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Standing
Committee of
Experts on
International
Migration,
Refugee and
Criminal Law

Subject **Meijers Committee's comments on how to reconcile the legal basis of the Facilitators Package (Art 83 TFEU) with safeguards to prevent criminalization of humanitarian actors, in addition to CM2407 Comment on the EU's Facilitators Package**

Surinameplein
122, 1058 GV
Amsterdam

Dear [REDACTED],

(+31) 020
3620505

[Website](#)

[E-mail](#)

The Meijers Committee has issued several recommendations to the European Commission and EU legislators on the proposal of the Facilitation Package (see [CM2407 Comment on the EU's Facilitators Package](#)). One key recommendation is that the European Commission should introduce changes to its proposal to create safeguards against investigation and prosecution of humanitarian assistance within the Package.

There has been some confusion as to whether an obligation to exclude humanitarian aid can be included in a provision based on Article 83 TFEU. In this letter we address this point and conclude that the use of the EU's criminalization powers, in areas that directly touch upon Charter rights, should go hand in hand with clear exemptions that limit Member States' power to use their criminal law provisions.

Article 83 TFEU provides the EU with the legal basis to establish minimum rules concerning the definition of criminal offences and sanctions in certain areas of serious crime. While Article 83 TFEU may originally not have been designed to include the power to obligate Member States not to criminalize specific behaviors, it could be argued that this possibility flows logically from its criminalization powers in conjunction with fundamental rights obligations from the Charter. This interpretation aligns with the ECJ's case law, which emphasizes that EU legislation, including criminal law instruments, must respect fundamental rights as enshrined in the Charter (ECJ, Case C-617/10, *Åkerberg Fransson*, para. 21).

The article's reference to "minimum rules" does not imply that Member States can criminalize any behavior beyond the minimum in a Directive: it is widely acknowledged that fundamental rights as laid down in the Charter can limit the scope of criminalization. This view is also supported by legal doctrine, which argues that minimum rules under Article 83 TFEU should not be interpreted as a *carte blanche* for over-criminalization by Member States. The principle of proportionality, as enshrined in Article 49(3) of the Charter, acts as a safeguard against excessive punitive measures (V. Mitsilegas, *EU Criminal Law*, 2022, pp. 119-120). Furthermore, legal interpretations suggest that minimum harmonization rules in substantive criminal law may also function as maximum rules, limiting the extent to which Member States may criminalize beyond the EU framework (H. Nilsson, "How to Combine Minimum Rules with Maximum Legal Certainty?", 2011, *Europarättslig Tidskrift* 665). This is to ensure legal certainty and uniformity in the application of EU law and to prevent the arbitrary extension of criminal offences at

national level. In contrast to Article 82(2) TFEU, which explicitly allows Member States to introduce higher levels of protection in criminal proceedings, Article 83 contains no such provision, reinforcing the argument that minimum rules define both the floor and the ceiling of criminalization at the EU level.

With regard to the provision of humanitarian assistance and assistance to family members, such rights include respect for human dignity (Article 1), the right to life (Article 2) and the right to private and family life (Article 7). Principles such as proportionality and *ultima ratio* also provide constraints on the criminal justice systems of Member States (see European Commission Communication 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law', 20 September 2011, COM(2011)0573; Council of the European Union, 'The future of EU substantive criminal law – Draft report by the Presidency', 28 May 2019, Council document 8619/19). Therefore, even if Article 83 TFEU does not directly provide powers to oblige exemptions from criminalization, such obligations can flow from the Charter itself and from the constitutional traditions of the Member States. It is crucial that such exemptions are referred to in the operative text of the Facilitation Directive, rather than merely in the non-binding preamble.

At least, it is clear that the operative text of a Directive can oblige States to take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties in certain cases: this exemption can be seen in the Directive on human trafficking with regard to crimes that victims of human trafficking were coerced into committing (also known as the non-punishment principle: Article 8 of Directive 2011/36/EU, as amended by Directive 2024/1712). Therefore, it is perfectly in line with the EU's current legislative efforts to include mandatory rule on non-prosecution or non-imposition of penalties in cases where this would otherwise be in conflict with fundamental rights. This demonstrates that EU law can, in some cases, specify exceptions to *de facto* criminalization, even within a broader criminal law framework. While this would not override the requirement to criminalize the core offense, it could function as a safeguard to protect individuals providing humanitarian aid in good faith from prosecution.

In light of these considerations, according to the Meijers Committee there is room within the EU criminal justice framework for clear and mandatory safeguards to ensure that humanitarian actors are protected from prosecution. The Meijers Committee holds that such safeguards shall be included directly in the text of the Facilitation Directive, rather than relying solely on the recitals, as has been proposed by the European Commission so far.

As always we remain available for any comments or questions you may have.

Best regards,



Ashley Terlouw, Chairwoman of the Meijers Committee