

Prof. Dr. Lorena Bachmaier Winter*

Cross-border Investigation of Tax Offences in the EU: Scope of Application and Grounds for Refusal of the European Investigation Order

Abstract:

The interplay of administrative and criminal proceedings increases the complexity that characterizes the transnational evidence in criminal matters and poses difficult challenges. The scope of the right to self-incrimination in administrative tax proceedings, the question whether the information obtained by a tax agency can be transferred to a foreign judicial authority in execution of an EIO, or the meaning of the principle of *ne bis in idem* are some of the problematic issues that are addressed in this paper. The implementation of the EIO in the member states will surely simplify the transnational gathering of evidence in criminal matters within the European Area of Freedom, Security and Justice, but it will also show that more harmonization is needed for advancing towards a single area of justice.

Keywords: mutual recognition, European judicial cooperation, tax offences, criminal investigation, transnational evidence, human rights

1. Introduction¹

The use of the European Investigation Order (EIO) in the realm of cross-border criminal investigation of tax offences presents additional problems to those that may appear in any transnational investigation². Besides the complexities related to the gathering of

* Universidad Complutense Madrid.

1 This paper is based on the presentation made at the conference “Administrative and criminal investigations in VAT and Custom duties. Towards a more effective and integrated administrative and judiciary European cooperation”, organized by Prof. Caianiello and Di Pietro at the University of Bologna in 2015.

2 On the specific challenges of cross-border criminal investigation within the EU and the European Investigation Order, see, among others, S. GLESS, *Beweisrechtsgrundsätze einer grenzüberschreitenden Strafverfolgung*, Baden-Baden 2007; L. BACHMAIER, Transnational evidence. Towards the Transposition of Directive 2014/41 Regarding the European Investigation Order in Criminal Matters, *EU CRIM 2/2015*, pp.47-58; “La Orden Europea de Investigación: la propuesta de Directiva europea para la obtención de pruebas en el proceso penal”, REDE 37 (January-March 2011), pp. 71-91; M. JIMENO BULNES, *Un proceso europeo para el siglo XXI*,

DOI: 10.5771/2193-5505-2017-1-46

evidence abroad, the problems deriving from the combined application of the *lex fori* and *lex loci* to the investigative measures and the admissibility of evidence, the investigation of cross-border tax offences present an additional difficulty: the frequent intermingling of administrative sanctioning procedures and criminal proceedings. Even if it is evident that the borderline between administrative sanctioning proceedings and criminal proceedings has become increasingly diffused, there are still significant differences between them that have to be taken into account when dealing with cross-border evidence³.

The fact that the same information that is gathered by the tax agencies from tax payers in order to establish the amount of tax due may also constitute the factual basis for determining criminal liability, and that such information may serve as evidence for a criminal sentence, poses specific problems as to the rights of defendants in criminal proceedings for tax offences, for example with regard to the right against self-incrimination.

Other problematic questions arise with regard to the protection of the principle of *ne bis in idem* in the sphere of administrative and criminal sanctions/proceedings. This principle has been understood differently in the EU member States, ranging from those States where the administrative sanction already bans the possibility to initiate a subsequent criminal procedure regarding the same facts (e.g. Belgium), to more lenient interpretations of the principle of *ne bis in idem*, where a second procedure on the same facts is not excluded as long as the administrative sanction imposed is taken into account when determining the criminal sanction.

The scope of the right to self-incrimination in administrative tax proceedings and the meaning of the principle of *ne bis in idem* for excluding a criminal procedure after the same facts have been sanctioned through an administrative procedure, are only some of the many problems that may have an impact on the gathering and transferring of cross-border evidence related to tax offences.

Cizur Menor, 2011, pp. 92 ff.; F. ZIMMERMANN, S. GLASER Y A. MOTZ, "Mutual Recognition and its Implications for the Gathering of Evidence in Criminal proceedings: a Critical Analysis of the Initiative for a European Investigation Order", 56 (2011) *EuCLR*, pp. 56 ff.; S. ALLEGREZZA, "Critical remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility", 2010 *ZIS*, pp. 573 ff.; M. BÖSE, "Ermittlungsanordnung – Beweistransfer nach neuen Regeln?", *ZIS* 4-2014, pp. 152-164; A. MANGIARACINA, "A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order", *Utrecht Law Rev.*, Vol. 10, Issue 1 (enero) 2014, pp. 113-133; I. ZERBES, "Fragmentiertes Strafverfahren. Beweiserhebung nach dem Verordnungsentwurf zur Europäischen Staatsanwaltschaft", *ZIS* 3/2015, pp. 145-155. S. RUGGERI, "Horizontal cooperation, obtaining evidence overseas and the respect for fundamental rights in the EU. From the European Commission's proposals to the proposal for a directive on a European Investigation Order: Towards a single tool of evidence gathering in the EU?", in S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Heidelberg-New York, 2013, pp. 279- 310; or M. DANIELE, "Evidence gathering in the European Investigation Order", *NJECL*, vol. 6-2 (2015), pp. 179-194.

3 See, for example, M. GÓMEZ TOMILLO and I. SANZ RUBIALES, *Derecho administrativo sancionador. Parte General*, Cizur Menor 2010, in particular pp. 64-70 and 109-115.

The aim of this study is not to define a model of international cooperation between the administrative sanctioning procedure and the criminal procedure when both deal with tax infringements⁴; nor to establish how the cooperation between tax agencies and judicial authorities should work at the EU level and what principles should govern in order to build up an efficient tax system and fight against tax evasion. Such an objective lies beyond the scope of this study.

My objective here is to point out some of the questions that will have to be addressed when using the EIO for gathering evidence from other EU countries within the investigation of cross-border tax offences. It should be noted that this exercise is anything but easy: the transnational dimension of a procedure already multiplies the complexities that appear at the national level. Yet when administrative and criminal proceedings interact at a transnational level, as it is the case in many of the tax offence criminal proceedings, such complex interplay increases the problematic issues that characterize the transnational evidence in criminal matters and undoubtedly adds more complexity to the tax investigation scenario. If I may contribute to identify some of these difficulties, I will have accomplished the objective of this study.

First, I will discuss the scope of the EIO and in particular in how far the information obtained by a tax agency can be transferred to a foreign judicial authority in the execution of an EIO. Secondly, I will focus on the grounds for refusal to execute an EIO, and precisely the *ne bis in idem* within the context of the execution of an EIO. The question that needs to be discussed is whether the same parameters that have been defined by the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) with regard to the fundamental rights in the administrative and criminal proceedings –and also within the context of the execution of the European Arrest Warrant–, are equally applicable to the cross-border gathering of evidence in the investigation of tax offences.

Although the analysis of the Spanish legal order is not the aim of this paper, references to the Spanish perspective, its case law and practice will be included, as this author is familiarised with it.. it goes without saying that a major comparative study should be undertaken to fully understand the problems of cross-border cooperation in the gathering of tax information and tax evidence in order to establish common guidelines in the implementation of the EIO, and for ensuring, not only efficiency of the international judicial cooperation, but also for providing an appropriate level of procedural safeguards.

4 On the initial problems of cooperation in administrative and criminal matters and its interactions and problems on the EU level, see. J. VERVAELE and A. KLIP “Supranational rules governing cooperation in administrative and criminal matters”, in J. VERVAELE and A. KLIP (eds.), *European Cooperation Between Tax, Customs and Judicial Authorities*, The Hague, 2002, pp. 7- 47.

2. The scope of application of the European Investigation Order

2.1 Criminal proceedings

Article 4 of the EIO Directive (DEIO) defines the types of proceedings for which the EIO may be issued. Following this rule, it applies to criminal proceedings that take place before a judicial authority “in respect of a criminal offence under the national law of the issuing State” (Article 4.a DEIO). Additionally to these criminal proceedings, it may also be issued within proceedings brought before an administrative authority for infringements “which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law” if these administrative proceedings can “give rise to proceedings before a court having jurisdiction, **in particular**, in criminal matters.”

The meaning of this provision as it is formulated is not fully clear; this is probably not due to the lack of linguistic skills of the European legislator, but rather to the difficulties to describe, in an abstract way, the types of proceedings that exist in several member States for applying criminal sanctions⁵. As I stated earlier, this rule aims to cover, for example, the issuing of an EIO in proceedings where the criminal sanction is imposed by the police or the public prosecutor –although the latter considered a judicial authority in several member States– within an administrative proceeding, but can end up before a criminal court if the sanctioned person opposes the sanction (e.g. The Netherlands)⁶.

The literal wording of Article 4.b DEIO, however, could also allow a different interpretation, namely that the EIO could also be issued within administrative sanctioning proceedings. In fact, Article 4 DEIO refers to “infringements” of rules and not to offences; secondly, when it mentions the sanctioning authority, it does not expressly say that it shall be a public prosecutor (or the police), but it refers more generally to proceedings before a “administrative authority”; and lastly, the criminal character of the proceedings is not clearly defined by the review before the court: this court shall be a court with jurisdiction *in particular* in criminal matters. This means that if this provision is read alone, it could be understood that an EIO can also be issued for the gathering of evidence within administrative sanctioning proceedings, if the decision can be challenged before a court with criminal jurisdiction –as it happens for example with the German *Ordnungswidrigkeiten*–, but also another type of judicial court.

5 The same wording is found under Article 1.a (iv) of the Council Framework Decision 2005/214/JHA of 24 February 2005, on the application of the principle of mutual recognition to financial penalties.

6 See L. BACHMAIER, Transnational evidence. Towards the Transposition of Directive 2014/41 Regarding the European Investigation Order in Criminal Matters, *EU CRIM* 2/2015, pp. 47-58, p. 48. See also, M. GROENHUIJSEN and J. SIMMELINK, “Criminal Procedure in the Netherlands”, in B. HUBER y R. VOGLER (eds.), *Criminal Procedure in Europe*, Berlin 2008, pp. 373-482, p. 384 ff.

In spite of the unclear wording of Article 4. b DEIO, I think it can be correctly concluded the European Investigation Order shall only be issued within criminal proceedings or proceedings that are of a purely criminal nature, despite the fact that such proceedings are dealt with in the first instance by an authority that is not a judge.

This is the conclusion to be drawn when Article 4 DEIO is read together with the Explanatory Memorandum of the Directive. Recital (2) of the Explanatory Memorandum makes clear that this legal instrument is based upon Article 82 (1) of the TFUE to foster the judicial cooperation in criminal matters and recital (27), when mentioning the cooperation regarding bank data, it refers expressly to the information necessary “in the course of criminal proceedings”.

In sum, it is not unreasonable to conclude that the Directive regarding the EIO is meant to facilitate the judicial cooperation in the gathering of evidence within criminal proceedings or administrative proceedings that are criminal in nature and thus linked to the criminal jurisdiction. However, it will be for the ECJ to define the meaning of this provision and what is a court that has jurisdiction “in particular” in criminal matters.

2.2 Types of investigative measures, data or evidence that can be requested under an EIO

The Directive regarding the EIO shall cover any investigative measures directed to the gathering of evidence in criminal proceedings, except the establishment of a joint investigation team (JIT) and the evidence this may collect. Joint investigation teams continue to be regulated by the Framework Decision 2002/465⁷, and are not based on the principle of mutual recognition but mainly on single agreements entered into by the Member States involved in a certain criminal investigation on a case-by-case basis⁸.

As a rule, therefore, all kinds of investigative measures could be requested for the investigation of a tax offence, although some very intrusive investigative measures are not commonly used when investigating ordinary tax offences⁹. In the next paragraph,

7 Council framework Decision of 13 June 2002, on joint investigation teams 2002/465/JHA, OJ 20.6.2002, L162/1. On the joint investigation teams and its regulation in the EU Framework Decision see for example the monographic study of E. VALLINES GARCÍA, *Los equipos conjuntos de investigación penal en el marco de la cooperación entre los Estados de la Unión Europea*, Madrid, 2006, in particular pp. 47 ff.; On the agreements on the basis of joint investigation teams between the EU and Switzerland and the USA, see also N. ZURKINDEN, *Joint Investigation Teams. Chancen und Grenzen von gemeinsamen Ermittlungsgruppen in der Schweiz, Europa und USA*, Freiburg i.Br., 2013, pp.8 ff.

8 *Ibidem* p. 72 ff. Although JITs might be established –and have been established– within the criminal investigation of tax frauds requiring coordination in different member States, their particular features and functioning will not be addressed here. It may be enough to state that even if the objective of the Directive on the EIO is to create a single instrument that covers all kind of investigative measures within criminal proceedings, it is appropriate that the regulation of JITs is kept out of its scope.

9 See J.A. CHOCLÁN MONTALVO, *La aplicación práctica del delito fiscal: cuestiones y soluciones*, Barcelona 2011, p.464.

we will point out some measures that may have specific relevance within the investigation and prosecution of tax offences.

2.2.1 Exchange of information between tax administrations and the EIO

The first question to be addressed is the one related to the assessment of the necessity and proportionality of the EIO within a criminal investigation for tax fraud, when the requesting authority needs information about a taxpayer from another Member State. At first glance, the request of tax data falls within the scope of the EIO in accordance with Article 3 DEIO, and therefore it should be possible for the authority investigating a tax offence to issue an EIO –provided that the other conditions for the issuing are given– in order to collect the tax information needed.

Nevertheless, could it be interpreted that the issuing of an EIO in this case would not be necessary or would not be proportional because such information could be obtained from the tax agency located in the forum state? Should the requesting authority prior to the issuing of the EIO ask the national tax agency to collect such information by way of means provided for under the Directive 2011/16/EU (from tax agency to tax agency)¹⁰? Could the information exchange regulated under Directive 2011/16/EU be used by the tax agencies for gaining access to data of a taxpayer for the purposes of a criminal investigation?

Nothing should prevent the judicial authority investigating the criminal offence to claim the data needed directly from the tax authorities of the State of the forum, if those data are already within such tax administration. In this case, pursuant to Article 16 of the Directive 2011/16, the information “communicated between Member States in any form pursuant to this Directive shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it”. However, this same Article authorizes the disclosure of the information transmitted from another State in two cases: “1) for the assessment and enforcement of other taxes and duties covered by Article 2 of Council Directive 2010/24 / EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measure; and 2) in connection with court and administrative proceedings that may involve penalties, initiated as a result of infringements of tax law, without prejudice to the general rules and provisions govern-

10 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC. On this Directive see, for example, J.M. CALDERÓN CARRERO, “Hacia una nueva era de cooperación fiscal europea: las Directivas 2010/24 UE y 2011/16 UE de asistencia en la recaudación y de cooperación administrativa en materia fiscal”, *Rev. Contabilidad y Tributación*, núm. 343, 2011 (Oct.), pp. 49-86; S. DE MIGUEL ARIAS, “Algunos aspectos de la protección jurídica de los obligados tributarios ante los requerimientos de información en la Unión Europea”, in F.A. GARCÍA PRATS (ed.), *Intercambio de información, blanqueo de capitales y lucha contra el fraude fiscal*, Madrid 2014, pp. 379-397. In the same volume also A. D. VIRTO AGUILAR, “Breve referencia a la mejora del intercambio de información bancaria en la Unión Europea”, pp.267-276.

ing the rights of defendants and witnesses in such proceedings.” It should be recalled that the EU Directive 2011/16 of 15 February 2011 does not apply to data related to VAT.

Following these provisions, should the investigating criminal authority, prior to issuing of the EIO, consider the possibility of getting such data from the domestic tax agency? When assessing the need and proportionality of the EIO, shall the issuing authority consider whether such data could be obtained without recourse to the international judicial cooperation? Is this the meaning of the proportionality principle under Article 6.1 DEIO?

First, from a practical standpoint, any judicial authority which knows or can foresee that information required for the tax offense criminal investigation may be obtained from their own national tax administration, will refrain from undertaking the efforts of issuing an EIO. To this end, the requesting authority should know whether the relevant information is already available at the national tax agency. This may not always be the case.

Secondly, from the point of view of the assessment of the proportionality principle, Article 6.1 DEIO does not seem to require that, prior to issuing an EIO the authority exhausts other ways of collecting the same evidence without recourse to international judicial cooperation. Article 6.1 DEIO requires the issuing authority to assess the proportionality and necessity of the measure for the purposes of the criminal proceedings and on the other hand, the executing authority shall assess the proportionality of the measure requested to determine if the required information can be obtained by less intrusive means (Article 10.3 DEIO). Apart from these situations, nowhere in the EIO Directive is it stated that its issuing is subsidiary of other instruments or ways to obtain the information or evidence required for the criminal proceedings. The subsidiarity of the EIO is neither a requisite for the issuing, nor could its execution be refused on the basis that the requesting authority could have obtained the evidence in its own country or through other mechanisms. While this is not required, certainly in practice any judge or prosecutor, as already indicated, would make that assessment, as this would help in saving time and effort.

Finally, it would be questionable if the authority investigating the criminal tax offense, instead of issuing an EIO, should claim from the national tax agency that they request the tax information needed by way of the exchange system provided for under Directive 2011/16/EU, for the purposes of the criminal investigation. I cannot venture to give a definite answer on this issue, but I am inclined to consider that the mechanism of cooperation and exchange of information between tax administrations is not intended to serve as an instrument to be used for requesting evidence needed in criminal proceedings.

One thing is that the data transferred in the context of an administrative tax investigation can be used in criminal proceedings, but another thing altogether would be to understand that the information exchange channel between tax administrations could serve to circumvent the international judicial cooperation mechanisms. In support of this interpretation, it might be argued that Article 1.3 EU Directive 2011/16 expressly

states that the Directive "shall not affect the application in the Member States of the rules on mutual assistance in criminal matters". In any event, in order to provide a definite answer to this question, a much deeper analysis, taking into account the different regulations in the Member States, should be carried out.

2.2.2 The EIO for obtaining already existing evidence or data

Article 1.1 DEIO expressly provides for the issuing of an EIO for obtaining evidence that is already in the possession of the competent authorities of the executing State. This rule is to be completed with Article 10.2 a) DEIO on substitution/refusal of the measure requested in the EIO. Article 10 DEIO tries to ensure that the cooperation in the transnational evidence gathering is not frustrated because the requested measure is not foreseen in the executing State. In such cases, instead of directly refusing the execution of the EIO, the Directive sets out that the executing authority shall make recourse to an analogous investigative measure that may be useful to obtain the data requested by the foreign authority.

In this context, Article 10.2 DEIO underlines that there will be no need to resort to another measure if the requested data are stored in a database and the executing authority has powers to access them. The Directive takes for granted that when data from a database are requested, such information will clearly be available in every State, so that resorting to a substitute measure would be out of place. In particular, Article 10.2 (a) and (b) DEIO refers to such a situation by stating that the following measures shall be always be in place:

"(a) the obtaining of information or evidence which is already in the possession of the executing authority and the information or evidence could have been obtained, in accordance with the law of the executing State, in the framework of criminal proceedings or for the purposes of the EIO;

(b) the obtaining of information contained in databases held by police or judicial authorities and directly accessible by the executing authority in the framework of criminal proceedings;"

Thus, Article 10 DEIO establishes certain limits on the possibility of substituting the requested measure on the grounds that it does not exist under the law of the requested State: access to databases is deemed to exist, and thus no substitution or refusal for non-existence comes into consideration. However, this does not mean that the rest of the grounds for refusal do not apply. Therefore, Article 10.2 DEIO has to be complemented with Article 11 DEIO.

I will try to point out several issues that will need to be further clarified with regard to the access of data which the executing authority are already in possession of, taking as an example data held on police and judicial databases. The first question is what shall be understood by *directly accessible* databases? If Spain were the executing State, the competent authority to execute an EIO would be an Investigating Judge. The Investigating Judge (*Juez de Instrucción*) does not have passwords or direct access to po-

lice databases nor to the databases of the tax administration. As a judicial authority, however, within a criminal procedure and therefore also within the procedure for executing an EIO, he/she has powers to issue a motivated judicial warrant to obtain all the data required for the criminal investigation that is stored on all kind of databases. Does this mean that he/she has *direct* access for the purposes of the DEIO? I am inclined to consider that this question should be answered in the positive, in order to favour the implementation of the principle of mutual recognition and in order to improve the judicial cooperation within the AFSJ.

The next question that arises is, if once the data are accessed, can they be transferred to the requesting authority in execution of an EIO, regardless the type of criminal investigation or procedure such data or evidence were obtained for? Pursuant to Article 11 of the Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, there does not seem to be any legal obstacle for such transfer of evidence or data in execution of an EIO¹¹. Regarding the transfer of evidence, the principle of speciality does not seem to apply and thus evidence gathered for the investigation of one offence could be transferred –if requested for the investigation of another crime–, without this constituting an infringement of the purpose limitation of the data protection laws.

Nevertheless, the answer could be different under Article 10.2 a. DEIO. As seen above, this provision opens the possibility to refuse the execution of an EIO that requests data which are already in the possession of the executing authority if the requested information “could not have been obtained for the purpose of the EIO”.

As a consequence, it should be considered that if the access to data or evidence already in the possession of the executing authority is to be applied in conjunction with Article 10.5 DEIO, then the measure exists –access to database– but those data would not be available in a similar domestic case. Technically this is not a “refusal” of the execution of an EIO, but an “impossibility to provide the assistance requested” based on legal reasons (Article 10.5 DEIO). As we stated earlier¹², this ground for non-execution introduces flexibility to the principle of mutual recognition, and brings the EIO closer to some of the principles of the mutual legal assistance system. This non-execu-

11 Article 11 of Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters reads:

“Processing of personal data received from or made available by another Member State

Personal data received from or made available by the competent authority of another Member State may, in accordance with the requirements of Article 3(2), be further processed only for the following purposes other than those for which they were transmitted or made available:

(a) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties other than those for which they were transmitted or made available;

(b) other judicial and administrative proceedings directly related to the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties;”

12 L. BACHMAIER, “Transnational evidence. Towards the Transposition of Directive 2014/41 Regarding the European Investigation Order in Criminal Matters”, p.54.

tion ground acts as a safeguard against the strict application of the mutual recognition principle and was introduced in the Directive of the EIO with the aim of protecting the coherence of the legal system of the requested State. The objective is to avoid that the executing State faces the dilemma of being obliged to comply with an EIO that would require infringing the principles of legality and proportionality applicable in such State¹³.

Furthermore, it should be considered if the grounds for refusal for such data not being accessible for the investigation of the crime indicated in the EIO and only to a closed list of offences within the executing State (Article 11.h DEIO), would also apply here.

2.2.3 Evidence obtained against the right to self-incrimination and its transfer by way of execution of an EIO

There is no harmonization on the exclusionary rules of evidence among the EU member States. This is known, and has been pointed out many times as one of the significant drawbacks in the establishment of a single AFSJ in criminal matters¹⁴: the data and pieces of evidence may be transferred from one country to another in a swift and easy way. As long as the evidentiary rules are not adequately harmonised among the different Member States, however, not only does such a transfer fail to contribute to ensuring the procedural safeguards of the defence, it also creates a fragmented criminal procedure: the evidence is transplanted from one legal order to another¹⁵. This is a situation that is not originated by the EIO Directive, but from the interplay of different legal systems, when gathering evidence by way of international judicial cooperation. The fragmentation is not caused by the EIO, but should be addressed in a better way when implementing it in the European AFSJ.

The issue that arises here is how to protect the fundamental right against self-incrimination when data obtained within administrative sanctioning proceedings are transferred to criminal proceedings by way of an EIO.

With regard to the right against self-incrimination in tax proceedings, the European Court of Human Rights has ruled, *inter alia*, in the cases *Saunders v. UK* of 17 Decem-

13 See L. BACHMAIER, “The role of the proportionality principle in the cross-border investigations involving fundamental rights”, in S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Heidelberg, New York, 2013, pp. 85-108.

14 On the need to establish general principles for transnational criminal proceedings, see the J. VERVAELE and S. GLESS, “Law Should Govern: Aspiring General Principles for Transnational Criminal Justice”, *Utrecht Law Rev.*, vol.9, issue 4 (Sept.) 2013, pp. 1-10: there is “need of rules that comprehensively deal with transnational criminal cases” (p.10).

15 S. GLESS, *Beweisgrundsätze einer grenzüberschreitende Rechtsverfolgung*, pp. 142 ff.; I. ZERBES, “Fragmentiertes Strafverfahren. Beweiserhebung und Beweisverwertung nach dem Verordnungsentwurf zur Europäischen Staatsanwaltschaft”, *ZIS* 3/2015, pp.145-155, although this last one referring specifically to the criminal proceedings under the EPPO.

ber 1996¹⁶, *IJL et al v. UK* of 19 September 2000¹⁷, *Weh v. Austria* of 8 April 2004¹⁸, or *Shannon v. United Kingdom* of 4 October 2005¹⁹, that when the incriminating statement, in accordance with applicable law, was obtained under coercive means, this information cannot be admitted as evidence in the subsequent criminal procedure against the taxpayer concerned, even if such statements had been made before being charged. In particular, in those cases where the administrative procedure for establishing the tax due and the sanctioning procedure are not separated, the right to remain silent should also be granted during the inspection procedure. Otherwise, the sanctioning procedure would be based upon self-incriminating evidence, which is against the *nemo tenetur* principle²⁰.

In the case *J.B. v. Switzerland*, of 3 May 2001²¹ the ECtHR found a violation of the right against self-incrimination where it could not be excluded that the information requested from the taxpayer regarding his income –which he was obliged to provide under sanction–, could be used for charging him for the offense of tax evasion. This same doctrine was reiterated in the case *Chambaz v. Switzerland* of 5 July 2012²².

Unlike the ECHR, the Spanish Constitution specifically mentions under Article 24.2 SC the right “not to testify against oneself” and the right “not to plead guilty”, which are closely related to the defence rights and the presumption of innocence. The right against non self-incrimination, is instrumental to the right of defence and must be respected *mutatis mutandis* also in administrative sanctioning proceedings. In this vein, the Spanish Constitutional Court has submitted “the essential values that are at the basis of Article 24.2 SC would not be safeguarded if it were accepted that the administration could compel or force the taxpayer to confess –or testify about– the commission of acts that would serve for incriminating him/her”²³.

For a full understanding of the problem at stake, it may be useful to describe the facts of a recent case before the Spanish Constitutional Court, decided by Judgment 54/2015 of 16 March: within a tax inspection regarding the infringement of the corporation tax law, VAT and other irregularities, the administrative authority ordered the entry and search of premises of the company investigated and the seizure of documents. The administrative authorization allowed the inspectors to carry out this mea-

16 Appl. No. 19187/91.

17 Appl. Nos. 29522/95, 30056/96, and 30574/96.

18 Appl. No.38544/97, para. 44.

19 Appl. No.6563/03.

20 C. PALAO TABOADA, “El Derecho a no autoinculparse en el ámbito tributario: una revisión.”, *Revista española de Derecho Financiero* num.159/2013, pp.1-25; J.A. CHOCLÁN MONTALVO, (2011), p.465.

21 Appl. No. 31827/96.

22 Appl. No.11663/04. On the two separate opinions to this judgment see, C. PALAO TABOADA, “El Derecho a no autoinculparse en el ámbito tributario: una revisión.”, pp. 4-5.

23 Among others, SSTC 272/2006, of 25 September, para. 3; 70/2008 of 23 June, para. 4; and 142/2009, of 15 June, para. 4. Regarding the prior case law of the Spanish Constitutional Court on this issue, see C. GARCÍA NOVOA, “Una aproximación del Tribunal Constitucional al derecho a no autoinculparse ante la Inspección Tributaria en relación con los delitos contra la Hacienda Pública”, *Jurisprudencia Tributaria Aranzadi*, num.53/2005, pp. 1-9.

sure, but only upon the consent of the owner or the administrator of the company. For the validity of the consent, the person affected –in this case the representative of the company- had to be informed of the existence of the administrative authorization as well as being made aware that the company could refuse to consent to the entry, search and seizure, unless there was a judicial warrant authorizing it.

In this case, the entry into the premises of the company took place upon the consent of the representative of the company, but without having been previously informed of the possibility to oppose to the measure. The Constitutional Court held that the officers involved could not consider that the absence of opposition from the taxpayer investigated was enough to interpret that he consented to the inspection activities. Along with this, it should also be noted that the taxpayer had to be informed that the administrative authorization in no way enabled the entry into the premises of the legal entity, a space that is also subject to constitutional protection. Consequently, the Court appreciated in this case that a substantial infringement of the legal requirements to carry out the investigative measure had been committed, as the consent was flawed and thus had become void.

This judgment is relevant as it grants full protection to the right against self-incrimination in administrative tax inspection proceedings and underlines that the protection is also to be granted in cases where the representatives of the legal entity consent to the entry, without having been informed of their rights first.

Applying the Spanish rules of evidence, the data and objects obtained by way of this tainted measure of entry, search and seizure cannot be assessed as evidence. In other words, they have no evidentiary value. Nevertheless, following the wording of the DEIO, the objects, disks and data seized during the entry, despite being void, are “in possession of the executing authority”. If the authority of another member State would issue an EIO requesting such information, should it be transferred or not?

As such evidence could have been obtained in a criminal procedure for tax offences and for the purposes of the EIO, from a formal point of view, all requirements set out under Article 10.1 DEIO would be fulfilled. But the question remains: shall the executing authority transfer the evidence already gathered even if such evidence is –under Spanish law– inadmissible for infringing a constitutional right? Could the requested authority invoke Article 11.1.f DEIO as a ground for refusing to execute the EIO in the case described? Article 11.1.f. DEIO allows the member States to invoke as optional ground for refusal that:

“there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter;”

If this provision would be applicable, the next question would be: would the transfer of evidence that has no evidentiary value under the law of the executing State –in this case under the Spanish law- be contrary to Article 6 TUE? Would it be against the principles common to the member States of “liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law” (Article 6.1 TUE)?

From the Spanish legal perspective, the evidence obtained through the violation of human rights is inadmissible, and assessing such evidence would be against the rule of law. The Directive does not include rules on admission or exclusion of evidence, but it states that the trial court shall take into consideration the way evidence has been obtained in a foreign country in order to assess its evidentiary value (Article 14.7 DEIO). The trial court, when assessing the evidence obtained through an EIO, must take into account the way in which it was obtained and as such, the Directive does not impose any specific exclusionary rule of evidence but indicates that it is necessary to scrutinize if the requisites for the admissibility of evidence have been met.

In our example, transferring such evidence would not be in conformity with the Spanish legal tradition, but in principle not against Article 6 TUE or Article 6 of the Charter. It has to be noted again that there are many EU countries, where the exclusionary rules of evidence are not so strict as in the Spanish legal system and a balancing test is applied for deciding on the admissibility of evidence²⁴. In those States, the assessment of such evidence would be completely in conformity with Article 6 TUE. The Directive only recalls that the trial court should pay attention to the way the evidence was obtained in the foreign country when assessing the evidence obtained from abroad.

Obviously facing the diversity of legal traditions within the European AFSJ, despite the uncontested relevance of the principles of efficacy and primacy of EU law, the ECJ will be called to deal with the complexity of coping with the problems of a multi-layered constitutional compound, when implementing the EIO.

3. Grounds for refusal of the recognition and execution of an EIO

The general grounds for refusal are listed under Article 11 DEIO, which are to be completed with other grounds that make the execution of the EIO requested impossible (e.g. Article 24.2 DEIO). The structure and content of the grounds for refusal of an EIO are very similar to the ones set out in the Framework Decision on the European Arrest Warrant²⁵, and both instruments have taken over most of the grounds for refusal found in the conventional system of mutual legal assistance in criminal matters, in particular the Council of Europe Convention of 1959 and the European Union Con-

- 24 On the problems stemming from the lack of rules on admissibility of evidence obtained abroad, see the interesting contribution of S.GLESS, “Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle”, *Utrecht Law Rev.*, vol.9, issue 4 (Sept.) 2013, pp. 90-108, 95-96.
- 25 On the grounds for refusal of the EIO see L. BACHMAIER, “The Proposal for a Directive on the European Investigation Order and the grounds for refusal. A critical assessment”, S. RUGGERI (ed.) *Transnational Evidence and Multicultural Inquiries in Europe*, Heidelberg, New York, 2014, pp. 71-90; See also M. BÖSE, “Ermittlungsanordnung – Beweistransfer nach neuen Regeln?”, *ZIS* 4-2014, pp. 152-164, p. 154 who classifies the grounds for refusal in three types.

vention of 2000²⁶. The EU legal instruments based on the mutual legal principle do not include an *ordre public* clause as ground for refusal, although the general clause on protection of fundamental rights as recognised in the EU (Article 11.1 f. DEIO) in some way could be considered as a European *ordre public* clause²⁷.

An EIO with limited grounds for refusal represents a further step towards the implementation of the principle of mutual recognition, and conversely, if the grounds for refusal would have been drafted in a very extensive way, the added value in comparison to the MLA instruments would have been less visible, making the principle of mutual recognition to almost vanish. The Directive on the EIO, to my mind, has reached an appropriate balance between the implementation of the principle of mutual recognition for promoting the efficiency in the judicial cooperation and the required flexibility of to the mutual legal assistance instruments. By doing so, it avoids imposing rules that the States would be unwilling or unable to abide by. Moreover, as the grounds for refusal in the DEIO are all optional, it will depend on the Member States when transposing this Directive into domestic legislation, to decide whether they keep the optional character of the grounds for refusal in the national law, or if they transform them as mandatory grounds for refusal.

Immunities and national security reasons (arts. 11.1a and b DEIO) are traditional grounds for refusal found in the MLA Conventions. As to the national security in general, it is rarely invoked as a ground to refuse the international judicial cooperation in the gathering of evidence. This may be because the requesting authorities either do not ask for classified information knowing that such request will be useless, or because the requested State simply does not mention it as a ground for refusal when refusing. Be that as it may, in practice it should not play a relevant role in the context of the investigation of ordinary tax offences within the EU. It does not, therefore, merit further attention here.

With regard to the existence of “an immunity or a privilege under the law of the executing State which makes it impossible to execute the EIO” (Article 11.1 a DEIO), recital (20) of the Explanatory Memorandum of the DEIO recognizes that “there is no common definition of what constitutes an immunity or privilege in Union law; the precise definition of these terms is therefore left to national law.” As examples, it cites “protections which apply to medical and legal professions” but explaining that these are not the only ones that could come into consideration and that this provision “should not be interpreted in a way to counter the obligation to abolish certain grounds for refusal as set out in the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union”.

Further analysis should be carried out as to what the practical implications of the existence of immunities or privileges for the cross-border investigation of tax offences are within the EU. International law immunities and state immunities are rarely put

26 See L. BACHMAIER, “The Proposal for a Directive on the European Investigation Order and the grounds for refusal. A critical assessment,” p. 72 ff.

27 See A. MANGIARACINA, *op. cit.*, pp.130-132.

forward as grounds for refusing the judicial cooperation in cross-border gathering of evidence –in fact they are highly exceptional–. But another type of immunity may play a relevant role in the execution of an EIO regarding the investigation of tax offences. The immunity, for example, enjoyed by auditors and tax counsels in the different member States comes to mind²⁸.

As to the possibility of refusing to execute an EIO on the basis of double incrimination, this reason is almost excluded within the context of tax offences, due to the specific provision included under Article 11.3 DEIO, and the inclusion of the offence of fraud in the Annex D.

In addition to the grounds for refusal already mentioned and the doubtless importance of the possible refusal of the execution of an EIO on the basis of the protection of fundamental rights, the *ne bis in idem* clause merits special attention in the context of the investigation of tax offences.

4. *Ne bis in idem* principle as ground for refusal of an EIO

4.1 Scope of application of the *ne bis in idem* principle

The principle of *ne bis in idem* in the European Union is recognized in Article 50 of the European Charter of Fundamental Rights. Article 50 of the European Charter reads:

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

“No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.”

This rule applies not only within the domestic legal framework of the member States, but also imposes the duty to respect the *ne bis in idem* between the States²⁹. Differently from Article 4 of Protocol 7 of the European Convention of Human Rights,³⁰ Article 50 of the European Charter also extends its material and territorial

28 Although the Law on Auditing of Spain, Ley 22/2015, 20 July provides in its Article 31 for the obligation of secrecy of the auditors and auditing companies, no privilege to refuse to testify is regulated for these professionals in the Criminal Code of Procedure, whilst para. 53 (1).3 of the German *Strafprozessordnung* provides for their *Zeugnisverweigerungsrecht*.

29 On Article 50 of the Charter and the EU *ne bis in idem*, see, among others, M. LUCHTMAN, “Transnational Law Enforcement in the European Union and the *Ne Bis In Idem* Principle”, *Rev. European Administrative Law*, vol. 4-2, pp. 5-29; J. VERVAELE, “*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the European Union?”, *Utrecht Law Rev.*, vol.19, issue 4 (September) 2013, pp. 211-229, in particular pp. 223 ff.

30 Article 4 of Protocol 7 of the ECHR: Right not to be tried or punished twice: “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.” For the case law of

scope of application³¹: it applies horizontally between the Member States and also vertically, between resolutions of the European bodies and tribunals of the Member States³². As is defined in Article 50 of the European Charter, *ne bis in idem* does not only ban a double punishment, but also grants protection against a second prosecution.

Article 11.1 d) DEIO states that the execution of an EIO may be refused if it would be contrary to the principle of *ne bis in idem*³³. Much has been discussed and written about the principle of *ne bis in idem* and its transnational horizontal effect in Europe³⁴. There is broad consensus on the idea that the development of a European AFSJ requires adequate mechanisms to avoid a person being sanctioned or tried twice for the same criminal facts. More difficult is to define when the *ne bis in idem* applies between administrative sanctions and criminal penalties. The Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests establishes a rule on interaction between criminal proceedings and administrative proceedings³⁵. It's Article 14 reads:

“The application of administrative measures, penalties and fines as laid down in Union law, in particular those within the meaning of Articles 4 and 5 of Council Regulation No 2988/95 or in national law adopted in compliance with a specific obligation

the ECtHR on Article 4 of Protocol 7, see B. VAN BOECKEL, *The Ne Bis in Idem Principle in EU Law*, The Netherlands, 2010, pp. 173-203.

- 31 See M. MANSDÖRFER, *Das Prinzip des ne bis in idem im Europäischen Strafrecht*, Berlin 2004, pp. 238 ff.
- 32 See A. ESER, “Artikel 50” in *Charta der Grundrechte der Europäischen Union*, J. MAYER (ed.), Baden-Baden, 2011, pp.704-717, p. 707.
- 33 In the text of the Proposal for a Directive regarding the EIO, it was set out that the *ne bis in idem* could not be alleged as a ground for refusal if the requesting authority provided “an assurance that the evidence transferred as a result of an execution of an EIO shall not be used to prosecute a person whose case has been finally disposed of in another Member State for the same facts (...)”. See the text agreed as general approach, made in Brussels the 21.12.2012, 18918/11, COPEN 369, EUROJUST 217, EJM 185.
- 34 Among others, see following monographic studies: M. MANSDÖRFER, *op.cit.*, pp. 135 ff.; R. KNIEBÜHLER, *Transnationales “ne bis in idem”*, Berlin, 2005, in particular on the Convention implementing the Schengen Agreement, see pp. 169 ff.; S. JAGLA, *Auf dem Weg zu einem zwischenstaatlichen “ne bis in idem” im Rahmen der Europäischen Union*, Frankfurt a.M, 2007, pp. 45 ff.; V. COSTA RAMOS, *Ne bis in idem e Unioa Europeia*, Coimbra, 2009, pp. 115 ff. See also, J.A. VERVAELE, “The transnational *ne bis in idem* principle in the EU. Mutual recognition and equivalent protection of human rights”, *Utrecht Law Rev.* Vol. 1, 2 (December) 2005, pp. 100-118; of the same author “*Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*”, *Utrecht Law Rev.* vol.9-4 (September) 2013, pp.211-229. In Spain see, for example, A. DE LA OLIVA, “La regla *non bis in idem* en el derecho procesal penal de la Unión Europea: algunas cuestiones y respuestas, in *La justicia y la Carta de los Derechos Fundamentales de la Unión Europea*, Madrid, 2008, pp. 167-185. In the same volume see M. CEDEÑO HERNÁN/ M. AGUILERA MORALES, “El principio *non bis in idem* a la luz de la jurisprudencia del TJUE”, pp.187-241.
- 35 Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law of 11.7.2012, COM(2012)363 final, establishes a rule on interaction between criminal proceedings and administrative proceedings.

under Union law, shall be without prejudice to this Directive. Member States shall ensure that any criminal proceedings initiated on the basis of national provisions implementing this Directive shall not affect the proper and effective application of administrative measures, penalties and fines that cannot be equated to criminal proceedings, laid down in Union law or national implementing provisions.”

Following the case law of the ECtHR³⁶, the ECJ in *Bonda*³⁷ and *Akerberg Fransson*³⁸ has underlined that the existence of a previous “criminal” sanction would prevent the commencement of a second set of proceedings, whether administrative or criminal, when the first penalty has become final³⁹. In assessing whether the administrative sanction amounts to a criminal penalty, the so called “Engel criteria” are to be checked⁴⁰: 1) the classification of the offence in national law, 2) the nature of the offence, and 3) the degree of severity of the penalty imposed on the offender⁴¹.

In both cases – *Bonda* and *Akerberg Fransson*—the ECJ decides that Article 50 of the Charter does not preclude a member State from imposing, for the same acts of non-compliance with declaration obligations administrative penalties, criminal penalties or a combination of the two. It is only if the administrative penalty is “criminal in nature” for the purposes of Article 50 of the Charter and has become final that this provision precludes criminal proceedings in respect of the same acts from being brought against the same person.

The Court, however, takes a different approach in both judgments: while in *Bonda* it clearly defines the sanction imposed for non-compliance of the rules of agricultural aids, as “non-criminal penalty”⁴², in *Akerberg Fransson*, it declares that it is for the national court to determine if the first penalty imposed in the administrative proceedings (surcharge in a VAT infringement case) “is not criminal in nature” (para. 37)⁴³.

36 See *Tomasović v. Croatia*, of 18 October 2001, Appl. No. 53785/09; *Öngün v. Turkey*, of 23 June 2009, Appl. No. 15737/02; *Sergey Zolotukhin v. Russia* [GC], of 10 February 2009 Appl. No. 14939/03; or *Ruotsalainen v. Finland*, of 16 June 2009, Appl. No. 13079/03.

37 ECJ *Lukasz Marcin Bonda*, of 5 June 2012, C-489/10.

38 ECJ *Hans Akerberg Fransson*, of 26 February 2013, C-617/10.

39 See paras. 76-79 of the Opinion of the Advocate General P. Cruz Villalón. The judgment *Akerberg Fransson* has given rise to a great number of scholarly comments. Among those see, for example, J.M. Calderón Ortega, “El TJUE confirma la aplicación del derecho fundamental de ne bis in idem en el marco de litigios tributarios internos”, *Quincena Fiscal*, 11(2013), pp.1-8; E.DE MIGUEL CANUT, “Carta de la Unión y derechos fundamentales: irrupción en materia tributaria”, *Quincena Fiscal*, 14(2014), pp.1-21;

40 *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22.

41 *Öztiürk v. Germany*, of 21 February 1984, Appl. No. 8544/79; *Lauko v. Slovakia*, of 2 September 1998, 4/1998/907/1119.

42 It should be recalled that before the *Bonda* case the ECJ had already held that the penalties prescribed in the rules on the common agricultural policy, as the temporary exclusion of a trader from the benefit of an aid scheme, are not of a criminal nature. See ECJ Case *Maizena Gesellschaft mbH* of 18 November 1987, C-137/85, para. 13; *Federal Republic of Germany v Commission*, of 27 October 1992, C-240/90, para. 25; or *Käserer Champignon Hofmeister GmbH*, of 11 July 2002, C- 210/00, para. 43.

43 For an interesting and critical comparison between these two judgments see J. VERVAELE, “*Ne Bis In Idem: Towards a Transnational Constitutional Principle in the European Union?*”,

The ECJ has tried to achieve in *Akerberg Fransson* a difficult balance: to follow the concept of *ne bis in idem* as defined by the ECtHR, and thus comply with Article 52.3 of the Charter, and at the same time avoiding to say that those national systems that permit successive administrative and criminal sanctions applying the compensation of the punishment, are against Article 50 of the Charter. By leaving to the Member States the decision on whether the administrative sanction is of a criminal nature, the ECJ has come to a balancing compromise between competing interests.

It has to be admitted that the legal argumentation in *Akerberg Fransson* is very creative although not completely convincing: it seems out of question that the surcharges in tax sanctions have a clear criminal nature following the *Engel* criteria⁴⁴. Not recognizing this, and referring to the assessment of the national courts in each case, ultimately not only contradicts the stance taken in the *Bonda* case, but it would appear that the court turns its head so as not to see the infringements against Article 50 of the Charter by several Member States.

4.2 Different scope of the *ne bis in idem* principle in the context of the judicial cooperation in cross-border evidence gathering?

Once this has been explained, -what the understanding of the principle of *ne bis in idem* adopted by the ECJ when interpreting Article 50 Charter EU actually is-, it shall be analysed whether such a strict concept of the principle of *ne bis in idem* is also to be applied when deciding upon the execution of requests for gathering evidence through an EIO.

Article 11.1 d) DEIO does not impose the refusal to execute an EIO because the case for which it has been issued would be affected by the *ne bis in idem* rule. It has to be insisted upon that the fact that the grounds for refusal under Article 11 DEIO are optional, and it will be for the Member States to decide whether they maintain such an optional character or they transform the grounds for refusal into mandatory ones. The question now is to analyse whether the principle of *ne bis in idem* shall be conceived as a mandatory ground for refusal, or not, and in the latter case, when it should be applied.

Following a strict application of the case law of the ECJ, the requested authority should refuse the execution of the EIO if it were aware that the defendant had been previously sanctioned for the same facts that are described in the EIO, either in an administrative proceeding or in a criminal proceeding, as long as the administrative sanction can be defined as “criminal in nature”. This strict understanding would promote the protection of the *ne bis in idem* also by refusing to assist another Member State in

cit., pp. 223-225. Of the same author also “The application of the EU Charter of Fundamental Rights and its *Ne bis in idem* Principle in the Member States of the European Union”, *Review of European Administrative Law*, 2013-1, pp. 113-134, pp.127 ff.

44 In the same sense, J. VERVAELE, “The application of the EU Charter of Fundamental Rights and its *Ne bis in idem* Principle in the Member States of the European Union”, *cit.*, p. 133.

gathering evidence, and thus prevent the risk of a person being sanctioned, tried or prosecuted twice for the same acts.

In practice, for the requested authority to find out whether the EIO issued by another Member State is aimed at investigating a case that has been previously sanctioned or tried in its own or in another State, is anything but easy. Difficulties increase if the requested authority should also avoid –by refusing to cooperate in the gathering of evidence– that the same facts are being investigated in parallel in different States: it would be difficult for the executing authority to establish whether the same case for which the EIO has been issued is already under *litispendentia* in another Member State.

Finally, taking into account that within the prosecution of cross-border tax offences the administrative sanction may have already been imposed in a State when the judicial authority issues the EIO, how will it be possible to control whether the same person has already been sanctioned through an administrative proceeding for the same tax infringement? And if the requested country would have access to such information, how could it possibly confirm whether the administrative penalty imposed is of a “criminal nature” or not?

There is no doubt that the protection will be best afforded, if it is the defendant who alleges and proves the existence of a prior procedure, sanction or criminal conviction relating the same facts. This, however, will only be feasible if the defendant were given the opportunity to appear and to be heard before the criminal proceedings in the issuing state. Thus, refusing to execute an EIO on the grounds of the *ne bis in idem* principle, in practice, will be difficult and it is not to be expected that the executing authority will have the time and means to check if the EIO complies with this principle.

In sum, the execution of an EIO unfolds a complex picture in the field of transnational *ne bis in idem* related to tax offence cases: as things currently stand, it will be for the national courts to determine the “criminal nature” of the administrative sanctions imposed, in order to appreciate whether there is *ne bis in idem* or not in a given case, and thus determine if the execution of the EIO should be refused in order to preventively protect the *ne bis in idem* EU constitutional principle.

At the domestic level, if the requested State still applies a system of compensation of administrative and criminal penalties –as long as this is still allowed, because ECtHR case law and the *Akerberg Fransson* judgment are clearly against it–, such a State should not be prevented executing an EIO even if the same acts had been already sanctioned at the requested State with an administrative sanction. But the answer is not that easy. Should such a State require the issuing State to also apply the compensation system? Or should it simply refuse because that would be against *ne bis in idem*? Conversely, if the requested State already has in place a strict rule regarding the prohibition of *ne bis in idem*, it would be coherent that, if aware of a prior judgment or administrative sanction of the same facts, it could refuse to cooperate with a second investigation and prosecution of the same facts by providing evidence.

5. Concluding remarks

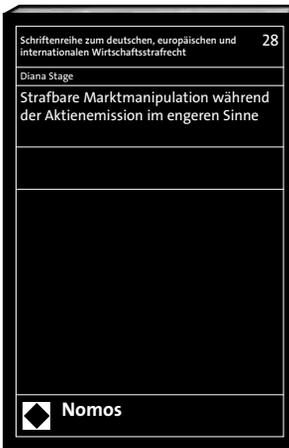
The implementation of the EIO will surely simplify the transnational gathering of evidence in criminal matters within the AFSJ, but it would be illusionary to think that the adoption of the EIO will automatically change the system of cross-border collection of evidence or create a free movement area for the criminal evidence. By introducing similar grounds for non-execution as those applied to the MLA system, the principle of mutual recognition is clearly nuanced: the idea that the executing authority will deal with the request made through the EIO as if it were a domestic judicial assistance request, is still, in my opinion, quite far off. And it may not be possible to advance at a quicker pace towards a “single evidence area”, because the free circulation of evidence still entails huge challenges for the national criminal justice systems, as well as for the protection of the fundamental rights of the defendants.

When receiving an EIO, the executing authority will have to face a difficult dilemma: either execute an EIO, assuming the risk that evidence that is tainted or even declared inadmissible in the executing State, may be used before a foreign court; or refuse the execution of the EIO because of the risk that the fundamental rights of the defendant might be infringed by the foreign trial court. The first alternative will promote the principle of mutual recognition and the swift cooperation in the sphere of the cross-border evidence gathering. The second alternative tends to prioritize the protection of the fundamental rights of defendants, by keeping a double check on the respect of those rights, in the executing State as well as in the requesting State.

The diverse regulations along the EU will have an impact on the system of cross-border evidence, as there is the evident risk of circumventing national evidentiary rules when the evidence is gathered in another State. Applying the *lex fori* in the executing State will not always be possible, and on the other hand will not solve all the inconsistencies stemming from the lack of harmonized legal systems. For example, in the requesting State there might be a rule establishing the need to protect the right against self-incrimination within the tax inspection proceedings (as is the case in Germany), a rule that does not exist in Spanish law. If a statement or document obtained without granting this right is required through an EIO issued within a criminal tax investigation, at that moment it will be too late to require that the taxpayer is informed about his/her rights to remain silent and refuse providing any information that might incriminate him/her. At that stage, the *lex fori* would only be applicable to the assessment of evidence, but not to the way of collecting or producing the evidence. Needless to say, all this has important consequences for the rights of the defence.

When transposing this Directive, it will be for the Member States to strike the right balance between improving the international judicial cooperation while safeguarding adequately the fundamental rights of the defendants. Finally, the role of the ECJ will be decisive in achieving an adequate balance between the efficiency and primacy of the EU law and to strive for a high level of protection of human rights. For the moment, in *Akerberg Fransson*, the ECJ has clearly defined that the Charter will be applied to all

cases where EU law is enforced⁴⁵. It has opted for a broad application of the Charter in VAT national enforcement procedures, while arriving at a compromise in the protection of the *ne bis in idem*: a high understanding of the protection, but powers for the States to determine if the requirements for applying the *ne bis in idem* are present. It will be seen how this balance is achieved in the implementation of the European Investigation Order.



Strafbare Marktmanipulation während der Aktienemission im engeren Sinne

By Dr. Diana Stage

2016, 611 pp., pb., € 139.00

ISBN 978-3-8487-3024-7

eISBN 978-3-8452-7408-9

(Schriftenreihe zum deutschen, europäischen und internationalen Wirtschaftsstrafrecht, vol. 28)

nomos-shop.de/27079

The protection from market manipulation through criminal law is considered very important by the European Union and the German legislature. The dissertation comprehensively examines the criminal market manipulation during the share issue in the narrower sense (IPO), which has up until now been minimally researched. The author assembles the many and often technical individual aspects of the subject to arrive at an overall synthesis. The European and German regulations, in particular the stock exchange and capital market regulations according to economic fundamentals are examined in this context.



Academic research and scholarly publications are also available on our online platform: www.nomos-elibrary.de

To order please visit www.nomos-shop.de, send a fax to (+49) 7221/2104-43 or contact your local bookstore. Returns are at the addressee's risk and expense.



Nomos

45 J. VERVAELE, "The application of the EU Charter of Fundamental Rights and its *Ne bis in idem* Principle in the Member States of the European Union", *cit.*, p. 128.