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| from : | Presidency and German Delegation |
| to : | Working Party on Substantive Criminal Law |
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| Subject : | Council conclusions on guidelines for future criminal law in EU legislation |

On 2 July 2009, the Article 36-Committee (CATS) discussed the item of "Criminal law in future negotiations - internal and external aspects" on the basis of doc.11335/09. There was broad support from delegations for a continuation of the discussions on this issue. There was also support for having some form of standard model provisions pertaining to both internal legislation and international agreements. With regard to the form of these model provisions, delegations expressed the wish for soft law instruments. The relevance of the issue in view of the possible entry into force of the Lisbon Treaty was underlined.

Further to these discussions, the Presidency, in cooperation with the German Delegation, has prepared a proposal for Draft Council conclusions on guidelines for future criminal law in EU legislation, set out in Annexes I and II.

This text will be discussed at the meeting of the Working Party on Substantive Criminal Law on 15 October 2009.

Draft Council conclusions on guidelines for future criminal law in EU legislation

Since the entry into force of the Amsterdam Treaty, the Council has, on the basis of Articles 31 and 34 of the TEU, adopted several Framework Decisions establishing minimum rules concerning the definition of criminal offences and sanctions in various areas, inter alia terrorism, computer crime and organised crime.

In addition, the European Court of Justice has clarified that criminal law provisions under certain conditions may be included in specific areas of Community policy. That is when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious offences, in order to ensure that the rules laid down are fully effective. Consequently, criminal law provisions have been included in some first pillar instruments.

If the Lisbon Treaty enters into force, the ordinary legislative procedure will be applicable on criminal matters in accordance with Article 83 of the TEU. The European Parliament and the Council may thus, by means of directives, establish minimum rules concerning the definition of criminal offences and sanctions in areas of particularly serious crime with cross-border dimensions such as 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, computer crime and organised crime.

Apart from the specified areas of particularly serious crime, the Lisbon Treaty provides a general legal basis for the adoption of criminal provisions through directives if approximation of Member States' laws and regulations relating to crime is considered essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures.

Bearing this in mind, and considering the increased inclusion of criminal law in EU instruments also under the present Treaty, matters concerning criminal law are likely to be discussed in various bodies and working groups within the Council to an even greater extent than at present. This may result in incoherent and inconsistent use of criminal provisions in EU legislation. Furthermore, provisions negotiated in different bodies within the Council might unjustifiably deviate from wording that is normally used in EU criminal legislation as well as in international instruments in the field of criminal law, thus creating unnecessary difficulties of interpretation of EU law and problems for national legislators in the process of implementation.

While noting the understanding reached in the JHA Council on 21 February 2006¹ 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 to ensure coherent and consistent use of penal provisions in EU legislation. To this end, it would be useful if the Council were to agree on guidelines for the inclusion of criminal law in EU legislation, and on specific model provisions to be used once the need to introduce criminal law has been established.

In addition to what has been outlined above, further advantages of guidelines and model provisions on criminal law are:

- Guidelines and model provisions would facilitate negotiations by leaving room to focus on the substance of the specific provisions;
- Increased coherence would facilitate the transposition of EU provisions in national law;
- Legal interpretation would be facilitated when new criminal legislation is drafted in accordance with agreed guidelines which build on common elements.

The following guidelines should be conceived only as a starting point for discussions in the Council. With a view to achieving the aims outlined above however, deviations from the guidelines should be specifically argued in the course of future legislative processes.

The Council therefore, without prejudice to the Commission's right of initiative, adopts the following conclusions:

¹ See doc. 7876/06.

Assessment of the need for criminal provisions

- (1) As a point of departure Member States should be allowed flexibility in determining which approach to take when sanctioning infringements of EU legislation. It should be left to Member States to decide whether to apply criminal law or to use other non-criminal measures.
- (2) Criminal provisions should only be adopted when necessary to address clearly defined and delimited conduct with cross-border implications that seriously harms or threatens or is likely to harm or threaten justified interests of the European Union, its Member States or its citizens, and that cannot be addressed effectively by less severe measures.
- (3) Before adopting new criminal provisions, the Council should further consider at least the following factors:
 - how widespread and frequent the harmful conduct is, both regionally and locally within the EU;
 - the possible impact of introducing criminal legislation in the particular area of EU policy;
 - the expected added value or effectiveness of criminal provisions compared to other measures, taking into account the possibility to prosecute the crime through reasonable investigative efforts, as well as its seriousness and implications;
 - the possible impact on existing criminal provisions in EU legislation and on related case-law;
 - the expected additional burden, including the financial impact, on investigating authorities, prosecutor's offices and courts in the Member States.

Structure of criminal provisions

- (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 and scope.

- (5) The criminal provisions should focus on conduct which cause harm to the right or essential interest which is the object of protection, rather than conduct which only imply an abstract danger that harm may result; that is, avoiding criminalisation of a conduct at an unwarrantably early stage.

Intent

- (6) EU legislation should, as a general rule, only prescribe penalties for acts which have been committed intentionally.
- (7) Negligent conduct should be criminalised only as an exception in cases of serious negligence which endangers human life or causes serious damage.
- (8) Strict liability should not be prescribed in EU criminal legislation.

Inciting, aiding and abetting and attempts

- (9) Although the criminalisation of inciting, aiding and abetting should, unless there are particular circumstances against it, normally follow the criminalisation of the main offence, attempts should not be routinely criminalised. The necessity of criminalising attempts should be subject to the same needs assessment as set out above for the main criminal provisions to which they are linked and take into account the different regimes under national law. In particular, criminalisation of conduct at an unwarrantably early stage should be avoided.

Penalties

- (10) As a rule EU legislation on criminal law should provide for penalties that are effective, proportionate and dissuasive, thus leaving it to the Member States to determine the type and level of the criminal penalties to be applied. If approximation of the lowest maximum levels for imprisonment is considered necessary levels should, as a rule, be adopted in line with the Council conclusions of April 2002².

² Doc. 9141/02.

Model provisions

- (11) Once it has been established, in accordance with the guiding principles set forth above, that criminal provisions should be adopted, either as the only option or as an alternative, there is usually a need to establish a range of concurrent rules, e.g. rules on liability of legal persons. There may also be a need to differentiate between conduct that should be prohibited but does not necessarily have to be established as a criminal offence by the Member States, and conduct that should be criminalised in accordance with the criminal law system of Member States.
- (12) In order to facilitate negotiations and ensure coherency and consistency in EU legislation, recurrent provisions should, as far as possible, be worded in a uniform manner. To this end the Council agrees that the model provisions set out in Annex II should guide future legislative work in criminal matters.

Model provisions on criminal law and related matters in EU legislation

The following wording shall guide future legislative work in criminal and related matters within the EU. The aim is to achieve coherent and consistent criminal law provisions, and to avoid unnecessary difficulties in the interpretation of EU law and problems for national legislators in the process of implementation.

A – Provisions on conduct that does not necessarily have to be established as criminal offences

Infringements

Member States shall prohibit...[description of the conduct to be prohibited]

Penalties for infringements

Member States shall [take the necessary measures to] ensure that infringements of the prohibition referred to in Article x committed intentionally [or with at least serious negligence] are subject to effective, proportionate and dissuasive penalties [against...].

Provision [for Directives]

The Member States shall lay down the rules on penalties applicable to infringements of the provisions adopted pursuant to this Directive. The penalties provided for must be effective, proportionate and dissuasive.

B – Provisions on conduct that should be established as criminal offences

Criminal Offences

Member States shall ensure that the following conduct constitutes a criminal offence, when [unlawful and] committed intentionally [or with at least serious negligence]:

or

Member States shall ensure that the infringements referred to in Article x constitute a criminal offence when committed intentionally, in each of the following circumstances as defined by national law: ...

Inciting, aiding and abetting

Member States shall ensure that the inciting of or aiding and abetting the [intentional] commission of an offence referred to in Article x is punishable as a criminal offence.

Criminal Penalties

Each Member State shall take the necessary measures to ensure that the offences referred to in Articles x and y are punishable by effective, proportionate and dissuasive criminal penalties.

[or

Each Member State shall take the necessary measures to ensure that natural persons who commit the criminal offence referred to in Article x and y are punishable by effective, proportionate and dissuasive criminal penalties.]

Liability of legal persons

1. *Member States shall [take the necessary measures to] ensure that a legal person can be held liable for offences referred to in Articles x and y where such offences have been committed for its benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on*
 - (a) a power of representation of the legal person,*
 - (b) an authority to take decisions on behalf of the legal person, or*
 - (c) an authority to exercise control within the legal person.*
2. *Member States shall also ensure that a legal person can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of an offence referred to in Articles a and b for the benefit of that legal person by a person under its authority.*
3. *Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles x and y.*
4. *[For the purpose of this Directive] 'legal person' shall mean any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations. [NB: This paragraph is preferably included in an Article on definitions, if such a provision exists.]*

Penalties against legal persons

1. *Member States shall take the necessary measures to ensure that a legal person held liable pursuant to [Liability of legal persons, paragraph 1] is punishable by effective, proportionate and dissuasive penalties [which shall include criminal or non-criminal fines and may include other penalties, such as:
 - (a) exclusion from entitlement to public benefits or aid;
 - (b) temporary or permanent disqualification from the practice of commercial activities;
 - (c) placing under judicial supervision;
 - (d) a judicial winding-up order;
 - (e) temporary or permanent closure of establishments which have been used for committing the offence.]*
2. *Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article [Liability of legal persons, paragraph 2] is punishable by effective, proportionate and dissuasive penalties or measures.*