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NOTE

From:	Presidency
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Subject:	The future of EU substantive criminal law - Policy debate

The Romanian Presidency decided to use the current period in the legislative cycle to launch a debate on 'the future of EU substantive criminal law'. The debate aimed *inter alia* to take stock of progress made so far and to examine the advisability of and need for introducing further criminal provisions, in keeping with the EU competences established by the Treaties.

In this context, a questionnaire was addressed to the Member States, to which many delegations provided written replies. In addition, delegations presented their views during several meetings of the Working Party, and in CATS.

On the basis of the input gained, the Presidency has drafted the attached report, which aims to provide assistance in the process of (possibly) further developing the regulatory framework in the field of EU substantive criminal law.

It is underlined that this is a Presidency report, so it reflects the views of the Presidency. However, following discussions with Member States, most recently in the meeting of CATS on 13 May 2019, the Presidency is confident that this report is supported by a very large majority of Member States.

To be noted that after the meeting of Coreper on 22 May 2019, where Member States agreed to submit the Presidency report to the Council, some minor linguistic refinements have been made to the text.

The Council (Justice and Home Affairs) is invited to have a policy debate in the light of this report at its meeting on 6/7 June 2019.

ANNEX

Future of EU substantive criminal law

Report from the Romanian Presidency

I. Introductory part

- **Context**

In recent decades, the European Union has steadily built up its legislation in the area of substantive criminal law. The process started with limited but increasing references to cooperation in the area of justice and home affairs in the Treaties of Maastricht (1993), Amsterdam (1999), and Nice (2003), which outlined a policy on justice that focused more on cooperation in criminal matters. It continued with the Treaty of Lisbon (2009), which provides the EU with new legal bases to legislate in the field of substantive criminal law, notably in the areas of particularly serious crime with a cross-border dimension covered by Article 83(1) of the Treaty on the Functioning of the European Union ('TFEU'). The TFEU expressly provides, for the first time, for the establishment of minimum rules concerning the definition of offences and sanctions under the ordinary legislative procedure.

Common minimum rules on substantive criminal law have thus made it easier to apply the principle of mutual recognition and allowed for the approximation of sanctions and common definitions of certain offences. They have also provided the EU with appropriate tools to respond to global challenges (notably the fight against terrorism and its funding, and organised crime).

In this context, the Romanian Presidency decided to use the current momentum in the legislative cycle to launch a debate with regard to the future of EU substantive criminal law. The debate aimed to refresh the Council's assessment of the need to further introduce criminal provisions in new areas, in keeping with the EU competences established by the Treaties and thus providing a snapshot of needs currently perceived by Member States. Issues related to transposition and implementation of the EU regulatory framework were also taken into account.

- **Questionnaire and aim of this report**

On 19 December 2018, the incoming Romanian Presidency presented a questionnaire with a set of nine questions addressed to the Member States relating to four main areas: regulatory framework, sanctioning system, specific notions and application of the regulatory framework (15728/18).

19 delegations provided written replies to the questionnaire (WK 840/2019 + ADD 1 + ADD 2 + ADD 3 + ADD 4). In addition, several delegations presented their views during the Working Party meetings, which took place on 24 January, 21 February and 10 April.

On the basis of this input, the Romanian Presidency has drafted the current report, which aims to provide assistance in the process of further developing the regulatory framework in the field of EU substantive criminal law, without prejudice to the right of initiative of the Commission and acknowledging that the needs currently perceived by Member States may evolve in the future.

II. Issues for reflection, as set out by the Presidency

- **Legal basis and results achieved so far**

Article 83(1) TFEU provides competence to legislate in 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*'. The Treaty lists the following areas where legislative action on this basis can be taken, in the form of Directives: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, cybercrime and organised crime.

On the basis of Article 83(1), the following Directives, *inter alia*, have been adopted since 1 December 2009:[1]

– Directive 2011/36/EU on preventing and combating trafficking in human beings;[2]

– Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children;[3]

– Directive 2013/40/EU on attacks against information systems;[4]

– Directive 2014/42/EU on freezing and confiscation;[5]

– Directive 2014/62/EU on the protection of the euro;[6]

– Directive (EU) 2017/541 on combating terrorism;[7]

– Directive (EU) 2018/1673 on combating money laundering.[8]

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1 Some cited instruments also have another legal basis (in addition to the legal basis of Article 83(1)).

2 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101, 15.4.2011, p. 1–11).

3 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ L 335, 17.12.2011, p. 1–14, with corrigendum in OJ L 18, 21.1.2012, p. 7-7).

4 Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (OJ L 218, 14.8.2013, p. 8–14).

5 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014, p. 39–50).

6 Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA (OJ L 151, 21.5.2014, p. 1–8).

7 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ L 88, 31.3.2017, p. 6–21).

8 Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (OJ L 284, 12.11.2018, p. 22–30).

Article 83(2) TFEU provides competence to establish minimum rules with regard to the definition of criminal offences and sanctions where 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.

On this basis, the following Directives have notably been adopted since 1 December 2009:

– Directive 2014/57/EU on criminal sanctions for market abuse;[9]

– Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests (PIF).[10]

- **Areas where it could be necessary to broaden the regulatory framework**

The second subparagraph of Article 83(1) contains a closed list of areas in which legislative action on the basis of that Article can be taken. The third subparagraph Article 83(1) provides for the possibility for the Council, in the light of developments in crime, to adopt a decision identifying other areas of crime that meet the prescribed criteria, but such a decision would require unanimity in the Council and the consent of the European Parliament.

The application of Article 83(2) provides more flexibility. Also, there are further areas of EU policy which have been subject to harmonisation measures and for which an approximation of criminal laws at EU level could be considered essential to ensure the effective implementation of a Union policy. One could think of areas such as fisheries, agriculture, customs, road transport, data protection, and various aspects of the internal market: intellectual property rights, cultural goods, dangerous goods or foodstuff, and trafficking in human organs.

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[9] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) (OJ L 173, 12.6.2014, p. 179-189).

[10] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ L 198, 28.7.2017, p. 29–41).

- **Areas of substantive criminal law instruments where it could be necessary to further approximate the sanctioning system**

The approximation of criminal sanctions should take into account the fact that legal traditions differ across Member States, and that the coherence of national systems must be maintained as much as possible, while at the same time striving to achieve a common denominator and level-playing field at Union level.

Up to today, the approximation of sanctions was limited to the obligation of Member States to provide for effective proportionate and dissuasive sanctions in their national law and to common minimum levels of the maximum sanctions against natural persons. However, the effect of the current system of approximation on serious cross-border criminality remains difficult to demonstrate.

- **Developing a common understanding on notions that are regularly used**

The various instruments adopted at EU level in criminal matters contain references to some notions that are used more regularly, such as serious crime (which has benefitted from some regulation and interpretation, but not exhaustively and not in a harmonised manner, depending on the context), and minor cases.

Although one may argue that flexibility needs to be maintained in order to adapt these notions to specific instruments, and also to the particularities of the national systems of criminal law, the Presidency wondered whether it could also be of value to develop a common understanding of these notions.

- **Analysing the application of the regulatory framework**

The regulatory framework cannot be viewed out of context; it is necessary to analyse it taking into consideration the way Member States transpose EU Framework Decisions and Directives. It is therefore useful to analyse the way in which they are implemented.

III. Outcome of discussions

Based on the replies to the questionnaire and taking into account the results of the debates held in the DROIPEN Working Party and in CATS, which examined the draft report as set out in 8619/19 at its meeting on 13 May 2019, the Presidency draws the following conclusions, without prejudice to the right of initiative of the Commission:

1. The Union legislator should cautiously continue to exercise its competence to establish minimum rules concerning the definition of criminal offences and sanctions in line with Article 83 TFEU, giving due attention *inter alia* to the principles of *ultima ratio*,[11] proportionality and subsidiarity.

2. At this stage, the emphasis should be on ensuring the effectiveness and quality of the implementation of *existing* EU legislation, and more efforts should be deployed to that effect. According to some Member States, this should include improving the tools for cooperation between Member States, both as regards judicial cooperation and in terms of exchange of best practices.

3. For the time being, further 'Lisbonisation' seems unnecessary.[12] [13]

4. At this point in time, there is no need to develop a common definition/understanding of certain notions, such as 'serious crime' and 'minor cases'. Several Member States indicated that they should retain flexibility concerning the application of these notions. According to those Member States, the approach followed until now, whereby serious crime could be defined, where necessary, by using different criteria for a specific legislative instrument, should continue to be applied.

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11 See also the 'Council conclusions on model provisions, guiding the Council's criminal law deliberations' of 30 November 2009 (16542/2/09 REV 2, point 1, and 16798/09, 16883/09).

12 In this context, 'Lisbonisation' is understood to be the process of replacing Framework Decisions adopted under the Amsterdam Treaty with Directives adopted under the Lisbon Treaty, thereby improving/updating the content of such instruments.

13 It was signalled though by two Member States that it might be appropriate to make an amendment to the text of point (d) of Article 2(1) of Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ L 335, 11.11.2004, p. 8), so as to broaden the scope of that Article, see WK 840/2019, p. 53.

5. It could be appropriate to carry out a full and thorough examination/analysis of the necessity and advisability of establishing (further) minimum rules concerning the definition of criminal offences and sanctions in specific areas. The following areas were suggested by one or more Member States, or the Commission, as areas that could be looked into:

   a) environmental crimes, including maritime, soil and air pollution;[14] [15]

   b) trafficking in cultural goods;[16]

   c) the counterfeiting, falsification and illegal export of medical products;[17]

   d) non-conviction based confiscation;

   e) trafficking in human organs;

   f) manipulation of elections[18];

   g) identity theft;

   h) preventing the facilitation of unauthorised entry, transit and residence, in order to combat illegal immigration;

   i) crimes relating to artificial intelligence, subject to further defining the issue at stake and subject to involving other relevant stakeholders.[19]

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14 In the field of the environment some instruments already exist, e.g. Directive 2005/35/EC and Directive 2009/123/EC on ship-source pollution, and Directive 2008/99/EC on the protection of the environment through criminal law.

15 The Commission is currently carrying out a study in this area, the results of which should become available at the end of 2019. Useful information may also be contained in the final report of the 8th round of mutual evaluations on environmental crime, which should become available later this year.

16 C.f. recitals 13 and 15 of Directive (EU) 2017/541 on combating terrorism.

17 Union legislation already exists in this area, see, for example, Directive 2001/83/EC on the Community code relating to medicinal products for human use.

18 This point was suggested by the Commission. Several Member States questioned whether this area should be addressed by criminal law and considered that it would be more appropriate to address this issue by administrative law.

19 In addition, the possibility of further analysing how artificial intelligence could be used in order to prevent and combat criminal activities, was also mentioned.

6. Where it is demonstrated, on the basis of evidence, that there are good reasons for taking legislative action in any of the areas mentioned under point 5, or any other area, the possibility of using Article 83(2) TFEU as a legal basis should be looked into before considering extending the scope of the second subparagraph of Article 83(1) TFEU (by unanimous decision of the Council pursuant to the third subparagraph of Article 83(1) TFEU).

7. Where the Union envisages legislating in an area that is already covered by an instrument of international law, in particular a convention of the Council of Europe, more in-depth dialogue with the relevant international organisation is necessary, *inter alia* to ensure complementarity and added value and to share information regarding best practices, obstacles to ratification, etc.

8. In order to ensure a high quality of Union legislation, all the technical specificities of the legislative process should be taken into account; this should include, *inter alia*, allowing sufficient time during the legislative process to carry out consultations at national level.

9. Directives adopted on the basis of Article 83 TFEU should allow Member States sufficient time to implement them. The period concerned should, in principle, be no less than 24 months. The legal form of a Directive leaves Member States flexibility as to how best to carry out implementation in their national legal order, including decisions on which stakeholders they want to involve in the process.