

ECBA Response to Commission Non-paper on Detention Conditions and Procedural Rights in Pre-Trial Detention

The ECBA¹ thanks the Commission for the preparation of the non-paper on detention conditions and procedural rights in pre-trial detention. The ECBA notes that the issues of decision making in relation to pre-trial detention and the conditions of such detention have troubled the European Union for a number of years.² The ECBA's Agenda 2020³ urged action on this vital issue.

The Commission's non-paper comes at a significant time. As noted by the Commission, the COVID - 19 crisis has led to increased risks to detainees. Despite the availability of, and encouragement to use alternatives, particularly in light of the pandemic⁴ the numbers of those detained has steadily increased.⁵

The ECBA is of the view that the excessive use of pre-trial detention is a crucial issue which now requires urgent remedial action at supranational level by way of legislation, impacting as it does not only on the fundamental rights of suspects and accused persons, but also, as identified by the non-paper, on the functioning of mutual trust and therefore mutual recognition, ultimately weakening its legitimacy. Furthermore, the excessive use of pre-trial detention undermines the presumption of innocence and negatively impacts on the rule of law and respect for human dignity upon which the European Union is founded.

The ECBA calls upon the JHA Council to promulgate and implement legislation to protect minimum standards in relation to pre-trial detention, requiring at a minimum:

¹ The European Criminal Bar Association (ECBA) was founded in 1997 and is an association of independent specialist defence lawyers. The association is wholly independent. It aims to shape future EU legislation with a view to ensuring that the rights of European citizens in criminal proceedings are protected and enhanced in practice. The ECBA acts through conferences, committees, working-groups, and provides up-to-date information via its website and newsletters and through the work of its board, and committees (e.g. the Human Rights Committee and the Committee on EU Legislation). It also facilitates networking and practical cooperation between its members. The ECBA represents over 40 different European countries including all EU Member States so it is uniquely positioned to make submissions on these issues.

² In 2001 the [Programme of measures to implement the principle of mutual recognition of decisions in criminal matters \(2001/C 12/02\)](#) foresaw measures 9 and 10 as instruments concerning alternatives to detention and mutual recognition of non-custodial measures. The [Green Paper from the Commission - Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union \(COM/2003/0075 final\)](#) did not cover the "right to bail" but stated that it required a separate measure of its own. A Green Paper on mutual recognition of non-custodial pre-trial supervision measures (SEC(2004)1046) (annex available at <https://www.statewatch.org/media/documents/news/2004/aug/non-cust-pre-trial-SEC-1046.pdf>) was presented in 2004. [The Stockholm Roadmap](#) included detention as "Measure F", but limited to a Green Paper on Pre-Trial Detention.

³ [ECBA Initiative 2017/2018, Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards](#) "Measure A: (Pre-Trial) Detention and the European Arrest Warrant".

⁴ [Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice 2019/C 422/06](#)

⁵ See the comprehensive coverage of this issue in Fair Trial's [Briefing to the European Commission on Pre-Trial Detention Rates and the Rule of Law in the European Union](#).

1. That there should be a presumption in favour of release; that pre-trial detention must be proportionate and must not be used in cases where a custodial sentence will not be imposed;
2. That a person may only be detained for the purpose of bringing them before the competent legal authority on reasonable suspicion of having committed an offence and that where such detention continues, the suspicion must continue and remain reasonable throughout the detention;⁶
3. That a person may not be detained without a lawful basis, i.e. unless there is a risk that they may fail to surrender to court, interfere with the investigation or proceedings, or re-offend;
4. A speedy judicial hearing (in the personal presence of the accused person and the defence lawyer) to determine whether a person should be detained, and the reasons for such detention;⁷
5. Access to a lawyer with adequate time and access to the file and materials of the case to effectively challenge a decision at an initial hearing;⁸
6. That the burden of displacing the presumption of release is on the prosecution, who must provide the defence with any evidence upon which an assertion that bail should be denied is based;⁹
7. Judges to state explicitly that alternatives to pre-trial detention have been considered, and to give reasons why such alternatives cannot be used in the specific circumstances;
8. An expedient and thorough review of the initial hearing, within specified time limits;
9. Regular and thorough judicial control of pre-trial detention, requiring the court to consider afresh the necessity for pre-trial detention, and the prosecution to set out the steps being taken to bring the case to trial expeditiously;
10. Minimum standards for conditions of pre-trial detention, including the provision of adequate facilities for the preparation of the defence;
11. Minimum standards for time limits for pre-trial detention;
12. An effective remedy for a breach of such legislation;

⁶ *Rasul Jafarov v. Azerbaijan*, App 69981/14, 17 March 2016, para 114-119

⁷ The ECBA notes the prevalence of unlawful grounds for pre-trial detention across the EU, including the severity of the offence, and an assumption that a person outside the member state in which they reside is automatically a flight risk.

⁸ See [Directive 2013/48/EU](#) of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty and [Directive \(EU\) 2016/1919](#) of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings. See also See Article 7(1) [Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings](#).

⁹ See Article 7(1) [Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings](#).

13. An effective means to challenge an order for pre-trial detention including the right to request a hearing in person within specified time periods;
14. An effective means to challenge an international arrest warrant (including a European Arrest Warrant) including the right to request a hearing in person within specified time periods.

The ECBA regrets the failure of national authorities to alleviate the excessive use of pre-trial detention in cross-border cases, when instruments which provide suitable alternatives such as the European Supervision Order or European Investigation Order, remain under-used. In addition to an instrument covering the above points, clear guidance at EU level is needed to strengthen cooperation between member states in such cases.

The ECBA recognises that legislating for criminal procedural standards across the EU is legally and politically contentious. Nevertheless, Article 82 of the TFEU provides a foundation for action where relevant and necessary and the principle of subsidiarity acts as a check on the EU legislator when envisaging the harmonization of national procedural law. Such action will strengthen the mutual trust required for the effective implementation of mutual recognition instruments and enhance the legitimacy of EU action.

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