

## Meijers Committee

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

### Secretariat

p.o. box 201, 3500 AE Utrecht/The Netherlands  
phone 0031 30 297 43 28/43 21  
fax 0031 30 296 00 50  
e-mail cie.meijers@forum.nl  
http://www.commissie-meijers.nl

**To (by email)** [JUST-CRIMINAL-JUSTICE@ec.europa.eu](mailto:JUST-CRIMINAL-JUSTICE@ec.europa.eu)

**Reference** CM1115  
**Regarding** Reply Meijers Committee to the Green Paper on strengthening mutual trust in the European judicial area- A Green Paper on the application of EU criminal justice legislation in the field of detention  
**Date** 29 November 2011

Dear Commissioner Reding,

In response to the Green Paper on the application of EU criminal justice legislation in the field of detention (COM(2011) 327 final), the Meijers Committee wishes to raise a few questions and comments, though not necessarily related to specific questions in the Green Paper:

1. A first issue relates to the principle of mutual trust, which possibly could be strengthened through the creation of minimum standards on detention conditions and on the maximum length of pre-trial detention. Such minimum standards could facilitate the transfer of persons within the EU, for instance under the regime of the European Arrest Warrant, the Transfer of Prisoners Framework Decision, and the European Supervision Order.
2. The creation of minimum standards on detention conditions is welcomed with enthusiasm by the Meijers Committee, in so far as such minimum standards will raise the existing level of detention conditions throughout the European Union.
3. Despite the positive approach towards the development of minimum standards on detention conditions, the Meijers Committee would like to emphasize the reality that the existence of such minimum standards will never automatically result in a 100% compliance with the obligations resulting from these minimum standards. Rather, in daily practice – even if national legislation would fully correspond with the minimum level required; and even if in most cases these detention conditions and maximum periods appear to be observed – it may always occur that in an individual case, detention norms are violated.

For that reason only, it is not recommendable that the existence of minimum standards on detention conditions would result in an absolute presumption of trust between the Member States. Also in the context of surrender and prisoner transfer, it would be undesirable to cooperate on a basis of absolute trust, that is only formal not material trust. After all; would an 'obligation to trust' not completely paralyze the judicial authorities of the Member States in those situations where it is crystal clear that the incoming request for cooperation has to be declined, for instance in cases of mistaken identity, or in cases of severe breaches of human rights and detention conditions?

4. What is more, how would cooperation on the basis of absolute and automatic trust between Member States correspond to the line of reasoning expressed in Strasbourg case-law in the context of asylum? After all, in *M.S.S. v. Belgium and Greece*, the ECtHR decided that the executing Member State may be held responsible for violations of fundamental rights committed by another Member State, if the executing Member State previously decided to expel the victim of this

violation towards the other Member State on the basis of a mutual recognition instrument. This judgment recognises that mutual recognition cannot warrant blind trust, not even where minimum standards, e.g. with regard to detention conditions, would exist.<sup>1</sup>

In brief: though the Meijers Committee would welcome the creation of EU-wide minimum norms on detention conditions and on the maximum length of pre-trial detention, it advises the European Commission not to use these minimum norms as a reason to oblige the Member States to cooperate on the basis of absolute trust.

5. More specifically, the Meijers Committee wishes to address the issue of pre-trial detention. It particularly wonders whether, according to the European Commission, it must be considered problematic that at the national level pre-trial detention is likely to function as anticipatory punishment in practice. This is, for instance, the case in the Netherlands, as research has shown.<sup>2</sup> This can be particularly pressing if suspects without a fixed domicile or residence in the country are treated differently under national law – as is the case under Dutch law. As a result, it may be relatively easy to detain non-national people in comparison to nationals. Does the Commission agree with the Meijers Committee that future initiatives on detention conditions should pay attention to this issue?

6. A related issue concerns the lack of a free-standing provision on alternatives for pre-trial detention. This is relevant for Dutch law, where alternatives are only possible by means of suspending or postponing pre-trial detention that has already been applied, but possibly applies to the national laws of other Member States as well. According to the Meijers Committee, the Commission needs to consider how this would correspond to the rule that pre-trial detention shall be a subsidiary measure. Is there not a risk that under such a regime, alternatives to pre-trial detention are much more likely to become the exception rather than the rule? It is therefore strongly recommended to the European Commission to pay explicit attention to actual practices at the national levels.

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

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<sup>1</sup> ECtHR 21 January 2011, appl. no. 30696/09.

<sup>2</sup> L. Stevens, "Voorlopige hechtenis en vrijheidsstraf. De strafrechter voor voldongen feiten?", *NJB* 2010, p. 1520-1525.