A Comparative Analysis of Statutes of Limitation

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Contents

Preliminary remarks

The concept of a statute of limitation lies at the intersection of substantive criminal law and criminal procedural law. Without knowledge of the respective procedural law systems, an academic analysis of this legal instrument as a comparative presentation would prove difficult. The present cross-section therefore has the task of elaborating commonalities and differences in the various statutes of limitations, taking into account substantive law and procedural law, and identifying regulatory models. Due to the aforementioned complexity, this is done by limiting the focus to core criminal law and the criminal liability of natural persons. Special features of specialized fields of the criminal law and the administrative offences regulated in the Criminal Code in some countries are thus not taken into account. For details, including exact sources and references, please refer to the detailed country reports.[1]

In the following, the terms "*statute of limitations on prosecution and enforcement*" are used without the intention of making a statement about their underlying legal character. In those countries in which the statute of limitations is recognised as being a matter of substantive law, the term

1 Unless otherwise stated, what is reproduced here can be found in the section of the respective country report that corresponds to this cross-section. Only to the extent that there is no evidence for what is stated in the country report are references made in this article.

"statute of limitations on criminal liability" or "statute of limitations on criminal offences"[2] would be more correct. However, this is not suitable for countries with a procedural conception of the statute of limitations. The term "limitation period for enforcement" is also ultimately inaccurate, since it is not the act of enforcement that is subject to the statute of limitations, but the possibility of doing so, so that the term "limitation period for enforceability" would be more appropriate.[3] The terms used in the text of this study are chosen primarily for reasons of better comprehensibility and reference to tradition.[4]

With two exceptions, all the legal systems examined here provide for regulations that limit the prosecutability of a criminal offence *and* the enforceability of a sanction by reference to a period of time. The regulations are found in the respective penal codes; only in France is the statute of limitations for prosecution standardised in the Code of Criminal Procedure.

Of the two common law legal systems included in the study, the one in England and Wales represents the rejection of the statute of limitations for criminal offences that is characteristic of this legal sphere. True to the maxim *nullum tempus occurrit regi*, the position in English law is that the prosecution of a criminal offence should not fail solely due to the passage of time, and offender should not feel safe from prosecution at any time. A deterioration of the evidence due to the fact that the offence occurred a long time ago is only taken into account on a case-by-case basis. It is up to the prosecutor to assess whether the available evidence is likely to be sufficient for a conviction and whether the prosecution is in the public interest. However, the legal system in England and Wales is not entirely without a statute of limitations for criminal offences. Specific statutes provide for a limitation period by way of exception, namely for the most minor offences, which are tried in the Magistrate's Court and are time-barred within 6 months of the commission of the offence if an application for a summons or warrant (information) or a complaint has not been made by that time. The reason given for this is that a later prosecution would not be pro-

2 This is the term used in the Country Report Greece.

3 The alternatively used expression "limitation period on punishment" (Country Report Greece) falls short, because in some countries, preventive measures are also subject to limitation.

4 The term "limitation period on prosecution" is also used in Austria despite the substantive character of the concept in that legal system; see, e.g., *Schallmoser*, in: Triffterer/Hinterhofer/Rosbaud (eds.), Salzburger Kommentar zum StGB (SbgK) (as of Dec. 2016), Vor §§ 57 ff. para. 16.

portionate in these cases due to the minor nature of the offence.[5] In addition, the fundamental non-limitability of offences is curtailed somewhat by the possibility of invoking the doctrine of abuse of the process in the event of a deliberate delay of the indictment.[6]

It has not been conclusively clarified why this model was not followed in the United States. The basic model of limitation in the United States – non-limitability of the most serious crimes (*capital crimes*) and short statutes of limitations for other crimes – has been modified over time by extending both the time limits and the scope of crimes that are not subject to a statute of limitations. In addition, in the case of the most serious crimes, there is a functional limitation on the statute of limitations in the possibility of claiming a violation of the due process clause in the case of indictment for a crime committed far in the past.[7] A statute of limitations on the enforcement of sentences is also unknown in the United States.

A. Comparative legal analysis of national regulations

First Complex: The statute of limitations in criminal law as a legal institution

I. Legitimacy of the limitation period

1. In general

The doctrinal justification of the statute of limitations causes difficulties in all countries. A bundle of different explanatory approaches is consistently cited for the statute of limitations for prosecution. In addition to preventive considerations, reference is usually made to evidentiary difficulties, with the result that mixed theories of the statute of limitations dominate which combine substantive with procedural arguments. It is striking that fundamental differences in reasoning cannot even be found between those countries in which the statute of limitations is indisputably assigned to substantive[8] or procedural[9] law.

5 Country Report England and Wales, A. First Complex. I. (at the bottom).
6 Country Report England and Wales, B.I.1.
7 Cf. Country Report United States, A. First Complex III.1.
8 Greece, Italy, Austria.
9 Germany, France.

More recent technological developments have made their way into policy discussions surrounding policy discussions surrounding statutes of limitations only with some hesitancy. These include the advances that have been made in forensic technology in securing and assigning evidence that dates back a long time, especially DNA analysis. Individual country reports[10] draw attention to the associated diminishment of the force of arguments surrounding the loss or decay of evidence[11]. However, if no other evidence is available, these techniques do not allow for clear proof of the identity of the perpetrator,[12] and they do not change the fundamental problem that *exculpatory* evidence dwindles with the passage of time. If the person concerned wants to prove that he or she was not at the scene of the crime at the time of the crime, he or she regularly has to rely on the testimony of witnesses. The more time that has passed since the commission of the crime, the more difficult it is to find exculpatory witnesses and the more difficult it is for them to remember the time in question. Even exculpatory personal documents, such as calendar entries, may have been lost in the meantime.[13] Because an accused person's evidentiary position is significantly less favourable than in the case of a prompt criminal prosecution, the danger of wrongful convictions remains.

The revolutionary *influences of the internet* on society also affect the foundations of the statute of limitations. As explained below,[14] in almost all countries the statute of limitations is justified by the fading of the offence from collective memory. The internet, however, does not forget.[15] Events that disappeared from collective memory over time before the establishment of the internet are now permanently retrievable with the help of search engines.[16] It is not necessarily the case that an act that occurred a long time ago will be set aside by public opinion as "past". Current social discussions show that changed social conditions can trigger social indigna-

10 Netherlands, Switzerland, the United States.

11 See below A. First Complex I.3.a.

12 On the possible sources of error in DNA analysis, see *Artkämper*, StV 2017, 553, 555 f.

13 Instructive on the perspective of persons wrongfully prosecuted is the discussion in *Asholt*, Verjährung im Strafrecht, 2016, 94 f.

14 Below A. First Complex I.2.a.

15 One is reminded of the Sisyphean efforts of the ECJ to enforce the "right to be forgotten" grounded in its own case law; ECJ judgment of 13.5.2014, C-131/12 (Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos [AEPD] and Mario Costeja González); judgment of 3.10.2019, C-18/18 (Glawischnig-Piesczek v. Facebook Ireland Limited).

16 See BVerfG NJW 2020, 300, paras. 101 ff. ("Right to be Forgotten I").

tion about the acts at a later date.[17] This raises the question of whether the assumption is still true that wrongdoing loses its significance simply through the passage of time.

So far, only the legislator in the Netherlands has reacted to the abovementioned developments, and has done so by abolishing the statute of limitations on serious crimes. The recent extension of crimes that are not subject to the statute of limitations[18] was justified by the fact that the arguments originally assumed to legitimise the statute of limitations had lost relevance.[19]

2. *Substantive-law approaches*

a) General deterrence

The most frequent reference to an element of general deterrence is the dwindling of social need for punishment.[20] In the course of time, the offence fades from the consciousness of the people, which means that the punitive purpose of general deterrence can no longer be achieved. In French literature, there is even talk of a "right to forget" (*droit à l'oubli*), which others counter with a "duty to remember" (*devoir de mémoire*).[21] One important aspect of general deterrence considerations is the assump-

17 Just think of the "Me too" debate, the discussion about sexual abuse in the Catholic Church which was tolerated for decades, or the shock to the general public when the extent of forced adoptions during the Franco regime in Spain became known.

18 Since the 2012 legislative reform, all crimes punishable by imprisonment of 12 years or more and serious sexual crimes against children are not subject to the statute of limitations in the Netherlands; Country Report Netherlands, A. Second Complex I.

19 Technological advancement, especially through DNA analysis, was also used to justify the abolition of the statute of limitations for murder and manslaughter in Sweden; see Country Report Sweden, Introduction.

20 Germany, France, Greece, Italy, Netherlands, Austria, Poland, Switzerland, Sweden, Spain, Hungary, United States (Model Penal Code, abbreviated MPC).

21 Both seem imprecise because the processes of forgetting and remembering an event are not controllable and therefore cannot be the subject of a right or a duty. See on these issues in the context of data protection *Joerden*, FS Kindhäuser, 2019, 989 (994 ff.). Discussion around a "law" or a "necessity of forgetting", which is also widespread in France, merely reformulates the assertion that the offender is to be protected from prosecution for an act in the distance past, without offering any justification for this notion.

tion that the statute of limitations plays a part in ensuring *certainty and the prevention of legal disputes.*[22]

b) Specific deterrence and rehabilitation

In terms of specific deterrence, the statute of limitations is based on the presumption that the offender has improved since committing the offence.[23] The argument that punishment after a certain period of time fails to achieve its resocialising purpose runs along the same lines.[24] However, a design of the statute of limitations with identifiable specific deterrence features can currently only be ascertained for two countries (Italy, Austria) in the form of an extension of the statute of limitations in the case of recidivism.[25] In the other countries, the rebuttal of the presumption of resocialization has no influence on the statute of limitations, which can be explained by the difficulties of reconciling a recidivism rule with the presumption of innocence[26] and the more complicated determination of the

22 Germany (BGH NStZ-RR 2016, 241; *Bosch*, in: Schönke/Schröder, StGB, 30th ed. 2019, Vor §§ 78 ff. para. 3; *Mitsch*, in: Joecks/Miebach [eds.], Münchener Kommentar zum Strafgesetzbuch [MK-StGB], 4th ed. 2020, § 78 para. 3); Estonia. The MPC and the U.S. Supreme Court also see the task of the statute of limitations as bringing about repose.

23 Germany, Estonia, Greece, Switzerland, Sweden, Spain, United States (MPC). Special preventive considerations, which are not further specified, are also indicated for Poland and Hungary.

24 Austria, Switzerland, Spain. This, in conjunction with the cost argument, is also the decisive justification for the statute of limitations for minor offences in England and Wales. The explanation formerly found in the Netherlands, that fear of prosecution during the period of limitation replaces punishment, is now considered outdated.

25 Country Report Austria, Country Report Italy, each under A. Second Complex II.4. The specific deterrence character of the statute of limitations has a long tradition in Austria. As early as 1803, § 208 d) Austrian CC stipulated as a prerequisite for the statute of limitations that the offender did not commit another crime during the period of limitation.

26 The Austrian regulation, according to which the earlier offence is only time-barred together with the later offence committed during the current limitation period and based on the same harmful tendency, is likely to be compatible with the ECtHR's case law on the presumption of innocence pursuant to Art. 6 para. 2 ECHR, insofar as the determination of the new offence is made by the court competent for this offence. This is because the ECtHR has so far not required a final conviction for the new offence in these cases. Cf. on the entirety of the matter: ECtHR, judgement of 12.11.2015, El Kaada v. Germany, NJW 2016, 3645; judg-

statute of limitations date that it would entail. The Swedish Country Report emphasises the connection of specific deterrence with the question of ensuring that the criminal law remains humane.[27]

c) Diminishing wrongdoing

For Germany, an attempt was made to explain the statute of limitations from a pure substantive-law perspective in the Hegelian tradition by reference to a decreasing relevance of wrongdoing with the passage of time, which would cause the concrete criminal injustice to expire.[28] How this is supposed to work, however, is not explained.[29] Nor is this thesis able to justify the modifications of the statute of limitations provided for in German criminal law.[30]

3. Procedural law approaches

a) Loss of evidence

Another frequently mentioned argument is that the passage of time leads to a loss of evidence, since witnesses remember the events only to a limited extent at best and other evidence may be unobtainable in the meantime. Because of the increased danger of a wrongful conviction, prosecution should be dispensed with in advance. While this is predominantly a supplementary explanation for the statute of limitations, this consideration is in the foreground in the United States, where emphasis is placed on the difficulties for the defence, said to be exacerbated by the adversarial charac-

ment of 3.10.2002, Böhmer v. Germany, para. 67; *Esser*, NStZ 2016, 697 (702 f.). From the perspective of judicial economy, one disadvantage of the provision of § 58 (2) Austrian CC is that prosecution for the earlier offence turns out to be superfluous if the later offence cannot be proven.

27 References to humanity or humanistic aspects can also be found in the Country Reports for the Netherlands, Poland, and Hungary.

28 *Asholt* (fn. 13), 281 f.

29 The "relevance of a concrete wrong for the present" cannot be equated with the concrete wrong; however, so *Asholt* (fn. 13), 281, 300. See also the criticism in *Dietmeier*, GA 2017, 637.

30 For this, *Asholt* (fn. 13), 373 ff., esp. 394, falls back on well-known arguments, resulting in the end in a mixed theory of limitation; see *Bosch*, in: Schönke/Schröder, StGB, Vor §§ 78 ff. para. 3; *Dietmeier*, GA 2017, 639.

ter of proceedings there and thus to affect the fairness of criminal proceedings.

b) Legal certainty

A reason for limitation less frequently mentioned in the country reports is legal certainty. While in France and Greece[31] the avoidance of wrongful convictions is understood as a manifestation of this principle, in Spain it is associated with the principle of legitimate expectations, which raises the question of how legitimate an expectation of not being prosecuted for a criminal offence can be.[32] It is noteworthy that in Hungary, legal certainty has gained importance as an independent justification of the statute of limitations. The term refers to the function of the statute of limitations to protect against an excess of state punitive power through a time constraint on the state's "claim" to prosecution.[33] A similar idea is found in the case law of the Spanish Constitutional Court, which explains the statute of limitations as a "self-restraint of the state in the prosecution of criminal offences".

c) Judicial economy

In addition to the difficulties of proof mentioned above, economic interests are sometimes put forward as another pragmatic justification.[34] In England and Wales, the decisive argument for the statute of limitations for the lightest offences is that the costs of prosecution would be disproportionate to a low public interest. For the Netherlands – against the backdrop of the principle of prosecutorial discretion that applies there – reference is made to the function of the statute of limitations in taking pressure off the public prosecutor's office, which without it would have sole responsibility for deciding on the prosecution of crimes that occurred long ago. In adversarial proceedings in the United States, the statute of limitations

31 In Germany, too, legal certainty is cited, usually without further explanation.
32 See *Asholt* (fn. 13), 105 f.
33 The argument of the Italian literature that the offender has a right not to be subjected to the state's punitive power for too long a period of time is probably in line with this.
34 Germany, Greece, Netherlands, Switzerland, United States.

saves the criminal courts from having to examine each individual case to determine whether a prosecution is still appropriate after a long time.

Even where authorities are under a legal obligation to initiate proceedings, the statute of limitations is partially charged with the task of relieving the criminal justice system. In Greece, for example, one advantage of the statute of limitations is that it allows law enforcement agencies to concentrate on current and more serious offences. In the past, special statutes of limitation have repeatedly been enacted there to reduce the workload of law enforcement agencies.

This shows the connection with the problem of *overlong criminal proceedings*. The shortening of the statute of limitations by the Greek laws was intended to compensate for the lack of possibilities to accelerate proceedings in the Greek CPC at that time. This instrumentalisation of the statute of limitations to deal with an extraneous structural problem can also be seen in Italy, where the statute of limitations is associated with the right to reasonable duration of proceedings.[35] At the same time, the example of Italy makes it clear that while this method may reduce the number of adverse judgments by the ECtHR for violations of Art. 6 para. 1 ECHR, it runs the risk of violating other international obligations.[36]

d) Disciplining law enforcement bodies

Individual country reports refer to a disciplinary function of the statute of limitations vis-à-vis law enforcement agencies.[37] According to the US Supreme Court, the statute of limitations is intended to prompt law enforcement agencies to act quickly in order to establish the facts as accurately as possible with the help of up-to-date evidence. In Germany, the statute of limitations is considered to have the task of "counteracting any inactivity on the part of the authorities at any stage of the proceedings".[38] This understanding of the statute of limitations conflicts with the case law of the ECtHR on Art. 3 ECHR, according to which it is fundamentally incompat-

35 This is also true of some of the literature in Spain.

36 On the obligations to prosecute arising from the ECHR, see *Ambos*, Archiv des Völkerrechts 1999, 318 f.; *Tulkens*, JICJ 2011, 577, 582 ff. On obligations arising from European Union law, see ECJ (GC), judgment of 8.9.2015, C-105/14 (Taricco and others); on this, *Hochmayr*, HRRS 2016, 239 (240 f.).

37 Germany, France, Greece, procedural views in Spain, United States.

38 BGH NStZ 2016, 277 (278); BGH (1st Criminal Senate), decision of 13.11.2019, Az 1 StR 58/19, para. 23; *Bosch*, in: Schönke/Schröder, StGB, Vor §§ 78 ff. para. 3.

ible with this guarantee that criminal proceedings for violation of the prohibition of torture become time-barred as a result of judicial delays.[39] Nor is it convincing in systems where prosecutors are obligated to investigate to understand the statute of limitations as a check on idle prosecutors.[40] It cannot fulfil this function for the very reason that it relieves the prosecutor of a sometimes burdensome criminal procedure. The task of keeping authorities in line should be reserved for disciplinary measures against inactive law enforcement agencies.

4. Summary

In summary, the statute of limitations cannot be attributed to a single doctrinal justification. The most convincing arguments turn out to be *legal certainty*[41] in combination with the *loss of evidence* and *interests of judicial economy*: If one does not want to leave it to the prosecutor's discretion whether to prosecute crimes committed long ago, as in the traditional common law model, the legislature must prescribe how long which crimes may be prosecuted. The time limitation of prosecutorial power ensures that the perpetrators of comparable offences are *treated equally*, and takes into account the increasing difficulties of proof, especially for the defence, and judicial economic interests.

II. The legal character of the statute of limitations

1. In general

The question of the classification of the statute of limitations into substantive or procedural law is not only of theoretical significance. In some countries, further consequences are tied to the rule's legal nature, especially for the validity of the prohibition of retroactivity.[42] Classification along these lines was particularly controversial for the judicial reckoning with the in-

39 ECtHR, judgment of 5.6.2007, Yesil and Sevim v. Turkey, para. 38. In some cases, the ECtHR even calls for these crimes not to be time-barred if they were committed by state actors; ECtHR, judgment of 17.10.2006, Okkali v. Turkey, para. 76; ECtHR, judgment of 2.11.2004, Abdülsamet Yaman v. Turkey, para. 55.

40 Cf. *Asholt* (fn. 13), 103 f.

41 In the sense of a time limitation of punitive power by the legislator, see below.

42 Below, A. First Complex III.3.b.

justice of the National Socialist era and the East German regime in Germany.[43]

It is striking that in the six countries where the classification is completely or largely undisputed,[44] the legal text makes explicit reference to the substantive or procedural character of the limitation period. However, it would be premature to conclude the legal nature from unambiguous-seeming wording, as the example of other countries shows.[45]

2. *Classifying limitation periods in the countries studied*

a) Substantive law character

In five countries, the predominant opinion is that the statute of limitations has a substantive effect.[46] The general view in Italy and Austria is that it belongs to substantive law. Italy has successfully defended the classification before the ECJ.[47] In Austria, the statute of limitations constitutes a personal ground for annulment, the occurrence of which removes the punishability – but not the constituent elements of the offence, illegality, and guilt – in retrospect. In Greece and Hungary, too, the statute of limitations is considered a ground for setting aside a sentence. Furthermore, in Poland it is predominantly assumed that the statute of limitations extinguishes the punishability of the offence. Dogmatically, a parallel can be drawn between personal grounds for annulment and exclusion of punishment, which can be grouped under the term "non-punishment clause".

However, *inconsistencies* can be found in all countries with a substantive understanding of the statute of limitations. In Greece, special laws have been enacted several times which declared crimes of minor or medium severity to be time-barred under the condition that the person concerned

43 See Country Report Germany.

44 Germany, France, Greece, Italy, Austria, Poland.

45 Netherlands: The legal formulation "The right to prosecute is time-barred" speaks for a procedural character, but the classification is controversial – also for historical reasons. Switzerland: The law indicates a procedural effect ("The right to prosecute is barred ..."), the classification is unclear. Spain: Despite the substantive wording ("Criminal liability expires ..."), case law and some commentators assume a mixed character.

46 Greece, Italy, Austria, Poland, Hungary.

47 ECJ (GC), judgment of 8.9.2015, C-105/14 (Taricco et al.); ECJ (GC), judgment of 5.12.2017, C-42/17 (M.A.S. and M.B.).

does not commit a new intentional offence within a "probationary period" for which he is sentenced to a prison term of a certain minimum duration. If the negative condition occurred, the statute of limitations was not invoked and prosecution became possible again.[48] In addition, in Greece and Austria, because of the early start of the statute of limitations, the offence may be time-barred before the effect of the commission of the offence and thus criminal liability have occurred.[49] In Austria, the case law circumvents the invokation of the prohibition of retroactivity resulting from limitation being classified as a ground for setting aside a penalty, and treats the statute of limitations in the matter as an obstacle to prosecution. In Italy, the statute of limitations is treated as a procedural obstacle. There, the person concerned can also waive the statute of limitations, which can result in his conviction. According to Art. 101 § 2 Polish CC, the statute of limitations for private prosecution offences ends 1 year after the aggrieved party became aware of the person of the perpetrator (but no later than 3 years after the commission of the offence). If there are several aggrieved parties who learn of the perpetrator at different points in time, it would have to be assumed that there is only a partial extinguishing of criminal liability. In Hungary and Poland, the statute of limitations was retroactively extended for crimes committed by the Communist systems that were already time-barred.[50] Ultimately, neither a "conditional annulment of punishment" (Greece) nor an annulment of punishment only against a certain victim (private prosecution offences in Poland) nor an annulment of punishment before the onset of criminal liability (Greece, Austria) can be convincingly dogmatically constructed.[51] Nor can the lapse of punishability be left to the disposition of the individual, as in Italy, or punishability be revived after impunity has occurred (Hungary, Poland). The doubts about the classification raised by these inconsistencies are reinforced by the fact that ultimately, no convincing substantive law argument for the statute of limitations can be given.[52]

48 Country Report Greece, A. First Complex VI.

49 Below, A. Second Complex II.2.a.aa.

50 For more details see at fn. 68.

51 At most, the non-expiry of the limitation period could be interpreted as an objective condition of punishability. However, objective conditions of punishability are problematic in view of the principle of culpability; *Eisele*, in: Schönke/Schröder, StGB, Vor §§ 13 ff. para. 125.

52 Cf. above at fn. 14, 25 and 28.

b) Procedural legal character

Two countries recognise the effect of the statute of limitations in procedural law:[53] In Germany, case law and the general opinion assume that the statute of limitations constitutes a procedural obstacle. It is not surprising that in France, which is the only country to regulate the statute of limitations in the Code of Criminal Procedure, the statute of limitations for prosecution is considered an obstacle to proceedings. However, it appears to run contrary to this system that, according to French case law, the offence loses its criminal character as a result of the statute of limitations.[54]

c) Mixed legal character

A mixed legal nature of the statute of limitations is the position in the case law and parts of the literature in Estonia and Spain. While the Estonian literature also takes a procedural view, parts of the Spanish literature assume a purely substantive character. In Sweden, the statute of limitations is considered to have a predominantly substantive character with procedural features.

d) Unresolved legal nature

In the Netherlands, there is a conflict between a substantive and a procedural view; the classification as substantive is mainly based on the fact that the statute of limitations was transferred from the Code of Criminal Procedure to the Criminal Code in 1886. The classification is also disputed in Switzerland. The Swiss Federal Supreme Court assumes a procedural impediment, the majority of the literature assumes a substantive ground for annulment of the sentence; in isolated cases, a mixed nature is assumed. Since the law expressly provides that in the event of a subsequent change in the statute of limitations, the law that is more favourable to the offender is to be applied, no practical significance is attached to the dispute.

53 See also the classification of the statute of limitations for the least severe offences as procedural in England and Wales.

54 For more details see below A. Second Complex III.1.

3. Changes in the conception of the legal character

In the United States, it was originally assumed that the statute of limitations precluded jurisdiction. Even today, in some states, it is up to the prosecution to prove that the statute of limitations has probably not yet run. In contrast, more and more states understand the statute of limitations as a protective device for the defendant to waive. The statute of limitations is considered a non-exculpatory defence that must be raised by the defence. This allows a plea bargain to obtain a conviction for a lesser offence that is actually time-barred and whose elements are included in the original crime charged.[55] Some states exclude the statute of limitations defence in such cases, regardless of any waiver by the defendant. The transformation of the statute of limitations from an institution that excludes jurisdiction to a dispositive instrument is predominantly due to procedural developments and is an example of how the design of criminal procedure can influence a legal doctrine.

A change in the view of the legal nature of the statute of limitations is also visible in other countries. Whereas in Germany the statute of limitations used to be classified as a ground for setting aside a sentence, since a change in the ruling of the Reichsgericht it has been regarded as an obstacle to proceedings.[56] Conversely, in Hungary, the statute of limitations was considered more of a procedural character due to its classification at the time under the heading "Grounds precluding the opening of criminal proceedings and the execution of the sentence". Since it was first stated in the Hungarian Criminal Code of 1950 that "criminal liability ... is annulled", the assumption has shifted in favour of a substantive legal nature of the statute of limitations.[57]

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55 Thus unlike in Italy or Estonia, for example, it is not a matter of waiving the statute of limitations in order to achieve an acquittal; see below A. Second Complex III.1.c.

56 *Saliger*, in: Kindhäuser/Neumann/Paeffgen (eds.), Nomos Kommentar zum StGB (NK-StGB), 5th ed. 2017, Vor §§ 78 ff. For evidence on the earlier classification as grounds for setting aside a sentence, see *Asholt* (fn. 13), 325 ff.

57 The change in the understanding of the nature of law is also emphasised in Sweden.

4. Applicability of the burden of proof

The principle of *in dubio pro reo* is closely related to the presumption of innocence. There is no evidence in the country reports for a hypothesis that the applicability of the principle in case of doubts about the facts giving rise to the statute of limitations suggests a substantive character of the statute of limitations. In all the legal systems with statute of limitations provisions examined,[58] the occurrence of the statute of limitations is to be assumed in the case of insurmountable doubts of a factual nature.[59] This can probably be explained by the fact that the burden of proof lies this way for other procedural conditions of criminal liability, such as the non-existence of an obstacle to prosecution,[60] or requires that "procedural conditions … be met with certainty", regardless of whether they have a beneficial or detrimental effect on the accused.[61]

5. Summary

In summary, the picture is mixed with regard to the legal nature of limitation. In five countries, a substantive conception dominates, in two countries a procedural conception; in three countries a mixed legal nature is assumed. In the remaining two countries, the legal nature is disputed. Since the divergences do not affect the handling of unresolvable doubts about the facts giving rise to the statute of limitations, their significance is decided by their impact on the prohibition of retroactivity.[62]

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58 With the exception of England and Wales.

59 The comments on this can be found in the Country Reports under A. First Complex III, in the Country Report Italy under A. First Complex II. This was left open for Spain, as there was no case law on this, and for the Netherlands. The special features of the legal situation in the United States are reflected in the Country Report United States, A. First Complex III.3.

60 Switzerland; cf. for Austria, where, however, a ground for setting aside a sentence is assumed, *Schmoller*, in: Fuchs/Ratz (eds.), Wiener Kommentar zur StPO (as at 1.11.2012), § 14 para. 50.

61 Cf. for German law *Rieß*, in: Löwe/Rosenberg, Kommentar zur StPO, 25th ed. 2001, § 206a para. 30; *Meyer-Goßner*, FS Jung, 2007, 543 (543 f., 551).

62 Below, A. First Complex III.3.

III. Constitutional limitations

1. Statutes of limitations in constitutional law

In none of the legal systems examined is the statute of limitations for criminal offences guaranteed by the Constitution. In Italy, the statute of limitations is related to the constitutional *right to a reasonable length of proceedings*.[63] The concrete consequences of this for the statute of limitations remain unclear. Since the right to reasonable duration of proceedings only takes effect after criminal proceedings have been initiated, the most that could directly be derived from it is the necessity of limiting the duration of criminal proceedings through the statute of limitations. In Hungary, the statute of limitations is increasingly justified by reference to the need for *legal certainty*, without recognising a constitutionally guaranteed individual right to limitation. In the US, the inadmissibility of a criminal prosecution can arise from the Due Process Clause, taken from the 5th and 14th Amendments to the US Constitution. To successfully invoke the clause, the defendant must show that the prosecution was delayed for tactical advantage and that he or she suffered substantial and continuing prejudice as a result. If the offence is time-barred, an invocation of the aforementioned clause has little chance of success, because case law attributes to the function of the statute of limitations to protect against indictment for offences dating back a long time.

The constitutional systems of two countries mention the criminal statute of limitations in the form of *an exclusion or an extension of the statute of limitations.* In Poland, a constitutional provision standardises the non-limitability of war crimes and crimes against humanity (including genocide). The Federal Constitution of Switzerland stipulates that sexual or pornographic offences committed against children before puberty and the sentences imposed for these offences are not subject to the statute of limitations. The reverse conclusion, that if the statute of limitations for specific offences is standardised in a constitution, this presupposes a constitutionally justified statute of limitations, is, as far as can be seen, only drawn in isolated cases.[64] Furthermore, Poland's constitution mandates a suspension of the statute of limitations for criminal offences committed during the communist era by or on behalf of holders of a public office, as long as prosecution for political reasons was not possible.

63 Country Report Italy, A. First Complex II.
64 See the Country Report Poland.

2. *(No) right to limitation*

An individual claim for limitation[65] is not recognised in any of the countries examined. The limited information available suggests that such a claim has not been discussed in most countries. It is true that a "right to limitation" is mentioned in parts of the Polish literature. One author apparently inferred such a right by implication from the cited provisions of the Polish Constitution. Others infer a right to limitation from the principle of the rule of law. However, this is not understood to mean a concrete right of the individual to limitation, but rather the validity of the prohibition of retroactivity. In the Hungarian Country Report, under the heading "Limitation as an individual right", there is discussion of whether the offender has a right not to be punished after the statute of limitations has run. In this respect, the question arises as to the scope of the prohibition of retroactivity. This addresses the most discussed question at the nexus of constitutional law and limitation periods, that of whether the prohibition of retroactivity applies.

3. *Subsequent extension of the limitation period*

a) If the limitation period has expired

There is agreement that a subsequent statutory extension of an already expired limitation period violates the *prohibition of retroactivity*. A prohibition on retroactive extension of a statute of limitations that has already run is also inferred from the requirement of legal certainty.[66] In Germany, the Federal Constitutional Court (BVerfG) had to rule in 1969 on the retroactive suspension of the statute of limitations for Nazi crimes. Due to the procedural nature of the statute of limitations, the court did not consider the principle *nullum crimen, nulla poena sine lege* to be applicable. However, it classified the retroactive extension of the statute of limitations as compatible with the principle of legal certainty and thus the principle of the rule of law only because acts that were already time-barred were excluded.[67]

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65 See *Esser*, in this volume, and the points made by *Lagodny*, FS M. Fischer, 2010, 121 (125 ff.) on a "right to respite from prosecution".

66 Germany, Hungary.

67 BVerfGE 25, 269 (285, 290 f.).

In two countries, on the other hand, constitutional *exceptions* are accepted in connection with coming to terms with systemic injustice under prior regimes.[68] The Hungarian constitution of 2012 stipulates that serious criminal offences during the communist dictatorship that were not prosecuted for political reasons are not to be considered time-barred, and the statute of limitations is extended retroactively.[69] In Poland, the constitutional revival of criminal liability for crimes committed by communist officials who had not been prosecuted for political reasons is considered a permissible exception to the prohibition of retroactivity for reasons of justice. In addition to fundamental questions, such as the compatibility with Art. 7 ECHR,[70] it remains unresolved whether a retroactive revival of criminal liability can be dogmatically reconciled with the substantive law notion of limitation that otherwise prevails in Hungary and Poland.[71]

b) In the case of an ongoing limitation period

The positions on the permissibility of a subsequent extension of an ongoing limitation period are twofold:

A majority of legal systems *permit* such extensions.[72] There is only a limited connection with the legal character of the limitation period. As expected, in the two countries with a decidedly procedural view,[73] a retroactive extension of the limitation period is considered permissible. For those countries with a clearly substantive understanding of the statute of limitations,[74] it would be expected that a retroactive postponement of the substantive exemption from punishment would be rejected as incompatible with the *nullum crimen* principle. However, this does not apply in Austria.

68 For another exception (not provided for in constitutional law), see the federal legal system of the United States, where the discovery of a DNA trace triggers a new statute of limitations for an offence that is already time-barred; Country Report United States, A. First Complex III.4.

69 Country Report Hungary, A. Second Complex II.6.

70 Art. 7 para. 2 ECHR only exempts crimes punishable under international law from the prohibition of retroactivity; see *Lohse/Jakobs*, in: Karlsruher Kommentar zur StPO, 8th ed. 2019, Art. 7 ECHR para. 2; *Sinner*, in: Karpenstein/Mayer (eds.), ECHR, 2nd ed. 2015, Art. 7 paras. 26 f.

71 Above A. First Complex II.2.a.

72 Germany, France, Netherlands, Austria, Sweden, Switzerland, Poland, United States.

73 Germany, France.

74 Italy, Austria.

Although the above-mentioned principle is of constitutional rank, according to case law and majority academic opinion, an explicit statutory mandate of retroactivity is permissible. The only controversial cases are those in which there is no express statutory provision. According to the prevailing view in the literature, the extension does not have retroactive effect due to the *lex mitior* principle and the classification of the statute of limitations as a ground for annulment of culpability. The Supreme Court, on the other hand, has affirmed a retroactive effect on the grounds that the statutes of limitation are merely "potential norms extinguishing punishability". This view is identified in the Country Report as a fundamental problem of Austrian limitations law. In Poland, too, regardless of the dominant substantive concept of the statute of limitations, subsequently amended statutes of limitations are considered applicable even if they are less favourable to the offender.

In Greece and Italy, on the other hand, the general *application of the prohibition of retroactivity* is based on the substantive character of the statute of limitations. This is the undisputed view in both countries and was confirmed by the Italian Constitutional Court in the wake of the *Taricco* case.[75] However, Italian law exempts crimes under international law from the prohibition.[76] The Estonian State Court, which assumes a mixed legal character of the statute of limitations, also considers the extension of a statute of limitations that is still running to be incompatible with the prohibition of retroactivity; in the literature there are some different views. In Spain, a fundamental prohibition of retroactivity of subsequent amendments to the statute of limitations unfavourable to the offender is probably the general view. In Switzerland, where the legal nature of the statute of limitations is unclear, a transitional provision in the Swiss Criminal Code imposes a general prohibition of retroactivity of statutes of limitations that are less favourable to the offender, from which the legislature may deviate. In Sweden, the constitutional prohibition of retroactivity does not extend to the statute of limitations. However, a prohibition of retroactivity provided for in the transitional provisions for the new statute of limitations in the Swedish Criminal Code has been interpreted broadly to apply to later amendments to the statute of limitations as well unless retroactivity is explicitly set out in the statute. In 1992, the Hungarian Constitutional Court ruled that a retroactive extension of an ongoing limitation period violated legal certainty and was therefore unconstitutional.

75 ECJ (GC), judgment of 8.9.2015, C-105/14 (Taricco and others).
76 Country Report Italy, A. Second Complex I.

4. Summary

The following conclusions can be drawn from the above: Since a clear connection between the assumed legal character of the limitation doctrine in the given legal system and the validity of the prohibition of retroactivity cannot be established, one should attach only secondary importance to the dogmatic classification of the statute of limitations, which is even subject in some countries to change. The admissibility of a retroactive extension of a statute of limitations that is still running can be left to the respective legal system, because EU fundamental rights, which in the current interpretation of the European courts allow for such a retroactive extension,[77] only set a minimum standard from which the EU Member States may deviate in the form of a higher standard.[78] The different conceptions of the statute of limitations do not constitute an insurmountable obstacle to legal harmonisation.

Second Complex: Statute of limitations for prosecution

I. Non-limitable criminal offences

1. In general

In all the legal systems examined, there are offences whose prosecution cannot be time-barred. In England and Wales, non-limitability is the rule;[79] in the other countries it is the exception. However, there is a trend towards extending the statute of limitations. In the Netherlands, for example, the statute of limitations has been greatly extended over the last two decades. In Sweden, non-limitability for serious crimes, which had been removed in 1975, was reintroduced in 2010, and the range of crimes that are not subject to a statute of limitations has been continuously expanded since then.

In terms of regulation, either all offences punishable by a certain penalty are declared non-limitable, or the respective offences are listed individu-

77 ECJ (GC), judgment of 8.9.2015, C-105/14 (Taricco and others), para. 56; ECtHR, judgement of 22.6.2000, Coeme and Others v. Belgium, para. 149.
78 See ECJ (GC), judgment of 5.12.2017, C-42/17 (M.A.S. and M.B.).
79 Two states in the United States also do not recognise a statute of limitations.

ally.[80] In some US states, all serious crimes (felonies) are considered non-limitable.

Five countries exercise *particular restraint* in this area. In France and Greece, only core crimes under international law are non-limitable. German, Spanish and Polish criminal law also rarely make use of non-limitability. In addition to crimes under international law, only particularly reprehensible intentional homicide, which is classified as murder, is exempt from the statute of limitations in Germany, and only terrorism resulting in death is exempt from the statute of limitations in Spain[81]. In Poland, in addition to crimes under international law, the statute of limitations does not apply to certain intentional crimes against life and limb or freedom committed by a holder of a public office in connection with the performance of his official duties. The regulation, a result of the regime change in Poland in the 1990s, is intended to prevent the impunity of public officials in situations where the offences were committed with the approval of state authority.

In the other countries, the range of crimes that are not subject to the statute of limitations is wider. In Sweden, in addition to crimes under international law, murder and manslaughter, terrorist offences, the (serious) rape of a child or adolescent and genital mutilation of a person under the age of 18 are now non-limitable. In some jurisdictions, all offences *punishable by life imprisonment* are exempt from limitation.[82] This seems to be based on the idea that crimes for which one can in principle be punished for life should also be prosecutable for life. In Italy, this conclusively describes the offences that are not subject to the statute of limitations. The offences covered include, for example, intentional homicide in the presence of certain aggravating circumstances, deprivation of liberty for the purpose of extortion resulting in death, and certain offences directed against the Italian state. In Estonia, for example, murder, aggravated assault against the state, including terrorism crimes, and certain narcotics offences are among the offences punishable by life imprisonment and thus not subject to a statute of limitations. It is worth mentioning that in Austria, the possibility of imposing life imprisonment is limited in time in order to take into account the decreasing need for punishment with the passage of time. If 20 years have passed since the start of the statute of limita-

80 A combination of both methods is found in Art. 70 para. 2 Dutch CC and § 26 para. 3 Hungarian CC.

81 Some other countries also explicitly exclude the statute of limitations for certain terrorism offences: Sweden, Switzerland, US federal law, New York.

82 Estonia, Italy, Austria, Hungary, United States (California).

tions, only a custodial sentence of 10 to 20 years can be imposed instead of a life sentence.

Since a 2005 amendment to the Dutch Criminal Code, crimes punishable by life imprisonment are not subject to the statute of limitations. The lower bound for non-limitability was lowered to *12 years' imprisonment* in 2012, so that since then all crimes punishable by this or a higher prison sentence have been considered non-limitable. In addition to murder and manslaughter, this also applies to killing by request or membership in a terrorist organisation. The extension of the limitation periods was justified by new social and technical developments that affected the legitimacy of the statute of limitations[83].

2. *The statute of limitations for selected offences*

a) Crimes under international law

There is a large consensus that crimes under international law are not subject to the statute of limitations. This can be explained by the fact that, with the exception of the United States, all the countries examined are parties to the Rome Statute, which stipulates that the crimes mentioned are not subject to a statute of limitations.[84] Non-limitable offences from this category regularly include all four core crimes under international law, i.e. genocide, crimes against humanity, war crimes, and the crime of aggression.[85] If the crime of aggression defined in Kampala in 2010[86] does not yet belong to the crimes of international law that are not subject to a statute of limitations in some countries,[87] this is probably due to the fact that this

83 See above, A. First Complex I.1.

84 Art. 29 Rome Statute of the International Criminal Court, Rom, 17.7.1998, UNTS, vol. 2187, nr. 38544, p. 3 (Rome Statute).

85 Genocide is included in the crimes against humanity wherever it is not explicitly mentioned in the wording of the statute. The reasons for this are historical: the crime of genocide was still part of crimes against humanity at the time of the Nuremberg Tribunal and only emerged as a separate crime of international law at a later stage, in particular through the Genocide Convention. In the US, federal law only declares genocide and war crimes to be non-limitable. The other core crimes under international law are not provided for in federal law.

86 Kampala Resolution RC/Res. 6 of 11.6.2010.

87 France, Greece, Sweden, Switzerland, Spain, Hungary, United States.

amendment to the Rome Statute has not (yet) been ratified[88] or implemented in the countries concerned.

In deviation from the above, war crimes in France are subject to a 30-year statute of limitations. Although this differentiation could be justified by the lesser severity of war crimes compared to the other core crimes under international law,[89] it is not compatible with Art. 29 Rome Statute, according to which all core crimes under international law are not subject to a statute of limitations. Therefore, there is a risk that in individual cases, France as a State Party may not be able to fulfil the prosecution obligations it assumed by acceding to the Rome Statute. This problem may also arise for Italy, because under Italian law, crimes under international law are only non-limitable if they are punishable by life imprisonment.

b) Intentional homicide

In terms of numbers, the countries that exclude the statute of limitations for at least qualified intentional homicide ("murder") predominate.[90] In Austria, any non-privileged intentional killing is punishable as murder with up to life imprisonment and therefore not subject to the statute of limitations. In Sweden, too, the statute of limitations extends to so-called manslaughter. In the Netherlands, as mentioned above, the exclusion of the statute of limitations even covers killing by request. In France, Greece, Poland,[91] Switzerland, and Spain, on the other hand, all intentional homicides are subject to the statute of limitations. In France, a functional equivalent to the non-limitation can be found in the form of a delayed start of the statute of limitations for "hidden" offences if the murder itself remains undiscovered.[92]

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88 France, Greece, Sweden and Hungary had not ratified the amendments as of 11.2.2021; https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en#1. The US is not a party to the Rome Statute.

89 The strongest argument is that the ground for exemption from punishment of acting on superior orders according to Art. 33 Rome Statute only applies to war crimes.

90 Germany, Estonia, Italy, Netherlands, Sweden, Austria, Hungary, almost all states of the United States (also MPC).

91 With the exception of killings committed by a public official in connection with the performance of his official duties; see above after fn. 81

92 For more information on hidden offences, see Country Report France, A. Second Complex II.2.

c) Sexual offences against minors

A more recent phenomenon is the non-limitability of certain sexual offences directed against victims who have not yet reached legal adulthood. The beginning of this development can be located in Switzerland and can be traced back to the specificity of direct democracy. Following the adoption of the popular initiative "Für die Unverjährbarkeit pornografischer Straftaten an Kindern" (For non-limitability of pornographic offences against children) on 30.11.2008, the Federal Constitution and the Swiss CC stipulated that certain offences against the sexual self-determination of children under the age of 12 cannot be subject to a statute of limitations. The amendments to the law came into force in 2013. In the Netherlands and Hungary, since amendments to the penal codes in 2012 and 2014 respectively, certain sexual offences against minors up to 18 years of age are also not subject to the statute of limitations.[93] In Sweden, the (aggravated) rape of a child or adolescent was recently declared non-limitable.[94] A corresponding reform in Poland has failed for the time being.[95]

3. De facto non-limitability

Cases in which, for practical reasons, the statute of limitations does not apply or only applies after a very long period of time (de facto non-limitability) are only perceived as a problem in a few countries. In Germany, the long limitation period for negligence offences whose effect only occurs decades after the offence was committed is a practically relevant issue. Due to their wording and the assumption that the statute of limitations only

93 In Hungary, it is additionally required that the sexual offence is punishable by a maximum term of imprisonment of more than 5 years. See also the statute of limitations for serious sexual offences against children in the United States.

94 In addition, there is no longer a statute of limitations for genital mutilation of a person under the age of 18.

95 Certain sexual offences against minors were to be declared non-limitable, but the reforming legislation was declared unconstitutional on formal grounds; Constitutional Court, ruling of 14.7. 2020, Monitor Polski 2020, item 647. The question of limitability was also discussed in France, for example. It should be added that the limitability (or non-limitability) can be a matter of the sentence able to be imposed: In Austria, for example, the (severe) sexual abuse of minors resulting in death is punishable by life imprisonment (§ 206 para. 3, § 207 para. 3 Austrian CC) and is therefore, like certain other offences, not subject to a statute of limitations.

begins to run with the material termination of the offence, some exceptional cases may result in offences only becoming time-barred after a very long period of time. Certain offences of a predominantly sexual nature may be exempt from limitation as a practical matter because of the postponement of the start of limitation period until the victim reaches age 30.[96] The latter problem also arises in Austria.[97]

In Greece, certain ongoing offences, especially in the area of money laundering, become time-barred only after a long period of time. The Country Report describes how the punishability of money laundering is instrumentalised to compensate for the statute of limitations of corruption offences. The criminalisation of offences of omission can also be used to postpone the commencement of the statute of limitations for a long time.

In Italy, the problem arises when serious crimes with long statutes of limitations are committed in the form of an "organisational crime", which doubles the statute of limitations to at least 30 years. If a procedural measure is taken that triggers a restart of the statute of limitations, a time bar under the statute of limitations is effectively no longer reachable.

In French law, the start of the limitation period for "hidden" (*disimulées*) and "concealed" (*occultes)* offences is postponed until the discovery of the offence. Academic commentary has criticized the judicial development of this delay[98] as *de facto* non-limitability. The legislature has since adopted the rule into law and at the same time set a limit on the *de facto* non-limitability of 30 years for felonies and 12 years for misdemeanours from the commission of the offence.[99] Some states in the United States also allow the statute of limitations to begin for certain offences only after the offence is discovered,[100] which can be tantamount to de facto non-limitation.

4. Conclusions

For the purposes of legal harmonisation, it should be noted that in each of the three countries with fundamental or far-reaching exemption from limi-

96 See BT-Drs. 18/2601, p. 23: "Serious sexual offences ... can therefore become time-barred at the earliest when the victim reaches the age of 50, although this period ... can even be extended until the victim reaches the age of 70."

97 The statute of limitations begins to run when the victim reaches the age of 28 and concerns certain offences against persons under the age of 18.

98 For more details see below A. Second Complex II.2.a.dd.

99 Country Report France, A. Second Complex II.2.

100 In some cases, the possibility to do so is sufficient.

tation, prosecutors have wide discretion about whether or not to bring cases.[101] A waiver of a fundamental duty to prosecute in the case of (far-reaching) non-limitability should be indispensable, if only because of limited capacities for prosecution. Since an introduction of such discretion would mean a fundamental change of system for most of the countries examined,[102] itself associated with considerable disadvantages, such a solution is not recommended from a comparative law perspective.

However, the non-limitability of crimes under international law appears to be indispensable, not only because of international requirements, but also because a functioning judicial system typically has to be rebuilt on a large scale after the commission of crimes under international law, and the perpetrator generation may lack the will to prosecute.

The link to a specific sentencing threshold, such as life imprisonment, is not recommended because sentencing varies widely among states, and not all EU Member States even make provision for life imprisonment.[103]

In view of the high value of life as a legal right, there is some justification for an argument that the intentional extinguishing of a human life should never be subject to the statute of limitations. Evidentiary difficulties, especially for the defence where it is no longer possible to reconstruct exculpatory facts from the distant past in a way that is reliable in court,[104] are not a problem specific to non-limitability: they also occur with long limitation periods of 20 or 30 years.

101 England and Wales, Netherlands, United States.

102 Apart from the countries mentioned in fn. 101, France and the legal systems of Belgium, Luxembourg and Denmark, which are not examined here, are the only EU countries that provide for such unfettered prosecutorial discretion. In these countries, however, the victim has far-reaching possibilities of initiating proceedings; see *Went*, Das Opportunitätsprinzip im niederländischen und schweizerischen Strafverfahren, 2012, 14 ff., 23.

103 The Portuguese Constitution prohibits the threat of life imprisonment; see *Caeiro/Costa*, in: Satzger (ed.), Harmonisation of Criminal Sanctions in the European Union, 2020, 379, 392.

104 For more details, see fn. 13 above.

II. The limitation period

1. Parameters for the length of the limitation period

a) Starting points

A common feature of the legal systems examined here is that the length of the limitation period depends on the *seriousness of the offence* as expressed by the sentencing range attached to it in the criminal code.[105] Half of the countries link the length of the limitation period to the maximum sentence.[106] The other half link the limitation period to the country-specific classification of offences into felonies, misdemeanours and the like.[107] Since this classification is based on the maximum sentence, the length of the period in these countries is also ultimately based on the maximum penalty.[108] In addition, certain offences that are considered particularly serious or that are typically only discovered at a late stage are occasionally assigned their own limitation periods.[109] The orientation of the length of the period to the seriousness of the offence is not itself a compelling reason for a substantive law justification of the statute of limitations. A procedural argument could just as well be made that in the case of minor offences, the state's interest in prosecution diminishes more quickly than in the case of more serious offences.

A special case is the statute of limitations for *private prosecution offences* in Poland, which ends one year after the aggrieved party becomes aware of the person of the perpetrator, but no later than three years after the commission of the offence. The purpose of this time limit provision, which deviates from the general rule, is to induce the private prosecutor to act

105 For deviations in the case of concurrent offences, see below under f.

106 Germany, Italy, Austria, Switzerland, Sweden, Spain, Hungary.

107 Estonia, France, Greece (where in the case of crimes the maximum sentence is also relevant), Poland, the Netherlands, New York.

108 This should also apply to the Netherlands, where the classification into felonies and misdemeanours refers to the list of offences in Book 2 and Book 3 of the Dutch CC. Misdemeanours are characterised by the fact that they are not subject to imprisonment; the maximum sentence is protective custody of a maximum of one year or a fine.

109 This is the case, for example, in France under Art. 7 para. 2 French CPC, in the United States (for more details, see fn. 121), or in Hungary for corruption offences pursuant to § 26 para. 2 Hungarian CC.

quickly, though it could be better achieved on a more solid doctrinal basis[110] through procedural provisions.

b) Gradations

In two legal systems, the length of the limitation period corresponds to the length of the maximum sentence, subject to a minimum time provision.[111] The number of gradations of the limitation periods is thus calculated according to the number of maximum sentences set out in the Penal Code minus the upper sentencing limits that fall below the minimum limitation period. In principle, this results in eleven bands for Italy[112] and six bands for Hungary.

In the other countries, a specific limitation period is assigned to a range of maximum sentences.[113] Even within individual legal systems, it is sometimes difficult to identify a logical pattern, and a comparative-law analysis can only identify broad tendencies: in the area of lower sentences, the statute of limitations is often a multiple, perhaps two or three times, the maximum sentences. Where longer sentences are in play, the limitation periods are often only half or one third higher or they correspond to the maximum sentence. However, it also happens with the shorter limitation periods that the most severe maximum penalty recorded corresponds to the length of the limitation period.[114] And in the area of higher penalties, there are several examples of limitation periods that are lower than the cor-

110 See above, A. First Complex II.2.a.

111 The minimum limitation period in Italy is 6 years for crimes and 4 years for infractions. In Hungary, the general minimum limitation period is 5 years.

112 In the case of infractions (*contravvenzioni*), the minimum limitation period of 4 years applies. For crimes (*delitti*), the upper penalty limits from the minimum limitation period are: 6, 7, 8, 10, 10.5, 12, 15, 20, 21, 24 years. This basically results in eleven limitation periods. It should be noted that the limitation periods can be doubled, for example if serious crimes are committed as "organisational crimes". Also, the limit of 24 years is not binding for temporary custodial sentences, so that a higher upper limit of 30 years is found in isolated cases (e.g., Art. 280 para. 4 Italian CC); cf. *Foffani/Vigano*, in: Satzger (ed.), Harmonisation of Criminal Sanctions in the European Union, 2020, 321.

113 In part, as mentioned, this is done indirectly by linking it to the classification of offences.

114 In Germany and Austria, for example, a statute of limitations of 5 years is assigned to sentences with a maximum penalty of 2, 3, and 5 years imprisonment.

responding maximum sentence.[115] There is no support for a transnational principle that prosecution should be feasible for as long as an offender would have to serve in prison.

For offences punishable by *life imprisonment*, limitation periods of between 20 and 30 years are typical[116] – if there is indeed any limitation period at all.[117]

The most common system is *five separate bands* of limitation periods.[118] If one disregards the special case of Italy with at least 11 limitation periods, France has the greatest differentiation with seven limitation periods. This results from the fact that a standard limitation period is set for felonies, misdemeanours, and infractions,[119] and a higher limitation period is set for certain serious crimes and misdemeanours.[120] Switzerland and the Netherlands use four gradations. Three limitation periods exist in Greece and New York. Estonian criminal law makes do with two limitation periods: 10 years for first-degree crimes and 5 years for second-degree crimes[121].

In the US, the traditional system of statutes of limitations provides for a general short limitation period for all crimes with numerous exceptions. The time limit is currently 5 years in federal law and often 3 years in the states. Following the example of the MPC, many states have now moved to standardise graduated limitation periods for the different categories of offences. In New York, the statute of limitations for felonies is five years, for

115 In Estonia, the maximum limitation period is 10 years. This also applies to those first-degree crimes that can be sanctioned with 12, 15, or 20 years' imprisonment. In France, the basic limitation period for crimes – including those punishable by 30 years or life imprisonment – is 20 years. In Greece, a 20-year statute of limitations is provided for crimes punishable by life imprisonment. New York also has a 5-year statute of limitations for crimes punishable by a maximum of 7, 15, or 20 years' imprisonment. In Poland, a 20-year limitation period is provided for crimes punishable by 25 years' imprisonment. In Sweden, the 15-year limitation period also applies to crimes punishable by 25 years' imprisonment.

116 20 years: France (unless a longer limitation period of 30 years is ordered), Greece, Poland, Spain; 25 years in Sweden; 30 years in Germany.

117 Above, A. Second Complex I.1.

118 Germany, Austria, Sweden, Poland, Spain.

119 The standard limitation period for felonies is 20 years, for misdemeanours 6 years, for infractions 1 year.

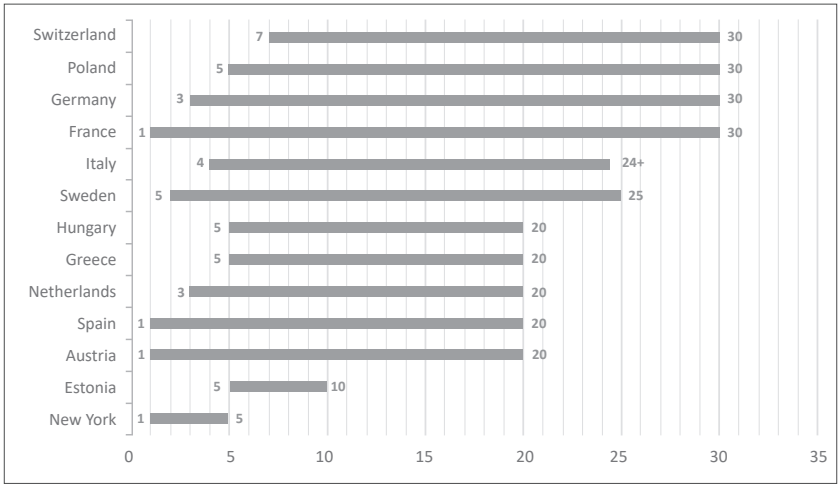
120 For serious crimes, such as war crimes, terrorism or illicit trafficking in narcotics 30 years; for serious offences, such as those of terrorism 20 years; for certain offences to the detriment of minors 10 years from the age of majority of the victim.

121 The category of misdemeanours is not provided for in Estonian criminal law.

misdemeanors two years and for petty offences one year. For certain serious crimes, such as crimes of violence, terrorism or crimes against children, some states have special longer statutes of limitations, often ten years. Theft of important works of art has a 20-year statute of limitations under federal law. With the exceptions, the legislation of these specific rules is a reaction to current events or addresses the fact that the respective crime is difficult to detect.

c) Upper and lower limits

Graph 1: Longest and shortest limitation periods



In four countries, the *longest limitation period* is 30 years.[122] This long period compared to the majority of countries is put into perspective by the fact that in three of the countries, the range of non-limitable offences is very small.[123] In Italy, this period can be exceeded in individual cases if a serious crime is committed as an "organisational crime".[124] In Sweden, 25 years

122 Germany, France, Poland, Switzerland.

123 Namely in Germany, France and Poland; above at fn. 81. In Switzerland, in addition to the core crimes under international law, certain sexual offences against children under 12 years of age cannot be time-barred (Art. 101 Swiss CC).

124 Without this doubling, the highest limitation period in Italy is, in general, 24 years.

was chosen as the longest period. In four other countries,[125] the longest limitation period is 20 years. The longest period in Estonia is only 10 years, so that prosecution of an intentional killing that does not qualify as murder ("manslaughter") is already barred after 10 years.[126] The longest (ordinary) limitation period in New York is a mere 5 years.

In summary, it can be said that there is great variation among the longest limitation periods set out by the respective systems. They range from over 30 years to 5 years. Most frequently, namely in nine countries, the longest limitation period is 30 or 20 years. If it is true that a 30-year maximum period was at one point a common European tradition,[127] the comparative-law analysis of these thirteen European countries must lead to the conclusion that this tradition no longer exists today; a 30-year maximum limitation period is only found in four countries.

The range of the *shortest limitation periods* is even broader, ranging from 1[128] to 7 years[129]. Most frequently, namely in four countries, the minimum limitation period was set at 5 years.[130] In three countries, the lowest limitation period is significantly lower at 1 year.[131] The intermediate minimum limitation periods are in the range of 2 to 4 years.[132] In France it is 6 years.

d) Increasing and decreasing sentencing ranges

If an aggravated or privileged offence has been committed, the limitation period is determined by the maximum penalty. The decisive factor is generally that these are *mandatory* sentences.[133] In Italy, only aggravating cir-

125 Greece, Netherlands, Austria, Spain.

126 In contrast, in Austria, for example, any intentional killing is punishable as murder and, since murder is punishable by life imprisonment, is not subject to a statute of limitations.

127 *Montenbruck*, FS Triffterer, 1996, 654; *Asholt* (fn. 13), 443 fn. 761.

128 6 months in England and Wales in the special case of the most minor offences subject to the statute of limitations.

129 Switzerland (with exceptions for individual offences, such as a 4-year limitation period for offences against honour according to Art. 178 Swiss CC).

130 Estonia, Greece, Poland, Hungary.

131 New York, Austria, Spain.

132 2 years in Sweden; 3 years in Germany and the Netherlands; 4 years in Italy.

133 This also applies to so-called "collective qualifications", which mandatorily increase the maximum penalty provided for the underlying offence, such as terrorism offences pursuant to § 278c Austrian CC or commission within the framework of a criminal organisation pursuant to § 91 Hungarian CC.

cumstances "with special effect" are taken into account which trigger an increase of the penalty by more than one third, such as the commission of an offence for the purpose of terrorism.[134]

If the increase or decrease to the sentence is *merely optional*, as is the case with recidivism factors under Art. 64 Polish CC, there are practical arguments against taking this into account when determining the limitation period, because it only becomes clear in the course of the sentencing whether the aggravating or mitigating factors apply.[135] The position of the case law and most academic commentators in Germany is that the standard examples provided for in the Special Part of the German Criminal Code that lead to the classification of offences as "aggravated" or "less serious" instances of an underlying standard offence are sentencing frameworks[136] whose application is only decided at a point in time too late to clarify the statute of limitations. For this reason, these standard examples, although they change the range of punishment, are to be disregarded when determining the limitation period.[137] This argument could also be used for the "(especially) serious cases" classification in the Swiss CC, a designation reserved to the court. However, the jurisprudence treats them like aggravating factors and uses them for the assessment of the limitation period. For the "(especially) minor cases" classification, this only has practical implications if a special sentencing range with a lower maximum penalty is provided for.

The principle of taking into account obligatory, but not optional, sentencing enhancements or mitigations is not consistently upheld in the German Penal Code either. § 78 para. 4 German CC declares enhancements or

134 In the Netherlands, the extent to which personal circumstances that increase or mitigate punishment are to be taken into account is a matter of dispute.

135 This is the solution in Poland; *Marszał*, Przedawnienie w prawie karnym, 1972, 119 ff.; cf. *Kulik*, Przedawnienie karalności i przedawnienie wykonania kary w polskim prawie karnym, 2014, 231 and footnotes there. However, Sweden has the opposite solution. In Hungary – and since the passage of Federal Law Gazette I 105/2019 also in Austria – recidivism increases the maximum penalty by 50 % from the outset (§ 89 Hungarian CC, § 39 Austrian CC). It is possible to undercut the range of punishment formed in this way only by way of an extraordinary mitigation of the sentence. A sentencing increase due to recidivism is therefore always to be taken into account for the assessment of the limitation period.

136 For many *Bosch*, in: Schönke/Schröder, StGB, § 243 para. 1.

137 A partial correction of the legislative decision to disregard particularly serious cases (§ 78 para. (4) German CC) was made by adding a further ground for tolling in § 78b para. (4) German CC.

mitigations under the provisions of the General Part to be irrelevant, so that, for example, the mandatory mitigation for aiding and abetting under § 27 para. 2 German CC does not affect the length of the limitation period. This approach avoids having to delve too deeply into the not always easy-to-find delimitations of the General Part in order to determine the duration of the limitation period. In Estonia, too, mitigations in the General Part are not taken into account for the determination of the length of the limitation period, a position justified by the fact that they do not influence the classification as a crime. Similarly, Greek case law does not take into account a change in the sentencing range, e.g. because of participation or attempt.

e) Juvenile offences

In order to take into account the special characteristics of the offender group, reduced sentences are usually applied to juvenile offenders. For some countries, information is available on whether the reduction of the penalties has an effect on the length of the limitation period. In Austria, the statute of limitations is calculated according to the reduced range of punishment. An exception is made for core crimes under international law, which are not subject to a statute of limitations even if the offender is a juvenile. Swiss juvenile criminal law has its own limitation periods of between 1 and 5 years, which are significantly shorter than in adult criminal law. However, if the offence in question is a certain serious offence against a child under the age of 16, the limitation period lasts until the victim reaches the age of 25. In contrast, in Germany, France and Poland, the same statutes of limitations apply as for adults.[138]

f) Effects of true concurrent offences

A phenomenon that can have a far-reaching effect on the length of the limitation period only becomes apparent in some countries if the application of the law in practice is taken into account: If the offender violates several criminal laws by an act (or omission), all of which are to be included in the conviction ("*true concurrent offences*"), in some countries all the offences realised become time-barred together with the most severe offence to be

138 No information is available on the other countries.

applied. Thus, a long statute of limitations can be applied to an offence representing relatively mild wrongdoing simply because a more serious offence was additionally realised by the conduct. This means a deviation from the principle that the length of the period depends on the maximum penalty threatened for the specific offence and thus on the seriousness of the offence.

A uniform limitation period for *concurrent* violations of the law exists in France, Austria, Poland, Sweden, and Spain. In Sweden, this effect is ordered by law. The Spanish Criminal Code provides to an even broader extent for a common statute of limitations according to the longest limitation period, linking e.g. the underlying offence and other offences made possible by it.[139] In France, the uniform limitation period results from the legal assessment of the act as a crime, misdemeanour, or infraction (*critère de la qualification légale de l'infraction)* and was specified by the Cour de Cassation.[140] In Austria, the jurisprudence and the literature refer to the wording of § 57 Austrian CC, according to which the punishability of the *offence*, but not the punishability of *prohibited conduct* (as a legal concept) is extinguished. For Polish criminal law, this is explained by the so-called "statutory cumulative concurrence" set out in the Polish CC. If the elements of several criminal offences are fulfilled by one act, the offender is to be punished on the basis of all the concurrent provisions, which, according to case law and the prevailing academic opinion, leads to the creation of a new criminal offence that can only become time-barred as a whole. In contrast, the statute of limitations is calculated separately for each violation of the law in the following countries: Germany, Estonia, Greece, Switzerland, and Hungary.[141]

The question here is of the object of the statute of limitations: the offence as a historical event or the concrete realisation of the offence. As shown, the answers to this question differ in the countries examined.

139 Art. 131 para. 4 Spanish CC.

140 Cass. Crim., 4.5.1960, Bull. crim. No. 238; similarly Cour d'Appel Paris, 6.6.1966, Gaz. Pal. 1966. 1. 159; Cass. Crim., 16.2.1993, No. 92–84.083, Bull. crim. No.7; Cass. Crim., 20.1.2009, No. 08–80.021, Bull. crim. No. 21.

141 The question was left open for Italy and the Netherlands.

2. *Parameters governing the start of the limitation period*

a) Commencement of the limitation period in general

If the commission of the offence extends over a longer period of time or if the result of the criminal conduct only occurs some time after the commission of the offence, the duration of the limitation period depends decisively on what triggers the commencement of the limitation period. In the countries studied, the law specifies one of four different points in time: the commission of the conduct constituting the offence, the completion of the offence, the material termination of the offence, and the discovery of the offence. Special rules for certain offences, especially of a sexual nature, against minors may also affect the start of the limitation period. They are dealt with below under c).[142]

aa) From conduct constituting the offence

Only three legal systems (Greece, Austria, Switzerland) link the commencement of the limitation period to the conduct constituting the offence. The determination of the beginning of the limitation period is particularly precise in the Austrian Criminal Code: According to § 57 Austrian CC, the limitation period begins to run "as soon as the conduct subject to punishment is completed or ceases". In Greece and Switzerland, too, the *completion of the conduct constituting the offence* is decisive.[143]

In these countries, the question of the result of the conduct is not important, so that the situation[144] cannot arise in which a negligent result-based offence becomes time-barred decades after the commission of the offence, despite the lower[145] associated level of wrongdoing and culpability.

142 See also, for example, the delayed start of the limitation period for financial offences in Sweden.

143 In Greece, the limitation period begins "on the day on which the offence is committed, unless otherwise provided" (Art. 112 Greek CC). The commission of the offence is understood to mean the completion of the conduct constituting the offence. According to Art. 98 (a) Swiss CC, the statute of limitations begins "on the day on which the offender carries out the criminal activity", meaning the completion of the criminal act; *Zurbrügg*, in: Niggli/Wiprächtiger (eds.), BSK-StGB I, 4th ed. 2019, Art. 98 para. 7 with further references.

144 On the issue see Country Report Germany, A. Second Complex I.2.

145 See only *Roxin/Greco*, AT I, 5th ed. 2020, § 24 para. 79.

On the other hand, in cases where the result or the objective condition of criminal liability occurs with a delay, the offence may be time-barred before criminal liability has arisen. Also, the limitation period for a negligence offence in cases where a long period of time elapses between conduct and its effects can only be determined after the occurrence of the limitation period because it depends on the nature of the result that has occurred.[146]

In order to alleviate the problem of the limiation period running before the rise of criminal liability, a compromise has been found in Austria for cases of a delay between conduct and result. § 58 para. 1 Austrian CC postpones the end of the limitation period until the same time limit has also elapsed since the result of the conduct arose or until the elapse of one and a half times the underlying limitation period, but at least 3 years from the conclusion of the criminal activity. The end of the limitation period that is more favourable for the offender applies, meaning that there is still some possibility that the offence may become time-barred under this provision before criminal liability has arisen.[147]

In Greece, a correction of the early start of the limitation period was made in one exceptional case. By way of specific legislation, the Greek legislator reacted to collapses of inadequately constructed buildings during earthquakes in the 1970s and 1990s, which resulted in numerous deaths and serious injuries and could no longer be prosecuted due to the early start of the statute of limitations. Accordingly, if an additional result element of the otherwise abstract endangerment offence of "violation of building regulations" (Art. 286 Greek CC) is met, the statute of limitations does not begin to run until the death or serious injury of a person occurs. Criminal liability is barred at the latest when 30 years have elapsed from the time of the ("abstract") breach of the building codes.

In addition, there are efforts in Greece by the courts and the literature to avoid a statute of limitations that is perceived as unfair with the help of the construction of criminal liability for omissions. For this purpose, prior

146 Cf. *Asholt* (fn. 13), 423.

147 For offences with an intent element, the additional difficulty in the case of late-arising results is that the punishability of the offence is extinguished with the running of the limitation period on attempt, so that due to the joint limitation on concurrent offences, it is not clear how a result arising at a point in time after the base limitation period but before 150 % of the base period has run can still have an effect on the limitation period at all. Case law and the majority of scholars assume a retroactive suspension of the expiry of the statute of limitations if the particular result does in fact occur; see *Juhasz*, JBl 2011, 214, 220 ff.

active conduct is said to give rise to a duty of care. The offender's subsequent failure to prevent a particular result of his prior active conduct arising is then treated as an ongoing realization of the offence. Thus, the beginning of the limitation period is regularly postponed until the occurrence of the result. However, the plenum of the Supreme Criminal and Civil Court of Greece (Areios Pagos) recently rejected this construction for employment fraud in the public service and declared that the statute of limitations for fraud commences with the commission of the deceptive act.

bb) Upon completion of the offence

In most of the jurisdictions studied, the limitation period generally begins to run when the offence is completed. In three countries, this point in time is explicitly specified in the law.[148] In other countries, the statute of limitations begins with the "commission of the offence", which is understood to mean the completion of the offence.[149]

For offences with a result element, the statute of limitations in these countries only begins to run when the *result is realized.* For negligence offences, this can lead to *de facto* non-limitability in cases of a long delay between conduct and result,[150] as well as to a disproportionately long limitation period compared to intentional commission, where a much later occurrence of success is a rather theoretical problem.

cc) Upon material termination

§ 78a German CC is formulated in a complicated manner: The statute of limitations begins with the termination of the offence, and in the case of the later occurrence of a success that constitutes an element of the offence, with this point in time. According to a growing body of literature, the

148 Estonia, Italy, Hungary.

149 France, Netherlands, Sweden, Spain, United States. In Poland, the above applies due to the statutory postponement of the commencement of the limitation period to the occurrence of success (Art. 101 § 3 Polish CC). The time of commission is referred to as "completion of the offence" in order to emphasise that it is not the first completion of the offence that is decisive for the beginning of the limitation period.

150 Above A. Second Complex I.3.

actual termination of the offence is the decisive factor.[151] By contrast, the courts and the still predominant academic position proceeds from the position that the limitation period only begins to run with the *material completion of the offence*, "when the offender wholly completes his 'act of negation of the law' and the wrongful act has thus actually been realised in its entirety".[152] This point in time can be a long time after the completion of the offence. In the case of offences with an dominant subjective element, such as fraud, the statute of limitations does not begin until the advantage sought has been obtained.[153] In the case of bribery offences, according to the Federal Supreme Court (BGH), the last act of fulfilment of the wrongful agreement is decisive.[154]

In the case of negligent success offences, the problems mentioned above under bb) arise when there is a long time gap between the act of commission and the occurrence of the result. In individual cases, the material termination can occur even later and further delay the start of the limitation period. The greatest disadvantage of this point of reference, however, is that due to the vagueness of the concept of the material termination of the offence,[155] the commencement of the limitation period can be difficult to determine.

dd) With the discovery of the offence

Some countries choose a (potentially) even later starting point for the limitation period: the discovery of the offence (France, Netherlands, United States). It is striking that in these are the countries in which prosecutors enjoy widespread discretion to dismiss cases. While it is impossible for a limitation period to run unnoticed, the legal system steps back from an

151 *Asholt* (fn. 13), 538 f.; *Mitsch*, MK-StGB, § 78a para. 5.

152 Settled case law; see only BGH NStZ 2020, 159 para. 9. For the literature, see for example *Bosch*, in: Schönke/Schröder, StGB, § 78a para. 1; *Saliger*, NK-StGB, § 78a para. 7.

153 BGH 22.1.2004, 5 StR 415/03.

154 BGH NJW 2008, 3076. Another example is subsidy fraud pursuant to § 264 para. 1 no. 1 German CC, which is completed as soon as the subsidy provider has received the false information; *Hellmann*, NK-StGB, § 264 para. 77. According to case law, the statute of limitations only begins "with the actual receipt of the subsidy" ("receipt of the last partial payment"); BGH StraFo 2020, 122 (123).

155 *Nazarian*, Der Beginn der Strafverfolgungsverjährung – § 78a StGB, 2010, 34; *Schmitz*, Unrecht und Zeit, 2001, 221.

obligation to investigate or prosecute crimes in every case, relieving potential pressure on the prosecuting authorities.

Thus, France bases the beginning of the limitation period on the discovery of the offence. This applies firstly to so-called hidden (*occultes*) offences, which cannot be discovered by the victim and the prosecution authorities. Offences such as embezzlement, money laundering or a serious violation of privacy have been classified as hidden by the jurisprudence. Secondly, the delayed start of the statute of limitations applies to so-called concealed (*dissimulées*) offences, i.e. offences of any kind whose detection the offender successfully tried to prevent by a concealing measure. In these cases, the limitation period only runs from the time when the offence has become known to the extent that a public prosecution could take place. The postponement of the start of the limitation period was originally developed by the jurisprudence *contra legem.* In 2017, the legislator adopted it and limited the maximum limitation period for these categories of crimes to 12 years for misdemeanours and 30 years for felonies.[156]

Since 2013, the Dutch CC has provided five exceptions to the rule that the statute of limitations begins with the commission of the offence. They only apply to certain offences and postpone the start of the statute of limitations to the discovery of the offence or the possibility of doing so. For example, the limitation period for certain serious environmental offences does not begin to run until an official charged with the prosecution becomes aware of them. The statute of limitations for document forgery and other forgery offences does not begin to run until the forgery certificate has been used. Kidnapping and other offences against liberty begin to be time-barred on the day after the liberation or death of the victim.[157]

In some states of the United States, the statute of limitations generally does not begin to run until the discovery of the offence or at the time when discovery would have been possible through the exercise of due diligence. This is likely related to the tight statutes of limitations. Other states only postpone the start of the limitation period to discovery or discoverability for certain offences.

156 It is not an absolute time limit, as the commencement of the limitation period may be delayed as a result of a recommencement or tolling of the limitation period before the expiry of the time limit.

157 For the other exceptions, see the Country Report for the Netherlands.

ee) Conclusions

The link to the *discovery* of the offence (or the possibility thereof) can be almost tantamount to abolition of the statute of limitations. It has several disadvantages: defining the "discovery" of an offence is a power that lies almost entirely with law enforcement agencies. It will be difficult if not impossible for the accused to rebut their position about the commencement of the limitation period. It seems difficult to determine with satisfactory legal certainty when an offence became *discoverable*. If, as in France, the delayed start of the limitation period is limited to certain offences, it is unclear which offences are to be included. In principle, the objection must be raised that the function of the statute of limitations is compromised. Conceptually, very purpose of the statute of limitations also covers cases in which the offence is not discovered within the time limit. It is therefore not advisable to allow the statute of limitations to begin only with the (possible) discovery of the offence. Instead, the fact that the offence in question is typically only discovered after a longer period of time should be taken into account by a sufficiently long assessment of the limitation period, i.e. the usual period of time from the commission of the offence to its discovery should be included in the limitation period.

The *material termination* of the offence relied on by the German courts is also not suitable for harmonising criminal law, given that it results in overlong extensions of the limitation period and is subject to similarly serious questions of adequate legal certainty.

The differences among the possible other standards for triggering factors (conduct constituting the elements of the offence, the Austrian compromise, or the completion of the offence) can be illustrated by an example:[158] If a civil engineer has completed the construction of a building on *1.2.2000* and the building collapses on 1.2.2012 due to a grossly negligent planning error, the 10-year limitation period for negligent homicide pursuant to Art. 117 Swiss CC[159] begins to run on 1.2.2000 in Switzerland. The occurrence of the later result has no influence on the statute of limitations, so that the offence became time-barred on 1.2.2010. In Austria, the 5-year statute of limitations applicable to grossly negligent homicide under § 81 para. 1 Austrian CC[160] would expire on 1.2.2017, calculated from the

158 The calculation of the commencement of the limitation period is based on the applicable law (as of 1.1.2021). Earlier versions of the law are not taken into account.

159 Punishable by up to 3 years' imprisonment.

160 Punishable by up to 3 years' imprisonment.

occurrence of the later result. As a result of the cap at one and a half times the base limitation period (*7.5* years), the offence was time-barred on *1.8.2007* and thus, as in Switzerland, before the onset of criminal liability. Since the Swiss statute of limitations is significantly longer, the statute of limitations in Austria occurs at the earliest point in time despite the special regulation. In all other countries, the statute of limitations would only begin with the occurrence of the result on 1.2.2012, and among these, the offence in Greece is likely the last to be time-barred (*1.2.2030*) due to the special regulation for the offence of violation of building regulations.[161] None of these regulatory models is completely convincing. The dogmatically most consistent solution is probably to agree with the majority of countries that the statute of limitations for offences with a result element should only begin with the complete occurrence of criminal liability, i.e. the completion of the offence.

b) Commencement of the limitation period in special cases

aa) Simple conduct offences and result-based offences

In the case of simple conduct offences, the limitation period begins uniformly with the completion of the offence. The beginning of the limitation period for result-based offences was dealt with above under a).

bb) Offences of omission

In the case of *simple omission offences*, the legal situation is inconsistent: In some countries, the end of the duty to act is decisive.[162] In other countries, the beginning of the duty to act is decisive,[163] which eliminates the problem of de facto non-limitability in the case of a duty to act that has existed for decades.

161 In Germany, the statute of limitations for involuntary manslaughter according to § 222 German CC would have run on 1.2.2017.

162 Germany, Greece, Austria, Switzerland, Sweden. In Poland, the treatment of simple omission offences is controversial. There is also the view that the limitation period begins with the end of the possibility to act.

163 Netherlands, Hungary; similar to France (from the point of awareness of the duty to act). Data on Estonia and Italy are missing.

If the offence of omission requires the occurrence of a *result*, the limitation period in most countries begins from the result.[164] In those three countries that allow the limitation period to begin with the conduct that constitutes the offence, the end of the duty to act is decisive (if there is a possibility to act).[165] If the end of the duty to act cannot be determined, Swiss case law focuses on the time at which the offence of omission is completed. There does not seem to be sufficient justification for this exception to the otherwise applicable principle in Switzerland that the occurrence of the result is not decisive. A disadvantage of the reference to the conduct constituting the offence becomes apparent in the area of negligence: the negligent creation of a risk through active action is time-barred at an earlier point in time than its negligent non-avoidance through omission.[166]

cc) Attempt

In some countries, the statute of limitations begins as soon as the offender crosses the threshold of culpability, i.e. begins to perform the attempted act.[167] In other legal systems, the beginning of the limitation period starts with the completion of the attempted act.[168] In Germany, it should depend on the completion of conduct contrary to law.[169] Since an attempted act does not usually extend over several days, it can be assumed that the different starting points of the limitation period will hardly have an effect in practice.

dd) Participation

An exact comparison of the commencement of the limitation period in the context of participation would require an analysis of the various regimes for participation in criminal law, which cannot be accomplished in this study. In particular, it depends on the extent to which the forms of partici-

164 See above, A. Second Complex II.2.a.bb.
165 This should also apply to Greece, because this point in time will regularly coincide with the occurrence of the result. (The Country Report Greece states that "the omission of the legally required action lasts until the result occurs").
166 See *Stratenwerth*, FS Riklin, 2007, 245 (247).
167 France, Poland, Sweden, Hungary.
168 Italy (by explicit regulation), Austria, Switzerland.
169 No data was provided for Estonia, France, the Netherlands, and Spain.

pation are framed as "accessory" and whether, for those countries in which the start of the limitation period is linked to the occurrence of a result, the realisation of the principal offence is to be regarded as success from the perspective of the participant(s). The surveys circulated to the country rapporteurs did not ask about participation and accessory, limiting the discussion here to the following points:

In (functional) single offender systems (Austria, Sweden),[170] the beginning of the limitation period is to be determined separately for each participant. In Sweden this applies with the restriction that there is no provision for quantitative accessory participation, as in the case of accomplices. In Poland, too, some commentators argue that the only decisive factor is the termination of the conduct of the respective contributor.[171]

Where a distinction is made between perpetration and participation, the start of the limitation period is linked to the principal offence. Some countries allow the limitation period for participation to begin with the *completion* of the principal offence.[172] In France,[173] the *commission* of the principal offence is decisive. Similarly, in Greece, the completion of the perpetrator's constituent conduct is decisive. In Estonia, the main offender's entry into the attempt stage is decisive.[174] In Switzerland,[175] the decisive factor is when the last partial act was performed by one of the participants.

In the case of German *co-perpetration*, the conclusion of the unlawful conduct by the last co-perpetrator is the decisive point in time, because the other co-perpetrators must allow this conduct to be attributed to them. For

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170 On Austria, *Fabrizy*, in: Höpfel/Ratz (eds.), Wiener Kommentar zum StGB, 2nd ed. (as of 1.5.2014), § 12 para. 13; on Sweden, *Rotsch*, "Einheitstäterschaft" statt Tatherrschaft, 2009, 159 ff.

171 According to other opinions, the statute of limitations only begins to run when the direct perpetrator enters the attempt stage. There are other views, such as that in the case of incitement, the evocation of the intention to commit the offence is sufficient.

172 Germany, Italy (from the time of a suitable attempt; here, a [theoretical] single offender system applies; see *Weißer*, Täterschaft in Europa, 2011, 98 f.), this is probably also true of the Netherlands and Spain (according to academic commentary), and also of Hungary (the doctrine of accessory).

173 A participation system with identical penalties for perpetrators and participants applies; *Weißer* (fn. 172), 79, 83.

174 For further special features, see the Country Report Estonia, A. Second Complex II.2. (at the bottom).

175 In Switzerland's dualistic participation system, participation is accessory to a limited extent; the offender must have acted in accordance with the offence and unlawfully, though not necessarily culpably; *Trechsel/Pieth*, Praxiskommentar StGB, 3rd ed. 2018, Vor Art. 24 paras. 24 ff.

the same reason, in Switzerland the statute of limitations is generally based on the last partial act of a co-perpetrator.

In Switzerland, *indirect perpetration* depends on the termination of the act by the intermediary, in Hungary on the *completion* of the offence by the intermediary, in Germany on the completion of unlawful conduct by the intermediary.

ee) Objective elements of criminal liability

Only one of the countries explicitly regulates when the limitation period begins for offences with an objective prerequisite for criminal liability. The Italian CC stipulates that the limitation period begins with the fulfillment of this condition,[176] a solution that is also advocated for in Germany in the case of a particular result being an objective prerequisite for criminal liability.[177] In countries where the commencement of the limitation period does not depend on the occurrence of a result, the limitation period consequently begins with the performance of the act or omission.[178] This can again lead to the inconsistency that the statute of limitations can end before the rise of criminal liability.

ff) Ongoing offences

In the case of ongoing or continuing offences, the point in time at which the limitation period begins is defined in most countries as the "termination of the unlawful state".[179] In other legal systems, the termination of the continuing act is decisive.[180] For legal systems in which the limitation period begins with the conduct constituting the offence,[181] only the latter

176 Country Report Italy, A. Second Complex II.1.

177 *Mitsch*, MK-StGB, § 78a para. 10 with further references.

178 This is the solution in Switzerland. The special provision of § 58 para. 1 Austrian CC only refers to a "result as an element of the offence" and therefore does not include objective conditions for criminal liability.

179 Germany, France, Netherlands, Austria, Sweden, Spain (explicit provision in § 132 para. 1 Spanish CC).

180 In Estonia (§ 81 para. 4 Estonian CC), Switzerland (§ 98 lit. c Swiss CC), and Italy (Art. 158 para. 1 Italian CC) this point in time is explicitly provided for in the statute. The solution in Greece and Poland also tends in this direction. The Country Report for Hungary leaves this question open.

181 Greece, Austria, Switzerland.

point in time is consistent with the overall system.[182] If the perpetrator of a deprivation of liberty extending over several weeks is hit by a car during this period and falls into a coma for a longer period of time, the limitation period should begin with the time when he last had the opportunity to free the victim. This was the end of the conduct that constituted the offence, even if the unlawful state of deprivation of liberty initially continued.

In the United States, the statute of limitations for *ongoing offences* also begins with the termination of the conduct. This category of offences, which has not been the subject of much research,[183] includes conspiracy and the sexual abuse of children. Determining the start of the statute of limitations for the far-reaching classification[184] of conspiracy poses particular problems related to its unclear boundaries[185] and can lead to conspiracy being prosecutable for a longer period than the offence at which the conspiracy was aimed.[186]

gg) Continued offence or unity of action

The legal concept of a *continued offence* continues to be recognised in many of the legal systems examined. In most cases, it is assumed that the limitation period begins with the performance of the last act constituting the offence.[187]

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182 Therefore, it is not convincing that in Austria the termination of the unlawful condition is considered decisive.

183 *Dürr*, Funktionelle Äquivalente der strafrechtlichen Konkurrenzlehre im Common Law, 2019, 163 f.

184 Cf. *Momsen/Washington*, ZIS 2019, 187.

185 *LaFave*, Substantive Criminal Law, Vol. II, 2nd ed. 2003, 257 f.

186 This objection does not apply if the conspiracy was not limited to a single offence.

187 Estonia, France, Poland, Spain, Hungary. Unclear in Italy: According to the country report, the partial acts of the continued offence can be time-barred individually (Country Report for Italy, A. First Complex II.1). In Greece, Art. 98 para. 1 Greece CC contains a provision for the assessment of the penalty for a continuing offence (to be distinguished from the so-called continuing offence according to Art. 98 para. 2 Greece CC, in which the quantifications of value or damage realised by the individual offences are added together; see fn. 195). Since this does not change the independence of the individual offences, the beginning of the limitation period depends on the individual offence.

In the German-speaking world,[188] this concept was abandoned some time ago. In substance, however, the core area of the former continued offence has been retained, and the amalgamation of what are formally multiple fulfillments of the elements of an offence into a single offence in the form of *a natural or factual unity of action* is still permitted. The statute of limitations then only begins with the performance of the last act that realises the elements of the offence. If there are longer intervals between the acts or if there is no other prerequisite for a unity of action, the law treats these as separate offences and each of them is subject to a separate statute of limitations.

hh) Compound offences

The concept of cumulative concurrent offences, applied in Poland in the case of *concurrent applicable criminal statutes*,[189] also influences the beginning of the limitation period. While the duration of the period depends on the most serious offence, the joint limitation period for all offences begins with the termination of the offender's conduct in accordance with the elements of this offence.[190]

In some countries, aggravating factors exist that consist of several independent offences committed consecutively. In Estonian criminal law, for example, repeat offending is recognized as an aggravating factor. Although the statute of limitations for the aggravated offence begins with the last offence, the individual offences that are part of the aggravation of punishment may already be time-barred and may then not be used to justify the aggravation.[191] By contrast, in France, habitual offences (*infractions d'habitude*), which consist of several similar acts, become time-barred as a group upon the running of the limitation period of the last act. The same applies to habitual offences according to the Spanish Criminal Code,[192] to offences requiring repetition in order to be classified as "commercial" or "for economic gain" in Greece and to so-called serial offences, such as stalking,

188 Germany, Austria, Switzerland.

189 Above after fn. 140.

190 Vgl. judgment of the Supreme Court of 23.11.2016, III KK 225/16, Legalis. For the general rule cf. *Kulik*, Przedawnienie karalności i przedawnienie wykonania kary w polskim prawie karnym, 2014, 287.

191 Cf. also the Swedish offence of serious violation of a woman's integrity.

192 Pursuant to Art. 132 para. 1 sentence 2 Spanish CC, the statute of limitations begins on the day on which the activity ceased.

in Italy.[193] In Austria, in the case of *recidivism*, the previous offence only becomes time-barred together with the new offence.[194]

The Greek and Austrian codes provide specific rules for cases where the offender has met several quantified aggravation thresholds in damage or value.[195] The effect is that an offender who exceeds the damage or value limit cumulatively through several acts is subject to the same higher penalty as an offender who does so through a single act. In Greece, the rule may result in a longer limitation period. If one follows the controversial view that the individual acts are merged into a single offence, the beginning of the limitation period is additionally postponed to the conclusion of the last act. In Austria, case law and literature agree that the individual offences are subject to a separate statute of limitations and that the so-called aggregation rule does not affect the statute of limitations.[196]

c) Special arrangements for the protection of minor victims

In all the countries examined here with statute of limitations rules, there are special provisions for the protection of underage victims. France, for example, extended the statute of limitations for this purpose as early as 1989. Subsequently, legal acts of the Council of Europe (Lanzarote 2007, Istanbul 2011) and the EU in particular have accelerated the development. The aforementioned conventions require a sufficiently long statute of limitations for relevant offences "to allow for the efficient initiation of proceedings after the victim has reached the age of majority", which must reflect the "gravity of the offence in question".[197] The EU Directive on com-

193 Country Report Italy, A. First Complex II.1. In this respect, the question arises as to whether these are independently punishable partial acts. The criminal offences of stalking in Austria and Germany, which in the author's view are to be classified as "successive offences", also become time-barred upon completion of the last partial act. For a comprehensive discussion see *Hochmayr*, ZStW 2010, 757 (780).

194 See above fn. 26.

195 Art. 98 para. 2 Greek CC (a so-called continuation offence; in contrast to the Austrian regulation, the offender's aim must be at the overall result), § 29 Austrian CC (the so-called aggregation rule).

196 Country Report Austria, A. Second Complex II.1.

197 Art. 58 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of 11.5.2011 (Istanbul Convention), ratified by all European states in the comparison group except Hungary and the UK; cf. Art. 33 Council of Europe Convention on the Protection of Children against

bating the sexual abuse and sexual exploitation of children also leaves the determination of the "duration of the sufficiently long period of time for prosecution after reaching the age of majority" to the Member States.[198] The directive additionally has an indirect effect on the length of limitation periods in the form of the minimum sentences it requires.

The scope of Member State discretion in implementation allows for different regulatory techniques, which are summarised here. The justification for the special regulations is that developmental psychological findings have shown that underage victims, especially of sexual abuse, are not able to process and categorise their experiences for a long time and only break free from dependency on the perpetrator at a later stage. The victims of crimes should be given a sufficiently long period of time to decide for themselves whether to press charges.

In almost all countries, the special regulations apply to victims who were minors at the time of the commission of the offence or who had not yet reached the age of 18.[199] In Switzerland, the *age of consent* is generally 16. The German provision differs from this by not specifying an age of consent and including adult victims under 30 years of age, which goes beyond the international guidelines.[200]

All the countries apply the special provisions to *sexual offences* against children and juveniles.[201] Many countries extend the regulations to certain

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Sexual Exploitation and Sexual Abuse of 25.10.2007 (Lanzarote Convention), ratified by all European states in the comparison group.

198 Recital 26 Directive 2011/92/EU of 13.12.2011 on combating the sexual abuse, sexual exploitation of children and child pornography and replacing Council Framework Decision 2004/68/JHA.

199 Estonia, France, Greece (Country Report Greece, A. Second Complex II.4.), Italy, Austria, Poland, Sweden, Spain, Hungary.

200 See Country Report Germany, A. Second Complex II.4.a.aa. The extension is probably due to an oversight in the legislative process. When the provision was introduced, the statute of limitations was suspended until the victim reached the age of 18. When in 2013 the age limit was raised to 21 and in 2015 to 30, an age of consent was overlooked with regard to those offences that can be committed against a person of any age. While some of the sexual offences covered can only be committed against persons under 14, 16 or 18 years of age, the statute of limitations for other offences, such as "sexual assault, sexual coercion, rape" pursuant to § 177 German CC or mutilation of female genitalia pursuant to § 226a German CC is also suspended for adult victims until they reach the age of 30, without the legislator explaining what the special need for protection is supposed to be.

201 § 78b para. 1 no. 1 German CC also covers certain sexual offences against adults up to the age of 30, as shown in fn. 200.

offences against life and limb, sometimes also *against freedom*.[202] The Spanish regime even covers "crimes against moral integrity",[203] crimes against privacy, the right to one's own image, and the inviolability of the home. Greece has gone the furthest, with *all crimes* against minors included in the Code as of 2019. This development is not without issues, as just one example will show: In Austria, the regular statute of limitations of 1 year for negligent bodily injury is extended to up to 29 years if the offence is against a minor.

The most common solution is to *delay the start of the limitation period* until the victim reaches the age of 18.[204] In some countries, the start of the statute of limitations has now been delayed even further: in New York to age 23, in Austria to age 28, and in Germany to age 30. In some countries, the postponement is effected by means of a *tolling of the limitation period.*[205] The extension of the statute of limitations is considerable: In Germany, sexual acts with children (§ 176 para. 1 German CC) are subject to a limitation period of between 27 and 40 years instead of 10 years, depending on the age of the child at the time of the offence.[206]

France and Italy provide for longer limitation periods in addition to the *later start of the limitation period*.[207]

In three countries, the law takes into account that the offence may have been *discovered before the age of consent was reached*. In Estonia, the suspension of the statute of limitations ends if the reason for the criminal proceedings is discovered before the victim reaches the age of 18. In Italy, the limitation period begins with the receipt of the criminal complaint if charges are brought before the age of 18. In New York, the statute of limi-

202 (a) Offences against life and limb: Austria (all offences against life and limb); Poland (offences against life and limb punishable by a maximum term of imprisonment of at least 5 years); Sweden (genital mutilation); Switzerland (intentional homicide, manslaughter, grievous bodily harm); Spain (attempted manslaughter, abortion without consent, bodily harm, torture); Hungary (manslaughter, grievous bodily harm punishable by a term of imprisonment of more than 3 years). (b) Offences against liberty: Germany (forced marriage); Austria (all offences against liberty); Spain (trafficking in human beings, crimes against liberty); Switzerland (trafficking in human beings); Hungary (extortionate kidnapping, trafficking in human beings, forced labour, deprivation of liberty).

203 These include, for example, torture (Art. 174 Spanish CC) or habitual domestic violence (Art. 173.2 Spanish CC).

204 Estonia, France, Italy, Netherlands, Sweden, Spain, Hungary.

205 Germany, Estonia, Greece, Austria.

206 If an act of prosecution occurs before then, the statute of limitations comes into effect even later.

207 France (10, 20 or 30 years); Italy (doubling of limitation periods).

tations begins to run when the offence is reported to a law enforcement agency or a statewide central child abuse registry. In the event of the victim's death, the Spanish Criminal Code advances the start of the limitation period to the time of death. The regulations take into account the fact that in the cases mentioned a decisive reason for postponing the statute of limitations no longer applies, namely that the offence only becomes known after the victim has reached the age of majority because the victim is only then in a position to file a criminal complaint.

A different regulatory approach is used by Switzerland and Poland, which do not *postpone* the beginning but rather *the end of the limitation period*. In Switzerland, the limitation period may not run before the victim reaches age of 25, in Poland not before the age of 30. The statute of limitations may continue beyond the aforementioned point in time, but in no case can it end beforehand. The effect is to set a minimum age of the victim for the point in time at which the offence becomes time-barred.

Finally, some countries make certain sexual offences against minors or children *non-limitable*.[208]

In conclusion, it should be noted that the scope of application of the special rules, be it the offences covered or the age at which the limitation period begins to run, has been subject to continuous expansion. At the same time, the usefulness of the special rules has been questioned in many countries. The principal point of criticism concerns the difficulty of proving offences that occurred long ago, especially when it comes to sexual offences where no physical traces can be established after a long time and the victim is the only witness. In addition, there is the threat of (re-)traumatisation of a victim, if his or her testimony is judged not to be credible, leading to an acquittal for reasonable doubt. Consequently, the victim's hope for justice associated with the extension of the statute of limitations is likely to be disappointed on a regular basis.

3. Calculation of the limitation period

With regard to the exact start of the limitation period, the legal systems studied take two approaches: one half allows the period to begin on the

208 Netherlands, Sweden, Switzerland, Hungary; for more details see above A. Second Complex I.2.c.

day of the event that triggers the period,[209] the other half on the day after.[210]

Almost all legal systems choose the most easily manageable calculation method and allow the limitation period to end on the numerically same day as it begins. If a 5-year limitation period starts on 16.10.2019, it ends in these countries on 16.10.2024.[211] In Germany and Greece, by contrast, the limitation period ends on the day before, e.g. on 15.10.2024.

The limitation period generally ends at midnight. Only in Poland is the exact time at which the limitation period began also decisive for its end. If the exact time of day cannot be determined, any doubt must be resolved in favour of the accused.

The various calculation methods usually result in only one day's difference and are therefore negligible from a comparative law perspective.

4. Influencing the end of the limitation period

a) Introductory remarks

A comparison of the base limitation periods in the legislation only gives a limited degree of insight into the length of limitation periods in a given legal system in practice. The case study on the statute of limitations[212] makes it clear that a legal system with what at first glance seem like short statutes of limitations, can turn out to be a legal system with a comparatively long statute of limitations if one takes account of the ways in which the limits can be affected in practice. Modifications of the statute of limitations are therefore particularly interesting. Only a careful examination of the interaction of the limitation period, the start of the period, and the modifications determines whether the system provides for a long or short limitation period.

No detailed comparison of the regulations can be made here. This would require a systematic comparison of procedural stages and measures, which is not possible in this context. In addition, the procedural events and circumstances that trigger a modification of the statute of limitations

209 Germany, Estonia, Greece, Poland, Sweden (Country Report Sweden, A. Second Complex II.2.), Spain.

210 France, Italy, Netherlands, Austria, Switzerland, Hungary.

211 Estonia, France, Italy, Austria, Poland, Switzerland, Sweden (Country Report Sweden, A. Second Complex II.2.), Spain, Hungary.

212 Below, C.

are listed casuistically in some legal systems and can hardly be presented in a comprehensive manner for the individual legal system. The present legal comparison is therefore limited to identifying regulatory models and working out commonalities.

In this context, particular caution is required with regard to the term "interruption", which in the German CC refers to a restart of the limitation period. Many of the legal systems represented here are based on this terminology, at least when translated into German. However, other forms of influencing the expiry of the time limit are also referred to as "interruption", such as the (conditional) interruption of the limitation period under the Spanish CC. The conceptual ambiguity is probably related to the fact that the term "interruption", on closer examination, is not suitable for expressing a restart of the limitation period. On the contrary, in the case of an "interruption" of the limitation period, one would expect the running of the limitation period to be suspended and the remaining period continue to run after the reason for interruption ceased to exist – an influence on the running of the period that is referred to as "tolling" in the German Criminal Code. The comparative law cross-section therefore avoids the term "interruption" and instead speaks of a "*restarting*" of the limitation period.

For a modification of the limitation period that suspends the beginning or continuation of the period, the terms "*inhibition*" and "*tolling*" are used here.

In the following, we speak of a "*termination* of the statute of limitations" when, in principle, the limitation can no longer come into effect, i.e. the offence can be prosecuted without a time limit.

The majority triggers of modification of the limitation period require some action on the part of the prosecuting authority. If the offence is not disclosed or if the prosecution authorities remain inactive, the base time limit usually applies.

b) The nature of the modification

The modifications to the limitation period can be divided into four groups according to the type of influence on the limitation period:

(1) The model most frequently chosen in the comparison group is the enumeration of grounds that trigger *a restart in combination with*

grounds that inhibit the beginning or continuation of the limitation period.[213] An example of the many procedural acts that cause the limitation period to restart is the first interrogation of the accused in Germany, and the arrest of the accused in Estonia. This results in a large number of possible extensions. In some countries, absolute statutes of limitation set limits even despite constant restarts.[214]

(2) Two countries work exclusively with *an inhibition of the beginning or of the continuation of the limitation period*. The respective periods of time are not included in the statute of limitations, which extends the time limit accordingly. If, as in Austria, the statute of limitations is suspended at an early stage, such as from the first interrogation of a suspect as an accused person (and does not continue until the final termination of the proceedings), this gives the prosecuting authorities – within the limits of the right to reasonable duration of proceedings according to Art. 6 para. 1 ECHR[215] – unlimited time to complete the proceedings. Furthermore, Austrian law provides for additional delay in the case of re-offending. In Greece, too, the only available modification is an inhibition of the beginning or of the continuation of the limitation period. Apart from legal obstacles to prosecution, only the opening of the trial phase (main proceedings) has this effect, tolling the statute of limitations until the criminal judgment becomes final, but for a maximum of 5 years in the case of felonies and 3 years in the case of misdemeanours.

(3) Poland provides for a *one-time extension of* the statute of limitations by a period of 10 years for offences prosecutable *sua sponte* by the authorities[216] and 5 years for private prosecution offences, which is triggered by the initiation of proceedings. In addition, the commencement or continuation of the limitation period may be *inhibited* for certain reasons.

(4) In four legal systems, certain procedural acts have the effect of *terminating the limitation period* such that, in principle, no further limitation can occur. The simplest regulation is in Switzerland, which has long

213 Germany, Estonia, France, Italy (Country Report Italy, A. Second Complex II.3.), Netherlands, Hungary.

214 Below A. Second Complex II.5.

215 For the simple legal formulation of this right, which has constitutional status in Austria, see § 9 Austrian CPC.

216 Including crimes prosecutable only on complaint of the victim (which are not considered part of the prosecuting authority's duty to pursue proceedings in Poland).

> base limitation periods and no possibility for lengthening them. Only the issuance of a first-instance judgment influences the running of the statute of limitations by terminating it. Before the introduction of the regulation, there was provision for restart and tolling of the statute of limitations in Switzerland. In order to simplify the handling of the statute of limitations, the Swiss legislator opted for a change of system and, by raising most of the time limits to the level of the former absolute limitation periods, "priced in" the former possibilities of extension into the regular time limits.[217]

Two countries provide for a *conditional termination* of the statute of limitations. In Spain, for example, "if the proceedings are directed against the person who, according to the circumstantial evidence, is responsible for the offence", the statute of limitations can no longer run unless the proceedings are discontinued or end without a conviction. Proceedings are deemed to be directed against the person presumed responsible from the formal initiation of proceedings or a subsequent reasoned court decision charging that person with involvement in a criminal offence. In the event of inactivity by the prosecuting authorities or the end of the proceedings without a conviction, the time limit begins to run anew. Thus, while the statute of limitations can no longer be tolled if the proceedings have been formally initiated and not subsequently halted and end with a conviction, the provision has the effect of suspending the statute of limitations and restarting the running of the time limit if the proceedings are not carried through or do not result in a conviction.

In Spain, the mere filing of a criminal complaint or a criminal charge triggers a conditional termination of the statute of limitations. If the proceedings are formally initiated within 6 months or if a reasoned court decision incriminating the person is issued, the limitation period is terminated. The regulation gives law enforcement bodies up to 6 months longer to formally initiate proceedings, an extension which only becomes relevant if the limitation period would otherwise have expired during this period. On the other hand, the statute of limitations continues to run *retroactively* without hindrance if the court does not admit the criminal complaint or charge within the aforementioned period or decides not to bring the proceedings against the person in question. In this case, the criminal action or criminal complaint has no effect on the statute of limitations.

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217 The new regulations came into force in 2002.

The Spanish Criminal Code does not explicitly regulate the question of how long the proceedings must stand still for the statute of limitations to restart. For the foreign observer, the question arises as to whether the end of the limitation period can be determined with legal certainty if the restart of the period depends on the inactivity of the prosecuting authorities, which is difficult to define exactly.

In Sweden, the arrest of the accused or the service of the indictment for the offence must take place within the limitation period. These events cause a (conditional) termination of the basic limitation period. Until the absolute limitation period has expired, the offence can no longer become time-barred unless the accused is released from pre-trial detention without service of an indictment or the proceedings against the accused are dismissed or discontinued after service of the indictment. The Country Report identifies as a disadvantage the potential for the accused to deliberately "run out the clock" by fleeing or absconding to avoid arrest or the service of the indictment.[218]

The statute of limitations in New York is conceived in a comparable way. There, the initiation of proceedings by indictment or issuance of an arrest warrant precludes the running of the statute of limitations indefinitely. In addition, there are grounds that toll the statute of limitations.

c) Modification of the limitation period through criminal proceedings

aa) Criminal proceedings generally

Occasionally, the procedural acts that extend the statute of limitations are *described* in the statute only *in general terms*. In Hungary, any criminal procedural act directed against the participant for the offence triggers the renewed running of the time limit. The act may be performed by a court, a public prosecutor's office or an investigating authority, and in cases with an international connection also by the Minister of Justice or a foreign authority. Acts that solely concern the organisation of the court or that are not likely to advance the proceedings on the merits are excluded. In the Netherlands, "any act of prosecution" has the effect of restarting the limitation period. Such acts are deemed to be acts by officials involved in prosecution that are aimed at obtaining an (enforceable) court decision.

218 Country Report Sweden, A. Second Complex II.3.

In Estonia, too, each act in the criminal proceedings originally resulted in a new start of the time limit. Because this trigger proved to be too vague in practice, it was decided to *enumerate the acts conclusively*. In three other countries, the procedural acts that extend the time limit are also enumerated explicitly. As expected, the list has a casuistic character and a common denominator is hardly recognisable.[219]

In France, *four categories of acts* are listed. They have in common that they are investigative or inquisitorial measures taken by the public prosecutor's office, the private plaintiff (*partie civile*), or an examining magistrate for the purpose of establishing a criminal offence, collecting evidence, or establishing the identity of the perpetrators or judgments.

In Sweden, *two procedural acts* terminate the (base) limitation period: the arrest of the accused or the service of the indictment.[220] Two comparable procedural events, namely the issuance of an arrest warrant or the filing of the indictment, have the effect in the United States that the statute of limitations cannot run out. In order to prevent the running of the limitation period in the case of unknown perpetrators, an anonymous indictment (*John Doe Indictment*) or the indictment of an unknown person of whom the DNA profile is available is possible in some states. In some cases, it is even possible to drop the charges and file a new indictment within a certain period of time without affecting the statute of limitations.[221] From a comparative law perspective, this practice appears to be a compensation for the short statutes of limitations in the United States, whose duration makes prosecution impossible if the perpetrator is discovered later were there no way of delaying the start of the statute of limitations. In Spain, a formal initiation of proceedings,[222] the filing of a criminal complaint, or criminal charges causes a conditional termination of the statute of limitations.

The *only procedural act* in Poland that results in a (one-time) extension of the statute of limitations is the initiation of proceedings. This requires a decision by the public prosecutor's office to initiate preliminary proceedings *in rem*, which in turn requires a reasonable suspicion of the offence.

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219 Germany, Italy, Austria.

220 Country Report Sweden, A. Second Complex II.3. On the problem associated with this trigger, namely that defendants can cause the statute of limitations to run by absconding, see Country Report Sweden, at fn. 157.

221 New York.

222 Or a later reasoned court decision charging participation in the offence.

In the case of lesser offences, the police may also initiate proceedings.[223] According to the prevailing view, in the case of imminent danger, the *de facto* initiation of preliminary proceedings by the public prosecutor's office or the police taking procedural actions to secure evidence is sufficient.[224] In Greece, only the lawful opening of the main proceedings causes a suspension of the statute of limitations (limited to 3 or 5 years) until the criminal judgement becomes final. In Switzerland, a first instance judgement must be handed down within the limitation period, which is the latest point in time observed in the comparison.

bb) Requirement of identification?

In five countries, procedural actions against unknown persons do not affect the running of the statute of limitations. Only when the suspect is *identified* can a procedural action extend the statute of limitations.[225]

In contrast, in some countries it is sufficient that the procedural measure is directed *against a participant in the offence*. The extension of the statute of limitations becomes effective by virtue of a statutory order for all participants in the offence, even if they are not affected by the prosecution action.[226]

In the third group, procedural acts against an *unknown* perpetrator already influence the running of the time limit, such as in Poland the aforementioned investigation *in rem*, which is intended to prevent a partic-

223 Preliminary proceedings initiated by the public prosecutor's office are referred to as "investigation proceedings"; if initiated by the police, they are referred to as "preliminary proceedings".

224 Art. 308 Polish CC. *Steinborn*, in Steinborn (ed.), Code of Criminal Procedure. Commentary to selected provisions, 2016, Art. 308 para. 3; *Zoll/Tarapata*, in: Wróbel/Zoll (eds.), Code of Criminal Procedure, 2016, Art. 102 para. 11; *Mozgawa*, Penal Code. Commentary updated, 2019, Art. 102 para. 4; *Sakowicz*, in Zawłocki (ed.), Kodeks karny, 2017, Art. 102 para. 4; disagreement from *Grześkowiak*, Penal Code, 2019, Art. 102 para. 10.

225 Germany (see § 78c (4) German CC: "The interruption is only effective against the person to whom the act relates." On the controversial question of whether it is sufficient for the identified suspect to emerge from the files or whether it must emerge from the measure itself, see in detail *Asholt* [fn. 13], 657 ff.), Estonia, Greece, Austria, Sweden (Country Report Sweden, A. Second Complex II.3.).

226 France (Art. 9–2 French CPC), Italy, Netherlands. According to Art. 132 para. 2 no. 3 Spanish CC, it is sufficient if the information in the court order allows for the subsequent specification of the person concerned within the organisation or group to which the offence is attributed.

ipant in the crime who is still unknown to the prosecuting authorities from escaping an extension of the statute of limitations by going underground.[227] According to the Hungarian Constitutional Court, the initiation of an investigation against an unknown perpetrator also has the effect of restarting the statute of limitations. In the United States, it is possible to avert the statute of limitations by bringing charges against an unknown perpetrator or against a DNA profile.[228] In France, too, investigative or remand measures are sufficient.

In the interest of predictability and predictability of the limitation period, it is preferable to presuppose suspicion of the offence *in personam.*

cc) Influencing deadlines through police actions

While some legal systems link an extension of the statute of limitations exclusively to procedural acts of the *court or the prosecutor*,[229] in other countries *steps taken by the police* also have this effect, such as the first interrogation as an accused person by the criminal police in Germany or Austria, an interrogation by the police in Italy, interrogation protocols of the police or gendarmerie in the context of police preliminary investigations in France. If one agrees with the prevailing view in Poland that the factual initiation of the proceedings is sufficient, evidence preservation measures taken by the police in case of imminent danger can also extend the statute of limitations.[230] In Hungary, a broad approach is taken. Any police action of a non-administrative nature that is suitable for advancing the criminal proceedings on the merits is sufficient.

dd) Further examples of procedural acts modifying time limits

Further examples of procedural actions that extend the time limit are canvassed in the evaluation of the case study. There, the effects are discussed of the initiation of an investigation by the public prosecutor's office, the

227 The switch from initiating proceedings *in personam* to initiating proceedings *in rem* took place in 2016.

228 See above before fn. 221.

229 Greece, Netherlands, Sweden, Spain, United States.

230 The security measures against the accused mentioned in § 81 para. 5 no. 1 Estonian CC, which trigger a restart of the statute of limitations, can also be taken by the police.

questioning of the accused by a public prosecutor or judge, the indictment, the temporary absence of the accused and a first-instance judgement in the countries studied.[231]

In most countries, procedural acts at the pre-trial stage (until the opening of the main proceedings) are sufficient. In addition to the procedural steps discussed in the case example, an arrest warrant or the arrest of the accused often triggers an extension of time.[232]

Apart from a first instance judgment, it is the exception that a procedural act after the opening of the main proceedings sets a (new) time limit in motion. In Germany, this applies to several procedural steps, such as each scheduling of a main hearing or the provisional judicial discontinuation due to absence or inability to stand trial. In Estonia, too, several measures trigger a new expiry of the limitation period: the adjournment of the main hearing if the defendant does not appear, the questioning of the defendant at the trial or the ordering of an expert opinion or a supplementary taking of evidence during the main hearing. It cannot be ruled out that even in countries where the reason for the restart of the time limit is formulated in general terms, such as in the Netherlands and Hungary, a later procedural event sets a new time limit in motion.

In models with few procedural acts affecting the time limit, these are either the initiation of the preliminary proceedings[233], the issuing of an arrest warrant or the indictment[234], the arrest of the accused or the service of the indictment[235], the opening of the main proceedings[236], or the first instance judgment[237].

ee) "Artificial" extensions

For some countries it was communicated that acts that do not have the effect of moving proceedings forward remain inconsequential for the period

231 Below, C.III.2.–6.
232 Germany (arrest warrant), Estonia, Italy (arrest or order confirming arrest), Netherlands, Austria (arrest by the criminal police or a request by the public prosecutor to impose pre-trial detention is sufficient), Sweden (actual detention required), United States.
233 Poland.
234 United States.
235 Sweden.
236 Greece.
237 Switzerland.

of limitation. Due to the risk of abuse, this restriction is particularly necessary if the trigger for the extension of the limitation period is standardised in a general clause. In Hungary, for example, the act in the criminal proceedings against the party involved that triggers the recommencement of the statute of limitations must advance the criminal proceedings on the merits.[238]

In Spain, only certain procedural acts cause the conditional termination of the limitation period. Actions that are useless for the purpose of the proceedings, have only formal content, repeat earlier actions or delay the course of the proceedings are considered as a failure to continue the proceedings with the consequence that a previous interruption of the limitation period loses its effect, i.e. the limitation period continues to run unhindered from the beginning. In this case, an abusive procedural act can hasten the end of the limitation period.

In Germany, some decisions of the Federal Supreme Court require that an act triggering the recommencement of the limitation period be factually related to the criminal prosecution and is at least likely to further it.[239] Since the change from a general clause to the enumerative listing of relevant procedural acts, however, it is questionable whether this limitation is still necessary.

ff) Acts in other jurisdictions

For two countries, it was reported that procedural acts of foreign law enforcement authorities are recognised as having the same effect on the statute of limitations as acts of domestic authorities. In France, the case law assumes this for procedural acts performed abroad, such as a search warrant or arrest warrant. In Hungary, criminal procedural acts of foreign authorities are equated by law with domestic criminal procedural acts.

In contrast, only domestic procedural acts are recognised in Germany. According to the Federal Constitutional Court, this applies even when it has to be assessed whether the statute of limitations of a criminal offence under which a European Arrest Warrant has been issued precludes the extradition of a German national. This is because "[t]he translation, classifi-

238 In the Netherlands, the restriction probably results from the fact that the "act of prosecution" must be an act of a public prosecutor or judge aimed at obtaining an enforceable court decision.

239 On this whole area see *Saliger*, NK-StGB, § 78c paras. 31 f.

cation and evaluation questions that regularly arise in the search for functional equivalents in foreign legal systems" impair the "predictability of the extradition proceedings".[240] Only in the scope of application of the European Convention on Extradition are functionally equivalent procedural acts abroad taken into account in the context of the examination of whether the extradition of a third-country national is to be refused due to the statute of limitations.[241] For Austria, too, the consideration of foreign procedural acts in the context of the statute of limitations is rejected for lack of an explicit legal basis.[242]

With a far-reaching harmonisation of limitation law in the EU, it seems consistent to grant procedural acts in another Member State the same effect as domestic acts. This increases mutual trust in the respective statute of limitations and the acceptance of a blocking effect of the termination or dismissal of proceedings due to limitation.

d) Extension of time limit due to obstacles to prosecution

Most of the legal systems examined[243] provide that certain obstacles to prosecution inhibit the commencement or continuation of the limitation period. These are legal or factual reasons that prevent prosecution. When the obstacle ceases to exist, the limitation period begins to run or the remainder of the period continues to run. This extends the limitation period by the period of its suspension. This is based on the idea that a statute of limitations should not run out without the (legal or factual) possibility of prosecution.

The absence of the declaration of the person entitled to press charges, such as a criminal complaint, an authorisation to prosecute or a private

240 BVerfG, Order of 3.9.2009, 2 BVr 1826/09, paras. 36, 40. On the applicability of the case law to other EU citizens as well as to nationals of third countries *Zimmermann*, in: Schomburg/Lagodny/Gleß/Hackner (eds.), Internationale Rechtshilfe in Strafsachen, 6th ed. 2020, § 9 IRG paras. 38 f.

241 *Zimmermann*, in: Schomburg/Lagodny/Gleß/Hackner, IRG § 9 para. 30 with further references. Art. 1 para. 4 4th CP-European Convention on Extradition expressly provides that "all acts done or events occurring in the requesting Contracting Party which may have the effect of interrupting or suspending the limitation period in the requested Contracting Party" are to be taken into account in accordance with its own laws.

242 *Schallmoser*, SbgK, § 58 para. 46.

243 The exceptions are (besides England and Wales) Sweden, Switzerland and Spain, whose systems have no provision for tolling.

action, should it be necessary for prosecution, does not postpone the commencement of the limitation period in any legal system, because it is not supposed to be within the power of private persons to delay the commencement of the limitation period.

In the Netherlands, only one trigger has the aforementioned effect, namely the suspension of prosecution in the context of *preliminary ruling proceedings*. This temporary obstacle to prosecution is recognised as a ground for tolling of the limitation period in some other countries.[244] A frequently occurring ground for tolling is *immunity*, especially of members of parliament.[245] The beginning of the tolling of the statute of limitations is handled differently. In some systems, the effect on the statute of limitations already occurs after an existing suspicion of a crime *in persona*.[246] The start of the statute of limitations can also be postponed in the case of certain offences against *underage victims*.[247]

In addition to legal obstacles, in individual countries the obstacles can also be of a *factual nature*. In France, this applies to "any insurmountable factual obstacle comparable to force majeure which makes it impossible to initiate or carry out public prosecution".[248] An example is the flight of the accused abroad in the case of uncertain extradition. In Estonia, the absence of the suspect or accused tolls the statute of limitations.[249] In the United States, it is also common for the statute of limitations to be tolled if the suspect flees or evades prosecution.[250]

Some of the above-mentioned grounds for suspension appear to be dispensable if the statute of limitations is modified accordingly, for example

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244 Germany, France, Greece, Italy, Hungary. In Austria, the statute of limitations stops running from certain investigative measures until the final conclusion of the proceedings, which is why there was no need for a separate regulation for preliminary ruling proceedings.

245 Austria, Estonia, France, Germany, Greece, Hungary, Italy, Poland.

246 Germany, Estonia (only after "suspicion has been raised"), Poland (according to case law, from the time of application for withdrawal of immunity). Unclear in Austria (or rather: already arises from the existence of the obstacle to prosecution, i.e. independent of the discovery) and Hungary.

247 More detailed above A. Second Complex II.2.c.

248 Art. 9–3 French CPC.

249 The same effect comes about in Greece if the accused, whose place of residence is unknown, does not appear at the main hearing and also does not allow himself to be represented. The proceedings are then suspended until the arrest of the accused, which is considered a legal impediment to prosecution.

250 In Poland, it is disputed whether the suspension of proceedings provided for when the accused cannot be found is a legal obstacle the duration of which is not to be included in the limitation period.

if a rather early procedural act suspends the running of the time limit until the final conclusion of the proceedings or leads to an extension of the time limit by a relatively long period of time. However, a tolling of the statute of limitations in the case of immunity is probably indispensable.

e) Multiple modifying factors on the expiry of the deadline?

In all legal systems that provide for a recommencement of the limitation period, this influence on the expiry of the time limit can be repeated, so that the start of the time limit can stack up. Only some of the countries set absolute limits on a constant recommencement.[251] In addition, the statute of limitations can be suspended in these countries due to obstacles to prosecution.

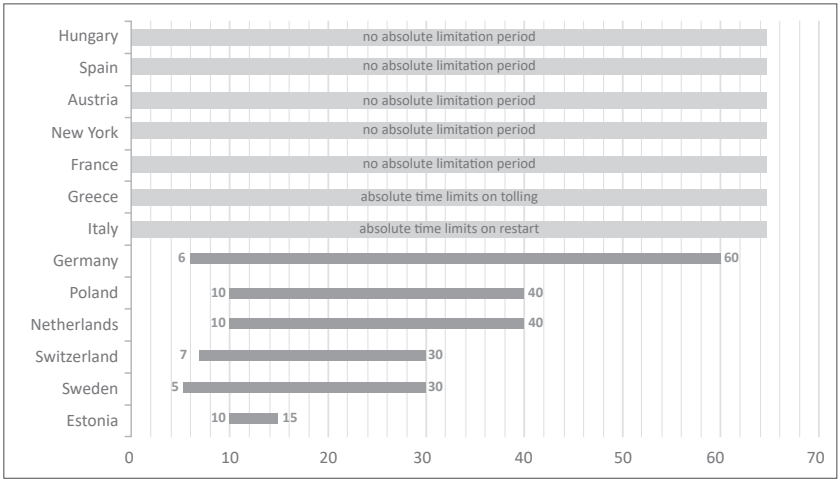
If a certain procedural act terminates the statute of limitations in a country, there can naturally be no further influence on the expiry of the time limit. In New York, however, a prior suspension of the limitation period is possible due to procedural obstacles.[252]

Even in models which, like Greek and Austrian law, rely exclusively on an inhibition of the limitation period, the period starts to run only once. It is true that in Austria, unlike in Greece, various procedural acts cause a suspension of the limitation period. However, since the performance of the first act of this kind already suspends the limitation period until the final conclusion of the proceedings, the performance of the further acts is no longer relevant. Multiple suspensions of the limitation period can only occur in these countries as a result of a prior legal procedural impediment. The same applies to the Polish solution of a one-time extension of the time limit from the initiation of preliminary proceedings in combination with a suspension of the limitation period in the case of procedural obstacles.

251 More details in the following chapter.
252 § 30.10 (4) New York CC.

5. Absolute limitation periods

Graph 2: Longest and shortest absolute limitation periods



As can be seen from the previous chapter, some regulatory models do not require separate absolute limitation periods. In Switzerland, for example, the regular limitation periods are of a quasi-absolute nature, as a first-instance judgment must be rendered within the period, without the possibility of an extension. In Poland, the statute of limitations and the possibility of a one-time extension by 5 or 10 years result in a quasi-absolute deadline that can only be postponed by a suspension.

Spain and the United States refrain from absolute time limits for the statute of limitations, although in these countries the influencing of the statute of limitations by a single procedural act (in the form of an interruption of the statute of limitations) is not limited in time. In Sweden, on the other hand, the provisional interruption of the statute of limitations is limited by a fixed period of time for prosecution.[253]

Within the countries where the period can constantly start anew, the solution is inconsistent: two countries (Germany, the Netherlands) provide for an absolute time limit for the restart of the limitation period, which is

253 With an absolute statute of limitations of 5 years for threat of fine, 15 years for offences in the secondary criminal law and offences with a maximum sentence of 2 years, 30 years for all other offences.

twice the regular limitation period or a fixed period of time.[254] The time limits do not apply to the suspension of the statute of limitations due to a procedural impediment, so that in individual cases the offence remains prosecutable despite the expiry of the "absolute" limitation period.

Two other countries in this group (France, Hungary) do not know an absolute time limit for the statute of limitations.

In the remaining countries of the group (Estonia, Italy) there are maximum time limits for an extension of the limitation period by a recommencement or a suspension. In Estonia, the regular limitation period may not be extended by more than 5 years as a result of a restart. Thus, depending on the severity of the crime, absolute limitation occurs after a total of 10 or 15 years. In the case of suspension of the limitation period, the absolute limitation period is 15 years. In Italy, the statute of limitations in both cases[255] may in principle not be extended by more than a quarter of the initial period. In the case of particularly serious corruption crimes and aggravated recidivism,[256] the extension may not exceed half of the initial period. In the case of repeated re-offending, the limit increases to two-thirds of the time limit, and in the case of habitual or professional commission, the limit increases to the entire base time limit again.

Of the two countries in the comparison group in which the statute of limitations is suspended from the time a certain procedural act is performed until the final termination of the proceedings[257] (Greece, Austria), Austria has dispensed with absolute limitation periods. On the other hand, Greece has opted for an additional time limit on the suspension: The suspension of the statute of limitations until the final conviction is limited to 5 years for felonies and 3 years for misdemeanours. After reaching the limit, the rest of the limitation period continues to run. Individual exceptions allow for a longer suspension, such as in the case of crimes against minors or if the criminal prosecution is suspended to clarify a preliminary question under civil or administrative law.

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254 Germany: double the limitation period, but at least 3 years; Netherlands: double the limitation period for felonies, 10 years for misdemeanours.

255 For the suspension, these time limits only apply in the case of a stay of proceedings due to the absence of the defendant within the meaning of Art. 422-*quater* Italian CPC; Art. 159 para. 6 Italian CC.

256 The compatibility with the presumption of innocence according to Art. 6 para. 2 ECHR is beyond question, since recidivism always requires a conviction for the previous offence.

257 Or, in Greece, of the sentence having the force of *res judicata*.

Whether absolute limitation periods are a sensible component of statutes of limitation is difficult to assess in this mixed situation. On the one hand, fixed time limits create clarity about the point in time at which prosecution is no longer permissible and thus serve to make the occurrence of the limitation period predictable. In some countries,[258] however, the "absolute" limitation periods do not apply to all modifications of the limitation, so that the end of the limitation period is only somewhat more predictable than in countries without these periods. Another advantage is that the imminent running out of the limitation period in individual cases can help to speed up the proceedings. On the other hand, absolute time limits have the disadvantage that the criminal proceedings cannot be completed if the time limit has been reached, even if the duration of the proceedings could still be considered reasonable.[259] Reasonableness of the duration of the proceedings according to Art. 6 para. 1 ECHR cannot be expressed in a fixed period of time,[260] but can only be determined by means of an overall consideration of several criteria that must be examined in the individual case, such as the importance of the case for the person concerned, the complexity of the case, and the conduct of the state organs and the person concerned.[261] The institution of the statute of limitations with its fixed abstract time limits is not suitable to take these requirements into account. It is therefore recommended that absolute time limits for criminal prosecution be dispensed with. Instead, an appropriate duration of proceedings should be ensured by an efficient design of procedural law, sufficient staffing and financial resources of the courts and public prosecutors' offices, as well as by appropriate legal remedies and compensation claims.

III. Consequences of the expiry of the limitation period

1. Procedural reactions to the expiry of the limitation period

From a procedural point of view, the occurrence of the statute of limitations is predominantly treated as a *procedural obstacle.* This solution is as-

258 This is the case, for example, in Germany and the Netherlands (at fn. 254).

259 One example is the "Love Parade" trial mentioned in the Country Report Germany, which were discontinued due to the threat of the statute of limitations.

260 *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, 7th ed. 2021, § 24 para. 83; *Meyer*, in: Karpenstein/Mayer (eds.), Konvention zum Schutz der Menschenrechte und Grundfreiheiten: EMRK, 2nd ed. 2015, paras. 76 f.

261 *Grabenwarter/Pabel* (fn. 260), § 24 paras. 82 f.

tonishing for Italy, because there the statute of limitations is attributed a substantive character. The other countries with a substantive conception of the statute of limitations assume a *ground for annulment of the sentence*.[262] In the United States, the traditional view is that the statute of limitations excludes jurisdiction.

In France, the courts assume that the statute of limitations leads to the disappearance of the criminal character (*caractère délictueux*) of the acts that are henceforth considered to be formally in conformity with the law. This is all the more noteworthy because the statute of limitations in France is indisputably procedural in character. For other countries, such as Sweden and Italy, on the other hand, it is emphasised that the conduct continues to be considered a criminal offence despite the occurrence of the statute of limitations and therefore, for example, the right to compensation for damages continues to exist.

a) In preliminary and intermediate proceedings

If criminal proceedings have already been initiated but no main hearing has been opened, the proceedings will be *discontinued* when the statute of limitations expires. In Estonia and Switzerland, proceedings are discontinued *by the public prosecutor's office*, in Austria alternatively *by the court* at the request of the accused. In Germany, the public prosecutor's office is responsible for discontinuing preliminary proceedings. If the expiry of the statute of limitations is only determined after the preliminary investigation stage, the court will terminate proceedings by declining to open the trial phase unless the public prosecutor withdraws the charges. In other countries, the termination of proceedings is generally done by the court: In Greece, the proceedings are terminated by decision of the judicial council. In Sweden, the court drops the charges without requiring the consent of the prosecution. In France, if a preliminary judicial investigation has already been initiated, the investigating judge terminates it by a so-called *ordonnance de non-lieu.* In Italy, the time bar is pronounced by the investigating judge of the preliminary investigation at the request of the public prosecutor.

262 Austria, Poland, Hungary (Country Report Hungary, A. Second Complex IV.1.), also Spain (with its mixed legal character of limitation).

b) In the main proceedings

If the proceedings are at the stage of main proceedings, the reaction to the occurrence of the statute of limitations varies. In four countries,[263] there is never an acquittal in such a case, but the proceedings are *discontinued* by the court. In Greece, the explanation is that the court is not allowed to make any further findings on criminal liability for the offence, since the statute of limitations has terminated the criminal liability.

In four countries, the accused must always be *acquitted*.[264] It is astonishing that France is one of these countries, although the legal nature of the statute of limitations is assumed to be procedural. This is for procedural reasons: the possibility of discontinuing proceedings at the main trial stage is not provided for in France.[265] In Italy, before an acquittal due to the statute of limitations, it must be examined whether the accused is to be acquitted for lack of guilt, because an acquittal on the merits takes precedence over an acquittal due to the statute of limitations. The idea of guilt thus takes precedence over the interest of judicial economy.

In the other countries, an *acquittal* only occurs if the offence is not proven.[266] The necessity of an acquittal is justified for Germany with the priority of a decision on the merits, in Poland with another contradiction to the material essence of the statute of limitations on criminal liability and its procedural function as a negative prerequisite for proceedings, which only justifies a discontinuation in an early phase of the criminal proceedings.[267] Otherwise, the proceedings are *discontinued*, in Germany by a trial judgement.[268]

263 Greece, Switzerland, Hungary, United States (there the final dismissal of the proceedings takes place at the request of the accused, dismissal with prejudice).

264 France, Italy, Austria, Spain.

265 (As in Austria).

266 Germany. In Poland, this applies in any case when the statute of limitations has come into effect at the time of the "passing of the sentence", if an acquittal on the merits is possible without further taking of evidence. Whether it is also possible beyond this point is disputed. In Estonia, an acquittal only takes place in appeal proceedings, otherwise the court proceedings are discontinued by judgment.

267 *Kmiecik*, Problemy Praworządności, 1980, No. 5, 13 f.

268 In Estonia, too, the court proceedings are discontinued by judgement. No information is available for Sweden.

c) In the event of waiver of the limitation period

In Estonia, after criminal proceedings have been discontinued due to the statute of limitations, the person concerned can demand that they be continued for the purpose of rehabilitation.[269] If it becomes apparent in the course of further proceedings that the offence cannot be proven, the proceedings are to be discontinued due to lack of sufficient suspicion or the accused is to be acquitted due to lack of provability of the offence. If a punishment fails only due to the statute of limitations, while all other punishment and prosecution requirements are met, it is disputed whether a conviction is to take place without a sentence or whether the proceedings are to be discontinued.

In Italy, the right to a defence also gives rise to the possibility of waiving the statute of limitations, whereby continued criminal proceedings can end in a conviction in an unfavourable case. In the United States, a waiver of the statute of limitations in a *plea bargain* can result in a conviction for a lesser offence that is actually already time-barred.[270]

d) Summary

The procedural reactions suggest that the treatment of the statute of limitations is more an outgrowth of the shape of procedural law than of the assumed legal character of the statute of limitations. One is reminded of France, where the occurrence of the statute of limitations interpreted as procedural leads to an acquittal, and of Greece, where the materially understood statute of limitations leads to a discontinuance. The fact that in Italy an acquittal due to the statute of limitations is treated as a second-class acquittal and that priority is given to an acquittal on the merits – in addition to the possibility of waiving the statute of limitations – calls into question the strict assignment to substantive law. From a human rights perspective, there is no right to rehabilitation through an acquittal on the merits. In the interpretation of the ECtHR up to the present, the presumption of innocence pursuant to Art. 6 para. 2 ECHR is preserved even if it is

269 The country report also mentions the reverse possibility of conducting proceedings for a time-barred offence for the purpose of certifying that an offence that is now time-barred has taken place.

270 See above at fn. 55.

expressed in the order or judgment terminating the proceedings that the accused is merely suspected of committing the time-barred offence.[271]

2. *Ne bis in idem*

a) At the national level

If the *judicial* discontinuation or acquittal due to the statute of limitations has become *res judicata*, no further prosecution may take place within the state concerned for the same offence.[272] The decision therefore has a blocking effect. This does not affect the possibility of reopening the criminal proceedings. In Austria, this is permissible, for example, if it subsequently turns out that the acquittal due to the statute of limitations was based on the false testimony of a witness, and the offence is in fact not yet time-barred at the time of the reopening.

It is less clear whether the principle of *ne bis in idem* also applies in the case of a discontinuation by the public prosecutor's office.[273] This is not the case in three of the countries examined. If the public prosecutor's office has erroneously assumed that the statute of limitations has occurred, a new criminal prosecution can be initiated in Germany, because a discontinuation according to § 170 para. 2 sentence 1 German CPC does not bar the initiation of new proceedings. In Estonia, the discontinuation can be annulled by the superior public prosecutor if there was an incorrect determination of the facts. In France, after a simple decision by the public prosecutor's office to discontinue the proceedings due to the statute of limitations (*classement sans suite*), the court has the possibility to reopen the proceedings if it subsequently turns out that the offence is not time-barred after all. In Austria, Switzerland and Hungary, on the other hand, further prosecution is generally excluded even if the public prosecutor's office discontinues the case due to the running of the statute of limitations. Only

271 ECtHR, judgment of 28.10.2014, Peltereau-Villeneuve v. Switzerland, paras. 34 f.

272 Austria, Estonia, France, Germany, Greece, Hungary, Italy, Poland, Switzerland. No information is available for Sweden, Spain, United States.

273 In Greece, once proceedings have been opened, the case is always dismissed by a court due to the statute of limitations. A decision by the public prosecutor's office before this point in time to file the case or to dismiss the criminal charges due to the statute of limitations does not necessarily prevent a new prosecution. In Italy, the investigating judge pronounces the discontinuation due to the statute of limitations. This should have a *ne bis in idem* effect.

under the conditions of reopening is a new prosecution of an offence that is in fact not yet time-barred possible as an exception.[274]

The substantively identical decision of the public prosecutor's office to terminate the prosecution due to the entry of the statute of limitations thus has a different status. While in three countries a new prosecution is permissible, this is not the case in three other countries. This divergence is probably related to the assumed legal nature of the statute of limitations.[275]

b) In cross-border cases

A Europe-wide application of the *ne bis in idem* principle, i.e. a bar to further prosecution across jurisdictions according to Art. 54 CISA (Art. 50 CFR) requires first and foremost that a trial be "finally disposed". In the *Gasparini* case, the ECJ held that in view of the objective of Art. 54 CISA to guarantee the right to freedom of movement, a *final acquittal due to the statute of limitations* is to be regarded as a final disposition and precludes a new prosecution for the same offence by a court of a State Party to the CISA.[276] This is the consistent development of the case law according to which the Contracting States have mutual trust in their respective criminal justice systems and must accept the application of the criminal law applicable in the other Contracting States, even if the implementation of their own national law would lead to a different solution.[277] In this context, because the criminal procedural systems of the Member States have only been harmonised to some extent, it cannot matter whether the substantively identical settlement of the proceedings takes place formally in the form of an acquittal or a discontinuation by trial judgement or the like. From

274 This was communicated for Austria and Switzerland.

275 The first group includes the two legal systems with a procedural legal nature of limitation, namely Germany and France; in Estonia a mixed legal nature is advocated. The second group includes two countries with a substantive legal nature of limitation, namely Austria and Hungary; in Switzerland the legal nature is disputed.

276 ECJ, judgment of 28.9.2006, Case C-467/04 (Gasparini), paras. 22 ff.

277 ECJ, judgment of 28.9.2006, Case C-467/04 (Gasparini), para. 30. On the other hand, a discharge of proceedings due to limitation cannot be equated with a decision on lack of jurisdiction (in this direction, however, *Klip*, European Criminal Law, 2016, p. 289 f.) because, unlike the latter, it claims to settle the case.

the functional perspective that offers itself here,[278] a definitive domestic *judicial discontinuation due to the statute of limitations* is also to be recognised as having a blocking effect within the meaning of Art. 54 CISA.[279] This view can be based on the ruling of the ECJ in the *M.* case, which classified a court decision to discontinue proceedings under Belgian law issued before the opening of the main hearing and only revocable if new incriminating facts emerged, as a "final conviction".[280]

The case law of the European Court of Justice has made clear that the European prohibition of double prosecution and double punishment can also be triggered by the *public prosecutor's* dismissal of proceedings due to the statute of limitations if the dismissal of proceedings is to be regarded as final in domestic law and if "detailed investigations" have been carried out into the running of the statute of limitations.[281] The domestic blocking effect is then extended to any country that applies the European *ne bis in idem* convention. Thus, all proceedings of a Contracting State mentioned under a) due to the statute of limitations, which exclude a new prosecution in the respective state[282] also prevent prosecution by another Contracting State. If, on the other hand, there is no barring effect within the state, the European prohibition of double prosecution and punishment does not apply.[283] This means that decisions by the public prosecutor's office to dis-

278 *Hochmayr*, in: Pechstein/Nowak/Häde (eds.), Frankfurter Kommentar zum Recht der Europäischen Union, 2017, Art. 50 GRC para. 14.

279 Also, e.g., *Meyer*, in: Wolter (ed.), Systematischer Kommentar zur StPO (SK-StPO), 5th ed. 2019, 7. ZP-EMRK paras. 77 f.

280 ECJ, judgment of 5.6.2014, Case C-398/12 (M.), paras. 26 ff.

281 ECJ, judgment of 11.12.2003, joined Cases C-187/01 and C-385/01 (Gözütok and Brügge), paras. 25 ff.; ECJ, judgment of 29.6.2016, Case C-486/14 (Kossowski), paras. 38 ff. In contrast to the case constellation underlying the Kossowski ruling, it should not matter whether "detailed investigations into the substance" (in the sense of investigations into the question of guilt) were carried out (loc. cit. para. 48). Only if the evidence that has not been examined calls into question the presumed time of limitation will a European barring effect have to be denied; so also *Wegner*, HRRS 2016, 396 (401); in the result also *Bürger*, wistra 2019, 473 (474); *Meyer*, in: SK-StPO, 7. ZP-EMRK paras. 77 f., who consider an examination of the facts from which the procedural impediment follows to be sufficient.

282 With the exception of the resumption.

283 Also *Esser*, in: Löwe-Rosenberg, StPO, vol. 11, 26th ed. 2012, Art. 14 ICCPR para. 1073; *Inhofer*, BeckOK StPO, 38th edition, status: 1.10.2020, SDÜ Art. 54 para. 27; *Wegner*, HRRS 2016, 402. Disagreement from *Meyer*, in: SK-StPO, 7. ZP-EMRK paras. 77 f.; *Schmitt*, in: Meyer-Goßner (ed.), StPO, 62nd ed. 2019, § 170 para. 9a; *Schomburg/Wahl*, in: Schomburg/Lagodny/Gleß/Hackner, Art. 54 SDÜ para. 61.

continue prosecution are treated differently under European law, depending on how high the hurdles are for a new prosecution in the respective state. Remedy would be possible through the development of criteria for a European-level rule on the entering into legal force of judgments or decisions.[284]

Furthermore, some legal systems waive prosecution even if the statute of limitations has run in a *third state,* thus recognising an even further *extended ne bis in idem* rule. Thus, in Greece, criminal offences committed entirely abroad, which are time-barred under the law of the third state, may no longer be the subject of criminal proceedings. This excludes certain offences against the Greek state as well as offences to be prosecuted according to the principle of universality. No proceedings may be brought in France against a person who has been finally convicted of the same offence abroad if, in the case of a conviction, the sentence has been served or its enforceability has lapsed.[285] This means that the occurrence of the limitation period for the foreign act[286] must have been recognised in a final foreign court decision. Switzerland's law on the application of criminal law generally excludes foreign offences from prosecution if the occurrence of the statute of limitations has been legally established abroad.

By contrast, there is no concept of "interstate" *ne bis in idem* in the United States. Even if the offence is time-barred in one state, a (further) prosecution may be conducted in another state or under federal law.[287]

3. International legal assistance

Under the customary rules of mutual legal assistance, double criminality is a prerequisite for assistance: the conduct alleged in the request for mutual assistance must also be punishable under the law of the requested state. There is some dispute as to whether it is sufficient that the conduct in the

284 See *Hochmayr*, Europäische Rechtskraft oder gegenseitige Anerkennung, in: Hochmayr (ed.), "Ne bis in idem in Europa". Praxis, Probleme und Perspektiven des Doppelverfolgungsverbots, 2015, 89 ff. with further references.

285 Art. 113–9 French CC, Art. 692 French CPC. Compared to Art. 54 CISA, the enforcement element is more narrowly defined. In particular, enforcement that is still ongoing is not an obstacle to renewed prosecution.

286 If the French courts have jurisdiction according to the territoriality principle, the procedural obstacle according to Art. 113–9 French CC and Art. 692 French CPC does not apply; Cour de cassation, e.g., Crim., 8.6.2005.

287 No information is available on the other countries.

requested state is subject to a criminal offence, or whether it is also important that no grounds for exemption from punishment (such as grounds for justification and excuse, grounds for exclusion of punishment and grounds for setting aside punishment) apply.[288] According to the prevailing opinion, the existence of a procedural impediment is irrelevant.[289]

Against this background, it is not surprising that it is equally unclear what the effect is of a time bar to prosecution in the requested state. The initial situation suggests that in countries with a substantive understanding of the statute of limitations, mutual assistance will be refused, but not in countries with a procedural understanding of the statute of limitations. However, the assumption of a connection between the character of the statute of limitations and the invocation of an obstacle to mutual assistance cannot be verified with the available data. It is true that at least three of the five countries with a substantive understanding of the statute of limitations routinely invoke it as a ground for refusing legal assistance under the EAW Framework Decision,[290] as that instrument entitles them to do.[291] A counter-example, however, is Poland, which can execute a European arrest warrant even for an offence that is statute-barred under its own law, because the optional ground for refusal was only implemented as a discretionary provision. Even for the protection of its own citizens, there is no obligation to refuse surrender on the basis of a European arrest warrant because of the occurrence of the statute of limitations. Conversely, the two countries with a decidedly procedural understanding of the statute of limitations refuse[292] extradition in such a case.[293] However, the functional view of the institution of the statute of limitations speaks for its equal treatment

288 *Satzger*, Internationales und Europäisches Strafrecht, 9th ed. 2020, § 5 paras. 95 ff. with further references.

289 Satzger (fn. 288), § 5 paras. 102 ff. with further references.

290 Greece, Italy and Austria. Greece does not extradite for offences that are statute-barred there; the execution of other acts of mutual legal assistance is at the discretion of the competent institution. In Austria, there is an exception, albeit a controversial one, for the execution of a European arrest warrant if there is no Austrian criminal jurisdiction.

291 Art. 4 No. 4 Council Framework Decision of 13.6.2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

292 Germany, France.

293 In the case of offences that are time-barred under Swiss law, such mutual assistance measures that require coercive measures are excluded, unless special mutual assistance agreements under international law – such as Art. 62 para. 1 CISA – provide otherwise. Unlike in Spain, for example, the statute of limitations is not part of the domestic *ordre public* in Switzerland.

in the area of mutual legal assistance, whether it is considered part of substantive law or procedural law.[294]

4. *Aggravating consideration of statute-barred offences*

For some countries, information was provided on whether time-barred offences may be considered as aggravating factors for sentencing purposes: in Estonia, Greece, Austria and Hungary, this is not permissible. The reason given for this in Greece is that the court is not allowed to make any findings on the commission of the time-barred offence. In Austria, time-barred offences are only exceptionally considered for inclusion in the prognosis of dangerousness within the framework of special preventive considerations.[295]

In Germany, on the other hand, the case law allows for consideration insofar as the now time-barred offences are established in the judgment. This approach is likely to be compatible with the presumption of innocence pursuant to Art. 6 para. 2 ECHR, because according to the ECtHR, unlike after a final acquittal, it may be permissible to invoke the offences after criminal proceedings have been dismissed for other reasons. For this purpose, the competent court must provide "legal proof of guilt" in proceedings in which the accused was able to exercise his or her rights of defence, with a lowered standard of proof for facts relating to punishment.[296] In the United States, too, a time-barred offence may be considered aggravating in the context of sentencing with a lower standard of proof.

5. *Effect on linked offences*

In some countries, the statute of limitations affects the apparent co-occurrence of offences. If the main offence is already time-barred, punishment for a technically unpunishable secondary offence may nonetheless be per-

294 For equal treatment also *Satzger* (fn. 288), § 5 paras. 102 ff.

295 This would be endorsed by the ECtHR, according to which Art. 6 para. 2 ECHR does not apply to allegations "made in the context of sentencing about the character and conduct of the accused"; ECtHR, judgment of 25.1.2018, Bikas v. Germany, NJW 2019, 203, para. 57.

296 ECtHR, judgment of 25.1.2018, Bikas v. Germany, NJW 2019, 203; *Esser*, StV 2019, 492 (498).

mitted.[297] In two countries, this solution is not on offer: in Austria, for example, the prevailing academic opinion refuses a revival of the secondary offence with reference to the fact that the event is to be assessed solely according to the primary type of offence and does not require actual punishment of the offence. Polish jurisprudence also assumes that the non-punishable secondary offence is time-barred together with the principal offence.[298]

IV. Scope of the limitation

1. Confiscation of assets

The question of whether *confiscation* can still take place even if the offence is already time-barred gives direct rise to difficulties of classifying the confiscation within the dogmatic structure of sentencing law. If confiscation has a *punitive character*, the running of the statute of limitations should prevent confiscation. If, on the other hand, it is understood as a *sui generis sanction* which ensures that offences do not pay off (profit confiscation), there need not be conclusive proof of culpability beyond the initial analysis.[299] This means that the question of whether a confiscation of profits may take place in the case of an offence that is time-barred cannot be answered unambiguously. The sanction could still fulfil the function of making the commission of offences economically unattractive after the statute of limitations has expired. Only reasons of legal certainty could be cited against a confiscation of profits after this time.

In the legal systems examined, the admissibility of *confiscation* beyond the limitation period is handled inconsistently. In terms of numbers, the majority of countries allow confiscation of unlawfully obtained proceeds despite the fact that prosecution is time-barred.[300] In Germany, this only applies to the extended and the non-conviction based confiscation of the

297 Germany, Greece, Sweden (the courts make exceptions to this rule, e.g., for receiving stolen goods), Switzerland, Hungary. France does not recognise unpunishable prior and subsequent offences; however, the same applies to so-called secondary offences, such as the use of a counterfeit after a forgery.

298 No information was provided on the other countries.

299 On sanction categories from a comparative law perspective *Hochmayr*, ZStW 2012, 67 f., 69 f., 74 ff.

300 Germany (partly), Italy, Netherlands, Switzerland (partly), Sweden, Spain (according to prevailing doctrine), Hungary.

proceeds of the offence or its value, for which a separate statute of limitations of 30 years from the end of the offence is standardised. For Italy, it is emphasised that in order for the sanction to be compatible with the ECHR and the Italian Constitution, the (time-barred) criminal liability of the accused must have been established in previous criminal proceedings. In Switzerland, the confiscation of assets is in principle time-barred at the same time as the offence, but at the earliest after seven years. In the case of misdemeanours, assets can therefore be confiscated after the statute of limitations has run. It should be noted that once a first instance judgment has been handed down in Switzerland, the limitation period on confiscation is terminated,[301] with the result that the measure can be ordered at any subsequent time.

In the other countries, the statute of limitations precludes the confiscation of assets.[302] Under French and Greek law, this is due to the classification of confiscation as a secondary penalty. In Estonia, however, in cases where the owner of the property is unknown, the property can be confiscated despite the fact that the offence is time-barred (confiscation *in rem*).

2. *Preventive measures*

Preventive measures[303] are intended to counteract the dangerousness of persons or objects that has manifested itself in a criminal offence. The sanction does not require the culpable commission of a criminal offence, but is based solely on the continuing dangerousness of the respective person or object.[304] In most cases, the imposition of a preventive measure against a person is no longer permissible after the statute of limitations has expired.[305] The reason given for this is partly the substantive legal nature of

301 For more details, see above, fn. 217.

302 Estonia (with exceptions), France, Greece (Country Report Greece, A. Second Complex IV.2. referring to exceptions in money laundering legislation), Austria, Poland. A separate limitation period for forfeiture exists in US federal law.

303 In Germany, the term "measures of correction and protection" (*Maßregeln der Besserung und Sicherung*) is commonly used.

304 *Hochmayr*, ZStW 2012, 67.

305 Germany, Estonia, Greece (therapeutic measures; Country Report Greece, A. Second Complex IV.3.), Italy, Austria, in principle also in Switzerland, Spain, Hungary (with the exception of the definitive blocking of access to electronic data), United States. In Poland, the question has not been clarified by law and is disputed in the literature. There is no information on the Netherlands and Sweden.

the statute of limitations[306] or the requirement that all of the other elements of criminal liability other than culpability, such as time left in the limitation period, also be fulfilled.[307]

The confiscation of *dangerous objects,* such as instruments, which is solely linked to the dangerousness of the object, is possible in some countries despite the fact that the offence is time-barred.[308] This can be explained by the fact that the measure depends solely on whether the object continues to be dangerous in the hands of the offender.

This is to be distinguished from preventive measures outside of criminal law, such as placement in a psychiatric hospital, which are exclusively linked to the dangerousness of the person and not to a criminal offence and can therefore be taken despite the statute of limitations on the criminal offence.[309]

3. Conclusions

A more detailed comparison of the measures would be required for the inclusion of the above-mentioned areas in a proposal for harmonisation of the statute of limitations, which cannot be achieved in this project. The recommendation here is to exclude these areas from an initial harmonisation proposal.

Third Complex: Limitation of enforcement of sentences

The common law jurisdictions examined here, England and Wales and the United States, have no concept of a statute of limitations on the enforcement of a sentence; a sanction imposed there can be enforced without any time limit. In all other countries, the statute of limitations on prosecution

306 Italy.
307 Switzerland; cf. Spain.
308 Greece (precautionary confiscation; there are additional special regulations on confiscation which are both criminal and precautionary in nature and for which it is partly expressly ruled that confiscation is possible even after the statute of limitations has expired), Austria (case law and overwhelming opinion), Switzerland, Italy (under the so-called "Anti-Mafia Code"). In Hungary, admissibility is denied. In Poland, the question is disputed.
309 See, for example, the Swedish law on compulsory psychiatric care.

corresponds to a statute of limitations for the enforceability of the sanction.

Like the concept of limitation itself, the justification for the limitation period for enforcement echoes that of the limitation period for prosecution. Some national reports note that the reasons given for the statute of limitations for prosecution, such as the decreasing need for punishment over time, also apply to the statute of limitations for enforcement; only the argument of the loss of evidence evaporates with a final conviction.[310] The French Country Report specifically lists the reasons given for the statute of limitations for enforcement: the "necessity of forgetting", the dwindling of the need for punishment in the social consciousness, the disturbance of social peace through late enforcement, the dependence of the effect of punishment on swift enforcement and the possible punitive effect of the threat of enforcement. Additionally, in France, the statute of limitations for enforcement is conceived of as a sanction for the inaction of the authorities.

The few academic voices on the legal nature of the limitation period for enforcement predominantly take a substantive view.[311] In Austria, the statute of limitations for enforcement is partly classified as a personal ground for annulment of a sentence.[312] This is hardly convincing, because then not only the sanction imposed, but also the criminal liability itself would vanish retroactively. In most other countries, the statute of limitations is an obstacle to enforcement and thus procedural in nature. This also applies to France, although there the statute of limitations for enforcement is regulated in the French Criminal Code in contrast to the statute of limitations for prosecution and is referred to as the "limitation of the penalty".[313]

310 Country Report Austria, A. First Complex I. Cf. also Country Report Italy, A. First Complex I.

311 Greece, Italy, Austria, according to the prevailing view also in Poland (Country Report Poland, A. First Complex II.).

312 Country Report Austria; *Seiler*, Strafrecht AT II, 8th ed. 2017, paras. 572 f. In Greece, too, it is considered an institute of substantive law.

313 Art. 133–3 French CC: "Penalties imposed for a crime are subject to a statute of limitations ...".

I. Non-limitability of the enforcement of a sanction

1. Non-limitable sentences

In all legal systems with a statute of limitations for enforcement, there are penalties that cannot be barred by the statute of limitations. In four countries, the *non-limitability of the sentence* is linked to the non-limitability of the offences. Sentences imposed for an offence that is not subject to the statute of limitations can be enforced for any length of time thereafter.[314] In the other countries, the non-limitable penalties and measures are *enumerated in a closed list*.

In many cases, sentences imposed for a *crime under international law* cannot be barred by the statute of limitations, regardless of the sentence imposed.[315] In France, non-limitability applies only to sentences for crimes against humanity (including genocide). This is probably related to the fact that war crimes are subject to the statute of limitations there. In Spain, sentences for certain war crimes can also be time-barred.

Life sentences are widely regarded as not subject to a statute of limitations.[316] The reason given in the German report is the seriousness of the underlying offence and the fact that if the most severe sentence is imposed, the sentenced person is likely to escape. In Austria, *custodial sentences of more than 10 years* are already regarded as non-limitable. The limit for custodial sentences is even lower in the Netherlands. As a result of the link to the broad range of offences that are not subject to a statute of limitations, any custodial sentence imposed for an offence punishable by imprisonment of 12 years or more or for certain sexual offences against children is not subject to a statute of limitations, *regardless of the length of the sentence.* In Switzerland, too, sentences for certain sexual offences against minors are not subject to the statute of limitations.[317] In some countries, sentences for certain terrorism offences are exempt from the statute of limitations.[318]

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314 Netherlands, Poland, Sweden, Switzerland. In substance, this also applies to Greece, where there is no statute of limitations on criminal offences and penalties only for core crimes under international law.

315 Germany, partly also France, Greece, Netherlands, Austria, Poland, Sweden, Switzerland, Spain, Hungary.

316 Germany, Estonia, Italy, Netherlands, Austria, Hungary.

317 A corresponding law had been passed in Poland; it was declared unconstitutional on formal grounds. Furthermore, in Poland, sentences for crimes committed by officials of the communist regime are not subject to the statute of limitations.

318 Sweden, Switzerland, Spain.

In Italian law, the statute of limitations does not apply to sentences imposed on a repeat offender.

The phenomenon of *de facto non-limitability* also exists in the area of limitation of enforcement. According to the Estonian Criminal Code, the statute of limitations for enforcement is suspended if the sentenced person evades enforcement. As long as the condition persists, the custodial sentence cannot be time-barred.[319]

2. *Non-limitable preventive measures*

For preventive measures that are directed against the dangerousness of a person or object that was expressed in an offence, there are usually no regulations on the statute of limitations for enforceability. This often leads to the conclusion that they are not limitable.[320] This is controversial in Poland, where the analogous application of the shortest limitation period for penalties is advocated for as an alternative.[321]

In Estonia, France, Switzerland,[322] and Hungary[323], preventive measures are generally not subject to a statute of limitations because – according to the reasoning in Switzerland – the reason for imposing the measure could continue to exist unchanged.[324]

In other countries, only certain measures are non-limitable. For example, preventive detention and indefinite supervision of conduct are excluded from the statute of limitations in Germany, preventive confiscation and corrective and curative measures for minors are non-limitable in Greece,[325] and the same goes for preventive measures outside of criminal proceedings in Italy and placement in an institution for mentally abnormal lawbreakers or an institution for dangerous recidivists in Austria.

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319 In contrast, there is an absolute limitation period for fines and the like. In Greece, too, grounds for tolling can lead to the de facto non-limitation of a sentence due to the lack of an absolute time limit.

320 Estonia; probably also France, Poland, Switzerland, Hungary.

321 Country Report Poland, A. Third Complex III.

322 With the exception of the confiscation of assets.

323 With the exception of education in a reformatory for juveniles; Country Report Hungary, A. Third Complex III.

324 BGE 126 IV 1 (3).

325 Country Report Greece, A. Third Complex III.

II. The limitation period

1. Parameters governing the length of the limitation period

Of the legal systems with a limitation period for enforcement, two-thirds determine the length of the limitation period according to the specific sentence imposed, and each assigns a *specific* limitation period to a range of sentence levels.[326] In Italy, the limitation period for enforcement in the case of a custodial sentence is *twice* the sentence imposed, but at least 10 years and at most 30 years.

Not quite a third of the countries base the statute of limitations on the categorisation of offences into felonies, misdemeanours, etc., as is already the case with the statute of limitations for prosecution.[327] Since this categorisation of offences is linked to the maximum penalty for the offence, the duration of the limitation period ultimately depends on the *abstract* threat of punishment provided for the respective offence.[328] In the Netherlands, the limitation period for enforceability is one third longer than the limitation period for prosecutability.

The Italian solution results in a large number of *gradations* of the time limits for the limitation of enforceability. In the other countries, the number of gradations varies between two and five. Four stages are most frequently used.[329]

As with the limitation period for prosecution, there is a wide range between the highest and lowest limitation periods for enforcement. *For custodial sentences*, the maximum enforcement limitation period is between 5 and 30 years. The upper limit of 30 years is found most frequently.[330] The

326 Germany, Greece, Austria, Poland, Sweden, Switzerland, Spain (taking into account a sentence reduced when leniency factors are triggered), Hungary.

327 Estonia, France, Netherlands; on the connection to the limitation periods for prosecution, see below.

328 In Poland, on the other hand, only the statute of limitations for prosecution, but not the statute of limitations for execution, is tied to the categorisation of offences into felonies, misdemeanours, etc.

329 Two gradations: Estonia; three gradations: Greece (with distinction between penitentiary and prison sentences), Austria, Poland; four gradations: Germany, France, Netherlands, Hungary; five gradations: Sweden, Switzerland, Spain; eight gradations: Italy.

330 In detail: 30 years: France, Greece, Italy, Poland, Sweden (only for life imprisonment), Switzerland, Spain; 26.6 years: Netherlands; 25 years: Germany; 20 years: Hungary; 15 years: Austria, 5 years: Estonia.

minimum duration of the enforcement limitation period is between 3 and 10 years. A frequently encountered minimum duration is 5 years.[331]

An outlier on the lower spectrum is Estonia, which provides for comparatively low limitation periods of 3 and 5 years for enforceability. The explanation given is that the shortness of the time limits is intended to encourage the state to enforce judgments as quickly as possible and to protect the person concerned from inaction by the state. On the upper spectrum is Poland with the highest minimum time limit of 15 years. It should be remembered that both countries are respectively also the countries with the lowest and highest time limits for prosecution.

In Swiss juvenile criminal law, the time limits for enforcement are significantly shorter than in adult criminal law. The longest period is only 6 years.

2. *Commencement and calculation of the limitation period*

The limitation period for enforcement begins to run when the judgement[332] or other procedural decision imposing the penalty becomes final. The relevant point in time is therefore the time at which the judgment can no longer be challenged with ordinary legal remedies. The possibility of seeking an extraordinary legal remedy, such as an application for a retrial of the criminal proceedings, does not prevent enforceability and thus the running of the limitation period for enforcement. In some countries, the day on which the judgment becomes final is included in the time limit.[333] In other countries, the limitation period does not begin until the day after.[334]

If a *suspended sentence* has been pronounced, in Italy, the Netherlands, and Hungary the limitation period does not begin to run until the condition for the enforceability of the sentence has been met. This is also the case in Austria, where the law provides for an immediate start of the limitation period with a simultaneous suspension of the continuation of the

331 In detail: 15 years: Poland; 10 years: Greece, Italy; 6 years: France; 5 years: Germany, Austria, Sweden, Switzerland, Hungary; 3 years: Estonia. Unclear Spain.

332 For Germany and Greece, it was emphasised that the sentence (not only the conviction) must also have become final.

333 Germany, Greece, Poland.

334 France, Netherlands, Switzerland. No information was provided on the other countries.

limitation period. In Switzerland, the period begins with the order to execute the sentence.

When imposing several sanctions, even of different types, such as custodial sentences and fines, Greece and Italy provide for a separate limitation period for enforcement of the individual sanctions. Germany and Austria, on the other hand, have opted for a uniform limitation period according to the longest applicable limitation period. In Austria, the treatment of cases in which time-barred and non-time-barred sanctions coincide is controversial. For these cases, the German Penal Code stipulates that the statute of limitations does not apply.

3. *Influencing the expiry of the deadline*

With the exception of Italy, the time limit can be extended in all countries with a limitation period on enforcement. From a regulatory point of view, this is usually done by suspending the running of the time limit due to certain circumstances, after which the rest of the time limit continues to run (tolling).[335] Occasionally, the time limit may be restarted[336] or otherwise extended.[337]

A frequent reason for extending the running of the time limit is the *escape of the convicted person*;[338] in Sweden, for instance, the duration of the time limit is determined by the outstanding balance of the sentence. Conversely, in Greece, the statute of limitations is suspended while the prison sentence is served and continues to run in the event of escape. Some countries provide for a suspension of the running of the time limit as long as the convicted person *is abroad* and cannot be extradited.[339] In Germany, the limitation period can be extended once by half in this case. In Austria, the running of the time limit is suspended every time the offender stays abroad. *During probation*, the enforcement limitation period typically also does not run;[340] in the Netherlands and in Sweden the period starts anew

335 Only Estonia, Greece, Poland, Switzerland and Spain have a rest period.
336 France, Netherlands, Austria, Hungary.
337 Germany, Netherlands, Sweden.
338 Suspension: Estonia, France (from the time a suspect is named publicly as wanted by the police), Poland (suspension limited to 10 years). Restart: Italy, Netherlands, Austria, Sweden, Hungary.
339 Estonia, Hungary; probably also France and the Netherlands.
340 Austria, Estonia, France, Germany, Greece, Spain, Switzerland.

after revocation of the conditional release.[341] If the enforcement of the sentence is delayed[342] or if the sentence cannot be executed due to the carrying out of another custodial sentence (or other measure),[343] this also suspends the expiry of the time limit in some countries.

In France and Hungary, the limitation period for enforcement can be restarted to a large extent, because any measure taken to enforce the sentence triggers a new start of the limitation period. For France, examples are detention, the issuing of a European arrest warrant or the search for the sentenced person.

In Austria, the execution of the custodial sentence or preventive measure interrupts the running of the limitation period and the period starts anew with the conditional release.[344] The regulation is intended to make it impossible for a convicted person who is taken into custody shortly before the expiry of the time limit to bring about the start of the limitation period by escaping.[345] A special feature of the Austrian regulation is that by analogy to the extension of the statute of limitations for prosecution in the case of *recidivism*, a new conviction to a sentence postpones the end of the statute of limitations for enforcement until the enforceability of the subsequently imposed sanction expires. Somewhat contrary to the law's policy aim of delaying the end of the limitation period in cases of re-offending, a conviction has the same effect even if the offence that is the subject of the second conviction was committed *earlier*.

4. Special features of the limitation period for enforcement

In countries where a single overall sentence is to be handed down after simultaneous conviction for several offences, the question arises as to whether the enforceability of the overall sentence is subject to a uniform statute of limitations or separately according to the individual sentences that make up the overall sentence. Germany, the Netherlands,[346] and

341 Similarly, in Hungary, the statute of limitations begins with the unsuccessful expiry of the probationary period.
342 Germany, Netherlands, Austria, Poland, Switzerland, Spain, Hungary.
343 Germany, Greece, Netherlands, Austria, Hungary.
344 Or conditional pardon, subsequent postponement of execution of sentence, escape from execution; *Marek*, in: Höpfel/Ratz (eds.), Wiener Kommentar zum StGB, 2nd ed. (as of 1.6.2018), § 60 para. 14.
345 EB RV StGB 1974, 30 BlgNR 13. GP, 168 f.
346 The time limit for the most serious offence is decisive.

Switzerland have opted for the first solution, Greece for the second. The Polish literature also favours a separate limitation period for the individual sentences. The solution only appears practicable if the total sentence is calculated by simply adding the individual sentences.[347]

III. Limitation of preventive measures

Preventive measures are generally not subject to a statute of limitations.[348] Where the enforceability of individual preventive measures is subject to a limitation period, the period is between 3 and 10 years.[349] A special case is the Netherlands, where the same limitation periods apply as for penalties. Accordingly, the time limits of the statute of limitations for prosecution, extended by one third, apply. In Italy, precautionary measures are generally subject to the same statute of limitations as the penalty.

B. Trends and problems

I. Trends

The statute of limitations for prosecution is an area of regulation with a high level of legislative activity in most of the countries examined here. In some countries, there is a *tendency to extend* the statute of limitations. As an example, the Netherlands extended the statute of limitations in 2005 and 2012 and abolished the statute of limitations for a number of offences. Most recently, the Minister of Justice proposed the complete abolition of the statute of limitations on sentences.

In Sweden, the range of crimes that are not subject to the statute of limitations has been increasingly expanded. In Hungary, the statute of limitations was significantly tightened from 2012 onwards. The minimum limitation period, the limitation periods for sexual offences against minors, and for corruption offences were extended. The statute of limitations was abolished for offences punishable by life imprisonment and for certain sexual offences against minors. The statute of limitations for unpunished crimes of the communist regime was retroactively extended.

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347 See Country Report Poland on the difficulties there.
348 See above A. Third Complex I.2.
349 Germany: 5, 10 years; Greece: 3, 10 years; Austria: 5 years; Spain: 5, 10 years.

In the United States, there is a trend toward extension of the comparatively short statute of limitations for certain crimes, or toward their total abolition. Moreover, the statute of limitations is increasingly no longer regarded as precluding jurisdiction, but instead as a right that the defendant can waive in the course of a plea bargain. It is then possible to be convicted of a lesser offence that is technically already time-barred instead of the more serious offence charged.

In Switzerland, the statute of limitations for serious offences has been lengthened and, as a result of a popular initiative, certain sexual offences against children have been declared non-limitable. The statute of limitations now ceases to run as soon as the first instance verdict is available, regardless of whether or not it is yet enforceable. The forthcoming harmonisation of sentencing ranges will probably result in longer limitation periods. In addition, legislative initiatives have aimed and are aiming to abolish the statute of limitations for offences punishable by life imprisonment.

In Poland, a law was passed in 2019 that would have extended the already comparatively long statute of limitations. For example, penalties for certain property offences, such as robbery, were to be increased with the consequence of longer limitation periods. A crime of homicide would have become time-barred after 40 years instead of the current 30 years. In addition, certain sexual offences to the detriment of a child and especially aggravated rape were made non-limitable. The reform failed because the law was declared unconstitutional on formal grounds.

For other countries, *no clear trend* towards an extension or shortening of the statute of limitations is discernible. In Estonia, for example, the reforms of recent years not only led to a partial extension of the statute of limitations[350] but also to its limitation by reducing the procedural acts that cause the statute of limitations to restart. In addition, the recommencement of the limitation period in case of recidivism was eliminated. In Greece, as a result of the reform of the Criminal Code that came into force in 2019, certain crimes were downgraded to misdemeanours and aggravated versions were removed. This was accompanied by a shortening of the statute of limitations. Conversely, however, the statute of limitations was extended, for example by introducing a new ground for tolling or by ex-

350 Increasing the statute of limitations for certain minor offences from 2 to 3 years, introducing a tolling period for members of parliament while they enjoy immunity, and a tolling of the limitation period for sexual offences against minors until they reach the age of majority.

tending the tolling of the statute of limitations to all crimes against minors.

II. Dissatisfaction with limitation rules

1. General criticism of the statute of limitations

In some countries, the statute of limitations is met with fundamental scepticism. This is not only true of the Netherlands. In France, it has been reported that the *Cour de Cassation,* notwithstanding the centuries-long tradition of the statute of limitations, has expressed criticism of it and extended the regulations by case law. In the United States, where the first statutes of limitation were adopted as early as 1652, some academics question the timeliness of the statute of limitations because of technological advances, especially in the field of DNA analysis. Conversely, the tendency to extend the statute of limitations and to declare additional crimes to be non-limitable has met with academic criticism as another example of radical change in criminal policy. A complete abolition of the statute of limitations is not to be expected in the United States, according to the prevailing assessment.

2. Criticism of short limitation periods

For some countries, there are reports of crimes whose short limitation periods have caused public uproar, such as the sexual abuse cases in the Catholic Church in Germany and Poland. While in Germany no further reform of the *de facto* elimination[351] of the statute of limitations for sexual offences against children is planned, in Poland an additional tightening of the statute of limitations regulations was passed, which, however, was nullified by the Polish Constitutional Court.[352] In Germany, moreover, the possibility of a time bar arising during ongoing proceedings because of the absolute limitation period is a feature of the law subject to criticism on occasion.

In Italy, the difficulties reflect the notoriously long duration of criminal proceedings. Combined with the earlier design of the statute of limita-

351 Above before fn. 96.
352 Cf. above fn. 95.

tions, where a statute of limitations could occur during ongoing criminal proceedings and despite the existence of a first or second instance judgment, this led to a number of criminal proceedings not being settled on the merits. The *Taricco* case, which an Italian criminal court referred to the ECJ for a preliminary ruling,[353] illustrates this. A 2017 legislative reform which increased the penalties for corruption crimes and thus the statute of limitations and ordered a temporary suspension of the statute of limitations from the first instance conviction brought some initial improvement. In 2020, a statute came into force that provides for tolling of the statute of limitations after every first instance judgment – even an acquittal – until it becomes final. At the same time, a comprehensive reform of the law was to take place to speed up criminal proceedings.

In Greece, there are reports of corruption offences committed by ministers or judges in the 1990s that were already time-barred when they were discovered. As a substitute for the statute of limitations, prosecution for money laundering was used, which as an ongoing offence was not yet time-barred. The Country Report refers to the high political and criminological significance of the money laundering statute as compensation for impunity due to the statute of limitations. The Greek public also has repeatedly expressed little understanding for cases in which offences are initially prosecuted as crimes and the criminal proceedings later have to be discontinued after a correction of the classification due to the statute of limitations. The problem is related to the longer duration of criminal proceedings for crimes due to procedural reasons and the narrow time limit of the suspension period. Currently, discontinuations of ongoing proceedings due to the statute of limitations are the subject of criticism prompted by the entry into force of the new Greek Criminal Code in July 2019. In the course of the reform, several crimes were downgraded to misdemeanours for reasons of proportionality and aggravating factors were removed, resulting in time bars suddenly terminating a number of pending criminal proceedings.

3. Criticism of non-limitability and of lengthening of limitation periods

On the other hand, difficulties in prosecution are reported from legal systems that do not have a statute of limitations or in which the statute of limitations has been greatly curtailed. In England and Wales, the need to

353 ECJ (GC), judgment of 8.9.2015, C-105/14 (Taricco and others).

clarify the criterion of public interest (in prosecution) became apparent in cases of prosecution of crimes committed long ago. It seems questionable whether the soft criteria specified in the guidelines for public prosecutors[354] provide sufficient remedy. In connection with the judicial processing of crimes committed by British soldiers in the Northern Ireland conflict, some of which date back more than 40 years, the Defence Committee of the House of Commons demanded that all crimes committed by soldiers during a military operation up to the Good Friday Agreement of 1998 be declared time-barred and that a Truth Commission be established as a supplementary measure.[355]

In the Netherlands, as in common law, the principle of prosecutorial discretion applies, so that there is in principle no obligation to prosecute even serious crimes. If the statute of limitations is now extended or even partially waived, there is a risk of undue strain on a discretion otherwise defensible under the rule of law, which is regulated practically by the resources of the prosecuting agencies. Since the resources for prosecution have not been increased, the country rapporteurs see clampdowns in the area of limitation as having a primarily symbolic character and in the long run endangering the reputation of the prosecutors, who for capacity reasons can only prosecute a comparatively small part of the crime that has been detected. The prosecution of older cases could also have a detrimental effect on the prosecution of current crimes.

For Hungary, the study reported that the tightening of the statute of limitations has hardly any effect on the practice of criminal prosecution, as it does not change the difficulties of proof in the case of offences committed far in the past.

354 The Code for Crown Prosecutors (October 2018); www.cps.gov.uk/publication/code-crown-prosecutors (last accessed 9.2.2021).

355 House of Commons Defence Committee Report Investigations into fatalities in Northern Ireland involving British military personnel, HC 1064, 26.4.2017, https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/1064/1064.pdf (last accessed 9.2.2021).

C. The limitation period in a case study

I. Introduction

To supplement the analysis of the regulatory models, the country rapporteurs were asked to play out the following case study on the statute of limitations for prosecution in their respective legal systems.

Case study: A applied for a scholarship to finance his law studies on 30 June 2013 and enclosed a forged document with the application. The scholarship was approved on 31.8.2013, although the conditions for approval were not met. From 1.10.2013 until 1.9.2018, monthly payments (always on the first of the month) were made in the amount of € 300 each (total amount: €18,000).

When does the statute of limitations for fraud begin in the present case? When does it end?

When does the limitation period for the use of the forged document begin and end?

Effects of procedural acts on the limitation period

a) On 1.8.2019, the public prosecutor's office opens an investigation and questions A as an accused on 1.9.2019.

b) On 1.4.2020, A is questioned by the court.

c) The indictment is issued on 1.2.2021.

d) As of 1.9.2023, the whereabouts of A are unknown. In view of this, the proceedings are conditionally dismissed on 31.12.2023 due to the absence of the accused. On 1.6.2024, the proceedings are recommenced because A has reappeared.

e) Before the expiry of the limitation period, a first-instance judgement is handed down with respect to the fraud. The judgement becomes enforceable on 1.9.2030.

What effects do these individual procedural acts have on the running of the limitation period? When does the limitation period end in each case? *If your legal system provides for different procedural steps, please assume a course of action that corresponds as closely as possible to the one mentioned.*

The selected constellation of facts raises questions about the beginning of the limitation period and the limitation of *concurring* offences. With fraud, the case study concerns one of the few offences for which the European

Union has harmonised the statute of limitations. Most of the Member States represented in this project apply the ordinary offence of fraud[356] to fraud against the Union's financial interests as covered by the relevant Directive.[357] Moreover, because the minimum elements in the Directive[358] are met for all the fraudulent acts realised in this case, it is possible to draw conclusions about the impact of minimum rules on limitation.

The present case is inspired by a decision of the Federal Supreme Court in Germany[359], the facts of which were adapted for the purposes of the present investigation. In order to ensure a legal assessment of the facts that is as uniform as possible, detailed information was not provided. The rapporteurs were to assume fraud with payment of the amount obtained by instalment as well as a simultaneously perpetrated forgery of documents in the form of the use of a forgery.

The basic case was supplemented by six procedural steps for prosecution with the aim of illustrating the effects of the modifications to the statute of limitations. The selection of the procedural steps was based on German procedural law and was examined in advance for two other legal systems.[360] As the evaluation of the rapporteurs' answers revealed, some of the procedural steps do not occur in some legal systems. In this case, the rapporteurs were asked to assume a procedural procedure that comes as close as possible to the one described. In some countries, not the procedural steps laid out in the case study, but comparable procedural steps cause an extension of the limitation period. In order to be able to determine the exact end of the limitation period for these countries as well, the times of these procedural steps were used as a basis for the comparison.

The individual answers are not printed because of the different depth of the explanations and for reasons of space. The results are summarised and evaluated below.

356 See the list in: 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, COM(2012) 363 final, p. 2 f.

357 Directive on the fight against fraud to the Union's financial interests through criminal law, (EU) 2017/1371, OJ L 198/29.

358 For more details, see fn. 428 below.

359 BGH, decision of 2.5.2001, 2 StR 149/01.

360 Austria and Poland.

II. The initial case

1. Substantive law elements and potential sentence

a) Fraud

While in some countries the basic offence of fraud has been committed,[361] in other countries a special offence is applied. According to the Hungarian Criminal Code, a state scholarship would mean the offence of budget fraud, aggravated by causing significant material disadvantage (§ 396 para. 3a Hungarian CC), and in the case of a private scholarship, aggravated fraud according to § 373 para. 4 Hungarian CC; the maximum sentence in both cases is 5 years' imprisonment. In Italy, fraud for obtaining public benefits is punishable as an aggravated offence (Art. 640*bis* Italian CC). In Austria, the qualification of aggravated fraud according to § 147 para. 1 no. 1 and para. 2 Austrian CC applies, because a false document was used for deception and damage exceeding € 5,000 was caused. In Sweden it is also a case of aggravated fraud by means of forgery of documents (ch. 9 § 3 Swedish CC).[362] In Greece, the qualification of causing "particularly serious" damage applies (Art. 386 para. 1 Greek CC), which only increases the minimum penalty for the offence and does not affect the statute of limitations.

Not all of the legal systems require actual loss as an element of the offence of fraud. For example, according to Polish law, fraud is completed when the disadvantageous disposition over property is made.[363] In Germany, fraud requires the occurrence of a pecuniary loss, but according to case law and the prevailing opinion, the incurrence of a disadvantageous liability is sufficient for this, so that, as in Poland, the fraud is completed at the time of the granting of the scholarship (so-called incurrence fraud).[364]

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361 See § 263 para. 1 German CC; Art. 286 § 1 Polish CC.

362 The damage qualification is not fulfilled because the damage is less than SEK 200,000 (equivalent to about € 19,000). If it is a grant for which the Central Study or Training Grant Committee is responsible, the offence is prosecuted as aggravated grant fraud according to § 3 of the Grant Offences Act (Bidragbrottslag 2007:612), which is punishable by imprisonment from 6 months to 6 years.

363 Supreme Court, judgment of 28.6.2017, III KK 100/17, LEX No. 2320356.

364 Cf. *Kühl*, in: Lackner/Kühl, StGB, 29th ed. 2018, § 263 paras. 40, 56 with references to case law; *Vogel*, JZ 2005, 308 (310).

The range of the maximum sentence for fraud in the case study is wide: between 3 and 10 years imprisonment. The lowest sentences come from Estonia, Austria and Spain. Five countries provide for a maximum sentence of 5 years. England and Wales (10 years), Poland (8 years), New York (7 years), Italy and Sweden (6 years) belong to the upper range.

b) Forgery

The case study contains both a fraud and a forgery offence.[365] Since it cannot be inferred from the facts of the case that A has also committed a criminal offence because of the forgery itself, only the use of a forged document (by presenting it when filing the application) is to be taken into account. Some legal systems differentiate between the forgery of private and public documents, with different penalties for each. Because of the disparity in formulation of aggravating factors, only the *base penalties* for forgery of documents are compared in the study. The maximum penalties range from 1 to 10 years' imprisonment. At the lower end of the scale are Estonia, Austria, Hungary and New York, each with 1 year, and Sweden with 2, ending again with England and Wales with 10 years' imprisonment as the maximum penalty. Most countries choose a maximum sentence in the middle of this range of 3[366] or 5 years.[367] The Netherlands is just above this with 6 years' imprisonment.

365 On the displacement of the document offence by fraud in individual countries, see below at fn. 375

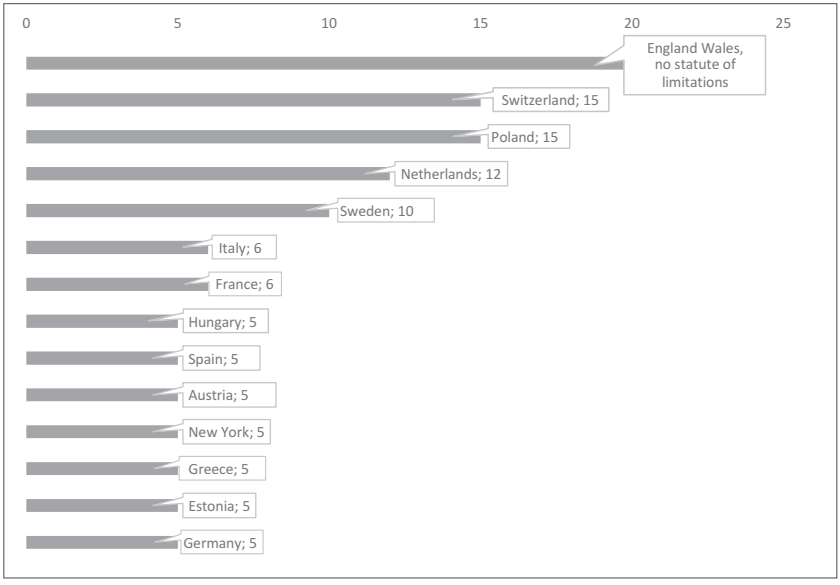
366 France, Italy, Spain.

367 Germany, Greece, Switzerland, Poland.

2. Limitation periods

a) Fraud

Graph 3: Statute of limitations for fraud offences



The comparison of the statutes of limitation for the variant of fraud realised in the respective legal system gives the following picture: In England and Wales, the offence of fraud cannot be time-barred. In the other countries in the study, the statute of limitations ranges from 5 to 15 years. Seven countries provide for a 5-year limitation period.[368] Under French and Italian law, the limitation period is 6 years. The longest limitation periods are 15 years in Switzerland and Poland. In the Netherlands, the period is slightly lower at 12 years; in Sweden it is 10 years.

368 Austria, Estonia, Germany, Greece, Hungary, New York, Spain.

b) Forgery

In England and Wales, there is also no statute of limitations for forgery of documents. In the other legal systems, the statute of limitations for the basic offence of forgery ranges from 2 to 15 years. The lowest limitation periods are found in New York (2 years)[369] and Austria (3 years).[370] The most common statute of limitations for the offence of forgery of documents is 5 years.[371] Italy and France[372] have a minimally longer limitation period of 6 years. The longest limitation periods are 15 years (Poland, Switzerland) and 12 years (Netherlands). Although in Poland the forgery in itself would be time barred after 10 years, the longer statute of limitations for fraud is applicable because the offences are deemed *concurrent* (see below).

3. Concurrence

The case example gives an impression of the effects of concurrence on the limitation period. In this case, the question is first whether there is a single act of fraud or several acts of fraud; secondly, whether the document offence is displaced by the fraud, and thirdly the treatment of the offences as genuinely concurrent.

(1) The fact that the pecuniary loss totalling € 18,000 occurs gradually over a period of 5 years is not dealt with uniformly. The majority of countries consider the conduct to be completed with the application for the scholarship and assume a *single act of fraud.* Thus, under Swedish law, the limitation period is simultaneous, not successive.[373] For Greek law, it has not been conclusively clarified whether there is a single offence, committed by active conduct, or whether the subsequent omission is also an offence. If one assumes that the failure to clarify the error caused by the active deception continuously realises the offence, it must still be determined whether the multiple realisations of the offence form a single act of fraud in the form of an ongo-

369 For "forgery in the third degree."
370 There, however, the forgery offence is superseded by the aggravated fraud; below at fn. 375.
371 Germany, Estonia, Greece, Spain, Hungary. This also applies to Sweden, where the forgery offence takes a back seat to aggravated fraud; below at fn. 375.
372 Here, too, the forgery offence takes a back seat to fraud; below at fn. 375.
373 Högsta Domstolen NJA 2007, 973.

ing offence (Art. 98 para. 2 Greek CC) or whether they are independent acts of fraud that are subject to a separate statute of limitations. Focusing on criminal liability for omission here would circumvent an otherwise very early start to the limitation period in Greece. A recent decision of the plenary chamber of the Supreme Court points away from this solution, however, ruling that in cases of employment fraud, subsequent omissions are not punishable.[374] Although it is not certain that the present case, in which the perpetrator does not provide any direct consideration for the monetary payments, would be decided in the same way, it is assumed here in view of the consistent legal position in almost all other countries, that there is a single act of fraud by active conduct. The exception is the Netherlands, for which it was reported that the law would assume *several independent acts of fraud*.

(2) The fraud (by active conduct) and the forgery of documents are theoretically concurrent offences, since they were realised by the same conduct: the filing of the application. In three countries, this is a case of mere apparent concurrence, with the consequence that separate criminal liability for the forgery offence is excluded: in Austria, the qualification of document fraud according to § 147 para. 1 no. 1 Austrian CC displaces the forgery offence due to speciality,[375] so that the offender is only to be punished for aggravated fraud. In France, too, it is assumed that there is only apparent concurrence (*cumul apparent*) if, as in the present case, the forgery is a means to an end (*infraction moyen-infraction fin*). Similarly, forgery offences according to Chapter 14 Swedish CC are considered covered by the fraud offence if the latter has a higher degree of severity.

(3) The coincidence of two offences in *genuine concurrence* has no influence on the statute of limitations in most countries; fraud and forgery offences are subject to separate statutes of limitations. As a rule, because of the earlier start of the statute of limitations for the forgery offence, this means that this offence is time-barred a few years before the fraud.

Some countries deviate from this rule. In Spain, Art. 131 para. 4 Spain CC sets out a *uniform statute of limitations* for related offences according to the most serious offence. The subject of the statute of limitations is the com-

374 See Country Report Greece C.

375 Supreme Court (OGH) 11.12.1985, 9 Os 131/85 (= SSt 56/98); *Ratz*, in: Höpfel/Ratz (eds.), Wiener Kommentar zum StGB, 2nd ed. (as of 1.10.2011), Vor §§ 28–31a para. 34.

plex of offences as a whole. In Poland, it follows from the General Part of the Polish code that if several offences are committed by a single act, the offender is to be sentenced for a single offence consisting of the concurrent offences. For this so-called cumulative concurrence – a special case of concurrence – the penalty is determined by the most serious offence,[376] as is the statute of limitations.[377] In the countries mentioned, the end of the statute of limitations for the document offence is postponed until the end of the statute of limitations for the fraud offence.[378]

4. Commencement of the limitation period in the initial case

a) Fraud

If one classifies the events as a single act of fraud, three relevant events for the statute of limitations come into consideration: the application for the scholarship on 30.6. 2013, the approval of the scholarship on 31.8.2013, and the payment of the last instalment of the scholarship on 1.9.2018.

(1) The first event is relevant in Greece, Austria and Switzerland, where the statute of limitations begins to run with the conclusion of the constituent conduct on 30.6.2013 – in Switzerland one day thereafter.

For Austria, it should be noted that the limitation period is extended due to the later occurrence of the result. If the result element of the offence occurs at a later point in time, the end of the limitation period is postponed to the point in time at which the limitation period would also have expired if it ran from the occurrence of the result (here: 1.9.2023), or one and a half times the limitation period (here: 7.5 years)[379] starting from the completion of the conduct element (here: 30.12.2020). The point in time applies that is more advantageous for the offender, so that the fraud is time-barred on 30.12.2020.

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376 Art. 11 § 2 and § 3 Polish CC.

377 This is the view of the Supreme Court and of the majority of the literature. If one were to deny an apparent concurrence of fraud and forgery for France, as in the case that the perpetrator also used the forged document on another occasion, the act would also be uniformly time-barred due to the existence of ideal concurrence.

378 Chapter 35 § 1 para. 2 Swedish CC also provides for the joint limitation of all offences realised by one act. This provision does not apply in the present case because the forgery of documents is superseded by the aggravated fraud.

379 The minimum period of 3 years is irrelevant in this specific case.

(2) The second event, the approval of the grant on 31.8.2013, governs the limitation period in Poland.[380] The earlier start of the limitation period in comparison to the other countries, which, like Poland, require the completion of the offence, results from the different conception of fraud, which in Poland is already completed when the disposition of property is made.[381]

(3) Two thirds of the legal systems focus on the payment of the last instalment of the scholarship and thus on the point in time at which the financial loss caused has occurred in its entirety.[382] In Germany, the fraud is already complete with the granting of the scholarship.[383] However, the material completion of the offence, which is decisive for the beginning of the limitation period, only occurs with the payment of the last instalment of the scholarship,[384] so that the limitation period begins to run from this point. Consequently, the limitation period in these countries begins on 1.9.2018,[385] and in France, where the day of the occurrence of the result is not taken into account in the calculation of the time limit, one day later.

For the Netherlands it was stated that in the case example several fraud offences would be assumed, which would be separately time-barred. The statute of limitations would start to run separately with each individual payment, with the following day being decisive for the calculation of the

380 See Supreme Court, judgment of 16.5.2008, II KK 354/07, Legalis; Wroclaw Court of Appeal, judgment of 8.3.2017, II AKa 23/17, LEX no. 2278268. Disagreement from Katowice Court of Appeal, judgment of 22.11.2006 (II AKa 226/06, LEX no. 297351), according to which in the case of a fraud in which the disposition of property takes place in several instalments, the limitation period begins only with the last payment.

381 Above at fn. 363.

382 Estonia, France, Germany, Hungary, Italy, New York, Spain, Sweden. For France, it was reported that fraud (*escroquerie*) is not always committed as a hidden offence, delaying the start of the time limit. It depends on whether the judge designates the act as hidden.

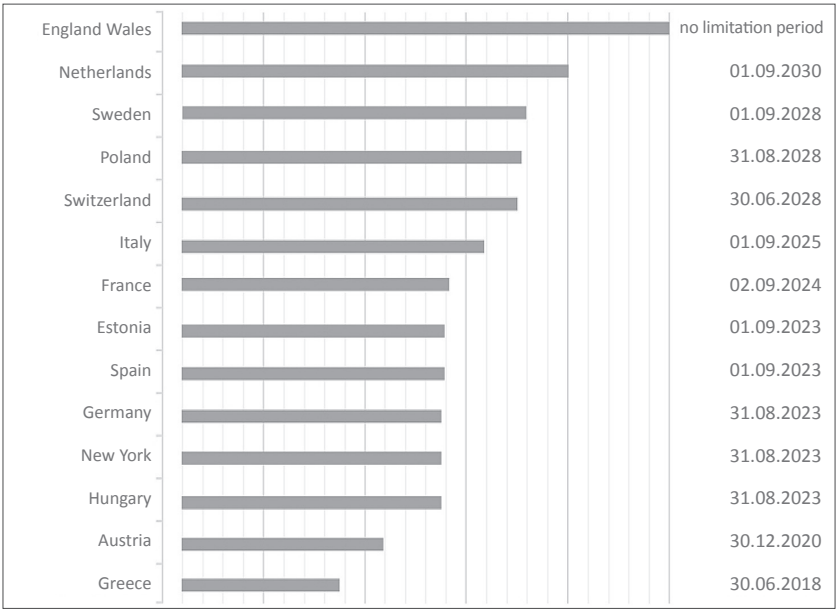
383 Above at fn. 364.

384 BGH, decision of 2.5.2001, 2 StR 149/01; *Rau/Zschieschak*, StV 2004, 669 (673); *Vogel*, JZ 2005, 308 (311).

385 This point in time would also be decisive in Greece in the case of the assumption of continued fraud, which would become time-barred at the same time as the last constructive omission, i.e. shortly before the last payment of the scholarship. If independent acts of fraud by omission were assumed, the last act would be time-barred from this point in time.

statute of limitations. The first act of fraud would thus be time-barred on 2.10.2013, the last act of fraud on 2.9.2018.

Graph 4: Ends of the limitation periods (assuming no prosecutorial measures taken)



In the initial case, the fraud is time-barred most quickly in Greece because of the early start of the limitation period, namely on 30.6.2018. For the same reason, the time limit in Austria also ends comparatively early on 30.12.2020. The difference of 2.5 years compared to Greece is a consequence of the Austrian compromise when the result of the conduct arises later.[386] In five countries, the statute of limitations for fraud in the basic case is 31.8.2023 or 1.9.2023, depending on the calculation of the period.[387] Due to longer statutes of limitations, the end of the period occurs 1 year later in France and Italy (1. and 2.9.2024, respectively). Notwithstanding the comparatively early start of the limitation period in Poland and Switzerland, the limitation period ends the latest, namely on 1.7.2028

386 At fn. 379.
387 Germany, Estonia, New York, Spain, Hungary.

(Switzerland) and 31.8.2028 (Poland), because of their longer-than-average periods. A similar limitation date (1.9.2028) applies in Sweden. In the Netherlands, the individual fraud offences become time-barred between 1.10.2025 and 1.9.2030, which can be explained by the long limitation period of 12 years and the later start of the limitation period compared to Poland and Switzerland, where the periods are even longer. In England and Wales, fraud can be prosecuted without a time limit.

b) Forgery

Forgery of documents in the variant offence of the use of the forgery is regularly regarded as a conduct offence. For example, according to German and Austrian law, the offence is completed at the time when the document is made accessible to another person in such a way that the latter can perceive it.[388] This is assumed in the case example with the filing of the application. Since the offence is not a result offence, the existing divergences do not have an effect on the commencement of the limitation period. The use of the forgery is also likely to have materially ended at the time mentioned, so that there is no later start of the period for Germany. Thus, in most countries, the forgery offence is time-barred on 30.6.2013 or the day after.[389]

By contrast, Italian law requires the recipient to become aware of the forged document. Only this result triggers the start of the time limit, so that the latest deadline is 31.8.2013, the date on which the grant was approved.

In Poland and Spain, the commencement of the statute of limitations is based on the most serious offence, i.e. fraud, because of the operation of cumulative concurrence of laws or of the same offence. For Spain, this

388 Much discussed, e.g., by *Heger*, in: Lackner/Kühl, StGB, § 267 para. 23; *Kienapfel/Schroll*, in: Höpfel/Ratz (eds.), Wiener Kommentar zum StGB, 2nd ed. (as of 1.1.2017), § 223 para. 214.

389 Germany, Estonia, Greece, New York, Sweden, Switzerland, Spain, Hungary. This would also apply to France, Austria and Sweden – if there were no sham competition. For France, it would then be necessary to point out that document forgery is not one of the so-called hidden offences, which is why the statute of limitations does not only begin with the discovery of the forgery; Cass. crim., 27.5.1991: Bull. crim. 1991, no. 222; Cass. crim., 3.5.1993: Bull. crim. 1993, No. 162; Cass. crim., 7.3.2000, No. 99–86.162: JurisData No. 2000–001612.

means a uniform start of the statute of limitations on 1.9.2018, for Poland on 31.8.2013.[390]

If there is no prosecution activity, the forgery of documents is time-barred first in New York (30.6.2015) and last in Switzerland (30.6.2028) and Poland (31.8.2028). In the Netherlands, the statute of limitations runs out only 3 years earlier (30.6.2025). The late end of the statute of limitations in Spain (1.9.2023) is due to the fact that the offence is subject to the statute of limitations together with the more serious offence of fraud that was committed at the same time.[391] In most countries, the end of the statute of limitations is in the middle range (29.6.2018 or one day later in Germany, Estonia, Greece, Hungary, Sweden, 31.8.2019 in Italy).

III. Effects of procedural acts

In many countries, the document offence is already statute-barred when the first prosecution activity takes place. In two of the countries where this is not the case, the document offence shares the fate of the fraud offence realised by the same act.[392] Since there are only three countries left in which the document offence is time-barred separately from fraud after the first prosecution activity on 1.8.2019,[393] the following remarks are limited to fraud. It does not take into account the legal system in England and Wales, where fraud and forgery are not subject to the statute of limitations.

If one assumes a single act of fraud committed exclusively through active conduct, the offence is already time-barred in Greece due to the early start of the time limit before the initiation of investigations. The effects of the criminal prosecution in Greek law can only be mapped out if Greek law considers the subsequent constructive omissions as part of the offence.[394]

It should be noted at this point that in Switzerland there is no provision for an extension of the limitation period in the form of a renewed start of

390 For more details, see fn. 376 above.

391 This also applies with restrictions to Poland, where the forgery of documents would have been time-barred on 30.6.2023 without the coincidence of the offence and the fraud.

392 Spain, Poland. In Sweden, it is an offence co-punished by the aggravated fraud.

393 Italy, Netherlands, Switzerland.

394 In this case, according to the Areios Pagos' previous decisions on employment fraud, the construction of an ongoing offence is to be expected.

the period or a suspension. Only a first instance judgement has an effect on the expiry of the limitation period (see 6. below).

1. Absolute extension limits

If a criminal prosecution is initiated, absolute statutes of limitations apply in some countries which may prevent an extension of the statute of limitations. The limits for the fraud in question are 10 years in Germany, 24 years in the Netherlands and 30 years in Sweden. It follows that the limitation period in these countries ends on 31.8.2028 (Germany), 1.9.2042 (Netherlands)[395] or 1.9.2048 (Sweden) at the latest. Although three countries do not have absolute limitation periods, they do provide for time limits for the recommencement or suspension of the limitation period. An extension in the form of a recommencement is limited in Italy to the expiry of one and a quarter of the limitation period (7 years and 6 months), in Estonia to 10 years. In Greece, the limitation period can be tolled for a maximum of 3 years.

2. Actions by the prosecuting authorities

a) Initiation of the investigation on 1.8.2019

In Polish law, the initiation of preliminary proceedings[396] is the decisive procedural act, extending the limitation period once by 10 years. In Germany and Hungary, although the initiation of the investigation does not cause the statute of limitations to begin again, the announcement to the accused does; this was assumed to be on 15.8.2019. In France, the statute of limitations would start anew with a request by the public prosecutor's office to open a judicial investigation (*réquisitoire introductif*), which was also dated 15.8.2019.

A special regulation is found in the Spanish legal system: a formal initiation of proceedings or any subsequent substantiated judicial decision charging the person concerned with the offence results in a provisional termination of the statute of limitations. The statute of limitations only resumes running if the proceedings are not pursued further or end without a

395 Last of the frauds.
396 For more information on this term, see fn. 223 above.

conviction (Art. 132 para. 2 no. 1a Spanish CC). Even before formal proceedings are initiated (by the filing of a criminal complaint), the statute of limitations is tolled for a maximum of 6 months (Art. 132 para. 2 no. 2a Spanish CC). The effect of the tolling depends on the further course of the proceedings. Only if the court formally initiates proceedings within the aforementioned period or makes another decision in which the offence is charged to the person concerned, will there be a retroactive temporary interruption of the statute of limitations from the time of the filing of charges, which is assumed to be 1.6.2019.

In all other countries, neither the aforementioned procedural act nor any equivalent has an influence on the statute of limitations. Thus, according to Art. 72 Netherlands CC, "any act of prosecution" triggers a renewed running of the time limit. However, only the action of a public prosecutor or criminal judge that is directed towards obtaining an enforceable court decision is considered as such. The initiation of the investigation by the public prosecutor's office does not fulfil this requirement.

Compared to the initial case in the study, the statute of limitations for fraud in Germany, France and Hungary is extended and ends on 15.8.2024 (Germany, Hungary) or 15.8.2025 (France), provided that no further procedural step resulting in an extension of the statute of limitations is taken. In Spain, the statute of limitations will provisionally terminate when the complaint is filed on 1.6.2019. Within the next 6 months, the proceedings must be formally initiated or a "reasoned court decision" accusing A of the offence must be handed down, otherwise the filing of the complaint will ultimately have no effect on the running of the time limit. The most striking effect is the initiation of the preliminary proceedings in Poland, where it postpones the end of the limitation period until 31.8.2038.

b) Interrogation of the accused on 1.9.2019

In five countries, the limitation date is postponed as a result of the questioning of the accused by the public prosecutor;[397] in two of the jurisdictions (Italy, Austria), this is the first modification of the limitation period. Here, the period generally restarts. An exception is Austria, where the statute of limitations is suspended between the first questioning of the accused and the final termination of the proceedings, i.e. the period is not

397 In France, the accused would be questioned by the police on behalf of the prosecution.

included in the statute of limitations, which shifts the end of the period far back.

If no further procedural steps affecting the limitation period are taken, the limitation period is extended as follows: Germany: 31.8.2024, France and Italy: 1.9.2025, Austria: 30.12.2031, Hungary: 31.8.2024.

3. Judicial hearing on 1.4.2020

In Estonia, Sweden and New York State, there is no provision for the accused to be questioned by a judge at this stage of the proceedings, which is why it is not possible for such an action to influence the statute of limitations. In Poland and Hungary, such an interrogation would only take place in the context of a coercive judicial measure, such as the imposition of pre-trial detention.

In Spain, the filing of charges on 1.6.2019 resulted in a temporary interruption of the limitation period until 1.12.2019. Since no formal initiation of proceedings or reasoned court decision within the meaning of Art. 132 para. 2 Spanish CC took place until then, there was ultimately no termination of the end of the limitation period and the 5-year period continued to run unhindered. A court summons for questioning as an accused person is already possible before formal proceedings are initiated and is considered a reasoned court decision charging the person with the offence. From this point on, therefore, a time bar is categorically impossible unless the proceedings come to a standstill or end without a conviction.

In some countries there can be repeated restarts of the limitation period, namely in Germany, France,[398] and Italy.[399] In the Netherlands, the request to open a judicial investigation or the summons to appear before a criminal court has this effect, in the hypothetical on 1.3.2020.

Taking into account the preceding procedural acts, if no further relevant procedural steps are taken, the limitation period is extended in Germany to 31.3.2025, in France to 1.4.2026. The latter cut-off date would also be decisive for Italy. However, the time limit for the recommencement of the limitation period must now be observed: The fraud is time-barred in Italy on 1.3.2026 at the latest, unless there is an additional reason for the

398 In the case of interrogation (*interrogatoire*) by an investigating judge (*juge d'instruction*) or an investigating chamber of a *Cour d'appel*.

399 This would also apply to Hungary if the judicial interrogation had taken place in the course of a coercive judicial measure.

suspension of the statute of limitations. The most far-reaching consequences are when the accused is summoned to appear before a court in Spain: In principle, the statute of limitations can no longer run unless the proceedings are suspended or end without a conviction.

4. Indictment on 1.2.2021

The greatest consensus may surround the effect of the indictment on the limitation period: it extends the limitation period in nine of the systems studied. In Sweden, the service of the indictment is decisive. In France, the investigating judge decides to refer the case to the adjudicating court (*ordonnance de renvoi*). In Spain, the court's admission of the indictment as a "reasoned court decision" charging A with involvement in a potentially criminal offence would provisionally terminate the limitation period. In the present case, this has no significance because the preceding court summons to appear as an accused already had this effect.

In many cases, the statute of limitations starts to run again (Germany, France, Italy, Netherlands, Hungary).

In Sweden and in the State of New York, the running of the statute of limitations is affected for the *first time* in the form of the termination of the statute of limitations. In Sweden, if the indictment is served (or the defendant arrested) within the 10-year (basic) limitation period, the running of the period stops and only the long absolute limitation period of 30 years applies. In New York, the statute of limitations can no longer run if charges are filed (or an arrest warrant issued) within the original limitation period.

In Austria, the filing of the indictment is one of several procedural steps that tolls the statute of limitations until the final conclusion of the proceedings. In the present case, this is irrelevant because the suspension already occurred due to the first hearing of the accused.

Estonian criminal procedure law does not provide for indictment by the prosecution and the limitation period starts anew for the first time with the opening of the main proceedings, which is set for 1.9.2021.

In Greek law, the opening of the main proceedings is of decisive importance because it triggers a suspension of the statute of limitations for the duration of the main proceedings, albeit for a maximum of 3 years. If one

assumes a fraud committed as a continuing offence,[400] the end of the limitation period would be postponed from 1.9.2023 to 1.9.2026 if the main trial lasted accordingly long.

In the hypothetical case study, the following changes result, taking into account all previous procedural acts: Germany: 31.1.2026, Estonia: 1.9.2026, France: 1.2.2027, (Greece: 1.9.2026), Hungary: 31.1.2026, Netherlands: 1.2.2033; Sweden: 1.9.2048. In Italy, the limitation period cannot be extended beyond 1.3.2026, so the restart of the period has no effect. In New York, the statute of limitations can no longer run.

5. Events surrounding the disappearance of the defendant

The procedural steps are difficult to compare because the criminal procedure laws react differently to the absence of the accused. In Greece[401] and Sweden, there is no provision for discontinuing the main proceedings due to the absence of the accused. In the Netherlands and Hungary, a judgment *in absentia* would be handed down in such a case. In France, a decision could be taken *in absentia*, which would trigger a new running of the limitation period. However, absence could also be understood as an actual obstacle that makes it impossible to carry out the prosecution and suspends the statute of limitations.[402]

In Germany, uniquely, the statute of limitations begins anew as of the provisional judicial discontinuation of the proceedings and ends at the latest with the expiry of the absolute limitation period on 31.8.2028. Other legal systems react by suspending the statute of limitations (suspension). In Italy, for example, proceedings are suspended in the case of the unjustified absence of the accused, which in the case study would delay the end of the limitation period in the case example by 5 months beyond the point set after the first restart. Estonian law differentiates according to the cause of the absence. If there are indications that the accused has evaded the proceedings, an alert is issued for him. From this decision, the limitation period is suspended until the accused is arrested or appears of his own accord before the authority conducting the proceedings. In the example case, the remaining limitation period would therefore continue from 1.6.2024 and end on

400 Above at fn. 394, 373. In the initial hypothetical, the fraud is statute-barred on 1.9.2023 with this solution.
401 For misdemeanours.
402 Art. 9–3 French CPC.

1.11.2026. Otherwise, the main hearing would be adjourned, which would result in a restart of the limitation period.

In Poland, on the other hand, the discontinuation of proceedings due to the absence of the accused is not recognised as a ground for suspension of the statute of limitations (Art. 104 Polish CC).[403]

In Spain, a provisional discontinuation of the proceedings due to the absence of the accused means that the proceedings will not be continued, so that the limitation period will start anew on 31.12.2023. With the continuation of the proceedings on 1.6.2024, the limitation period is provisionally terminated, so that in principle no further limitation is possible.

In the State of New York, because charges were filed within the statute of limitations, the statute of limitations can no longer run. Only an absence of the person concerned *before* the initiation of criminal proceedings would not be included in the limitation period and would extend its course by a maximum of 5 years.

The procedural events result in a different end of the limitation period in the following countries: Germany: 31.8.2028, Estonia: 1.11.2026, Italy: 1.8.2026. In Spain, in principle, no further limitation period can occur.

6. *First instance judgment before expiry of the time limit*

If the criminal proceedings have progressed to a first-instance judgement, the statute of limitations can still run in four countries as long as the judgement has not become enforceable.[404] The majority of countries reject this solution, which makes little sense from the point of view of conservation of judicial resources, and which wastes the use of human and financial resources if prosecution is begun at too late a point in time.

Insofar as any non-final first instance judgment, whether an acquittal or a conviction, affects the running of the limitation period, the solutions vary between a restart and a tolling of the limitation period. A restart of the limitation period occurs in France[405] and Hungary. In Italy, any judg-

403 Supreme Court, decision of 24.11.2016, II KK 296/16; LEX No. 2200382.

404 Estonia, Greece, Poland, Sweden. However, due to the long statute of limitations in Poland, it is unlikely that the offence will become time-barred after the judgement in the first instance has been issued.

405 Art. 9–2 no. 4 French CPC.

ment suspends the running of the limitation period until it becomes final.[406] In Austria, the limitation period is suspended from the outset until the judgment becomes final. In Germany, the statute of limitations ends with the entry into force of the judgment.[407] In none of the countries is there a limitation by absolute limitation periods. If an acquittal becomes final, the remainder of the newly started or suspended statute of limitations continues to run, which is predominantly important for a reopening of the criminal proceedings to the detriment of the accused.

A different legal approach was chosen in Switzerland. Here, according to the wording of the law, the statute of limitations no longer applies if a first-instance judgement has been handed down before the expiry of the limitation period.[408] Both a guilty verdict and an acquittal terminate the statute of limitations. If one were to take the law at its word, the offence would become non-limitable after an acquittal and could be prosecuted indefinitely. In order to avoid this unjust consequence, courts apply the original statute of limitations to appeals against acquittals.

In Spain, it remains the case that, in principle, the offence becomes non-limitable. Only if the proceedings end without a (final) conviction does the limitation period start anew.

7. The longest limitation period following all procedural steps

The assumed later procedural events are not suitable for the final comparison of the statutes of limitations for the following reasons: After the entry into force of the judgment, the statute of limitations for prosecution is only relevant in the case of an acquittal if the respective legal system allows for a retrial or appeal to the detriment of the acquitted person. Due to the narrow limits that are set for a reopening of the judgment under these cir-

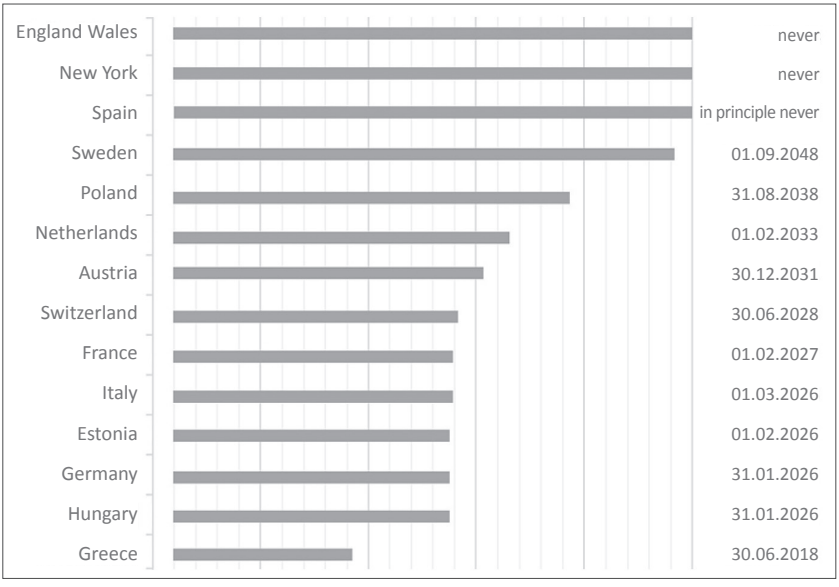
406 This solution was introduced by a change in the law in January 2019. Previously, only a conviction tolled the statute of limitations for a maximum of 1.5 years until the verdict of the next instance was pronounced. Whether the statute of limitations is also suspended in the Netherlands until the judgment becomes final cannot be answered on the basis of the information available.

407 It is not expressly regulated what applies in the case of subsequent vacation of the judgment, in particular as a result of a reopening of proceedings. In the opinion of the majority academic commentators, the remainder of the period that has not yet elapsed continues to run from the reopening of the case; *Mitsch*, MK-StGB, § 78b para. 21 with further references. Others advocate a new start of the statute of limitations; *Saliger*, NK-StGB, 5th ed., § 78 para. 15.

408 In New York, the indictment has that effect.

cumstances, the end of the limitation period after a final acquittal has little relevance in practice. The absence of the accused prior to this is also not suitable as a basis for comparison, because in some countries a judgement *in absentia* would be handed down. The final comparison therefore refers to the time of the *indictment*.

Graph 5: Statute of limitations for fraud after indictment



If one compares the end of the statute of limitations after all the above-mentioned procedural actions up to and including the indictment have been carried out, four groupings emerge in terms of time:

(1) The earliest statute of limitations occurs in Greece (30.6.2018), despite the base limitation period of 5 years as in the majority of countries. Only if the omission following the active deceptive act is also considered to be a conduct element would the limitation period not expire before 1.9.2023 due to the later start – still the earliest date by far.
One cause is the immediate start of the statute of limitations with the conclusion of the conduct constituting the offence, which is not softened by compromise, as in Austria, or by a long statute of limitations, as in Switzerland. In addition, the Greek legislator is reluctant to extend the statute of limitations, which remains possible only in the

form of a narrowly limited suspension from the opening of the main proceedings. It can be assumed that the difficulties in the substantive assessment of the fraud case in question are related to the problems caused by the early start of the statute of limitations.

(2) In the second group, the time limit expires on 31.1.2026 (Germany, Estonia, Hungary), 1.2. or 1.3.2026 (France, Italy) or 30.6.2028 (Switzerland). These are predominantly countries in which the limitation period does not begin until the result of the conduct has been fully realized and numerous extension options are available. In contrast to this, the modifications of the statute of limitations provided for in Estonian law only come into effect in the case study when the main proceedings are opened. Switzerland, which provides for an early start of the limitation period without modifications, stands out even more from the countries in this group. The fact that the statute of limitations nevertheless ends last within the group is due to the fact that the Swiss offence of fraud has the longest statute of limitations at 15 years. In four countries of this group there are multiple restarts of the limitation period in the case study. Up to and including the indictment, the period starts anew four times in Germany and France, and three times in Italy and Hungary, which requires a constant recalculation of the end of the limitation period and makes the end of the limitation period difficult to predict.

(3) In the third group, the limitation period ends on 30.12.2031 (Austria) or 1.2.2033 (Netherlands). In the Netherlands, the comparatively late end is due to a long limitation period of 12 years, coupled with a restart if two of the procedural steps in the hypothetical are carried out. In Austria, the limitation period is only 5 years. Despite the early start of the limitation period, the late end comes from the fact that the first hearing of the accused suspends the period until the final conclusion of the proceedings.

(4) The last group includes Poland, Sweden and those countries where the statute of limitations for fraud does not (further) apply. In Poland, the time limit does not expire until 31.8.2038. Polish law exercises restraint in extending the statute of limitations by only standardising a one-time extension by a specified period (10 years) from the initiation of the investigation, but because of the long initial period of 15 years, the fraud is only time-barred after 25 years. For Sweden, the late end of the statute of limitations is explained by the fact that the service of the indictment interrupts the running of the 10-year statute of limitations and then only the long absolute statute of limitations of 30 years is relevant. In Spain, from the first reasoned court decision charging

participation in the possible offence,[409] the offence can in principle no longer be time-barred, unless the proceedings stand still or end without conviction. In New York, the indictment has the effect that the offence is no longer time-barred. In England and Wales, there is no statute of limitations for fraud offences.

IV. Analysis

1. Divergence of the earliest and latest end dates

If no prosecution takes place, the end of the statute of limitations is identical for six of the 14 legal systems examined. In two other countries, the statute of limitations occurs only 1 year later. The picture changes when the above-mentioned procedural steps come into play, including the filing of charges. The fraud offence then only becomes time-barred at the same time in three countries[410] and only in two other countries is the difference no more than 2 years.

If we look at the biggest differences and disregard the special case of the statute of limitations in England and Wales, the statute of limitations without prosecution for the fraud in question diverges by up to 12 years from country to country. While the fraud in Greece can no longer be prosecuted as of 30.6.2018, the EU Member States Netherlands and Poland could initiate prosecution for 12 and 10 years longer, respectively. In Switzerland, too, the statute of limitations for fraud is 10 years later than in Greece.[411] Even the difference between the countries in the lower midfield and Greece, which is ranked first, is considerable, at 5 years.

After the procedural steps have been taken, the difference between the countries at the top and at the bottom of the scale increases. In Poland, the statute of limitations for the fraud is 20 years later than in Greece. Between Greece and the lower midfield, the time gap increases to 7.5 years (Germany, Estonia, Hungary), in the case of the Netherlands to (almost) 15 years,[412] in the case of Sweden even to 30 years. The time gap with Spain

409 In the present case, the court summons for questioning as an accused.

410 Germany, Estonia, Hungary.

411 However, a prosecution shortly before the deadline does not promise success, because a first instance judgement would have to be reached within the deadline.

412 The difference in the statute of limitations between Greece and the Netherlands is 14 years and 7 months.

cannot be quantified, as there is no longer a statute of limitations unless the proceedings stand still or end without a conviction.

Greece could be dismissed as an outlier, since here the statute of limitations begins early, without this being compensated by long basic limitation periods as in Switzerland, or a compromise in the case of delayed occurrence of result as in Austria. One could also object that the substantive assessment of the facts as a single act of fraud completed with the active deceptive act is not a certainty under Greek law.[413] But even if one considers the subsequent failure to clarify the error as relevant to the offence and assumes a continuing offence, the distance between the end of the limitation period in Greece and Poland would still be 12 years. This time gap also exists between the lower midfield and Poland.

2. *Causes for the divergence*

The case study illustrates that only the interplay of several factors – the range of penalties associated with the offence, the length of the period, the time at which the statute of limitations begins and the influences of prosecution activities – can determine the severity of a statute of limitations regime. Furthermore, the range of offences must be taken into account that are not subject to the statute of limitations.[414] Finally, differences in substantive law and procedural law have an impact on the length of the limitation period.

a) Limitation periods

According to the basic statutes of limitation for the offence of fraud, three groups can be distinguished, as shown: Switzerland, Poland, the Netherlands and Sweden form the group with the longest time limits of 15, 12, and 10 years respectively. The lowest term of 5 years is only one third of the longest term and is applied in seven countries (Germany, Estonia, Greece, New York, Austria, Spain, Hungary). In between are France and Italy with a 6-year base period.

413 See above at fn. 373.
414 See above, A. Second Complex I.

b) Commencement of the limitation period

If the statute of limitations begins to run *before the result of the conduct* has arisen, as is the case in Greece, Austria and Switzerland, offences with delayed occurrence of results become time-barred at an earlier point in time despite being subject to the same limitation period. In the example case, there are deviations of up to 5 years, 2 months compared to Greece within the group of countries with a limitation period of 5 years.[415] Conversely, the link to *material completion* in Germany results in a later limitation date in cases where the completion and the material completion fall at disparate points in time.

c) Modifications

The effects of the modifications of the statute of limitations are even more significant, as the example of Austria shows. Despite a short base statute of limitations in comparison – here Austria is the country in which the fraud offence is time-barred the fastest after "front-runner" Greece due to the early start of the statute of limitations – the position shifts to one of the last final time limits from the time the first procedural step relevant to the statute of limitations is taken. The time gap to the second group, to which most countries belong,[416] is almost 6 years in the case study. This is due to the decision of the Austrian legislator to grant an unlimited period of time for prosecution from the first relevant procedural act and to let the pausing of the statute of limitations end only with the final termination of the criminal proceedings. Austrian law is thus more limitation-friendly than other legal systems only when there is no criminal prosecution.

A similarly striking shift can be seen for the State of New York, which is in the lowest midfield in terms of basic statutes of limitations for fraud, but is one of the strictest jurisdictions when measured by the end of the statute of limitations when proceedings are initiated in a timely manner. The Swedish legal system also moves from one of the front to one of the back positions. This is due to the termination of the (basic) statute of limitations and the change to the long absolute statute of limitations with service of the indictment. Finally, the position of Spanish law shifts from the

415 In Austria, the statute of limitations occurs 2 years and 8 months earlier than in the other countries with a 5-year statute of limitations.

416 Above C.III.7.(2). Earliest end of limitation period on 31.1.2026.

group with the lowest limitation periods to that with the longest limitation periods.

The opposite tendency can be observed for Switzerland, which moves from one of the lowest ranks to the middle when the influences of prosecution activities are taken into account. This can be explained by the Swiss system of long basic limitation periods without the possibility of extension. Only after a first-instance judgement has been handed down is it no longer possible for the statute of limitations to expire.

d) Subject matter of the limitation period

In addition, the limitation period can be influenced by the co-occurrence of offences. If one takes the whole criminal act and not the individual offences[417] as the object of the statute of limitations, the statute of limitations of all offences realised by one act is based on the most serious offence, which can significantly extend the statute of limitations. In two countries, the forgery offence in the case study only becomes time-barred together with the fraud,[418] while the offence in the other countries is already time-barred[419]. For this reason, the use of the forged document can be prosecuted for 15 years in Poland.[420]

e) Divergences of substantive law

In addition to the individual components of the statute of limitations, the formulation of the offences can influence the time of the statute of limitations. For example, the length of the limitation period may depend on the range of punishment for an offence. The Austrian Criminal Code can serve as an example. In the area of property offences, it structures the range of punishment according to loss valuation, with the consequence that in the case of low value and damage amounts, a low threat of punishment and thus a short limitation period applies. If, in the example case, it were a case of fraud with a damage of less than 5,000 € and without the use of a forged

417 Or criminal offences.
418 Spain, Poland.
419 Or, as in France and Austria, was displaced by way of mere apparent concurrence.
420 Without law enforcement activities.

document, the basic offence of fraud (§ 146 Austrian CC) would be committed, punishable by imprisonment of up to 6 months and with a statute of limitations of 1 year. In Germany, on the other hand, the penalty would be up to 5 years' imprisonment (§ 263 para. 1 German CC) and five times the Austrian statute of limitations.

Divergences in the wording of the offence, such as leaving out a result element in the case of fraud,[421] can also have an effect on the statute of limitations. Finally, a divergent interpretation of the offence, as in the case of the question of a continuing realisation of the offence by omission,[422] can influence the expiry of the limitation period.

It follows from all this that even a standardisation of limitation rules in the European Union, for which there is currently no legal basis, could not completely eliminate differences in limitation.

f) Divergences of procedural law

Differences in the procedural law of the legal systems also come into play through the modifications of the statute of limitations. Some procedural steps are not even provided for in a similar form in the criminal procedure code of other countries, so that a comparable influence on the statute of limitations is impossible for this reason alone. Conversely, procedural options available in any single country, such as a judgement *in absentia*, can settle the question of the statute of limitations. The divergences speak in favour of restraint in providing for an extension of the limitation period in a model regulation. If the extension is linked to a procedural step, it is important to select procedural actions that exist in a comparable form in each country.

V. Implications for harmonisation within the current EU legal framework

In accordance with Art. 83 TFEU, the European Union may, for certain areas of crime and within the framework of ancillary competence,[423] pre-

421 Above at fn. 363.
422 Above before fn. 374.
423 Commonly referred to as annex competence. On this concept see *Hochmayr*, in: Frankfurter Kommentar zum Recht der Europäischen Union, 2017, Art. 83 para. 32.

scribe "minimum rules concerning the definition of criminal offences and penalties" in directives. There is agreement that the competence extends to minimal interventions in the general part of criminal law.[424] It is questionable whether a sector-specific harmonisation of the statute of limitations could also take place on this basis. If one understands the general part of criminal law as the general regulations that are applicable to all norms of conduct in the special part and concern the prerequisites for criminal liability, the statute of limitations could be included, regardless of its classification in substantive or procedural law.[425] Academic literature, however, has expressed doubt that Art 83 TFEU allows minimum requirements for limitation periods,[426] and in some cases even rejects the need for harmonisation.[427]

So far, the EU has only harmonised the statute of limitations in the Directive on combating fraud against the Union's financial interests by means of criminal law.[428] The Directive, which is based on Art. 83 para. 2 TFEU, is an illustrative example of the possibilities and limits of such standards. Bringing countries into line with one another in the result precludes the imposition of fixed definitions that would lead to a standardisation of the law. According to the traditional understanding of the term "minimum rules", the only standard in a Directive could be not to fall below a certain limitation period. Accordingly, under Art. 12 para. 2 of the aforementioned Directive, in the case of offences which according to the Directive are punishable by a maximum sentence of at least 4 years, prosecution – including court proceedings and judicial decisions – must be possible for *at least 5* years "from the date of the commission of the offence". The Directive accepts a shorter limitation period of 3 years if the period can be interrupted for "certain procedural steps" not subject to any further clarification.[429] The minimum requirements can also be met by longer

424 *Ambos*, Internationales Strafrecht, 5th ed. 2018, § 11 para. 12; *Hecker*, in: Sieber/Satzger/Heintschel-Heinegg (eds.), Europäisches Strafrecht, 2nd ed. 2014, § 10 para. 33; *Satzger*, in: Streinz (ed.), EUV/AEUV, 3rd ed. 2018, Art. 83 para. 42; *Stuckenberg*, in: Böse (ed.), Europäisches Strafrecht, 2nd ed. 2021, § 10 para. 6.

425 Cf. *Vogel*, JZ 1995, 331 (337); *Weigend*, FS Roxin, 2001, 1376 (1378).

426 *Satzger*, in this volume, at III. ("not only an attribute of the sanction itself"); *Asp*, The Substantive Criminal Law Competence of the EU, 2012, 101 ("indirect connection"). Left open by *Ambos* (fn. 424), § 11 fn. 133. Disagreement from *Lochmann*, EuR 2019, 61 (78), who argues for a corresponding competence.

427 *Kaiafa-Gbandi*, EuCLR 2015, 3, 12 f. (on the PIF Directive, fn. 428). Rejecting also *Zeder*, öAnwBl 2013, 192, 199 f.

428 (EU) 2017/1371, OJ L 198/29.

429 Art. 12 para. 3 of the Directive.

limitation periods or, as Recital 22 of the Directive makes clear, by doing without a limitation period.[430]

In the concrete case, each of the legal systems examined fulfils the minimum requirements: The limitation period for the applicable offence of fraud is 5 years or higher. For the purposes of the Directive – combating fraud against the Union's financial interests – this may be sufficient. However, considering that the offences fall under the *jurisdiction of the EPPO*,[431] a harmonisation "downwards" seems insufficient. The EPPO, after all, could specifically prosecute in a Member State where the statute of limitations occurs significantly later than in the state where the offence was committed, if the accused has his habitual residence or nationality there or if the majority of the financial damage occurred there.[432] The divergences, which can be 2.5 to 12 years before proceedings interfere and 7.5 to 30 years once they have begun, are also a problem for interstate cooperation in criminal matters based on the *principle of mutual recognition.* How can a Member State cooperate in confidence with another Member State whose legal system allows the offence to become time-barred much later, and vice versa? If a Member State has not (optionally) invoked the statute of limitations in its refusal,[433] it must extradite the person concerned to the other state on the basis of a European arrest warrant, even though the offence would have been time-barred long ago under its own law. If its law provides for the possibility of refusal, the other Member State must then in turn refrain from surrendering the person concerned, even though its legal system still permits prosecution. Mutual trust in the other legal system is undermined by too great a gap between the limitation periods.

It could be considered whether the "minimum rules" permissible under Art. 83 TFEU also include requirements for an upper limit of the limitation period.[434] In this case, too, however, the Member States would have to be left a margin of implementation, the exercise of which is likely to considerably impede mutual trust in the respective other legal system. Furthermore, the case study has shown that even between those legal systems that

430 The regulations had to be transposed into national law by 6.7.2019 (Art. 17 of the Directive).

431 Art. 22 para. 1 Regulation on the implementation of enhanced cooperation to establish the European Public Prosecutor's Office (EPPO), OJ L 283/1.

432 Art. 26 para. 4 of the EPPO Regulation.

433 Art. 4 No. 4 FD ECA (fn. 290).

434 Cf. the discussion of the term "minimum rules" in *Meyer*, in: von der Groeben/Schwarze/Hatje (eds.), Europäisches Unionsrecht, 7th ed. 2015, Art. 83 paras. 20 ff., 63 f.

provide for the *same limitation period*, the differences in the commencement of the limitation period and the extension of the limitation period in particular can still result in considerable divergences.

According to all this, even if the EU were to have a corresponding competence, a harmonisation proposal within the existing EU legal framework would not be suitable to remedy the problems identified. Also, the proposal would then have to be limited to the areas of crime covered by Art. 83 TFEU.[435] The proposal is therefore that the limitation rules be subject to voluntary harmonisation (below D.IV.).

D. Overall conclusions

I. Essential commonalities

Grouping the limitation models examined has only proved feasible for individual aspects, such as the start of the limitation period or modifications to the limitation period. As soon as other aspects are included, the picture becomes confusing and the previously formed groups disintegrate. However, the comparative law study has revealed the following cross-national commonalities on which a harmonisation of the statute of limitations[436] can build:

1. Each of the legal systems examined *applies the concept of limitation* to criminal offences. Even in England and Wales, which represent the typical common law model of the non-limitability of criminal offences, special laws exceptionally provide for a statute of limitations, especially for the lightest criminal offences. In continental Europe, the statute of limitations for criminal offences is a common starting point. However, no legal system recognises a right to limitation.
2. The *doctrinal justification of the statute of limitations* causes difficulties in all countries. A bundle of different explanatory approaches is invariably cited. In addition to preventive considerations, reference is usually made to evidentiary difficulties, with the result that mixed theories of limitation dominate in which substantive considerations are combined with procedural ones. Even in a comparison between countries with a

435 Such as terrorism, trafficking in human beings, sexual exploitation of women and children, computer crime, etc., as well as harmonised policy areas (Art. 83 para. 1 and para. 2 TFEU).

436 See IV. below.

nominally substantive understanding of the statute of limitations and procedurally oriented countries, no fundamental differences in reasoning are discernible.

3. If *doubts* as to whether the factual prerequisites for the statute of limitations exist cannot be resolved, the offence – irrespective of whether the statute of limitations is classified as substantive or procedural – is deemed to be time-barred.[437]
4. There is agreement that the *subsequent extension* of the statute of limitations *after it has already run out* violates the *prohibition of retroactivity* and is impermissible. In two countries, however, the constitution provides for exceptions to the prohibition of retroactivity in connection with coming to terms with communist system injustice.
5. In every country, there are *crimes that cannot be time-barred*. Common to all the countries studied is the fact that core crimes under international law are not subject to a statute of limitations.
6. The *statute of limitations* in each country is ultimately *based on* the maximum penalty and thus on the *seriousness of the offence*. This also applies to those countries in which the statute of limitations is linked to the country-specific classification of offences into felonies, misdemeanours and the like, because this in turn is tied to the maximum penalty.
7. With regard to the *commencement of the limitation period*, there are few similarities: In the case of simple offences of activity, the period begins to run when the conduct constituting the offence is completed. In particular, the start of the statute of limitations varies greatly for offences with a result element. Most countries have decided that the limitation period begins with the completion of the offence, i.e. with the occurrence of the result.
8. Each country provides for the *possibility of extending the limitation period*. The triggers for the extension diverge. In many cases, the time limit is influenced by the indictment. In most countries, however, procedural events prior to this have this effect. Immunity, especially of members of parliament, also extends the statute of limitations in many countries.
9. With the exception of the two Anglo-American legal systems examined, the *enforceability* of a criminal sanction can be barred by the statute of limitations in all legal systems examined.

437 This remained open for Spain and the Netherlands.

II. Secondary importance of the legal nature of the limitation period

Another important insight for harmonisation efforts is that the nominal legal character of the limitation period has less influence on the design of the limitation period than was to be expected. When it comes to the legitimacy of the limitation period and dealing with doubts about the existence of a fact giving rise to the limitation period, there is no discernible difference between substantive and procedural conceptions of the limitation period. The assignment of the statute of limitations to substantive law or procedural law also does not allow any clear conclusions to be drawn about the procedural treatment of the statute of limitations. Rather, this depends on the nature of the overall procedural law. Even the admissibility of a retroactive extension of a *running* limitation period depends only to a limited extent on the classification of the limitation period: while the admissibility is affirmed for the two countries with a clearly procedural conception, the question is handled inconsistently in the countries with a limitation period characterized as substantive law.[438] It follows from all this that a particular dogmatic understanding of the statute of limitations is not an obstacle to legal harmonisation.

It should be added that inconsistencies can be found for both conceptions, but to a lesser extent in the case of a procedural classification, so that this model appears to be more convincing.

III. Interaction between criminal procedure and the statute of limitations

The legal comparison revealed a variety of influences of the design of criminal procedural law on the statutes of limitation. The most striking is the connection between the statute of limitations and the application of the principle of prosecutorial discretion. In the three countries with fundamental or far-reaching non-limitability,[439] the prosecution of even the most serious crimes is at the discretion of the law enforcement agencies. This leeway is probably also necessary to avoid overburdening the prosecuting authorities. Since the other legal systems examined, with the exception of France, provide for a fundamental obligation to prosecute, a change to fundamental or far-reaching statute of limitations would result in fundamental procedural upheavals.

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438 A. First Complex III.3.b.

439 England and Wales, United States, Netherlands.

The example of the United States also shows that the structure of criminal proceedings can speak in favour of the statute of limitations for criminal offences. For reasons of fairness, it is considered necessary there[440] for the protection of the accused's evidentiary position in adversarial proceedings that criminal offences can in principle be time-barred. Conversely, the primacy of plea bargaining means that the accused can dispose of the statute of limitations by waiver.

If the structure of the criminal proceedings or the staffing and financial resources of the courts and public prosecutors' offices result in long proceedings, there is a need to relieve the prosecuting authorities through the statute of limitations. The statute of limitations is thus used to solve the problem of excessively long proceedings.[441] A reform of the statute of limitations should therefore be accompanied by an increase in the effectiveness of criminal proceedings and a strengthening of human and financial resources.

The Swiss model of long time limits without the possibility of extension presupposes that criminal proceedings can be brought to a swift conclusion. Otherwise, in complex criminal cases, it would no longer make sense to initiate criminal proceedings even several years before the deadline expires, because it would be foreseeable that a first-instance judgement could not be handed down in time. However, there is no indication that Switzerland enjoys some outstanding position in the duration of criminal proceedings.[442] One negative example of the Swiss regulation is the judicial

440 Unlike the United Kingdom and Canada.

441 For Italy: In 2018, the disposition time for first instance criminal cases in Italy was 361 days, well above the median of 122 days. No data is available for Greece. Source: European Judicial Systems, CEPEJ Evaluation Reports, Part 2, 2020, 51 (https://rm.coe.int/evaluation-report-part-2-english/16809fc059, last accessed 15.2.2021). The indicator "disposition time" is the number of proceedings not completed at the end of the year divided by the number of proceedings completed multiplied by 365 (days).

442 The disposition time for criminal cases at first instance in Switzerland in 2018 was 100 days, which is below the median of 122 days for all countries covered; see European Judicial Systems (fn. 441), 91. Within ten of the countries covered, which are also included in the present study (no data were available for Germany, France and Greece in 2018), Switzerland ranks fourth with this value. The best performer in this respect is Estonia (35 days), followed by Hungary (58 days). Switzerland ranks first only with the lowest values for incoming (0.48) and pending (0.131) cases. With a case completion rate of 99.7 %, Switzerland ranks 7th (together with Poland).

reckoning with the FIFA scandal, which ended after 5 years of cost-intensive investigations with a dismissal due to the statute of limitations.[443]

The examples illustrate that when transferring a limitation model to another legal system, the interactions between the limitation rules and procedural law must be taken into account.

IV. A uniform model of the statute of limitations

Since a harmonisation proposal within the framework of existing law would bring little improvement,[444] an attempt should be made to develop what might be called a "model statute of limitations" along the lines of the American Model Penal Code; in other words: statute of limitations regulations that could be adopted voluntarily by the Member States due to their model character and that would result in the most uniform statute of limitations possible for criminal offences in the EU. The idea of voluntary legal unification in the area of criminal law may seem utopian at the present time. That such an approach can work in principle has been proven by the Model Penal Code, which has strongly influenced criminal law in many US states. If a simple, convincing model can be devised, pragmatic considerations could also prompt a Member State to adopt the model. Hope is raised here by Switzerland, where a fundamental system change from a complex to a transparent, easy-to-handle statute of limitations model has succeeded.[445]

In the interest of functioning cooperation in criminal law, a solution must therefore be found that is acceptable to as many EU Member States as possible. As in the United States, it is conceivable that the statute of limitations model will be adopted with deviations. Ideally, the deviations should be within a framework that avoids major differences in the statute of limitations.

The following requirements for a model system of limitation can be derived from the comparative law analysis. A pragmatic approach is advisable.

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443 www.nzz.ch/schweiz/sommermaerchen-verjaehrt-prominenter-fifa-fall-ist-vom-tisch-ld.1552858?reduced=true; www.zdf.de/nachrichten/sport/sommermaerchen-wm-2006-schweiz-prozess-eingestellt-verjaehrung-100.html (retrieved 11.9.2020).

444 Cf. above C.V.

445 For details see the Country Report Switzerland, A. Second Complex II.4.

1. The complexity of the regulations is decisive for the assessment of which regulatory system is a model. The simpler a model is, the more suitable it is as a model for a Union-wide solution, because it can be more easily transferred to other legal systems and makes the limitation period transparent. Systems in which the end of the limitation period is difficult to foresee appear less suitable. This applies in principle to all regulatory models that apply multiple restarts of the limitation period.
2. At first glance, the simplest solution would be to adopt the model of fundamental non-limitability of criminal offences. However, as comparative law has shown, a fundamental or even far-reaching non-limitability is linked to the principle of opportunity in terms of criminal procedure. This is the only way to handle non-limitability in the case of limited capacities for prosecution. Since this would require a fundamental change of system in the majority of countries, this solution is not recommended.[446]
3. As far as the range of non-limitable crimes is concerned, the non-limitability of core crimes under international law is indispensable. A link to the threat of life imprisonment, on the other hand, is out of the question because the threat of punishment is used for different offences in different countries and not all EU Member States provide for life imprisonment. In view of the high value of life as a legal interest, it could be justified that the intentional extinguishing of a human life should never be subject to a statute of limitations.
4. It is not apparent that any of the legal systems examined entirely fulfils the requirements of an "ideal" limitation model. The Swiss model, for example, with high initial deadlines and a fundamental waiver of an extension of the statute of limitations, is probably too inflexible. The Polish model of a one-time extension of the long initial periods by a certain period is not convincing in view of the long limitation period. A combination of different components of the existing limitation models is needed.
5. The best time for the commencement of the limitation period remains to be discussed. Doctrinal arguments speak in favour of the solution most often chosen in comparative law, i.e. the completion of the offence.
6. Due to the great divergences in penalty frameworks, the goal of a transnationally coordinated statute of limitations will only be achievable if a small number of different time limits are provided for. In or-

446 Above D.III.

der to compensate for the differences in punishments, the limitation periods should tend longer.

7. There should only be a few possibilities for extending the deadline. One indispensable element should be tolling in the case of immunity. For reasons of resource conservation, it should no longer be possible for the statute of limitations to run after certain procedural steps (to be determined later) have been taken.

Translation by *Christopher Schuller*.