European Network of Councils for the Judiciary (ENCJ)

Réseau européen des Conseils de la Justice (RECJ)

Response of the ENCJ to the European Commission's Green Paper on

on the

application of EU criminal justice legislation in the field of detention

The ENCJ is an organisation entirely constituted of national institutions of Member States of the EU which are independent of the executive and legislature, or which are autonomous, and which are responsible for the support of the Judiciary in the independent delivery of justice. The Ministry of Justice of Member States where such institutions do not exist may be granted observer status. The ENCJ's aim is to promote mutual understanding and trust between judges and judiciaries across Europe.

ENCJ submitted the questionnaire to its members and received replies from the following: the Supreme Judicial Council of Bulgaria (the Prosecutor's Office of the Republic of Bulgaria), the Danish Court Administration, the Judges' Council of England and Wales, the Courts Service of Ireland, the Council of Justice of Republic of Latvia, the Judicial Council of Lithuania, the Netherlands Council for the Judiciary, the Superior Council of Magistracy of Portugal, the General Council for the Judiciary of Spain and the Superior Council of Magistracy of Romania. We further attach to this response our member's answers[1].

Some parts of the Detention Green Paper deal with operational issues that do not engage our member's competences and, subsequently, our expertise.

The ENCJ shares the Commission's view on the fact that "detention issues come within the purview of the European Union as […] they are a relevant aspect of the rights that must be safeguarded in order to promote mutual trust and ensure the smooth functioning of mutual recognition instruments"[2]. The EU's Roadmap for strengthening procedural rights set out essential safeguards which will ensure fundamental rights.

ENCJ supports the Green Paper's proposals to conduct the pre-trial procedure in a speedy manner and in a way that safeguards equality of arms. We also share the opinion that the citizenship or residence in another member state cannot justify a difference of treatment about an eventual pre-trial detention or, instead, an alternative measure.

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[1] The response from the Portuguese Conselho Superior da Magistratura is written in Portuguese as received.

[2] Strengthening mutual trust in the European judicial area- A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327 final, 14.6.2011, p.3.

Answers to the specific questions:

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?

In general, any restriction of the freedom of movements of a person presumed innocent, as not yet convinced, must be considered exceptional and only applicable, with different intensity, if strictly necessary when there is some relevant risk in the delay, being this risk fugue, pollution or occultation of evidences, or, in limited and justified cases, commission of new offences or in protection of the victim.

The first alternative is therefore the simple obligation of fixing an address attending the convocations of the court when produced.

From this minimum measure, a wide range of restrictions are available in all the Member States.

Due to the different legal systems between EU Member States, it's up to national authorities to decide how they can -- and whether or not they want to -- implement alternatives into their national legislation. In all cases, alternatives to pre-trial detention suppose a legislative framework and mechanisms in place to assure compliance with the conditions set.

Frequently, alternatives to remanding defendants in custody demand the existence of measures imposing financial guarantees, restrictions on movement and monitoring requirements. Those alternative measures may be applied independently or in combination with other supervision measures.

Some examples include: the remand on bail, bail on a home address, signed promise for appearance; the prohibition imposed to the accused party from directly approaching the victim, house arrest, the obligation not to leave the locality/country, temporary release under judicial control. Those alternatives are applied into practice and work with entire normality.

In our view, consideration should be given to proportionality in relation to the **infrastructure** that makes possible to implement suitable alternatives to pre-trial detention.

The question about the suitability of the promotion of alternatives at European Union level must be answered taking into consideration the extraterritorial effect of

measures taken in other MS. Accordingly, beside EU common alternatives, the first need is to promote the mutual recognition of the alternative measures and its enforcement in another MS, by promoting the effectiveness of the Council Framenwork Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

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?

Member States put in place different alternatives to custody, as are the following:

1. Community services orders;
2. Conditional discharge (conditions may include: unpaid work, drugs rehabilitation requirements, treatment for a mental disorder, prohibited activity, etc.);
3. Financial penalties;
4. Suspended sentences on condition set by the court;
5. Probation measures (also probation surveillance in the probation period).

Those alternatives are applied into practice.

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?

ENCJ agrees with the conclusion, contained in the Green Paper that the achieving of compatible conditions for execution of the imprisonment in the EU Member States is of crucial importance for improving the mutual trust

Detention conditions in the issuing state may play a role in the assessment of whether the surrender would constitute a breach of a person's fundamental rights arising from unacceptable detention conditions. The ECHR established that, even though it is at first a responsibility of the issuing state to guarantee that it lives up to its obligations under the ECHR, a person should not be surrendered if there are *substantial grounds* to believe that there would be a *real risk* for the surrendered person to be subjected to a treatment contrary to Article 3 ECHR (or Article 4 of the EU Charter).[3]

To substantiate their claim requested persons may provide the court with different types of information, such as general information about the situation in the issuing Member State. However, a mere possibility of improper treatment is not

[3] Criteria derived from the jurisprudence of the ECtHR, e.g. *Saadi v. Italy* (28 February 2008, Application No. 37201/06. Rechtbank Amsterdam, 22 October 2010, 13/706685-10, http://www.rechtspraak.nl/ljn.asp?ljn= BO1448.

enough. Therefore, the information should substantiate that the *individual* concerned is running a *real risk* to be treated in a way contrary to Article 3 ECHR. A sufficiently substantiated claim should lead to further investigation by the court.

So far, there has not been an individual case in which the court accepted that the execution of the EAW would constitute a breach of Article 3 ECHR (or Article 4 Charter). It concluded either that the alleged treatment was not severe enough to fall under the protection of these provisions or that the information was not specific enough to substantiate a real risk for the individual concerned.

ENCJ believe that additional guarantees regarding detention conditions may diminish the number of complaints. This would enhance the smooth and rapid functioning of the EAW procedure.

Furthermore, minimum standards on detention conditions and a mechanism to supervise their implementation would most likely strengthen the *factual* mutual trust of judges in the legal system of other Member States.

Similar considerations could be sustained regarding the transfer of persons convinced under the provisions of the framework decision of transfer or prisoners.

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?

This obligation varies from a Member State to another. The principle's application in practice reveals:

1. Release on bail. Bail can only be refused by the court in certain set out exceptions such as a substantial grounds for the court to believe that the accused would fail to surrender to custody (at a subsequent hearing), commit a further offence or interfere with witnesses or obstruct the course of justice or for his own protection or he is already in custody in respect of another matter.
2. Release in the pre-trial proceedings **(**when the danger that the accused would hide themselves or commit another crime drops off) by prosecutor's order;
3. Release in exercising the *ex officio* control on the detention in the pre-trial phase of the proceedings;
4. Release and replacement or dismissal of the measure, if the grounds which motivated the measure changed or ceased.

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?

We agree that different practices on pre-trial detention jeopardise the good faith that exists between EU Member States.

The ENCJ supports the aspiration set out in the Green Paper that it is important to set minimum standards for the use of pre-trial detention and end excessively long pre-trial detention.

Also, the ENCJ strongly believes that EU minimum rules on regular review of the grounds for detention and time limits would help to reduce its use and promote alternatives.

In our view, minimum procedural safeguards are necessary and would help mutual recognition.

6. Courts can issue an 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?

Yes, it is already used. It happens when courts may fear that the accused person will not return voluntarily for trial and/or sentence.

Meanwhile, it is also observed that wanted persons contesting an incoming EAW before the court, sometimes state that the EAW is only issued to assure their attendance at the trial. Often persons add that they would have voluntarily appeared at trial if they were requested to do so.

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?

Yes, we think that EU minimum rules for maximum pre-trial detention periods and regular review of such detention would be beneficial to strengthen mutual trust, but only if the maximum period would not be extensive.

Some of measures that might reduce pre-trial detention are: imposed conditions in the granting of bail, such as the surrender of a passport, requiring an individual to "sign on" daily in their local police station, enrolment in addiction treatment programmes pending trial, curfews and surveillance orders might avoid the necessity to keep foreign nationals in custody pending trial or surrender, reducing their periods of incarceration. Such measures could be adopted in other jurisdictions or in a common European Framework.

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

The detention of minors should only ever be used as a last resort, when all other alternatives have been considered and deemed inappropriate.

Member States put in place different alternatives to custody, among others the following: supervision by the parents or the guardian, supervision by the administration of the educational establishment where the underage person has been placed, supervision by the inspector at the child pedagogical facility; or by a member of the local commissions, reprimand, supervised freedom, hospitalization in a rehabilitation center, hospitalization in a medical-educational center.

Those alternative measures are largely applied in practice.

Taking account of the special features of the juvenile delinquency and the closer relation with the State of citizenship and residence of the offender, we consider that there are no problems with the use of the instruments of mutual recognition of the acts.

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?

A potential suggestion is to promote and develop a full network of national detention monitoring bodies as well as prison governors. A network of directors of prison administrations has been also suggested.

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?

Future EU action in this field could play a part in promoting comparable prison standards and comparable pre trial detention periods. It must be recognised that this is a difficult and sensitive area but it is noted that it is a highly legitimate aim of all concerned in this field that all EU citizens of whatever gender, age or vulnerability when accused of a crime should be tried in a timely and proper manner and should only be in custody awaiting such court processes when it is essential for that citizen to be so detained.

Financial supports may be needed to assist states who wish to conform to the standards set by the Council of Europe in relation to prison conditions and detention. The improvements required in some jurisdictions in order to ensure adequate prison conditions would require large-scale capital investment which might not always be possible, particularly in the current economic climate. Therefore, it is suggested that any measures taken to ensure mutual trust in the field of detention are reinforced with monetary supports to ensure the necessary investment to maintain and improve prison conditions across EU member states.

In terms of practical measures, additional translators should be provided to individuals who are subject to detention in a country where they might not speak the language, foreign nationals should be entitled to free legal aid across the European Union in order to ensure that they are afforded the benefits of the presumption of innocence while in custody and provision should be made for emergency accommodation for individuals remanded on bail in a foreign country pending trial, in particular, where have no fixed address in the jurisdiction.