



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

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subject **Note on the Council General Approach on the Directive on the presumption of innocence and the right to be present at trial**

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

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Dear members of the LIBE Committee,

In reference to the Council General Approach on the directive of the European Parliament and of the Council on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings, the Meijers Committee would like to share the enclosed comments with you.

Identical letters have been sent to the Commission, the General Secretariat of the Council and the Permanent Representations of the Member States.

As always, the Meijers Committee welcomes the opportunity to further discuss the contents of this note with you.

Sincerely,

Professor Theo de Roos,
Chairman

Note on the Council General Approach on the Directive Presumption of Innocence and the Right to be Present at Trial

The Meijers Committee has taken note of the General Approach adopted by the Council on the Proposal for a directive of the European Parliament and of the Council on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings (dated 4 December 2014, Council Doc. 16531/14). The Meijers Committee emphasises the great importance of the presumption of innocence and related rights in criminal proceedings to suspected and accused persons. Following the extensive revisions in the Council preparatory bodies and the General Approach ultimately adopted, the Meijers Committee invites the Parliament and the Council to take the following remarks and suggestions into consideration.

Subsidiarity of the proposal

A number of Member States have expressed doubt as to the added value of the current proposal. Together with the Dutch Advisory Council on International Affairs, the Meijers Committee is of the opinion that harmonizing procedural rights is most desirable in light of previously agreed European cooperation in criminal matters.¹ This ensures the legal protection of individuals throughout the Union. The Meijers Committee notes that although guarantees as to the presumption of innocence and the right to be present at trial are of an adequate standard in many Member States, harmonization will enhance the mutual trust which mutual recognition presupposes.

Material scope: not only criminal law

The proposal limits the scope of application of this directive to criminal proceedings only. Administrative proceedings, including administrative proceedings that can lead to sanctions, such as proceedings relating to competition, trade, financial services, or tax, including tax surcharge, and investigations by administrative authorities in relation to such proceedings, as well as civil proceedings, are not covered by this Directive (recital 6). The Meijers Committee finds this general exclusion of administrative law from the scope of application of this directive to be unjustified. The Meijers Committee recalls the long line of case-law of the European Court of Human Rights, which establishes that the application of administrative law can be (extremely) punitive in nature (e.g. fines in tax law), and hence fall within the scope of Article 6 ECHR concerning a fair trial.² Many branches of law, such as those mentioned in the recital above and social security and agricultural law, are upheld by administrative law and its administrative sanction system, not by the criminal law. Although the sanctioning system is a national choice, the Meijers Committee sees no justification for allowing the Member States to choose whether or not a European human right standard, such as the *presumptio innocentiae*, should apply when the sanction is punitive in nature.

The Meijers Committee recommends that Article 2 be expanded to cover all administrative proceedings and investigations that can lead to sanctions.

¹ AIV, De Rechtsstaat, Waarborg voor Europese burgers en fundament voor Europese samenwerking, no. 87 2014, p. 11.

² *Adolf v. Austria, Öztürk v. Germany, Jussila v. Finland, Bendenoun v. France, Turan v. Turkey, Gheorghe v. Romania, Lutz v. Germany, Engel et al. v. Netherlands.*

Personal scope of the proposal

Article 2(1) of the revised text limits the scope of the proposed directive to natural persons only. The Meijers Committee is unconvinced of the arguments put forward in recitals 9, 10 and 11 for doing so. They fail to clarify the critical points at which the presumption of innocence diverges in respect of natural and legal persons. Moreover, according to standing case-law of the ECtHR Article 6(2) ECHR does also apply to legal persons.³ A separate legal regime for legal persons is undesirable, unless the nature of the right renders application to legal persons incompatible, such as the right to remain silent.

The Meijers Committee proposes that the personal scope of the Directive be extended to legal persons.

Temporal Scope of the proposal

The Meijers Committee agrees with the Council that the directive should apply from the moment a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until final determination of whether the person has committed the offence concerned, and that decision has become definitive.

Public references to guilt

Article 4 regulates public references to guilt before a decision by a competent judicial authority.⁴ Paragraph 1 formulates the prohibition on public authorities from referring to the suspect or accused persons as if they were guilty before they have been proven guilty according to law.

The Meijers Committee recommends that this paragraph be clarified by including the criteria which have been developed in ECtHR case-law in relation to this issue in Article 4.⁵ **The Meijers Committee suggests that the text be amended as follows:**

Article 4 Public references to guilt before being proven guilty according to law

1. *Member States shall take the necessary measures to ensure that, before suspects or accused persons have been proven guilty according to law, public statements by public authorities do not refer to the suspects or accused persons as if they were guilty. **[In particular, any statements should not be of a such a nature as to serve to encourage the public to believe the applicant guilty and to prejudge assessment of the facts by the competent judiciary authority].***

(* * *)

Article 4(3) requires Member States to take appropriate measures in the event of a breach of paragraph 1. The Working Party on Substantive Criminal Law has already called for further

³ ECtHR, Judgment of 12 November 2002, Fortum Oil and Gas Oy v. Finland, Appl. 32559/96, par. 2 (de facto criminal). See also ECtHR, Decision of 25 January 2000, Aannemersbedrijf Gebroeders Van Leeuwen B.V. v. the Netherlands, Appl. 32602/96, par. 1, 2 (civil/criminal).

⁴ The explanatory memorandum refers to a 'conviction', which the Meijers Committee understands to mean 'adjudication'.

⁵ See ECtHR *Alленet de Ribemont v. France*, 10 February 1995, para 41 and ECtHR *Kouzman v. Russia*, 18 March 2010, para 68, referring to statements by public authorities 'which had served to encourage the public to believe the applicant guilty and prejudged the assessment of the facts by the competent judiciary authority.'

clarification of ‘appropriate measures.’ The Meijers Committee does not see this reflected in the revised text and invites the Union legislator to develop a clearer definition. According to the Meijers Committee, such clarification should be included in the operative part of the directive rather than in the preamble.

Subsequent proceedings

As the case-law of the ECtHR points out, the presumption of innocence also protects individuals who have been acquitted of a criminal charge and in respect of whom other judicial decisions are taken referring to the offence with which they had been charged as if they were guilty.

The proposal for a directive does not refer to the presumption of innocence in relation to these subsequent proceedings after the acquittal has become final. **The Meijers Committee suggests expanding Article 4 to these types of proceedings, e.g. former accused’s request for compensation for detention on remand or other inconvenience caused by the criminal proceedings or former accused’s request for compensation for damage caused by an unlawful or wrongful investigation.** Voicing any suspicion of guilt when dealing with such requests should be avoided.

Burden of Proof

The Meijers Committee agrees with the Council version of Article 5(2) that presumptions of fact and law may be used in criminal proceedings, as long as they are rebuttable. The Meijers Committee welcomes the deletion of earlier proposals within the Council to exclude minor (road traffic) offences from the right of rebuttal.

Standard of Proof

Article 5(3) of the original proposal introduced a common standard of proof for criminal liability across the EU. The proposed standard was that of ‘beyond reasonable doubt’. However, CATS considered the introduction of a common standard of proof as ‘too intrusive’ and deleted it.

The Meijers Committee points out that the term ‘reasonable doubt’ originates in Common Law. Different standards apply in civil law systems, which most continental Member States use, such as the French *intime conviction* or the German *freien Uberzeugung*. However, in practice, these standards approximate closely to the notion of reasonable doubt. At the same time, the Meijers Committee agrees with the Council that complete harmonization is undesirable. The different standards of proof have been developed and refined in case-law over the course of centuries and are generally of good quality. The introduction of a new common standard would at best lead to criminal law judges – who are not used to working with EU law – simply ignoring it by interpreting it as equivalent to the pre-existing standard. At worst it would lead to confusion and extensive new litigation on an issue that is not a genuine problem within the EU. This would not benefit legal protection.

The Meijers Committee recommends that the European Parliament adopt the Council’s position on this issue.

Breach of Article 6

The Meijers Committee urges the Union legislator to reintroduce in Article 6 a provision that **evidence obtained in breach of the right to remain silent and the right not to incriminate oneself,**

shall not be admissible, with a very narrow exception clause to cover situations where the use of such evidence would not prejudice the defendant's rights.

Article 6(5)

In the view of the Meijers Committee, it is unclear what the function of the exception set out in Article 6(5) is, and why such an exception clause should be needed. **The Meijers Committee advises that this should be clearly explained in the Preamble, or the provision should be deleted.**

Temporary exclusion from trial

Article 8(4), as currently formulated, provides a broad ground for temporarily excluding a suspect or accused person from the trial. The Meijers Committee is of the opinion that only ensuring the proper course of the criminal proceedings can provide a valid ground for doing so; therefore, **the clause 'the smooth operation' should be removed.**

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.

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