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NOTE

From:	Presidency
To:	Delegations
No. prev. doc.:	9284/16
Subject:	Criminal Law Contact Group - Guiding principles for legislative initiatives in the field of substantive criminal law - Outcome of the informal meeting on 28 June 2016

On 28 June 2016, the Netherlands Presidency organised an informal meeting at its Permanent Representation on the issue of the "Guiding principles for legislative initiatives in the field of substantive criminal law".

The Presidency opened the meeting and gave a general introduction on the basis of document 9284/16, which had been distributed in advance of the meeting.

Subsequently, Mr. Dennis de Jong, Member of the European Parliament and initiator of the resolution of the European Parliament of 22 April 2012 on "An EU approach to criminal law" (2010/2310(INI)), presented his views on the issue.

Mr. De Jong noted that the three institutions have each adopted a set of guiding principles for legislative initiatives in the field of substantive criminal law:

- the Council, in 2009, adopted its "Council conclusions on model provisions" (doc. 16798/09);
- the Commission, in 2011, adopted its communication "*Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*" (COM(2011)573 final);
- the Parliament, in 2012, adopted the Resolution "An EU approach to criminal law" (see reference above).

In the view of Mr. De Jong it would be advisable for the three Institutions to adopt one common document – which could be an informal document, such as a memorandum of understanding – setting guiding principles for legislative initiatives in the field of substantive criminal law. Mr. De Jong observed that such document could provide for a coherent framework and could substantially enhance the consistency and quality of legislation in the field of European criminal law. He underlined that a common document could have as an advantage that the Institutions could invoke the respect of this document during legislative negotiations, while noting that the document should leave sufficient flexibility to the Institutions to consider and apply tailor-made solutions when necessary and appropriate. Mr. De Jong said that he preferred to establish a common document with the Commission, but that if this Institution would not be ready to agree on a text, the option of agreeing a common document between the two co-legislators – European Parliament and Council – could possibly be explored.

The Commission welcomed the possibility to have an exchange of views on this issue and advocated for continuation of an informal dialogue between the Institutions. However, the Commission questioned the added value of a common document and remarked that such a document would prejudice its right of initiative. Further, it referred to the valuable experiences gained from the assessment of implementation by Member States of EU criminal law instruments, which it deemed of relevance for the future work in this area. The Commission also provided information about its Expert Group on Criminal Law. The Expert Group, which meets twice per year and consists of academics and practitioners, assists the Commission in the development of EU Criminal Law. The Council and European Parliament Secretariats are invited to the meetings of the Expert Group. The Commission indicated that it did not exclude any open dialogue on EU Criminal Policy with the other Institutions in the future.

Member States which took the floor made inter alia the following comments:

- Various Member States expressed support for the idea of establishing a common document on guiding principles for legislative initiatives in the field of substantive criminal law, although most of them underlined that such document should have an informal character and should not be binding in any way whatsoever.
- Several Member States noted that the texts of the three Institutions are rather close, which should allow for the possibility to agree on a common document.
- One delegation observed that it could be appropriate to establish a hierarchy among the principles. According to this delegation, the greatest importance should be given to the principle of "ultima ratio" ("last resort").
- Another delegation suggested that it could be interesting, as an element of future discussions on this issue, to gather information on the scope and definition of substantive criminal law concepts such as intent, attempt and complicity in the national legislation of the Member States.
- It was observed that the acceptability of any common document would very much depend on the contents and status of such document. In any event, it was said, a very cautious approach should be taken as regards for instance rules on penalties that could be imposed by the competent authorities of the Member States; reference was made to the Council conclusions of April 2002 on the approach to apply regarding the approximation of penalties (doc. 9141/02).
- It was noted that the scope of any common document should be clearly defined, since the current approach of the three Institutions seems to differ, at least slightly.
- The suggestion was made to have a more strategic discussion on this issue, for example at the level of CATS.

The Chair concluded that there seemed to be openness among Member States to discuss this issue further and to explore the advisability and possibility of establishing a common document on guiding principles for legislative initiatives in the field of substantive criminal law. The Chair observed that a cautious approach would be necessary, that any common document should concern general principles only and that it should have an informal character: nothing should be set in stone.

The incoming Slovak Presidency adhered to these conclusions and indicated that it would consider whether this issue could be the subject of a strategic discussion during its term in office, for example at the level of CATS.
