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

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To Mr. Jerzy BUZEK
President of the European Parliament

By e-mail

Reference CM0905

Regarding Draft Framework Decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings; Draft Framework Decision on the transfer of proceedings in criminal matters

Date 25 August 2009

Dear Mr. BUZEK,

Please find attached a Note with observations on the Draft Framework Decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings and the Draft Framework Decision on the transfer of proceedings in criminal matters, prepared by prof. André Klip (Maastricht University, member of our committee).
The Meijers Committee shares his view that the initiative to regulate the transfer in proceedings must be welcomed. It would make the network of cooperation among the Member States of the European Union complete and creates a system in which at all stages of the criminal investigation and procedure cooperation may take place, whilst at the same time respecting the rights of the individual.
In contrast, the proposal relating to the settlement of conflicts fails to prevent conflicts of jurisdiction at all and does not add anything to what can be done already on the basis of existing rules on cooperation with regard to settling conflicts.

We hope you will find these comments useful. Should any questions arise, the Standing Committee is prepared to provide you with further information on this subject.

Yours sincerely,

On behalf of the Standing Committee,

Prof. dr. C.A. Groenendijk
Chairman

Prof. dr. P. Boeles
Secretary

cc. - European Commission

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OBSERVATIONS OF THE MEIJERS COMMITTEE ON THE DRAFT FRAMEWORK DECISION ON THE PREVENTION AND SETTLEMENT OF CONFLICTS OF EXERCISE OF JURISDICTION IN CRIMINAL PROCEEDINGS[1] AND ON THE DRAFT FRAMEWORK DECISION ON THE TRANSFER OF PROCEEDINGS IN CRIMINAL MATTERS.[2]

Abstract:
The initiative to regulate the transfer in proceedings must be welcomed. It would make the network of cooperation among the Member States of the European Union complete and creates a system in which at all stages of the criminal investigation and procedure cooperation may take place, whilst at the same time respecting the rights of the individual.
In contrast, the proposal relating to the settlement of conflicts fails to prevent conflicts of jurisdiction at all and does not add anything to what can be done already on the basis of existing rules on cooperation with regard to settling conflicts.

Introduction
The Meijers Committee takes these two drafts together in its observations because they deal with issues which are intertwined. Both deal with concurrent jurisdiction and aim at preventing that accused are prosecuted for the same offence in two or more states.

Prevention of jurisdictional conflicts
It is striking to see that neither of the proposals provides for anything that could amount to the *prevention of multiple jurisdiction*. Despite the task and mandate given in Article 31 TEU no proposal has ever been launched to come to a prevention of concurrent jurisdiction. This could be done for instance by reducing multiple jurisdiction and by allocating jurisdiction to Member States. In the context of mutual recognition other fields of law, such as in civil law, various Regulations have been adopted which basically settle two issues: they allocate jurisdiction and they create the obligations to mutually recognise the decisions that follow from using the allocated jurisdiction. We refer to Directive 91/439 on the Mutual Recognition of Driving Licences and to Regulation 44/2001 on Jurisdiction and Recognition of Civil Judgments. In order to prevent multiple jurisdiction one could for instance reduce the application of jurisdictional principles to, in principle, territorial jurisdiction only.[3]

Such an approach would be more in line with basic concepts of Union law outside the field of criminal law. Regarding the four freedoms, only one Member State is competent to determine whether it is in compliance with the law. All other Member States shall mutually recognise that decision. In criminal law, all Member States having jurisdiction over an offence have the competence to make decisions. This is not only ineffective, but also undermines the principle of mutual recognition. Member States and the EU should not allow or stimulate multiple jurisdiction over offences.

Solving of jurisdictional conflicts
While the proposals could do better if they would contribute to preventing jurisdictional conflicts, the Transfer of Proceedings Proposal does have added value with regard to solving such conflicts. However, one may seriously doubt whether the mechanism provided in the draft on the settlement of conflicts will be effective in practice. This especially relates to the triggering mechanism as found in Article 5. The competent authority must contact another Member State's authority when it has "reasonable grounds to believe that parallel proceedings are being conducted in another Member State." This would not only require fair knowledge of all the extraterritorial jurisdictional principles of all Member States, but also of the priorities in criminal investigation and prosecution of those Member States having jurisdiction.

Besides, the instrument may even create parallel investigations and conflicts, because it might inform a Member State, till then unaware of the case and its own jurisdiction over it. This is a perfect example of making a theoretical problem into a real problem by using a specific technique, necessitating the subsequent devise of a mechanism in order to solve the self-made problem.

[1] These comments are based on the draft of 18 May 2009, 8535/09, COPEN 71.
[2] These comments are based on the draft of 30 June 2009, 11119/09, COPEN 115.
[3] André Klip, *European Criminal Law. An Integrative Approach*, Intersentia Antwerpen 2009, p. 423-424.

Transfer of proceedings
We certainly deal here with the last form of cooperation that should become applicable to the EU Member States in order to have a complete network of cooperation in every stage of the criminal investigations and proceedings, whilst at the same time respecting the rights and interest of accused and other individuals. From the very beginning of the first suspicion that a crime is committed to the execution of sentences, the network of EU legislation provides for tools for cooperation. The current proposal allows for assistance at the moment that a decision to prosecute must be made. The criteria of Article 7 must be regarded as most relevant.

The effects must be welcomed. It creates the possibility to allocate the case to the most appropriate state for prosecution, it offers an alternative to more coercive instruments like an EAW in minor cases and last but not least it may seriously reduce the need for other orders. An example is the situation in which a perpetrator of German nationality committed a crime in France and seeks refuge after the crime in Germany. In the current system France could easily get his surrender by issuing an EAW. However, since the accused is a national of the executing state, he must be returned for serving his sentence in Germany. The introduction of the transfer of proceedings could reduce the number of cooperation procedures from two to one. France could then transfer the proceedings right away to Germany.

Double criminality or legality
Unlike the cooperation based on the principle of mutual recognition, Article 11 provides that double criminality must be provided. However, this requirement could be better phrased with stipulating that the principle of legality applies. The principle of legality, which is a general principle of the Union's law,[4] requires that the Member State prosecuting can only do that on the basis of a crime provided under its own national criminal law. In that sense the reference to double criminality *in abstracto* in the draft Explanatory Report (p.12) is incorrect. The receiving Member State will always be obliged to judge the case *in concreto*.

This instrument could be turned into a mutual recognition instrument, as expressed above, under condition of allocation of jurisdiction. But even then, the legality principle does not allow any deviation from the double criminality rule.

The rights of the accused
Article 8 stipulates that the accused or suspect shall be informed. However, it does not state for what purpose that shall be done. The proposal is ambiguous as to whether the accused has legal remedies or not. We could imagine that the rights of the accused against a transfer would be satisfied if he could test the compliance with the criteria of Article 7 in the criminal proceedings in the receiving Member State. For the rest, Article 17, paragraph 6 adequately protects the accused against a deterioration of his penal position as a result of the transfer.

Conclusions
- the EU should regulate the prevention of multiple jurisdiction by allocating jurisdiction;
- the proposal on settling conflicts of jurisdiction does not have added value and should be withdrawn;
- the proposal on transfer of proceedings should, with slight amendments, be adopted.

Utrecht, 25 August 2009

[4] Court of Justice, 3 May 2005, *criminal proceedings against Berlusconi and others*, C-387/02, C-391/02 and C-403/02 [2005] ECR I-3565.