

Report on the HERCULE III Project “Criminal law protection of the financial interests of the EU” of the University of Miskolc, Faculty of Law

Report

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I. Introduction – Aim of the HERCULE Project

The project “*Criminal law protection of the financial interests of the EU – Focusing on money laundering, tax fraud, corruption and on criminal compliance in the national legal systems with reference to cybercrime (HUUNIM-ISKOLCPFI)*” was funded by the European Anti-Fraud Office’s (OLAF) HERCULE III programme (2014–2020) under the section “*Legal Training and Studies 2017.*” The project started in January 2018 with the University of Miskolc as the main coordinator and included academics and legal practitioners from six countries (Austria, Germany, Greece, Hungary, Italy, and Romania).

The general objective of the project was to protect the financial interests of the European Union and to prevent and combat fraud, corruption, and other illicit activities affecting the financial interests of the Union. In this context, the project focused on new practical challenges, e.g. cybercrime. Within the framework of this general objective, more specific objectives of the project were:

- Raising awareness among the branches of legal professions involved in the protection of the EU’s financial interests by organizing international conferences, workshops, and trainings;
- Improving cooperation between practitioners and academics;
- Carrying out comparative analyses of the legal regulation and practice of the Member States involved;
- Exchanging information and best practices;
- Using the results in legal education;
- Examining the relationship between countries participating in the EPPO and those not participating and fostering sensitivity in connection with this question.

II. Project Participants

The project was coordinated by the University of Miskolc, Faculty of Law. The Hungarian project team included *Prof. Dr. Ákos Farkas* (university professor, project manager, former dean of the University of Miskolc), *Dr. habil. Judit Jacsó* (associate professor, project coordinator), *Dr. Bence Udvarhelyi* (assistant professor, project coordinator), *Dr. Erika Váradi-Csema* (associate professor, project member) and *dr. László Dornfeld* (PhD student, project member).

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The University of Miskolc had the following cooperation partners: National Office for the Judiciary, Office of the Prosecutor General of Hungary, National Tax and Customs Administration of B-A-Z County, Hungarian Financial Intelligence Unit of the National Tax and Customs Administration and the tax audit advisory Leitner+Leitner Budapest. Experts from the five other Member States also participated in the project, including *Prof. Dr. Gerhard Dannecker* (University of Heidelberg, Germany), *Prof. Dr. Robert Kert* (Vienna University of Economics and Business, Austria), *Prof. Dr. Richard Soyer* (University of Linz, Austria), *Prof. Dr. Maria Kaiafa-Gbandi* (University of Thessaloniki, Greece), *Prof. Dr. Mirisan Valentin* (University of Oradea, Romania), and *Dr. Vincenzo Carbone* (University of the International Studies of Rome, Italy). Judges, public prosecutors, and other academic and legal experts from the six Member States also participated in the project.

III. Main Events

The *opening conference* of the project entitled “*The Criminal Law Protection of the Financial Interests of the European Union Manifestations with Special Issues*” was organized at the University of Miskolc on 23–24 March 2018. Its aim was to spur a practice-oriented discussion of the main questions and various special forms of criminal law protection of the financial interests of the European Union, in particular by presenting the good practices of the Member States. The conference focused on criminal offences that fall under the legal notion of EU fraud in the narrower sense and on horizontal challenges like cybercrime and compliance.

Two workshops followed the opening conference: The first workshop on corruption and money laundering took place on 2-4 July 2018 and was organised by project members of the Vienna University of Economics and Business and the University of Miskolc. The second workshop on VAT fraud was held on 29-31 October 2018 by the Universities of Oradea and Miskolc. The workshops enabled the local (Austrian and Romanian) practitioners to share their experiences.

The *closing event* of the project was the *Winter Academy “Current questions and answers relating to the criminal law protection of the financial interests of the European Union”* from 14–16 February 2019 at the Hungarian Judicial Academy. The event was organized by the Faculty of Law of the University of Miskolc, the Association of Hungarian Lawyers for the European Criminal Law, the Research Centre for European Criminal Law of the Faculty of Law of the University of Miskolc and the National Office for the Judiciary of Hungary.

IV. HERCULE Winter Academy Lectures

The Winter Academy was opened by *Dr. András Osztoivits*, Director of the Hungarian Judicial Academy; *Dr. Tünde Handó*, President of the National Office for the Judiciary; and *Prof. Dr. Ákos Farkas*, project manager and former dean of the University of Miskolc, Faculty of Law.

The lectures in the *first section* – chaired by *Prof. Dr. Gerhard Dannecker* (University of Heidelberg) – presented the most important theoretical and practical questions in connection with the collection and assessment of evidence in the light of procedural guarantees and the practice of the Court of Justice of the European Union.

Prof. Dr. Ákos Farkas (University of Miskolc) outlined differences in the regulation of evidence collection and assessment in the Member States and the main problems caused by this situation. Some problems still have not been solved, despite the efforts of the European Union in this regard. One possible solution could be to extend the principle of mutual recognition to the collection of evidence; however, this has not yet been successful, because the Member States tend to protect their national sovereignty. Prof. Farkas concluded that automatic recognition of the evidence obtained in another Member State is a deadlock; the adoption of common minimum standards is required instead. He added that it would be too slow and time-consuming to decide on the admissibility of evidence in each individual case and that this process could be significantly

accelerated by common minimum standards, even if they could not be applied everywhere (for example in connection with experts).

Prof. Dr. Anne Schneider (University of Mannheim) talked about constitutional issues in conjunction with the collection of evidence, focusing on the “hidden” effects of EU law. She argued that decisions by the European Court of Justice in the field of competition law have a hidden, unintentional impact on fundamental rights. In connection with the 2015 *Taricco* case, she pointed out that requiring an effective sanction is contrary to the system of procedural guarantees, which could result in more preliminary rulings in the future.

Dr. Vanessa Seibel (public prosecutor, Public Prosecutor’s Office of Mannheim) dealt with the consequences of the inadmissibility of evidence and demonstrated how the strictness of the admissibility tests has changed in certain Member States over the years. The major problem in the system is the lack of clear rules; however, this can also be beneficial, since the lack could give the authorities involved more leeway. There is currently no specific test for when the acquisition of evidence has violated fundamental rights, which poses a serious problem in practice. In her view, the ideal solution could be to use the EU rules on fair trial as a benchmark.

Dr. Oliver Landwehr (Senior Legal and Policy Officer, European Commission, OLAF) analysed the changing role of OLAF in investigations. OLAF is a “hybrid” organisation that conducts administrative investigations in criminal matters without criminal enforcement power, since it can only make recommendations. The legal status of the organization is evolving, for example in connection with the collection and admission of evidence, because there are currently no administrative procedures in many Member States according to which the evidence gathered could be taken into consideration. In the future, criminal investigations will be conducted by the European Public Prosecutor’s Office (EPPO). Lastly, he presented a proposal of the Commission on the division of competences and cooperation between OLAF and the EPPO, according to which the two organizations cannot investigate the same case but can assist each other.

Dr. Gábor Gál (Member of the Competition Commission, Hungarian Competition Authority) addressed European competition law. He presented the different types of cartels using examples and the responses of EU law, e.g., the European Competition Network, which allows cooperation between the authorities of the Member States and the EU. He mentioned methods to increase efficiency in the fight against cartels, e.g., the regulation on whistleblowers in Hungary, according to which informants receive a sum of money equivalent to 1% of the fines imposed. *Prof. Dr. Gerhard Dannecker* commented that good practices and procedures in the field of cartel law can serve as a model for future cooperation between the EPPO and Member States.

Dr. János Bóka (State Secretary responsible for EU and international judicial cooperation, Ministry of Justice, Hungary) welcomed the participants on the second day of the Winter Academy. In the *second section* – also chaired by *Prof. Dr. Gerhard Dannecker* – lectures focused on implementation of Directive (EU) 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law (PIF Directive). *Dr. Franz Reger* (Former Head of the Department of Fiscal Penal Law, Ministry of Finance, Austria), emphasized the need for proper implementation of the PIF Directive in connection with VAT fraud. The fight against VAT fraud is in the interest of the Member States. It is an important development that the scope of the PIF Directive covers VAT fraud. This provision is also in line with the objective of the EPPO, which focuses on the cross-border commission of crimes. He further addressed the criminalization of filing a proper tax return, which may seem problematic, but may be justified if the intention is to avoid paying tax in the case of a missing trader.

Kai Sackreuther (public prosecutor, Public Prosecutor’s Office of Mannheim) tackled the issuing of bogus invoices. He stated that nowadays there is no carousel fraud without the use of bogus invoices and underlined the role of fictitious companies issuing bogus invoices, which contribute to the current system of tax

fraud. In cases involving criminal organisations, this method is used as a means to conceal bribery fees and to pay illegal workers. The fictitious companies often change their headquarters and stay undetected for years because of more lenient regulation for small businesses. In Germany, this means that more prosecutors have to be often involved in a case.

Prof. Dr. Robert Kert (Vienna University of Economics and Business) focused on the provisions of the PIF Directive and the new EU Directive 2018/1673 on combating money laundering by criminal law. One of the most important differences between the instruments is that the latter includes self-laundering as an offense. In this context, it may be problematic for Member States to decide whether tax savings could be the subject of money laundering. Prof. Kert pointed out that personal savings cannot be considered in the same way; it would violate the principle of proportionality if all tax evasions were to be considered money laundering. Prof. Dr. Gerhard Dannecker commented that, under German law, the entire amount could be confiscated if 10% of the assets in an account are considered “dirty;” however, this regulation is considered to be too strict and will be changed.

Prof. Dr. Maria Kaiafa-Gbandi (University of Thessaloniki) presented the CJEU's decisions in *Hans Åkerberg Fransson*, *Menci* and *Taricco I/II*. She specified the importance of these judgements for Member States' judiciaries, which serve the proper administration of justice in an institutionally multilevel and highly sensitive judicial area. By comparing the judgements in *Hans Åkerberg Fransson* and *Menci* (with regard to the enforcement of the *ne bis in idem* principle between administrative and criminal sanctions), she concluded that the Court pulled back from its initial stance in *Menci* and favored the protection of EU's financial interests. The *Taricco I* judgment may have unforeseeable consequences if the limitation period does not apply due to the requirement of effective protection of the EU's financial interests, but the Court rightly modified its decision in *Taricco II*. An overview of her presentation offered guidance to national judges as to an effective protection of fundamental rights in their national laws, but also raised awareness of the importance of vigilance in future activities in this direction in collaboration with the competent bodies of the EU legal order.

The *third section* – chaired by *Prof. Dr. Richard Soyer* (University of Linz) – focused on the theoretical and practical issues surrounding the protection of the financial interests of the European Union. *Dr. János Homonnai* (public prosecutor, Office of the Prosecutor General of Hungary) analysed the fight against corruption from the point of view of the prosecutors. After briefly describing the Hungarian rules of bribery, he turned to the problems of investigation. In this context, he highlighted the consensual nature of the criminal offence, the lack of direct evidence, and the importance of collecting and scrutinizing indirect evidence, subsequently presenting the “hidden” investigative measures. In conclusion, he proposed exemption of the co-operating defendant from criminal liability, augmentation of the protection of whistleblowers, and easier availability of electronic and financial data.

Dr. Judit Szabó (judge, Tribunal of the Capital) and *Dr. Péter Pfeifer* (judge, Tribunal of Veszprém) discussed the topic of money laundering and corruption in judicial practice. After presenting statistical data on corruption, international surveys, and the importance of latency, Dr. Pfeifer explained the relevant domestic regulations and recounted some of the recent decisions of the Hungarian Curia. For example, according to the judicial practice of the Hungarian Curia, passive corruption is committed in every case in which the perpetrator accepts money. Active corruption can only be punished if the bribed person expressed the intent to exert influence during his/her term of office. Dr. Szabó briefly described the Hungarian regulation on money laundering and the relationship between bribery and money laundering. She presented the recommendations of MONEYVAL 2016 on Hungary and their legal transposition. She also gave statistics on improvements in both the number of cases and the length of procedures. Her presentation was rounded off by exploring problematic questions in judicial practice concerning legal regulations like the question of value limits and the legal definition of “asset” and “account money.”

The *fourth section* was dedicated to the establishment of the European Public Prosecutor's Office. It was chaired by *Prof. Dr. Erika Róth* (University of Miskolc).

Prof. Dr. Péter Polt (Prosecutor General of Hungary) presented the process of establishment of the EPPO, including its development and major changes in the draft regulation over time. According to Polt, the regulation does not achieve its most important objective, i.e., the unified fight against criminal offences threatening the EU's financial interests. The difference between minimum and maximum penalties raises the possibility of forum shopping. He also believes that the current college model, in which prosecutors are members of both national and European organizations, seriously undermines the sovereignty of the Member States. Instead of this model, a network model should have been established, because it has already been proven to be an effective, less bureaucratic alternative in many cases. From his point of view, it would not harm national sovereignty if the EPPO were to act as a private prosecutor, based on the fact that the European Union can be considered a the victim of the crimes in question – an issue which would, however, require further legislation. He also clarified the need for an agreement between the non-participating Member States and the EPPO so that the system can work well in the future.

Prof. Dr. Valentin Mirisan (Dean, University of Oradea) and *Dr. Christian Mihes* (University of Oradea) analysed the most important steps leading to the establishment of the EPPO, its purpose, and the regulations governing the functioning of this new body. They explained the reasons why they consider its establishment an important step forward. They also discussed the position of Romania, which was the only Member State in which the opinion on respect for subsidiarity differed between the two chambers of the Parliament: whereas the lower house rejected it (and hence also the creation of the EPPO), the Senate took the opposite stance.

Dr. Stefan Schumann (University of Linz) probed the issue of the EPPO's competences in the light of the general division of competences between the European Union and the Member States. In his opinion, the determination of the scope of the EPPO is too vague. If the EPPO proves to be successful, however, its scope can be extended to additional crimes. He analysed the jurisdictional conflict of the applicable laws of Member States, forum shopping and the role of the EU law, including the practice of the ECJ and the statutes of the Charter of Fundamental Rights of the EU. He drew attention to the fact that, if these latter were the basis for cooperation, it would be necessary to include rules on guarantees beyond the minimum standards set by the EU. However, if the Member States' regulations are adjusted to the minimum, this could result in the erosion of the procedural guarantees.

V. Résumé

On the last day of the Winter Academy, participants also discussed the results of the conference. The organizers presented the final document, which contained conclusions on the various topics discussed during the above-mentioned main events.

In sum, approximately 100 Winter Academy participants attended highly informative professional lectures, which were accompanied by a lively professional discourse. The closing conference made the complexity of the topics readily apparent. Legal experts with a theoretical approach, on the one hand, and those with a practice-oriented approach, on the other, exchanged their views on the various issues brought forth during the event. The organizers feel that the HERCULE Winter Academy achieved its goal and provided an opportunity for a theoretical and practice-oriented review of a wide range of professional issues. It also served to build collegial relationships and foster informal exchanges of information.

The written and edited versions of the presentations of the HERCULE project were published in a collective volume in English and Hungarian. The volume "Criminal Law Aspects of the Protection of the Financial

Interest of the European Union with particular emphasis on the national legislation on money laundering, tax fraud, corruption and criminal compliance with reference to cybercrime” was published by Wolters Kluwer (2019). The publication can be useful both for domestic and foreign lawyers (academics and legal practitioners alike). It can also be consulted for legal training.

More information about the activities, results, and conclusions of the project as well as the lectures and articles from the international conferences and workshops can be found on the project website: <https://hercule.uni-miskolc.hu/EN>

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