

Meijers Committee

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

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To (by email) Mr Herman van Rompuy
President of the European Council
Rue de la Loi 175
B-1048 Brussels

Reference CM1317
Regarding Note Meijers Committee on the new Area of Freedom, Security and Justice Multiannual Programme for the period 2015-2020
Date 7 October 2013

Dear Mr Van Rompuy,

In view of the adoption of a new Area of Freedom, Security and Justice Multiannual Programme for the period of 2015-2020, the Meijers Committee would like to share with the European Council its views on what it believes should be the priorities for such a programme.

The Meijers Committee therefore respectfully submits attached note for the European Council's consideration. In this note, the Committee focuses on the following issues:

1. Fundamental Rights
2. Evaluation and Implementation
3. Institutional affairs
4. Judicial criminal cooperation and strengthening of procedural rights
5. Data protection
6. Non-discrimination
7. Immigration
8. Asylum
9. External Dimension

We hope you will find our 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

Enclosure: Note on the new Area of Freedom, Security and Justice Multiannual Programme for the period 2015-2020

CC: Mr José Manuel Barroso, President of the European Commission
Mr Martin Schulz, President of the European Parliament

Note on the new Area of Freedom, Security and Justice Multiannual Programme for the period 2015-2020

1. Fundamental Rights

The Meijers Committee urges the Council as well as the European Union in general to continue to develop a coherent human rights policy. Important steps have been taken over the last years, for instance in the Area of Freedom, Security and Justice (AFSJ), with respect to guaranteeing European citizens an equivalent level of human rights protection throughout the EU. Those efforts will facilitate the goals set out in Article 3(2) TEU.

As EU policies are mostly implemented and enforced through the legal orders of the Member States, loyal cooperation between the Member States amongst each other, and cooperation with the EU is vital. The Meijers Committee invites the Council, the other EU institutions and national governments to develop legislative initiatives that ensure the implementation of human rights standards into the framework of transnational cooperation between national authorities. The articles concerning *ne bis in idem* (54-58) of the Convention Implementing the Schengen Agreement are a fine example of how legislative initiatives foster the protection of fundamental right standards, also in transnational cases. The Meijers Committee invites the Council and other stakeholders to develop further initiatives in the area of transnational cooperation and cooperation between national and European authorities (for instance, the European public prosecutor). In particular, it considers the matter of access to justice on the European territory – and a system of European forum choice, guaranteeing a proper administration of justice – to be a very important issue, particularly in the area of migration law and criminal law.

The Meijers Committee suggests to develop a system of monitoring the follow-up actions of Member States on critical observations in the reports of UN and Council of Europe supervisory treaty bodies to the extent those observations pertain to areas covered by Union law.

In order to allow the Union to act in case of serious or systematic human rights violation in a Member State, the Meijers Committee proposes to consider:

- extending the mandate of the European Union Agency for Fundamental Rights (FRA) or involving the Council of Europe Commissioner of Human Rights in fact finding in cases of serious human rights violations in a Member State in order to provide the European Commission with the necessary information before it decides on a possible infraction procedure, and
- granting individuals, in the case of systematic human rights violations in a Member State (in a purely internal situation), the possibility to seek redress on the basis of EU law before both national courts and the European Court of Justice.

The latter proposal would require amending the TFEU at a next Intergovernmental Conference, the former proposal already can be realized within the framework of the current Treaties.

2. Evaluation and implementation

The Meijers Committee notes with concern that various proposals for new Union law have been made without proper evaluation and implementation of existing instruments. For example, the Smart Borders proposals were published at a time when the Visa Information System (VIS) was not yet fully implemented and the Schengen Information System (SIS II) just had become operational. The Meijers Committee believes that the next multiannual programme should focus on full and effective implementation, enforcement and evaluation of existing instruments. Accordingly, new initiatives for monitoring and implementation should be proposed. The Meijers Committee invites the European Council to consider adopting the following measures:

- new tools in order to stimulate the enforcement of the EU Charter of fundamental rights in Member States should be developed;
- the use of Article 70 TFEU to conduct objective and impartial evaluations of the implementation of Union instruments in the field of asylum and immigration, similar to the Schengen evaluation mechanism.
- new centralised European databases should only be created on the basis of studies that have shown their added value, as previously stated in the Hague Programme.

3. *Institutional affairs*

The conclusions of the European Council of 27 and 28 June 2013 do not mention a role for the European Parliament in the decision making process on the next multiannual programme. Both the EP and the national parliaments should have an explicit role in the adoption of the programme.

The working practices of the Committee of Internal Security (COSI) should allow for:

- a greater degree of transparency of its work as coordinator of operational cooperation in the AFJS;
- greater scrutiny of the European Parliament and national parliaments by handing them more tools thereto;
- consultation of EU bodies and agencies such as the FRA and the European Data Protection Supervisor (EDPS), to avoid a focus on security and negligence of human rights issues.

The adoption of priorities in the framework of the EU's Internal Security Strategy and the multi-annual policy cycle requires the input and consultation of all institutional actors, most importantly the European Parliament.

The activities of independent agencies in the field of Justice and Home Affairs should take place in full compliance with fundamental rights and should be subject to democratic scrutiny and the possibility of judicial review.

4. *Judicial criminal cooperation and strengthening of procedural rights*

The Meijers Committee believes that the Council should focus on implementing the "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings", taking into account the costs for the Member States in the implementation of these rights. Particularly in cooperation cases, certain rights may carry a high financial burden (e.g. translation and interpretation) and a subsequent unwillingness on part of the executing Member States to afford these rights to individuals. To counter this incentive, the Meijers Committee would welcome legislation that provides for a fair distribution of costs between issuing and executing Member States.

In line with the Report of the LIBE Committee of the European Parliament on an EU Approach on criminal law,¹ the Meijers Committee underscores that substantive criminal law provisions should only be developed when there is added value in a common EU approach. The next multiannual programme should initiate the development of a checklist on the criminalisation of conduct on EU level, assessing subsidiarity and proportionality, added value, compliance with fundamental rights and enforcement possibilities.

¹ Committee on Civil Liberties, Justice and Home Affairs, *Report on an EU approach on criminal law*, 24 April 2012, (2010/2310(INI)).

The Meijers Committee supports the proposal of the United Kingdom to limit the application of the European Arrest Warrant to serious crime only. The next multiannual programme should contain a proposal to limit the definition of crimes covered by the European Arrest Warrant.

5. *Data protection*

Before adopting new proposals on data processing and exchange, including the Smart Borders proposals, the next multiannual programme should call upon a systematic EU wide evaluation of:

- the discriminatory effects of the use of large-scale migration databases (Eurodac, VIS, SIS II) for law enforcement purposes and the added value of this use for the prosecution of crimes;
- the quality of the collection and processing of fingerprints and other biometric data in databases and the added value of the use of these data for identification- and verification purposes;
- compliance with the principle of purpose limitation by national and EU authorities, including an assessment of national rules and decisions, effectively prohibiting and sanctioning the use of EU databases by Member States for other purposes than for which they were established.²

6. *Non-discrimination*

The new multiannual programme should address the increased use of profiling by public and private authorities and its possible discriminatory consequences for ethnic and religious minorities, specifically for the Roma community.

The Meijers Committee notes an increase of hate speech and incitement to discrimination and hatred in the Member States. It advises the Commission to evaluate the Framework Decision 2008/913/JHA of 28 November 2008 on combating racism and xenophobia, with special attention to discrimination of Roma.

The Meijers Committee is also concerned with the position of nationals of Member States that acceded to the Union in 2004 or 2007 and who reside or intend to reside in another Member State. There is a tendency among certain Member States to restrict the access to their labour market for nationals from the new Member States. The principle of free movement of workers should be guaranteed for citizens of all Member States and discrimination on grounds of nationality should effectively be banned.

7. *Immigration*

The Meijers Committee invites the Council to pay particular attention to the existing inconsistencies in EU immigration legislation. Rather than making proposals for further harmonisation, the next multiannual programme should initiate the streamlining of EU immigration legislation, for example by proposing an EU Immigration Code. Particular attention should be paid to inconsistencies such as between the SIS-alert (SIS II) and the Entry Ban (Returns Directive) and the grounds for and conditions of detention in various directives and to make explicit the right of third country nationals to enter and stay in the EU when the conditions are met, as this is insufficiently guaranteed in current Schengen Borders Code (Regulation (EC) No. 562/2006).

The Meijers Committee considers that harmonisation of national legislation in the field of labour migration has been difficult. Directives that have been adopted so far are hardly functioning. The next multiannual programme should ensure that EU labour migration is only proposed or adopted when it does not lead to fragmented, inefficient legislation.

² See, for example, the judgment of VG Wiesbaden, 4 April 2013, prohibiting the use of VIS information for the rejection of an asylum application and ordering the deletion of this data.

8. *Asylum*

The full implementation of the recently adopted second phase of the Common European Asylum System in accordance with international law and the general principles of community law, and the effective monitoring thereof should be a key priority in the field of asylum. In this context, the new “early warning, preparedness and management of asylum crisis” system (EWS) could be used as an important source of information, since it should provide information on the quality of decision making, reception conditions and asylum procedures. The EWS should function as a transparent ‘permanent health and quality check’ on the basis on periodic country reports as well as information from civil society and asylum experts.

The Meijers Committee also invites the Council to pursue the implementation of some highly relevant proposals which were included in the Stockholm Programme but are not yet executed and/or finalised:

- creating a framework for the transfer of protection of beneficiaries of international protection when exercising their acquired residence rights under Union law should be considered;
- publication of the EC study on the feasibility and legal and practical implications to establish joint processing of asylum applications and introduction of new proposals on the basis thereof;
- consideration of the accession of the European Union to the 1951 Refugee Convention.

9. *External Dimension*

The programme should emphasise that the external dimension of the AFJS cannot adversely impact the level of human rights protection in third countries. To this effect the EU should, in the adoption of internal instruments, such as the amendment to the Visa Regulation, assess the possible consequences for the level of protection of fundamental rights in non-Member States.

Similarly, the possible consequences for the level of protection of fundamental rights in non-Member States should be carefully assessed prior to any form of cooperation or the conclusion of formal relations with third countries in Justice and Home Affairs matters. The protection of fundamental rights should be a central element in the relations with third countries on these matters and compliance should be continuously monitored.

The external dimension of the AFSJ should focus on the strengthening of the rule of law in third countries. It should aim to enhance capacities for border, migration and asylum management in those countries as an addition and not substitute for the EU's efforts in these fields.

The cooperation between agencies in the field of Justice and Home Affairs and the relevant administrative authorities of third countries should take place in full compliance with fundamental rights and should be subject to democratic scrutiny and the possibility of judicial review.