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NOTE

From:	Presidency
To:	Delegations
Subject:	Council conclusions on 'The future of Union criminal law - recommendations on the way forward' - Redraft submitted by the Presidency

Following the initial examination of the draft conclusions on the future of Union criminal law at the meeting of JHA Counsellors and experts on 24 April, the Presidency has proceeded to redraft the text in order to take the comments and suggestions expressed by delegations at the said meeting and subsequently in writing into account.

The redraft can be found in annex to this note, with modifications in relation to the text annexed to document 9006/24 indicated in **bold underline** or ~~striketrough~~. Delegations are invited to mark their agreement to this text, or provide any final comments or suggestions they may have, at the meeting of JHA Counsellors scheduled for 13 May.

(re-draft)

Council Conclusions

‘The future of Union criminal law: recommendations on the way forward’**Introduction**

- a) The development of the criminal law of the European Union and the principles governing it have been discussed for several decades, both within the institutions and among academic experts¹. The discussions gained momentum during the run-up to the entry into force of the Lisbon Treaty, which introduced new legal bases for Union criminal law ~~which introduced~~. A set of dedicated Council conclusions *on model provisions, guiding the Council’s criminal law deliberations* was approved **on 27 November 2009**², a Commission communication³ “Toward an EU criminal policy: Ensuring the effective implementation of EU policies through criminal law” followed in 2011. **The European Parliament resolution of 22 May 2012 on an EU approach to criminal law was adopted in 2012**⁴.
- b) An important number of Union instruments in the area of criminal justice have been adopted since then under the legal bases **in Articles 82 and 83 TFEU** introduced by the Lisbon Treaty. These instruments have notably addressed particularly serious crime with a cross-border dimension based on Article 83(1) TFEU, introduced measures to ensure the effective implementation of a Union policy (Article 83(2) TFEU) **and created criminal procedural law based on Article 82 TFEU**. In addition to this, **a Eurojust Regulation has been adopted on the basis of Article 85 TFEU and** the ground-breaking European Public Prosecutor’s Office has been set up **on the basis of Article 86 TFEU**.

¹ See, for example, The Manifesto on the EU Criminal Policy in 2011 of 2009 (www.crimpol.eu) and A Manifesto on European Criminal Procedure Law of 2010 (www.zis-online.com)

² ST16542/2/09.

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011DC0573>

⁴ **OJ C 264 E, 13.09.2013, p. 7.**

c) The Council and the Parliament, as co-legislators, as well as the Commission have throughout this time strived to ensure the highest possible quality of the criminal legislation. In this sense, the following issues have appeared particularly important **in relation to substantive criminal law:**

- that the Union legislator should **ensure that** ~~taken into account~~ the commonly agreed principles of criminal law, such as the principle of legality, the principle that criminal law should only be used as a last resort (*ultima ratio*) and the protection of fundamental rights **in general, are fully respected.**
- that the internal coherence of the Union criminal law acquis is safeguarded,
- that Union criminal law instruments **respect the different legal systems and traditions of the Member States and** give them the necessary flexibility to implement them in a way that does not interfere with the system and consistency of the national criminal laws.

In relation to criminal procedural law, the key horizontal interest has been to ensure that the Union instruments respect the different legal systems and traditions of the Member States and that they are consistent with the obligations of Member States under International law, in particular the relevant conventions of the Council of Europe.

- d) It has however become evident that the high number of proposals in different policy areas that include criminal law elements makes it challenging for the co-legislators to ensure that all these aspects are systematically and fully taken into account.
- e) In this transition between two legislative cycles, it appears timely to address the future of the Union criminal law in a horizontal manner, so that the quality of the criminal legislation can be enhanced.

Conclusions of the Council

General considerations

1. The Union has an obligation to ensure that its actions in the area of criminal ~~law justice~~ respect the specific principles governing this area, such as the legality principle and the principle of *ultima ratio*, **as well as the general** principles of **conferral**, subsidiarity and proportionality **as set out in Article 4 TFEU and Article 5 TEU**.
2. In particular, criminal law instruments and provisions should only be adopted when necessary to achieve the objective behind **those** instrument **and provisions**, **when** this objective cannot be achieved through other means and when there is a clear legal basis for them.
3. ~~Except in cases of urgency~~ **As a general rule, and in accordance with the Interinstitutional Agreement on Better Law-Making⁵**, the need for and appropriateness of any criminal law instrument or provision needs to be based on **strong** evidence. **This requires, except in cases of urgency, in-depth impact assessments**.
4. Union criminal law instruments and provisions, and in particular the ~~core~~ provisions on penalties, criminal responsibility, jurisdiction and limitation periods, ~~is bound to~~ **must** be clear and coherent.
5. Union criminal law instruments and provisions **need to** ~~must~~ **respect the different legal systems and traditions of the Member States** and ~~need to~~ be elaborated in a manner that makes it possible for the Member States to implement them in the existing system of national criminal laws, in particular **without undermining the consistency of** their general part.

⁵ OJ L 123, 12.5.2016, p. 1–14.

Actions to be taken by Council

1. The Council will, with starting point in the **abovementioned** 2009 Council conclusions on model provisions, initiate work on the establishment of modernised model provisions for the Union criminal law, in particular as regards **minimum rules** on penalties for natural and legal persons, liability of legal persons, aggravating and mitigating circumstances, incitement, aiding and abetting and attempt, jurisdiction, limitation periods, **the availability of effective and proportionate** investigative tools ~~that should be made available~~ **and the obligations to provide statistical data**. **These model provisions should be included in future European legislation, to the extent it is considered necessary to include them in a specific legislative instrument and in respect of the different legal systems and traditions.**
2. The Council calls on the Union institutions involved **in the legislative procedure** to reach a common understanding ~~between the European institutions involved in the legislation procedure~~ on the main principles of the Union criminal law and on **the** model provisions.
3. The Council will promote the use of the model provisions, once they have been agreed upon, during legislative work, except where there are strong **and justified** reasons to diverge from them.
4. **In parallel to the work on the establishment of modernised model provision on substantive criminal law, the Council will continue the reflection on the future of judicial cooperation in criminal matters.**

Institutional

1. The Council invites the Commission to continue **and enhance its actions**:
 - to ensure that any proposal with a criminal law element is based on evidence that such legislation is necessary **and proportionate** to achieve the objectives **and that it is only used as a last resort (ultima ratio)**,
 - to elaborate thoroughly prepared and detailed impact assessments, **including on the impact of the proposal on fundamental rights**, that are made available before the start of the examination of the proposal in Council.
 2. The Council invites the Commission and the Parliament to take the need of Member States to ensure the consistency **and basic principles** of their national legal orders into account with a view to future legislative negotiations.
 3. The Council invites the Commission and the Parliament to engage in a structured and comprehensive joint reflection on all aspects of the future of the Union criminal law, including **on a reinforcement of the internal coherence of the Union criminal law and** the possibility of having common model provisions.
 4. The structured joint reflection mentioned in the preceding point ~~sh~~ould, where appropriate, involve also academia, practitioners and other external experts.
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