

to The Members of the LIBE Committee
c/o Secretariat
European Parliament
Wiertzstraat 60
B-1047 - Brussels
België

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

Mailing address
Postbus 201
3500 AE Utrecht

Visitor address
Kanaalweg 86
3533 HG Utrecht

Ph +31(0)30 297 4328
F +31(0)30 296 0050

W www.commissie-meijers.nl

E I.middelkoop@commissie-meijers.nl

date 26 September 2014

reference CM1408

subject **Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings**

Dear Members of the LIBE Committee,

In view of the General Approach adopted by the Council on the Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings the Meijers Committee prepared the following comments for consideration.

As always, we remain at your disposal for questions and comments.

Sincerely,



Theo de Roos
Chairman

Note on the Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings

The Meijers Committee has taken note of the General Approach adopted by the Council to the Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings.¹ After studying the Council's position, the Meijers Committee would like to share the following concerns.

Protection standards for children v adults

In general, the Meijers Committee would like to emphasise that, considering the particular vulnerability of children suspected or accused in criminal proceedings, it is vital to observe particularly high standards in this area. Whereas it is understandable, from the perspective of uniformity in EU law, that the wording of some of the revisions in the General Approach are quite similar to existing Directives that apply equally to both adults and children, it may sometimes be necessary to provide stronger safeguards for children. **The Meijers Committee cautions against focusing too much on uniformity of laws at the expense of considerations for the greater vulnerability of children compared to adults.**

Recitals

The Meijers Committee questions the number and length of the recitals of the proposal under consideration and wonders whether the recitals in their entirety comply with Guideline 10 of the 'Joint Practical Guide for persons involved in the drafting of European legislation' which, briefly, states that "[t]he purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations".²

Scope

In article 2(5a)(1) and recital 11(a) the application of the Directive is excluded in respect of some minor offences.

The Meijers Committee is of the opinion that it is essential for those involved in criminal proceedings, particularly children, to be informed of the possible consequences of such proceedings in relation to minor offences, including the consequences of extrajudicial settlements. Even where no deprivation of liberty is involved, either pre-trial or as a sanction, the outcome of such proceedings may have adverse consequences – in terms of judicial documentation, for instance – which can greatly affect their future lives. Access to a lawyer is essential to inform children of such consequences. It would therefore be disproportionate to deny children the rights provided in this Directive in case of minor offences generally. The Meijers Committee also wishes to express its concern as to the vague definition of minor offences in the Council's approach.

¹ 22 May 2014, Council Document 10065/14.

² <http://eur-lex.europa.eu/content/pdf/techleg/joint-practical-guide-2013-en.pdf>

The Meijers Committee therefore suggests the situations in which the application of the Directive can be excluded in respect of minor offences be specified, taking into account the principle of proportionality, rather than listing categorical exceptions. Moreover, the Meijers Committee suggests that the meaning of ‘minor offences’ should be specified more closely (e.g. in terms of severity, penalty, and the type of offence).

Assistance by a lawyer

Articles 6a(1)(a) and 6a(1)(b) propose potentially far-reaching exceptions to the right of children to be assisted by a lawyer.

It is the opinion of the Meijers Committee that the exceptions are formulated too broadly: the exact scope of the right to assistance by a lawyer is not sufficiently clear from the wording of Article 6a(1): the kind of situations to which these exceptions refer remains vague. In what situations, for example, could the complexity of a case justify an exception from the rule of assistance by a lawyer? What kind of alleged offences make the exercise of the right to have a lawyer present disproportionate? What is a ‘short period of time’?

The Meijers Committee strongly recommends that the exceptions to which Article 6a(1) refers should be narrowed and made more explicit.

Immediate questioning in the absence of a lawyer

The Meijers Committee fears that the exceptions that are formulated in Article 6a(2) can be interpreted too broadly. In particular, it may be relatively easy for the authorities to interpret ground (b) in such a manner that it becomes the rule rather than the exception: in serious cases, compliance with the requirement that ‘immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings’ can be established relatively easily, whereas it is exactly in such cases that the assistance of a lawyer is of prime importance for the fairness of the proceedings and the child’s best interests.

The Meijers Committee proposes that Article 6a(2)(b) be deleted.

Conduct of questioning of children

The Meijers Committee is pleased that the Directive establishes provisions in Article 9 for the audio-visual recording of questioning.

However, the exceptional grounds in para. 2 should be formulated more strictly to include an exhaustive list of the type of offences and /or the maximum penalties that fall within the exception, rather than having recourse to open-ended criteria. Such a list would emphasise that *not* recording is the exception rather than the rule, taking into account that para. 2 refers to cases in which children are deprived of their liberty, implying that the alleged offences are of a serious nature.

The Meijers Committee suggests the addition to para. 2 of a list of instances (e.g. which type of offences/which maximum penalty) in which audio-visual recording is mandatory.

Moreover, it is recommended that a more stringent formulation of the exception to audio-visual recording be provided in case ‘questioning has a sole purpose [...] to determine whether an

investigation should be started' (recital 21). The actual wording of the proposal implies that questioning during the early stages of criminal proceedings may quite easily fall within this exception.

Finally, the Council proposes in Article 9(2a) that Member States may decide that audio-visual recording will not take place 'when the questioning takes place in the presence of a lawyer'. The Meijers Commission agrees with the Commission that the safeguard provided by the recording of interviews serves a purpose that is different from the purpose of the safeguard of having a lawyer present during such interviews, namely to facilitate *a posteriori* checks of possible irregularities in police reporting of the suspect's statement. For this reason the exception as proposed by the Council is undesirable. Ensuring one safeguard should not be considered compensation for not ensuring the other.

The Meijers Committee thus proposes that the exception formulated in Article 9(2a) should not be adopted.

Pre-Trial detention

The Meijers Committee is pleased that the Commission and Council agree that detention of a child before final determination by a court is a measure of last resort and justified only for the shortest appropriate period of time (Article 10).

The Meijers Committee suggests that the need for considering alternatives to detention be stated more clearly and prominently by supplementing Article 10 (1) with the following sentence: 'In all cases, the competent authorities shall first consider alternatives to pre-trial detention and make use of them wherever possible' (rather than the current formulation in para. 3).

The Meijers Committee also proposes that para. 2 should clarify when the periodic review by a court should take place: it is vital that the first review takes place promptly (according to the Committee on the Rights of the Child, within 24 hours) and that detention shall subsequently be reviewed regularly.³

Special detention regime

In regard to Article 12(1), the Meijers Committee underlines the principle that children and adults shall be detained separately in view of their different needs, and that the only exception to this principle shall be when such is in the child's best interest.

The Meijers Committee advises the adoption of more explicit criteria indicating when it is in the child's best interest not to hold children separate from adults. Moreover, the Meijers Committee suggests clarification of what the exception proposed in para. 1b refers to, where it is stated that 'children may be detained with young adults unless these persons are not suited for joint accommodation with children': does it refer only to the situation where a child attains his/her majority while in detention, or are there other situations in which it would be in the best interest of the child to do so?

³ ECtHR 3 February 2009, *İpek and Others v. Turkey*, appl.nos. 17019/02 and 30070/02, para. 36; UN Committee on the Rights of the Child (CRC), CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice, UN Doc. CRC/C/GC/10 (2007), para. 83 and 84.

Proceedings behind closed doors

Whereas the Commission's original proposal provided in Article 14 that as a rule criminal proceedings involving children shall take place in the absence of the public, this has been eliminated in the current draft. Instead, recital 28 sets down that there should be a balancing exercise between the best interests of the child and the general principle of a public hearing.

It is the Meijers Committee's opinion that proceedings in the absence of the public should be the rule and that exceptions shall be construed narrowly. **As the Committee already indicated in its Note on the Package of Fair Trials, these exceptions should be formulated clearly in the text of the articles of the Directive and not in the recital.**

Protection of biometric data

Finally, the Meijers Committee would advise the inclusion in Article 14 of the provision that taking and retaining fingerprints, DNA samples, and profiles of children suspected of a criminal offence should be subject to particularly strict criteria, considering the importance of children's development and integration into society. Regard should be had, inter alia, to the nature and gravity of the offence, the strength of the suspicion, and the duration of retention. **If the proceedings do not in the end result in a conviction, the materials should be eliminated from the database.**⁴

About

The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.

The Meijers Committee is funded by the Dutch Bar Association (NOVA), the Dutch Refugee Council (VWN), Forum Institute on Multicultural Affairs, the Dutch Section of the International Commission of Jurists (NJCM), Art. 1 Anti-Discrimination Office, and the Dutch Foundation for Refugee Students UAF.

Contact info:

Louis Middelkoop

Executive secretary

l.middelkoop@commissie-meijers.nl

+31(0)30 297 4328

Please visit www.commissie-meijers.nl for more information.

⁴ ECtHR (GC) 4 December 2008, S. and Marper v. United Kingdom, appl. nos. [30562/04](#) and [30566/04](#).