Principle of Efficiency in EU Criminal Law

Rasa Volungevičienė[1]

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Criminal law traditionally has a national character and reflects national values and goods – its relationship with national sovereignty remains really close until present days. Nevertheless, in today's globalisation age, the criminal law in the EU is examined with regard to possibility to ensure effectiveness of EU aims and policies (Lenaerts, Gutiérrez-Fons, 2016). So, in our world, we see efficiency not as a request, but as a strict demand for criminal law to be effective on a requested level.

In globalisation age, we can detect a strong focus on effectivity which plays the key role in primacy of the EU law, and sharply influences the subsidiarity doctrine. A large quantity of Member States have different historical experience and legal culture, so, the diversity causes the dissimilarity in reception of EU rules, the same as different understanding of EU policies and it has an impact on their selection of tools, used to reach European goals (Melander, 2014). This situation generates a problem - if different Member States have different criminal law systems, based on different values, can the principle of efficiency be implemented in the common legal system of EU and if this principle is used in a considerable number of legal acts, how can it be understood?

Criminal law requires that we should not use the notions which are not clear neither from legal acts nor from case-law. It is necessary to describe the boundaries because this principle serves as a distinguishing sign between the national and EU law in competence matters. And looking at the harmonisation of EU criminal law through efficiency, we can understand this principle as

[1] PhD Student and Assistant in Kaunas Vytautas Magnus University Faculty of law. Dissertation in progress: *Protection of the Financial Interests of the European Communities: Problematic Issues after Implementation of the Directive 2017/1371*. E-mail: rasa.volungeviciene@vdu.lt; https://orcid.org/0000-0002-9922-1553.

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a measuring unit or sometimes as a target of criminal law. In criminal law, we also see effectiveness as a sharp argument for imposing criminal sanctions or generating new law instruments.

The decision of the European Commission to limit the discretion of the Member States to choose the instruments for ensuring the implementation of European Union policies foresaw common rules including the soft request to fix the criminal sanctions for the breach of the EU law (Communication from The Commission, 2011). It means when, in EU criminal law doctrine, we hear the discussions of how we could understand efficiency, we have at least two opinions. So, the effectiveness can be understood as the means to end of criminal law or as a tool of criminal law- an ultimate objective of EU law (Melander, 2014). In both cases, we really ignore the moral face and the basis of values in criminal law, and for this reason, we need to find the answer on what the efficiency can be built.

Even in XVIIIth century, it was stated that the most efficient tool for prevention of criminal offences is not the cruelty of penalties, but their inevitability and it is arising from legislature, and it has a significant impact on society and is able to stop persons from committing new criminal offences (Bekaria 1992). In this period of time, society believed that by punishing guilty persons, we will have more efficient justice. It was thought that that criminal law should serve not only as a safeguard for the interests of citizens, but also guarantee the society's security and help to reach the goals of the policies, including prevention of crimes and sanctions for the offenders. We can see these historic parallels between VXIIIth century and our globalisation age - criminal sanctions should be evaluated as efficient when by their help we can guarantee the compliance with the EU law; moreover, the sanctions should safeguard most valuable goods of transnational society.

Directives, proposals and other legal documents of the European Union law promote deterrence through initiatives for further harmonisation of offences and sanctions. And not surprisingly, that principle of effectiveness is directly linked to the effectiveness of the criminal sanctions (Commission of the European Communities vs. Council of the European Union, 2005). The same position is detected in ability by the means of punishment to ensure the proper implementation of Union policies - the most efficient criminal system is most clearly reflected in punishment theories. (Melander, 2014). Going by this way,

it is necessary to invoke criminal sentencing theories, which can be used as a tool to assess the effectiveness of penalties by the ability to act in most possible deterrent way. Testing the ability of criminal sanctions to act in a manner by achieving future-oriented objectives we can ensure the implementation of the principle of effectiveness in the EU criminal law.

Looking for the answer, and by invoking the doctrines of effectiveness of punishment theories - when the criminal offences cross the borders of Member States and damage is made not only for certain countries, but also has a negative influence on EU financial interests, nature resources or stability of the euro system, it is evident that criminal sanctions more and more often become an instrument to ensure efficient EU policies. To continue, the principle of efficiency most evidently is reflected in the theories of punishment, but nevertheless, trying to look deeper, the sanctions are most efficient by acting in a non-direct way based on really existing and in society fluently functioning moral norms (Nuotio, 2020). In the recent years, we can observe a tendency which reflects in proposals, directives or audit documents - aspiration to strengthen the safeguard of EU common goods by stating, that present state of deterrent measures is not effective enough and the way to the solution is based on harmonising sanctions- in most cases, increasing numeric values of penalties. In addition, it is worth to state that most of EU criminal law harmonising tools do not speak about recriminalisation, the same as we do not see the offences which the EU would like to criminalise and which would not be already criminalised by the Member States. So positive deterrence, based on harmonised sanctions, is able to create a mechanism, used for present and future offenders, inspiring to act according to law and not avoiding the situation when law is used like an inquisition tool.

If we took a look at two of most popular criminal punishment theories which could help eliminate or at least minimise objectionable behaviour, we should refuse the compensation theory because of its orientation to the past. Looking at the compensation theory of punishment as a theoretical basis for the balance between the profit, gained of offender and harm caused for society, we are not able to foresee the impact of such punishment on the future society. In this case, the question in what way this kind of punishment will influence achievement of objectives of criminal law, or will it have a deterrent effect on society stays unanswered.

The most serious attention should be paid to another theory of punishment - the deterrent theory as a practical implementation of efficiency principle in the EU criminal law. Sending the message to society about the harmfulness of behaviour, we wish not only to stop the possible offender, but also to inform the society about the consequences for actions which cause harm to our values, accepting the position that the safeguard, given by criminal law, can exist only being exclusively preventive (Heinz, 2017). Nevertheless, the most important criteria in this case should not be eliminated in any way - criminal law should be used as *ultima ratio* and as it has been pointed in the Nordic criminal law doctrine, based on moral values (Lahti, 2020).

In this situation, the main question arises - if punishment is a tool for social control of most valuable goods, do we need to identify these values and not to limit ourselves with amount of sanctions? It is known that efficiency serves as one of criteria for criminalisation- when other non-criminal measures are not efficient, we open the gate for criminal law. On the other hand, the same situation helps to think over the basis of criminalisation- are the criminal measures really able to guarantee the efficiency (Suominen, 2014). Furthermore, the main question is if we, by using the deterrent punishment theory as a mechanism to stop the behaviour which is socially harmful, are still accepting the position that sanctions are really effective, paying no attention on moral basis of criminal law and denying background of common values?

The implementation of deterrence in the EU is more complicated than on national basis because of its complexity- it is difficult to find the mechanism which could influence people with different interest, different culture and national legal systems.

It is important to note that the principle of efficiency can be implemented through sanctions only if we find the balance with already existing legal norms in legal systems in Member States. The penalty scale which seems quite suitable for one country if is used by "cut and paste" mode in another country can have the opposite effect because of disbalance with already existing norms.

The globalised criminal law in the EU can be effective putting the accent on indirect effect- not only understanding the sanctions having deterrent effect and ensuring functioning of efficiency but regarding to indirect influence of morals norms in society. It means that not the hard sanctions, but its legitimacy, explained to society guarantees the efficiency arising from the inner side of society.

In order to harmonise the criminal law for the most serious crimes affecting the EU policy, the principle of efficiency is used as the main concept separating national and EU competences. Nevertheless, the meaning of this principle remains unclear and uncertain until present days. Whereas the effective criminal law requires effective sanctions, EU criminal law efficiency is tightly connected with penalties. By criminalising certain types of conduct and using effective, dissuasive and proportionate sanctions, first of all, we need to answer what kind of sanctions are effective from the national view and the view of EU politics. The EU criminal justice system will only be effective if it is based on the common values of the Union, for which proportionate sanctions were used in the same way refusing the template transposition of directives to the national law and avoiding the illusion of balance and efficiency of national legal systems.

Criminal sentencing theories which can be used as a tool to assess the effectiveness of penalties, require a test to prove its ability of criminal sanctions to act in a well organised manner by achieving future-oriented objectives ensuring the implementation of the principle of effectiveness in the EU criminal law. Theoretically, by using two main penal systems, that is to say, compensatory and preventative penal theories, we have a possibility to test the models of national legislators, used to implement EU criminal law. The nature of the EU contradicts to the compensatory punishment theory- in today's society, criminal law has one of the most important tasks- to deter individuals from committing a criminal offence. Hence, the criminal law must be able to act in a deterrent way. Only the sanctions which are based on the protection of the EU values and are implemented in national legal system without any disbalance can be seen as a concept of efficiency principle.

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About author

PhD Student and Assistant in Faculty of Law, Kaunas Vytautas Magnus University.