

## **“Strengthening mutual trust in the European judicial area – a Green Paper on the application of EU criminal justice legislation in the field of detention”**

### **General introduction – ECBA**

The European Criminal Bar Association (ECBA) is an association of independent specialist defence lawyers. The association was founded in 1997 and has become the pre-eminent independent organisation of specialist defence practitioners in all Council of Europe countries. We represent over 35 different European countries including all EU Member States. The ECBA's aim is to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons, not only in theory, but also in the daily practice in criminal proceedings throughout Europe.

Through its conferences, website and newsletter the ECBA provides a suitable forum to access absolutely up-to-date information on legal developments. Through the work of its legal development sub-committee the Association actively seeks to shape future legislation with a view to ensuring that the rights of European citizens in criminal proceedings are enhanced in practise. Through the networking opportunities available with membership, members establish one to one contact with other practitioners in other member states both with a view to the exchange of information and to practical cooperation in specific cases. This experience from comparative jurisdictions shapes and informs the submissions which are made by the Association to the law makers, and ensures that those submissions are given due weight.

We are member of the Justice Forum and we participate(d) in several EU-projects (e.g. training events for defence lawyers jointly with ERA, networking/legal aid; letter of rights; pre-trial emergency defence; European Arrest Warrant) and we are regularly invited to many EU experts' meetings concerning criminal law issues.

Further information on the ECBA can be found at our website: [www.ecba.org](http://www.ecba.org).

### **Executive Summary on the Green Paper on detention**

- There have already been a number of EU wide research projects which highlight key problems in detention throughout the EU, including the excessive use of pre-trial detention, overcrowding in prisons, substandard detention conditions and disparity in rules on the detention of juveniles.
- There is very disparate use of alternatives to detention, either pre or post-trial – frequently it appears that although such measures are available, they are rarely considered in some Member States.
- The ECBA recommends that the EU takes urgent action in this area to include
  - legislation to set minimum standards for the use and review of pre-trial detention in the EU;
  - more effective information gathering to monitor how pre-trial detention is used throughout the EU, to include the immediate addition of questions in this area to the annual review of EAW cases;
  - work to be done on ensuring facilities are available to enable a suspect to defend themselves at trial, with the absence of such facilities to be a reason not to allow surrender under an EAW;
  - a presumption of release pending trial
  - a maximum period of pre-trial detention should be introduced
  - legal aid to be provided in the issuing and executing states to enable legal advisers to make submissions for alternatives to immediate surrender,

appropriate use of the European Supervision Order (ESO), alternatives to detention on conviction and transfer of prisoners between member states post conviction.

### **Questions on mutual recognition instruments**

#### **1. Pre-trial: What non-custodial alternatives to pre-trial detention are available? Do they work? Could alternatives to pre-trial detention be promoted at European Union level? If yes, how?**

Pre-trial detention interferes with the right to liberty and is contrary to the right to be presumed innocent until proven guilty. While pre-trial detention is an important means to ensure that justice is served, it should only be used as a last resort when all other alternatives have been considered and deemed inappropriate. Pre-trial detention must therefore be seen as a measure of last resort and there should be a presumption for release pending trial. The European Convention on Human Rights (ECHR) states that prolonged pre-trial detention must be regularly reviewed and will only be justifiable in exceptional circumstances (Article 5). There should also be an effective means to challenge a decision of pre-trial detention.

Alternative measures might include for example house arrest – which may be monitored by electronic tagging or other means, the confiscation of the defendant's passport and other travel documents or mandatory assistance of probation services after the release. Generally, judges might be more willing to release suspects pending trial if there are effective mechanisms for monitoring such a conditional release and if a system is put in place where it is possible for the authorities to exercise some form of supervision or control over the suspect's behaviour. Some domestic systems therefore allow judges to release suspects under the condition that they have to live at a specific address (and inform the court about any changes in regards to their address), refrain from any contact with the victim of the suspected crime or any witnesses thereto, refrain from consuming any drugs or alcohol or even undergo drug treatment or psychotherapy. Similarly, release can be made subject to the payment of a bail or be "secured" by way of ordering a suspect to report to the authorities regularly.

Most domestic justice systems do provide for these (or similar) alternatives but many judges are reluctant to make use of them. In practice pre-trial detention is not confined to exceptional cases (where no alternative measures can be deemed sufficient) but is often more or less automatic without providing adequate justification beyond standard expressions or the mere repetition of the wording of the law.

A change of emphasis is needed to encourage alternatives to pre-trial detention to be applied appropriately by judges across the European Union. Training and awareness raising is needed in order to ensure that pre-trial detention practice makes proper use of existing alternatives and thereby follows the jurisprudence of the European Court of Human Rights. In addition, the regular review of continued detention – which practically all domestic systems require – should not be a simple formality but an effective safeguard against excessive, discriminatory or otherwise unjustified pre-trial detention.

On the European level the availability of the European Arrest Warrant (EAW) and the proposed European Supervision Order (ESO) must lead to a situation in which defendants are not "automatically" deemed a flight risk (and thus be subject to pre-trial detention) purely because they are non-nationals. Instead of assessing only if a suspect has concrete ties to the State where the trial is to take place, courts should look into whether the person has concrete ties within the European Union generally. The ESO could help to address the concerns in so far as conditions attached to provisional release can be effectively supervised in the home State. Obviously, training and information on these new instruments need to be

provided for judges, prosecutors, defence lawyers and any practitioners involved in transnational cases.

The Commission presents an annual report on the EAW, but there are several key pieces of information that are not currently collected which would give a much better understanding of whether the EAW is being used effectively and appropriately, for example:

- Was the suspect legally represented and advised about the EAW? Was this advice received in the issuing and/or executing state? Was legal aid available for the advice?
- Was the suspect allowed to contact his Embassy and/or Consular Officer, and was a visit provided?
- Was the suspect remanded in pre-trial detention or released on arrival at the issuing state? Were alternatives to pre-trial detention considered and, if so, what measures or conditions were made? Was an ESO considered? How long was the suspect detained in pre-trial custody?
- Was there a trial or alternative disposal of the matter? If a trial, was the suspect convicted or acquitted? If convicted, what was the sentence?

**2. Post Trial: What are the most important alternative measures to custody (such as community service or probation) in your legal system? Do they work? Could probation and other alternative measures to detention be promoted at European Union level? If yes, how?**

Alternative measures to custody might range from all kinds of restorative justice approaches (community service, alternative measures involving compensation for/settlement with victims etc) to monetary fines, house arrest, “electronic tagging”, suspended sentences, release on parole and other measures depending on the domestic system involved. Again, as is the case with alternatives to pre-trial detention, these measures can include additional elements that allow the authorities to exercise some form of supervision or control over the suspect’s behaviour by making alternative measures dependent upon conditions such as abstinence from alcohol or narcotics, participation in rehabilitative courses (e.g. therapy, treatment for anger issues etc.), cooperation with the probation services or periods where there are restrictions on liberty such as curfews, reporting obligations etc.

Generally, these alternative measures are to be welcomed as they provide the important opportunity to respond to criminal behaviour in a way that does not put the primary focus on punishment or general deterrence but rather on other (sentencing) objectives as recompense for victims and rehabilitation and reduction of re-offending.

While it is recognised that the most serious cases require custodial sentences for the protection of the public, it has to be noted that in cases of less serious crime, mandatory prison sentences – as the most coercive and punitive sanction that the European states impose – can be negative for the needs of both the individual and society.

The influence of the European Union in promoting alternative measures may be limited due to the fact that sentencing is generally very heavily based on the immediate impression a defendant gives in front of the sentencing judge and the subsequent assessment and evaluation of sentencing needs by the respective judge. However, EU wide monitoring of the use of alternatives to custody and the effectiveness of these measures on re-offending and rehabilitation provide an important backdrop to the type of sentencing that may be available. Judges need to have training in these alternative measures. In addition, with limited prison facilities, there should be monitoring and sharing of information on the costs of such measures compared to detention. An area where the European Union could play an important role in promoting alternative measures is the advancement of “electronic tagging”

and respective monitoring for EU citizens in member states other than the one where they were sentenced, in order to ensure that sentencing practices do not discriminate between nationals and non-nationals.

**3. How do you think that detention conditions may have an effect on the proper operation of the EAW? And what about the operation of the transfer of prisoners framework decision?**

A member state has to refuse to surrender a person to another member state if the prevailing conditions of detention in the state that issued the arrest warrant amount to inhuman and degrading treatment. Therefore, as long as detention standards in some European countries continue to be of concern in the light of the obligations under Article 3 of the ECHR and Article 4 of the Charter of European Union (and moreover vary greatly across Europe), it is obvious that extradition and the transfer of prisoners is and will be challenged on the basis that prison conditions in the country which issued the arrest warrant are not in compliance with human rights standards.

This obviously has a detrimental effect on the principle of mutual recognition and the “proper operation of the EAW” (as it is called in this paper) but it must be emphasised that this proper operation of the EAW – as desirable as it might seem – must not come at the expense of basic rights and freedoms. If serious concerns exist in regards to detention conditions in the issuing state, member states should be made aware of these and encouraged to decline to execute a warrant, regardless of its effect on the proper operation of the EAW, if no sufficient assurance for treatment in accordance with the standards guaranteed by Articles 3 ECHR and 4 of the European Charter are provided. The EU should also continue to advocate for the improvement of prison conditions across Europe and support independent institutions that monitor places of detention.

The arguments are the same for the operation of the transfer of prisoner’s framework decision. The ECBA have already commented on this framework decision but are of the view that an individual should consent before they can be transferred to a different jurisdiction.

In addition, the ECBA are strongly of the view that adequate and humane conditions of detention must also include providing facilities which enable a suspect to defend themselves in a trial, for example the ability to communicate with their lawyer confidentially either in person, writing or on the telephone, to have access to their lawyer and others relevant to their defence (eg. experts etc.) as frequently as reasonably necessary to conduct their defence, the provision of interpreter and translation facilities for prison visits, the provision of meeting rooms to enable confidential meetings with lawyers and other experts, the ability for the suspect to store and view the evidence in their case, including secure storage of papers and access to laptops to view material served electronically etc.

**Questions on pre-trial detention**

**4. There is an obligation to release an accused person unless there are overriding reasons for keeping them in custody. How is this principle applied in your legal system?**

The ECBA attended and contributed to the meetings organised by the EU Commission on the topic of minimum standards in pre-trial detention procedures on 9 June 2006 and 9 February 2009. At the meeting in 2009, the Research Group of the University of Tilburg presented their draft report which had been commissioned by the EU to assist in the debate: "An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU" (JLS/D3/2007/01)

Key points presented at the meeting included:

- Nearly a quarter of the prison population in the EU in 2006 were in pre-trial custody (139,883 out of 607,725). There was considerable variation between countries, with the Czech Republic at around 12% and Italy at around 57%<sup>1</sup>.
- Pre-trial detention prisoner rate per 100,000 people of population varied considerably too – from 8.8 in Finland to 78 in Estonia, with 31.6 as the EU average.
- There is prison overcrowding in 15 Member States.
- There are significant differences between the Member States as regards the definition of pre-trial detention, the average length of detention, the legal rules governing detention, e.g. maximum time limits for pre-trial detention, periodic review of detention or all these elements in combination.
- The deduction of pre-trial custody in any final sentence was erratically observed and used in the various member states.

The main observations from the study were:

- There is little evidence that pre-trial detention is really seen as a last resort.
- There is little evidence that introducing alternatives has resulted in a reduction in pre-trial detention.
- Courts have little time and information to consider alternatives as they are overloaded.
- Conditions for providing financial surety or security are not popular in continental countries because it is perceived as being a violation of the principle of equality.
- There are big differences in the age of criminal responsibility between Member States (from 8 to 16 years old) and there is little information available on the numbers of juveniles in pre-trial detention.
- In only half the countries is pre-trial detention for juveniles regulated by specific acts.
- Detention conditions for juveniles are often worse than adults in many countries.
- Juveniles are not always separated from adults.

In our view the lack of minimum standards of pre-trial detention in criminal proceedings is already a bar to mutual trust. In fact, we believe if there was a better understanding of the stark disparities and sometimes appalling conditions that adult and juvenile prisoners are held in European Member States before they have been found guilty of a criminal offence, there would be widespread concern amongst the relevant authorities who make decisions on mutual recognition instruments such as the EAW and the transfer of prisoners.

The main reasons for not allowing pre-trial detention are the risk of the suspect interfering with an investigation or the risk of flight. In many cases, the alleged risk of interfering with an investigation does not constitute a legitimate reason to impose pre-trial detention, as it is not easily acceptable that the function of the investigation and judicial mechanism relies on one person alone (the defendant). In any event, there are more lenient and effective measures or conditions that can be imposed in order to ensure that there is little risk of such interference, such as restrictions of travelling in certain areas, being forbidden to come into contact with specific persons etc. Further, interference with an investigation may be a legitimate reason at the very early stages of an investigation, but it becomes less relevant over time as evidence is gathered (including witness statements, forensics etc) and therefore the risk of interference diminishes. Therefore, if it is agreed that there is a real risk of interference at the outset, effective and regular reviews of the decision should be conducted to ensure that the

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<sup>1</sup> *Thomas Hammarberg*, Council of Europe Commissioner for Human Rights in his latest [Human Rights Comment](#) published on 18/08/2011 presented slightly altered figures from 11 per cent in the Czech Republic to 42 per cent in Italy.

investigation is expedited and a person is detained only for the minimum amount of time necessary to gather the crucial evidence.

The perceived risk of flight is a common ground for detaining individual's pre-trial. Measures or conditions can be introduced to ameliorate the risk, including surrender of passports and travel documents, reporting to the police on a regular basis, financial surety or security being provided and forfeited if the suspect does not attend court. Further, in many jurisdictions the defendant can be represented in the Court by a lawyer and his/her personal presence is not required for the trial to continue.

The reduction of pre-trial detention should be a priority: pre-trial detention is expensive, both for the Member state and for the individuals (whose lives can often be destroyed even following a short period in detention), and the prison system is overburdened in many European countries. The use of alternative measures in the appropriate cases is logical and a responsible way of using limited resources. Urgent action needs to be taken at an EU level to ensure that it does not legitimise the misuse of pre-trial detention powers and thereby the abuse of EU citizens.

**5. Different practices between Member States in relation to rules on (a) statutory maximum length of pre-trial detention and (b) regularity of review of pre-trial detention may constitute an obstacle to mutual confidence. What is your view? What is the best way to reduce pre-trial detention?**

**7. Would there be merit in having European Union minimum rules for maximum pre-trial detention periods and the regular review of such detention in order to strengthen mutual trust? If so, how could this be better achieved? What other measures would reduce pre-trial detention?**

The duration of pre-trial detention is of critical importance. Some member states have not established a legal maximum length of pre-trial detention. Others allow such detention for excessive periods, such as up to four years (e.g. Spain). As a result, a person can spend years in prison without being tried: examples of cases brought to the Strasbourg Court where pre-trial detention has lasted between four and six years are not uncommon.

There are harsh consequences for the individuals concerned. A recent study<sup>2</sup> underlined the socio-economic impact of pre-trial detention: pre-trial detainees may lose their jobs, be forced to sell their possessions, lose contact with family and friends and be evicted from their homes. Even if the detainee is, in the end, acquitted, the mere fact that he or she has been in prison tends to be stigmatising.

There needs to be a robust system of custody time limits for pre-trial detention and reviews of such detention. Reviews must be made by an independent judge and can be appealed to a higher court. There must be a presumption against pre-trial detention unless there are good and valid reasons for a suspect to be detained. The validity of those reasons may change over time and therefore reviews must be thorough and revisit the decisions made before. Alternative measures or conditions that can be imposed must be available and their use should be encouraged. Legal aid should be available to ensure that the suspect is properly represented and the use of alternative measures can be properly explored. If the matter is a cross border case, for example an EAW or ESO case, there should be legal aid available in both states.

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<sup>2</sup> The Socioeconomic Impact of Pretrial Detention, A Global Campaign for Pretrial Justice Report, February 2011, Open Society Foundations & United Nations Development Program

European Union minimum rules are required for maximum pre-trial detention and for the regular review of such detention in order to strengthen mutual trust. The ultimate goal is the creation of a common framework of rules to ensure compliance with fundamental rights and freedoms as encapsulated in the ECHR, the decisions of the European Court of Human Rights and most particularly ensuring the right to a fair trial and the presumption of innocence.

**6. Courts can issue a EAW to ensure the return of someone wanted for trial who has been released and allowed to return to his home State instead of placing him in pre-trial detention. Is this possibility already used by judges, and if so, how?**

Research needs to be conducted by the EU to confirm if the EAW is being used for this purpose. This should be one of the questions in the annual review of the functioning of the EAW.

In our experience, in practice it is only those who are able to pay for lawyers in both the issuing and executing member states who are generally able to persuade the courts that they should be allowed to return to their country of residence rather than being placed in pre-trial detention. Many of these arrangements are innovative and are conducted outside of the EAW procedures.

**Questions on Children**

**In relation to the text in the GP on children we note the following:**

It is of paramount importance for the sake of a harmonious due process as well as to avoid uncertainty in the application of criminal law to children within the EU countries, that there is an agreed minimum age for criminal responsibility, possibly to be set at the age of 13 years old, which is a medium term between the present extremes of 8 years in Scotland and 16 years in Portugal. This, of course, is regardless of the special regulations provided in each EC country for the adequate rehabilitation treatment applied to juveniles which have breached criminal law.

We consider that the words “arrest” or “detention” should not be used in the case of proceedings against minor children. Instead the appropriate words to be used in the legal text should be “holding” and/or “retention”, which have a lesser negative criminal implication.

Furthermore, it should be clarified, that the children shall be kept under urgent and adequate proceedings from the moment of retention and “*prompt*” access should be changed to “*immediate*” access to legal and other appropriate assistance. In addition, the Court in charge of the case should be a specific juvenile Court and not an ordinary criminal Court.

**8. Are there any specific alternative measures to detention that could be developed in respect of children?**

Minor children up to the age of 13 should be exempt from criminal procedures. Juveniles above the age of 13 years old should only be subject to “retention” (not arrest or detention), should be kept completely apart from adults, be provided with immediate communication and access to their legal adviser, be provided with immediate communication and access to their immediate family (where appropriate), and their conduct be judged by a specific Juvenile Court and not by an ordinary criminal Court.

### **Question on Monitoring of detention conditions**

#### **9. How could monitoring of detention conditions by the Member States be better promoted? How could the EU encourage prison administrations to network and establish best practice?**

The monitoring of detention conditions is linked to budgetary conditions prevailing in each Member State, and assigned to prison administrations. The allocation of adequate resources to existing monitoring bodies should be ensured by Member States. Proper monitoring of detention conditions and networking and sharing of best practice amongst prison administrations, can lead to more effective use of resources, including understanding of the best methods to ensure the security of the prison and prisoners whilst enabling them to defend themselves in the trial process and embark on rehabilitation and productive activities whilst in detention (either pre-trial or post conviction). Recommendations from national monitoring bodies should systematically be disseminated to member states and there should be coordination amongst the various monitoring bodies active in this field to ensure consistency and methodological coherence and avoid duplication. The particular needs of vulnerable groups, including non-nationals, women and children, and ethnic or religious minorities, must be part of the areas reviewed by monitoring bodies.

Co-ordination between judges and prosecutors who decide the application of an alternative measure and the institutions and professionals charged with applying it should be encouraged. When taking the decision to use appropriate alternative measures to prison, the judge and prosecutor should take into account personal factors, including psychological, health, socio-family and socio-labour. The judiciary, prosecutors and other public institutions legally entitled to visit places of detention should be actively encouraged to fulfill their obligations to monitor places of detention.

### **Question on Detention Standards**

#### **10. How could the work of the Council of Europe and that of Member States be better promoted as they endeavour to put good detention standards into practice?**

Any review of good detention standards must include the provision of facilities to enable a suspect to prepare for his defence of the trial (see above).

There needs to be a co-ordinated approach to the work of the Council of Europe and Member States, in conjunction with NGOs with different experiences of the criminal justice system to enable a holistic view of conditions from different perspectives, for example in-mates, families of those detained, legal advisers, medical professionals, religious figures, prison officers, local community etc.