EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE, FREEDOM AND SECURITY

Directorate D : Internal security and criminal justice
Unit D3 : Criminal justice

DISCUSSION PAPER

MEETING OF EXPERTS

on minimum standards in pre-trial detention procedures – Action plan implementing the Hague Programme

Brussels – Friday 9 June 2006

The aim of this discussion paper is to set out the purpose of the meeting of experts and to stimulate debate on the subject of minimum standards in pre-trial detention procedures.

The first part of the paper explains the background to the Commission's work in this area. The second part sets out four general discussion themes which are accompanied by a number of more specific questions. It is envisaged that discussion will take place *during* the meeting however, should you wish to contribute in writing (either before or after the meeting) we would be pleased to receive your views. We would also be interested in knowing whether there are existing studies available in the areas covered in chapter 2 (themes for discussion – below). Written contributions may be sent by e-mail to Thomas.Ljungquist@ec.europa.eu or Sarah.Keenan@ec.europa.eu .

1. Background

1.1. Council and Commission Action Plan implementing the Hague Programme

As indicated in the invitations which were issued to participants last month, the Council and Commission Action Plan implementing the Hague Programme[1] provides that an "*analysis of minimum standards in pre-trial detention procedures and the routines for regular review of the grounds for detention*" should be undertaken before the end of 2007.[2]

The Commission has organised this meeting in order to contribute to the first part of that analysis, *i.e.* mainly to identify obstacles which either directly affect the smooth functioning of cooperation between EU Member States in the area of pre-trial detention or indirectly hinder mutual trust and confidence, which is the basis of mutual recognition in general.

The identification of possible obstacles will be of importance for the second part of the analysis, which is to initiate one or more studies devoted to such problems. The Commission is therefore planning to conclude one or more service contracts on the basis of a tendering procedure.

It should be underlined that, at this stage, no concrete action is envisaged. However, some words on the legal basis for possible action should be said.

[1] Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, OJ C 198, 12.8.2005, p. 1.
[2] P. 19 of the Action Plan, in chapter 4.2. Judicial cooperation in criminal matters, under the heading "approximation", lit. k).

1.2. Legal basis

The decisive question for a legal basis for taking action on minimum standards in pre trial procedures and the routines for regular review of the grounds for detention is whether the envisaged norms provide for "*ensuring compatibility in rules applicable in the Member States as may be necessary to improve [judicial cooperation in criminal matters]*", as Article 31(1) (c) of the EU-Treaty states. "*Ensuring compatibility*" can also be achieved by providing for some approximation of minimum standards in criminal matters so as to enhance mutual trust and confidence between Member States.

It should be added that this legal reasoning seems valid not only with regard to criminal law rules dealing with the situation before judgment (and thus covering the situation of pre-trial detainees) but also for the period following a judgement (covering the situation of prisoners). In particular procedural rules concerning the execution of a sentence and aiming at better reintegrating prisoners into society after release might help to prevent recidivism and thus contribute significantly to a main objective of the EU-Treaty, which is to prevent crime (Article 29). However, we will not be discussing the post-trial situation in this context.

As a consequence, rules aiming at establishing minimum standards concerning the (legal) treatment of pre-trial detainees (and convicted prisoners) can fulfil the criteria concerning competence of Title VI of the EU-Treaty.

1.3. The interest of the European Parliament for questions related to pre-trial detention

The European Parliament has for several years expressed a strong interest in issues related to pre-trial detention.

1.3.1. Resolutions on the situation concerning basic rights in the European Union

In its Resolutions on the situation concerning basic rights in the European Union, the European Parliament urged the Commission to take action regarding various issues in the area of pre-trial detention and alternatives to such detention.

In its Resolution for *2001*[3], the European Parliament called on Member States to step up their efforts in this area by restricting detention as far as possible and completely avoiding taking children into custody save in absolutely exceptional cases.[4] The European Parliament was of the opinion that serious violations of human rights in one Member State are not just the responsibility of that country but should also be the proper concern of the EU as a whole.[5] It called on the Council to adopt a framework decision on common standards for procedural law, for instance on rules covering pre-trial orders, so as to guarantee a common level of fundamental rights protection throughout the EU.[6]

In its Resolution for *2002*[7], the European Parliament noted that the situation of prisoners in the EU deteriorated in some Member States in 2002, mainly as a result of overcrowding in prisons.[8] The European Parliament considered it essential, especially as the EU prepared for enlargement, that the Member States, *i.a.* take far more determined measures with a view to allow prisoners to have access to a lawyer from the outset, ensuring at least minimum standards for the health and living conditions of prisoners and, in particular, *examine detention procedures in order to ensure*

[3] Adopted on 15 January 2003: P5_TA(2003)0012, rapporteur Joke Swiebel (A5-0451/2002).
[4] See paragraphs 29 and 31.
[5] See paragraph 32
[6] See paragraphs 143 and 144.
[7] Adopted on 4 September 2003: P5_TA(2003)0376, rapporteur Fodé Sylla (A5-0281/2003).
[8] See paragraph 19.

that human rights are not violated, that detention periods are not unnecessarily long and that grounds for detention are reviewed regularly.[9] The European Parliament once again, called on the Council to adopt a framework decision on common standards governing procedural law, for example on the *rules concerning pre-trial orders*, with a view to guaranteeing a uniform level of protection of fundamental rights throughout the EU.[10] Finally, the European Parliament underlined the importance of the right to have judgment given within a reasonable time.[11]

1.3.2. Reports and other documents

According to the Report by MEP Alima Boumedienne-Thiery on the situation as regards fundamental rights in the European Union for *2003*[12] "misconduct by the police and other law enforcement officials and abuses at police stations and prisons have been occurring for years in EU Member States". The report "calls on the EU Member States to enforce more effectively the safeguards for prisoners laid down in various international and European conventions and, where no independent body exists to monitor activities of the police and the running of prisons, to set one up, and urges the Member States to participate in the Council of Europe's 'police and human rights' programme".[13]

In his Report with a proposal for a European Parliament recommendation to the Council on the rights of prisoners in the European Union (2004), MEP Maurizio Turco concluded that the European Union must make progress towards the establishment of a genuine area of freedom, security and justice based on respect for every individual's fundamental rights.[14] The (revised[15]) proposal (MEP Marco Cappato and Giuseppe Di Lello Finuoli) "[r]ecommend[ed] to the Commission, the Council and the Member States that they urgently adopt a framework decision laying down minimum standards to safeguard the fundamental rights and freedoms of prisoners".

It can further be noted MEP António Costa in his Report with a proposal for a European Parliament recommendation to the Council on the quality of criminal justice and the harmonisation of criminal law in the Member States (2005[16]) mentions "minimum rights of prisoners in any Member State" as a priority and that an initiative should be considered at Union level. According to report "[t]he establishment of a genuine area of freedom, security and justice is founded on a judicial culture based on the diversity of legal systems, with high-quality standards, and presupposes the establishment of a common reference framework and the adoption of a mechanism for mutual evaluation. This is necessary in order to increase mutual trust and hence boost the application of the principle of mutual recognition".[17]

1.3.3. Recommendation on the rights of prisoners in the European Union

Based on, *i.a.*, the above-mentioned proposal concerning prisoners, the European Parliament, in 2004, adopted a Recommendation on the rights of prisoners in the European Union.[18] The recommendation encouraged the Council of Europe to revise its European Prison Rules, incorporating a higher degree of protection on the basis of the principles drawn up by the CPT

[9] See paragraph 20.
[10] See paragraph 142.
[11] See paragraphs 146 – 148.
[12] 22 March 2004, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0207/2004).
[13] See paragraph 15.
[14] See "3. Conclusions", 25 February 2004, report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0094/2004).
[15] Proposal for a recommendation to the Council by Marco Cappato and Giuseppe Di Lello Finuoli on behalf of the GUR/NGL Group on the rights of prisoners in the European Union (B5-0362/2003/rev.).
[16] 9.2.2005, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A6-0036/2005.
[17] Chapter 3, p. 18.
[18] European Parliament recommendation to the Council on the rights of prisoners in the European Union (2003/2188 (INI), OJ C 102 E, 28.4.2004, p. 154.

Committee and the European Court of Human Rights.[19] Moreover, it encouraged the drafting of a binding European Prison Charter covering all the Council of Europe's member States.[20] The Charter should contain detailed rules on, *i.a.*, the right to have access to a lawyer, the "separation of categories of detained persons: juveniles, persons on remand, convicted criminals" and special protection for juveniles.[21] However, "[s]hould the European Prison Charter not be completed in the near future, or should the outcome prove unsatisfactory, the European Union [should] draw up a Charter of the rights of persons deprived of their liberty which is binding on the Member States and which can be invoked before the Court of Justice".[22]

Based on the above-mentioned António Costa report, the European Parliament a Recommendation to the Council on the quality of criminal justice and the harmonisation of criminal law in the Member States (2005).[23] Among other things, it recommends the establishment of a comparative statistical database, and, with regard to procedural law, it underlines that "minimum rights of prisoners in any Member State" should have priority.

1.3.4. Conclusion

The above examples show that the European Parliament attaches a special importance to the question of minimum standards in pre-trial detention procedures and that it presses for some action to be taken at European Union level.

1.4. Council of Europe

1.4.1. Council for Penological Co-operation (PC-CP)

The Commission participates - as an observer - in the work of the Council for Penological Co-operation PC-CP) of the Council of Europe. Its main task was to update the so-called European Prison Rules, which was a Recommendation (R (87) 3) of the Committee of Ministers of the Council of Europe.

1.4.1.1. 2006 European Prison Rules

On 11 January 2006, the Committee of Ministers of the Council of Europe adopted the new version of the European Prison Rules (Rec (2006) 2). The new European Prison Rules – although not binding - are of a particular importance for the whole European continent. It should also be noted that all 46 member States of the Council of Europe could agree on this recommendation that now is applicable from the Pacific Ocean in the east to the Atlantic Ocean in the west.

According to established case-law of the European Court of Human Rights, unacceptable detention conditions may violate Article 3 ECHR ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment") even where the is no evidence of a positive intention of humiliating or debasing the detainee.

Basic principle 4 of the new European Prison Rules, clearly states that "[p]rison conditions that infringe prisoners' human rights are not justified by lack of resources".

1.4.1.2. European Prisons Charter

[19] 1.(a).
[20] 1.(b).
[21] 1.(c).
[22] 1.(d).
[23] (2005/2003(INI), OJ C 304 E, 1.12.2005, p. 109.

The PC-CP also deals with a proposal to draw up a **European Prison Charter**, which is intended to be a binding instrument covering different aspects of detention (pre-trial detainees and convicted prisoners). The work on the European Prison Charter stems from a recommendation, which was adopted by the Parliamentary Assembly of the Council of Europe in 2004 (Recommendation 1656 (2004) on the situation of European prisons and pre-trial detention centres, based on the Hunault report). The Steering Committee (CDPC) has discussed the draft texts, but has not yet taken any decision.

It is envisaged that the European Prison Charter will address a number of issues relating to prison conditions. Work on the Charter is still ongoing. For that reason, it is suggested that it would be premature to discuss prison detention conditions in the context of this meeting of experts and that it would be more appropriate, at this time, to focus on the discussion themes (outlined below).

1.4.2. Committee of experts on remand in custody etc

The Commission also participated as an observer in the Committee of Experts on Remand in Custody and its Implications for the Management of Penal Institutions (PC-DP Committee). The main task of this committee was to update Recommendation No. (80) 11 concerning custody pending trial. The PC-DP committee dealt with alternatives to pre-trial detention and different ways to improve the conditions of detention of remand prisoners, in particular, the material conditions of detention (separate from or together with convicted prisoners, single/multiple cells, sanitary facilities, libraries etc). The text has still to be approved by the Committee of Ministers.

1.4.3. CPT standards

In its publication "The CPT standards"[24], the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT Committee) of the Council of Europe underlined that prison overcrowding is often particularly acute in pre-trial detention establishments. In such circumstances, the CPT Committee has repeatedly noted that throwing increasing amounts of money at the prison estate does not offer a solution. Instead, current law and practice in relation to custody pending trial needed to be reviewed.[25] The problem was sufficiently serious as to call for cooperation at European level (2003).

1.5 Draft Framework Decision on the European supervision order

In order to combat discrimination, to extend the right to liberty and the presumption of innocence to the EU as a whole and to reduce prison over-crowding, the Commission will shortly present a proposal for a Council Framework Decision on the European supervision order and on mutual recognition of non-custodial pre-trial supervision measures.

The background to the proposal is as follows. According to both the ECHR and general principles of law, pre-trial detention should be regarded as an exceptional measure and the widest possible use should be made of non-custodial supervision measures. At present, however, EU citizens who are not residents in the territory of the Member State where they are suspected of having committed a criminal offence are often kept in pre-trial detention or subject to a long-term non-custodial supervision measure in a foreign environment. As a result, there is a clear risk of unequal treatment between non-resident and resident suspects which can also be seen as an obstacle to the free movement of persons in the Union. The right to liberty and the right to the presumption of innocence in the European Union, seen as a whole, may not be fully enforced as long as such unequal practices exist.

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[24] The CPT standards, "Substantive" sections of the CPT's General Reports, Council of Europe, CPT/Inf/E (2002) 1 – Rev. 2004 English.

[25] Paragraph 28, p. 24, of the (revised) CPT standards (2003 and 2004).

At present, non-custodial pre-trial supervision measures that exist in national law (e.g. reporting to the police) cannot be transposed or transferred across borders as States do not recognise foreign judicial decisions in these matters.

The main idea of this Proposal for a Council Framework Decision is to enable a judicial authority in the Member State where an offence was committed to transfer non-custodial pre-trial supervision measures to the Member State where the suspect normally has his residence. The proposal creates an obligation on the State of residence to recognise and execute the decision of the trial State. This would allow the suspect to be subject to a supervision measure in his normal environment until the trial takes place in the foreign Member State and ensure his appearance at the trial (if an *in absentia* judgment is not possible). The proposal provides for the possibility of the suspected person's return to the trial State by force in the event he does not do so voluntarily.

The proposal is based on the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters of November 2000 (measure 10) as well as the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (2005).

2. Themes for discussion

2.1. Grounds for review of detention

In accordance with Article 5(4) ECHR, everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. Even where the initial decision to detain a person was taken by a "court", the detained person is entitled to a review of the detention at reasonable intervals in circumstances where the basis for that detention may cease to exist.

Thus, where a person has been remanded in custody pending trial on the ground that e.g. he poses a flight risk, he is entitled to a review of his detention if issues arise which show that he no longer presents such a risk.

Questions:

2.1.1. To what extent is there divergence between Member States in terms of the rules which apply to review of pre-trial detention?

2.1.2. If differences exist, might they constitute an obstacle to mutual confidence between Member States, confidence that is required in an area of freedom, security and justice?

2.1.3. In a 'common' area of freedom, security and justice, would there be merit in having uniform rules in this area?

2.2. Length of pre-trial detention

Closely linked to the discussion on grounds for review of detention (above) is the issue of the length of pre-trial detention. It is clear that the length of pre-trial detention in Member States should not be viewed in isolation and should be considered in the context of the criminal procedural framework at national level; national rules on pre-trial detention and, in particular, review thereof obviously have an impact on the average length of time spent in pre-trial detention. The ECHR does not provide any specific maximum time limits for pre-trial detention, except that everyone is entitled to a fair and public hearing within a "reasonable time". The

European Court of Human Rights has continuously stated that the concept "reasonable time" cannot be translated into a fixed number of days, weeks, months or years, or into various periods depending on the gravity of the offence.

That being said, at national level, several jurisdictions have set maximum time limits for pre-trial detention (e.g. Austria, Greece and Scotland). The existence of such time limits might be said to act as both an impetus to the prosecution to proceed swiftly to trial and as a protection to the accused in the sense that unnecessary delays will be minimised. It could also be argued that maximum time limits provide a degree of certainty and security to the accused in that he is aware from the very outset of how long his deprivation of liberty will last.

The impact assessment preceding the Commission's Proposal for a Council Framework Decision on the European supervision order shows that the average length of pre-trial detention varies considerably from one Member State to another (from 42.5 to 365 days).

Questions:

2.2.1. Could such differences constitute an obstacle to mutual confidence between Member States, confidence that is required in an area of freedom, security and justice?

2.2.2. In a 'common' area of freedom, security and justice, would there be merit in having uniform maximum time limits for pre-trial detention?

2.3. Juvenile suspects

A number of measures have been taken at European and international level in order to protect the rights of children and juveniles in the criminal procedure, in particular as regards detention.

As emphasised by Article 37 of the UN Convention on the Rights of the Child (CRC), arrest and detention of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. When the deprivation of the liberty of a child is necessary, he or she must be treated in a manner, which takes into account the needs of persons of his or her age. Article 40 of the CRC underlines the importance of swift criminal proceedings for juveniles in the presence of legal or other appropriate assistance and, depending on the age of the child and other circumstances, his or her parents.

Generally speaking, Member States have special procedures (a separate system of juvenile justice) or at least make some kind of special provision in the mainstream criminal framework for juveniles who are suspected of having committed a crime. In view of the vulnerability of this category of suspect – as defined by national law – it is arguable that not only should juveniles benefit from special treatment whilst in detention but also that the procedures in the pre-trial stage should be expedited.

It should also be mentioned that the lack of criminal responsibility owing to the age of a requested person under the law of the executing State, is a mandatory ground for non-execution of a European arrest warrant. As there is no common rule as to the age of criminal responsibility in the European Union, this mandatory ground for refusal can give rise to problems between EU Member States with different age limits[26].

[26] In fact, the minimum age of criminal responsibility varies throughout the European Union from 7 years in Ireland to 16 years in Portugal

Questions:

2.3.1. Should there be common EU rules in order to speed up the pre-trial procedure for juvenile suspects?

2.3.2. How should that category of suspect be defined, if at all?

2.3.3. Could differences in the age of criminal responsibility in the EU constitute an obstacle to mutual confidence between Member States, in view of the fact that it appears as a ground for refusal in the Framework Decisions on the European Arrest Warrant[27] and Financial Penalties[28].

2.4. Statistics

The Commission recognises that the collection of statistics in the criminal justice field is a necessary pre-requisite to the proper evaluation of the need for action at European level. For that reason, the Commission is in the process of developing a strategy to measure crime and criminal justice and it is envisaged that a Communication on this matter, which will incorporate a five year action plan, will be issued later this year.

It is with this strategy in mind that we would be interested in receiving your views on which areas might be appropriate for further statistical analysis.

Questions:

Would there be merit in collecting quantitative / qualitative information / statistical data in the following areas?

2.4.1. on the grounds under national law that permit pre-trial detention to be imposed on a person suspected of having committed a crime;

2.4.2. on the mechanisms and periods for review of pre-trial detention under national law;

2.4.3. on the proportion of persons who, having been placed in pre-trial detention, are

- convicted and who remain in custody following the imposition of a custodial sentence;

- convicted and who are released from custody because no custodial sentence is imposed;

- acquitted;

- nationals / residents of another Member State or who are third country nationals;

2.4.4. on the extent to which periods spent in pre-trial detention can be deducted from a custodial sentence imposed following conviction;

2.4.5. on the type of special provision which exists at national level for dealing with juveniles during the pre-trial procedure.

[27] OJ L 190, 18.7.2002, p.1
[28] OJ L 76, 22.03.2005, p. 16