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Report of the Presidency: Overview of the discussions on the future of EU criminal law

On the basis of the reflections on the Future of EU criminal law initiated by the Belgian Presidency of the Council this year and continued by the Hungarian Presidency, delegations will find in annex a Report of the Presidency including an overview of the state of play.

REPORT OF THE HUNGARIAN PRESIDENCY OF THE COUNCIL**The future of EU Criminal Law: overview of the discussions so far****1. Introduction**

The Presidency has elaborated this report with an overview of the current state of the discussions following the reflections on the future of EU criminal law launched by the Belgian Presidency in the first half of 2024 and continued by the Hungarian Presidency in the second half of the year. The overview below is based on written and oral comments and suggestions from delegations, as well as other inputs, such as mission letters for Commissioners, the concluding report of the High-Level Group on Access to Data for Law Enforcement approved on 15 November, the final report of the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty¹, and the draft final report of the 10th round on the European Investigation Order approved by CATS on 21 November.² This overview should not be seen as exhaustive, neither in terms of issues raised, or in the detail of the positions shared thus far.

The overview below is structured around the main areas that have been highlighted by delegations. The main interest of Member States appears to lie in ensuring an effective implementation of the *acquis*, whereas the appetite for new legislations is limited to a few targeted areas.

¹ 6741/23

² It should also be recalled that the final report from the tenth round of mutual evaluation on the implementation of the European Investigation Order (EIO) will be finalised soon, and that this report may contain further ideas as regards future needs for legislation on mutual recognition.

2. *Horizontal issues*

a) *Focus on implementation of the existing acquis*

- Delegations have called for a stronger focus on non-legislative measures to enhance the implementation and functioning of the existing acquis.

b) *Evaluations and impact assessments*

- Many delegations have emphasized the need to focus on the effectiveness of existing instruments, including by existing evaluation procedures, such as the cycle of evaluation round, before new ones are proposed. It is important to ensure that existing legislation is fully taken into account when developing new instruments.
- It has also been suggested that non-legislative measures (e.g., handbooks, recommendations, funding) could improve the functioning of legal instruments. Targeted use of mutual evaluations under Joint Action 97/827/JHA could also contribute to better implementation.
- In this sense, some delegations also emphasized that any new proposal should be grounded in practical needs.

c) *Consistency and coordination*

- The Council Conclusions of 14 June 2024³ stressed the importance of ensuring consistency in EU criminal law, including maintaining the consistency of national criminal law. Although these conclusions focus mainly on substantive criminal law, this need may apply for other sectors of EU criminal law as confirmed during subsequent discussions.

³ Council conclusions on ‘The future of EU criminal law: recommendations on the way forward’

- Concerns have been raised about potential fragmentation if criminal law issues are addressed in instruments prepared and negotiated without sufficient criminal law expertise, and without a good understanding of the whole EU criminal law framework.
- It has been noted that provisions of criminal procedural law (e.g., on investigations, evidence, etc.) are often included in instruments in other areas, notably in substantive criminal law, and that the horizontal aspects of procedural law should not be overlooked in such cases.
- Ensuring consistent terminology in criminal procedural law, especially when procedural elements are included in instruments in other types of legislative acts, is also crucial.
- In order to ensure a coherent criminal justice policy, actions to address the issue of crime prevention within the existing competences also appear important.

3. *Mutual recognition (Article 82(1) TFEU)*

a) *Horizontal issues with regard to mutual recognition*

- In general, most delegations do not favour a “lisbonisation” of the acquis, in the sense of replacing the framework decisions containing mutual recognition instruments for the sake of using the post-Lisbon framework, including the use of directives or regulations;

- However, many delegations see a need for some substantial review of mutual recognition instruments. Several arguments have been made:
 - i) A number of delegations call for a general evaluation of existing mutual recognition instruments and for actions to enhance their effectiveness as a priority for the Union in the coming years. They appear to be of the opinion that current instruments represent a patchwork of various types from different eras, resulting in some inconsistencies. Ensuring more consistent use of certain terms, especially in older framework decisions, is therefore in their view considered important, as divergences in terminology and implementation may negatively impact both effective cooperation between Member States and mutual trust in respective legal systems.
 - ii) In particular, efforts to ensure coherence in the practical application between the European Arrest Warrant (EAW)⁴ and other instruments (including the EIO⁵ or transfer of prisoners⁶) have been encouraged (see in this regard the lessons from the last two rounds of mutual evaluations), while most delegations would not be in favour of amending the EAW framework (see below).

⁴ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)

⁵ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters

⁶ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union

- iii) Regarding case law from the European Court of Justice, it has been noted that a significant number of rules have been given binding interpretations by the Court. At least one delegation suggests that codifying this case law could provide a more accessible overview for judicial authorities and defendants, whereas several others have opposed this idea.
- iv) It has also been noted that some of these instruments, such as the European Supervision Order and the European Protection Order, are very rarely used in practice, and there may be a need to assess whether these instruments require revision or other measures. The 9th round of mutual evaluations, which covered four instruments of mutual recognition, did not lead to explicit recommendations to amend the EU legal framework but rather proposed practical measures to improve their use.
- v) Should mutual recognition instruments be revisited, at least one delegation has argued that this would also raise the question of which type of instrument – directive or regulation – should be used in the future, while the majority prefers directives.

b) *The European Arrest Warrant (EAW)*

- Most delegations consider that the EAW is working sufficiently well and does not call for any revision. Some even see a clear risk of complicating the current framework, which has proven to be functional and has stood the test of time.
- A few Member States would favour some revision of the instrument. It is in this context recalled that the mission letter to the Commissioner for Justice notes that there is a need to strengthen the EAW in order to allow judicial authorities to work more closely.
- As indicated above, particular problems, often stemming from case law, have been mentioned with regard to the relationship between the EAW, on the one side, and other instruments such as those containing rules on transfer of prisoners and extradition to third countries, on the other.

c) The European Investigation Order (EIO)

The EIO has been the subject of more detailed discussions in the framework of the 10th round of mutual evaluations. The Presidency did not notice elements on the EIO raised during the discussions on the future of EU criminal law which have not arisen in the 10th round of mutual evaluations.

The final report of the 10th round of mutual evaluations was approved by CATS on 21 November. It identifies several areas where measures could be taken at EU level. Given the importance of the EIO, the outcome of the discussions on the 10th report is taken into account in the reflections on the future of EU criminal law. The relevant recommendations expressed by the High-Level Group on access to data for effective law enforcement should also be considered.

d) Mutual recognition of disqualifications

Mutual recognition of disqualifications (or bans to perform certain activities) was considered a priority in the already old (2001) programme of measures to implement the principle of mutual recognition of decisions in criminal matters⁷. Some work has taken place in the early years of the implementation of the programme⁸. There are also some provisions in non-criminal law instruments, such as the draft rules on driving disqualification in the proposal to amend the Driving Licence Directive.

- In general, it has been underlined that all aspects of this issue, such as the existence of not of certain types of disqualifications as a penalty in different jurisdictions, must be very carefully assessed before any action is taken in this area.

⁷ OJ, C 012, 15/01/2001, p. 10-22.

⁸ See Art. 11(1)(b) of Framework Decision 2009/315/JHA (exchange of information extracted from the criminal record between Member States). See also the proposal for a framework decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children, which was not adopted (OJ, 7/12/2007, C 295, pp. 18-20).

- Further than that, delegations seem rather divided, some expressing cautious interest while others being clearly reluctant to address the issue given its complexity.
- A concrete idea was to introduce rules on disqualifications in the scope of Framework Decision 2008/947/JHA on mutual recognition with a view to the supervision of probation measures and alternative sanctions.

e) Participation at the criminal trial by videoconference

- The issue of participation at the criminal trial by videoconference has been discussed in different fora and was considered to be an interesting idea that could be explored further by many Member States as regards cross-border cases, while almost all Member States were opposed to regulating the same matter at domestic cases.
- The final report of the 10th round of mutual evaluations also invites the Commission to address at legislative level the question of the participation of the accused person in the trial via videoconference from another Member State.

f) Other issues on mutual recognition

- The issue of road traffic offences has been raised during discussions. The main concerns seem to be to ensure consistency between the various instruments regarding the enforcement of fines for road traffic offences. Reference has been made to consistency issues stemming from the co-existence of criminal law and administrative procedures, in particular with, on the one hand, Framework Decision 2005/214/JHA (mutual recognition of financial penalties) and, on the other hand, the (soon) revised Directive (EU) 2015/413 facilitating cross-border exchange of information on road-safety-related traffic offences⁹.
- A call for a clarification of functioning of the system for transferring persons serving a prison sentence (Framework Decision 2008/909/JHA), and for removing the remaining barriers for such transfers, has been made.

⁹ The adoption of the modification to the Directive is foreseen in the coming weeks.

- One delegation has insisted on the need to ensure that all types of national confiscation orders, including as regards unexplained wealth, are recognised and enforceable throughout the EU.

4. *Mutual admissibility of evidence*

The issue of admissibility of evidence is at the crossroad of mutual recognition and approximation of legislation, as Article 82(2) TFEU provides for the possibility to establish minimum rules on mutual admissibility of evidence between Member States. It has been the object of many reactions:

- The great majority of delegations strongly oppose the need for any EU initiative on admissibility of evidence, which is fundamental issue of national law which fall under the procedural autonomy of the Member States. In addition, the added value in practice of such an initiative has been questioned.
- The delegations that do not exclude an initiative in this area have expressed caution that such an initiative should not unduly lower existing procedural standards in the cooperation between Member States. Such rules should in any case not go beyond what is necessary to facilitate mutual recognition.

5. *Establishing minimum rules of criminal procedural law (Article 82(2) TFEU)*

- Most delegations have expressed cautious positions as regards the idea of further approximation of procedural criminal law. The added value of approximation going beyond what is necessary for an effective and efficient cross-border cooperation has been questioned, and the risk of an undesirable interference with national legal systems highlighted.
- Most delegations have noted that there is no need to harmonise the general principles of criminal procedural law at this point in time.

- A few delegations have nevertheless expressed openness to at least initiate general reflection towards the elaboration of a fully-fledged, comprehensive harmonisation of (procedural) criminal law at long term, with due account taken to the current legal bases in the Treaty.
- Delegations have strongly underlined the need to respect legal traditions and ensure that the specificities of national legal systems are taken into account.

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6. *Establishing minimum rules of substantive criminal law (Article 83 TFEU)*

As mentioned above, a lot of the discussions on the approximation of substantive criminal are continuing in the more specific framework of the discussions on model provisions. This aspect is not tackled here.

It seems important to note that, in the broader reflection on the future of EU criminal law, some references were made to possible categories or forms of crime for which approximation of substantive criminal law would be useful, not the least in order to keep up with the evolution of criminality and to ensure that the appropriate procedural instruments (EIO, EAW) can be applied to the relevant offences:

- The initiative of the Commission to extend the list of “Eurocrimes” in Article 83(1) TFEU to hate crimes and hate speech, which has not led to any Council decision, has been recalled by delegations.
- Some delegations have called for an update of Framework Decision 2008/841/JHA on the fight against organised crime, in particular as regards the definitions and the offences regarding participation in a criminal organization.

- It has been noted that illegal arms trafficking, which is listed among the Eurocrimes, has still not been the subject of European criminalisation. The Commission is currently pursuing an impact assessment for a possible legislative initiative to fill this gap.
- Calls have also been made for the approximation of the criminal law response to falsification of medicines and other types of violation of intellectual property.

7. *Main EU bodies and agencies in the field of cooperation in criminal matters*

So far, most of the discussions on the “future of EU criminal law” have focused on the aspects mentioned above and on the model provisions. There have only been few discussions on the EU bodies and agencies which play a key role in criminal matters.

Taking this limitation into account, the following elements can already be mentioned:

- The importance of providing adequate resources to the EPPO, Eurojust and the EJM has been highlighted, including in the light of the mission letter for the Commissioner for internal affairs and migration which foresees a proposal to double Europol’s staff over time.

EPPO:

- There were already some discussions on a possible improvement of the EPPO’s legal framework, including on the basis of a study presented by the Commission in November 2023. A need for an urgent revision of the EPPO Regulation¹⁰ has not been identified by national authorities. It seems generally understood that the best is to wait for the evaluation report which is being prepared by the Commission based on Article 119 of the EPPO Regulation.

¹⁰ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’)

- With regard to a possible extension of the material competences of the EPPO (to types of crime other than the protection of financial interests), reflections were first initiated with regards to terrorism, followed by the launch of an idea to extend the competence to also to violations of restrictive measures. Delegations remained however divided over supporting the idea of any extension of the EPPO's competence

Eurojust:

- A reference has been made to the evaluation of the Eurojust Regulation due by December 2024 (Article 69 of Regulation 2018/1727¹¹).

8. Access to data for the purpose of criminal investigations

Many delegations pointed to the horizontal issue of access to data for the purpose of criminal investigations. It seems to deserve a separate section, also because it is not always clear at this stage what would be the type of instrument envisaged.

- In general terms, delegations have recalled the importance of access to data and reference was frequently made to the work of the High Level Group on access to data for effective law enforcement. The need for fully respecting fundamental rights was also highlighted. The recommendations of the High Level Group¹² reflect the opinion of experts. While it is recalled that not all delegations support all the recommendations of the Group, the Presidency considers that the relevant recommendations for this reflection on the future of EU criminal law include:

- Fostering transparency rules for providers of Electronic Communications Services with regard to the data that they process, generate or store and on informing law enforcement authorities about what data is available (rec. 17);

¹¹ Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA

¹² 9984/24.

- Establishing a research group to assess the technical feasibility of built-in lawful access obligations for digital devices (rec. 26);
 - Establishing a harmonised EU regime on data retention and rules on access (rec. 27);
 - Measures, including criminal law measures, against “non-cooperative” Electronic Communications Services and hosting providers (rec. 33-34);
 - Harmonising national legal frameworks for access to data in transit (including possibly putting forward an EU initiative on lawful interception) (rec. 38);
 - Adjusting the concept of territorial jurisdiction over data (rec. 39)
 - Exploring how the EIO could better support efficient cross-border lawful interception requests (rec. 40);
 - Reflecting on necessary safeguards when lawful interception applies to non-traditional communication service providers (rec. 41);
 - Adopting minimum rules at EU level allowing for the mutual admissibility evidence obtained from lawful interception measures against non-cooperative providers (rec. 42).
 - Legislative proposals in this area should be handled by the Working Group and Committee competent in the area of criminal justice as far as criminal law measures are concerned
- The mission letter for the Commissioner for internal affairs and migration contains a reference to update law enforcement’s tools for access to digital information and rules on data retention, while safeguarding fundamental rights.

- On data retention, several delegations already called for new legislation at EU level in order to prevent a further fragmentation of approaches in this area, as well as to achieve a more balanced approach between privacy concerns and the need of law enforcement to access data. Many delegations recalled that any legislative initiative should, in particular in this area, be accompanied by an impact assessment.

9. *Fight against organised crime*

Generally speaking, there seems to be broad support for the idea that reflections on the future of EU criminal law should take into account the need for enhanced cooperation in the fight against organised crime and drug trafficking, given the evolving threat, as highlighted in numerous discussions over the past two years.

A possible revision of Council Framework Decision 2008/841/JHA on the fight against organised crime is also being considered as explained above. A revision of the rules on organised crime is envisaged in the communication of the Commission on an EU Roadmap on the fight against drug trafficking and organised crime.

Some have argued that more should be done to address such crime through administrative measures (the administrative approach), which would likely not fall within the scope of this review.

Increased approximation of procedural rules to reinforce advanced investigative measures and other tools used to combat organised crime may also be considered.