FULL EFFECTIVNESS OF EUROPEAN UNION'S POLICIES

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Abstract

One of the conditions for the adoption of legal instruments in the field of criminal law is to ensure the effectiveness of their indispensability Union policies. European Court of Justice has tried to ensure the full effectiveness of criminal law by proposing the adoption of some criminal tools. The study aims to observe some criteria to determine the full effectiveness, where it exisst and to present some defendpolicies by which the Member-States should be guided.

Keywords: *EU policies, principle of effectiveness, lack, fight against criminality at all levels inside each member-state.*

Introduction

According to Article 83 of TFEU, *The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. EN C 83/80 Official Journal of the European Union 30.3.2010.*

Same article establishes the areas of crime where minimum rules regarding a definition is needed: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

Furthermore, same article says that *if the approximation of criminal laws and regulations of the Member States proves essential to ensure the* ***effective implementation*** *of a Union policy in an* ***area*** *which has been* ***subject to harmonisation measures****,* ***directives may establish minimum rules*** *with regard to the* ***definition of criminal offencesand sanctions*** *in the area concerned.*

Regarding these provisions that TFEU underlines, the Commission has made some proposals for a Council Framework Decision in some criminal areas.

Because any legislative proposal from the Commission to the Council and European Parliament is accompanied by an impact study, we will try to highlight how these proposals for a framework decision/directive would reflect the necessity of adopting the legislative act.

European Commission defines impact assessment as a *set of logical steps which helps the Commission to do this. It is a process that prepares evidence for political decision-makers on the advantages and disadvantages of possible policy options by assessing their potential impact.*

The Commission also mentions that the *most effective way of improving the quality of new policy proposals is by making those people who are responsible for policy development also responsible for assessing the impact of what they propose.*

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It is said that impact assessment also *helps to explain why an action is necessary at the EU level and why the proposed response is an appropriate choice. It may of course also demonstrate why no action at the EU level should be taken.*

Main content

First of all in this study we will focus on how European Commission motivates the need of definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension. We will focus on the impact assessments of some directive proposals that regard crimes on trafficking in human beings, protection of the environment, financial interests of the European Union, insider dealing and market manipulation, attacks against information systems, illegally staying third-country nationals.

In the second part of the study we will analyze the principle of effectiveness from the point of view of a part of some European Court of Justice case-law decisons, and last but not least we will conclude on how is mentioned and explained the principle of effectiveness in the impact assessments of the directive proposals chosen in the first part of the study.

A. The need of a definition of criminal offences and sanctions, part of effectiveness of EU policies

I. Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims[1].

Being a problem that concerns not only the third countries from where it is considered that rises, but also all the Member States, it is necessary to assure a common policy *aimed at preventing and prosecuting this kind of crimes,* but more important providing protection for its victims.

The explanatory memorandum of this proposal first lists the existing provisions in this area, and then makes a summary of views and how they have been taken into account regarding trafficking in human beings. As it results from it, the European Commission's Group of Experts on Trafficking in Human Beings, in its written opinion, underlined as guiding principles:

- the need for an adequate legal framework in each country,
- the need to make human rights a paramount issue,
- to take a holistic,coordinated and integrated approach to link government policies on trafficking in humanbeings to migration policies,
- to respect children's rights,
- to promote research about trafficking in human beings,
- to monitor the impact of anti-trafficking policies.

Also, it is shown that **many stakeholders agreed on the need for specific provisions aimed at strengthening investigation and prosecution**. The crucial role of assistance measures was generally emphasised. The issue of introducing a specific obligation to criminalise clients who knowingly use sexual services from a trafficked person was controversial among stakeholders. Several MS pointed out that in any case such a provision should not be binding.

On the impact assessment problem, the proposal underlines that **v**arious policy options have been examined as a means to achieve the objectives of preventing and combating trafficking in human beings more effectively, and better protecting victims.

More, the proposal summarizes some policy options as there are shown below:

[1] Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, *OJ L 101, 15.04.2011, p. 1-11.*

1. No new EU action refers to that fact that the EU would take no action to combat trafficking in human beings, while Member States may continue the process of signature and ratification of the Council of Europe Conventionon Action against Trafficking in Human Beings. So, in this case, the most important role is the one of the MS that, not in these terms exactly, has the obligation to sign and ratificate the EU's legislative act that fights against trafficking in human beings.

2. Second of all, non legislative measures are imposed. So, first, FD 2004/629/JHA would not be amended. Non-legislative measures could be put in place in the areas of victim support schemes, monitoring, prevention measures in countries of destination, prevention measures in countries of origin, training, and law enforcement cooperation. This policy takes into consideration the victim support and should be taken measures to assure a protection based on MS's cooperation.

3. Third of all, new legislation on prosecution, victim support, prevention and monitoring is needed. So, the new FD will contain along with existing provisions new ones in the areas of substantive criminal law, jurisdiction and prosecution, victims' rights in criminal proceedings, victim assistance, special protective measures for children, prevention, and monitoring.

4. As policy 2 and 3 shows, New legislation and non legislative measures should be taken into account. So, a new FD would be adopted, incorporating the existing FD and including new provisions. The new FD would be supplemented by non-legislative measures, and in particular those identified in policy option 2.

II. Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law[2]

As the explanatory memorandum first states, *in order to guarantee a high level of protection of the environment, an objective recognized by the EC Treaty (Article 174 §2 EC), the increasing problem of environmental crime must be tackled.*

It is necessary to take measures in order to assure a fully effective protection of the environment. Many acts of legislative are already adopted in this sense, but, as it is shown in various studies the sanctions currently in place in the Member States are not always sufficient to effectively implement the Community's policy on environmental protection.

After all the arguments that a framework decision, and an improved legislation has to be implemented in each MS, it is presented the general context of all the acts that had been taken to try to assure such a protection.

Regarding the impact assessment, we mention from the proposal that various options were considered in the impact assessment: For example:

- the possibility of no action on EU level,
- the possibility to improve cooperation between the Member States through voluntary initiatives,
- the possibility of full harmonization of environmental criminal law,
- a limited approximation of the national legislation on environmental crime in the Member States.

On the lack of action or non-binding action by the Community legislator the proposal says that would not tackle the existing difficulties in addressing environmental crime, difficulties which are rooted to a significant extent in the differences between the laws of the Member States.

[2] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, *OJ L 328, 6.12.2008, p. 28–37*.

Furthermore, the necessity of a full harmonization of environmental criminal law would go beyond and would ignore the fact that national criminal law is still strongly influenced by the respective cultural values of each Member State so that a certain flexibility in the implementation is required.

The notion of a limited approximation is mentioned in this proposal and it takes into consideration three different possible measures:

- harmonization of a list of serious offences,
- harmonization of the scope of liability of legal persons,
- approximation of the sanction levels for offences committed under aggravating circumstances.

Finally, it is said that in all three cases, **the possible impact on the level of protection of the environment as well as police and judicial cooperation have been assessed very positively**, whereas the costs for business and the burden on public authorities would not be significant.

III. Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation[3]

Regarding the economic crisis prevention and support for economic activity, the European Commission has assessed the application of the national rules implementing the MAD and has identified a number of problemswhich have negative impacts in terms of market integrity and investor protection.

In our opinion, this proposal is the most complete in determing the impact assessment of it, describing in a large way all the instruments that should assure effectiveness of such a framework decision.

The impact assessment identifies that the sanctions currently in place to fight market abuse offences are lacking impact and are insufficiently dissuasive, which results in ineffective enforcement of the Directive.

More, along the Member States criminal offences on this matter are very different defined. So, the proposal give for example that *five Member States do not provide for criminal sanctions for disclosure of inside information by primary insiders and eight Member States do not do so for secondary insiders. One Member State does not currently impose criminal sanctions for insider dealing by a primary insider and four do not do so for market manipulation.* All these undermine the internal market and leave a certain scope for perpetrators of market abuse to carry such abuse in jurisdictions which do not provide for criminal sanctions for a particular offence.

Like other legislative proposals, this one also shows that in ensuring effectiveness of this Union policy minimum rules on criminal offences and on criminal sanctions for market abuse would be transposed into national criminal law and applied by the criminal justice systems of the Member States.

Also, an issue is the definition of criminal offences, and the proposal states that*common minimum rules for the most serious market abuse offences facilitate the cooperation of law enforcement authorities in the Union, especially considering that the offences are in many cases committed across borders.*

Furthermore, *the definition of the most serious market abuse offences and on minimum levels of criminal sanctions attached to them.*

[3] Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation,COM (2011) 0654 final.

Asresults of consultations with the interested parties and impact assessments thepolicy options related to criminal sanctions were considered as part of this preparatory work.

The conclusion of the impact assessment required for Member States **to introduce criminal sanctions for the most serious market abuse offences being essential to ensure the effective implementation of the Union policy on market abuse.**

IV. Directive 2013/40/EU of the European Parliament and of the Council on attacks against information systems and replacingCouncil Framework Decision 2005/222/JHA[4]

As we seen in all the legislative proposals, the explanatory memorandum states the main objective in adopting a framework decision. In the area of attacks against information systems the objective is to improve cooperation between judicial and other competent authorities, including the police and other specialised law enforcement services of the Member States, by approximating the rules of the criminal law in the Member States in relation to attacks against information systems.

The proposal also underlines that *the main cause of this phenomenon is vulnerability resulting from a variety of factors. Insufficient response by law enforcement mechanisms contributes to the prevalence of these phenomena, and exacerbates the difficulties, as certain types of offences go beyond national borders. Reporting of this type of crime is often inadequate, partly because some crimes go unnoticed, and partly because the victims (economic operators and companies) do not report crimes for fear of getting a bad reputation and of their future business prospects being affected by public exposure of their vulnerabilities.* Different definitions and different procedural maners and *may give rise to differences in investigation and prosecution, leading to differences in how these crimes are dealt with.*

The conclusions of the consultation of interested parties in this area where sattled down in a few important points:

- the need for the EU to act in this field;
- the need to criminalise forms of offences not included in the current Framework Decision, in particular new forms of cyber attacks (botnets);
- the need to eliminate obstacles to investigation and prosecution in cross-border cases.

Also, some policy have been summarized as follwos:

1. Status Quo / No new EU action. EU will not take any further action to combat this particular type of cybercrime, i.e. attacks against information systems. Ongoing actions are due to be continued, in particular the programmes to strengthen critical information infrastructure protection and improve public-private cooperation against cybercrime.

2. Development of a programme to strengthen the efforts to counter attacks against information systems by means of non-legislative measures. This policy point brings into atetntion the cross-border law enforcement and public-private cooperation, named as a soft-law instruments that will aim to promote further coordinated action at EU level, including:

- strengthening of the existing 24/7 network of contact points for law enforcement agencies,
- establishment of an EU network of public-private contact points involving cybercrime experts and law enforcement agencies;
- elaboration of a standard EU service level agreement for law enforcement cooperation with private sector operators;

[4] Directive 2013/40/EU of the European Parliament and of the Council on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, *OJ L 218, 14.08.2013, p. 8-14.*

- support for the organisation of training programmes for law enforcement agencies on the investigation of cybercrime.

3. Third policy option settles a *targeted update of the rules of the Framework Decision (new Directive replacing the current Framework Decision) to address the threat from large-scale attacks against information systems (botnets) and, when committed by concealing the real identity of the perpetrator and causing prejudice to the rightful identity owner, the efficiency of Member States' law enforcement contact points, and the lack of statistical data on cyber attacks.*

In this policy option, strenghtened legislation must be adopted along with non-legislative measures in cooperation against cross border criminality in area of information attacks.

4. Fourth policy option regards introduction of comprehensive EU legislation against cybercrime.

New comprehensive EU legislation is the main idea of this policy option, along with different kinds of information system crimes, also financial cybercrime, illegal Internet content, the collection/storage/transfer of electronic evidence need more detailed jurisdiction rules.

This option underlines that the legislation would operate in parallel with the Council of Europe Convention on Cybercrime, and would include the accompanying, non-legislative measures mentioned at the policy options described above.

5. This fifth policy option reffers to an update of the Council of Europe Convention on Cybercrime.

The proposal makes clear that is needed a*substantial renegotiation of the current Convention, which is a lengthy process and is at odds with the time frame for action that is proposed in the Impact Assessment.*

A problem is that it is identified a sort of no international willingness to renegotiate the Convention, and an updated Convention it is considered a not feasible option.

This Proposal highlights furthermore a referred policy option which is made of a combination of non-legislative measures (option 2) with a targeted update of the Framework Decision (option 3).

V. Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals[5]

The proposal underlines the scope of the problem as *tackling illegal immigration - one part of the EU's effort to develop a comprehensive migration policy.* As a general problem, the illegal immigration needs to be reduced, especially regarding the employment of third-country nationals who have no or limited rights to work, and the limited rights are being exceeded.

The large number of illegaly staying nationals made necessary that some objectives to be taken into consideration. The proposal takes into two categories of objectives, general and specific, as follows:

General objectives:

- to contribute to reducing illegal immigration.
- specific objectives:
- to reduce employment of illegally staying third-country nationals
- to create a level playing field for EU employers.
- to contribute to reduced exploitation of illegally staying third-country nationals.

As regards the policy options for this proposal, six important options were mentioned.

[5] Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 0249 final.

1. The first policy option for this directive - Status quo – proposes to maintain the existing legislative acts in this area. More, this policy option mentions that national measures also had been taken, preventive measures and penal sanctions are increasing. Also, they mention *measures placing the responsibility on the employer to declare new employees and verify their status, measures encouraging employment of documented workers, and, partnership agreements for cooperation and initiatives to prevent illegal work (between (1) Member States, and, (2) Ministries and Social Partners)* that had been imposed.

2. Second policy option - Harmonised sanctions for employers of illegally staying third-country nationals across the EU, with an enforcement obligation on Member States. Here, the main issue is to harmonise sanctions for employers of illegally staying third-country nationals, to put in place new penalties and criminal sanctions. For example, they propose *a 'menu' of penalties would be put in place, including, for example, temporary ineligibility for public contracts and subsidies, temporary suspension of activity, temporary withdrawal of trading licence and/or confiscation of equipment.* The proposal also establishes some criteria to be taken into consideration when choosing a penalty:

- intention / knowledgeable act: whether the employer deliberately and knowingly hired (an) illegally staying third country national(s);
- repeat offence;
- other circumstances (e.g. economic situation).

In serious cases employers could also be subject to criminal sanctions, based on the following alternative criteria:

- repeat offence (e.g. second or third time / within a certain time period);
- employment of a significant number of third-country nationals; and/or
- particularly exploitive working conditions.

3. Policy option 3 refers at - harmonised preventive measures: common requirements across the EU for employers to copy the relevant documentation (residence permit) and to notify the competent national bodies.

For this policy option it is needed to **involve actions by the employer and competent national authorities.**

4. For the policy option 4 - harmonised employer sanctions and preventive measures – is a combination between policy option 2 and 3, as the proposal itself states.

5. EU awareness raising campaign on consequences of hiring an illegally staying third-country national – is the fifth policy option.

It is a *non-regulatory* option seek to make employers aware of their legal obligations and negative consequences of hiring illegally staying third-country nationals.

6. The last policy option - identification and exchange between Member States of good practices on the implementation of employer sanctions – involves the **cooperation between Member States in implementing a common system** in managing the situation of illegally staying third-country nationals.

B. ECJ case-law and the principle of effectiveness

Analyzing 175 ECJ decisions, we have selected a number of 19 such decisions where we can find the principle of effectiveness mentioned. From this 19 selected decisions we can see that only in a few of them the effectiveness is defined from a criminal point of view. In many of them the effectiveness is only determined in relation with civil law issues. For example, the most common situation where effectiveness is involved is the one based on the amount of damage which could be recovered by an individual who has suffered an infringement of his rights.

Regarding relevant decisions where the principle of effectiveness is mentioned, we can find a very important one that states: It is settled case-law that, in the absence of EU rules in the matter, it is for the internal legal order of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding in full rights which individuals derive from EU law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that ***they do not render virtually impossible or excessively difficult the exercise of the rights conferred by EU law (principle of effectiveness)***[6]. So, the effectiveness is in relation with the rule that if they are needed to be laid down common EU rules, these one can not be less favourable.

Similar[7], the Court stated that it is for the domestic legal system of each Member State to lay down such a procedural rule, provided, first, that the rule is not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that it does not render in practice impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness).

Furthermore, regarding the application of the principle of effectiveness, the Court has held in another decision that every case in which the question arises as to whether a national procedural provision makes the application of European Union law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure[8].

The ECJ case-law highlights the **effectiveness in relation with an obligation of injured parties to have recourse systematically to all the legal remedies available to them** even if that would give rise to excessive difficulties or could not reasonably be required of them, obligation considered to be contrary to this principle[9].

From the ECJ case-law we can observe that firstly this principle is interpreted along with the principle of equivalence.

Then the basic condition that must be met to be considered as respected this principle is that there are provisions to protect the rights of individuals nationwide, provisions that can not be less favorable and not impose difficult procedures than those conferred by EU law.

Finally we can note that this principle is discussed especially in those cases which concern an injury repair.

[6] See Case C-452/09, *ToninaEnzaIaia, Andrea Moggio, UgoVassalle***,** [2011] ECR I-4042, paragraph 16; Joined Cases C‑114/95 and C‑115/95, *Texaco and OlieselskabetDanmark*, [1997] ECR I‑4263, paragraph 41; Case C‑62/00,*Marks & Spencer*, [2002] ECR I‑6325, paragraph 34; and Case C‑445/06,*DanskeSlagterier*, [2009] ECR I‑2119, paragraph 31.

[7] Case C-542/08, *Friedrich G. Barth*, [2010] ECR I-3189, paragraph 17; Case C-228/96, *Aprile*, [1998] ECR I-7141, paragraph 18.

[8] Case C-246/09, *Susanne Bulicke*, [2010] ECR I-7003, paragraph 35; Case C-312/93,*Peterbroeck*, [1995] ECR I-4599, paragraph 14; Case C-432/05, *Unibet*, [2007] ECR I-2271, paragraph 54; Case C‑40/08 *Asturcom Telecomunicaciones* [2009] ECR I‑9579, paragraph 39; and Case C-63/08, *Pontin*, [2009] ECR I-10467, paragraph 47.

[9] Case C-445/06, *Danske Slagterier* [2009] ECR I-2119, paragraph 62.

C. Impact assessment and the principle of effectiveness. Conclusions

It is stated in one impact assessment that compared with the civil and administrative tools in implementing common procedures to reduce criminality in each Member State, the means of criminal investigation and prosecution are more *powerful*.

Furthermore, the effectiveness of Union policy, in our opinion, of any Union policy proposed, can be assured by transposing into national criminal law minimum rules on criminal offences and criminal sanctions (*for market abuse* in the issue analyzed in the proposed directive) that should be applied in each and every Member State.

It is also mentioned that the effectiveness of measures are highly dependent on efforts and resources put in place for enforcement.

Conclusion 1

We can develop the idea and say that the effectiveness of such measures depend especially on how each Member State can implement a common category of procedures taking into account its situation and its level of judiciary development. It is not a solution to create measures or to impose procedures that are impossible to apply in one Member State.

Of course, we also agree that shared definitions make it possible to exchange information and collect and compare relevant data in specific areas of criminality as we have already analyzed above and, again the effectiveness of prevention measures across the EU and international cooperation will be also enhanced.

As we said above and as even the Commission underlines, the effectiveness of measures currently in place seems to be highly dependent on efforts and resources put in place for enforcement.

Again, effectiveness still depends significantly on enforcement, so how can each Member State can apply each proposed policy option without affecting its main system of such measures and procedures.

So, effectiveness still depends on the Member States capacity to enforce the common regulations. Of course, the objectives that are highlighted as we have seen in the proposals analyzed are important to establish, but maybe it is needed to create a common pattern for all criminal offences through EU policies, so that the criminality to be reduced. But we think that creating such a pattern is yet early as Member State still have own policies applied above EU ones.

A very important idea is the one that provides a very important criterion regarding improved effectiveness and efficiency of enforcement bodies that could positively influence the number of offences uncovered.

Conclusion 2

We agree that effectiveness depends on the power of the legislation envisaged to be transposed and enforced in practice. The enforcement is the the responsibility of each Member States. Even with the enforcement obligation and the the sharing of good practices, the effectiveness of inspections would still be dependent on the Member States.

The effectiveness of penalties and sanctions are important considerations in the context of legal persons and crimes affecting the EU's interests, but they are not the only considerations. The criminalisation of conduct undertaken by legal persons also allows for enforcement agencies to use (more intrusive detection) criminal procedure methods (e.g. surveillance, telephone tapping, searches, seizure of computer hardware etc.) which can change perceptions of

the likelihood of being detected[10]. But even if these instruments can be used, we think that EU can not impose them as general instruments and because of them all policies to become effective.

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