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NOTE

From:	Presidency
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Subject:	Guiding principles for legislative initiatives in the field of substantive criminal law - Towards a common inter-institutional document ?

INTRODUCTION

The three institutions have each adopted a set of guiding principles for legislative initiatives in the field of European substantive criminal law:

- In 2009, the Council adopted the "Council conclusions on model provisions" (doc. 16798/09);
- In 2011, the Commission adopted its communication "*Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*" (COM(2011)573 final);
- In 2012, the European Parliament adopted its Resolution "*An EU approach to criminal law*" (2010/2310(INI)).

CRIMINAL LAW CONTACT GROUP

Next to the principles, the resolution of the European Parliament also called 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 establishing an inter-institutional working group appeared not to be advisable at that stage, the Council and the Commission were willing to informally exchange views on the quality and consistency of legislation in the field of European criminal law. It is for this reason that the criminal law contact group (CLCG), an informal contact group of representatives of the European Parliament, the Council and the Commission, was established.

So far, the group has met a couple of times, the Council always being represented by its Presidency. A summary of the CLCG meeting of 12 May 2015 is set out in doc. 10137/15.

COMMON STANDARDS ?

During the meetings of the CLCG, MEP De Jong, who initiated the EP resolution, noted that it would be logic and appropriate if the three Institutions would adopt one common document setting guiding principles for legislative initiatives in the field of European substantive criminal law.

The Netherlands Presidency organised an informal meeting on 28 June 2016 to discuss this issue with the Member States and the Commission, the summary of which is set out in doc. 10599/16. Mr. De Jong attended this meeting for part of the time and reiterated his view that 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. As a basis for this work a table produced by the EP Secretariat could be used, which contains a comparison of the documents of the three Institutions (see Annex).

Mr. De Jong observed that the Institutions could invoke the guiding principles set out therein during legislative negotiations and thus provide a coherent framework with a view to enhancing the consistency and quality of legislation. He underlined 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 including 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 could 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.

Various Member States expressed support for the idea of establishing such a common document and noted that it should be possible given that the texts of the three Institutions (see in the Annex) are rather close. Most Member States underlined, however, that such a document should have an informal character and should not be binding in any way whatsoever.

QUESTION TO DELEGATIONS

Delegations are invited to consider **whether the Council should enter into discussions with the European Parliament and the Commission with a view to establishing a common informal and non-binding document** on guiding principles for legislative initiatives in the field of substantive criminal law.

Those delegations that are in favour of starting this work are invited to indicate the **possible requirements** (constituting elements, involvement of Commission, …).

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

TOPIC	EP RESOLUTION	COUNCIL CONCLUSIONS	COMMISSION COMMUNICATION
COHERENCE	**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. 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. 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. 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. 2, par. 2, second bullet point**: "Increased coherence would facilitate the transposition of EU provisions in national law;"	**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."

ULTIMA RATIO **(LAST RESORT)**	**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. 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. 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.
SUBSIDIARITY AND PROPORTIONALITY	**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. 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. 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. 3, lett. Q, point 1: "Stresses that proposals for EU substantive criminal law provisions must fully respect the principles of subsidiarity and proportionality;"		**p. 6, par. 5**: "The general subsidiarity requirement for EU legislation must be given special attention with regard to criminal law." **p. 7, par. 3**: "criminal law must always remain a measure of last resort. This is reflected in the general principle of proportionality."
***LEX CERTA*, PRECISE WORDING AND FORESEEABILITY**	**p. 3, lett. K:** "whereas in accordance with the *lex certa* requirement the elements of a criminal offence must be worded precisely in order to ensure predictability as regards its application, scope and meaning;" **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 *lex certa* requirement, not only EU legislation itself, but also its transposition into national legislation must be of the highest quality;" **p. 4, lett. Q, point 4, second indent:** " [Recognises the importance of] ... the	**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. 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. 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

	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,		offences and sanctions. This would contribute to ensure consistency, increase legal certainty and facilitate implementation of EU law."
INTENT, NEGLIGENCE AND PRINCIPLE OF GUILT	**p. 3, lett. Q, point 4, first indent**: "[Recognises the importance of] ... the principle of individual guilt (*nulla poena sine culpa*), thus prescribing penalties only for acts which have been committed intentionally, or in exceptional cases, for acts involving serious negligence," **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 (*nulla poena sine culpa*), although in certain instances it may be justified to provide for corporate liability for certain types of offence;	**p. 3, Intent, (6):** "EU criminal legislation should, as a general rule, only prescribe penalties for acts which have been committed intentionally." **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. 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. 9, par. 2: "**All EU criminal law instruments include in the definition intentional conduct, but in some cases also seriously negligent conduct."

HARMFULNESS AND SERIOUSNESS OF THE CRIME	**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. 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. 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. 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. 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. 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."

EU ADDED VALUE	**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. 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. 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. 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. 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."

PROPORTIONALITY OF THE PENALTY	**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 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. 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 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. 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. 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."