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LIMITE

CRIMORG 99

NOTE

from:	Presidency
to:	Multidisciplinary Working Group on Organised Crime (MDG)
No. prev. doc.:	8232/98 CRIMORG 69; 9960/99 CRIMORG 100
Subject:	**Approximation of the constituent elements of criminal acts and penalties: proposal for establishing a work programme**

I. The mandate for approximation

1. The present paper seeks to build on documents 8232/98 CRIMORG 69 and 9960/99 CRIMORG 100 regarding the approximation of the constituent elements of criminal acts and penalties, and suggests criteria for determining the areas of priority. It has been drafted to parallel recommendations 16, 17 and 18 in 9423/99 CRIMORG 80.

2. According to article 29 of the Treaty on the European Union, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice, for example by approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e) TEU. This article, in turn, deals with the progressive adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

3. The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (13844/98 JAI 41) sets goals related to the constituent elements of criminal acts and penalties. Paragraph 46(a) of the Action Plan describes measures that should be undertaken in this respect within two years of the entry of the Treaty of Amsterdam into force. Paragraph 46(b) of the Action Plan mentions the protection of the euro and the protection of means of payment other than in cash. (In both of these areas, work is already under way in the material criminal law working group.) The corresponding period established for the measures referred to in paragraph 50(c) of the Action Plan is five years.

4. Now that the Treaty of Amsterdam has in fact entered into force (as of 1 May 1999), there is reason to begin the work referred to in paragraph 46(a). The measures referred to in paragraph 50(c) appear to be intended as a follow-up to the work being initiated now, and so consideration of what is called for in paragraph 50(c) can be deferred. (It should be emphasized, as indeed is done in 8232/98 CRIMORG 69, that much work has already been undertaken within the European Union in regard to the issue of approximation.)

5. It may be noted that some work on approximation is being carried out in other fora. Indeed, the issue of approximation is not a new one in international criminal justice. For example the many international conventions that have been signed regarding the criminalization, investigation, prosecution and adjudication of specific offences have directly or indirectly dealt with this issue. Work is currently being carried out in other fora in connection with, for example, such offences as money laundering, corruption, trafficking in persons, trafficking in migrants and trafficking in firearms.

II. Factors contributing to the need for approximation within the European Union

6. The need for approximation of the **constituent elements** of criminal acts is primarily due to the fact that differences in how offences are defined may slow or even block the granting of requests for extradition and mutual assistance. In particular the widely applied requirement for double criminality requires that an act is criminalized in both the requesting and the requested State before the request can be granted. As a result of differences in the definition of offences, it is possible that this requirement is not filled, or at least that practical difficulties arise in responding to the request.

7. As noted in 8232/98 CRIMORG 69 (p. 5), organised crime groups appear to have the ability to identify weaknesses in judicial and legal systems. If a certain legislative regime offers advantages, organised crime groups may well prefer to operate in such an environment.

8. The need for approximation of **sanctions** is largely due to the fact that differences in the level of sanctions may hamper the response to a request for extradition or mutual assistance, and in particular the response to a request for certain coercive measures. In many Member States, such a response is possible only if the level of imprisonment for the offence in question exceeds a certain limit. An exceptionally low level of imprisonment in the requested Member State might thus forestall the response.

9 It has separately been suggested that one possible reason for approximation of sanctions may arise if some Member States define certain offences restrictively or apply exceptionally low sanctions to some offences. In particular where these restrictive scopes or low sanctions also reflect the low priority that the criminal justice system attaches to investigation, prosecution and conviction of offenders for such offences, and where the offence involves some degree of premeditation and planning, the Member States in concerned may attract potential offenders from other Member States.

III. Criteria for determining priorities

10. The first task in implementing paragraph 46(a) of the Action Plan is the identification of behaviour for which it is urgent and necessary to adopt measures establishing minimum rules relating to the constituent elements and to penalties. In order for it to be possible to assess the degree of urgency, one should first consider what factors could render measures related to a certain type of behaviour urgent and necessary. The Finnish Presidency suggests the following criteria for consideration by the MDG:

a) Differences in the constituent elements or minimum rules in the different Member States significantly hamper judicial cooperation between the Member States in the investigation, prosecution or adjudication of offences.

b) The exceptionally lenient level of penalties or the restricted scope of the constituent elements in some Member States serve to attract international offenders to such States[1].

c) The offence in question is a serious one.

d) No instruments have been or are being drafted within the framework of the European Union or elsewhere that could help to respond to the problems raised by differences in national legislation. (The annex of 8232/98 CRIMORG 69 includes a detailed list of relevant instruments.)

e) Other reasons might be of a more political character, such as the necessity to approximate because of shared common interests (e.g. fraud against the Community, the protection of the euro).

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1 This is primarily a problem for the Member State in question. However, it is possible that such a State will become a centre for criminality that has a significant impact also on the territory of other Member States.

IV. Identification of the priority offences for approximation

11. Paragraph 46(a) of 13844/98 JAI 41 and the explanatory note to the paragraph list some types of offences as "prime candidates" for examining whether urgent measures are needed. The paragraph calls for the following measure:

> "... identify the behaviour in the field of organised crime, terrorism and drug trafficking, for which it is urgent and necessary to adopt measures establishing minimum rules relating to the constituent elements and to penalties and, if necessary, elaborate measures accordingly.
>
> *Prime candidates for this examination could include, in so far as they relate to organised crime, terrorism and drug trafficking, offences such as trafficking in human beings and sexual exploitation of children, offences against drug trafficking law, corruption, computer fraud, offences committed by terrorists, offences committed against the environment, offences committed by means of the internet and money laundering in connection with those forms of crime. Parallel work in international organisations like the Council of Europe have to be taken into consideration"*

12. In the following, some assessments are made of these different types of offences in the light of the criteria for urgency and necessity noted above. However, no ready-made documentation is available on the problems that appear in practice, for which reason the various types of offences can be assessed from this point of view only on the basis of a discussion in the working group.

13. Some indications may be given within the framework of the mutual evaluation exercise, but it is yet too early to draw any definitie conclusions on this basis.

14. Certain questions relating to dual criminality have been examined by the Working Party on Judicial Cooperation in Criminal Matters (see documents 9813/98 JUSTPEN 68 REV 1 and 5270/1/99 JUSTPEN 2 REV 1 + ADD 1).

Organised crime

15. Organised crime is a broad general concept that covers a number of different offences. It is not sensible to speak in general about the constituent elements of or the level of penalties for organised crime. Implementation of the Plan of Action to combat organised crime adopted on 16-17 June 1997 has reached an advanced stage, and consideration of a follow-up has already been initiated in the Multidisciplinary Group, in accordance with the mandate of para. 47 of 13844/98 JAI 41. Of the work that has been carried out in relation to organised crime, special reference should be made to the Joint Action of 21 December 1998 on making it a criminal offences to participate in a criminal organisation in the Member States of the European Union (OJ L 351 of 29 December 1998). A second document that should be kept in mind is the Convention relating to Extradition between the Member States of the European Union (OJ C 313 of 23 October 1996, p. 11). According to article 3 of the Convention, the requirement of double criminality can be set aside under certain conditions, for example when the request for extradition relates to organised crime.

Terrorism

16. Terrorism is also a general concept that incorporates many different types of offences. Some of the EU Member States have not separately criminalized terrorism, and instead possible acts of terrorism are punishable on the basis of such general criminalizations as murder, the taking of a hostage or aggravated arson. Even without a separate study it can be assumed that acts that are deemed to be terrorism are comprehensively criminalized in all Member States. Since the acts are typically rather serious, it can further be assumed that also the sanctions are severe. What was noted in the preceding paragraph regarding the Extradition Convention also applies to terrorism. (Reference can also be made to the United Nations Convention for the Suppression of Terrorist Bombings.)

Drug trafficking

17. All Member States of the European Union are parties to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna 1998). This in itself would seem to ensure that the constituent elements of drug offences in the different Member States already today fulfil certain minimum criteria. According to article 3(4)(a) of the Convention, each State Party is to make the commission of the offences established by the Convention liable to sanctions which take into account the grave nature of the offences. Thus, also the level of penalties in the States Parties presumably fulfils certain minimum criteria.

Trafficking in human beings and the sexual exploitation of children

18. A great number of international instruments have been adopted within the framework of the United Nations, the Council of Europe and the European Union on trafficking in human beings, in particular in order to protect women (see 14412/98 CRIMORG 207 JUSTPEN 120). Within the framework of the EU, a basic document is the Joint Action of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children (OJ L 63, 4 March 1997, p. 2). With this Joint Action, the Member States of the EU have undertaken to criminalize trafficking in human beings and the sexual exploitation of children, and to providing that these offences, and participation in or attempt to commit them, are punishable by effective, proportionate and dissuasive criminal penalties. According to title IV (B) of the Joint Action, the Council is to assess the fulfilment by Member States of their obligations under the Joint Action by the end of 1999.

19. Trafficking in human beings is currently being considered within the framework of the United Nations, in a protocol to the draft United Nations convention against transnational organised crime.

Corruption

20. Corruption is one of the themes that have been dealt with extensively in various international organisations during the 1990s. Binding documents against corruption have been drafted within the framework of the European Union and the OECD, and several have also been drafted within the EU. The scope of application of the EU instruments against corruption has gradually expanded from EU civil servants (the corruption convention and protocol) to national civil servants, and expanded further to the private sector (the Joint Action of 22 December 1998 on corruption in the private sector). The Council of Europe corruption convention is even broader than this entity, but on the other hand it provides a rather large scope for making reservations. The action taken by the Member States in respect of corruption in the private sector will be assessed within two years of when the Joint Action entered into force, after which the need for further measures is to be assessed.

21. Through the EU instruments, the Member States have undertaken to criminalize acts of corruption and make them subject to effective, proportionate and dissuasive criminal penalties. It would thus seem as if in respect of corruption the approximation of legislation has proceeded quite far.

Computer fraud

22. Since it is possible to use computers in order to easily commit crimes across national borders, the EU has a natural interest in ensuring the appropriateness of penal provisions in this sector. First of all, an assessment should be made of the contents of the legislation of Member States on computer frauds. In that context, work undertaken by the Council of Europe needs to be taken into account.

23. The examination in the EU material criminal law working group is proceeding in respect of the use of information technology in the commission of fraud related to means of payment and of payments. The document that is the basic text is the Communication from the Commission on a framework for action on combating fraud and counterfeiting of non-cash means of payment, which includes a draft for a Joint Action 10537/98 CRIMORG 119 JUSTPEN 76 ECO 274 (COM (1998) 395 final).

24. The Convention on the protection of the European Communities' financial interests does not separately consider computers as a means for committing fraud.

25. The use of information technology in the commission of offences is currently being examined also within the Cyber-space expert group of the Council of Europe. The expert group is considering, among other issues, the constituent elements of computer fraud and a provision regarding effective, proportionate and dissuasive criminal penalties.

Environmental offences

26. Work related to crimes against the environment has already been initiated within the European Union. The Danish proposal for a Joint Action on the prevention of serious environmental crime (5579/99 CK4 10, CRIMORG 13, JUSTPEN 5, ENFOPOL 8) is being considered by the material criminal law working group. At the moment, a summary is being prepared on the legislation of the different Member States on environmental crime.

27. It should also be noted that the Council of Europe Convention on the Protection of the Environment through Criminal Law was adopted on 4 November 1998. The Council of Europe intends to follow how the ratification of the Convention proceeds in the different Member States, and how this affects possible deficiencies in their legislation. In addition, document 9423/99 CRIMORG 80 (recommendation 55) also includes proposals within the European Union to monitor developments.

Crimes over the Internet

28. The draft articles worked out by the Cyber-space expert group in the Council of Europe also concern offences committed through the use of the Internet or that are directed against the Internet. In this respect, what was said above regarding computer fraud could be cited.

29. In respect of the dissemination of child pornography over the Internet, political agreement was reached within the EU on a Joint Action in December 1998. An Austrian initiative for a decision in this respect was recently examined by the MDG.

Money laundering

30. The second protocol to the Convention on the protection of the European Communities' financial interests (OJ C 221 of 19 July 1997, p. 11) contains an obligation to criminalise money laundering. According to article 2, "each Member State shall take the necessary measures to establish money laundering as a criminal offence". This applies to the laundering of the proceeds obtained through fraud directed against the financial interests of the European Communities as well as the proceeds that have been obtained through corruption of certain authorities. Article 2 of the convention gives Member States relatively strict indications of which penalties to apply.

31. More generally, fourteen Member States have ratified the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. States Parties undertake to adopt the necessary legislative measures to establish as offences the acts noted in the text (article 6(1)). According to articles 2 through 4 of the Convention, States Parties commit themselves to aligning their laws on undertakings contracted in regard to intenrational cooperation on investigation, seizure and confiscation.

32. The laundering of the proceeds of drug trafficking, in turn, should be criminalised on the basis of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. On 3 December 1998, the Council adopted Joint Action 98/699/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime. There are certain differences between the Member States in respect of what offences have been established as predicate offences in respect of money laundering.

33. Money laundering has also been considered by the Multidisciplinary Working Group.

Other types of offences

34. Smuggling is clearly a type of offence in respect of which the EU has a strong interest in prevention and control. For the time being, smuggling has only been dealt with in passing in the discussion of the approximation of legislation, in connection with the demand that the provisions on the protection of the financial interests of the European Communities also extend to smuggling that harms such interests. The smuggling of drugs, in turn, is covered by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. An examination might be made of whether the provisions in force in Member States on other unlawful export and import are sufficient. Smuggling that does not endanger the financial interests of the Communities might nonetheless result in financial loss to an individual Member State.

V. The approximation of sanctions

35. Para 46(a) of 13844/98 JAI 41 also calls for the identification of behaviour for which it is urgent and necessary to adopt measures establishing minimum rules relating to penalties. In section III above, some comments have already been presented on possible criteria for considering this urgency and necessity. In general, it can be noted that the Member States have already committed themselves, in various connections, to ensuring that several specific types of offences are punishable by effective, proportionate and dissuasive criminal penalties. Some EU instruments, in turn, note that the sanctions should be such that they allow for the possibility of the extradition of the suspected offender.

36. In considering the urgency for and necessity of minimum rules relating to penalties, there is reason to recall also some of the factors that have hampered attempts to approximate sanctions:

a) each Member State uses a range of sanctions that has been established in accordance with the seriousness of the offences in question. There may be considerable differences between the systems in the different Member States in this respect. It may prove impossible to amend the range provided for an individual offence to any essential degree without the latitude becoming out of proportion in respect of the range for other offences. This proportionality between sanctions is an important characteristic of national penal systems.

b) There may be considerable differences between Member States in particular in respect of maximum sentences, which complicates the establishment of minimum rules relating to penalties.

c) There may also be problems in respect of the approximation of minimum penalties. Indeed, not all Member States even have minimum penalties applicable to individual offence categories.[1]

d) The statutory range of sanctions does not necessarily reveal very much about the length or even type of sanctions imposed in practice. For example, it is possible that the sanctions imposed may be taken, as matter of course, from the lower end of the statutory range. In some Member States and in many cases, furthermore, a completely different type of sanction is imposed in stead of the sentence of imprisonment referred to in the penal provision.

37. It should also be noted that the level of sentencing varies between courts also within a Member State. As shown by criminological research, where the range of applicable sanctions provide the judge with discretion, different judges often decide differently even in respect of similar cases. It has not been possible to eliminate this variation in sentencing from national courts.

VI. Establishing a work programme

38. A proposal for a work programme on approximation is contained in recommendations 16, 17 and 18 of 9423/99 CRIMORG 80. Recommendation 16 calls upon the Council to adopt instruments on approximation, after having investigated the scope of the legislation of Member States related to the constituent elements of and to the penalties for key offences, and discussed the need for approximation, on an offence-by-offence basis in the following order: drug trafficking offences, trafficking in human beings, terrorism-related offences, money laundering, tax fraud, sexual exploitation of children, environmental crime, corruption, computer fraud and offences committed by means of the Internet. It is further proposed that the investigation and examination of the first offence should be completed by 31 December 2000, and further offences should be examined at the rate of at least one per Presidency.

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[1] Declaration 8 connected with the EU Treaty states that cooperation in accordance with article K.3(e) cannot require those Member States that do not have minimum penalties to adopt such penalties.

39. The investigation and examination should be based on practical experience with international cooperation. As suggested in 9960/99 CRIMORG 100, the European Judicial Network could assist in identifying possible problem areas.

40. Recommendation 17 calls upon the Council to adopt an instrument on the prevention, control and approximation of legislation on the counterfeiting of the euro. In this respect, a proposal by the German delegation has been submitted to Council[1]. The target date is 31 December 2000

41. Recommendation 18 calls upon the Council to adopt an instrument concerning the approximation of national legislation on fraud and counterfeiting involving means of payment other than currency. The target date is 31 July 2001.

42. **In line with the preceding, the Finnish Presidency proposes that the MDG:**

- **discuss the criteria for the determination of priority proposed above in section 3;**
- **apply the criteria agreed upon in identifying priorities for work within the European Union, both in relation to the approximation of the constituent elements of offences, and to the approximation of sanctions.**

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[1] Doc. 9966/99 DROIPEN 4.