EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE, FREEDOM AND SECURITY

Directorate E : Justice
Unit E3 : Criminal justice

DISCUSSION PAPER

MEETING OF EXPERTS

on minimum standards in pre-trial detention procedures

Brussels – Monday 9 February 2009

1. Introduction

The Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (2005)[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]

On 9 June 2006, the Commission organised an experts' meeting in Brussels in order to prepare a study on such minimum standards.[3]

On 20 December 2007, the Commission concluded a service contract[4] with the University of Tilburg on a study on minimum standards in pre-trial detention in the European Union on the basis of a tendering procedure. This study is now ready and the results of the study will be presented at the experts' meeting on 9 February 2009.

The **aim of this meeting** is to consult the experts on whether the differences between the Member States in the area of pre-trial detention and detention conditions constitute an obstacle to the mutual confidence between Member States that is necessary for the smooth functioning of the principle of mutual recognition in the area of justice, freedom and security and whether further action in this area at European Union level is possible and appropriate and, if the answer is in the affirmative, what kind of action.

IMPORTANT NOTICE

It is envisaged that discussions will take place *during* the meeting. However, for different reasons – lack of time etc. – it may not be possible to exhaustively treat all the aspects of the themes for discussion during this experts' meeting.

Should you wish to contribute in writing (either before or after the meeting), we would be pleased to receive your views. Written contributions may be sent by e-mail to Thomas.Ljungquist@ec.europa.eu .

[1] 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).
[3] The Discussion Paper that was sent out to the participants to the experts' meeting of 9 June 2006 as well as the minutes of the discussions in that meeting are attached to this Discussion Paper.
[4] Contract JLS/D3/2007/01.

1. Background

1.1. European Parliament

The European Parliament has for several years expressed a strong interest in issues related to pre-trial detention and detention conditions.[5]

In its Resolutions regarding the situation concerning basic rights in the European Union, the European Parliament has, since many years, repeatedly urged the Commission to take action regarding various issues in the area of pre-trial detention, including detention conditions, and alternatives to pre-trial detention: For example, in its resolution for 2002[6], the European Parliament considered it essential, especially as the EU prepared for enlargement, that the Member States take far more determined measures with a view to ensuring at least minimum standards for the health and living conditions of prisoners and, in particular, *examine detention procedures in order to ensure that human rights are not violated, that detention periods are not unnecessarily long and that grounds for detention are reviewed regularly.*[7]

In 2004[8], the European Parliament adopted a Recommendation on the rights of prisoners in the European Union, which mentions the so-called European Prison Charter. This was a common "European" project emanating from a number of Parliamentarians of the Parliamentary Assembly[9] of the Council of Europe and of the European Parliament[10]. The intention was to create a binding instrument. According to the EP recommendation, the Charter should contain detailed rules on, *i.a.*, the separation of categories of detained persons: juveniles, persons on remand, convicted criminals, and special protection for juveniles. The recommendation mentions, moreover, that should 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.[11] The report[12] on which the recommendation was based 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.[13] The revised[14] report recommended 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". At present, however, the work on the European Prison Charter seems to have come to a standstill.

In 2005[15], the European Parliament – in a Recommendation to the Council on the quality of criminal justice and the harmonisation of criminal law in the Member States – underlined that "minimum rights of prisoners in any Member State" should have priority. The recommendation

[5] For further details (until 2006), see the Discussion Paper for the experts' meeting on 9 June 2006, attached (chapter 1.3. "The interest of the European Parliament for questions related to pre-trial detention", with several subchapters).
[6] Adopted on 4 September 2003: P5_TA(2003)0376, rapporteur Fodé Sylla (A5-0281/2003).
[7] See paragraph 20.
[8] 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.
[9] In particular Michel Hunault.
[10] In particular Maurizio Turco.
[11] P. 154, 1.(d).
[12] Rapporteur Maurizio Turco (A5-0094/2004).
[13] See "3. Conclusions", 25 February 2004, report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0094/2004).
[14] 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.).
[15] (2005/2003(INI), OJ C 304 E, 1.12.2005, p. 109.

was based on a report[16], which mentioned that the "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 principle of mutual recognition".[17]

In recent years, a large number of MEP:s have asked parliamentary questions regarding different aspects of detention conditions (including post-trial detention).[18] It can be noted that the number of questions from Greek MEP:s was particularly high at the end of 2008 depending on the critical situation in Greek prisons at that time.

1.2. Council of Europe

Pre-trial detention is an area where the different bodies of the Council of Europe, such as the CPT-committee and the Commissioner for Human Rights, and its different working groups or committees continuously are active.[19]

Two important recommendations on detention were adopted in 2006: 1) The European Prison Rules (Rec (2006) 2, adopted on 11 January 2006; and 2) Recommendation (Rec (2006) 13 to Member States on the use of remand in custody, the conditions in which it takes place and the provisions of safeguards against abuse.

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".

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.

In its “CPT standards” and various reports, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT Committee) of the

[16] 9.2.2005, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, rapporteur António Costa (A6-0036/2005).
[17] Chapter 3, p. 18.
[18] For recent years, see, *i.a.*, James *Allister* (E-3978/06: prisoners early release scheme), Frieda *Brepoels* (E-3800/08: European harmonisation of legislation on prisons; E-4107/08: policy of dispersing political prisoners), Marco *Cappato* (E-3872/08: detention-without-charge in the UK), Zdislaw Kazimierz *Chmielewski* (H-512/06: situation of disabled persons in prisons), Bairbre *de Brun* (E-2186/08: situation of women in prisons in the EU), Proinsias *De Rossa* (E-4053/07: visiting prisoners), Robert *Evans* (P-3576/07: case of Vadim Benyatov), Georgios *Georgiou* (E-6304/08: living conditions in Greek prisons), Jeanine *Hennis-Plasschaert* (E-2331/08: violation against children in detention centres; E-0042/09: situation in French prisons), Georgios *Karatzafaris* (E-3284/06: prisons in urban regions in Greece), Sajjad *Karim* (E-4108/07: UK Government proposal to extend the periods for which people can be detained under terrorism legislation), Stavros *Lambrinidis* (E-2723/07: inspection report by the Greek Ombudsman on Malandrinos prison; E-6394/08: detention conditions in Greece), Marios *Matsakis* (E-1685/08: violation of human rights of young citizens; E-2458/08: treatment of detainees in Cyprus; E-5099/08: mental patients in prisons in the UK), Erik *Meijer* (P-5453/07: case of Robert Hörchner, Dutch national, imprisoned in Warsaw following his extradition to Poland), Cristiana *Muscardini* (E-3760/06: prison policy; E-5977/07: prisons and penitentiary police), Athanasios *Pafilis* (H-0689/06: infringement of the fundamental rights of Greek prison inmates; H-0948/08: inhuman prison conditions), Marie *Panayotopoulos-Cassiotou* (E-5825/08: special conditions for women serving jail sentences in Europe), Dimitrios Papadimoulis (E-6328/08: living conditions in Greek prisons), Margaritis *Schinas* (E-2335/08 (correctional centres for foreign young offenders: Germany, Cyprus; E-3686/08: imprisonment of juvenile offenders as a means of rehabilitation), Nikos *Vakalis* (H-0345/07: living conditions in the prisons in the EU), Frank *Vanhecke* (E-2652/07: number of prison inmates in EU Member States), Luis *Yañez-Barnuevo García* (E-3252/07: arrest of two Spanish students in Latvia), Erik *Meijer* (P-5453/07: case of Robert Hörchner, Dutch national, imprisoned in Warsaw following his extradition to Poland),
[19] For further details (until 2006), see the Discussion Paper for the experts' meeting on 9 June 2006, attached (chapter "1.4. Council of Europe" with several subchapters.

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.[20] The problem was sufficiently serious as to call for cooperation at European level.

The Commissioner for Human Rights has publicized reports on the situation in prisons showing considerable problems, in some countries, with prison overcrowding.

1.3. European Union

Many prisons in the European Union, including pre-trial detention centres, are confronted with the phenomenon of prison overcrowding, which continues to blight penitentiary systems across Europe. The statistics[21] for 2008 show that 14 EU Member States have a prison occupancy level of more than 100%.

Also within the framework of the European Union, there has been considerable activity regarding pre-trial detention, matters relating to detention and alternatives to detention.

On 27 - 28 November 2008, the Justice and Home Affairs Council came to a political agreement on a proposal[22] from the Commission, the so-called European supervision order. The title has now been changed to Council Framework Decision 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.[23]

The future Framework Decision, which will enable the EU Member States to mutually recognise non-custodial pre-trial supervision measures, is expected to help reduce the number of non-resident pre-trial detainees in the European Union. At the same time it will reinforce the right to liberty and the presumption of innocence in the European Union and will reduce the risk of unequal treatment of non-resident suspected persons.

As regards the post-trial stage, two Council Framework Decisions were adopted on 27 November 2008: 1) Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union[24], which concerns transfer of prisoners; and 2) Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions[25].

2. Legal basis

Present treaty

Detention conditions are essentially under the competence of the Member State (Article 33 TEU). However, 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

[20] Paragraph 28, p. 24, of the (revised) CPT standards (2003 and 2004).
[21] International Centre for Prison Studies, King's College, University of London.
[22] 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).
[23] Council document 17002/08 COPEN 249, Brussels, 12 December 2008.
[24] OJ L 327, 5.12.2008, p. 27.
[25] OJ L 337, 16.12.2008, p. 102.

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).

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.

Lisbon Treaty

Pursuant to Article 83(2) of the Lisbon treaty, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. They shall, in the first place, concern (a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; but may also include (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

In this context one should also mention Article 70 of the Lisbon Treaty. This article allows the adoption of measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in Title V by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. This title concerns, i.a. mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal law (Article 67(3)).

3. Themes for discussion

3.1. Grounds for review of pre-trial detention

Study: chapter V.

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:

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

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?

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

3.2. Length of pre-trial detention

Study: chapter VI.

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. 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.

Questions:

4. Could differences in the length of pre-trial detention between Member States constitute an obstacle to mutual confidence between Member States, confidence that is required in an area of freedom, security and justice?

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

3.3. Other relevant aspects

Study: Chapter VII.

3.3.1. Deduction of "foreign" pre-trial detention

Study: Subchapter 7.1.

Questions:

6. To what extent is there divergence between Member States in terms of the rules which apply to deduction of "foreign" pre-trial detention?

7. 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?

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

3.3.2. Compensation for unlawful pre-trial detention

Study: Subchapter 7.2.

Questions:

9. To what extent is there divergence between Member States in terms of the rules which apply to compensation for unlawful detention?

10. 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?

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

3.3.3. Juvenile suspects

Study: Subchapter 8.1.

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:

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

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

14. 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].

3.3.4. Detention conditions

Questions:

15. Could differences in detention conditions constitute an obstacle to mutual confidence?

14. In a 'common' area of freedom, security and justice, would there be a merit to have common rules in this area?

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