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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMENTS ON THE PROJECT ON MODEL PROVISIONS

Document prepared by the CDPC Secretariat
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FINLAND

FI finds the idea of model provisions useful. As stated in the mandate, by using standard provisions on certain general issues, long discussions in future ad hoc expert groups could be avoided. FI thanks for the document on the model provisions project as well as an opportunity to attend in two preparatory meetings. FI thinks that amendments which have been made in the latest document, go into a right direction and the text as a whole has improved a lot.

General comments

FI has following general remarks. Firstly, regarding the legal status of the model provisions, it would be important to clarify in the text that the provisions are intended to be used as drafting recommendations and guidance for future work. It should be made clear that model provisions are not meant to be binding, nor would it necessarily be appropriate or necessary to use them in all possible future conventions. This flexibility is necessary, since as yet we are not aware of the substance of possible future conventions.

Secondly, FI would prefer more general provisions. Instead of drafting detailed provisions, which would cover all possible scenarios, the focus should be on such ”core” criminal law provisions, which are most relevant and common to all or at least most criminal law conventions. In this regard the text could be simplified.

Thirdly, FI thinks that the Committee should give a clear message to ad hoc groups that criminal law should be used only as a last resort. Therefore, before introducing such provisions, it should be carefully considered the appropriateness of criminal law provisions in comparison to other possible measures. Crime preventions should be stressed as well. In this regard, paragraphs 3, 4 and 11 of the explanatory box are particularly important to maintain and could be included in the beginning of the model provisions, to be taken into account as guiding principles when considering the need and appropriateness of criminal law provisions. Requirements for clarity and preciseness of criminal law provisions should also be stressed in this context.

Comments on individual articles

Articles 1 and 2

As to paragraph 2 of Article 1, various ways of follow-up mechanisms should be left open. It would, for instance, not be necessary to set up a specific committee for each convention. Such mechanism (as an obligation in all conventions) might cause unnecessary administrative burden.

It is important to maintain the last paragraph (8) in the explanatory box under which the need to include specific provisions on the protection of victims depend also on the subject matter of the convention to be drafted. This explanation is relevant also in relation to Article 1 b).

Article 3

No particular comments, even though it can be considered whether this, substantially empty provision is necessary in model provisions.

Article 4

FI prefers the text in paragraph 1 and suggests to add the following text in the explanatory box (e.g. in the end of paragraph 13: " It is up to States to decide how this obligation is fulfilled, e.g. by establishing a specific criminalisation for the offence concerned, or by ensuring that the conduct is punishable as a criminal offence by other criminal law provisions".

FI suggests to simplify paragraph 14 in the explanatory box. It would be sufficient to have the first two sentences in the text. Rest of paragraph 14 is too detailed in the model provisions and, as such, also problematic. There are e.g. other degrees of culpability in different legal orders than those described in the explanatory box. Criminal law provisions should focus on conduct which is intentional, and leave questions on negligence as well as further analysis of culpability etc. out of the model provisions.

FI does not support options A or B. As said before, the focus should be on criminal law provisions (where, in accordance with *ultima ratio* and other criteria mentioned above, such provisions are necessary). If alternatives on administrative sanctions are given, as in option A, that might lead to confusion in relation to subsequent provisions (Art.5-16), which usually apply only to criminal law, not administrative law. These are for instance provisions on aiding and attempt, jurisdiction, aggravating circumstances, penalties, international cooperation etc. In other words, since subsequent provisions cover concepts of criminal law or include instruments or measures relevant only to criminal offences, also the "core" provision in Article 4, should cover only criminal law. On the other hand, instruments on cooperation between administrative authorities might have own mechanisms on cooperation etc., which also might lead to overlap and confusion, if these model provisions and subsequently criminal law conventions cover them also.

Furthermore, if too many alternatives are offered to negotiators, including "shall consider" model as in option B, it may encourage to use all options so that in addition to a "basic" criminal law article, a provision on administrative sanctions for "the rest" will be taken, which is not covered by a criminal law provision, and even a third "shall consider" option B for politically difficult cases.

In the explanatory part it could be said that criminal law provisions do not exclude the possibility to use administrative sanctions where appropriate, nor would it exclude a "shall consider" provision, if negotiators cannot agree on an obligation to criminalise certain conduct.

As to the options on reservations, FI prefers option A.

Article 5

It should be examined on a case-by-case basis, whether an attempt to commit a particular criminal offence, should necessarily be criminalised. Therefore, to clarify this, it is important to maintain paragraph 23 in the explanatory box.

Article 6

FI does not have difficulties with paragraphs 1 – 3. It could be considered to add persons habitually residing in the State to paragraph 1 d), as in some recent CoE criminal law conventions. FI suggests paragraphs 3bis and 3ter to be deleted from the operational part of the model provisions. They are not commonly used and as explained in the explanatory box (31), normally CoE criminal law conventions are drafted on the assumption that a state is not prevented from subordinating its jurisdiction to the requirement for double criminality. Therefore an obligation to explicitly exclude this possibility, should not be included (even in square brackets) in model provisions. An obligation to establish jurisdiction without a condition that the prosecution can only be initiated following a report from the victim (3ter), depends on the offence, and may be acceptable in certain situations, but not as a generally recommended text. Therefore, this possibility should be deleted from operational part of model provisions. Such a possibility could be explained in the explanatory part.

Article 7

No particular comments.

Article 8

As to paragraph 2, FI suggests to use the word “may” instead of “could” [,and *may* include other measures, such as..]. This would correspond with texts used in various instruments.

Article 9

As said in the explanatory box (41), whether article 9 is appropriate or not, will have to be determined taking into account the subject matter of the convention and the description of the offences. Therefore, if it is maintained, it should be in square brackets and with this explanation. It can be discussed, whether it is logical to include a provision on aggravating circumstances, since there is no provision on mitigating circumstances either. Even though there are provisions on aggravating circumstances in some recent instruments, that is not a commonly used provision in the CoE Conventions (nor is it included in the EU model criminal law provisions).

Article 10

The text in the explanatory box should be softened into a more discretionary form, also to make it compatible with explanations for other provisions. It seems not logical e.g. to say that negotiators *may consider*, whether to include a provision obliging previous (domestic) convictions to be taken into account as an aggravating circumstance under

Article 9, but under Article 10 *they are always obliged* to include a provision on taking into account previous sentences passed by another Party.

Article 11

FI thinks this Article should be deleted. A possibility to subordinate investigations or prosecution to a complaint should not – at least in all cases - be excluded; there might be crimes, where a decision of the victim not to investigate or prosecute, should be respected, or at least this option should be left for contracting States.

Article 12

It can be questioned whether this provision, which does not mean much in substance, is necessary.

Article 13

FI suggests ”enforcement of sentences” to be added as a form of international cooperation in paragraph 1.

Articles 14 and 15

FI refers to the comment above (regarding Articles 1 and 2). As said in the explanation box, in paragraph 50, the appropriateness of provisions on protection of victims, depends on the subject matter of the convention. This explanation is important to maintain, as well as keep the text in square brackets, apart from the last sentence, which FI suggests to delete. As said in the beginning, model provisions should offer guidance for future negotiations. It might be, that even though provisions on the protection and standing of victims were considered appropriate in a convention in question, it should not be required, that only the whole text of Articles 14 and 15 as such, without any flexibility, has to be used.

Article 16

FI suggests to soften the explanation in paragraph 52 along the lines of paragraph 50, e.g. “Negotiators may choose to insert an article on protection of witnesses, where considered appropriate, taking into account the specific nature of the crime and the situation of possible witnesses”.

Articles 19 - 21

FI repeats its comment on Article 1(2). There should not be an obligation to set up a follow up committee for each convention. Also alternative and less bureaucratic follow-up mechanisms could be considered. Therefore articles 19 – 21 should be in square brackets, as also Article 1(2) is.

GERMANY

With reference to the Secretariat email of 22 January 2015, the German delegation would like to comment on the revised texts of the model convention and explanatory report as follows:

On substance, we reiterate our proposal to replace the term “sanctions” in Article 8 paragraph 1 by the term “penalties”. In our view this would be the more precise term to be used in this paragraph which concerns only sanctions/penalties imposed on natural persons. We note that while previous CoE conventions have used the term “sanctions” in the corresponding provision, the first sentence of such paragraphs apparently was intended to apply to both, natural and legal persons. In this case the term “sanctions” would appear to be correct. However, the draft model text uses a slightly different approach in that its first paragraph concerns only natural persons whereas its second paragraph concerns legal persons. Making the proposed changes in Article 8 paragraph 1 would require corresponding changes in paragraph 38 of the notes and paragraph 35 of the draft explanatory report.

In addition, we have the following technical remarks:

In paragraph 22 of the draft explanatory report (on Article 6), in the second sentence, the term “endeavor” should be replaced by the term “consider” in order to bring this in line with the terminology used in Article 6. Also in the draft explanatory report, paragraphs 43 and 44 should be deleted as the corresponding provisions in Article 9 of the draft convention have been deleted.

LATVIA

Comments on the draft explanatory report:

Article 1 paragraph 1 subparagraph c

Article 1 subparagraph c indicates on the internal (domestic) cooperation. The Ministry of Justice of Republic of Latvia insists that the internal (domestic) cooperation should not be reflected in the standard clauses, as an international treaties usually focuses directly on international cooperation, leaving internal regulation on cooperation for the state in its national legislation. Similarly, if an international agreement oblige for The Republic of Latvia to cooperate, then, according to the Republic of Latvia international commitments in any case should be a national mechanism for the implementation of international commitments. Within this view, it is necessary to make the appropriate adjustments in the project:

Article 1 – Purpose of the Convention

1 The purpose of this Convention is:
a) to prevent and combat…..;
b) [to protect the rights of victims of the offences established under this Convention];
c) to [facilitate/promote] ~~[domestic and]~~ international cooperation [against ….]

Article 4 paragraph 1

Ministry of Justice invites to take a flexible approach to the criminalization of the offenses, since in some cases national legislation already provides a certain substantive framework for an international agreement to include certain infringement. Therefore Ministry of Justice supports the proposal for the project specified in option B;

Article 13 paragraph 1

It is unclear what constitutes a "regional instrument". Ministry of Justice of Republic of Latvia indicates that in our case, if there is a separate international agreement, for example between Baltic States, it shall be considered as an international instrument, rather than regional instrument. Similarly, if the instrument is practiced only territory of the Republic of Latvia, it is considered to be internal (domestic) instrument.

NORWAY

Document on the Model Provisions Project (CDPC (2014) 17rev3)

Page 4:

Preamble

Comment [LKD1]: No comments to the preamble.

Page 5:

3 *As this model text is primarily intended to be applied for drafting of CoE criminal law conventions, it foresees that the draft convention, in line with the respective Committee of Minister's mandate, will need to include one or more provisions on substantive criminal law (Article 4 of this model text), requiring Parties to ensure that a certain type of conduct described therein is criminalized under domestic law. In determining the specific type (scope) and definition of conduct that the Parties to the convention will be required to criminalize, negotiators should consider that criminalization of such conduct should always be seen as a "last resort" and the convention should thus focus on serious cases of conduct that actually require a criminal law response. Criminal law provisions should not*

Comment [LKD2]: US spelling

Page 6:

[Article 2 – Principle of non-discrimination

The implementation of the provisions of this Convention by the Parties~~, in particular the enjoyment of measures to protect the rights of victims~~, shall be secured without discrimination on any ground such as sex, race, colour, language, age, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, sexual ~~orientation~~identity, state of health, disability or other status.]

Comment [LKD3]: Non-discrimination is important for all. By not mentioning victims, it cannot be interpret that non-discrimination is *more* important concerning victims than other groups.

Page 9:

11 *When drafting provisions on substantive criminal law, negotiators should always consider the appropriateness of requiring Parties to criminalize the specific conduct (c.f. notes on Article 1 of this model text). The criminal law provisions should focus on serious cases of conduct causing actual harm or seriously threatening the rights or essential interest which the draft convention intends to protect. The draft convention should avoid criminalisation of a conduct at an unwarrantably early stage. Conduct which only implies an abstract danger to the protected right*

Comment [LKD4]: UK spelling

Page 17:

[Article 7 – Liability of legal persons

1 Each Party shall ensure that legal persons can be held liable for criminal offences referred to in [Articles x, y of] this Convention, when committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within that 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;
c) an authority to exercise control within the legal person.

2 Apart from the cases provided for in paragraph 1, each Party shall ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of a criminal offence referred to in this Convention for the benefit of that legal person by a natural person acting under its authority.

Comment [LKD5]: It's our opinion that the wording – reference – should be the same in no.1 and no.2

Page 18:

3 [Each Party shall take the necessary legislative and other measures, in accordance with domestic law, to permit seizure and confiscation of:

i. instrumentalities used to commit criminal offences in accordance with this Convention [….];
ii. Proceeds derived from such offences, or property whose value corresponds to such proceeds.]

Comment [LKD6]: In our opinion, the wording of Art 8 no 3 relating to seizure and confiscation is quite extensive, as it appears that the authorities shall have the right to seize and confiscate in relation to *all* criminal offences in accordance with the Convention. We therefore suggest including "in accordance with domestic law" in the first sentence, and that the article should read as follows:

"Each Party shall take the necessary legislative and other measures, in accordance with domestic law, to permit seizure and confiscation of: …"

Such wording is used in recent COE Conventions, for instance in Art 25 of the Convention on the Manipulation of Sports Competitions.

37	*The text in Article 8 largely follows examples of recent CoE conventions and should be inserted into any new convention, possible with certain variations depending on the specificities of the crimes in question as well as the obligations to criminalize such conduct.*

Page 19:

a) ….. [….]
b) [the offence was committed in the framework of a criminal organization;]
c) the perpetrator has previously been convicted of offences established in accordance with this Convention.]

Comment [LKD7]: US spelling

Page 27:

Chapter VI – Follow-up mechanism

Article 19 – Committee of the Parties

1 The Committee of the Parties shall be composed of representatives of the Parties to the Convention.

2 The Committee of the Parties shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within a period of one year following the entry into force of this Convention for the tenth signatory having ratified it. It shall subsequently meet whenever at least one third of the Parties or the Secretary General so requests.

Comment [LKD8]: We suggest this is considered again. The convention enters into force with 5 ratifications.

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Chapter VII – Relationship with other international instruments

Article 22 – Relationship with other international instruments

1 This Convention shall not affect the rights and obligations arising from the provisions of other international instruments to which Parties to the present Convention are Parties or shall become Parties and which contain provisions on matters governed by this Convention.

Comment [LKD9]: We suggest that the wording related to the legal hierarchy is considered again. Should it always be as the present wording in no.1?

Addendum - Draft elements for an explanatory report (CDPC (2014) 24 rev)

Page 2:

5. The list of non-discrimination grounds in Article 2 is based on that in Article 14 ECHR and the list contained in Article 1 of Protocol No. 12 to the ECHR. However, the negotiators wished to include also the non-discrimination grounds of age, sexual orientation, state of health and disability. "State of health" includes in particular HIV status. The list of non-discrimination grounds is not exhaustive, but indicative, and should not give rise to unwarranted *a contrario* interpretations as

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Page 3:

9. The last sentence of paragraph 1 clarifies that, while it is left to each Party to decide whether to foresee criminal sanctions for the conduct described in this paragraph, each Party which decides to do so is called upon to endeavour to also apply Articles 5 to 16 to such criminal offences. If, on the other hand, a Party decides to foresee non-criminal sanctions instead, there is consequently no obligation even to endeavour to apply Articles 5 to 16 to such offences.

Page 4:

Article 6 - Jurisdiction

18. This article lays down various requirements whereby Parties must establish jurisdiction over the offences referred to in this Convention. The obligation in this respect is only to make the necessary provisions in their domestic law which allow exercising of jurisdiction in such cases. The provision is not intended to require law enforcement authorities and/or courts to actually exercise (make use of that) statutory jurisdiction in a specific case. This Article is considered to set "minimum rules". Thus it only contain an obligation to "at least" criminalize offences and/or foresee a competence for their courts when the offence is committed under the circumstances described in that article on jurisdiction (c.f. paragraph 6).

19. Paragraph, 1.a is based on the territoriality principle. Each Party is required to ~~punish~~ establish jurisdiction over the offences referred to in the Convention when they are committed on its territory.

Page 5:

21. Paragraph 1.d is based on the nationality principle. The nationality theory is most frequently applied by countries with a civil-law tradition. Under that principle, nationals of a country are obliged to comply with its law even when they are outside its territory. Under sub-paragraph d, if one of its nationals commits an offence abroad, a Party is obliged to ~~be able to prosecute~~establish jurisdiction over the criminal offence committed by him/her.

27. Paragraph 4 provides for a possibility for Parties to enter reservations on the application of the jurisdiction rules laid down in paragraph 1.d. A Party may determine~~s~~ that it reserves the right not

Page 8:

Article 9 – Aggravating circumstances

41. Article 9 requires Parties to ensure that certain circumstances (mentioned in letters a. to d.) may be taken into consideration as aggravating circumstances in the determination of the sanction for offences referred to in this Convention. This obligation does not apply to cases where the aggravating circumstance already forms part of the constituent elements of the offence in the domestic law of the State Party.

42. By the use of the phrase "may be taken into consideration", the negotiators highlighted that the Convention places an obligation on Parties to ensure that these aggravating circumstances are available for judges to consider when sentencing offenders, although there is no obligation on judges to apply them. The reference to "in conformity with the relevant provisions of domestic law" is intended to reflect the fact that the various legal systems in Europe have different approaches to address those aggravating circumstances and permits Parties to retain their fundamental legal concepts.

43. The first aggravating circumstance (a), is where the offence caused the death of, or [serious] damage to the [physical or mental] health of the victim.....

44. The second aggravating circumstance (b) is where the offence was committed by persons abusing the confidence placed in them in their professional capacity....

45. The third aggravating circumstance (c) is where the offence was committed in the framework of a criminal organisation. The Convention does not define "criminal organisation". In applying this provision however, Parties may take their line from other international instruments which define the concept. For example, Article 2(a) of the United Nations Convention against Transnational

Comment [LKD1]: Comments to Art 9 refer to Art 9 letters a. to d., while this article only contains letters a. to c.

It also refers to letter b. which does not correspond with the wording of the draft convention. This section of the Explanatory Report should therefore be reviewed and updated.

Comment [LKD2]: See above. The text in the convention says in b) criminal organisation.

Comment [LKD3]: UK spelling; in the convention the US spelling is used.

SWEDEN

Comments on the draft Model Provisions and Explanatory Report

As we mentioned in the last plenary meeting, Sweden is on the whole satisfied with the draft Model Provisions and believes that this document and the Model Explanatory Report in their final form will be of great value to future negotiators. We are also very pleased to see that many of the improvements suggested during the plenary have been taken on board in the new drafts, which are decidedly going in the right direction. In order to improve the texts further, we respectfully offer the following comments and suggestions regarding the new versions of the documents.

Article 4(1)

- We suggest the following changes to the beginning of para. 14 of the commentary box:

  CoE conventions typically require criminalisation only in case of *intentional conduct*. The interpretation of the term "intentionally" is left to the domestic law of the Parties. ~~However, w~~ When drafting the description of the offence in paragraph 1, negotiators will need to decide ~~clarify~~ whether the offence should cover ~~intentional~~ ~~conduct to be described should refer~~ only ~~to~~ certain acts or omissions by the offender or also ~~to~~ a particular effect this conduct has e.g. on the health or the financial interests of a victim. [...]

  The reason for deleting "However" in the beginning of the third sentence is that this word implies a contrast with the previous sentences that does not exist. The other suggested changes are intended to simplify the text and to make clear that this sentence applies also to the drafting of negligent offences (which are discussed later in the paragraph).

Article 4(1) – Option A

The applicability of Articles 5–16 when Parties choose non-criminal sanctions in accordance with Option A

- We do not object to the inclusion of Option A in the model text, as this may provide a wise compromise solution in some negotiations. For Option A to be acceptable, however, it must be clear that none of Articles 5–16 gives rise to obligations in situations where a Party has exercised the right to apply non-criminal sanctions. These articles concern measures of a distinct criminal law character. For systemic reasons, it would be very difficult to take such measures in respect of non-criminal offences. We are therefore grateful that it is now clear from the wording of most of these articles that they only apply to criminal offences. In the remaining cases, the same could

possibly be said to follow from the context. As there is, however, room for interpretation, we would prefer to see clarifications in the text. Please see our comments to Articles 10, 13(1) and 14.

- Along the same lines, the following sentence in para. 16 of the commentary box should be clarified, as it implies that Articles 5–16 may sometimes be applicable when Parties have chosen non-criminal sanctions: "Normally, those articles should (strictly) be applicable only to 'criminal offences'." (Cf. the last sentence of the paragraph – "Thus Articles 5 to 16 should always refer to 'criminal offences' with the understanding that the obligation set out therein does not apply if a Party has opted for noncriminal sanctions." – and para. 8 of the Explanatory Report – "As Articles 5 to 16 refer only to 'criminal offences in accordance with this Convention' […]").)

The applicability of Articles 5–16 when Parties choose criminalisation over the alternatives provided under Option A

- As Option A in effect makes criminalisation optional, it would make sense not to require that Parties apply Articles 5–16 in cases when they have chosen criminalisation rather than the introduction of non-criminal sanctions. Otherwise, they might be deterred from using the criminal law option and choose instead non-criminal sanctions, which is a less intrusive option in that it does not entail any obligations under Articles 5–16.

- If this approach is accepted, we suggest providing one single method of making the application of Articles 5–16 optional in the above-mentioned situation. Offering alternative techniques would likely result in long and confusing discussions in working groups that are not composed solely of legal experts. We would suggest using the least complicated method available. Thus, the square brackets around the second sentence of Option A should be removed, ensuring that this sentence is always included when Option A is used.

- With the amendments we have suggested, para. 16 of the commentary box would need to be amended. Furthermore, the last sentence of para. 8 of the Explanatory Report would have to be altered, as the part stating that "the obligations provided for in those articles apply only if a State chooses to apply criminal sanctions" is only relevant if the second sentence of Option A is not used.

Article 4(1) – Option B

- The point made above concerning the obligation to apply Articles 5–16 is even more relevant in respect of Option B. As this option does not require Parties to take any measures at all, it might seem disproportionate to

require of Parties who choose to criminalise certain behaviour – on an entirely voluntary basis – that they apply also Articles 5–16. We thus favour deleting the square brackets around the second sentence of Option B as well, making the use of this sentence mandatory whenever Option B is used. (Para. 17 of the commentary box – which does not take the second sentence of Option B into account – would need to be amended accordingly.)

Article 5

- We do not understand why, in para. 1 of the Article, the words "acts of" used in para. 14 of the Explanatory Report as well as the previous version of the text have been replaced by square brackets ("the intentional [...] aiding or abetting"). The Article could probably work with or without "acts of", but the square brackets do not seem to serve any purpose.

- Para. 21 of the commentary box should be reworded, as it gives the impression that the criminalisation of attempt is required in respect of at least some criminal offences. As follows from the fact that the paragraph on attempt is placed in square brackets, as well as para. 23 of the commentary box, this is clearly not the case.

- If (as we have suggested above) the square brackets in Article 4(1) Options A and B are removed, para. 24 of the commentary box needs to be adjusted.

Article 6

- It would be preferable to not to leave options for how to handle the active nationality principle. As far as we understand, there are Member States who do not recognise this principle and therefore would need flexibility in this regard in any future convention (regardless of its subject matter). Such flexibility could be achieved either by deleting Article 6(1)(d) – which is currently in square brackets – or by including Article 6(1)(d) in the text (without the square brackets) and providing for a possibility of reservation. If one of these options were chosen once and for all, experts would not have to debate a horizontal issue whose solution does not depend of the nature of the convention being negotiated.

- We warmly welcome the substitution of "shall consider" for "shall endeavour" in para. 2. However, the third sentence of para. 22 of the Explanatory Report still mentions "endeavour".

Article 7

- We agree with the notion in para. 4 of the Article 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. 34 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 criminal sanction on the offender and vice versa."

Article 8

- The point of the square brackets at the end of Article 8(3)(i) should be explained in the commentary box.

- 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 9

- The function of the square brackets in the chapeau of the Article is unclear to us.

- Paras. 41 and 43–46 of the Explanatory Report need to be adjusted in accordance with the changes made to this Article since the previous draft.

Article 10

- It should be clarified that the Article applies only to *criminal* offences. This could possibly be seen as following from the subject matter of the provision, but we would be more comfortable with wording that positively rules out the interpretation that it extends to the "sentencing" of non-criminal offences.

Article 13

- The Article should apply only to co-operation regarding *criminal* offences. This already follows from the wording of para. 2 but needs to be clarified in para. 1. (The omission of a reference to criminal offences in para. 1 seems to be a mere oversight; cf. paras. 54 and 55 of the Explanatory Report, where "co-operation in criminal matters" and "investigations or proceedings of crimes" are mentioned.)

Chapter IV

- In para. 60 of the Explanatory Report, the reference to the protection of health should be put in square brackets, cf. Article 14(a) and para. 62 of the Explanatory Report.

Article 14

- This Article should only apply to victims of *criminal* offences, as "victims" of non-criminal offences is not a recognised concept in all jurisdictions. For Sweden, all of this Article – and in particular sub-paragraph c that concerns the right of victims to compensation from the perpetrators – will be problematic unless it is limited to criminal offences.

- In para. 63 of the Explanatory Report, we suggest deleting the part of the second sentence that says that the compensation "covers both material injury (such as the cost of medical treatment) and non-material damage (the suffering experienced)", as this goes beyond what follows from Article 14(c). The Article does not specify the kinds of damage that should be compensated, which is as it should be; any attempt of harmonising the concept of damage would risk coming into conflict with national provisions of a horizontal nature. Furthermore, since the crimes that can give rise to compensation differ in nature and severity, it may not always be the case that compensation for non-material damage appears adequate. The details of the compensation should always be decided in accordance with national law. This ensures that victims of criminal offences covered by a convention are not treated differently than victims of other crimes in the national legal systems.

Article 15

- In para. 1(d) of the Article, there should be a comma after "families" ("providing effective measures for their safety, as well as that of their families, from intimidation and retaliation").

- Para. 66 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 15(1)(d), the reference to risk should be deleted.

Chapter VI

- Article 1(2), which refers to the setting up of a follow-up mechanism, has been put in square brackets and para. 5 of the commentary box states that "negotiators may propose to refrain from setting up any follow-up mechanism in Articles 19 to 21". If that is the intention, all of Chapter VI should be in square brackets, as should the references to the Committee of the Parties in Article 23. Furthermore, the document should indicate that the procedure for dispute settlement in Article 28 needs to be altered if the convention does not establish a Committee of the Parties.

Article 19

- For the sake of consistency, should not the end of the second sentence of para. 2 of the Article read "… having ratified, accepted or approved it"?

- Para. 76 of the Explanatory Report should be put in square brackets, as it would seem less relevant when the ratification, acceptance or approval by ten signatories is necessary for the convention to enter into force. (The text would make more sense when the Parties have exercised the option to lower the number required, cf. para. 61 of the commentary, or in relation to the former Option A version of Article 24, according to which only five ratifications etc. were required.)

Article 20

- The reference to health authorities in para. 82 of the Explanatory Report may be irrelevant depending on the subject matter of the convention. We suggest deleting it or placing it in square brackets. (The latter option is perhaps preferable, as it would signal to the negotiators that they should give thought to what sectors and disciplines to mention here.)

Article 24

- The current text is based on Option B included in the previous version. We prefer basing the text on Option A or allowing negotiators a choice between the two options.

- In para. 3 of the Article, "10" and "eight" should be put in square brackets to signal that the numbers are open for discussion (cf. para. 61 of the commentary box). The same goes for "10th" in para. 75 of the Explanatory Report.

Minor errors and matters of consistency

- Is there a thought behind the different ways of drafting the chapeaux of the substantive articles? To introduce the obligation imposed by a provision, the phrase "shall ensure that" is common, but other expressions are also used ("shall take the necessary measures to…", and "shall take the necessary legislative and other measures to…"). Furthermore, offences are said to be either "referred to" in the convention, "established" in accordance with the convention or "covered by" the convention.

- In **Article 8(1)**, a comma is missing after "[y]" in the last sentence.

- In **Article 12**, the left bracket should be moved so that the whole text of the Article, including its number and title, are included in the brackets (cf. para. 46 of the commentary box, where the first sentence signals that the Article as such is optional).

- In **para. 8 of the commentary**, the reference should be to Articles 14 and 15.

- In **para. 9 of the commentary**, the reference in the second sentence should be to Article 1.

- In the first sentence of **para. 44 of the commentary** ("Standard language that should be used in all recent CoE criminal law conventions."), either "that should be" or "recent" should be deleted.

- In **para. 50 of the commentary,** the reference in the last sentence should also include Article 14.

- In **para. 58 of the commentary**, the reference should be to Article 26 (concerning declarations) and Article 27 (concerning reservations).

- In **para. 60 of the commentary**, a reference to Article 25 should be made in the third sentence.

- In **para. 35 of the Explanatory Report**, the reference to specific articles should be deleted.

- While Article 25 is not in square brackets, the corresponding text in the **Explanatory Report (para. 94)** is. This would seem to be an oversight.