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CDPC (2015) 25

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

**COMMENTS ON THE DOCUMENT ON MODEL PROVISIONS FOR
COUNCIL OF EUROPE CRIMINAL LAW CONVENTIONS**

Document prepared by the CDPC Secretariat
Directorate General I – Human Rights and Rule of Law

THE NETHERLANDS

As to article 4 and 12 of the model provisions we have the following comment to make.

We should as CDPC be realistic about the impact of our work.

Model provisions and the commentary are a useful tool and necessary but they should not aim in becoming the A and O for negotiators of future treaties.

With regard to article 4 we have the following comments on numbers 18 and 19.

Number 18

The first two sentences of the comment is helpful. However the rest, starting from "Thus reference..... until the end should be deleted. The texts is highly complicated. The additional wording did not clarify things. Furthermore it is overdoing things in try to cover all thinkable options. When the case will occur, leave it to the negotiators and the CDPC to find a correct solution.

Number 19

Here again the exceptional situations are described in great detail and we do think that this is neither necessary nor helpful.

With regard to article 12 we are happy with paragraph 2 as it is in the text now.

SWEDEN

Article 4

- We welcome the deletion of Options A and B for Article 4(1) of the Model Convention. While we do not object to the use of these options as such, discussions during the last plenary meeting made it clear that it might be difficult to reach consensus on this issue. It seems a good way forward to mention these options only in the commentary box, as now proposed. As there was confusion among delegations concerning the meaning of part of the commentary text – as well as differing opinions on what the commentary text *should* say – we would, however, prefer a briefer text.
- In particular, we propose the following deletion in para. 18 of the commentary box (which concerns the option to provide alternatively for non-criminal sanctions):

[...] If negotiators choose to use such a wording for a particular criminal law provision, it would be necessary to take this into account when negotiating general provisions such as those in Articles 5 to 15 of this model text. Normally, those articles should (strictly) be applicable only to “criminal offences”. Thus reference in articles 5 to 15 to the articles should exclude an article, which uses such alternative wording. Alternatively, the wording of Articles 5 to 15 could include reference to an article modelled on this alternative wording of paragraph 1, but should clarify that they only apply if a Party has opted to foresee criminal sanctions. Thus Articles 5 to 15 should refer to “criminal offences” (and not use the term “offences”) with the understanding that the obligation set out therein does not apply if a Party has opted for non-criminal sanctions.

We have previously proposed changes to this text, with which we have difficulty. It appears, however, that other delegations have read this text differently. This would seem to indicate that the text is too complicated to provide the intended guidance to future negotiators. Furthermore, it is our understanding, after hearing the discussions in June, that delegations have highly diverging views on the substance (i.e. the status of Articles 5 to 15 when alternative wording is used for Article 4). To leave this passage out would likely prevent long, and possibly inconclusive, discussions in December.

- Along the same lines, we propose to delete the corresponding part of para. 19 of the commentary box (which concerns the option to use softer language, “shall consider”):

[...] Here, as well, negotiators would need to clarify whether and to what extent the general provisions such as those in Articles 1 to 15 of this model text should apply to articles which use such “softer” language.

Article 7

- We agree with the notion in para. 4 of Article 7 that liability of a legal person shall be without prejudice to the criminal liability of the natural person who has committed the offence. However, there might be individual cases where it is not appropriate to impose a sanction on both the legal person and the individual offender. Therefore we suggest that para. 30 of the Explanatory Report be softened so that it provides that “foreseeing a liability of the legal person should not generally be considered as an alternative to imposing a criminal sanction on the offender and vice versa.”

Article 8

- We suggest the following changes to para. 38 of the commentary box:

[...] The *second sentence* follows typical examples of CoE conventions. ~~While the principle of proportionality should be taken into account in determining the appropriate sanctioning level for certain offence,~~ CoE conventions typically require Parties to foresee in the case of some or all of the offences described, when committed by natural persons, *penalties involving deprivation of liberty that may give rise to extradition*. ~~The reason is that u~~Under Article 2 of the European Convention on Extradition (CETS No. 24), extradition is to be granted in respect of offences punishable under the laws of the requesting and requested Parties by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. The provision here ~~will~~ is thus ~~intended to~~ ensure that alleged offenders are extraditable – at least in relation between Parties that are also parties to CETS No. 24. The principle of proportionality should always be taken into account in determining the appropriate sanctioning level for certain offence. A typical CoE criminal law convention does, however, provide for the criminalisation of at least one offence that is serious enough to warrant a penalty that may give rise to extradition.

The changes are intended to clarify that the principle of proportionality is paramount. The appropriate level of sanctions should not be determined by a wish to enable extradition but by the seriousness of the offence.

Article 14

- Para. 59 of the Explanatory Report goes further than the above-mentioned provision in that it mentions protection against “any risk of” intimidation and retaliation. To align the text with the text of Article 14(1)(d), the reference to risk should be deleted.

Consistency etc.

- The final document should be proofread and checked for consistency. Council of Europe conventions should, for instance, be referred to in a consistent manner.

UNITED KINGDOM

Page 12

Article 6 – Jurisdiction

- 1 Each Party shall take the necessary measures to establish jurisdiction over criminal offence referred to in [Articles x, y of] this Convention, when the offence is committed:
 - a) **in whole, or in part** in its territory; or
 - b) on board a ship flying the flag of that Party; or
 - c) on board an aircraft registered under the laws of that Party; [or
 - d) by one of its nationals].

UK Comment: The addition is intended to make sure that the Model Provisions reflect the increasing cross border nature of criminal activity across Europe.

Page 17

Article 7 – Liability of legal persons

...

- 36** *This text follows the standard language of CoE criminal law conventions and is intended to address the different concepts of liability of legal persons for criminal offences, which are applied in different CoE member States. Normally, CoE criminal law conventions should include this article. The intention of this provision is, to make commercial companies, associations and similar legal entities ("legal persons") liable for criminal actions performed – for their benefit – by a natural person. It does not require foreseeing criminal sanctions against the legal entity itself but allows foreseeing civil or administrative liability instead. However, depending on the subject matter (types of crimes), negotiators may choose not to include this article (e.g. the Istanbul Convention CETS No. 210 does not contain such a provision). **Negotiators should carefully consider whether the Convention requires corporate liability when taking into account the nature of the conduct under consideration.***