17 Comparative Analysis

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17.1 Introduction

The European Union has, in the past years, developed criminal legislation to protect its financial interests. The focus of the legislation has been on public spending, fraud, bribery and cybercrime. Despite the desire by the Union to establish a harmonized legal framework to curb crimes in these areas, the transposition of these measures in the Member States has faced a series of challenges. Equally, the legal basis in the Treaty of the Functioning of the European Union (TFEU) has contrasted the legal philosophy in some Member States. In understanding the trends and challenges faced by the Member States in both the implementation and the transposition of EU criminal law protecting the Union's financial interests, this study performs a comparative analysis on practices employed in 11 selected Member States. The countries are Malta, Latvia, Ireland, France, Estonia, Croatia, Greece, Poland, Spain, Italy and Germany. The focus will then be on examining the issues arising from the implementation of the PIF Directive, which was adopted in July 2017 after extensive negotiations by the Member States, to further protect the financial interests of the EU.

17.2 Common Trends and Challenges in the Implementation of the EU Criminal Law in the Member States

There is variance in how the EU criminal law is implemented in Member States, and this depends on the national legislative approach of each Member State. Visible commonalities also exist in methods of some jurisdictions, especially those in which judicial systems have been influenced by one another, such as the civil law systems in Germany and the Baltic States. Like Germany, the two Baltic States – Estonia and Latvia – similarly dealt with the implementation of the EU criminal law in their national judicial structures. For example, the effect of EU's criminal law became apparent when these countries drafted their penal codes in anticipation of Union membership. At the time when the Estonian Penal Code (EPC) and the Latvian Criminal Law (LCL) were drafted and implemented, both countries were on their way to becoming EU Member States. Therefore, to comply with the requirements of the Association Agreements, both the Baltic States had to make their legislation compatible with the legal framework and

philosophy of the EU, and this included the development of new criminal law provisions, comprising the measures that the acts of the third pillar of the European Union required.

The drafters of the EPC and the LCL managed to ensure compliance in some critical areas of EU legislation on criminal law, by introducing new offences into their national criminal laws such as offences against a person, family and minors. When drafting the provisions covering fraud, the EPC promulgators also ensured compliance with the Convention on the Protection of the European Communities' Financial Interests and Article 209a of the Maastricht Treaty. Likewise, in line with the Convention on the fight against corruption involving officials of the EU or officials of Member States of the EU, the drafters of the EPC took into account the EU legal position on active and passive corruption. In addition to compliance in these areas, the drafters of the EPC also ensured that the country aligned its laws to accommodate the Council of Europe Recommendations by criminalizing offences committed by legal persons and also by introducing a new penalty of community service.

Despite these efforts, Estonia was still unable to fully integrate its legal system and introduce all offences that would warrant its full compliance with the European Union law at the time of its accession to the Union. With these adoptions, it is evident that Estonia had to rearrange its legal philosophy and attempt to reconcile its criminal justice system to the demands of EU criminal law regime. However, the country has systematically introduced the doctrines found within the EU legal framework in its penal code, striving to achieve full compliance. Latvia has taken a similar approach in this regard.

The influence of the EU criminal law on the procedural criminal law of Estonia and Latvia has also been significant. At the time when both countries adopted their laws on the criminal procedure (entered into force on 1 July 2004 and 21 April 2005 respectively), they had already become members of the EU. Therefore, the national legislators sought to draft the laws that would be in full compliance with the requirements of the EU, the Council of Europe conventions, the ECHR as well as the decisions of the ECtHR. However, the original criminal procedure laws did not comply with the EU *acquis* in their entirety, as Estonia complied with the European Arrest Warrant (EAW) Directive only after the original law on criminal procedure was amended on 28 June 2004, that is, before the original law entered into force on 1 July 2004.

In contrast to the two Baltic States, whose legal systems proved to be rather susceptible to change and influence stemming from the Union's law, the situation in Germany – a judicial system that had itself significantly influenced the criminal law systems of the Baltic States – has been different. Due to the existence of well-developed and long-established criminal law concepts, the degree of EU criminal law influence on German criminal law varies from area to area. At the same time, the influence of EU law on Germany's procedural rules has been quite limited. Like many other Member States

considered in this study, the German legislator had to adjust its penalties to comply with EU provisions. However, there are a number of discrepancies between the EU and national provisions that still remain. For instance, Germany has been less cooperative in the efforts to adjust its penalties to correspond to EU provisions.

The challenges on compliance witnessed by the two Baltic States were not posed to all countries that sought membership with the EU. However, there are also challenges that exist in those Member States which initially formed the foundation of the EU in Europe. In practice, such countries have determined the trajectory of the overall development of the EU and dominated the ways in which it has implemented its policies. Generally, they have had minimal challenges in implementing the legal requirements dictated by the EU. For instance, in the case of France, it has not had difficulty in complying with the provisions of the EU *acquis* because of its leadership role in drafting new instruments required for the development of the EU legislation, or its influence in directing the choices that are made within the EU. It will not be an overstatement to say that most of the EU convention decisions, new laws and directives in the area of EU criminal law would almost always be compatible with the criminal law regime of France. Despite this, there are legal experts and criminal lawyers in France who have expressed concern on the difficulty to implement some legislative proposals of the EU because of their effect on the fundamental principles to which the French procedural criminal law is predicated. Two of the concerns are the French approach to the European Public Prosecutor's Office (EPPO) and the legal framework implementing the PIF Directive.

Even with this reservation, France has often been supportive of EU legal considerations that would make the Union more efficient in its operations. However, in the past, France has shown reluctance to accept centralized options fronted by the EU. This is different from Estonian and Latvian approaches since these Member States showed no resistance to the effective national implementation of new criminal law provisions according to the third pillar of the European Union. A report commissioned by the European Parliament and released in 2018 on procedural criminal law highlighted France as one of the countries that were not ready to fully introduce changes to its legal regime that would significantly alter its legal system. However, legal experts explain the highlight of the report by pointing to the compatibility that EU legal instruments have with the fundamental principles of French procedural law.

There are instances where France has shown the challenges it has in implementing EU criminal law. It has been noted that sometimes the legislative intervention to implement new secondary law is insufficient, while the supreme courts of France show a lack of enthusiasm to interpret the EU instruments and to assess the appropriateness of national implementation. French courts have reacted in dismissive ways to legislative interventions of the EU through its directives to provide a secondary law that the country can use when determining its cases.

The challenges exhibited in France in the implementation of the EU's criminal law are different from those exhibited in Ireland. First, it should be noted that together with the UK and Denmark, Ireland has opted out from the entire Area of Freedom, Security and Justice (AFSJ). Likewise, the CJEU's jurisdiction interpreting any provision of the Area of Freedom, Security and Justice would not apply to it. However, having opted into many of the legislative measures adopted by the EU, Ireland actively participates in their application, specifically in the areas where there is a distinctive need for cross-border cooperation, such as money laundering, terrorism and cybercrime. Unlike the Member States that habitually implement EU criminal law provisions by systematically adopting amendments to their penal codes (i.e., Greece, Estonia, Latvia and Germany), the Irish legislature complies with the EU law by implementing separate Criminal Justice Acts covering special areas. Such Criminal Justice Acts remain the only necessary reference points for specific types of offences. In line with the EU criminal law and the requirements of the PIF Directive, Ireland established criminal liability for legal persons. Of note is a creative way in which Ireland has given extraterritorial effect to cybercrime, promoting a cross-border approach in this area. Ireland has opted to participate in the Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. However, it has not yet implemented the relevant national law.

The implementation of the EU criminal law in Greece is relatively different from the approach of some other Member States. Unlike Ireland, which has separate Criminal Justice Acts covering offences such as terrorism, the Hellenic Republic has placed all the provisions of EU criminal law within the Hellenic Criminal Code. In this respect, the Hellenic approach is similar to the one adopted by the two Baltic States. However, while Greece strongly relies on the Criminal Code, Article 29 of the Constitution of Ireland governs the adoption and application of EU law in the country. Moreover, Ireland's steps towards collaborating with the EU is closely related to the approach of other states such as Germany and France. Arguably, like these jurisdictions' efforts, the Constitution of Ireland mainly supports its international relations such as becoming a member of the EU. However, despite this legal practice, it protects the way EU law operates in Ireland to ensure that laws enacted, acts accomplished and measures implemented by the country corresponds to EU membership requirements. In this regard, the European Communities Act 1972 was introduced to give both domestic effects to EU law and to permit the government to implement EU law in the form of secondary regulations.

Unlike in the other Member States, the legislative and juridical arms of the government have significantly influenced Italy's EU law implementation process. While other states rely on the Criminal Code and the Constitution, only Italian courts have actively participated in the adoption of EU law. This standoff implies a stalemate between the Italian courts and their relationship with EU law. The situation has been

worsened by the complexity at the legislative level. For instance, in 2015 and 2016, Italy managed to implement only two important EU criminal law instruments namely, the Framework Decision on Joint Investigation Teams and the Framework Decisions on the mutual recognition of both confiscation orders. These back and forth issues in Italy directly derail the efforts of other Member States such as France and Spain, which have readily complied with the EU legal instruments. In Spain, for instance, there is a positive attitude towards implementation of the EU criminal law. Like Italy, Spain is successful at both the judicial and legislative levels. Therefore, the country is likely to benefit from implementing EU criminal law compared to Italy, which still drags out the process because of different legal issues.

Most of the national reports have commented on the limits of mutual trust in the execution of EAWs, the major culprits being the non-application of the proportionality test when EAWs were issued for minor offences and the issue of interaction between the application of EAW Framework Decision and fundamental rights. It should be emphasized that even though there are some well-developed EU measures aimed at enhancing the Member States' cooperation, the lack of trust and inefficiency both undermine the effective and smooth cooperation in all instances.

For instance, Malta has a strict policy on fairness and some of the reasons that EAWs contain do not fall within the fairness and proportionality trials that Malta's legal framework demands. This has led to the country having challenges in actualizing EAWs, but has effectively discharged its mandate at the local level through its legal framework.

In Poland, there were challenges as well, just like in Malta. Poland had to change its Constitution to allow for EAWs to be enabled in the country. Subsequently, this aligned the Polish Criminal Procedure Code with the EU legal instruments on administrative proceedings that protect the EU's financial interests through the PIF Directive. Apart from the introduction of the EAW, the amendment to the Constitution was also to establish rules of jurisdiction. Poland's Constitution was strict and lacked flexibility in granting of jurisdiction to external bodies and countries. Despite the efforts made by Poland, there are provisions within the EU legal framework that still contradict the national legal regime. One of those provisions is the forfeiture of assets of a suspect that were acquired five years before the crime was committed unless the suspect can show proof that the assets were acquired in a legal process. Poland's Penal Code does not allow for this provision, and it makes it impossible to implement this provision by EU law where an EAW is made within Poland. Equally, perpetrators can successfully adjudicate their cases in Polish courts against forfeiture of their assets acquired years before an offence was committed. The effect is a setback to the PIF Directive in Poland.

Although Poland is new to the Western political influence due to its democratic transformation only in 1989, the country is geared towards unprecedented developments in terms of law modification and enforcing the Council of Europe

Standards. The adoption of the EU Criminal law is progressive since the Polish legislator's process of implementation has been broad. Poland and Malta have robust and specific EU criminal laws. For instance, in Malta, the PIF Directive has been enforced based on the speedy legislative amendments and other administrative interventions. Like the Hellenic Republic, Malta strongly relies on its Criminal Code to implement some of the EU criminal law against crimes such as fraud, bribery and financial corruption.

All the reports highlighted that generally, the Member States have successfully implemented in their criminal laws the EU legislative norms dealing with offences of terrorism, organized crime and cybercrime. Several new substantive offences have been introduced in all countries. However, there are still a number of discrepancies in definitions of what constitutes an offence. For example, the Estonian definition of an act that constitutes a 'terrorist offence' does not contain all of the terrorist activities listed in Article 1(1)(f) of the Framework Decision 2002/475/JHA.

The national reports have revealed that not all implementation and transposition were smooth, as some elements of the definitions of offences found in EU provisions were not duly implemented; in some instances, the scope of the EU measures has been widened, while in others it has been narrowed. For instance, in Germany, the traditional definition of the term 'organization' would have a more formal structure, which inevitably narrows the definition provided for in the EU Framework Decisions on the criminalization of terrorism. Similarly, the Latvian definition of an 'organized group' appears to have a wider scope, since it does not have the criterion of benefit, which could be found in Article 1(1) of the Framework Decision FD 2008/841/JHA. Likewise, the Estonian legislature has narrowed the scope of the definition of 'criminal organization', since the national measure has an additional element of 'division of tasks and functions in the criminal organization'. Another criticism of the German transposition of EU criminal law relates to Framework Decision 2005/222/JHA on the criminalization of attacks against information systems, where under the national rules some acts covered by the EU law would not be covered by the relevant national provisions.

Like the rest of the EU Member States, Greece, Spain, and Italy have also encountered issues during the implementation of EU criminal law. In Greece, the idea of incorporating the new EU instruments into the Criminal Code did not meet the expectations of the EU. In effect, the EU reacted negatively to such a proposition because, in its opinion, it was inadequate. In other words, EU standards demand criminal law instruments to entail non-criminal elements. However, this can only happen if the offence is included in the national legal order and a state introduces administrative measures to ensure the efficiency of the substantive criminal provision, which the Hellenic legislators failed to observe. Similarly, Spain has encountered uneven legal connotations. Although this country has had a positive attitude towards its implementation task, it postpones enforcing critical legal issues. For instance, most of the mutual recognition instruments

that were adopted during The Hague Programme (i.e., before the entry into force of the Treaty of Lisbon in December 2009) were not accomplished till December 2014 when Act 23/2014 came into force. Based on these delays, the Spanish legislature often refers to EU law notions, which are alien to the legislators. The situation is similar in Italy. Although the administrative structure has made efforts to ensure the country complies with the EU criminal law, the legislative arm of the government still lags in the implementation process. For instance, these drawbacks at the legislative level have thwarted efforts to implement the Council Framework Decision 2008/841/JHA on organized crime and the PIF Directive. Therefore, these countries have encountered issues with the EU criminal law implementation.

Some discrepancies were eventually cured by subsequent amendments to the national provisions; however, other discrepancies and lacunas remain. It should be noted that there is a lack of effective prosecution in some areas. For example, there are barely any significant prosecutions under money laundering legislation in Latvia and no prosecutions of cybercrime in Ireland. Therefore, it should be concluded, that in order for the EU legislative measures to reach their full potential, Member States have to further amend their applicable legislation and implement all of the necessary provisions found in the EU legislative measures.

The implementation of the EU criminal law in the Member States discussed above express the different trends and challenges that the national legislators have in adopting and accommodating the EU criminal law. In the case of Estonia and Latvia, the challenges presented are reflective of the trends that countries who were not EU members face when they decide to become EU members. The requirement for compliance with the criminal law system of the EU significantly alters the legal regime of a country and the fundamental principles to which the legal justice system of a country is predicated upon. The cases of Germany and France represent a situation where Member States which have a dominant influence of the EU legislative agenda face resistance to change in its national criminal justice systems. In the case of Ireland, there is representation of a country that has opted out of participating in the entire Area of Freedom, Security and Justice, while at the same time, chose to opt into many EU criminal law measures. These countries broadly represent the trends and challenges that the Member States are facing when implementing the EU criminal law.

17.3 Common Trends and Challenges in the Transposition of EU Law on the Crimes Against the Financial Interests of the EU

It has been confirmed that all Member States participating in this study are fully involved in the EU's action to protect its financial interests and combat fraud. However, some reports ascertained that corruption and money laundering is of great concern in some

Member States (e.g., Ireland and Latvia). Both Ireland and Latvia faced infringement actions under the enforcement procedure of Article 258 TFEU for non-implementation of the fourth AML Directive. This situation reflects the fact that even though the adequate legal instruments could be in place, further work needs to be done in order to effectively investigate and enforce them. Additionally, in some instances, the Member States have failed to implement the necessary national measures in a timely manner, as for example, Estonia in the case of Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities.

One of the issues relevant to the application of EU law in practice is the efficiency of national monitoring processes, as well as the independence of national agencies and bodies engaged in investigations and prosecutions. In some instances, the multitude of agencies creates a situation where it is literally impossible to discern the responsibilities and obligations of the authorities at hand. The effectiveness of investigation and prosecution is also of concern.

Transposition of EU law in protecting the financial interests of the Union depends on the national legal regimes of Member States. In the case of Italy, the country has used its governance platform and influence within the EU to ensure the protection of the Union's financial interests. On the academic front, Italy contributed a member to the eight-member experts team that drafted the *Corpus Juris*. *Corpus Juris* is synonymous with the existence of the current EPPO. The EPPO enables the EU to effectively adjudicate on offences committed against its financial interests. *Corpus Juris* was carried out in the 1990s as part of the European Legal Area Project aimed at identifying how Member States can contribute to the legislative framework of the Union with the aim of protecting the EU's financial interests. Several experts and practitioners from Italy made their contributions, specifically in the establishment of the EPPO. This is the academic contribution that Italy made. However, there is the legal contribution through Italy's judicial system in the confines of 'double-track' system and *ne bis in idem*.

The present legal debate in Italy is how the principle of *ne bis in idem* can be applied concurrently in administrative and within criminal proceedings on issues on a 'double-track' system. 'Double-track' system is a sentencing system that provides measures of prevention and penalties for offenders. It considers the criminal capacity of offenders and the prevention measures for dangerous offenders. *Ne bis in idem* on the other hand follows through with the provisions of Article 649 of Italy's Code of Penal Procedure (CPP) that eliminates subjecting a person who has been acquitted or convicted from further criminal proceedings on the same facts. The wording of the principle makes it inapplicable to situations where first proceedings are of an administrative nature, and not of a criminal nature. The clarification in the country's tax crime laws is that when the same fact enables both criminal and administrative liability, then a person can be subjected to the two proceedings. The tax crime legislation, however, prohibits providing similar penalties to the individual. This is in consideration of the substantive

principle of *ne bis in idem*. In practice, where an individual has administratively been found guilty of misappropriation of funds, administrative penalties can be issued by competent administrative authorities, but, if criminal legislation also punishes the same facts and the person found guilty is undergoing prosecution, then the penalties issued are not executed during the period when the criminal trial is taking place. If the legal system finds the person guilty and he or she is convicted, then the administrative penalties are not executed. However, if there is an acquittal through the criminal justice system, then the person is subject to the previously issued administrative penalties.

The debate between *ne bis in idem* and 'double-track' system is central to protecting the financial interests of the EU in Italy. There are already judgments that have been handed down by both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) on the matter. The ECtHR had determined that the principle of *ne bis in idem* was compatible with the rules on tax crime. The consequence was an escalation of the same to the Italian Constitutional Court. One of the cases that ECtHR had to rule in recognition of *ne bis in idem* was the case of *Grande Stevens v. Italy*. The case concerned the rules on market manipulation in Italy. ECtHR ruled that there was no compatibility of the duplication of criminal and administrative proceedings where the right to *ne bis in idem* was to be considered if the administrative procedure which the facts are subjected to is deemed to be similar to a 'criminal charge' using the Engel criteria. The Constitutional Court in Italy failed to follow a request made by the national Court, which proposed an extension of Article 649 CPP to bar further criminal proceedings through procedural *ne bis in idem* on the same facts that had been decided upon by an administrative authority and a final decision made, which in accordance to the proceedings, had a criminal nature.

When the matter was still under consideration by the Constitutional Court, the ECtHR, through its decision on *A & B v. Norway*, changed its approach on the issue and ruled that duplication of administrative and criminal proceedings does not breach the principle of *ne bis in idem*, where there is sufficient time and a substantial connection between the two proceedings. The ruling also provided a criterion to be followed in determining the existence of adequate time and substance connection in a case. The implication of this development led the Constitutional Court of Italy to send the case back to the national Court for a determination on whether there were sufficient substance and time connection between the administrative and the criminal proceedings on the matters of the case. The statement by the Constitutional Court of Italy meant that the ruling in *A & B v. Norway* made it less likely to subject violation of the principle of *ne bis in idem* where duplication of administrative and criminal proceedings take place.

However, the Constitutional Court added that if there is lack of sufficient time and substance connection in a specific case due to the handling of the proceedings of matters

in the case, whether in the field of tax crime or any other field, then the duplication is adduced to have violated the principle of *ne bis in idem.*

Apart from the ECtHR, the CJEU also suspected that there was variance in the way the Italian rule was applied in relation to EU law. In its ruling that was an endorsement to a large extent of the Strasbourg Court, the CJEU determined in the case of *Menci*, upon an Italian court's request, that Article 50 of the European Charter was compatible to issuing both criminal and administrative sanctions for the same facts against the same person. The facts of the case were a failure to pay Value-Added Tax (VAT) that was due as provided for by law within certain time limits. According to the ruling by the CJEU, duplication of proceedings and penalties represents a limit and not a violation of *ne bis in idem*. In VAT offences, the justification for enabling duplication of penalties and proceedings is the general interest objective of combating such crimes and ensuring that collection of due VAT is not hampered through legal means. There are experts who point to a complementary approach to the application of both criminal and administrative proceedings since they consider different aspects of the unlawful conduct.

Once the CJEU had pronounced itself in the *Menci* case on what it perceived as applicability of *ne bis in idem* in tax laws and its compatibility to EU law, the Italian Court that had requested the direction of the CJEU on the case failed to take a decision on the case merits, but raised a question to the Constitutional Court of Italy. The Italian Court wanted the Constitutional Court of Italy to make a determination on how the *ne bis in idem* principle applies in relation to its compatibility to Article 649 of Italy's Code of Penal Procedure given the two rulings by the ECtHR and the CJEU. The dilemma that the Italian Court needed clarification on is that on tax laws, specifically on failure to pay VAT in a timely manner within the specifications of the law, there is a lack of complementarity between criminal and administrative proceedings since they both aim at punishing identical conduct. Subsequently, the Court pointed to a lack of real coordination between the two proceedings since they are predicated upon different rules. The Constitutional Court of Italy is still seized of the matter and is yet to make a determination. This further fuels speculation on the intent of the Italian and European courts, with the Italian courts committed to ensuring that there is no disproportionate punishment of persons who are at fault of tax laws. The aim of the Italian courts is also to balance the protection of the EU's budget with the protection of the right not to undergo punishment twice for an offence on the same facts.

The metrics of protection of the EU's financial interests do not measure favourably to Spain as they do to Italy. However, Spain still does not stand out, whether positive or negative, on the subject. There have been doubts raised on Spain's accuracy in calculating fraud, specifically tax fraud, but EU's usual reports do not single out Spain negatively or positively on the same. The areas that Spain has made contributions on are dealing with the crimes against the EU's financial interests using Spain's criminal justice system, and its application of both the *ne bis in idem* principle and the stature of limitations. The 2004

report by the European Commission on compliance of Member States to the legal framework on fraud and other financial interest cases rates Spain as compliant. Despite this, there were doubts raised on the intensity by Spain's criminal justice system to evenly prosecute all instances of money laundering without focusing only on serious cases. A similar report in 2008 by the European Commission was equally positive about Spain with a single issue raised on how Spain was going to treat liability of legal persons. At the time, the problem was still under consideration by Spain's judicial system.

Unlike in Italy, where the principle of *ne bis in idem* is yet to be concluded by the Italian Constitutional Court given the reference by the national Court on clarification of compatibility to Article 649 given the rulings made by both the CJEU and ECtHR, the Court of Justice in Spain has given a verdict on how the principle applies with relation to laws in Spain. The Court of Justice in Spain had previously made a ruling, even in the absence of the secondary legislation of the EU that requires compliance of EU criminal law by all Member States, to the effect that Article 325 of TFEU obligates Member States to protect the EU's financial interests. The Court of Justice added that such support has in recent and immediate cases taken a narrative of ensuring punishment of a criminal nature to offenders. After its ruling in the *Akerberg Fransson* case, Spain's Court of Justice lowered its exigencies that it made in its judgment on *Luca Menci* where it stated that the Member States may impose both a formal administrative sanction and a criminal penalty where conditions under the Engel criteria are met. This is despite Spain having one of the strongest adherences to the principle of *ne bis in idem*. Spain does not allow the cumulative imposition of both criminal and administrative penalties in a single case. An individual case in this context means a case where there are identical facts, legal ground, and subjects. In such a situation, it is only criminal law that has priority.

Unlike the situation in Italy and Spain on the continued debate on *ne bis in idem*, there are other countries that do not have many controversies in their transposition of EU criminal law on the protection of financial interests of the Union. Estonia represents the countries that operate with minimal legal controversies with the EU criminal legislation of cybercrime, fraud and public spending. Estonia is one of the countries that has fully transposed Directives 2014/25/EU, 2014/24/EU and 2014/23/EU. It did this through the Public Procurement Act of 2017, which meant that all information and communication exchange relating to public procurement would be done in the e-procurement system. This includes exchanges between an economic operator and the contracting entity or authority, availability of procurement documents, submission of tenders, clarifications on procurement issues and requests to participate in procurement opportunities. Apart from the Public Procurement Act of 2017, Estonia had also adopted a new Customs Act in 2017 that made its customs laws compliant with the EU Customs Code. Some of the changes that the Customs Act introduced were the use of x-ray images and establishing an image database for customs check purposes and collecting information. Subsequently, such information shall be used in the prevention of tax

fraud and smuggling. The new Customs Act also added a requirement to collect information about all international train and bus passengers and their carriages as well.

Just like Estonia, Latvia has also aligned its laws with the requirements of the EU laws on the protection of the Union's financial interests. For instance, Latvia had enacted a law that sought to protect the right of its citizens against the usage of personal data by unauthorized and third-party entities. The rights were captured in the Latvian Personal Data Protection Law of 2000. However, this law made it difficult to enact the requirements of information sharing between the Member States on individual information of persons in Latvia. Subsequently, the law was a barrier to the fight against cybercrime and other fraud-related cases. This forced Latvia to make a series of amendments to the law and later substituted the law in 2018 with the Personal Data Processing Law. The law set preconditions for sharing of personal data with other agencies both at a national and international level. Just like the previous law, the 2018 law received criticism from EU members on its contribution to fragmentation of the EU's regulatory framework. This led Latvia's Ministry of Justice to draft a new law that would enable the effective sharing of data within the EU to curb fraud and cybercrime. The Personal Data Processing Law was then effectively supplemented with the 2019 special law on the Processing of Personal Data in Criminal and Administrative Offenses.

The transposition of EU law on the crimes against the financial interests of the EU has created specific challenges to the principles of Member States. For instance, in the case of Italy and Spain, both countries have had to rethink their application of the principle of *ne bis in idem* to conform to the rulings made by both the CJEU and the ECtHR. In the case of Italy, the Constitutional Court is yet to determine whether its protection of double penalty on an offence liability is against the provisions of EU law. Likewise, in Spain, the Court of Justice had to make a ruling in support of the EU law, while locally, the courts still firmly hold to a strong *ne bis in idem* principle. This means that transposition of EU law has not been smooth in some of the dominant countries within the EU. However, in countries such as Estonia and Latvia, the legal justice systems have acted to conform to the EU Directives with minimal resistance. Transposition of EU law has had a negative effect in some EU countries with respect to changing their legal principles on fundamental issues.

17.4 Issues Arising from the Implementation of PIF

Implementation of some provisions of the PIF Directive has proved to be a challenge to some Member States, same as participation in the EPPO. In contrast to a relatively conflict-free implementation of the PIF provisions into the national systems in Estonia and Latvia, other Member States, such as France and Germany, had some challenges to overcome. Likewise, the participation in the EPPO has been a hotly debated (and resisted

to) issue in some Member States such as Ireland, Germany and France, while at the same time being wholeheartedly accepted and committed to by others, such as Latvia and Estonia.

Like the other EU Member States, Malta had to change its penal codes and criminal justice frameworks to enable compliance to the requirements of the PIF Directive. In dealing with crimes that relate to protecting the EU's financial interests, the Maltese Criminal Code has numerous provisions that tackle offences in the PIF Directive. Some of such offences are obtaining money by pretence, misappropriation of funds and use of resources for fraudulent gains. The implementation of PIF in Malta also faced issues arising from the inadequate application of the specialized investigative legal instruments. These are not the only problems that characterize the PIF Directive in Malta. Arguably, the field of determining confiscations present two issues, namely, the non-conviction-based confiscation of assets and third-party confiscation of assets. Ideally, these two elements were absent from the critical EU legal framework. Locally, other issues exist, such as the use of EAW to cover frivolous offences, which should not be the case. Arguably, another problem has been about freezing and confiscation, which may interfere with the freedom of one's property. However, the primary issue in Malta regarding enforcing the PIF Directive is that the process can significantly lead to freezing of all assets of the subject matter indiscriminately. In effect, such actions can lead to interference with the freedom of an individual. In other words, the problem of freezing orders in Malta does not meet any proportionality principle.

In the case of Greece, the country has used a different approach than other countries who prefer the copy-paste method in establishing a legal framework to support the PIF Directive. Greece chose to tackle the cases within the PIF Directive on an issue-by-issue basis, and where possible, align them to the existing legal framework in Greece. This meant that the legal framework in Greece on topics such as tax fraud, cybercrime and public expenditure are different from the laws on the same problems in other countries. There have been calls for Greece to align its laws to mirror similar laws around Europe. One area that the European Commission has shown its displeasure with the Hellenic Republic is in the decision by Greece to opt for a criminal code as the basis for directives on money laundering rather than having a particular criminal law on the same. A criminal code has a limited scope of application and implementation as opposed to a full special criminal law that covers extensive areas of law regarding a crime. Greece attributes their insistence to adopting a different approach to the dormant and ineffective laws that other countries have concerning the implementation of the PIF Directive.

A similar but more drastic approach to the PIF Directive was taken by Germany as well. As of 2018, Germany had not enacted any laws or revised any of its criminal codes to support the implementation of the PIF Directive. Unlike for Greece, there has not been any criticism of Germany for its failure to enact a legal framework and instruments in

support of the PIF Directive. However, the country has indicated its support through verbal pronouncement on the need to have a more comprehensive way of protecting the rights of suspected persons. Germany has also proposed the establishment of a link to which the financial interests of the EU can be protected in legislations where it is eminent that an expansion of substantive criminal law must occur. The difference in applicability and implementation of the PIF Directive reveals the issues that the EU faces in protecting its financial interests among the Member States.

Latvia has already implemented the necessary measures to comply with the PIF Directive. Ireland has also implemented parts of the required amendments to comply with the PIF, and further measures are anticipated to be implemented by the end of 2019. For both Latvia and Ireland, one of the issues that needed tackling with regards to compliance with the PIF Directive was the limitation periods. While the former had to amend its criminal law provisions relating to limitation periods, the latter does not have prescription periods, so the Recital 22 of the PIF directive would apply to it.

Estonia is currently in the process of drafting the relevant legislation to comply with the PIF Directive provisions, yet there are no drafts available at the moment. The German limitation periods were in line with the provisions of the directive, so no action was required on that front.

Similarly, France and Poland have encountered issues arising from the implementation of PIF. On the one hand, the PIF Directive first featured in the French Official Journal in July 2017. Despite this achievement, the implementation measures did not take place at the time of writing. Secondly, the *verrou de Bercy* has been incompatible with the EPPO's elements as stipulated in the EPPO Regulation and the PIF Directive. Another crucial shortcoming relates to the criminal liability of legal persons – in France the offence must be committed on behalf of a legal person. However, this has proven challenging since the criterion in the PIF Directive dictates that an offence must be committed for the benefit of a legal person. On the other hand, Poland has had issues in harmonizing the EU legal instruments. These problems remain unsolved. For instance, enforcement remains an issue, as some of the provisions aimed at implementation of the EU legal instruments, such as provisions on corruption of foreign public officials and officials of international organizations, are not enforced. The practical aspects of enforcement, for instance with regard to credit and subvention fraud, are questionable since the duration of the criminal proceedings is excessively long. As a result, one is not certain if the proceedings and the eventually imposed sanctions fulfil the criteria of effectiveness and deterrence, as required by the EU criminal instruments. In this way, there is a systematic lack of effective legal measures regarding criminal liability of legal persons, as the criminal sanctions are hardly ever imposed. Additionally, there is significant difficulty in ensuring effective asset recovery. Therefore, in practice, the effective implementation of EU criminal law in these matters has not been fully achieved. On the other hand, Poland has not actively participated in the adoption of

the PIF Directive because an intervention of authorities is necessary to officiate the effectiveness of sanctioning.

Like France and Poland, Spain and Italy have also faced challenges concerning the implementation of the PIF Directive. Although Spain has introduced a new criminal offence of misappropriation and inclusion of VAT fraud, it has lagged behind its other national counterparts in fulfilling some of the directive's requirements. Arguably, the highly volatile Spanish political landscape has thwarted the implementation of PIF Directive.

On the face of it, Croatia appears to be one of the few Member States that has already successfully adopted the amendments necessary for implementing the PIF Directive into the national criminal justice system. However, the Croatian national compliance measures could be said to be of dubious quality, as the only change that was introduced is the reference to the PIF Directive in Article 386 of the Criminal Code. The Croatian Government claimed that national criminal legislation already complies with the PIF Directive and there is no need for any additional substantive changes. Nevertheless, a number of shortcomings highlighted in the report prove that the transposition is defective and without any proper content. It is evident that Croatia has failed to fully transpose the directive. For instance, elements of crimes prescribed by Article 3 and Article 4 of the directive cannot be aligned with the national offences found in the Croatian Criminal Code.

17.5 Conclusion

The EU seeks to ensure the adoption of its criminal legislation by its Member States. The countries considered in this study have successfully managed to adapt their legal systems to the demands of the EU criminal legislation on the protection of the EU's financial interests. Countries such as Spain and Italy had sought to offer support to the EU criminal legislation, but their attempts raised a discourse on the viability of their principles in the context of applying a different principle in the EU cases while having a separate legal application in the local context. One such area of variance is in the application of the *ne bis in idem* principle. There have also been issues in the implementation of the PIF Directive, and this largely informs the definitions of offences in the national judicial systems. Malta, for instance, has had to change its laws to achieve conformity to the requirements by the EU on data sharing in curbing of fraud. Poland, on the other hand, had difficulties in allowing the implementation of the forfeiture principle of the accused where assets acquired five years before a crime is committed had to be confiscated as well. While other countries tried to align their laws to the requirements of the PIF Directive, there were others such as Germany that had not enacted any laws in support of the implementation of the PIF Directive. The EU has faced significant

challenges in its desire to implement criminal legislation and make it effectively implemented and applied by the Member States. This jeopardizes the aim of securing the financial interests of the Union.