Discussion Paper

Informal Justice and Home Affairs Ministers' Meeting

Copenhagen

26-27 January 2012

Session II (Justice)

Criminal sanctions and the proposal for a directive on insider dealing and market manipulation

1. On 20th September 2011, the Commission presented its communication "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law". It follows *inter alia* from the communication that the adoption of EU criminal law measures in view of the cross-border dimension of many crimes can help ensure that criminals can neither hide behind borders nor abuse differences in national legal systems for criminal purposes. Furthermore, common minimum rules can enhance the mutual trust between Member States and the national judiciaries. A high level of trust is indispensable for smooth cooperation among the judiciaries in different Member States. The principle of mutual recognition of judicial measures, which is a cornerstone of judicial cooperation in criminal matters, can only work effectively with a high degree of mutual trust.

The Lisbon Treaty created an explicit legal basis for the adoption of criminal law directives. Previously, the usual instruments for approximation of EU criminal law were framework decisions.

It follows from Article 83(1) TFEU that measures can be adopted concerning a list of explicitly listed offences (sometimes referred to as "euro

crimes") that by definition merit an EU approach due to their particularly serious nature and cross-border dimension (eg. terrorism, trafficking in human beings and money laundering). Furthermore, it follows from Article 83(2) TFEU that the European Parliament and the Council may adopt minimum rules with regard to the definition of criminal offences and sanctions 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 a harmonization measure.

In April 2002, the Council adopted conclusions on the approach to approximation of penalties (see Council doc 9141/02). On 30 November 2009, the Council adopted conclusions on model provisions, guiding the Council's criminal law deliberations (see Council doc 16542/2/09).

2. In its communication of 20th September 2011, the Commission states that it is not the role of the EU to replace national criminal codes, but EU criminal law legislation can add important value to the existing national criminal law systems. The Commission lists a number of areas where this is the case. First of all, EU criminal law can foster the confidence of citizens in using their right to free movement and to buy goods or services from other Member States through a more effective fight against crime and the adoption of minimum standards for procedural rights in criminal proceedings as well as for victims of crimes. Furthermore, many serious crimes, including violations of harmonised EU legislation, today occur across borders and there is thus an incentive and possibility for criminals to choose the Member State with the most lenient sanctioning system in certain crime areas unless a certain degree of approximation of the national laws prevents the existence of such "safe havens". Moreover, common rules strengthen mutual trust among the judiciaries and law enforcement authorities of the Member States and this facilitates the mutual recognition of judicial measures as national authorities feel more comfortable recognizing decisions taken in another Member State if the definitions of the underlying criminal offences are compatible and there is a minimum approximation of sanction level. Common rules also facilitate cooperation with regard to the use of special investigative measures in cross-border cases. Finally, EU criminal law helps to prevent and sanction grave offences against national law implementing EU law in important policy areas, such as the protection of the environment or illegal employment.

However, criminal law is a sensitive policy area with significant impact on the citizens' fundamental rights and the sovereign powers of the Member

States. Criminal law is generally considered to reflect basic values, customs and choices of any given society and has in most cases gone through a long and continuous development reflecting the development in the surrounding society. It is therefore important to ensure that EU criminal law respects the different legal systems and traditions of the Member States as provided by Article 67 TFEU and gives room for well-founded differences in national criminal law.

3. On 20th October 2011 the Commission presented its proposal for a directive on criminal sanctions for insider dealing and market manipulation. The proposed directive is the first proposal based on the new legal basis in Article 83(2) TFEU. The proposal requires Member States to take the necessary measures to ensure that the criminal offences of insider dealing and market manipulation are subject to criminal sanctions and that the criminal sanctions imposed are effective, proportionate and dissuasive.

The Impact Assessment accompanying the proposal shows that there are significant differences in the national laws of Member States in regard to criminal sanctions for marked abuse crimes. The proposed provision on sanctions does not define a specific level of sanctions, but sets up the general criteria that sanctions should be effective, proportionate and dissuasive. It could be argued that the Commission has thereby tabled a proposal that diminishes the risk that criminals can speculate in national differences while respecting the diversity of the national legal systems.

4. Against this background, the Presidency invites Ministers to address the following questions:

- Do Ministers agree that in regard to the proposal for a directive on criminal sanctions for insider dealing and market manipulation it is appropriate to have – as proposed by the Commission – a provision that does not define a specific level of sanctions?

- Do ministers consider that establishing common minimum and maximum sanctions in an instrument of this kind would provide added value?

- Do ministers consider that provisions defining specific levels of sanctions should be the general rule or the exception in future criminal law directives where the legal basis is Article 83, paragraph 2, or should this issue be examined on a case-by-case basis?