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NOTE

From: Presidency
To: Delegations

Subject: Meeting of the Criminal Law Contact Group on 12 May 2015
- Information by the Presidency

Following an invitation by MEP Dennis De Jong, who was the rapporteur of the European Parliament resolution of 22 April 2012 on "An EU approach to criminal law" (2010/2310(INI)), a meeting of the "criminal law contact group" (CLCG) took place on 12 May 2015. At this meeting, representatives of the European Parliament, the Commission and the Council were present, the latter being represented by the Latvian Presidency; representatives of the incoming Luxembourg and Netherlands Presidencies were also present.

It is recalled that the CLCG is an informal contact group which was established some years ago following the adoption of the above mentioned resolution of May 2012. That resolution called, inter alia, for "*an inter-institutional agreement on the principles and working methods governing proposals for future EU substantive criminal law provisions*" and invited "*the Commission and the Council to establish an inter-institutional working group in which these institutions and Parliament can draw up such an agreement and discuss general matters, where appropriate consulting independent experts, with a view to ensuring coherence in EU criminal law*". While the Commission and the Council were not willing to enter into negotiations on a formal inter-institutional agreement, they were willing to informally exchange views on the quality and consistency of legislation in the field of European criminal law. It was for this reason that the CLCG was established.

Mr. De Jong observed that all three institutions have produced a set of guiding principles underlying legislative initiatives in the field of substantive criminal law, and he called for the adoption of a document – which could also be a more informal document, such as a memorandum of understanding – setting common standards regarding these principles. According to Mr. De Jong, as a basis for this work a table produced by the EP Secretariat could be used, which contains a comparison of the Parliament resolution of 2012, the 2009 Council conclusions on model provisions (doc 16798/09) and the communication of the Commission (*Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*, COM(2011) 573 final). This table is set out in the Annex.

In a reaction to the call by Mr. De Jong, the Commission explained that at this stage it is more concerned about the substance and would favour continuing the informal exchange of views instead of focusing on a common document. According to the Commission, the three institutions have a common approach but the devil is in the details. The Commission also suggested that a few more topics could be added to the list of principles set out in the comparative table, such as the prescription period, minimal sanctions and jurisdiction. It would be difficult, however, to find a "one fits all" solution for all criminal files.

The Latvian Presidency explained that it does not have a mandate from the Council to work on a common document, and that any action towards such a document would require prior discussions and a positive decision in the appropriate forum in the Council. The Presidency underlined however that the Council also attaches great importance to the issue of quality and consistency in European criminal justice legislation, and that it is therefore open to continue informal discussions in the CLCG.

Mr De Jong stated that he supports the Commission' suggestion of including additional elements in the table that are already provided in the three texts of the institutions, but that he would prefer to exclude any new elements, notably those which are still under discussion, such as prescription (PIF).

Mr. De Jong also asked for comments on the comparative table. **Member States who have any such comments, are kindly invited to inform the Presidency thereof.**

EP RESOLUTION 2012 / JHA COUNCIL CONCLUSIONS 2009/ COM COMMUNICATION 2011

| TOPIC | EP RESOLUTION | COUNCIL CONCLUSIONS | COMMISSION COMMUNICATION |
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| COHERENCE | <p>p. 2, lett. H: "whereas criminal law must constitute a coherent legislative system governed by a set of fundamental principles and standards of good governance in full respect of the EU Charter of Fundamental Rights, the European Convention on Human Rights and other international human rights conventions to which the Member States are signatories;"</p> <p>p. 3, lett. O: "whereas there is a need for Parliament to develop its own procedures in order to ensure, together with the co-legislator, a coherent criminal law system of the highest quality;"</p> | <p>p. 1, par. 5: "While noting the understanding reached in the JHA Council on 21 February 2006 on the procedure for the future handling of legislative files containing proposals relevant to the development of criminal law policy, the Council acknowledges the need for further action and coordination to ensure coherent and consistent use of criminal law provisions in EU legislation;"</p> <p>p. 2, par. 2, second bullet point: "Increased coherence would facilitate the transposition of EU provisions in national law;"</p> | <p>p. 3, par. 5: "Coherence and consistency: While EU criminal law measures can play an important role as a complement to the national criminal law systems, it is clear that criminal law reflects the basic values, customs and choices of any given society. The Lisbon Treaty accepts this diversity. For this reason, it is particularly important to ensure that EU legislation on criminal law, in order to have a real added value, is consistent and coherent."</p> <p>p. 12, par. 1: "This communication represents a first step in the Commission's efforts to put in place a coherent and consistent EU Criminal Policy by setting out how the EU should use criminal law to ensure the effective implementation of EU policies."</p> |

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| <p>ULTIMA RATIO (LAST RESORT)</p> | <p>p. 2, lett. I: "whereas in view of its being able by its very nature to restrict certain human rights and fundamental freedoms of suspected, accused or convicted persons, in addition to the possible stigmatising effect of criminal investigations, and taking into account that excessive use of criminal legislation leads to a decline in efficiency, criminal law must be applied as a measure of last resort (ultima ratio) addressing clearly defined and delimited conduct, which cannot be addressed effectively by less severe measures and which causes significant damage to society or individuals;"</p> | <p>p. 2, Assessment, (1): "Criminal law provisions should be introduced when they are considered essential in order for the interests to be protected and, as a rule, be used only as a last resort."</p> | <p>p. 7, par. 3: Necessity and Proportionality – Criminal law as a means of last resort ("ultima ratio") Criminal investigations and sanctions may have a significant impact on citizens' rights and include a stigmatising effect. Therefore, criminal law must always remain a measure of last resort. This is reflected in the general principle of proportionality (as embodied in the Treaty on European Union and, specifically for criminal penalties, in the EU Charter of Fundamental Rights). For criminal law measures supporting the enforcement of EU policies, the Treaty explicitly requires a test of whether criminal law measures are "essential" to achieve the goal of an effective policy implementation.</p> |
| <p>SUBSIDIARITY AND PROPORTIONALITY</p> | <p>p.2, lett. D: "whereas the principles of subsidiarity and proportionality, as mentioned in Article 5 TEU, are therefore particularly relevant in the case of legislative proposals governing criminal law;"</p> <p>p. 3, lett. Q, point 1: "Stresses that proposals for EU substantive criminal law provisions must fully respect the</p> | <p>p. 2, Assessment, (2): "Criminal provisions should be adopted in accordance with the principles laid out in the Treaties, which include the principles of proportionality and of subsidiarity, to address clearly defined and delimited conduct, which cannot be addressed effectively by less severe measures:"</p> | <p>p. 2, par. 1: "An EU Criminal Policy should have as overall goal to foster citizens' confidence in the fact that they live in a Europe of freedom, security and justice, that EU law protecting their interests is fully implemented and enforced and that at the same time the EU will act in full respect of subsidiarity and proportionality and other basic Treaty principles."</p> |

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| | <p>principles of subsidiarity and proportionality;"</p> | | <p>p. 6, par. 5: "The general subsidiarity requirement for EU legislation must be given special attention with regard to criminal law."</p> <p>p. 7, par. 3: "criminal law must always remain a measure of last resort. This is reflected in the general principle of proportionality."</p> |
| <p>LEX CERTA, PRECISE WORDING AND FORESEEABILITY</p> | <p>p. 3, lett. K: "whereas in accordance with the <i>lex certa</i> requirement the elements of a criminal offence must be worded precisely in order to ensure predictability as regards its application, scope and meaning;"</p> <p>p. 3, lett. L: "whereas in the case of directives, Member States retain a certain measure of discretion on how to transpose the provisions into their national legislation, which means that in order to meet the <i>lex certa</i> requirement, not only EU legislation itself, but also its transposition into national legislation must be of the highest quality;"</p> <p>p. 4, lett. Q, point 4, second indent: "[Recognises the importance of] ... the</p> | <p>p. 3, Assessment, (4): "The description of conduct which is identified as punishable under criminal law must be worded precisely in order to ensure predictability as regards its application, scope and meaning."</p> | <p>p. 7, par. 6: "the principle of legal certainty requires that the conduct to be considered criminal must be defined clearly. However, an EU directive on criminal law does not have any direct effect on a citizen; it will have to be implemented in national law first. Therefore, the requirements for legal certainty are not the same as for national criminal law legislation. The key is the clarity for the national legislator about the results to be achieved in implementing EU legislation."</p> <p>p. 12., par. 2: "For this purpose, the Commission will draft, in close cooperation with Parliament and Council, sample language. This should guide the EU legislator whenever drafting criminal law provisions setting minimum rules on</p> |

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| | <p>principle of legal certainty (lex certa): the description of the elements of a criminal offence must be worded precisely to the effect that an individual shall be able to predict actions that will make him/her criminally liable.</p> <p>p. 3, lett. Q, point 4, first indent: "[Recognises the importance of] ... the principle of individual guilt (<i>nulla poena sine culpa</i>), thus prescribing penalties only for acts which have been committed intentionally, or in exceptional cases, for acts involving serious negligence,"</p> <p>p. 2, lett. J: " whereas EU criminal legislation should, as a general rule, only prescribe penalties for acts which have been committed intentionally or, in exceptional circumstances, for those involving serious negligence, and must be based on the principle of individual guilt (<i>nulla poena sine culpa</i>), although in certain instances it may be justified to provide for corporate liability for certain types of offence;</p> | | <p>offences and sanctions. This would contribute to ensure consistency, increase legal certainty and facilitate implementation of EU law."</p> |
| <p style="text-align: center;">INTENT, NEGLIGENCE AND PRINCIPLE OF GUILT</p> | <p>p. 3, Intent, (6): "EU criminal legislation should, as a general rule, only prescribe penalties for acts which have been committed intentionally."</p> <p>p. 3, Intent, (7): "Negligent conduct should be criminalised when a case-by-case assessment indicates that this is appropriate due to the particular relevance of the right or essential interest which is the object of protection, for example in cases of serious negligence which endangers human life or causes serious damage."</p> <p>p. 3, Intent, (8): "The criminalisation of an act that has been committed without intention or negligence, i.e., strict liability, should not be prescribed in EU criminal legislation."</p> | | <p>p. 9, par. 2: "All EU criminal law instruments include in the definition intentional conduct, but in some cases also seriously negligent conduct."</p> |

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| <p>HARMFULNESS AND SERIOUSNESS OF THE CRIME</p> | <p>p. 3, lett. Q, point 3, first indent: "[Emphasises that...the necessity of new substantive criminal law provisions must be demonstrated by the necessary factual evidence making it clear that:] the criminal provisions focus on conduct causing significant pecuniary or non-pecuniary damage to society, individuals or a group of individuals,"</p> <p>p. 3, lett. Q, point 3, third indent: "[Emphasises that...the necessity of new substantive criminal law provisions must be demonstrated by the necessary factual evidence making it clear that:] the crime involved is of a particularly serious nature with a cross-border dimension or has a direct negative impact on the effective implementation of a Union policy in an area which has been subject to harmonisation measures,"</p> | <p>p. 3, Assessment, (5): "The criminal provisions should focus on conduct causing actual harm or seriously threatening the right or essential interest which is the object of protection; that is, avoiding criminalisation of a conduct at an unwarrantably early stage. Conduct which only implies an abstract danger to the protected right or interest should be criminalised only if appropriate considering the particular importance of the right or interest which is the object of protection."</p> <p>p. 2, Assessment, (2), lett. a): [Criminal provisions should be adopted ... to address clearly defined and delimited conduct, which cannot be addressed effectively by less severe measures:] in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis, or"</p> | <p>p. 11, par. 3: "minimum rules on the definition of criminal offences and sanctions may prove to be essential in order to ensure the effective implementation of EU legislation. This analysis should take into account the following considerations. The seriousness and character of the breach of law must be taken into account. For certain unlawful acts considered particularly grave, an administrative sanction may not be a sufficiently strong response."</p> <p>p. 12, par. 2 of box: "In fields of EU policy where there is an identified enforcement deficit, the Commission will assess the need for new criminal law measures (...). This concerns notably (...) serious infringements of road transport rules, serious breaches of data protection rules, customs offences, environmental protection, fisheries policy and internal market policies to fight illegal practices such as counterfeiting and corruption or undeclared conflict of interests in the context of public procurement."</p> |
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| <p>EU ADDED VALUE</p> | <p>p. 3, lett. Q, point 3, fourth indent: "[Emphasises that...the necessity of new substantive criminal law provisions must be demonstrated by the necessary factual evidence making it clear that:] there is a need to combat the criminal offence concerned on a common basis, i.e. that there is added practical value in a common EU approach, taking into account, inter alia, how widespread and frequent the offence is in the Member States, and"</p> | <p>p. 2, Assessment, (3) second bullet point:" [When there seems to be a need for adopting new criminal provisions the following factors should be further considered, while taking fully into account the impact assessments that have been made:] how serious and/or widespread and frequent the harmful conduct is, both regionally and locally within the EU;"</p> <p>p. 2, Assessment, (3) first bullet point: "[When there seems to be a need for adopting new criminal provisions the following factors should be further considered, while taking fully into account the impact assessments that have been made:] the expected added value or effectiveness of criminal provisions compared to other measures, taking into account the possibility to investigate and prosecute the crime through reasonable efforts, as well as its seriousness and implications;"</p> | <p>p. 2, par. 3: "the EU can tackle gaps and shortcomings wherever EU action adds value. In view of the cross-border dimension of many crimes, the adoption of EU criminal law measures can help ensuring that criminals can neither hide behind borders nor abuse differences between national legal systems for criminal purposes."</p> <p>p. 5, par. 1 of box: "While it is not the role of the EU to replace national criminal codes, EU criminal law legislation can, however, add, within the limits of EU competence, important value to the existing national criminal law systems."</p> |
| <p>PROPORTIONA LITY OF THE PENALTY</p> | <p>p. 3, lett. Q, point 3, fifth indent: "[Emphasises that...the necessity of new substantive criminal law provisions must be demonstrated by the necessary factual evidence making</p> | <p>p. 3, Penalties, (10): "When it has been established that criminal penalties for natural persons should be included it may in some cases be sufficient to provide for effective, proportionate and</p> | <p>p. 8, par. 3: "The explicit requirement of the Charter of Fundamental Rights that "the severity of the penalty must not be disproportionate to the criminal offence" applies."</p> |

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| | <p>it clear that:] in conformity with Article 49(3) of the EU Charter on Fundamental Rights, the severity of the proposed sanctions is not disproportionate to the criminal offence;"</p> | <p>dissuasive criminal penalties and leave it to each Member State to determine the level of the penalties. In other cases there may be a need for going further in the approximation of the levels of penalties. In these cases the Council conclusions of April 2002 on the approach to apply regarding the approximation of penalties should be kept in mind, in the light of the Lisbon Treaty."</p> | <p>p. 9, par. 5 of box: "Regarding sanctions, EU criminal law can require Member States to take effective, proportionate and dissuasive criminal sanctions for a specific conduct. Effectiveness requires that the sanction is suitable to achieve the desired goal, i.e. observance of the rules; proportionality requires that the sanction must be commensurate with the gravity of the conduct and its effects and must not exceed what is necessary to achieve the aim; and dissuasiveness requires that the sanctions constitute an adequate deterrent for potential future perpetrators."</p> |
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