change, it is incumbent upon the Commission, after it has adopted an adequacy decision pursuant to Art 25(6) of Directive 95/46, to check periodically whether a finding relat-

ing to the adequacy of the level of protection ensured by the third country in question is still factually and legally justified. Such a check is required, in any event, when evidence gives rise to any doubt in this regard.<sup>39</sup> In this context, account must also be taken of the circumstances that emerged after that decision's adoption.<sup>40</sup> The important role played by the protection of personal data in the light of the fundamental right to respect for private life, and the large number of persons whose fundamental rights are liable to be infringed when personal data is transferred to a third country not ensuring an adequate level of protection, reduce the Commission's discretion as to the adequacy of the level of protection ensured by a third country and require a strict review of the requirements stemming from Art. 25 of Directive 95/46, read in the light of the Charter.<sup>41</sup> The Court's conceptualisation of adequacy has thus led to the requirement of the introduction of a rigorous and periodical adequacy assessment by the European Commission, an assessment which must focus on whether a level of data protection essentially equivalent to the one provided by the European Union is ensured by third countries.

On the basis of these general principles, the Court went on to assess the validity of the specific adequacy decision by the European Commission. The Court annulled the decision, finding that it constituted interference with the fundamental rights of persons whose personal data is or could be transferred from the European Union to the United States<sup>42</sup> and that the decision did not meet the necessity test. The Court evaluation was based, in this context, largely on its ruling in the case of *Digital Rights Ireland*.<sup>43</sup> It reiterated that legislation is not limited to what is strictly necessary if it authorises, *on a generalised basis*, storage of all the personal data of all the persons whose data has been transferred from the European Union to the United States *without any differentiation, limitation or exception being made in the light of the objective pursued and without an objective criterion being laid down by which to determine the limits of the access of public authorities to the data, and of their subsequent use for purposes which are specific, strictly restricted and capable of justifying the interference which both access to that data and its use entail*.<sup>44</sup> Legislation permitting the public authorities to have access, on a general basis, to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Art. 7 of the Charter.<sup>45</sup> In this sense, the Court of Justice stresses that generalised, mass, and unlimited surveillance is contrary to privacy and data protection. The Court's findings are thus also applicable to other instances of generalised surveillance sanctioned by EU law, including surveillance currently permitted under systems of transatlantic counter-terrorism cooperation under the EU-US PNR and TFTP Agreements, both of which involve generalised, indiscriminate surveillance.

#### IV. Conclusion

At first sight, the difference in the Court's approach to the relationship between mutual trust and fundamental rights in the internal and external dimension of Europe's area of criminal justice appears striking. In the internal dimension, the Court of Justice seems to have adopted an uncritical acceptance of pursuance of the enforcement aims of the system of mutual recognition in criminal matters in the European Union. In this system, mutual trust operates largely to serve the enforcement objectives of the issuing Member State. Mutual trust is presumed, and the space for a critical examination of compliance with fundamental rights of other EU Member States or of the impact of the functioning of mutual recognition on the rights of affected individuals is extremely limited. This enforcement paradigm takes precedence over the protection of fundamental rights, even if the latter are protected on a higher level by national constitutions. Member States should not, in principle, examine the fundamental rights situation in other EU Member States and should not expect that these states to provide a higher level of fundamental rights protection than that provided by EU law. The uncritical acceptance of the central principle of mutual trust and its elevation – notwithstanding the inherent subjectivity of the concept – to a fundamental principle of EU law – poses significant challenges to the European Union's claims of providing effective protection of fundamental rights. It is glaringly at odds with the approach of the European Court of Human Rights, which stresses the need for an individual examination of the impact of state action on fundamental rights on a case-by-case basis and focuses on the requirement for states to ensure the effective protection of fundamental rights on the ground.

The approach of the Strasbourg Court has similarities with the line taken by the Court of Justice in *Schrems* as regards the external dimension of EU action. In *Schrems*, the Court stressed the need for essentially equivalent fundamental rights standards to apply when data is transferred to third countries and demanded detailed, rigorous scrutiny by EU institutions (the Commission, in this case) of whether third countries meet the high EU fundamental rights standards. The difference in the Court's approach may be explained by a double standard of mutual trust, with EU Member States enjoying a significantly higher level of trust than third countries. This difference may also be explained by the nature of the legislation in question. In the cases concerning internal EU law, the protection of fundamental rights is seen as a limit to the cooperative system established under mutual recognition – with the Court's priority being to ensure the effectiveness of EU enforcement law. The outcome may be different in cases when the Court is called upon to ensure the effectiveness of EU law, which protects the individual, e.g., in cases concerning the interpretation

of EU measures on the rights of the suspect and the accused in criminal proceedings, where effectiveness may lead to a higher level of fundamental rights protection by the Court.<sup>46</sup> A similar outcome can be discerned in Schrems, where the Court upheld EU standards involving the rights of individuals – the Court defended what it deems to be a high level of fundamental rights protection in the Union’s external action.

It remains to be seen whether the approach taken by the Court in Schrems will have an impact on its case law on the operation of the principle of mutual recognition in internal EU law. A review of this case law, and of the approach taken by the Court on mutual trust in Opinion 2/13, is essential in order to ensure full compliance of the European Union with one of its key proclaimed values.

1 Case C-399/11, *Melloni*, judgment of 26.2.2013.

2 Paragraphs 36-38.

3 Paragraph 41.

4 Paragraph 43.

5 *Medenica v. Switzerland*, Application no. 20491/92; *Sejdovic v. Italy*, Application no. 56581/00; *Haralampiev v. Bulgaria*, Application no. 29648/03.

6 Paragraph 49.

7 Paragraph 51.

8 Paragraphs 56-57.

9 Paragraph 58. Emphasis added.

10 Paragraph 60. Emphasis added.

11 Paragraph 61.

12 Paragraph 62.

13 Paragraph 63. Emphasis added.

14 For a full analysis, see V. Mitsilegas, ‘The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe’s Area of Criminal Justice’ in *New Journal of European Criminal Law*, vol. 6, no. 4, 2015, upon which sections 2 and 3 of this article are based.

15 L.F.M. Besselink, ‘The Parameters of Constitutional Conflict after Melloni’ in *European Law Review*, 2014, 39(4), pp. 531-552, p. 542; A. Torres Pérez, ‘Melloni in Three Acts: From Dialogue to Monologue’ in *European Constitutional Law Review*, 2014, 10, pp. 308-331, pp. 317-318.

16 See also the Opinion of AG Bot, who linked national discretion to refuse surrender with the perceived danger of forum shopping by the defendant – paragraph 103.

17 See also the Opinion of AG Bot, according to whom the Court cannot rely on the constitutional traditions common to the Member States in order to apply a higher level of protection (paragraph 84) and that the consensus between Member States leaves no room for the application of divergent national levels of protection (paragraph 126).

18 According to Besselink, attaching this importance to secondary legislation as “harmonisation of EU fundamental rights” risks erasing the difference between the primary law nature of fundamental rights and secondary law as the subject of these rights. Besselink, *op. cit.*, p. 542.

19 Opinion 2/13, paragraphs 191-192.

20 Paragraph 188.

21 The post-Lisbon Directive on the European Investigation Order has introduced an optional ground for non-recognition or non-execution: where there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing state’s obligations in accordance with Art. 6 TEU and the Charter (Art. 11(1)(f)). Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, O.J. L130, 1.5.2014, p. 1.

22 *Tarakhel v. Switzerland*, Application no. 29217/12. For comments, see H. Labayle, ‘Droit d’Asile et Confiance Mutuelle: Regards Croisés de la Jurisprudence Européenne’ in *Cahiers de Droit Européen*, vol. 50, no. 3, 2014, pp.501-534; C. Costello and M. Mouzourakis, ‘Reflections on Reading *Tarakhel*: Is “How Bad is Bad Enough” Good Enough?’ in *A&MR* 2014, no. 10, pp. 404-411.

23 Paragraph 104, emphasis added.

24 Opinion 2/13, paragraph 191.

25 Joined Cases C-411/10 and C-493/10, *N.S. and M.E.*, judgment of 21 December 2011. For a commentary, see V. Mitsilegas, The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice. From Automatic Inter-state Cooperation to the Slow Emergence of the Individual’ in *Yearbook of European Law* 2012, vol.31, pp. 319-372.

26 *M.S.S. v. Belgium and Greece*, judgment of 21 January 2011, Application No 30696/09.

27 Regulation (EU) No. 604, O.J. L180/31, 29.6.2013, Art. 3(2).

28 Paragraph 103.

29 According to Halberstam, *Tarakhel* is a strong warning signal to Luxembourg that the CJEU’s standard better comport either in words or in practice with what Strasbourg demands or else the Dublin system violates the Convention. D. Halberstam, ‘It’s the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward’, Michigan Law School, Public Law and Legal Theory Research Paper Series, Paper No. 432, February 2015. p. 27.

30 Paragraph 115.

31 P. Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarchy?*, Jean Monnet working paper 01/15, p. 36.

32 Case C-362/14, judgment of 6 October 2015.

33 Paragraph 70. Emphasis added.

34 Paragraph 72. Emphasis added.

35 Paragraph 73. Emphasis added.

36 Ibid.

37 Paragraph 74. Emphasis added.

38 Paragraph 75. Emphasis added.

39 Paragraph 76.

40 Paragraph 77.

41 Paragraph 78.

42 Paragraphs 87-91.

43 *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238.

44 Paragraph 93. Emphasis added. *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 57-61.

45 Paragraph 94.

46 The potential of procedural rights legislation to change the balance between security and the protection of fundamental rights in the European Union is examined in detail in V. Mitsilegas, *EU Criminal Law After Lisbon. Rights, Trust and the Transformation of Justice in Europe*. Hart, 2016, forthcoming.

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# ECHR and the CJEU

## Competing, Overlapping, or Supplementary Competences?

Alexandros-Ioannis Kargopoulos

It is certainly true that the juridical system on the protection of human rights in Europe is rather complex. This is for two main reasons; firstly, the Charter serves as a clear legal basis for the CJEU to rule on fundamental rights issues and, secondly, the EU's intensive legislative activity in criminal matters has produced a great amount of cases that most often impinge upon sensitive human rights issues. This has necessarily resulted in the CJEU dwelling on what has so far been an exclusive domain of the ECtHR and national courts. Against this background, the current article highlights issues with respect to the sharing of competence over fundamental rights by the two courts.

### I. The Relationship Between the Two European Courts

In general, the two European Courts have developed a harmonious and co-operative relationship.<sup>1</sup> Their relationship is not framed in an institutionalised context but is rather informal and structured “on a two-fold basis consisting of [an ambivalent] presumption of equivalent human rights protection and of an abstract legal commitment on the part of the CJEU to follow the jurisprudence of the ECtHR.”<sup>2</sup>

Since the judgements in *Bosphorus*<sup>3</sup> and in *M. & Co v Germany*,<sup>4</sup> the ECtHR has developed and maintained the “presumption of equivalent protection” as a necessary compromise to hear cases involving EU law as it lacks the legal basis to do so and as a matter of comity towards the CJEU's jurisdiction.<sup>5</sup> The presumption serves to exclude EU measures from scrutiny, save in exceptional cases where it is rebutted<sup>6</sup> or where Member States enjoy a discretion in the implementation of EU law.<sup>7</sup>

Fundamental rights, as guaranteed by the ECHR, constitute general principles of the EU's law, although the ECHR has not yet been formally incorporated into EU law.<sup>8</sup> The Recital of the Charter “reaffirms the rights as they result [...] from the ECHR and from [...] the case-law of the ECtHR” and its wording almost verbatim resembles that of the ECHR. More importantly, under the “conformity” clause<sup>9</sup> of Art. 52(3) CFR, the CJEU is committed to abide by the ECHR standards and to follow the jurisprudence of the ECtHR in the interpretation of any corresponding Charter rights.<sup>10</sup> The CJEU has consistent-

ly applied the jurisprudence of the ECtHR<sup>11</sup>, and so far seems to confirm the above reading of Art. 52(3) CFR.<sup>12</sup>

### II. Variable Perceptions on Fundamental Rights Protection

Relevant case law on criminal matters however, reveals an insistence of the Luxembourg Court in deviating from Strasbourg case law in order to preserve the autonomy and effectiveness of EU legislative measures, even over human rights standards set by the ECtHR.<sup>13</sup> Its approach is based on what the CJEU has emphatically and repeatedly stressed as “the particular characteristics of EU law,” which necessitate a differentiated interpretation and application of fundamental rights within the framework of EU law than in relation to rights flowing from the ECHR and other sources.<sup>14</sup> Hence, according to the CJEU, the ECtHR should not be able “to call into question the CJEU's findings in relation to the scope *ratione materiae* of EU law,” which could naturally include the interpretation of fundamental rights.<sup>15</sup>

Indeed, the ambit and interpretation of many individual CFR rights vary significantly from their ECHR equivalents. An example includes *ne bis in idem* under EU law,<sup>16</sup> which, in contrast its Convention equivalent,<sup>17</sup> is not taken to include “punitive” administrative proceedings.<sup>18</sup>

More importantly, mutual trust in the area of freedom, security and justice establishes an almost irrefutable presumption of fundamental rights compliance in order to bolster integration by precluding Member States from checking each other's compliance with fundamental rights.<sup>19</sup> For example, the CJEU has established that violations of fair trial guarantees could not be invoked as grounds for denying execution of the EAW,<sup>20</sup> while the ECtHR is following a different approach in similar cases in which a violation of Art. 6 ECHR amounts to a “flagrant denial of justice.”<sup>21</sup> In simple terms, mutual trust presupposes that, once the appropriate standard of fundamental rights protection has been set by the relevant EU secondary measure and the Charter, no other favourable derogations are permissible in favour of higher human rights standards, be it those defined by the ECtHR or by other international instruments, as this would

run contrary to the primacy and effectiveness of EU law.<sup>22</sup> Following this syllogism, in the *Melloni* case,<sup>23</sup> the CJEU managed to render the safeguard clause of Art. 53 CFR devoid of any meaningful substance.<sup>24</sup> Additionally, Art. 52(1) CFR is another potential source of variable geometry in fundamental rights protection, since its literal interpretation renders redundant any distinction between “absolute” and “qualified” rights in the Charter and permits the EU legislator to impose restrictions on both types of rights to promote an “objective of the EU”<sup>25</sup> in favour of “security” and “efficiency” requirements.<sup>26</sup> Thus, Art. 52(1) CFR could well justify additional derogations or restrictions of fundamental rights than those considered legitimate by the Strasbourg jurisprudence as “necessary” in a democratic society,<sup>27</sup> notwithstanding that the ECtHR so far has been accepting derogations of fundamental rights for the benefit of European integration.<sup>28</sup>

### III. Clash of Competences

In the field of criminal matters, most tensions between the two Courts in the exercise of their competences could arise in cases when an act or omission on the part of a Member State linked to a provision of EU secondary law allegedly infringes a fundamental right secured by both the Charter and the Convention.

In particular, the most striking overlaps and conflicts would arise in the context of the preliminary ruling procedure under EU law, which is described as “the keystone of the [EU] judicial system.”<sup>29</sup> This procedure is the main avenue for the CJEU to address fundamental rights issues, given the lack of a remedy empowering individuals to resort directly to the CJEU for violations of fundamental rights and given the limited protection offered by all other available remedies.<sup>30</sup> Both remedies under the ECHR, that is, the individual action available to any person, NGO, or group of individuals for violations of their rights,<sup>31</sup> but also the “preliminary-like” mechanism provided for by Protocol 16 of the ECHR (which would allow highest courts and tribunals to refer questions to the ECtHR for advisory opinions),<sup>32</sup> could cause friction with the preliminary ruling procedure before the CJEU. This is particularly so in criminal matters, given their sensitivity regarding fundamental rights.

The main problem lies in the plausible scenario of a case being brought to the ECtHR even if the CJEU had not had the opportunity to examine the validity or the plausible interpretations of the EU act at issue in the light of the applicable fundamental right. Although, in principle, national courts of the last instance are obliged to refer a question regarding the interpretation of EU law to the CJEU, Art. 267 TFEU, which basically relies on voluntary cooperation between national judges and the CJEU,<sup>33</sup> allows for the above scenario to occur. This is as a

preliminary reference to the CJEU could not be regarded as a “domestic remedy” that the applicant should have exhausted.<sup>34</sup> In such a case, however,

“if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.”<sup>35</sup>

It is, however, not assured that conflicts will be eliminated beforehand if national courts refer a preliminary question; even in such a case, the ruling of the CJEU would certainly not be binding for the ECtHR, which could result in a different outcome.<sup>36</sup> The ECtHR could thus, disregard the “particular traits” of EU law, thereby damaging its effectiveness and autonomy.

The outcome of all these scenarios would be puzzling in most regards. The lack of a prior ruling by the CJEU would preclude it from aligning EU law requirements of effectiveness and autonomy with fundamental rights guarantees in a manner that would alleviate the ECtHR from establishing a violation. It is also possible that, in the absence of a ruling by the CJEU, the ECtHR could deliver a judgement on the merits and not find a violation justifying Member State action that may be contrary to higher and more elaborate EU law standards. In addition, a Member State found liable for violation of ECHR rights would be obliged to apply individual or general measures to redress the violation, contrary to EU law obligations.<sup>37</sup> This could occur even in cases in which the CJEU has already issued a judgement under the preliminary ruling procedure. Arts. 53 CFR and ECHR would also create further confusion, since Art. 53 ECHR essentially reserves the power of the states to lay down higher standards of fundamental rights protection, contrary to what the CJEU has ruled with regard to Art. 53 CFR.<sup>38</sup>

The procedure of Protocol No. 16 could also circumvent the preliminary ruling procedure, as the national court may – intentionally or unintentionally – choose not to refer a question to the CJEU but instead resort directly to the ECtHR<sup>39</sup> for an advisory opinion. In such a case, it is highly possible that the ECtHR, by abiding to its own standards, would issue a decision calling for lower safeguards than those provided for by existing EU law, which the national court may be inclined to follow. It is also possible that the ECtHR may request higher standards of human rights protection by disregarding “the particular characteristics of EU law” that call for a differentiated interpretation. Again, the different operation of Art. 53 CFR compared to Art. 53 ECHR may further exacerbate the situation. It may well be true that an opinion sought under Protocol 16 is not binding on the referring highest court.<sup>40</sup> This, however, does not suffice to eliminate any friction, since such an opinion would certainly have an impact on national proce-

dures. Given that the procedure under Protocol 16 does not relieve the referring court from its obligation to refer a preliminary question according to Art. 267 (3) TFEU, the referring court could find itself in the awkward position of having to decide to which European Court to refer the question, or it could even refer it to both Courts simultaneously! This obscure prospect will definitely not add to legal certainty and will most definitely damage the protection of fundamental rights across Europe.

Another clash of the courts' competences could well also occur in inter-party cases regarding the application of the ECHR within the context of EU law.<sup>41</sup> It is true that such cases are quite rare or even inexistent, but it is still open to the EU Member States to submit an application to the ECtHR concerning an alleged violation of the ECHR by a Member State in its application of EU law.<sup>42</sup> According to the CJEU, this possibility may undermine the requirements of the TFEU and its exclusive competence, since, according to its reading of Art. 344 TFEU, it has exclusive jurisdiction over any dispute between the Member States on matters of EU law, which may also touch upon issues of ECHR.<sup>43</sup> That Member States could resort to the ECtHR by disregarding the competence of the CJEU on the basis of Art. 344 TFEU could not of course be ruled out, since Art. 344 TFEU is at odds with Art. 55 ECHR. Art. 35(2) (b) ECHR may in such an instance provide for a solution as it may render inadmissible an application to the ECtHR to the extent the matter has already been brought to the CJEU according to Art. 344 TFEU. Nevertheless, this does prevent the opposite scenario from occurring, as such a "lis pendens" rule is not found in the TFEU and thus, the CJEU would most definitely not relinquish itself from its jurisdiction to hear the case, even after the matter has already been brought to the ECtHR.

#### IV. Competing, Overlapping, or Supplementary Competences?

It has been firmly established that, most notably in criminal matters, there is now a vast area where the competences of the two Courts may "overlap," as it is feasible for both to rule on similar issues or even on the same case. This applies to cases in which individuals are involved but also to inter-state disputes. The competences of the two Courts can also surely be described as "competing," given that the CJEU, by invoking the "specific characteristics" of EU law, is challenging the binding force of the jurisprudence of the Strasbourg Court and appears to claim a predominant role in the interpretation of ECHR rights that have been encapsulated and mirrored within the Charter.<sup>44</sup>

Nevertheless, as contradictory as it may be, the overlapping and competing competences of the two Courts could well be

also be characterised as "supplementary" if individuals are to be placed at the epicentre of this antagonism as its beneficiaries. Both the Charter and the ECHR provide for only partial legal fundamental rights protection, since the available legal remedies cover limited cases in practice. Although the ECtHR may receive individual applications for violations of human rights,<sup>45</sup> individuals cannot force a reference to be made to the CJEU. The reluctance then of national courts to refer preliminary questions, but also practical problems associated with remedies at national orders affecting the admissibility of individual applications,<sup>46</sup> to the ECtHR should be taken into consideration in this calculation.

Hence, resorting to the ECtHR can function as a remedy against the lack of prior involvement of the CJEU in case of an unjustified denial of national courts to submit a preliminary reference, as this is considered a violation of fair trial guarantees<sup>47</sup> and would rebut the presumption of equivalence.<sup>48</sup> It could thus even serve to rectify the non-conformity of national courts to a prior judgement of the CJEU,<sup>49</sup> since a final judgement by the ECtHR would oblige contracting parties to take all individual measures necessary to redress the violation,<sup>50</sup> either in the form of actual restitution, such as the reopening of proceedings, or by awarding just satisfaction.<sup>51</sup> Also, the competence of the ECtHR to rule on the interpretation of a judgement or the failure of a state to conform with a judgement<sup>52</sup> may provide for an opportunity to eliminate possible contradictory judgements by both courts at a latter stage. Furthermore, while the ECtHR examines national "proceedings as a whole," the CJEU has the competence to deal in a generic manner only with the particular legal issues referred to it.<sup>53</sup> Therefore, the use of the preliminary ruling procedure, which can be triggered at the very first stages of national proceedings – even before the trial stage, could prevent a violation of fundamental rights from occurring and thus could relieve an individual from having to resort to the ECtHR after exhausting all national legal remedies. Although judgements issued by the ECtHR neither directly affect the validity of national acts, nor of course the validity of EU law, the CJEU can declare invalid Union legislation under the preliminary ruling procedure.<sup>54</sup> As such, the generic nature of the CJEU's judgements issued under this procedure inevitably benefit all affected individuals throughout the EU. This could certainly apply to ECtHR judgements as well because contracting parties are obliged to adopt "general measures" (such as changes in legislation, administrative or judicial practices) to avert further similar violations. As the ECtHR rules on the facts of a particular case, however, it is not certain that this will occur in most cases. It can, however, establish and rectify a violation stemming from the particular facts of a case, which the CJEU would be unable to do, because of the generic nature of the preliminary ruling procedure and its judgements.

Last but not least, the judicial dialogue between the two Courts, which is the fruit of their concurring competences, could definitely enhance fundamental rights protection across Europe. The CJEU judgement in *NS*, which complemented the judgement of the ECtHR in *MSS v Belgium and Greece*,<sup>55</sup> is a prime example.

Currently, however, in cases where Member States act as an executive organ of the EU, the violation would be attributable

solely to the EU and thus lie beyond the power of scrutiny of the ECtHR.<sup>56</sup> Therefore, both the EU and its organs largely remain outside any control of fundamental rights compliance. The supplementary competences of both European Courts are actually inadequate to provide for a safe net of fundamental rights protection. Thus, the current architecture needs a thorough redesigning and restructuring. This is particularly true for the area of freedom, security and justice where the weaknesses of the current system are immensely prominent.<sup>57</sup>

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15 *Ibid*, paras 183-186.

16 Art. 50 CFR.

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# Protection of Fundamental Rights and Criminal Law

## The Dialogue between the EU Court of Justice and the National Courts

Valeria Scalia

Of the most significant innovations of the Treaty of Lisbon, one must refer to the conferral to the EU of a competence in criminal matters,<sup>1</sup> according to which the national legislator, in some cases, is under the obligation to adopt criminal provisions implementing choices of criminalization decided at the supranational level. Indeed, according to Art. 83 TFEU, the EU legislative bodies – European Parliament and Council in co-decision – “establish, by means of directives adopted in accordance with the ordinary legislative procedure, minimum rules concerning the definition of criminal offences and sanctions.” Such a competence is conferred with respect to two situations: 1) when serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis is at stake; 2) when the approximation of criminal laws and regulations of the Member States proves essential to ensuring the effective

implementation of Union policy in an area that is subject to harmonization measures. Therefore, in these cases, it is up to the EU legislative bodies to assess the underlying choice for a criminal protection relying on the special importance of the protected legal interest and the necessity/need of the criminal sanction. The latter concerns the proportionality between the objective to be achieved and the means to achieve it, on the one hand, and the lack of measures less intrusive to the individual's fundamental rights than the criminal sanction (e.g., civil or administrative remedies), on the other.

Some criminal law scholars are very critical of such EU competence, fearing its irrational and excessive use by the European legislator, which could cause, in their opinion, an “over-criminalization” at the supranational level that conflicts with the very fundamental principles of criminal policy. Neverthe-

less, such a worry is to be considered within the framework of the fundamental rights and guarantees already well established at the EU level, which has a very strong foundation. According to Art. 6 TEU, which also confirms the importance of constitutional traditions common to Member States and the European Convention on Human Rights (hereinafter ECHR) as EU general principles, the Charter of Fundamental Rights of the European Union (hereinafter the Charter) should be recognized as having binding value not only for European institutions but also for Member States, when they implement EU law (Art. 51, para. 1, of the Charter). As a consequence, fundamental rights become the object and limit for the achievement of the EU objectives, especially within the Area of Freedom, Security and Justice (hereinafter AFSJ).<sup>2</sup> Indeed, respect for fundamental rights at the same time represents a limit to EU legislative action, as it does not allow the adoption of legal rules that are not in compliance with individuals' rights protected by the supranational legal system. It is a crucial means to building a European judicial area, since it constitutes a strong basis for the development of mutual trust, which is necessary for setting up common standards concerning the protection of fundamental rights among Member States' legal systems. Following the entry into force of the Lisbon Treaty, the Charter became the EU bill of rights, legally binding within the EU legal system. As a consequence, the European Court of Justice (hereinafter CJEU) received jurisdiction over the respect for such rights in EU legislation (including the former third-pillar legal acts) and in Member States' legal acts, "only when they are implementing Union law."

This contribution focuses on the crucial role played by the Charter as a catalogue of the most important individual rights and guarantees concerning, in particular, criminal law matters (i.e., Arts. 47–50) and their application by the CJEU according to two perspectives.<sup>3</sup> On the one hand, the rights protected by the Charter are to be considered general principles of criminal law, limiting the exercise of the competence attributed to the EU legislative bodies in this field. In particular, they represent reliable criteria by which to assess the necessity/need of criminal sanctions to be adopted in EU legislation, in line with solutions in the case law of the European Court on Human Rights (hereinafter ECtHR).

On the other hand, the rights established in the Charter have to be employed by the CJEU as parameters by which to assess compliance with the Charter of Member States criminal law provisions implementing EU law. In this respect, this contribution will focus on the wide interpretation of the wording "only when they are implementing Union law" in Art. 51, para. 1, of the Charter, given by the CJEU in its recent case law, and on the reactions from national courts.<sup>4</sup> The analysis of this topic will show in a paramount manner the extraordinary contribution of the interaction between the different courts acting with-

in the European area (i.e., CJEU, ECtHR, and national courts) in the attempt to limit the risk of irrational use of competence in criminal matters by the EU legislative bodies and, at the same time, to guarantee a better level of respect for individual rights within the AFSJ, especially when fundamental rights, such as freedom and dignity of individuals, are at stake.<sup>5</sup>

## I. Assessment of the Necessity and Proportionality of EU Criminal Legislation

All EU institutions involved in the adoption of legal instruments at the supranational level – Council,<sup>6</sup> Commission,<sup>7</sup> and Parliament<sup>8</sup> – have issued soft law instruments, which show their common consensus on the need to draft criminal policy guidelines, according to which the EU legislator should adopt criminal provisions. In such documents, which for the first time refer to an EU criminal policy, the necessary respect for the fundamental rights, provided for in the Charter,<sup>9</sup> and for the general principles concerning the criminal law represents an essential condition. Some principles, in particular, are recalled as the basis of EU criminal policy: the legality principle, the harm principle, and the guilt principle. The first principle is considered to cover the requirements of the accessibility and foreseeability of criminal provisions. The harm principle requires that criminal behavior must cause effective harm, or at least a serious danger, in order for the legal interest to be protected. The guilt principle implies that, as a general rule, only conduct committed intentionally is to be considered punishable; negligent conduct can be criminalized only in particularly serious cases (e.g., serious negligence endangering human life or causing serious damage).<sup>10</sup> Furthermore, as for the general choice concerning the criminalization of a form of conduct, according to the above-mentioned texts, criminal law must be the last resort and require the European legislator to comply with the principles of necessity and proportionality. They at the same time represent important constraints, even for the identification of the type and quantity of the criminal measures to be adopted.

The functioning of the supranational legal system should ensure that compliance with the above-mentioned general principles on the part of the EU legislator as regards the criminalization of some forms of conduct is tested. However, if the supranational legislator has not respected such principles and rights in a situation that can be considered exceptional or "pathological", an *ex post* control should be done by the CJEU, or by the ECtHR, which will act in these cases as a real Constitutional Court in relation to legal provisions adopted by the EU legislator. In this respect, the criteria at the disposal of CJEU by which to assess compliance with fundamental rights and general principles of the EU legislator's choices concern-

ing the criminalization of some forms of conduct are provided for in the Charter, in the Treaty, and in earlier CJEU case law. As for the parameters established by the Charter, they refer especially to Art. 49, stating the principle of proportionality of criminal sanctions, and to Art. 52, providing restrictions on the enjoyment of some rights (so-called *relative* or, *rectius*, not absolute rights). Furthermore, Art. 83 TFEU expressly refers to the need for the criminal measures. Many CJEU judgments deal with the parameter of proportionality concerning obligations of criminal protection and criminal sanctions.<sup>11</sup>

Although the supranational legal system had already provided criteria for an in-depth assessment by the CJEU of the EU legislator's choices, such criteria often turned out to be quite formalistic and, because of this, they were inadequate for ensuring a critical evaluation.<sup>12</sup> However, the CJEU has recently undertaken many efforts to apply these parameters in a stricter and more critical manner in light of the ECtHR case law,<sup>13</sup> as the *Digital Rights* case shows.<sup>14</sup> In particular, the CJEU states in its decision the non-compliance of some restrictions – provided for in Directive 2006/24/EC on data retention<sup>15</sup> on the enjoyment of the right to privacy and the right to protection of personal data (as protected by Arts. 7 and 8 of the Charter) – with the principles of necessity and proportionality, according to Art. 52 of the Charter. The Court's reasoning, in particular, follows an in-depth analysis of the challenged provisions of the Directive, taking into consideration ECtHR case law concerning Art. 8 ECHR, and adopts a critical approach, concretely based on the protection of fundamental rights.

The above-mentioned concerns would also be supported by consideration of the judicial remedies provided for in the European legal system for bringing a case before the CJEU, particularly by an individual. In fact, both the action of annulment (provided for in Arts. 263 and 264 TFEU) and the preliminary ruling (provided for in Art. 267 TFEU) are basically reserved for Member States and EU institutions and for Member States' judicial authorities, respectively. Citizens, as individuals or groups, have access to the former remedy only if the act to be challenged is “addressed to that person;” “is of direct and individual concern to them;” or is “a regulatory act which is of direct concern to them and does not entail implementing measures.”<sup>16</sup> Consequently, since the conditions for bringing an application before the CJEU by individuals are very strict according to the Treaty and because general rules unlikely refer individually and directly to single persons, EU citizens very rarely would be able to challenge an act before the Court. The situation concerning the CJEU's assessment of the compliance of Member States' criminal law provisions with the fundamental rights protected by the Charter is probably even more complex, since the wording of its Art. 51, para. 1, is unclear and not easily understandable.

The wording of Art. 51, para. 1, which recognizes CJEU jurisdiction over Member States' legislation but “only when they are implementing Union law,” shows the concerns of some Member States about an extension of EU competences, which could result from recognition of the Charter's binding value. This is clearly confirmed by para. 2 of the same article, which aims at preventing an extension of EU competences, and is also reiterated by Art. 6 TEU.

## II. The Wording “only when they are implementing Union law” (Art. 51, para. 1, Charter) and the Scope of CJEU Judicial Control over Member States' Criminal Law

To what extent the CJEU can actually check compliance of Member States' criminal law provisions with the fundamental rights guaranteed by the Charter is crucial to a better understanding of the relationships (and eventually the possible conflicts) between the CJEU and national judges. In this respect, attention should be drawn to CJEU case law concerning the interpretation of the wording “only when they are implementing Union law,” as provided for in Art. 51 of the Charter. According to traditional CJEU case law, the control of the Court over the respect for fundamental rights covers: a) measures adopted by Member States executing EU law, regardless of the extent of discretion reserved for national legislators; b) measures adopted by Member States, following the derogations expressly concerning fundamental rights and freedoms provided for in the Treaties – the so-called “overriding requirements.”<sup>17</sup>

In particular, the first category of measures (i.e., execution of EU law) consists of measures implementing provisions of EU regulations<sup>18</sup> and directives,<sup>19</sup> even if they provide a minimum of harmonization.

Since its earlier decisions, the CJEU has adopted an interpretation of the wording of Art. 51,<sup>20</sup> probably aiming at widening its control over the compliance of the Member States' legislations with fundamental rights, partially overcoming in this way the role of the national Constitutional Courts in the protection of fundamental rights. Such an approach allowed the Court to keep to a minimum the number of cases in which it had to declare its lack of jurisdiction on the grounds that the challenged acts were not within the scope relating to the implementation of EU law (i.e., purely domestic legislation without any link to supranational law). The judgment in the *Kremzow* case is an important step forward in CJEU case law, since it states that a significant link with EU law exists when specific criminal offences can be connected to a field of EU policy (e.g., if such offences are provided for in order to guarantee the achievement of an important EU objective, as established in EU directives). This is the case even if, as in the decided case, the Court

believes that such a link does not exist because the involved criminal law provisions had not been adopted to implement EU legislation.

The wide interpretation of Art. 51, para. 1 is also supported by the *travaux préparatoires*<sup>21</sup> and the updated document “Explanations relating to the Charter,” which provide that “the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States *when they act in the scope of Union law*.” The same provision also refers expressly to the judgments *Wachauf* and *ERT*, generally considered leading cases in the field of CJEU control over national legislations (concerning both the execution of EU law and derogations allowed by the Treaty provisions), from the perspective of fundamental rights protection. Actually, according to such an interpretation, the Charter also applies to the latter kind of domestic provisions (i.e., those adopted on the grounds of specific derogations provided for in the Treaty), which could seem *prima facie* not to be covered by the expression “implementation of Union law” provided in Art. 51, para. 1.

Furthermore, the explanations relating to para. 2 of the same provision state that “the Charter may not have the effect of extending the competences and tasks, which the Treaties confer on the Union”, so that it prevents the *manipulation* of the Charter as a judicial basis allowing for positive EU actions, with respect to situations not expressly mentioned by the Treaty, or widening (via interpretation) the scope of the Treaty provisions concerning EU competences.

In this respect, the Opinion of Advocate General Sharpston in the *Zambrano* case,<sup>22</sup> is particularly interesting. It stresses that “[...] in the long run, the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on *the existence and scope of a material EU competence*.” This means that, if an EU competence (whether exclusive or shared) exists, EU citizens enjoy EU fundamental rights, even if such a competence has not yet been exercised. This goes beyond the CJEU’s wide interpretation in the *Maurin* case.<sup>23</sup>

Such a reading of Art. 51, para. 1 would have important advantages in the opinion of the Advocate General. In particular, this interpretation would significantly improve legal certainty, since it would avoid the need to create or promote fictitious or hypothetical “links with Union law” of the kind that have, in the past, sometimes confused and possibly stretched the scope of application of Treaty provisions. It would also consequently remove possible discrepancies (as far as EU fundamental rights protection is concerned) between fully harmonized and

partially harmonized policies. Moreover, fundamental rights protection under EU law would only be relevant when the circumstances leading to it being invoked had fallen within an area of exclusive or shared EU competence. From this perspective, therefore, Member States might be encouraged to move forward with detailed EU secondary legislation in certain areas of particular sensitivity (such as immigration or criminal law), which would *include* an appropriate definition of the exact extent of EU fundamental rights, rather than leaving fundamental rights problems to be solved by the Court on an *ad hoc* basis, as and when they are litigated. Such a definition of the scope of application of EU fundamental rights would also be coherent with the full implications of citizenship within the Union, which is “destined to become the fundamental *status* of the nationals of Member States.”<sup>24</sup>

However, making the scope of EU protection of fundamental rights essentially dependent on the existence of an exclusive or shared EU competence, even if not exercised by means of the adoption of relevant secondary legislation, would, in the opinion of the Advocate General, imply the introduction of an expressly federal element in the structure of the EU judicial and political system. This requires a clear political statement – stressing the new role of fundamental rights within the EU system – by the same EU institutions and by Member State representatives. The reading proposed, then, cannot be applied at the moment, although it could be desirable for its implications.

### III. The *Fransson* Case: A Step Forward in the CJEU’s Controlling Role over the Compatibility of Member States’ Criminal Law Provisions with Fundamental Rights

The CJEU seems to have recently stepped forward as to the futuristic scenario outlined by Advocate General Sharpston, by stating that “[...] the fundamental rights guaranteed by the Charter must be complied with where national legislation falls within the scope of European Union law, *situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter*.”<sup>25</sup> In its decision, the Court recognized its jurisdiction with regard to assessing the compliance of a domestic criminal law provision with the *ne bis in idem* principle (provided for by Art. 50 of the Charter), since “the tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject *are connected in part* to breaches of his obligations to declare VAT.”<sup>26</sup> According to the Court’s reasoning, because of the obligation established by Art. 325 TFEU for Member States to counter illegal activities affecting EU financial interests (including

those activities detrimental to revenue from the application of a uniform rate to the harmonized VAT assessment bases determined according to EU rules), a direct link exists between the correct and complete collection of VAT revenue and the availability of the correspondent amounts in the EU budget. In other words, illegal activity affecting the collection of VAT directly determines a reduction of EU financial resources; therefore, national criminal law providing for tax penalties and criminal proceedings for tax evasion falls within the field of application of EU law.<sup>27</sup> As a result, it can be scrutinized by the CJEU, which has jurisdiction to check its compliance with fundamental rights protected by the Charter.<sup>28</sup>

According to such an approach, therefore, the interpretation of the wording provided for in Art. 51, para. 1 covers all cases where a linking *tesserae* (as well as only a partial joint) – even if not in terms of actual implementation or execution – exists within EU law.<sup>29</sup> In fact, the bond between already existing EU competences and national law is to be affirmed whenever the inconsistency between domestic legislation and fundamental rights protected at the EU level represents an obstacle for the implementation of EU law in the relevant field. Indeed, the Court stresses the importance of fundamental rights protection, as a *conditio sine qua non* of EU law implementation and application. In a more recent judgment, the Court singled out some several criteria to be followed in order to assess whether a connection between the challenged national legislation and EU law exists. Specifically, the elements to be checked are a) whether that legislation is intended to implement a provision of EU law; b) the nature of that legislation; c) whether it pursues objectives other than those covered by EU law, even if it can indirectly affect EU law; d) whether there are specific rules of EU law on the matter that can affect it.<sup>30</sup>

The wide approach proposed by the CJEU in the *Fransson* judgment was shared by Advocate General Villalón in his opinion in the *Delvigne* case.<sup>31</sup> There, the Advocate General recognized the CJEU's jurisdiction to check the compatibility of the challenged national legislation (in particular, a French criminal provision concerning the loss of the right to vote, the right to stand for election and, in general, all civil and political rights should a sentence for a serious criminal offence be passed) with fundamental rights (Art. 39 of the Charter concerning the right to vote). He argued that an EU competence exists in this field, according to Art. 223 TFEU, although such a competence has not yet been executed. In the Advocate General's opinion, however, the same provision "reveals the wish of the primary legislature to make the election of the members of the European Parliament a «situation governed by EU law» within the meaning of the *Åkerberg Fransson* judgment, albeit not exclusively but rather with the participation of the laws of the Member States in the context of the uniform procedure

established by the Union or, as the case may be, the common principles laid down by it".<sup>32</sup>

Ultimately, it should be borne in mind that the CJEU recognizes its jurisdiction to give preliminary rulings, even concerning the compliance of national legislation with the fundamental rights protected by the Charter. This holds true even in situations in which the facts being considered by the national courts are *outside the scope of European Union law*, i.e., when a) domestic law refers to the content of those provisions of EU law in order to determine the rules applicable to a situation that is purely internal for the Member State concerned, to ensure that internal situations and situations governed by EU law are treated in the same way, irrespective of the circumstances in which the provisions or concepts taken from EU law apply, and b) the provisions of EU law at issue have been made directly and unconditionally applicable to such situations by national law.<sup>33</sup> Such an interpretation – which referred only to the provisions of Treaties and secondary legislation and not to the Charter before the entry into force of the Lisbon Treaty – clearly represents a further widening of the concept of "implementing EU law," as provided by Art. 51, para. 1 of the Charter, since this approach does not restrict the scope of the protection of fundamental rights to the fields expressly covered by EU law. It can, however, also be extended to matters not regulated by EU law, aiming at achieving a more uniform protection of individual rights and guarantees, which is a crucial means of enhancing mutual trust among the Member States' legal systems. However, it is clear that this last approach applies only if the same Member States voluntarily decide to widen the scope of EU influence on their legal systems, extending principles and rights covering fields falling within the scope of EU law to other fields through an express *renvoi* to supranational legal instruments, which has to be direct and unconditional. Therefore, no new competences or obligations for the States arise from this CJEU case law.

Adopting an *a contrario* perspective and in order to have a more reliable overview as to what extent a domestic legislation can be considered falling within the scope of EU law, a look at the CJEU case law concerning national provisions (believed by the same Court as not being governed by EU law) can be particularly interesting. In this respect, the Court first of all states that the mere fact that a field falling within the scope of EU law is indirectly affected is not sufficient to support the conclusion that the situation covered by the national provision producing that effect is governed by EU law.<sup>34</sup> Furthermore, the CJEU has recently pointed out that "the concept of 'implementing Union law', as referred to in Art. 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other"<sup>35</sup>: by stating

that the Court excludes such national legislation concerning the protection of archeological and cultural heritage could be considered as falling within the scope of EU law because of its connection with the protection of environment, which is a field surely governed by EU law.

#### **IV. The Direct Effect of the Charter's Provisions on the Member States' Legal Systems according to *Fransson*: The Relevant Consequences of CJEU Scrutiny of Domestic Criminal Legislation**

In the *Fransson* judgment, the CJEU also states that “European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, *with, as the case may be, the cooperation of the Court of Justice*, whether that provision is compatible with the Charter.”<sup>36</sup> Therefore, the Court recognized a direct and immediate effect of the Charter provisions, binding national judges to check autonomously the compliance of domestic legislation with fundamental rights and, in case of a conflict, to apply them without any intervention by the national Constitutional Court.

Such an approach by the CJEU has raised several concerns, especially relating to those cases in which the Charter includes general provisions, i.e., general principles. Such concerns can be overcome, however, when fundamental rights included in the ECHR are at stake (i.e., all the rights concerning substantive and procedural criminal law), since the explanations relating to Art. 52 of the Charter provide that, in order to interpret such rights reference should be made to ECtHR case law, which often provides criteria that are much more precise than the general formulation of the ECHR provisions. On the contrary, problems could arise for those rights having no direct correspondence in the Strasbourg Convention (e.g., social rights and the so-called fourth generation rights). Even in these cases, however, such problems could be solved by a request for a preliminary ruling to the CJEU by the national judges, in order to have an opinion about the exact interpretation by the same Court, as was stated in the *Fransson* judgment, which expressly *invited* national judges to cooperate with it in the interpretation of the Charter. By this indication of the Court (which can appear useless, as the preliminary ruling provided in the Treaty has been used by national judges since a long time), two concerns arise, which are linked to each other: one the one hand, the Court probably foresees the Member States' resistance in leaving their jurisdictions regarding the control concerning the fundamental rights; on the other hand, the same

Court has some doubts about relying only on national judges in respect of the control of fundamental rights.

From this perspective, the CJEU's invitation to the national judges represents a kind of *counter-objection* to the possible objection of the Member States concerning the limitation (in favor of EU competence) of the Constitutional Courts' control relating to a national legislation's compliance with fundamental rights, at least when the domestic rules present a linking *tesserae* with EU law. This limitation of jurisdiction – already accepted for the interpretation of the Treaty and secondary legislation – could face much more resistance by the Member States when the Charter's provisions are at stake. The concern of the CJEU relating to the control in respect of fundamental rights devoted – by the same Court – to national judges seems to be mitigated by such an invitation to the judges to use the preliminary rulings, which represents a kind of *strong recommendation* but not a real obligation. According to such an interpretation of Art. 51, para. 1 of the Charter, CJEU scrutiny could be extended to any piece of national law adopted within the scope of Arts. 83, paras. 1 and 2, and 325 TFEU, arguing that fundamental rights protection represents a necessary preliminary condition for the application of EU law, especially in a field such as criminal law, where the most important individual rights can be significantly affected. The above-mentioned concerns (i.e., limitation of judicial remedies for EU citizens and vagueness and uncertainty of the criteria elaborated by the CJEU) could be partially overcome by a reference to the ECHR system of human rights protection.<sup>37</sup>

The first concern (i.e., limitation of judicial remedies for EU citizens) could, in fact, be solved by referring to the ECHR individual application (according to Art. 34 ECHR), which can be activated by any individual of the Contracting States, who can prove to be a victim of an effective or potential infringement of a right protected by the Convention. By the recourse to such a remedy, the individuals could ask for a check on compliance with the fundamental rights of national criminal provisions, eventually implementing EU law, before the ECtHR. As for the second concern (i.e., vagueness and uncertainty of the criteria, concerning the test on necessity and proportionality, elaborated by the CJEU), reference to ECtHR case law would be particularly recommended, in order to have more precise and sure parameters for such an assessment. Indeed, the CJEU has been dealing with such analysis for a long time and has handled a wide variety of cases. In this respect, a difference can be distinguished within ECtHR case law between: a) the cases in which the Strasbourg Court assesses compliance with human rights of positive obligations coming from the ECHR and incumbent upon the Contracting States; b) the cases in which it makes such an assessment on the negative obligations of the States, in particular under those circumstances

concerning alleged violations of rights, whose enjoyment can be subjected to some constraints.<sup>38</sup>

It is not possible here to carry out an in-depth analysis of the complementary and supplementary role played by the ECHR system in the protection of fundamental rights within the EU and its Member States' legal systems. Notwithstanding, it has to be argued that such a role is particularly significant, and the continuous dialogue between the two European Courts – even before a formal accession of the EU to the ECHR system, which at the moment seems at a standstill after the CJEU opinion 2/13<sup>39</sup> – can enhance a general and uniform protection of fundamental rights in the European area. Such protection is a crucial condition for the development of a common value heritage that makes the setting-up of a European criminal law system easier, mitigating the Member States' resistance in transferring their sovereignty to the supranational legal system.<sup>40</sup>

#### **V. The Member States' Reactions to the Widening of the CJEU's Role in the Protection of Fundamental Rights: A New Path of the "Solange Doctrine" or an Opportunity to Enhance the Dialogue between CJEU and National Courts?**

In issuing the *Fransson* judgment, the CJEU started to widen its jurisdiction concerning its control over the respect for fundamental rights. On the one hand, such an approach strengthens the CJEU's role in checking the choices of criminalization adopted by the EU legislator, from the perspective of compliance with individuals' guarantees and general principles. Consequently, some of the concerns expressed by Member States about the risk of an indiscriminate overcriminalization at the supranational level are overcome. At the same time the CJEU gains more control over domestic criminal law. On the other hand, the CJEU interpretative approach could be perceived by Member States as an undue intrusion by the CJEU into the jurisdiction of domestic tribunals and Constitutional Courts and, generally speaking, into national constitutional competences in the matter of fundamental rights protection, usually linked to the most sensitive fields covered by Member States' sovereignty (i.e., criminal law). In this respect, indeed, the German Constitutional Court has already reiterated the so-called "*Solange doctrine*" by excluding the existence of a link between national law – in particular concerning the exchange of information stored in a database (between police and intelligence), relating to persons suspected to be terrorists – and EU law, although EU competence in the field of data protection has been clearly established, according to Art. 16 TFEU and other secondary legislation (Directive 95/46/EC and Framework Decision 2005/671/JHA, actually dealing with the exchange of information and cooperation in the field of terrorism).<sup>41</sup> In

the opinion of the *Bundesverfassungsgericht*, the judgment in the *Fransson* case has binding value only for the decided case. Consequently, the interpretation of Art. 51, para. 1 of the Charter proposed in such a decision is not to be considered a general interpretation valid beyond the specific case, since such a generalization would be contrary to Germany's constitutional identity.<sup>42</sup> Such a judgment patently shows the will of the German Constitutional Court to hinder CJEU interpretation concerning its jurisdiction on national law, in particular when criminal law is at stake – especially concerning the fight against terrorism. The *Bundesverfassungsgericht* in fact made no attempt to open a dialogue with the CJEU by activating the preliminary ruling and trying to find a mutual solution.

Ultimately, the CJEU, in the *Taricco* case,<sup>43</sup> stated that a number of Italian rules concerning the limitation period (in particular the mechanism for its interruption) for some criminal offences can have an adverse effect on the fulfilment of obligations under Art. 325, paras 1 and 2 TFEU when specific circumstances exist.<sup>44</sup> In such cases, therefore, the domestic courts have to disapply the challenged rules, since they would prevent Italy from fulfilling its EU obligations. This judgment shows the prominent role that the CJEU wishes to keep in the development of EU criminal law and of the harmonization of national criminal law provisions. It also remarks that there would be no violation of the principle of legality (*nullum crimen, nulla poena sine lege*) provided for in Art. 49 of the Charter, although disapplication of the challenged domestic rules by the national judge could have the effect of preventing the application of a more favorable provision concerning the limitation period for the sentenced. In the opinion of the Court and Advocate General Kokott, this conclusion should be based on the circumstance that the acts allegedly committed by the accused constituted, at the time they were committed, the same offences and were punishable by the same criminal penalties as those applicable at present. Therefore, according to the relevant ECtHR case law concerning Art. 7 ECHR (basically corresponding to Art. 49 of the Charter), the extension of the limitation period and its immediate application would not entail an infringement of the principle of legality, if the relevant offences have never become subject to limitation.<sup>45</sup>

Advocate General Kokott also expressly stressed that "the domestic provisions concerning limitation period simply – at a procedural level – release the national prosecution authorities from shackles which are contrary to EU law." Therefore, "it cannot be inferred from the principle of the legality of penalties that the applicable rules on the length, course and interruption of the limitation period must of necessity always be determined in accordance with the statutory provisions that were in force at the time when the offence was committed. No legitimate expectation to that effect exists."<sup>46</sup>

Such a judgment immediately elicited strong reactions by Italian courts and scholars, since the conclusions elaborated by the CJEU are basically not consistent with the settled case law of the Italian Supreme *Corte di Cassazione* and Constitutional Court. They regularly include provisions concerning the limitation period within the scope of substantive criminal law, consequently fully covered by the principle of legality and non-retroactivity of criminal law.<sup>47</sup> Several days after the CJEU judgment, however, the Supreme *Corte di Cassazione* declared the domestic criminal provisions concerning the limitation period (i.e., Arts. 160 and 161 Italian Criminal Code) inapplicable according to the CJEU's statement.<sup>48</sup> The day after, the Court of Appeal of Milan brought an application before the Italian Constitutional Court concerning compatibility of the national rules ratifying the EU Treaties with the principle of legality, provided for in Arts. 25, para. 2 of the Italian Constitution. In particular, the Court of Appeal asked the Constitutional Court to activate a mechanism, elaborated in the *Frontini* and *Granital* cases,<sup>49</sup> allowing the Court to exclude the application of EU law when such legislation is not consistent with the core principles protected by the same Constitution (the so-called *controlimiti* doctrine). It is not easy to foresee what the decision of the Constitutional Court will be, since the question represents a crucial point of conflict between the national and supranational judicial authorities. In other words, a general application of the principles formulated in the *Taricco* judgment could imply the application of a *softened* version of the principle of legality. This would be completely different from the principle currently well established in Italy's legal culture, which also covers all rules on the limitation period (considered substantive, not procedural, criminal law).

In this situation, a preliminary ruling on the interpretation of Art. 49 of the Charter would be highly desirable. The Italian Constitutional Court could try to obtain a clear statement from the CJEU on whether the discipline concerning the limitation period has to be considered substantive or procedural criminal law and, consequently, whether it is covered by the principle of *nullum crimen, nulla poena, sine lege*.<sup>50</sup> In this respect, a specific focus not only on ECtHR case law, but also on the constitutional traditions common to Member States, could be a possible means for the CJEU to find an interpretation that is more acceptable to a large number of Member States.<sup>51</sup> Put differently, this would be an interpretation that could represent a fair balance between the conflicting interests at stake. Such a balance should be struck, considering the different rank that fundamental rights can have in an integrated system of protection like the potential supranational system. Such a clarification would also be particularly important, not only in order to solve the material case but also to identify the exact scope and content of the principle of legality at the supranational level.

A different approach from that of the Italian Constitutional Court (i.e., a closing position, looking only at the "constitutional identity" of the State) would be detrimental in a wider sense, since it would represent an obstacle to the development of a new understanding of the general principles concerning criminal law. This new understanding requires the availability of the CJEU and the national courts to *listen* to each other, in order to develop new concepts simultaneously including the common trends of Member States' constitutional traditions, the criteria established by the ECHR system, and the specific characteristics of the EU legal system, according to Art. 6, para. 3, TEU.<sup>52</sup> This solution would be also consistent with the requirements expressed by the CJEU in the *Melloni* judgment,<sup>53</sup> in which it interpreted the wording of Art. 53 of the Charter as allowing Member States to provide a standard of protection for fundamental rights higher than the one ensured at the supranational level, unless such a provision is detrimental to the uniform and correct application of EU law.

## VI. Concluding Remarks

The recent CJEU judgments *Fransson* and *Melloni* show the strong commitment of the Court in Luxembourg to widen and strengthen the scope and the binding value of the Charter. Indeed, the Court is fully aware of the importance and sensitivity of its role in the scrutiny of the criminalization choices of the EU legislator and of the relevant national criminal provisions. It tries to have an independent position from the ECtHR, even in the light of future accession to the ECHR.

However, comparing the material facts in *Melloni* (application of the European Arrest Warrant) and in *Taricco* (fight against the offences affecting the EU's financial interests), one could conclude that, when security needs are at stake, the CJEU is more likely to lower the standard of protection for fundamental rights. Such an opinion cannot be agreed with for various reasons. In the *Fransson* case, where the protection of EU financial interests was at stake, the Court provided a wide interpretation of the scope of Art. 50 of the Charter. But, it should be stressed more that strong efforts were made by CJEU in the protection of fundamental rights, even when security needs were at stake (as in the last judgment issued in the *Kadi* case<sup>54</sup> and in the decision on the *Schrems* case).<sup>55</sup> The necessity of judicial control concerning the respect for individual fundamental rights is starkly reiterated as well as for acts issued by international organizations, even in cases dealing with European security in the face of the threat of terrorism.

It must be borne in mind that the CJEU, as the judicial body of the EU legal system, has as a primary goal: the strengthening and development of such EU legal system and not the mere

protection of fundamental rights and principles. Therefore, the future accession of the EU to the ECHR will be able to guarantee that scrutiny of the respect for fundamental rights on the part of the EU and national law will be external and impartial, since the ECtHR has as a primary goal: the protection of fundamental rights in the European area. In this respect, the necessity for a preliminary ruling by the CJEU, before the ECtHR issues a decision on the compliance of an EU act with the ECHR – which is one of the conditions required by the CJEU in its opinion on the EU accession to the ECHR<sup>56</sup> – could guarantee the uniform application and interpretation of fundamental rights in the European area, on the one hand, and, on the other, the possibility for the CJEU to save its autonomous jurisdiction concerning the scrutiny of EU law, taking into particular consideration the special needs linked to the conservation of the EU legal system. Such integration of a different level of protection of fundamental rights will not rep-

resent a chaotic and inefficient system or a loss of individual guarantees but instead an opportunity to set up a system of protection in which different legal instruments and different courts (aiming at different goals) could enhance the enjoyment of individual fundamental rights. Attention would be paid to the necessity of a regular and precious dialogue among these different judicial bodies, in order to prevent conflicts or closing positions, which can only be detrimental to the protection of fundamental rights.<sup>57</sup>

These considerations apply, in particular, to the field of criminal law, since such a system of protection based on the integration of different levels could guarantee an in-depth control of the choices of criminalization adopted by the EU legislator, according to Arts. 83, paras. 1 and 2, and could represent an important basis for the development of an AFSJ founded on mutual trust among Member States' legal systems.



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1 See, in this respect, G. Grasso, 'La «competenza penale» dell'Unione europea nel quadro del Trattato di Lisbona', in G. Grasso, L. Picotti and R. Sicurella, *L'evoluzione del diritto penale nei settori d'interesse europeo alla luce del Trattato di Lisbona*, Milan, 2011, p. 694; R. Sicurella, 'Setting up a European Criminal Policy for the Protection of EU Financial Interests: Guidelines for a Coherent Definition of the Material Scope of the European Public Prosecutor's Office', in K. Ligeti (ed.), *Toward a Prosecutor for the European Union*, Oxford and Portland, Oregon, 2013, p. 870 and p. 892; R. Sicurella, 'Questioni di metodo nella costruzione di una teoria delle competenze dell'Unione europea in materia penale', in *Studi in onore di Mario Romano*, Milano, 2011, p. 2629; L. Picotti, 'Limiti garantistici delle incriminazioni penali', in G. Grasso, L. Picotti and R. Sicurella, *L'evoluzione del diritto penale*, op. cit., p. 216, who distinguishes between "direct competences," provided for in Art. 83, par. 1 TFEU and "accessory competences," provided for in Art. 83, par. 2 TFEU; Art. 325 TFEU provides an obligation incumbent for Member States not only to approximate their legislation but also to provide efficient and equivalent measures aiming at the fight against fraud, even adopting regulations (pp. 223-224).

2 L. Picotti, 'I diritti fondamentali come oggetto e limite del diritto penale internazionale', in *Indice Penale*, 2003, p. 259 ff.; V. Militello, 'I diritti fondamentali fra limite e legittimazione di una tutela penale europea', *Ragion pratica*, pp. 139-160, N. Parisi, "Spazio di libertà, sicurezza e giustizia" e principio di legalità. Qualche riflessione a partire dal principio del mutuo riconoscimento in campo penale', in E. Castorina (ed.), *Profili attuali e prospettive di diritto costituzionale europeo*, Turin, 2007, pp. 410-411.

3 S. Manacorda, 'Le contrôle des clauses d'ordre public: la «logique combinatoire» de l'encadrement du droit pénal', in G. Giudicelli-Delage, S. Manacorda (direction) and J. Tricot (coordination), *Court de Justice et justice pénale en Europe*, Paris, 2010, p. 57 and p. 71; B. Favreau, 'La politique pénale européenne et l'enjeu des droits fondamentaux', in G. Grasso and R. Sicurella (ed.), *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di*

*integrazione penale*, Milan, 2008, p. 584; D. Ruiz-Jarabo Colomer, 'Quel rôle pour la CJCE dans la définition de l'action de l'Union en matière pénale? Perspective d'amélioration institutionnelle et affirmation de concepts communs', in G. Grasso and R. Sicurella (ed.), *Per un rilancio del progetto europeo*, op. cit. [n. 3], p. 635.

4 F. Viganò, *Les interactions en droit pénal de fond: la perturbation des hiérarchies internes*, in G. Giudicelli-Delage, S. Manacorda (direction) and J. Tricot (coordination), *Court de Justice et justice pénale*, op. cit. [n. 3], p. 137; see in the same volume A. Nieto Martín, *Architectures judiciaires du droit pénal européen*, p. 271 and p. 299.

5 U. Sieber, *The future of European criminal law: a new approach to the aims and models of the European criminal law system*, in G. Grasso and R. Sicurella, *Per un rilancio del progetto europeo*, op. cit. [n. 3], p. 733.

6 See *Council Conclusions on model provisions, guiding the Council's criminal law deliberations* – 2979th Justice and Home Affairs Council meeting, Brussels, 30 November 2009.

7 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law", Brussels, 20.9.2011, COM(2011) 573 final.

8 European Parliament, Resolution of 22 May 2012 on an EU approach to criminal law (2010/2310(INI)).

9 See, in this respect, Communication from the Commission to the European Parliament, the Council [...], "Towards an EU Criminal Policy", op. cit. [n. 7]: "Criminal law measures comprise intrusive rules, which can result in deprivation of liberty. This is why the Charter of Fundamental Rights – made legally binding by the Lisbon Treaty – provides important limits for EU action in this field. The Charter, being the compass of all EU policies, provides for a binding core of rules that protects citizens.", p. 4. See also *A Manifesto on European Criminal Procedure Law. European Criminal Policy Initiative*, in ZIS 2013, p. 430.

10 See *Council Conclusions on model provisions, guiding the Council's criminal law deliberations*, op. cit., [n. 6], pp. 2-3.

11 A. M. Maugeri, 'Il principio di proporzione nelle scelte punitive del legislatore europeo: l'alternativa delle sanzioni amministrative comunitarie', in G. Grasso, L. Picotti and R. Sicurella (ed.), *L'evoluzione del diritto penale*, op. cit., [n. 1], p. 75 and p. 93; A. M. Maugeri, 'I principi fondamentali del sistema punitivo comunitario: la giurisprudenza della Corte di Giustizia e della Corte europea dei diritti dell'uomo', in G. Grasso and R. Sicurella (ed.), *Per un rilancio del progetto europeo*, op. cit. [n. 3], p. 102; S. Van Drooghenbroeck, *La proporzionalità dans le droit de la Convention européenne des droits de l'homme – Prendre l'idée simple au sérieux*, Brussels, 2001.

12 A. Bernardi, 'Ombre e luci nel processo di armonizzazione dei sistemi penali europei', in G. Grasso, G. Illuminati, R. Sicurella and S. Allegrezza (eds.), *Le sfide*

dell'attuazione di una Procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni, 2013, p. 221 and p. 250; C. Sotis, 'I principi di necessità e proporzionalità della pena nel diritto dell'Unione europea dopo Lisbona', in *Diritto penale contemporaneo*, 2012, 1, p. 111.

13 See, in this respect, R. Sicurella and V. Scalia, 'Data Mining and Profiling in the Area of Freedom, Security and Justice. State of Play and New Challenges in the Balance between Security and Fundamental Rights Protection', in *New Journal of European Criminal Law*, 2013, 4, p. 669.

14 CJEU, judgment of 8 April 2014, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

15 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (O.J. 2006 L 105, p. 54).

16 Art. 263, para. 4, "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

17 See, in this respect, CJEU judgment of 18 June 1991, *Elliniki Radiophonia Tileorassi (ERT) AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and Others*, Case C-260/89, *European Court Reports*, 1991 I-02925; CJEU judgment of 11 July 1985, *Cinéthèque SA and Others v. Fédération nationale des cinémas français*, joined cases 60 and 61/84, *European Court Reports*, 1985 I-02605, para. 26; CJEU judgment of 30 September 1987, *Meryem Demirel v. Stadt Schwäbisch Gmünd*, Case 12/86, *Reports of Cases*, 1987, 03719, para. 28; CJEU judgment of 26 June 1997, *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, Case C-368/95, *Reports of Cases*, 1997, I-03689.

18 CJEU judgment of 13 July 1989, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, case 5/88, *European Court reports* 1989, p. 02609, paras. 19-22; CJEU judgment of 24 March 1994, *The Queen v. Ministry of Agriculture, Fisheries and Food*, ex parte *Dennis Clifford Bostock*, case C-2/92, *European Court reports* 1994, p. I-00955, para. 16; CJEU judgment of 13 April 2000, *Kjell Karlsson and Others*, case C-292/97, *European Court reports* 2000, p. I-02737, para. 37.

19 CJEU judgment of 12 December 2002, *Ángel Rodríguez Caballero v. Fondo de Garantía Salarial (Fogasa)*, Case C-442/00, *Reports of Cases*, 2002 I-11915, paras. 40 and 41; CJEU judgment of 10 July 2003, *Booker Aquacultur Ltd and Hydro Seafood GSP Ltd v. The Scottish Ministers*, joined cases C-20/00 and C-64/00, *Reports of Cases*, 2003, I-07411, paras. 88 and 93; CJEU, judgment 6 November 2003, *Criminal proceedings against Bodil Lindqvist*, case C-101/01, *Reports of Cases*, 2003 I-12971, concerning national criminal legislation implementing Directive 95/46 (relating to a derogation expressly provided in the same Directive). In particular, the CJEU interpretation of the wording "activity which falls outside the scope of Community law" is interesting within the meaning of the first indent of Art. 3(2) of Directive 95/46, which is relevant in order to check whether processing of personal data does not fall under the application of such Directive. In this respect, the Court points out that recourse to Art. 100a, as a legal basis, does not presuppose the existence of an actual link with free movement between Member States in every situation referred to by the measure founded on that basis (para. 40). Such an opinion is reiterated by the Court in the judgment of 20 May 2003, *Rechnungshof v. Österreichischer Rundfunk and Others*, joined cases C-465/00, C-138/01 and C-139/01, *Reports of Cases* 2003 I-04989, paras. 41 and 42, which also represents a case concerning control by the Court of the compliance of domestic legislation implementing Directive 95/46 with fundamental rights, as such considered to fall within the field of application of EU law. See also CJEU judgment of 25 March 2004, *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, case C-71/02, *Reports of Cases*, 2004 I-03025, para. 49, concerning national provisions implementing Directive 84/450; CJEU judgment of 22 November 2005, *Werner Mangold v. Rüdiger Helm*, case C-144/2004, *Reports of Cases*, 2005 I-09981, para. 75; CJEU judgment of 27 June 2006, *European Parliament v. Council of the European Union*, case C-540/03, *Reports of Cases*, 2006 I-05769, para. 105.

In the literature, see J. Nusser, *Die Bindung der Mitgliedstaaten an die Unionsgrundrechte*, Tübingen, 2011, in particular on the excursus of CJEU case law in this field, see p. 9; N. Lazzarini, 'Il controllo della compatibilità del diritto nazionale con la Carta dei diritti fondamentali alla luce della sentenza McB.', in *Rivista di Diritto*

*Internazionale*, 2011, 1, p. 139; J. Kokott and C. Sobotta, *The Charter of Fundamental Rights of European Union after Lisbon*, EU Working Papers, Academy of European Law, 2010/6, p. 6; A. Ferraro, 'Le disposizioni finali della Carta di Nizza e la multiforme tutela dei diritti dell'uomo nello spazio giuridico europeo', in *Rivista italiana di Diritto Pubblico Comunitario*, 2005, p. 508; R. A. García, 'Le clause horizontali della Carta dei diritti fondamentali dell'Unione europea', in *Rivista di Diritto Pubblico Comunitario*, 2002, p. 4; P. Eeckhout, 'The EU Charter of fundamental rights and the federal question', in *Common Market Law Review*, 2002, p. 945.

20 In some cases, the Court interpreted in a wide way the provisions of the Treaty, in order to prove the existence of the link between national legislation and EU law and, consequently, to recognize its jurisdiction: CJEU judgment of 11 July 2002, *Mary Carpenter v. Secretary of State for the Home Department*, C-60/00, *Reports of Cases*, 2002, I-06279; CJEU judgment of 23 September 2003, *Secretary of State for the Home Department v. Hacene Akrich*, Case C-109/01, *Reports of Cases*, 2003, I-09607; CJEU judgment of 25 July 2002, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v. Belgian State*, C-459/99, *European Court Reports*, 2002, I-06591; CJEU judgment of 17 September 2002, *Baumbast and R v. Secretary of State for the Home Department*, C-413/99, *European Court Reports*, 2002, I-07091; CJEU judgment of 29 April 2004, *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Württemberg*, joined cases C-482/01 and C-493/01, *Reports of Cases*, 2004, I-05257; CJEU judgment of 27 April 2006, *Commission of the European Communities v. Federal Republic of Germany*, C-441/02, *Reports of Cases*, 2006, I-03449. In the judgment of 19 January 2010, *Seda Küçükdeveci v. Swedex GmbH & Co. KG*, C-555/07, *Reports of Cases*, 2010, I-00365, the Court scrutinized a national legislation, which did not strictly execute EU law, in the light of the general principle of non-discrimination on the grounds of age. In particular, the Court found the linking *tesserae* between national legislation and EU law in the circumstance that the domestic provision dealt with a matter regulated by an EU Directive ("that directive had the effect of bringing within the scope of European Union law the national legislation at issue in the main proceedings, which concerns a matter governed by that directive, in this case the conditions of dismissal" para. 25).

21 See, in this respect, the analysis of P. Eeckhout, *The EU Charter of fundamental rights*, op. cit. [n. 20], p. 954.

22 CJEU judgment of 8 March 2011, *Gerardo Ruiz Zambrano v. Office national d'emploi*, case C-34/09, Opinion of the Advocate General E. Sharpston, *European Court Reports*, 2011 I-01177, para. 163.

23 CJEU judgment of 13 June 1996, *Criminal proceedings against Jean-Louis Maurin*, case C-144/95, paras. 11 and 12.

24 CJEU judgment of 8 March 2011, *Gerardo Ruiz Zambrano v. Office national d'emploi*, case C-34/09, Opinion of the Advocate General E. Sharpston, cit., paras. 166-170.

25 CJEU judgment of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, case C-617/10, *European Court Reports* 2013, para. 21 (emphasis added). For comments on such judgment, see V. Skouris, 'Développements récents de la protection des droits fondamentaux dans l'Union européenne: les arrêts *Melloni et Åkerberg Fransson*', in *Diritto dell'Unione europea*, 2, 2013, p. 229; S. Manacorda, *Dalla Carta dei diritti fondamentali ad un diritto "à la carte" - Note a margine delle sentenze Fransson e Melloni della Corte di Giustizia: www.penalecontemporaneo.it*. From a critical perspective, see F. Fontanelli, *Fransson and the application of the EU Charter of Fundamental Rights to State measures - nothing new under the sun of Luxembourg*, <http://www.diritticomparati.it/2013/03/fransson-and-the-application-of-the-eu-charter-of-fundamental-rights-to-state-measures-nothing-new-u.html>; S. Montaldo, 'L'ambito di applicazione della Carta dei diritti fondamentali dell'Unione europea e il principio del ne bis in idem', in *Diritti umani e diritto internazionale*, 2013, n. 2, p. 574.

26 CJEU judgment of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, op. cit. [n. 25], para. 24 (emphasis added).

27 In particular, it constitutes the implementation of Arts. 2, 250(1) and 273 of Directive 2006/112 (previously Arts. 2 and 22 of the Sixth Directive) and of Art. 325 TFEU.

28 CJEU judgment of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, op. cit. [n. 25], paras. 25 and 26.

29 See, in this respect, G. Grasso, 'La protezione dei diritti fondamentali nella Costituzione per l'Europa: spunti di riflessione critica', in G. Grasso and R. Sicurella (eds.), *Lezione di diritto penale europeo*, Milan, 2007, p. 663 and p. 664.

30 CJEU judgment of 6 March 2014, *Cruciano Siragusa v. Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo*, C-206/13, not yet published, para. 25.

31 Opinion of Advocate General P. C. Villalón, 4 June 2015, *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde*, C650/13, not yet published, paras. 95 and 96. It is also interesting to note that the preliminary ruling proposed by the French judge also dealt with the question of compatibility of the same national criminal provision with Art. 49 of the Charter (relating, in particular, to the right to retroactive application of the more favorable criminal law), since there was a legislative amendment of the national criminal law that can undoubtedly be categorized as a case of *reformatio in mitius*, but that was excluded from applying to convictions before the law entered into force. Before proceeding to analyze the scope of the guarantee afforded by Art. 49 of the Charter and, in particular, whether that guarantee also extends to convictions made by a final judgment already delivered when the amendment entered into force, the Advocate General examines whether the criminal sentence in question was passed "in implementation of EU law." The Advocate General believes that the CJEU has no jurisdiction to scrutinize such a question, in contrast to that concerning Art. 39 of the Charter, since the "Member State's *ius puniendi* was exercised in a field completely outside the Union's competence, that is to say, in relation to the imposition of a penalty for the offence of murder. Therefore, in the present case there is no provision of EU law that would make it possible to assert that the penalty was imposed thereunder." (para. 82). He further points out that the circumstance that "a different interpretation of the scope of the right to *reformatio in mitius*, in the terms proposed by Mr Delvigne, could have given rise to the application to him of the legislative reform which took place after his conviction, with consequences, ultimately, for his enjoyment of the right to vote, is not sufficient to alter that conclusion," as it would represent only an indirect affect of a field falling within the scope of EU law, not sufficient to state that the challenged national legislation was governed by EU law (paras. 83 and 84). The CJEU judgment (6 October 2015, *Thierry Delvigne v. Commune de Lesparre-Médoc and Préfet de la Gironde*, Case C-650/13, ECLI:EU:C:2015:648) recognized its jurisdiction, referring to Art. 14(3) TEU and Art. 1(3) of the 1976 Act concerning the election of the members of the European Parliament by direct universal suffrage and not to Art. 223 TFEU. It also stated that the challenged French legislation did not represent undue interference into the enjoyment of the right to vote protected by Art. 39 of the Charter and did not violate the principle of retroactivity of the most favorable legislation provided for by Art. 49, para. 2 of the Charter.

32 Opinion of Advocate General P.C. Villalón, 4 June 2015, *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde*, *op. cit.*, para. 96.

33 See CJEU, 7 November 2013, *Giuseppa Romeo v. Regione Siciliana*, C-313/12, *European Court Reports*, 2013, paras. 21 and 22 concerning, in particular, a question on the compliance of a national legislation with Art. 41 of the Charter. See also CJEU, 21 December 2011, *Teresa Cicala v. Regione Siciliana*, C-482/10, *Reports of Cases*, 2011, I-14139, paras. 17-19, also concerning the same provision of the Charter. The following judgments basically refer to provisions of the Treaties and secondary legislation: CJEU, 16 March 2006, *Poseidon Chartering BV v. Marianne Zeeschip VOF and Others*, C-3/04, *European Court Reports*, 2006, I-02505, para. 15; CJEU judgment of 11 December 2007, *Autorità Garante della Concorrenza e del Mercato v. Ente tabacchi italiani – ETI SpA and Others and Philip Morris Products SA and Others v. Autorità Garante della Concorrenza e del Mercato and Others*, paras. 22 and 26; CJEU judgment of 18 October 2012, *United States of America v. Christine Nolan*, C-583/10, ECLI:EU:C:2012:638, paras. 45-48.

34 CJEU judgment of 18 December 1997, *Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio*, C-309/96, *European Court Reports*, 1997 I-07493, paras. 21-23.

35 CJEU judgment of 6 March 2014, *Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, *op. cit.* [n. 30], para. 24.

36 CJEU judgment of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, *op. cit.* [n. 25], para. 48 (emphasis added). The Court, in particular, remarks that, since the rights protected by the Charter are in fact EU law as well as the Treaties and the secondary legislation, "the conclusions to be drawn by a national court from a conflict between provisions of domestic law and rights guaranteed by the Charter, it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means" (para. 45), reiterating the same conclusions adopted in its previous case law (e.g., CJEU, 9 March 1978, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, Case 106/77, *Eu-*

*ropean Court Reports* 1978, 00629, paras. 21 and 24; CJEU, 19 November 2009, *Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu*, C-314/08, *Reports of Cases*, 2009, I-11049, para. 81; CJEU, 22 June 2010, *Aziz Melki and Sélim Abdelli*, joined cases C-188/10 and C-189/10, *European Court Reports*, 2010, I-05667, para. 43).

37 The *Fransson* judgment also stresses the distinction between the case of incompatibility between a right protected in the Charter and a national criminal law provision and the differing case of conflict between a right protected by the ECHR and the national provisions. In the latter case, the national judge has no power to declare the conflicting national provision inapplicable, since "it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law", CJEU, judgment 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, *op. cit.* [n. 30], para. 44.

38 These constraints, however, must comply with some standards. They have to be provided for in specific legal texts. The pursued goals must be legitimate. They have to be necessary in a democratic society and proportionate to the sacrificed interests (e.g., the case law concerning the interpretation of Arts. 8, 9, 10, and 11 ECHR). See, in this respect, V. Scalia, 'Controllo giurisdizionale su necessità e proporzione delle scelte di criminalizzazione del legislatore europeo: uno sguardo sulle possibilità di dialogo tra le Corti europee', in G. Grasso, G. Illuminati, R. Sicurella, S. Allegrezza (eds.), *Le sfide dell'attuazione di una Procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni*, Milan, 2013, p. 366; A. M. Maugeri, *Fundamental Rights in the European Legal Order, both as a Limit on Punitive Power and as a Source of Positive Obligations to Criminalise*, in *New Journal of European Criminal Law*, 2013, 4, p. 374; M. Klatt, 'Positive obligation of the European Convention on Human Rights', in *ZaöRV*, 2011, 71, p. 692; F. Viganò, 'Il diritto penale sostanziale davanti ai giudici della CEDU', in *Giurisprudenza di merito*, 2008, 12, p. 81; G. De Vero, 'La giurisprudenza di Strasburgo', in G. De Vero and G. Panebianco, *Delitti e pene nella giurisprudenza delle Corti europee*, Turin, 2007, p. 28.

39 Opinion of the Court (Full Court), 18 December 2014, n. 2/13, not yet published (Court reports – general).

40 See, in this respect, S. Allegrezza, 'The interaction between the CJEU and the ECtHR with respect to the protection of procedural safeguards after Lisbon: the accession of the EU to the ECHR', in K. Ligeti (ed.), *Toward a Prosecutor for the European Union*, Portland, 2013, p. 937.

41 See BverfG, 1 BvR 1215/07, 24 April 2013, available at [http://www.bverfg.de/entscheidungen/rs20130424\\_1bvr121507.html](http://www.bverfg.de/entscheidungen/rs20130424_1bvr121507.html)

42 *Ibid.*, paras. 88-91.

43 CJEU judgment of 8 September 2015, *Criminal proceedings against Ivo Taricco and Others*, C-105/14, not yet published. On this judgment, see S. Peers, *The Italian Job: the CJEU strengthens criminal law protection of the EU's finances*, available at the website <http://eulawanalysis.blogspot.it/2015/09/the-italian-job-cjeu-strengthens.html>; F. Viganò, *Disapplicare le norme vigenti sulla prescrizione nelle frodi in materia di IVA? Primato del diritto UE e nullum crimen sine lege in una importante sentenza della Corte di giustizia (8 September 2015 (Grande Sezione), Taricco, causa C-105/14)*, available at the website [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it); S. Manacorda, *Note minime a prima lettura della sentenza Taricco*, available at the website [http://www.academia.edu/16035018/Note\\_minime\\_a\\_prima\\_lettura\\_della\\_sentenza\\_Taricco](http://www.academia.edu/16035018/Note_minime_a_prima_lettura_della_sentenza_Taricco).

44 Art. 160 of the Italian Penal Code, as amended by Law n. 251/2005, read in conjunction with Art. 161 of that Code, which provided, at the time in question in the main proceedings, that the interruption of criminal proceedings concerning serious fraud in relation to value added tax had the effect of extending the limitation period by only a quarter of its initial duration. The specific circumstances identified by the CJEU refer, in particular, to two conditions: a) if the considered national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or b) if it provides for longer

limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, which it is for the national court to verify.

45 The CJEU recalls some specific very important ECtHR relevant judgments, such as *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96, and 33210/96, § 149, ECHR 2000-VI; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 110 and the case law cited, 17 September 2009, and *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, §§ 563, 564, and 570 and the case law cited, 20 September 2011.

46 Opinion of Advocate General J. Kokott, delivered on 30 April 2015, *Criminal proceedings against Ivo Taricco and Others*, C-105/14, ECLI:EU:C:2015:293, paras. 118-119.

47 The majority of Italian criminal law scholars share the same opinion as that in the case law (*Corte di Cassazione* and Constitutional Court), stressing especially that the retroactive application of the mechanisms concerning the limitation period does not comply with the constitutional principle of legality (Art. 25, para. 2, Italian Constitution) and does not represent a means to solve the inefficiency of the domestic criminal justice system (e.g., the length of the criminal trial, the lack of effective application and execution of penalties); see, in this respect, M. Nobili, L. Stortoni, M. Donini, M. Virgilio, M. Zanotti and N. Mazzacuva, 'Prescrizione e irretroattività fra diritto e procedura penale', in *Foro italiano*, 1998, V, 317; M. Romano, Art. 157, in M. Romano, G. Grasso, T. Padovani, *Commentario sistematico del Codice Penale*, vol. III, Milano, 2011, p. 65. G. Marinucci and E. Dolcini, *Corso di diritto penale*, Milano, 2003, p. 262, have a different opinion, since they recognize a retroactive application of the rule concerning the limitation period if the limitation period has not yet expired. In these cases, in their opinion, there would be no violation of the principle of legality, as the individual's expectation in terms of criminalized conduct, nature, and quantity of the sanction would not be affected.

48 See Cassazione penale, sez. III, 17 September 2015, *Pennacchini*. The reasoning of the judgment has not yet been published.

49 Italian Constitutional Court, 18 December 1973, n. 183, and 5 June 1984, n. 170, in *www.cortecostituzionale.it*

50 In these terms, see the Opinion of Advocate General J. Kokott, delivered on 30 April 2015, *Criminal proceedings against Ivo Taricco and Others*, C-105/14, ECLI:EU:C:2015:293.

51 See C. Safferling, 'Der EuGH, die Grundrechtecharta und nationales Recht: Die Fälle Åkerberg Fransson und Melloni', in *Neue Zeitschrift für Strafrecht*, 10, 2014, p. 545, who stresses that, in recent CJEU case law and particularly in the *Fransson* and *Melloni* judgments, the Court neither considers nor mentions the constitutional traditions common to Member States (p. 550).

52 See, in this respect, R. Sicurella, *Diritto penale e competenze dell'Unione europea. Linee guida di un sistema integrato di tutela dei beni giuridici sovranazionali e dei beni giuridici di interesse comune*, Milan, 2005, pp. 519-521.

53 CJEU judgment of 26 February 2013, *Stefano Melloni v. Ministero Fiscal*, not yet published, ECLI:EU:C:2013:107. On this judgment, see C. Safferling, *Der EuGH, die Grundrechtecharta und nationales Recht*, op. cit. [n. 51], p. 545; A. Ruggeri, *La Corte di giustizia e il bilanciamento mancato (a margine della sentenza Melloni)*, in *Il Diritto dell'Unione Europea*, 2, 2013, p. 399.

54 CJEU judgment of 18 July 2013, *European Commission and Others v. Yassin Abdullah Kadi*, joined cases C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518.

55 CJEU judgment of 6 October 2015, 06/10/2015, *Maximilian Schrems v. Data Protection Commissioner*, C-362/14, ECLI:EU:C:2015:650.

56 Opinion of the Court (Full Court), 18 December 2014, n. 2/13, not yet published (Court reports – general).

57 See, in this respect, A. Ruggeri, *La Corte di giustizia e il bilanciamento mancato (a margine della sentenza Melloni)*, op. cit. [n. 53], pp. 407-408.

## Principles of the European Criminal Policy

### Starting from the Protection of the European Union's Financial Interests against Fraud

Prof. Nicoletta Parisi and Prof. Dino Rinoldi

#### I. Starting from Practice: The CJEU in the Taricco Judgment and the Legislative Proposals about the Fight against Fraud

A judgment by the CJEU, issued upon the reference for a preliminary ruling raised by the Court of Cuneo,<sup>1</sup> urges reflections of a general scope to understand the legal foundations of EU regulatory action on criminal law. This is a useful starting point for recomposing the framework of the EU principles relevant to criminal matters based on Arts. 2 and 6 TEU.

This judgment was issued, as a matter of fact, at a moment marked by the topicality and incisiveness of legislative proposals by the European Commission that have been adopted in the matter of the protection of the financial interests of the Union through the employment of instruments of substantive,

procedural, and institutional criminal law. We consider, in particular, the proposal for a Directive by the European Parliament and the Council on the fight against fraud affecting the Union's financial interests by means of criminal law<sup>2</sup> (PIF Directive) to be relevant. It was preceded by the Commission's Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations: an integrated policy to safeguard the taxpayers' money.<sup>3</sup>

The proposed directive, based on Art. 325 TFEU, aims at harmonizing the Member States' rules and regulations concerning any conduct likely to affect EU legal goods (its financial interests), such as fraud (already recorded in the PIF Convention of 1995, as defined in Art. 1) and certain "related offences:" the

provision of information, or failure to provide such information, to contracting or grant-awarding entities or authorities in a public procurement or grant procedure involving the Union's financial interests; money-laundering; active and passive corruption; and misappropriation, that is an intentional act by a public official to commit or disburse funds and to take possession of goods or use them for a purpose other than that for which they were originally granted, with the intent of damaging the Union's financial interests.<sup>4</sup>

The fight against these types of conduct forms part of a wider range of EU measures designed to protect the good which the EU defines as "licit economy." The "package on the protection of licit economy," in addition to the above-mentioned proposed directive, consists of the following initiatives: measures strengthening the institutional framework through better cooperation among the principal European Agencies involved (OLAF, Eurojust, Europol);<sup>5</sup> financial incentives allocated to the Member States to fight corruption;<sup>6</sup> and a proposal for a Directive on the freezing and confiscation of proceeds of crime.<sup>7</sup> The protection starts from the appreciation of the transnational dimension of conduct damaging to the organization and from the appreciation of its negative impact, both on the functioning of the internal market and also on the confidence of European citizens in the Union's institutions.

In addition to these initiatives, there is also the proposal for a Council Regulation, presented by the Commission on 17 July 2013,<sup>8</sup> establishing a European Public Prosecutor's Office (EPPO), pursuant to Art. 86 TFEU. The European Public Prosecutor's Office shall:

"contribute to increase the protection of the EU financial interests and the development of a European area of justice, and to increase the confidence of the Union's companies and citizens in its institutions, in accordance with all the fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union; to establish a common investigation and prosecution system for the offences damaging the Union's financial interests; to increase the number of criminal prosecutions against the trafficking aimed at labour exploitation and, consequentially, of sentences handed down and of the recovery of European grants obtained fraudulently; to ensure an effective cooperation and information exchange between the European and national Authorities having jurisdiction over the matter; to increase the deterrent effect on the commission of offences detrimental to the Union's financial interests."<sup>9</sup>

Any prosecution conducted by an EU judicial body – despite the limits to the protection of the financial interests of the Union – requires the establishment of rules in compliance with the principles of the rule of law.<sup>10</sup>

The CJEU intervened in the current institutional debate. Firstly, it made reference to the VAT, defining it as a tax that is to be integrated into the regime of the proposed PIF directive.<sup>11</sup> According to the Court, "as the European Union's own resources

include, inter alia, as provided in Article 2(1) of Decision 2007/436, revenues coming from the application of a uniform rate to the harmonized VAT taxable incomes, determined according to EU rules, there is [...] a direct link between the collection of VAT revenues in compliance with the applicable EU law and the availability to the EU budget of the corresponding VAT resources, since any fault in the collection of the first potentially causes a reduction in the second."<sup>12</sup>

Therefore, the Court intervened – even rather harshly – in the institutional debate with a decisive action that tends to exclude (by the Council's will) the VAT issue from the PIF proposal's scope.<sup>13</sup> For these reasons, it should be concluded that a regulatory provision that is in conflict with the judgment of the Court of Luxembourg could raise difficult issues in terms of litigation in inter-institutional relations.

The Court points to Art. 325 TFEU as the basis for the action of the Union and of Member States in the matter of combating fraud affecting the financial interests of the Union. It is stated in the judgment that "[t]he national judge shall give full effect to Art. 325(1) and (2) TFEU, if need be, by 'dis-applying' the provisions of the national law having the effect to prevent the concerned Member State from fulfilling its obligations under" this rule of the Treaty.<sup>14</sup>

Since the legislative works pointing towards the use of a different legal basis (Art. 83 TFEU), an inter-institutional case could occur in the future on this specific issue and just as a consequence of the judgment. We must be aware that the margins of *manoeuvre* allowed to the EU institutions under Art. 325 TFEU are far more extensive than those provided for by Art. 83 TFEU,<sup>15</sup> and it is easily arguable on the part of the Commission that the choice of this legal basis does not allow a full and effective protection of the financial interests of the Union.

In the present case, the provisions of Italian law to disapply relate to the compatibility with a general principle of criminal law peculiar to the Member States of the EU and, consequently, to the Union itself: these provisions are found in the regime regulating the statute of limitation (time limitation), which impacts on the punishment capacity of a Member State.<sup>16</sup>

The wording of the CJEU, contained in the first paragraph of the operative part of the judgment, is very clear: "The national provision in the matter of limitation of criminal offences such as the one laid down by the last subparagraph of Article 160 of the Criminal Code, as amended by Law No. 251 of 5 December 2005, read in conjunction with Article 161 of that Code – regulations which provided, at the time of the main proceedings, that the interruption of criminal proceedings con-

cerning serious frauds in the matter of the value added tax had the effect of extending the limitation period by only a quarter of its initial duration – is suitable to have an adverse effect on the fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive sanctions in a significant number of cases of serious fraud affecting the financial interests of the European Union, or in which it provides for - in cases of fraud affecting the financial interests of the Member State concerned - limitation periods longer than those provided for in cases of fraud affecting the financial interests of the European Union [...].”<sup>17</sup>

## II. EU Criminal Law and Principles of the Rule of Law

Since the Maastricht reform, the complexity of EU action in the field of criminal law has raised suspicion, diffidence, and fear because the progressive transfer of regulatory competencies did not coincide, in parallel, with the identification of a framework of principles and shared criteria capable of addressing the exercise of powers by the European Community and the Union.

The legal doctrine offers a constructive contribution to the debate. A first *Manifesto on the EU Criminal Policy* prepared by lawyers of different nationalities has been followed by a second and much more recent one.<sup>18</sup> Because of the need for every criminal provision to have democratic legitimacy governed by the rule of law, in this document there is an acknowledgment of the foundations of a balanced EU criminal policy: the principles of proportionality or legitimate expectation, of *extrema ratio*, of fault, of legality (with its corollaries: legal certainty, non-retroactivity, *nulla poena sine lege*), of subsidiarity and consistency are identified as indefectible.

The reflections of MEDEL (Magistrats Européens pour la Démocratie et les Libertés) specifically pinpoint a minimum standard that is common to the Union Member States, limited to the sector of judicial function: the debate within this association aims to relate the principle of mutual recognition, within the European area of criminal justice with the necessary independence and impartiality of the national judge and with the purpose of a proper administration of justice. It is therefore essential that national legal systems accept certain principles: the existence of an independent and self-governing judicial body; a statute of the judge and of the prosecutor which ensures their autonomy; an effective right to judicial recourse; the recognition of criteria to qualify the natural status of a national criminal court.<sup>19</sup>

These reflections, in particular, take into account the fact that the EU is actually a governmental authority to which Member

States have conferred regulatory powers, also in the criminal justice sector; competences that can affect inter-individual legal relationships in much the same way as those of a national state, despite not having the same nature of being an original body. This setting establishes that the EU shall intervene in the criminal law according to the principles of the rule of law on which it is based (Art. 2 TEU).

The modern criminal law of a constitutional state body is based, as is well known, on several basic principles. A practice that started to take root even before the Lisbon reform, although sporadically, seems to confirm that the Union can continue along the path marked by these principles. The principle of offensiveness (that is, the existence of a fact objectively harmful to a good or a socially significant interest) emerged in the Advocates General's arguments<sup>20</sup> and also in a specific legislative framework that combined this principle with the one of *extrema ratio*.<sup>21</sup> The principle of offensiveness was enshrined in Art. 49 of the Charter of Fundamental Rights of the EU and was also recognized in the Commission's reflections on the principles for the approximation of criminal sanctions.<sup>22</sup>

The principle of fault even if not made explicit in the Charter – was considered to exist in EU law, both because of its belonging to the constitutional traditions common to the Member States<sup>23</sup> and because of the basis of the case law of the European Court of Human Rights.<sup>24</sup> The latter inspires the application and interpretation of the European norms in matters of respect for fundamental rights;<sup>25</sup> examples of this are Art. 6 of Framework Decision 2003/568/JHA on corruption in the private sector as well as Framework Decision 2001/413/JHA on combating fraud and counterfeiting of non-cash means of payment.<sup>26</sup>

The Court of Justice in Luxembourg enforces compliance with the principle of legality, also with its corollaries.<sup>27</sup> Moreover, both the legislation of the Union<sup>28</sup> and the intelligent interpretation adopted by the Court of Justice<sup>29</sup> recognize the principle of *extrema ratio* of the sanction, at least in general.

As for the principles of subsidiarity and consistency (vertical, or in the relationships between the national legal systems and the Union law), the first one is also safeguarded by the control of national parliaments:<sup>30</sup> for a significant example on this topic, see the “*yellow card*” rejection procedure of several national parliaments at the moment of evaluating the principle of subsidiarity related to the establishment of a European Public Prosecutor's Office.<sup>31</sup> The second principle is reflected in the discretionary choices that the European Union leaves to the national authorities.<sup>32</sup> Ultimately, the respect for the person involved in a criminal proceeding has long been confirmed by consistent and well-known EU case law.<sup>33</sup>

### III. Relevance of the Issue within the EU

At the institutional level, we can note several convergent factors. On the eve of the entry into force of the Lisbon Treaty, the Justice and Home Affairs Council held on 30 November 2009 adopted the *model provisions* containing the principle of materiality, offensiveness, fault, and *extrema ratio*.<sup>34</sup> Less than two years afterwards, the Commission returned to this topic, following the conceptual framework proposed by the Council, and adopted a communication that examines principles and criteria designed to provide a coherent criminal policy for the EU.<sup>35</sup> This document aims to establish the conditions that the Commission has to follow in its legislative initiative activity; legislative initiative activity that, consequently, will be subject to an impact assessment, the aim of which is to consider the need for the new European criminal law as well as its proportionality to the stated objectives. It states that the Union should act “*dans le plein respect de la subsidiarité et de la proportionnalité comme des autres principes fondamentaux du traité*,” in which the rights of the human being are identified, adding that “*le droit pénal doit rester un dispositif de dernier recours*.” Therefore, attention is focused on criteria for adequately managing the EU’s criminal competence, so that “*la législation de l’UE en matière pénale soit cohérente et homogène, afin d’apporter une véritable valeur ajoutée*” to the national criminal law systems. Lastly, a two-step approach is outlined: the first step in accordance with the decision “*si des mesures de droit pénal doivent véritablement être adoptées*,” the second step in accordance with the assessment “*du type de mesures de droit pénal à adopter*.” To the latter end, the intervention shall be limited to disposing minimum rules; the congruence between conduct and form of punishment will have to be assessed; the punishment shall be proportional, dissuasive, and effective; and the legislation relating to the liability of legal persons shall also be reviewed.

Finally, the European Parliament has contributed to the discussions with its Report on a European approach on criminal law.<sup>36</sup> As co-legislator in the criminal law, it reaffirmed the principles of subsidiarity, proportionality, *extrema ratio*, offensiveness, and fault, etc. (such as respect for the rights of the human being, the principle of *ne bis in idem*, legal certainty, non-retroactivity of penal law, *lex mitior*, presumption of innocence), all not expressed in the Council and Commission documents.

### IV. Concluding Remarks

The next step in the EU institutional framework should, as a consequence, consist in the signing of an international agreement pursuant to Art. 295 TFEU – among the three institutions involved in exercising the regulatory function “on prin-

ciples and working methods governing future legal proposals concerning criminal law:” as the European Parliament points out, it is necessary because “the European criminal law should constitute a coherent legislative system governed by a set of fundamental principles and standards of good governance,” which should not be the result of the unilateral and different stances of the Community institutions.

In short, legal doctrine and institutions have committed to starting “a preliminary reflection so that [...] a better informed opinion can be reached [...] on the utility and feasibility of a legislative proposal [...] which will lead both to the approximation of the rules applicable to criminal penalties in general and to the mutual recognition of custodial sentences and alternative sanctions in the European Union.”<sup>37</sup> This approach, affecting both substantive criminal law and criminal procedure, sometimes creates conflicts in current regulatory practice, even if they are not violations of the principles of the rule of law.<sup>38</sup>

One would have expected the five-year Program on the Area of Freedom Security and Justice to take a stance on this topic: it should have been adopted in June 2014 (at the end of the term of the Greek presidency of the Council), which would have continued the process started in Tampere<sup>39</sup> and been furthered with the Hague<sup>40</sup> and the Stockholm Programmes.<sup>41</sup> The *Assises de la Justice, Discussion Paper* had also suggested proceeding in this way.<sup>42</sup> On the contrary, the *Strategic Guidelines* adopted at the meeting of the European Council of 26–27 June 2014<sup>43</sup> are extremely lacking in substantive content and lack any reference to the issue investigated here. Certainly, the spillover effects of the severe and long financial crisis that has been hitting the European continent since 2008 (and that only seems to have abated in the past few months) do not help the implementation of a common European policy in criminal matters. The message coming from a certain political wing advocates – critically misunderstanding – the return to full national sovereignty in this as in other relevant matters conferred to the Union’s competence.

This political wing does not take into consideration that we are living in an age defined by globalization, a phenomenon that must be governed and not faced in an antagonistic way. Following the premise that “law cannot register subsequent changes in its way of being as it meets globalization, namely the growing tendency of the various parts of the world to communicate and connect with one other,”<sup>44</sup> the consequence is that the state has to learn to temper the exercise of its sovereignty to a level, which can also be different from the mere internal level (internal to its own legal system), meaning the international one. This is fine as long as it happens in accordance with the principles of the rule of law.

1 CJEU, CV-105/14, Taricco and others, 8.9.2015. V.F. Viganò, Primato del diritto UE e nullum crimen sine lege in una importante sentenza della Corte di giustizia (sent. 8 September 2015 (Grande Sezione), Taricco, causa C-105/14, in [www.dirittopenalecontemporaneo.it](http://www.dirittopenalecontemporaneo.it); and, for subsequent case law (partic. Corte d'appello di Milano, sez. II pen., 18 September 2015), V.F. Viganò, *Prescrizione e reati lesivi degli interessi finanziari dell'UE: la Corte d'appello di Milano sollecita la Corte costituzionale ad azionare i 'controlimiti'*, [www.dirittopenalecontemporaneo.it](http://www.dirittopenalecontemporaneo.it).

2 COM(2012) 363 final. On the proposal, see A. Venegoni, *Indagini penali e diritto UE nelle frodi comunitarie*, in *Questione Giustizia*, [www.questionegiustizia.it](http://www.questionegiustizia.it), 31 luglio 2015.

3 COM(2011) 293 final.

4 Art. 4 proposal cit.

5 COM(2011) 308 final.

6 COM(2011) 293 final.

7 COM(2012) 85 final.

8 COM(2013) 534 final. On the proposal, see N. Parisi, *The Centrality of the Person and the Area of Freedom, Security and Justice: the Role of the European Public Prosecutor's Office*, in *Protecting fundamental and procedural rights from the investigations of OLAF to the future EPPO*, Fondazione Basso, Rome, 2012, p. 157 ff.

9 *Ibid.*, point 3.3.

10 D. Rinoldi, *Lo spazio di libertà, sicurezza e giustizia. I. Questioni generali e principi penalistici*, Naples, 2012.

11 Point 36 case op. cit.; see also CJEU Case, C-617/10, *Å17/10, Fransson*, 26.2.2013, point 26.

12 CJEU Case *Taricco*; on the matter, see A. Venegoni, *Il difficile cammino, op. cit.*

13 A. Venegoni, *Il difficile cammino della proposta di direttiva per la protezione degli interessi finanziari dell'Unione europea attraverso la legge penale (c.d. direttiva PIF): il problema della base legale*, in *Cass. pen.*, 2015, p. 2442 ff.

14 CJEU Case *Taricco*, 1st point of the judgment.

15 On the matter, see D. Rinoldi, *Lo spazio di libertà, op. cit.* [n. 10].

16 The Italian rules in the matter of time limitations (revised by law No. 69/2015 and currently under revision by the draft law No. 2150) have been verified within other international contexts, e.g., by GRECO (third cycle of peer review) and by the European Court of Human Rights (recently, *Case Cestaro v. Italy*, 7.4.2015, No. 6884/11, 219 ff.).

17 Italics added.

18 "A Manifesto on European Criminal Procedure Law", *Zis*, 2013, p. 430 ff.

19 Memorandum to the European Institutions, in *Justice: un pouvoir de la démocratie en Europe*, [www.medelnet.org/images/publikacija.pdf](http://www.medelnet.org/images/publikacija.pdf).

20 CJEU, C-176/03, *Commission v. Council*.

21 Directive 2008/99/CE on the protection of the environment through criminal law.

22 *Green Paper on approximation, mutual recognition and execution of criminal penalties in the UE*, COM (2004) 334 fin., pp. 12-13.

23 CJEU C-326/58, *Hansen*; also CJEU C-352/09, *ThyssenKrupp Nirosta*, point 162.

24 *Sud Fondi srl v. Italia*, 20.1.2009.

25 Art. 52, No. 3, Rec. No. 5 of the Charter of Fundamental Rights, and also Art. 6, No. 3, TUE.

26 There is no single practice: Framework Decision 2002/475/GAI on combating terrorism, for example, does not accept the principle of fault.

27 Concerning the principle of non-retroactivity of the more favorable provisions of criminal law, see CJEU C-61/11P, *El Dridi*, 28.4.2011 and CJEU, C-420/06, *Jager*, 11.3.2008. Concerning the principle of legal certainty and assertiveness of criminal offences, see CJEU, joined Cases C-387/02, C-391/02 and C-403/02, *Berlusconi e altri*, 3.5.2005.

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28 Art. 9 of Directive 2009/52/CE providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

29 CJEU, C-181/84, *Man Sugar*, 24.9.1985.

30 Protocol No. 2 to the Union Treaties.

31 [www.ipex.eu/PEXL-WEB/news.do#082dbcc541eeb8b90141ffc8e3c10fcb](http://www.ipex.eu/PEXL-WEB/news.do#082dbcc541eeb8b90141ffc8e3c10fcb).

32 See, for example, the broader discretion granted to the Member States in qualifying the corrupt behavior of legal persons: Council Framework Decision 2003/568/GAI on combating corruption in the private sector.

33 CJEU C.399/11, *Melloni*, 26.2.2013.

34 Council Conclusion on model provisions, guiding the Council's criminal law deliberations, pp.1-2.

35 Green Paper *Vers une politique de l'UE en matière de droit pénal: assurer une mise en oeuvre efficace des politiques de l'UE au moyen du droit pénal*, COM(2011) 573 final, 20 September 2011.

36 PE Resolution 22 May 2012, A7- 0144/2012

37 Commission, *Green Paper*, see Fn 36, p. 2.

38 See point 7 of the *Manifesto*, op. cit. [n. 18].

39 Multiannual program for an area of Freedom, Security and Justice, adopted by the Tampere European Council on 15 and 16 October 1999, [www.europarl.europa.eu/summits/tam\\_it.htm](http://www.europarl.europa.eu/summits/tam_it.htm).

40 Program on strengthening freedom, security and justice in the European Union, adopted by the European Council on 4-5 November 2005, EUOJ C-53 of 3 March 2005, p. 1ff.

41 The Stockholm Program - An open and secure Europe serving and protecting citizens, adopted by the European Council on 10-11 December 2009, EUOJ C-115 of 4 May 2010.

42 See [http://ec.europa.eu/justice/events/assises-justice-2013/index\\_en.htm](http://ec.europa.eu/justice/events/assises-justice-2013/index_en.htm), with specific attention to the *Discussion Paper 5: Fundamental Rights*. Regarding the area of freedom, security and justice the document states that "all the [EU] institutions commit to a common approach to guarantee the respect of fundamental rights throughout the legislative process:" point III.2.

43 European Council, EUCO 79/14, 27.6.2014.

44 M.R. Ferrarese, *Prima lezione di diritto globale*, Rome/Bari, 2012, p. 5.

# Le Principe de Légalité aux Termes de l'Article 7 de la Convention Européenne des Droits de l'Homme

## Un bref Aperçu de Jurisprudence

Andrea Tamietti

**English Summary:** The decision by the European Court of Human Rights in *Soros v. France* centered on questions regarding the principle of legality in article 7 ECHR. More precisely, the interpretation of "insider trading" was challenged and whether or not it was possible to appraise whether the French national law had forbade this kind of acts at the respective time. As the principle of legality is a fundamental right in the EU Charter, this decision could significantly influence the principle's interpretation in the European criminal law area.

Il existe, parfois, de comportements qui paraissent à première vue suspicieux, car ils semblent aller à l'encontre de la morale et des règles de base de la société. Cependant, lorsqu'on essaye de les classer à la lumière des normes juridiques qui sont censées avoir codifié ces règles de base, on s'aperçoit que leur contrariété à la loi est douteuse. Ceci peut être dû à plusieurs facteurs: le libellé de la loi est très spécifique et la conduite incriminée semble se situer en dehors de ses limites étroites; ou bien la lettre de la norme est vague et générale, et on se demande si l'on peut l'estimer suffisamment claire. Encore, il s'agit d'un cas d'espèce nouveau, jamais jugé par les tribunaux, et par rapport auquel on ne peut s'appuyer sur aucune jurisprudence.

### I. Le Principe de Légalité

Lorsque, dans l'une des situations énumérées ci-dessus, l'État décide néanmoins de punir l'auteur de la conduite, des problèmes délicats peuvent surgir sous l'angle de l'article 7 de la Convention européenne des Droits de l'Homme (CEDH). La seule disposition conventionnelle qui concerne directement le droit pénal matériel,<sup>1</sup> et qui dans son premier paragraphe établit que « Nul ne peut être condamné pour une action ou une omission qui, au moment où elle a été commise, ne constituait pas une infraction d'après le droit national ou international. De même il n'est infligé aucune peine plus forte que celle qui était applicable au moment où l'infraction a été commise ». Le présent article a pour objet l'examen de l'interprétation que la Cour de Strasbourg a donné à ce principe fondamental du droit moderne et de l'application qui en a été faite dans une récente affaire controversée, *Soros c. France* (n° 50425/06, 6 octobre 2011), où étaient en cause tant les règles du droit national que celles du droit de l'Union européenne.

Selon la Cour de Strasbourg, la garantie que consacre l'article 7, élément essentiel de la prééminence du droit, occupe une place primordiale dans le système de protection de la Convention, comme l'atteste le fait que l'article 15 n'y autorise aucune dérogation même en temps de guerre ou autre danger public menaçant la vie de la nation. Ainsi qu'il découle de son objet et de son but, on doit l'interpréter et l'appliquer de manière à assurer une protection effective contre les poursuites, les condamnations et les sanctions arbitraires.<sup>2</sup> Par ailleurs, cette disposition ne se borne pas à prohiber l'application rétroactive du droit pénal au désavantage de l'accusé,<sup>3</sup> mais consacre aussi, de manière plus générale, le principe de la légalité des délits et des peines – « *nullum crimen, nulla poena sine lege* ».<sup>4</sup>

Ce principe doit être entendu dans le sens qu'il est interdit d'étendre le champ d'application des infractions existantes à des faits qui, antérieurement, ne constituaient pas des infractions. En outre, la loi pénale ne doit pas être appliquée *de manière extensive* au détriment de l'accusé, ce qui s'analyse en une prohibition de l'extension par analogie.<sup>5</sup>

Il reste à déterminer quel degré de précision est requis pour qu'une disposition « pénale » puisse satisfaire aux exigences de l'article 7. À cet égard, il convient de rappeler que la jurisprudence de Strasbourg a à des maintes reprises affirmé, dans le cadre d'autres dispositions conventionnelles prescrivant qu'une mesure soit prévue par la loi,<sup>6</sup> que la norme interne doit être énoncée avec assez de précision pour permettre au citoyen de régler sa conduite. En s'entourant au besoin de conseils éclairés, il doit être à même de prévoir, à un degré raisonnable dans les circonstances de la cause, les conséquences qui peuvent découler d'un acte déterminé.<sup>7</sup> Puisque, cependant, une parfaite exactitude dans la rédaction des lois est inatteignable, la « prévisibilité » ne doit pas être interprétée

comme une certitude absolue. Cette dernière risque d'être trop rigide et incapable de s'adapter aux changements de situation et à l'évolution des conceptions de la société.<sup>8</sup> Il suffit d'ouvrir un quelconque code pour se rendre compte que beaucoup de lois se servent de formules plus ou moins « vagues », dont l'interprétation et l'application dépendent de la pratique.<sup>9</sup> Le rôle des tribunaux nationaux devient alors essentiel: c'est à eux qu'il incombe de dissiper les doutes qui pourraient subsister quant à l'interprétation des normes internes.<sup>10</sup>

En va-t-il de même pour le domaine pénal, ou bien au vue des risques encourus par le prévenu, doit-on exiger ici une plus grande précision dans la rédaction des lois? La réponse doit à mon avis être affirmative, et ce en dépit du fait que les formules utilisées par la Cour pour énoncer les principes généraux sous l'angle de l'article 7 soient quasi-identiques à celles employées dans le cadre des articles 8, 9, 10 et 11 CEDH.<sup>11</sup> En effet, lorsqu'ils remplissaient leur tâche de « s'assurer que, au moment où un accusé a commis l'acte qui a donné lieu [...] à la condamnation, il existait une disposition légale rendant l'acte punissable », les juges de Strasbourg ont été bien plus exigeants envers le Gouvernement défendeur que lorsqu'il s'agissait d'analyser si une ingérence dans des droits non absolus était justifiée. Dans ce deuxième cas, une quelconque disposition pouvant, même par les biais d'une interprétation (parfois très) extensive,<sup>12</sup> englober la conduite du requérant a été considérée comme une base légale suffisante. Dans le domaine pénal, en revanche, la Cour a examiné avec soin le libellé des dispositions internes, ainsi que la nature et la précision de la jurisprudence qui en faisait application, exigeant clarté et netteté dans la fixation de la frontière entre le licite et l'illicite.<sup>14</sup>

Ainsi, même si elle a constamment répété que les lois peuvent recourir à des catégories générales plutôt qu'à des listes exhaustives,<sup>15</sup> qu'il existera inévitablement un élément d'interprétation judiciaire pour élucider les points douteux,<sup>16</sup> et que l'article 7 CEDH ne proscrie pas la clarification graduelle des règles de la responsabilité pénale par l'interprétation judiciaire d'une affaire à l'autre,<sup>17</sup> la Cour s'est chargée de contrôler si l'interprétation judiciaire dont un requérant se plaignait était accessible et « raisonnablement prévisible »,<sup>18</sup> et ce afin de s'assurer que nul ne soit soumis à des poursuites, condamnations ou sanctions arbitraires.<sup>19</sup>

Faisant application de ces principes, la Cour a, par exemple, estimé non conformes à l'article 7 CEDH tant l'absence, en droit ukrainien, d'une procédure claire et prévisible pour demander la tenue de manifestations pacifiques,<sup>20</sup> que la règle de droit maltais selon laquelle, dans certain cas, la mesure maximale de la peine dépendait (également) du choix discrétionnaire du parquet de porter l'affaire devant la *Criminal Court* ou bien devant la *Court of Magistrates*.<sup>21</sup>

En même temps, la jurisprudence de Strasbourg a précisé que des lois pénales rédigées dans un langage familier et non technique n'étaient pas pour autant forcément « imprévisibles », étant donné que les mots employés étaient d'usage courant et leur signification était claire pour les justiciables.<sup>22</sup> La Cour a également eu l'occasion de dire que l'absence totale de jurisprudence sur une certaine disposition de loi ou sur quelques-uns de ses éléments n'emporte pas, en soi, une méconnaissance du principe *nullum crimen sine lege*. Par la force des choses, tout texte de droit est à un moment ou à un autre appliqué pour la première fois, sans pour autant priver la condamnation de sa base légale aux termes de la CEDH.<sup>23</sup>

## II. *Soros c. France*

Compte tenu de ce complexe panorama jurisprudentiel, des questions délicates sont surgies dans le cadre de l'affaire *Soros c. France*, où la cinquième section de la Cour a conclu, par une étroite majorité (quatre voix contre trois), à la non-violation de l'article 7 CEDH.

Les faits remontent à 1988, lorsque le requérant, un investisseur professionnel, avait eu connaissance d'un projet visant à acquérir le contrôle d'une grande banque française. Grâce à cette information, le requérant put effectuer des opérations de spéculation boursière sur les titres de la banque, réalisant, en quelques semaines, des gains importants, à hauteur de 2,28 million de dollars. Il fut accusé et condamné pour délit d'initié, une infraction punie, à l'époque, par l'article 10-1 de l'ordonnance n° 67-833 du 28 septembre 1967. Cette disposition s'appliquait aux personnes « disposant, à l'occasion de l'exercice de leur profession ou de leur fonctions, d'informations privilégiées sur les perspectives [...] d'un émetteur de titre ». Or, le requérant n'entretenait aucun rapport contractuel avec la banque en question, et la jurisprudence interne antécédente à son affaire n'avait considéré comme étant des « initiés » que les personnes ayant un lien professionnel avec la société convoitée. Par ailleurs, la Commission des opérations boursières (la « COB ») avait estimé qu'il n'existait aucun précédent jurisprudentiel applicable à des situations analogues, et que le libellé de l'article 10-1 précité ne permettait pas de tracer avec certitude une frontière précise entre le licite et l'illicite.

Dans ces circonstances, l'on aurait pu soutenir – comme l'ont fait les juges Villiger, Yudkivska et Nussberger dans leur opinion dissidente commune – que la norme était ambiguë. De plus, les doutes raisonnables quant à sa signification auraient dû jouer en faveur de l'accusé, et non du législateur, coupable de ne pas s'être exprimé clairement en une matière où une plus grande précision aurait été non seulement souhaitable, mais aussi possible. Il est probable que même s'il avait demandé

l'avis d'un conseil éclairé, le requérant n'aurait pas pu savoir si les actes qu'il envisageait étaient, ou non, interdits. Le caractère « vague » de la loi vis-à-vis le comportement spécifique du requérant aurait donc pu conduire à un constat de violation de la Convention, surtout si l'on songe à l'exigence d'éviter que les décisions de justice puissent apparaître comme arbitraires. Il convient de rappeler, à cet égard, que plusieurs Cours Suprêmes sont allées jusqu'à annuler des dispositions nationales qui, tout en punissant des comportements moralement répréhensibles, définissaient les éléments constitutifs des infractions en des termes excessivement généraux, de nature à empêcher aux juges de leur donner une interprétation cohérente, ponctuelle et raisonnablement prévisible.<sup>24</sup>

### III. La Décision de la Cour et le Lien avec le Droit de l'Union Européenne

Dans l'affaire *Soros*, la majorité de la cinquième section de la Cour a cependant choisi une autre voie : elle a affirmé que la jurisprudence antérieure à l'affaire du requérant concernait des situations « suffisamment proches » à celle de l'intéressé pour lui « permettre de savoir, ou à tout le moins de se douter, que son comportement était répréhensible ». Les juridictions internes n'avaient par ailleurs pas eu l'occasion de le dire auparavant, faute d'avoir eu à trancher sur des affaires identiques. Au demeurant, la Cour a souligné la qualité d'« investisseur professionnel » du requérant, qui l'obligeait à faire preuve d'une prudence accrue.

Ainsi, la Cour semble avoir établi le principe selon lequel, en matière pénale, le justiciable ne doit pas seulement savoir ce qui est interdit et ce qui ne l'est pas. En cas de doute, et, il semblerait, même en cas de doute relativement marginal et en présence de formules législatives paraissant limiter l'applicabilité de la norme à des sujets dans une situation différente de la sienne, il doit entrevoir le risque que sa conduite soit jugée illégale. Face au risque, il doit s'abstenir d'agir. S'il ne s'abstient pas, il doit supporter les conséquences de ses actions.

Un autre aspect de l'affaire *Soros* mérite d'être noté : le requérant alléguait, entre autres, qu'une directive européenne (89/592/CEE) adoptée le 13 novembre 1989, et donc après la commission des faits contestés, mais avant le prononcé d'une condamnation, avait défini avec plus de précision la notion d'« information privilégiées ». Cette doléance, que la Cour a écarté en observant avoir déjà conclu à la prévisibilité du droit français pertinent, amène en premier lieu à constater l'importance croissante du droit de l'Union européenne dans les requêtes introduites devant la Cour de Strasbourg. Ce droit est invoqué de plus en plus souvent par les requérants, et ce même dans la matière pénale, et son analyse a parfois contribué au constat d'une violation de la CEDH.<sup>25</sup> De plus, l'on pourrait s'interroger sur l'importance que la directive européenne en question aurait pu avoir pour l'affaire *Soros*. À supposer que, en apportant de plus amples précisions sur la notion d'« initié », celle-ci eût vraiment été plus favorable au requérant, sa non-application en l'espèce aurait pu porter atteinte au principe de la rétroactivité de la loi pénale plus douce, énoncé par la Grande Chambre dans l'arrêt *Scoppola c. Italie (No. 2)*.<sup>26</sup>

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1 À l'exception, en matière de peine, de l'article 1 du Protocole No. 6 à la Convention, aux termes duquel « La peine de mort est abolie. Nul ne peut être condamné à une telle peine ni exécuté. »

2 Voir, entre autres, *S.W. c. Royaume-Uni*, 22 novembre 1995, § 34, série A No. 335-B; *C.R. c. Royaume-Uni*, 22 novembre 1995, § 32, série A No. 335-C; *Kafkaris c. Chypre* [GC], No. 21906/04, § 137, CEDH 2008; et *Del Rio Prada c. Espagne* [GC], No. 42750/09, § 77, CEDH 2013.

3 Voir, en ce qui concerne l'application rétroactive d'une peine, *Welch c. Royaume-Uni*, 9 février 1995, § 36, série A No. 307A; *Jamil c. France*, 8 juin 1995, § 35, série A No. 317B; *Ecer et Zeyrek c. Turquie*, No. 29295/95 et 29363/95, § 36, CEDH 2001III; et *Mihai Toma c. Roumanie*, No. 1051/06, §§ 26-31, 24 janvier 2012.

4 *Kokkinakis c. Grèce*, 25 mai 1993, § 52, série A No. 260-A, et *Del Rio Prada*, précité, § 78.

5 Voir *Coëme et autres c. Belgique*, No. 32492/96, 32547/96, 32548/96, 33209/96 et 33210/96, § 145, CEDH 2000-VII, et *Del Rio Prada*, précité, § 78 ; pour un exemple d'application par analogie d'une peine, voir l'arrêt *Başkaya et Okçuoğlu c. Turquie* [GC], No. 23536/94 et 24408/94, §§ 42-43, CEDH 1999IV.

6 Voir, en particulier, les articles 8, 9, 10 et 11 de la Convention qui protègent la vie privée et familiale et les libertés de religion, d'expression et de manifestation.

7 Voir, parmi beaucoup d'autres, *Djavit An c. Turquie*, No. 20652/92, § 65, CEDH 2003III, et *Kudrevičius et autres c. Lituanie* [GC], No. 37553/05, § 109, 15 octobre 2015.

8 *Ezelin c. France*, 26 avril 1991, § 45, série A No. 202.

9 Voir, parmi d'autres, *Sunday Times c. Royaume-Uni (No. 1)*, 26 avril 1979, § 49, série A No. 30 ; *Rekvenyi c. Hongrie* [GC], No. 25390/94, § 34, CEDH 1999-III ; *Ziliberberg c. Moldova (déc.)*, No. 61821/00, 4 mai 2004 ; *Galstyan c. Arménie*, No. 26986/03, § 106, 15 novembre 2007 ; et *Primov et autres c. Russie*, No. 17391/06, § 125, 12 juin 2014.

10 *Kruslin c. France*, 24 avril 1990, § 29, série A No. 176-A ; *Kopp c. Suisse*, 25 mars 1998, § 59, *Recueil des arrêts et décisions* 1998-II ; *VgT Verein gegen Tierfabriken c. Suisse*, No. 24699/94, § 52, CEDH 2001-VI ; *Mkrtychyan c. Arménie*, No. 6562/03, § 43, 11 janvier 2007 ; *Vyerentsov c. Ukraine*, n° 20372/11, § 54, 11 avril 2013 ; et *Kudrevičius et autres*, précité, § 110. Faisant application de

ces principes, la Cour a, par exemple, estimé, en matière civile, que la notion de « bonnes mœurs » dans les affaires satisfaisait à l'exigence de prévisibilité voulue par la Convention : voir *Barthold c. Allemagne*, 25 mars 1985, § 47, série A No. 90, et *Markt intern Verlag Gbm et Klaus Beermann c. Allemagne*, 20 novembre 1989, § 30, série A No. 165, où il était question de la loi allemande de 1909 sur la concurrence déloyale.

11 Voir, par exemple, les affirmations suivantes : « Il s'ensuit que la loi doit définir clairement les infractions et les peines qui les répriment. Cette condition se trouve remplie lorsque le justiciable peut savoir, à partir du libellé de la disposition pertinente, au besoin à l'aide de l'interprétation qui en est donnée par les tribunaux et le cas échéant après avoir recouru à des conseils éclairés, quels actes et omissions engagent sa responsabilité pénale et quelle peine il encourt de ce chef » (*Cantoni c. France*, 15 novembre 1996, § 29, *Recueil des arrêts et décisions* 1996V ; *Kafkaris*, précité, § 140 ; et *Del Rio Prada*, précité, § 79).

12 Voir *Coême et autres*, précité, § 145 ; *Achour c. France* [GC], No. 67335/01, § 43, CEDH 2006IV ; et *Del Rio Prada*, précité, § 80.

13 Voir, par exemple, *Open Door et Dublin Well Woman c. Irlande*, 29 octobre 1992, §§ 59-60, série A No. 246-A, où la Cour a estimé que l'interdiction faite aux sociétés requérantes de signaler aux femmes enceintes les possibilités de se rendre à l'étranger pour s'y faire avorter était « prévisible » sur la base des garanties que le droit irlandais – législation et jurisprudence – assurait aux droits de l'enfant à naître.

14 Voir, par exemple, *Rohlens c. République tchèque* [GC], No. 59522/08, § 53, CEDH 2015, où la Cour a précisé qu'elle devait rechercher si la condamnation du requérant reposait sur une base « suffisamment claire ».

15 *Kokkinakis*, précité, § 40 ; *Cantoni*, précité, § 31, et *Rohlens*, précité, § 50.

16 *Kafkaris*, précité, § 141.

17 *Streletz, Kessler et Krenz c. Allemagne* [GC], No. 34044/96, 35532/97 et 44801/98, § 50, CEDH 2001-II ; *K. H.W. c. Allemagne* [GC], No. 37201/97, § 85, CEDH 2001III ; *Korbely c. Hongrie* [GC], No. 9174/02, § 71, CEDH 2008 ; et *Kononov c. Lettonie* [GC], No. 36376/04, § 185, CEDH 2010.

18 Voir, pour ce qui est des éléments constitutifs de l'infraction, *Pessino c. France*, No. 40403/02, §§ 35-36, 10 octobre 2006, et *Dragotoniou et Militaru-Pidhorni c. Roumanie*, No. 77193/01 et 77196/01, §§ 43-44, 24 mai 2007 ; voir, pour ce qui est de la peine, *Alimuçaj c. Albanie*, No. 20134/05, §§ 154162, 7 février 2012.

19 *Del Rio Prada*, précité, § 93, et *Rohlens*, précité, § 50.

20 *Vyerentsov c. Ukraine*, No. 20372/11, §§ 62-67, 11 avril 2013.

21 *Camilleri c. Malte*, No. 42931/10, §§ 39-45, 22 janvier 2013.

22 Voir, notamment, l'arrêt. *Ashlarba c. Géorgie*, No. 45554/08, 15 juillet 2014, portant sur l'utilisation, par le législateur, de notions telles que « le monde souterrain des voleurs » (*thieves' underworld*), tirées plutôt de la langue parlée que de la tradition juridique géorgienne.

23 Voir, notamment, *Kudrevičius et autres*, précité, § 115, où, dans le cadre de l'examen de l'existence d'une « base légale » aux fins de l'article 11 de la Convention, la Cour a précisé qu'« il faut bien qu'une norme juridique donnée soit un jour appliquée pour la première fois ». Voir également, relativement à l'article 7 de la Convention, *Huhtamäki c. Finlande*, No. 54468/09, § 51, 6 mars 2012, avec d'autres références.

24 À titre d'exemple, on peut ici rappeler l'arrêt No. 96 du 8 juin 1981, par lequel la Cour constitutionnelle italienne a déclaré la contrariété à la Constitution de l'ancien article 603 du code pénal, punissant l'infraction de *plagio*, dont était coupable quiconque soumettait « une personne à son pouvoir, de manière à la réduite en état d'asservissement total » (*totale stato di soggezione*). La Cour constitutionnelle a notamment déclaré que le libellé de l'article 603 précité prévoyait une « hypothèse non vérifiable dans son accomplissement et dans son résultat », étant donné qu'il était impossible d'identifier les « activités que l'on pourrait concrètement effectuer pour réduire une personne dans un état d'asservissement total ».

25 Voir, notamment, l'arrêt *Schipani et autres c. Italie*, No. 38369/09, 21 juillet 2015, concernant la non-transposition en droit interne de deux directives européennes (No. 363 du 16 juin 1975 et No. 82 du 26 janvier 1976) en matière de rémunération des médecins ayant suivi des cours de spécialisation, ainsi que l'arrêt *Dhahbi c. Italie* (No. 17120/09, 8 avril 2014), où une violation de l'article 6 § 1 de la Convention découlait de l'omission, par la Cour de cassation, d'examiner une demande de renvoi préjudiciel à la Cour de Justice de l'Union européenne. Voir également *Tolgyesi c. Allemagne* (déc.), No. 554/03, 8 juillet 2008, où l'article 7 de la Convention a été appliqué à l'interprétation donnée par un État membre de l'Union européenne aux réglementations adoptées par un autre État membre.

26 Voir l'arrêt du 17 septembre 2009, No. 10249/03, § 109, où la Cour a affirmé que « que l'article 7 § 1 de la Convention ne garantit pas seulement le principe de non-rétroactivité des lois pénales plus sévères, mais aussi, et implicitement, le principe de rétroactivité de la loi pénale plus douce. Ce principe se traduit par la règle voulant que, si la loi pénale en vigueur au moment de la commission de l'infraction et les lois pénales postérieures adoptées avant le prononcé d'un jugement définitif sont différentes, le juge doit appliquer celle dont les dispositions sont les plus favorables au prévenu. »

## Council of Europe Convention Against Trafficking of Human Organs

Oscar Alarcón Jiménez\*

The trafficking of human organs (THO) has gone from being an urban legend for many countries to becoming a dark reality that can end in a custodial sentence. Understood as an international problem that demands a response from governments, legislative institutions, and international organizations, it mainly emerges in the context of the inability of countries to cope with the transplantation needs of their patients. The shortage of organs, disparities accentuated by the economic crisis, the

vast differences between health systems, and the voracity of unscrupulous traffickers have, in recent years, led to an increase in transplant tourism and the development of an international organ trade where potential recipients travel abroad to obtain organs from impoverished people through commercial transactions. There are many direct consequences of the current shortage of organs such as long waiting lists for transplantations and the high cost of alternatives to transplantation (i.e., dialysis), etc.

As a problem of global proportions, THO violates basic fundamental freedoms, human rights, and human dignity. It also constitutes a direct threat to public health, integrity, freedom and often the life of individuals, and therefore there is a real need to put in place measures to protect the most vulnerable individuals. Frequently linked to the activities of transnational organized criminal groups, who profit from the vulnerable situation of donors from poverty-stricken and deprived areas and the desperation of recipients, this crime erodes the public's confidence in existing transplantation systems, therefore perpetuating its root cause: organ shortage. Although it is difficult to precisely quantify the scale of this criminal activity because it is hidden, the proliferation of cases of THO is a significant problem. Despite numerous responses to THO from many countries, the necessity for a solid legal framework, especially at the international level, is more acute than ever, as the absence of an international legal instrument establishing this activity as a criminal offense has facilitated the cross-border cooperation of criminals (organized networks) and allowed terrorists to work with total impunity. THO becomes part of a wider circle of violence and threats to human rights, democracy, and the rule of law, values on which the Council of Europe (CoE) is founded. Thus, this worldwide problem can only be addressed through concerted efforts at a global level.

The CoE Convention against Trafficking in Human Organs represents a historical milestone in the fight against THO from an efficiency standpoint. This report aims at introducing the Convention and its most relevant features in order to assess to what extent this new legal instrument represents a significant advancement towards the establishment of a “zero tolerance zone” against THO.

## I. International Legal Framework

It should be recalled that the subject of THO is not new, and certain international organizations have carried out significant work to combat THO either from the bioethics perspective, in the field of organ transplantation, or from the criminal law perspective, concentrating on trafficking in human beings (THB). From a bioethics perspective, the international legal framework implemented by the Council of Europe (CoE), the European Union (EU), and the World Health Organization (WHO) should be acknowledged:

a) Art. 21 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the application of Biology and Medicine: The Convention on Human Rights and Biomedicine<sup>1</sup> (hereafter, the Oviedo Convention) prohibits any action that gives rise to financial gain from the human body and its parts. This idea is included in Art. 21

of its Additional Protocol<sup>2</sup> and developed in Art. 22 of the same Protocol, which prohibits organ and tissue trafficking. In this regard, Art. 26 of the aforesaid Protocol urges that parties should provide for appropriate sanctions to be applied in the event of infringement of the prohibition.

In addition to the Oviedo Convention, there is a range of other legal instruments<sup>3</sup> from the Committee of Ministers of the CoE that deal with organizational and technical issues. They highlight that organ removals from living donors may be achieved, provided that safeguards are implemented in order to guarantee the freedom and safety of the donor and a successful transplant. In this regard, particular attention should be paid to Recommendation Rec(2004)7 on organ trafficking, which clearly states that organ trafficking is illegal<sup>4</sup> and that countries should ensure that legal instruments prohibiting the trafficking of organs<sup>5</sup> are in place.

b) At the EU level, while its first objective may be the safety and quality of organs, the EU Directive on standards of quality and safety of human organs intended for transplantation (Directive 2010/45/EU)<sup>6</sup> contributes indirectly to combating organ trafficking through the establishment of competent authorities, the authorization of transplantation centers, and the establishment of conditions of procurement and systems of traceability.<sup>7</sup>

c) In the UN, the WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation are intended to provide a framework for the acquisition and transplantation of human cells, tissues, and organs for therapeutic purposes.<sup>8</sup>

In addition to this legal framework, the work carried out by other international actors should also be mentioned. Although the 2008 Istanbul Declaration defined “organ trafficking” and “transplant tourism” and highlighted their prohibition, this definition is, however, just a step in the right direction from a summit convened by the Transplantation Society and International Society of Nephrology and does not represent the opinion of the international community/states. Important efforts to raise awareness of organ trafficking among health professionals and transplant organizations should be attributed to the Istanbul Custodian Group, established in 2010 to promote the principles of the Declaration of Istanbul and to encourage and assist in their implementation.

From the criminal law perspective, the following legal instruments contain criminal law provisions against THB for the purpose of organ removal:

a) The Additional Protocol to the UN Convention against Transnational Organised Crime (Palermo Convention) and the UN Optional Protocol to the Convention on the Rights of the

Child on the sale of children, child prostitution and pornography, both adopted in 2000 by the United Nations;

b) The Convention on Action against Trafficking in Human Beings,<sup>9</sup> adopted in 2005 by the CoE, and the EU directive 2011/36/EU on prevention and combating trafficking in human beings and protecting its victims contain a definition which also covers trafficking in human beings for the purpose of the removal of organs.

Unfortunately, these legal instruments do not cover THO or other cases in which the donor has consented to the removal of organs. The loopholes for perpetrators in the international legal framework prompted the CoE to consider the necessity of drafting a legal instrument. Prior to this, the CoE and UN had drafted a “Joint study on trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs,”<sup>10</sup> which issued the following recommendations:

- To clearly distinguish two different phenomena, THO *per se* on the one hand, and “Trafficking in human beings for the purpose of the removal of organs” (HTOR), on the other;
- To support the principle of the prohibition of making financial gains with the human body;
- The need for an internationally agreed definition of THO;
- To elaborate an international legal instrument setting out measures to prevent such trafficking as well as to protect and assist the victims and containing criminal law measures to punish the crime.

Following these recommendations, the Committee of Ministers of the CoE mandated a committee of experts on Trafficking in Human Organs, Tissues and Cells,<sup>11</sup> under the authority of the European Committee on Crime Problems (CDPC), to draft a criminal law convention against THO and, if appropriate, an additional protocol to it.<sup>12</sup> In less than one year, the members of this Committee produced a draft convention that was finalised and approved by the CDPC in 2012<sup>13</sup> and adopted by the Committee of Ministers on 9 July 2014. The Convention was opened for signature on 25 March 2015 in Santiago de Compostela, Spain, the city which gives name to the Convention.

## II. The Convention

### 1. General ideas

Given the importance of the legal rights involved, the first binding international legal instrument against THO, the Santiago de Compostela Convention, contains legal provisions of a criminal law nature. It also sets out the offenses committed intentionally that states should introduce into their national legislation. This means that states will be held responsible if

they do not respond adequately to any illicit activity in respect of human organs. Following the principle of legality applied in criminal matters, states parties are required to specify in their domestic law all the offenses provided for in the Convention.

Similar to the THB Convention, the Santiago de Compostela Convention follows the “4 Ps” principle:

- Prevents;
- Prosecutes THO;
- Protects the human rights of the victims;
- Promotes international cooperation on both the national and international levels.

One of the major achievements of this Convention is the definition of THO, as requested by the Joint Study CoE/UN. Without being a *strictu sensu* definition of the crime, it consists of an enumeration of the substantive criminal law provisions setting out the different criminal acts constituting THO<sup>14</sup> (i.e., Art. 4 paragraph 1 and Arts. 5, 7, 8, and 9). The scope of the Santiago de Compostela Convention covers four different areas:

- Trafficking in human organs for purposes of transplantation;
- Trafficking in human organs for other purposes;
- Other forms of illicit removal;
- Other forms of illicit implantation.<sup>15</sup>

It should be recalled that the legal trade in medicinal products, manufactured from human organs or parts of human organs (such as advanced therapy medicinal products), is not covered by the Convention and shall not be restricted by it.

### 2. Punishable acts under the Convention

State parties to the Convention will establish as a criminal offense the following acts:

#### a) The illegal removal of human organs (Art. 4.1)

The situations criminalized under this article cover the removal of human organs:

- Without the *free, informed, and specific consent*<sup>16</sup> of the living or deceased donor (Art. 4.1.a),
- Without *authorization by the domestic law* in the case of the deceased donor (Art: 4.1.a),
- Where a *financial gain or comparable advantage* has been received or offered:
  - To the living donor or a third party in exchange for the removal of organs (Art. 4.1.b);
  - To a third party in exchange for the removal of organs from a deceased donor (Art. 4.1.c).

This means that the removal of any organ from a living or deceased person is illicit when valid consent is absent and/or

when financial gain has been offered or received in exchange for the organ removal. It should be mentioned that the idea of consent to an intervention in the health field comes from Art. 5 of the Oviedo Convention, which should be read in relation with Art. 19.2 of the same Convention, whereby consent must be specific and given in written form or before an official body. This has been further developed in Art. 13 of the Additional Protocol to the Oviedo Convention. Two groups deserve particular attention:

*a) Persons not able to consent:* According to this Convention, organ removal from persons unable to give consent is prohibited, as already stated in Art. 20 of the Oviedo convention and Art. 14 of its Additional Protocol.

*b) Persons deprived of their liberty:* Art. 4 also applies to these persons regardless of whether they are living or deceased.

The expression “financial gain or comparable advantage” does not include compensation for loss of earnings and any other justifiable expenses caused by the removal of an organ or the related medical examinations. It also does not include compensation in case of damage that is not inherent to the removal of organs. It does not apply to any arrangement authorized under domestic law (such as arrangements for paired or pooled donation). This wording is taken from the Additional Protocol to the Oviedo Convention to clearly distinguish the lawful compensation of organ donors in certain cases from the prohibited practice of making financial gains with the human body or its parts. According to the Convention, any removal of organs from living or deceased donors performed outside the domestic transplant system, or violating the essential principles of national transplant legislation, is considered a criminal offense.

#### **b) The use of illicitly removed organs (Art. 5)**

Art. 5 shall apply to any case concerning an organ that has been removed under any of the circumstances described in Art. 4.1 (see above) for purposes of implantation or other purposes (e.g. research).

#### **c) Solicitation, recruitment, and undue advantages (Art. 7)**

With the aim of criminalizing the activities of those persons operating as an interface between/bringing together donors, recipients, and medical staff, the illicit solicitation and recruitment of organ donors and recipients for financial gain (or comparable advantage), either for the person soliciting or recruiting or for a third party, has been criminalized under the Santiago de Compostela Convention. Although advertising is indeed a form of solicitation, the Santiago de Compostela Convention introduces as a preventive measure an explicit obligation for state parties to prohibit the advertising of the need for/availability of human organs, with a view to offering

or seeking financial gain or comparable advantage (Art. 21.3). This measure does not, however, prevent activities to recruit donors authorized under domestic law. In addition, the active and passive corruption of healthcare professionals, public officials, or persons working for private sector entities in the illicit removal<sup>17</sup> or implantation<sup>18</sup> of human organs has also been criminalized.<sup>19</sup>

#### **d) Acts committed following the illicit removal of human organs (Art. 8)**

Under this article, the preparation, preservation, storage, transportation, transfer, receipt, import and export of organs removed under the conditions described in Art. 4.1 and, where appropriate, in Art. 4.4, when committed intentionally, should be understood as criminal offenses. It should be noted that the wording “where appropriate” means that, if a state party considers establishing the offense contained in Art. 4.4 to be a criminal offense, then it should also be included in Art. 8.

#### **e) Aiding or abetting and attempt (Art. 9)**

According to the Santiago de Compostela Convention, all acts aiding or abetting the commission of any of the above criminal offenses as well as any attempt to commit them will be established as offenses.

### **3. Additional elements**

The Santiago de Compostela Convention also introduces additional important elements, such as:

#### **a) Corporate liability (Art. 11)**

Applied to both individuals and corporations, legal persons are, in addition to natural persons, among the perpetrators of these offenses. This being so, commercial companies, associations, and similar legal entities are liable for criminal actions performed on their behalf. Moreover, liability is also possible when someone in a leading position fails to supervise or check on an employee or agent of the entity, thus enabling them to commit any of the offenses established in the Convention for the benefit of the entity. Some measures have been foreseen, e.g., the closure of any establishment, the seizure and confiscation of the proceeds derived from criminal offenses, etc.

#### **b) Aggravating circumstances and previous convictions (Arts. 13, 14)**

Certain circumstances may be taken into consideration in the determination of the sanction, e.g.:

- The death of, or serious damage to the physical or mental health of, the victim;
- The abuse of power;
- An offense committed within the framework of a criminal organization;
- Previous convictions of the perpetrator;
- The victim being a child or any other vulnerable person.

The internalization of crimes and, in particular, the transnational nature of criminal organizations or individual persons when perpetrating THO means that convictions may take place in more than one country. With a view to tackling these offenses, it is important that final sentences passed by one party be taken into account by another. As such, the Convention provides that parties may introduce into their domestic law that previous convictions by foreign courts may be taken into account. This possibility should also include the principle that the offender should not be treated more favourably than he/she would have been treated if the previous conviction had been a national conviction.

#### c) Criminal procedure (Arts. 15–17)

With a view to facilitating prosecution, it is not necessary that a victim file a complaint because public authorities can prosecute offenses *ex officio* (Art. 15). The Santiago de Compostela Convention can be considered the legal basis for judicial cooperation in those cases in which a party to the Convention does not have a treaty with a country requesting extradition to that country (Art. 17). The interest in this provision is high, given that it is possible for third countries to join this Convention.

#### d) Protection measures

The protection of, and assistance to, victims of THO is conceived as a priority for the Santiago de Compostela Convention. Thus, it provides for them to be assisted in their physical, psychological, and social recovery. The term “victim” is not defined in the Convention. The question of whether the organ donor or recipient should be prosecuted is left open. Whereas, in some states these persons could be prosecuted for having participated in, or even instigated, the THO, in other states

they would not be prosecuted because they could be considered “victims.” The right of victims to compensation from the perpetrators and to effective protection from potential retaliation or intimidation for witnesses giving testimony in criminal proceedings are also measures foreseen in the Convention.

#### e) Prevention measures

Measures for preventing THO at both national and international levels are set out in the Convention, e.g., ensuring a transparent domestic system for transplantation; adequate collection, analysis and exchange of information relating to the offenses; capacity building and awareness-raising activities for legal and health professionals; appointing a national contact point for the exchange of information pertaining to trafficking in human organs; etc.

## 4. Conclusions and the way forward

In addition to giving a definition of THO and bringing legal clarity with regard to acts that constitute THO, there are two other issues that can be seen as the added-value elements of this Convention: the situation of victims and international cooperation. As mentioned before, the victims must be protected and granted reparation. A major shortcoming of the current state of international cooperation in law enforcement is its geographical fragmentation: A more coordinated and multi-state approach is needed. Without a proper legal framework, international cooperation is hampered or even impossible from the onset. The more states that become party to CoE instruments, the more the network of legally binding connections expands and increases the possibilities for cooperation. This Convention is a first step that is opening the way towards a concerted approach at the international level, which is needed to fight this scourge. In addition to CoE Member States and observer states, this Convention is open for signature to EU and non-Member States upon invitation by the Committee of Ministers. To date, 16 countries have signed the Convention. In doing so, the international community can work together towards a common goal: to win the fight against transnational criminal groups.

\* The views expressed in this article are purely those of the author and may not under any circumstances be regarded as stating an official position of the Council of Europe.

1 CETS No.: 164

2 Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, CETS No.: 186

3 Resolution (78) 29 on harmonisation of legislations of Member States relating to removal, grafting and transplantation of human substances, Recommendation Rec(2004)7 on organ trafficking, Resolution CM/Res(2008)4 on adult-to-adult

living donor liver transplantation, Resolution CM/Res(2008)6 on transplantation of kidneys from living donors who are not genetically related to the recipient.

4 Recommendation Rec(2004)7 on organ trafficking, Art. 1

5 Ibid. Art.4

6 Directive 2010/45/EU of the European Parliament and of the Council of 7 July 2010. Vid. Directive 2010/53/UE Rectificatif à la directive 2010/45/UE du Parlement européen et du Conseil du 7 juillet 2010 relative aux normes de qualité et de sécurité des organes humains destinés à la transplantation.

7 Ibid. Directive 2010/45/UE, recital §7.



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Co-Secretary of the European Committee on Crime Problems, Council of Europe

8 WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation, as endorsed by the sixty-third World Health Assembly in May 2010, in Resolution WHA63.22, § 4.

9 CETS No.: 197

10 Joint Council of Europe/United Nations study, Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs, Directorate General of Human Rights and Legal Affairs, Council of Europe, 2009.

11 Following the Terms of Reference of this Committee, every Member State was invited to designate one or more representatives with specific expertise in the relevant fields of criminal law, bioethics, and transplantation of organs, tissues, and cells. Moreover, the Parliamentary Assembly of the Council of Europe, the

European Committee on Crime Problems (CDPC), the Committee on Bioethics (DH-BIO), the European Committee on Transplantation of Organs (CD-P-TO), the European Union, states with observer status with the Council of Europe (Canada, Holy See, Japan, Mexico, USA), United Nations Office for Drugs and Crime (UNODC), International Criminal Police Organization (INTERPOL), and the World Health Organization (WHO) could send representatives to the four meetings held (13-16 December 2011, 6-9 March 2012, 26-29 June 2012, 15-19 October 2012).

12 The Committee experts decided not to elaborate an additional protocol on tissues and cells and recommended reviewing this possibility in the future.

13 At its 63rd plenary session on 4-7 December 2012.

14 Art. 2, paragraph 2

15 The expression "other forms of illicit removal and of illicit implantation" refers only to actions covered by Art. 4, paragraph 4 and Art. 6.

16 "Specific" means that the consent must be clearly provided and pertain to the removal of a "specific" organ that is precisely identified.

17 Offences under Art. 4.1 and Art. 5 and, where appropriate, Art. 4.4 (removal performed outside of the framework of the domestic transplantation system or in breach of essential principles of national transplantation laws/rules) of the Santiago de Compostela Convention.

18 Offences under Art. 6 of the Santiago de Compostela Convention (i.e., implantation of organs outside of the domestic transplantation system or in breach of essential principles of national transplantation law).

19 Arts. 4.4 and 6 leave parties a margin to decide on whether to establish the offenses described therein as criminal offenses or not.

## The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism

Kristian Bartholin

United Nations Security Council Resolution 2178 (hereinafter "UNSCR 2178") was adopted by the Security Council acting under Chapter VII of the Charter of the United Nations on 24 September 2014. It aims at stemming the flow of so-called "foreign terrorist fighters" (i.e., individuals who travel to another State than that of their nationality or residence for the purpose of "the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training") to Syria and Iraq to join "ISIL, ANF and other cells, affiliates, splinter groups or derivatives of Al-Qaida."<sup>2</sup>

Given the estimated relatively high number of "foreign terrorist fighters" from Europe,<sup>3</sup> it seemed natural for the Council of Europe to assist the efforts of both the Security Council and its Member States in getting a grip on the problem by providing a clear legal framework for the criminalisation of conduct associated with the phenomenon of foreign terrorist fighters at the pan-European level.

On 22 January 2015, the Committee of Ministers of the Council of Europe, at the suggestion of the Steering Committee

responsible for counter-terrorism measures (CODEXTER), decided to establish an *ad hoc* Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE) tasked with drafting an additional protocol supplementing the Council of Europe Convention on the Prevention of Terrorism from 2005 with a series of provisions criminalising the acts of:

- Being recruited, or attempting to be recruited, for terrorism;
  - Receiving training, or attempting to receive training, for terrorism;
  - Travelling, or attempting to travel, to a state other than the state of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training;
  - Providing or collecting funds for such travels;
- Organising and facilitating (other than "recruitment for terrorism") such travels.

Moreover, the COD-CTE was requested to examine "whether any other act relevant for the purpose of effectively combating the phenomenon of foreign terrorist fighters, in the light of UNSCR 2178, should be included in the draft Additional Protocol."<sup>4</sup>

A draft Additional Protocol was prepared by the COD-CTE from 23 February to 26 March 2015. It was finalised by CODEXTER on 8-10 April 2015 and submitted to the Committee of Ministers for final adoption. On 19 May 2015, the Committee of Ministers of the Council of Europe adopted the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, and on 16 September 2015, the Committee of Ministers decided to open the Protocol for signature in Riga, Latvia, on 22 October 2015. The Additional Protocol is not a “stand-alone instrument,” but *supplements* the Council of Europe Convention on the Prevention of Terrorism (hereinafter “the Convention”). The Convention already contains provisions on national and international measures for the prevention of terrorism, on victims of terrorism, on human rights and rule-of-law safeguards in the fight against terrorism, and on criminalisation of the following acts:

- Public provocation to commit a terrorist offence (Art. 5);
- Recruitment for terrorism (Art. 6);
- Training for terrorism (Art. 7).

The Additional Protocol, containing 14 articles, is consequently focused on the criminalisation of five types of conduct (Arts. 2 to 6) associated with foreign terrorist fighters, as well as the establishment of a mechanism for the exchange of police information concerning foreign terrorist fighters on a 24/7 basis (Art. 7). Given the importance of balancing the need to provide an effective tool for states to prevent and suppress the phenomenon of foreign terrorist fighters with the need to ensure the observance of relevant human rights standards and the principles of rule of law in the application of measures provided for in the Additional Protocol, it was considered pertinent to repeat (and somewhat enlarge) the provision on human rights and rule-of-law safeguards, contained in the Convention, in the Additional Protocol itself (Art. 8).

In the following, the reader will be provided with a brief overview of the main provisions of the Additional Protocol, their relation with the Convention and with UNSCR 2178, and some considerations by the author on the way ahead in international cooperation on the prevention and suppression of terrorism.

## II. Participating in an Association or Group for the Purpose of Terrorism (Art. 2)

1. For the purpose of this Protocol, “participating in an association or group for the purpose of terrorism” means to participate in the activities of an association or group for the purpose of committing or contributing to the commission of one or more terrorist offences by the association or the group.

2. Each Party shall adopt such measures as may be necessary to establish “participating in an association or group for the purpose of terrorism”, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Criminalising the act of “being recruited, or attempting to be recruited, for terrorism” turned out to be much more challenging than originally envisaged. One of the main stumbling blocks for the drafters was the perceived “passivity” of this particular conduct. Would it be enough to consider the crime to have been committed if the perpetrator had been approached by a recruiter and agreed to join? Or would it be necessary for the crime to have been committed that the perpetrator took active steps to be recruited? Finally, would mere inactive membership *eo ipso* be sufficient reason for criminalisation?

In the end, the drafters decided to opt for a different solution, namely criminalisation of the participation in an association or group for the purpose of terrorism – a closely related conduct, which presupposes that “recruitment” (in whatever form) has already taken place. The perpetrator must “participate in the activities of an association or group for the purpose of committing or contributing to the commission of one or more terrorist offences by the association or the group,” thereby ensuring a sufficiently active behaviour on the part of the perpetrator to warrant criminalisation. The perpetrator must furthermore commit the crime “unlawfully and intentionally,” thus excluding, e.g., police agents who infiltrate a terrorist group from the scope of criminalisation, since such agents will be acting “lawfully.” Taking into account that this type of conduct is often several stages removed from the actual commission of a terrorist offence, the drafters decided not to oblige the signatory parties to criminalise attempt.

## III. Receiving Training for Terrorism (Art. 3)

1. For the purpose of this Protocol, “receiving training for terrorism” means to receive instruction, including obtaining knowledge or practical skills, from another person in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence.

2. Each Party shall adopt such measures as may be necessary to establish “receiving training for terrorism”, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Art. 6 of the Convention criminalises the provision of training for terrorism to others. The practical experience of parties to the Convention has, however, demonstrated a need to also criminalise the receiving of training for terrorism at the international level. Furthermore, UNSCR 2178 itself calls for the criminalisation of receiving training for terrorism in the context of defining foreign terrorist fighters’ activities, cf. Operative Paragraph 6 (a).

Art. 3 of the Additional Protocol is intended to meet that demand. It is in many ways a “mirror provision” of Art. 6 of the

Convention with the significant exception that the additional requirement of *mens rea* contained in that provision, namely that the perpetrator must know that the skills provided are intended to be used for terrorism, is not repeated in Art. 3 of the Additional Protocol. This is, however, logical when taking into account that it must be assumed that the person receiving the training must know what the purpose of acquiring the skills is. As in all of the substantive criminal law provisions of the Additional Protocol, the perpetrator must act “unlawfully and intentionally.” In the case of receiving training for terrorism, it is considered to be acting “unlawfully” if the perpetrator carries out otherwise lawful activities, e.g., attending a university course in chemistry or taking flying lessons with a licensed instructor, if it can be demonstrated that the perpetrator had the intent to use the skills acquired to carry out a terrorist offence. Training can be received in person or via the Internet. However, the mere act of visiting websites or otherwise receiving communications, which could potentially be used for training for terrorism, is not sufficient to have committed the offence described in Art. 3 of the Additional Protocol.

As was the case for Art. 2 of the Additional Protocol, the drafters did not consider it necessary to criminalise attempt.

#### IV. Travelling Abroad for the Purpose of Terrorism (Art. 4)

1. For the purpose of this Protocol, “travelling abroad for the purpose of terrorism” means travelling to a State, which is not that of the traveller’s nationality or residence, for the purpose of the commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism.
2. Each Party shall adopt such measures as may be necessary to establish “travelling abroad for the purpose of terrorism”, as defined in paragraph 1, from its territory or by its nationals, when committed unlawfully and intentionally, as a criminal offence under its domestic law. In doing so, each Party may establish conditions required by and in line with its constitutional principles.
3. Each Party shall also adopt such measures as may be necessary to establish as a criminal offence under, and in accordance with, its domestic law the attempt to commit an offence as set forth in this article.

The right to freedom of movement is enshrined in Art. 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, as well as in Art. 12 of the International Covenant on Civil and Political Rights of the United Nations – restricting such basic human rights should only be done as a last resort. Taking into account the seriousness of the threat posed by foreign terrorist fighters to states all over the world, combined with the fact that the aforesaid human rights instruments allow for restrictions to be imposed on the exercise of these rights under certain conditions, *inter alia* for protection of national security, the drafters concluded that, on balance, criminalisation of the act of travel-

ling abroad for the purpose of terrorism is both necessary and warranted. This is one of the key provisions of the Additional Protocol, and its wording closely reflects the content of Operational Paragraph 6 (a) of UNSCR 2178. There are, however, certain differences. Whereas UNSCR 2178 uses the wording “for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training” to describe the unlawful activities of foreign terrorist fighters, the Additional Protocol in Art. 4, paragraph 1, uses the wording “for the purpose of the commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism.” The reason is that the drafters considered the latter wording to be more in line with that used in Council of Europe criminal law instruments in general and the Convention in particular. The drafters did not intend to add to, or subtract from, the meaning contained in UNSCR 2178.

Another – and more significant – difference is found in Art. 4, paragraph 2, *in fine*, which states that, in transposing Art. 4 into their domestic legislation, “each Party may establish conditions required by and in line with its constitutional principles.” This leaves parties under the Additional Protocol with a certain margin of appreciation when criminalising the act of travelling abroad for the purpose of terrorism – a margin which, however narrow in practice, was not foreseen by, or contained in, UNSCR 2178. By providing this leeway, the Additional Protocol facilitates the criminalisation of travel activity related to the phenomenon of foreign terrorist fighters in those legal systems, which, for constitutional reasons, would otherwise face fundamental obstacles in implementing this particular aspect of UNSCR 2178.

It should be noted that the obligation to criminalise such travels in Art. 4 of the Additional Protocol covers travels from a party’s territory, or undertaken by its nationals from the territories of other states, cf. Art. 4, paragraph 2. The drafters also decided that, in line with UNSCR 2178, the attempt to commit the offence of travelling abroad for the purpose of terrorism shall also be criminalised.

#### V. Funding Travelling Abroad for the Purpose of Terrorism (Art. 5)

1. For the purpose of this Protocol, “funding travelling abroad for the purpose of terrorism” means providing or collecting, by any means, directly or indirectly, funds fully or partially enabling any person to travel abroad for the purpose of terrorism, as defined in Article 4, paragraph 1, of this Protocol, knowing that the funds are fully or partially intended to be used for this purpose.
2. Each Party shall adopt such measures as may be necessary to establish the “funding of travelling abroad for the purpose of ter-

rorism”, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

The basis for this provision of the Additional Protocol is found in Operative Paragraph 6 (b) of UNSCR 2178 to which it broadly corresponds. However, it differs in one important aspect: Operative Paragraph 6 (b) only requires that the perpetrator be “in the knowledge” that the funds provided or collected are to be used for travelling abroad for the purpose of terrorism in order to establish *mens rea*. But the wording of Art. 5, paragraph 1, *in fine*, “knowing that the funds are fully or partially intended to be used for this purpose” combined with the requirement contained in paragraph 2 of the provision, that the offence should be committed “unlawfully and intentionally,” effectively limits the obligation for parties to criminalise the act of funding travelling abroad for the purpose of terrorism to situations in which the perpetrator has demonstrated one of the higher degrees of criminal intent.

Concerning the definition of “funds,” reference was made by drafters to the definition contained in Art. 1, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism, and the provision of the Additional Protocol shall be applied without prejudice to Art. 2, paragraph 1, of the aforesaid Convention. The drafters did not consider it necessary to criminalise the attempt to commit the offence described in Art. 4, but it is of course left open to states to decide whether or not to do so.

## VI. Organising or Otherwise Facilitating Travelling Abroad for the Purpose of Terrorism (Art. 6)

1. For the purpose of this Protocol, “organising or otherwise facilitating travelling abroad for the purpose of terrorism” means any act of organisation or facilitation that assists any person in travelling abroad for the purpose of terrorism, as defined in Article 4, paragraph 1, of this Protocol, knowing that the assistance thus rendered is for the purpose of terrorism.

2. Each Party shall adopt such measures as may be necessary to establish “organising or otherwise facilitating travelling abroad for the purpose of terrorism”, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Art. 6 of the Additional Protocol is based on Operative Paragraph 6 (c) of UNSCR 2178. The main differences are the following: Firstly, “acts of recruitment” are not covered by this provision, as this offence has already been criminalised in Art. 6 of the Convention. Secondly, as in the case of Art. 5, the drafters considered it prudent to reserve the obligation for parties to criminalise the act of organising or otherwise facilitating travelling abroad for the purpose of terrorism to those situations in which the perpetrator has demonstrated one of the higher degrees of criminal intent, hence the wording of Art. 6, paragraph 1, *in fine*, “knowing that the assistance thus ren-

dered is for the purpose of terrorism” in combination with the requirement that the offence be committed “unlawfully and intentionally,” cf. Art. 4, paragraph 2. The idea behind this limitation is to avoid obliging parties to criminalise the conduct described in Art. 6 in cases of very low degrees of criminal intent, such as “*dolus eventualis*.” For example, a travel agent may have some vague suspicion that the client to whom he is selling a ticket (thereby in principle “organising” the travelling abroad for the purpose of terrorism) is a foreign terrorist fighter but does not have any explicit knowledge thereof.

The term “facilitation” is used to cover all types of conduct other than those falling under “organisation”, e.g., smuggling a foreign terrorist fighter across a border. As in the case of Art. 5, the drafters did not consider it necessary to criminalise attempt in connection with the act of organising or otherwise facilitating travelling abroad for the purpose of terrorism, but states may choose to do so.

## VII. The Exchange of Information (Art. 7)

1. Without prejudice to Article 3, paragraph 2, sub-paragraph a, of the Convention and in accordance with its domestic law and existing international obligations, each Party shall take such measures as may be necessary in order to strengthen the timely exchange between Parties of any available relevant information concerning persons travelling abroad for the purpose of terrorism, as defined in Article 4. For that purpose, each Party shall designate a point of contact available on a 24-hour, seven-days-a-week basis.

2. A Party may choose to designate an already existing point of contact under paragraph 1.

3. A Party’s point of contact shall have the capacity to carry out communications with the point of contact of another Party on an expedited basis.

This provision of the Additional Protocol is essentially inspired by Operative Paragraph 3 of UNSCR 2178, which calls on states to “intensify and accelerate the exchange of operational information regarding actions and movements of terrorists or terrorist networks, including foreign terrorist fighters, especially with their States of residence or nationality, through bilateral or multilateral mechanisms, in particular the United Nations.”

The purpose of Art. 7 is to facilitate the exchange of police information concerning suspected foreign terrorist fighters through contact points available on a 24/7 basis, thereby enabling states to intercept such individuals before they can join the terrorist groups in question, or at least to trace their travel routes. The mechanism established under Art. 7 can, however, not be used for the sending and receiving of requests for mutual legal assistance in criminal matters or for the extradition of suspects. Neither can it be used for the exchange of intelligence.

### VIII. The Way Ahead

Both the Convention and its Additional Protocol are unique for being the only international legal instruments dealing with the prevention of terrorism, including through criminal law measures. None of the standards contained in these two instruments are, however, especially tailored for application in Europe. It is our hope that they may yet serve as inspiration for regional cooperation on countering terrorism, including the phenomenon of foreign terrorist fighters in other parts of the world.

Criminal law measures against terrorism, such as the Additional Protocol, are important but cannot stand alone. Hence, on 19 May 2015, the Committee of Ministers of the Council of Europe adopted an “Action Plan to combat extremism and radicalisation leading to terrorism (2015–2017).” Initiatives include the elaboration of a recommendation on “terrorists acting alone” – a problem closely related to that of “foreign terrorist fighters” – as well as a series of social and educational measures to counter extremism and radicalisation.

In so far as the legal questions are concerned, the main remaining challenge in the international efforts to combat terrorism efficiently is the lack of an internationally agreed legal defi-

nition of “terrorism.” Neither the Convention nor its Additional Protocol contains such a definition. Instead they refer to other international instruments covering different aspects of terrorism, which do not provide a concise and comprehensive definition. And this state of affairs is by no means specific to the Council of Europe legal instruments in the counter-terrorism field.

The result is an apparent lack of legal precision, which may theoretically pose problems in the application of criminal law. In practice, however, this situation will normally have little effect on the individual, who will be able to predict with a high degree of certainty whether an act would be illegal or not simply by looking at the terrorism definition and related criminal law provisions contained in the applicable domestic legislation. The real challenge concerns international cooperation in criminal matters, e.g., on extradition of suspects between states, which apply different definitions of terrorism and hence cannot cooperate.

Denying terrorists shelter anywhere in the world and bringing them to justice is probably the most efficient way of preventing and suppressing terrorism – not having an internationally agreed legal definition of terrorism is standing in the way of this achievement.

#### Kristian Bartholin

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\* The views expressed in this article are those of the author and do not necessarily reflect the position of the Council of Europe.

1 Cf. UNSCR 2178 (2014) Operative Paragraph 6 (a), *in fine*.

2 Cf. UNSCR 2178 (2014) Operative Paragraph 10.

3 According to the International Centre for the Study of Radicalisation and Political Violence (ICSR), in 2014 approximately 3850 persons or 19 % of the estimated total of “foreign terrorist fighters” present in Syria and Iraq originated in the European Union.

4 Cf. the Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, paragraph 7.

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