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Section I.
Introduction

On 29 November 2021, the second international conference of the Humboldt Research Group's Linkage Project *'On the systematisation of criminal responsibility by and in enterprises'* took place under the direction of *Prof. Dr. Dr. h.c. Gerhard Dannecker* und *Prof. Dr. Judit Jacsó*. This event was organised by the Universities of Heidelberg and Miskolc under the title *'The structure, instrumental framework and institutional background of investigations in the EU and the Member States. Comparison of relevant practices and experiences in the Member States / The structure, instrumental framework and institutional background of investigations. Comparison of relevant practices and experiences in the Member States'.*
The main objective of the Humboldt Project is to systematise theoretical and practical experiences and findings on the criminal liability of and in companies, to exchange criminal policy responses to technological and social changes and to analyse them from a comparative law perspective. This discourse involved the participation of academics, practitioners, law students and doctoral candidates. The central aim of this second event was to address and discuss procedural issues. Speakers from nine countries - Germany, Greece, Italy, Croatia, Austria, Poland, Romania, Switzerland and Hungary - took part in the conference. The topic of the conference aligns perfectly with the current discussions on criminal law in the European Union and its Member States.
The following articles deal on the one hand with basic questions of criminal investigation proceedings associated with considerable encroachments on fundamental rights, and on the other hand with specific questions of criminal investigations, discussing national dimensions as well. In order to ensure the most comprehensive analysis, both EU and national perspectives were initially adopted.
Prof. Dr. Anne Schneider (holder of the chair at Heinrich Heine University Düsseldorf) dealt with the prohibition of using evidence obtained illegally, i.e., in violation of the law. She distinguished between two types of unlawful collection of evidence: evidence collected by investigating authorities in violation of criminal procedural regulations and evidence obtained illegally by private individuals. Both types of evidence gathering can be relevant in connection with the criminal liability of and in companies.

Prof. Dr. Dr. h.c. Gerhard Dannecker (Project Manager, University of Heidelberg) focused on investigations under European antitrust law. This is an administrative proceeding in which the Commission can also impose fines. He pointed out that this bears the risk that administrative procedural law dominates the process, even though sanctions of a criminal nature are imposed. The law on cartel fines of the EU impressively demonstrates that compliance with individual criminal law guarantees cannot guarantee an overall procedure based on the rule of law (Rechtsstaatsprinzip). For this reason, the tendency to introduce administrative procedures for the imposition of fines in the Member States should be reconsidered.
Prof. Dr. Frank Meyer (Institute Director, University of Heidelberg) adressed the topic: Limits of the accused's duty to cooperate according to the case law of the ECtHR and the ECJ. He pointed out that there have been significant developments in this area, which are difficult to reconcile with fundamental and human rights requirements.
Other speakers outlined the following topics: the obligation to conduct internal investigations in companies, the recognition of a prohibition on self-incrimination for legal persons, the obligation to produce documents for use in criminal proceedings, the obligation to disclose circumstances relevant to criminal proceedings, internal investigations and leniency programmes that lead to exclusion from punishment or mitigation of punishment.
The Austrian legal situation was presented by *Prof. Dr. Richard Soyer* (Institute Director, University of Linz), the German one by *Kai Sackreuther* (Public Prosecutor's Office Mannheim), the Italian one by *Assoc. Prof. Dr. Vincenzo Carbone* (UNINT University of the International Studies of Rome), the Romanian one by *Assoc. Prof. Dr. Christian Mihes* (Dean, University of Oradea) and by *Assoc. Prof. Dr. Diana Cirmaciu* (University of Oradea) and the Polish one by *Assoc. Prof. Dr. Beata Baran* (Jagiellonian University of Cracow). The article written by *Prof. Dr. Judit Jacsó* (University of Miskolc) and *Assoc. Prof. Dr. Ferenc Sántha* (University of Miskolc), taking into account the importance of combating budget fraud and tax evasion, aims to examine the topic of error in general and in the case of tax evasion.
There was an agreement that comparative law cannot justify the recognition of rights or legitimise solutions to problems. However, comparative law can highlight structural problems and risks that should be considered in different legal systems. Fundamental differences exist in the use of investigation results in the main hearings of various EU Member States. This must be

taken into account when collecting evidence and, particularly, when adopting evidence collected in other states. Finally, it has been demonstrated that minimum standards, such as those found in the European Convention on Human Rights, can significantly contribute to guaranteeing legal procedures. However, national and EU constitutional law may result in higher standards that must be adhered to.

We would like to thank *Prof. Dr. Csilla Csák*, Dean of the Faculty of Law, University of Miskolc, for enabling to publish the articles in the journal European Integration Studies. Our special thanks also go to the authors for their high-quality articles. Furthermore, we thank the professional reviewers *Prof. Dr. Judit Barta, Prof. Dr. Wolfgang Brandstetter, Prof. Dr. István Gál, Assoc. Prof. Dr. Sándor Madai, Assoc. Prof. Dr. Ferenc Sántha, Assoc. Prof. Dr. Stefan Schumann* and *Assoc. Prof. Dr. Bence Udvarhelyi*. Our thanks also extend to *Assist. Prof. Konrad Eichblatt, Dr. Zita Nyikes, Assoc. Prof. Dr. Bence Udvarhelyi* for the linguistic review and *Assoc. Prof. Dr. Andrea Jánosi, Assist. Prof. dr. Gergely Cseh-Zelina* and *Assist. Prof. Dr. Csenge Halász* from the University of Miskolc for their support in the layout of the articles. Additionally, we express gratitude to *Viktória Kerekes*, scientific assistant at the University of Heidelberg, for her assistance in publishing these contributions. Last but not least, we would like to thank the Alexander von Humboldt Foundation for its generous financial support for the publication of the articles in this journal.

We hope that the contributions to the structure, instrumental framework and institutional background of investigations in the EU and the Member States presented here will attract wide attention.

Prof. Dr. Dr. h.c. Gerhard Dannecker *Prof. Dr. Judit Jacsó*

Heidelberg, Miskolc/Vienna in December 2023

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ANNE SCHNEIDER*

Prohibition of the use of evidence in the case of unlawfully obtained evidence?**

ABSTRACT: The question of whether evidence that was obtained unlawfully can be admitted as evidence is discussed in any criminal justice system. This paper examines the solutions that can be found in EU secondary and primary law and in the case-law of the Court of Justice of the European Union. It reveals that different area of EU law use different approaches, which can be explained by the underlying rationales.

KEYWORDS: nemo tenetur, European Court of Justice, Charter of Fundamental Rights of the European Union, European evidence law.

1. Introduction

A classical question of criminal procedure law is what happens when evidence has been obtained by breaching the law. The transnational dimension of EU criminal law brings a new dynamic to this question: evidence can more easily be collected abroad and used in the forum state than under the classical regime of mutual legal assistance. The founding of the European Public Prosecutor`s Office has increased the possibilities for transferring evidence even further.[1] Although the problem of whether to exclude evidence that was obtained unlawfully applies to all types of criminal procedures, the level of protection of companies and other legal entities in criminal investigations differs more between the Member States. Even in EU law, there are different standards of the privilege against self-incrimination for legal entities and natural persons.[2]

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** This study was prepared as part of the linkage project of the Humboldt Research Group "On the systematisation of criminal responsibility of and in enterprises" led by the University of Heidelberg and the University of Miskolc (2020-2025).
[1] See Art. 31. of the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').
[2] *Orkem v Commission of the European Communities* – Case 374/87 - 18 October 1989 and *DB v. Consob* - Case C-481/19 - 2 February 2021.

This paper addresses the question of how to deal with evidence that has been obtained unlawfully, i.e. the violation of applicable law from the perspective of EU law. In doing so, it is first important to recognize that there are two different methods of unlawfully obtaining evidence: either the evidence may have been obtained by the investigating authorities themselves in violation of criminal procedural rules, or private individuals may have obtained the evidence in an illegal manner before it was lawfully collected from the private individual by the investigating authorities.

Both constellations are relevant in the context of criminal liability of and in companies. A case of unlawful collection of evidence by the investigating authorities exists, for example, if the authorities access documents that are subject to attorney-client privilege.[3] An unlawful collection of evidence by private parties can occur in particular if the company conducts internal investigations and, in doing so, fundamental rights of employees such as the right to protection of the core area of private life or the nemo tenetur principle are not sufficiently observed.[4]

The following paper will only address the first case constellation and will also only deal with the question of whether illegally collected evidence can be used as evidence in criminal proceedings. The extent to which it can also be used as starting point for other investigative measures will not be discussed. Nor will the paper cover the use as evidence in punitive administrative proceedings.[5]

2. The rationales of exclusionary rules

The rules on the admissibility of illegally obtained evidence vary widely among the Member States.[6] Which approach a Member State follows depends, among other things, on the design of the criminal procedure system and its objectives.[7] In adversarial systems of criminal procedure, the collection of evidence typically falls within the responsibility of one of the parties. According to this rationale, if the evidence was unlawfully obtained,

[3] See, for instance, *AM & S Europe Limited v Commission of the European Communities* - Case 155/79 – 18 May 1982.
[4] On the seizure of documents collected in internal investigations, see *Akzo/Akcros v. Commission* - Case C-550/07– 14 September 2010, para 125 ff.
[5] On the use of evidence in these kinds of proceedings, see Giuffrida and Ligeti, 2019.
[6] See, in more detail, the comparative studies by Thaman, 2013; Gless and Richter, 2019, although both cover non-Member States, too, as well as Giuffrida and Ligeti, 2019.
[7] Turner and Weigend, 2019, pp. 255 ff.

the party responsible should not benefit from the breach of law.[8] In inquisitorial systems, it is more complicated to find the reasons behind exclusionary rules or the lack of such rules.

Turner and Weigend have identified four common rationales of exclusionary rules on the basis of a comparative analysis of criminal procedure law in both common law and civil law countries: finding the truth, upholding judicial integrity, deterring police misconduct and human rights considerations.[9]

2.1. Finding the truth

A criminal procedure system must at least aim at convicting the true perpetrator of the crime. Therefore, finding out what has actually happened is a classic objective of criminal proceedings.[10] With regard to exclusionary rules, this approach leads to limited exclusion of evidence. Basically, evidence is only excluded when it is deemed to be unreliable.[11] In case of unlawfully obtained evidence, the breach of law must be of such a nature that the evidence gathered in this manner cannot be considered to be reliable. The classic example concerns verbal statements obtained under duress or torture. However, other types of evidence are sometimes considered less reliable than others. In Germany, this is discussed for evidence obtained by polygraph[12] and verbal statements by the defendant's family.[13]

2.2. Upholding judicial integrity

A criminal procedure system having the objective to uphold judicial integrity operates on the idea that the criminal justice system and in particular the judiciary must not allow tainted evidence to form the basis of judicial decisions.[14] The integer state shall not profit from the misconduct of its agents. However, the system might also be compromised if crimes are not prosecuted because people might lose confidence in the judicial system.

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[8] Turner and Weigend, 2019, p. 256.
[9] Turner and Weigend, 2019, pp. 257 ff.
[10] Turner and Weigend, 2019, p. 257.
[11] Schneider, 2021, pp. 337 ff.
[12] Bundesgerichtshof (1998) *Ständige Sammlung der Rechtsprechung des Bundesgerichtshofs* (collection of case-law by the Federal Court of Justice) vol. 44, pp. 308 (319); Bundesgerichtshof (2011) *Neue Zeitschrift für Strafrecht*, pp. 474 (475).
[13] See, e.g., Eckstein, 2013, pp. 389 ff.
[14] Turner and Weigend, 2019, p. 258.

Accordingly, this approach requires a balancing test:[15] It must be weighed whether the illegal collection of evidence or the failure to use the evidence is more detrimental to the integrity of the system, taking into account that any withdrawal of evidence makes it more difficult to establish the truth.

2.3. Deterring police misconduct

The rationale of deterring police misconduct also aims at establishing and upholding trust in the judicial system. However, in contrast to the general approach of upholding judicial integrity, this is achieved by excluding evidence that was collected in breach of the law.[16] The idea behind this is to make police officers, who are usually tasked with collecting evidence, aware that any breach of law in order to obtain evidence leads to its exclusion and thus threatens the case. Deterrence is achieved not by individual liability, but by the collective responsibility of the police authorities for having failed to obtain a conviction. This dissuasive effect would be the strongest if all evidence that was gathered illegally were to be excluded.

2.4. Human rights considerations

If a criminal procedure system is predominantly based on human rights considerations, the exclusion of evidence is seen as an effective remedy for human rights violations.[17] It serves as compensation for a violation of human rights suffered during the investigation when evidence was collected illegally. This approach calls for less flexibility of exclusionary rules because any violation of human rights should then lead to the exclusion of evidence.[18]

Most existing legal systems do not follow one approach exclusively. Nonetheless, this categorization shows which elements might play a role in designing exclusionary rules in a legal system.

3. Exclusionary rules in the European Union

Having established possible rationales for exclusionary rules, the focus of this paper turns to EU law and raises the question of which exclusionary

[15] Turner and Weigend, 2019, p. 259.
[16] Ibid.
[17] Turner and Weigend, 2019, pp. 261 ff.
[18] Turner and Weigend, 2019, p. 269.

rules apply within EU law. This requires, first, a brief look at the scope of EU evidence law. Secondly, written EU law on exclusionary rules will be examined before general principles as they were developed in EU antitrust law and the Charter of Fundamental Rights will be examined.

3.1 Scope of application of European evidence law

In European criminal law, the question of the admissibility of illegally obtained evidence arises in all criminal proceedings in which EU law is implemented. These include all proceedings in which crimes are committed in order to protect the financial interests of the European Union or which fall within the scope of application of Union law for other reasons.[19] The European law of evidence is also applicable if evidence is to be recognized within the framework of mutual recognition in criminal proceedings or if evidence has been obtained in violation of the accused's rights harmonized in the EU.[20]

In principle, it does not matter whether a natural person or a company is the accused, provided that the proceedings against the company are subject to the rules of criminal procedure in the Member States. However, not all directives on natural persons are applicable to companies. For example, Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings explicitly applies only to natural persons (Article 2), and Directive 2016/343/EU on procedural safeguards for children in criminal proceedings is also unlikely to play a role for companies. This means that violations of the rights contained in these directives cannot form the basis of an exclusionary rule for companies and other legal entities.

3.2 EU secondary law

Although EU law has promoted the mutual recognition of evidence and harmonized defence rights to some extent, there is surprisingly little written law on exclusionary rules.

3.2.1 Directives on the rights of the defendant

The six directives on defendants' rights (interpretation, notification, access to counsel, presumption of innocence, children's rights, and legal aid) do

[19] On the scope of EU law, see, e.g., Böse, 2014b, pp. 107 ff.
[20] Böse, 2021, pp. 399 ff.

contain requirements that affect the collection of evidence. For example, according to Article 4 of Directive 2013/48/EU, the confidentiality of communications with the defence counsel must be ensured, from which it follows that evidence may not be taken if it is evident that these communications are affected. Therefore, for example, correspondence between the defence counsel and the defendant may not be accessed and read.

However, by default, the Directives do not regulate the consequences of a violation of these rights. Most directives have provisions on remedies for violations of the defence rights contained in the directives:[21]

> Article 8 Verification and remedies Directive 2012/13/EU
> […]
> 2. Member States shall ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive.
>
> Article 12 Remedies Directive 2013/48/EU
> 1. Member States shall ensure that suspects or accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, have an effective remedy under national law in the event of a breach of the rights under this Directive.
> 2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.

[21] With the exception of Directive 2010/64/EU, which indicates a need for remedies, but not as explicitly as the other directives, see Caianiello and Lasagni, 2022, p. 233.

> Article 10 Remedies Directive 2016/343/EU
> 1. Member States shall ensure that suspects and accused persons have an effective remedy if their rights under this Directive are breached.
> 2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected.
>
> Article 19 Remedies Directive 2016/800/EU
> Member States shall ensure that children who are suspects or accused persons in criminal proceedings and children who are requested persons have an effective remedy under national law in the event of a breach of their rights under this Directive.
>
> Article 8 Remedies Directive 2016/1919/EU
> Member States shall ensure that suspects, accused persons and requested persons have an effective remedy under national law in the event of a breach of their rights under this Directive.

Thus, while the accused is entitled to an effective remedy, it remains completely open how this remedy ought to be structured.[22] Only two provisions touch upon the topic of the admissibility of evidence,[23] but only to make clear that an impact on the national system of admissibility of evidence was not intended. Other than that, the provisions simply state that the rights of the defence and the fairness of proceedings have to be respected. Considering that all EU Member States are part of the Council of Europe and adhere to the European Convention on Human Rights, this

[22] Caianiello and Lasagni, 2022, pp. 233 ff.
[23] Art. 12(2) of the 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 and Art. 10(2) of the 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.

requirement is hardly surprising and does not help to clarify when evidence that was unlawfully obtained is admitted in criminal proceedings.

This was different in the original Commission draft for Directive 2013/48/EU, which, in view of the case law of the European Court of Human Rights, provided for a ban on the use of evidence obtained in violation of the right of access to a lawyer in Article 13(3) COM(2011) 326 final:

> (3) Member States shall ensure that statements made by the suspect or accused person or evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 8, may not be used at any stage of the procedure as evidence against him, unless the use of such evidence would not prejudice the rights of the defence.

This rule would have excluded evidence collected in breach of the right of access to a lawyer from criminal proceedings, but was rejected in the legislative process by the Member States who did not want binding exclusionary rules.[24] This makes sense considering that the systems of admitting evidence are very different and that not all Member States operate with binding exclusionary rules.[25] Nonetheless, the effectiveness of the legal remedies is hampered by the Directives' silence on the admissibility of evidence.

3.2.2 European Public Prosecutor's Office

The European Public Prosecutor's Office, which has been operational since June 2021, has the possibility to collect evidence in the Member States through the Delegated European Public Prosecutors without having to go through the classical mutual legal assistance procedure.[26] The criminal proceedings are conducted before the national courts of the Member States. Regarding the admissibility of evidence collected by the European Public Prosecutor's Office in national criminal proceedings, the Regulation states:

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[24] Corell and Sidhu, 2012, p. 250.
[25] Giuffrida and Ligeti, 2019.
[26] Arts. 30, 31 of the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

> Article 37 Evidence Regulation 2017/1939/EU
> 1. Evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State.
> 2. The power of the trial court to freely assess the evidence presented by the defendant or the prosecutors of the EPPO shall not be affected by this Regulation.

This regulation does not help with the question of the admissibility of unlawfully obtained evidence, either. The fact that evidence may not be rejected as inadmissible solely because it was obtained in accordance with the law of another Member State is a consequence of the principle of equivalence. However, it is not clear from the provision what applies if the collection of evidence was already unlawful in the executing state. Rather, the principle of the free assessment of evidence applies in this respect (Article 37(2)), which means that it is up to the Member States to decide whether or not to admit the evidence.[27]

3.2.3 European Investigation Order

In the context of mutual legal assistance, the rules are not more precise as can be seen with the example of the European Investigation Order. Article 14(7) of Directive 2014/41/EU reads:

> 7. The issuing State shall take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law. Without prejudice to national procedural rules Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO.

Again, the Member States are only obliged to respect the rights of the defence and the fairness of the proceedings when assessing evidence. Even

[27] See, in more detail, Burchard, 2021, Art. 37 para 5 ff.

a successful challenge against the EIO, i.e. a court decision recognizing that either the execution or the recognition of the EIO was unlawful, does not necessarily lead to the exclusion of the evidence.[28] It is up to the individual Member State to assess the evidence collected abroad.

3.2.4 Conclusion

The analysis of EU secondary law shows that the EU has so far been very reluctant to oblige Member States to exclude certain evidence. Although, to be fair, one must say that the drafting of general EU exclusionary rules would have been a very difficult task and might be beyond the EU competence. EU law does not even provide for the exclusion of evidence that was gathered in breaching minimum defence rights or which has been held to have been illegally collected in the executing state. Similarly, rules on admitting or excluding evidence collected by the EPPO are largely missing.

3.3 Charter of Fundamental Rights

In the absence of explicit prohibitions on the use of evidence, the question arises whether a prohibition on the use of evidence can arise from the principle of a fair trial set forth in Article 47 Charter of Fundamental Rights of the European Union and other Charter rights such as Article 7, 8 of the CFR. The Court of Justice of the European Union (CJEU) had to deal with this question primarily in connection with VAT fraud. In *WebMindLicences*, the question was whether evidence that had been collected in criminal proceedings without the necessary court order could be used in administrative taxation proceedings.[29] The CJEU stated that the requirements of an effective remedy are satisfied if the court can verify '[...] whether the evidence on which that decision is founded has been obtained and used in breach of the rights guaranteed by EU law and, especially, by the Charter.'[30] It is not clear from the judgment, what happens if such a violation of rights is found.

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[28] See Böse, 2014a, p. 161.

[29] *WebMindLicenses Kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* - Case C-419/14 – 17 December 2015.

[30] *WebMindLicenses Kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* - Case C-419/14 – 17 December 2015, para 87.

In *Dzivev*, the CJEU had to decide whether the exclusion of evidence unlawfully obtained by surveillance, i.e. without judicial authorization by a competent court, was compatible with the principle of effectiveness as laid down in *Taricco*.[31] The CJEU answered the question in the affirmative:

> In that regard, it is common ground that the interception of telecommunications at issue in the main proceedings was authorised by a court which did not have the necessary jurisdiction. The interception of those telecommunications must therefore be regarded as not being in accordance with the law, within the meaning of Article 52(1) of the Charter.
> It must therefore be observed that the provision at issue in the main proceedings reflects the requirements set out in paragraphs 35 to 37 above, in that it requires the national court to exclude, from a prosecution, evidence such as the interception of telecommunications requiring prior judicial authorisation, where that authorisation was given by a court that lacked jurisdiction.
> It follows that EU law cannot require a national court to disapply such a procedural rule, even if the use of that evidence gathered unlawfully could increase the effectiveness of criminal prosecutions enabling national authorities, in some cases, to penalise non-compliance with EU law […].
> In that regard, the fact, pointed out by the referring court, that the unlawful act committed is due to the imprecise nature of the provision transferring power at issue in the main proceedings is irrelevant. The requirement that any limitation on the exercise of the right conferred by Article 7 of the Charter must be in accordance with the law means that the legal basis authorising that limitation should be sufficiently clear and precise […]. It is also of no relevance that, in the case of one of the four defendants in the main proceedings, only the interception of telecommunications initiated on the basis of authorisations granted by a court lacking jurisdiction could prove his guilt and justify a conviction.[32]

[31] *Ivo Taricco and Others* – Case C-105/14 – 8 September 2015.
[32] *Petar Dzivev and Others* – Case C-310/16 – 17 January 2019, paras 37-40.

Accordingly, EU law does not prevent the exclusion of evidence, at least in cases, in which the privacy rights guaranteed in the Charter support this approach. This is even true if the evidence excluded was the only evidence on which a conviction could be based. However, the Court again did not specify whether the exclusion of evidence is mandatory when defence rights or procedural guarantees are violated.

This follow-up question was the subject of the joined *IN and JM* proceedings, which dealt with the usability of evidence obtained in violation of an international agreement.[33] The CJEU dismissed the proceedings as inadmissible, as recommended by the Advocate General. In her opinion, however, AG Kokott addresses the question of an exclusionary rule for evidence that was obtained unlawfully:

> In this regard, it should be noted, first, that EU law does not provide for any rules on the gathering and use of evidence in the context of criminal proceedings in the field of VAT, and hence that sphere falls, in principle, within the competence of the Member States. Criminal procedures for countering infringements in the field of VAT therefore fall within the procedural and institutional autonomy of the Member States. This applies a fortiori to the use of evidence for the assessment of income tax if that evidence was gathered in a preliminary investigation due to VAT-related offences.
> In the implementation of Union law, that autonomy is nevertheless limited by the fundamental rights and the principle of proportionality as well as the principles of equivalence and effectiveness. Against this background, however, it is not apparent that the principles of equivalence and effectiveness preclude an evaluation by the national court in the context of assuming a prohibition on the use of evidence. Nor is violation of fundamental rights apparent. Article 47 of the Charter does not entail an automatic prohibition on the use of evidence. […] An assessment of the proportionality of the intervention on a case-by-case basis is the best way of taking the fundamental

[33] *IN and JM v Belgische Staat* - Joined Cases C-469/18 and C-470/18 – 24 October 2019.

> rights into account, as takes place in the evaluation by the national courts […].[34]

According to AG Kokott, evidence that was obtained unlawfully is not automatically excluded. Instead, an assessment by national authorities, taking into account EU fundamental rights, is acceptable.

Her point of view mirrors that which the CJEU has taken in *Steffensen* for punitive administrative proceedings.[35] In this case, Mr. Steffensen was to be fined for a violation of EU food law provisions. However, the competent national authorities failed to take additional samples of the contested food as was prescribed by EU law. The question was whether the analysis of the food samples was admissible as evidence even though Mr. Steffensen had not been provided with samples of his own in order to have them tested independently. The Court stressed that it was up to the Member States to decide on the admissibility of evidence, as long as the principles of equivalence and effectiveness were respected.[36] However, it also pointed out that the Member State ought to take the fair trial principle and fundamental rights into account.[37] Again, a clear and predictable rule cannot be found in EU law.

It can thus be summarized that, as things stand, EU law leaves the Member States a great deal of leeway with regard to the admissibility of evidence that was obtained illegally. An exclusionary rule for illegally obtained evidence is not automatically given in case of violations of EU law, but it is also not prohibited to adopt such a rule. Clear rules are missing in EU criminal procedure law.

3.4 EU Competition Law

When analysing EU criminal procedure law, one should not forget to have a look at other areas of EU Law which have a punitive function. EU punitive administrative law has a longer tradition than EU criminal law and was the first area of EU law in which defence rights and procedural safeguards were discussed. Therefore, it is well worth looking at EU competition law and the respective jurisprudence by the CJEU.

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[34] *IN and JM v Belgische Staat* - Joined Cases C-469/18 and C-470/18 – 24 October 2019, AG Kokott Opinion, paras 73-78.
[35] *Joachim Steffensen* - Case C-276/01 – 10 April 2003.
[36] *Joachim Steffensen* - Case C-276/01 – 10 April 2003, paras 62 ff.
[37] *Joachim Steffensen* - Case C-276/01 – 10 April 2003, paras 78 ff.

EU competition law acknowledges several procedural rights for the companies that are the subject of investigations and are to be fined, including legal professional privilege[38] and nemo tenetur[39]. The general rule in competition law is that a violation of the procedural safeguards by the Commission leads to the exclusion of the evidence thus collected. In *Akzo Nobel*, the question was whether a violation of legal professional privilege had occurred and what the consequences of such a violation would be. The European Court clarified that evidence obtained in breaching legal professional privilege was not only excluded from sanctioning proceedings, but should not become known to the Commission at all:

> Therefore, even if that document is not used as evidence in a decision imposing a penalty under the competition rules, the undertaking may suffer harm which cannot be made good or can only be made good with great difficulty. Information covered by LPP might be used by the Commission, directly or indirectly, in order to obtain new information or new evidence without the undertaking in question always being able to identify or prevent such information or evidence from being used against it. Moreover, harm which the undertaking concerned would suffer as a result of disclosure to third parties of information covered by LPP could not be made good, for example if that information were used in a statement of objections in the course of the Commission's administrative procedure. The mere fact that the Commission cannot use privileged documents as evidence in a decision imposing a penalty is thus not sufficient to make good or eliminate the harm which resulted from the Commission's reading the content of the documents.[40]

This shows that all use of evidence gathered in breach of legal professional privilege is forbidden. The Court has also repeatedly stressed that '[…] if the Community judicature annuls the inspection decision or holds that there has been an irregularity in the conduct of the investigation,

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[38] *AM & S Europe Limited v Commission of the European Communities* - Case 155/79 – 18 May 1982.
[39] *Orkem v Commission of the European Communities* – Case 374/87 - 18 October 1989.
[40] *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities* - Joined cases T-125/03 and T-253/03 – 17 September 2007, para 87.

the Commission will be prevented from using, for the purposes of infringement proceedings, any documents or evidence which it might have obtained in the course of that investigation […]'.[41] These examples show that evidence that was obtained illegally cannot be used in sanctioning proceedings under EU competition law.

4. Assessment and conclusion

When comparing EU criminal law and EU competition law, it becomes obvious that the exclusion of evidence is dealt with differently. While the exclusion of illegally obtained evidence is not necessary in EU criminal law, it is undisputed in EU competition law. This result is, at first glance, astonishing because one might expect the rules on admissibility of evidence to be more precise in criminal law than in administrative law, be it punitive or not. Nonetheless, there are many differences between EU competition law and EU criminal law, not the least historically, that can explain these differences.

One way to explain this alleged contradiction has to do with the rationales for exclusionary rules that have been presented above. The different treatment can be traced back to the fact that different goals are pursued in individual areas of European criminal law in a broad sense.

In competition law proceedings, the Commission has far-reaching investigative powers of its own, which are opposed by rather restrictive regulations for the protection of the accused.[42] Although national authorities support the Commission in its investigations, the main rules of procedure have been laid down in EU law. Keeping in mind that competition law was one of the earlier areas in which EU authorities could deal out punishment, it was and is important to control the Commission diligently. Therefore, the idea of deterring the Commission's officials from breaking the law is prominent in EU competition law. The fact that the Member States have transferred the power to sanction violations of competition law to the EU makes it necessary for the Commission to follow these rules detailly and operate by the book. This is especially true because the EU has limited

[41] *Deutsche Bahn AG and Others v European Commission* - Case C-583/13 P - 18 June 2015, para 45; see also *Roquette Frères SA v Commission of the European Communities* - Case C-94/00 - 22 October 2002, para 49.

[42] For an overview on competition law from a comparative perspective, see Scholten and Simonato, 2017, pp. 28 ff.

competences in the criminal sector. Following this rationale, it is easy to see why a violation of procedural safeguards in collecting evidence must lead to its exclusion. This is particularly compelling when taking into consideration that the investigating body and the sanctioning body are, at least initially, the same, i.e. the Commission.

In contrast, EU criminal law in the strict sense has so far not had a player that was as powerful as the Commission in competition law. In contrast, when it comes to protecting the Union's financial interests, the Member States are primarily responsible for prosecution and enforcement. Even the EPPO is dependent on national investigative measures and national police officers for its investigations. The risk that EU authorities in criminal matters break the law unpunished is thus low. The EU's influence is much more limited. Accordingly, the deterrence approach plays no significant role here.

The idea of redressing human rights violations has also played a subordinate role in European criminal law to date. This is due to the fact that all Member States are members of the Council of Europe and the European Court of Human Rights monitors compliance with the ECHR. The EU legislator refers to the ECHR and the fair trial principle, but – so far – does not provide for an equivalent regime for protecting individual rights in EU evidence law.

European criminal law thus follows an approach that is geared to preserving the integrity of the criminal procedure system and dispenses with rigid rules for this purpose. There are no binding rules on the admissibility of evidence. Instead, it is the Member States' task to apply their own law on the use of illegally obtained evidence. However, this flexibility comes at the price of a certain arbitrariness and unpredictability of results. While this is true for any legal system that chooses such a flexible approach, the results are more arbitrary in EU law because the decision on admitting or excluding evidence might differ from Member State to Member State. For example, a breach of lawyer-client confidentiality[43] might exclude the use of evidence in one Member State, make it inadmissible at trial in another and allow for compensation, but not inadmissibility in a third Member State. Such

[43] Art. 4 of the 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.

differing results can impair the harmonization of criminal procedure law severely. The idea behind this is, of course, to preserve the integrity of the Member States' criminal justice system, but at the price that an integrated EU criminal justice system is far away. In this respect, it is doubtful whether this approach is convincing in an area of law that is by nature fragmented.

What is the solution? The current trend in EU criminal law to leave out any reference to the admissibility of evidence leads to fragmentation and threatens the goal of harmonization. It is therefore advisable to include the consequences of violations of EU law for criminal proceedings in the law. A starting point could be the Directives on defence rights which already prescribe minimum defence rights. It would not be hard to identify core rights whose violation must lead to the exclusion of evidence thus gathered. For other rights, the consequences of a violation could still be left to the devices of the national systems. Such an approach might be a starting point towards an EU law of evidence in criminal matters and could also provide guidelines for the EPPO.

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Investigations in European antitrust law**

ABSTRACT: The Commission is responsible for investigating cartel law violations and imposing fines on companies. The investigations are carried out in an administrative procedure in which the facts of the case must be investigated in compliance with the rule of law. Here, fundamental rights must be guaranteed. In this respect, the jurisdiction of the ECJ still shows deficits, as it is based on the assumption that human rights belong exclusively to human beings. When legal persons are fined, they must be granted the guarantees of constitutional law.

KEYWORDS: Corporate fines, EU antitrust sanctions, Investigations of the Commission in cartel cases, Applicability of human rights to companies.

1. The European Union's preliminary proceedings under the law on fines

The European Union does not have its own criminal law in the classical sense. However, fines can be imposed on companies in antitrust law if cartel agreements are made, a company abuses its dominant market position or legal violations are committed in connection with merger control.[1] De lege ferenda, the imposition of fines should also be introduced for legal violations by gatekeepers such as Google, Facebook, etc.[2]

The responsibility for conducting antitrust proceedings lies with the European Commission, which conducts the investigations and imposes fines the companies.[3]

Judicial control is exercised by the Court of Justice, the Court of First Instance and the European Court of Justice.[4] Although it is possible to

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[1] Emmerich and Lange, 2021, p. 12.

[2] Paal and Kumkar, 2021, p. 809; Jovanovic and Greiner, 2021, p. 678.

[3] Dannecker and Schröder, 2021a, p. 407.

review both the findings of fact and the application of the law, both courts limit their judicial examination to questions of law.[5] In this respect, there is no effective legal protection by the courts.

Based on ECHR jurisdiction, fines imposed on companies are criminal law in a broader sense.[6] The criminal law guarantees of the ECHR apply to this and do so already in the pre-trial proceedings. But not all human rights guarantees are recognized. The ECHR jurisprudence is based on the assumption that human rights belong exclusively to human beings.

2. The conduct of the proceeding by the Commission

Commission antitrust proceedings usually start with a so-called dawn raid, i.e. "at dawn" without notification.[7] The companies concerned and, in some cases, the employees' private residences are searched to find evidence of cartel violations such as price fixing or market sharing between competitors. In doing so, the Commission is entitled to rely on the national search regulations as the legal basis. It must adhere to these when carrying out the search.[8]

Antitrust authorities conduct investigations of all companies concerned at the same time. On the one hand, the companies are not to warn each other. On the other hand, equal opportunities for leniency programs are to be maintained. A person who declares his or her willingness to cooperate to the antitrust authority may, under certain conditions, be granted complete immunity as a principal witness if he or she is the first one to agree to cooperate.[9] Subsequent declarations of willingness to cooperate can only lead to reduced fines (bonuses). Whether this is successful depends in particular on how quickly a company reacts.[10] Bonus requests are often made during the ongoing search. In addition, the company must show consistent cooperation.

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[4] Dreher and Kulka, 2018.
[5] Bueren, 2012, p. 363.
[6] *Jussila v. Finland* App. No. 73053/01, 23 November 2006. Art. 43.
[7] Dreher and Kulka, 2018; Miersch and Israel, 2017, p. 89.
[8] Seitz, Werner and Lohrberg, 2007.
[9] Dreher and Kulka, 2018, p. 1751; Dittrich, 2012.
[10] Miersch and Israel, 2017, p. 60.

In many cases, an investigation is only initiated after a company has made use of the leniency program and uncovered a cartel. This reflects the use of the leniency program as a method of uncovering antitrust violations.[11]

The Commission may ask companies to provide information necessary to detect antitrust violations.[12] If companies do not comply with such a request, they cannot be forced to admit to an infringement. However, they are obliged to answer questions of fact and to submit documents, even if the respective information can be used to provide evidence of an infringement by the companies concerned or by other companies. Furthermore, incorrect or incomplete information is punishable by a fine.[13]

The Commission may interview any person who has pertinent information and record their statements.[14] The Commission's investigators may also, in the course of an investigation, impose a seal for the time necessary for this purpose.[15] As in general, the duration of the sealing should not exceed 72 hours.[16] The investigators may request any information related to the inspection and they are authorized to enter any premises where business documents may be located, including private residences.[17] In the latter case, a court decision of the Member State is required, serving as an anticipatory legal check and limiting the investigating authority's power.[18]

Legal consequences of an antitrust investigation include an order to desist,[19] generally, the imposition of a fine,[20] claims for damages by competitors and consumers due to excessive cartel prices[21] and compensation of the sanctioned company against the responsible individual persons.[22]

A certain corporate strategy that is ideal with regard to the fine proceedings may, in retrospect, turn out to be failed in the overall picture.

[11] Dannecker, 2004, p. 361.
[12] Bischke and Neideck, 2020.
[13] Miersch and Israel, 2017, p. 115.
[14] Sura, 2018.
[15] Miersch and Israel, 2017, p. 69.
[16] Sura, 2018.
[17] Miersch and Israel, 2017, p. 64.
[18] Ibid.
[19] Lettl, 2021.
[20] Ibid.
[21] Becker and Kammin, 2011, p. 503.
[22] Degner, 2021.

Thus, a leniency application can minimize the risk of a fine and at the same time significantly increase the risk of damages. In some cases, the antitrust authority can only prove a legal violation on the basis of the confession of a leniency witness. The cartel authority's findings are in principle binding on the civil court in any follow-on damage claim by virtue of statutory order.[23] This is an exception, as in Germany courts are generally not bound by the decisions of other courts.

3. The arrangement of the proceeding as an administrative procedure

The antitrust investigation is an administrative procedure conducted by the Commission. It is therefore not a criminal investigation. At the end of the procedure, there is an official prohibition decision and, if necessary, the imposition of a fine on the companies.[24]

In general, the principles that govern the administrative procedure apply. However, since fines are penalties in the broader sense, the criminal law guarantees must be respected.[25]

The main procedural rules are found in Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Mentioned there:

- The respect of fundamental rights of defence.
- The burden of proof for antitrust violations: The authority has the burden of proving the infringement in accordance with the relevant legal requirements. It is up to the companies or business associations wishing to invoke justification against a finding of infringement to provide evidence, in accordance with the relevant legal requirements, that the conditions for such justification are met.
- The right of the undertakings concerned to be heard by the Commission.[26] Third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised.[27]

[23] Schmidt, 2017, p. 330.
[24] Breit, 2014.
[25] Dannecker and Schröder, 2021b, p. 423; Völcker, 2017, p. 44.
[26] *Hoffmann-La Roche v Commission* C-85/76, 13 Februry 1979, para 9.
[27] *Ismeri Europa v Court of Auditors* C-315/99 P, 10 July 2001, para 31.

- While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network should likewise be safeguarded.
- The principle *ne bis in idem* applies.[28]
- *Nemo tenetur*, the prohibition of self-incrimination, does not apply to companies in principle, according to the ECJ. However, there is also no obligation to make a confession.[29]

4. Procedural guarantees

According to the Commission and the Court of Justice, Regulation 1/2003 respects fundamental rights and is consistent with the principles enshrined, in particular, in the Charter of Fundamental Rights of the European Union.[30]

According to German Federal Constitutional Court, national constitutional criminal law guarantees must be applied in addition to the ECHR and EU fundamental rights if the national law is not fully determined by European Union law on the basis, primarily, of the fundamental rights of the Basic Law. This applies even in cases where the relevant provisions of domestic law serve to implement European Union law. The application of the fundamental rights of the Basic Law as the primary standard of review is informed by the assumption that European Union law, where it affords Member States latitude in the design of ordinary legislation, is generally not aimed at uniformity in fundamental rights protection but allows for fundamental rights diversity. This leads to the presumption that the application of the fundamental rights of the Basic Law simultaneously ensures the level of protection of the Charter of Fundamental Rights of the European Union. An exception to the assumption in favour of fundamental rights diversity in cases where Member States are afforded latitude in the design of ordinary legislation, or a rebuttal of the presumption that the application of the Basic Law's fundamental rights simultaneously ensures the level of fundamental rights protection of the Charter, should only be considered if there are specific and sufficient indications therefor.[31]

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[28] *Limburgse Vinyl Maatschappij and Others v Commission*, C-238/99 P, 15 October 2002, para 59. and *Toshiba Corporation and Others*, C-17/10, 14 February 2012, para 94.
[29] Bardong and Stempel, 2020.
[30] Völcker, 2017, p. 47.
[31] *Recht auf Vergessen I*, 1 BvR 16/13, BVerfGE 152, 152, 6 November 2019.

5. Conclusion: The European Union's antitrust investigations as an example for investigations under national law? – 10 theses

1. The administrative antitrust proceeding falls short of the standards of a criminal proceeding despite the recognition of the guarantees of criminal law.
2. Examples of inadequate recognition of criminal law guarantees in fines against companies include:
- Recognition of irrefutable rules of evidence
- Negation of *nemo tenetur* for companies
- Statutory notification obligations despite the threat of a fine (e.g., in relation to company turnover, which is relevant for the setting of fines)
- The right to be heard as only a formal principle
- The renouncement of the principle of orality as an achievement of the enlightened criminal process
- Limitation of the judicial control to the justifiability of the administrative decision
- Prohibitions of use as evidence are formally determined.

3. Already the initiation as well as the implementation of sanction proceedings constitutes an infringement of fundamental rights, which is subject in particular to the principle of proportionality.[32]
4. The necessity of terminating the proceeding may result from the principle of proportionality.
5. In general, it must be ensured that fundamental rights and human rights are also respected in the investigation procedure.
6. The Federal Constitutional Court is right when it examines all guarantees - human rights as well as EU and national constitutional guarantees (Judicial Decision "Vergessen II").[33]
7. The European Union's antitrust procedural law is not suitable to be adopted as a legal transplant into Member States' national legal systems.
8. On the contrary, Member States' antitrust procedural rules give reason to reconsider the Commission's procedure with regard to the rule of law![34]

[32] Dittert, 2017, p. 290.
[33] *Recht auf Vergessen I*, 1 BvR 276/17, BVerfGE 152, 152, 6 November 2019.
[34] Völcker, 2017, p. 48.

9. At the same time, a look at the investigative proceedings under antitrust law makes it clear that a general procedural law theory based exclusively on legal philosophy is inadequate and is not a sufficient foundation for the questions to be solved. This requires the inclusion of sociological, psychological and cultural contexts. This becomes particularly clear if one understands the trial maxims and guarantees as “condensed experiences”.

10. It is the strength of the law that sociological and psychological findings are not directly taken into account, but that legal principles are developed based on empirical findings, but which are generalized and must be observed in criminal proceedings.

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Duties to cooperate and their limits under the case law of the ECtHR and the ECJ**

ABSTRACT: Economic regulation and supervision mechanisms habitually include duties to cooperate which require individuals and legal persons to document their activities and disclose information about their actions if they come under investigation. These duties are often backed up by sanctions, forcing the addressee to decide whether to hand over information or face adverse consequences. Such pressure could violate the privilege against self-incrimination and other fundamental rights guarantees. The article reviews the case law of the ECtHR and the ECJ and summarizes the present state of European human rights law. It will show that the current situation is unsatisfying as it leaves crucial questions unanswered. Most importantly, the article will shine a light on the lack of reliable precedent regarding the right to remain silent of legal persons.

KEYWORDS: duty to cooperate, nemo tenetur, right to remain silent, privilege against self-incrimination, attorney-client-privilege, confidentiality, business secrets, privacy, legal persons, ECJ, ECtHR.

1. Background and practical relevance

Economic regulation and supervision nowadays entail numerous documentation, information and disclosure obligations. They represent standardised building blocks of regulatory and supervisory law in regulated industries, but also form part of the general legal framework in other economic sectors. Natural and legal persons thus might be subjected to such strictures either as a precondition for being admitted participating in a certain market or because of their regular economic activities, should the general legal requirements contain such obligations. Such information and

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disclosure obligations become particularly relevant in connection with the investigation of alleged infringements by administrative authorities. To facilitate effective investigations, cooperation and correct, prompt information are existential from the authorities' point of view and companies are obliged to cooperate accordingly. The effective functioning of these mechanisms is often secured by the threat of sanctions in the event of refusals or sketchy reporting. Such obligations to cooperate, if backed up with sanctions, can easily come into conflict with the rights of the natural and legal persons concerned. They can violate attorney-client privilege and trade secrets, and most importantly, freedom from self-incrimination (nemo tenetur). The article will first provide a brief overview of these limits to the freedom of cooperation but will then confine itself to the nemo tenetur principle.

2. Limitations of obligations to cooperate at a glance

To safeguard the rights of defence and to protect the legal work and advise of attorneys, communication between lawyers and clients is protected by the so-called legal professional privilege (which is recognised as a general legal principle of EU law and protected in Article 6 paragraph 1 and 3 lit. c, Article 8 ECHR, Article 41 paragraph 2, Article 47 paragraph 2, Article 48 paragraph 2 in connection with Article 52 paragraph 3 CFR).[1] State investigations must respect this sphere of trust. Documents to which the attorney-client privilege extends need not be communicated upon request[2] nor need requests for information on their contents be answered.[3] The privilege encompasses all communication that took place within the framework of a client-lawyer relationship and in connection with the client's right of defence.[4] The decisive factor is the existence of a functional link to criminal proceedings. It is therefore irrelevant whether correspondence concerning the allegations dates from the time before investigations were opened. Internal records of communication with defence counsel or

[1] *AM v. S* - Case 155/79 - 18 May 1982, para. 18; *Hilti v. Commission* - Case T-30/89 – 4 April 1990, para. 13; *Akzo/Akcros v. Commission* - Case T-125/03 and others – 17 September 2007, para. 76; *S. v. SUI* App. No. 12629/87 and 13965/88, 28 November 1991, para. 48; *Campbell v. UK* App. No. 13590/88, 25 March 1992, para. 48; *Foxley v. UK* App. No. 33274/96, 20 June 2000, para. 44; Schubert, 2009.
[2] Lubig, 2008, p. 110.
[3] Lubig, 2008, p. 111.
[4] *AM v. S* - Case 155/79 - 18 May 1982, para. 21.

appointed lawyers[5] or preparatory (defence) documents (for the subsequent exercise of the rights to an effective defence) are equally privileged.[6] In contrast, in-house advice on the allegations is not protected, nor are compliance documents or advice and information gathered in internal investigations, because such legal practices are not essential activities of attorneys as they do not involve giving independent legal advice and representing clients in legal cases.

Further limitations that restrict access of state authorities to (existing) documents and information may result from the freedom to exercise one's profession.[7] However, as rules on the exercise of a profession, duties to cooperate and produce information will quite likely be predominantly proportionate. The ECHR does not protect the freedom to exercise one's profession directly and in absolute terms, but only under special conditions as an aspect of the right to private life in Article 8 ECHR, which is why it is already questionable that these duties fall into the substantive scope of protection of this freedom. The legal situation might be different where requests concern business or other protected secrets.

Finally, the principle of nemo tenetur generally protects the accused from undue coercion to incriminate themselves.[8] The accused therefore enjoys both a comprehensive right to silence and freedom of cooperation vis-à-vis prosecuting authorities, which may not be undermined by force, threats, sanctions, or deceptions tantamount to coercion. This privilege seems hard to square with duties to provide information, as such duties might require actively editing evidence or handing over documents. That said, suspects must nonetheless tolerate search and seizures of pre-existing evidence (evidence that exists independently of the will of the suspect) in the course of lawful coercive measures.[9]

3. Nemo tenetur se ipsum accusare

The privilege against self-incrimination is not mentioned in either the ECHR or the CFR. However, it is unanimously recognised as a fundamental

[5] *Hilti v. Commission* - Case T-30/89 – 4 April 1990, para. 16 et seq.
[6] *Akzo/Akcros v. Commission* - Case T-125/03 and others – 17 September 2007, para. 123.
[7] Art. 15 and 16 of CFR.
[8] Lamberigts, 2019, pp. 307-308; Ott, 2012, p. 68; Meyer, 2022, para. 140.
[9] Meyer, 2022, p. 146; *Saunders v. UK* App. No. 19187/91, 17 December 1996, para. 71; *J.B. v. SUI* App. No. 31827/96, 3 May 2001; *Funke v. FRA* App. No. 10828/84, 25 February 1993.

right and as such derived from Article 6 paragraph 1 and paragraph 2 ECHR or from Article 47 and Article 48 paragraph 2 CFR by the ECtHR and the ECJ respectively. Accordingly, the nemo tenetur principle forms part of the essence of a fair trial. Advocate General Pikamäe recently argued that nemo tenetur is also enshrined in human dignity.[10] This view has far-reaching consequences for the protection of this fundamental right, because only natural persons could invoke and benefit from its full protection if this were true.

In contrast, the ECtHR has so far given theoretical priority to the idea that nemo tenetur protects the will against compulsory cooperation,[11] but does not substantively establish this idea as a degrading encroachment on Article 3 ECHR or as an impairment of personality rights covered by Article 8 ECHR. The court, indeed, emphasises the procedural dimension. Coercion to testify and cooperate undermines the proceedings and prevents them from being perceived as fair.[12]

3.1. Existence of criminal proceedings

The applicability of nemo tenetur presupposes the existence of criminal proceedings. Whether proceedings are of a criminal nature is assessed by the ECtHR in accordance with the so-called *Engel*-test, which comprises three criteria. The decisive factors are the classification of a legal offence as a criminal offence *under* national law *(classification of the offence under national law)*, the nature of the offence and the nature and *degree* of severity of the *penalty.* [13]The ECJ follows this approach and declares the three-step test to be the decisive yardstick in Union law as well,[14] with both courts striving for consistency in the application of the law[15].

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[10] *DB v. Consob* - Case C-481/19 - 27 October 2020, AG Pikamäe Opinion, para. 99.

[11] *Heaney and McGuinness v. IRL* App. No. 34720/97, 21 December 2000, para. 40; *Saunders v. UK* App. No. 19187/91, 17 December 1996, para. 68.

[12] Art. 6(1) of ECHR.

[13] *Engel and Others v. NL* App. No. 5100/71, 8 June 1976, paras. 80 ff.; more recently ECtHR, *Kadubec v. SK* App. No. 27061/95, 2 September 1998, paras. 50 ff.; ECtHR (GC), *Jussila v. FIN* App. No. 73053/01, 23 November 2006, paras. 30 f.

[14] *Bonda* - Case C-489/10 – 5 June 2012, para. 37; *Menci* - Case C-524/15 – 20 March 2018, para. 26; *DB v. Consob* - Case C-481/19 - 2 February 2021, para. 42; The administrative sanctions imposed by Consob were deemed to be criminal in nature due to their repressive objective and the high degree of severity, para. 43; see also *Garlsson Real Estate and Others* - Case C-537/16 – 20 March 2018, para 28.

[15] See *DB v. Consob* - Case C-481/19 - 2 February 2021, para. 43 refers to the same assessment of the procedural character by the ECtHR in the "Grande Stevens"-case.

Thus, a large number of proceedings, which know obligations to provide information and to cooperate, fall within the factual scope of protection of Article 6 paragraphs 1-3 ECHR, most importantly tax proceedings,[16] customs proceedings,[17] competition or antitrust proceedings,[18] supervisory proceedings under capital market law,[19] as well as other administrative sanction proceedings, [20] insofar as these provide for the punishment of legal transgressions with repressive sanctions. In these so-called quasi-criminal proceedings, which are not part of the hard core of criminal law, the ECtHR accepts a reduced scope of protection ("not necessarily with full stringency") to enable member states to cope with the side-effects of the extensive interpretation of "criminal proceedings". For nemo tenetur, however, the ECtHR has not yet decided this intricate question.

3.2. Personal scope

As regards the personal scope of application, the legal situation is not entirely clear. The case law of the ECtHR and the ECJ is not consistent and serious uncertainties surrounding the level and kind of protection afforded to legal entities persists.

3.2.1. ECHR

The ECtHR protects natural persons but has not yet decided whether legal persons also enjoy full nemo tenetur-protection. However, a conclusive landmark decision of the ECtHR on the validity of nemo tenetur for legal persons is still lacking. The development of the ECtHR's case law has been

[16] *J.B. v. SUI* App. No. 31827/96, 3 May 2001, paras. 44 ff.; *Jussila v. FIN* App. No. 73053/01, 23 November 2006, para. 38; If penalty surcharges do not serve the sole purpose of collecting tax arrears and interest but have an additional and substantial punitive and deterrent character; *Bendenoun v. FRA* App. No. 12547/86, 24 Fabruary 1994.

[17] *Salabiaku v. AUT* App. No. 10519/83, 7 October 1988.

[18] *Société Stenuit v. FRA* App. No. 11598/85, 11 July 1989, para. 62; *Menarini v. ITA* App. No. 43509/08, 27 September 2011, para. 40; *Carrefour France v. FRA* App. No. 37858/14, 1 October 2019.

[19] *Grande Stevens and Others v. ITA* App. No.18640/10 et seq., 4 March 2014, paras. 94 ff.

[20] *Lauko v. SK* App. No. 26138/95, 2 September 1998, paras. 57 ff.; *Guisset v. FRA* App. No. 33933/96, 26 September 2000, para. 59: disciplinary proceedings in the civil service for breach of budgetary and financial regulations; 3.12.2002, *Lilly France SA v. FRA* App. No. 53892/00, 2 December 2002: Competition and Consumer Protection Authority for abuse of a dominant position.

driven by investigative measures against natural persons and is characterised by the conflict between state and citizen. The ECtHR has not yet had to pronounce itself on the applicability to legal persons. Since the aforementioned obligations to provide information and to cooperate primarily affect companies, the practical relevance of nemo tenetur thus critically depends on its applicability to legal persons. Since companies are in the same position of being endangered by fundamental rights, their inclusion in the scope of protection seems obvious; especially since the ECtHR has declared a number of other Article 6 rights to be applicable to companies.[21] This view is shared by the legal literature.[22] The scope of personal protection has been confirmed in relation to the right of access to the court,[23] the independence and impartiality of the court,[24] the right to a public hearing,[25] equality of arms[26] and protection against excessively long proceedings.[27] These are important aspects of the fair trial guarantee, compliance with which appears to be central to the creation of procedural legitimacy. Regarding this procedural legitimation element, an extension appears to be indicated, since the freedom from compulsory participation appears to be even more elementary for the guarantee of an effective defence and its internal and external legitimation effect than in the cases already decided.

If one zooms in on the essence of the presumption of innocence as the second pillar of justification for the privilege against self-incrimination no other picture emerges. According to the presumption of innocence no one

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[21] Fura-Sandström, 2007, p. 162; *Teltronic-CATV v. Poland* App. No. 48140/99, 10 January 2006, paras. 52 et seq.: Granting legal aid; for Art. 47 para. 3 CFR on legal aid also *Trade Agency Ltd v. Seramico Investments Ltd* - Case C-619/10 - 6 September 2012, paras. 37 ff, 59 f.

[22] Esser, 2017, para. 882; Meyer, 2019, p. 182; Dannecker, 2016, p. 1006; Eser and Kubiciel, 2019, para. 13; Jarass, 2021, Art. 48 para. 12.

[23] *Immobiliare Saffi v. ITA* App. No. 22774/93, 28 July 1999, para. 74; *National & Provincial Building Society v. UK* App. No. 21319/93 and Others, 23 October 1997, para. 97 ff.: civil proceedings.

[24] *San Leonard Band Club v. MLTA* App. No. 77562/01, 29 July 2004, para. 47: civil; *Gazeta Ukraina-Tsentr v. UKR* App. No. 16695/04, 15 October 2007, para. 34: civil.

[25] *Coorplan-Jenni GESMBH and Others v. AUT* App. No. 10523/02, 27 July 2006, para. 63: right of residence.

[26] *Dacia S.R.L. v. MDA* App. No. 3052/04, 18 March 2008, paras. 50, 77 ff.: criminal; *Baroul Partner-A v. MDA* App. No. 39815/07, 16 July 2009, para. 41: criminal.

[27] *Comingersoll S.A. v. POR* App. No. 35382/97, 6 April 2000, para. 25; *Marpa Zeeland v. NL* App. No. 46300/99, 9 November 2004, para. 64: in criminal proceedings.

must be treated as guilty before proved guilty according to the law for which the burden is on the prosecuting authorities. Forcing defendants to provide this proof themselves undermines the foundation of this pillar.

3.2.2. EU law

The ECJ also fully protects natural persons. The court has not given in to the demands of national authorities to reduce the scope of protection for cases in which the effectiveness of Union law is at stake.[28] The intended preservation of the viability of multi-track or multi-level supervisory and sanctioning procedures thus has limits. Public interest in protecting the integrity of the financial markets cannot justify drastic reductions of individual rights. Antitrust law thus does not provide a template for the enforcement of EU economic law against natural persons in that regard. The decisive argument for the ECJ was above all that antitrust proceedings are directed exclusively against companies and therefore structurally different. Such fundamental differences rule out an analogy.

For legal persons, by contrast, the Court of Justice considers this level of nemo tenetur-protection to be inapplicable in antitrust law. In its ground-breaking and much criticised "Orkem"-decision, the Court of Justice held that companies may not refuse to hand over and provide information on the grounds that they would force them to incriminate themselves.[29] The ECJ has not departed from this line ever since.[30] It merely affords undertakings a hollow out right to refuse to provide information which would require them to admit the existence of an infringement, even though the Commission bears the burden of proof in this respect.[31] Undertakings should not be

[28] *DB v. Consob* - Case C-481/19 - 2 February 2021. As a follow-up question, the ECJ had to decide whether the national laws implementing EU regulations are amenable to an interpretation in conformity with fundamental rights that preserves its validity or becomes inapplicable altogether due to the conflict with CFR requirements, cf. para. 49.

[29] *Orkem* v. *Commission* - Case 374/87 – 18 October 1989; *SGL Carbon and others v. Commission* - Case C-301/04 P -29 June 2006, para. 48.

[30] *Orkem* v. *Commission* - Case 374/87 – 18 October 1989; *Limburgse Vinyl Maatschappij and Others v. Commission* – Joint Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, Cases. C-250/99 P-C-252/99 P, Rs. C-254/99 P - 15 October 2002, para. 273; *SGL Carbon and others v. Commission* - Case C-301/04 P -29 June 2006, paras. 42 ff.; *Dalmine v. Commission* - Case C-407/04 –P – 25 January 2007, para. 34.

[31] *Orkem* v. *Commission* - Case 374/87 – 18 October 1989, para. 35; *Tokai Carbon Co. Ltd and Others v. Commission* - Case T-236/01 and others – 29 April 2004, para. 402.

forced to admit their own responsibility, either explicitly or implicitly.[32] In practice, however, it is quite unclear and difficult to discern what exactly enjoys protection pursuant to the "Orkem"-doctrine.

For other sanctioning mechanisms against corporations or other legal entities, the applicability of nemo tenetur-protection remains unsettled. It is against this background that the landmark decision DB v. Consob offers some highly interesting insights in this respect which invite speculations about the future course of the ECJ. The ECJ's reasoning underlines that in EU law relevant case regarding legal persons law exists only in antitrust law. In the much larger and growing other areas of EU enforcement law and especially in Union criminal law, secondary harmonisation steps have been refrained from. There is no leading decision of the ECJ on the multitude of Union legal acts that require both corporate liability and effective sanctioning in order to enforce EU law effectively.[33]

However, both the Advocate General's Opinion and the reasoning of the ECJ can be interpreted as meaning that an analogous application of antitrust standards is considered plausible, if not conclusive. At least where the effective enforcement of Union law appears to be dependent on the cooperation of undertakings, this greatly reduced defence protection without freedom from self-incrimination is, according to the idea, probably also to be applied in other areas.[34] While the ECJ's explanations of the factual reasons for the difference in the legal treatment of natural as opposed to legal persons remain relatively pale, AG Pikamäe is more explicit. AG Pikamäe concludes from his erroneous premise (see III.) that the right to remain silent is closely linked to the protection of human dignity that the case law on the right to remain silent of natural persons cannot be transposed unmodified to legal persons.[35] In the not too distant future, the

[32] Kindhäuser and Meyer, 2020, para. 228; *DB v. Consob* - Case C-481/19 - 2 February 2021, para. 47.

[33] Union criminal law is at best indifferent when it comes to legal persons. Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and presence at trial explicitly excludes legal persons from its scope of application. Recital 13 indicates that legal entities the latter were not considered to be equally in need of protection, since "the rights deriving from the presumption of innocence do not apply in the same way to legal persons as to natural persons". The aspect of comparable vulnerability was thus dealt with in a very sweeping manner. Already back then, there were first indications that the ECJ's antitrust standards could become the dominant EU-wide standard for legal persons.

[34] *DB v. Consob* - Case C-481/19 - 27 October 2020, AG Pikamäe Opinion, para. 99.

[35] Ibid.

"Orkem" line might find itself upgraded from a special antitrust doctrine to a Union-wide yardstick for association proceedings, if one assumes that necessity and legal impact of duties to cooperate are more or less the same in all of these areas. This would have far-reaching consequences, as their contents deviate considerably from the ECHR standards.

3.2.3. Evaluation

The downscaling of fundamental safeguards for legal persons across the board would be hard to defend under fair trial-considerations. It appears justifiable only if one were to implicitly acknowledge that the protection of the natural will of an accused is at the heart of the guarantee and hence essential to its interpretation. As the use of coercion against legal persons would not entail a comparable humiliating or degrading personal depth it could not affect human dignity and trigger procedural rights specifically associated with safeguarding the core of human personality. Based on this premise and to this extent alone, a comparable vulnerability of natural and legal persons could be denied. Even if one followed this view, however, it would still not be established that non-personal fair trial considerations are not already sufficient to demand full protection against compulsory cooperation (as a precondition of procedural legitimacy). In any case, it is highly questionable whether such a dignity-inspired reading of nemo tenetur can be reconciled with the line of the ECtHR. If, by contrast, it is sufficient for a fair trial violation to threaten a defendant with sanctions if he refuses to testify or cooperate,[36] companies could be affected in the same way as individuals. Furthermore, should the coercion directed against an individual actually reach the degree of a violation of dignity, Article 3 ECHR should be invoked in addition to Article 6 ECHR. This would clarify the scope of dignity-related protection and forestall argumentations a contrario seeking to reason lower standards for legal persons.

4. Material scope

4.1. ECHR

According to ECtHR case law, accused persons enjoy a comprehensive right to remain silent and freedom from compulsory cooperation vis-à-vis prosecuting authorities. They may be forced to cooperate by force, threat,

[36] *Ibrahim and Others v. UK* App. No. 50541/08 and Others, 13 September 2016, para. 267.

legal sanctions, or deception if amounting to coercion. There is also no obligation to actively disclose evidence or hand over documents.

The protective effect of nemo tenetur, in general, applies to statements and the surrender of evidence. It sets in at an early stage, that is, the moment when persons concerned are instructed, interrogated, or implicitly treated as suspects in a material sense. From this point on, nemo tenetur excludes obligations to provide information and to produce evidence, which can lead to self-incrimination in criminal proceedings. Citizens may not be forced to provide information or produce documents if this would lead to an infringement of the right to remain silent.[37] In particular, the threat of sanctioning a refusal to provide information violates the right not to incriminate oneself.[38]

The right to refuse sharing information goes far beyond admissions of wrongdoing or directly incriminating statements. It includes any information on issues of fact or even allegedly exculpatory statements that may potentially have an impact on a later conviction of that person (in particular by substantiating the allegations) or the choice and assessment of the sanction imposed on him or her in criminal or quasi-criminal proceedings.[39]

Nemo tenetur, on the other hand, does not give the accused the right to unilaterally stay away from interrogations or otherwise obstruct the investigation through delaying tactics.[40] Nemo tenetur also does not protect against the taking of investigative measures as such.

This also applies to the surrender of documents. Official requests to actively hand over or produce documents would be permissible but not enforceable by coercion or sanctions. However, obligations to tolerate coercive measures to seize documents and data sources (servers, hard drives, etc.) that already exist (regardless of the will of the data subjects) are deemed compatible with nemo tenetur since the persons concerned are not compelled to actively hand over information for proceedings or even to create it in the first place. This is not seen as a violation of the freedom of

[37] *Funke v. FRA* App. No. 10828/84, 25 February 1993, paras. 42 ff.; *J.B. v. SUI* App. No. 31827/96, 3 May 2001, paras. 64 ff.; *Marttinen v. FIN* App. No. 19235/03, 21 April 2009, paras. 67 ff.

[38] *J.B. v. SUI* App. No. 31827/96, 3 May 2001, paras. 63 ff; *Funke v. FRA* App. No. 10828/84, 25 February 1993,

[39] *Saunders v. UK* App. No. 19187/91, 17 December 1996, para. 71; *Corbet and Others v. FRA* App. No. 7494/11, 19 March 2015, para. 34; also *DB v. Consob* - Case C-481/19 – 2 February 2021, para. 40.

[40] *DB v. Consob* - Case C-481/19 - 27 October 2020, AG Pikamäe Opinion, para. 87.

self-incrimination as the suspect is not forced to contribute actively to the prosecution.[41] This differentiation, which has developed with a view to biological or physiological evidence such as DNA, blood, urine, loses its persuasiveness, once one considers that the existence of (extracorporeal) business information and documents is not based on natural processes, but rather the result of extensive regulatory documentation obligations which are, among other things, meant to ensure the verifiability of lawful and professional conduct.[42] In these cases of access to existing documents nemo tenetur, hence, offers little protection. Limits or bans on seizing and using them may still arise from other fundamental rights. The protection of communication with defence counsel, business secrets, but also privacy may block state access to these sources.

Finally, nemo tenetur also affects duties to cooperate in non-criminal proceedings. If a risk materializes, that information or documents to be produced over the course of these proceedings may end up as evidence in a criminal case because criminal proceedings are running in parallel or are foreseeable, the ECtHR is of the view that nemo tenetur has ramifications for non-criminal cases too. Potential suspects are exempt from duties to cooperate in non-criminal proceedings to protect the privilege against self-incrimination from being undermined.[43]

4.2. Union law

For natural persons there are not many discrepancies. The legal situation could be best described as one of far-reaching parallelism engineered through Article 52 paragraph 3 CFR. Recently, the ECJ has expressly clarified that natural persons are guaranteed the same level of protection against coercion to cooperate under the CFR as under the ECHR. With respect to legal persons, the scope of protection is uncertain. It is currently primarily modelled on antitrust law for lack of alternatives and precedent. In antitrust law, a general duty to cooperate applies which turns nemo tenetur on its head. Yet, the principle of personal responsibility applies in antitrust law as well, which requires that defendant legal entities must be granted a right to effective defence. This is a "fundamental principle of the

[41] Meyer, 2019, p. 193.
[42] Meyer, 2020, pp. 333-353.
[43] *Chambaz v. SUI* App. No. 11663/04, 5 April 2012, para. 43.

Community order".[44] That principle of respect for the rights of the defence, which the ECJ derives from personal responsibility, does not, however, imply any restrictions on the general duty to testify or produce documents relating to the subject-matter of the investigation, even if those documents may be used by the Commission as evidence of the existence of a horizontal cartel.[45] Of course, these duties are not limitless. The ECJ has identified several exceptions. First, duties to cooperate cannot go beyond what is actually and legally possible *(ad impossibilia nemo tenetur),* irrespective of the content of the information.[46] Thus, there is no obligation to obtain documents not in one's own possession, e.g., from other undertakings and persons involved in the infringement.

Secondly, the ECJ has invented a "right to refuse to confess"/"privilege against compelled confessions"[47] as an outflow of the specific right to an effective defence in competition cases. This protection against compulsory cooperation shields companies against being forced to admit their personal responsibility through the requested cooperation or sharing of information. This is not more than a minimum quantum of fair trial. Ultimately, the ECJ only allows as much effective defence as it believes to be absolutely necessary for the legitimisation of its procedural practice in antitrust cases.

This possibility of refusing to confess is not a stringently derived right of defence. The doctrinal ambiguities become abundantly clear above all at the level of practical application. The demarcation between implicit compulsion to concede responsibility and compulsion to cooperate, which is permissible under the ECJ, can be difficult in practice. Neither the ECJ nor the General Court have succeeded in substantiating the "Orkem" doctrine sufficiently. Thus, it remains unclear which types of conduct are covered by the exception and whose perspective determines the assessment in individual cases. It must be clarified in each case in which editions, documents, or other information to be provided an admission of guilt could

[44] *Orkem* v. *Commission* - Case 374/87 – 18 October 1989*;* earlier indicated in *Michelin* - Case 322/81 – 9 November 1983.

[45] *SGL Carbon and others v. Commission* - Case C-301/04 P -29 June 2006, para. 44.

[46] *Buzzi Unicem SpA v. Commission* - Case C-267/14 P – 15 October 2015, AG Wahl opinion, para. 70.

[47] Hennig, 2019, para. 27; Schwarze, 2009, pp. 171-191; *Orkem* v. *Commission* - Case 374/87 – 18 October 1989.

be said to be implicit. The ECJ merely states that the answer must at least be equivalent to an admission of an infringement.[48]

5. Outlook

In terms of the scope of protection and despite far-reaching convergence, considerable differences between the ECtHR and the ECJ could still arise. The ECtHR has so far granted full protection against any compulsion to cooperate. The ECJ differentiates between natural or legal persons. Only natural persons are fully protected as under the CFR. For legal persons, antitrust law allows requiring them to provide information and to surrender information. Sanctions may be imposed in case of refusal. Only coercion to (implicitly) admit one's own responsibility was held impermissible. In practice, the line between permissible and impermissible coercion proves to be very difficult to draw. For other sanctioning proceedings against companies in other areas of EU law, the risk of an analogous adoption of antitrust standards is looming on the horizon, because various national and EU institutions see substantial differences between proceedings against natural persons and proceedings against legal persons which would supposedly militate in favour of less stringent standards for legal persons. Whether the ECJ and the EU's legislative bodies will continue along this path or whether antitrust law will remain a singular sui generis phenomenon remains to be seen and tracked closely. And even though no comparable expansion tendencies are discernible for the ECHR at the time of writing, a downward harmonisation of the level of protection in EU law for all sanctioning proceedings against legal entities might put the ECtHR under pressure not to question its conformity with fundamental rights.

[48] *Limburgse Vinyl Maatschappij and Others v. Commission* – Joint Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, Cases. C-250/99 P-C-252/99 P, Rs. C-254/99 P - 15 October 2002, para. 273.

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RICHARD SOYER*

Internal investigations and the principle nemo tenetur se ipsum accusare – The Austrian perspective**

ABSTRACT: There is no general one but there are limited specific obligations in Austria to carry out Internal Investigations. The Austrian Constitutional Court clarified in a ruling 2016 inter alia that the principles of Article 6 of the European Convention on Human Rights concerning procedural guarantees apply to corporations as well. Yet, it has been accepted also before that the nemo tenetur principle also applies to legal persons. However, disputed questions still exist.

KEYWORDS: internal investigations, principle nemo tenetur se ipsum accusare, European Convention on Human Rights.

1. Introduction

The main features of the Austrian Code of Criminal Procedure (StPO) date back to 1873 and are to be regarded as a milestone and cornerstone for modern criminal proceedings. Since the *Constitutio Criminalis Carolina* of 1768, criminal procedure law in Austria has developed on the way from inquisition to an accusation process with an inquisitorial public hearing.[1] The StPO of 1873 is largely still valid today in the main and appeal proceedings, while numerous amendments have been made since that time. After the re-promulgation of the StPO in 1975,[2] a comprehensive reform process focusing on pre-trial criminal proceedings has taken place since the 1990s. At the beginning of 2004, this resulted in the adoption of the so-called "Strafprozessreformgesetz", the Criminal Procedure Reform Act,[3] which finally entered into force on January 1, 2008, due to the necessary

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[1] Birklbauer and Wess, 2020, p. 11; Soyer and Stuefer, 2021, p. 7.
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organizational and administrative changes, especially in the public prosecutor's and criminal police area.

The main innovation of this major reform process was the creation of a new structure of pre-trial proceedings: a public prosecutor's preliminary investigation (instead of the former judicial preliminary investigation) with a substantive (instead of a formal) definition of the accused. The activities of the criminal police, the public prosecutor's office and the court in the preliminary proceedings have been separated from each other in new ways. Since then, the public prosecutor's office is responsible for leading the investigation. The investigative competence of the criminal police was recognised and embedded in a cooperation model with the public prosecutor's office. The role of the court in the pre-trial proceedings was mainly defined for the purpose of judicial protection. At the same time, there was an extension of victims' rights and an expansion of the rights of the accused and the defense.[4] This new model of pre-trial investigations has certainly proven itself in the last 15 years and can be seen in the present context with two other significant legislative developments.

On the one hand, a code of corporate criminal law (Verbandsverantwortlichkeitsgesetz[5]) has been in force in Austria since 2006. On the other hand, a central public prosecutor's office authority, which is active throughout Austria, was set up with special jurisdiction, in order to intensify the prosecution of white-collar and corruption crimes.[6]

2. Obligation to carry out internal investigations in corporations

Compared to Germany, internal investigations in Austria in connection with criminal proceedings have not yet acquired a very high priority. It should be noted that there is no general obligation in Austria to carry out internal investigations de lege lata. However, in certain areas – particularly securities supervision, financial market supervision, in regard of money laundering and stock exchanges[7] – there is a legal obligation to specific

[4] More closely thereto: Pilnacek and Pleischl, 2005.

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compliance standards. If internal investigations are now considered as a part of an adequate compliance system, for which good reasons can be brought into the discussion, a limited obligation to carry out internal investigations can be deduced from this.[8]

Another basis for an obligation to carry out internal investigations, however, might also be seen in the employer's duty of care under labour law. It aims at the employer's duty of care for the mental and physical well-being of the employee as well as his property. The Austrian Supreme Court has already recognized a duty of the employer to protect employees from the vexatious behavior of other employees.[9] In the correct view, in particular where there is a connection to the alleged commission of a criminal offence, the employer therefore is also obliged to carry out internal investigations.

Finally, it should be noted that obligations under labour law to make statements in the context of an internal investigation are in tension with the principle *nemo tenetur se ipsum accusare*. Internal investigations are capable of counteracting this principle of criminal procedure. This is sharply demonstrated when it is considered permissible that employee interviews carried out in the context of internal investigations are transferred to a court trial without restriction – by reading the minutes of the statements without the consent of the defense.[10]

3. Prohibition of coercion to self-incriminate regarding legal persons (entities)

The ruling of the Austrian Constitutional Court of December 2, 2016, clarified that the principle of guilt, as known in individual criminal law, is not the benchmark for any corporate criminal responsibility of legal entities (legal persons). It was also stated that "those principles of Article 6 of the ECHR concerning procedural guarantees (principle of fairness) [...] also apply to corporations".[11] It should be borne in mind that the European Convention on Human Rights has constitutional status in Austria.[12]

[8] Pollak, 2020, pp. 14-10.
[9] OGH 9 ObA 131/11x, RIS-Justiz RS0119353.
[10] Detailed and critical, for a teleologically restrictive interpretation of Art. 252(2) öStPO. Pollak, 2020, pp. 14-119.
[11] VfGH2.12.2016, G497/2015-26; G 678/2015-20.
[12] Soyer, 2019, p. 385.

Even before this landmark decision of the Austrian Constitutional Court, other rulings of Austrian courts have already recognized, in principle, the validity of the prohibition of coercion to self-incrimination regarding legal persons.[13] While in Germany, for example, this principle is based on the general right of personality and thus tailored to natural persons, it must also be applied to legal persons after the introduction of the corporate criminal liability. For companies (corporations), this principle plays an important role, especially at the beginning of investigations due to the mixture of different interests.[14] Therefore, it has been accepted in Austria that the nemo tenetur principle also applies regarding legal persons already for a long time.

It is disputed, however, which services of an attorney are covered by the protection of professional secrecy, secured in Austria by a procedural right of the attorney to refuse to testify, with protection against circumvention.[15] This is particularly relevant in the case of internal investigations by lawyers: If these investigations are classified as a balancing matter of legal advice, legal representation and criminal defense – collectively constituting the attorney profession –, a protection of seizure by the legal client-attorney privilege applies.

As far as the obligation to submit documents for use in criminal proceedings by a corporation is concerned, it has long been recognised in the legal practice of criminal courts[16] that corporations, as legal persons, are not obliged to provide self-incriminating information or to produce such documents and make them accessible. In other words, they have no obligation to cooperate. However, this does not prevent the prosecution authorities in proceedings against corporations from carrying out the search of a bank and/or seizing documents (incriminating for the corporation).[17]

As a manifestation of the procedural maxim of the prohibition of compulsion to self-incriminate, in proceedings against prosecuted corporations, decision-makers have always conceived the status of accused persons during interrogations, i.e., even without being confronted with a suspicion of having committed a crime themselves,[18] they have a right to

[13] OLG Wien 22 Bs 5/13s; OLG Wien 22 Bs 177/24d; Soyer, 2022, pp. 23-47.
[14] Urbanek, 2022, pp. 2.155-2.157.
[15] Art. 157(1) no. 2, (2) öStPO.
[16] FN 15.
[17] Urbanek, 2022, p. 156.
[18] Art. 17(1) öVbVG.

remain silent and they are not bound by a duty to tell the truth during interrogations. Employees of the corporation, on the other hand, are only in the position of such a (privileged) status if they are personally suspected of having committed a connecting offence as a prerequisite for the corporation's criminal liability.

In this context, it should be mentioned that the Austrian Criminal Code provides for a dual system for recording personnel evidence: (informal) enquiries and (formal) interrogations.[19] While enquiries – "the request for information and the receipt of a communication from a person" – serve to prepare the taking of evidence, interrogations concern the taking of evidence itself. This occurs once the procedural role of the respondent (witness or accused) has been clarified and the respondent has been formally informed on his or her position and rights in the proceedings as a witness or accused person. Such formal interrogations may not be circumvented by inquiries, otherwise they should be void.[20]

This regulatory mechanism takes account of the nemo tenetur principle in corporate criminal law, as required by the rule of law. In the opinion of the author, the Austrian regulation is a good practice model.

Finally, it should be noted that in Austria a 'small' and a 'huge' leniency policy (Kleine und Große Kronzeugenregelung) may be applied to accused individuals and/or legal entities.[21] Whereas the Huge Leniency Program ultimately results in impunity, the Small Leniency Program merely leads to a mitigation of the sentence. These regulations have repeatedly been adopted and extended for a limited period of time until now. Also, there is already a long-standing special, far-reaching leniency program in the event of antitrust proceedings.[22]

[19] Art. 151 öStPO.
[20] Art. 152(1) 2nd half sentence öStPO. See specified in Soyer, Pollak, Circumvention of the rights of defendants and witnesses in Austrian criminal proceedings, in the forthcoming.
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KAI SACKREUTHER*

Preliminary and criminal proceedings against legal persons and associations of persons – on the legal situation in Germany**

ABSTRACT: This article is based on a lecture given on 29 November 2021 at the II Conference of the Universities of Heidelberg and Miskolc within the framework of the Humboldt Institute Partner Project "Systematising criminal responsibility of and in corporations". It presents the procedural law applicable in Germany and the intended changes within the framework of the so-called Association Sanctions Act, dealing with questions of conducting internal investigations in the company and the associated obligations to submit documents and to disclose other circumstances relevant to criminal proceedings. The question of whether the prohibition of self-incrimination is to be recognised for legal persons and to what extent internal investigations can constitute grounds for a mitigation of sanctions is also examined.

KEYWORDS: Association Sanctions Act, sanctioning of corporate bodies and associations, nemo tenetur, prohibition of self-incrimination.

1. Introduction

German criminal law and criminal procedure law is in a phase of upheaval regarding the sanctioning of corporate bodies and associations. Beginning in 2013, various proposals for the codification of a corporate sanctions law were presented. This development reached a preliminary climax with the draft of a corporate sanctions law by the Federal Government in 2020 (VerSanG-E)[1].

However, the draft law was not implemented in the 19th legislative period. The extent to which the draft law will be continued and implemented

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[1] VerSanG-E = Entwurf eines Gesetzes zur Sanktionierung von verbandsbezogenen Straftaten (Draft of a Law on the sanctioning of association-related offences).

by the new federal government cannot be assessed at present. Under current law, sanctions against associations for criminal offences and misdemeanours committed by association leaders or by which the association was intended to be enriched are only possible through the so-called association fine on the basis of section 30 OWiG.[2]

2. Possibilities of sanctions against legal persons and associations of persons under current law

If leaders of associations commit criminal offences or administrative offences in this function, or if the association should be enriched by such acts, the prosecuting authorities can apply for a so-called association fine against the association under section 30 OWiG.

2.1. Main features of the procedure

It is at the discretion of the criminal prosecution authorities whether to impose a fine on associations for offences committed for their benefit or by their leaders. In this respect, the principle of opportunity applies. If an association fine is to be imposed, it is usually to be negotiated together with the punishment of the individual defendants. However, according to section 30 (4) OWiG, there is also the possibility of independent proceedings. This is usually considered if the individual defendants are not prosecuted according to the principles of expediency or if a defendant cannot be individualised as a responsible person of the association, but it is established that an offence was committed by a management person ("anonymous" association fine).

The main proceedings in court are governed by section 444 of the Code of Criminal Procedure (StPO). According to this, the association has the status of a secondary party. However, it essentially has the rights of an accused or defendant. In particular, the association has the right to be heard[3]; the provisions on the hearing of accused persons apply accordingly to the hearing of the association[4]. In the court hearing, the association has

[2] OWiG = Deutsches Gesetz über Ordnungswidrigkeiten (German Administrative Offences Act).
[3] Section 444 (2) in conjunction with section 426 (1) sentence 1 of the Code of Criminal Procedure.
[4] Section 444 (2) in conjunction with section 426 (2) of the Code of Criminal Procedure.

the powers of an accused.[5] The rights are exercised by the legal representatives of the association. If they are individually accused, a defence counsel shall be appointed for the association.

In addition, the provisions of the Code of Criminal Procedure apply mutatis mutandis to preliminary proceedings against associations under section 46 OWiG. Accordingly, the association is entitled to the right to remain silent under section 136 of the Code of Criminal Procedure. The representatives of the association cannot be forced to give information that could lead to the imposition of a fine on the association. In order to clarify the facts of the case, searches may be ordered under sections 102 and 105 of the Code of Criminal Procedure. Sections 94 et seq. of the Code of Criminal Procedure apply accordingly regarding seizure. Accordingly, under section 97 of the Code of Criminal Procedure, documents in the custody of a mandated professional secrecy holder may not be seized if these documents - to put it briefly - relate to the association's communication with the professional secrecy holder.[6]

2.2. Safeguarding the "nemo-tenetur" principle

Beyond the aforementioned procedural rights, there is no further legal protection of the principle of nemo-tenetur in proceedings against associations. According to the case law of the Federal Constitutional Court, the principle of "nemo tenetur" is by its very nature not applicable to legal persons.[7] This can be particularly significant if the service providers of a company are not the legal representatives of an association and do not themselves have the status of defendants. In terms of procedural law, they have the status of witnesses and are therefore in principle under an unlimited obligation to provide information. This applies even if they are able to provide more information than the legal representatives, who have the right to remain silent, due to their position in the company.

The question arises, however, as to how far special legal rules, which as an outflow of the nemo-tenetur principle provide for a prohibition of use of such information which has a self-incriminating effect but which the person concerned is obliged to provide for other reasons (e.g. Section 97 (1)

[5] Section 444 (2) sentence 1 in conjunction with section 427 (1) of the Code of Criminal Procedure.

[6] Compare this in particular in connection with internal investigations: BVerfG, Order of 27.6.2018 – 2 BvR 1405/17 – Jones Day.

[7] BVerfG, Oder of 26.2.1997 – 1 BvR 2172/96.

sentence 3 Insolvency Code or Section 43 (4) Federal Data Protection Act), can be applied in favour of associations. In my opinion, these simple statutory provisions can already be applied to companies without any problems according to their wording, but undoubtedly in view of the purpose they pursue, even if the application of the principle of nemo-tenetur is not required by the constitution.

2.3. Leniency rules and Sanction Reductions

With the exception of the bonus rules in §§ 81h et seq. of the Act against Restraints of Competition, German fine law does not know any leniency rules. However, cooperation and clarification assistance can be taken into account when calculating the fine according to section 17 (3) OWiG.

The cooperation of the association will reduce the fine, especially in complicated cases, if the cooperation makes it possible to clarify the offence. However, there is no obligation to cooperate. Failure to do so must not lead to an increase in the fine.[8]

3. On the planned changes through the Association Sanctions Act

In the draft Association Sanctions Act of the Federal Government in 2020 (VerSanG-E), in addition to the existing provisions, there are, in particular, provisions on the conduct of internal investigations as well as the possibility of mitigating sanctions if the associations make the results of the internal investigations available to the state investigating authorities.

3.1. Procedural law

The most significant difference envisaged by the VerSanG-E in connection with the sanctioning of associations is that if leaders of associations commit criminal offences and administrative offences in this function or if the association is to be enriched by such acts, the prosecution authorities are now to be obliged to take action against the association. In doing so, however, the legislator creates a confusing juxtaposition of exceptions and the application of different procedural rules, which complicate the application of the law.[9]

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[8] Mitsch, 2018, § 17 point 65.

[9] Critical also the Wissenschaftliche Vereinigung für Unternehmens. Und Gesellschaftsrecht in "Die Aktiengesellschaft - Zeitschrift für Aktienrecht" Vol. 2020, pp. 618-619.

Apart from that, the VerSanG-E does not significantly change the procedural law compared to the previous legal situation. The relevant provisions are §§ 27, 33 VerSanG-E. Section 27 of VerSanG-E provides for the corresponding application of the provisions of the Code of Criminal Procedure on the accused in favour of the association against which proceedings are being conducted for so-called association offences. § Section 33 of the VerSanG-E provides that the association is to be granted a legal hearing in the proceedings through the questioning of the legal representative, who, however, also has the right to remain silent.

In the course of the VerSanG-E, however, section 97 of the Code of Criminal Procedure is to be amended. According to this, there is to be no prohibition of seizure of records and objects in the custody of professional secrecy holders, which a businessman is legally obliged to keep. Thus, the professional secrecy holder cannot serve as a safe harbour for these records. A hitherto controversial question is thus clearly regulated by law.

3.2. Mitigation of sanctions

The VerSanG-E also does not provide for a leniency programme. However, § 15 (3) no. 7 alt. 1 VerSanG-E explicitly mentions "the association's efforts to uncover the association's offence" for the first time as a general assessment rule in favour of the association. In addition, §§ 17, 18 VerSanG-E provide for special mitigations if the association has conducted internal investigations and left them to the prosecution authorities. The mitigations provide for the omission of the minimum fine and the reduction of the maximum fine by half. In addition, the – in principle obligatory – publication of the association's conviction is excluded. However, the VerSanG-E does not compel the association to carry out internal investigations or even to comply with the provisions of the law.

3.3. Regulations for internal investigations

In connection with the possibility of mitigating sanctions when conducting internal investigations, section 17 VerSanG-E establishes various standards that must be met in order to merit mitigation. These include, in particular, the fair-trial principle, the scope of employers' rights to information and requirements for documentation obligations. In this respect, the legislator hopes that the judicial authorities will be supported by the companies concerned.

Insofar as the legislator regulates the manner of internal investigations, there is undoubtedly a practical necessity in this respect. However, this is initially a matter of company law or labour law. In this respect, the Association Sanctions Act does not seem to me to be a suitable place for regulation.

Moreover, it seems questionable whether the expected support of the judicial authorities can be achieved. In this respect, it must be seen that the official duty of the investigative bodies to investigate remains unaffected. On the other hand, there is definitely the danger that the association - even if subconsciously - shapes the investigations in a tendentious manner. As a result, the results of the investigations provided by the association must be evaluated with particular care by the prosecuting authorities. Noticeable relief is not to be expected in this respect.

4. Conclusion

In my view, the current legal situation in Germany already provides a sufficient possibility to effectively punish criminal offences and administrative offences committed by leaders of associations in this function. Possibly, certain procedural circumstances could be regulated more clearly, and the sanction framework could be tightened. In particular, the assessment of sanctions based on the earnings situation of the association could be a preferable approach. However, in my view, the changes intended by the VerSanG-E do not lead to the desired results.

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VINCENZO CARBONE*

The role of the public prosecutors in the repression of tax crimes - the Italian perspective**

ABSTRACT: The investigation and prosecution of tax crimes is characterized by the coexistence of administrative and criminal proceedings, which can lead to the imposition of multiple penalties. This paper therefore analyses the role of the public prosecutor's office in the prevention and prosecution of tax crimes.

KEYWORDS: Investigations, tax crimes, administrative proceedings, criminal proceedings, public prosecutor, tax administration.

1. Introduction

The Italian system, as we know, adopt the so-called Double Track. This means that the investigation and the repression of tax crimes is characterized by the coexistence of administrative and criminal proceedings which may lead the infliction of multiple penalties.[1]

During the investigation phase, therefore, the figures responsible for carrying them out are many. Without a shadow of a doubt, an important role is played by the public prosecutor, however, the tax administration and the financial police are also responsible for carrying them out for the administrative procedure. In this work, therefore, we will analyse the role of the Italian public prosecutor in the prevention and prosecution of tax crimes.

2. Public Prosecutor's Office in Italy

Although tax crimes are governed by a specific regulation, and do not reside in the penal code, the procedural rules are, of course, the same for all types

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[1] Condello, 2008, p. 332; Musco, 2012, p. 923.

of crime. For this reason, it is worthwhile to dwell on the structure of the public prosecutor's office in Italy.

In Italy, a prosecutor's office consists of a chief prosecutor (procuratore capo) assisted by deputies (procuratori aggiunti) and assistants (sostituti procuratori).

Prosecutors in Italy are judicial officers like judges and are ceremonially called Pubblico Ministero or PM. As custos legis, Italian prosecutors are responsible for ensuring that the law is actually enforced. Under the Constitution[2], they are required to initiate preliminary investigations as soon as they become aware of or personally take cognizance of a criminal offence - notitia criminis - or receive a criminal complaint. They may direct the investigation or carry it out by issuing orders and instructions to (judicial police) criminal investigators, who may conduct their own parallel investigations in coordination with the public prosecutor's office. The PPO has very broad investigation and enforcement powers. The most relevant could be identified as follows:

- Powers of interview. The PPO is authorized to summon and question the suspect and potential witnesses or delegate these tasks to the police.
- Powers of search/to compel disclosure. If the PPO has gathered enough evidence, it must serve notice to the defendant, informing him/her of the accusation.
- Power of arrest. The PPO may request the judge to issue an arrest warrant or to validate an arrest within 48 hours, where the suspect has been caught in flagrante delicto (in the very act of committing the misdeed).
- Powers to enforce court orders. The PPO can only request the judge to issue precautionary measures (such as pre-trial detention, house arrest) where there is a serious likelihood that the suspect has committed a crime and it is necessary in order to prevent the suspect from fleeing, committing another crime and destroying or falsifying evidence.[3]

The prosecutor's office is the only authority empowered to bring charges in criminal proceedings. When the prosecution has gathered sufficient evidence, it submits a request to the judge of the Preliminary Hearing

[2] Art. 112.
[3] Ricasoli, 2021, p. 92.

(Giudice per l'udienza preliminare - GUP) to bring charges against the offender. If the evidence collected is not sufficient to prosecute the offender, the prosecution shall file a motion with the judge of the preliminary investigation to dismiss the case (Giudice per le indagini preliminari).

If the evidence collected is sufficient to continue the proceedings, the prosecutor is obliged to continue the proceedings from the preliminary investigation to the initiation of the trial, with the prosecutor being responsible for bringing the charges, but having the overriding duty to promote justice. In practice, this duty means that the prosecutor is prohibited from withholding exculpatory evidence and must seek an acquittal if, during the course of the trial, he or she becomes convinced of the defendant's innocence or concludes that there is no evidence to prove his or her guilt beyond a reasonable doubt.

In appellate courts, the Office of the Prosecutor is called Procura Generale and the Chief Prosecutor the Procuratore Generale.

2.1. The General Prosecution Office at the Italian Supreme Court

In Italy there is only one Supreme Court for criminal and civil cases (Corte di Cassazione). The Court does not (in principle) pronounce judgments on the merits but decides on the correct application of the law by the courts of appeal or the courts of first instance.

In addition to the Court, there is a Prosecutor General's Office, whose members have the task of communicating their opinion in the mere interest of the law to the Supreme Court in every case that comes before it.

There is no hierarchical link between the various prosecution offices in the country and the General Prosecutor's Office at the Supreme Court, but the latter is the supreme institution of law enforcement, just as the Supreme Court is the supreme institution of the judiciary.

The Prosecutor General's Office must act and present its conclusions in every appeal before the Supreme Court. The Prosecutor General is not bound by the conclusions presented by the representatives of the Prosecutor's Office at earlier stages of the proceedings, even if they have appealed to the Court.

By law, the General Prosecutor has the power to control the so-called Direzione Nazionale Anti-Mafia (a nationwide prosecutor's office charged with coordinating investigations against organized crime).

In addition, the Prosecutor's Office is the only body responsible for resolving positive or negative conflicts of jurisdiction between two or more district prosecutors' offices.
Prosecutors are allowed to act in place of another prosecutor during their careers, but a recent ruling by the Italian Constitutional Court states that prosecutors who wish to become judges must move to another region and may not participate in proceedings that they themselves have initiated.[4]

2.2. The National Anti-Mafia Office

The National Antimafia Directorate (Direzione Nazionale Antimafia, DNA), established in 1991, is the legal coordinating body for the enforcement of antimafia laws. It consists of the National Antimafia Prosecutor (Procuratore Nazionale Anti-mafia) and 20 deputy prosecutors. The DNA works closely with the Antimafia Investigation Agency (Direzione Investigativa Antimafia, DIA), which is part of the Ministry of Public Security and is composed of specialized personnel in charge of intelligence and pretrial investigations. The establishment of the DNA and DIA was intended to promote coordination among the various judicial authorities in Italy while respecting two fundamental constitutional principles. Under Article 112 of the Constitution, the Public Prosecutor's Office is required to initiate criminal proceedings in all cases in which criminal law is violated. Second, under Article 101 of the Constitution, judicial authorities, including prosecutors, are independent in their activities.

The head of DNA suggested in a statement to the committee CRIM that this model of administrative coordination could inspire similar practices in other EU countries as well as at the EU level, for example, building on similar activities of Eurojust and OLAF.[5]

3. Territorial Jurisdiction for Tax Crimes

The discipline of territorial jurisdiction for tax crimes has always been characterized by different rules from those adopted by the code of criminal procedure for the generality of crimes. In fact, with reference to the identification of territorial jurisdiction for crimes relating to direct taxes and VAT, already art. 21 of Law 7 January 1929, n. 4 determined territorial jurisdiction based on the exclusive criterion of the "place where the crime

[4] Tonini and Conti, 2022, p. 15.
[5] Tonini and Conti, 2022, p. 55.

was ascertained", instead of the general rules dictated by the code of procedure.

The criterion of territorial jurisdiction over the place where the crime was ascertained was subsequently confirmed by art. 11 of Law 7 August 1982, n. 516. However, the provision was at the centre of heated doctrinal criticism, on the assumption that the criterion lent itself, on the one hand, to the instrumental location of the investigative activities in order to hinge the criminal proceedings on judges "chosen" by the administrative authority and investigator and, on the other hand, could be the cause of a conflict with the principle of the natural judge pre-established by law pursuant to art. 25 of the Constitution, as it did not allow for the preventive identification of the territorially competent judicial authority. The reform of the criminal tax law implemented with Legislative Decree 10 March 2000, n. 74, providing for a tendential coordination of the discipline concerning tax crimes with the ordinary one, eliminated the peculiar provision of the single criterion, simultaneously introducing new criteria aimed at determining the territorial jurisdiction for tax crimes.

In derogation of the general principles of the Code of Criminal Procedure on jurisdiction, the local judge with jurisdiction over fiscal offenses is determined by special rules established in Article 18 of Legislative Decree No. 74/2000, according to which it is determined at the place of commission of the offense and, subsidiarily, at the place of assessment of the offense.[6]

The aforementioned art. 18, paragraph 1, without prejudice to the hypotheses outlined by paragraphs 2 and 3, autonomously regulated, identifies, on a subsidiary basis, in the Judge of the "place of ascertainment of the crime" the one with territorial jurisdiction.

Chapter I of Title II, explicitly mentioned by the second paragraph of the art. 18, refers to declaratory crimes which are always considered to be committed in the place where the taxpayer has his tax domicile. The Legislator's choice to exclude the most important category of criminal offenses from the general rule of the criminal procedure code, dictating a derogatory and characterizing discipline for it, is centred on the data (which should be objectively verifiable) of the tax domicile of the offender.

In relation to cases of omitted declaration, pursuant to art. 5 of Legislative Decree 74/2000, the III Section of the Court of Cassation with sentence of 14 September 2020, n. 27606 stated that, as a rule, "the tax

[6] Torzi, 2015, p. 527.

domicile coincides with that of the registered office, but that, if this is of a purely fictitious nature, it corresponds to the place where the actual headquarters of the entity are located". The same Board, with subsequent ruling of 25 November 2021, n. 43331, considered, in consideration of the telematic method of presentation of the declaration, whose place of perpetration of the crime is not identifiable, that in identifying the competent judge "it must be denied that a different rule of attribution of competence is relevant" with respect to the one under consideration.
In the hypothesis of tax fraud, on the other hand, the Supreme Court with sentence number 4461.2022, filed on February 09, 2022, affirmed that the territorial jurisdiction of the Public Prosecutor competent to hear the investigation - and therefore of the Judicial Authority called to judge following indictment - must be identified with reference to the place where the registered office of the company is established, provided that the same is effective and not fictitious.

4. Agreements between the Public Prosecutor's Office and Tax Authorities

The relationship between tax proceedings and criminal proceedings is complex. In order to better regulate the information flows and communications between the various subjects, it is interesting to highlight that some "collaboration agreements" have been signed between the Revenue Agency, the Public Prosecutor's Office and the Guardia di Finanza.

As stated in the introduction to the collaboration agreement between the Revenue Agency - Valle d'Aosta Regional Directorate, Guardia di Finanza - Regional Command and the Public Prosecutor's Office at the Court of Aosta, signed on 30 March 2018, "The autonomy, the diversity of the evidentiary regime and the aims of the criminal and tax proceedings do not exclude the importance of identifying directives and operating instructions aimed at the most effective cooperation between the Revenue Agency, the Guardia di Finanza and the Judicial Authorities, in order to optimize the connection between the tax audit procedures, the subsequent assessment of taxes – including the possible activation of accession or conciliation procedures – and criminal investigations concerning tax crimes".

A further recent agreement between the Public Prosecutor's Office and the tax administration of Oristano, signed in the 27 September 2022, states

that the memorandum of understanding aims to improve the overall effectiveness and timeliness of the action to combat tax evasion and tax crimes in the field of income taxes and VAT envisaged by Legislative Decree no. 74/2000, as well as guaranteeing knowledge of significant debt situations following omissions to make declarations.
There are many agreements signed between the various prosecutors and tax administrations. Among the various we recall the agreement signed on 26 March 2015 between the Catania Public Prosecutor's Office, the Sicily Regional Directorate, and the Guardia di Finanza of the Province of Catania and the most recent Memorandum of Understanding for the fight against financial and tax violations in the Province of Chieti of 19 July 2018.

These documents are aimed at promoting an effective link between the entities involved, to facilitate criminal investigations concerning crimes in tax matters.

5. Concluding remarks

The analysis carried out so far focuses on the role of the public prosecutor in the prosecution of tax crimes. Although tax crimes are governed by a specific regulation, and do not reside in the penal code, the procedural rules are, of course, the same for all types of crime. The rule concerning territorial jurisdiction is particularly important. As anticipated, it follows a different principle, expressly regulated by article 18 of Legislative Decree No. 74/2000 and enriched by the recent sentences of the Supreme Court.

The intense work of the tax administration, ready to collaborate with the public prosecutor's office, is undoubtedly appreciable. This is demonstrated by the numerous agreements signed over the years.

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DIANA CÎRMACIU[*] - CRISTIAN MIHEȘ[**]

The interference of fiscal regulations with those in the criminal field. The right to silence and the right not to self-incriminate of a legal person in Romania[***]

ABSTRACT: In our approach, some aspects must be clarifies from the beginning, regarding a prerogative of the financial (fiscal) authority, but also of the tax system, respectively the *control function*. The Tax Procedure Code regulates the procedures by which the tax bodies verify the fulfilment by the persons subject to the tax law of the legal obligations. These procedures are the followings i.e. tax inspection, unexpected control, verification of the personal tax situation by the central tax body, anti-fraud control, and documentary verification. Each procedure is governed by specific rules and objectives. Also, the issues of taxpayer's right to present his point of view on the relevant facts and circumstances are going to be addressed, and of course, the taxpayer's obligation to cooperate versus the right to silence and plea-agreement.

KEYWORDS*:* fiscal procedure, criminal procedure, right to be heard, obligation to cooperate, right to silence.

1. Introduction

In our approach[1], some aspects must be clarified from the beginning, regarding a function of finance, but also of the tax system, respectively the

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[***] This study was prepared as part of the linkage project of the Humboldt Research Group "On the systematisation of criminal responsibility of and in enterprises" led by the University of Heidelberg and the University of Miskolc (2020-2025).
[1] The present topic was adressed within the project "Certain questions of the external, internal and criminal investigation of the criminal offences affecting the financial interests of the European Union (fraud, corruption, money laundering and other illegal activities against the financial interests of the EU) with special focus on the role of OLAF, EPPO, Eurojust, and Europol" (project number: 101015428 — EUINVESTIGUNIMISKOLC), and finalized with the publication of the paper: Cîrmaciu, D., Miheș, C., (2022) `Position of the Fiscal Authority in Criminal Proceedings, Plea Agreements at the Interface of the

control function[2]. The need for the control function of public finances stems from the fact that the funds of public financial resources belong to the whole society. The control function of public finances responds to the requirement imposed by society, aiming to ensure legality and increase economic efficiency through better management of public money. This implies the continuous supervision of the integrity of the public property by verifying the observance of the criteria on the basis of which the necessity and the opportunity of the public expenditures are determined, the observance of the obligations towards the budget, etc.[3]

The doctrine identifies the existence of different types of control, within the financial control, practiced by distinct control bodies. In the overall context of financial control, the tax control has its own specifics, given the tasks and purposes it fulfils.[4]

In the Romanian tax system, mainly a declarative system[5], the tax authorities receive control attributions in order to ensure that all taxpayers fulfil their obligations. The Tax Procedure Code regulates the procedures by which the tax bodies verify the fulfilment by the persons subject to the tax law of the legal obligations. These procedures are the followings i.e. tax inspection, unexpected control, verification of the personal tax situation by the central tax body, anti-fraud control and documentary verification.

This model of organizing the tax control aims at the efficiency, effectiveness of the verification, the tax bodies using their resources gradually, depending on the objectives pursued. Each procedure is governed by specific rules and objectives, thus respecting the principle of independence of procedures. According to this principle, different prerogative tax bodies are provided, but the taxpayer is also provided with the guarantees specific to each of them.

It should be noted that with regard to the conduct of the tax authority during the performance of the tax control activity. But, in general, in the entire activity of administration of tax receivables must comply with a

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Criminal Tax Proceedings, Estimates in Tax Law, Self-Disclosure` in Farkas, Á., Dannecker, G., Jacsó, J. (eds.) *External, Internal and Criminal Investigations of Criminal Offences Affecting the Financial Interests of the European Union*, Budapest: Wolters Kluwer Hungary, pp.258-270.

[2] State control allows, for example, the detailed verification of the activity of the economic agent. In this regard see also Șaguna and Radu, 2018, p. 17.

[3] Cîrmaciu, 2010, p. 14.

[4] Boța, 2002, p. 48.

[5] See also Anghel, 2020, p. 354.

number of obligations, such as the obligation to objectively examine the tax situation of the taxpayer subject to the tax inspection, the obligation to take into account all the edifying circumstances for determining the tax state of affairs, the analysis of all the elements specific to an individualized case[6], or the obligation to exercise the right of assessment within the limits of reasonableness and fairness[7].

Also, before taking the decision based on the tax inspection report, the tax authority is obliged to provide the taxpayer/payer with the opportunity to express his point of view on the relevant facts and circumstances in making the decision. The right to be heard is an essential element of *the right to defense and the right to good administration*[8], and is also an important procedural right of the taxpayer. Observance of this right allows the clarification of the factual and legal situation, leading to the finding of the truth and the possible avoidance of erroneous decisions that would have the effect of formulating costly appeals[9].

Several considerations are also required in the case of another general principle of conduct in the administration of taxes, duties, contributions due to the general consolidated budget, respectively that of *the obligation to cooperate*. The taxpayer/payer is obliged to cooperate with the tax body to determine the tax situation by presenting the facts known by him, in full, according to reality. And by indicating the means of proof known to him, a collaboration in the administration of evidence. Unlike the old regulation[10],

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[6] To take into account the *obligation of diligence* of the tax body, obligation of careful analysis of the investigated case.

[7] Thus, the tax body will ensure a fair proportion between the aim pursued and the means used to achieve it - see Art. 6(2) of the Tax Procedure Code.

[8] Consider the content of the right to good administration provided in Art. 41 of the Charter of Fundamental Rights of the European Union [Online]. Available at: https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012P/TXT&from=IT (Accessed: 5 November 2021).

[9] The right to be heard also has some *limitations* expressly provided by the legislator, if:
a) the delay in making the decision determines a danger for ascertaining the real tax situation regarding the execution of the taxpayer's / payer's obligations or for taking other measures provided by law;
b) the amount of the tax receivables is to be modified by less than 10% of the value of the previously established tax receivable;
c) the information presented by the taxpayer / payer, which he gave in a statement or in a request, is accepted;
d) enforcement measures are to be taken;
e) the decisions regarding the accessory tax obligations are to be issued.

[10] G.O. No. 92 of 3003 Tax Procedure Code, repealed with effect from 01.01.2016.

the Romanian legislator provided a limitation of this obligation, namely *the compliance with the provisions in criminal matters and criminal proceedings*. This express limitation supports the content of the presumption of innocence, the right to silence and non-self-incrimination[11]. However, it is expressly provided by the criminal legislation, the right to silence does not belong exclusively to the criminal field. From the jurisprudence of the ECHR, this right is also applicable in administrative matters, including in the field of administration of taxes, fees, contributions, when the taxpayer risks a criminal sanction. In this context, the right to silence also refers to the taxpayer's right not to make self-incriminating information available to the authorities. If the tax authority, by exercising the right to address third parties for obtaining information about a taxpayer, enters possession of data/documents that may incriminate the taxpayer, it is not considered that any prejudice to the right to silence.[12]

The result of the tax inspection is recorded in writing in a tax inspection report, which presents the findings of the tax inspection body from a factual and legal point of view and their tax consequences.[13] Whenever it is necessary documents regarding findings made at the taxpayer's/payer's premises or at its secondary offices, such as minutes concluded during unannounced or on-the-spot checks, etc. are attached to the tax inspection report.[14]

Also, the tax inspection body has the obligation to notify the competent judicial bodies in connection with the findings made on the tax inspection and which could meet constitutive elements of a crime, under the conditions provided by the criminal law. In this situation, too, the tax inspection body has the obligation to draw up a minute signed by the tax inspection body and by the taxpayer subject to the inspection, with or without explanations or objections. This minute represents an act of notification and is the basis of the notification documentation of the criminal investigation bodies. The provisions of Article 132 of the Tax Procedure

[11] Art. 10(4) of Criminal Procedure Code, according to which ‚before being heard, the suspect and the defendant must be informed that they have the right not to make any statement'.

[12] The right to silence is also not infringed if, on the basis of a legally ordered search, documents are taken from the taxpayer. We note that even in this case, the documents will be obtained without the actual participation of the taxpayer. About details regarding the right to silence in Romania, please see: Miheș, 2019, pp. 10-24.

[13] Except for the situation regulated in Art. 145(1) of the Tax Procedure Code.

[14] See: Direcția Generală Coordonare Inspecție Fiscală (no date).

Code are thus in harmony with those of Article 61 of Criminal Procedure Code, the obligation to notify the criminal investigation bodies provided in the Tax Procedure Code has the same content as the one stipulated in the criminal law. Article 61 paragraph 1 point (a) establishes that:

> whenever there is a reasonable suspicion that a crime has been committed, they are obliged to draw up a report on the circumstances found: a) *the bodies of state inspections*, of other state bodies, as well as of public authorities, public institutions, or other legal persons of public law, for crimes that constitute violations of the provisions and obligations whose observance they control, according to the law.

The concluded report constitutes an act of notification of the criminal investigation bodies and cannot be subject to control through administrative litigation.

The report drawn up by the tax body will include those aspects, facts that the inspection body considers as being able to meet the constitutive elements of a crime – the tax body mentioning the elements on which the suspicion is based. In addition, even the Constitutional Court notes that, in essence, the minutes are an official document recording certain facts or legal acts. The bodies provided by Article 61 paragraph 1 points (a)-(c) of the Code of Criminal Procedure, drawing up the minutes, records in detail the facts, listing the elements on which it is based i.e. personal findings, statements, documents, etc. [15]

2. The plea agreement, theoretical and practical approach

The plea agreement, inspired by other contemporary legal systems, has generated controversy and ambiguity both in judicial practice and in the literature, but even so, it proves its effectiveness in the case of financial crimes in respect of which it should be consider recovering the damage.

We note that, in an analysed file, was concluded the plea agreement with the defendant T. R. having as object the recognition of the commission

[15] In this regard, see the Constitutional Court, Decision No. 198 of 2016 [Online]. Available at: https://lege5.ro/gratuit/gezdeojzgi4q/decizia-nr-198-2016-referitoare-la-respingerea-exceptiei-de-neconstitutionalitate-a-dispozitiilor-art-114-alin-4-din-codul-de-procedura-penala (Accessed: 6 November 2021).

of the deed and the acceptance of the legal framework for which the criminal action was initiated, respectively the commission of the crime of tax evasion in continuous form, referred to in Article 9 paragraph 1 point (c) of Law No. 241 of 2005, with the application of Article 35 paragraph 1 of the Penal Code (250 material documents).

From the evidence administered in the case, it resulted that during February 2015 – December 2016, the defendant, in order to evade the payment of tax obligations, repeatedly and based on the same criminal resolution, ordered the registration in the company's accounting records of tax invoices which unrealistically certifies expenses related to the acquisition of goods from a company (X SRL).

The damage caused to the state budget (through the tax advantages obtained by the defendant's company, respectively the right to deduct expenses with purchases made and the reduction of the taxable base when calculating the profit tax, but also through the illegal exercise of the right to deduct VAT) was set at 280,000 lei. From the documents submitted to the case file, it was noted that the defendant paid part of the damage, 85,000 lei (to the civil party, A.N.A.F.). Defendant T.R. filed an application with the Prosecutor's Office Besides The Bihor Court to initiate a plea agreement.

The punishment established as a result of the agreement between the prosecutor and the defendant T. R. for committing the crime of tax evasion in a continuous form for which the criminal action was initiated is 1 year and 6 months imprisonment with the suspension of the execution of the sentence under supervision. The established term of supervision is two years from the date of finality of the decision.

The plea agreement concluded with the defendant stipulates, at the same time, the prohibition, as a complementary punishment, of exercising the rights to be elected to public authorities or any other public office and to hold a position involving the exercise of state authority for a period of two years from the finality of the sentence, as well as the prohibition as an accessory punishment of exercising the rights to be elected in public authorities or any other public office and to hold a position involving the exercise of state authority, from the finality of the sentence until upon the execution or consideration as executed of the main punishment.

The agreement further provides that, during the term of supervision, defendant T.R. will perform unpaid work for the benefit of the community for a period of sixty days.

The criminal investigation file and the plea agreement were sent to the Bihor Court.

As this document is drawn up outside the criminal proceedings, the report cannot be *a means of proof.* The Constitutional Court considers that the minutes drawn up under the conditions provided by Article 61 of the Code of Criminal Procedure may constitute "testimony in the prosecution", the bodies listed in the norm acquiring the quality of 'witnesses'.[16]

In this sense, we also highlight a Decision of the Constitutional Court, No. 72 of 2019 by which the exception of unconstitutionality raised by the parties was admitted ... in a criminal case and it was found that the provisions of Article 233/1 paragraph 2 and 3 of G.O. No. 92/2003 regarding the Tax Procedure Code[17] (our note the old Code) and of Article 350 paragraph 1 of Law No. 207 of 2015 on the Tax Procedure Code are unconstitutional. Also, the exception of unconstitutionality raised by the same parties in the same file was admitted, finding that the phrase '*which constitutes means of proof*' from the content of Article 233/1 paragraph 5 of G.O. No. 92 of 2003, with reference to paragraph 2 and 3 of the same articles is unconstitutional. In the same sense, the exception of unconstitutionality raised by the parties in the same file was admitted and finds that the phrase *"which constitutes means of proof"* from the content of

[16] For the purposes of the Convention for the Protection of Human Rights and Fundamental Freedoms.

[17] Article 233/1 Collaboration with criminal investigation bodies.

(1) In the situation where there are solid data or indications regarding the preparation or commission of some offenses concerning goods provided in with the subsequent amendments and completions, which fall within the scope of application of the excise, the criminal investigation bodies may carry out activities of ascertainment, research and preservation of evidence.

(2) In the situation provided in para 1 the criminal investigation bodies immediately request the bodies with control attributions within the National Agency for Tax Administration to carry out tax verifications according to the established objectives.

(3) At the request of the criminal investigation bodies, when there is a danger of disappearance of evidence or change of a factual situation and it is necessary to urgently clarify some facts or circumstances of the case, the designated staff of the National Agency for Tax Administration performs tax checks.

(4) In duly justified cases, after the beginning of the criminal investigation, with the approval of the prosecutor, the National Agency for Tax Administration may be requested to carry out tax verifications, according to the established objectives.

(5) The result of the verifications provided in para. (2) - (4) shall be recorded in the minutes, which constitute means of proof. The minutes do not constitute a title of tax claim within the meaning of Art. 110.

Article 350 paragraph 3 of Law No. 207 of 2015 with reference to paragraph 1 of the same article is unconstitutional. In essence, after setting out the substantive and formal arguments, we conclude that the texts and the phrase 'which constitutes evidence' are unconstitutional, which is why they cannot be corroborated by the provisions of the Code of Criminal Procedure applicable to evidence. In this context, *the Court concludes that the activity of tax verification carried out before the beginning of the criminal investigation and materialized in a report cannot constitute a means of proof in the sense regulated by Article 97 paragraph 2 point (e) from the Code of Criminal Procedure.*

As we also pointed out, this report is only an act of notification of the criminal investigation bodies and not a means of proof. Instead, according to the provisions of the Code of Criminal Procedure, respectively of the Tax Procedure Code[18], the criminal investigation body has the competence to order, after starting the criminal investigation, to carry out a tax verification completed by drawing up a report or a finding according to Article 172 paragraph 9 of the Code of Criminal Procedure, in which case the report, respectively the finding report constitutes a means of proof according to Article 97 paragraph 2 point (e) from the Code of Criminal Procedure.

That is why those texts were declared unconstitutional.

In conclusion, the Constitutional Court found that the mentioned provisions and the phrase '*which constitute means of proof*' in these texts cannot be interpreted and applied in conjunction with the provisions of the Code of Criminal Procedure on incidental means of evidence. On the contrary, a tension is revealed between the content of the aforementioned texts and Articles 97 and 100 of the Code of Criminal Procedure. Consequently, the court notes that these legal texts disregard the overall logic of the Code of Criminal Procedure on probation.

The Court also notes that the new Code of Criminal *Procedure eliminated the institution of acts prior to the commencement of criminal proceedings* (Article 224 of the Code of Criminal Procedure of 1968), so that even the criminal investigation body can no longer draw up a report notes the performance of preliminary acts which could constitute evidence. Therefore, the minutes drawn up by the tax authorities, although compatible with the Code of Criminal Procedure of 1968, cannot currently be used as a

[18] According to Art. 350(2) of the Tax Procedure Code, *in duly justified cases, after the beginning of the criminal investigation, with the prosecutor's approval, may be requested that N.A.F.A. perform tax controls, according to the established objectives.*

report on the completion of preliminary acts, since they are no longer regulated by the new Code of Criminal Procedure, but may constitute only an act of notification of the criminal investigation bodies in accordance with Article 61 paragraph 5 of the Code of Criminal Procedure[19].

We also specify that, during the event 'Justice 2020-professionalism and integrity'[20] of the chief prosecutors of the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anticorruption Directorate, the Directorate for the Investigation of Organized Crime and Terrorism and the prosecutor's offices in addition to the courts of appeal, the issues regarding the documents drawn up by National Agency for Fiscal Administration (hereinafter: NAFA) were debated, if these minutes, acts of tax inspection fulfilled prior to the notification of the criminal investigation body, may constitute evidence in the criminal process. The issue was clarified by referring to the rules established by the Code of Criminal Procedure and the Decision of the Constitutional Court No. 72 of 2019. But the following issue was also discussed whether the relations provided to NAFA by the suspect or defendant i.e. explanatory notes, memoranda, etc. may or may not be used against him. The undisputed solution to the content of the right to non-self-incrimination is that they cannot in any case be used against the suspect or defendant.

Returning to particular issues regarding the tax inspection and the right of the tax authority to establish tax claims, we must point out that in light of the amendments to the Tax Procedure Code[21], a new case of suspension of the limitation period of the right to establish tax claims was introduced, namely

> during the period between the date of communication to the criminal investigation bodies of the report of the notification of the criminal investigation bodies or of the report drawn up following the request of the criminal investigation bodies addressed to the tax bodies to make findings regarding the facts that constitute violations of the dispositions and obligations

[19] For details, see the reasoning of the decision, *in extenso*.

[20] See the minute of the meeting [Online]. Available at: http://inm-lex.ro/wp-content/uploads/2020/04/Minuta-intalnire-procurori-sefi-sectie-Bucuresti-9-10-martie-2020.pdf (Accessed: 6 November 2021).

[21] Law No. 295 of 2020 for the amendment and completion of Law No. 207 of 2015 on the Tax Procedure Code, as well as the approval of some fiscal-budgetary measures, published in the Official Gazette of Romania No. 1266 of 21.12.2020.

whose observance is also controlled by the date of the final solution of the solution of the criminal case.

The new case of suspension takes into account the situation in which the tax authorities notify the criminal investigation bodies starting from the reasonable suspicion regarding the commission of a crime of tax evasion. This provision must be analyzed taking into account the provisions of Article 131 and 145 Tax Procedure Code, according to which, if during the tax inspection there is a reasonable suspicion regarding the commission of acts that could meet the constitutive elements of a crime, the inspectors will draw up the act of notification of the criminal investigation bodies, without concluding an inspection report, respectively tax decision regarding the tax receivables concerned by the notification.[22]

Analyzing the regime of the acts of notification of the criminal investigation bodies, it is noticed that the Romanian legislator emphasizes the difference between the administrative-tax acts regulated by the Tax Procedure Code[23] and the category of the minutes. It is nderlying the notification of the criminal investigation bodies by which the tax bodies ascertain factual situations which could meet the constitutive elements of a crime. As well as the minutes concluded at the request of the criminal investigation bodies through which the damage is assessed. (The latter are not tax administrative acts within the meaning of the Tax Procedure Code, even if by these acts the tax body estimates/evaluates the amount of the damage. As we have mentioned, they have the legal nature of notification documents.

Based on these minutes, the tax body organizes the tax record of the amounts representing the damage entered in these minutes, distinct from the record of the tax receivables. The taxpayer/payer or other interested person may pay the amounts entered in the minutes or, as the case may be, the claims of the tax body entered in the documents by which a civil party was constituted in the criminal proceedings. It is considered that this record formula was established in order to ensure the necessary framework for the

[22] These documents will be drawn up only for those amounts that do not constitute the object of the notification.

[23] According to Art. 1 point (1) of the Tax Procedure Code 'the tax administrative act - the act issued by the tax body in the exercise of the administration attributions of taxes, fees and social contributions, for establishing an individual situation and in order to produce legal effects towards the one to whom it is addressed'.

application of the causes of impunity and reduction of penalties provided in Law No. 241 of 2005 for preventing and fighting against tax evasion.[24] Whenever, by the documents issued by the judicial bodies e.g. the criminal investigation body, the court, it results that the person who made the payment does not owe the amounts paid, they are refunded, the right to restitution being established on the date of communication of the act by the judicial body.[25]

3. Statistical trends and conclusions

The statistical perspective highlights the following situation regarding the involvement of anti-fraud inspectors in the investigation of economic and financial causes: 896 reports findings drawn up, of which 690 with low degree of complexity, 128 with medium degree of complexity and 78 with a high degree of complexity; 738 financial investigations for unavailability of goods; approximately 511/514 million lei total amount of damages established; approximately 127 million lei value of unavailable goods; 269 reports drawn up in cases finalized through plea agreements; 450 cases in which finding reports were drawn up and the closing was ordered.

During the criminal investigation, after the formal filing of charges, the defendant and prosecutor can conclude an agreement as a result of the defendant plea agreement.

The usefulness of this special procedure provided in Art. 478 and the following in Criminal Procedure Code also consists in the efficiency of the way of completing the criminal investigation activity and of the strategy adopted by the prosecutors in order to avoid expensive and long-lasting criminal proceedings.

Regarding the fight against financial interests crimes of the European Union[26], although 2020 was an atypical one from the point of view of the functioning of the entire Ministry of Public affected by the epidemiological crisis, the prosecutors of the National Anticorruption Directorate fulfilled their duties effectively in the field fight ahains the fraud phenomenon and

[24] Law no. 241 of 2005 for preventing and fighting against tax evasion published in the Official Gazette of Romania No. 672 of 27.07.2005. See also Anghel, 2020, p. 468 and Pătrăuș and Popa, 2017, pp. 92-116.

[25] Art. 150(4) of the Tax Procedure Code.

[26]See Raportul privind activitatea desfasurata de Directia Nionalaa Anticoruptie in 2020 (Report on the activity carried out by the National Anticorruption Directorate) https://www.pna.ro/obiect2.jsp?id=487 (Accessed: 8 November 2021).

protection of the EU's financial interests, by conducting criminal prosecutions and resolving a significant number of cases concerning the procedures for accessing and using funds from the general budget of the EU, the courts being implied into a considerable number of of cases.

In 2020, the prosecutors of the National Anticorruption Directorate[27] had 1623 cases under investigation compared to 1934 in 2019, being registered 606 new cases having as object crimes against the financial interests of the U.E. (compared to 749 in 2019), registering a slight decrease in the number of complaints in this area.

Also, in 2020, prosecutors solved 668 cases compared to 858 in 2019, remaining in progress at 31.12.2020 a number of 955 cases compared to 1076 at the end of 2019.

In 2020, the prosecutors of the National Anticorruption Directorate prepared 58 indictments (70 indictments in 2019), regarding a total number of 105 defendants sent to trial, of which 85 individuals and 20 legal entities, a decrease compared to the previous year when there were 169 defendants. The prosecutors also drafted 46 plea agreement relating to 46 defendants, of which 41 natural persons and 5 legal persons, for which the competent courts were notified. In this respect, there was an increase in the number of agreements concluded compared to previous years, given that in 2019 38 were registered and in 2018 only 12 such agreements.

At the level of the central structure of the National Anticorruption Directorate, in the field of protection of the financial interests of the EU, 16 indictments were drawn up, 2 by the Anti-Corruption Section and 14 by the Anti-Corruption Section assimilated to corruption offenses.

At the same time, the prosecutors concluded 8 plea agreements, one by the Anti-Corruption Section, 6 by the Anti-Corruption Section and one by the Service for Prosecuting Cases of Military Corruption.

The territorial structures of the National Anticorruption Directorate have drawn up a number of 42 indictments and 38 plea agreements, as follows:

- Territorial Service Alba Iulia, 10 indictments
- Territorial Service Bacau, 1 indictment and 10 plea agreements
- Territorial Service Brasov, 0 indictments / plea agreement
- Territorial Service Cluj, 3 indictments and 6 plea agreements

[27] About the competence of the criminal investigation bodies in Romania, see also, Mirișan, 2019, pp. 186-187 and Mirișan and Mirișan, 2019, pp. 198-199.

- Territorial Service Constanța, 8 indictments and 3 plea agreements
- Territorial Service Craiova, 2 indictments and 8 plea agreements
- Territorial Service Galati, 2 indictments and one plea agreement
- Territorial Service Iasi, 3 indictments and 4 plea agreements
- Territorial Service Pitesti, 0 indictments/plea agreement
- Territorial Service Ploiesti, 2 indictments
- Territorial Service Suceava, 6 indictments
- Territorial Service Tg. Mures, 0 indictments / plea agreement
- Territorial Service Timisoara, 1 indictment and 6 plea agreements
- Territorial Service Oradea, 4 indictments

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BEATA BARAN-WESOŁOWSKA*

Criminal liability of collective entities – the Polish perspective**

ABSTRACT: This paper aims to present the Polish perspective on the criminal liability of collective entities. The author refers to the legal nature of the criminal liability of collective entities. Also, the material prerequisites for the criminal liability of companies are scrutinized in this article. The legal status of companies' internal investigation in the context of criminal liability of collective entities is also discussed.

KEYWORDS: Internal investigation, criminal liability, legal persons' criminal liability, companies' criminal liability, corporations' criminal liability, collective entitles criminal liability.

1. Introduction

The purpose of this paper is to present the issue of the general legal framework of legal persons' liability, mandatory internal investigation, and obligation to disclose documents and circumstances relevant to criminal proceedings under Polish legal regulations. I will also tackle the topic of self-incrimination and leniency statements in the context of criminal punishment mitigation.

The first point which should be brought to light is the general legal framework of responsibility of legal persons. The Polish regulation on this matter has been in force for almost twenty years and is stated in The Act of 22 October 2002 on the Liability of Collective Entities for Punishable Offences (as amended Journal of Laws of 2020, item 358). This is the first comprehensive legal regulation introducing the institution of liability of legal persons into Polish law.

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2. Material scope

The aforementioned Act of Parliament is subjectively relevant to collective entities, as legal persons or organizational units without legal personality, to which separate legal provisions grant legal capacity. Also, a commercial company with the State Treasury as its shareholder, local government units or associations formed by them, a company in the process of incorporation, an entity under liquidation, and an entrepreneur other than a natural person, as well as foreign organizational units, are defined as collective entities. Exceptions are the State Treasury and local government units and associations formed by them.

Let the material scope of the given Act be the starting point for the forthcoming scrutiny. The first issue, which should be addressed in this paragraph, is the catalogue of material prerequisites for the criminal liability of legal persons.

Due to the provision of the aforementioned Act, a collective entity shall be held liable for an offence involving the conduct of an individual:

- acting for or on behalf of the collective entity within the framework of his right or obligation to represent the entity, make decisions on behalf of the entity, or perform internal audits, or violating that right or obligation,
- enabled to act because of a violation by the person referred to of his rights or obligations,
- acting for or on behalf of the collective entity with the consent or acquiescence of the person referred to,
- being an entrepreneur directly collaborating with the collective entity to achieve a legal purpose,

if the collective entity has benefited or could have benefited from that conduct, even non-financially. A collective entity shall be held liable if the natural person referred to has committed an offence, as confirmed by a final and non-appealable judgment convicting that person.

3. The legal nature of criminal liability of collective entities

In the view of the mentioned Act, the corporation does not itself commit an act that is forbidden as an offence, but the responsibility of the corporation is a result of the act committed by its member. Thus, it is a secondary liability. It is also claimed that *mens rea* and *actus reus*, known in criminal

law, cannot be attributed to corporate liability. Therefore, it is justified to say that a new form of liability has been created. The reference to jurisprudence and doctrine seems to be significant here. The view presented in the judgment of November 3, 2004; No. K 18/03 of the Polish Constitutional Tribunal is similar to that presented above. Nevertheless, some authors claim[1] that the discussed Act has a criminal nature, and could be assessed as a piece of criminal law *sensu largo*. Others point out that such institutions used in the act *as culpa in eliegndo* or *culpa in custodiendo* contradict its criminal nature.[2] It is unquestionable that the statute does not refer to the Criminal Code at all.[3]

In the context of the given regulations, defining the legal nature of such a structure appears as a fundamental question of responsibility. The legal doctrine presents two different positions in this respect. The first assumes that the liability of collective entities introduced into Polish law under discussion is criminal liability. The second position recognizes that the discussed Act introduced a new type of repressive liability into Polish law, which was not strictly criminal.[4] In my opinion, the liability of a collective entity is not a criminal liability *sensu stricto* because of a violation of a sanctioned legal norm not by a collective entity but by a natural person.[5] Nevertheless, the court shall impose a monetary penalty on the collective entity, ranging from PLN 1000 to PLN 5 000 000, which may not exceed 3 percent of the revenue earned in the business year.

To sum up this thread, the model of liability of collective entities adopted so far has not proved successful. The number of proceedings conducted based on the analyzed regulation reflects this. According to information from the National Prosecutor's Office, in the years 2016-2021, 54 applications were submitted to declare the liability of collective entities based on the existing regulation.[6] In the mentioned period, the courts issued 33 judgments confirming the liability in question.[7] As a result, work on the new version of the act, the draft of which was published in 2023, is

[1] Waltoś, 2003, p. 396–406; Namysłowska-Gabrysiak, 2004, p. 62. et. seq.
[2] Filar, 2006, p. 23; Mik, 2003, p. 67.
[3] Pniewska, 2010, p. 206.
[4] Ibid.
[5] See also: Pawluczuk-Bućko, 2021, p. 375.
[6] Ministry of Justice, 2022, p. 3.
[7] Ibid.

ongoing.[8] Work on the bill stopped at the government stage of work and was not submitted to the parliament.

4. Internal investigation in the context of criminal liability of collective entities

Firstly, let me briefly characterize the circumstances under which internal investigations are mandatory. They are all connected with internal whistleblowing procedures. Several normative regulations oblige to perform them:

- the provisions of Countering Money Laundering and Terrorist Financing Regulations,
- the provisions of the Banking Law,
- the provisions of Public Offering, the Conditions Governing the Introduction of Financial Instruments to Organized Trading, and on Public Companies,
- the provisions of Civil Aviation Law.

A common factor for all the above-listed regulations is the issue of implementing internal whistleblowing procedures. The largest group of persons being potential whistleblowers are employees. In some cases, the personal scope is extended, e.g., to other persons performing work activities on behalf of a given obliged institution, as AML regulations state.

In each case, the internal whistleblowing procedure aims to report any actual or potential infringements of general law provisions, internal regulations, and ethical standards. Worth underlining is the fact that documents and reports produced, and scrutinized during internal investigations, are private documents. If, during a proceeding, it turns out that there is a possibility of committing a crime, the organization is obliged to inform the law enforcement authorities (Police or public prosecutor's office) about this fact.

This raises the question of the status of the internal investigation proceedings' documents during criminal proceedings. Firstly, let me indicate that there is no obligation to prepare separate documents for use in criminal proceedings. Nevertheless, internal documentation can be claimed as a piece of evidence. Items that may constitute evidence in a criminal case should be issued at the request of the court or the prosecutor, and in urgent

[8] Ministry of Justice, 2022, p. 1.

cases - also at the request of the Police or another authorized body. Also, the public prosecutor may call a company for the voluntary release of documents. In the event of voluntary failure to disclose given papers or to find items that may constitute evidence, the premises and other places may be searched if there are reasonable grounds to believe that the said items are there. Under Polish law, authorized bodies may conduct a search to discover, arrest or involuntarily haul in a suspect, as well as find things that may constitute evidence in the case or be subject to seizure in the criminal proceeding.

Another way of gaining knowledge about internal investigations, and following their documents, is to question witnesses on those circumstances. These statements are made under the pain of criminal responsibility for false testimony. None of the presented evidence sources are directly connected with producing special documentation preparation of documentation for the needs of pending criminal proceedings.

When analyzing the topic of internal investigations, it is worth taking into consideration, that Polish criminal law does not foresee internal investigations and leniency statements as grounds for mitigation of punishment. As mentioned at the beginning, the liability of collective entities has a secondary meaning compared to the criminal liability of individual persons. It can be described as quasi-criminal liability. Consequently, also self-incrimination statements do not apply.

5. Conclusion

To sum up, the liability of collective entities is not a typical criminal liability. It is secondary to the criminal liability of individual persons, but the corporation's responsibility is a result of the act committed by its member. Moreover, internal investigations are not directly connected with a criminal investigation nor constitute part of it. Conclusions drawn from them are not binding for law enforcement authorities. Nevertheless, internally collected material may create one of the sources of evidence.

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The crime of budget fraud and problems of error in Hungarian criminal law***

ABSTRACT: Taking account of the importance of combating budget fraud and tax evasion, this article aims to examine the topic of error in general and in the case of tax evasion. After a brief introduction, the article is divided into two main parts. Firstly, in order to understand the relevant issues, the models of regulation of tax crimes in Europe are outlined, including Hungary's national legislation on the crimes of budget fraud, which can be a good example of effectively combating against tax evasion in the field of substantial criminal law. Secondly, error as a ground for excluding criminal liability in general and in the case of tax fraud is presented and discussed, with particular reference to the issues of error of law, error of fact and, finally, misjudging the social danger of the offence.

KEYWORDS: Criminal law, error in general, error of law, error of fact, error of the social danger of the act, tax evasion, tax fraud, budget fraud, economic crisis.

1. Introduction

An efficient tax system is a basic condition for the proper functioning of the state, including the Member States of the European Union. Public tax revenues are particularly important in economically difficult situations. However, the sole creation of tax legislation cannot function effectively without the establishment of criminal law protection. Tax evasion and fraud have existed for as long as tax has existed, but the methods, form and means of combating this type of crime have changed from one era to another. The fight against tax fraud has occupied an important place in the criminal

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policy of the Member States of the European Union over the last decades. The repressive and preventive objectives of criminal law also apply to the area of criminal tax law. With criminal law, the legislature – in view of its ultima ratio character – contributes to the observance of the tax legislation in force by providing for criminal sanctions in certain cases, such as the intentional "deduction" of state tax revenues which is violating the Criminal Code. It should be emphasized that tax evasion and tax fraud are closely linked to economic activity, and over the past years, there have been several cases of budget fraud in which the crimes were committed in a criminal organization.[1] The economic crisis of 2006-2008 also led to several reforms in the area of tax law and criminal tax law. This crisis pressed the national legislators to introduce new instruments to protect the revenue side of the budget. In Hungary, a conceptual change was introduced with the creation of the criminal offence of budget fraud[2], and several were also amended in German and Austrian tax criminal tax law. [3] The COVID-19 pandemic also had a negative impact on the economy, leading to a decline in state tax revenues. To protect the economy, a number of changes affecting tax law and criminal tax law were introduced in the Member States of the European Union.

During the pandemic, the risk of budget fraud has also increased significantly in Hungary. The unlawful use of state-funded special allowances, the sale of goods or the provision of services without handing over receipts or the cash payment of the employees to avoid paying social security contributions and other related contributions to the budget are only the most representative examples. Moreover, a large number of workers committed what is known as 'sick pay fraud' (benefit fraud) by claiming sickness pay from the general practitioner without actually being sick because they were afraid to go to work. If these frauds become increasingly common, it cannot be excluded that the potentially large number of criminal procedures may need to be balanced by extraordinary means, such as an amnesty.[4]

Tax evasion and fraud not only damage public finances and therefore jeopardize the stability of the financial system, but also have a number of other consequences that can affect not only the country concerned, but also

[1] Sántha, 2019a, pp. 68-75.
[2] Molnár 2011; Tóth, 2014.
[3] Jacsó, 2017b, pp. 451-466.
[4] Ambrus, 2020, pp. 107-118.

the economies of other countries and the global financial system in the course of globalization. The lack of tax revenue increases public deficits and debt levels of the Member States, reduces the resources available to stimulate public investment and employment, and – last but not least – undermines citizens' confidence in the fairness and legality of tax collection.[5] There are several reasons why the fight against tax evasion/tax fraud is necessary. These behaviors distort competition in the European Union's internal market and have a negative impact on good governance, macroeconomic stability, social cohesion, and public confidence in the institutions.

New trends have emerged in the fight against tax evasion and tax fraud, which can be traced back to a number of factors. The process of economic globalization, especially the increase in international trade with the rapid development of information technologies, has led to new forms of tax crime. Therefore, coordinated action against tax fraud has become an increasingly important policy priority in recent years.

In this study, we would like to emphasis the relevant problems of error in general and in the case of tax evasion. To understand the problem, firstly it is necessary to outline the differences between national regulations.

2. Models of regulation of tax crimes

The revenue and expenditure sides of the budget are typically protected by various criminal offenses in the Member States. In Austria and Germany, for example, the revenue side is protected by the specially regulated criminal tax law (criminal customs law), while the expenditure side is protected by fraud (subsidy fraud), which is regulated in the criminal code. In Hungary, however, both sides of the budget are protected by a single criminal offence, which is regulated in the criminal offence of budget fraud.

Criminal tax law is a special area of criminal law in all Member States of the European Union. In some Member States, it is regulated in the Criminal Code (such as in Spain, Slovakia or in Hungary), in others it is contained in special regulations (such as in Germany or France), while in

[5] European Parliament resolution of 19 April 2012 on the call for concrete ways to combat tax fraud and tax evasion (2012/2599(RSP)), Available at: https://www.europarl.europa.eu/doceo/document/TA-7-2012-0137_EN.html (Accessed: 11 November 2020).

others it can be found in the Financial Criminal Code (such as in Austria, Portugal and the United Kingdom since 2017).[6]
According to the research of Dannecker and Jansen[7], the national regulations on criminal tax law can be divided into three models (I-III.).[8] These can be supplemented by a fourth type of regulation, which was implemented in Hungary in 2012.

I.	II.	III.
Comprehensive regulatory model	*Differentiated system*	*Specific criminal law provisions*
In countries with a *comprehensive regulatory model*, we find a single criminal offence for all kind of taxes (e.g. Germany[9]).	In countries with a *differentiated system*, there is a fundamental distinction between tax evasion and its more serious forms (tax fraud), which implies "some extra criminal activity" (e.g. Austria[10]).	In the countries classified in the third group, specific criminal law provisions can be found in different tax laws (e.g. Greece, Denmark).
IV. „Hungarian model"		
The Hungarian regulation can basically be classified into the comprehensive regulatory model. However, the unified approach that focuses on the budget differs greatly from the regulation of the other Member States, therefore – according to our point of view – it forms a separate category.[11]		

[6] Sewell, 2020; Dannecker, 2015, pp. 373-439.; Dannecker and Jansen 2007.
[7] Dannecker and Jansen 2007; Dannecker 2015; Jacsó 2015; Jacsó 2017b
[8] „Uniform tax offense with qualifications or examples of rules"; „Uniform tax offense, supplemented by one independent offense to record serious violations" and "Criminal tax law special regulations in individual tax laws" See Dannecker, 2015, pp. 373-439.
[9] Germany has as uniform offence for tax and customs evasion in the crime tax evasion (Article 370 Tax Code – Abgabenordnung (AO)).
[10] E.g. perpetration of the tax evasion with the use of fictitious bills, transactions, this is separated in the crime of tax fraud (Art. 39 FinStrG, 'Abgabenbetrug'). See more Leitner and Brandl and Kert, 2017, pp. 206-222. This model was introduced by the reform of the Financial Criminal Law (Finanzstrafgesetz - FinStrG) in 2010, by which the Austrian legislature decided for the solution similar to the Swiss legislation. See Dannecker 2015.
[11] Budget fraud Art. 396 of the Hungarian Criminal Code. See: Sántha, 2019, pp. 68-75.; Jacsó 2017b; Jacsó 2017c; Jacsó and Udvarhelyi, 2019, pp. 128-137.

2.1. The crime of budget fraud in Hungary

Under Hungarian criminal law, national and European financial interests are protected in the same way, therefore our solution could serve as an example for other countries. The Hungarian legislator tries to solve the major problem of tax evasion with new methods. Therefore, with Act LXIII of 2011, which came into force on January 1, 2012, the fraud-related offences (tax fraud, employment related tax fraud, excise tax violation, illegal importation, VAT fraud, unlawful acquisition of economic advantage, violation of the financial interests of the European Communities) were integrated into one single criminal offence. The name of this integrated offence was budget fraud.

With the new regulation of the financial criminal law of 2011, the legislature intended to achieve the following objectives: to ensure more effective and coordinated protection of the budget, to eliminate loopholes and opportunities for abuse, to eliminate interpretation problems in connection with the criminal offence of violating the financial interests of the European Communities, to eliminate delimitation problems, and to ensure uniform protection of the revenue and expenditure side of the budget as well as the national and EU budget.

In order to achieve the aforementioned objectives, the focus of the protection against budget fraud becomes the budget[12] itself.

Both the revenue and expenditure sides of the EU budget are covered by the legal definition of budget fraud. On the expenditure side, the Hungarian regulation protects not only the budget managed by the European Union or by other Member States, but also the budget of any other foreign states.[13]

[12] According to the legal definition of Art. 396(9)(a) of the Hungarian Criminal Code, 'budget shall mean the sub-systems of the central budget - including the budgets of social security funds and extra-budgetary funds -, budgets and/or funds managed by or on behalf of international organizations and budgets and/or funds managed by or on behalf of the European Union. In respect of crimes committed in connection with funds paid or payable from a budget, the term budget shall also mean - in addition to the above - budgets and/or funds administered by or on behalf of a foreign state.'

[13] Sántha 2019; Jacsó and Udvarhelyi, 2019, pp. 128-137.

Structure of the regulation of budget fraud in the Hungarian Criminal Code (Article 396)[14]				
Article 396(1) a)–c)		Article 396(2) – (5)	Article 396(8)	Article 396(9)
1st category	Budget fraud in the narrower sense	Aggravating circumstances	Reduction of the penalty without limitation	Explanatory provisions: - budget - financial loss
Article 396(6)				
2nd category	Budget fraud committed on excise goods			
Article 396(7)				
3rd category	'Administrative budget fraud'	–	–	

The criminal offences of budget fraud can be divided into three different types of conducts: a distinction can be made between budget fraud in the narrower sense[15], budget fraud committed on excise goods, and the violation of settlement, accounting or notification obligations relating to funds paid or payable from the budget (administrative budget fraud). [16]

Budget fraud in the narrower sense can be committed by anybody who

(a) induces a person to hold or continue to hold a false belief or suppresses known facts in connection with any budget payment obligation or with any funds paid or payable from the budget, or makes a false statement to this extent;

(b) unlawfully claims an advantage made available in connection with budget payment obligations; or

[14] Jacsó 2017c; Jacsó and Udvarhelyi, 2019, pp. 128-137.
[15] Karsai, 2013, pp. 919-931.
[16] Udvarhelyi, 2019b, pp. 6-23.

(c) uses funds paid or to be paid from the budget for purposes other than those authorized;

and thereby causes financial loss to one or more budgets.

The criminal offence is a misdemeanor punishable by a maximum of two years' imprisonment.[17] According to the Hungarian Criminal Code, budget fraud is a material offence punishable if it causes financial loss to one or more budgets. The penalty that can be imposed on the perpetrators of budget fraud depends on the amount of the financial loss. The legislature has defined as an aggravating circumstance that the budget fraud is committed in a criminal organization with accomplices or on a commercial scale.

From the point of view of legal error, it should be emphasized that all three basic types of budget fraud are intentional criminal offenses. Similar to the PIF Directive, negligent conducts are not punishable. The consciousness of the perpetrator has to capture not only the punishable acts, but the result as well. The error precludes the criminal liability of the perpetrator. In the case of an error of the facts, the perpetrator is not aware of the objective elements of the criminal offence. In court practice, however, the perpetrator is acquitted due to the lack of a criminal offense, so that the criminal offence cannot be established. Errors of the social danger are rare in court practice.[18] It can be justified if the perpetrator receives false information from the authorities.

2.2. Criminal liability of heads of business

2.2.1. Basis of the liability

The characteristic of this type of liability is that the head of business does not participate in committing the crime, neither as a perpetrator nor as an accomplice. Liability is based on the perpetrator's position within an organization or hierarchy and his omission or breach of duty in connection with the criminal offence.

In 2001, as part of the harmonization of criminal law at European level, the Act CXXI of 2001 amending the Hungarian Criminal Code introduced the criminal liability of the heads of *business* regarding two criminal offences. Now, with respect to the budget fraud, Article 397 of the

[17] Art. 396(1) of the Hungarian Criminal Code.
[18] EBH 2003.931.

Criminal Code now contains the relevant provision, a separate offence named 'Omission of Supervisory or Controlling Duty in connection with Budget Fraud'. According to this article,

> The leader of the business organization, or its member or employee entitled to control or supervision is punishable, if the member or employee fails to fulfil the duty of control or supervision, and thus makes it possible for the member or employee of the business organization to commit the budget fraud within the scope of the business organization's activities.[19]

2.2.2. The elements of the liability of heads of business

a) For the heads of business to be found guilty, a criminal offence (basic-offence) must have been committed by a relevant person. The basic-offence is budget fraud, which must have been committed within the scope of the business organization's activities. The offender of the basic-offence can be any member or employee of the business organization.

b) The subject of this special liability (head of the business), namely the special perpetrator is the leader of the business organization, or its member or employee entitled to control or supervision. In Hungary, instead of enumerating the potential liable persons, a framework-definition is used, the framework is filled by the relevant rules of civil law concerning the given organization. Usually, the laws of different kinds of business organizations lay down the conditions under which a person can be considered a leader, and the relevant law or the charter of the given organization describes the employees who are entitled to control or supervision.

c) The relationship between the head of the business/the business organization and the offender of the basic-offence must be examined on different levels. Firstly, the head of the business exercises control or supervision over the activities of the person who commits the crime. On the other hand, the offender of the basic-offence commits it 'within the scope of the business organization's activities'. Consequently, if the budget fraud has no connection with the activities of the organization, or the employee or the

[19] Similar provision can be found regarding the crime of Active Official Bribery Art. 293 (4) and (5).

member commits the crime for his own benefit, the leader is not responsible.

d) The next objective element is the offence of the head of the business. The criminal conduct of the leader is an omission, namely the failure to fulfill the control or supervision obligation. The nature of the failure must be examined prudentially, since the fact that an offence was committed within the framework of the business organization indicates provable errors and deficiencies in the organization. However, it is also very important to refrain from the approach according to which the mere fact of the offence presumes deficiencies in the control and supervision process. Therefore, the actual break of duty by the head of the business and its relation to the crime committed by the employee (member) must be examined in each case. It is suitable to distinguish between high-level leaders and other leaders. The task of the high-level leaders is to develop and operate a control and supervision system to prevent the commission of crimes and control the activities of the lower-level leaders. As far as the liability of subordinate leaders is concerned, the fulfilment or break of the personal duties of the particular leader must always be examined.

e) The subjective element of liability, the mens rea of the head of the business, must be examined from two angles. First, the criminal conduct (failure to exercise mandatory control or supervision) should be intentional. The other - and most controversial - issue of the mens rea of the head of the business is the awareness of the basic offence. According to one of the academic approaches, the head of business shall not know that the employee/member is about to commit a crime because he, as the perpetrator, is responsible for the basic offence. This is the abetting by omission.[20] On the other hand, it may be argued that the knowledge of the head of the business about the basic offence is not relevant, and he is responsible on the basis of the special form of liability, regardless of whether he did or did not know that the employee/member wanted to commit an offence. This approach is confirmed by the argument that the liability of the heads of business is a sui generis form of criminal perpetration that precedes the application of the rules of abetting.

f) The final – and further problematic – element is the *link* between the head's of the business omission and the basic offence. The words of Article 397 ('if the member or employee fails to fulfill his duty of control or supervision, and *thus enables* the member or employee of the business

[20] Molnár, 2017, pp. 107-118.

organization to commit budget fraud') indicate that this relationship is a (hypothetical) causal link between the omission of the head of business and the budget fraud.

Finally, it should be emphasized that there were no cases in which Hungarian criminal courts punished the head of the business based on these special forms of liability. We can console ourselves that the existence of a legal order in itself has a considerable deterrent effect on the future attitudes of business and other leaders.

3. Error in general and in case of tax evasion

The topic of error in criminal tax law is an important practical problem raising a number of theoretical problems.[21] The regulation of errors is an immanent part of the criminal law system in the Member States of the European Union. According to the research of Dannecker and Jansen, the error is evaluated among the mens rea elements of the criminal offence only in the Czech Republic and in Slovakia.[22] In case of tax evasion, we generally have to differentiate between error within criminal law and error outside of criminal law regulation. In the first case it is an error in accordance with the elements for the criminal offence, while the second means the error in the circumstance outside of the criminal law.[23]

3.1. Error in general as a reason for excluding criminal responsibility

Errors are the fault of senses, the incorrect reflection of reality in human consciousness. Criminal law errors can have considerable consequences: Excluding or limiting the criminal liability of the perpetrator for a criminal offence. Of course, an error does not change the existing situation or the objective reality, but it affects the mens rea and may exclude the intent to commit a criminal offence.

In criminal law, a traditional distinction is made between errors of fact and errors of law, and a third form is also known in the Hungarian legal system, namely the error of the social danger of the act. This latter form of error is often referred to 'error of unlawfulness of the act' or 'error of

[21] Dannecker and Jansen, 2007.
[22] Ibid.
[23] See more about the error regulation by tax evasion in Europe by Dannecker and Jansen, 2007. About the error in financial criminal law: Kahl and Kert, 2017, pp. 206-222.

prohibition' in foreign legal literature ('Verbotsirrtum' in German criminal law).[24]

According to the traditional principle of 'ignorantia legis neminem excusat' (ignorance of law excuses no one), an error of law does not exclude criminal responsibility, since everyone is presumed to know the law. However, in common law legal systems, judicial practice recognizes a legal error as relevant when a legal text was inaccessible to the accused or is invalid because of vagueness, or the accused acts on the basis of an official's incorrect legal opinion.[25] Moreover, in some civil law systems, legal errors have been incorporated into the criminal codes, see, e.g. Article 122-3 of the French Criminal Code[26] or Article 17 of the German Criminal Code.[27]

Error of law (in a narrow sense) usually does not affect the punishability of the perpetrator, if the perpetrator is not aware

- that his/her conduct constitutes a criminal offence;
- of the legal classification of his/her criminal conduct;
- of the level of the punishment.[28]

However, it should be emphasized that there are no clear dividing lines between the three types of error mentioned, which interact and can complement each other, e.g. the error of law, namely the lack of adequate

[24] The German criminal law distinguishes between two forms of error (error of fact and error of prohibition, Art. 16 and Art. 17 German Criminal Code). 'Error of fact (1) Whoever, at the time of the committing the offence, is unaware of a fact which is a statutory element of the offence is deemed to lack intention. Any criminal liability due to negligence remains unaffected. (2) Whoever, at the time of commission of the offence, mistakenly assumes the existence of facts which would satisfy the elements of a more lenient provision may only be punished for the intentional commission of the offence under the more lenient provision.' Error of prohibition: 'If, at the time of the committing the offence, the offender lacks the awareness of acting unlawfully, then the offender is deemed to have acted without guilt if the error was unavoidable. If the error was avoidable, the penalty may be mitigated pursuant to Art. 49 (1).' See more about the differences between the two forms of error: Roxin, 2008, pp. 275-390; Dannecker, 2007, pp. 57-322; Nagy, 2004.

[25] Scaliotti, 2002, pp. 1-46.

[26] 'A person is not criminally liable who proves that he believed, because of the error of law which he was not in a position to avoid, that he could legitimately carry out the act.' See in Elliott 2000.

[27] 'If the perpetrator, while committing an offence, is not aware to act unlawfully, his guilt is excluded, provided that he could not have avoided this error.' See in Badar, 2005, pp. 203-246.

[28] Gál, 2007.

knowledge about the legislation and legal requirements, may be the basis of the error of the social danger.[29] It is also worth mentioning that the first case of error of law/ignorance of law is 'general ignorance', which means a lack of information about a legal provision or a legal question.[30] In this context, Dan-Cohen pointed out that the indeterminacy of the standards makes it less likely that ordinary citizens will be able to rely on them or the sheer volume and complexity of the law would probably elude the legally untutored citizen.[31] Furthermore, it is possible that even a lawyer could not have known for sure that the act in question constituted a crime which is called 'special ignorance of law' by Gellér. This may be due to the vagueness of the effective law or the retroactive amendment of the legal provision in question, and the third possible situation when the perpetrator sought legal advice from the authority and acted accordingly but the advice later proved inappropriate.[32] The latter, as we will see later, may be relevant as an error of the social danger in Hungarian judicial practice.

Error of law is not regulated by the Hungarian Criminal Code which distinguishes between error of fact and misjudging the social danger of the offence (error of the social danger of the act).

3.2. Error of fact

Given the fact that an actual error affects and can exclude the intention to commit a criminal offence, our starting point is the principle that the perpetrator must be aware of all the objective statutory elements of the respective criminal offence, i.e. he/she must know the relevant features of the criminal conduct, the object of the perpetration (e.g. the object of another person in case of theft), the result of the criminal conduct (e.g. the damage) and the causal relation between the conduct and the result, and finally the place (e.g. the public event), the time (e.g. at night), the means (e.g. armed) and the method of the perpetration (e.g. with violence). Consequently, the perpetrator shall not be punishable for a fact which was not known to him at the time of committing the criminal offence.[33] If the perpetrator lacks knowledge of an objective statutory element of the offence, this element cannot be taken into account in the legal classification

[29] Hati, 2012, pp. 11-18.
[30] Gellér, 2008.
[31] Dan-Kohen, 1984, pp. 625-677.
[32] Gellér, 2008.
[33] Hungarian Criminal Code, Art. 10(1).

of the act.[34] Accordingly, an error of fact could have the following legal consequences:

a) Error excluding the perpetrator's liability for the offence in question.

- The perpetrator made an error in the relevant features of the object, e.g. the accused shall not be punishable for counterfeiting money if he/she did not know that the money was counterfeit at the time of payment;
- The perpetrator was not aware of the relevant features of the criminal conduct, e.g. the perpetrators (a brother and her sister) shall not be punishable for incest if they had no knowledge about the family relationship between them;
- 'Error of age-defence': if a person has a consensual sexual relationship with a person younger than 14 years old, he/she cannot be convicted of sexual abuse if he/she reasonably believed that the partner was above this age;
- Error about the causal relationship between the conduct of the perpetrator and the prohibited result of the offence, e.g. the nurse gives the patient poison from a factory-labelled medicine box and the patient dies, the nurse cannot be held liable for homicide if she/he was not able to recognize the exchange of the pills, even by exercising reasonable care.[35]

b) Error excluding the punishability of the perpetrator for the offence in question but liability for another – usually a less severe – offence.

- Age misconception: if the perpetrator has a consensual sexual relationship with a person under the age of 12, but he truly believes that the partner is 13 years old, he cannot be convicted of rape, but is guilty of sexual abuse;
- Error in the qualifying circumstances of the offence in question (except for the result of the offence): If the victim was already dead when the perpetrator dismembered the victim's body into pieces, he/she will not be punished for qualified homicide, but for simple homicide even if he/she believed that the victim was still alive at the time of the dismemberment;

[34] Blaskó and Lajtár and Elek, 2013, pp. 137-147.
[35] Sántha, 2019b, pp. 207-211.

- According to Article 20(3) of the Hungarian Criminal Code, an error of fact does not exclude punishability if the error was caused by negligence and the Code punishes the offence committed by negligence as well. E.g. the woman is liable for negligent homicide if she gives birth to a healthy child who dies due to inadequate care because she mistakenly believes the child was stillborn;
- An error in the identity of the victim (error in personae) can only be relevant if the victim is strongly protected, e.g. if the perpetrator intends to injure his neighbor but hits a police officer in the dark, he/she cannot be convicted of assault on a public official, but (the less severe) bodily harm. The same rule applies to the error in object (error in obiecto).

c) Error not affecting the liability of the perpetrator (irrelevant error).

- Error in the identity of the victim, e.g. the perpetrator intends to injure his neighbor but hits another person in the dark;
- 'Situations of failed attacks'[36] or aberratio ictus, when the perpetrator's act is not carried out on the target person, but – as a result of his/her negligence – on another person present at the crime scene. E.g. if the perpetrator aims to kill X but by chance or lack of skills hits Y, who dies, he/she is liable for negligent homicide of Y and also for the attempt of (intentional) homicide of X;
- Irrelevant error of the causal relationship (dolus generalis), e.g. the perpetrator wrongly assumes that his victim has already died as a result of his prior violent conducts and throws the body into the river, whereupon the still-living victim drowns. This error is irrelevant, the offender is punishable for homicide[37];
- Error of the result as a qualifying circumstance of the offence is irrelevant since the more severe consequences attached to the result as a qualifying circumstance of the crime may be applied if the perpetrator is at least charged with negligence in respect of the result.[38] E.g. the perpetrator is guilty of bodily harm causing serious health impairment, even if he/she did not intend to cause this effect but he/she was able to recognize it.[39]

[36] Blomsma, 2012.
[37] Karsai and Szomora, 2010, pp. 77-102.
[38] Hungarian Criminal Code, Art. 9.
[39] Sántha, 2019b, pp. 207-211.

3.3. Error of fact in tax evasion

In criminal proceedings for economic crimes, especially in tax evasion proceedings, the perpetrator's error plays an important role. What constitutes a factual error when it comes to tax evasion? First, we must determine what constitutes the elements of the crime that are defined in the Criminal Code. Especially when it comes to the crime of tax evasion, the answer is not so simple and concerns the question of the blanket laws.[40]

According to the German Federal Constitutional Court, 'the prerequisites for criminal liability must then be described sufficiently clearly either in the blanket penal act itself or in the law referred to (...). In addition, the blanket law must make it sufficiently clear what the proposal refers to.'[41] This has to comply necessarily with the legal certainty requirement in criminal law. *Binding* was one of the first in criminal law literature who paid greater attention to this particular form of criminal offense. The disposition of the criminal offence must not be completely 'empty', because this would impair the legislature's power to exercise punitive power and this would be incompatible with the requirement of certainty. In contrast, elements of the offense with a normative character only presuppose the application of individual non-criminal legal terms or legal rules. They have to be filled in, but not in the form of blanket penal norms. These penal norms do not contain any express legal reference to any other norm. The classic example of this is the subject of theft, a 'foreign' thing, whereby the definition of 'foreign' property must be determined on the basis of the civil law.[42] The question of whether tax evasion should be understood as a blanket law or as a criminal offense with normative character is not assessed uniformly in the states. In Germany there is a dispute about the classification of the crime of tax evasion. According to the opinion of the judicial practice, the criminal norm of tax evasion contains provisions relating to substantive tax law by the elements of tax loss and the breach of duty.[43]

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[40] 'Blankettstrafgesetze': Tiedemann, 2014; Dannecker, 2007, pp. 57-322.

[41] BVerfG,Beschl. v. 29.04.2010 – 2 BvR 871/04, 2 BvR 414/08, 56.

[42] Dannecker, 2007, pp. 634-674.

[43] See Art. 370 AO: 'Tax evasion (1) A penalty of up to five years' imprisonment or a monetary fine shall be imposed on any person who

1.furnishes the revenue authorities or other authorities with incorrect or incomplete particulars concerning matters that are relevant for tax purposes,

2.fails to inform the revenue authorities of facts that are relevant for tax purposes when obliged to do so, or

Contrary to the opinion of the jurisprudence, the legal literature takes the view that tax evasion is not a blanket offense, but a criminal offense with normative features.[44] However, the established jurisprudence regards certain cases as errors of fact.[45] The abbreviation of tax represents a blanket reference to the laws that determine the tax claim of the state. Nevertheless, according to the Federal Court of Justice in Germany, an error about the tax claim is an error of fact according to § 16 Art 1 Sentence 1 of the German Criminal Code.[46] The jurisprudence in Germany sees the error about the tax claim in § 370 AO as a special case of the doctrine of error.[47] The "subject of the intent" is the existence and amount of the tax claim. 'According to the established case law of the Federal Court of Justice, the intent of tax evasion includes that the perpetrator knows the reason and amount of the tax claim or at least believes it to be possible and wants to reduce it, whereby the conditional intent is sufficient. If the taxpayer incorrectly assumes that no tax claim has arisen, there is an error of fact that excludes intent according to case law (§ 16 (1) sentence 1 StGB)'.[48]

In Hungarian judicial practice, the error of fact in budget fraud cases *is almost completely ignored,* although the perpetrators often rely on errors of fact, e.g. that they were not aware that the invoice was fictitious or – in case of the so-called 'temporary work agency scam'[49] – they did not know that the fraudulent agency failed to pay the social security and other related contributions to the budget. According to the practice of the tax authorities, an invoice is fictitious if it has significant deficiencies in content and includes false information about the business transaction or the participants. An indication of a fictitious invoice could be if the economic transaction between the participants on the invoice did not take place at all, or the transaction took place but not between the persons specified on the invoice,

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3.fails to use revenue stamps or revenue stamping machines when obliged to do so and as a result understates taxes or derives unwarranted tax advantages for himself or for another person.

Available at: https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html#p2615 (Accessed: 12 January 2021).

[44] Dannecker, 2007, pp. 634-674.

[45] Bülte, 2019, pp. 176-217; Bülte, 2013, pp. 65-72.

[46] 'Steueranspruchstheorie': Krell, 2019, pp. 145-175.

[47] According to meaning in the literature this is not necessary. See: Bülte, 2019, pp. 176-217.

[48] BGH 1 StR 296/19. The conditional intent is in this case dolus eventualis.

[49] Sántha, 2019b, pp. 207-211.

or the transaction took place between the persons, but the buyer knew or should have known that he was actively involved in the tax evasion. Circumstances to be examined in this regard, e.g.: can the company be found at the registered office; whether the company has the personal and material requirements necessary to perform the business transaction; whether the company is listed in the business register at all or is in liquidation, etc. If this is the case, the buyer (the accused in the criminal procedure) has taken the substantial steps to check the above-mentioned requirements and could not recognize that the invoice was fictitious, he/she cannot be held liable for budget fraud, which can only be committed intentionally.

When courts rarely accept these defenses, the acquittal decisions are based on the lack of criminal offences and do not refer to the provision of error of fact. However, one exception can be mentioned: budget fraud is committed, as an indirect perpetrator by the so-called de facto leader of the company, who prepared and submitted the false tax return, misleading both the de jure leader and the tax authority. In this case, the de jure leader of the company cannot be punished for his error of fact.[50] In another case, the court pointed out: It may appear that the official head of business acted negligently and did not foresee the consequences of his actions, because he failed to pay the attention expected of him and trusted in the de facto leader, gave full authorization to him, but the crime of budget fraud cannot be committed by negligence.[51] Moreover, there are many examples in which the Prosecutor's Office, on the basis of criminal tactical reasons, does not bring charges against these de jure leaders (who are in many cases practically stooges in many cases), but rather examines them as witnesses and collects evidence against the de facto leader.[52] At the same time, judicial practice is not at all uniform: there are court decisions in which the de jure leader/stooge was also responsible for budget fraud. According to the courts' reasoning, the official head of business is fully responsible for directing and controlling the activity of the company and he/she may not rely on the defence that he/she was not aware of the processes and events in the company.

[50] BH2010.319.I.
[51] Szeged Court of Appeal Bf.23/2014/6.
[52] Fodor, 2017, pp. 90-111.

3.3.1. Misjudging the social danger of the offence

Intent consists of two separate components, the cognitive part and the volitional part. The cognitive part can also be divided into two elements: The first is knowledge of the facts, which means that the perpetrator must be aware of all the objective elements of the offence, and the second is awareness of the social danger of the act which is established if the perpetrator is aware of the unlawfulness of the act or of the material danger of his/her conduct, or he/she knows that the act in question is morally reprehensible.[53] The perpetrator can therefore only rely on the error of the social danger of the act if he knew neither the illegality nor the danger and did not recognize the conduct.

In most criminal cases, the criminal courts assume that the offender was aware that the act was socially dangerous because knowledge of the objective elements of the offense also conveys an awareness of the social danger.[54] Moreover, it is not sufficient that the perpetrator' commits the act in the mistaken belief that it is not dangerous to society', but must have reasonable grounds for this belief.[55] Based on this legal definition, a successful defense of this type of error is very limited in court practice.

The Courts take into account the following circumstances when examining the awareness of the social danger:

- The nature of the criminal conduct in question: most criminal offences are traditionally punishable (e.g. homicide, rape, theft), the danger and unlawfulness of these crimes are obvious to everyone.[56] Similarly, lending money on usurious rates is a socially condemned and forbidden act, even for the perpetrator who has only completed a primary school education. In contrast, there are several criminal offences which are defined in so-called framework dispositions, which refer to rules stipulated by statues of other fields of law.[57] The framework disposition of budget fraud, for example, is filled in by the highly complex customs and tax legislation – in the form of laws, government regulations and other rules – which are frequently changed and sometimes difficult to understand even for an expert.

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[53] Sántha, 2019b, pp. 207-211.
[54] Karsai, 2019, pp. 77-102.
[55] Hungarian Criminal Code, Art.10 (2).
[56] Sántha, 2019b, pp. 207-211.
[57] Ibid.

In these cases, perpetrators are more likely to commit the offence in the erroneous belief that it is not dangerous to society, especially if the courts of first and second instance disagree.[58] Moreover, understanding the legal background of the relevant national and EU law often requires specific (legal) expertise, and knowledge of a regulation of an administrative nature can usually be expected from those who regularly deal with the rules. However, an error as to the social danger of the act may be invoked by an accused who occasionally and arbitrarily infringes the complicated and difficult-to-access regulations.[59]

- The personal circumstances of the perpetrator, especially his/her level of education, expertise and practice, but error is not a valid defense in relation to the commonly known facts[60], and the court refused to consider the argument that knowledge of a subordinate regulation – e.g. a government regulation – is not to be expected from a layperson.[61] Higher expectations must be set for persons with special experience for the content of the law and, in this context, for the error of social danger.[62] In a criminal case relating to credit transactions, the court emphasized that the defendant, who had completed a degree in economics and had professional experience, could have been expected to have the necessary knowledge of the social value judgement of the facts;[63]

- False information by an authority: the accused acquitted by the court in a case of budget fraud who did not pay tax on the basis of the decision of the tax authority of the second instance after taking possession of warehouse receipts. According to the decision, the tax is not due merely by possession of the receipts. The court pointed out that the defendant who acts in reliance on the decision of the authority, even if the decision of the authority was wrong, he/she has reasonable grounds to believe that the act is not dangerous to society;[64]

- It is generally considered that incorrect information/misadvice from a lawyer (private attorney) cannot give rise to an error of the social danger. By contrast, according to the court's questionable decision, however, the perpetrator shall not be punishable if he/she commits the offence on the

[58] Supreme Court Bfv. III.843/2008/5.
[59] Supreme Court Bfv.II.360/2007/5.
[60] Metropolitan Court of Appeal Bf. 5.1.017/2004/9.
[61] Supreme Court Bfv.I.593/2006/5.
[62] Elek, 2018.
[63] Supreme Court Bfv. X.16/1999/6.
[64] EBH 2003.931.

basis of and in reliance on the advice of a lawyer because he/she committed the offence in the mistaken belief that it was not socially dangerous. In this case, the lawyer is liable for the offence as an indirect perpetrator;[65]

- Employment of an accountant is a common defense of the perpetrator in budget fraud cases, e.g. 'the accountant was responsible for preparing and submitting the tax return' (Elek 2009). This defense is not accepted by the court: The employment of an accountant does not eliminate the liability of the accused (the head of the business) for the submission of the tax return, as he/she should have verified the submission.[66] However, in our view, a leader of a company can successfully rely on the defence of error of the social danger if he/she made all reasonable efforts to control the accountant's activity;

- The reference to criminal law-literature (textbooks, commentaries) is of great interest in court practice. According to an earlier decision, an explanation published on judicial practice (e.g. a commentary on the Criminal Code) may not form the basis of the error of the social danger, but is (only) to be regarded as an opinion of legal literature.[67] In another case, the accused law student argued that his opinion of the case and his conduct had been established on the basis of a criminal law textbook and therefore he could not have committed the offence. However, the court did not accept the accused's defense: Knowledge of the legal literature alone is not a reason to invoke the error of the social danger; rather, the defendant must also confirm that he/she carefully examined the relevant legal literature and did so before committing the offence.[68]

4. Conclusions

The protection of public tax revenues through criminal law measures is an integral part of national criminal law in all Member States of the European Union. However, the Directive 2017/1371 of the European Parliament and of the Council[69] has brought about a significant change in this area, as it has established the criminal law basis for joint action against serious VAT

[65] BH 2018.216.II.
[66] Supreme Court Bfv. III.315/2002/3.
[67] Supreme Court Bfv. III.97/2000/5.
[68]Supreme Court Bfv. II/13/2009/5.
[69] 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. See: Udvarhelyi, 2019a, pp. 205-215; Udvarhelyi, 2019c, pp. 208-211.

fraud[70] to the detriment of the common VAT system.[71] The foundations were laid by the new EU criminal law introduced by the Treaty of Lisbon, which paved the way for harmonization in the area of tax criminal law.[72]

The measures to combat tax evasion and tax fraud are also in line with the opinion of the majority of EU citizens. The Eurobarometer surveys from 2017 show that the following areas must be a priority for the citizens of the European Union: The fight against terrorism (80%), unemployment (78%) and environmental protection (75%), as well as the fight against tax fraud (74%).[73]

As can be seen, the Hungarian Criminal Code provides effective protection of the national budget and of the budgets through the crime of budget fraud. It should be emphasized that the fight against tax delinquency in Hungary has taken place at various levels.[74] The Hungarian tax system has been restructured in recent years. In 2015, the online cash register was introduced. In connection with the fight against tax crime, another measure should also be highlighted: the Electronic Public Road Trade Control System[75] introduced in 2015.

This system is particularly important in the context of VAT fraud, as it aims to strengthen the market position of law-abiding traders, to make the movement of goods more transparent, to prevent food fraud, which often endangers human health, and, last but not least, to prevent tax evasion. With the help of this system, the actual route of the goods can be tracked because the transport-related data (name and quantity of goods, recipient, sender, vehicle registration number, etc.) must be registered in a central electronic

[70] According to the PIF Directive, this is the case when activities or omissions related to VAT fraud relate to the territory of two or more Member States of the Union and cause total damage of at least EUR 10 million. (Art. 2(2) of the PIF Directive)

[71] See more details about the results of the HERCULE III Project „Criminal Law Protection of the financial interests of the EU – Focusing on Money Laundering, Tax Fraud, Corruption and on Criminal Compliance in the National Legal Systems with reference to Cybercrime. Available at: https://hercule.uni-miskolc.hu/study (Accessed: 06 November 2020).

[72] See about Europeanisation of tax criminal law, especially of the regulation of tax evasion: Dannecker, 2015, pp. 373-439; Jacsó, 2017b, pp. 451-466.

[73] Britons want to see more cooperation with EU in security and fighting terrorism new poll finds. Available at: https://www.europarl.europa.eu/news/en/press-room/20170427AVI72826/uk-eurobarometer (Accessed: 6 November 2020).

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[75] See: Electronic Public Road Trade Control System. Available at: https://ekaer.nav.gov.hu (Accessed: 20 October 2020).

system before the transport begins. Within five years, the VAT tax gap fell by 12 percentage points to 9%; such a reduction in VAT fraud is also exemplary at the EU level.[76]

[1] It should be emphasized that a common approach is needed to effectively fight against tax evasion; states cannot solve this problem alone. The European Union and the Member States must work together to combat tax evasion and tax fraud.

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Section II.

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The concept and main features of the primary sources of law of the European Union

ABSTRACT: The European Union's (EU) sources of law, which fall under the generic definition of a source of law, each have unique characteristics. This article examines the dual nature of the EU law and addresses the issues with its concepts and features. The sources of EU law are classified as primary and secondary. The primary sources include constituent agreements and general principles of law, while the secondary sources comprise regulations, directives, and framework decisions.

KEYWORDS: European Union law, sources of law, form of law, primary law.

1. Introduction

The statement that the sources of law of the European Union (EU), as well as any other legal system, fall under the general understanding of the source or form of law, would have both common generic characteristics and features and their own characteristics if it did not take into account the following facts: first, the literature has not developed a stable idea of the general features and characteristics that form the concept of "source of law," and second, it is in the features of each source of law that its specific essence and content are "laid down."[1]

Thus, when considering the sources of EU law, to avoid confusion, it is theoretically and methodologically important to first determine the initial, general theoretical provisions and, based on them; consider the features of the sources of law of the legal system in question.

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[1] Shebanov, 1968.

2. Forms of law

Among jurists and state scholars, questions such as "What is a form of law and what is a source of law?" and "Are these identical phenomena and concepts?" have traditionally not reached a consensus.

Therefore, in some cases, the form of the law was considered identical to that of the rule of law. It was assumed that the "legal norm" appeared in the form of an internal form of law "imparting general binding to it" and the "normative acts of the state" in the form of an external form of law.[2]

In other cases, the main directions (theories) of law and its approaches, such as positive and natural law, were considered "two basic forms of law," to which the norms of the law were reckoned and with the help of which they were ordered.[3]

In the third case, the form of law is understood as the internal organization of law (internal form) and 'the form of expression of the normative state will of the ruling class adopted in a given society.'[4]

Contradictory opinions dominate not only in relation to the "form of law," but also in relation to the "source of law," as well as their relationship with each other.

Noting the ambiguity and simultaneous failure of the term "source of law," introduced into scientific circulation by Titus Livius,[5] "source" is generally understood by researchers as including the forces that create law, the materials "underlying this or that legislation," the historical monuments "which once had the meaning of the current law," and the means of cognition of the current law.[6]

Some authors, often without analyzing the definition of the term "source of law," consider it in two manifestations: formal and material.

For Western jurists, such as Professor Ian Brownlee of Oxford University, it is "generally accepted to distinguish between formal and material sources of law."[7]

In contrast, for post-Soviet authors, formal (or, more precisely, formal legal) sources include methods (techniques, means) of internal organization

[2] Ioffe and Shargorodskij, 1961, p. 134.
[3] Trubeckoj, 1998, pp. 73–74.
[4] Shebanov, 1968, pp. 23–24.
[5] Hearn, 1883, pp. 31–32.
[6] Shershenevich, 1911, p. 5.
[7] Crawford, 2012.

and external expression of law and material sources—economic, social, and other living conditions that necessitate adoption or change, canceling, or supplementing certain legal acts.[8] Western researchers understand the concepts of “formal" and “material" sources very differently. For Western researchers, formal sources are the ‘legal procedures (procedural rules) and methods used in the process of developing and adopting general rules that are legally binding on everyone to whom they are addressed,’[9] while the material sources include ‘evidence (proof) of the existence of general norms adopted in accordance with the established procedure, which are of a mandatory nature.’

The lack of a unanimous opinion among post-Soviet and Western jurists on issues related to the concepts of "form of law" and "source of law" is complemented by a variety of judgments concerning the problems of their correlation.

The fact that ‘the sources of the European law system are distinguished by their originality’[10] and that ‘the division of European law into its constituent parts is largely predetermined by the nature of its sources’ identifies the source with the form of law and draws a dividing line between them in other cases.[11]

Without going into the reasons for the discrepancy in opinions regarding the concepts of "source of law" and "form of law," (which are both subjective and objective generated by the complexity and often-contradictory nature of the subject under study), let us only address the following.

Considering the sources of law inherent in the EU from a general theoretical standpoint and from the perspective of theoretically and methodologically important universal provisions developed by legal doctrine and confirmed by legal practice, it should be noted that their features are more crucial to understanding the nature and character of the sources of EU law.[12]

Among them, it is necessary to first highlight the features associated with the peculiar legal nature and the nature of the sources of the EU legal system. The essence of this peculiarity lies in the fact that, unlike the

[8] Marchenko, 2019, p. 29.
[9] Crawford, 2012.
[10] Abashidze, 2001, p. 49.
[11] Badin, 2001, p. 67; Luchin and Mazurov, 2000, p. 11.
[12] McCormick, 1999, pp. 32–46; Shaw, 2000, pp. 240–243.

sources of national law, whose initial principle and basis are the will and interests of the people living within the jurisdiction of the national state, the sources of EU law are based on the aggregated interests of European peoples and the consistency of their wills.

This directly concerns sources of the EU legal system, such as the constituent treaty acts, on the basis of which all three European Communities (the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community) were originally formed, and later the European Union was formed. By their legal nature and character, these treaty acts have always been and remain nothing more than international legal acts, in which, as in any other international legal act, the will and interests of not one state but all those participating in the data are expressed and reflected.[13]

If the agreed will and interests of the EU member states are expressed directly in the Constituent Treaty Acts, they will be manifested indirectly in the legal acts emanating from the supranational institutions formed by them, represented by the European Parliament, the Council of the EU, the European Commission, and other bodies.

By their nature and characteristics, these acts are neither national nor international. In the spatial-territorial relation, regional acts, in their essence, content, and purpose, occupy an intermediate place between national and international legal acts.

The main reason for the legal uncertainty and, in some way, the duality of the acts under consideration lies not in themselves or even in the legal system of the European Union that is being formed and constantly replenished due to its norms, but in the EU itself, and more precisely, in the duality of its legal nature.

3. Types of sources within the legal system of the EU

The question regarding the types of sources in the EU's legal system, as well as in any other legal system, is not so much a matter of theory as it is of the practical efficiency of their use. The vitality and effectiveness of the legal system depend largely on what theoretically and practically significant acts are recognized and used as sources of law and how they are classified.[14]

[13] Dinnage and Murhy, 1996, pp. 3–18; Snyder, 2001, pp. 1–9; Hoaben, 2005, pp. 11–29.
[14] Badin, 2001, pp. 65–70; Lejst, 2002, pp. 152–166; Berzhel', 2003, pp. 96–104.

Despite the fact that the problems concerning various types of sources of the EU legal system (presented in scientific research as "unique" and different from Romano-Germanic and Anglo-Saxon law, the regional legal system)[15] have been studied since the inception of this system, numerous issues within these studies still remain unresolved.

One of them concerns the list of legal phenomena that belong to the category of "sources of the legal system of the European Union."

By defining the sources of EU law as 'external forms of expression (manifestation), consolidation of legal norms adopted by the EU institutions within the framework of their powers and in accordance with established procedures',[16] some authors limit themselves to listing only the founding treaties of the European Communities and acts specified in Article 249 of the Treaty on the European Economic Community (later the European Community), which entails the legally significant acts emanating from the bodies of the EU authorized for their publication, namely, the regulation, directive, decision, recommendations, and conclusion.

However, the range of EU law sources includes a much larger number of phenomena than those officially recorded in the aforementioned article,[17] such as the general principles of EU law, including the rule of law, the principle of democratic government, and the principle of freedom of the transnational market.[18]

Some of these and other similar principles are enshrined in legislation, whereas others are developed and applied by the court. They are recognized and viewed as sources of law, which in the context of judicial law-making, according to some experts, 'mean even more than written law generated by the founding treaties.'[19] This is because the principles discovered and developed by the European Court of Justice are general principles of law inherent to each individual and all combined national legal systems of the EU member states. These principles were traditionally divided and used within national legal systems in the form of law sources "long before the appearance of written law that arose on the basis of constituent agreements."

In addition to the above, the EU system of law sources also includes judicial precedents and legal doctrines; emerging legal customs, for which,

[15] Cruz, 1993, p. 123.
[16] Shvecov, 2007, pp. 22–23.
[17] Topornin, 1998, pp. 284–287.
[18] Petersmann, 1995.
[19] Edward and Lane, 1995, p. 64.

however, the status of an independent source of law is not always recognized; the so-called acts of a "special category" or kind (sui generis acts) recognized by the court, related to the internal organizational and other activities of the EU institutions; as well as acts that are part of the so-called "soft law," defined as ‘a system of rules of conduct that, in principle, do not have any officially recognized legal force’ but nevertheless have "significant practical effect” within various EU bodies in the field of legal activity.[20]

"Soft law" (as opposed to "hard law" - the usual substantive and procedural) in the Western legal literature is considered subsidiary and, accordingly, is called "subsidiary" law.[21]

Its sources also include legally significant acts, such as declarations, communiqués, and resolutions of various EU institutions, official answers to questions addressed to the European Parliament, the Commission's statements on the policy pursued by the EU in a particular area, and others.

In trying to bring all EU law sources into a single system and classify them for deeper study and more effective use, post-Soviet and Western authors were guided by a variety of criteria.

Depending on the scope and direction of the action of certain sources, they are divided into internal and external.[22] Internal sources include articles of association, current EU legislation, and general principles of law, while external sources are international treaties.

Based on various criteria, such as the method of formation and adoption of certain acts, and depending on the form of their expression, all law sources are divided into the following categories:

- Founding treaties, "comparable in meaning to national constitutional laws," and "other acts regulating the most important issues of the organization and functioning of the European Union";
- Acts adopted by the EU institutions "comparable to ordinary laws and bylaws of national law";
- Decisions of the European Court of Justice, ‘based on the legal norms of the constituent acts of the European Union and other sources of law (general principles of EU law and international law, legal doctrine).’[23]

[20] Snider, 1993, p. 32.
[21] Edward and Lane, 1995, p. 52.
[22] Shaw, 2000, p. 240.
[23] Shvecov, 2007, p. 17.

In addition to the above, there are other criteria for classifying sources of EU Law but the most common and well established is the criterion according to which the sources of the law under consideration are classified depending on their legal force. According to it, all sources of EU law are divided into two main groups: primary law and secondary law. In the scientific literature, they are sometimes called primary and secondary sources,[24] with the latter not always of fundamental importance. It is only important that no confusion be allowed with the classification of law sources according to "material" and formal legal criteria. The material sources are vital (economic, social, etc.) conditions affecting the process of formation and development of law and are considered primary sources of law, while the formal legal sources, being the forms (methods, means) of expressing legal norms outside, are the secondary sources of law.[25]

4. Sources of primary law

Without touching on other criteria for the classification of EU law sources and the characteristics of their individual types, this section examines only the sources of primary law.

Initially, however, we should analyze which types of legal acts belong to the category of primary law sources. The research on the topic refers to the sources of the primary law of the European Union as ‘all constituent treaties on the formation of communities, customary law and general legal principles.’[26]

In other cases, this category of sources, in addition to the founding agreements, includes all agreements that amend and supplement them ‘with all provisions, protocols, declarations, and other accompanying documents,’ as well as legal customs, traditions, general principles recognized and proclaimed in the constitutions of the member states of the EU, and legal doctrines, the essence of which is seen in the fact that ‘the norms of the law of communities are contained not only in the constituent treaties and other legal acts, but also in unwritten law,(and) are consistently reflected in the decisions and conclusions of the court (of the) European Communities’.[27]

[24] Borhardt, 1994, pp. 32–33; Shaw, 2000, pp. 241–243.
[25] Marchenko, 2019, pp. 55–58.
[26] Gornig and Vitvickaya, 1998, p. 282.
[27] Topornin, 1998, p. 145.

Third, the range of primary EU law sources is limited to the list of constituent acts and treaties introducing amendments and their additions.[28] Along with that, there are different ideas about the types of sources that should be attributed to the sources or forms of primary law.

Analyzing various approaches to the structure and other aspects of primary law, it is obvious that, with all their diversity, the authors express unanimity in direct or indirect forms that the primary law of the EU is an analog of national constitutional law and the founding agreements are analogous to the national constitution.[29]

The legal literature on this matter correctly states that 'the division of European law into its constituent segments is largely predetermined by the nature of its sources' and that 'the special significance of the constituent acts for the creation and functioning of Communities and the Union served as the basis for their qualification as acts of constitutional significance'[30] on the basis of which—a kind of constitution—various legislative acts are issued and applied to form the secondary law.

Based on this thesis (and the assumption that the constituent treaty acts are essentially a kind of aggregate European constitution—the forerunner of the unified supranational constitution currently under discussion within the EU—and that the primary law formed on their basis is a very close analogue of constitutional law), all issues related to the classification by legal force of sources of law in the EU in general and its primary law, in particular, should be resolved.

According to this approach, the system of primary law sources is undoubtedly constituted by the treaty acts of the European Communities and the EU as a whole, with the main subsystem of sources of primary law as an integral part of their common system. This is on the one hand, and on the other hand, all other contractual acts are included in the general system of primary law sources, with the help of which amendments and additions are made to the constituent agreements, as well as all documents accompanying the adoption and development of the constituent agreements in the form of protocols, declarations, and other supplements that develop and explain certain provisions contained in contractual acts.[31] They form a second

[28] Cruz, 1995, pp. 172–173.
[29] Edward and Lane, 1995, pp. 51–54; Freestone and Davidson, 1988, pp. 11–12; Sieberson, 2004, pp. 993–1040.
[30] Entin, 2004, p. 83.
[31] Topornin, 1998, p. 280.

subsystem, dependent on the first subsystem of primary law sources, and are an integral part of the general system of sources of this law.

As for all other EU law sources, such as legal custom, tradition, judicial precedent, international treaties of the European Communities with third countries (states that are not members of the EU), as well as other legal acts that, for all their importance and social significance, cannot be considered as basic, "constitutional" acts. Logically, they should be classified as sources of secondary law.[32] They are entirely dependent on the sources of primary law on the basis of which the secondary sources are created, developed, and applied.

Having the highest legal force in the system of law sources in the EU is the main, but not the only, distinctive feature of the primary law sources.

4.1. Distinctive features of sources of primary law

Among the distinguishing features of the primary law sources—constituent treaties—it should also be noted that, by their nature and character, international legal acts have a direct purpose and focus on the formation and regulation of intra-institutional (within the European Communities and the EU as a whole) relations.

If, in the way of elaboration, conclusion, and implementation of the constituent treaties, they reproduce the corresponding order and procedures usually adopted when concluding international treaties and agreements, and in a way ‘resemble an ordinary international treaty,’ then, in terms of their focus and the range of subjects to whom the instructions contained in these acts are addressed, from the point of view of their content and significance, ‘they are in many respects close to such a legal source of national law as the constitution.’[33]

Assessing the legal nature and character of the constituent treaty acts, Western authors emphasize ‘the more than classical nature of this kind of international treaties, establishing mutual obligations between the high contracting parties.’[34]

Last but not least, the "more than classical character" of these acts lies in the fact that being international legal acts, they nevertheless:

- "create quasi-state bodies (institutions), independent of national state authorities" endowed with "sovereign rights" in the field of

[32] Craig and Harlow, 1998; Hartley, 1999; Hanlon, 2003.
[33] Topornin, 1998, p. 85.
[34] Mathijsen, 1990, p. 304.

legislative, administrative, and judicial activities, which are transferred to them from the member states of the EU;

- "lay down the basic principles" in accordance with which these quasi-state institutions function.[35]

Moreover, the founding agreements, as sources of primary law, establish a "special legal order" in the European Communities and the EU as a whole and create the constitutional and legal foundations for their existence and functioning.

4.2. Special legal order in the European Communities

Back in the early 1960s, the European Court of Justice stated that the founding treaties created a "new legal order in the field of international relations" that served every member state of the European Community, which "voluntarily limited its sovereign rights in some areas." The subjects of this legal order are not only the member states of this Community (Communities), but also their citizens, who receive certain duties associated with their "common European" citizenship, and who are at the same time granted certain rights as part of their legal status.[36]

In 1964, returning to the issue of the "special legal order" laid down by the constituent treaties in the European Communities, the Court reaffirmed its previous position on the uniqueness, independence, and self-sufficiency of this legal order[37] and explained that it manifested itself primarily in the creation of such a Community, which "is not limited by any period of its existence," "has its own person, its own legal capacity, and the right to represent in the international arena," Most importantly, it has "real power arising from the voluntary limitation of its sovereignty" by the member states of the European communities in some areas and the transfer of its respective powers to supranational institutions that have acquired the right to "adopt generally binding acts both for the states themselves and for their citizens."[38]

Of course, this "special legal order" was not created and approved immediately, even after a number of court decisions supporting it at the European level. It took years ‘until all national courts and tribunals recognized the legal order created by the European founding treaties as a

[35] Ibid.
[36] Edward and Lane, 1995, p. 55.
[37] Mathijsen, 1990, p. 305.
[38] *Flaminio Costa v E.N.E.L.* C-6/64, 15 July 1964.

special, independent legal order',[39] despite the fact that some of them, such as the German Supreme Administrative Court, immediately expressed support for the idea that the law of the European Communities creates 'a separate legal order, the main provisions of which do not relate to either international law or to the national law of the Member States of these Communities.'

Establishing a special legal order in Europe, the constituent treaty acts as the backbone of both the primary and the rest of the European law, simultaneously laying the constitutional and legal foundations for the process of formation and development of the structural elements of the European Community—various supranational institutions, their powers, the main goals of their creation, the tasks they face, as well as their relationships with each other and with the relevant bodies of the national states forming the European Community.[40]

In addition, the founding agreements formulate and consolidate the basic principles of the relationship of common European law (more precisely, the law of the European Union, supranational in nature) with national and international law, and supranational European legal order with a national and international legal order.

In other words, despite the fact that the constituent treaty acts are in some cases only very conditionally equated with national constitutional acts,[41] they nevertheless establish and secure the EU's main fundamental provisions and characteristics within the framework of its legal system; in their essence and meaning, they fulfill sterling constitutional roles.

This process is not impeded by the fact that having the same legal force, each constituent treaty—the Paris Treaty of 1951 on the European Coal and Steel Community and the two Rome Treaties of 1957 on the European Economic Community and Euratom—has its own special area of application, pursues its strictly defined, specific goals, and regulates a range of certain social relations.

Scientific and educational literature correctly notes that the Treaty on the European Coal and Steel Community and the Treaty on Euratom were aimed "at specific, narrow areas of integration, the special nature of which required a separate settlement," as evidenced by their names. By contrast,

[39] Mathijsen, 1990, p. 305.
[40] Polland and Ross, 1994, p. 168.
[41] Topornin, 1998, p. 86.

the Treaty of the European Economic Community covers almost the entire sphere of economics and politics.[42]

When characterizing this treaty and defining its place and role in the system of primary law, researchers call it not only the largest in volume (over 300 articles plus 2 annexes and 35 protocols) but also the most important source of the primary law of the European Union as a whole.[43] This treaty, the authors emphasize, is 'the main international legal act in the system of European law,' creating 'a unique in many respects legal regime in the European region.'[44]

In the mid-1980s, the European Court of Justice highlighted its importance by recognizing it as a kind of "constitutional charter." In the early 1990s, the Court consolidated its assessment of this treaty: "although it was concluded in the form of an international treaty, it nevertheless constitutes a constitutional charter for a Community based on the rule of law." At the same time, the court stated that 'the essential characteristics of the Community's legal order, which were thus established, were, in particular, its primacy over the law of the member states and the direct effect of a number of provisions that apply to their citizens and to the member states themselves.'[45]

Distinguishing the Treaty on the European Economic Community from other constituent treaty acts by objective indicators does not diminish the role and significance of these acts, but only emphasizes one of the features of primary law in the general system of European law, the essence of which is that the constituent treaties that form it, being equal to each other legally, are by no means, such in fact.

The Treaty on the Establishment of the European Economic Community (now the European Community) has always held the leading position in this respect. However, after the formation of the European Union in 1992, the Treaty on the European Union (Maastricht Treaty) was singled out in the legal literature along with the Treaty on the Establishment of the EU as the main constituent treaty due to its economic and socio-political

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[42] Topornin, 1998, p. 114.
[43] Gornig and Vitvickaya, 1998, p. 233.
[44] Freestone and Davidson, 1988, p. 11.
[45] *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* Opinion 1/91, 14 December 1991, p. 124.

significance.[46] However, this did not in any way affect the perception of the de facto status of the Treaty on the European Economic Community as the leading constituent treaty.

Considering the primary law sources from different angles, it is noticeable that along with the possession of supreme legal force, a constitutional character in relation to all sources of EU law, and differentiated character in relation to each other, these sources also possess other features.

Among them, we can single out their direct action in relation to national law and the rule of law, which is examined in more detail below.

4.3. Direct action of sources of primary law in relation to national law and order

According to the legal doctrine and conclusions of the European Court of Justice, a number of provisions in the constituent treaties have direct effects, both on various domestic authorities, legal entities, and individuals. In particular, this concerns the rights and freedoms of citizens, as well as directly related provisions of treaties, with respect to which the court has repeatedly emphasized that they can be implemented without the additional adoption of any other legislative acts in court and that national courts are obliged to respect general European legislation.

However, analyzing the direct action of the primary law sources, it should be noted that the doctrine of the so-called "direct effect"[47] guided by the judicial authorities in the process of applying European legislation as well as the established judicial practice, proceeds from the fact that not all provisions of the constituent agreements can be directly applied by national courts.[48]

Subject to the direct application are only those provisions of constituent legal acts that: a) are distinguished by their "clarity and concreteness;" b) have a "pronounced character;" c) "do not need any additional measures for their application" (acts) on the part of national and supranational authorities; and d) do not leave for the national, as well as for

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[46] *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* Opinion 1/91, 14 December 1991, pp. 125–126.

[47] Pescatore, 1983, pp. 153–158.

[48] Mathijsen, 1990, pp. 307–308.

the supranational authorities, applying certain provisions of the constituent treaties, "any significant alternatives or discretion."[49]

By establishing such requirements for the directly applicable provisions of the constituent agreements, the legal doctrine of "direct effect" and the corresponding jurisprudence, on the one hand, completely exclude the possibility of the direct action of such very abstract legal phenomena as norms-goals, norms-general attitudes, or norms-tasks. On the other hand, they recognize a number of articles contained in the constituent legal acts as subject to direct application.[50]

This includes, in particular, clearly stating and not allowing any ambiguity in the understanding and interpretation of articles, such as Article 39 (in the original version of Article 48) of the treaty establishing the European Community, according to which "the free movement of workers within the Community is guaranteed" and "presupposes the abolition of any discrimination on the basis of the citizenship of workers of the member states with regard to recruitment, remuneration, and other conditions of work and employment"; Article 56 (former Article 73-B), according to which "all restrictions on the movement of capital between the Member States and third countries, carried out within the framework of the provisions set out in this chapter, are prohibited," i.e., in Chapter 4, this includes the contracts entitled "Capitals and Payments."

4.4. The principle of priority of the later act in relation to the previous one and the procedure for making amendments and additions to the constituent agreements

Regarding characterizing the sources of primary law, in addition to their noted features, evolutionary constituent agreements are made according to somewhat different standards compared to other sources of EU law and, above all, legislative acts, the development of which is carried out in accordance with the principle of priority of a later act in relation to a previously adopted one. That is, not by replacing one outdated treaty act with another updated act, but by introducing amendments to the constituent agreements that meet the spirit of the times as well as the interpretation of the court.

For the sake of objectivity, it should be noted that in the process of developing the primary law, attempts were made to completely replace one

[49] *Public Prosecutor v Tullio Ratti* C-148/78, 5 April 1979.
[50] Edward and Lane, 1995, p. 55.

constituent agreement with another, new agreement. For example, in February 1984, a proposal to replace the Treaty of Rome with a new treaty on the EU was supported by the European Parliament but did not receive approval from a number of member states of the European Community and was therefore not implemented.[51]

The need to make changes and additions to constituent agreements, as well as to any other legal acts, always arises as social relations develop and new circumstances emerge that require appropriate adjustments. However, this often happens far from the same conditions, with the manifestation of varying degrees of novelty and radicalism of the changes and additions introduced in compliance with different requirements for the changes and additions made, as well as the corresponding procedures.

Regarding the constituent contractual acts, the legal basis for their revision and the introduction of certain amendments and additions is Article 48 of the Treaty on the EU, according to which 'the government of any member state or the Commission may submit to the Council proposals to amend the treaties on which the Union is based.'[52] And further, in procedural terms:

> If the Council, after consulting the European Parliament and, if necessary, the Commission, gives an opinion on the need to convene a conference of representatives of the governments of the member states, then such a conference shall be convened by the President of the Council in order to determine, by common agreement, the amendments that should be made to these treaties.[53]

The adopted amendments become effective upon ratification by all member states 'in accordance with their constitutional procedures.'[54]

The procedure for introducing amendments and changes to constituent agreements, in which practically all legislative and executive bodies of the EU are involved is generally accepted and standardized.

However, in addition to it, there is also a simplified procedure for revising some articles of the constituent acts. For example, a procedure in

[51] Freestone and Davidson, 1988, pp. 7–8.
[52] Art. 48 of the Treaty on European Union.
[53] Ibid.
[54] Ibid.

which the possibility of amending the treaty is allowed only by the decision of the Council, without the participation of other EU bodies in this process, and without the subsequent ratification of the amendments by the Member States of the Community. This procedure is used, in particular, when solving issues that relate to the quantitative composition of certain supranational bodies.

A simplified procedure for amending articles of association was used in other cases.[55] In addition to amending the constituent agreements as a way to improve them, the European Court of Justice plays a huge role in this process, which ensures, in accordance with Article 220 of the Treaty on the European Community, the 'application of Community law through the uniform interpretation and application of this treaty.'

5. Conclusion

Having considered the sources of law, the increasingly clear tendency toward the unification of constituent treaty acts and the creation, on their basis, of a single basic constitutional document is clearly highlighted.

This trend does not arise on its own but is instead based on a number of objective and subjective reasons reflecting the internal integration processes taking place within European Communities and external global processes worldwide.

The most striking manifestation of the tendency toward the unification of constituent agreements, "their revision" and "the creation on their basis of a single codified act," which would replace the current constituent acts[56] and, moreover, would be 'a simpler and shorter document',[57] was received during the preparation and attempts to adopt at present the draft of a single Constitution of the EU.

Supporters of the idea of creating a pan-European federation note that the proposed draft constitution is still "not yet a constitution of a federal state with a unified legal order that arose on the basis of pan-European and national law. The presented pan-European constitution is only a basic act that 'stands in the same row (alongside) with the national constitutions' of the EU member states, which are 'the supreme sources of law in their national legal order.

[55] Gornig and Vitvickaya, 1998, pp. 126–130.
[56] Sieberson, 2001, p. 994.
[57] Petersmann, 1995.

However, even in this version, the discussed constitution (draft) testifies, according to the authors, to the development of the founding law of the European Union, as well as of this quasi-state entity itself, toward the formation of a single constitutional act and the creation of the "United States of Europe," an all-European federation.[58]

Regarding the prospects for quasi-state and state development of the EU, the question remains open. However, it is indisputable that, together with the supranational development in modern Europe, under the influence of internal and external factors, the process of constitutional development is gaining momentum toward the unification of constituent treaty acts as the basis of primary law and adoption, instead of accumulating and systematizing the main provisions of a single constitutional act.

[58] Sieberson, 2004, p. 995.

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Exploring the Enforcement of the Right to Resist in the 19th Century Natural Law Theory

ABSTRACT: Studies on natural law carrying the more moderate spirit of the Enlightenment promoted the establishment of civil society, humanity, and equity, and by the turn of the 18th and 19th centuries, created a synthesis of the views of Pufendorf, Leibniz, Thomasius, Wolff, and Kant, which reflected the state and legal systems. Although the sovereignty of the state and the nature of its *maxima societas* remains unquestionable, governance can be subject to criticism. Executive power can only be exercised under the law, and if not, citizens may use various means of their right to resistance, observing the principle of gradation and proportionality. This study demonstrates the applicability of these tools to the interpretation of natural law in the 19th century.

KEYWORDS: natural law, Hungarian natural-law literature, citizen's and public authority's rights and obligations, enforcing rights, form of rights to resist, principles of gradation and proportionality, tyrannical exercise of State power.

1. Nature Law Literature in Hungary in the 19th Century

The changes in the Faculty of Law at the University of Vienna during the first decade of the 19th century led to a change in attitude towards Hungarian studies in natural law. Thereafter, studies in natural law no longer referred exclusively to the works of Karl Anton Martini but sought to make it possible to accept the new rationalist aspect represented by Franz von Zeiller and Franz von Egger (Martini's successors in the department) based on Immanuel Kant's concepts. By the turn of the 18th and 19th centuries natural law studies promoted the establishment of civil society, humanity, and justice with a more moderate spirit of the Enlightenment; and by the turn of 18th and 19th centuries it synthesised the views of Pufendorf, Leibniz, Thomasius, Wolff and later Kant on the state and the law of

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societies. In the spirit of the old Aristotelian scholasticism, the principles of natural law, practised as part of philosophy, underwent a reform in legal education and thus became a terrain for the adoption of new ideas, in which oddly enough the governments of the Enlightenment absolutist states played a catalytic. State support for legal education had its reasons, it was in line with the educational goals of Karl Anton Martini and Joseph Sonnenfels. These objectives were based on the Wolffian thesis that the purpose of the State is to ensure the public good and prosperity of its citizens; consequently, the ruler, as the representative of the State, is entitled to and obligated to regulate all matters of the State, including education, in a sovereign manner.[1] This type of mindset, as well as the reorganisation of legal education, resulted in the establishment of a separate department for instructing on natural law. The heads of the department – Martini and his successor Zeiller – implemented natural law into the service of Austrian private law codification, thus making theoretical considerations of natural law useful in practice. Martini attempted to rationalise nearly six decades of preparatory work for the Austrian Civil Code from a natural law perspective, however, the final version of the Code also carried the conceptual features of natural law, owing to Franz Zeiller's reworking of the Kantian spirit.[2]

Mihály Szibenliszt was the first to represent and establish this aspect of natural law in Hungary, and Imre Csatskó and István Bánó used his two-volume natural law in institutions.

It was officially adopted in academic circles by Antal Virozsil, and at the end of the 19th century, Tivadar Pauler's works[3] represented contemporary literature on natural law.[4]

2. Rights and Obligations under the Concept of Natural Law

Nineteenth-century natural law based its grasp on law on the essence of human nature, asserting that the principles of natural law could only be applied in relation to humans and human communities. According to this view, humans as both rational and free.[5] Therefore, the principles of natural

[1] Kornis, 1927, p. 4.
[2] Hamza, 2002, p. 40.
[3] Szabadfalvi, 2010, p. 343.
[4] Szabadfalvi, 2011, pp. 479-480.
[5] Virozsil, 1833, p. 1.

law can be revealed with knowledge of human nature and the invocation of pure reason. It is necessary to identify ways of thinking that allow people to distinguish between lawful and unlawful.[6] According to this conception, law is the sum of the conditions under which one person's will is reconciled with that of another through the general laws of freedom and to which the power of compulsion is related. Every law carries within itself the possibility of coercion, that is, the possibility of preventing violations through legal means.[7]

According to natural law to acquire a clearer understanding of the law, it is necessary to clarify the essence of a legal obligation, which should be understood as the free formation of an external act that conforms to a legal obligation. The legal obligation can arise from another person's right, and it is simply the necessity to conduct a determined external action; for example, from the right of a creditor, the obligation to fulfil arises for the debtor.[8] In social coexistence, it is not possible to possess 'rights' without considering the freely expressed external actions of others, therefore, it is necessary to consider both rights and obligations.[9] The essence of a legal obligation (i.e. an obligation correlatable to a right) is explained by natural law as follows:

- Originally, all legal obligations have a negative content, aiming to not disturb others in their exercise of rights.
- This only applies to external acts, as internal acts are not suitable for limiting others' freedom of activity.
- Compliance with legal obligations can be encouraged by applying coercion to prevent someone who does not fulfil a legal obligation from exercising the right to resist its fulfilment.[10]

3. The Possibilities for Exercising the Right of Resistance

Natural law theories distinguish between a state of nature (*status naturalis*) and a civil relationship (*civilis nexus*), where the civil relationship denotes a social relationship between people organised as a state. Individuals are entitled to rights in their naturalistic state in which they are characterised by

[6] Zeiller, 1819, p. 1.
[7] Szibenliszt, 1820, pp. 12-13.
[8] Szibenliszt, 1820, pp. 13-14., and see more Zeiller, 1819, p. 7-8.
[9] Szibenliszt, 1820, p. 12.
[10] Szibenliszt, 1820, p. 15.

a system of relations based on individual rights and obligations.[11] In such a state, individuals are independent, free, and equal, characterised by rational thinking, which implies that they are capable of formulating their own will and making decisions.[12] Thus, natural law not only describes, analyses, and explains the rights of people living within the state framework (*in civitate*) but also presents the rights entitled to people in their condition of nature, that is, those rights which the individual has independent of all state formations (*ius extrasociale*). This emphasises that all rights in civil society are derived from rights which originally belonged to the individual.[13] However, for the safe exercise of these rights and accompanying obligations, such social formation based on a consensual agreement (social contract) is required, which aims to ensure the aforementioned. This social formation is the state (*civitas*) in which individuals unite in common strength for a common purpose and, by their common will, organise themselves into a state to achieve this goal.[14] The theory of natural law holds that all types of states are based on consensus and must have at least three content elements: 1) union (*pactum unionis*), 2) determination of the state form (*pactum constitutionis formae*), and 3) submission to state power (*pactum subiectionis*), which, either separately or collectively constitute the treaties that create the state. All contract elements create mutual rights and obligations between the contracting parties. The contracting persons, now citizens, determine the form of government they have selected and its subject, to whom they submit themselves to in order, to ensure that their rights are entrusted to them as representatives of public power.[15]

The exerciser of public power and the now subjects of state[16], thus established mutual rights and obligations, and it was also recognised that the subjects had the right to form an opinion on the measures of public power and, in the last resort, to express their dissatisfaction through pressure, i. e. through methods of force (*coactione*). This right reserved for the citizens stems from the principle of '*ius resistendi*', and the means of enforcing this

[11] Szibenliszt, 1820, p. 23.
[12] Szibenliszt, 1820, p. 2.
[13] Szibenliszt, 1820, p. 24-25.
[14] Szibenliszt, 1821, p. 46.
[15] Szibenliszt, 1820, p. 57; Zeiller and Egger, 1810, Geistinger Band 2. pp. 2-3;Martini, 1795, p. 13.
[16] In natural law terms, the Latin word '*persona*' refers to an individual within a private legal context, focusing on their autonomy. Conversely, the term '*subjectum*' is used in public law to describe the individual and express their public subordination as a citizen.

right are accurately determined by the natural law. It presents a logical system of legal means by which citizens can legally oppose the state's power holder - typically the 19th-century monarch - in the case of conflict.

Under the concept of '*ius resistendi*', a wide range of measures can be undertaken, from simple civil disobedience (*ab obligatione obediendi immunes declarari*) to the right to armed resistance (*ius armorum*). The legality of the current means of expressing dissatisfaction depends on the availability of alternative options to the citizens[17] The choice of appropriate means can be considered as a method that guides the interpreter through this process according to an algorithm.

In possible applications between the two extreme points of the toolset, the current and legally usable tools must be selected according to two conjunctive principles. First, adhering to the principles of proportionality and graduality, no harsher measures may be used if milder measures are available in a reasonable manner. Second, efforts should always be made to uncover the real cause of injury.[18]

To select appropriate legal instruments, the natural law of the 19th century built additional filters into the process. It must be examined whether the demand for enforcement is expressed through individual or collective (*ius concivium*) application. In the case of individual enforcement, it must be clarified whether an injury is a consequence of a public or a private act of exercising public power. In the latter case, citizens cannot be denied the right to protest. However, the right to assess the legality of state acts has been transferred to the exerciser of state power by the *pactum subiectionis*, therefore, its assessment is within his scope.[19] The possibility of exercising the right to resist as a community must be interpreted differently. It should be examined whether the offence stems from the violation of constitutional rights or, although it does not violate them, allows for the inference of a form of governance contrary to the state's goals. In cases of constitutional grievances, a distinction must be made between whether the fundamental laws are laid down specifically in positive laws or take shape only in natural laws.[20] When constitutional rights are not violated, but the direction of public affairs appears to be contrary to the state's goals for some reason, citizens, by their duty of obedience, do not have the right to resist, since,

[17] Szibenliszt, 1821, pp. 280-281.
[18] Szibenliszt, 1821, p. 281; Zeiller and Egger, 1810, p. 394.
[19] Szibenliszt, 1821, p. 280; and see more Zeiller and Egger, 1810, p. 394.
[20] Szibenliszt, 1821, p. 281; and see more Zeiller and Egger, 1810, p. 394.

under the terms of *pactum subiectionis* the citizens have transferred decision-making power over such matters to the exerciser of state power, therefore, in such a situation, they have waived their right to resist. Otherwise, all the people would have transferred state power to the ruler on the condition that it could only be exercised if the people judged it to be well governed. According to some authors, such a stipulation would not be valid, as it would mean that the people who undertake the obligation of obedience in *pactum subiectionis* could unilaterally dissolve this obligation themselves.[21] Therefore, the actual situation is that the ruler reserves the right to act in the affairs of the state according to his judgement, while the people declare their obedience. Therefore, if an unfortunate situation or human weakness results in a bad government, it is primarily the right and duty of the ruler to take action against it.[22]

When citizens protest against the state's measures of public authority concerning the violation of the constitution (*laesio Constitutionis*), and this is considered a violation of laws that are laid down in basic laws, they act legitimately against the exerciser of public power. At this point, it must be examined whether the violation of the statute is only assumed or factually occurred. Until it is doubtful that this has occurred, all subjects are obliged to comply with the public authority's orders. The good faith of public authority in the exercise of state power can only be questioned by considering its inherent right to good reputation.[23]

However, the people are entitled to pre-submission rights (*ius proponendi*), according to which they can present the basis on which they judge that a constitutional injury has been committed. Moreover, they have the right to propose alternatives to the actions they consider to be unlawful. The right to express an opinion (*ius iudicandi*) on this is also granted to the people under the term 'Treaty of Submission' (*pactum subiectionis*).[24]

If it becomes clear that basic law has been breached, it must be examined whether the exerciser of public power did so arbitrarily or out of necessity, and if done out of necessity, citizens have the right to be informed about the necessity itself so that they can comply with the basic agreements. Indeed, fundamental law was created to serve the public good, to provide a more secure and solid instrument for the attainment of the state's purpose,

[21] Szibenliszt, 1821, p. 282., and see more: Zeiller and Egger, 1810, p. 396.
[22] Szibenliszt, 1821, p. 283., see more Zeiller and Egger, 1810, pp. 397-398.
[23] Szibenliszt, 1821, p. 284., see more Zeiller and Egger, 1810, p. 398.
[24] Szibenliszt, 1821, p. 284., Zeiller and Egger, 1810, p. 398.

and not to impede it. Thus, if the constitution conflicts with the welfare of the state, its validity is suspended in such a situation by the tacit consent of the people in the interest of the state, and the exerciser of state power has, out of necessity, violated the constitution or a passage of the constitution which has impeded the achievement of the state's purpose.[25]

When no situation necessarily leads to a violation of the constitution, citizens are entitled to the right of explanation and reckoning as to whether the provisions of the fundamental law have been fulfilled (*ius repraesentandi et ex eadem rationem postulandi*). If this legal tool is insufficient, then the people have the right to refuse obedience to the rule, contrary to the Constitution.[26] Nevertheless, if a public authority forces citizens to act according to the unconstitutional provision, it should be examined whether the exerciser of state power is attempting to enforce civic obedience through internal or external forces.[27] If coercion is backed by internal forces, and all citizens, or at least the majority, do not obey, the right to resist reaches its goal, as the majority will enforce the solution. If only a small section of citizens deny obedience, then the right to resist must be rejected not only based on the *pactum subiectionis* but also because the majority of the fellow citizens do not wish to exercise it, as well as from the treaties that define the union (*pactum unionis*) and the form of government (*pactum constitutionis formae*).[28]

In the case of a fundamental law which is not regulated by statutes but only manifested in natural law, such as when freedom of conscience, the so called to freedom of religion is violated, the rights to the aggrieved community must be examined. In such cases, the essence of the violation must be determined precisely, for examples, what appears to them as a religious ethical obligation and what type of injury they suffered in this regard if the aforementioned right is violated. In this determination, whether state regulations violate a facultative or compulsorily prescribed religious rule must be considered. Permission for facultative religious acts by the state always depends on certain conditions, the assessment of which is the state's right; therefore, citizens are obliged to obey state regulations. If a state act prescribes the violation of a mandatory religious-moral act, such as the requirement that citizens do not practice any religion, thereby denying

[25] Szibenliszt, 1821, p. 285., and see more Zeiller and Egger, 1810, pp. 398-399.
[26] Szibenliszt, 1821, p. 285., Zeiller and Egger, 1810, pp. 398-399.
[27] Szibenliszt, 1821, p. 286., Zeiller and Egger, 1810, p. 399.
[28] Szibenliszt, 1821, p. 286., Zeiller and Egger, 1810, pp. 398-399.

their humanity and allowing them to be treated as objects, they rightly refuse to comply with such a ruling. Moreover, disobedience against such sanctions is allowed even if the public authority invokes a state of emergency, as citizens cannot be treated as objects.[29] However, those who cite the violation of the freedom of religion demonstrate disobedience or open resistance against the act of the State that is not considered illegal, commit the same offences as, for example, lèse-majesté or rebellion.[30]

4. Resistance against the Tyrannical Exercise of Power

Natural law considers the legal instruments provided for the protection of citizens' rights when a tyrant violates the laws of nature. It defines a tyrant as an exerciser of state power who intentionally uses means openly and suitably directed towards the detriment of civil society.
Consequently, those who violate citizens privately or cause damage to the state without malevolent intent are not tyrants.[31]

According to some natural law views, people are even allowed to take up arms against a tyrannical ruler since the interpretation of the *pactum subiectionis* cannot be forbid the people to act in defence of their inherent rights while their destruction is deliberately attempted. This right to resistance is further supported by the fact that those who exercise power in a tyrannical manner may be assumed to have been tacitly deprived of the right to govern the state because the intention to destroy the state is incompatible with governance.[32] Armed resistance to the ruler can, therefore, legally be exercised under two conjunctive conditions: first, if, of the subjects see, the ruler as truly a tyrant and, in judging it, there is consensus among all the people or at least the overwhelming majority; and second, if this is the only means to restrain the tyrannical rule. Further consideration is required if the tyrant resorts to external assistance, because in such cases, the right of force can be exercised only against external helpers while respecting the state's order. However, the principle of gradation must continue to be applied here; it is primarily advisable to resort to disobedience towards the tyrant when the subjects or the overwhelming majority agree to do so. Consequently, the

[29] Szibenliszt, 1821, p. 288; Zeiller and Egger, 1810, pp. 403-404.
[30] Szibenliszt, 1821, p. 288; Zeiller and Egger, 1810, p. 405.
[31] Szibenliszt, 1821, pp. 288-289. , and see more Zeiller and Egger, 1810, p. 406; Martini, 1795, p. 131.
[32] Szibenliszt, 1821, p. 298; Zeiller and Egger, 1810, p. 406.

tyrannical ruler, together with the loyal minority, will no longer be able to enforce his despotic provisions. If he were to call upon foreigners for help, neither the *pactum unionis* nor the *pactum subiectionis* would impose any obligation on the people that would prevent them from exercising their right to resist foreigners. After all, the people have not entered into any type of agreement with foreigners and are not subject to tyrannical rule.[33]

While exercising the right to resist as the legitimate defence of the people, milder means should always be preferred. For example, the secure custody of the ruler (*secura custodia Imperanti*) considered a tyrant or his removal from public life and ultimately from the state (*remotio a Civitate*). The enforcement of the right to punishment is not directly vested in the people as a state prerogative. Therefore, citizens can never exercise the right of arms against the ruler (*ius armorum in personam Regis*) because his person is sacred and inviolable.

Armed resistance is forbidden from being demonstrated against the ruler as long as he has both personal and real state power. However, if he has already been deprived of these and the subjects act against him, he can be considered simply as a subject, like anyone else. From that point on, he can be subjected to the enforcement of both *ius puniendi* and *ius armorum*.[34]

5. Conclusion

Although state authority is unquestionable due to its sovereignty and the nature of *maxima societas*, governance can be subject to the citizens' criticisms. Executive power can only be exercised in accordance with laws. Otherwise, citizens can resort to various means of resistance, considering the principles of gradualism and proportionality.

First, non-public law acts, that is, the private acts of rulers that offend certain citizens, can be highlighted, against which citizens undeniably have the right to resist, which they can enforce by turning to court. Regarding public law acts, citizens have the right to complain about alleged or actual injury (*ius proponendi*), form an opinion, and judge the acts of the public authority (*ius iudicandi*).

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[33] Szibenliszt, 1821, p. 298., and see more Zeiller and Egger, 1810, pp. 408-409.

[34] "Imperanti itaque judicio relinquitur, quid e re sit Civitatis, et in eo se popululs imperium transferens adquiescere velle declarat. Quod si male regimini praeest, fortunae id adversae, humanae imbecillitati, difficilliom Rectoris numeri tribui, ac patienter ferri debet." Szibenliszt, 1821, p. 283., and see more Zeiller and Egger, 1810, pp. 397-398.

This is related to people's right to receive information (*communicetur*) about the situation of necessity that has justified the offending, restricting acts. This is where it is necessary to mention the citizens' rights to explanation and to enquire whether or not the provisions of the fundamental treaty were fulfilled (*ius repraesentandi et ex eadem rationem postulandi*). Finally, individuals can use civil disobedience as a form of pressure.

However, this peaceful pressure can only be applied if the subjects, or at least majority of them, have consented to its application. This already implies such a demonstration of force, so that further disobedience becomes unnecessary. Therefore, the right to arms (*ius armorum*) is lawful only against a tyrant, however, the principles of gradualism and proportionality also apply.

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On the budgetary regulations of the European Union

ABSTRACT: The research topic of this study is the regulation of the European Union budget and its possible development strategies. The examination will include, on the one hand, the Common Budget of the European Union and its regulatory issues, and, on the other hand, it will also study the financing of the budget and the fundamental issues of the regulation of aid from the budget. The study provides a detailed analysis of the budgetary regulation process and its expected development trends considering the 2021-2027 multiannual financial framework.

KEYWORDS: European Union budget, EU budget, multi-year financial plan, budgetary regulation, Common Budget of the European Union, multiannual financial framework.

1. Introduction

In my analysis, all the general issues relating to budgetary regulation, the system of budgetary revenue, the medium-term financial perspective, the principles of the creation of the budget, the stages of drafting, adopting, implementing, and controlling the budget, and its structure and content are also highlighted. Based on the available literature, sources of law, and relevant practices of the Court of Justice of the European Communities, as well as reviews of the reports and opinions of the European Court of Auditors, I will supplement its research results. The aim is to make it known what has been achieved in previous years in line with the objectives set, and also what general findings can therefore be drawn, based on the experience of the discussions on the budgetary framework, which are likely to affect the remaining and stable constraints, to assess the development opportunities that will open up in the long term and take advantage of these development opportunities. From the available resources, we get a current picture of the possibility of the European Union focusing on the development of its budget in recent years, decades, and today, and which sectors are increasingly benefiting from the budget.

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2. Budget of the European Union

Actions and projects financed by the European Union budget reflect the priorities set by the EU at a given time. According to the percentage breakdown of EU expenditure, competitiveness, and cohesion were the highest priorities for 2007-2013, with a rate of 44.6%. For the period 2007-2013, EU countries have decided to devote a significant part of their joint efforts and the EU budget to achieving greater economic growth and creating more jobs. Sustainable growth has become one of the top priorities of the EU. The EU economy needs to become more competitive, and less affluent regions need to catch up with others. [1]

Natural resources came in second place: agriculture, rural development, environment, and fisheries. Owing to Europe's geographical and climatic diversity, EU countries produce a wide range of agricultural products. In this area, the European Union envisages two main aspects. It is important that what is produced also meets the needs of consumers. On the other hand, it is also important to strive for a high level of quality of the agricultural product produced and the safety of production. In addition, the successful management and protection of natural resources should include environmental protection, restructuring and widening the structure of rural economies, and direct measures to promote sustainable fisheries. After all, animal diseases, oil spills, and air pollution do not stop at national borders. Such threats require extensive action in several countries on many fronts.[2]

This is followed by a 1.3% split between citizenship, freedom and security, and the enforcement of rights. The EU aims to better manage migration flows into the EU, expand cooperation in criminal and judicial matters, and strengthen societies based on the rule of law.[3]

These are the main categories of expenditure. The EU budget was originally set up to ensure the financing of common policies adopted by Member States. However, changes in the integration process and external environment have made new policies necessary. However, the Common Budget of the European Union was only partially able to follow this

[1] Európai Bizottság (2010): Az Európai Unió költségvetése dióhéjban. p. 3. Available at: https://docplayer.hu/2158259-Az-europai-unio-koltsegvetese-diohejban.html (Accessed: 2 June 2022).
[2] Juhász, 2010, p. 147.
[3] Ibid.

development, not least because of the attitudes of those Member States that paid great attention to the balance between their contribution to and access to the EU budget. This attitude (and its spread) has gradually overshadowed the original objective of joint (co-) financing of commonly agreed common policies during debates.[4]

As a result of this research, it can be concluded that the Budget of the European Union is becoming increasingly complex every year. Trends in the previous year show that the budget is undergoing changes that have a positive impact on the economy. The annual budget of the European Union determines the total revenue and expenditure of the European Union for the current year. The budget shall ensure, inter alia, the financing of programs and the EU's access to the revenue it needs to cover its expenditures. The EU budget finances actions and projects in policy areas where all EU countries have agreed to act at the EU level. By pooling their strengths in these areas, Member States can achieve significant results at a lower cost.[5] All revenue and expenditure items of the union shall be foreseen for each financial year and shall be indicated in the budget. [6] The Treaty on the Functioning of the European Union lays down the principles for the functioning of the budget, the need for its own resources, and the institutional and decision-making process for the preparation, adoption, and implementation of the common budget in detail. At the same time, we cannot speak of a clearly defined federal division of labor between the Member States and the EU level.[7]

Expenditure related to agricultural policy and regional policy represents a decisive part of the EU's budget expenditure, expressed as a percentage of, 60-70%. This primarily means allocation, distribution, and development functions. At the same time, it does not cover most areas of redistribution policy, that is, redistribution policy, because the EU budget does not deal with welfare transfers (e.g., unemployment benefits), health insurance, or, for example, public goods such as protection.[8]

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[4] Szemlér, 2019, p. 8.
[5] Európai Bizottság (2010): Az Európai Unió költségvetése dióhéjban. p. 3.
Available at: https://docplayer.hu/2158259-Az-europai-unio-koltsegvetese-diohejban.html (Accessed: 2 June 2022).
[6] Art. 310 of title II financial provisions of the Treaty on the Functioning of the European Union (TFEU).
[7] Kengyel, 2019, p. 522.
[8] Ibid.

The TFEU also regulates other issues relating to the EU budget, including the obligation to draw up a budget for the European Union, where the budget includes all community revenue and expenditure, as well as administrative expenditure relating to the common foreign and security policy and cooperation in justice and home affairs. The TFEU also sets out the basic rules for the financing of the budget, the period of budgetary authorization, and the principle of the annual budget. There are also provisions on the order in which the budget is drawn up in Articles 313–314 of Chapter 3. All institutions except the European Central Bank plan their expenditure for the following financial year before July 1. The TFEU provides the basic criteria for the implementation of the budget, the general responsibility of the Commission for the implementation of the budget, and the requirement for sound financial management.[9]

3. System of budgetary revenue and expenditure of the European Union

The functioning of the European Union (EU) is based on a balanced budget. It has resources to finance the Union's expenditure and finances its budget entirely from its resources. Legally, they are the resources of the union. Since the European Union does not have its own separate customs and tax authorities, they are collected by Member States on behalf of the European Union and transmitted to the EU budget on a set timetable. Revenue and expenditure planned for budget components are transferred.

The EU budget (following the principle of consistency) comprises two main parts: expenditure and revenue. Their size (based on the principle of budgetary balance) must be the same as that of each other.[10]

All institutions except the Commission shall draw up an estimate of their planned revenue and expenditure and shall send it to the Commission by July 1 each year and, at the same time, to the European Parliament and the Council for information.[11]

The draft budget shall contain a summary of the general statement of revenue and expenditure of the Union and shall combine the planned

[9] Treaty on the Functioning of the European Union (TFEU) Chapter 3, Art. 314.
[10] Miskolczi, 2018, p. 26.
[11] Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 Art. 36.

amounts referred to in Article 36. The draft may include planned amounts other than those estimated by the institutions.[12]
The task of the budget usually consists of reallocating the revenues of the state (or a sub-state level or even a supranational organization) to finance its expenditure. Budget revenues can typically be taxes, duties, and various contributions; for different organizations, the revenue structure may vary greatly.[13]

3.1. Own revenues

The Communities' own resources system should provide adequate resources for the regular development of community policies, considering the need for strict budgetary discipline.[14] The revenues of the common budget can therefore be divided into two main categories: the so-called own resources and other revenues. Other revenues are only a small part of the budget, so the European Union relies on its traditional resources. We distinguish between traditional resources, most of which are mainly derived from duties imposed on imports of products from non-EU countries.

This represents approximately 12% of the total EU revenue. A source of value-added tax is a single percentage rate applied to harmonized VAT revenue in all Member States. VAT-based sources account for 11% of the total revenue. A single rate is applied to the Gross National Income (GNI) of each Member State for its own resources based on gross national income (GNI).
This resource is drawn using a single rate based on the gross national income (GNI) of each Member State and is used to finance a part of the EU budget that is not covered by its resources and other sources of revenue. The aim is to ensure a balance between revenue and expenditure.[15]

Furthermore, we can conclude that because of the gradual loss of traditional resource revenues and the shift in the proportions that have occurred over the past budgetary periods, the revenues of the EU budget are increasingly derived from GNI-proportional contributions. This process undermines the principle of own-resource budgetary management and the

[12] Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 Art. 38.
[13] Szemlér, 2019, p. 8.
[14]Official Journal of the European Union 2007/436/EC, Euratom.
[15] Official Journal of the European Union 163, 23. June 2007. 23.

EU's financing autonomy since, in essence, only customs revenues are the real resources of the EU budget.

The VAT-based resource and the GNI-based contribution are already linked to the budgets of the Member States, so the EU budget, together with the latter two items, is practically at least 85% dependent on the willingness of the Member States to pay, that is, we cannot talk about truly autonomous budgetary management.[16] The proposed new funds would represent about 12% of the revenues of the common budget. So, there would still be a high dependence on GNI-based payments, but at the same time, it would be possible to move towards creating real resources. The Commission calculated that the share of traditional resources on the revenue side of the EU budget would fall from 15.9% in 2018 to 15.1% in 2027. The share of VAT-based payments changed from 12% in 2018 to 14.1%. GNI-based payments will be reduced from 72.1% in 2018 to 56.8% by 2027.[17]

3.2. Other revenues

Other revenue may include additional revenue from previous budget years or income from persons associated with the community institutions and employees of the community institutions, such as taxes and pension contributions, which they pay. Revenue from the administrative activities of the community institutions, the sale of assets, interest, repayments of expenditure relating to various community programs, interest on late payments and fines, and income from credit operations.[18] A further stipulation under Article 7 of Article 2007/436/EC, Euratom is that a Surplus in Community revenue more than the total actual expenditure in the Community budget during the financial year shall be transferred to the following financial year.

3.3. Expenditure

The expenditure side of the EU budget has evolved over a long period, with agricultural and cohesion policies currently representing the largest share, with a total share of approximately 80%. After the 1980s, cohesion policy, that is, regional and social policy, represented a significant part of budgetary

[16] Kengyel, 2019, p. 524.
[17] Kengyel, 2019, p. 525.
[18] Halász, 2018, p. 49.

expenditure, covering a wide range of projects in the form of co-financing, such as infrastructure building or vocational training.[19]

The expenditure side of the budget is divided into 10 chapters: the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions, the European Ombudsman, the European Data Protection Supervisor, and the European External Action Service.

The appropriations for the expenditure chapters are all operational appropriations, except the Commission chapter, which is divided into two main parts: the Commission's operational appropriations and the appropriations for financing EU policies - agriculture and structural policy. The expenditure side of the budget is divided first and foremost into chapters of the institutions, which mainly contain appropriations to cover the administrative and operational expenditures of the institutions.

The appropriations to cover the Union's political objectives and operations are not in its separate part but in the Chapter of the Commission. In addition to the appropriations covering the operational functioning of the Commission in this chapter, the appropriations for financing Union policies are divided into the following seven main categories:

- the common agricultural policy (CAP);
- Structural funds and cohesion policy - these two appropriations are still in the leading position to this day;
- other internal policies;
- external operations relating to third States (+ instrument of pre-accession);
- administrative appropriations;
- reserves.

3.4. Factors limiting revenue and expenditure in the budget

In the first instance, the contracts themselves appear to be a limiting factor. There should be no shortage of the European Union budget, which means that revenues must cover all expenditures. The next factor is the expenditure ceiling, which is set jointly by the governments and parliaments of Member States. Known as the 'own resources cap,' the limit for payments from the EU budget is currently 1.24% of the EU's gross national income (GNI). This equates to an average of approximately EUR 293 per EU citizen; the

[19] Giday, 2002, p. 505.

multiannual financial framework, jointly established by the European Parliament, Council, and European Commission, which regulates the evolution of the EU budget by cost category over a given period; and the Financial Regulation adopted by the Council and Parliament laying down the rules for drawing up, implementing, managing, and controlling the budget.[20]

4. Principles of budgetary regulation

Budgetary principles define the general framework for budgetary management. They cover the whole area of budgetary management on a general basis, while simultaneously providing the most basic framework for legislative provisions on the budget.[21]

The principles also include so-called budgetary management rules, and on the other hand, accounting, or related rules. These budgetary principles help the European Union ensure that the budget drawn up is transparent. These principles have existed since the beginning and have been constantly evolving and supplementing.[22] According to the rules in force, the basic principles of budgetary law can be found in the TFEU on the one hand and in the Financial Regulation on the other.

The *principle of consistency* according to which all the community's financial operations, total revenue, and expenditure are summarized in a single document in the budget. According to the provisions in force of the TFEU, all items of revenue and expenditure in the community should be foreseen for each financial year and indicated in the budget.[23] No revenue shall be collected in the budget and no expenditure shall be fulfilled if not indicated in the budget. The appropriations in the budget shall also be the ceiling for expenditure and, accordingly, no expenditure obligation shall be assumed or authorized more than approved budget appropriations. The budget may include only appropriations that are linked to a specific purpose, and which are deemed necessary; accordingly, the budget shall not contain

[20] Európai Bizottság (2010) Az Európai Unió költségvetése dióhéjban. p. 7. Available at: https://docplayer.hu/2158259-Az-europai-unio-koltsegvetese-diohejban.html (Accessed: 2 June 2022).
[21] Halász, 2018, p. 42.
[22] Erdős, 2005a, p.43-63.
[23] Treaty on the Functioning of the European Union (TFEU) Art. 310.

an appropriation relating to expenditure deemed unnecessary.[24] In recent decades, there have been numerous attempts from several directions, including from the European Parliament, to integrate these out-of-budget items into the budget. The Court of Justice of the European Communities had to take a position in the debate on the budgetary position of the European Development Fund.[25]

The *principle of the annual budget*. According to the principle of the annual budget, the community budget shall cover a single and complete financial year. In the EU, as in the system of Hungarian and many other European states, the budget year begins on January 1 and lasts until December 31. The appropriations in the budget, if the budget has been adopted, may be used with effect from January 1, as a rule, until the end of the financial year, that is, until December 31.[26] The appropriations approved for that financial year shall be used in the financial year for which the approval was granted in any event, but if they are not used, they shall be deleted. In some cases, *budget appropriations may be transferred* in the *following year*. Such exceptions:

- amounts relating to commitment appropriations, for which a significant part of the preparation of the undertaking procedure had been carried out by December 31. Commitments may be made for these amounts by March 31 of the following year.
- commitments the legal basis of which has already been adopted by the legislator in the last quarter of the financial year but which the Commission has not been able to provide an appropriation for this purpose for December 31.
- The payment appropriations necessary to cover existing commitments, where the appropriations included in the relevant budget of the following financial year do not cover the needs. The institution concerned may first use the appropriations for the financial year in question and shall not use the appropriations transferred until the former has been exhausted.
- Non-differentiated appropriations relating to commitments arising from the contract concluded at the end of the financial year automatically but only for the following financial year.[27]

[24] Halász, 2018, p. 44.
[25] Iván, 2006, p. 40.
[26] Halász, 2018, p. 44.
[27] Halász, 2018, p. 49.

Article 315 of the TFEU states that if the budget has not been adopted by the beginning of the financial year, monthly expenditure may be fixed for each chapter or other smaller entity under the Treaty up to one-twelfth of the assets provided for in the previous financial year, while the maximum number of appropriations shall not exceed those contained in the budgetary plan under preparation.

According to the *principle of balance*, expenditure in the Union budget is fully covered by revenues; that is, the budget should not contain either surpluses or deficits, and there is no possibility to cover budgetary expenditure by borrowing. Perhaps the most marked departure from national budgets is due to this rule. On the one hand, the principle of balance means that neither a budget surplus nor a deficit can be planned, and payments must be fully covered by revenues.[28]

This principle seems to be easy to adhere to, but it is clear with considerable care that there is no budget deficit or surplus, and that efforts should be made to ensure that revenues cover expenditure should also be sought in the implementation of the budget. Given that, according to the principle of balance, it is not possible to cover the unforeseen or planned budget deficit by borrowing, an amending budget should be drawn up in the event of a deficit (or surplus) being formed, which either transfers the appropriations or involves additional resources.[29]

According to the *principle of unit of account*, budget appropriations must be given not only in one lump sum but also broken down at different depths. The accounting unit of the budget is the euro. A significant number of Member States still use their national currencies today, so it is also necessary to regulate how and at what exchange rate the conversion between the euro and national currencies can occur. In principle, the implementing rules of the Financial Regulation shall consider the daily Euro exchange rate published in the Official Journal in this case. If the daily exchange rate is not published, the monthly settlement rate should be considered. While the use of the euro in budgetary matters may now seem trivial, it was important to define the unit of account at the principal level in the period before the introduction of the common currency.[30]

The *principle of universality*, states that all revenue and expenditure must be indicated in full without offsetting each other. Thus, it is identical to

[28] Miskolczi, 2018, p. 18.
[29] Iván, 2006, p. 704.
[30] Halász, 2018, p. 54.

the principle of gross accounting, which is named in the Hungarian Accounting Act. Revenue and costs (expenses) and receivables and liabilities shall not be recognized against each other, except in cases covered by this Act.[31]

If we were not based on the principle of gross accounting, but on the principle of net settlement, which would be achieved if revenues and expenditure could be accounted for against each other, the Council and Parliament would only be able to decide on the difference between revenue and expenditure, that is, the whole system would be fundamentally called into question.

The *principle of detail and uniqueness*, the principle of detail or specificity, also known as the principle of individuality, foresees those appropriations in the budget, particularly the appropriations on the expenditure side, are designed, presented, adopted, and reported on implementation in sufficient detail. Proper detail is the guarantee that only the expenditure intended by the institution(s) that adopted the budget will be realized.[32] The principle is enshrined in Article 316 TFEU. Appropriations shall be subheadings, including expenditures grouped according to their nature and purpose, and further detailed by the Regulation adopted under Article 322. Expenditure by the European Parliament, European Council, Commission, and Court of Justice of the European Union shall form separate parts of the budget without prejudice to the specific provisions relating to each common expenditure.[33]

Based on Articles 316 and 322 TFEU (formerly Articles 271 and 279 of the EC Treaty), the Financial Regulation provides for an appropriate breakdown of the budget. In the budget, we meet the following categories of division (moving from the largest to the smallest): – *book (volume) or section,* the Hungarian terminological equivalent of which may be the chapter–*a separate book/section in the budget are the institutions listed below; title,* the Hungarian terminological equivalent of which can be title – for example, the operating income, personal or material expenses of a given institution are displayed as titles; other categories within the titles *are subheadings (chapters), articles and articles.*[34]

[31] Act C of 2000 on accounting.
[32] Halász, 2018, p. 57.
[33] Treaty on the Functioning of the European Union (TFEU) Art. 316.
[34] Halász, 2018, p. 58.

According to the *principle of sound financial management and* the *principle of sound financial management*, budget money should be treated sparingly and an optimum between results and expenditure should be sought. The Court's audit covers this. However, the key to effective management lies not only in proper decision-making but also in effective internal control, to apply Article 31 of the Financial Regulation:

- efficiency, effectiveness, and economy of operations,
- reliability of the reports,
- protection of assets and information,
- the prevention, detection, correction, and monitoring of fraud and irregularities, and
- ensuring that the risks associated with the legality and regularity of the operations concerned are properly managed.[35]

Principle of transparency. The budget shall be established and implemented, and the submission of reports shall be carried out by the principle of transparency. The Financial Regulation also specifies that the budget and amendments to the budget will be published in their final form by the President of the European Parliament and that the consolidated annual accounts and reports on budgetary and financial management prepared by each institution shall also be published in the Official Journal of the European Union. [36] Audits conducted by the European Court of Auditors play a prominent role in budgetary control. Annual reports, statements of assurance, special reports, annual special reports, and opinions prepared by the Court of Auditors shall also be published in the Official Journal, but they can also be found on the Court's website.[37] It is important to mention that transparency is not the same as publicity. Publicity means that the report and the data are accessible to anyone and are freely transparent. Transparency is a much narrower concept, namely that the facts, data, or even information obtained make it possible to be known in its reality so that if the budget or part of it is examined or the management of a budgetary institution is analyzed, it turns out that this is done by the current legal

[35] Halász, 2018, p. 62.

[36] Council Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, 26.

[37] Commission Regulation (EU) No 1268/2012 on the rules for the application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on financial rules applicable to the general budget of the Union.

requirements. An important tool for this purpose is the application of the accounting principle of comparability. Accordingly, the Act about public finances Section 4 (4) provides that "*In the course of reporting, it is necessary to ensure that all revenue and expenditure are taken into account in full, in a comparable manner between the budgetary years"*.[38]

Based on *the principle of publicity*, the Union budget shall be published in the Official Journal of the Community within two months of its adoption.

Following the principles, the budget must also meet certain criteria considering which externality is reflected, which is the assumption that costs and benefits for some of the activities will also appear in the partner countries, which may require appropriate control and compensation. The next criterion is undividedness, based on which certain activities cannot be distributed among the Member States for economies of scale and functional reasons, and should therefore be implemented at the community level. The next is cohesion as a transfer of income, so it passes from richer to poorer and weaker economies. A minimum level of service should be provided to all citizens of the community. The last criterion is subsidiarity: functions must be delegated to the lowest level if there is no benefit from being exercised at a higher level.[39] These principles determine the structure and completeness of the budget.

5. Adoption of the annual budget of the European Union

The tasks and powers of the budget are shared between the three main institutions of the Union, the European Parliament, the Council, and the Commission.

The Commission was responsible for planning the budget and creating a preliminary budget plan. The specificity of the adoption of the budget is that since 1975, the powers of adoption have been shared between the two other institutions, the European Parliament and the Council. (Previously, the budget was adopted by the Council after consultation with the Parliament). Unlike national budgets, the UNION budget must be jointly adopted by the two institutions.[40]

[38] Act CXCV of 2011 on public finances.
[39] Szeverényi, 2012, p. 23.
[40] Halász, 2018, p. 139.

Considering the above, it can be said that it is a lengthy process. It will be adopted after months of sitting and making proposals with a pragmatic timetable, as follows. This is a long-lasting and unique task. By its specific nature, this means that neither the ordinary budgetary procedure nor the procedure for amending it can be combined with other procedures. Such a mixed legislative procedure is not possible in the European Union. Both the budget and the budget are amended, and the accounts are adopted under a special procedure that does not allow legislation to be adopted by another type of procedure or the budget to be included in the proposal to adopt the budget or the accounts.[41]

In February, the Council and the European Parliament adopted budgetary guidelines, and in March, the Council and the European Parliament met to set out their priorities and agree on the main dates.

The draft budget is drawn up by the Commission, usually by the end of May, which it submits to the Council and European Parliament. In July, the Council formulated its position. In September, the Council adopted its position and forwarded it to the European Parliament. Within 42 days, the European Parliament will either approve the council's position or adopt amendments.

In October, the Commission adopted an amendment to agriculture. If the European Parliament adopts amendments to the council's position, a conciliation committee shall be convened, which will have 21 days to adopt a common text. If the Conciliation Committee succeeds in agreeing on a common text, the Council and Parliament will have 14 days to approve. In this case, an annual budget was adopted.

If no agreement is reached between the Council and the European Parliament, the Commission will have to submit a new draft budget. If the annual budget cannot be adopted by the beginning of the following year, the so-called temporary twelfth system shall apply: 1/12 of the budget of the previous year may be used each month.[42]

The final adoption of the budget is also an essential step for the financial relations between the Communities and the Member States. The final adoption of the budget imposes an important obligation on the Member States, given that, if the President of the European Parliament has declared

[41] Halász, 2018, p. 150.

42 Az uniós költségvetés elfogadásának menete (pragmatikus menetrend), Available at: https://www.consilium.europa.eu/hu/infographics/eu-budget-timeline/ (Accessed: 5 June 2022).

the budget to be definitively adopted, each Member State shall, from January 1 of the following financial year, make available to the Communities the amounts referred to as their resources specified in the Decision on the System of The Communities' resources.[43]

6. Implementation of the annual budget of the European Union

By the EC Treaty and the provisions of the TFEU, it is for the Council and Parliament to adopt the general budget of the European Union, while it is for the Commission to implement it. However, it cannot be clearly stated that all implementing powers are exercised exclusively by the commission. Member States shall cooperate with the Commission to ensure that budget appropriations are used by the principles of sound financial management.

The Commission shall implement the budget in cooperation with the Member States and by the provisions of the Regulation adopted under Article 322, at its own risk and within the limits of appropriations, by the principles of sound financial management.[44]

There are four methods for implementing the previous budget. The first Financial Regulation was adopted on December 21, 1977. The last revised Financial Regulation was adopted in 2012 following the legislative procedure initiated by the Commission in 2010, preceded by public consultation in 2009. The regulation was amended in May 2014 and again in October 2015.[45]

- in a centralized manner, in which the Commission performs the implementing tasks directly or indirectly through its departments or indirectly, with the assistance of executive agencies, specialized bodies (e.g., European Investment Bank), national or international public sector bodies, or bodies performing public functions under private law;
- in a manner shared with Member States when the Commission delegates certain implementing tasks to Member States;
- in a decentralized manner, in which the implementation tasks are incumbent on third states, including those; furthermore;

[43] Halász, 2018, p. 208.
[44] Treaty on the Functioning of the European Union (TFEU) Art. 317.
[45] Implementation of the budget, Available at: https://www.europarl.europa.eu/factsheets/en/sheet/30/implementation-of-the-budget (10 June 2022).

- joint management with international organizations.[46]

Under the new Regulation, there are three modalities, such as *direct implementation*, in which the Commission performs tasks relating to the implementation of the budget by its departments or its executive agencies.

Direct implementation means that the Commission implements the budget completely independently, without the formal involvement of a Member State or Member State (or, more precisely, certain appropriations thereof). In doing so, the Commission itself (as an institution and not as a college of commissioners) acts or is carried out by implementing agencies, if the bodies entrusted with enforcement have transparent, non-discriminatory, and conflict-of-interest procurement and aid award procedures, an effective internal control system, a system of accounting enabling the correct use of resources, external control, and access to information are ensured. Public access and annual publication of the list of beneficiaries.[47]

The second modus operandi refers to *shared implementation* with Member States when the Commission retains its responsibilities but shares the tasks with Member States (typically in the case of the European Agricultural Guarantee Fund, which accounts for the largest share of the budget, and the European Structural and Investment Funds). Titles I and II of Part II of the Financial Regulation[48] lay down, on the one hand, the application to the EAGF, the EAFRD, the Structural Funds, the Cohesion Fund, and the EFF to the provisions on implementation, as set out in Part I of the Financial Regulation and discussed above, as regards centralized implementation, but at the same time, in addition to taking into account the implementation of those budgetary instruments, not only the provisions on budgetary management laid down in Part I of the Financial Regulation and discussed above, but at the same time, in addition, the implementation of those budgetary instruments should also take into account not only the

[46]Council Regulation (EC, EURATOM) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248, 16.9.2002, Art. 53

[47] Halász, 2018, p. 174.

[48] Council Regulation (EC, EURATOM) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248, 16.9.2002, Art. 168-180.

budgetary Regulation (and implementing regulation), but also the provisions of separate regulations on the Funds.[49]

The third method is *indirect enforcement*, where the Commission entrusts third parties or even individual entities to carry out the implementation tasks, be it third countries, international organizations, the European Investment Bank, or public legal entities. In practice, around 76% of the budget is spent under 'shared management,' with the allocation of funds and the management of expenditure carried out by the Member States, 22% carried out by the Commission or its executive agencies under 'direct management,' and the remaining 2% under 'indirect management.'[50]

Article 317 of the TFEU states that the Commission implements the budget in cooperation with Member States and adds that the provisions adopted under Article 322 of the TFEU lay down the control and accounting obligations and responsibilities of Member States in the implementation of the budget and the responsibilities associated with them.

7. Control of the annual budget of the European Union

In addition to national monitoring, EU-wide monitoring was also conducted. We distinguish internal controls at the EU level. The inspection shall be carried out in each institution by authorizing officers and accounting officers, and then by the internal auditor of each institution.[51]

The Court of Auditors is responsible for external audits.[52] External audits are carried out by the national audit offices and the European Court of Auditors. Each year, by Article 287 TFEU, the latter shall submit the following detailed reports to the budgetary authority:

- A statement of assurance (DAS) certifying the reliability of the accounts and the legality and regularity of the underlying transactions;
- annual accounts for the implementation of the general budget, including the budgets of all institutions and related bodies; and
- annual special reports on the agencies and bodies of the European Union;

[49] Halász, 2018, p. 179.
[50] Based on the statistical data of the Commission's Directorate-General for Budget.
[51] Budgetary control, Available at: https://www.europarl.europa.eu/factsheets/en/sheet/31/budgetary-control (10 June 2022.)
[52] See detailed: Erdős, 2005b.

- separate reports on specific issues (performance tests);
- inspection reports and opinions.
- Review of policies and governance topics, analysis of areas not yet audited, or establishing a factual basis for certain topics (until September 2019, the reviews included several subcategories: health checks, information documents, and quick case studies).[53]

In fact, by preparing comprehensive, extensive, and real audit reports and opinions on certain issues, the European Court of Auditors is also contributing to improving the economy and management of the European Union, thereby protecting the interests of EU citizens.

The Court of Auditors shall draw up an annual report on the budget each year after receiving accounts from the European Commission. It can examine the EU's assets, revenues, and obligations and has the power to monitor EU spending at the national level. Since 1993, the Court of Auditors has also had the power to issue a 'statement of assurance' certifying the reliability of the EU accounts.[54] Since 2003, this Declaration may be supplemented by specific evaluations covering all the main areas of community activity.[55] Since 1999, the Court of Auditors has been responsible not only for verifying the effectiveness of the accounts but also for reporting if it detects irregularities.[56] Since 1993, the Court of Auditors has been preparing specific reports on the quality of expenditure policies in addition to checking financial compliance.[57]

Politically sound control is the responsibility of the European Parliament. Within the European Parliament, it is for the *Committee on Budgetary Control* to prepare the Parliament's position, in particular:

- Control over the implementation of the budgets of the European Union and the European Development Fund;
- the closure and control of the accounts and balance sheets of the Union, its institutions, and all organizations financed by the Union;
- control of the financial activities of the European Investment Bank;
- monitoring the cost-effectiveness of the various forms of European funding in the implementation of Union policies;

[53] Ibid.
[54] Art. 45c TEU and Art. 188c TFEU.
[55] Art. 45c, 160c and 248 TEU.
[56] Art. 45c, 23 160c and 188c TFEU.
[57] Benedetto, 2019, p. 20.

- examining fraud and irregularities in the implementation of the Union budget, adopting measures to prevent and act against such cases, and protecting the Union's financial interests in general.[58]

The European Court of Auditors cannot carry out detailed audits in all areas each year, so it selects audit tasks to make the most efficient use of its resources. It considers several factors when selecting each task, such as performance risks, regularity of expenditure, the level of amounts spent since the last court audit, and the expected developments in the regulatory and operational framework and considering the political or public interest.[59]

8. Long-term budget for 2021-2027

The main question is what fundamentally affects the directions and limitations of possibilities for future change. The following is a look at possible modalities considering the feasibility of the Commission's package of proposals for the multiannual financial framework for 2021-2027, on the one hand, and the ideas outlined therein.

These multiyear plans include the main spending categories for the coming period and their ceilings. On the one hand, this determines the net financial positions of each Member State, since the annual budget of the union must be adapted to the figures of the financial framework. On the other hand, the framework entails the reform of the most important policies, highlighting areas that may be important for integration in the coming period so that more resources can be provided for them. Other policies may lose relevance if they are measured by the size of the resources provided and their changes. The budgetary decision determines only the room for maneuver; the actual implementation of each policy is regulated by separate regulations, so the financial decision will bring procedural changes.[60]

The guiding principles include subsidiarity, proportionality, conditionality, and solidarity as well as the legitimate need for EU policies to provide real added value. By the latter, it is understood that the common budgetary resources, up to the last euro cent, should be used as efficiently as possible. The quality of spending needs to be improved, which also requires a certain degree of flexibility and simplification on the part of public authorities and the concentration of resources in areas that contribute most

[58] Ibid.
[59] Giday, 2002, p. 506.
[60] Koponicsné, 2020. p. 369-379.

to increasing economic growth and employment and improving competitiveness.[61]

8.1. The Multiannual Financial Framework

Article 312 of the Treaty on the Functioning of the European Union provides a multiannual financial framework. The legislation does not provide for the actual length of the framework; it merely stipulates that it must be at least five years old. This has been the case in previous years; following the practice of previous periods (2000-2006, 2007-2013, 2014-2020) they worked with seven-year periods in the European Union. The current plans are also for 2021-2027. This *financial framework appears in the form of a regulation.* The multiannual financial framework shall be laid down in a regulation adopted by the Council under a special legislative procedure. The Council shall act unanimously after the agreement of the European Parliament adopted by a majority of its members.

The ceilings contained in the multiannual financial framework are not expenditure objectives; the EU's annual budget is usually lower than the upper spending limits set out in the Multiannual Financial Framework Regulation, with the only exception being the cohesion policy, for which the ceiling of the multiannual financial framework is an expenditure objective.[62]

The European Council may, by a decision adopted unanimously, authorize the Council to decide by a qualified majority vote on the adoption of the regulation referred to in the first subparagraph. The European Parliament, the Council, and the Commission shall, throughout the procedure for adopting the new financial framework, take all necessary measures to facilitate adoption.[63]

It follows from the lengthy negotiations that the multiannual financial framework finally adopted is not optimal; it can only become a good deal or compromise for all countries. Each Member State intends to make this decision on its national interests, where the share rate will be important in the future.

The budget structure focuses predominantly on redistributive policies, which are based in many respects on questionable considerations. The situation in the WORLD and the EU and its member states has changed significantly in recent decades. For example, global competitiveness and

[61] Somai, 2014, p. 2.
[62] Nyikos, 2017, p. 94.
[63] Treaty on the Functioning of the European Union (TFEU) Art. 312.

environmental issues have become more important today than just a few years ago. However, these changes are not fully or adequately reflected in the priority changes that have occurred thus far in the EU budget.[64]

The Commission points to the serious problems associated with the underfunding of the multiannual financial framework for the period 2014-2020, and it follows that, if possible, it is necessary to avoid a repeat of previous mistakes in some form, which can be remedied by setting a budget over the next seven years from which all can be met, stable, and credible. The multiannual financial framework for 2021-2027 should fundamentally ensure that the UNION stimulates sustainable economic growth, research, and innovation; promotes the empowerment of young people; effectively tackles migration challenges; combats unemployment, long-term poverty, and social exclusion; further strengthens economic, social, and territorial cohesion, sustainability, biodiversity loss, and the resources needed to tackle climate change; strengthens EU security and defense; protects its external borders; and supports neighboring countries.[65]

The financial framework must eliminate the problems of previous years; there is a framework from which cooperation is established in areas such as crisis management and health; that the single market is strengthened; that the EU has access to a long-term budget for green and digital transitions; and that a fairer and more resilient economy is created. This financial framework is EUR 1,824.3 billion, of which the European Union's 7-year budget, that is, the multiannual financial framework, is EUR 1,074.3 billion. It is also important to mention that the MFF is unsuitable for responding to crises, new international commitments, and new political challenges that were not taken into account at the time of its adoption and/or which were not foreseeable; however, given the effort to provide the necessary funding, the multiannual financial framework has already reached its limits, resulting in the use of flexibility provisions and special instruments to an unprecedented extent following the depletion of the available reserves, whereas the budget for high-priority EU programs for

[64] Dezséri, 2008, p. 40.

[65] Interim report on the Multiannual Financial Framework 2021-2027 – Parliament's position with a view to an agreement, Available at: https://www.europarl.europa.eu/doceo/document/A-8-2018-0358_EN.html (Accessed: 11 June 2022).

research and infrastructure has already been reduced after only two years of their adoption.[66]

The long-term budget has been present in the life of the European Union since 1988 and has always covered periods of 5-7 years. The first long-term budget, the so-called first Delors. The package covered the period 1988-1992 and focused on the creation of a single market and the consolidation of the Multiannual Framework Program for R&D.

The second long-term budget, the second Delors Package (1993-1999), highlighted the social cohesion policy and the introduction of the euro as priority areas.

The long-term budget, known as the 'Agenda,' covered the period 2000-2006 and focused on the enlargement of the Union. The long-term budget for 2007-2013 focused on sustainable growth and competitiveness to create jobs.

The change in the weight of the new structure and the expenditure items in the 2007-2013 financial perspective reflected this intention – the proportion of amounts directly aimed at improving competitiveness increased significantly – but the effects were relatively limited due to the still limited size of the EU budget. The effects are also difficult to assess, as the 2008 global financial and economic crisis overridden virtually all previous scenarios. On the positive side, however, it was to be appreciated that the enlarged EU's common budget remained operational, even if it was "richer" with several 'special treatments'.[67]

The long-term budget for the period 2014-2020 focused on people's access to work and economic growth, in line with "Europe," a strategy for smart, sustainable, and inclusive growth.

The structure of the multiannual financial framework for the period 2014-2020 is as follows:

- Chapter 1: Intelligent and Inclusive Growth:

Subsection 1a: Competitiveness for growth and employment, including the European Network Financing Facility;

Subsection 1b: Economic, social, and territorial cohesion;

- Chapter 2: Sustainable growth: natural resources, subject to a ceiling on market-related agricultural expenditure and direct payments;
- Chapter 3: Security and Citizenship;

[66] Ibid.
[67] Szemlér, 2019, p. 12.

- Chapter 4: The EU as a global player;
- Chapter 5: Administration, subject to a ceiling on administrative expenditure;
- Chapter 6: Compensation. For the first time in the history of the EU, a smaller envelope was set for the next seven-year period than for the previous cycle. Under the agreement, the total amount of the multiannual framework is EUR 960 billion at the level of commitments (funds to be committed) and EUR 996.8 billion (at 2011 prices), including items outside the multiannual framework.[68]

The long-term framework for the period 2021-2027 gives the EU-27 a new, modern, pragmatic budget. When drawn up, the guiding principle was to create a clear, simple, and flexible budget that focused on the most important priorities and policies with the highest possible European added value. In other words, the new budget invests in building a Europe that provides protection, security, and opportunities to its citizens, as President Jean-Claude Juncker urged in his 2016 State of the Union address. The proposal also takes into account the withdrawal of the United Kingdom, an important contributor to the EU budget, in a fair and balanced way by moderately reducing funding for the common agricultural policy and cohesion policy programs.[69]

On the one hand, the common budget should act as a catalyst for growth and job creation, including by exploiting economies of scale and cross-border and spillover effects; on the other hand, it should reflect the consolidation efforts of Member States to reduce the general government deficit and put public debt on a sustainable path.[70]

8.2. Direction of change proposed in the 2021-2027 Multiannual Financial Framework

As a result of studying the financial framework, it can be said that in the period 2021-2027, the EU will spend even more on certain areas where Member States cannot or do not manage at all on their own, or where joint action is more effective, be it in the areas of research, migration, border

[68] Halmai, 2020, p. 108.
[69] A modern budget for a Union that protects, empowers and defends: Questions and Answers, Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_3621 (Accessed: 11 June 2022).
[70] Somai, 2014, p. 2.

control, or defense. In addition, the EU will continue to finance traditional but modernized policies, such as the common agricultural policy and cohesion policy.[71] On May 2, 2018, the Commission published its package of proposals for the period 2021-2027 with a just transition support mechanism. The European Commission has presented a new draft framework that could be a precondition for the long-planned reform of major policies. In addition, it contained several novelties such as the imposition of the rule of law.[72]

The adoption of a multiannual financial framework always requires lengthy preparation and is preceded by more consultations and negotiations. This is because Member States need to make a unanimous decision on which objectives are of paramount importance over the next seven years and what they should devote the most resources to, which area they need to treat outstandingly.

Based on the Commission's proposal, the aim is to create a modern, simple, and flexible budget. It provides a relatively high degree of flexibility between and within programs, strengthens crisis management instruments in their current state of play, and creates a so-called new EU reserve for the management of unforeseen events and emergencies. The Commission is also calling for the introduction of a new European investment stabilization function and a new reform support program, which will provide support to all Member States with a total budget of €25 billion to implement priority reforms, especially in the context of the European Semester. A new convergence support instrument will also provide targeted support to Member States outside the euro area that are about to join the single currency (€2.16 billion).[73]

Another innovation of the financial perspective is that the link between EU funding and the rule of law is strengthened in the proposed budget. According to the press release, respect for the rule of law is essential to spend European taxpayers' money responsibly. The Commission is therefore proposing a new mechanism to protect the EU budget from financial risks linked to shortcomings in the rule of law in Member States.

[71] Multiannual EU budget for 2021-2027: Commission proposes modern budget for Union providing protection, security and opportunities, Available at: https://ec.europa.eu/hungary/news/20180502_multiannual_financial_framework_hu (Accessed: 11 June 2022).
[72] Koponicsné, 2020, p. 1-2.
[73] Ibid.

The newly proposed instruments for all Member States will allow the UNION to suspend, reduce, or restrict access to EU funding in a manner commensurate with the nature, severity, and scope of the shortcomings affecting the rule of law. The Commission will propose this decision, and its adoption will be decided by the Council by a reverse qualified majority vote.

In this light, compared to previous years, there has been no significant change in the size of the budget or the structure of the budget since each Member State has the right to veto the vote on the financial framework. However, as in previous practice, the Commission changed the structure of the budget for 2021-2027, thus dismantling chapters and reallocating programs between the different chapters.

A clear roadmap for new resources has been put in place: a mechanism to counteract the carbon intensity of imported goods, own resources based on the ETS, and a digital levy should be proposed by June 2021, as well as additional new own resources by June 2024. A separate mechanism was also agreed upon to protect the EU budget from violations of the rule of law.[74]

However, the proposed multiannual financial framework for 2021-2027 can be said to highlight several key areas that are truly of strategic importance for the whole integration process. In the economic field, the main task of the European Union is to strengthen competitiveness and convergence. In addition to the proper functioning of the internal market, cohesion policy support is the engine. This is taken into account in the expenditure items of the proposed budget: the budget can contribute to creating a more integrated and competitive Europe by increasing expenditure in the areas of research and development, innovation, the digital economy, education, and infrastructure.[75]

9. Closing thoughts

In my study, I analyzed in detail the process and changes in the budget of the European Union, as those interested in the subject must get a comprehensive picture to get to know the EU budget in sufficient detail.

[74] Ibid.
[75] Kengyel, 2019, p. 546.

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Prison overcrowding in Poland and Hungary

ABSTRACT: The aim of the article is to describe and discuss current problem in prisons' system - overcrowding in prisons in Hungary and Poland. It is an essential problem which deserves an attention, prisons' overcrowding has been especially visible in these two countries, so it is eminently important to rise this problem in the dispute of doctrine and to try to solve it. This study contains both previous and present information, statistics, and position of international bodies on currently overcrowding of prison facilities. The legal regulations of these two countries are pretty similar, but there are still far away from perfection, that is why this article shows their advantages and drawbacks. The authors try to emphasize that overcrowding is a significant problem, they also offer some *de lege ferenda* ideas to resolve this alarming situation.

KEYWORDS: imprisonment, prison overcrowding, prison facilities.

1. Introduction

Polish and Hungarian prisons comprise 194 and 180 individuals of every 100,000 people, respectively. At first glance, the numbers might not seem significant; however, compared to other European countries, these rates are among the highest.

Imprisonment is the most severe punishment currently. However, as seen in both countries, it is often imposed on perpetrators. If a state imposes this penalty upon an individual, it must satisfy some basic conditions. However, this is not always ideal. Imprisonment must always comply with the requirements of respect for human dignity and treating a sentence as a human. Therefore, an inmate's legal status must always be regulated to

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show basic human respect. [1] This status consists of two basic elements: the status at a prison and as a party in enforcement proceedings. Each of them is characterized by certain rights and obligations. Among these is the right to a living space.[2] Noteworthily, prison overcrowding is related to security problems, violence, and pathologizing of the goals of imprisonment.[3] It is one of the obstacles to progressive development because it makes adequate cultural or educational activities for prisoners harder to organize.[4]

2. Expectations versus reality of the prisons' situation in Poland

According to the European Committee for the Prevention of Torture (CPT), the minimum standard for one person in prison is 6 m^2 for a single room and 4 m^2 per person in multi-occupancy cells.[5] Moreover, there should be a sanitary annex (excluded from the minimum space required for each prisoner)[6]. The CPT noted this problem more than once in government reports, which indicated that despite its repeated previous recommendations, the official minimum standard of living space per prisoner remains unchanged[7].

In Poland, regulations on living spaces in prisons have changed several times. First, cubature standards were enforced until 1998; living quarters were provided, the size of which varies between 6 m^3 and 13 m^3 for multi-person cells, depending on the period of the validity of the regulations. However, this regulation was criticized because it was not precise, and it often led to poor conditions when the rooms in which the convicts were detained were very high. [8] In addition, between 1989 and

[1] Hołda, 1988, p. 110–112; Nawój-Śleszyński, 2013, p. 46. The same statements can be found in the judicature. Check f.e.: Judgement of the Supreme Court (17 March 2010, II CSK 486/09; of 28 February 2007, V CSK 431/06).
[2] Nawój-Śleszyński, 2013, p. 47.
[3] Nawój-Śleszyński, 2019, p. 140.
[4] Zybert, 2011, p. 424.
[5] Raffaelli, 2017, p. 3.
[6] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Living space per prisoner in prison establishments: CPT standards, 2015, p. 3–4. Available at: https://rm.coe.int/16806cc449 (Accessed: 8 August 2022).
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[8] Szymanowski, 2007, p. 284–285.

1998, the conditions were distinguished depending on gender; the minimum standard size was 3 m^2 for men and 4 m^2 for women.[9]
According to Art. 102.1 of the Executive Criminal Code, a convicted person has the right to adequate food, clothing, living conditions, accommodation, health services, and hygiene conditions. Moreover, in Art. 110 of the ECC, a multi- or single-person cell should have at least 3 m^2 per person; inmates should have separate sleeping places, appropriate hygiene conditions, sufficient air supply, temperature, and lighting for reading and work.

Notably, in exceptional cases, such as in the event of a war, epidemic, or threat to the safety of prisoners or prisons, the director may place inmates in a cell with an area of at least 2 m^2 per person; the period of staying in such small cells may not exceed 90 days. Prison overcrowding is also allowed when there are no vacancies, especially since it is necessary to immediately detain the most dangerous prisoners (e.g., those sentenced to imprisonment for more than two years, recidivists, members of an organized crime group, convicted of crimes against sexual freedom, and convicts who have escaped prison). However, in these cases, the period of stay in such small cells may not exceed 14 days (28 days if a penitentiary judge agrees). The inmate may dispute each decision in a penitentiary court, which examines such dispute within seven days. However, it is questionable whether penitentiary courts have a real influence on the director's decision. It is uncertain whether they have the means to challenge such a restriction. Moreover, it is unclear if the director makes this decision only exceptionally. Placing an inmate in a cell of less than 3 m^2 is possible 180 days after the end of the previous limitation on his or her right to a decent surface.

The problem of prison overcrowding was not significant a few years ago. According to Polish prison officers' data, the population of prisons comprise 87.46% of all places for them[10]. This number was consistent in the last five years, with a slight decrease[11]. However, there persists a problem

[9] Nawój –Śleszyński, 2013, p. 53–55.
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[11] Data from Eurostat. Available at:

with a significant number of people in prisons. Moreover, cells smaller than 3 m^2 are associated with unfavourable living conditions; the standard of 3 m^2 per person is already one of the lowest in European countries. For example, the standard in France is is 4.7 m^2 to 9 m^2 per prisoner[12], 9 m^2 to 10 m^2 in Spain [13]; and 7 m^2 to 9 m^2 in Italy.[14]

The problem of prison overcrowding in Poland has repeatedly been the subject of research by the European Court of Human Rights (ECHR). It was found that the conditions did not meet the minimum standards, indicating a violation of Art. 3 of the European Convention on Human Rights. According to the ECHR, some inmates stayed in cells between 2 and 2.4 m^2 for several years[15]. This is not ideal because the ECHR indicates that basic objective conditions of humane treatment must be satisfied and severe levels of ill-treatment must be strictly avoided. The basic conditions pertain to the size of the living space; the duration of degrading conditions; the psycho-physical effects; the inmates' characteristics (e.g., gender and health) and their access to the toilet with privacy, air supply, natural light, heating, and proper hygiene; and the authorities' attitude and steps taken to improve such conditions[16].

3. Solutions

The solution to prison overcrowding involves a variety of strategies. First, new prisons must be made, or existing ones must be expanded; however, this is very difficult and expensive[17]. Second, society must take preventive action through supervision and control, activity, and cooperation with law enforcement agencies. Third, non-custodial penalties, such as fines or restrictions on liberty, may be imposed as a criminal policy of the state and

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https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Prison_statistics#Overcrowding_and_empty_cells (Accessed: 25 June 2022).

[12] Cretenot and Liaras, 2013, p. 10.

[13] Aranda Ocaña, 2013, p. 10.

[14] Marietti, 2013, p. 10.

[15] Wenerski v. Poland, No. 44369/02, 20 January 2009; Musiałek and Baczyński v. Poland, No. 32798/02, 26 July 2011.

[16] Sikorski v. Poland, No. 17599/05, 22 October 2009; Orchowski v. Poland, No. 17885/04, 22 October 2009.

[17] Moreover, although building new prisons is the way to limit the overcrowding, it does not limit the criminality – Check: Hough, Allen and Solomon, 2008, p. 25 and following.

judicial authorities. Moreover, it is possible to suspend the execution of imprisonment[18] or release a sentence after serving at least half of the sentence[19] or under certain conditions, which may allow the convict to serve a sentence of imprisonment in the electronic supervision system.

An ordinance on the procedure to be followed by authorities if the number of inmates in prisons or pre-trial detention centers exceeds the total capacity on a national scale was passed on November 25 2009. However, this ordinance does not solve the problem of prison overcrowding. It is laconic, and it contains only one order: after receiving information about prison overcrowding, authorities should organize additional cells while courts shouldverify whether it is possible to postpone some convicts' sentence execution.

In our opinion, non-custodial penalties and an electronic supervision system (ESS) may be the most effective solution for prison overcrowding. Last year's data show that until 2015, courts' sentences mostly involved imprisonment; however, these sentences decreased yearly. For example, while there was more than 64% imprisonment between 2011 and 2015, this kind of punishment accounted for only 37%. A significant change has been observed since 2016; there are more non-custodial sentences and this number keeps increasing. However, this phenomenon requires further approval.

[18] According to Art. 69 § 1 Criminal Code, suspension of the execution of imprisonment is possible when (1) the punishment is under 1 year, (2) the perpetrator has not been sentenced before to the imprisonment, and (3) this kind of punishment is sufficient to achieve the goals of punishment, especially a return to crime.

[19] According to Art. 77, § 1 CC early release is possible when attitude and personal conditions of sentenced, their behavior after crime and in prison and all other circumstances indicate that they will obey the legal order and not commit the crime once again. If the person has previously served a sentence of imprisonment, it is possible after they served at least 2/3 years; after 15 years if the sentence was 25 years; and after 25 years if the sentence was life imprisonment.

Table 1: The number of penalties[20]

Year	Percentage of imprisonment sentences	Numbe of imprison ment sentences	Non-custodial		
			Total	Restriction of liberty	Fines
2011	66%	280,023	143,182	49,611	93,571
2012	65%	265,876	142,026	50,730	91,296
2013	67%	235,032	118,046	41,287	76,759
2014	67%	199,167	96,087	33,009	63,078
2015	64%	167,028	92,557	31,096	61,461
2016	43%	125,368	160,496	61,720	98,776
2017	41%	99,346	138,575	53,854	84,721
2018	37%	103,814	168,663	78,172	90,491
2019	37%	105,841	178,835	84,992	93,843

The number of applications from convicts for a non-custodial sentence under the ESS in Poland has been slowly increasing.[21] However, such requests are automatically approved by the penitentiary court. The table below shows that only 1/3 of proposals were accepted each year.

[20] Source: Statistics from the judicial system. Available at: https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/ (Accessed: 1 July 2022).
[21] Przesławski and Stachowska, 2021, p. 49–50.

Table 2: Number of accepted applications for a non-custodial sentence under the Electronic Supervision System[22]

Year	Number of accepted applications	Number of submitted and examined applications	Percentage of accepted applications
2011	3,577	11,979	30%
2012	10,438	29,262	36%
2013	13,289	34,827	38%
2014	11,820	30,980	38%
2015	10,065	29,723	34%
2016	8,252	25,832	32%
2017	12,072	34,651	35%
2018	12,559	36,919	34%
2019	12,427	38,673	32%

Despite being desirable among those sentenced to imprisonment, the ESS is not as commonly used as it could be. The percentage of accepted applications oscillates between 30% and 38%, showing that approximately one out of three sentences sentenced to imprisonment is under the ESS. Notably, according to Art. 43la § 1 ECC, the ESS is only possible under these specific circumstances: 1) the punishment is not stricter than a one-and-a-half-year imprisonment, and the sentenced is not recidivist; 2) this punishment is enough for a perpetrator to resocialize; 3) the sentenced has a permanent residence; 4) flatmates have agreed for serving a sentence in the ESS in a particular place; and 5) other technical conditions.

To conclude, it is also worth emphasizing that according to the Follow-up covid-19 related statement by the Council for Penological Cooperation Working Group, most countries coped well with the coronavirus pandemic[23]. In some early release schemes, postponing the execution of prison sentences or replacing them with community sanctions or measures were implemented to stop the spread of the virus. Evidently,

[22] Source: Information collected from Przesławski and Stachowska, 2021.

[23] Follow-up Covid-19-related statement by the Council for Penological Co-operation Working Group, 2020. Available at: https://rm.coe.int/pc-cp-2020-10-e-rev-follow-up-to-pc-cp-wg-statement-covid-19/16809ff484 (Accessed: 17 July 2022).

this solution is possible in a short time; therefore, in the case of prison overcrowding in the future, we might have the best-known measures.

4. Hungarian legal regulation

Hungary's national legislation declares that the dignity of people is respected in prison facilities. Therefore, cruel, inhumane, or degrading treatments or punishments may not be used. This is the general treatment clause.

With regard to prison overcrowding, the ECHR first addressed the decision of Varga et al. on 10 March 2015[24], establishing that Hungarian prisons' conditions violated Art. 3 of the European Convention on Human Rights, the prohibition of torture. ECHR's decision was leveraged to examine the conditions of Hungarian prisons according to a pilot procedure, suggesting that this is not an isolated case, but a systemic problem.

The main problem is inadequate access to air space and hygiene in prisons. The Council of Europe and the Committee for the Prevention of Torture and Inhuman Treatment (CPT), based on its position and judgment per room for maneuver in many cases, did not even reach 1 nm^2. Inadequate hygienic conditions meant inadequate separation of the living space and toilet, lack of sufficient washrooms, and actual obstruction of the open-air law for a certain period. The Constitutional Court examined freedom and the 6/1996 IM Decree on the rules for the execution of pre-trial detention (VII. 12. of the IM).

In the meantime, the legislator should repeal the abovementioned 6/1996 IM Decree effective from 1 January 2015, and replace it with Decree 16/2014 (XII. 19). The IM decree came into force. However, impugned provisions with the same content are included in Section 121 of the IM Decree. According to this, the number of people that can be accommodated in a cell or living quarters should be determined such that each convict has as much as 6 m^3 of air space, with 3 m^2 for male convicts and 3.5 m^2 for women.

For the often-treated problem of current prisons, it is possible to name the current capacity of Hungarian prisons associated with their gradual overcrowding. A slight decrease in the total number of inmates in recent years is observed; however, the exact decrease is unclear. The prison

[24] Varga and Others v. Hungary, Nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 June 2015.

population was 17,944 in 2017; 17,251 in 2018; and 16,664 in 2019. Thus, a slight decrease was expected in 2020.

5. Compensation procedure

The ECHR ruled on March 10 2015 that prison overcrowding is a mass structural problem in the Hungarian penitentiary system. Therefore, Hungary was obliged to produce a plan within six months (on or before December 10 2015) to reduce it significantly and permanently. Notably, building new prisons is not the solution because it is expensive, and international data show that increasing the system's capacity is accompanied by a growth in the number of detainees. On its last visit, the CPT confirmed that the facilities complied with the minimum standard of 4 m^2 per prisoner in multi-seat cells (excluding toilets and other sanitary areas). Thus, the official prison capacities were recalculated accordingly. Therefore, a compensation procedure was introduced to breach CPT's principles.

6. Conclusions

There are several ways to effectively reduce the prison population, such as effective and efficient systems for alternative sentences, electronic monitoring, and conditional releases. Reintegration surveillance is regulated by Art. 61/A of the abovementioned code. According to this, the correctional institution proposes to command reintegration surveillance to the court. Thus, reintegration surveillance is not implemented by the correctional institution, but the judge of the second-instance criminal court. In such cases, the court decides through the submitted documents; however, it may also hold a hearing based on the request submitted by the sentenced person or their defender.

Reintegration surveillance[25] may be initiated once during the punishment's completion term by a sentenced person or defender. The correctional institute brings the request to the criminal court within 15 days. The emphasis on 'once' is important because the sentenced receives a significant change in their lifestyle conditions. Therefore, it is only accessible to those sentenced who are judged as less dangerous to society, and who can be reasonably expected to successfully reintegrate into civil society. Although those who are sentenced under the reintegration

[25] Nagy and Menyhért, 2018, pp. 227-239.

surveillance may leave prison before the punishment is actually completed, they can only stay at their house or apartment designated by the law enforcement judge, and leave the designated property for strictly defined reasons (e.g., for daily needs, work, education, and medical treatment).

Art. 187/A (1) of the above-mentioned code regulates the conditions under which reintegration surveillance can be ordered. If the purpose of liberty deprivation can be achieved in this manner, the sentence may be placed under reintegration surveillance before the estimated date of release from punishment. The agreement of sentenced is needed and the following conditions need to be met:

- Sentenced to imprisonment for the crime committed with negligence.
- Sentenced to imprisonment for an intentional crime.
- Not convicted of an offense concerning violence against a person (as defined in Art. 459 (1) 26 of the Criminal Code).
- Convicted for the first time for a non-custodial sentence or as a non-recidivous criminal
- Maximum term of detention of five years.

Moreover, the durations of reintegration surveillance is:

- Up to one year if the person is sentenced to imprisonment for a negligent crime
- Up to ten months otherwise.

Juvenile reintegration surveillance is also available to minors according to the code with additional specifications:

- Family therapy or counseling at least once during the deprivation of liberty
- Consent of the legal representative for the installation of electronic monitoring equipment and a declaration of accommodation with a statement to escort the detainee.

The code also implements a multidirectional extension of the reintegration surveillance to reduce the saturation of institutions. On the one hand, it allows a wider range of offenders to benefit from this, as the amendment would extend to those who are sentenced for the first time and are convicted of negligent offenses. On the other hand, it determines the length of time spent in reintegration surveillance depending on the degree of guilt over a longer period (ten months for intentionality and one year for negligence).

Another way to combat prison overcrowding is through the effective legal regulation of conditional release from imprisonment and the ‘back-

end' home prison penalty. In Hungary, this means that after serving 2/3 of the imprisonment time, a prisoner can be released according to the general rule of the Criminal Code of Hungary.

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