

Meijers Committee

Standing committee of experts on international immigration, refugee and criminal law

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To The European Parliament
Committee on Civil Liberties, Justice and Home Affairs
60 rue Wiertz
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Regarding Note on the Package of Fair Trial Rights

Date 18 March 2014

Dear members of the Civil Liberties, Justice and Home Affairs Committee:

The Meijers Committee has taken note of the Commission's recent efforts to further strengthen procedural rights for citizens in criminal proceedings by means of proposing a package of proposals regarding the presumption of innocence and the right to be present at trial (COM(2013) 821/2), procedural safeguards for children (COM(2013) 822/2) and vulnerable persons (C(2013) 8178/2), and legal aid (COM(2013) 824 and C(2013) 8179/2). These initiatives are very much welcomed. The Meijers Committee observes that in criminal law a balance between the effective combat of crime on the one hand, and adequate legal protection of individuals on the other hand needs to be struck. In recent years, EU-harmonization of criminal law has been largely geared towards the more effective combat of crime. This is highlighted by legislation regarding substantive criminal law, such as the directive on Euro-counterfeiting, the Market Abuse Directive, and the Money Laundering and Terrorist Financing Directive. On the procedural side, the focus has been on law enforcement too, as exemplified by the European Arrest Warrant, efforts to strengthen the role of EUROJUST and the creation of a European Public Prosecutor's Office.

On the other hand, adequate legal protection of individuals has known a piece-meal approach. Instruments on the right to an interpreter, information on criminal charges, and access to a lawyer have been the greatest accomplishments so far. The package on procedural rights discussed in this note represents an important step forward as it aims to harmonize some major fair trial guarantees. The Meijers Committee believes that effective legal protection is crucial to build the mutual trust upon which mutual recognition in criminal cooperation is based. The Meijers Committee finds that there is room for improvement in the current proposals. Accordingly, with a view to the adoption of rights that are practical and effective, the Meijers Committee wishes to call to your attention the following questions and remarks.

Presumption of innocence and right to stand at trial

In order to ensure the effectiveness of the presumption of innocence, draft Directive Com(2013) 821/2 prescribes Member States to ensure that public statements and official decisions from public authorities do not publicly present the suspected or accused persons as if they were convicted and that in case of breach, appropriate measures will be taken (Article 4). This also implies that pre-trial detention should be used as a last resort. The Meijers Committee would like to make three suggestions in this regard:

• Commissie Meijers
Permanente commissie van deskundigen in internationaal vreemdelingen-, vluchtelingen- en strafrecht

• Comité Meijers
Comité permanent d'experts en droit international de l'immigration, des réfugiés et du droit pénal

• Meijers-Ausschuss
Ständiger Ausschuss von Experten im internationalen Ausländer-, Flüchtlings- und Strafrecht

1. The Committee proposes to add to Article 4 that Member States not only ensure that public statements and official decisions from public authorities do not *refer* to suspected or accused persons as if they were convicted but also that public authorities do not *treat* suspected or accused persons as such.
2. Secondly, the Meijers Committee suggests that the draft Directive should clarify the redress afforded in the event of a breach of the presumption of innocence.
3. The Meijers Committee suggests that the Commission includes specific provisions on pre-trial detention.

The draft Directive determines that in principle, any evidence obtained in breach of the right not to incriminate oneself and not to cooperate (Article 6) as well as any evidence obtained in breach of the right to remain silent (Article 7) shall not be admissible. An exception to this rule is allowed under the condition that 'the use of such evidence would not prejudice the overall fairness of proceedings'. According to the Meijers Committee, the exception as currently formulated can be interpreted too broadly. Since the right to remain silent and the right not to incriminate oneself lay at the heart of the right to a fair trial, the Meijers Committee is of the opinion that evidence obtained in breach of this right should, as a rule, not be used.

4. The Committee strongly recommends a more narrow formulation of the exception (e.g. 'the use of such evidence would not in any way prejudice the rights of the defendant') .

Moreover, the Meijers Committee is concerned that the draft Directive may provide too narrow an interpretation of the right not to incriminate oneself and not to cooperate with the investigation. According to Preambular Recital 18, this right 'should not extend to the use in criminal proceedings of material which may be obtained from the suspect or accused person through the use of lawful compulsory powers but which has an existence independent of the will of the suspects or accused persons, such as material acquired pursuant to a warrant (...)'. However, under the ECtHR's case law, putting pressure on a defendant to produce certain documents may under certain circumstances violate the right not to incriminate oneself.¹

5. The Meijers Committee recommends to redraft Recital 18 to bring it in line with the ECtHR's interpretation of the right against self-incrimination.

The Directive should, in the opinion of the Meijers Committee, also take a position on the relationship between the presumption of innocence and the direct enforcement of sentences, pending appeal. It is steady case law of the ECtHR² that the States are required to confine such enforcement within reasonable limits that strike a fair balance between the interests involved. So there should be a restrictive approach towards direct enforcement of the imposed penalty and a weighing of the interests at stake, for example when direct enforcement has such a disproportional adverse impact on the life of the defendant that it should not be imposed.

6. The Meijers Committee recommends to introduce provisions on the enforcement of sentences before appeal proceedings are concluded.

Procedural safeguards for children

Article 6 para. 2 provides a right to access to a lawyer also in cases where criminal proceedings may lead to the final dismissal of the case by the prosecutor. The Meijers Committee is concerned that the wording of the draft Directive is not clear enough to guide Member States and wonders which situations the Commission is referring to. Does the Commission refer to final dismissal in general, or only to criminal proceedings which after being finally dismissed by a prosecutor may be appealed or referred to a court having jurisdiction in criminal matters?

¹ E.g. ECtHR, *Chambaz v. Switzerland*, 5 April 2012, appl.no. 11663/04.

² ECtHR, *Västberga Taxi Aktieföretag and Vulic v. Sweden*, 23 July 2002, appl. no. 36985/97, par. 118 and ECtHR, *Janosevic v. Sweden*, 23 July 2002, nr. 34619/97, par. 106.

7. The Meijers Committee recommends to further clarify the scope of the right to access to a lawyer.

Article 12 para. 1 mentions 'the child's best interests' as the parameter to determine whether or not to make an exception to the rule that children are detained separately from adults following the UN-Convention on the Rights of the Child (Article 37). The proposal however does not mention in its preamble or in the text which factors should be taken into account in this assessment of the child's best interest.

A similar remark is made with regard to Article 14 para. 1 of the proposal. This provision allows for derogation from the rule that criminal proceedings involving children take place in the absence of the public, but only in exceptional circumstances and after due consideration 'of the best interest of the child'. To what kind of exceptional circumstances is the Commission referring – they could be explained in Article 14 or in the preamble like e.g. social importance and impact of a criminal prosecution for a very serious crime committed by a juvenile – and which factors should be taken into account in order to guarantee the protection of the best interests of the child?

8. The Meijers Committee recommends to include criteria to assess the best interest of the child in relation to Articles 12(1) and 14(1).

Procedural safeguards for vulnerable persons

Recommendation C(2013) 8178/2 lays down several procedural rights for vulnerable persons who are suspected or accused in criminal proceedings. As it concerns important issues that may have a significant impact on the treatment of persons considered vulnerable, the Meijers Committee considers a directive to be the proper instrument to deal with this subject.

9. The Meijers Committee recommends to regulate the procedural safeguards for vulnerable persons in a directive.

Furthermore, it is unclear who are considered vulnerable persons in the proposal. Is it really the intention to leave the categories of persons concerned completely to the Member States? Procedurally, there should be a moment in the investigation where the status of a suspect as vulnerable or not is determined. Moreover, the Meijers Committee is of the opinion that the right to access to a lawyer should not be subject to a waiver in the cases of vulnerable persons. The Meijers Committee therefore makes the following recommendations:

10. To insert a definition of vulnerable persons more specific than currently included in the preamble under (1) and in section 3 no. 7, because belonging to this group entitles the person to certain specific rights.
11. To provide for a structural fixed moment in the beginning of the investigation phase to establish whether the suspect/accused falls within the category of deprived persons.
12. Section 3 under no. 11 should exclude categorically the possibility for the vulnerable person to waive the right to access to a lawyer.

(Provisional) Legal Aid

Paragraph 2 of Recommendation C(2013) 8179/2 states that all suspects and accused persons in criminal proceedings should have a right to legal aid from the time they are suspected of having committed a criminal offence until the conclusion of the proceedings. The proposed Directive on legal aid (COM(2013) 824), however, only applies to a much more limited category: to *provisional* legal aid for suspects or accused persons *deprived of liberty* and legal aid in European arrest warrant proceedings. For any suspect or accused person who cannot afford a lawyer for financial reasons, the right of access to a lawyer remains a dead letter as long as they are not provided with legal aid. Article 47(3) of the Charter of Fundamental Rights of the EU thus provides that 'Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to

ensure effective access to justice.’ A binding provision in this regard, applying not only to detained suspects but to all persons facing criminal proceedings, is highly desirable in order to ensure the effectiveness of the right of access to a lawyer.


13. The Meijers Committee suggests to expand the scope of this proposed Directive to include the right to legal aid for all suspects and accused persons in criminal proceedings.

The same is true with regard to Section 3 of Recommendation C(2013) 8179/2 which emphasizes the importance of a mechanism safeguarding the sufficient quality of lawyers, including the requirement of professional training and permanent education. The effectiveness of the right to legal aid will be greatly enhanced by a binding provision on such a fundamental issue. Also, the future directive on legal aid should design a formula on the division of costs related to the effectuation of this right in cross-border cases where judicial cooperation between Member States occurs. In such situations, the Meijers Committee suggests that the issuing Member States will in principle be obliged to reimburse the executing Member State for the expenses made for the effectuation of legal aid. Would the *executing* Member State be liable to pay these costs, the securing of legal aid is likely to be undermined, given that a state might be less eager to pay fair amounts of money for assistance in criminal cases without any direct national interest. Of course, only the costs necessary to comply with the minimum guarantees of the directive should be reimbursable.

14. The Meijers Committee recommends to include provisions on the divisions of costs in between Member States in cases of judicial cooperation. In this context, the opportunity could be taken to discuss the introduction of an EU Fund for the effectuation of procedural rights throughout the European Union.

We hope you will find these comments useful. Should any questions arise, the Meijers Committee is prepared to provide you with further information on this subject.

Yours sincerely,



Prof. Kees Groenendijk
Chairman