

to The Members of the LIBE Committee
c/o Secretariat
European Parliament
By e-mail

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

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Dear Members of the LIBE Committee,

The new European Parliament has inherited a large number of outstanding legislative files in the field of Justice and Home Affairs (JHA) from the previous mandate. In order to assist MEPs new to these issues, the Meijers Committee, an independent group of legal experts in the field of European justice and home affairs and human rights law, prepared an overview of the key JHA legislation on which the new Parliament shall have to reach political agreement with the Council in the near future. The Meijers Committee discusses the state of play of the relevant files and identifies the critical human rights issues in them.

This note covers two horizontal issues first: the European Council Strategic Guidelines for 2020 and the new EU framework to strengthen the Rule of Law. In the area of Home Affairs the issues discussed in this note are the Task Force Mediterranean, the Smart Borders Package, the recast of the Visa Code and the recast of the Researchers Directive. For Justice the European Public Prosecutor's Office, the Fair Trials Package, reform of the EAW and other mutual recognition instruments, and the General Data Protection package are discussed.

We hope you will find this information useful. The Meijers Committee intends to organize a meeting in Brussels in the fall to further discuss the issues in this note. You will receive an invitation to this event in due course. The Meijers Committee is glad to receive your questions and comments in the meantime.

Sincerely,



Kees Groenendijk
Chairman

FUNDAMENTAL RIGHTS ASPECTS OF OUTSTANDING JUSTICE AND HOME AFFAIRS FILES

1. Horizontal issues

European Council Strategic Guidelines for 2020

In June 2014, the European Council adopted strategic guidelines for the Area of Freedom, Security and Justice for the period up until 2020.¹ The guidelines serve to instruct the European Commission and the Council. Contrary to the guidelines 2009-2014, the so-called Stockholm programme, the new guidelines are rather brief and void of detail. The Council prioritizes implementation and enforcement of existing Union legislation rather than the need for new legislation. The Meijers Committee subscribes to this conservative approach, as many legislative instruments in this area are not yet properly implemented in Member States and an excess of new legislative output would undermine the readiness of practitioners to actually take Union law seriously.

However, the strategic guidelines fail to provide guidance on a number of politically highly contentious issues. The Meijers Committee believes this is a missed opportunity. Although mention is made of finishing the legislative process on new legislation in the field of data protection and border security, no concrete ideas are put forward on, for example, how to achieve a European asylum policy based on solidarity and fair sharing of responsibility. Moreover, the Council requires action to 'further strengthen' fair trial standards in criminal proceedings across the EU, but sets no new ambitions or horizons. No mention is made of the relevance of the EU Charter of Fundamental Rights and rule of law policy dossiers are omitted.

The Meijers Committee believes that the guidelines are of very limited value. **The Meijers Committee calls upon the European Parliament, the Council and the Commission to further develop a long-term agenda which actually addresses the greatest challenges that the EU faces in the Area of Freedom, Security and Justice, such as the functioning of the rule of law, a fair asylum and migration policy, protection of fundamental rights both internally and externally and legislation to strengthen mutual trust and mutual recognition in both criminal and asylum law.**

¹ European Council Conclusions of 26 and 27 June 2014, EUCO 79/14, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf.

New EU Framework to Strengthen the Rule of Law

In March 2014, the European Commission presented a framework to strengthen the Rule of Law in the EU.² This framework was developed in response to a number of crises in various Member States, such as the laws limiting media freedom in Hungary and the breakdown of the asylum system in Greece. Apart from court procedures for individual violations, an EU preventative and sanctioning mechanism already exists to act upon systemic violations of the rule of law.³ However, most political actors consider this mechanism too burdensome in most rule of law crises. To fill the gap between political pressure on the one hand and the preventative and sanctioning mechanism on the other hand, the newly proposed framework envisions a three-step dialogue procedure between the Commission and the Member State concerned.

The Meijers Committee has voiced its doubts about the efficacy of this new procedure, as it presupposes a constructive attitude of the Member State to address the threat to the rule of law. The Committee believes that this expectation might not be realistic when the country's politics are dominated by populist sentiments. In addition to a bilateral ad hoc procedure between the EC and the Member State, **the Meijers Committee recommends the involvement of other actors in an early stage, such as the EP and the Council. Moreover, the Council of Europe's Commissioner for Human Rights and non-governmental stakeholders, such as civil society organizations, journalists and lawyers should be involved in the dialogue procedure as well. More importantly, the Meijers Committee recommends the EU to develop a continuous review system to monitor the rule of law situation rather than act on ad hoc basis.** In a letter to the EC, the Meijers Committee made a number of suggestions on how this could be designed.

To read the original letter of the Meijers Committee on the Rule of Law Framework, please go [here](#).

2. Home Affairs

Task Force Mediterranean

The Task Force Mediterranean (TFM) was created after the Lampedusa boat refugee disaster of October 2013 and in response to the overall excessive death toll among migrants attempting to reach Europe by crossing the Mediterranean Sea. The TFM was instructed to come up with measures to prevent further deaths, but also measures to combat irregular migration. In December 2013 and

² Communication from the Commission to the European Parliament and the Council "A new EU Framework to strengthen the Rule of Law", 19 March 2014, available at http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf.

³ Art. 7 Treaty of the European Union.

the European Commission issued communications regarding the work and priorities of the TFM.⁴ The Meijers Committee observes that the work of the TFM is largely shielded from democratic scrutiny. **The European Parliament is sidelined and must passively await any action that the Council and the Commission decide upon.**

The TMF has not made any specific proposals as of yet, but is expected to do so in the course of the new parliament's mandate. These proposals will relate to five identified main areas: reinforced border surveillance; assistance and solidarity between Member States; regional protection programmes, resettlement and legal ways for migrants to access Europe; cooperation with third countries; and the fight against trafficking, smuggling and organized crime.

In effect this constitutes a strong push for combating irregular migration through law enforcement on the one hand and shifting the burden to third countries on the other hand. **An important omission in this respect is attention to adequate reception capacities and conditions for migrants, despite the struggles that Mediterranean Member States experience in accommodating the large number of rescued or stranded migrants.**

Mediterranean border surveillance and refugees

Member States' border operations to intercept and disembark refugees found at sea will increasingly be coordinated by the EU border agency FRONTEX through an information-exchange system called EUROSUR.⁵ In January 2014, the Council and Parliament reached agreement on the rules governing search and rescue operations which are conducted jointly by Member States.⁶ **However, on several points these rules do not fully meet with the standards of the European Court of Human Rights.** In particular the right to access to the asylum procedure and the right to a remedy has been inadequately secured. Under the new rules, Member States may return migrant vessels to the coast of Africa without enabling the individuals on board to make use of interpreters and legal assistance to substantiate their asylum claim. Moreover, remedies with suspensive effect against immediate return are unavailable to these vulnerable groups.

For each operation, Frontex is required to develop operational plans that respect human rights, in particular the prohibition to return a victim of persecution to their persecutor (the prohibition of *refoulement*). However, these operational plans remain confidential and little democratic oversight

⁴ Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean, 4 December 2013, available at http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131204_communication_on_the_work_of_the_task_force_mediterranean_en.pdf; Commission Staff Working Document, Implementation of the Communication on the Work of the Task Force Mediterranean, 22 May 2014, available at http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/general/docs/sdw_implementation_of_the_communication_on_the_work_of_the_task_force_mediterranean_part_1_en.pdf.

⁵ Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosir), available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2013.295.01.0011.01.ENG.

⁶ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011R1168>.

is available. **The Meijers Committee advises the new Parliament to pressure the European Commission and Frontex to disclose and scrutinize these operational plans in the years to come.**

However, the largest border surveillance operations are currently not conducted through Frontex but solely by individual Member States, such as Italy's *Mare Nostum*. Frontex operations for now remain merely complementary to these national operations. **The Meijers Committee proposes to bring nationally conducted operations within the scope of the Search and Rescue Regulation, imperfect as this regulation may be.**

Previous comments by the Meijers Committee on the Frontex Rules for Maritime Surveillance can be read [here](#).

Smart Borders Package

Under pressure from the Member States, the European Commission has proposed to establish two databases to monitor arrival and departure of all non-EU-citizens (third-country nationals or TCNs) in the EU. The first database, the Registered Traveler Programme (RTP) is presented as a service for quick border passage for what the EC calls 'bona fide' travelers.⁷ Only pre-vetted frequent visitors of the EU may register to enjoy the privileges of this programme. A second class of third-country nationals, by far and large the majority of international travelers, will have to stand in a separate line to have prints of all 10 fingers and a facial picture recorded in a so-called Entry/Exit System (EES).⁸ The biometric data will be stored from 6 months up to 5 years. Together, the RTP and EES make up the core of what is called the Smart Borders package, which enables the Member States to identify people who overstayed their maximum permitted stay in the Schengen area.

The United States developed a similar system for 6 billion US Dollars but could not get the exit registration to work. Nevertheless, the EC estimates initial development costs of the EES at only one billion Euros. The Meijers Committee remains unsure how the EU will develop a complete system for only - give or take – a sixth of the costs which the US spent on half of such a system. **However, the Committee is even more concerned about the limited efficacy of such databases in comparison to the impact which large-scale registration of biometric data has on fundamental rights.** A huge group of 270 million TCNs on average will be registered in the EES at any given time according to the EC.

In return, a list of overstayers which may be consulted by law-enforcement agencies is generated. However it is unclear how this list will help combat illegal migration, as the EES cannot provide information on the current country, let alone location of the overstaying individual. The statistics on overstayers are also of very little use for policy measures, as again the EES provides no information on the location of overstayers other than their original point of entry. Moreover, the Visa Information System (VIS) already monitors any overstaying by visa-required travelers. The added

⁷ Proposal for a Regulation of the European Parliament and of the Council establishing a Registered Traveller Programme, 28 February 2013, available at http://ec.europa.eu/dgs/home-affairs/doc_centre/borders/docs/1_en_act_part1_v14.pdf.

⁸ Proposal for a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union, 28 February 2013, available at http://ec.europa.eu/dgs/home-affairs/doc_centre/borders/docs/1_en_act_part1_v12.pdf.

value of the EES would be the registration of the overstayers among visa-exempt travelers, such as US and Canadian citizens.

For these and a number of other reasons **the Meijers Committee believes that EES and RTP proposals are not in line with fundamental rights standards on data protection.** To justify the recording of private and biometric data, any measure must serve a legitimate aim and be necessary and proportionate. Although combating illegal migration is a legitimate aim, the European Commission has not established how these databases will contribute to it other than providing statistical insights.

Nevertheless, support for both databases appears to be strong within the Council. **The European Parliament is advised to approach the proposals with great scrutiny, especially the EES, both with regard to the overall impact on data protection and the procedural guarantees in them.**

Further comments on the Smart Borders package by the Meijers Committee can be found [here](#).

Recast of the Researchers and Students Directives

In 2013, the EC presented a proposal for a Directive on the condition of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing as a recast of both the Students Directive and the Researchers Directive.⁹ The reports on the implementation of those two directives pointed out certain insufficiencies of the two current instruments mainly concerning the admission conditions, rights, procedural safe guards, student's access to the labor market and intra-Union mobility. Also specific improvements were considered necessary regarding the optional categories of third-country nationals in the Students Directive (school pupils, unremunerated trainees and volunteers). Consultations have also pointed out the need for better job-seeking possibilities for researchers and students and better protection of au-pairs and remunerated trainees by extending the scope of the new instrument to these categories.

Negotiations on this directive have reached an advanced stage and the Meijers Committee will release a more elaborate commentary later this month.¹⁰ At this point the Meijers Committee wishes to express its concern over the narrow scope which the directive has been given over the course of the negotiations. The Meijers Committee also **objects to the mandatory withdrawal clause in situations where not the TCN but rather the host entity or the host family are at fault.** If resident permits are summarily revoked and the TCN is not allowed to find an alternative institution to finish his aborted research or studies, the general principle of EU law of legal certainty comes under threat.

The Meijers Committee recommends **allowing students to work for at least 20 hours a week**, given the importance for work experience on the labour market. In this respect, the Meijers Committee recommends that **graduated students are allowed a period of up to a year to search for employment** within the EU. The Meijers Committee also recommends **treating family members of students equal to those of researchers** by including them in Article 25 of the proposal.

⁹ (COM(2013) 151 final); Students Directive (2004/114), Researchers Directive (2005/71).

¹⁰ These comments are based on Council Document 11439/14 of 2 July 2014.

To read the Meijers Committee's original comments of 2013, please go [here](#). A note in relation to the current state of play will be released in September 2014 and will be available at www.commissie-meijers.nl.

Recast of the Union Visa Code

The Visa Code regulates the conditions and procedure for issuing short-stay visas for third-country nationals who need such a visa.¹¹ Under the Visa Code, Member States may be represented by other Member States by bilateral agreement. This scheme facilitates legitimate travelers considerably, especially as Member States are cutting back on their diplomatic representation across the world.

Now that the Visa Code is subject to a recast, the Meijers Committee invites the European Parliament to address a **shortcoming in the legal protection in cases where Member States represent one another**.¹² Courts in a number of Member States refuse to hear appeals against rejected visa applications for that Member State if the impugned decision was taken by another Member State on behalf of that Member State. It appears that judges are hesitant to overrule decisions taken by consular officers of other Member States, even though the appealed decision was taken on behalf the Member State against whom proceedings are initiated.

As a consequence, the applicant needs to seek redress in the representing Member State, even if it is uncertain whether the courts there will not turn down the appeal either, as after all the decision was taken for another Member State. Even if the courts of the representing Member State accept jurisdiction, the Meijers Committee is concerned that this poses a **real obstacle to the applicant in obtaining an effective remedy against an unjust refusal of their visa**. This is both practical and psychological: the applicant is likely to be less familiar with the representing state than with the represented state of destination, she is also less likely to have any personal ties with the representing State or able to avail herself of legal assistance. This is both at odds with Article 47 of the EU Charter on Fundamental Rights and defies the purpose of the Union Visa Code, namely to facilitate short term travel to the EU.

To get more information on this issue, please read the note of the Meijers Committee of June 2013, available [here](#). The Meijers Committee will release a note in September 2014 that further addresses this issue in light of the recast of the Visa Code and puts forward a solution. This note will be available on www.commissie-meijers.nl.

¹¹ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:243:0001:0058:en:PDF>.

¹² Proposal for a Regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code), 4 March 2014, available at http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/visa-policy/docs/proposal_regulation_union_code_on_visas_en.pdf.

3. Justice

European Public Prosecutor's Office

In 2013, the EC proposed to create a European Public Prosecutor's Office (EPPO) to combat crimes 'against the EU's financial interests.'¹³ EPPO is considered to have serious implications for national sovereignty and Member States' governments have approached the proposal with great scrutiny. Within six weeks after the launch of the proposal, eleven national parliaments put it temporarily on hold by issuing a so-called yellow card. The parliaments are unconvinced that an EU-level prosecutor creates added value over national prosecution services, and voiced concerns about over-arching powers and inadequate fair trial protection. In the Council, much of the debate focuses on the structure of EPPO and the control of the Member States over its functioning. Although the EC dismissed the national parliament's concerns out of hand, the Greek presidency overhauled the original proposal and built more influence for Member States over EPPO's decision-making structure.

Legal safeguards for suspects in cases investigated and prosecuted by EPPO have been left largely unaddressed in the negotiations so far. The Meijers Committee considers the provisions on this issue in the proposal far from adequate. In a commentary, the Meijers Committee voiced concerns over the **incomplete fair trial rights**, the need for clear criteria to **prevent EPPO from launching investigations in the jurisdictions with the least favorable procedural rights** for suspects and the **need for remedies against and accountability** for EPPO's actions. Moreover, there are no proper safeguards in place with regard to **storage of private data and sharing** of such information with other organizations or even third countries.

In March 2014, the European Parliament adopted a resolution which reflects these concerns. As the Treaties provide for EPPO to be created through the consent procedure, the EP cannot table any amendments. Nevertheless, with this resolution the previous Parliament indicated under what conditions it will accept the proposal. Meanwhile, discussions within the Council still focus on competency and influence. **The Meijers Committee is hopeful that once the negotiations reach a next stage, fundamental rights issues will be given due attention** by the Council and calls upon the Parliament to follow the developments closely.

Please go [here](#) to read the Meijers Committee initial note on the EPPO proposal.

Fair Trials Package

In November 2013 the EC proposed three directives and two recommendations on fair trial rights the Council and the Parliament.¹⁴ The Meijers Committee believes this is an important step on the so-called Roadmap on Procedural Rights and absolutely necessary to achieve the mutual trust that

¹³ Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM/2013/0534 final), 17 July 2013, available at: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52013PC0534>.

¹⁴ For an overview of the proposals, please go to http://ec.europa.eu/justice/newsroom/criminal/news/131127_en.htm.

should underpin mutual recognition in criminal proceedings. The Council first took up the draft directive on procedural safeguards for children and recently started discussing the substance of the directive on the presumption of innocence. The Meijers Committee issued a general comment on the whole package in March and released another note on minors involved in criminal proceedings specifically in August. The Meijers Committee expects to release more notes as the negotiations unfold, but wishes to bring the following general points to the attention to the EP:

Legal aid

Firstly, the Meijers Committee believes that **legal aid for all suspects** should be regulated in a directive. The current proposal contains a non-binding recommendation for legal aid in criminal cases in general, while only *provisional* legal aid for *detained* suspects or those subject to European Arrest Warrant proceedings are covered by a directive. The Meijers Committee believes that in order to give useful effect to the right to access to a lawyer, financial assistance is indispensable for indigent suspects.

Presumption of innocence

Secondly, the Meijers Committee believes that the current package of proposals **fails to address** one of the most contentious issues, namely **pre-trial detention**. In many Member States suspects of offences are subjected to these serious infringements of their personal liberty as a matter of course rather than as measure of last resort. The explanatory memorandum refers to a Green Paper on the issue, but the Meijers Committee considers that harmonization of **rules regarding pre-trial detention should be prioritized**, especially given the growing importance of the European Arrest Warrant.

Vulnerable suspects

Thirdly, the **proposal on procedural safeguards for vulnerable suspects should be a legally binding directive instead of a recommendation**. The same arguments as to expanding the scope of the directive on legal aid apply. Moreover, the **definition of which persons are considered to be 'vulnerable' should be further clarified** and there should be a moment where **vulnerability is officially determined** in the early stages of criminal investigations.

More general comments on the fair trials package can be read [here](#). More comments by the Meijers Committee on the proposed directive on procedural safeguards for children and on the presumption of innocence will be released in the fall of 2014 on www.commissie-meijers.nl

Reform of the EAW and other mutual recognition instruments

The European Parliament, in its resolution of 27 February 2014, expressed various concerns about Framework Decision 2002/584/JHA on the European Arrest Warrant (EAW), such as disproportionate use of the EAW for minor offences. Some of these concerns, according to the Parliament, are also relevant for other mutual recognition measures. The European Parliament considers it important to work on a horizontal measure establishing principles applicable to all mutual recognition instruments or, if such a measure is not feasible, to make amendments to Framework Decision 2002/584/JHA. It has requested the Commission to submit legislative proposals providing for, amongst other things, a proportionality check when issuing mutual recognition

decisions and a mandatory refusal ground where there are substantial grounds to believe that the execution of such a measure would be incompatible with fundamental rights. **The Meijers Committee shares the Parliament's concerns and supports the recommendations made.**

In 2011, the Meijers Committee wrote a book on the issue of mutual recognition across criminal and migration law, which contains a number of recommendations. A version of this book is available [here](#). A hardcopy can be requested through the Meijers Committee secretariat.

General Data Protection Regulation – Profiling

The Meijers Committee welcomes the agreement reached in March 2014, during the European Parliament's first reading, on the Commission's proposals for a revised legal framework of data protection.¹⁵ The Commission's proposals are built upon the core principles of data protection and respond to the need to update current data protection standards in view of rapid technological developments. In 2012, the Meijers Committee commented more specifically on the regulation of the use of personal data in for law enforcement purposes, of data profiling, and the role of national and European supervisory authorities.

The Meijers Committee welcomes with regard to the current text (13.3.2014) on data profiling, the inclusion of additional conditions with regard to the use of profiling such as the 'necessity' requirement, and the explicit prohibition of profiling solely based on the special categories of data as mentioned in Article 9 of the General Data Protection Regulation. The Meijers Committee supports the extension of these special categories of data in the compromise text, now also including philosophical beliefs, sexual orientation and gender identity, biometrics, administrative decisions and judgments. The Meijers Committee also supports the explicit prohibition of profiling leading to measures with legal effects or significantly affecting rights, interest or freedoms of the data subject, which is solely or predominantly based on automated processing.

The Meijers Committee **regrets however that the current text no longer includes the general right of a data subject not to be subjected to measures producing legal effects or significantly affecting his person.** The new compromise text in Article 20 merely grants the data subject a right 'to object against data profiling' and sets forth that the subject shall be informed about the right to object to profiling 'in a highly visible manner'. However, it is still very unclear how private and public entities will enable data subjects to object against profiling. As experience shows, it is difficult to translate the concepts of consent and dissent in practice and consumers are too often confronted with the necessity to give away their data in order to have access to certain services. **Although the inclusion of the right to object to profiling is a step ahead, there is lack of clarity on this point**

The Meijers Committee **emphasizes that the goal of data protection standards is in the first place to protect individuals against unlawful, incorrect, and not transparent use of their personal data.** For this purpose, the legal position of individuals must be strengthened against measures or adverse decisions by commercial entities or governmental authorities solely based on profiling. This may also involve decision-making based on profiling of 'non-sensitive' data, for example the refusal to grant persons financial or other commercial services solely on the basis of the postal or city area in which they live. **The Meijers Committee recommends, in addition to the extra guarantees as proposed by the European Parliament, to reintroduce the original right of a person not to be subjected to**

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measures producing legal effects which are solely based on automated decision making or data profiling.

To read previous commentaries of the Meijers Committee on the data protection legislation, please go [here](#).

About

The Meijers Committee is an independent think tank 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. Please visit www.commissie-meijers.nl for more information.