A Model for a Workable Harmonisation of Criminal Statutes of Limitations in the EU

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Prosecution for the following offences may be commenced at any time:
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3. War crimes;
4. The crime of aggression.

§ 2 Limitation Periods
(1) Offences of intentional killing (basic and aggravated offences) are subject to a limitation period of 30 years.
(2) Other serious crimes are subject to a limitation period of 20 years.
(3) Less serious crimes are subject to a limitation period of 8 years. Less serious crimes consist of:
1. *offences punishable by up to X years / offences punishable by a minimum of fewer than Y years of imprisonment.*
2. *offences from a particular category.*

§ 3 Beginning of the Limitation Period

(1) The limitation period begins to run with the completion of the offence; for offences of attempt, it begins to run from the completion of the last act of the attempt; for continuous crimes, it begins to run as soon as the continuous crime has ceased.

(2) For offences under *§§/Art....* against minors, the limitation period begins to run once the victim has reached the age of 18.

§ 4 Tolling of the Limitation Period

(1) The limitation period is tolled as soon as the offender knows or could have known

1. that criminal proceedings have been commenced against him, and is tolled until the conclusion of such proceedings; or
2. that criminal proceedings cannot be commenced against him because of immunity he enjoys, and is tolled until the end of that immunity.

(2) The period of tolling under paragraph 1, number 1 is limited to

1. 8 years for less serious offences; and
2. 20 years for all other offences.

Discussion

A. Preliminary Considerations

The model for harmonised rules on statute of limitations on prosecution presented here[1] is the result of insights gained through the comparative law study[2] conducted on the basis of the country reports[3] as well as the case study[4] conducted as part of the project. A first draft of the harmonisation proposal was presented at the joint project conference in September

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1 Referred to variously as "statute of limitations", "limitation period", "limitation period of the offence", "limitation periods on prosecution" to be differentiated from limitation periods on the enforcement of a sentence, which are not covered by this Harmonisation Proposal. Our decision to settle on the term "statute of limitations on prosecution" does not reflect a particular position on the question of whether or not limitation periods are a matter of substantive or procedural law. Subsequent references to "limitation", "limitation period", or "statute of limitations" should be understood as referring to time limits on prosecution.

2 Cf. *Hochmayr*, A Comparative Analysis of Statutes of Limitation, in this volume.

3 Cf. respectively in this volume: *Gropp/Sinn*, Landesbericht Deutschland; *Halliday/Lazer/Wood*, Country Report England and Wales; *Parmas/Sootak*, Landesbericht Estland; *Walther*, Landesbericht Frankreich; *Papakyriakou/Pitsela*, Landesbericht Griechenland; *Orlandi*, Landesbericht Italien; *Faure/Klip*, Landesbericht Niederlande; *Sautner/Sackl*, Landesbericht Österreich; *Kulik*, Landesbericht Polen; *Haverkamp*, Landesbericht Schweden; *Lehmkuhl/Häberli/Schafer/Wenk*, Landesbericht Schweiz; *Gómez Martín*, Landesbericht Spanien; *Karsai/Szomora*, Landesbericht Ungarn; *Thaman*, Country Report United States.

4 Cf. *Hochmayr* (fn. 2), C.

2020[5] and discussed extensively with the researchers involved. The results of those discussions have been worked into the proposal in its current form.

I. The Harmonisation Proposal as a Non-Binding Model Rule

It became clear from the analysis of the case study that a harmonisation proposal does not have the potential on the basis of current EU law, which anyway only extends to certain areas of the criminal law,[6] to clear up all the problems presented by the status quo.[7] It is therefore presented as a non-binding model rule, comparable to the Model Penal Code in the United States,[8] which can serve as an orientation point for Member States and provide an opportunity to re-shape the law on limitation periods at the national level. The proposed rule here serves as a substantive example that can be adopted by Member States' own legislative processes after the necessary adjustments are made to the wording for each respective legal system.

II. Development of Core Criteria for a Workable Model Rule

The case study furthermore made clear that the operation of limitation periods in a given case will always depend on a variety of factors such as the substantive criminal law governing the case, the severity of the possible penalty, the length of the base limitation period, rules governing the commencement of the limitation period, questions of procedural law, and the effects of various stages of criminal proceedings on the limitation period.[9] A harmonisation proposal inductively derived from a broad spectrum of limitation period regimes would have had to take all these factors into ac-

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5 Cf. on this issue *Kolb*, eucrim 2020, 350 ff.

6 Such as terrorism, trafficking in human beings, sexual exploitation of women and children, computer crime, etc.; also applies to harmonised policy areas: see Art. 83 paras. 1 and 2 TFEU.

7 Cf. *Hochmayr* (fn. 2), C.V. as well as *Kolb*, Der internationale und europarechtliche Rahmen der Verfolgungsverjährung, Zweiter Teil § 1 (forthcoming).

8 Cf. American Law Institute, Model Penal Code: Official Draft and Explanatory Notes: Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962, Philadelphia 1985.

9 Cf. *Hochmayr* (fn. 2), C.IV.2.

count. And even if this were possible with regard to limitation periods in the narrower sense, the interplay of outside factors would still lead to differences in limitation periods in concrete cases to an extent not solvable by a single harmonisation proposal.[10] Any attempt to make the "forest of limitation rules" in the EU transparent and understandable cannot devote too much attention to individual trees.

The proposal set out below represents a first input toward a reform of Member State law at the national level that makes limitation periods more readily comprehensible. That is the attraction of the Harmonisation Proposal, which otherwise could not be expected to enjoy broad acceptance by the Member States. Genuine reform of the present law would require the largest possible number of Member States to voluntarily adapt their legal systems according to the example given by the proposal. The hope is that acceptance can be achieved not just on the basis of states' recognizing the commonalities between their current limitation frameworks and the proposal, but also on the basis of a recognition that a harmonisation of limitation periods across the Union is best achieved via this proposal for the reasons set out below.

The following criteria for harmonisation were arrived at deductively from the comparative-law insights gained from the case study:

1. Transparency and Predictability

The goal of any harmonisation should be simple rules on limitation periods that make it easy to determine questions surrounding the limitation period, thus leading to increased transparency. A simplified limitations regime would be an improvement compared to the current situation in the Member States included in the study, further increasing the attractiveness of the proposal. Every aspect of the proposal must thus be tested against the standard of whether the limitation period is predictable by the offender as well as the prosecuting authority and whether it remains so. The rules must be clear enough that their application to different legal systems does not result in misunderstandings or difficulties of interpretation.

10 Cf. *Hochmayr* (fn. 2), C.IV.5., C.IV.6. and C.V.

2. Roots in Existing National Law

The harmonisation proposal must maintain a conservative approach, respecting well-tested elements of national limitation regimes as far as possible so that it is rooted in the existing laws of EU Member States.

The country reports prepared by contributors to the project provide a comprehensive picture of the limitation regimes currently in force in the Member States of the European Union. Of the fourteen legal systems, chosen explicitly for their different legal cultures and the unique features of their limitation regimes, eleven are Member States of the EU.[11] The country reports as well as the comparative law study[12] conducted on their basis served as a broad range of source material for the drafting of the proposal.

One aspect of the research was the question of how widespread a given regulatory feature was among the systems studied. The goal was not just to capture the breadth of acceptance of a particular feature in the legal systems, but also to benefit from the experience of the contributing researchers in the weighing of the strengths and weaknesses of individual regulatory features against one another. The joint conference of all the contributors in September 2020 provided a suitable opportunity for this; the less broadly a particular aspect of the proposal was anchored in the law of the states included in the study, the more discussion it prompted at the conference.

3. Considerations of Criminal Law Theory

Not only must a harmonisation proposal be broadly compatible with the core principles of the doctrine of limitation in the EU Member States; it should also provide the basis for a harmonised "theory of limitation". The development of the proposal also considered, in addition to criteria 1. and 2. above, the question of which regulatory variant fits best with the overall proposal. There may be some necessity for later correction here if two aspects of the proposal are in fundamental conflict on the theoretical or doctrinal level.

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11 The study covered the EU Member State legal systems of Germany, Estonia, France, Greece, Italy, the Netherlands, Austria, Poland, Sweden, Spain, and Hungary as well as the non-member states Switzerland, the United Kingdom (England and Wales), and the United States (New York).

12 Cf. *Hochmayr* (fn. 2), A.

Such a conflict does not arise simply because the final proposal combines different approaches into a "mixed model" of limitation. Mixed models are already a feature of many of the legal systems under study.[13] Indeed, such compromises may be critical for reaching the broadest possible acceptance for the proposal under the "rooting" criterion.

The various doctrinal underpinnings of limitation periods have a central commonality: the idea of the necessity of prosecution[14] constitutes a counterweight to any limitation considerations. Prosecution for an offence should only be time-barred when the offence no longer need be prosecuted; should the necessity for prosecution endure, this may speak for grouping the offence with those not subject to limitation periods.

III. Application of the Core Criteria to the Basic Elements of Criminal Statutes of Limitation

The three core criteria for a workable harmonisation proposal then needed to be applied to the basic elements of every limitation regime.[15] These basic elements were in turn derived from the comparative-law study:

1. The question of offences not subject to limitation periods;
2. The question of the duration of limitation periods;
3. The question of when the period begins to run; and
4. The question of the modification of a running limitation period.

For each element of the harmonisation proposal, the consequences for the Member States' legal systems will be laid out, with a differentiation between changes on the national level and changes to the situation within the EU. Special attention will be paid to those legal systems whose present rules diverge furthest from the proposal, meaning that the changes to their law would be the most extensive. In the result, this should show the extent to which the legal situation within the EU would change if the proposal were implemented – in essence, whether and to what extent the existing differences could be resolved.

13 Cf. *Hochmayr* (fn. 2), A. First Complex I.1.

14 The term "necessity of prosecution" is not intended to represent a particular position on the question of whether limitation periods are a matter of substantive or procedural law.

15 See below, B.I.–IV.

B. Discussion of Individual Provisions

I. Offences not Subject to Limitation

The proposal specifies a number of offences not subject to any limitation period at all. This question forms the logical starting point of any model of limitation, since the offences named are exempt from all of the provisions as to limitation periods, their start, and their modification that follow.

1. Proposed Regulation

The proposal is to exempt only the core crimes under international law from any limitation period.

§ 1 Exemption from Limitation
Prosecution for the following offences may be commenced at any time:

1. The crime of genocide;
2. Crimes against humanity;
3. War crimes;
4. The crime of aggression.

2. Roots in Existing National Law

The proposed rule corresponds in substance to Art. 29 of the Rome Statute of the International Criminal Court. The Rome Statute has been ratified by all EU Member States, and is already reflected in the national law of (almost) all EU Member States.[16] This broad foundation in the national law of the Member States is an indication that exempting the crime of genocide, crimes against humanity, war crimes, and the crime of aggression from limitation rules is likely to enjoy broad acceptance. The rule in this form was supported unanimously at the project conference.

16 The small number of exceptions are covered in *Hochmayr* (fn. 2), A. Second Complex I.2.a.

3. Transparency and Predictability

The requirements of transparency and predictability are likewise fulfilled. Exemption is the clearest statement that can be made about a given offence from the limitation perspective. A situation cannot arise in which the limitation period and whether it has run is unclear for a court, prosecutor, or offender. The question of whether the conduct in question is covered by one of the four core offences of international law is an entirely separate matter. Resolving it may be decisive for the question of whether or not prosecution is time-barred, but this is not an issue that can or should be solved by limitation rules. The offences have been deliberately taken on as they are named in the ICC statute, and the classification of an offence as a core offence under international law is a matter to be resolved according to the definitions in the Rome Statute.

4. Considerations of Criminal Law Theory

If the doctrine of limitation is founded in a presupposition that the need for prosecution of an offence diminishes over time,[17] then an exemption from limitation periods can be explained in two ways: that the need for prosecution is so urgent that it does not diminish appreciably within the lifetime of the offender, or that for offences of a certain quality, it does not diminish over time. Inasmuch as the end of the limitation period represents an abstract point in time after which punishment is deemed no longer legitimate,[18] it is arguable that the legitimacy of punishment, in exceptional cases, never gives way to other considerations.

A doctrinal justification for limitation periods based on "diminishing relevance of wrongdoing" functions in much the same way.[19] Certain criminal offences constitute such a high degree of wrongdoing that this cannot be reduced to a negligible level (the threshold relevant for justifying the operation of the statute of limitations) within one human life (the life of the perpetrator).[20] This substantive-law approach to justification justifies the non-limitability of a criminal offence in extreme cases.

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17 Cf. *Greger/Weingarten*, in: Greger/Lose/Valerius/Weingarten (eds.), Leipziger Kommentar StGB, Vol. 6: §§ 69–9b, 13th ed. 2020, Vor § 78 para. 1a.

18 Cf. *Mitsch*, in: Erb/Schäfer (Hrsg.), Münchener Kommentar StGB, Vol. 2: §§ 38–79b, 4th ed. 2020, § 78 para. 3.

19 Discussed extensively in *Asholt*, Verjährung im Strafrecht, 2016, 462 ff.

20 Cf. *Asholt* (fn. 19), 464.

On the other hand, procedural arguments alone cannot be used to justify the fact that an offence is not subject to a limitation period. If one were convinced by the approach that limitation periods are necessary to overcome time-related evidentiary difficulties,[21] then on a strict construction, no offence could be exempted from limitation. Given that the doctrine of limitation periods is deeply rooted in every legal system studied, discarding it is not a realistic possibility.

Indeed a singular focus on the aspect of a (difficult to grasp) "severity" of offences would probably deliver good arguments to justify the exemption of other offences as well.[22] However, the aspect of the need for prosecution mentioned above allows for a further gradation by including factors beyond merely severity and time. Unlike other most serious offences, perpetrators of crimes under international law regularly have certain resources and networks at their disposal to evade prosecution that the "normal" offender does not have. Often, such perpetrators are under the protection of – or indeed among – those in central positions of power. The statute of limitations for crimes under international law is a clear statement that they must fear prosecution for the rest of their lives, regardless of their age and the current political situation. This results in a deterrent effect that goes beyond the mere threat of punishment. An unlimited period of prosecution is automatically accompanied by a higher probability of prosecution, especially as a result of a change of power. The probability of prosecution is of central importance for the deterrent effect of punishments. No perpetrator of a core offence under international law should be able to be released from his criminal responsibility by the mere passage of time.

5. Preliminary Conclusions

The broad roots, the requirements of the Rome Statute, the unanimous vote at the project conference as an indicator of the probable acceptance of the regulation and, last but not least, the special need for punishment resulting from the nature of crimes under international law ultimately speak in favour of exempting these offences from any limitation period.

21 The broad range of arguments against this position is covered in *Greger/Weingarten* (fn. 17), Vor § 78 para. 1b.
22 See 6., below.

6. Alternative Approaches

During the development of the proposal, there was discussion about whether further offences should be included in the catalogue of offences exempted from limitation periods, since in almost all legal systems examined[23] certain offences beyond just the core offences under international law are exempt from limitation. As further starting points for a provision of non-limitability, three main areas can be found in the legal systems examined: limitation periods in the area of homicide (a.), for offences subject to life imprisonment (b.), and for serious sexual offences against minors (c.). The following sets out the reasons why it was ultimately decided not to include these offences.

a) Non-Limitability of Non-Privileged Homicides

The most controversial discussion centred around whether to exempt some homicide offences from the limitation period. The Draft Harmonisation Proposal presented for discussion at the project meeting contained a provision in § 1 no. 2 of the Draft Harmonisation Proposal according to which the *core offence* of intentional killing and all *qualified instances* of the same offence should not be subject to limitation periods.

aa) National Law as a Starting Point

The draft proposal was supported by the fact that non-limitability for at least the most serious forms of intentional homicide can be regarded as well rooted in the national legal systems of the EU. It is a feature of seven of the eleven EU Member States examined.[24] The inclusion in the Harmonisation Proposal of an exemption from limitability for the most serious intentional homicide offences would therefore probably have been accepted in many states due to the low need for change. At most, the proposal would have been met with reservations by those legal systems that do

23 With the exceptions of France and Greece.
24 Germany, Estonia, Italy, the Netherlands, Austria, Sweden, and Hungary.

not yet have a limitation period for homicide offences and would have had to introduce one.[25]

Greater acceptance problems stood in the way of an exemption for the "normal" unqualified offence of intentional homicide. There is not broad support in national legal systems for such a provision.[26] The voluntary implementation of § 1 no. 2 of the Draft Harmonisation Proposal would have required a willingness in some states to extend the non-limitability which previously only applied to the most serious cases of intentional homicide to simple intentional homicide cases as well.[27] In Estonia, this would even have meant a change from a ten-year limitation period[28] to complete non-limitability.

bb) Necessary Systematisation of Homicide Offences

The perhaps obvious-seeming solution, limiting the exemption from limitation to the most serious cases of intentional homicide, fails because of the different structure of intentional homicide offences in the various legal systems of the European Union. There is no uniformly understood "most severe case" of homicide across countries. For the question of how to determine with legal certainty which homicide offences should deemed non-limitable, the Draft Harmonisation Proposal therefore looked to a categorization drawn up in 2015 in a research project led by *Albin Eser* and *Walter Perron*.[29] The "'simple' intentional killing"[30] of another human being is the initial offence, while all further aggravating factors that increase the potential penalty and that "firstly, are specifically related to intentional killing and, secondly, either have their own offence designation or have fixed factual characteristics, in the presence of which the correspondingly modified penalty is to be applied directly, i.e. without the exercise of additional sentencing discretion"[31] are referred to as "qualifications". On the

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25 France, Greece, Spain, and Poland; in Poland, intentional killing and all aggravated instances thereof are only non-limitable if they are committed by a public official in the course of his or her duties: Art. 105 § 2 Polish CC; in Spain, this is true only of killing in terrorism cases: Art. 131 para. 3 Spanish CC.

26 Probably only in the Netherlands, Austria, and Sweden.

27 In Germany and Estonia, for example.

28 Cf. *Parmas/Sootak* (fn. 3), A. 2. Komplex II.1.

29 Eser/Perron (eds.), Strukturvergleich strafrechtlicher Verantwortlichkeit und Sanktionierung in Europa, 2015, 770 ff.

30 *Perron*, in: Eser/Perron (fn. 29), 771.

31 *Perron*, in: Eser/Perron (fn. 29), 773.

other hand, a "privilege" exists if the conditions mentioned have a mitigating effect on potential penalty.[32] For the draft proposal, the special offences excluded by *Perron* "for a limited number of factual situations"[33] such as infanticide or killing upon request, which are separately regulated in some states, should also be considered privileges and thus not fall under the exemption provision of § 1 no. 2 of the Draft Harmonisation Proposal.

Exemption from limitation for both the initial offence and all qualifications of intentional killing offences would have been the only feasible option for the proposal. *Perron's* categorisation shows[34] that the most serious homicide offence from a national perspective is a qualification in some legal systems[35] and the initial offence in others.[36] If one were to declare the most serious offence under the statutes of each country to be exempt from limitation, the simple intentional killing of another person would be exempt from limitation in some states[37] and subject to it elsewhere.[38] If, on the other hand, one were to declare offences featuring what are described by *Perron* as "qualifications" to be non-limitable, the most serious possible homicide offences that are not structured as qualifications would be excluded from exemptions on limitation periods.[39] This is not a path to the sought-for harmonisation of the various European legal systems. Only an exemption from limitation for both the initial offence and offences featuring "qualifications" on *Perron's* definition could guarantee a uniform effect of the regulations in the various national legal systems.

cc) Difficulties of Acceptance and Compromise

However, a vote among the researchers participating in the project as representatives of their respective legal systems showed that great difficulties of acceptance were likely, at least when it came to exemption for the unqualified initial case of intentional homicide. Since acceptance by the

32 Ibid.
33 Cf. *Perron*, in: Eser/Perron (fn. 29), 772.
34 Cf. the diagram in *Perron*, in: Eser/Perron (fn. 29), 773.
35 Germany or Portugal, for example.
36 Germany or Portugal, for example.
37 Austria, for example, classifies this as murder: § 75 Austrian CC.
38 Germany, for example, classifies this as manslaughter: § 212 German CC.
39 An intentional killing for the purpose of sexual gratification would be non-limitable in Germany but limitable in Austria, whose homicide statute does not have separate offences qualified by additional aggravating elements.

Member States is an essential requirement given the non-binding nature of the proposal and no other regulatory model, i.e. no other practicable subdivision of the homicide offences, is possible for the reasons mentioned above,[40] § 1 no. 2 of the Draft Harmonisation Proposal was abandoned.

However, it was decided to take into account the exceptional character of non-privileged homicide offences by extending, as explained below, the limitation period for other serious crimes.[41]

b) Non-Limitability in the Case of Life Imprisonment

The idea of exempting all crimes punishable by life imprisonment from limitation was quickly rejected,[42] although such a regulation seems consistent with an understanding of limitation periods as (at least partially) a matter of substantive law. The threat of a life sentence implies that it takes a whole (offender's) life to extinguish the offender's guilt or wrongdoing and to satisfy the need for punishment. Consistency would thus seem to require that it also be possible to prosecute the offence for life, meaning it would be exempt from limitation.[43] For if even the enforcement of the sentence does not ensure that the aforementioned factors sink to a negligible level, the mere passage of time certainly cannot bring about this effect.

However, such a provision is out of the question in the present proposal for two reasons: first, the term "life imprisonment" nowadays only very rarely means that the sentenced person is deprived of his or her liberty for life. According to the European Court of Human Rights, an actual life sentence without the possibility of resocialization is a violation of Article 3 of the ECHR.[44] In most states, therefore, there is the possibility of conditional release after a minimum period of time served.[45] Thus even when proceeding from a purely substantive-law conception of the limitation period,

40 See above, B.I.6.a.bb.
41 Elaborated further below, II.2.a.
42 This corresponds to the current position in Estonia, Italy, Austria, and Hungary.
43 Cf. *Satzger*, Jura 2012, 433 (435).
44 ECtHR judgment of 9.7.2013, cases 66069/09, 130/10, 3896/10, Vinter v. United Kingdom.
45 Cf. the list in the judgment in Vinter v. United Kingdom (fn. 44), line 68.

it no longer automatically follows that a life sentence justifies exemption from limitation.[46]

Furthermore, a regulation according to which offences punishable by life imprisonment are not subject to limitation periods would not be practicable for harmonisation. This is because, just like the limitation periods themselves, the statutory provisions for penalties in the Member States have not yet been harmonised and demonstrate considerable differences.[47] Some Member States of the EU do not impose life sentences.[48] A rule of non-limitability linked to the potential penalty would therefore not result in harmonisation because of the different sanction systems. On the contrary, the number of situations would increase in which a criminal offence is already time-barred in one Member State but can still be prosecuted in another.

c) Sexual Offences against Minors

In some of the legal systems examined, certain sexual offences against minors are exempt from limitation.[49] From the standpoint of substantive-law theories of limitation, there is no question that these offences constitute a high degree of wrongdoing, even if the legal interest of human life enjoys a far higher priority than that of sexual self-determination. These offences also lack characteristics of the protection of offenders by their own political system when the offence is committed, which was the decisive factor in this proposal for the non-limitability of crimes under international law. The special position under limitation rules, which is based on legal instruments of the Council of Europe and the EU[50] and which is afforded to sexual offences against minors in all the legal systems examined, is not justified solely by the seriousness of these offences, but above all by the characteristics of the person of the victim, whose age and, in many cases, depen-

46 *Asholt* (fn. 19), 458, takes this position as well. Two legal systems that consider limitation a matter of substantive law (Greece and Poland) stop short of non-limitability for offences punishable by life imprisonment.

47 Discussed in more detail at II.2.b. below.

48 *Hochmayr* (fn. 2), A. Second Complex I.4.

49 Cf. *Lehmkuhl/Häberli/Schafer/Wenk* (fn. 3), A. 2. Komplex I.; *Faure/Klip* (fn. 3), A. 2. Komplex I.; *Karsai/Szomora* (fn. 3), A. 2. Komplex I.; *Haverkamp* (fn. 3), A. 2. Komplex I. A statutory reform along these lines failed for procedural reasons recently in Poland. See *Kulik* (fn. 3), Einführung.

50 Cf. *Kolb* (fn. 7), Dritter Teil § 3.

dence on the offender prevent self-determined reporting of the offence.[51] The understandable social and criminal policy interest in preventing an early commencement of the statute of limitations for these offences are taken into account in the proposal by postponing the commencement of the statute of limitations (see III.). In contrast to the exemption provisions, this method leaves scope for a certain gradation according to the severity of the offence. Even in the case of comparatively less serious offences, where the extent of wrongdoing is not comparable to the core crimes under international law and does not justify non-limitability, there is a need for a late commencement of the statute of limitations due to the special position of the victims. For the sake of simplicity and clarity of the proposal, the range of crimes that are not subject to limitation should therefore be deliberately kept small and the category of sexual offences against minors should be dealt with in the context of the commencement of the statute of limitations.

7. *Consequences of Implementing § 1 of the Harmonisation Proposal*

Since almost all EU states already have corresponding regulations on the statute of limitations for core crimes under international law, the greatest need for change in an implementation of the proposed regulation model results from the closed list of crimes exempt from limitation periods. In some states, implementation would result in a massive reduction in the number of crimes that are not subject to the statute of limitations. The Netherlands would probably be the most affected. As recently as 2012, the Netherlands extended non-limitability to crimes punishable by 12 or more years' imprisonment and to serious sexual offences against minors, the largest-scale change of statutes of limitations to date.[52] This trend towards long limitation periods and many non-limitable offences would not only be stopped but reversed by the implementation of the proposal. The will of the legislature, which is evident from the most recent legislative reforms, and the arguments against the statute of limitations[53] presented in their course make implementation of the Harmonisation Proposal appear doubtful. In other states, too, such as Italy, Estonia, Austria, and Hungary – whose law provides exemption from limitation for all offences punish-

51 Cf. *Hochmayr* (fn. 2), A. Second Complex II.2.c.
52 Cf. *Faure/Klip* (fn. 3), A. 2. Komplex I.
53 Cf. *Faure/Klip* (fn. 3), A. 1. Komplex I.

able by life imprisonment – far-reaching potential changes would likely mean reservations about the proposal.

Such a massive intervention in these legal systems could theoretically be prevented by formulating only a minimum catalogue of offences that are not subject to the statute of limitations instead of a final regulation.[54] In this case, the proposal would certainly gain acceptance – less drastic changes are naturally easier to sell and implement than a change at the systematic level. However, by specifying only a minimum extent of regulation, the present proposal would lose most of its impact. The conflicts justifying the underlying project are based on the fact that different statutes of limitation or limitation rules apply to the same offence in several legal systems with potential jurisdiction over the same criminal act. The greater the discrepancy between the limitation periods, the longer the period of time in which conflicts in prosecutorial cooperation can occur. The goal must therefore be to eliminate or at least significantly reduce these differences. Reaching the goal of harmonising limitation periods throughout the Union means that drastic changes at the national level cannot be avoided. The proposed regulation, formulated as a minimum catalogue, would not change anything in the current legal situation, since, as already described, a corresponding statute of limitations for core crimes under international law exists in (almost) all the legal systems examined. A reduction of points of friction caused by the statute of limitations can only be achieved if some of the Member States are willing to make drastic compromises. The greatest differences between the limitation periods in two states exist where an offence is not subject to limitation in one Member State but is subject to limitation elsewhere. In order to overcome the existing "gap", either a blanket non-limitability for all serious crimes must be introduced in many countries, or some of the statutes of limitations must be revoked in some countries.

In doing so, it is inevitable that on a national level, some offences which can currently be prosecuted for the lifetime of the offender will suddenly become subject to a limitation period. However, this is the logical consequence of shortening limitation periods. At best, a certain cushioning and acceptance could be achieved through transitional regulations.

As a result, the reduction of the catalogue of offences exempt from limitations can be expected to lead to a massive reduction of friction within the Union. The fact that all offences not mentioned in § 1 of the Harmoni-

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54 A suggestion made by *Arndt Sinn*, one of the German country rapporteurs at the joint project conference (cf. fn. 5).

sation Proposal are to be subject to the limitation period will eliminate the extreme cases in which an offence is not subject to the statute of limitations in one state but is in another. The next section of the Harmonisation Proposal deals with the length of the limitation period that will henceforth apply to these offences.

II. Limitation Periods

1. Proposed Regulation

For offences that do not qualify for an exemption from limitation, the proposal envisions three fundamental limitation periods:

§ 2 Limitation Periods
(1) Offences of intentional killing are subject to a limitation period of 30 years.
(2) Other serious crimes are subject to a limitation period of 20 years.
(3) Less serious crimes are subject to a limitation period of 8 years. Less serious crimes consist of:

1. *offences punishable by up to X years / offences punishable by a minimum of fewer than Y years of imprisonment.*
2. *offences from a particular category.*

2. Discussion

The proposed model follows a system of differentiated grades in determining the limitation period. § 2 para. 1 of the Harmonisation Proposal is a special provision that only covers a very specific group of offences and can thus constitute an exception to the strict connection between the national threat of punishment and the duration of the limitation period. The allocation of offences to the time limits from § 2 paras. 2 and 3 of the Harmonisation Proposal, in turn, is to be carried out while respecting different national conceptions of the seriousness of an offence. Strictly speaking, this is thus a statute of limitations system with two categories of time limits and a special regulation for non-privileged intentional homicide offences.

a) The Special Status of Non-Privileged Homicide Offences

Substantive-law approaches to limitation[55] considers only for non-limitability and also for the comparatively longest limitation periods only those offences whose wrongfulness is thought to be particularly high in quantitative or qualitative terms. While within a legal system it is possible to resort to the threat of punishment of the given offence in order to classify its qualitative and quantitative measure of wrongdoing, this is not possible for a regulation across legal systems due to the different levels of sanction at play. Therefore, abstract standards are needed that are applicable to each legal system involved.

One appealing approach is a categorisation based on the *legal rights affected*. The most prominent role here is played by life as an object of legal protection, which corresponds to the system of fundamental and human rights applicable in the EU. The right to life is foremost among the rights and freedoms standardised in the first part of the European Convention on Human Rights (Art. 2 ECHR). In the EU Charter of Fundamental Rights, the right to life is listed immediately after the declaration of the inviolability of human dignity (Art. 2 I CFR). The ECtHR has also emphasised the paramount position of the right to life.[56] Life forms the biological basis for the realisation of all[57] other fundamental rights.[58] The destruction of a human life, the offence of homicide, thus represents the offence whose completion constitutes the highest level of injustice.[59]

In this context, a *distinction* must be made *between intentional and negligent killing*. This is decisive for the wrongfulness of the act.[60] In the case of an intentional offence, the offender makes a conscious decision to violate another's legal rights,[61] whereas the negligent offender "only" behaves in a

55 See B.I.4., above.
56 Cf. ECtHR, judgment of 27.9.1995, McCann v. UK, case 18984/91, line 147; ECtHR, judgment of 29.4.2002, Pretty v. UK, case 2346/02, line 37.
57 With the possible exception of human dignity, cf. *Calliess*, in Calliess/Ruffert, EUV/AEUV, 5th ed. 2016, Art. 1 GRC para. 18.
58 Cf. BVerfGE 39, 42; *Alleweldt*, in: Dörr/Grothe/Marauhn, EMRK/GG Konkordanzkommentar, 2nd ed. 2013, chapter 10 para. 7; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, 6th ed. 2016, § 20 para. 1; criticism from *Doehring*, FS Mosler 1983, 145 (148 f.).
59 Cf. *Grünewald*, Das vorsätzliche Tötungsdelikt, 2010, 147 with further citations there in footnote 10.
60 Cf. *Grünewald* (fn. 59), 147 with further citations there in footnote 13.
61 Cf. *Frisch*, Vorsatz und Risiko, 1983, 111.

manner contrary to his or her duty of care.[62] Negligent homicide offences are rightly classified as less serious offences and are therefore to be excluded from the special regulation proposed here.

In order to capture only the most serious, i.e. most unlawful, acts from among the group of intentional homicides, those with legally standardised unlawful mitigating circumstances are also excluded. The wrongfulness or culpability of these acts – examples of which include homicide "in the heat of the moment" or even killing by request – falls far short of the standard case of intentional homicide.

Fundamentally, non-privileged intentional homicide[63] is associated with the qualitatively and quantitatively greatest injustice due to the paramount importance of the affected right (life) together with the intentional manner of commission and the lack of mitigating circumstances.[64] Accordingly, the need for punishment is also highest for these offences and the policy goals underpinning punishment lose importance only very slowly. The proposal for the longest limitation period for these offences is thus compatible with substantive-law theories of limitation.

This discussion of completed intentional homicide can be applied to attempted non-privileged homicide. As soon as the attempt creates even the appearance of danger,[65] the essential wrong is already realised with the immediate onset as the objective element of the attempt and the decision to commit the offence as the subjective element. Moreover, there is no precedent for a shorter limitation period for the attempt of a criminal offence in any of the legal systems examined. This position in the various legal systems speaks in favour of dispensing with such a distinction in the present regulation proposal as well.

Even though the special position of these offences as described above could have justified their non-limitability,[66] the choice of a determinable limitation period seems more promising with a view to the acceptance of

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62 Cf. *Sternberg-Lieben/Schuster*, in: Erb/Schäfer (eds.), MK-StGB, Vol. 1, 4th ed. 2020, Vor § 15 para. 121.

63 The reference is to the killing of another person where the intent is specifically to bring about their death, as opposed to cases where the bringing about of the death is a (factual) element of the offence.

64 *Safferling* argues that this is already per se true of homicide, cf. *Safferling*, in: Matt/Renzikowski, StGB, 2nd ed. 2020, § 211 para. 10b.

65 The purpose of this formulation is to exclude attempts that are unsuccessful for reasons that would have been readily apparent to any reasonable person beforehand, but are nonetheless able to give rise to criminal liability, such as "Attempt in gross ignorance" under § 23 para. 3 German CC.

66 See above, B.I.6.a.

the proposal.[67] Since in some states the offences covered are wholly or partly exempt from limitation while in others – such as in Estonia for manslaughter – a much shorter limitation period applies, the 30-year basic limitation period represents a compromise that does not demand an unacceptable degree of systematic change from any of the states. In fact, a limitation period of 30 years, the expiry of which can also be delayed by a further 20 years through the commencement of proceedings (see IV. below), is likely to be equivalent to non-limitability in many cases. At the same time, in limitation-friendly Member States, the principle of statute of limitations for these offences remains intact.

b) Categorisation of Other Offences According to National Threats of Punishment

For all other offences, the limitation period should be 20 years or 8 years depending on the classification of the offence as serious or less serious.

Such a model deviates strongly from the regulations currently existing in the participating states. In eight of the eleven Union legal systems examined, there are five or more gradations.[68] Only the Netherlands with four, Greece with three, and Estonia with two different limitation periods fall below this limit.

However, a changeover of the existing national limitation systems to a system with few time limits is necessary in order to achieve a real change. The current problems in prosecutorial cooperation are largely based on the fact that comparable offences may be subject to different limitation periods in several legal systems seized of the matter.

aa) Specification of Categories of Severity

The aim must therefore be to resolve these differences by means of a regulatory model for limitation periods, on the basis of which an offence has the same limitation period in all legal systems (or as many as possible).

A uniform regulation oriented towards maximum or minimum penalties for all Member States would not be expedient. Due to the strongly dif-

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67 Problems of acceptance discussed above, B.I.6.a.cc.
68 Cf. *Hochmay*r (fn. 2), A. Second Complex II.1.b.

fering penalty levels, their application would simply lead to different limitation periods in each legal system.

The theoretical possibility of setting specific limitation periods for each criminal act would go beyond the scope of any proposed regulation. Moreover, since the classification of individual offences by severity varies among the legal systems, such a proposal would come at the expense of consistency at the national level. Within each legal system, offences would be given a longer limitation period in relation to other offences, despite being subject to lesser penalties. The provision from § 2 para. 1 of the Harmonisation Proposal also has this effect in a limited form,[69] but this contradiction can be justified by the special character of non-privileged intentional homicide offences and the need for a clearly communicated limitation period.[70] Furthermore, it is desirable – perhaps even essential – for an acceptable proposal to maintain the connection between the seriousness of the offence as expressed by the penalty incurrable and the length of the limitation period. In every legal system examined, the limitation period is at least indirectly based on the potential punishment for an offence.[71] It is not to be expected that provisions breaking this connection would meet with acceptance.

The only option that would appear to be feasible would be for the proposed regulation to specify various categories of severity, which the Member States would then "fill in" while maintaining their own ideas about the severity of a given criminal offence.

bb) Number of Severity Categories

The more categories are specified, the higher the probability that an offence will be assigned to different categories of time limits in different legal systems, as the following chart demonstrates abstractly using three example states. The twelve offences (A-L) are assigned a different ranking in these three legal systems – with regard to their severity:

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69 In Germany, manslaughter, with its penalty range of five to fifteen years, would be subject to a 30-year limitation period, whereas robbery resulting in death would be subject to a limitation period of 20 years, despite its higher penalty range of ten years to life.

70 See the arguments advanced above at B.II.2.a.

71 Either the maximum penalty or, as in e.g. Poland, the classification of crimes into categories (misdemeanour, felony, etc.) which are in turn tied to sentencing ranges.

Most Severe Offence												Least Severe Offence
State 1	A	B	C	D	E	F	G	H	I	J	K	L
State 2	A	C	B	D	F	G	E	K	J	H	I	L
State 3	A	B	D	E	C	G	H	J	F	I	K	L

12 Categories: 2 Matches – Offences A, L:

	Category 1	Category 2	Category 3	Category 4	Category 5	Category 6	Category 7	Category 8	Category 9	Category 10	Category 11	Category 12
State 1	A	B	C	D	E	F	G	H	I	J	K	L
State 2	A	C	B	D	F	G	E	K	J	H	I	L
State 3	A	B	D	E	C	G	H	J	F	I	K	L

6 Categories: 3 Matches – Offences A, D, L:

	Category 1		Category 2		Category 3		Category 4		Category 5		Category 6	
State 1	A	B	C	D	E	F	G	H	I	J	K	L
State 2	A	C	B	D	F	G	E	K	J	H	I	L
State 3	A	B	D	E	C	G	H	J	F	I	K	L

4 Categories: 3 Matches – Offences A, B, L:

	Category 1			Category 2			Category 3			Category 4		
State 1	A	B	C	D	E	F	G	H	I	J	K	L
State 2	A	C	B	D	F	G	E	K	J	H	I	L
State 3	A	B	D	E	C	G	H	J	F	I	K	L

3 Categories: 6 Matches – Offences A, B, D, G, I, L:

	Category 1				Category 2				Category 3			
State 1	A	B	C	D	E	F	G	H	I	J	K	L
State 2	A	C	B	D	F	G	E	K	J	H	I	L
State 3	A	B	D	E	C	G	H	J	F	I	K	L

2 Categories: 9 Matches – Offences A, B, C, D, H, I, J, K, L:

	Category 1						Category 2					
State 1	A	B	C	D	E	F	G	H	I	J	K	L
State 2	A	C	B	D	F	G	E	K	J	H	I	L
State 3	A	B	D	E	C	G	H	J	F	I	K	L

1 Category: 12 Matches – Offences A, B, C, D, E, F, G, H, I, J, K, L:

	Category 1											
State 1	A	B	C	D	E	F	G	H	I	J	K	L
State 2	A	C	B	D	F	G	E	K	J	H	I	L
State 3	A	B	D	E	C	G	H	J	F	I	K	L

A number of considerations had to be balanced in the question of how many categories, i.e. limitation period levels, the proposed regulation should contain: on the one hand, the more stages there are, the more precisely the wrongdoing realised by the offence can be expressed in the length of the limitation period. From a substantive-law perspective, a limitation period model with many gradations would therefore be desirable. Theoretically, the number of gradations would then correspond to the number of possible sentencing ranges. On the other hand, it is helpful for the practicability of the Harmonisation Proposal if it contains as few gradations as possible. Due to the different value assigned to different individual offences in the Member States, this is the only way to ensure that many offences are henceforth subject to the same limitation period throughout the Union. Therefore, a number of graduations should be chosen for the proposed regulation which, on the one hand, realizes the fundamental idea that longer limitation periods should apply to more serious offences and, on the other hand, results in a Union-wide concurrence of the limitation period for as many offences as possible.

The choice of only one category in addition to the special regulation from § 2 para. 1 of the Harmonisation Proposal was not pursued further. It is true that a certain gradation would result from this special provision plus the non-limitable offences. However, the idea that offences such as trespass or failure to render assistance could be subject to the same limitation period as, for example, robbery resulting in death, cannot be justified against the background of the long tradition of different gradations of offences in the legal systems of the Member States.

For the decision between a model with two further limitation periods and a model with three further limitation periods, the decisive factor is the extent to which the harmonisation effect of the two models differs. This difference was therefore calculated for the German, Austrian and Polish legal systems on the basis of twelve offences[72] as examples. By shifting the assessment threshold for classification into the respective categories, the highest possible level of "match" was determined. For the model with two limitation periods, all offences – with the exception of perjury – could be placed in the same category without changing the value of the offences in relation to each other at the national level. This corresponds to a harmonisation effect of almost 92 percent. Using an acceptable model with three limitation periods, agreement could be reached for eight offences, i.e. a harmonisation effect of less than 67 percent. In addition to perjury, under this model, intentional illegal possession of firearms, corruption, and fraud would not be subject to the same limitation period in the three selected states. In order to achieve the goal of substantial harmonisation, the choice of only two further limitation periods (in addition to the special limitation period for homicide offences) is therefore preferable. A possibly slightly higher acceptance of the alternative model with three further periods, which is likely to be largely based on its greater resemblance to the existing situation in the Member States, cannot compensate for the significantly higher effectiveness of a two-category solution.

cc) Duration of the Limitation Periods

After deciding on the number of graduations, the question arose as to the length of the respective limitation period.

Here, the offences potentially falling into these categories were taken into account. The length of the longer limitation period must take into consideration the fact that all serious crimes apart from non-privileged intentional homicide and core crimes under international law will fall into this category. Given the short closed list of offences exempt from limitation, there is a strong argument in favour of choosing a relatively long limitation period in order to take into account the high degree of wrongdoing of

72 Fraud, assault, theft, embezzlement, acceptance of bribes, forgery, armed robbery, failure to render assistance, firearm possession, counterfeiting, perjury, negligent homicide (other than grossly negligent homicide). With the exception of armed robbery, the offence used for the comparison is the base, unaggravated offence. The only offence subject to the same limitation period in all of the comparison states here is armed robbery. See *Pierzchlewicz*, Möglichkeiten einer unionsweiten Harmonisierung der Grundverjährungsfristen, Table 14, in this volume.

the offences that are subject to the statute of limitations. The longest limitation period in most EU states is between 20 and 30 years,[73] and too much deviation from this is likely to reduce the acceptance of the proposal. However, the division of all limitable offences into only two categories shows that even moderately serious offences fall into the upper category. Too long a time limit could be inappropriate for these offences.

The longer of the two limitation periods must thus be long enough on the one hand to be accepted as a possible period for the most serious offences, and short enough on the other hand not to be completely disproportionate even with respect to offences of moderate severity. The determination of the length of the time limit thus requires a compromise, as do many other aspects of the proposed regulation. Achieving an actual significant change in the legal situation can only be reconciled to a limited extent with theoretical ideal ideas of a statute of limitations model. At the joint project conference, it was finally agreed, with no dissenting votes and one abstention, on a period of 20 years. This limitation period still seems justifiable taking into account the significance of serious crimes without being unreasonably disproportionate for moderately serious crimes.

The same applies to the shorter limitation period. It must be acceptable both for petty offences and for moderately serious offences. The shortest limitation period in the legal systems of the EU Member States examined is between one year and five years. In order to allow for a reasonable limitation period for moderately serious offences, a longer period would be appropriate. Therefore, the participants of the project meeting agreed, again with no dissents and one abstention, on a term of eight years for less serious offences. The proposal also fulfils the minimum requirements under Union law of three or five years for limitation periods for offences against the Union's financial interests.[74]

dd) Classification of National Legal Provisions

On the basis of the data submitted by the project participants on penalty levels and limitation periods in their legal systems, it was calculated for a catalogue of offences up to which level of potential penalty a classification

73 Cf. *Hochmayr* (fn. 2), A. Second Complex II.1.c.

74 Cf. Art. 12 of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ 2017 L 198/29.

among the "less serious" offences of the proposal would have to be made in each case in order to achieve the greatest possible agreement. This results in separate limits for each state, which are to be respected as far as possible when classifying the offences into the two severity categories. The respective limit can be linked to the minimum penalty,[75] the maximum penalty[76] or the classification[77] into a certain category of offences.[78] The current stages of the national limitation systems were not broken down for this purpose, but in some cases several stages were combined into one time limit category. The implementation ensures the highest possible number of offences with a limitation period that is henceforth uniform throughout the Union. Even in the case of only partial implementation of the proposal, the limitation periods would be the same in all of the implementing states.

3. *Alternative Approaches*

In principle, it would also be possible to allocate offences to the two limitation periods according to a different system largely detached from the existing limitation periods. For example, in a recently published research project by *Helmut Satzger* on criminal sanctions in the European Union,[79] an attempt was made to classify the sanction levels in selected states into five categories. The demarcation between the categories is based not only on the minimum and maximum penalty, but also on other factors depending on the legal system, such as the possibility of suspension of the sentence, the possibility of parole, the jurisdiction of the court or even the length of the statute of limitations for prosecution. The model developed was also applied to three states in this project: Germany, Poland, and France.[80] It would be conceivable to "fill in" the two categories of lim-

75 In Poland, the category of "less serious offences" includes all those whose minimum penalty is less than three years' imprisonment (misdemeanours).
76 The category of "less serious offences" in Germany, Estonia, and Austria includes all those offences whose maximum penalty is less than five years' imprisonment; in Sweden, those punishable by less than 8 years' imprisonment; in France, Spain, and Hungary, those punishable by less than ten years' imprisonment.
77 "Less serious offences" in Hungary also includes all those in Chapter XXVII of the Hungarian CC (bribery offences).
78 See the entries in Table 15 in *Pierzchlewicz* (fn. 72).
79 Satzger (ed.), Harmonisierung strafrechtlicher Sanktionen in der Europäischen Union, 2020.
80 Cf. *Linder*, in: Satzger (fn. 79), 628 ff.

itable offences in the present project with the five categories from the sanctions project, i.e. to use the levels there above or below the third category as a border between serious and less serious offences within the meaning of §§ 2 paras. 2 and 3 of the Harmonisation Proposal:

<table>
<tr><td>Category I (Sanctions Project)</td><td>Category II (Sanctions Project)</td><td>Category III (Sanctions Project)</td><td>Category IV (Sanctions Project)</td><td>Category V (Sanctions Project)</td></tr>
<tr><td>↘</td><td>↓</td><td>↙</td><td>↘</td><td>↙</td></tr>
<tr><td colspan="3">Less Severe Offences (Limitation Project)</td><td colspan="2">Severe Offences (Limitation Project)</td></tr>
</table>

<table>
<tr><td>Category I (Sanctions Project)</td><td>Category II (Sanctions Project)</td><td>Category III (Sanctions Project)</td><td>Category IV (Sanctions Project)</td><td>Category V (Sanctions Project)</td></tr>
<tr><td>↘</td><td>↙</td><td>↘</td><td>↓</td><td>↙</td></tr>
<tr><td colspan="2">Less Severe Offences (Limitation Project)</td><td colspan="3">Severe Offences (Limitation Project)</td></tr>
</table>

For Germany, Poland and France, this would also result in a largely uniform limitation period for the offences under review.

Since the category model can also overcome differences in sanctioning, it would also be conceivable to prescribe a separate limitation period for each severity category. A review of the available categorisation examples[81] for the countries examined in the present project has yielded promising results.[82] An advantage of this solution would be that the differences between the limitation periods would be smaller with slightly different classifications in the categories than with only two limitation periods. However, the harmonisation effect for the other states cannot be verified at this point without a prior categorisation of the respective sanction systems. There-

81 For Germany, France, and Poland see *Linder*, in: Satzger (fn. 79), 629 ff.

82 An examination of seven offences (the unaggravated offences of fraud, assault, theft, embezzlement, bribery, forgery; plus armed robbery) showed that they were all assigned to the same severity category in the German, French, and Polish systems. An investigation of the classification of perjury and theft of property worth in excess of 50.000 Euro in Germany and Poland showed differences of up to two severity categories: perjury fell into category IV in Germany and II in Poland; theft fell into Category II in Germany and III in Poland.

fore, we will leave it at pointing out this alternative option for drawing the line and refer to our own calculations for the Harmonisation Proposal.

4. Consequences of Implementing § 2 of the Harmonisation Proposal

The implementation of § 2 of the Harmonisation Proposal would, as already mentioned, result in massive changes at the national level. This is true for all of the legal systems under study. In Estonia at least the previous system with two gradations would remain (apart from non-privileged homicides), but with limitation periods up to twice as long: 5 and 10 years would become 8 and 20 years. Since the previous limit was adopted for the classification of Estonian offences into the two time limit categories, it represents the system with the least need for change in that regard. The case is quite different in Italy, for example. There are currently at least eleven different limitation periods. Crimes that were previously subject to six different time limits would henceforth fall into the same category. As in many other countries, a system of tiers based on the level of potential punishment would only exist in minimal form after the implementation of § 2 para. 1 of the Harmonisation Proposal.

The limitation period for a criminal offence which in France, Spain, or Austria was previously assigned to the lowest limitation category[83] would increase from 1 to 8 years. In addition, there are also offences for which the limitation period would not have to be changed: the most serious limitable offences in Hungary, Greece, the Netherlands, Spain, and Austria, for example, already have a limitation period of 20 years.

Compared to the current situation, the new system is simpler and more transparent. It is sufficient to know the boundary between the two categories to determine the limitation period of an offence. All that remains of the idea that a higher threat of punishment also comes with a higher limitation period is the principle that a higher range of punishment cannot lead to a lower limitation period.[84]

Accordingly, the basic idea of a substantive understanding of the statute of limitations in the form of a connection between increasing severity of the offence and increasing limitation period is still recognizable under the proposal, even if it has been strongly influenced by pragmatic considera-

83 Cf. *Hochmayr* (fn. 2), A. Second Complex II.1.c.
84 Exceptions are possible under the rule governing non-privileged homicide offences, see B.II.2.a. above.

tions. This effect ensures that in the future, the same limitation period will apply to the majority of offences in the implementing states. It should not be denied that in the few cases where an offence is assigned to two different categories, the differences between the time limits may well increase.

Nevertheless, the proposed regulation from § 2 of the Harmonisation Proposal, precisely because it results in the greatest change, leads us to expect an enormous reduction in points of friction within the European Union.

III. Beginning of the Limitation Period

1. Proposed Regulation

The proposed regulation consists of the general regulation proposal on the beginning of the limitation period in paragraph 1 and a special regulation for certain offences to the detriment of minors in paragraph 2.

§ 3 Beginning of the Limitation Period
(1) The limitation period begins to run with the completion of the offence; for offences of attempt, it begins to run from the completion of the last act of the attempt; for continuous crimes, it begins to run as soon as the continuous crime has ceased.
(2) For offences under *§§/Art....* against minors, the limitation period begins to run once the victim has reached the age of 18.

2. Discussion of § 3 Para. 1 of the Harmonisation Proposal

§ 3 para. 1 of the Harmonisation Proposal links the beginning of the limitation period to the completion of the offence. For offences with a "permanent element", the moment at which the constituent element ceases to exist is to be decisive. This includes classic continuing offences such as deprivation of liberty, but also purely activity-based offences such as drunk driving as well as genuine offences of omission such as failure to render assistance. The statute of limitations for criminal attempts begins at the time when the offender performs an act of attempt aimed at the completion of the offence for the last time.

a) Significance of the Limitation Theories for the Beginning of the Limitation Period

The decisive point in time for the beginning of the limitation period can be justified in different ways depending on the theory of limitation advocated.

If one assumes a diminishing need for punishment, it is only possible to speak of "diminishing" from the point in time at which the offender's culpability for the specific offence is established. A punishability that has not yet arisen should not be extinguished by the passage of time. It must first be possible for punishment to be legitimized in order for it loses its legitimacy again due to the passage of time.[85] This is also supported by the fact that a non- or not yet criminal act cannot be prosecuted and it would therefore be absurd to subject it to a time bar on prosecution (as e.g. German law defines the limitation period). The starting point for the reduction of the need to prosecute, i.e. the beginning of the limitation period, is therefore – at the earliest – the point in time at which the elements of an offence or its punishable attempt are realised for the first time.

Against the background of the decreasing relevance of injustice, the decisive moment is the one at which the injustice of an act has reached its peak. The fact that its relevance can decrease due to time only seems plausible from this point on. However, it is possible that the wrongfulness of an offence is not brought to an end by the completion of the offence. In the case of continuing offences, wrongdoing can even become more serious even after the elements for the offence have been met, for example if the effect of the completed offence endures (e.g. in the case of deprivation of liberty). Accordingly, the commencement of the limitation period is tied to the earliest point in time at which the perpetrator has completely concluded his conduct in accordance with the offence.

On the other hand, the argument advanced for limitation periods beyond substantive law, namely to avoid evidentiary difficulties and the resulting wrongful convictions,[86] would favour an earlier beginning of the limitation period. Evidence can lose clarity or be lost from the moment of criminal liability or the culmination of an offence, but the same is possible from the very moment when the conduct to be proven occurs. As a rule, it is not the proof of a result of the offence that will require the examination

85 The various supporters of this view are canvassed by *Asholt* (fn. 19), 422 f.
86 Arguments against in *Greger/Weingarten* (fn. 17).

of witnesses, but the question of who brought about this result, for what motives, and by what action.[87]

b) Different Types of Offences

There are therefore good reasons to focus on substantive-law grounds for the statute of limitations and, on this basis, to discuss the beginning of the statute of limitations on the basis of various types of offences. The discussion proceeds from a standard example of each type of offence in order to facilitate applicability to other legal systems.

aa) Result-Based Offences

In the case of offences whose key element is a particular harmful consequence, the concrete punishability results only from the occurrence of the consequence. Without this, there is no criminal liability and no justification for punishment (e.g. in the case of a result-based offence of negligence) or only to a lesser extent (if attempt or result-based aggravating factors qualify the offence further). In these cases, the completion of the offence is the earliest factor that could commence a diminishment of the need for punishment. This applies in particular to cases where the result arises long after the conduct elements. It is possible that the conduct in breach of a duty of care, e.g. a building or construction defect, leads to the particular result, e.g. a fatal accident, only decades later.[88] However, it is only at this moment that criminal liability arises. In the time between the wrongdoing and the occurrence of the result, the perpetrator does not yet have to fear punishment. The wrongdoing of the act is only realised in its entirety when the wrong of the result, such as the death of a person, occurs. It would be absurd for the offence to be already time-barred at this point, for example by linking the beginning of the limitation period to the conduct in breach of duty. Faulty constructions which lead to an accident only after many years due to repeated stresses, a storm, or a "winter of the

87 This ultimately results in a further argument against this approach to the justification of the statute of limitations. Linking the beginning of the limitation period to the conduct constituting the offence would hardly be sufficient. Facts to be proven in court can also concern preparatory acts or a confrontation between the perpetrator and the victim that took place years before any hearing of evidence.

88 On these cases cf. *Asholt* (fn. 19), 421.

century", could otherwise never be prosecuted. In the case of negligent result-based offences, the wrongful act alone is so minor that it does not trigger criminal liability. According to both doctrinal approaches to limitation, the occurrence of success is the earliest point to be taken into account. The same is therefore true of result-based offences from the categories of concrete endangerment offences and non-genuine omission offences. The proposal is that the limitation period should, in principle, only begin when the offender has realised all of the statutory elements of the respective offence. According to the approach advocated here, the basic statute of limitations thus represents the period of time available to the prosecution authorities to initiate criminal proceedings, and can thus only begin once the offender's criminal liability has been established in the first place, i.e. the elements of the offence have been fulfilled.

This corresponds to the most common approach in the EU Member States examined: eight out of eleven choose the completion of the offence as the beginning of the limitation period.[89] Greece and Austria (with some exceptions) link the limitation period to the conduct constituting the offence,[90] whereas Germany chooses the material termination of the offence.[91]

bb) Continuous Crimes

If a constituent element of an continuous crime is maintained by the offender's conduct, the limitation period is to begin only when the constituent element of the offence ceases. This applies primarily to standard examples of continuous crimes such as deprivation of liberty. Criminal liability arises at the time of completion of the offence, i.e. when all of the elements of the offence are fulfilled for the first time. The wrongfulness of the offence, on the other hand, increases from that same moment onwards until the situation that constitutes the offence ceases again. The strongest argument for linking of the beginning of the limitation period to this (later) point in time is that otherwise, a deprivation of liberty beyond the duration of the limitation period could no longer be prosecuted. Additional-

89 Estonia, France, Italy, Netherlands, Poland, Sweden, Spain, Hungary, cf. *Hochmayr* (fn. 2), A. Second Complex II.2.a.bb.

90 Cf. *Hochmayr* (fn. 2), A. Second Complex II.2.a.aa.

91 The German regulation is unanimously regarded as unsuccessful, cf. *Gropp/Sinn* (fn. 3), A. 2. Komplex II.2.a.; *Greger/Weingarten* (fn. 17), § 78a para. 1 with further references in footnote 1.

ly, the policy imperative for punishment also increases with the duration of the offence. In the German legal system, for example, an aggravating factor is added to the offence of deprivation of liberty in § 239 no. 1 German CC, raising the minimum penalty once the deprivation has lasted one week.[92] Thus, according to both theories, the statute of limitations should not begin while the offence is still ongoing. The argumentation can also be applied to simple activity offences such as drunk driving and genuine omission offences such as a failure to render assistance. Here, too, the need for punishment and the relevance of the wrong can only diminish when the offender's criminally culpable act or failure to act has reached its conclusion.

cc) Attempt

In the case of attempted offences, criminal liability arises in many countries at the immediate onset of the attempt. At this moment, the offender expresses his or her decision to violate the law through his or her conduct. Depending on the facts of the case, many other decisions can follow. It is not obvious why the limitation period should run from the first such expression if many repeated attempts may follow.

Here, too, a parallel can be drawn to continuous crimes. If, for example, the perpetrator throws 20 stones at a person in succession, each of the throws would constitute attempted bodily harm if one wanted to artificially divide the event. With each stone thrown, the wrongdoing of the act is repeated, which stands in opposition to any notion of the diminishing policy relevance of punishment. This can only begin when the last instance of conduct aimed at completion of the offence has been finished. The same applies to the diminishing of the policy imperative for punishment. This point in time is therefore to be used for the commencement of the limitation period. The possibility of abandonment of an attempt, on the other hand, is irrelevant. Abandonment can annul the wrongful act again and extinguish criminal liability, irrespective of the passage of time that is decisive for the limitation period.

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92 See also the corresponding aggravating factor in Austria for the case that the deprivation of liberty is ongoing for longer than one month; § 99 para. 2 Austrian CC.

c) Implementation of the Theoretical Findings Through a Model Rule

As described above, it is not possible to give a general answer for all types of offences as to when the limitation period should begin. In principle, the commencement of the limitation period should be linked to the completion of the offence. However, in the case of offences with an continuing element, this would lead to unjust results. In the case of attempt, on the other hand, there is no completion.

German law attempts to cover all these situations with the concept of "completion of the offence".[93] However, it makes sense to choose more detailed language for a Union-wide proposal, since a regulation that is already controversial at national level would not be suitable for legally secure application to different legal systems. The regulation should avoid technical terms of individual criminal law systems and describe as abstractly as possible the situation to which the commencement of the limitation period is to be linked. The chosen wording of § 3 para. 1 of the Harmonisation Proposal seems suitable for this.

3. Discussion of § 3 Para. 2 of the Harmonisation Proposal

According to § 3 para. 2 of the Harmonisation Proposal, the statute of limitations for selected offences should only begin with or after the victim of the offence has reached the age of 18. This represents a deviation from the base rule in paragraph 1. The regulation goes back to legal instruments of the Council of Europe and the European Union.[94] These same instruments are responsible for the fact that special regulations for the protection of underage victims can be found in the statute of limitations systems of all EU Member States examined.[95] These broad roots mean that this "special issue" should not be ignored in the present proposal.

Two questions must be separated here: first, in which form the requirements of the supranational instruments are to be taken into account in the

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93 § 78a sentence 2 German CC has at most a clarifying function.

94 Cf. Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25.10.2007 (Art. 33); Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of 11.05.2007 (Art. 58); Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography and replacing Council Framework Decision 2004/68/JHA (Art. 15 para. 2).

95 On this cf. *Hochmayr* (fn. 2), A. Second Complex II.2.c.

Harmonisation Proposal, and secondly, which offences should fall under the more specific regulation. The second question cannot be conclusively clarified in the scope of this proposal. At best, categories can be specified or reference can be made to the descriptions in the supranational instruments.

a) Requirements Flowing from the EU and CoE Instruments

The EU and CoE instruments cover a broad catalogue of offences, including those related to sexual violence, sexual exploitation, child pornography, forced marriage, and female genital mutilation. Each of Art. 15 para. 2 of the 2011 EU Directive,[96] Art. 33 of the 2007 Council of Europe Convention,[97] and Art. 58 of the 2011 Council of Europe Convention[98] contain the requirement that prosecution or initiation of prosecution must be possible for these offences "for a sufficient period of time" or "during a sufficiently long period of time" after the victim has reached the age of majority. The duration of this indeterminate period should be in proportion to the seriousness of the respective offence.

Most Member States have adopted the solution of delaying the beginning of the limitation period in these cases.[99] Many states already link the beginning of the limitation period to the age of majority of the victim of the offence, i.e. the age of 18. It was discussed whether linking the offence to the age of 25 would increase acceptance in those states that in their current law provide for non-limitability for some of the offences covered[100]

96 "Member States shall take the necessary measures to enable the prosecution of any of the offences [...] has been used, for a sufficient period of time after the victim has reached the age of majority and which is commensurate with the gravity of the offence concerned."

97 "Each Party shall take the necessary legislative or other measures to ensure that the statute of limitation for initiating proceedings [...] shall continue for a period of time sufficient to allow the efficient starting of proceedings after the victim has reached the age of majority and which is commensurate with the gravity of the crime in question."

98 "Parties shall take the necessary legislative and other measures to ensure that the statute of limitation for initiating any legal proceedings [...] shall continue for a period of time that is sufficient and commensurate with the gravity of the offence in question, to allow for the efficient initiation of proceedings after the victim has reached the age of majority."

99 For example in France, Italy, the Netherlands, Sweden, Spain, and Hungary.

100 Cf. above under B.I.6.c.

or, like Germany and Austria, choose a much later starting point.[101] In the end, however, it was unanimously decided in favour of the age of 18, as this already results in a much longer than average statute of limitations in the overall context of the proposal, adequately taking into account the exceptional nature of the offences covered. The respective seriousness of the offences is taken into account by the two different limitation periods according to § 2 para. 1 nos. 2 and 3 of the Harmonisation Proposal.

b) Reasons for a Specific Regulation of these Offences

The understanding advocated for in this discussion[102] of the basic limitation period as a time limit for initiating criminal proceedings also speaks in favour of the chosen regulatory model. Such a period can only begin once the initiation of criminal proceedings is possible. As a rule, the possibility of criminal prosecution exists from the time of completion of the offence as discussed above. However, in some cases this legal possibility may be foreclosed by a factual impossibility. It is factually impossible to initiate criminal proceedings if, for instance, in a given individual case, the traces of a criminal offence are so skilfully hidden or concealed that they cannot be discovered. It is precisely the fact that undiscovered offences can no longer be prosecuted after a certain period of time that constitutes the statute of limitations. Thus, the mere lack of discovery of a criminal offence cannot be the decisive factor; what is decisive is the *discoverability* of a criminal offence. Since statutes of limitation are based on abstract standards and not on the circumstances of the individual case, this undetectability must regularly result precisely from the nature of a certain group of offences. Finally, a certain gravity of undetectability must be required in order to avoid unilaterally circumventing the commencement of the limitation period to the detriment of the offender. Simple difficulties in detection can also be taken into account by setting a longer limitation period. A special regulation can only be considered for cases in which the offence cannot otherwise be discovered for many years and the offender would not have to fear prosecution because the limitation period has expired.

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101 Austria ties this to the age of 28, Germany to age 30, although both states use the mechanism of tolling.

102 See above at B.III.2.b.aa.

This can also result from several cumulative factors. A first decisive factor is a possible relationship of dependence between the offender and the victim. In such cases, the victim of the crime may be prevented from reporting the crime in a self-determined manner. If the offence is committed out of the public eye or even within the family, it is routinely impossible for the authorities to gain knowledge of it by other means. In addition, even if the authorities obtain knowledge by other means, the relationship of dependency routinely prevents the victim from testifying, which can result in an acquittal in the face of reasonable doubt or a plea bargain. A second major factor is the age of the victim and the associated mental maturity and independence. They play a major role in whether the victim even realizes that he or she has been wronged and whether he or she can bring himself or herself to turn to the authorities or at least to third parties about the crime. Inhibitions in this regard can also result from the nature of the offence committed, especially in the case of sexual offences.

In the case of the offences mentioned in supranational instruments,[103] all these factors regularly coincide. Viewed in the abstract, these offences cannot be detected and prosecuted by the authorities in the vast majority of cases. By postponing the start of the limitation period, some of the causal factors can be compensated for. The victim of the crime has more time to mature mentally and to consider from a position of safety whether to press charges. In addition, being of majority age confers a certain freedom from a possible relationship of dependency. The clarification and conclusion of similar cases and the accompanying media coverage can give the victim the courage to report the crime years after the fact.

For these reasons, the start of the limitation period for the offences against minors described in the EU and CoE instruments should be postponed until the victim reaches the age of 18. The same argumentation can also be applied (to a certain extent) for other offences against life and limb at the expense of minors. The issues arising from relationships of dependency and the age of the victim could speak in favour of also covering cases that go beyond the requirements of the supranational instruments. However, in order to ensure the most uniform implementation of the regulation, the scope of offences should be limited to those circumscribed in the EU and CoE instruments. The implementation of the Harmonisation Proposal should be carried out by naming the relevant offences in the national regulation.

103 See above at B.III.3.a.

4. Consequences of Implementing § 3 of the Proposal

The consequences of the implementation of the proposed provision of § 3 para. 1 of the Harmonisation Proposal at the national levels cannot be covered here. Major changes cannot be ruled out for individual offences and special fact patterns. However, the majority of legal systems are already oriented, at least in principle, towards the completion of the offence as the point in time for the beginning of the limitation period.[104] Special regulations for offences with a continuing element are also not uncommon.[105] The greatest friction within the EU currently arises from the different lengths of the limitation periods and various tolling or extension provisions. However, the start of the time limit also has a major impact in some cases. The fact that the proposed regulation does not provide for a start of the limitation period before the occurrence of the result of result-based offences will eliminate the greatest differences. Especially in the context of late-arising consequences, a regulation such as currently exists in Austria, Switzerland, and Greece could lead to major divergences.[106] In these cases of effects arising much later, the regulation proposal should be able to achieve the greatest convergence. For Austria, the adoption of the proposal would not represent a fundamental change in the system, because the commencement of the statute of limitations in financial criminal law is already currently linked to the point in time when the effect of the conduct arises.[107]

The clearest change resulting from § 3 para. 2 of the Harmonisation Proposal is probably that the commencement of the statute of limitations for the offences covered by the regulation under all legal systems would uniformly come with the age of majority of the victim. Major differences may arise from the fact that two legal systems have different views on whether a given case falls within the scope of the regulation. In such cases, the start of the limitation period can theoretically differ by up to 18 years. However, major divergences should then already exist in current law. For legal systems that go beyond the proposed regulation with their special regulation, e.g. Greece, where the start of the statute of limitations is postponed

104 Cf. *Hochmayr* (fn. 2), A. Second Complex II.2.a.bb.
105 Cf. even just § 81 para. 4 Estonian CC, Art. 158 paras. 1, 3 Italian CC; § 57 para. 2 Austrian CC; Art. 98 lit. b. Swedish CC; Art. 132 para. 1 Spanish CC; § 27 lit. c and d Hungarian CC.
106 Cf. *Hochmayr* (fn. 2), A. Second Complex II.2.a.ee.
107 § 31 para. 1 of the Austrian Financial Crimes Act (FinanzstrafG).

for every crime against minors, implementation would mean a significant shortening of the statute of limitations in some cases.

IV. Modifying the Limitation Period

1. Proposed Regulation

Three regulatory options were initially developed to allow for possible adjustments to the limitation period. The decision to adopt the rule as laid out below was arrived at after a discussion with all of the researchers involved at the project conference in September 2020.

§ 4 Tolling of the Limitation Period
(1) The limitation period is tolled as soon as the offender knows or could have known
1. that criminal proceedings have been commenced against him, and is tolled until the conclusion of such proceedings; or
2. that criminal proceedings cannot be commenced against him because of immunity he enjoys, and is tolled until the end of that immunity.

(2) The period of tolling under paragraph 1, number 1 is limited to
1. 8 years for less serious offences; and
2. 20 years for all other offences.

2. Discussion

For reasons of simplicity and clarity of the proposed regulation, it was unanimously decided at the project conference to include only one model for modifying the underlying limitation periods in the proposal. The proposal provides for tolling (suspension of the limitation period) in two cases: to enable the conduct of criminal proceedings that have already begun without time pressure due to the statute of limitations, and second if proceedings cannot be started or continued despite the discovery of the offence because the offender enjoys immunity. While there is an upper limit for the suspension due to criminal proceedings, the suspension due to immunity is not subject to any time limit.

In choosing a regulatory model, four questions had to be clarified. First, it had to be decided whether there should be a possibility of modification at all (a.). This was followed by the questions of what form such a modification should take (b.) and what procedural event(s) should trigger the (c.). Finally, it had to be clarified how often it should be possible to influence the running of the limitation period and whether an unlimited and possibly disproportionate postponement of commencement should be prevented by an absolute limitation period (d.).

a) The Necessity of Modification

In principle, it would also be possible to let the limitation period expire without modifications. The start of the period would then determine the date on which the limitation period begins to run. By this time, a final judgement would have to be handed down, otherwise the offence would no longer be punishable and ongoing proceedings would have to be terminated.

The great strength of such a model would lie in its transparency. The exact date of the commencement of the limitation period could be determined on the day the offence was completed according to the conception discussed above.[108] A subsequent change – a "pushing back" of the date the time bar is reached – would not be possible. For all parties involved, this date would be the ascertainable cut-off after which the offence could no longer be punished. Nor would the mutual recognition of foreign procedural acts that prolong the statute of limitations have to be discussed any longer.

However, this lack of flexibility is the model's major weakness. If they became aware of the offence shortly before the end of the limitation period, prosecution authorities would be faced with a dilemma. As soon as it was foreseeable that a (final) judgement could not be reached by the time the limitation period had run, investigations would be abandoned for reasons of procedural economy, and whether such an abandonment is even legally possible depends significantly on the design of prosecutorial discretion in the respective legal system. The authorities could be obliged to initiate investigations even in cases that have no prospect of success given the impending statute of limitations. This would result in a great waste of resources. In other cases, it could lead to a situation that is undesirable from the point of view of the rule of law: that the proceedings become a race against time. A trial under time pressure would be in the interest of neither the accused (in the worst case: the wrongly accused) nor the prosecu-

108 Cf. § 3 of the proposed regulation.

tor, as a rushed trial would likely be conducted at the expense of thoroughness and procedural justice. A statute of limitations without the possibility of extension or modification gives rise to both economic and constitutional objections. Moreover, such a model is not found in the legal system of any EU Member State examined.[109] There is no reason to think that this drastic change would meet with acceptance.

Therefore, the only viable option for the proposed regulation was to include some model of modification or extension of the limitation period, since after a certain point, both economic interests and the interests of the rule of law require criminal proceedings to be carried out in a manner that is decoupled from the time pressure of the statute of limitations.

b) Possible Deadline Modifications

The applicable statutes of limitations of the Member States contain various regulatory models for this.[110] In some cases, the limitation period starts anew, linked to various events in criminal proceedings. Tolling or interruption of the limitation period are also common. In this case, the expiry of the limitation period is paused. The beginning of the suspension can also coincide with the beginning of the expiry of the limitation period. It is also possible to extend the limitation period from a certain event in criminal proceedings by a certain period of time, i.e. to add a fixed period of time to the basic limitation period still remaining at that time. Finally, some states work with a model of termination of the limitation period. A combination of different regulatory models is not uncommon.

According to this proposal, the primary purpose of a limitation modification is that sufficient time should remain to conduct and conclude criminal proceedings after a criminal offence has been discovered prior to the expiry of the limitation period, and that a time bar – possibly even deliberately brought about by the defence[111] – cannot arise during the proceed-

109 Only in Switzerland, cf. *Lehmkuhl/Häberli/Schafer/Wenk* (fn. 3), A. 2. Komplex II.4.

110 Cf. *Hochmayr* (fn. 2), A. Second Complex II. 4.b.

111 Cf. e.g. the various acquittals of the former Italian prime minister Silvio Berlusconi due to the intervening statute of limitations (in some cases only on appeal), https://www.n-tv.de/politik/Berlusconi-kommt-erneut-davon-article5596231.html; https://www.faz.net/aktuell/politik/ausland/korruptionsvorwuerfe-verjaehrt-berlusconi-spielt-auf-zeit-und-gewinnt-11662238.html; https://

ings.[112] Each of the four modifications mentioned appears to be suited, at least in principle, to taking the unwanted time pressure off the parties to the proceedings.

However, the tolling approach has decisive advantages over the other forms of modification:

In contrast to tolling, restart, extension and termination of the limitation period mean a blanket intervention in the duration of the limitation period with no relation to the time actually required for the proceedings. Moreover, this interference is irreversible, so that even after the proceedings have been concluded or discontinued again, the prolonging effect of the modification measure remains. This weighs all the more heavily if the proceedings are terminated at such an early stage that the person concerned is not afforded any protective effect by an at least partial substantive-law bar to their resumption. In this case, a statute of limitations that had almost expired before the proceedings were initiated could be extended by years or even decades after the proceedings were discontinued, despite the serious infringement of rights associated with being the subject of criminal proceedings. In the case of the termination of the statute of limitations,[113] the statute of limitations would offer no further protection at all.

With tolling, on the other hand, the beginning of the statute of limitations is not pushed back across the board. Instead, the limitation period is only paused for as long as proceedings are actually ongoing.[114] This results in a clear distinction between the period of time that is available for the initiation of proceedings according to the view advanced in this discussion (the basic limitation period) and the period of time that is intended to ensure that the proceedings can be carried out without the time pressure caused by the limitation period (the tolling period). Consequently, the theoretically conceivable possibility of abuse by the prosecution authorities of initiating proceedings despite the lack of initial suspicion, merely for the sake of extending the statute of limitations, is also eliminated. This is because the re-entry into the remaining basic limitation period does not leave

kurier.at/politik/ausland/berlusconi-entgeht-haftstrafe-wegen-verjaehrung/400060370 [each last accessed on 11.01.2020].

112 According to the regulatory model chosen here, this is only possible if the basic limitation period and the maximum tolling period (see d.) have both elapsed.

113 This would have to be linked to a potentially later point in time in the proceedings, which would probably result in a certain blocking effect of any dismissal or discontinuation.

114 For the factors triggering the beginning and end of tolling, see c. below.

a longer prosecution period after a discontinuation of the proceedings than before its initiation.[115] On the other hand, a new start or the extension of the limitation period would have had this effect.

After all this, the decision was made in favour of a pure tolling provision, which does not definitively prevent the running of the limitation period, but only postpones it as long as criminal proceedings are actually being conducted.

As with every modifying intervention in a running statute of limitations, a purely substantive-law view of the doctrine of limitation reaches its limits in the dogmatic underpinnings of the proposed rule.[116] At best, the initiation of proceedings could be seen as an indication of the state's policy imperative for punishment and thus justify the extension of the time limit or assume an "updating" of the relevance of the wrongdoing. Therefore, the above-mentioned procedural reasons (procedural economy, interests of the rule of law) can be cited in favour of the regulation.[117]

A certain rootedness in the legal systems examined argues in favour of the proposed regulation. When it comes to countering obstacles to prosecution such as immunity of the offender, the tolling of the statute of limitations is already by far the most common instrument.[118] For a simple and clear regulatory model, this form of time limit modification was also the one chosen when conducting criminal proceedings.[119] On the other hand, the inclusion of further possibilities for extending the time limit would increase the complexity of the regulation and the risk of application difficulties in the very different criminal (procedural) legal systems of the Member States.[120]

115 The authorities only gain the time that an investigation is actually underway. The time for *initiating* the proceedings, the basic statute of limitations, is not extended. If the offence was already almost time-barred beforehand, the discontinuation of the proceedings is followed promptly by the final time bar of the statute of limitations.

116 The German legal position is discussed in *Satzger*, Jura 2012, 433 (436).

117 Criticism by *Asholt* (fn. 19), 386 f.

118 For example in Germany, Estonia, France, Greece, Italy, Austria, Poland, and Hungary.

119 This could also have been the decisive factor behind Greece and Austria limiting themselves to only one type of modification, cf. *Hochmayr* (fn. 2), A. Second Complex II. 4.b.(2).

120 For each further possibility of modification included, one (or more) triggering factor(s) would have to be defined in each national law. In this context, different requirements should be placed on a procedural event for the commencement of suspension (see below under c.) than on an event that triggers the recommencement, extension, or even termination of the limitation period. Due to the irre-

c) Relevant Procedural Events

With regard to the transparency criterion, special requirements must be met by events that influence the limitation period. This applies both to tolling due to criminal proceedings and to tolling due to immunity, and in particular to the onset of tolling. In order to make the commencement of the limitation period ascertainable for all parties involved, knowledge on the part of both the offender and the authorities must be assumed, at least in principle.

aa) Tolling During Criminal Proceedings

It follows from what has been said so far that the objective of § 4 para. 1 no. 1 of the Harmonisation Proposal of ensuring an undisturbed course of proceedings only justifies the modification of the statute of limitations once preliminary proceedings have been issued. Secret or covert investigative measures are not considered sufficient to induce tolling. The relevant point in time is supposed to be a perceptible criminal procedural measure (e.g. the arrest of the suspect or a search of the flat) or the accused's awareness that criminal proceedings have been instituted against him or her. This point in time can be referred to as the *time of inculpation.*

This point in time has the advantage of broad support in the existing rules of the legal systems under study. Some EU legal acts already refer to this point in time, if under different names. For example, both the Directive on the right to interpretation and translation in criminal proceedings[121] and the Directive on the right of access to a lawyer in criminal proceedings[122] apply to persons "from the moment they are informed by the competent authorities of a Member State, by official notification or other-

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versibility of the extension of the limitation period, the involvement of a judge might be required in these cases. It would be difficult to determine criminal procedural acts that are suitable as triggers for an extension of proceedings across legal systems.

121 Directive (EU) 2010/64 of 20.10.2010 on the right to interpretation and translation in criminal proceedings, OJ 2010 L 280/1.

122 Directive (EU) 2013/48 of 22.10.2013 on the right of access to a lawyer in criminal proceedings and in proceedings for the execution of the European Arrest Warrant and on the right to be informed of a third party when deprived of liberty and the right to communicate with third parties and with consular authorities during deprivation of liberty, OJ 2013 L 294/1.

wise, that they are suspected or accused of having committed a criminal offence."[123] Furthermore, in assessing the reasonableness of the duration of proceedings within the meaning of Art. 6 para. 1 ECHR, the ECtHR also defines the commencement of proceedings as the point in time at which "the person concerned is officially notified or otherwise informed that he or she is being investigated on suspicion of having committed a criminal offence".[124]

However, the present proposal does not deal with the rights of the accused; it deals with the tolling of the statute of limitations, which has a detrimental effect on the rights of the person concerned. Therefore, unlike in the cases mentioned above, there is a need to regulate the cases in which the person concerned deliberately evades inculpation. It should not be possible for the offender to prevent the tolling of the limitation period.[125] Instead of presupposing actual knowledge on the part of the offender, it therefore makes sense to focus on the *concrete possibility* of knowledge. The requirements for such a concrete possibility and how the fulfilment of these requirements is to be documented are left to the implementing states. Connection to an externally perceptible act of persecution would be one possibility.

With the conclusion of the proceedings, the suspension ends and the (remaining) underlying limitation period continues to run. In addition to legally binding terminations, the term "conclusion of proceedings" also refers to any other decision not to continue the proceedings at the current stage or to advance them to the next stage.[126] The only exceptions are cases in which criminal proceedings cannot be continued for reasons that lie in

123 Cf. Art. 1 para. 2 of Directive 2010/64/EU and, with slightly different wording (on the other hand: "... are suspected or accused") Art. 2 para. 1 of Directive 2013/48/EU.

124 See *Lohse/Jakobs*, in: Hannich (ed.), Karlsruher Kommentar zur Strafprozessordnung, 8th ed. 2019, ECHR Art. 6 para. 29; *Meyer-Ladewig/Harrendorf/König*, in: Meyer-Ladewig/Nettesheim/von Raumer (ed.), Europäische Menschenrechtskonvention, 4th ed. 2017, Art. 6 para. 196 with case law references in footnote 706. Alternatively, it is sufficient for the ECtHR that the accused is seriously affected by criminal prosecution measures, see *Meyer-Ladewig/Harrendorf/König*, loc. cit.

125 See on this problem existing in Sweden *Haverkamp* (fn. 3), B.I.

126 In addition to a final judgement or penalty order, final diversion decisions by the public prosecutor's office or the dismissal of proceedings due to a lack of evidence are thus also sufficient.

the person of the accused.[127] This exception is based on the idea that even a person against whom proceedings are already underway should not be able to influence the course of the limitation period through his or her absence.[128] On the other hand, substantive-law bars to re-prosecution arising from the termination of proceedings cannot and must not matter, as this would open up potential for abuse by prosecuting authorities. The mere initiation of preliminary proceedings, which would be discontinued after a short period of time, could delay or even prevent the commencement of the statute of limitations for a long time. A discontinuation of the pre-trial proceedings due to a lack of evidence should therefore be sufficient for an end of the suspension, even if this decision does not have a substantive-law blocking effect in the legal system concerned.[129] On the other hand, a first-instance judgement before it has entered into force is not sufficient. This is because in this case a decision is still pending as to whether the proceedings should be concluded or transferred to the next procedural stage (appeal).

bb) Tolling Due to Immunity

Decisive for the beginning of the immunity-related tolling under § 4 para. 1 no. 2 of the Harmonisation Proposal is not the beginning of the immunity but the point in time at which the immunity makes criminal proceedings impossible. If the immunity already prevents the initiation of preliminary proceedings, the suspension begins when the offender or the body granting immunity is informed by the prosecution authorities of the reasonable grounds for the offence (initial suspicion). The tolling of the limitation period guarantees that the prosecution authorities have the same amount of time to initiate criminal proceedings as they do in cases where

127 For example, in Austria, a discontinuation of proceedings in absentia does not terminate the suspension of the statute of limitations; *Marek*, in: Höpfel/Ratz (eds.), Wiener Kommentar zum Strafgesetzbuch, 2nd ed. (as of 1.6.2018), § 58 para. 27.

128 Here again, there is a parallel to overlong criminal proceedings, in the assessment of which the ECtHR also does not include flight-related absences in the procedural period, cf. 20.6.2006, No. 18078/02, Vayiç v. Turkey, para. 44.

129 This applies, for example, to the decision issued in this case in Germany pursuant to § 170 para. 2 German CPC. The proceedings there could be continued at any time, even without the existence of new facts or evidence; cf. *Moldenhauer*, in: Hannich (ed.), Karlsruher Kommentar zu Strafprozessordnung, 8th ed. 2019, § 170 para. 23.

the perpetrator does not enjoy immunity. If preliminary proceedings are possible, but no charges may be brought due to immunity,[130] a suspension under § 4 para. 1 no. 1 of the Harmonisation Proposal begins with the inculpation and initiation of the investigation, which changes into the immunity-based tolling as soon as the continuation of the proceedings becomes impossible. Tolling under this provision of the Harmonisation Proposal ends in any case when either immunity no longer exists or the reasonable grounds for suspicion cease to exist. In the first case, the immunity-based tolling may be immediately followed by a suspension due to criminal proceedings.

d) Time Limits on Tolling

The tolling of the statute of limitations is subject to time limits when it operates under § 4 para. 1 no. 1 of the Harmonisation Proposal. The limit has the effect of disciplining the prosecution authorities to a certain extent and can do some work at preventing overlong criminal proceedings at the level of the statute of limitations. Alternatively, it would have been possible to dispense with an explicit upper limit and trust that extreme cases would be stopped via Art. 6 para. 1 ECHR. Although the prevention of overlong proceedings should not primarily be the task of the statute of limitations,[131] it was agreed at the joint project conference that tolling should not exceed 8 years for the less serious offences as defined in § 2 para. 3 of the Harmonisation Proposal and 20 years for other limitable offences. From an acceptance point of view, this reflects the fact that seven out of eleven EU Member States examined put certain upper limits on the modification of the limitation period.[132] In addition, the harmonised statute of limitations model gains predictability. If there are no indications of immunity on the part of the person concerned, an offence can be classified as "definitely time-barred" by simply adding the basic limitation period and the maximum period of suspension, even without a closer look at any proceedings which may or may not have taken place or concluded. The maximum peri-

130 Cf. for example Annex 6 to the Rules of Procedure of the German Bundestag, Resolution of the German Bundestag on the lifting of the immunity of members of the Bundestag, https://www.bundestag.de/parlament/aufgaben/rechtsgrundlagen/go_btg/anlage6-245194 (last accessed 22.01.2021).

131 On the arguments against an absolute limitation period, cf. *Hochmayr* (fn. 2), A. Second Complex II.5.

132 Cf. *Hochmayr* (fn. 2), A. Second Complex II.5.

od of tolling limits the suspension in *total*, i.e. it can also be reached as the sum of tolling after several initiations of proceedings. The distinction between paragraph 2 no. 1 and no. 2 according to the severity of the offences can be explained by the fact that more serious offences do not necessarily entail a greater procedural effort,[133] but they do give rise to a greater policy imperative to bring the proceedings to a final conclusion. The longer period of tolling thus prevents cases in which, despite the discovery of a serious offence, extensive investigations, and the initiation of main proceedings, the proceedings would have to be terminated due to time constraints, a result which could seriously damage the general trust in the legal system.[134]

The limit only refers to cases of criminal proceedings, not to immunity-based tolling. Here, it would be very counterproductive to enforce time-barring of the statute of limitations after a certain period of tolling.[135]

3. *Consequences of Implementing § 4 of the Harmonisation Proposal*

The implementation of the regulation would result in a marked simplification of the national legal situations. The limitation to only one procedural event for the commencement of suspension in the case of criminal prosecution leaves little room for application problems on the part of the national legal systems. Instead of having to determine an equivalent in national criminal procedural law for a broad catalogue of procedural events, it is sufficient to designate the point of inculpation in each case.

If the proposal were to be implemented in the future in a large number of Member States, it might be feasible or desirable from a consistency standpoint[136] to give the national date of inculpation a Union-wide effect on the statute of limitations. This would have the consequence that the execution of a European arrest warrant could only be refused in the rarest of

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133 Just think of a simple homicide in front of witnesses compared to a complex economic crime.

134 Just think of the outrage over the dismissals of the German “Love Parade” and the Swiss “Sommermärchen” trials and imagine if the trials had been about premeditated (!) homicides.

135 This is likely to be of particular importance when the shorter limitation period of 8 years applies.

136 *Hochmayr* (fn. 2), A. Second Complex II.4.c.ff.

cases[137] with reference to a national time bar,[138] since the issuing state would have it in its hands to trigger a timely, Union-wide tolling of the limitation period.

Translation by *Christopher Schuller*.

137 E.g. in the few cases where differences between the basic limitation periods remain even under this proposal, cf. above at B.II. 4.

138 Cf. the optional reason for refusal from Art. 4 No. 4 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (FD-EUHb), OJ 2002 L 190/1; for more details see *Kolb* (fn. 7), Erster Teil § 2 A.