

Legal Regulation & Education: Doing the Right Thing?

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Illegal access to information systems and the Directive 2013/40/EU: a step backwards on the adequate protection of rights.

The Directive 2013/40/EU of the European Parliament and of the Council of 12, August 2013, on attacks against information systems, came into force on 3, September 2013, replacing Council Framework Decision 2005/222/JHA. Albeit it criminalizes new activities such as the illegal interception and the usage of certain tools for committing offenses, it roughly maintains a similar set of criminal offenses.

The offense that is the center focus of our communication - illegal access to information systems - is henceforth referred to in Article 3 of the new Directive and brings about some new characteristics that should be addressed. The Article now has a single paragraph (dedicated this), thus eliminating the two numbers that comprised the same offense in Council Framework Decision 2005/222/JHA. What now stands out is that the incrimination of the illegal access to information systems depends upon whether such access infringes a security measure. Thus, what previously constituted a mere faculty of the Member States (Article 2, No. 2 of Framework Decision 2005/222/JHA), is now, with this new wording, an essential element to unleash criminal legal responsibility. In our view, it is a legal solution that not only creates hermeneutic quandaries in its implementation, but also presents us with some doubts at a criminal policy level. In fact, one should ask what are "security measures" in information systems, e.g., laptops, smartphones, tablets, etc.. Are judges, prosecutors, lawyers and law students aware of the difficulties raised by the implementation of the legal norms of this new field of law - cybercrime - and, more specifically, the effort needed to bring into force the new Directive in order to comply with the minimum standards set out by the European Union? And is this new Directive, regarding the illegal access to information systems, the correct path? These are some of the questions to which we propose a reply that, as anticipated by the title of our communication, will explain whether such is a step backwards on the adequate protection of rights.