

Meijers Committee

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

CM1908 Response to a Note from the Presidency on 'The future of EU substantive criminal law – Policy debate'

Brussels 28 May 2019, council doc. 9726/19

10 October 2019

The Meijers Committee has taken note of the report, drafted by the Romanian Presidency, on the outcome of the debate among Member States' delegations on the future of EU substantive criminal law. It very much welcomes the initiative to start such a debate; it believes that the fundamental interests that are at stake in criminal policy, deserve to be reconsidered time and again – especially in the EU context where substantive criminal law competences are limited, either through institutional principles (such as the principle of subsidiarity), or through values-based principles rooted in criminal law theory (such as the last resort principle). The Meijers Committee therefore wishes to express its appreciation for the initiative to launch such a debate.

In an attempt to contribute to future reflections as well as to future legislative processes in the field of substantive criminal law, the Meijers Committee takes the liberty of commenting on the report and submitting some recommendations on how to develop the legal framework any further. These notes are obviously addressed to the Council, but also to the other institutions and bodies involved in EU law- and policy-making.

1. The Meijers Committee supports the Member States' intentions – expressed on p. 7 and under Section III.2 on p. 8) – to put emphasis on assessing the functioning of existing legislation (i.e. *ex post* evaluations). As stated, “more efforts should be deployed to that effect”. Sympathetic as this position may be, specific proposals on how to realize these welcome intentions are lacking. The Meijers Committee underscores the importance of actual evaluation processes in this area and encourages concrete proposals to that end.
2. In relation to the previous point, the Meijers Committee strongly encourages the strengthening of *ex ante* assessments, at least by means of drawing up impact assessments. Moreover, with regard to delicate or complicated topics of substantive criminal law, the Meijers Committee suggests to submit green papers. A stronger deployment of *ex ante* assessments will not only foster the needed care and precision in developing substantive criminal law and policy, it also complies with the intentions under the EU Better Regulation agenda and, hence, is likely to strengthen the legitimacy of EU action more generally.
3. In their call for cautiousness, Member States acknowledge the need to give ‘due attention *inter alia* to the principles of *ultima ratio*, proportionality and subsidiarity’ (Section III.1). Even though the expression ‘*inter alia*’ leaves open the possibility that other principles must be given due attention to, the Meijers Committee found it surprising that the *lex certa* principle was not explicitly mentioned here. In light of the fundamental importance of this principle, it deserves to be listed too.
4. According to the Meijers Committee, it seems contradictory to express, on the one hand, the need for caution in exercising the substantive criminal law competences (Section III.1), and, on the other hand, to suggest such a large number of areas that could be looked into for establishing

Meijers Committee

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

minimum rules (Section III.5). This applies in particular in relation to those areas in which EU action is not immediately obvious, for instance in view of the subsidiarity principle. Areas that the Meijers Committee especially thinks of concern trafficking in cultural goods, the manipulation of elections, identity theft, and crimes relating to artificial intelligence.

5. In that regard, it has struck the Meijers Committee that the option of *decriminalisation* has not been mentioned at all in the report. This suggests that the discussion on the future of EU substantive criminal law has taken place from the sole perspective of whether or not to broaden the scope of substantive criminal law, without fair attention for the perspective of limiting its scope. However, if the Union legislator wants to give real substance to the principles of *ultima ratio*, proportionality and subsidiarity (Section III.1), the option of decriminalisation deserves to be seriously considered too – not only in the examination of the necessity and desirability of establishing new or extended provisions, but also in analyzing the results of evaluations of existing legislation in the field of substantive criminal law. Therefore, the Meijers Committee strongly recommends to include the decriminalisation option in any future debate on EU criminal policy.
6. One of the areas listed under Section III.5 concerns ‘non-conviction based confiscation’. Because Article 83(2) TFEU holds the perspective of legislating in specific fields of crime, legislating in this area would amount to ‘horizontal harmonization’, for such legislation would logically apply to behaviors previously criminalized through areas-based directives. The Meijers Committee wonders whether Article 83(1) TFEU actually envisages a legal basis for such horizontal harmonization.
7. With regard to the suggestion of looking into the areas of crime mentioned under Section III.5, the Meijers Committee underlines that pursuant to Article 82(1) TFEU, the exercise of competences under Article 83 TFEU must demonstrate a link between facilitation of judicial cooperation on the basis of mutual recognition on the one hand and substantive criminal law measures on the other hand. This requirement constitutes an important limit to the exercise of EU substantive criminal law competences.
8. In the course of the suggested “full and thorough examination/analysis” of the need and desirability of further legislative action, the Meijers Committee suggests to go beyond the level of the crime area and to also conduct the discussions in a much more detailed manner, i.e. on the level of specific behaviors. Thus, instead of only assessing proportionality, subsidiarity, *ultima ratio*, etc. in relation to, for instance, trafficking in human beings in general, such principles should also be assessed in relation to specific behaviours falling under that area (such as trafficking in human organs) as well as in relation to so-called related offenses and inchoate offenses. After all, proportionality, subsidiarity, *ultima ratio* and *lex certa* may be fulfilled with regard to the act of trafficking in human organs itself, but may not necessarily also be fulfilled with regard to aiding or abetting in the commission of this act.
9. One of the outcomes of discussion was that ‘there is no need to develop a common definition/understanding of certain notions, such as “serious crime” and “minor cases” (Section III.4). However, the question arises how national courts as well as the European Court of Justice (ECJ) know whether such general notions are not meant to qualify for autonomous

Meijers Committee

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

interpretations by the ECJ. Therefore, in order to avoid interpretation issues (hence, potential *lex certa* issues) in practice, the Meijers Committee recommends to make sure that when the occasion arises, recitals or articles will make explicit as to which notions no common definition/understanding was foreseen.

10. As a final point, the Meijers Committee concludes that the discussion has focused on criminalisation, with less or no attention for the (further) harmonization of sanctions. It also observes that up until now, EU legislation regarding sanctions concerns either minimum maximum terms for imprisonment, or minimum maximum amounts of fines. In view of that, the Meijers Committee raises the question whether the EU legislature is considering to develop a policy on other, so-called alternative forms of sanctions, including a policy on forms of restorative justice. The latter would logically attune to other EU measures regarding the position of victims in criminal proceedings.