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NOTE

from:	Presidency
to:	COREPER/Council
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Subject:	Draft Council conclusions on model provisions, guiding the Council's criminal law negotiations

On 2 July 2009, the Article 36 Committee (CATS) discussed the item of "Criminal law in future negotiations - internal and external aspects" on the basis of doc. 11335/09. There was broad support from delegations for a continuation of the discussions on this issue. There was also support for having some form of standard model provisions pertaining to both internal legislation and international agreements. With regard to the form of these model provisions, delegations expressed the wish for soft law instruments. The relevance of the issue in view of the possible entry into force of the Lisbon Treaty was underlined.

Further to these discussions, the Presidency in cooperation with the German Delegation, presented on 9 October 2009 a proposal for draft Council conclusions on guidelines for future criminal law in EU legislation. The Working Party on Substantive Criminal Law has discussed the text of the draft Council conclusions during several meeting days in October and November.

The document has been discussed by the Article 36 Committee on 11 November 2009.

Delegations will find attached, in the Annexes I and II, a Presidency compromise proposal for the text of the Draft Council conclusions on model provisions, guiding the Council's criminal law negotiations. Modifications with regard to doc. 15565/09 are underlined. Deletions are marked by [...]. This text has been provisionally agreed in the margins of the meeting of the Article 36 Committee on 11 November 2009 and during consultations with the Member States.

The text is subject to general scrutiny reservations by all Member States.

Draft Council conclusions [...] on model provisions, guiding the Council's criminal law negotiations

Since the entry into force of the Amsterdam Treaty, several Framework Decisions have been adopted on the basis of Articles 31 and 34 of the TEU, establishing minimum rules concerning the definition of criminal offences and sanctions in various areas, inter alia terrorism, computer crime and organised crime.

In addition, the European Court of Justice has clarified that criminal law provisions may under certain conditions be included in specific areas of Community law.

The Lisbon Treaty is likely to have the effect that criminal law provisions will be discussed [...] within the Council to an even greater extent than at present. This may result in incoherent and inconsistent criminal provisions in EU legislation. Furthermore, provisions negotiated [...] within the Council might unjustifiably deviate from wording that is normally used in EU criminal legislation, thus creating unnecessary difficulties when implementing and interpreting EU law.

While noting the understanding reached in the JHA Council on 21 February 2006¹ 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.

To this end, it would be useful if the Council were to agree on guidelines and model provisions for its work on criminal law.

¹ See doc. 7876/06.

Foreseeable advantages of guidelines and model provisions for criminal law include:

- Guidelines and model provisions would facilitate negotiations by leaving room to focus on the substance of the specific provisions;
- Increased coherence would facilitate the transposition of EU provisions in national law;
- Legal interpretation would be facilitated when new criminal legislation is drafted in accordance with agreed guidelines which build on common elements.

The following guidelines should be conceived as a starting point for discussions in the Council [...]. These guidelines do not introduce obligations or constraints that go beyond what is set out in the Treaties. On this basis, the Council suggests that the Presidency should conduct future discussions on criminal law within the EU taking these conclusions into account, and that the Council should look, together with the European Parliament and the Commission and as soon as possible after the entry into force of the Lisbon Treaty, to further develop and refine them, and invites the Presidency to take the necessary measures to that end.

The Council therefore adopts the following conclusions:

Assessment of the need for criminal provisions

- (1) As a point of departure the European Union should as a general rule adhere to the principle of use of criminal law as a last resort.
- (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, 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.

- (3) 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 harmonisation measures and 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;
 - how serious and/or widespread and frequent the harmful conduct is, both regionally and locally within the EU;
 - the possible impact on existing criminal provisions in EU legislation and on different legal systems within the EU.
 - [...]

Structure of criminal provisions

- (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.
- (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.

Intent

- (6) EU criminal legislation should, as a general rule, only prescribe penalties for acts which have been committed intentionally.

- (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.
- (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.

Inciting, aiding and abetting, and attempt

- (9) The criminalisation of inciting, aiding and abetting of intentional offences should normally follow the criminalisation of the main offence. Attempts to commit an intentional offence should be criminalised if it is necessary and proportionate in relation to the main offence. Consideration should be given to the different regimes under national law.

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 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.

Model provisions

- (11) Once it has been established [...] that criminal provisions should be adopted, either as the only option or as an alternative, there is [...] a need to establish a range of concurrent rules, e.g., rules on liability of legal persons. There may also be a need to differentiate between conduct that should be prohibited but does not necessarily have to be established as a criminal offence and conduct that should be criminalised.

(12) [...] The model provisions set out in Annex II should guide future work of the Council on legislative initiatives that may include criminal provisions.

Model provisions

The following wording shall guide future legislative work in criminal and related matters within the EU. The aim is to achieve coherent and consistent criminal law provisions, and to avoid unnecessary difficulties in the interpretation of EU law and problems for national legislators in the process of implementation².

A – Provision on infringements and penalties that do not necessarily have to be criminal

Infringements

Each Member State shall lay down the rules on penalties applicable to infringements of the provisions adopted pursuant to this Directive. The penalties provided for must be effective, proportionate and dissuasive.

B – Criminal law provisions and related provisions

Criminal Offences

Each Member State shall ensure that the following conduct constitutes a criminal offence, when [unlawful and] committed intentionally [or with at least serious negligence].

Inciting, aiding and abetting, and attempt

1. *Each Member State shall ensure that inciting, aiding and abetting the intentional conduct referred to in Article (Article on Criminal Offences) is punishable as a criminal offence.*
2. *Each Member State shall ensure that attempting the intentional conduct referred to in Article (Article on Criminal Offences) is punishable as a criminal offence.*

² Text within square brackets indicates that the inclusion of such text should be considered on a case by case basis.

Criminal Penalties (for natural persons, without approximation of levels)

Each Member State shall take the necessary measures to ensure that the offences referred to in Articles (Article on Criminal Offences) are punishable by effective, proportionate and dissuasive criminal penalties.

Criminal Penalties (for natural persons, with approximation of levels)

Each Member State shall take the necessary measures to ensure that an offence referred to in Article (Article on Criminal Offences) is punishable by penalties of [period/s of time] of imprisonment.³

Liability of legal persons

1. *Each Member State shall [take the necessary measures to] ensure that a legal person can be held liable for offences referred to in Articles (Article on Criminal Offences) where such offences have been committed for its benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on
 - (a) a power of representation of the legal person,
 - (b) an authority to take decisions on behalf of the legal person, or
 - (c) an authority to exercise control within the legal person.*

- [2. *Each Member State shall also ensure that a legal person can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of an offence referred to in Articles (Article on Criminal Offences) for the benefit of that legal person by a person under its authority.*]

³ The Council conclusions of April 2002 on the approach to apply regarding the approximation of penalties (doc. 9141/02) should be kept in mind, in the light of the Lisbon Treaty.

3. *Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles (Article on Criminal Offences).*
4. *[For the purpose of this Directive] 'legal person' shall mean any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations. [NB: This paragraph is preferably included in an Article on definitions, if such a provision exists.]*

Penalties against legal persons

Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article (Article on Liability of legal persons) is punishable by effective, proportionate and dissuasive penalties [which shall include criminal or non-criminal fines and may include other penalties, such as:

- (a) exclusion from entitlement to public benefits or aid;*
- (b) temporary or permanent disqualification from the practice of commercial activities;*
- (c) placing under judicial supervision;*
- (d) a judicial winding-up order;*
- (e) temporary or permanent closure of establishments which have been used for committing the offence.]*