Measuring the Added Value of EU Criminal Law

Wouter Van Ballegooij *

eucrim
European Law Forum: Prevention • Investigation • Prosecution

ABSTRACT

As part of its efforts to ensure better law-making at the EU level, together with the other EU institutions, the European Parliament is paying increasing attention to the added value of European action ("European added value") as well as the costs of not taking action at the EU level ("cost of non-Europe").
This article looks at the questions of how and to what extent these concepts can be applied to the area of EU criminal law. It will do so based on an assessment of two studies produced by the European Parliament's Directorate for Impact Assessment and European Added Value:
- A European added value assessment accompanying a legislative initiative report on the reform of the European Arrest Warrant;
- A cost of non-Europe report on organised crime and corruption, supporting an own-initiative report on the matter.
The article concludes by identifying a number of challenges and limitations to measuring the added value of EU criminal law.

AUTHOR

Wouter Van Ballegooij

Legal and policy officer on criminal law
European Commission

CITE THIS ARTICLE

Van Ballegooij, W. (2016). Measuring the Added Value of EU Criminal Law. Eucrim - The European Criminal Law Associations' Forum. https://doi.org/10.30709/eucrim-2016-010

Published in eucrim 2016, Vol. 11(2) pp 90 – 94

https://eucrim.eu

ISSN:

I. Better Law-Making

In the context of its agenda on better law-making,[1] the EU aims at ensuring that EU policy is prepared, implemented, and reviewed in an open, transparent manner, supported by the best available evidence, and backed up by involving stakeholders.[2] In this context, impact assessments prepared by the European Commission collect evidence to assess whether future legislative or non-legislative EU action is justified. An impact assessment must identify and describe the problem to be tackled, establish objectives, formulate policy options, and assess the impacts of these options. The Commission's impact assessment system follows an integrated approach that assesses the environmental, social, economic, and fundamental rights impacts of the options identified in accordance with the Better Regulation Guidelines and an accompanying "Toolbox."[3] All relevant impacts should be assessed quantitatively, if possible, as well as qualitatively. Similarly, impacts should be expressed in terms of money whenever possible.[4] The European Parliament also contributes to the quality of EU law-making, *inter alia* through its Directorate for Impact Assessment and European Added Value, which is part of its Directorate General for European Parliamentary Research Services. This directorate provides *ex-ante* and *ex-post* impact assessment support to parliamentary committees, together with assessments of the added value of future or current EU policies. This includes the option of providing complementary or substitute impact assessments to those prepared by the European Commission.[5]

II. European Added Value and the Cost of Non-Europe

In their latest interinstitutional agreement on better law-making adopted in March 2016,[6] the European Commission, the European Parliament, and the Council of the European Union agreed that analysis of the potential "European added value" of any proposed Union action, as well as an assessment of the "cost of non-Europe" in the absence of action at Union level, should be fully taken into account when setting the legislative agenda.[7] This includes the situation in which the Commission decides not to submit a proposal in response to a request based on a legislative initiative[8] put forward by the European Parliament.[9]

The cost of non-Europe and European added value are two mirror concepts. The first one focuses on assessing the cost of non-action at the EU level; the second one concentrates on the benefits of action at EU level. The European added value concept originates from discussions on the added value of EU spending,[10] whereas the cost of non-Europe concept derives from the 1988 Cecchini report on the cost of non-Europe in the single market, defined as the untapped potential of the single market due to its incomplete implementation.[11]

Benefits of action at the EU level could, for instance, be financial (cost savings due to efficiency gains), legal (more legal certainty, coherence), social (reduction in inequality), or political (enhanced mutual trust, effectiveness in achieving the policy aims of the Union in the area concerned). The cost of non-Europe and European added value concepts are linked to the requirements of subsidiarity and proportionality laid down in Art. 5 TEU and the relevant protocol, particularly in assessing whether the objectives of the proposed action cannot be sufficiently achieved by the Member States (i.e., necessity) and whether the action can therefore, by reason of its scale or effects, be implemented more successfully by the Union (i.e., added value).[12]

III. Measuring the Added Value of EU Criminal Law

The EU aims at developing into an area of freedom, security and justice, combining rules on the free movement of persons with measures related to the prevention and combating of crime. This includes minim-

https://doi.org/10.30709/eucrim-2016-010

um rules regarding the definition of criminal offences for particularly serious "Euro crimes" and for ensuring the effectiveness of a harmonised EU policy area, such as environmental policy, the facilitation of judicial cooperation, the adoption of minimum standards for procedural rights, and the protection of the Union's financial interests. However, the principles of subsidiarity and proportionality remain particularly relevant in the area of EU criminal law,[13] given the need to take into account the differences between the legal traditions and criminal justice systems of the Member States, as underlined in the relevant legal bases provided for by the TFEU.[14] Another important consideration for this policy area concerns the need for law enforcement measures to comply with fundamental rights in accordance with Art. 6 TEU and the EU Charter of Fundamental Rights.[15]

Since 2009, each of the three EU institutions has taken a position regarding EU criminal policy: the Council adopted conclusions containing model provisions guiding Council deliberations on criminal law,[16] the Commission adopted a communication on EU criminal policy,[17]and the European Parliament adopted a resolution entitled "An EU approach to criminal law."[18] All EU institutions have outlined ideas to ensure that the necessity for EU criminal law is demonstrated based on factual evidence.[19] However, the Commission's communication also addresses the benefits of action at the EU level from a policy perspective, notably strengthening the confidence of citizens in exercising their free movement rights, enhancing mutual trust among judiciaries and law enforcement, ensuring effective enforcement of EU law in areas such as the protection of the environment or illegal employment, and ensuring a consistent and coherent system of legislation.[20] The European Parliament's resolution also led to the establishment of an informal contact group of representatives of the European Parliament, the Council, and the Commission, the so-called "Criminal Law Contact Group" (CLCG). The group aims to discuss the quality and consistency of legislation in the field of EU criminal law, including the topics of subsidiarity, proportionality, and EU added value.[21] The idea of the three EU institutions exchanging information on best practice and methodologies relating to impact assessments is also covered by the aforementioned 2016 interinstitutional agreement on better law-making.[22] Measuring the added value of EU criminal law entails a number of challenges and limitations. These challenges and limitations will be identified in the following on the basis of the two studies mentioned in the introductory remark.

1. The European added value of reforming the European Arrest Warrant

The European Parliament's legislative own-initiative report on the revision of the European Arrest Warrant and the accompanying European Added Value Assessment (EAVA) focused on the benefits of addressing deficiencies in the operation of surrender procedures based on the European Arrest Warrant, notably the lack of safeguards preventing its disproportionate use and ensuring the protection of the fundamental rights of requested persons. The EAVA concluded that the weaknesses of the existing European Arrest Warrant regime not only undermine the credibility of the process but are also costly for the individuals concerned, for their families, and for the taxpayer in general. Between 2005 and 2009, almost 75% of incoming EAWs (43,059) were not executed. The EAVA estimated the costs of these inefficiencies to be approximately €215 million for the EU as a whole.[23] The European Parliament called for amendments to the Framework Decision or horizontal EU legislation and non-legislative measures. The added value of these measures was expressed both in quantitative terms (cost savings for Member States) and qualitative terms (more coherence, legal certainty, and mutual trust based on respect for fundamental rights).[24]

The European Commission responded[25] that proposing legislative change would be premature in the light of the increased enforcement power of the Commission since December 2014. It also referred to the development of other mutual recognition instruments "that both complement the European arrest warrant system and in some instances provide useful and less intrusive alternatives to the European arrest warrant;" and the ongoing work "to further improve this context by ensuring respect for fundamental rights by providing

common minimum standards of procedural rights for suspects and accused persons across the European Union."[26]

In its judgment of 5 April 2016 (Joined Cases *Aranyosi* & *Căldăraru*), the Court of Justice has now partially addressed the fundamental rights and proportionality deficiencies by interpreting Art. 1 para. 3 of the Framework Decision on the European Arrest Warrant in a manner that ultimately allows the surrender procedure to be brought to an end if there is a real risk of inhuman or degrading treatment.[27] This judgement, however, leaves many questions open as regards the mandate of the executing judicial authority when dealing with violations of the right to liberty, fair trial, family life, and free movement. From the perspective of legal certainty, legislative intervention therefore remains the preferred option.

2. The cost of non-Europe in the fight against organised crime and corruption

The Cost of Non-Europe Report on Organised Crime and Corruption sought to identify the costs of organised crime and corruption in social, political, and economic terms at the European Union level and examined the potential benefits of more concerted action at the EU level compared to the lack of action or action by Member States alone.

Based on the research conducted, the report concludes, however, that establishing the "cost of non-Europe" in this area is difficult given the lack of clarity related to the concepts of "serious"[28] and "organised" crime[29] as well as "corruption."[30] Furthermore, information on crime and corruption is uneven across the Member States. And when it is available, it is often not coherent and comparable. Criminal justice statistics may also be interpreted in different ways, depending on the perspective taken and whose "costs" are measured (law enforcement, victim, suspect, society as a whole, etc.). This is of particular importance given the close relationship this area has with the protection of individual rights.[31]

Given the limitations described above, the report provides scenarios showing the extent of organised crime and corruption in the European Union as well as the potential benefits of decreasing their impact. Based on the research conducted by RAND, the report estimates the economic loss to the European economy in terms of GDP due to corruption to be between €218 and €282 billion annually. The study also builds on existing estimates of the size of illicit markets representing a value of approx. €110 billion.[32] As combatting organised crime and corruption is a shared competence between the EU and its Member States, the report estimates the potential that could be achieved by the EU and its Member States acting together at €71 billion annually. This could be done above all by improvements in monitoring mechanisms (possibly integrating them into a broader rule-of-law monitoring framework), digitalisation of procurement procedures (reducing the risk of corruption), and the expected increase in prosecution and conviction rates (due to the establishment of a European Public Prosecutor's Office).[33] It is clear, however, that the benefits of more concerted action at the EU level can only be clearly assessed based on the ultimate shape of the policy options mentioned. Their impact will have to be further evaluated both *ex-ante* and *ex-post*.[34]

IV. Challenges and Limitations to Measuring the Added Value of EU Criminal Law

The concepts of the cost of non-Europe and European added value can be, and have been, applied to the area of EU criminal law. However, the various positions adopted by EU institutions as regards the development of EU criminal policy and the two case studies on the European Arrest Warrant and organised crime/

corruption also point to challenges and make apparent the limits of quantifying the costs and benefits of EU intervention in an area mostly guided by qualitative considerations.

EU criminal law contributes to the development of the Union as an area of freedom, security and justice. As the case study on the European Arrest Warrant shows, ensuring compliance with the Union's fundamental rights obligations remains a challenge. The currently predominant focus on effectiveness from a law enforcement perspective overlooks the wider aims of the Union. The case study on organised crime and corruption further illustrates the need to overcome the lack in comparable data and clear definitions of serious and organised crime at the operational level. Without them, a proper assessment of the need for and impact of EU criminal law is not possible.

These challenges should be addressed through a proper interinstitutional discussion, including discourse within the context of the Criminal Law Contact Group. Agreement needs to be found on data collection needs, the development of quantitative and qualitative criteria to determine the added value of EU criminal law, as well as the joint commitment to measure the impact of specific proposals on fundamental rights.

---

1. For background information, see the Commission website on better regulation: <http://ec.europa.eu/smart-regulation/index_en.htm>. See also A. Renda, "Too good to be true, A quick assessment of the European Commission's new Better Regulation Package", *CEPS special report*, No 108, May 2015, available at <https://www.ceps.eu/system/files/SR108AR_BetterRegulation.pdf>.↩
2. Commission Staff Working Document, Better Regulation Guidelines, SWD (2015) 111of 19.05.2015.↩
3. Better Regulation "Toolbox", available at: http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf.↩
4. European Commission, Guidelines on Impact Assessment, section 2.5.3, available at: <http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.htm>.↩
5. European Parliament, Conference of Committee Chairs, Impact Assessment Handbook, available at <http://www.europarl.europa.eu/EPRS/impact_assesement_handbook_en.pdf>, paragraph 13-15.↩
6. Interinstitutional Agreement on Better Law-Making between the European Parliament, the Council of the European Union and the European Commission, available at: http://ec.europa.eu/info/files/inter-institutional-agreement-better-law-making_en.↩
7. Interinstitutional Agreement on Better Law-Making, op. cit. (n. 9), recital 5.↩
8. Art. 225 TFEU: "The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons."↩
9. Interinstitutional Agreement on Better Law-Making, op. cit. (n. 9), paragraph 10.↩
10. Commission Staff Working Paper, "The added value of the EU budget", SEC(2011) 867 of 29.6.2011, p. 2: "European added value is the value resulting from an EU intervention which is additional to the value that would have been otherwise created by Member State action alone."; For an example see Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 – the European Fund for Strategic Investments, *O.J.* L 169, 1.7.2015, pp. 1–38, Art. 16.↩
11. For a summary, see European Commission, Europe 1992, the overall challenge, SEC(88) 524 of 13.4.1988, available at <http://penguincompanion-toeu.com/wp-content/uploads/2012/10/Cecchini-Report-Summary-April-1988.pdf>.↩
12. Art. 5 TFEU; Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, *O.J.* C 326, 26.10.2012, pp. 47–390; The Commission elaborated the concept of European added value in a number of specific questions mentioned in its Better Regulation "Toolbox #3", available at <http://ec.europa.eu/smart-regulation/guidelines/tool_3_en.htm>.↩
13. For a more general reflection on the application of the principles of subsidiarity and proportionality in the area of EU criminal law, see E. Herlin Karnell, *The constitutional dimension of European Criminal Law*, Oxford 2012, chapter 4 section IV; P. de Hert and I. Wieczorek, "Testing the prin-
ciple of subsidiarity in EU criminal policy, The Omitted Exercise in Recent EU Documents on Principles for Substantive European Criminal Law", *New Journal of European Criminal Law*, 3 (2012), pp. 394-411.↩
14. Arts. 69, 81-83, 86 TFEU, in particular; W. De Bondt and S. Miettinen, "Minimum Criminal Penalties in the European Union: In Search of a Credible Justification", *European Law Journal*, 21 (2015), pp. 722-737.↩
15. *O.J.* C 115 of 9 May 2008, p. 1. For a commentary on the EU Charter, see S. Peers, T. Hervey, J. Kenner, A.Ward (eds.), *The EU Charter of Fundamental Rights*, Oxford et al., 2014.↩
16. "Model provisions guiding Council's criminal law deliberations", Council doc. 16798/09.↩
17. "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law", COM (2011) 573.↩
18. European Parliament resolution of 22 May 2012 on an EU approach to criminal law, P7_TA(2012)0208; Commented by A. Klip, *European Criminal Law, An integrative approach,* 3rd edition, Cambridge-Antwerp-Portland, 2016, pp. 241-243.↩
19. As compared in the Annex to Council Doc. 10137/15 of 24 June 2015; '"Meeting of the Criminal Law Contact Group on 12 May 2015- Information by the Presidency"'.↩
20. COM (2011) 573, p. 5.↩
21. "Meeting of the Criminal Law Contact Group on 12 May 2015 – Information by the Presidency", Council Doc. 10137/15 of 24 June 2015.↩

22. Interinstitutional Agreement on Better Law-Making, op. cit. (n. 9)„ paragraph 17↩
23. M. del Monte, op. cit. (n. 1), p. 30.↩
24. M. del Monte, op. cit. (n. 1), p. 32.↩
25. Commission response, SP(2014)447, available at: <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2013/2109%28INL%29&l=en#tab-0>. The position of the Commission was confirmed by Justice Commissioner Věra Jourová during her nomination hearing procedure by the European Parliament in October 2014, see p. 5, 6: http://www.europarl.europa.eu/hearings-2014/resources/library/media/20141021RES75568/20141021RES75568.pdf.↩
26. Commission response, op. cit. (n. 28). For comments, see W. van Ballegooij; The nature of mutual recognition in European Law, Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area, Cambridge-Antwerp-Portland, 2015, Chapter 3, section 5.3.1.↩
27. CJEU, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi* and *Robert Căldăraru*, 5 April 2016, not yet published.↩
28. Cf. CJEU, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland* and *Seitlinger and others*, 8 April 2014, ECR [2014] 238, para. 60: "Secondly, not only is there a general absence of limits in Directive 2006/24 but Directive 2006/24 also fails to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference. On the contrary, Directive 2006/24 simply refers, in Article 1(1), in a general manner to serious crime, as defined by each Member State in its national law". See also P. de Hert and I. Wieczorek, op. cit. (n. 16), p. 406.↩
29. CEPS, op. cit. (n. 2), section 2.2.↩
30. RAND Europe, op. cit. (n. 2), section 1.4.↩
31. CEPS, op. cit. (n. 2), sections 1.1.4. and 1.2.4.; P. Bárd, "The benefits of the EU from a criminal law perspective", *Social Security Network/ CEPS blogpost*, 2016, available at: <http://societalsecurity.net/blog/ceps-blog-post-benefits-eu-criminal-law-perspective-0>.↩
32. E.U. Savona and M. Riccardi (eds.), *From illegal markets to legitimate businesses: the portfolio of organised crime in Europe.* Final Report of Project OCP, 2015, available at: http://www.ocportfolio.eu/_File%20originali/OCP%20Full%20Report.pdf.↩
33. W. van Ballegooij and T. Zandstra, op. cit. (n. 2), p. 24-27.↩
34. A. Davies, *Initial appraisal of a Commission Impact Assessment. European Commission proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office*, Ex-Ante Impact Assessment Unit, European Parliament, PE 514.087, December 2013; W. van Ballegooij and T. Evas, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, Interim European Added Value Assessment accompanying the Legislative initiative report (Rapporteur Sophie in 't Veld)*, European Added Value Unit, European Parliament, PE.579.328, April 2016. For an example of an ex-post impact assessment, see A. Scherrer and H. Werner, *Trafficking in Human Beings from a Gender Perspective (Directive 2011/36/EU): European Implementation Assessment*, Ex-Post Impact Assessment Unit, European Parliament, PE 581.412, April 2016.↩

Author statement

The views expressed in this article are solely those of the author. The author would like to thank Prof. André Klip, Prof. Wim Marneffe, Dr. Amandine Scherrer, and Dr. Katharina Eisele for comments on previous drafts of this article.

legal and policy developments across Europe.
All content is freely accessible at https://eucrim.eu, with four online and print issues published annually.

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases.
The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union

https://doi.org/10.30709/eucrim-2016-010