Permanente commissie
van deskundigen in
internationaal vreemdelingen-,
vluchtelingen- en strafrecht

Secretariaat
postbus 201, 3500 AE Utrecht/Nederland
telefoon 31 (30) 297 42 14/43 28
telefax 31 (30) 296 00 50
e-mail cie.meijers@forum.nl

To Dr. A. Vitorino
European Commissioner for Justice and Home Affairs
Wetstraat 200
B-1049 Brussels

JAI-justicepenale@cec.eu.int

Regarding Consultation Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union

Reference CM0412
Date 29 juli 2004

Dear Dr. Vitorino,

Following the public consultation process as posted on the European Commission's website on Justice and Home Affairs, we herewith send you our comments on the Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union(COM(2004)334 final, 30 April 2004).

Yours sincerely,

on behalf of the Standing Committee,

Prof. mr. C.A. Groenendijk
Chairman Standing Committee

Permanente commissie van deskundigen
in internationaal vreemdelingen-,
vluchtelingen- en strafrecht

COMMENTS ON THE GREEN PAPER ON THE APPROXIMATION, MUTUAL RECOGNITION AND ENFORCEMENT OF CRIMINAL SANCTIONS IN THE EUROPEAN UNION (COM(2004)334 final, 30 April 2004).

By the Standing committee of experts on international immigration, refugee and criminal law (Utrecht, the Netherlands).

Impediments for free movement or differences that should be respected?

Question 1 of the Green Paper – "To what extent do the differences between sentencing systems raise barriers to the establishment of the area of freedom, security and justice" – addresses two major problems. On the one hand, a lack of security resulting from the fact that in one or more member states certain conduct is not classified as an offence or is not actually prosecuted, while it is an offence and it is actually prosecuted in (most) other member states. This might, among other undesirable effects, create the risk that criminals relocate their 'nefarious activities' to the first mentioned member states. The Green Paper mentions in this context as examples financial, business or computer crime. Little is known about possible relocation effects in these fields, and research on this issue has to be promoted indeed. On the other hand, there is the problem that freedom of movement might be impeded by the fact that conduct that is lawful in one country might be unlawful in another In the Dutch legislative debate about the bill that was meant to implement the Framework Decision on the European Arrest Warrant (the 'Overleveringswet'), much attention was spent to this issue (examples: abortion, euthanasia, drugs policy). Rightly, the parliament and the government showed themselves concerned about the possibility that the Netherlands, in the vein of the mutual recognition approach, would be forced to facilitate foreign requests for legal assistance in the case of conduct on Dutch territory that is not only not punishable, but that is deemed desirable and useful according to the Dutch legislation, tradition and legal consciousness. Other member states undoubtedly have comparable examples. When these examples concern choices motivated by "historical, cultural and legal reasons (…), deeply-rooted in their legal systems, which have evolved over time and are the expression of the way in which Member States have faced and answered fundamental questions about criminal law" (Green Paper par. 4.1, p. 47), the differences between the member states have to be respected and approximation should not be considered, even if this might produce restrictions to the freedom of movement.

Prosecution – mandatory or discretionary?

Major differences between the Member States as far as enforcement of harmonised regulations is concerned indeed should be avoided (Question 2 Green Paper). However, it seems doubtful whether the difference between types of prosecution policy (mandatory or discretionary) has much to do with this. It is very well possible within a discretionary system like the Dutch system ("opportuniteitsbeginsel") to guarantee sufficient priority for law enforcement efforts with respect to harmonised offences.

Sentencing guidelines?

The Questions 3 – 12 of the Green Paper concern sentencing practices. As the Dutch experience of the last ten years have shown, the matter of egality of sentences really is a hard nut to crack, already within one small scale national law system like the Dutch. Setting up a sentencing information system is a necessary condition in order to come to some kind of coordination, but it is a difficult and costly operation. Also from a theoretical point of view serious questions arise as to the comparability of the sentences. Nevertheless, much may be learned in this field from national experience, like the 'orientation points' established by the criminal courts in the Netherlands, which lack a binding nature and leave room for assessing personal features of the perpetrator. It is very doubtfuil, however, whether it is worth while to undertake troublesome and time consuming exercises like exploring the possible need for approximation on the issue of recidivism.

Economic offences

The risk that business activities will be relocated from member states with a strict legislation and enforcement practice to member states which are more lenient has to be taken seriously. It may be assumed that the enforcement efforts are by far more important than legislation. The very idea of economic (criminal) regulation is to prevent unjustified competition advantages by avoiding legal prescriptions. Thus, approximation of the enforcement efforts indeed is a matter of priority (see question 9).

Alternative sanctions; position of the victim; mediation

Encouraging ‘alternative sanctions’ (in the broad sense used by the Green Paper) by setting up mechanisms at European Union level in order to disseminate information and to establish ‘best practices’ would be a good initiative. It is remarkable, however, that the Green Paper in this context stresses so much the mediation in criminal cases (question 15). In most member states, mediation in criminal cases – on legitimate grounds! - has only a very limited place, and it is not very probable that this will change in the near future.

Early release; life sentences

Question 17 adresses the very complicated matter of early release, but also the issue of (the execution of) life sentences. In the Netherlands, nowadays the latter is object of political and societal debate. In this member state, life imprisonment really is life emprisonment (‘gratie’ is very exceptional, and early release is not provided). Other member states know very different systems, as the Green paper rightly observes. Considering the need for approximation in this field only makes sense when other sanctions like forced treatment of offenders (e.g. in the Netherlands the ‘measure’ of ‘tbs’) are taken into account. The suggestion of placing the question of minimum standards on the agenda should be welcomed, without however pushing an irrealistic and counterproductive expectation of quick results.

Transfer of execution of sentences

Many questions in the Green Paper are dedicated to the transfer of the execution of imposed penalties (the Green Paper is using a different terminology: ‘enforcement of the penalty’ or ‘enforcement of a criminal judgment’). Generally spoken, the Paper shows convincingly that in this field much can and should be improved. A first step, before answering all the questions, should be to evaluate thoroughly the actual practices and to make an assessment of research that has been done already on this issue. The Green Paper only mentions the study of the Max Planck Institute in Freiburg, but obviously there is much more. In this stage, question 33 (“What simple and effective structures should be provided to implement the mutual recognition of criminal penalties and the transfer of prisoners?”) seems rather naïve.