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NOTE

from :	General Secretariat
to :	Multidisciplinary Group on organised crime (MDG)
No. prev. doc.:	12940/97 CRIMORG 31; 8232/98 CRIMORG 69.
Subject :	Organised crime and approximation of European laws – the harmonisation issue

At its meeting on 7 January 1999, the MDG examined considered the issue of approximation of legislation on the basis of document 8232/98 CRIMORG 69. At the conclusion of the debate, the Presidency invited the delegations to provide the General Secretariat with their written comments and contributions by 12 April 1999 (Telex n° 320 of 22 January 1999 and 370 of 26 January 1999).

This document summarizes the outcome of the discussions of the MDG on 7 January 1999 and appends the written contributions from the following Member States : Greece, Ireland, Italy and Sweden.

Summary of the discussion on 7 January 1999

The UK, French, Austrian, Finnish, Dutch, and German delegations as well as the Commission took the floor. All delegations agreed that organized crime could profit from the differences between the laws of the Member States and underlined that the document is a helpful basis for future discussion.

They also stressed that the question is broad and complex and asked for an approach mainly targeted at specific problems linked with organized crime. They recommended that areas for which approximation is absolutely necessary should be defined, underlining that it would be better to start from what is not working well for practitioners rather than from theoretical viewpoints.

For that purpose, two delegations (Finland and Commission) suggested to ask questions relating to practice to the European Judicial Network as well as to Europol. Other delegations (Netherlands and Germany) proposed to wait for the conclusions of studies under way explaining that the results of such studies could be a helpful starting point for an in depth analysis.

The Dutch delegation suggested that focusing on compatibility more than on harmonization would be an interesting path to follow whereas the Austrian delegation suggested that the first priorities should be to improve the networks, the legal provisions and, the way the information is provided to Member States.

The UK delegation was in favour of a step by step approach and announced that a document on mutual recognition which could be considered as one step of this approach, should be issued shortly[1].

In conclusion, the Presidency pointed out that the target date for the topic in the Action Plan against organized crime is mid-1999 and urged delegations to send the General Secretariat their written contributions on the priorities in the field of approximation.

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[1] This document has been issued on 29 March 1999. The references are 7090/99 CRIMORG 35 JUSTPEN 18.

ITALY

The discussion of the approximation of criminal law between the Member States is an essential part of the process of European integration in general and an essential stage in improving police and judicial cooperation in criminal matters within the legal framework taking shape following the entry into force of the Treaty of Amsterdam.

In this sense the approach adopted in the document under discussion is endorsed. The document, with necessary simplifications, identifies in its discussion of the approximation of laws an intermediate stage between assimilation and harmonisation, which would make it possible to change register, moving from classic mutual assistance in criminal matters to consultation based on confidence on the part of the Member States in reciprocal compliance with standards, minimum or otherwise, relating to human rights and defence rights, and on the will to combat organised crime and the allocation of appropriate resources to this objective.

The time is ripe for discussion, and the drawing up of joint actions and resolutions in implementation of the Action Plan to combat organised crime and the approval of the Action Plan establishing an area of freedom, security and justice show that it is possible to improve on the currently fragmentary level of awareness of common problems and the current level of cooperation, and for the EU to move towards a more complete and organic methodological approach.

The document correctly identifies the advantages of approximation. The link between the abandonment of the principle of double incrimination and the introduction of the principle of mutual recognition of the validity of the rules of proof should be highlighted. The links between these two questions should be studied by a group of experts and a deadline set for the production of a report. In the light of experience, however, it would not appear necessary to have a preparatory study drawn up by an external research body.

The document's conclusions give a clear indication of the possible future course of the discussion. The following comments should be made, however:

1. Existing laws have already been approximated to a significant extent, and this can be put to the test as Europol begins effective operational activities; further work remains to be done in this area, however.

2. Existing laws are not sufficient for improving cooperation, to the extent that what is an obligation in one Member State may be optional in another, thus creating an imbalance (as recent cases of (lack of) cooperation have shown), or given the lack of any supranational body for the legal resolution of disputes.

3. Europol's activities already cover a sufficiently large area of cross-border crime. With the possible exception of the inclusion of money laundering and facilitating illegal immigration (to the extent that this is not already covered by the trade in human beings), Italy considers the effective exercise of Europol's powers to be more important than their extension.

4. The approximation of procedural law, although made difficult by differences of judicial and constitutional tradition from one Member State to another, is an objective to be pursued. A first step in this direction would be more comprehensive reciprocal recognition of court decisions.

5. Approximation of laws by rational systematisation is an objective which cannot be deferred.

SWEDEN

In our view this issue should be analysed on a problem-oriented basis. Work must build on knowledge of how the problem appears in practice; there is no point in constructing a systematised model of work.

Work should concentrate on crime which is typically cross-border and/or where differences in the extent to which such offences are regarded as criminal create problems for international cooperation. It is particularly important to identify areas where differences in legislation result in criminal activities moving to favourable "niches". All types of safe haven within the Union must be opposed.

We are prepared to discuss the question of abolishing or limiting the double-criminality requirement and believe that this can be a quick and simple method of improving cross-border cooperation in criminal matters.

Work on harmonising or approximating the laws of the Member States should initially concentrate on the question of whether and to what extent substantive criminal law should be approximated or harmonised.

The need to harmonise national law on criminal procedure is probably not so great and requires a separate assessment and separate solutions.

In the case of international criminal procedure, there may be a need for approximation. The joint assessment currently under way of how Member States are fulfilling their obligations as regards mutual assistance in criminal matters will provide a basis for taking decisions and does not therefore need to be discussed in the present context.

We do not feel that an independent research institute can provide the proper basis for taking decisions but think that it is those who apply the rules in the Member States – the practitioners – who can provide us with information and pinpoint problem areas.

There are of course various ways of obtaining basic information from practitioners. Perhaps the European Judicial Network could discuss the matter and identify possible problem areas at one of its meetings? Or maybe a seminar for practitioners should be arranged? Practitioners could for example have an open discussion based on the list of areas for which Europol is responsible or concentrate in discussions on certain specified areas; economic crime is one example of a complicated area which is important in this connection. Europol could be consulted about whether, in the course of its activities and from its own particular point of view as a police cooperation body, it has identified areas/questions which require attention.

Subsequently – when the problem areas have been identified – a questionnaire could be drawn up and replies collected from the Member States.

GREEK

Progressive approximation of the laws on crime is a common objective of the European Union States that is set out in many working documents and legal instruments which have been adopted (e.g. Action Plan on Organised Crime). Under the Amsterdam Treaty, this objective takes a more specific form in the provisions of Article 31 which, inter alia, stipulate that joint action on judicial cooperation on criminal matters must include ensuring the compatibility of laws applicable in the Member States, as may be necessary to improve such cooperation, and progressively adopting measures establishing the minimum rules relating to the constituent elements of criminal acts and penalties in the fields of organised crime, terrorism and illicit drug trafficking.

Cooperation between States is the most frequent and traditional framework, and is the most widely accepted by States, given that individual countries retain their powers and legal traditions. This form of approximation, which is already applied in practice on the basis of existing legal provisions, could be further strengthened both by speeding up ratification by the Member States of the legal instruments which have already been signed, or by re-examination of the reservations provided for in those instruments, particularly in areas relating to organised crime.

A substantive and decisive step towards improving judicial cooperation between the Member States of the European Union will be achieved by speeding up ratification of the 1970 Council of Europe Conventions on the International Validity of Criminal Judgments, and the 1991 European Union Convention on the Enforcement of Foreign Criminal Sentences, implementation of which will make it easier to deal with new forms of international crime.

The fact that all EU Member States have signed the Convention for the Protection of Human Rights and Fundamental Freedoms, and have accepted the jurisdiction of the European Court of Human Rights, and that the legislations of all the above States are based on the same essential principles and express the same social and humanitarian values, minimises the risk that implementing judicial rulings handed down in other Member States will breach their constitutional provisions, or the fundamental principles of their legal systems or of public order, even if differences exist in the procedural and substantive laws of the two parties involved.

Acceptance of this view will provide practical confirmation of the confidence, theoretically proclaimed and certainly quite justified, that exists between EU Member States.

The adoption and enactment in law of this view should constitute a first step, rather than being seen as the end-result and culmination, of a procedure of approximation and harmonisation of individual legislations, which is likely to be lengthy and complex, at whatever level, in whichever sector and to whatever extent it is attempted.

We consider assimilation useful insofar as protection of a Community interest is concerned.

We are not opposed to the harmonisation procedure, but we feel that, for the moment, priority should be given to creating the stable, clear and specific body of legislation which will constitute the common reference point.

Finally, with regard to unification, we feel that it is not feasible for now, and we also have reservations about the need for it.

With regard to the establishment of a European pursuit agency ("corpus juris"), we believe that to concentrate and unify criminal pursuit activities would create more problems than it would solve.

Regarding the issues set out in the conclusion, our comments are as follows:

It is not advisable to postpone discussion of the approximation of laws, but it is not possible to define the time needed to examine the question. We do not feel that this is a task that can be entrusted to and carried out by an independent research institute; rather, it should be completed within the operational framework of the Council.

Finally, our replies to the questions posed are as follows:

1. We consider that, from the texts set out in the Annex regarding the international legal instruments available to deal with drug trafficking and terrorism, the level of approximation is satisfactory. For other forms of serious international crime, however, further approximation is required.

2. A very positive point is that almost all the legal instruments provide for the spontaneous provision of information. However, an indicative example that might be given of an aspect that hinders cooperation is the over-emphasis in some cases on personal data protection.

3. For the time being, we consider that a satisfactory degree of harmonisation has been achieved in the areas covered by the Europol Convention.

4. Since all the EU Member States apply the European Convention on Human Rights, which contains safeguards to ensure that individuals accused receive a fair trial, the question of harmonising national procedural laws does not arise.

5. We feel that the approximation of laws should be "systematised", by establishing priorities and criteria governing firstly, international cooperation, secondly, the convergence of substantive law, and thirdly, how sentences are served.

IRELAND

1. Does what is already present in the texts set out in the Annex represent a sufficient degree of approximation ?

The texts in the Annex are divided into three categories

- Those within the remit of Europol's objectives, viz. unlawful drug trafficking, terrorism and serious forms of international crime.
- Tasks which are to be carried out by Europol in the areas of unlawful drug trafficking, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings and motor vehicle crime.
- Crimes with which Europol could deal.

Examination of the texts under these three headings indicate that there is already a close degree of harmonisation of Member States laws under way. The Treaty of Amsterdam provides in Article 29 that one method of combating organised crime is for Member Sates to approximate rules on criminal matters and to do so specifically in the areas of

Terrorism,
Trafficking in persons and offences against children,
Illicit drug trafficking and illicit arms trafficking,
Corruption and
Fraud.

All Member States have taken substantial action in these areas in recent years both from a national standpoint and from their commitments arising internationally. The Treaty of Amsterdam commits Member States to continue on the path of approximation. The topics set out in the annexes to 8232/98 CRIMORG 69 represent a good base on which approximation of law Member States may be examined further.

2. **In what respect is it sufficient or insufficient, from the point of view of the improvement of co-operation ?**

8232/98 CRIMORG 69 refers to two dominant features that enable organised crime to succeed and prosper –adaptability and the ability to operate on a transnational basis. These features are identified as the areas that are the cause of the problems which beset the EU in the fight against organised crime ; it seems logical then that the aim for Member States must be to ensure that, where laws are being examined with a view to approximation, the expected outcome of any actions will result in adaptability and will enable Member States to deal efficiently and speedily with transnational issues.

3. **Which areas must have priority for greater harmonisation ? Must we restrict ourselves to matters for which Europol is competent ? Must we go further ?**

The areas for which Europol has competence at present as set out in Article 2 (1) of the Europol Convention should form the basis for greater harmonisation. A study should be undertaken to establish (a) what the needs are in those areas, (b) the conflicts that arise between different laws of Member States and (c) the manner in which those conflicts can be best overcome. While this in under way, Member States might give consideration to prioritising those other forms of serious international crime set out in the third paragraph of Article 2 to the Annex to the Europol Convention for which Europol should have responsibility.

However, only after the present areas of responsibility of Europol have been satisfactorily considered and a specific plan to achieve harmonisation in those areas has been put in place should the possibility of giving new areas of responsibility for Europol be considered.

4. Should procedural law be approximated ?

Examination of approximation of procedural laws should be considered where particular problems caused by procedural laws

(a) are considered to be impeding co-operation among Member States

(b) point to incompatibilities between the laws of Member States or

(c) act as an obstacle to adaptability and the ability to operate on a transnational basis.

5. Should the approximation of laws be « systematised » by rationalisation of its structure ?

It is not quite clear what is meant by this question. Approximation of laws should exist in accordance with a framework which

- Identifies the problem areas among Member States which are being exploited or are likely to be exploited by organised crime
- Defines the issues to be resolved in those areas
- Takes account of the ways in which the resultant legal changes impact on good practice in Mutual Assistance and
- Where necessary, revise the existing Mutual Assistance practices.