PROCEEDINGS OF THE SEMINAR

The Significance of EU Criminal Law in the 21st Century: The Need for Further Harmonisation or New Criminal Policy?

(SHORT PAPERS)

28-29th January, 2021 Vilnius University Faculty of Law

Virtual seminar

Faculty of Law

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European Criminal Law Academic Network

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VILNIAUS UNIVERSITETO LEIDYKLA

2021

INFORMATION ABOUT THE SEMINAR
Platform: Virtual Seminar
Date: 28-29 January 2021

SCIENTIFIC COMMITTEE OF THE CONFERENCE
Prof. dr. Anne Weyembergh *(Université Libre de Bruxelles)*
Prof. dr. Katalin Ligeti *(University of Luxembourg)*
Prof. dr. Sabine Gless *(University of Basel)*
Prof. dr. Pedro Caeiro *(University of Coimbra)*
Prof. dr. Robert Kert *(Vienna University)*
Prof. dr. Valsamis Mitsilegas *(Queen Mary University of London)*
Prof. habil. dr. Gintaras Švedas *(Vilnius University)*

All submitted short papers have been reviewed.

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Foreword by the Dean

Vilnius University Faculty of Law

Vilnius University Faculty of Law was honoured to host the 9th European Criminal Law Academic Network (ECLAN) PhD Seminar on European Criminal Justice "*The Significance of EU Criminal Law in the 21st Century: The Need for Further Harmonisation or New Criminal Policy?*" on 28-29 January 2021. This was the first time the ECLAN seminar was organised in Lithuania, which in the midst of the global pandemic was made possible (virtually) with the joint effort of the ECLAN and the members of Criminal Department of the Faculty of Law.

The Seminar provided aspiring scholars with an invaluable opportunity not only to share their research in various topics, inter alia, the rule of law, cross-border legal cooperation in criminal matters, mutual recognition instruments and institutional framework, the impact of Brexit on EU criminal law and future cooperation with the UK, issues related to EU substantive criminal law, recent trends in the case law of the Court of Justice, and rights of defendants and victims in criminal proceedings, but also to receive feedback from recognised legal minds who moderated the panels of the event members (Prof. dr. Anne Weyembergh (*L'Institut d'études européennes de l'Université libre de Bruxelles*), Prof. dr. Katalin Ligeti (*Université du Luxembourg*), Prof. dr. Sabine Gless (*Universität Basel*), Prof. dr. Pedro Caeiro (*Universidade de Coimbra*), Prof. dr. Robert Kert (*Universität Wien*), Prof. Valsamis Mitsilegas (*Queen Mary University of London*), Prof. habil. dr. Gintaras Švedas (*Vilniaus universitetas*)). Moreover, the participants of the Seminar had a unique opportunity to attend a guest lecture given by Prof. Valsamis Mitsilegas (*Queen Mary University of London*) on the topic: "*Brexit and Legal Cooperation with the UK*".

Therefore, this year, it was decided to finalise the event with a publication of short papers on the findings of the participants' original research. Thus, the reader is presented with this relatively brief publication of the collection of the peer reviewed short papers on the topic of the future of the EU criminal law. Hopefully, this edition of short papers will be a perfect way to deepen knowledge in the subtle matter of many EU criminal law's modern aspects and will be helpful for students, scholars and practitioners.

Prof. dr. *Tomas Davulis*, L.L.M.

Seminar Programme

Eclan
European Criminal Law Academic Network

ECLAN PhD Seminar 2021

The Significance of EU Criminal Law in the 21st Century: The Need for Further Harmonisation or New Criminal Policy?

Vilnius University Faculty of Law
Online on MS Teams
28–29 January, 2021

Vilnius University

Thursday, 28 January 2021

10.00-10.15	**Opening remarks** *Dean Prof. dr. Tomas Davulis (Vilnius University)* *Prof. dr. Anne Weyembergh (Université Libre de Bruxelles, ECLAN)*

1st Panel: EU substantive criminal law and its national implementation
Moderators: *Prof. dr. Anne Weyembergh (Université Libre de Bruxelles)*
Prof. habil. dr. Gintaras Švedas (Vilnius University)

10.15-10.45	**Two Steps Forwards, One Step Back With the Harmonisation of Substantive Criminal Law: the Environmental Crime Directive** *Ieva Marija Ragaišytė (Vilnius University)*
10.45-11.15	**The Impact of European Union Law on the Distinction Between Tax Evasion and Fraud in the Criminal Code of the Republic of Lithuania** *Martynas Dobrovolskis (Vilnius University)*
11.15-11.45	**Is there the Need for Further Harmonisation on Corruption Offences in the European Union?** *Laura Mickevičiūtė (Vilnius University)*
11.45-12.15	**Principle of Efficiency in EU Criminal Law** *Rasa Volungevičienė (Vytautas Magnum University)*
12.15-13.00	***Lunch break***

2nd Panel: Combating organised crime and the EPPO
Moderators: *Prof. dr. Katalin Ligeti (University of Luxembourg)*
Prof. dr. Sabine Gless (University of Basel)

13.00-13.30	**A Network Perspective on the Law of Organised Crime: A Case Study of England and Wales** *Santiago Wortman Jofre (Queen Mary University of London)*
13.30-14.00	**European Investigation Order as an Instrument for The Fight Against Organised Crime** *Serena Cacciatore (University of Burgos and the University of Palermo)*
14.00-14.30	**EPPO** *Dimitris Nomikos (Democritus University of Thrace Greece)*
14.30-15.00	***Coffee break***
15.00-15.30	**Defence in Cross-Border Investigations of the EPPO** *Merve Yolaçan (University of Freiburg)*
15.30-16.00	**European Investigation Order Directive: What About Defence Rights?** *Chloé Fauchon (University of Strasbourg and University of Salamanca)*

16.00-16.30 **The Independence of Prosecutors and the Rule of Law**
Simone Rivabella (University of Luxembourg)

16.30-17.00 ***Guest lecture.*** *Brexit and legal cooperation with the UK.*
Prof. dr. Valsamis Mitislegas (Queen Mary University of London)

Friday, 29 January 2021

3rd Panel: Criminal policy and human rights
Moderators: *Prof. dr. Pedro Caeiro (University of Coimbra)*
Prof. habil. dr. Gintaras Švedas (Vilnius University)

10.00-10.30 **Human Smuggling, Penal Populism and the Rule of Law: Lessons from Italy**
Marta Minetti (Queen Mary University of London)

10.30-11.00 **Criminal Law & Populism - Is There a Place for Human Rights?**
Pavlo Demchuk (Ivan Franko National University of Lviv)

11.00-11.30 **Reshaping Plea Bargaining in European Criminal Justice**
Simona Garbatavičiūtė (Ljubljana University)

11.30-12.00 **The Right to Legal Assistance in Criminal Proceedings**
Oaskars Kulmanis (University of Latvia)

12.00-12.45 ***Lunch break***

4th Panel: Cooperation in criminal matters and other legal instruments
Moderators: *Prof. dr. Robert Kert (Vienna University)*
Prof. Valsamis Mitsilegas (Queen Mary University of London)

13.00-13.30 **Civil Asset Confiscation Law – New Criminal Policy or Restrictions out bounding Criminal Procedure?**
Laura Martinaitytė (Vilnius University)

13.30-14.00 **Bail as Social phenomena's Applicability in Legal Liability Forms**
Justinas Bagdžius (Vilnius University)

14.00-14.30 **Assessment of Social Rehabilitation as the Main Purpose of Framework Decision 2008/909/JHA on the Transfer of Prisoners in the Light of the Lithuanian Experience**
Ugnė Markevičiūtė (Vilnius University)

14.30-15.00 **Closing remarks**
Prof. dr. Valsamis Mitislegas (Queen Mary University of London)
Prof.dr. Anne Weyembergh (Université Libre de Bruxelles, ECLAN)

Vilnius University

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Two Steps Forward, One Step Back with the Harmonisation of Substantive Criminal Law: The Environmental Crime Directive

Ieva Marija Ragaišytė[1]

Keywords: environmental crime, approximation of criminal law, *corpus delicti*.

In 2008, the European Parliament and the Council adopted Directive 2008/99/EC on the protection of the environment through criminal law (hereinafter, the ECD), which not only provided minimum definitions on environmental offences but also was the first of its kind – the first directive to be adopted in the field of the EU criminal law. Being pre-Lisbon creation, the ECD was somewhat limited but progressive, nonetheless.

Recently, a finalised European Commission Evaluation on the ECD[2] (hereinafter, the Evaluation) identified that the Directive contributed to combating cross-border environmental crime, thus having added value beyond the national level (European Commission, 2020, p. 2). Nonetheless, the ECD did not fully meet its objectives due to the lack of coherence mainly through outdated and incomplete annexes (See: European Commission, 2020).

Interestingly enough, the Evaluation did not analyse or dispute the legal framework under which the ECD was established, "accepted" the legal framework under TFEU 83(2), yet continued to label environmental crimes as particularly serious, emphasizing the need to combat and improve certain areas of regulations.

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2 The European Commission conducted evaluation on the ECD with the purpose to establish the relevance, effectiveness and efficiency on the EU rules on environmental crime. The Evaluation was published on the 5th of November 2020.

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These improvements would not be a topic 12 years after the adoption of the ECD if the Lisbon Treaty had set the legal framework of the ECD under Art. 83(1) and the legislator had followed the example of the Convention on the Protection of the Environment through Criminal Law. Establishing an environmental crime area under serious (Euro) crime could have: brought public awareness a decade ago as well as imposed a certain obligation for prioritisation for all Member States (during the 2019 survey some Member States informed that there is no high need to combat these crimes); widened the scope of the ECD and would not have bound the scope of the annexes (which not only get outdated but also are bound to be amended, changed and loose relevance in time); enabled a wider institutional approach and required the gathering of statistical data (which to this day contributed to the lack of reliability and validity of scientific data).

Whereas the implementation of the toolbox approach could have strongly contributed to: 1) coherence (through wider scope of legal remedies in order to combat the same criminal phenomenon); 2) clearer definitions, *corpus delicti* and the need for criminalisation; 3) differentiation of liabilities (administrative, civil and criminal); 4) compliance with the fundamental criminal law principles (first and foremost principle of *ultima ratio*).

The current regulation provides reason to question whether minimum definitions established in the ECD comply with the criteria for serious crime under the TFEU 83(1). Art. 83(1) describes serious crime as particularly dangerous crime, transboundary in nature or damages and as a crime which rises need to combat it on common basis.

In theory, all environmental crime areas (wildlife and forest crimes, pollution, waste crimes, *etc*.) comply with the standards established in the TFEU. Most (if not all) environmental offences satisfy the element of dangerousness through the impact to human and the environment (serious injury or serious damage), *e.g*., killing of highly endangered species might cause the extinction of certain species, while illegal or even negligent handling of ionising materials can cause lasting degradation of human well-being and the environment.

Cross-border nature of these crimes presents itself through the act or omission (*e.g.,* shipment, smuggling, trafficking, *etc*.) and / or through consequences (when negative effects of the illegal conduct cross the border of one stay), *e.g.,* pollutants spilled into a river get carried to a neighbouring country; ille-

gally killed endangered specimens are native to several countries and migrate between them.

While the global pandemic of 2020 emphasised the need to combat these crimes,[3] the aforementioned necessity arises from the impact of this crime area on human life and health, and the environment, as well as the potential to spread negative effects or be conducted in several countries. Moreover, this necessity stems from the interconnection of environmental crimes with other serious crime areas as organised crime, money laundering, corruption and even terrorism.

It is important to highlight that, in respect to *ultima ratio* principle, every serious environmental offence must have its counterpart as a less serious and / or administrative offence. This differentiation leads to the strong need for implementation of a toolbox in the ECD.

However, do all environmental offences, their minimum requirements, established under the ECD comply with the requirement of serious crime?

Most of the offences under Art. 3 of the ECD comply with the requirement of dangerousness through the utilised object (*i.e.*, ionising substances, hazardous waste *etc.*) and serious consequences, *i.e.,* offences established in para. "a" to "b", and from "d" to "h".[4] These criminal offences are constructed to display the dangerousness of certain substances, *i.e.,* ionizing radiation, nuclear materials, waste, other dangerous substances. On the other hand, the

3 Although, it is not clear yet from which animal species SARS-CoV-2 originated it is a zoonotic virus. Thus, the global pandemic highlights the need to regulate human activity and to prevent crime which can contribute to the spread of such virus. This brings to thoughts on legitimacy of human involvement in the remaining ecosystems, consequences of our activities on the environment in general as well as global warming. Several facts lead to this question: a) zoonotic diseases are caused by human-animal interaction which would not occur on normal circumstances, i. e. a person in living in Lithuania would not have direct contact with pangolin or its parts; b) human activity strongly negatively impacts ecosystems through (il)legal activities, e. g. timbering, contributing to animal to human interaction, as well as animal to animal interaction increasing the risks of spread and mutation of zoonotic viruses.

4 Offences established under Art. 3 para. "d" and "h" could be questioned regarding their dangerousness, however, consequences foreseen by these illegal conducts as well as the impact (which in the case of the complete destruction of the habitat or illegal operation of nuclear power plant would be long-lasting) prompts to establish the compliance with the *ultima ratio* requirement.

construction of offences requiring consequences and describing them (death or serious injury to any person or substantial damage to environmental elements) leads to the conclusion that the offence complies with the *ultima ratio* principle through a carefully measured impact and can be identified as highly dangerous to various legal values.

Moreover, most of the offences established under Art. 3, such as the discharge, emission or introduction of a quantity of materials or ionising radiation ("a"); the collection, transport, recovery or disposal of waste ("b"); the operation of a plant in which a dangerous activity is carried out ("d"); the production and other use of nuclear materials or other hazardous radioactive substances ("e"); offences related to the protected fauna and flora species ("f" and "g") and any conduct which cause a significant deterioration of a habitat within a protected site("h") can be transboundary in its nature (*e.g.,* trafficking, shipping) or have a negative criminal transboundary effect, thus, satisfying the criteria of the need to combat them on a common basis under the TFEU 83(1).

From the look of it, the mentioned offences observe the serious crime criteria under the TFEU 83(1), even though all of them are considered criminal if conducted unlawfully.

Nonetheless, two of the offences and the way they are constructed within Art. 3 of the ECD raise doubts not only as a serious crime, but as a criminal offence in general. These are the illegal waste shipment (Art. 3, "c") and illegal production, importation, exportation, placing on the market or use of ozone depleting substances (hereinafter, illegal use) (Art. 3, "i").

First of all, these offences do not comply with the standard of dangerousness. The preconditional obligation to comply with the underlying regulation, especially in case of illegal waste shipment, results in a negative legislative practice where any deviation from the underlying regulations (mostly administrative regulation) results in unlawfulness[5] rendering the conduct "legible"

[5] In the case *SC Total Waste Recycling SRL v Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség* the ECJ deemed that waste shipment in the country of transit at a different border crossing point than that stated in the necessary documentation constituted 'illegal' because it was executed 'in a way which is not specified materially in the notification', within the Art. 2(35) d of the Regulation (EC) No 1013/2006 (ECJ, C-487/14, para. 37; ECLI:EU:C: 2015:780). Following the rationale of this case, even the slightest (from the perspective of criminal law) incompliance with the underlying

for criminal liability. Therefore, the conduct itself does not have to be dangerous in itself, just illegal, to constitute a criminal offence.

Moreover, preconditioning on the underlying regulation (which, as mentioned above, is currently one of the main critique points) destabilises criminal legislation and hinders application of criminal legal rules. Not only the underlying regulations are prone to change, to be amended, but it also has the influence to change the *modus operandi* of a criminal offence, thus questioning the compliance with the *nullum crimen sine lege* and *lex certa*.

Both illegal waste shipment and illegal use of ozone depleting substances lack in consequences which leads to incompliance with *the ultima ratio* principle as it is not only clear what impact this criminal offence has, but also to what legal values can a harm be done. Certainly, one can understand that these criminal offences might result in serious injury, substantial damage, even the destabilisation of economics (through illegal introduction to market), yet the act itself does not undoubtedly condition possible consequences or harm (as could have been presumed with illegal use of nuclear material). Furthermore, this incomplete criminalisation impedes rational and proportional implementation of the ECD in national legislations, resulting in criminalisation differences. In short, the EU legislator cannot reach the wanted harmonisation results.

Does this mean that offences in the Art. 3 "c" and "i" should be decriminalised? Not necessarily. The reason for the criminalisation of illegal waste shipment or illegal use of ozone depleting substances is not irrelevant *per se*. However, it is important to have a clear differentiation between serious environmental offences and other environmental offences which could be criminal and administrative alike. These offences should be criminalised in different articles following the example of the 1998 Convention. Introduction of such a distinction would contribute to the clearer harmonisation goal, acceptance of certain environmental offences as "highly" serious (equal to serious crime areas under the TFEU 83(1), as well as reduce reliance on administrative legislation and provide some level of differentiation of liabilities.

regulation (in the case of waste shipment – Art. 2(35) of Regulation No 2013/2006) constitutes *corpus delicti* element – unlawfulness. Therefore, cases where large amount of waste is shipped with deviation from the formal requirement (than those stated in the documentation) are sufficient for criminal liability, as the dangerousness and the impact of the offence are derived from the compliance with environmental regulations (protection of the policy).

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About author

Ieva Marija Ragaišytė is a PhD Student and Junior Assistant at the Department of Criminal Justice, Faculty of Law, Vilnius University. Her main areas of scientific interest and research include environmental crime, substantial criminal law, EU and national criminal law.

The Impact of European Union Law on the Distinction Between Tax Evasion and Fraud in the Criminal Code of the Republic of Lithuania

Martynas Dobrovolskis[1]

Keywords: crimes against the financial system, composition of the criminal offence, *nullum crimen sine lege*.

Article 2(1) of the Criminal Code of the Republic of Lithuania (hereinafter, CC) defines the principal of *nullum crimen sine lege* as an imperative that prohibits the prosecution of a person if his or her actions do not correspond to the composition of the criminal offence or misdemeanour provided for in the criminal law. One of the requirements of criminal law arising from this principle is that the elements of the offence and the formal elements of it should be expressed in the criminal law as clearly as possible, with the aim of properly assessing person's actions in classifying criminal offences (the principle of *nullum crimen, sine lege certa*) (Švedas, 2006, p. 81).

Such an interpretation of this principle is also enshrined in the case law of the Constitutional Court of the Republic of Lithuania. As stated in the ruling of the Constitutional Court of the Republic of Lithuania no. 7/03-41/03-40/04-46/04-5/05-7/05-17/05, legal regulation established in legal acts must be clear, understandable, non-contradictory, wording of legal acts must be accurate, the internal coherence of the legal system must be ensured, the legal acts must not contain provisions that simultaneously regulate the same public relations in a different way; the law cannot require the impossible; infringements for which liability is established by law must be clearly defined. However, with the ever-increasing amount of criminalised socially unacceptable behaviours that

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leads to almost casuistic creation of a specific criminal law norm for each of the undesirable behaviours in question, a difficulty of delimiting certain criminal offences in practice arises. One of the main reasons for such an intensive criminalisation could also be linked to the transposition of European Union law into national law.

At present, as many as 33 pieces of the European Union legislation (Framework decisions and Directives) have been transposed into national law through the CC and a handful still awaits transposition. In this context, it should be noted that the European Union legislation harmonised by all 27 countries often uses specific legal techniques to construct criminal offences, which often leads to compatibility problems that are not addressed by a systematic assessment of the criminal law system but by *ad hoc* creation of new criminal offences. This creates preconditions for enshrining in the criminal law legal norms that are similar in nature, which establish different limits of criminal liability for acts of a substantially similar nature.

One of such problems, in the author's opinion, is the problem of delimitation of property and tax offences (in this case – fraud (swindling) established in Article 182[2] of the CC and provision of inaccurate data on income, profit or assets established in Article 220[3] of the CC), which still remains relevant to both criminal law science and for practitioners of qualification of criminal acts (lawyers, prosecutors, pre-trial investigation institutions).

Taking this into account, the aim of this research is to distinguish the features of the delimitation of fraud (swindling) established in Article 182 of the CC from the provision of inaccurate data on income, profit or assets offence

[2] Article 182. Swindling
1. A person who, by deceit, acquires another's property for own benefit or for the benefit of other persons or acquires a property right, avoids a property obligation or annuls it shall be punished by community service or by a fine or by restriction of liberty or by arrest or by a custodial sentence for a term of up to three years. <...>

[3] Article 220. Provision of Inaccurate Data on Income, Profit or Assets
1. A person who, seeking to evade the payment of taxes the amount whereof exceeds 100 MSLs, provides data on the person's income, profit, assets or the use thereof that are known to be inaccurate in a tax return or in a report approved in accordance with 76 the specified procedure or in another document and submits such data to an institution authorised by the State shall be punished by a fine or by a custodial sentence for a term of up to four years. <…>

established in Article 220 of the CC and to assess their validity in the context of the Lithuanian and European Union legislation. To achieve this goal, the article analyses the features of criminal offences enshrined in Articles 182 and 220 of the CC, the constructions of criminal offences and their influence on the qualification of these criminal offences, compares the features of the composition of the offences in question with those set out in Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (hereinafter - Directive (EU) 2017/1371).

The following scientific research methods were mainly used in the work: 1) linguistic (in interpreting the meaning of the terms used in the composition of criminal offences established in Articles 182 and 220 of the CC); 2) systemic (in assessing the place of the criminal offences in question in the CC system); 3) comparative (identification of similarities and differences in the features of the composition of the criminal offences in question); 5. Document analysis (assessment of the most relevant case law of the Constitutional Court of the Republic of Lithuania).

The object of a criminal act embedded in Article 220 of the CC is the state financial system, the object of the crime provided for in Article 182 of the CC is property and property rights, which is to be considered an integral part of the state financial system. Although O. Fedosiukas notes that in criminal law, there is no fundamental distinction between financial and property crimes, they are set out in different sections of the CC. An encroachment on the public finance system is in no way contrary to the concept of property crime, so in criminal law, the application of property and financial crime rules under the rule of ideal coincidence is commonplace (Fedosiukas, 2010, p. 173). Having that in mind, it is acceptable that the assessed objects of criminal offences are not contradictory to each other but they should not be harmonised, as property is only one of the components of the public financial system. It should be noted that one criminal offence may encroach on both property and public finances (e.g. by falsifying a VAT return, which unreasonably reduces the amount of VAT payable to a person), in the presence of conditional competition for goods protected by criminal law, the public finance system should dominate.

It must therefore be concluded that one of the main characteristics which distinguishes the offences in question is the subject - matter. If it is established that a person's actions have directly encroached on the public financial system,

it should be qualified as a relevant crime against the public financial system. Property and property rights are only an integral part of public finances, therefore it is considered that this object is wider and violation of it affects a significantly larger number of persons.

Analysis of the objective side shows that the objective features of deceit essentially include the features of a criminal offence enshrined in Article 220 of the CC. There are no reasonable criteria to distinguish deceit from incorrect submission of data to a public authority, as the purpose of such submission is to ultimately mislead/deceive the public authority responsible for tax administration. Furthermore, it is important to note that in the case of crimes against the financial system, criminal offences are deemed to have been completed from the moment the acts are committed or abstained, and fraud (swindling) requires the consequences provided for in criminal law. In such a case, it must be considered that the application of Article 220 of the CC should be simpler and more effective, as it is not necessary to establish a complex causal link between the offence and the risen consequences, but in practice, a false report in order to avoid taxes is, in principle, always established only after the fact of tax evasion has been established. In the view of this, the method of committing the criminal offences in question and the formal construction of these norms do not in themselves allow them to be effectively delimited. The only way to delimit the offences in question is to assess the nature of the property to which the offence was directed, bearing in mind whether there is a fundamental difference between public and private finances. Therefore, it should be noted that there could be compliance issues of the constituent elements of the said criminal offences with regards to the principle of *nullum crimen, sine lege certa*, whereas these different criminal offences often criminalise identical misconduct.

It should be noted that the composition of the criminal offence set out in Article 3 (d)[4] of Directive (EU) 2017/1371 does not bring any greater clarity in

[4] (d) in respect of revenue arising from VAT own resources, any act or omission committed in cross-border fraudulent schemes in relation to:
(i) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget;
(ii)non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or
(iii)the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

order to distinguish property fraud from criminal offences to the state financial system, because the article in question regards different acts, namely tax evasion, tax avoidance and embezzlement, as simply fraud. In that context, the question arises as to why the (EU) 2017/1371 did not make a clear distinction between tax evasion and tax embezzlement, since, in the author's view, the unlawful conduct in question is not identical in nature and consequences. There is no doubt that in the case of tax evasion, a person seeks to avoid a specific tax liability, even though he or she has the opportunity to actually enforce it, and in the case of tax embezzlement, a person encroaches on public finances (the whole of the European Union) without any legal basis, which is essentially similar in nature to the elementary theft of another's property. Taking into account such established regulation, in the Republic of Lithuania, a person would currently be subject to criminal liability under Article 220 of the CC for the features provided for in Article 3 (d) (i) and (ii) and criminal liability for simple fraud (Article 182 of the CC) for features provided for in Article 3 (d) (ii). Thus, the current legal framework of the European Union still does not allow to draw a specific line in distinguishing tax-related criminal offences from criminal offences to private property. However, the evaluation of the implementation of the said Directive (EU) 2017/1371 into national law by the Commission could provide further answers, whether criminal offences related to VAT evasion and embezzlement fall within the scope of fraudulent crime, or specific criminal offences enshrined in Chapter XXXII of the CC - crimes against the public finance system – should be established.

Given that national VAT also accounts for the bulk of the European Union's budget, it is not clear why such an important tool for harmonising the European Union law is chosen to criminalise only VAT embezzlement of an international nature. Although it is understood that the Directives lay down only minimum requirements for the Member States and that Directive (EU) 2017/1371 created the preconditions for the functioning of the European Public Prosecutor's Office, in the author's opinion, the regulation in question could have been more extensive, clearly establishing the core definitions of tax avoidance, optimization, embezzlement, while not emphasising the necessary cross-border element, as the vast majority of VAT is appropriated within the inner system of the states. Paragraph 1 of Article 83 of the Treaty on the Functioning of the European Union clearly states that the European Parliament and the Council may, by means

of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly 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. In this context, there is no doubt that the fight against both national and supranational (European Union level) VAT fraud is of particular need to be tackled on a common basis.

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Is there the Need for Further Harmonisation on Corruption Offences in the European Union?

Laura Mickevičiūtė[1]

Keywords: international standards, criminalization of corruption offences, trading in influence

The importance of comprehensive approach to fight corruption (a combination of prevention and repressive measures) is emphasised in this year's Report on the rule of law situation in the European Union (hereinafter – EU) (2020 Rule of Law Report). This Report analyses various aspects such as amendments of national criminal laws regarding corruption offences, the importance of criminal investigations, and the application of sanctions for corruption offences.

Why is the topic of fight against corruption so important? Corruption is a "euro-crime which is established in Article 83.1 of the Treaty on the Functioning of the European Union (hereinafter – TFEU). What does it mean for the Member States? Article 83.1 of the TFEU establishes that the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly 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. The EU has competence to harmonise criminal laws in this field. Thus, the EU might establish minimal standards that should be followed by the Member States (See more: Klip, 2009, p. 151-166).

Important legal frameworks regarding the issues of corruption were adopt-

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ed in the EU about 20 years ago. Thus, this research seeks to answer the question whether there is a need for further harmonisation of corruption offences in the EU? In order to answer this question, first of all, the research reveals the legal framework, the minimal standards, the definition of corruption offences and its development. Second, this research compares the EU's legal framework, the United Nations Convention against Corruption (hereinafter – UNCAC), and the Criminal Law Convention on Corruption of the Council of Europe (hereinafter – the Convention on Corruption). The comparative analysis provides a different approach to the corruption offences, in particular, the criminalisation of trading in influence.

This analysis is based both on theoretical (comparative, systematic analysis) and empirical methods (analysis of the EU law on corruption, other international standards, scientific and legal works).

The Legal Framework of the EU on the Criminalisation of Corruption

Corruption has attracted international attention only since the end of the XXth century. There are some reasons for growing international attention to corruption, for example, the process of globalisation and privatisation, bribery scandals, the importance of legal cooperation and assurance of double criminality principle (See: Kaiafa-Gbandi, 2010, p. 139-183; Szarek-Mason, 2010, p. 32). At the European level, the first minimal standards for the fight against corruption related to the criminalization of corruption crimes was adopted in the EU more than 20 years ago.

Regarding the criminalisation of corruption offences, these legislative instruments are relevant: Protocol drawn up on the basis of Article K.3 of the Treaty on the European Union to the Convention on the protection of the European Communities' financial interests – Statements made by Member States on the adoption of the Act drawing up the Protocol (hereinafter – Protocol) adopted in 1996, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (hereinafter – the EU Convention) adopted in 1997, Council Joint Action 98/742/JHA of 22 December 1998 on corruption in the private sector (no longer in force)(hereinafter – the Joint Action) and Council Frame-

work Decision 2003/568/JHA on combating corruption in the private sector (hereinafter – Framework Decision 2003/568/JHA) replaced the Joint Action adopted in 2003.

Briefly, some key aspects should be mentioned. According to the preamble of the Protocol, the main aim of this regulation at the EU (EC) level was to ensure the criminal liability for corruption offences committed by Community (Union) or foreign officials. At that time, the national regulations did not cover, or covered only in exceptional cases, conduct involving Community officials or officials of other Member States. Other features of corruption offences were not discussed a lot. However, the definition of the *corpus delicti* of active and passive corruption, including main features, was provided by the Protocol. Of course, only general corruption offences – active and passive bribery, were described. So, the first step of harmonisation did not attempt to make significant changes regarding to the list of corruption crimes, many countries had criminalised bribery in their national laws.

Certainly, the cross-border element was crucial for the first attempt to harmonise national law regarding the criminalisation of corrupt behaviour. The fundamental freedoms of the EU were the essential reason why the harmonisation of corruption offence was stressed. Thus, it was concerned about crimes committed in another Member State. A second major project of the harmonisation of criminal law in the 1990s is the development of international standards against transnational corruption. In this regard, principles of double criminality and trust between the Member States played the important role. (Pieth, 1999, p. 535).

Later, the EU introduced a somehow new approach to corruption-related crimes. The criminalisation of corruption in private sector has been emphasised in the EU since 1998. This was the fundamental change related to corruption offences because major countries were not familiar with this concept. Indeed, currently the criminalisation of corruption in private sector has raised many discussions, too.

However, the first definition of corruption offences was limited to the EU's financial interests. Although the notion of the EU's competence changed, the establishment of minimal standards has not changed. In the last decade, aspects regarding the criminalisation of corruption offences have been stressed less than other questions related to corruption such as confiscation, organised

crimes and so on. Nevertheless, the question related to the criminalisation of corruption offences can still be found in the EU law that protects the EU's financial interests since corruption is a particularly serious threat to the EU's financial interests (Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud). However, the notion of corruption offences has not changed – the active and passive corruption is only established. Moreover, it is limited by the EU's financial interests (Article 4). Some other legal acts (for instance, Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law) provided only the link to the Convention on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union and Council Framework Decision 2003/568/JHA.

To sum up, the legal regulation on corruption offences has been adopted more than 20 years ago in the EU and this notion is still found in legal acts regarding other topics which fall under the competence of the EU.

The EU's Policy Correlations with the Policy of the United Nations and the Council of Europe

Almost at the same time, at the end of XXth century, other international instruments related to fight corruption were adopted. In 1999, the Council of Europe adopted the Convention on Corruption. The UNCAC which is the only international instrument was adopted in 2003. The broader definition of corruption offences, including uncommon new corruption crimes (such as trading in influence), has been introduced in the Convention on Corruption and the UNCAC. What is the attitude in the EU to these anti-corruption instruments? Does the adoption of these instruments explain the absence of a new regulation regarding the criminalisation of corrupt behaviour at the EU level? (See: Kaiafa-Gbandi, 2010, p. 166).

The importance of cooperation among organisations and the other international legal instruments have been recognised by the EU since the XXth century. The development of a comprehensive anti-corruption policy was emphasised in the Stockholm Programme. Also, the importance of GRECO was

mentioned.[2] But the active progress was made only in 2019. Since 2019 the European Union has participated in GRECO's proceedings as an observer. This means that the EU might participate in GRECO's meetings, see all documents discussed (Council Decision (EU) 2019/1086 of 18 June 2019 on the position to be taken on behalf of the European Union). Observation of the situation in the Member States would be helpful (the European Union becomes an observer). However, the question is what impact it will have on the EU regulation? Will it change the way of harmonisation of the national laws on criminalisation of corrupt behaviour?

Of course, the Member States have been encouraged to ratify international legal acts (On a comprehensive EU policy against corruption). Thus, the harmonisation of national laws on corruption offences has been related not only to the EU but also to the Council of Europe and the United Nations. How has it affected the notion of the criminalisation of corrupt behaviour? As it was mentioned, these legal instruments have provided longer lists of corruption crimes. However, for instance, the approach to some uncommon corruption crimes is not as strict as to active and passive bribery. The UNCAC has provided trading in influence as a semi-mandatory offence. It means that states might decide to criminalise this activity or not. The Council of Europe provided the possibility of reservations regarding the criminalisation of trading in influence.

Conclusions

The EU has adopted international instruments regarding the criminalisation of corrupt behaviour. Further, the legal acts of the UNCAC and the Council of Europe have an impact on the legal policy in the EU. The main legal acts regarding the criminalisation of corrupt behaviour were adopted more than 20 years ago in the EU. Since then, new legal acts on corruption offences have not been adopted. Maybe, there are enough international legal acts, and the main

[2] In 1999 the Council of Europe established GRECO which monitors the implementation of the Convention standards, cooperates with Member States, evaluates both the Member States' regulation and case-law, addresses recommendations to each country and assesses the measures taken by them to implement these recommendations (see Welcome to the GRECO website – Council of Europe, available at https://www.coe.int/en/web/greco).

questions are answered. However, there are some unclear aspects, for example, the approach to uncommon offences such as trading in influence, the notion of some features of bribery and so on.

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Principle of Efficiency in EU Criminal Law

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Keywords: principle of efficiency; effectiveness of criminal law.

Criminal law traditionally has a national character and reflects national values and goods – its relationship with national sovereignty remains really close until present days. Nevertheless, in today's globalisation age, the criminal law in the EU is examined with regard to possibility to ensure effectiveness of EU aims and policies (Lenaerts, Gutiérrez-Fons, 2016). So, in our world, we see efficiency not as a request, but as a strict demand for criminal law to be effective on a requested level.

In globalisation age, we can detect a strong focus on effectivity which plays the key role in primacy of the EU law, and sharply influences the subsidiarity doctrine. A large quantity of Member States have different historical experience and legal culture, so, the diversity causes the dissimilarity in reception of EU rules, the same as different understanding of EU policies and it has an impact on their selection of tools, used to reach European goals (Melander, 2014). This situation generates a problem - if different Member States have different criminal law systems, based on different values, can the principle of efficiency be implemented in the common legal system of EU and if this principle is used in a considerable number of legal acts, how can it be understood?

Criminal law requires that we should not use the notions which are not clear neither from legal acts nor from case-law. It is necessary to describe the boundaries because this principle serves as a distinguishing sign between the national and EU law in competence matters. And looking at the harmonisation of EU criminal law through efficiency, we can understand this principle as

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a measuring unit or sometimes as a target of criminal law. In criminal law, we also see effectiveness as a sharp argument for imposing criminal sanctions or generating new law instruments.

The decision of the European Commission to limit the discretion of the Member States to choose the instruments for ensuring the implementation of European Union policies foresaw common rules including the soft request to fix the criminal sanctions for the breach of the EU law (Communication from The Commission, 2011). It means when, in EU criminal law doctrine, we hear the discussions of how we could understand efficiency, we have at least two opinions. So, the effectiveness can be understood as the means to end of criminal law or as a tool of criminal law- an ultimate objective of EU law (Melander, 2014). In both cases, we really ignore the moral face and the basis of values in criminal law, and for this reason, we need to find the answer on what the efficiency can be built.

Even in XVIIIth century, it was stated that the most efficient tool for prevention of criminal offences is not the cruelty of penalties, but their inevitability and it is arising from legislature, and it has a significant impact on society and is able to stop persons from committing new criminal offences (Bekaria 1992). In this period of time, society believed that by punishing guilty persons, we will have more efficient justice. It was thought that that criminal law should serve not only as a safeguard for the interests of citizens, but also guarantee the society's security and help to reach the goals of the policies, including prevention of crimes and sanctions for the offenders. We can see these historic parallels between VXIIIth century and our globalisation age - criminal sanctions should be evaluated as efficient when by their help we can guarantee the compliance with the EU law; moreover, the sanctions should safeguard most valuable goods of transnational society.

Directives, proposals and other legal documents of the European Union law promote deterrence through initiatives for further harmonisation of offences and sanctions. And not surprisingly, that principle of effectiveness is directly linked to the effectiveness of the criminal sanctions (Commission of the European Communities vs. Council of the European Union, 2005). The same position is detected in ability by the means of punishment to ensure the proper implementation of Union policies - the most efficient criminal system is most clearly reflected in punishment theories. (Melander, 2014). Going by this way,

it is necessary to invoke criminal sentencing theories, which can be used as a tool to assess the effectiveness of penalties by the ability to act in most possible deterrent way. Testing the ability of criminal sanctions to act in a manner by achieving future-oriented objectives we can ensure the implementation of the principle of effectiveness in the EU criminal law.

Looking for the answer, and by invoking the doctrines of effectiveness of punishment theories - when the criminal offences cross the borders of Member States and damage is made not only for certain countries, but also has a negative influence on EU financial interests, nature resources or stability of the euro system, it is evident that criminal sanctions more and more often become an instrument to ensure efficient EU policies. To continue, the principle of efficiency most evidently is reflected in the theories of punishment, but nevertheless, trying to look deeper, the sanctions are most efficient by acting in a non-direct way based on really existing and in society fluently functioning moral norms (Nuotio, 2020). In the recent years, we can observe a tendency which reflects in proposals, directives or audit documents - aspiration to strengthen the safeguard of EU common goods by stating, that present state of deterrent measures is not effective enough and the way to the solution is based on harmonising sanctions- in most cases, increasing numeric values of penalties. In addition, it is worth to state that most of EU criminal law harmonising tools do not speak about recriminalisation, the same as we do not see the offences which the EU would like to criminalise and which would not be already criminalised by the Member States. So positive deterrence, based on harmonised sanctions, is able to create a mechanism, used for present and future offenders, inspiring to act according to law and not avoiding the situation when law is used like an inquisition tool.

If we took a look at two of most popular criminal punishment theories which could help eliminate or at least minimise objectionable behaviour, we should refuse the compensation theory because of its orientation to the past. Looking at the compensation theory of punishment as a theoretical basis for the balance between the profit, gained of offender and harm caused for society, we are not able to foresee the impact of such punishment on the future society. In this case, the question in what way this kind of punishment will influence achievement of objectives of criminal law, or will it have a deterrent effect on society stays unanswered.

The most serious attention should be paid to another theory of punishment - the deterrent theory as a practical implementation of efficiency principle in the EU criminal law. Sending the message to society about the harmfulness of behaviour, we wish not only to stop the possible offender, but also to inform the society about the consequences for actions which cause harm to our values, accepting the position that the safeguard, given by criminal law, can exist only being exclusively preventive (Heinz, 2017). Nevertheless, the most important criteria in this case should not be eliminated in any way - criminal law should be used as *ultima ratio* and as it has been pointed in the Nordic criminal law doctrine, based on moral values (Lahti, 2020).

In this situation, the main question arises - if punishment is a tool for social control of most valuable goods, do we need to identify these values and not to limit ourselves with amount of sanctions? It is known that efficiency serves as one of criteria for criminalisation- when other non-criminal measures are not efficient, we open the gate for criminal law. On the other hand, the same situation helps to think over the basis of criminalisation- are the criminal measures really able to guarantee the efficiency (Suominen, 2014). Furthermore, the main question is if we, by using the deterrent punishment theory as a mechanism to stop the behaviour which is socially harmful, are still accepting the position that sanctions are really effective, paying no attention on moral basis of criminal law and denying background of common values?

The implementation of deterrence in the EU is more complicated than on national basis because of its complexity- it is difficult to find the mechanism which could influence people with different interest, different culture and national legal systems.

It is important to note that the principle of efficiency can be implemented through sanctions only if we find the balance with already existing legal norms in legal systems in Member States. The penalty scale which seems quite suitable for one country if is used by "cut and paste" mode in another country can have the opposite effect because of disbalance with already existing norms.

The globalised criminal law in the EU can be effective putting the accent on indirect effect- not only understanding the sanctions having deterrent effect and ensuring functioning of efficiency but regarding to indirect influence of morals norms in society. It means that not the hard sanctions, but its legitimacy, explained to society guarantees the efficiency arising from the inner side of society.

In order to harmonise the criminal law for the most serious crimes affecting the EU policy, the principle of efficiency is used as the main concept separating national and EU competences. Nevertheless, the meaning of this principle remains unclear and uncertain until present days. Whereas the effective criminal law requires effective sanctions, EU criminal law efficiency is tightly connected with penalties. By criminalising certain types of conduct and using effective, dissuasive and proportionate sanctions, first of all, we need to answer what kind of sanctions are effective from the national view and the view of EU politics. The EU criminal justice system will only be effective if it is based on the common values of the Union, for which proportionate sanctions were used in the same way refusing the template transposition of directives to the national law and avoiding the illusion of balance and efficiency of national legal systems.

Criminal sentencing theories which can be used as a tool to assess the effectiveness of penalties, require a test to prove its ability of criminal sanctions to act in a well organised manner by achieving future-oriented objectives ensuring the implementation of the principle of effectiveness in the EU criminal law. Theoretically, by using two main penal systems, that is to say, compensatory and preventative penal theories, we have a possibility to test the models of national legislators, used to implement EU criminal law. The nature of the EU contradicts to the compensatory punishment theory- in today's society, criminal law has one of the most important tasks- to deter individuals from committing a criminal offence. Hence, the criminal law must be able to act in a deterrent way. Only the sanctions which are based on the protection of the EU values and are implemented in national legal system without any disbalance can be seen as a concept of efficiency principle.

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European Investigation Order as Instrument for the Fight Against Organised Crime

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Keywords: transnational evidence gathering, mutual recognition, judicial cooperation in criminal matters

According to Art. 1 of Directive 2014/41/EC (hereinafter: DEIO) of the European Parliament and of the Council of the 3 April 2014 (OJ No. L 130 of 1 May 2014)[2] a European Investigation Order (hereinafter: EIO), "is a judicial decision which has been issued or validated by a judicial authority of a Member. State ('OG the issuing State') to have one or several specific investigative measure(s) carried out in another Member. State ('the executing State') to obtain evidence in accordance with this Directive"[3]. An instrument that is working well as reveals the recent Report published by EUROJUST in November 2020 which in two years has registered 1529 cases, most of them defined with success.

In this area, two interesting judgments of the ECJ have been detected:

The judgment related to the Case (C-324/17) criminal proceedings against Ivan Gavanozov, that concerns peculiarities of the Bulgarian criminal proce-

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2 Published in G.U. C. E., May 1, 2014, n. 130, pp. 1-37. The deadline provided for in Art. 36 par. 1 was set up the 22 May 2017. In this regard, BACHMAIER WINTER, Lorena, "Prueba transnacional penal en Europa: la Directiva 2014/41/CE relativa a la orden europea de investigación", Revista General de Derecho Europeo 2015, n. 36, available at http://www.iustel.com (Last accessed: December 4, 2020).

3 In accordance with MANGIARACINA Annalisa, "A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order", Utrecht Law Review 2014, n.1, available at https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.260/ (Last accessed: December 4, 2020).

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dure. An interpretation was requested as regards Art. 14 DEIO, which provides that the Member States shall ensure that legal remedies equivalent to those available in a similar domestic case are applicable to the investigative measures indicated in the EIO (Art. 14 (1)).

The substantive reasons for issuing the European Investigation Order may be challenged only in an action brought in the issuing State, without prejudice, to the guarantees of fundamental rights in the executing State (Art. 14 (2)).

The second judgment of the Court (Grand Chamber), of 8 December 2020, reveals that the EIO is not purely a mutual recognition instrument. It is demonstrated by the checks requested on both States –requesting and executing, especially on fundamental rights.

The reference for a preliminary ruling concerns the interpretation of Articles 1(1) and Article 2 (c) of the Directive on the EIO in criminal matters. That application was made in the context of a request for execution, in Austria, of a European order for criminal investigation issued by the public prosecutor's office of Hamburg against an individual and other unknown persons suspected of having falsified bank transfer orders.

The intent of the research is to analyse the principle of mutual recognition of judicial decisions with the aim of testing how it has been applied in the content of the Directive of the European Investigation Order, moreover, to examine how the Directive has been implemented in Italy and Spain.

In the era of globalization, one of the most alarming offences is that related to organised crime. For this reason, another purpose of my research is to verify whether some specific investigative instruments provided for by the EIO can represent an added value in the fight against transnational organised crime. Interpretative/qualitative considerations inspired by the recent process of globalization, which imply the gradual weakening of the barriers, have been done. This has developed a great impact in the interconnections between the economies and criminals of different countries, highlighting the systematic aspects of relationships between societies and States.

From the European perspective, in relation to organised crime, the contribution of the European Union has been particularly significant in substantive and procedural law under the enactment of specific rules, but also in the establishment of *ad hoc* bodies in order to promote a better coordination between the judicial and police authorities of each Member State. The Eurojust, in par-

ticular, although not expressly mentioned in the content of DEIO, is playing an important role in the context of this instrument: it intervenes at all the stages of proceedings, sometimes before the issuing of an EIO.[4] In addition, the Eurojust, the European judicial network and the liaison magistrates in relation with judicial authorities as well as OLAF and Europol in relation with police authorities are the milestones made by the European institutions since the Tampere European Council of 15 and 16 October 1999, which has led to considerable results.

The two implemented methods have been the deductive and the inductive method.

For what concerns the deductive method, the consultation of literature, case-law and legislation from the European and national law, has been carried out according to the analysis of the data obtained. At the same time, discussions with experts and academics on different topics related to the European Investigation Order, through attendance to seminars and/or conferences took place.

On the other hand, the Inductive method has been developed addressing questionnaires online, as well as face-to-face or remote interviews held with judges, prosecutors, police officers, lawyers, and other legal professionals. Adequate visits to EU and national institutions and other bodies have taken place such as Courts of Justice, Prosecution Offices, Police Offices in Italy and Spain.[5]

The instrument is working well, also in the context of pandemic[6]. The Eurojust and European Judicial Network collected information from Member

4 On the regulatory plan, first the framework decisions and, with the entry into force of the Treaty of Lisbon of 13 December 2007, Directives are the European Union's privileged source of legislation in the field of judicial cooperation in civil and criminal matters. Member States have a specific obligation to implement these instruments.

5 For instance, I visited Eurojust last November (2019) where I had the opportunity to interview face-to-face a Spanish Member of Eurojust, Francisco Jiménez-Villarejo, as well as Filippo Spiezia Vice President of Eurojust. Moreover, I had the opportunity to interview Davide Spina a public prosecutor' office.

6 In this regard, JIMENO BULNES, Mar "Emergencia judicial ante la crisis sanitaria originada por el COVID-19" Blog Rights International Spain 2020, available at http://rightsinternationalspain.org/es/blog/165/emergencia-judicial-ante-la-crisis-sanitaria-originada-por-el-covid-19 (Last accessed: December 4, 2020).

States on the: "The Impact of COVID-19 on Judicial Cooperation in Criminal Matters". In some States, the instrument is being issued and translated, but its transmission to the executing State is being affected, suspended or postponed, except when it is urgent. Where this prioritisation applies, the main criteria used besides urgency are, for instance, the seriousness of the offence, the risk that evidence will be lost and the stage of the proceedings in which the evidence is to be gathered. A case-by-case evaluation in principle applies. The majority of the States recommend electronic transmission of requests (i.e., e-mail) as the most effective means in the current situation. The Eurojust and European Judicial Network can help with the transmission of the instrument, facilitating exchange of information and identification of the competent executing authority.

The European Investigation order is a hybrid instrument: it is a consequence of the lack of previous harmonisation of rules related to the law of evidence. A concrete example could be the temporary transfer to the issuing State (Article 22 DEIO). There are different opinions on the basis of national laws in relation to the provision that "The transferred person shall remain in custody in the territory of the issuing State" (Article 22(6) DEIO).

Another example could be given by the Interception of telecommunications. However, we must distinguish between the Interception of telecommunications with technical assistance and the Interception of telecommunications without technical assistance.

For what concerns those with technical assistance (Article 30 DEIO), different opinions prevail concerning whether or not this provision could be applied to a request to install a covert listening device (e.g., bugging of a car).

While different opinions exist on whether this provision also applies in the case of a covert listening device (e.g., bugging of a car) according to the Interception of telecommunications without technical assistance (Article 31 DEIO).

To conclude, the application of EIO with its double check by the issuing as well as by the executing State on the principle of legality, proportionality, on the grounds for refusal, risks to put in crisis the principle of mutual recognition which is based on mutual trust.

According to the Eurojust in practice, in some States, the control is more pervasive than it should be: without reinforcing mutual trust among States

there is a risk that cooperation might become ineffective., with consequences on the field of the fight against organised crimes that have a transnational dimension.

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EPPO (From a Federal and Protection of Human Rights Perspective)

Dimitrios Nomikos[1]

Keywords: EPPO, federalism, corpus juris, PIF directive, human rights.

In a few words and in a simplified way, the core of the PhD research is: 1 why EPPO, 2) what EPPO, 3) how EPPO (works), 4) rights and EPPO. The main subject is to elaborate and to criticise the new institution of European Public Prosecutor's Office (EPPO) in a federal and constitutional view of the EU, to clarify the necessity of the new institution and to make crucial proposals in order to improve the operation of the EPPO in the aspect of the protection of the fundamental rights in the AFSJ. In the proposed aspect, the future of the EPPO is strictly connected with the EU integration, the fundamental rights and the EU citizenship (Mitsilegas, 2016, p.121-123). Furthermore, we are going to compare the EPPO, to the USA federal prosecution system (Diez, Gomez, 2015, p. 129-135). Emphasis will be given to the cooperation with the OLAF and EUROJUST (Herrnfeld, Brodowski, Burchard, 2021, p. 588-589).

The EU as a *sui generis* federal organization, is an autonomous legal entity and doubtlessly, is based on the balances between the sovereignty of the Members States and the federal structure of the EU. Criminal law is the hard core of national sovereignty and it was perceived as an exclusive privilege of national authorities, so it is necessary to focus on the elaboration of the competence of the EU in criminal matters (Mitsilegas, 2009, p. 107-109) from the establishment of the EEC (no competence in criminal matters) to Lisbon Treaty (provided competence in criminal matters). In the past, the EU (EEC) was strictly a financial organization without any competence in criminal matters and it has gone a really rocky way to establish the EPPO. Nowadays, the EU not

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only has expressed the competence in the field of criminal law, but also has an independent institution with the main task to protect the financial interests of the UNION. The research will explain the relation between the national sovereignty and the EU, under a historical and comparative progressive approach, in order to support the necessity of the establishment of the EPPO, which is in the centre of the discussion for the EU competence in criminal matters and has been the subject of so many debates (Ligeti, 2013, p. 1-6). The CJEU has been the motor of the EU integration (Sicurella, 2016, p. 49-53), so it is useful to focus on the cornerstone decisions of the CJEU (Wieczorek, 2020, p. 126-127), concerning the EU competence in criminal law (Greek Maize). The Lisbon Treaty has really changed everything in the structure and the competence of the EU in criminal matters, consequently the research will be based on the TEU and TFEU mainly in the provisions of ar. 82,83,86, 325 TFEU focusing on the importance of the so called choice of legal basis (Öberg, 2017, p. 119-131).

The debate for the establishment of the EPPO is related to various concerns of the national sovereignty, thus it is necessary to pay attention to this debate and to support it with legal arguments that the EPPO is an innovative and advantageous institution efficiently protecting the financial interests of the EU (PIF directive) and it would be useful to expand the competences of the EPPO. In addition, the co-operation with the national authorities is necessary (Satzger, 2018, p. 43-55) and we are going to elaborate this coordination, especially taking into account the so called forum shopping and the judicial review concerning the EPPO acts. The success of the EPPO from a constitutional view is based on the protection of human rights. Consequently, further research has to do with all these issues concerning the human rights, the international treaties (the European Convention on Human Rights), the Charter of Fundamental Rights of the European Union and all the secondary EU law affecting the rights of the accused and the fairness of the investigations and prosecutions under the EPPO (Klip, 2016, p. 260-261), including the judicial review (Ambos, 2018, p. 578-579). Furthermore, the main principles of the EU Law (such as subsidiarity, mutual recognition, proportionality, *ne bis in idem*, rule of law) will be examined in relation with the operation of the EPPO (Tridimas, 2006).

The main conclusion of the research is that the ambitious EPPO is a very innovative institution, empowering the constitutional structure of the EU and enforcing the federal nature of the EU. Finally, we propose that the EPPO

should have a more centralised structure in order to be more effective, we should legitimate a special and autonomous procedural code for the crimes under the EPPO (why not a new *Corpus juris*) and establish a special court for these crimes (based on the International Criminal Court).

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European Investigation Order Directive: What About Defence Rights?

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Keywords: European Investigation Order; defence rights; efficiency of the proceedings

Introduction

In the 2009 *Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility*, the Commission established the necessity to adopt an instrument which would expand the application of the principle of mutual recognition to all investigative measures in the gathering of evidence across the European Union (hereinafter, the EU). In April 2014, Directive 2014/41/EU on the European Investigation Order (hereinafter, the EIO Directive) was finally adopted (on its adoption process: Belfiore, 2015, p. 312-313). Its transposition was due by the 22nd of May 2017 (Art. 36) and has been complied by all the Member States (except Ireland and Denmark, which exercised their opt-out right).

The European Investigation Order (hereinafter, EIO) can be defined as "a judicial decision which has been issued or validated by a judicial authority of a Member State to have one or several specific investigative measure(s) carried out in another Member State to obtain evidence" (Art. 1(1) Dir.). All investigative measures are part of its scope of application, apart from joint investigation teams (Art. 3).

The application of mutual recognition in the EIO certainly favours the rapidity of the proceedings. At present, a national investigative authority can directly issue an order to a foreign competent judicial authority to ask it to carry

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out one or more investigative measures and this second authority would have to comply with this request, as if the order came from one of their national colleagues. As it can be deduced from the first recitals of the EIO Directive, the adoption of this new instrument aimed indeed at increasing the efficiency of cross-border criminal investigations. Although it is a valuable goal, it is regrettable that "the objective of strengthening mutual assistance between Member States has prevailed, once again, over the objective of enhancing the role of the accused in criminal proceedings having a cross-border dimension" (Belfiore, 2015, p. 324).

As the EU aspires to build a real Area of Freedom, Security and Justice, judicial cooperation instruments can no longer solely favour the investigation and prosecution, but also need to take the suspect into consideration in order to reduce the gaps faced by the defence in transnational criminal proceedings (European Criminal Policy Initiative, 2013; Gless, Vervaele, 2013; Gless, 2015; Weyembergh, Sellier, 2018, p. 66-86). As part of this evolution[2], the EU legislator has included some provisions about suspects' rights in the EIO Directive, namely Articles 1(3) and 14.

In comparison with the former mutual recognition instruments adopted in criminal matters, which do not contain any specific rule about defence rights, the EIO Directive constitutes a clear improvement. Yet, an improvement does not mean that defence rights' shortcomings are now fully addressed, and these provisions may not be sufficient to ensure effective equality of arms between prosecution or investigative authorities and the suspected person. Therefore, there is a special interest in analysing to what extent the EIO Directive strengthens the position of the defence in evidence gathering across the EU.

Two procedural rights are specifically relevant for this study. The first one is related to the right of the suspect to initiate the issuing of an EIO to have evidence obtained in order to defend himself/herself (Section 2). The second one applies when an EIO has been issued and the suspect wants to challenge, either the issuing or the execution of such order (Section 3).

2 After the Stockholm Program, the first step on this direction has been the adoption, between 2010 and 2016, of the directives on application of the 2009 *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings* (right to translation and interpretation, to information, to lawyer assistance, to presumption of innocence and be present at trial and to legal aid).

The right to initiate the issuing of an EIO

Article 1(3) of the EIO Directive states that "the issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure". This provision was absent in the drafts of the EIO Directive and was added nearly at the end of the adoption process. This addition is a clear improvement, as the suspect was originally excluded from the possibility to request evidence gathering in cross-border proceedings (Hodgson, 2011, p. 627; Bachmaier, 2015). Nevertheless, two important limitations can be identified in this provision.

First, this provision does not grant a right to make a direct request to the foreign authority through an EIO. Instead, the defence would have to request the national competent authority to issue the order. Yet, the EIO Directive does not regulate to what extent the authority is obliged, upon request of the defence, to issue an EIO, nor imposes legal remedies to challenge a refusal. As a result, national authorities have a broad margin of manoeuvre to decide either to respond favourably to the suspect's request or to rule it out (Van Wijk, 2017, p. 93).

The second limitation lies on the reference made in Article 1(3) to "national criminal procedures". It means that suspects are not offered a general right to request the issuing of an EIO across the EU. On the contrary, it would depend on whether the national law grants suspects a right to request the execution of an investigative measure in domestic proceedings.

This reference to national procedures in Article 1(3) can lead to important disparities on the position of the defence from one State to another. Moreover, it gives national legislators a lot of power, as they have no obligation to guarantee the defence the right to be an active party in evidence gathering across the EU and to initiate the issuing of an EIO (Buric, 2016, p. 76; Van Wijk, 2017, p. 267).

However, this reference also presents positive aspects. First, it is in full conformity with the obligation imposed to the Union by Article 67(1) of the Treaty on the Functioning of the European Union to "respect the different legal systems and traditions of the Member States". Moreover, it is a way to avoid inequality between suspects in national proceedings and suspects in transnational ones regarding their ability to participate to evidence gathering. Nevertheless, such an inequality could also be avoided by granting every suspect, in

national and transnational proceedings, a right to request the execution of an investigative measure (Buric, 2016, p. 76-77). It would ensure a better equality of arms between the prosecution and the suspect, but it seems to exceed the EU's current competence (Van Wijk, 2017, p. 265).

The right a suspect has to initiate the issuing of an EIO, by requesting it to his or her national competent authority, is not guaranteed across the EU by the EIO Directive and depends on the national legislations. The situation is quite identical regarding the right to challenge the issuing or execution of an EIO, as seen below.

The right to challenge the issuing or execution of an EIO

The right to an effective remedy against the issuing or the execution of a judicial cooperation instrument has been highly discussed in the last years, starting with the European Arrest Warrant[3]. For the first time, in 2014, the European legislator has taken this right into consideration and has inserted specific provisions on it in the EIO Directive, namely Recital 22 and Article 14. According to Article 14(1), "Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO". This provision has been seen as a positive innovation (Garcimartín Montero, 2017, p. 48; Ambos, 2018, p. 460), but it remains unsatisfying regarding the ability of the defence to effectively challenge an EIO.

Indeed, similarly to Article 1(3), Article 14(1) also refers to national legislation and only imposes "legal remedies equivalent to those available in a similar domestic case". But what happens if national law does not provide for legal remedies against some investigative measures, including in domestic proceedings? In that case, is the law compatible with Article 14? Moreover, does the EIO Directive grant, in an immediate and direct manner, to a concerned party the right to challenge an EIO?

These questions have been raised through a preliminary ruling (*Gavanozov* case, 2019) by a Bulgarian court to the Court of Justice of the European Un-

3 As illustrated by the "Jeremy F. case": CJEU, *Jeremy F. v. Premier ministre*, 30 May 2013, C-168/13 PPU.

ion (hereinafter, CJEU). However, the CJEU avoided answering to the referred questions, by reducing the dispute "to a mere formal question" (Wahl, 2020). Consequently, the Bulgarian court requested a new preliminary ruling (*Gavanozov II* case) in which it expressly asked if an EIO can be issued when the law of the issuing State does not provide for any legal remedy against that order (because of the investigative measures concerned). This preliminary ruling is still pending and the CJEU's answer is very expected, because of the repercussion it could have on the appreciation of defence rights.

Regarding the impacts legal remedies may have on the proceedings, Article 14 offers a positive provision and a negative one. Starting with the latter, according to paragraph 6, "a legal challenge shall not suspend the execution of the investigative measure, unless it is provided in similar domestic cases". This provision is disappointing on two aspects. On the one hand, it is a clear example of the importance granted to the efficiency of criminal investigations at the expense of the situation of suspects. On the other hand, once again, the rights granted to the defence depend on national legislations, with all the existing discrepancies. Fortunately, Article 13(2) counterbalances a little bit, by stating that "the transfer of the evidence may be suspended, pending a decision regarding a legal remedy".

Then, coming back to the positive innovation, Article 14(7) obliges the issuing Member State to "take into account a successful challenge against the recognition or execution of an EIO". This provision is important in a transnational context and strengthens the efficiency of the right to legal remedies.

Conclusion

A common conclusion for both rights emerges from the elements highlighted above: in some respects, the EIO Directive has strengthened the rights of the suspect or accused. Indeed, for the first time in a judicial cooperation instrument in criminal matters, there is a specific provision related to legal remedies. Moreover, the defence is offered a possibility to request the issuing of an EIO, that is to say, a possibility to be an active party in the gathering of evidence.

Nevertheless, those positive innovations are far from sufficient to guarantee equality of arms between the investigative authorities and the defence.

Mainly, the choice to offer the suspect, either the right to request the issuing of an EIO or access to legal remedies in order to effectively challenge the issuing or the execution of an EIO, remains regulated at the national level. The EIO Directive does not give direct rights to suspects. Plus, some of its provisions show the importance still granted in the EU to the efficiency of criminal proceedings at the cost of suspects' rights.

In conclusion, the EIO Directive is certainly an instrument of big value to increase the efficiency and the rapidity of transnational criminal investigations, as the application of the principle of mutual recognition makes recollection or exchange of evidence easier. Yet, unsurprisingly, the protection of suspects' rights is still a step backward and is affected by the transnational aspect of the proceedings, which is problematic in the perspective of a real Area of Freedom, Security and Justice where the emphasis is not only put on the Security aspect.

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Criminal Law & Populism – Is There a Place for Human Rights?

Pavlo Demchuk[1]

Keywords: *nullum crimen sine lege*, rule of law, penal populism.

Democracy in the modern world faced a new challenge – the populism movement. This political concept creates a lot of difficulties not only for traditional political parties but also for governments. Articulating categories such as "corrupt elite", "true people", "pure people" and "oligarchic power" they rebalance the common political establishment and provoke large masses to protest against the government. In case of some populist party winning the elections, they will try to implement their ideas into state policy. But intrinsic part of populist ideas is that they are attractive only when they remain ideas. Like a Cinderella's coach, they will inevitably turn into a pumpkin once elections are over and it is time to implement them. Criminal law is among the victims of populist politicians. They make a negative impact on the quality of criminal statutes by violating the requirements of the legality principle.

The main hypothesis is that the populism movement makes a negative impact on the quality of criminal law statutes, which is one of the requirements of the legality principle in criminal law. Requirements of the stability and reasonable dynamism of the criminal statute are often not complimentary with the interests of a wide range of ordinary citizens. That is why the theory of prevention unjustified and inappropriate changes to the criminal statute are needed.

The methodology of this research is the following. The first step is to find a starting point – the common definition of populism and its features. The next step is to collect empirical data - legal texts and literature on populism and

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law, especially, penal populism. The latter is sufficiently studied in the works of American scholars. At that stage, the studies about the populists' movement in Ukraine will be of great importance.

The sub hypothesis is that the law-making rules as well as the complicated procedure for amending the Criminal Code, including the examination of draft laws may be an effective prevention mechanism from negative populism impact. I will analyse the last draft laws on amendments to the Criminal Code of Ukraine, explanatory notes to them, and conclude the habits of populism in draft law creation. The logical method is used to create a conclusion about populism's impact on the criminal legislature creation process.

1. Democracy and the rule of law as the underlying values of the legality in criminal law

The historical and philosophical development of this principle allows us to conclude that freedom and individual autonomy, democracy, separation of power, and the rule of law are underlying values of legality in criminal law. Philosophers of the Enlightenment era (Montesquieu, Hobbs, Beccaria) have a huge impact on the development of these values. Their works can help us to find a modern interpretation of the meaning of legality.

The rule of law requires the arbitrariness of power to be limited by law. On this position, Dicey states that "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government" (Dicey, 1965, p. 120-121). Tamanaha pointed out that at its core rule of law entails a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms (Tamanaha, 2009). The rule of law and democracy are fundamental values in democratic societies. It is strongly connected with the principle of the rule of law as a procedure of participation individuals in formulating the general will of the state, that allows self-determination of the community (Held, 2018).

Democratic procedures legitimise criminal statutes. Only society (or democratically elected representatives) can bring responsibilities to follow certain rules and be responsible for non-compliance with them. There is an old dis-

cussion between scholars about two types of democracy - procedural (when only compliance with democratic procedures matters) and substantive (when respect to human dignity is a matter as well). As this discussion is not the focus of this study, we will adopt the view of scholars, who combine the requirements of these two types.

The democratic legislative process also has its disadvantages. Gregor Fitzi states that in the wake of globalisation, the recent financial crisis, and the following austerity policies, the departure of political decisions into extra-parliamentary bodies provoke the erosion of the parliaments' power and exacerbates the crisis of democratic representation (Fitzi et al., 2018, p. 1). The institutions' weakness causes an increased risk of the development of populist political forces in the country and their coming to power.

2. The quality of criminal statutes as a requirement of the legality principle in criminal law

Nullum crimen sine lege certa requires the law to be precisely defined so that foreseeability of the punishment and accessibility of the concrete penal norms can be established for individuals (Rauter, 2017, p. 20). The main idea of written law is to provide the orienteers for individuals to guide their actions. This concept makes huge stress on the quality of law.

We agree with factors formulated in the Danish Government White Paper "Outlook on Legislation" that the following factors formulate the idea of the quality of law: legality, conformity with the Constitution, international treaties and the effectuation of general legal principles; effectiveness and efficiency; subsidiarity and proportionality; practicability and enforceability; harmonisation; simplicity, clarity, and accessibility (Arnscheidt et al., 2017, p. 78). Ukrainian legislator creates Rules for drafting laws and basic requirements of legislative technique. It consists of a system of established theoretical and applied rules, based on many years of law-making practice. These rules outline the means and methods of drafting and writing draft laws that ensure accurate and complete compliance with the provisions, their content, and purpose, comprehensive legal regulation, clarity and accessibility of legal material, etc. Unfortunately, they contain only part of the technical and legal requirements for the formulation of legal acts and do not pay attention to the substantive requirements for laws.

Substantive requirements to laws reflect its suitability, necessity, and usefulness, which ultimately determines its feasibility and effectiveness in achieving the objectives of this law. All of these requirements must be ensured through the legislative process. To this end, there are procedures for public debates, parliamentary hearings, and the involvement of experts in the law-making process.

However, there may be situations where the expert and scientific validity of the law are rejected in favour of other purposes.

3. Populism as an impact factor on the quality of the criminal statute

Populism is an ideology "that considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite,' and which argues that politics should be an expression of the general will of the people" (Mudde, 2004, p. 543). There are two sets of factors that allow populism to influence democracy: First, institutional weakness provides an opening for the populist suffocation of democracy. Second, a huge resource windfall or clear success in overcoming acute, severe crises gives populist leaders massive support, allowing them to remove the remaining obstacles for an authoritarian concentration of power. When either one of these conditions is absent, populist machinations fail and democracy survives (Weyland, 2020, p. 2).

The populists' rhetoric was always used by Ukrainian politicians. Populists in Ukraine and Europe are anti-globalist, directing their critic towards the International Monetary Fund and other international financial organisations. Populists everywhere use radical rhetoric against corrupt elites, the 'liberal establishment' and authorities (Kuzio, 2018).

The influence of populist politicians on the process of creation of criminal statutes is present on all levels of the legislative process:

I. Legislative initiative. A study of empirical data reveals that members of parliament by submitting bills seek to increase their rating among the population. At the same time, they realise that this bill will be withdrawn or will never reach the Verkhovna Rada.
II. Public discussion. The speed of adoption of laws eliminates the normal order of discussion with the expert community.
III. Evaluation by external experts.

IV. Public hearings in the parliament. The possibility of amending draft laws "from the ground" eliminates previous procedures.

The populist rhetoric of Ukrainian politicians often concerns criminal law issues. Calls for increased or establishing criminal responsibility are usually made after certain tragic events or emergencies. For example, criminal liability for denying the Famine is proposed on the anniversary of remembrance, propositions about strengthening the responsibility for drunk driving – after a huge traffic accident.

The worst case scenario is the adoption of these scientifically unjustified changes to the criminal code by Ukrainian Parliament.

For example, Parliament imposed a life sentence for the falsification of medicines, which caused death of a person or other serious consequences, legalised the term "thief in law", established criminal liability for the spread of criminal influence, and strengthened criminal liability for violation of quarantine rules. These examples clearly illustrate the willingness of politicians to use criminalisation as a means of increasing their ratings. Especially in Ukraine, where a mono-majority in the Parliament simplifying the parliamentary debates during the law-making process.

This is a general trend. John Pratt and Michelle Miao (one of the most famous criminologists) wrote that from the 1980s onwards, there has been a marked shift towards protecting the public – at the expense of individual rights – from those who would otherwise put this at risk. As this has occurred, criminal law has become more punitive, regulatory, and extensive. It no longer simply reacts to a crime but seeks to prevent it through initiatives backed by penal sanctions, even though no crime may have been committed (Fitzi et al., p. 47).

Since the beginning of the ninth convocation of the Verkhovna Rada of Ukraine, 62 bills on amendments to the Criminal Code of Ukraine have been submitted. Of these, only 4 laws were adopted.

This only proves the hypothesis that criminal justice is now less autonomous than it was three decades ago, and more forcefully directed from the outside. A new relationship between politicians, the public, and penal experts has emerged in which politicians are more directive, penal experts are less influential, and public opinion becomes a key reference point for evaluating options. Criminal justice is now more vulnerable to shifts of public mood and political reaction. New laws and policies are rapidly instituted without prior consultation with the criminal justice professionals, and expert control of the

policy agenda has been considerably reduced by a populist style of policymaking (Garland, 2002, p.172).

Calls to social security rise a couple of problems related to law application practice by law enforcement agencies and - for the most part – judicial authorities. The most common problems related to populist rhetoric are calls for increasing terms of imprisonment – especially in sensitive types of criminal cases (corruption, sexual offences); interpretation of uncertainties in criminal law in favour of society, not the individual; psychological pressure on judges.

The above-mentioned factors necessitate the development of an effective system to prevent ill-considered changes in criminal statutes and their application, which we defined below.

Conclusions

The principle of legality in criminal law, which is recognised in civilised countries, places several requirements on the quality of criminal law and its application.

The need to ensure respect for human rights leads to the study of the properties of quality criminal law, as well as factors that negatively affect it. One such factor is the deviation from the normal legislative process towards populism. This way has common features – the reason for changes in legislation are acute social events, an attempt to satisfy the "appetites of the public" by proposing such changes, lack of proper legal justification for amending the criminal law (inconsistency with the existing doctrine of criminal law).

To prevent this, a system of rules of legislative technique should be developed, which will include the following:

- complicated way of deciding on making changes to criminal statute (the special subject of legislative initiative);
- the temporary restriction on the possibility of making changes to the same article of the Criminal Code and to the Criminal Code in general (for example twice a year permitted to review the criminal statute);
- mandatory public discussions with the involvement of all stakeholders in the field of criminal law - scientists, practitioners;
- providing an opinion of a special institution on the compliance of amendments to the Criminal Code with its principles.

These recommendations are not comprehensive. Further research on the negative impact of populism on criminal law, as well as ways to reduce such an impact, should continue.

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Pavlo Demchuk is a Ph.D. Student at the Ivan Franko National University of Lviv and the Assistant Judge at the Higher Anti-Corruption Court. His main areas of scientific interest and research include the principle of legality in criminal law, the rule of law principle, and ways of the limitation state arbitrariness in the field of criminal law.

Reshaping Plea Bargaining in European Criminal Justice

Simona Garbataviči ūtė[1]

Keywords: plea bargaining, procedural safeguards, European Union.

The doctoral research, "Reshaping Plea Bargaining in European Criminal Justice", has been carried out in the field of plea bargaining in Europe and its compatibility with European criminal procedural values. One part of the research focuses on the European Union's (hereinafter EU) attempts to approach the matter of plea bargaining.

EU projects contributing to the mechanism of plea bargaining

Despite the rapid spread of plea bargaining in European continental criminal procedures, it may seem that no specific efforts have been put in to address the threats that plea bargaining causes to European procedural values. Kagan (2007) notes that the fragmented and complex decision-making structure of the EU has often resulted in deadlock or delays in responding to political demands for policy initiatives (Kagan, 2007).

It is worth noting that it is possible to observe partial EU attempts to approach the issue of European plea bargaining in several different projects related to this legal mechanism.

The first project that is worth mentioning is the EU project to support Kazakhstan's criminal justice system (Council of Europe Portal, 2018). The objective of this project was to bring Kazakhstan's criminal justice framework and institutional practices in line with European and international standards and practices in the area of criminal justice. More precisely, part of the project

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devoted efforts to ensuring that guilty plea proceedings are conducted in line with European standards. Hence, the outcome of this project may contribute significantly to the process of adopting plea bargaining, and to more transparent usage of it in Europe.

The second project that has been conducted focuses on legal aid in plea bargaining. The report of this project describes the standards of the European Convention on Human Rights (hereinafter ECHR) and the experience of selected countries from Western Europe relating to legal aid for defendants involved in plea bargaining negotiations. The assignment of this project falls within the joint United Nations Development Programme ("UNDP") and the United Nations Children's Fund ("UNICEF") project, "Enhancing Access to Justice and Development of a Child-friendly Justice System in Georgia", principally funded by the EU under the financing instrument "Support to the Justice Sector Reform in Georgia" signed in May 2015 (European Union & the United Nations Development Programme, 2017). As the researchers of this project note, a common theme seems to be concern as to pressure put upon accused persons (arising from detention, heavy potential sentences etc.) calling into doubt the voluntary nature of the plea bargains. This project raises questions such as whether the state is obliged to make a lawyer available in the context of plea bargaining, and whether the accused can be allowed to waive that entitlement without violation of Article 6 § of the ECHR arising as a result. Defined guidelines in the field of safeguards should be kept in mind when studying the standards on mandatory defence, funding, waivers etc.

One more report, prepared and issued by The European Commission for the Efficiency of Justice, titled "Study on the situation of the contractualisation and judicial process in Europe of 2010" drew a distinction between "Anglo-Saxon" plea-bargaining, characterised by a lack of legal provisions regulating the practice and the possibility of charge bargaining, and continental European systems characterised by much greater legal regulation and sentence-only bargaining (The European Commission for the Efficiency of Justice, 2010, p. 39-40). Plea bargaining in the light of the Court of Justice of the European Union

EU legislation should be perceived as an important factor that shapes the values of continental legal tradition and at least indirectly, should play a role in the process of shaping plea bargaining models in Europe. The Court of Justice of the European Union (hereinafter Court of Justice) interprets EU law to

make sure it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions (Fletcher, Lööf & Gilmore, 2008).

The Court of Justice provided some important insights regarding the mechanism of plea bargaining in joined cases C-187/01 and C-385/01 (2003). Analysis of the ruling in this case proved that there are no doubts that plea bargaining is perceived as a very complicated mechanism in the criminal justice system. Regardless, both the European Court of Human Rights (hereinafter ECtHR) and the Court of Justice have considered it unnecessary to give a thorough ruling on the matter. Although this may be true, it is obvious that both courts acknowledge the European derivatives of plea bargaining. Judges comprehend the issues that arise from this mechanism and try to provide at least basic insights on the operation of plea bargaining in Europe. Despite academic scholars often disparaging plea bargaining *per se*, the same grounds cannot be found in the EU criminal law field. Hence, the spread of adversarialism and adoption of plea bargaining in European national criminal procedures seems to be viewed quite supportively.

Roadmap for strengthening the procedural rights of suspects and accused persons. A missed opportunity?

In 2009 the EU took an approach towards the issue of strengthening the rights of suspects and defendants in criminal procedure (Peers, 2011). For its part, the European Council adopted a Resolution just before The Treaty of Lisbon came into force, setting up a 'Roadmap' for strengthening the procedural rights of suspects and accused persons. The outcome of the project has been the adoption of several Directives, which guarantee a broad scope of procedural rights to defendants.

Despite the fact, that none of the Directives on procedural rights address plea bargaining directly, this research demonstrated how Directives might be usefully employed across different EU countries whilst applying the mechanism of plea bargaining. Research provided examples regarding Directives as follows: Directive (EU) 2016/343 (2016) on the presumption of innocence, Directive 2013/48/EU (2013) on the right to access a lawyer, Directive 2012/13/EU on the right to information in criminal proceedings, Directive 2012/29/

EU, establishing minimum standards on the rights, support and protection of victims of crime.

For instance, Article 7 (4) § of the Directive (EU) 2016/343 (2016) on the presumption of innocence states that Member states might take into account, when sentencing, the cooperative behaviour of suspects and accused persons. Arguably, European legislation has expressed favour to cooperative defendants and the plea bargaining mechanism, as was previously discussed, is based on this kind of "exchange" mechanism. This rule could be taken into consideration whilst shaping sentence discounts in plea bargaining across Europe.

Whilst shaping the defence lawyer's participation in plea bargaining, the Directive 2013/48/EU (2013) on the right to access a lawyer could be employed as well. As was previously discussed, it is common to regard the right to a lawyer as a primary safeguard of fairness in plea bargaining. The lawyer must be perceived as the "equaliser" in the bargaining process (Alschuler, 1974; Bibas, 2016). Notably, the effective assistance of counsel in plea bargaining is also inextricably linked with the right to information, as it requires that defence lawyers have basic information about the case, both to fully advise their clients and to effectively negotiate on behalf of their clients (Alkon, 2014). Considering that plea bargaining is a relatively new derivative in European criminal procedures, the defence lawyer's presence should particularly contribute not only to negotiating the most favourable conditions, but also explaining the nature of plea bargaining and its consequences to the accused in the first place (Alkon, 2010).

Furthermore, fairness of the criminal procedural system requires that defendants have the knowledge and freedom required to make intelligent choices amongst the alternatives (Bibas, 2016). The right to information about procedural rights and about the accusation must be part of every negotiated settlement between the defendant and the prosecution. According to the Directive 2012/13/EU on the right to information in criminal proceedings, Article 3 §, national authorities must at least inform the suspect or the accused about their right of access to a lawyer, any entitlements to free legal advice and the conditions for obtaining such advice, the right to be informed of the accusation, the right to interpretation and translation, and the right to remain silent. With the application of the plea bargaining mechanism, the defendant is presented with new options in the criminal procedure, so they should be entitled to a different package of rights, which is broader than that which they are entitled to receive

in a regular criminal procedure. Most importantly, the defendant is entitled to express their defence freely and with the right not to be forced to accept any settlement (Buzarovska & Misoski, 2011). Simultaneously, the defendant has the right to accept or decline the prosecutor's offer. This places criminal justice officials under the obligation to provide defendants not only with general information about procedural rights, but particularly about the nature of the plea bargaining arrangement, the likely outcome in advance of a plea, or possible waivers, i. e. rights that the accused is giving up. The defendant could also be entitled to an explanation of the sentences for the crime they are charged with. The accused needs to understand what bargaining tools the prosecution possesses and what is the scope of the negotiation. In short, defendants need to have an understanding of the substantive merits of the deal in order to be able to evaluate the risks and benefits of holding out or walking away (Bibas, 2016), and the Directive 2012/13/EU could be a great starting point. Furthermore, as part of this Directive, access to the case file must be guaranteed to every defendant before they make a decision whether to enter negotiation in European continental criminal procedure. The proper use of this right guarantees the possibility for the defendant to be fully familiar with the facts of the case and the strength of the evidence against them. Respectively, it contributes significantly to the fairness of European plea bargaining procedure.

Thus, the provisions of the Directive on the right to information in criminal proceedings could easily be employed whilst establishing safeguards for the defendant to know their rights in the plea bargaining procedure, and to make a voluntary and knowledgeable waiver of the right to a full trial.

Directive 2012/29/EU, establishing minimum standards on the rights, support and protection of victims of crime, also seems to produce effects on plea negotiations. Not only does it have a broad scope of applicability, but it also makes explicit reference to the subject of agreements in criminal procedure (Torre, 2019). The provisions of this Directive specify that the only right of the victims, as stated in this Directive, which may, under certain circumstances not be applied to out-of-court settlements, is the "right to a review of a decision not to prosecute" (Directive 2012/29/EU, Article 11(5)§). An important provision is enshrined in this Directive, which sets forth the right of victim to be heard (Directive 2012/29/EU, Article 10 §). This provision seems to have crystallised the victim's right to have the chance to be heard, in person or at least in writing, before a negotiated judgment is delivered (Torre, 2019).

Conclusive remarks

As can be concluded, in comparison to the Council of Europe (hereinafter, CoE), the EU has played a very minor role regarding the plea bargaining mechanism and its safe usage in Europe. It seems that whilst aiming at the issue of a defendant's procedural rights and fair criminal procedure in general, the EU not only accepts, but also encourages the operation of plea bargaining on European soil. It acknowledges the dangers of this form of negotiated justice and this is the reason why the greatest emphasis is placed on safeguards being in place. Despite stating a number of safeguards, none of the conducted research or presented projects have focused on the essence of plea bargaining in the European contemporary continental criminal framework and its compatibility with prevailing procedural values. Plea bargaining still lacks a detailed and systematic evaluation in the light of European procedural values.

Moreover, considering all the anxieties about the rapid and uncontrollable spread of plea bargaining in Europe, the fact that none of the Directives on procedural rights address plea bargaining directly may cause consternation. Arguably, it might be considered as a missed opportunity for EU legislation to actually outline the possible operation of the plea bargaining mechanism in Europe.[2] European legislation might be a great starting point for improving plea bargaining safeguards in national criminal justice systems.[3] Rights that

[2] Same conclusion should be made regarding a suggested new roadmap for 2020 aiming at taking further action at EU level to strengthen procedural rights of suspected or accused persons. According to the "Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards" the ECBA suggests taking measures regarding pretrial detention and the EAW, procedural rights in trial, exclusion of evidence, witnesses' rights and confiscatory bans, conflicts of jurisdiction and *ne bis in idem*, remedies and appeal, and compensation. Plea bargaining mechanism, on the other hand, is not a key focus of any of those measurements. See, for instance, Asselineau, V. (2018). Agenda 2020: A New Roadmap on minimum standards of certain procedural safeguards. *New Journal of European Criminal Law, 9*(2), pp. 184-190.

[3] Together with the ECtHR case law, Directives could become an excellent starting point for fortifying safeguards in plea bargaining. For instance, when the Court has examined whether waivers of the right to silence are made willingly and knowingly, the ECtHR has considered factors such as whether a lawyer is present and whether the accused has had sufficient information on his rights presented to him in simple, non-legalistic language, with the assistance of interpretation and translation if necessary, which may have made

are enshrined in the EU Directives can result in positive influences on the development of plea bargaining. In order to *prepare the accused person to be an independent party who can voluntarily choose a plea bargaining option in European continental criminal procedure, support from the criminal justice system needs to be provided*. The EU is working towards achieving common minimum standards of procedural rights in criminal proceedings to ensure that the basic rights of suspects and accused persons are protected sufficiently. This is solid enough ground to argue that the EU should use this line of thinking regarding plea bargaining as well, which is currently seen as a huge threat to defendants' rights by academics, the CoE, and non-governmental organisations such as Fair Trials.

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it harder for the accused to understand and foresee the consequences of their waiver. See Hermi v. Italy, 2006, para. 41. An analogous arguments could and should be applicable in the case of plea bargaining where defendant is facing a decision of waiving the right to full trial. Hence, the defence lawyer's participation should be perceived as mandatory in those cases.

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The Right to Legal Assistance in Criminal Proceedings

Oskars Kulmanis[1]

Keywords: the right to legal assistance, the fairness of the criminal proceedings, admissibility of evidence.

The development of individual rights protection in European Criminal Law including the accession to the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR) has significantly extended the content and scope of rights of the defendant. On 22 May 2012, Directive 2012/13/EU[2] on the right to information in criminal proceedings was adopted. Article 3(1) (a) explicitly clarifies that the Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively – the right of access to a lawyer. As noted in recital 19 of Directive 2012/13, the right to be informed of one's rights aims to safeguard the fairness of criminal proceedings and to guarantee the effectiveness of the rights of the defence from the first stages of those proceedings.

On 8 June 2011, the EU Commission presented a proposal for a directive on access to lawyer. On 22 October 2013, Directive 2013/48/EU[3] was adopted. This

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2 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. OJ L 142, p. 1–10.

3 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. OJ L 294, p. 1–12.

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Directive serves to harmonise the defence rights in a European single area of Freedom, Security and Justice. It also adequately guarantees the rights of the defendants in transnational criminal proceedings. The Directive can be considered as a legal instrument which represents a significant step forward in the protection of fundamental rights in criminal proceedings.[4] Recitals 12, 21 and 51 of Directive 2013/48 highlight the aim to lay down minimum rules concerning the right of access to a lawyer in criminal proceedings and promote the application of the Charter, in particular Articles 4, 6, 7, 47 and 48. By building upon Articles 3, 5, 6 and 8 of the ECHR, as interpreted by the ECtHR, which in its case-law reiterates that the Directive sets standards on the right of access to a lawyer. The Directive also emphasises the situation regarding police questioning in which a person other than a suspect or accused person becomes a suspect or accused person, questioning should be suspended immediately.

The European Court of Justice (ECJ) has recognised that the purpose of both Directive 2012/13 and Directive 2013/48 is to establish minimum rules on certain rights of suspects and accused persons in criminal proceedings. Directive 2012/13 concerns more specifically the right to information about rights and Directive 2013/48 relates to the right to have access to a lawyer Furthermore, it is clear from the recitals of those Directives that they are based to that end on the rights set out in, *inter alia*, in Articles 6, 47 and 48 of the Charter and seek to promote those rights with regard to suspects or accused persons in criminal proceedings.[5]

In accordance with Article 2(1) and (3) of the Directive 2013/48 the personal scope of the application are suspects or accused persons in criminal proceedings. The Directive also clarifies that it shall also apply to persons other than suspects or accused persons who, while questioning by the police or by another law enforcement authority, become suspects or accused persons. Article 3 of the Directive anticipates that suspects and accused persons have the right of access to a lawyer in such time and in such a manner to allow the persons concerned to exercise their rights of defence practically and effectively. The access to a lawyer must be without undue delay. For example, before they

4 Bachmaier Winter, L. (2015). The EU Directive on the Right to Access to a Lawyer: A Critical Assessment. Article in: Human Rights in European Criminal Law. Springer Heidelberg, 113.

5 *Rayonna prokuratura Lom* [CJEU], No. C-467/18, [19.09.2019]. ECLI:EU:C:2019:765.

are questioned by the police or by another law enforcement or judicial authority or upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act.

The ECJ has acknowledged that Article 3(1) of the Directive 2013/48 requires the Member States to ensure that suspects and accused persons have that right in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.[6] Although Article 3(1) lays down the fundamental principle that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow them to exercise their rights of defence practically and effectively, that principle is fleshed out in paragraph 2 of that article with respect to the moment from which the right must be granted.[7] The lawyer must be present and participate effectively when questioned. Since the authorities carry out any investigative act against a certain person, it might be unclear when the person should be considered a suspect and not a witness anymore. In such circumstances to provide that the access to a lawyer is granted without undue delay, the nature of the investigated offence and the case materials must be assessed.

Article 12(1) of the Directive clarifies that the Member States shall ensure that suspects or accused persons in criminal proceedings have an effective remedy under national law in the event of a breach of the rights under this Directive. The recital 10 of Directive 2016/1919[8] repeats the considerations that were mentioned in Directive 2013/48. It emphasises that where a person who was initially not a suspect or an accused person, such as a witness, becomes a suspect or an accused person, that person should have the right not to incriminate himself or herself and the right to remain silent in accordance with Union law and ECHR, as interpreted by the Court of Justice of the European Union and by the European Court of Human Rights. The presumption of innocence is strengthened in Directive 2016/343[9].

6 *Kolev and Others* [CJEU], No. C-612/15, [5.06.2018]. ECLI:EU:C:2018:392.

7 *VW* [CJEU], No. C-659/18, [12.03.2020]. ECLI:EU:C:2020:201.

8 Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings. OJ L 297, p. 1–8.

9 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. OJ L 65, p. 1–11.

In accordance with Article 4(1) of Directive 2016/1919, the Member States shall ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require.

The ECtHR has clarified that the protections afforded by Article 6(3) and (3) (c), which lie at the heart of the present case, apply to a person subject to a "criminal charge", within the autonomous ECHR meaning of that term. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him or her.[10] The ECtHR held that a person arrested on suspicion of having committed a criminal offence,[11] in such cases the status of a person is of formal importance if the facts available to the investigative authorities confirm the reasonable suspicion,[12] a suspect questioned about his or her involvement in acts constituting a criminal offence,[13] a person who has been questioned in respect of his or her suspected involvement in an offence,[14] irrespective of the fact that he or she was formally treated as a witness[15] as well as a person who has been formally charged with a criminal offence under procedure set out in domestic law[16] can all be regarded as being "charged with a criminal offence" and claim the protection of Article 6 of the ECHR. It is the actual occurrence

10 *Beuze v. Belgium* [ECHR], No. 71409, [9.11.2018]. ECLI:CE:ECHR:2018:1109JUD007140910.

11 *Heaney and McGuinness v. Ireland* [ECHR], No. 34720/97, [21.12.2000]. ECLI:CE:ECHR:2000:1221JUD003472097.

12 *Brusco v France* [ECHR], No. 1466/07, [14.10.2010]. ECLI:CE:ECHR:2010:1014JUD000146607.

13 Aleksandr Zaichenko v. Russia [ECHR], No. 39660/02, [18.02.2010]. ECLI:CE:ECHR:2010:0218JUD003966002.

14 *Stirmanov v. Russia* [ECHR], No. 31816/08, [29.01.2019]. ECLI:CE:ECHR:2019:0129JUD003181608.

15 *Kaleja v. Latvia* [ECHR], No. 22059/08, [5.11.2017]. ECLI:CE:ECHR:2017:1005JUD002205908.

16 *Pelissier and Sassi v. France* [ECHR], No. 25444/94, [25.03.1999]. ECLI:CE:ECHR:1999:0325JUD002544494.

of the first of the aforementioned events, regardless of their chronological order, which triggers the application of Article 6 in its criminal aspect.[17]

The ECHR is intended to guarantee rights that are practical and effective and not theoretical and illusory. In order to ensure that the protections afforded by the right to a lawyer and the right to silence and privilege against self-incrimination are practical and effective, it is crucial that suspects be aware of them. This is implicit from the ECtHR application of the "knowing and intelligent waiver" standard to any purported waiver of the right to counsel. Immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the absence of any official notification of these rights. However, where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his or her right to a lawyer and his or her right to silence and privilege against self-incrimination takes on a particular importance.[18] The presence and knowledge of a defence counsel as a qualified professional lawyer preventively ensures that procedural measures in which a suspect or an accused is involved are performed in accordance with the law, including the basic principles of criminal proceedings.

The ECtHR reiterates that the right to be assisted by a lawyer applies throughout and until the end of the questioning by the police, including when the statements taken are read out and the suspect is asked to confirm and sign them, as the assistance of a lawyer is equally important at this point of the interview. The lawyer's presence and active assistance during questioning by the police is an important procedural safeguard aimed at, among other things, preventing the collection of evidence through methods of coercion or oppression in defiance of the will of the suspect and protecting the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police.[19] Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, the effect of which is

17 *Simeonovi v. Bulgaria* [ECHR], No. 21980/04, [12.05.2017]. ECLI:CE:ECHR:2017:0512JUD002198004.

18 *Ibrahim and Others v. the United Kingdom* [ECHR], Nos. 50541/08, 50571/08, 50573/08 and 40351/09, [13.09.2016]. ECLI:CE:ECHR:2016:0913JUD005054108.

19 *Harun Gurbuz v. Turkey* [ECHR], No. 68556/10, [30.07.2019]. ECLI:CE:ECHR:2019:0730JUD006855610.

amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence.[20]

Neither the latter? nor the spirit of Article 6 of the ECHR prevents a person from waiving of his or her own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. That also applies to the right to legal assistance. However, if it is to be effective for ECHR purposes, such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance. The waiver needs not be explicit, but it must be voluntary and must constitute a knowing and intelligent relinquishment of a right. Moreover, the waiver must not run counter to any important public interest. An accused's lawyer may serve an important role as the "watchdog of procedural regularity". It also is well-established in ECtHR case-law that any conversation between a detained criminal suspect and the police must be treated as formal contact and cannot be characterised as informal questioning or interview.[21]

The ECtHR has examined whether the overall fairness of the criminal proceedings against the applicant was prejudiced by the absence of a valid waiver of legal assistance when the applicant gave statements to the police and the subsequent admission by the trial court of those statements to secure his/her conviction. There were no compelling reasons to restrict the applicant's right of access to a lawyer when he was giving statements to the police. The onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice. The quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. Indeed, where the reliability of evidence is in dispute the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance. It was in the first place the trial court's duty to establish in

20 *Ayetullah AY v. Turkey* [ECHR], Nos. 29084/07 and 1191/08, [27.10.2020]. ECLI:CE:ECHR:2020:1027JUD002908407.

21 *Goran Kovacevic v. Croatia* [ECHR], No. 34804/14, [12.04.2018]. ECLI:CE:ECHR:2018:0412JUD003480414.

a convincing manner whether the applicant's confessions and waivers of legal assistance had been voluntary.[22]

Since the lawyer's presence and active assistance during questioning by the police is an important procedural safeguard, the effective exercise of this right should be provided. Therefore, in situations where the suspect or accused person in a certain stage of pre-trial investigation exercises the right to legal assistance, it should be guaranteed, or his/her waiver of rights must be voluntary, knowing and intelligent, for example, in the presence of defence counsel. Otherwise, the freedom of a suspect or an accused person to exercise the rights of defence and the fairness of criminal proceedings might be breached.

In certain situations, the police or other investigative authorities persuade suspects or accused persons to waive the right to defence counsel in his or her absence, thus causing a risk that the guarantees arising from the presumption of innocence might be limited. If the testimony acquired in police interrogation is the result of invalid waiver of the right of legal assistance, it should render the evidence inadmissible. In such circumstances the prosecutor supervising an investigation at an early stage should prevent the injustice caused by the restriction of legal assistance. Thus, to secure the interests of investigation and appropriate conviction of the perpetrators, the prosecutor supervising an investigation should ensure that evidence is gathered according to procedural law. Failure to prevent the shortcomings might be the cause for domestic court to declare obtained evidence inadmissible.

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22 *Rusen Bayar v. Turkey* [ECHR], No. 25253/08, [19.02.2019]. ECLI:CE:ECHR:2019:0219 JUD002525308.

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Civil Asset Confiscation Law – New Criminal Policy or Restrictions Out Bounding Criminal Procedure?

Laura Martinaitytė[1]

Keywords: civil asset confiscation, proportionality in criminal procedure, limitation of human rights

In order to talk about any restrictions related to property, we must start with basic principles. In criminal procedure, such restrictions are often necessary to implement the goals of criminal procedure.[2] Most common restrictions related to property in pre-trial investigation are search, seizure and temporarily limitation of property rights. These coercive measures are strictly established in the criminal procedure code (Lietuvos Respublikos baudžiamojo proceso kodeksas, 2002). Such measures can be applied only when necessary and must be clear and concrete, efficient, proportional, legitimate and within the scope. As well as such regulation is harmonised with the EU law and international law acts.

At the time, Lithuania's criminal procedure code was changed to satisfy not only the EU law but also decisions of the European Court of Human Rights[3]. The overall purpose of coercive measures is to limit the human rights and freedoms to the preconditions for a normal, unhindered process to achieve the objectives of criminal proceedings. The objectives are oriented to 1) ensure sanction and the process itself, 2) cognitive function, gathering evidence, 3) prevention. So, when choosing measures which interfere suspect's personal

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2 Referring to criminal procedure in the Republic of Lithuania.

3 The Criminal Procedure Code adopted articles regarding fair trial, right to access to court, terms of investigation were established, etc.

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life, especially property, subjects of pre-trial investigation should pay attention to the purpose (objective) of such proceeding.

It is very important that a person against whom such measures are used has the right to check the lawfulness and proportionality of those measures. Therefore, as a person has the right to appeal the officer's decision, the right to access to court remains implemented. Besides that, the presumption of innocence is being respected.

But what happens when the criminal procedure is over (e.g., terminated pre-trial investigation or acquittal decision or release on bail)? Can a person expect peace? The answer is not satisfying as Lithuania has recently adopted Law on civil asset confiscation which allows to confiscate the asset gained since 2010 (hereinafter – the Law) (Lietuvos Respublikos civilinio turto konfiskavimo įstatymas, 2020).

Article 2 of the Law declares that "*The property and the property benefit received from it (hereinafter - property) may be confiscated on the grounds and in accordance with the procedure established by this Law, when there is reason to believe that the property was not obtained lawfully and the total value of the property does not correspond to the person or persons referred to in paragraph 2. legal income and this difference exceed the amount of 2,000 basic fines and penalties*".[4]

This new Law act was adopted in favour to satisfy requirements of Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing and confiscation orders.

Some Member States allow the confiscation of property without a prior criminal conviction by a criminal or a civil court decision. There are no common EU rules, and substantial differences exist in this respect between EU Member States.

Even though there were several proposals to make changes in the Law, the adopted version declares possibility to confiscate asset which was gained since 2010 and not necessarily related to organised crimes or criminal activity at all.

The origin of the need to find a way to confiscate unlawful asset was related to organised crime, money laundering and illegal enrichment. Therefore, in some countries like Italy, UK and Ireland, the asset which might be confiscated

4 This is 100.000 euro.

is related to such crimes. In Lithuania's version of the Law – it is enough just to suspect that property was gained unlawfully.

Even though this seems like a perfect fit to the criminal procedure code (as the origin is to fight organised crimes), the procedure is under the Civil Procedure Code of the Republic of Lithuania. Therefore, some essential questions arise. First of all, the question of the presumption of innocence. Secondly, the burden of proof. Thirdly, the opinion on double punishment.

In 2013, the Council of Europe made an impact study on civil forfeiture[5]. The emphasised note was that "civil forfeiture should never be seen as an alternative or substitute for the institution of criminal proceedings when there is sufficient evidence to support such proceedings and where such proceedings would otherwise be justified."

So, now we have unclear boundaries on the presumption of innocence as it is presumed in criminal procedure. Civil procedure is based on adversarial principle, which leads us to the burden of proof to the defendant. According to the principle of the presumption of innocence, the burden of proof lies with the accuser, and any doubt must be interpreted in favour of the accused. The presumption of innocence is therefore infringed if the burden of proof is shifted from the charge to the defence (*Barberà, v. Spain (1998), Telfner v. Austria (2001), Allen v. The United Kingdom (2013)*.[6]

The defendant in civil procedure must prove each statement. Proportionality of possibilities to prepare a case of pre-trial investigation officers and a defendant is uneven especially when the Law declares that "*data collected during criminal proceedings can be used as evidence in civil confiscation proceedings*". It is very possible that a person acquitted in criminal procedure has to face the proceeding one more time, just without the appropriate defence mechanism, especially when the Law is valid 10 years backwards. Boundaries between criminal and

[5] Impact study on civil forfeiture was made by the Council of Europe in 2013. It discusses some countries examples and is very useful to see different regulation and different definitions on what kind of asset can be confiscated. Here is a link to electronic document: https://rm.coe.int/impact-study-on-civil-forfeiture-en/1680782955.

[6] The Plenary Session of the Supreme Court of Lithuania discussed the presumption of innocence in accordance with illegal enrichment (Lietuvos Aukščiausiojo Teismo Baudžiamųjų bylų skyriaus plenarinės sesijos 2015 m. lapkričio 10 d. nutartis byloje Nr.2K-P-100-222/2015).

civil procedures with this Law became unclear. Nevertheless, it is important to ensure the general principles (such as the right to access to court, presumption of innocence, proportionality) to every person in the proceedings.

It may look as if, in Lithuania, the civil asset confiscation by civil process was a continuous process after "failed"[7] criminal procedure. In civil procedure, there is no necessity to prove the crime was committed.

It is also possible that this new Law may affect behaviour of the suspect in criminal procedure. For example, in criminal procedure, there is a possibility to be released from criminal liability if a person actively assists in detecting the criminal acts committed by members of the organised group or the criminal association. Therefore, a suspect is willing to testify in order to be released from criminal liability. Now knowing that after a deal with the prosecutor, the suspect is not "safe" due to possible civil confiscation law, would there still be a willingness to testify?

I have no doubt that, in ideal world, we would not have doubts that Law is implemented by honestly respecting principles of proportionality, where the goal is to confiscate the asset which was gained from criminal activity or used as a tool. Civil asset confiscation law enables the prosecutor to have help from all the institutions in the investigation, but the person (the defendant) is all alone in the process. Today's reality is that civil confiscation of property is sought to be legalised in Lithuania without establishing that a person has committed a criminal offence and without the legal mechanism established by the Criminal Procedure Code but only by limiting a few laconic provisions of the draft Law on Prevention of Organised Crime, but also threatens to unduly restrict the property rights of individuals (Drakšas, 2019).

The ECtHR emphasised that restrictions on ownership were justified by an overriding reason relating to the public interest and proportionate to the objectives pursued. In all cases, the ECtHR rejected claims that the confiscation of property on the grounds that it had been obtained from illegal activities or that such property was intended to be used for illegal activities violated the presumption of innocence. The ECtHR based its position on the fact that the

7 I use "failed" ironically, because the process can be terminated due to different reasons – lack of evidence, question of guilt, etc. Nevertheless, the commitment of crime is not proved in such cases.

confiscation of property was used as a preventive measure rather than a punitive one and that the fault of the defendants was not raised in the confiscation proceedings (Bikelis *et al*, 2018).

Even though Lithuania has all tools to confiscate asset in criminal procedure (possibility to confiscate asset which was gained from unlawful activity or illegal enrichment, which was used as a tool, even extended confiscation of property is possible) it is questionable why the state needs a law act to confiscate property without relating it to criminal activity. Especially when the origin of the need to use civil confiscation came in order to fight specifically organised crimes.

To conclude, I can only hope for two outcomes. First, the Parliament will make amendments, relating the property which may be confiscated by the Law to criminal activity. Second, the Supreme Court will create precedent clarifying application of the Law in respect of its origin, proportionality and protection of the property rights.

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Bail as Social Phenomena's Applicability in Legal Liability Forms

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Keywords: bail[2], vouch, trust, legal liability

When one commits a crime, not only does he or she breach the law and violates the interests of the state and the victim, but he or she also shows a great disrespect to the values that are agreed to be protected by law. The state, as a protector of these values, must react to every criminal act (as well as other offences) that infringes legal order. One form of this reaction is criminal liability for crimes. In case of the implementation of criminal liability, the legal criminal relations arise. First of all, between the perpetrator and the victim, secondly, between the perpetrator and the state, where the state is empowered to take all necessary measures to reveal one's crime and to affect the perpetrator so that his or her criminal behaviour would not occur again. So, crime automatically inflicts a criminal conflict between two sides – the offender and the state.

Traditionally, the criminal procedure, if the guilt of the defendant is proven under the law, ends up with conviction and the perpetrator must endure the legal consequences of his or her crime by being punished and receiving a criminal record. On the other hand, in nowadays, the punishment is not the only

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2 In this topic and the text below the term "bail" is used as a synonym for legal instrument of surety or guarantee as it is more comprehended in Lithuania's criminal law system. Though, in legal English, the term "bail" has a variety of definitions depending on the context. For most, the term "surety" is known in civil law to describe a person who accepts legal responsibility for another person's debt or behaviour; also "guarantee" can be used as a promise that something will happen or exist; and the "vouch for something/someone" can be used to support the good character of someone, based on your knowledge or experience. These terms will be used in the text depending on the context.

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possible state's reaction form to a criminal act and not the only way to reach the goals of the criminal liability. Because the criminal procedure from its very beginnings to conviction is severe and frustrating not only economically but psychologically as well, European countries have developed various criminal procedure diversion forms in their legal system when the defendant can obviate being sentenced and the criminal case can be closed at the earliest stages.

In Lithuania's criminal law, there is an institute of release from criminal liability, which also works as criminal procedure discontinuance form. The release from criminal liability is kind of a deal between the state and the offender, where, if complied with certain terms, the perpetrator can be released from punishment and other elements that characterise criminal liability: 1) sentencing; 2) appointment of punishment; 3) execution of punishment; and most importantly – 4) being convicted and having a criminal record in his or her biography. However, the release does not mean the acquittal of perpetrator as *corpus delicti* of his or her crime must be settled.

Article 40 of the Criminal Code of the Republic of Lithuania states that a person who commits a misdemeanour, a negligent crime or a minor or less serious intentional crime may be released from criminal liability to a request by a person worthy court's trust to transfer the offender into his or her responsibility on bail. A person may be released from criminal liability on this ground if: 1) he or she commits the criminal act for the first time, and 2) he or she fully confesses his or her guilt and regrets having committed the criminal act, and 3) at least partly compensates for or eliminates the damage incurred or undertakes to compensate for such where it has been incurred, and 4) there is a basis for believing that he or she will fully compensate or eliminate the damage incurred, will comply with laws and will not commit new crimes. The release from criminal liability on bail can be implemented from 1 to 3 years.

As this regulation may seem vague, the main principle of this institute's mechanism is the voluntary participation of a trustworthy third person in legal criminal relations aside to perpetrator. This trustworthy third person plays a role of a guarantor by entrusting court that despite offender's criminal behaviour, he or she, generally speaking, is a good human being that does not deserve to be punished and after being released from criminal liability will fully comply with laws and will not commit a crime again. In other words, he or she vouches for him or her as a person and for his or her future behaviour.

Bail (or surety) as a legal instrument is widely known in civil law where it stands as a form of obligation enforcement's assurance. But the surety, as phenomenon, first of all is an expression of a social relation of trust. By guaranteeing (or vouching) for someone you transfer your personal trust for him or her to another person so that your trust could build confidence between those two, who is related (or wants to be related) with another (legal) relations. This basic notion derives from the Roman conception of guarantee and is valid in all modern common or civil law systems when speaking about civil relations. Nonetheless, this phenomenon has its own body in criminal law as well, even though it is not clearly discovered by scholars yet.

Taking its origins, it most likely was a custom, but Romans were the first who developed the "good-named" citizens' participation in criminal procedure. In ancient criminal process, when case was brought to a public court, one specific type of evidence could settle the final result of all charges and offender's fate. Among other evidence, traditionally used in Roman criminal trials, there was an institute of so-called *laudatores* (men of reputation). These *laudatores* were trustworthy, high-ranked Roman citizens who stepped in front of judges and jury to speak not about circumstances of criminal act (*crimina*) but to a character of men on trial. This practice is frequently mentioned in Cicero's pleadings: "These honest Men, whom we all know, and now see before us, were desirous not to give a character in writing but to appear before you in person, to bear testimony to his worth." (Pettingal, 1779, p. 162). Since prestige was appreciated in Roman society by highest expand, the truth and its methods of demonstrations – arguments and evidence – "received their warmest welcome when conveyed by people radiating social prestige, *dignitas* and *auctoritas*." (Du Plessis, *et al.,* 2016, p. 271). It was a custom to bring ten *laudatores* to court and "by the words *wyr nod* or *viri notabiles*, was signified in this case men of reputation, who were known characters, whom the public might confide in (*benestissimos homines, quas nossemus*)" (Pettingal, 1779, 182). These *laudatores* "whose standing added to that of the protagonist and acted as a guarantee of the truth of their testimony, even if it was often only praise." (Du Plessis, *et al.,* 2016, p. 277).

In the middle ages, this institute transformed into so-called compurgation which was common and well-known criminal cases settlement practice in ancient judicial practice in all continental Europe (including Slavs) and Britain

(*see e. g.* Pettingal, 1779; Machovenko. 2004, p. 51). The defendant could justify himself or herself from accusations with a help of a group of high casted (rank) or good-named society members who swore on reputation of the defendant, verifying his or her testimony of not being guilty.

Today, it is difficult to image resolving cases only by third parties' praise of the defendant and this procedural cases' settlement form might seem too ancient and too alien from our paradigmatic understanding of law. Nevertheless, as trust naturally exist in society, it penetrates into certain legal regulations, developing its own legal shape. Besides release from criminal liability on bail, one disciplinary case that was held to one Lithuanian judge serves as the best example to show this social phenomenon's existence and applicability in legal relations.

On 19 of May 2020, Vilnius district court judge M. S. (depersonalised by the author) was pulled over by the police driving to work with 0,61 alcohol concentration level in his organism. The administrative offence procedure for drunk-driving started and of course his judicial powers were suspended and the disciplinary procedure initiated. This story drew wide public attention. The judge kept apologizing publicly, admitted his unlawful act, showed sincere emotions of regret. But the law is very clear – the ethical, moral and professional standards for judges is above any other public servants. Every judge must protect his or her honourable name and follow the so-called noblesse oblige standard both in his or her professional as well as non-professional activities, because the consequences are indeed harsh. If the judge is being dismissed because of the act that dishonoured judge's name, this judge would not only lose his or her job, but he or she would also lose all rights to social guaranties such as state pension of the judge, he or she never again can be appointed to a judge position because of the loss of his or her good reputation.

Despite the disciplinary procedures in the judiciary self-government bodies, the President of the Republic of Lithuania did not wait for its results and initiated M. S. dismissal independently. The President addressed the Judicial Council for advice to dismiss this judge on the Constitutional ground of dishonouring judge's name. So, the President is certain that M. S. dishonoured judge's name by drunk-driving, the question is now on the table of the Judicial Council. I should quickly explain that The Judicial Council is an executive body of the autonomy of courts ensuring the independence of courts and judg-

es, which is composed of seventeen members (judges only). According to the Constitution of the Republic of Lithuania, this special body of judiciary must advise the head of the state for every question that concerns judges: appointment, career, dismissal. And if the advice is not given, this is legally binding to the President and he or she cannot take its final decision on that judge. That is the implementation of checks and balances idea in Lithuania's constitutional regulations concerning judges.

This was not the first time that a judge who was operating the vehicle under the influence of alcohol was as at disciplinary procedure. Almost everyone was dismissed from the position by default. Without a doubt, drunk-driving dishonours judge's name. But this time the Judicial Council did not advise the President to dismiss judge M. S. This decision was not accepted very favourably. This case was and is debated broadly. The constitution law experts say that the Judicial Council overstepped its discretional powers because the constitutional doctrine clearly states that when the President asks for advice, the Judicial Council must 1) determine whether the act of the judge occurred and 2) answer whether this act dishonoured judge's name. If these two conditions are being determined, the Judicial Council has no other option but to advise the Present to dismiss the judge.

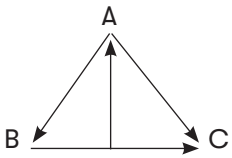
What was special about M. S. case? At the same time that the news of disciplinary proceedings of M. S. was released, Lithuanian judges from different courts began to address independently the Judicial Council and the Judicial Court of Honour stating basically one thing: they personally know M. S., they are shocked by his act, they do not excuse his actions, but they actually know him, he is a good human being, qualified and honoured judge that has huge respect and empathy for others, responsible and excellent legal professional and it would be a great loss for all judiciary if he was dismissed. In other words, these judges (who are respected because of their status) vouched for M. S. and his character. They vouched for him as a good human being, more importantly they vouched for him as a professional judge.

The Judicial Council noted on its resolution refusing to advice the President to dismiss judge M. S.: "The Judicial Council notes that it is the representation of judges elected by the entire community of judges of the Republic of Lithuania. The Judicial Council, deciding on the issue of advice to the President of the Republic, so the question of trust in a particular judge, cannot

ignore the strong trust in M. S. expressed by the judiciary <…>, guaranteeing for his professional and personal qualities."

The judges vouched for M. S. They expressed their trust in him and they asked to forgive him. There are no legal norms allowing to vouch in disciplinary procedures. On the other hand, what to do if this social relation of trust occurs in certain legal situation? Should it be ignored and rejected as impossible?

Hence, we can identify a clear pattern of long-existing socio-legal phenomenon of bail (guarantee; surety; vouch) that transforms social trust relationship into legal trust relationship:



The scheme above describes the mechanism of a legal vouch and the social trust's transformation into legal one. Here, A stands for official authority; B is the guarantor who is not involved in legal relations between A and C, though has close relation to C (*e.g.,* family, friend, colleague, *etc.*); and C is the offender. A has to impose legal sanctions on C because of his or her unlawful act. B and C have close social bond. B steps in legal relations between A and C in favour of C vouches for him or her (his or her personal qualities and future behaviour). Because A sees B as trustworthy (based on evidence that supports his or her trustworthiness) he or she can develop trust on C's personality so the sanction for his or her responsibility could be lessen or he or she could be pardoned. In terms of release from criminal liability on bail, the perpetrator is being given a term from one to three years to prove the trust he or she was granted. However, the principle of the "triangle of trust" that could legally happen in any other legal relations works in the same way – it builds trust and creates legal relations of trust between parties.

Over past few decades, trust as social phenomenon has brought a broad attention of social sciences (philosophy, history, sociology) and, unfortunately, "many authors have found the concepts to be opposition to one another"

(Cross, 2005, p. 84–85). The participation of a trustworthy society member due to build trust relationship between government authorities and individual has not been discovered yet. Though it may be the essential key in recognising trust as a legal principal, moreover, it supports approaches that find cooperation between trust and law. Since trust in law is a quite unexplored field, especially, in criminal law, the institute of release forms criminal liability on bail as well as genesis of a vouch as social phenomena could be a starter for broader discussions between scholars.

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Assessment of Social Rehabilitation as the Main Purpose of Framework Decision 2008/909/JHA on the Transfer of Prisoners in the Light of the Lithuanian Experience

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Keywords: social rehabilitation, transfer of prisoners, enforcement of a sentence.

Almost 10 years have passed since the date for the implementation[2] of the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (Council Framework Decision 2008/909/JHA, 2008 (hereinafter, Framework Decision on the transfer of prisoners))[3]. During this period of time, a significant number of sentenced persons were transferred back to the European Union (hereinafter, the EU) country of which they are nationals and where they normally live to serve the sentence with a view to enhancing their social rehabilitation[4]. As a result, it is ap-

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2 As foreseen in Article 29(1) Framework Decision on transfers of prisoners should have been implemented by 5 December 2011.

3 In 2009 it was amended by the Council Framework Decision 2009/299/JHA of 26 February 2009 on trials *in absentia,* which as stated in recital 6, is focused on setting conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused (Council Framework Decision 2009/299/JHA…, 2009).

4 In the context of this paper social rehabilitation is understood in accordance with Recital 9 of Framework Decision on the transfer of prisoners and Article 2(11) of Law on the mutual recognition and enforcement of judgments in criminal matters by Member States of the European Union on the mutual recognition (2014).

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propriate to evaluate issues related to the Framework Decision on the transfer of prisoners functioning and to discuss the challenges ahead. This paper is focused on the assessment of social rehabilitation as the main purpose of the Framework Decision on the transfer of prisoners. Special attention is given to the relevant jurisprudence of the Court of Justice of the EU (hereinafter, the CJEU), Lithuanian legislation and jurisprudence regarding the mentioned subject.

During the past few years, the CJEU have already delivered various judgements related to the interpretation regarding practical application of the Framework Decision on the transfer of prisoners. For instance, in 2016, the CJEU delivered their first judgement in *Ognyanov* case on the law governing the enforcement of the sentence (Judgement of the Court (Grand Chamber) of 5 July 2016 in Case C-614/14), then a few more in 2017: *Grundza* regarding interpretation of the condition of the double criminality (Judgement of the Court (Fifth Chamber) of 11 January 2017 in Case C-289/15), *van Vemde* regarding interpretation of the concept of the final judgement under the transitional provision (Judgement of the Court (Fifth Chamber) of 25 January 2017 in Case C-582/15) and one more in 2019: *Popławski (II)* regarding declaration foreseen in Article 28(2) and principle of the primacy of EU law (Judgement of the Court (Grand Chamber) of 24 June 2019 in Case C-573/17). Most recent CJEU judgement was delivered in March, 2020 in *SF* case, where the CJEU emphasised that the duration of the sentence or detention must be adapted only within the strict conditions set out in Article 8(2) (Judgement of the Court (Fourth Chamber) of 11 March 2020). However, until now there are no cases directly related to evaluation of social rehabilitation[5] in the context of the Framework Decision on the transfer of prisoners.

[5] It is noteworthy that in 2018 the Slovak Republic had submitted a request for a preliminary ruling to the CJEU regarding interpretation of social rehabilitation of the sentenced person (The Slovak Republic request for preliminary ruling of 30 July 2018, applicant YX). The essence of the questions referred to the CJEU was related to evaluation of social rehabilitation in those cases were a sentenced person in the executing State, which is a Member State of his nationality, has no concrete links which could enhance his social rehabilitation (such as family, social, professional etc.), but merely formally-recorded habitual residence. However, in 2019 the CJEU issued an order stating that the sentence pronounced against YX is being enforced in the issuing Member State, as a result, the questions referred for a preliminary ruling are now hypothetical and the conditions enabling the Court (i.e. CJEU) to proceed with the reference are no longer satisfied (Order of the Court (Fourth Chamber) of 1 October 2019).

On one hand, it is well known that the Framework Decision on transfers of prisoners is one of the most commonly used EU's legal instrument which seeks to extend the application of the principle of mutual recognition. On the other hand, social rehabilitation is declared as the main purpose of this instrument. As stated in recital 9, the enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation of the sentenced person. Article 3(1) adds that rules under which the Member States recognise judgments and enforce sentences are established with a view to faciliating the social rehabilitation of the sentenced person. Obligation to respect fundamental rights must be observed too (Article 3(4)). While the Framework Decision on the transfer of prisoners provides no explicit definition of social rehabilitation, it provides a non-exhaustive list of elements to take into account when assessing if social rehabilitation of the sentenced person will be enhanced as a result of the transfer of the sentence. As foreseen in recital 9 of the Framework Decision on the transfer of prisoners the competent authority of the issuing State should take into account such elements as, for example, "the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State. Based on these criteria, the issuing Member State authority is requested to predict whether the transfer will increase the chances of rehabilitation" (Martufi, 2018, p. 51).

It follows from the above that in the context of the Framework Decision on the transfer of prisoners, social rehabilitation should be understood in the sense that it is more appropriate for measures of rehabilitation to be taken in a Member State where the sentenced person understands the language and to which he or she has close links (Commission notice – Handbook on the transfer…, 2019). The opportunity for social contact with relatives and friends helps preparing the sentenced person for a return to the community. This objective may not be served if such a person is kept in a foreign State when it is likely that he or she will no longer be permitted to remain in that State after having served the sentence (Commission notice – Handbook on the transfer…, 2019). However, a negative opinion of the sentenced person regarding social rehabilitation itself (as reffered to in recital 10 of the Framework Decision on the transfer of prisoners), cannot be considered as ground for non-recognition and non-enforcement[6].

6 The exhaustive list of grounds for non-recognition and non-enforcement are foreseen in Article 9.

What is more, it is generally accepted that transfer of the sentenced person to the Member State of his nationality will ensure way more successful and easier social rehabilitation. EU Member States have an interest in transferring sentenced persons to the EU country of their nationality as soon as possible.

Taking into consideration the fact that concept of social rehabilitation is still vague and the Framework Decision on the transfer of prisoners limits the situations where consent of the sentenced person is required, prescribes a clear timeframe for the procedure and transfers can only be refused on the basis of a limited number of grounds of non-recognition or non-enforcement (Commission notice – Handbook on the transfer…, 2019), it is inevitable to ask, whether the competent authorities responsibly asses the elements stated above when deciding on the recognition of the judgement and enforcement of the sentence (especially in cases when the sentenced person is transferred back to the EU Member State of his or her nationality and where he or she normally lives[7])? And if the main purpose of the Framework Decision on the transfer of prisoners is actually fulfilled? One of the possible ways to answer this question is to analyse national legislation and case-law.

The provisions of the Framework Decision on the transfer of prisoners into Lithuanian legal system were implemented in 2014 through the Law on the mutual recognition and enforcement of judgements in criminal matters by the Member States of the European Union (Law on the mutual recognition…, 2014)[8], which came into force on 1 April 2015. This act of law not only emphasises social rehabilitation as the main purpose of the Framework Decision on the transfer of prisoners, but also defines the concept of it. Pursuant to Article 2(11), social rehabilitation is understood as social, psychological, legal, pedagogical measures which aim to ensure successful reintegration of the sentenced person into society. Nonetheless, in the vast majority of the cases, regardless of the sentenced persons arguments that, for instance, they no longer have ties with the Republic of Lithuania, since they live and work in

7 As stated in Article 6(2)(a) the consent of the sentenced person is not required where the judgment together with the certificate is forwarded to the Member State of nationality in which the sentenced person lives.

8 In order to fully implement Framework Decision on the transfer of prisoners, several amendments have also been made to the Penal Enforcement Code and the Code of Criminal Procedure.

another EU country for the past few years, citizens of the Republic of Lithuania are transferred back to Lithuania for further execution of a sentence.

To illustrate this, examples from the recent national case law where Lithuanian citizens were transferred back to Lithuania for further execution of the sentence are provided. In this first example the person was convicted of a criminal offence – aggravated theft. The competent authorities of the issuing Member State decided to transfer him to back to Lithuania for further execution of the sentence. The sentenced person, on the other hand, refused to be transferred and stated that he considered himself to be attached to Member State in which a final decision was delivered and stated that his family (a spouse and a minor child) lives in the issuing Member State. Despite these arguments the court ruled that, *inter alia,* the execution of a custodial sentence in Lithuania does not prevent him from maintaining contacts with his family remotely. His marital status is not generally considered to be a relevant factor in recognition of the sentence and is not affected by it. What is more, he is a citizen of Lithuania, he was born and raised in Lithuania and has other relatives here, therefore there is no doubt that the aim of social rehabilitation will be more effectively achieved by serving the custodial sentence in Lithuania (the Ruling of the Panevėžys Regional Court of 25 April 2019). In the second example, a person was convicted of rape. The competent authorities of the issuing Member State decided to transfer him to back to Lithuania for further execution of the sentence[9]. The sentenced person refused to be transferred and stated that by serving his sentence in the issuing Member State he will have the opportunity to work, study and meet with his family (brother and sister) living there. And on the contrary, he would lose the opportunity to meet with his family if he was transferred to Lithuania. In this case, the court ruled that he is a citizen of Lithuania, his last place of residence is in Lithuania and there is no data on the declared departure to a foreign country. His refusal to be transferred to Lithuania in order to achieve a more comfortable execution of the custodial sentence does not create grounds for non-recognition and non-

9 It is important to note that in this case a decision regarding the sentenced person's deportation was issued, meaning that once the sentenced person is released from the enforcement of the sentence he will be deported to the Member State of his nationality (as in a given example to Lithuania) (Article 4(1)(b)).

enforcement (the Ruling of the Šiauliai Regional Court of 20 November 2020). In the third example, a person was convicted of theft. The competent authorities of the issuing Member State decided to transfer him back to Lithuania for further execution of the sentence. The sentenced person considered himself to be attached to the Member State in which a decision was delivered rather than to Lithuania and stated that there are more favourable conditions for his social rehabilitation: prison conditions are better, he can work and earn money here, which he sends to his family, regular communication with family is ensured not only remotely but also during meetings. There were also requests from the sentenced person's family members (spouse and parents) asking not to transfer him back to Lithuania as prison conditions are poor there. The court ruled that he is a citizen of Lithuania, his last place of residence is also in Lithuania, what is more, there is no data on the declared departure to a foreign country. His refusal to be transferred to Lithuania in order to achieve more comfortable execution of the custodial sentence and allegations that Lithuanian prisons do not meet international standards guaranteeing human rights and freedoms do not create grounds for non-recognition and non-enforcement (the Ruling of the Panevėžys Regional Court of 1 July 2019). It is of no surprise that the court stated almost the same things regarding the sentenced person's citizenship and its residence, but what was unexpected that the court also stated that a person's desire to change his lifestyle is fundamentally linked to his strong personal determination and will, and not to the surrounding environment, regardless of the country in which he would serve the sentence (the Ruling of the Panevėžys Regional Court of 1 July 2019). Assessment of the essence of this statement may lead to a conclusion that no matter in which country the sentence will be served, successful social rehabilitation depends solely on the person and his "desire to change his lifestyle". This naturally forms the basis to question the court's decision: why to transfer the sentenced person back to Lithuania if as the court stated country in which the sentence will be served does not matter? In author's opinion, this is not entirely compatible with the essence of the rules foreseen in the Framework Decision on the transfer of prisoners. Although only a few examples were mentioned, from the analysis of the national case law of the past 4 years it is almost clear that in assessment of social rehabilitation the elements of the sentenced person's citizenship and formally-recorded residence are usually decisive. From the author's point of view, this does not en-

tirely support the aim of enhancement of social rehabilitation since elements such as family, social or professional ties are unreasonably underestimated.

To sum up, the Framework Decision on the transfer of prisoners ensures more efficient and simpler legal cooperation among the EU Member States with regard to transferring the sentenced persons for further execution of the custodial sentence. However, it remains questionable whether the main purpose of the Framework Decision on the transfer of prisoners is fulfilled since in assessment of social rehabilitation the elements of the sentenced person's citizenship and formally-recorded residence are usually decisive.

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[1] Read more about Eurpean Criminal Law Academic Network on official ECLAN webpage, [interactive] Available at: http://www.eclan.eu/en. [Accessed 2021 March 31].

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(Vienna University)

Robert Kert studied law at the University of Vienna. In 2001, he completed his PhD Thesis entitled "The Impact of European Law on the Austrian Food Criminal", his "habilitation" dealt with the character of a criminal sanction. From 1997 to 2009 he was a research assistant at the Institute of Criminal Law and Criminology at the University of Vienna. From 2010 to 2013 he held a position as Assistant Professor for criminal law and criminal procedure at the University of Vienna. Since 2013 he has been Professor for criminal law and criminal procedure at the Vienna University of Economics and Business, since 2014 he has been Head of the Institute for Austrian and European Economic Criminal Law at this University.

His research focuses on sanctioning law, European criminal law, white collar crime and economic criminal law, fiscal penal law, administrative penal law and diversion. He has participated as an expert in many comparative projects on behalf of the European Commission and other European institutions which dealt with various questions of European criminal law. Between 2011 and 2013 he led the preparatory study for an impact assessment on a new legislative instrument replacing the Council Framework Decision 2004/757/JHA on illicit drug trafficking, between 2014 and 2015 he led a comparative study on minimum sanctions within the EU on behalf of the European Commission. Robert Kert is contact point for Austria in the European Criminal Law Academic Network (ECLAN) and member of the ECLAN Management Committee. He is president of the Austrian Association of European Criminal Law.

Prof. Valsamis Mitsilegas
(Queen Mary University of London)

Valsamis Mitsilegas is Professor of European Criminal Law and Global Security and Deputy Dean for Global Engagement (Europe) at Queen Mary Univer-

sity of London. He has served in a number of senior leadership roles at Queen Mary, including as Head of the Department of Law (2012-2018), as Dean for Research for the Humanities and Social Sciences (January-December 2017) and as Academic Lead for Internationalisation with pan-university responsibilities (2017-2018). He was also the Inaugural Director of the Queen Mary Institute for the Humanities and Social Sciences (IHSS) from January to December 2017 and has been the Director of the Queen Mary Criminal Justice Centre since 2011. From 2001 to 2005 he served as legal adviser to the House of Lords European Union Committee. His research interests and expertise lie in the fields of European criminal law; migration, asylum and borders; security and human rights, including the impact of mass surveillance on privacy; and legal responses to transnational crime, including organised crime and money laundering

Professor Mitsilegas has a leading role in the establishment and development of a number of transnational research networks. He is Co-Coordinator of the ECLAN and a member of the Management Board of the International Research Network on Migration and Crime (CINETS). He has participated in a number of research projects involving transnational research co-operation, including the 40-month FP7 interdisciplinary research project on EU Action to Fight Environmental Crime (EFFACE) (2012-2016). He has recently been involved in three Commission-funded projects on the development of various aspects of the European Public Prosecutor's Office (EPPO) and is currently member of a research team funded by the ESRC on a research grant on *Anti-Smuggling Policies and their Intersection with Humanitarian Assistance and Social Trust* (2016-2017).

Professor Mitsilegas is involved actively in collaborative projects with civil society and NGOs. He is a member of the Research Advisory Group of the Howard League for Penal Reform and a member of the European Union Sub-Committee of the Immigration Law Practitioners' Association (ILPA). He has been involved in a series of projects with the Centre for European Policy Studies (CEPS) with recent publications including a Report on Access to Electronic Data by Third-Country Law Enforcement Authorities and policy papers on the EU and its Counter-terrorism policies after the attacks in Paris (The EU and its Counter-Terrorism Policies after the Paris Attacks) and Barcelona.[5]

[5] Read more about the professor on official Queen Mary University of London webpage, [interactive] Available at: https://www.qmul.ac.uk/law/people/academic-staff/items/mitsilegas.html [Accessed 2021 March 31].

Prof. habil. dr. Gintaras Švedas
(Vilnius University)

Professor, habilitated doctor Gintaras Švedas has acquired the degree of Doctor of Law in 1993 (Vilnius university) and post-doctoral degree (dr. habil.) in 2009 (Faculty of Law and Administration; University of Lodz (Poland).

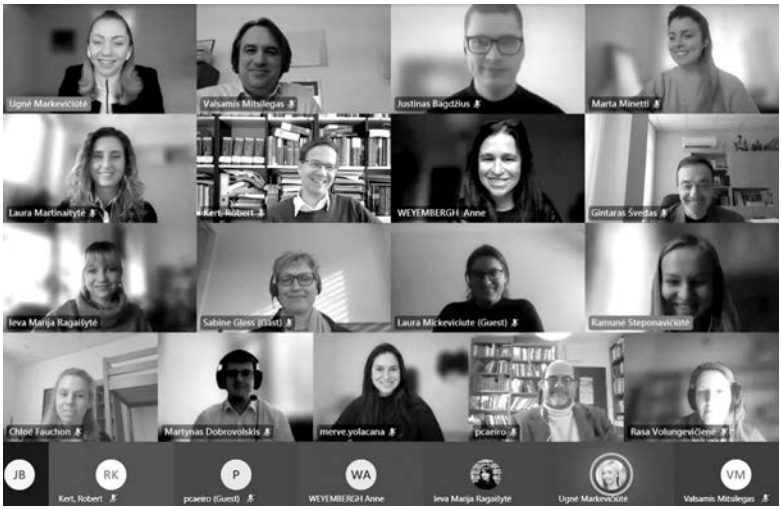
G. Švedas – Head of Criminal Justice Department of Law Faculty of Vilnius university (from 2003), Professor of law at Law Faculty of Vilnius university (from 2009); Vice-Dean for Planning and Sciences of Law Faculty of Vilnius university (from 2006); Member of the Committee of the Criminal Code Supervision under the Ministry of Justice (from 2012); Contact point for Lithuania in the European Criminal Law Academic Network (ECLAN) (from 2006) and Member of Management Committee of ECLAN (from 2018); Member (as foreign expert) of the Committee on Legal Reform in Ukraine (from 2019), etc.

As a national or international expert, he took part in more than 10 international scientific projects. As a short-term senior expert, he participated in the EU projects "Support to the Government of Moldova in the field of anti-corruption, reform of Ministry of Internal Affairs, including police and personal data protection" (2011-2013), "Support to Justice Sector Reforms in Ukraine" (2015-2017) and „Support to Justice Sector Reforms in Ukraine-PRAVO-Justice" (from 2018). He also was involved in preparation of, among others, the Criminal Code, Code of Punishment Enforcement and Code of Criminal Procedure of Lithuania.

G. Švedas was Vice-Minister of Justice of Lithuania (1993-2006), Agent of the Government of the Republic of Lithuania to the European Court of Human Rights (1995-2003), Member of the Management Board of Fundamental Rights Agency (2007-2010), Public Adviser to the Minister of Justice in the fields of criminal law, enforcement of punishments, implementation of the EU law (2012-2016), etc.

The ECLAN PhD seminar provides a friendly environment in which research students can develop contacts with academics and other researchers in the field and gain experience in presenting their research. This year's seminar will therefore represent an opportunity to reflect on the significance of EU Criminal Law in the 21st Century and to discuss the challenges ahead.

Since 2010, ECLAN has organised PhD seminars in different universities across the EU. So far, PhD seminars have taken place at the Université Libre de Bruxelles (2010), the University of Luxembourg (2011), the University of Bayonne (2013), the Queen Mary University (2014), the University of Copenhagen (2015), the University of Vienna (2016), the University of Basel (2017), the University of Luxembourg (2019), and lastly, due to the global pandemic the Seminar was held virtually at the Vilnius University (2021).



This publication contains the proceedings of the 9th European Criminal Law Academic Network (ECLAN) PhD Seminar on European Criminal Justice *"The significance of EU criminal law in the 21st century: the need for further harmonisation or new criminal policy"*, hosted by the Vilnius University Faculty of Law. Participants of the event presented their research in various criminal law fields related to the EU substantive criminal law and its national implementation, combating organised crime and the EPPO, criminal policy and human rights and cooperation in criminal matters and other legal instruments. Thus, the publication provides short papers of the main ideas and conclusions of several speakers' presentations.

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