

## TWENTEETH INTERNATIONAL CONGRESS OF PENAL LAW (Rome, 13-16 November 2019)

### Section III: Prevention, investigation and sanctioning of economic crime by alternate enforcement regimes

#### *Preamble*

The participants of the Preparatory Conference for Section III of the XXth AIDP International Congress of Penal Law 'Criminal Justice and Corporate Business' held in Freiburg (Germany), 18–20 June 2018 and of the meeting in Freiburg on 4 November 2019.

Noting that

- in the global risk society, economic crimes are not only causing new risks but are also becoming more complex and transnational
- this makes economic crimes more difficult to prevent, to investigate, and to prosecute using the traditional criminal justice system

Considering that

- at the same time, additional legal regimes for the prevention, investigation, and sanctioning of economic crimes are emerging and fusing with criminal law under a new framework or a new 'architecture' into a comprehensive 'security law' with an increased potential
- these legal regimes simultaneously create serious risks for fundamental safeguards, including not only international human rights (enshrined especially in the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights) but also constitutional guarantees and other legal safeguards developed in traditional criminal law and in public law

Concluding that

- the potential of these alternative enforcement mechanisms and the accompanying emerging new architecture of criminal policy should be assessed and harnessed for the purpose of improving the prevention, investigation, and sanctioning of economic crime
- at the same time, however, the necessary legal safeguards for these systems must be identified and developed so that the new legal architecture of security is accompanied and balanced by an adequate framework or architecture of legal safeguards especially in the realm of non-criminal law based enforcement mechanisms

Taking into account the results of

- the AIDP XVth International Congress of Penal Law (Rio de Janeiro, 1994) on 'Reform Movements in Criminal Protection and the Protection of Human Rights',
- the XVIth International Congress of Penal Law (Budapest, 1999) on 'The Criminal Justice System Facing Challenges of Organized Crime', and
- the XVIIIth International Congress of Penal Law (Istanbul 2009) on 'Special Procedural Measures and Respect of Human Rights'

*adopt the following Resolutions, which are directed especially to legal science (infra I) and to legal science and legal policy makers (infra II):*

#### *I. Scrutinizing the New Legal Architecture of Security*

1. For dealing with the actual problems of controlling economic crime, legal science and law makers must understand the *general fundamental changes of criminal policy* in the modern risk society: on the objective level, threats of complex crime are rising. On the subjective level, these risks are increasing the general population's fear of crime. This development has led in many areas to a *paradigm shift* in criminal policy from *ius puniendi* to *ius praeveniendi*: in many areas today, criminal policy is no longer dominated by the traditional retrospective question of punishment but rather by notions of danger and risk prevention.

2. Legal policy should take into account that this paradigm shift in the control of complex crime is generally happening not only within but also outside core criminal law: *within criminal law*, many states are intensifying the criminalization of preparatory acts and thereby creating preventive criminal law. *Outside criminal law*, many areas

see an increasing use of alternative preventive legal regimes for the control of complex crime, such as administrative law, police law, intelligence law, or even the laws of war. As a consequence, criminal law is becoming part of an overarching framework, which is described as a 'new architecture of preventive security law'. While this new combination of criminal law and alternative enforcement mechanisms can be quite effective at preventing crimes, many of these new legal regimes outside the realm of traditional core criminal law lack the safeguards that have been developed in substantive and especially procedural criminal law since the Enlightenment.

3. In the field of *economic crime (including economic crime committed by organized crime)*, the potential and the risks of this new development of alternative and preventive legal regimes have become visible and must be analyzed by legal science, especially in the following main areas: preventive administrative measures, punitive administrative sanctions, extended criminal confiscation and non conviction based (so called 'civil') confiscation, preventive 'targeted' sanctions, preventive anti-money laundering systems, as well as private compliance regimes including internal investigations of private companies.

4. Criminal law science should no longer ignore or summarily reject the development of such new legal regimes: first, these new systems offer promising new opportunities for crime control, which should be scrutinized. Second, criminal law science cannot turn a blind eye when the tasks of criminal law are being fulfilled in important areas by other legal regimes in which the key guarantees of criminal law may be circumvented under the guise of various 'non-criminal' labels. Thus, the emerging *legal architecture of security* must be complemented from the beginning by the development of a corresponding *new architecture of legal safeguards*.

## *II. Developing an Overarching Architecture of Legal Safeguards*

### *A. Defining the Methodological Approach*

1. The necessary legal safeguards for the new architecture of criminal and alternative enforcement mechanisms can be developed either by transferring safeguards of criminal law to other legal regimes (in an identical or modified way) or by independently constructing safeguards on the basis of human rights law, constitutional law, and basic principles of law.

2. The most well-known approach for the extension of criminal law guarantees is based on the three so-called Engel criteria of the ECtHR for determining whether there is a 'criminal charge'. Within the resulting broad sphere of criminal law, the ECtHR differentiates a core area of criminal law (in which the safeguards of criminal law are fully applicable) and a second subcategory with other types of criminal law (in which these safeguards are not applied with their full stringency). By using this principally broad conception of 'criminal law', the ECtHR's jurisprudence prevents the guarantees of criminal law from being circumvented simply by labeling sanctions differently.

3. The Engel criteria are, however, inherently vague. In addition, they do not set standards for the development of guarantees for non-criminal law sanctions. It is also an unnecessary detour and methodologically questionable to base the applicability of rule-of-law guarantees on the interpretation of the term 'criminal sanction' instead of determining their applicability directly based on the rationale underlying the specific criminal law guarantees.

4. It is therefore necessary to develop an additional and new approach that first identifies the rationale behind the specific legal safeguard in question and then examines whether this rationale also applies with regard to the implementation of this safeguard in the respective (non-criminal) regime. In this approach, fundamental rights and the principle of proportionality - which apply generally and are not limited to criminal law - carry much greater weight. According to the principle of proportionality, which is widely recognized as a general principle of law, any interference with fundamental rights by state authority must pursue a legitimate aim, must be suitable and necessary for achieving this aim, and must be adequate in the sense that the (intended and unintended) detriments of the measure must not outweigh its benefits. The principle of proportionality constitutes the bedrock of ensuring respect for fundamental rights when assessing the lawfulness of enforcement measures (and thus it goes well beyond the criminal law principle according to which the severity of a penalty must fit the crime).

### *B. Preventive Administrative Measures*

1. Regulatory authorities must, before turning to punitive sanctions, apply, specify, and often also set the applicable standards of business conduct. They also enforce this form of law by means of supervisory measures. The prevention of risks and future danger is a key element of these tasks. Such measures are generally not punitive but preventive in nature.

2. The guarantees of criminal law generally do not apply to these preventive activities. The measures are, however, subject to the rules of administrative law and they must comply with fundamental rights. A key element in applying these fundamental rights is the principle of proportionality described above. When applied in the field of risk prevention, this principle does not match the severity of a sanction to the gravity of a past wrongdoing but instead ties the intrusiveness of preventive measures to the degree of danger posed.

3. In light of the requirement of a parliamentary (i.e. statutory) basis for encroachments upon fundamental rights, the use of serious preventive measures requires that the legislator clearly describe pertinent situations of risk and the respective permissible measures; this principle of legal certainty is a functional, albeit less strict, equivalent to the criminal law principle '*nullum crimen sine lege certa*'. Other elements of the criminal law principle of legality also do not apply to preventive administrative measures, such as the prohibition of retroactive criminal law, which, for preventive administrative measures, is replaced by a requirement of foreseeability in order to provide for the necessary flexibility of risk prevention measures. The legislator should define and codify this together with other applicable legal safeguards in administrative law.

4. These non-punitive regulatory actions should, in principle, precede administrative and criminal sanctions and strictly comply with the principle of proportionality. The greater the risk, the more intrusive preventive measures can be justified. However, when choosing between preventive and punitive options policymakers should keep in mind that the uncertainty of the underlying prognosis and the reduced legal certainty can make preventive measures more intrusive than punitive administrative sanctions.

### C. Punitive Administrative Sanctions

1. Punitive administrative sanction law is generally characterized by the strong role of administrative authorities in the investigation and adjudication of wrongs, by its renunciation of custodial sanctions, and by its weaker procedural safeguards. The goals and the fields of application of punitive administrative sanctions are twofold: (a) to alleviate the criminal justice system from the burden of less serious -and especially mass- wrongdoings, and b) to facilitate the enforcement of complex economic matters by assigning investigation and sanctioning to specialized administrative institutions. In general, these administrative sanctions are considered to be retrospective and punitive.

2. Punitive administrative sanctions often do not comply with the -criminal law- requirement that punishment may only be imposed by an *independent and impartial tribunal*. The application of punitive administrative sanctions should, however, meet the following requirements:

a) Minor administrative offences may -as is done in practice- be prosecuted and punished primarily by administrative authorities, provided that the defendant is guaranteed the right to a judicial review by an independent and impartial tribunal which has the power to fully review the administration's decision concerning both questions of law and questions of fact.

b) With regard to severe administrative sanctions (such as in antitrust law, financial market law, or banking law), however, these requirements for minor (especially mass) offences are insufficient. In such cases, the right to an impartial 'tribunal' should already be afforded within the first-instance system of regulatory authorities: the respective administration should separate the investigating and prosecuting branch from the deciding body. The members of the adjudicating body should be afforded quasi-judicial independence. The defendant in these first-instance proceedings must have adequate rights to participation as well as the right to appeal to a court.

3. For reasons of clarity and legal certainty, adequate substantive and procedural safeguards should be regulated by the legislature in a comprehensive way applicable to all administrative punitive sanctions of the respective legal order. These safeguards include, *inter alia*, the rights of the defence, the burden of proof, the presumption of innocence, the privilege against self-incrimination (for individual persons and companies), the rights to be heard and to have an oral hearing, the access to the file, the right to an effective remedy (on facts and on law), and the prohibition against retroactive sanctioning. Offences with more intrusive sanctions shall require stricter safeguards than offences with minor sanctions.

4. More clarity and regulation is required for determining the severity of the offence and the respective sanction. The widespread combination of often high maximum sanctions and broad administrative discretion can lead not only to unequal treatment of offenders but also to the exertion of inappropriate pressure on suspects in the context of plea bargaining. Standards for sentencing should be defined by law and may be specified in non-retroactive guidelines, the application of which can be controlled by the courts. Above all, an administrative body should never be permitted to impose custodial punishment.

### D. Targeted Sanction Law

1. Targeted sanctions are supranational coercive measures imposed primarily at the UN and EU levels by the executive (Security Council and the EU Council). These sanctions include the freezing of assets of individuals and businesses and thereby comprehensively isolate them from other economic actors. They cover, in particular, the financing of terrorism, the support of armed groups through illegal trade in natural resources, and the misappropriation of state funds by senior state officials.

2. The procedures and the safeguards of the UN system for targeted sanctions do not adequately meet many basic fundamental rights precepts, especially with respect to the separation of powers, the availability of an impartial and effective review, the privilege against self-incrimination, access to file, other rights of information

and participation, a sufficiently high evidentiary threshold, and considerations concerning the nature of admissible evidence (including undisclosed intelligence, hearsay evidence, and media reports). The substantive requirements for targeted sanctions are vague and far too broadly phrased.

3. Above all, an extensive reconceptualization of targeted sanctions is needed. As a starting point, substantive law should much more clearly define the targeted wrongdoing that can justify supranational targeted sanctions. In addition, it must be ensured that the sanctions are strictly preventive in nature. Limits for such measures shall be deduced from the protection of property and the proportionality principle. In procedural law, the legal safeguards developed by the Court of Justice of the European Union over the course of the past years have to be further developed. The targeted persons' right to participating in the procedure should be strengthened, evidentiary standards should be refined.

#### *E. Confiscation Law*

1. The foundation of legal regimes for confiscating the proceeds and instruments of crime are mainly based on two, in some jurisdictions three, different justifications or models:

(a) criminal conviction based confiscation of the *proceeds of criminal activity*, (b) non criminal conviction based confiscation of *criminal gains or of unexplained wealth* (along the lines of the private law concept of unjust enrichment) in non criminal procedures (also known as 'civil' confiscation), and (c) non criminal conviction based *preventive confiscation* based on the avoidance of risks.

2. *Traditional 'criminal law based confiscation'* requires that the confiscated proceeds originate from a concrete crime for which the perpetrator was convicted (or in cases of illness or absconding could have been convicted). *Extended* confiscation, a subcategory of criminal conviction based confiscation, also requires the conviction of a person for a criminal offence that benefits the perpetrator economically. This conviction permits the confiscation of property which is disproportionate to the person's lawful income, if the court is satisfied that the property in question is derived from (any!) criminal conduct. Thus, extended confiscation dispenses with the necessity of proving the concrete crime of enrichment and thereby also of proving a causal relationship between a crime and the confiscated enrichment. Such a construction can still be considered in accordance with fundamental rights and can be an effective instrument for dealing with organized crime.

3. *Non criminal conviction based ('civil') confiscation of criminal or illicit gains* goes one step further: it does not require any criminal conviction but is instead based on non-criminal ('civil') procedures proving the criminal origin of assets or even only an unjust enrichment. This leads to significantly weaker standards of proof (such as a preponderance of evidence) than the criminal proceedings' standards of 'proof beyond reasonable doubt' and 'in dubio pro reo'.

An excessive lowering of these standards in non criminal conviction based (civil) confiscation proceedings must, however, be rejected independent of their label, because this would contravene the fundamental right to property and the proportionality principle. This type of confiscation should therefore require a high standard of proof. It should, however, also permit taking into account the inability or unwillingness of the affected person to plausibly explain the origin of assets when these appear highly likely to originate from criminal or otherwise unlawful activity; *the nemo tenetur* principle does not apply in civil procedures. Since the *nemo tenetur* principle is not recognized in non criminal conviction based ('civil') procedures, it must be ensured that self-incriminating statements which are directly or indirectly compelled by this procedure are not used in criminal proceedings against that person, not even as a trigger for further investigative measures.

4. *Preventive confiscation* is based on the idea that assets under the control of (potential) criminals (esp. in organized crime) present a risk, as they could be used to facilitate the commission of future crimes. In light of this justification and in order to prevent abuse, preventive confiscation should only be employed in cases where there exists a clear risk of such use. In addition, in view of the principle of proportionality, it should be carefully assessed whether and to what extent a permanent confiscation of assets (and not only a temporary freezing) can be justified as a preventive measure.

#### *F. Anti-Money Laundering Law*

1. Anti-money laundering (AML) can support the prevention, detection, and prosecution of economic crime by preventing the integration of illicit gains into the regular economy and by providing information to the criminal justice system for investigating criminal offences. The system is based on financial data gathered by Financial Intelligence Units (FIUs) primarily by means of cooperation duties of the private sector.

2. The current deficits of money laundering control can be traced mainly to the fact that the objectives of AML regimes and of the competent FIUs' mission remain unsettled and are not implemented consistently. Legal science and practice should therefore come to a consensus on these basic questions, in particular concerning the purposes of AML, the detrimental impact of private customer due diligence on customers (such as the freezing of accounts), the nature and powers of FIUs, and the relationship between AML and data protection law.

3. FIUs should not be an integral part of the criminal justice system but should be conceptualized as intelligence-gathering bodies. Considering the high intrusiveness of the clandestine monitoring, analyzing, and transmitting of financial data of millions of respectable citizens, privacy and data protection considerations require that the respective FIU information should be shared with the general prosecution authorities and the police only in cases of serious crime. In addition, special attention must be given to the international level since the institutional nature, competences, and powers of FIUs currently differ profoundly from country to country; as a result, the cross-border transfer of data between FIUs can effectively undermine safeguards of privacy and data protection law.

4. The increasing cooperation, mandatory or voluntary, of the private sector in the field of crime control and the ensuing outsourcing of state functions - matters which are inherent in the development of AML- must be analyzed and evaluated carefully in a broader context not limited to economic crime.

#### *G. Compliance Regimes*

1. Compliance regimes are private measures taken by companies. They pursue two different (and separately achieved) aims: first, the *prevention* of crime and unethical behavior, and second, the *investigation* of corporate crimes in support of state criminal investigations.

2. The *preventive* aspects of compliance programs (e.g. setting the 'tone at the top') should be encouraged further. Scientific research should analyze in more depth the options available for making compliance programs more successful and for distinguishing effective compliance programs from mere fig leaf activities.

3. The *investigative* aspects of compliance programs (esp. internal investigations) must be regulated in more detail. These rules must ensure coherence with labor and data protection laws and should specify the range, thresholds, standards, and guarantees for internal investigations within companies. If an internal investigation is conducted at the behest or for the benefit of the state, the guarantees of the employees concerned should correspond to comparable criminal procedure standards. The rules should also clarify possible privileges for defense attorneys and legal advisors and limits to the seizure of internal documents.

4. The relationship between compliance regimes and criminal and administrative sanction laws should be clarified. Corporate liability should primarily be based on the violation of supervisory and organizational duties of the company concerned. As a consequence and in order to provide a stronger incentive, robust compliance programs should not only mitigate but potentially exclude corporate liability. In addition, personal liability of senior management officials under criminal law must remain a key element in controlling corporate crime and should not be neglected as a result of focusing on compliance regimes.

#### *H. Overarching Aspects for Combining the Various Regimes of Crime Control*

Since different public and private legal regimes for crime control are frequently combined and interact with one another, this interaction should be organized in an efficient way and must not lead to infringements of human and fundamental rights.

1. The *transfer of information* from one legal regime to another generally entails that the information is used for a different purpose than that which the information was originally gathered for. Its use for this new purpose must be justified by law and be proportionate to the methods employed when originally gathering the data. Some basic principles are:

- If information is gathered in one regime using an intrusive investigatory measure (such as a clandestine online search under criminal law) which the legislator chose not to introduce in another (e.g. administrative) regime, the information should not be transferred to this other regime.

- Information from AML systems should be transferred to the criminal justice system only in cases of serious crime.

- If a non-criminal legal regime compels persons to make self-incriminatory statements, the information thereby obtained must *not* be transferred to and used in criminal proceedings.

2. Excessive (especially uncoordinated) *cumulation of parallel investigations* performed by different institutions and based on various legal regimes should be avoided through early coordination, thus ensuring compliance with the principle of proportionality. Such early coordination could also avoid possible problems with respect to the principle '*ne bis in idem*'.

3. *Multiple sanctioning* under two different legal regimes should be restricted by applying the principle '*ne bis in idem*'. In the European Union and in the Member States of the Council of Europe, this principle can be applied if a criminal sanction and a punitive administrative sanction are combined without forming part of a close, integrated approach of dual proceedings with different purposes. The same result should also apply in transnational European constellations, e. g. with respect to a criminal sanction in one country and an administrative punitive sanction in another country. It should be analyzed whether this approach can also be applied in other regional organizations that provide for close cooperation mechanisms. Yet, even if the '*ne bis in idem*'

principle does not prevent the combined imposition of multiple sanctions and measures (e.g. with respect to preventive administrative or civil measures), the second sanctioning decision or measure must be foreseeable for the person concerned, take into account the first decision, and, taken as a whole, be proportionate in order to avoid constituting an overly excessive burden.