
Report on the experts meeting on pre-trial detention

9 February 2009

On 9 February 2009, Dr Holger Matt (Chair of the ECBA) and Louise Hodges (Vice-Chair of the ECBA) were invited to attend an **experts' meeting on pre-trial detention procedures** hosted by the European Commission. In preparation for the meeting, the delegates were provided with an empirical study on pre-trial detention throughout the European Union produced by Tilburg University. A copy of the report is available on the [ECBA website](#). Prior to the meeting, a number of members had provided the ECBA committee with comments and observations about pre-trial detention in their various jurisdictions which allowed us to have an excellent insight into the issues that impact on defendants and defence practitioners throughout Europe. These comments have been compiled into a report and in addition to this report, the official minutes of the meeting are also available on website mentioned above.

Introduction/Background

Peter Csonka (European Commission) welcomed participants and explained that this was the second meeting on pre-trial detention (details of the previous meeting held on 9 June 2006 are available on the [ECBA website](#)). There is a mandate under the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (2005) to discuss minimum standards in pre-trial detention procedures and the routines for regular review of the grounds for detention. Mr Csonka drew attention to two underlying aims of the meeting – to come up with ways to reduce prison overcrowding and to increase mutual trust between EU Member States.

The main themes of the meeting were:

- **Grounds for review of pre-trial detention;**
- **Length of pre-trial detention;**
- **Deduction of "foreign" pre-trial detention;**
- **Compensation for unlawful pre-trial detention;**
- **Juvenile suspects;**
- **Detention conditions.**

A key area for discussion was whether there are grounds for the EU to act to introduce minimum standards regarding the length, definition and regular review of pre-trial detention. In particular it was noted that the European Arrest Warrant (EAW) makes provision for time spent in pre-trial detention being deducted from the final sentence but this is not always applied properly and consistently throughout the EU.

Presentation of the study

Various members of the team from Tilburg University provided an overview of the draft study. Difficulties in providing an accurate comparison arose as different countries define pre-trial detention in different ways, with some defining it as from arrest until the trial starts (narrow) and some defining it as from arrest until the final sentence (broad). There were also difficulties encountered related by different terminology which may refer to different or overlapping types of detention (pre-trial detention, preliminary detention, detention on remand), and accessibility or availability of legal sources or information.

Key summary points:

- 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%.
- In 17 out of the 27 EU Member States, the trend for pre-trial detention prison population is upwards while in ten countries it is downwards.
- There is prison overcrowding in 15 Member States.

There was a discussion about the figures in the report and trends in various member states since 2006.

The deduction of pre-trial custody in any final sentence was erratically observed and used in the various member states. Sometimes it included any period of time when movement was restricted during the pre-trial phase, for example if an individual is under house arrest or is subject to electronic monitoring. Similarly the rules on compensation were very different between member states, most notably, in some states it is automatic whereas in others it is only available where the pre-trial detention is determined to be illegal.

Alternatives to pre-trial detention include bail (not only financial security but can be a promise to do certain things), conditions, controlled freedom/judicial supervision and conditional suspension of pre-trial detention/conditional release. Electronic monitoring and house arrest are rare.

The main observations from the study were:

- Little evidence that pre-trial detention is really seen as a last resort
- 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
- Bail is not very 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 MS (from seven to 18 years old for example) and there is little information available on numbers of juveniles in pre-trial detention (and it is not known how many in non-prison institutions). Key points are:

- In only half the countries is pre-trial detention for juveniles regulated by specific acts
- Pre-trial detention for juveniles considered as a last resort – alternatives often developed for juveniles
- Conditions for juveniles are often worse than adults in many countries
- Juveniles not always separated from adults

Intervention at an EU Level

Peter Csonka queried whether, with nearly a quarter of the prison population being pre-trial detainees, this is an area where the EU should intervene? It was interesting to note that the majority of the representatives from the Ministries of Justice (MOJs) did not see this as an area where the EU should intervene or, in any event, that this should not be a priority. Many stated that more pressing and important at this stage is minimum standards of procedural

safeguards. We will monitor with interest the support these Ministries give to the new European Commission initiative on procedural safeguards in criminal proceedings throughout the EU, which is due to be a priority during the Swedish Presidency.

It was also noted that there are Council of Europe rules on pre-trial detention and time should be given to see if these are applied. In addition, the MOJs generally agreed that there was no indication that pre-trial detention is regarded as an obstacle to the use of the EAW and mutual recognition in general. A counter argument was that it was important that member states should strive to limit the time a person is detained before a judgment is given. Long periods of detention can cause suffering to the individual, can lead to bilateral problems, contribute to problems of overcrowding and can undermine confidence between countries. There should be EU level intervention to compliment the work already being conducted by the Commission to protect the rights of people as EU citizens in particular on probation and on European Supervision Order.

Dr Holger Matt (European Criminal Bar Association) commented that the study is very useful as it shows where there is a need for work at an EU level in this area. There is a need for common definitions so that statistics can be read and compared correctly. Issues of prison overcrowding may be assisted by action at an EU level. An earlier study indicated that the assistance of a lawyer early in the process can reduce the time and individual spends in pre-trial detention. There could be added value at the EU level if there could be binding standards relating to pre-trial detention, such as: minimum standards and procedural safeguards; the right to representation of a lawyer to protect against legal infringements; the right to appeal to a judge; alternatives to pre-trial detention available on an EU-wide basis (for example a supervision order); and legal aid available during pre-trial detention. In relation to compensation, he noted that in Germany if the pre-trial detention is illegal then is it not self-evident that compensation has to be paid. As it is a civil complaint, he would give it to a civil lawyer as the state protects itself fiercely from having to pay any form of compensation. This could be an area where the lack of discipline in MS can be reduced and where uniform standards would be very helpful.

Jago Russel (Fair Trials International, UK) noted that there were a disproportionately high number of foreign detainees in pre-trial detention compared with total prison population. Individuals can be in pre-trial detention for months or years without a trial, no access to interpretation (and therefore they do not have a clear understanding of the charges against them) and little access to a decent lawyer. The EAW means that suspects can be surrendered even if there is concern of there having a long pre-trial detention without access to a lawyer. There is a risk of a backlash against the EAW if there is no confidence in the treatment of people in the countries that they are surrendered to. Regular judicial reviews of the need for pre-trial detention are important and should be conducted by an independent judge, ideally in public, with translation and interpretation available.

Fernando Piernavieja Niembro (Criminal Law and Human Rights Committee, ES) stressed the importance of the principle of the presumption of innocence in this issue. Pre-trial detention is sometimes used to break prisoner's will. Minimum procedural guarantees should be a minimum starting point.

Conclusion

The participants agreed that it would be a good idea to let the Commission explore these issues further via a Green Paper later this year. The Commission sees it as part of the procedural rights package. It is hoped that this topic will be discussed during the Swedish presidency of the EU.