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NOTE

From:	Presidency
To:	Delegations
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Subject:	Future of substantive criminal law - Outcome of discussions of the meeting of the Working Party on Substantive Criminal Law on 21 February 2019

At the meeting of the Working Party on Substantive Criminal Law (DROIPEN) on 21 February 2019, delegations discussed the issue of the 'Future of EU substantive criminal law' on the basis of the replies¹ provided by Member States to the questionnaire contained in 15728/18, the summary of the replies set out in WK 1863/2019, and the questions contained in 6230/19.

The discussions can be summarised as follows:

1. A considerable number of Member States expressed that the Union legislator should cautiously continue to exercise its competence on establishing 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*, proportionality and subsidiarity.
2. Many Member States requested that, at this stage, more efforts be deployed on the effectiveness and quality of the implementation of *existing* EU legislation. 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.

¹ See WK 840/2019 + ADD 1 + ADD 2 + ADD 3 + ADD 4.

3. For the time being, no Member State requested further 'Lisbonisation'.² However, one Member State stated that it would 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, so as to enlarge the scope of that Article.³
4. At this point in time, no Member State saw the need to develop a common definition/meaning 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 these 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.
5. Various Member States advocated that it would 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. The following areas were mentioned:
 - a) environmental crimes, including maritime, soil and air pollution;^{4 5}
 - b) trafficking in cultural goods;⁶
 - c) the counterfeiting, falsification and illegal export of medical products;⁷
 - d) trafficking in human organs;
 - e) manipulation of elections;⁸
 - f) crimes relating to artificial intelligence, subject to further defining the issue at stake.⁹

² 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.

³ OJ L 335, 11.11.2004, p. 8. See WK 840/2019, p. 53.

⁴ 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.

⁵ It should be noted that 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.

⁶ C f. recitals 13 and 15 of Directive (EU) 2017/541 on combating terrorism.

⁷ 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.

⁸ Other areas mentioned by delegations were 'identity theft' (SI), 'non-conviction based confiscation' (IT), and 'preventing the facilitation of unauthorised entry, transit and residence, in order to combat illegal immigration' (HR).

⁹ In addition, NL mentioned the possibility of further analysing how artificial intelligence could be used in order to prevent and combat criminal activities.

6. Various Member States drew the attention to the fact that where it is demonstrated that there are good reasons for taking legislative action in any of the areas mentioned under points 5 and 6, or any other area, the possibility of using Article 83(2) TFEU as a legal basis should be considered before extending the scope of the first subparagraph of Article 83(1) TFEU by unanimous decision of the Council pursuant to the third subparagraph of Article 83(1) TFEU.
7. Several Member States insisted that where the Union envisaged 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 was necessary, *inter alia* to ensure complementarity and added value and to share information regarding best practices, obstacles to ratification, etc.
8. Many Member States recalled that, in order to ensure the 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. A large number of Member States insisted that Directives adopted on the basis of Article 83 TFEU should allow Member States sufficient time for the implementation of these instruments. The period concerned should in principle be no less than 24 months. Some Member States recalled that the legal form of a Directive leaves Member States flexibility on how best to carry out their implementation in the national legal order, including decisions on which stakeholders they want to involve in the process.
