Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law'

COM(2011) 573 final

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Rapporteur: **Mr DE LAMAZE**

On 20 September 2011, the European Commission decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law

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The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 22 March 2012.

At its 480th plenary session, held on 25 and 26 April 2012 (meeting of 25 April 2012), the European Economic and Social Committee adopted the following opinion by 131 votes, with 2 abstentions.

1. **Conclusions and recommendations**

1.1 The EESC supports the communication's objective of providing for the exercise of the EU's competence in the field of criminal policy, conferred on it by Article 83(2) of the Treaty on the Functioning of the European Union (TFEU), in new harmonised sectors. This could provide the EU with an effective tool for improving and strengthening the implementation of its policies, as a continuation of the case-law advances of the Court of Justice of the EU in 2005 and the two directives of 2008 and 2009 aimed at establishing an environmental criminal law.

1.2 The Commission's communication undoubtedly represents progress since, for the first time, the EU is proposing to put in place a policy to govern its actions in criminal matters. The EESC believes that this policy should be given strong political impetus.

1.3 In relation to the aforementioned legal developments, the EESC would point out firstly that the desire to ensure the implementation of Union policies is not in itself sufficient justification for recourse to criminal law, since increasing the scope of European criminal law is subject to respect for the principles of subsidiarity and proportionality.

1.4 Given the punitive and controversial nature of criminal sanctions, the criminalisation of States by the Union for a particular form of conduct should be a last resort ('ultima ratio'). The difficulties faced by Member States in the implementation of an EU policy, compromising the effectiveness of that policy, should not in themselves be sufficient to justify recourse to criminal law. The conduct in question must also constitute a serious violation of an interest which is considered to be fundamental.

1.5 The EESC believes that the Commission's project first requires a clear identification of what the concept of a general interest defined at European level could cover. This concept does not currently exist in law, but is necessary in order to justify imposing criminal sanctions defined at EU level on European citizens. Consumers' interests alone cannot be sufficient to justify recourse to such measures.

1.6 The EESC would call, more broadly, for an examination of how fundamental rights, including social rights, could, in the future, be protected by criminal sanctions defined at EU level, and consideration should be given to how the latter can be harmonised in the different Member States. Given that the definition of offences and sanctions can vary amongst Member States to the point of prejudicing fundamental rights by violating the principles of proportionality and legal certainty, the EESC believes that harmonisation in criminal matters would be necessary in these cases.

1.7 The decision to adopt new criminal measures at European level must first be justified by means of an impact analysis carried out in cooperation with experts from the different Member States, which includes a comparative law-based study into the systems responsible for the implementation of the regulations in question in the Member States, and an analysis of the need to improve the rule of law, demonstrating that this new provision must be enacted at the European level.

1.8 In other words, the analysis must be able to demonstrate the need for European criminal legislation in light of the principles of subsidiarity and necessity and of the proportionality (the ultima ratio requirement) of the criminal sanction. The EESC is pleased that the Commission intends to take this approach in relation to extending EU action in the field of criminal law.

1.9 The EESC believes that the effectiveness and impact of criminal law laid down at European level on fundamental rights should be subject to an independent scientific evaluation, as an essential counterpart to the prior impact assessment.

1.10 The EESC considers it crucial to stipulate the content of a harmonisation policy in the criminal field, particularly in relation to whether it is intended to harmonise definitions of sanctions and violations.

1.11 The EESC believes that the minimum rules established at EU level must not interfere with national authorities' definition of categories of offences, which furthermore is linked to their legal system, and that it should be left to them to draw up their own enforcement strategies, in strict compliance with the principle of subsidiarity.

1.12 The EESC would stress that, in any event, the progressive harmonisation of substantive criminal law rules can only be carried out at the institutional level, on the basis of close cooperation between the prosecuting authorities (justice ministers and public prosecutors) and between judicial authorities. This cooperation should be guaranteed by means of a specific budget. This harmonisation would not however put an end to the heterogeneity of national criminal procedural rules, particularly in terms of the specific guarantee of rights to defence (e.g. appeals). Furthermore, procedural matters do not fall within the scope of the communication. The criminal procedures and practices of the different enforcement systems therefore lead to variations which the European regulator is not providing for. For this reason, the EESC considers it particularly important for the future European public prosecutor to be responsible for overseeing, within the limits of his powers, the progressive harmonisation of national criminal legislations, on the basis of which judicial proceedings will be brought.

1.13 Furthermore, the EESC believes that consideration should be given to the criminal liability of legal persons, which has not yet been accepted by all Member States. Given this inequality before the law, consideration of this issue should be a priority, since many significant offences in the economic, social and environmental fields are committed by industrial and commercial enterprises.

1.14 Extending the European scope in criminal matters first requires a discussion of subjects such as:

— the preference for criminal law over all other systems of prevention and remedy, such as administrative sanctions, including fiscal sanctions, and the possibility of class action, as well as mediation;

— identification of the appropriate level of sanction, to be defined at European level, without which criminal law would have less of a deterrent effect in many of the legislations it supersedes;

— the role of Eurojust and the role of the future European public prosecutor.

1.15 Finally, the EESC believes that the discussion on the principle of extending European criminal law should go hand in hand with a discussion on respect for rights of defence, which are less well protected outside of the judicial framework provided by criminal proceedings. If the extension of a European criminal area is to be effective, rights of defence must be reinforced, particularly where Eurojust and Europol are concerned. These rights must be effectively guaranteed in practice, and for every EU citizen. Only in this way will European criminal law meet the requirement to respect fundamental rights laid down in the Treaties (Article 67(1) and Article 83(3) TFEU).

2. **Content of the communication**

2.1 The Commission maintains that EU action in criminal matters is recognised as necessary for underpinning the effective implementation of EU policies in the financial sector and in protecting the EU's financial interests in terms of safeguarding the euro and combating counterfeiting.

2.2 It calls for assessing the appropriateness of extending such action to the following areas: road transport, data protection, environmental protection, fisheries policy, internal market policies (counterfeiting, corruption, public procurement). The list is not exhaustive.

2.3 The stated legal basis for this EU action is Article 83(2) TFEU, which stipulates: '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 offences and sanctions in the area concerned.'

2.4 While the Lisbon Treaty provides a legal basis facilitating the adoption of directives on criminal law, these directives must rigorously comply with the fundamental rights guaranteed by the Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms and the fundamental principles of subsidiarity and proportionality, with recourse to criminal law being sought as a last resort ('ultima ratio'), as stipulated in the communication.

2.5 By virtue of the principle of subsidiarity, as explained in the communication, it is only if the Member States are unable to enforce EU law, or if significant differences in this area were to emerge between the Member States leading to inconsistencies in its implementation, that the EU can act.

2.6 In accordance with the requirements of last resort ('ultima ratio'), the Commission states that the choice between criminal or administrative sanctions will be based on a detailed impact assessment. A group of experts will help it with this task and also provide an interpretation of certain basic concepts of criminal law ('effective, proportionate and dissuasive sanctions', 'minor cases', 'aiding and abetting', etc.).

2.7 The Commission assesses the added value of EU action in the criminal sphere in terms of four basic objectives:

— encouraging the free movement of persons and cross-border purchases (through minimum standards governing procedural rights);

— preventing the existence of 'safe havens';

— strengthening mutual trust between judiciaries and cooperation between law enforcement authorities;

— preventing and sanctioning serious offences against EU law (environment, combating illegal employment, etc.).

2.8 The communication does not touch upon the measures which may be adopted, pursuant to Article 83(1) TFEU, to combat the limited list of offences referred to as 'eurocrimes' because of their particular seriousness and cross-border dimension ([1]).

3. **General comments**

3.1 The goal of this communication is particularly sensitive, since criminal policy has derived from sovereign power since States were first created, and enforcement rules directly affect the individual freedoms and rights of every citizen.

3.2 Whilst there is undoubtedly a desire for the EU to pursue criminal action in certain areas, particularly in combating human trafficking and the sexual exploitation of women and children, which are covered by Article 83(1) TFEU, the EESC is not convinced that there is a similar desire as regards those areas governed by Article 83(2) TFEU.

3.3 *The bases of European criminal legislation*

3.3.1 The need for a sufficient legitimate interest

3.3.1.1 The new features introduced by the Lisbon Treaty are an achievement that the EESC welcomes. They facilitate the adoption of directives on criminal matters and provide greater guarantees for protecting fundamental rights.

3.3.1.2 Nevertheless, the EESC would like to remove some possible confusion from the outset: Article 83(2) TFEU must not give rise to the idea that the desire to ensure implementation of EU policies is enough, in itself, to legitimise recourse to criminal law.

3.3.1.3 The 'economic recovery' – to which the Commission refers in contemplating broadening the scope of EU action in criminal matters (page 10) and which is universally acknowledged as an essential goal and priority – cannot in itself constitute sufficient legitimate interest to justify recourse to criminal law. This goal depends on much more than combating 'the illegal economy and financial criminality', to which, moreover, the Commission thinks EU action in criminal matters could not be restricted.

([1]) Terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment and organised crime.

3.3.1.4 The EESC believes that the Commission's project first requires a clear identification of what the concept of a general interest defined at European level could cover. This concept does not currently exist in law, but is necessary in order to justify imposing criminal sanctions defined at EU level on European citizens. Consumers' interests alone cannot be sufficient to justify recourse to such measures.

3.3.1.5 The EESC would call, more broadly, for an examination of how fundamental rights and social rights could, in the future, be protected by criminal sanctions defined at EU level, and consideration should be given to how the latter can be harmonised in the different Member States. Given that the definition of offences and sanctions can vary amongst Member States to the point of prejudicing fundamental rights by violating the principles of proportionality and legal certainty, the EESC believes that harmonisation in criminal matters would be necessary in these cases.

3.3.2 The 'metaprinciple' of subsidiarity and the requirement of 'ultima ratio'

3.3.2.1 The EESC places much importance on respecting the principle of subsidiarity when it comes to European criminal legislation: it is of particular relevance in as much as the social values protected by criminal law are closely linked to the social structure and the very identity of Member States' societies. This identity is enshrined in the TFEU, which points out that the Member States should not hesitate to use their prerogatives and pull the 'emergency brake' if they feel that the proposed legislation affects fundamental aspects of their criminal justice system (Article 83(3)).

3.3.2.2 The EESC believes that the minimum rules in criminal matters established at European level must not interfere with national authorities' definition of categories of offences, which furthermore is linked to their legal system, and that it should be left to them to draw up their own enforcement strategies, in strict compliance with the principle of subsidiarity.

3.3.2.3 The EESC would point out that the communication indicates that, in accordance with the principle of subsidiarity, EU action in criminal matters is only justified if all or a majority of Member States are not able to ensure compliance with EU law by means of their own legislative capacities. The issue of EU intervention deserves to be raised in the event that one or a small number of Member States are in that situation.

3.3.2.4 Because it is likely to interfere with the rights of the individual, any European criminal legislation must be founded on the principle of proportionality, and in particular on the ultima ratio requirement, which presupposes that the absence of any less coercive means of achieving the desired objective be first proved.

3.3.2.5 The communication stresses the importance of applying these principles, which means that assessments should be carried out taking account of all possible alternative measures.

3.3.2.6 The EESC is aware of the Commission's desire to undertake such studies. The Commission states that it will 'develop plans to collect further statistical data and evidence to deal with the areas covered by Article 325(4) and Article 83(2)' (point 2.2.2).

3.3.2.7 Regarding implementing the 'ultima ratio' requirement, it states that the legislator must use impact studies as a basis and include an 'assessment of whether Member States' sanction regimes achieve the desired result and difficulties faced by national authorities implementing EU law on the ground' (point 2.2.1).

3.3.2.8 It has to be recognised that there are few assessments to date of how Member States will transpose and implement European legislation. Similarly, there is little comparative research into the different legal systems. The first task will be to undertake such studies. The EESC feels that it is only in the light of their findings that it will be possible to determine whether harmonisation is 'essential'.

3.3.2.9 The EESC would stress that it is necessary to illustrate both the shortcomings in Member States' legal frameworks and the nature of the difficulties raised at EU level by the differing views of criminalisation, sanctions and the effectiveness of law enforcement.

3.3.2.10 The EESC believes that the European criminal law instrument too should be subject to an independent scientific assessment of its effectiveness and impact on fundamental rights. Only by means of an assessment such as this can the truly effective measures be enhanced and others abandoned. For this purpose, Member States should have a specific financial instrument to enable the necessary financial resources to be allocated within their budgets. It also means drawing up a common European methodology stipulating the main indicators and measuring tools.

3.3.2.11 The EESC is aware that the debate surrounding the principle of subsidiarity in the sphere of criminal legislation is still in its early stages. The case law is still being created. In this respect, it stresses the need for further consideration in order to better define this concept. More generally, it calls for the principles underpinning any European criminal legislation to be examined in greater detail.

3.3.2.12 The EESC considers that the reasons put forward in the communication to highlight the added value of EU action in criminal matters (page 4) require further consideration.

3.3.2.12.1 In particular, while – in the view of the EESC – the reasoning relating to the differences between sanctions within the EU above all raises the issue of discrimination between EU citizens in terms of fundamental rights, it should however be qualified: firstly, because of the discretionary powers of the judge in many countries, and secondly, because the deterrent effect depends primarily on the effectiveness of enforcement agencies.

3.3.2.12.2 The EESC would stress that, in any event, the progressive harmonisation of substantial criminal law rules can only be carried out at the institutional level, on the basis of cooperation between national judicial authorities, and this cooperation must be guaranteed by means of a specific budget. The Committee would point out that the desired harmonisation cannot entirely eliminate the differences in criminal procedures, particularly as regards the concept of the adversarial process and the rights of the defence.

3.3.2.12.3 Since action on criminal law would seem essential, the EESC consequently draws attention to the need for seeking harmonisation in collecting evidence.

3.3.2.13 Finally, the EESC would like to point out that, by virtue of the ultima ratio requirement, the option of preventive measures, particularly via actions in the social field, should be explored. This might be effectively combined with criminal sanctions.

3.3.3 Other principles

3.3.3.1 The EESC would note that, in accordance with the Charter of Fundamental Rights and the Convention for the Protection of Human Rights, the legislator has an obligation to ensure that charges are clear and accurate, which simply reflects a general obligation to ensure legal certainty. The EESC believes that this obligation should extend to secondary offences such as attempted crimes and aiding and abetting, which are defined differently from one State to another.

3.3.3.2 As the Commission points out, the plan to harmonise legislations should not result in increasing the levels of sanctions applicable in the Member States. The EESC points out that, by virtue of the principle of (vertical) consistency, the minimum penalties envisaged by the EU should not lead to an increase in the possible maximum penalties within a Member State, which would be contrary to that country's legal system (Article 67(1) TFEU). It calls for a distinction to be made between the concepts of severity and effectiveness when assessing a penalty.

3.3.3.3 Since they are approved by the EU, the EESC believes that, for the sake of consistency across the board, account should also be taken of the levels of sanction already laid down in European legislation.

3.4 *Legal concepts to be clarified*

3.4.1 The Commission clearly wished to open a discussion before even defining certain basic concepts, hence a certain lack of clarity in the communication. Whilst the EESC is aware of the political scope of the document, it regrets that the discussion could not begin on the stable basis it would have

wished. It particularly emphasises the complexity of the necessary distinction between the concepts of criminal sanctions and administrative sanctions and questions what is to be understood by 'serious breaches' of EU law.

3.4.2 The work carried out by the group of experts should help to dispel some ambiguities. The EESC will ensure that these experts are actually chosen from legal professionals, lawyers, magistrates, criminologists, etc. as stated.

3.5 *To which sectors should EU action in criminal matters be extended?*

3.5.1 The communication rightly refers to alternatives to criminal law, but does not, in the Committee's view, pursue all the implications: in its opinion, the EU reaction to criminal financial, social and economic conduct should include the economic option itself, i.e. administrative and civil sanctions (a ban on exercising a profession, for example).

3.5.2 The absence of an overall strategy for criminal policy at European level means that there is no rigorous justification for the list of sectors in which the Commission might envisage implementing initiatives.

3.5.3 The EESC believes that EU action should be based on three criteria: the degree of seriousness (to be defined), the cross-border dimension of offences, and the common criterion of the degree to which they violate the law, in line with the significance of the interests affected.

3.6 *What degree of harmonisation?*

3.6.1 The EESC takes note of the communication's goal of setting minimum standards. The Treaty makes no provision for going further and rules out full harmonisation. Nevertheless, minimum rules may reflect a desire for a more or less ambitious level of harmonisation. The Committee deems it important to define precisely the level of harmonisation sought, according to the sector in question. While the European Parliament will be able to provide the necessary political impetus and a guarantee of democratic legitimacy, it is essential for parliaments at national level to address the issue and express an opinion in line with their new responsibilities in order to strengthen trust in European criminal law.

3.6.2 This is all the more relevant given that the huge and never-ending task of harmonising the definitions of offences and sanctions – even if it is conceived on a minimum basis – cannot fail, in the Committee's view, to impact on the identity of each national legal system.

3.7 *Rights of defence*

3.7.1 The EESC draws attention to the fact that, according to the case law of the European Court of Human Rights, the criminal or administrative penalty influences the corresponding guarantees for the person subject to legal proceedings (implementation of Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms), whereas in reality, there may be differences in the level of protection of defence rights depending on the type of sanction chosen. The Committee believes that this de facto situation argues for a clear and a priori definition of what is covered by administrative sanctions and what is covered by criminal sanctions.

3.7.2 With a view to better protecting rights of defence in the event of administrative sanctions, the EESC would support the establishment of principles aimed at bringing such sanctions within the jurisdiction of the courts.

3.7.3 The EESC wishes to stress that the question of the rights of defence is also relevant to cooperation between judicial and law enforcement services (principally Eurojust and Europol).

3.8 *Subsidiary questions*

3.8.1 The question of the system of liability (criminal or non-criminal) to be applied to legal persons.

3.8.1.1 The fact that certain States do not currently recognise the criminal liability of legal persons creates a gap between the effectiveness of the possible enforcement methods and the referral to the competent judges (criminal or civil, according to the designation rules of private international law, hence the risk of forum shopping). For example, in the case of large-scale cross-border pollution, it goes without saying that a criminal response against the companies which are generally responsible is more effective than proceedings exclusively against company directors or their staff. This is an issue that requires further consideration, particularly the issue of the power to delegate responsibility within a company, otherwise there will be no equivalence in enforcement or hence in the deterrent effect of preventive measures.

3.8.1.2 Since the harmonisation of criminal company law is problematic due to the conceptual differences between Member States, action against the violation of the fundamental rules ensuring the establishment of European standards remains exclusively of an administrative nature, whether at the instigation of the Commission, the Member States, and/or their independent authorities. It is important that the rights to defence of legal persons brought before these bodies with powers to impose sanctions are guaranteed just as they are before a criminal court.

3.8.2 Other issues raised by the communication:

3.8.2.1 Should EU legislation contain a definition of serious negligence?

3.8.2.2 In line with the principle 'nulla poena sine culpa' ['no penalty without a law'], the EESC believes that if EU legislation were to provide a definition of intentional conduct, the Member States alone would, by contrast, be competent for establishing sanctions to deal with serious negligence (to be discussed).

3.8.3 Should confiscation measures be included in EU legislation?

3.8.3.1 Whilst, in principle, there seems to be nothing against including the penalty of confiscation (as distinct from the seizure of assets) in European legislation, particularly with regard to drug trafficking, the issue may call for more in-depth discussion if there are plans to include a measure for the general confiscation of assets, which is not part of many legal systems, and may raise the question of the proportionality and uncertainty of the penalty.

Brussels, 25 April 2012.

The President
of the European Economic and Social Committee
Staffan NILSSON