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

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To (by email) Ms Hohlmeier
European Parliament
Rue Wiertz
B-1047 BRUXELLES

Reference CM1112
Regarding Proposal for a Directive on attacks against information systems (COM(2010) 517)
Date 13 October 2011

Dear Ms Hohlmeier,

Please find attached a note of the Meijers Committee on the Proposal for a Directive on attacks against information systems (COM(2010) 517).

In the attached note the Meijers Committee comments on a) the necessity of the Directive, b) the clarity of the conduct prohibited in Article 7 of the Directive, c) phrases in the Directive that will complicate implementation and d) jurisdiction as mentioned in Article 13.

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

Yours sincerely,

Prof. dr. C.A. Groenendijk
Chairman

Note on the Proposal for a Directive on attacks against information systems

a) Necessity of legislation at this stage

The first issue concerns the question why this new legal instrument, which carries little changes in comparison to its predecessor, has been introduced only six years after the adoption of the initial Framework Decision and only four years after the implementation deadline expired. Given the "implementation-fatigue" which is also identified in the Explanatory Memorandum, it might be better to wait until more ground-breaking changes can be brought about. Member States are currently struggling with all the implementation obligations and should not be further overburdened.

b) Clarity of the prohibited conduct

The most important point, however, relates to the formulation of prohibited conduct in Article 7. In its current form, this Article criminalises any production of tools that could theoretically be used to commit the relevant crimes. In view of the proportionality principle, it is highly questionable if such a broad formulation can be justified. It would be comparable to criminalising any production of knives, because knives could be used to kill people. Besides, there is no need for such a specific provision, because those perpetrators that knowingly and willingly produce tools for the commission of offences, are already covered by Article 8 and can be prosecuted as aiders and abettors.

c) Keep the legislation simple

The proposal contains a couple of sentences which are used very often, but will complicate the process of implementation in the Member States. It concerns: a) the phrase "cases which are not minor" (Article 4); b) the reference to aggravating circumstances (Article 10); and c) the use of the Greek maize criteria with regard to penalties (Article 9). The common characteristic of these provisions is that they deal with norms directed at the enforcement of the implemented legislation. These rules must certainly be applied in the practice of enforcement of Union law. However, they do not need to be codified, because the Court has already stipulated that Member States must provide for effective, proportionate and dissuasive measures. Whilst the Court assesses these criteria *in concreto*, they now appear consistently as criteria for legislation *in abstracto*. As such, it burdens the national legislator with the difficult task to ensure that the Greek maize criteria are already complied with in the legislation. The same goes for the two other examples given, which come from the same source. Whether specific circumstances qualify for aggravation, or whether a certain case is minor can be assessed at the moment of enforcement and can be assessed afterwards- if necessary by the Commission and the Court- on the basis of the Greek maize criteria. Therefore, the mentioned phrases in the proposal should be deleted.

d) Jurisdiction

Article 13 copies the regular provision on jurisdiction. This seems to neglect that the present Draft Directive deals with crimes of a different nature and brings up the question how to determine the exact territory on which the crimes mentioned in this Proposal are committed. The Draft Directive fails to formulate criteria for determining *the locus delicti* of crimes committed between computers, although it must be admitted that formulating such criteria would be a real innovation. Furthermore, Article 13 obliges Member States to create extraterritorial jurisdiction, but remains silent on solutions for overlapping jurisdictional powers which surely will be the consequence of this obligation. In order to prevent enforcement agencies of different Member States from spending double effort on investigating the same crimes and to prevent that citizens will be prosecuted twice, it is important that this issue is not ignored, if only because overlapping jurisdictional powers are likely to threaten the mutual loyalty and cooperation amongst Member States.

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