



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL JUSTICE, FREEDOM AND SECURITY  
**Directorate D**  
Internal security and criminal justice  
Unit D/3 - Criminal justice

**Subject: Meeting of Experts on minimum standards in pre-trial detention procedures, Brussels Friday 9 June 2006, Charlemagne S1**

COM opened the meeting by welcoming participants and setting the background to the meeting by recalling the previous and present work of the Parliament, Council of Europe (European Prison Charter and European Prison Rules) and COM itself.

The discussion paper, which had previously been issued to participants, formed the basis for discussion. It set out four general discussion themes that were accompanied by a number of more specific questions. COM introduced each discussion theme to which participants then had the opportunity to react, having regard to the questions.

**Themes 1 and 2 - grounds for review of detention and length of pre-trial detention.**

COM introduction.

**Jørn Vestergaard (University of Copenhagen, DK):** Important to discuss pre-trial detention as a way of (1) improving detention conditions and (2) making the EAW a more successful instrument – many countries have doubts about abolishing double criminality and the ban on extraditing one's own citizens as there is a lack of mutual trust amongst MSs.

**Stephen Jakobi (Fair Trials Abroad, UK):** There are major discrepancies between paper rules and practice in the area of pre-trial detention.

**Giovanni Tamburino (independent expert, IT):** All aware of the increase in the prison population – 25% of which is made up of pre-trial detainees. Statistics obtained in April 2006 illustrate that the percentage of Italians in pre-trial detention is almost equal to the percentage of foreigners in pre-trial detention as 25% of foreigners in detention are in pre-trial detention. In IT, the maximum length of pre-trial detention is 1 year, which explains the high number of people in pre-trial detention. This phenomenon is also linked to the length of court cases, which in IT is excessive. Combating serious crime e.g. organised crime / mafia activity is not easy and it is true that such cases very often take longer to be investigated and brought to trial than other common crimes. There are a number of initiatives on the table which aim to reduce the length of pre-trial detention but no such reduction has yet been achieved. A number of concerns on COM's proposal for a European Supervision Order.

**Paolo Matta (University of Lisbon, PT):** In PT, there is an obligatory review of pre-trial detention every 3 months - judge has to verify whether the detention can be justified. The imposition of fines would normally remove the need for pre-trial detention. The existence of different rules on pre-trial detention and of different maximum periods of detention clearly prejudices trust and the rights of the citizens of the EU; in PT, the maximum length of pre-trial detention is 54 months. In a common area of freedom security and justice, it is desirable to create uniform rules across the EU as a whole for length of pre-trial detention and grounds for review.

**Marie-Anne Swartenbroekx (MEDEL, Brussels, B):** There should be action at EU level for regular compulsory review of pre-trial detention. Such review should be undertaken by an impartial judicial entity (not a prosecutor). In BE, an accused has to be brought before a judge within five days of the initial detention and thereafter every month, although earlier review is possible - speedy model. Another issue for discussion is the threshold for triggering pre-trial detention, which is usually linked to the potential penalty attaching to the offence. There is great disparity between MSs on this point which has a bearing on the principle of mutual recognition and which must be seen in the context of justice and freedom.

**Pierre Tournier (Directeur de Recherche au Centre National de la Recherche Scientifique, Paris, F):** It costs only 40€/ year / country in order to maintain statistics within the Council of Europe. However, there is a need for clear definitions of what we mean by (pre-trial) detention before statistics can be collected: pre-trial detention can be viewed narrowly (detention preceding initial judgment of conviction), broadly (all periods of time spent in detention before exhaustion of appeal process) and there is also a middle ground.

**Dr Stefan König (Deutscher Anwaltverein, DE):** Set deadlines exist for the review of preventive detention being two weeks following the initial decision to detain and every 2 months thereafter. The system is complex. There is a high number of pre-trial detainees because the review procedures are not enough in themselves, as S. Jakobi pointed out. Of relevance to this issue is the stage at which an accused should have access to defence counsel. According to a survey carried out by the DE federal authorities, where an accused is given access to a lawyer from the outset, the overall procedure is shorter (on average, 20 days).

**Dr Holger Matt (European Criminal Bar Association, DE):** Agreed with previous comments. Mutual trust only works if you have a set of minimum standard rules in criminal proceedings. These need to be agreed upon. Convinced that there is a legal basis for the EU to take such action; all criminal proceedings potentially have a cross border element. The duration of detention must be restricted; there must be real deadlines. There should also be unfettered access to defence counsel and as quickly as possible.

**Gerald Ruhri (Austrian Bar Association, AT):** Agreed with previous speakers. There must be regular review of pre-trial detention. Under the AT system - the first review takes place two weeks after the initial decision to detain, again after four weeks then every two months thereafter. After the third review, the procedure may be dropped: the judge has to make a concrete decision regarding evidence.

**Carmen Prior (AT Ministry of Justice):** It was difficult to prepare for this meeting as COM's proposal for a European Supervision Order was not made available and it ought to have been. It is important to ensure that there is no duplication with the work of the Council of Europe. On the question of the legal basis, it is not accepted by all MSs that the COM has the competence to act in this area. Need a legal basis that is acceptable to all parties.

**Jaroslav Fenyk (University of Brno, CZ):** The problem with pre-trial detention is its complexity. There are various questions that could be discussed but as we are all signatories to the Council of Europe, need to ensure that there is an added value. As a consequence, discussion in this forum should not be so wide ranging; rather, it should focus on a few discrete problems such as the length of pre-trial detention and review.

**Leo Tigges (Secretary General "Conférence Permanente de a Probation", NL):** Increased free movement of persons has given rise to an increase in the number of foreigners involved in crime. From the point of view of rehabilitation, preventive detention should be as short as possible, not just from the perspective of the accused, but also because it can have a detrimental effect on society to which he will be returned on release. There is a need to think about alternatives (such as supervision, not necessarily electronic) in order to combat overcrowding but also to deal with the rehabilitation needs of the person. On the question of statistics, it is important to assess how the law is implemented. SPACE statistics are good and use definitions that are understood and agreed.

**Susanne Södersten (SE Ministry of Justice):** The issue of harmonisation is of great significance. The work of the Council of Europe need not stand in the way of contemplating action at EU level. Mutual trust is important in order to facilitate a high degree of legal certainty. In SE, the threshold for detention is that the offence in question should be punishable by a sentence of at least one year. There are three grounds justifying detention: (i) risk of flight; (ii) collusion; and, (iii) recidivism which are considered in light of the criterion of proportionality. SE agreed with COM position and considered that there were legal reasons for producing an instrument in the future.

**Göran Berling (Chief District Prosecutor, SE Ministry of Justice):** In SE, there is a legal obligation on the prosecution to be objective and to consider all evidence and circumstances of a case – both inculpatory and exculpatory. All evidence has to be made available to the defence and the pre-investigation phase has to be as complete and as transparent as possible. The objective is to see justice done. Personal experience shows that where assistance is sought from other countries in the context of criminal proceedings, it can often take some time before such assistance is received which has an impact on the accused person in custody.

**Jorge Costa (Public Prosecutor, PT):** Important to defend basic rights. Four aspects: (i) what length of time must elapse between detention following arrest and validation of the detention by a judicial authority? (ii) a distinction should be drawn between detention (by the police) following arrest and pre-trial detention proper (which can last up to 4 years in PT). In PT, a person may be detained on the basis of suspicion of having committed a crime or on a warrant but in both cases he must be presented to a judge within 48 hours. (iii) under what

circumstances is pre-trial detention available? (for all crimes?) (iv) grounds for review.

**Bohacik Branislav (SK Ministry of Justice):** Not convinced that there is a legal basis for work in this area. The objectives of the meeting are not clear from the discussion paper – minimum standards already exist (ECHR and associated case law). In SK, judicial authorisation is required if pre-trial detention is to exceed 6 months. Detention of up to 48 months is possible for extraordinarily serious offences. Detainee is entitled to apply to a judge for release at any time, which application must be decided without delay. A distinction is drawn between detention following police arrest and pre-trial detention. It is not considered that the differences in this area of law across the EU constitute obstacles to mutual trust; it is not necessary to have uniform rules but we should respect other legal systems. The Council of Europe is the most appropriate forum for discussion of these issues. Fully support the collection of information on pre-trial detention.

**David Dickson (International Cooperation Unit, Crown Office, Scotland, UK):** For less serious crime (those punishable up to 6 months) a person may be held in custody for a maximum of 40 days. If the trial does not begin within that period, the charge falls with the result that the accused is released and the criminal proceedings end. The equivalent period for serious crimes is 140 days. A person has an opportunity to have his detention reviewed whilst in custody.

**Bob Daws (Home Office UK):** COM must learn some lessons from the procedural rights proposal. The UK position is that there is no legal base for such a measure. Pre-trial detention must be viewed in context: interplay of constitutional safeguards, rules on evidence. The Council of Europe has enormous experience in this area and should be involved.

**Ilari Hannula (Ministry of Justice FI):** Need to consider whether the EU is the correct forum for adding value to the work of the Council of Europe. There are a number of problems with mutual recognition which means that we have to look closely at the possibility of harmonisation. There are a number of areas in which FI would like to draw up common rules.

**Anton Van Kalmthout (independent expert, NL):** The CPT has worked in this area and there are many issues for consideration. Any move towards harmonisation should focus on the grounds for review of detention and the length. Although the Council of Europe has worked in this area, it has not done enough.

**Stéphanie Bosly (Service Public Fédéral, BE):** Surprised as to why this meeting was organized; COM has not put forward any legislative proposal. BE is in favour of harmonisation and considers that there is a legal basis for action. However, this debate is perhaps slightly late as the EAW is already in operation. Any problems in this area will be linked to the mismatch between different MSs' systems. Need to concentrate on key areas where there is great disparity, especially where there is a cross border impact. Would support *de minimis* rules on the grounds for regular review. Not convinced of the need for a maximum length for pre-trial detention; the very fact that pre-trial detention should be the exception and only employed if absolutely necessary is in itself the safeguard. Setting a maximum time limit not always appropriate.

**Claire Huberts (Service Public Fédéral, BE):** BE law on pre-trial detention was reviewed last year. Very stringent time limits for review after: firstly after 5 days, then after one month, following which every three months. The detainee can apply to be released every month.

**Panagiotis Maidanis (Deputy Prosecutor, EL):** Very strict time limits under EL law. If the trial does not take place within 18 months, person will be freed. Should be possible to reach consensus on which offences could give rise to pre-trial detention and on the maximum duration of any such detention.

**Rainer Kaul (Federal Ministry of Justice DE):** There is a need for minimum standards that would help to build trust between MSs. However, do we need measures at European level? Council of Europe has been working quite intensively on this area and is drawing up a detailed text. If the Council of Europe proposals were to be adopted, there would be sufficient standards throughout the EU. COM should perhaps therefore wait and see; it could ask MSs in writing whether the Council of Europe rules suffice. If the response is negative, COM could then step in.

**Manuel Rubio-Gullon (Ministry of Justice FR):** The Action Plan contains provision for an analysis of the review for the grounds of detention, but this should be read in light of the general guidelines which accompany it and which make it clear that the scope of discussions is without prejudice to the scope of the Treaty. This gives an idea of the spirit in which such discussions should take place. FR has not yet formed a view on the issue of the legal basis, but need to bear in mind the principles of subsidiarity and proportionality.

**Elsa Garcia Maltras de Blas (Ministry of Justice ES):** ES can provisionally support an examination of pre-trial detention procedures and indeed the harmonization of such criteria if it enhances mutual confidence. However, it is not clear whether the aspects identified in theme 2 actually constitute obstacles to mutual confidence. There should be greater clarity in the definition of pre-trial detention – linked to the collection of reliable statistics.

**Maria Malachtou-Pampalli (CY)** In CY, no one can be detained without judicial decision. Detainees are there for a reason which is linked to protection of society. There is a need to guarantee not only that the rights of the suspect are upheld but also those of society. Need to have a balance between conflicting interests in each case.

### **Theme 3 - juvenile suspects**

COM introduction.

**David Dickson (International Cooperation Unit, Crown Office, Scotland, UK):** The age of criminal responsibility in Scotland is 8 years. However, between the ages of 8 and 16, children are not subject to the mainstream, adult, criminal justice system but rather to a specialised children's hearing system. Where decision is taken in the context of that system, measures of *care and assistance* rather than punishment are taken in resolution of the offence. If a custodial measure is ordered, the detention will take place in secure accommodation, rather than in a prison.

**Charlotte Lauritsen (Ministry of Justice DK):** In view of the work which has already been undertaken in this area (Council of Europe), we should question whether the EU should also work on this subject. In view of the fact that all MSs are bound by the ECHR and its associated case-law, do we really need further specific instruments in this field? DK would support the collection of statistics and would welcome analysis in this field, such as on the grounds for pre-trial detention, length and review thereof.

**Dmitrijs Podprigora (Ministry of Justice LV):** On average the maximum length of pre-trial detention for adults is 24 months for adults and 12 months for juveniles. Discussion should focus on what could be done to reduce the number of pre-trial detainees.

**Erika Róth (University lecturer, HU):** In terms of the work being carried out by the Council of Europe, the following documents deserve further attention: Resolution 11 of 1965, Recommendation 11 of 1980 (Committee of Ministers) and Recommendation 1245 of 1994 (Parliamentary Assembly). They emphasise the exceptional nature of pre-trial detention and stress that juveniles should not be placed in custody unless it is absolutely necessary.

**Ilari Hannula (Ministry of Justice FI):** In FI, the detention of juveniles is very limited. Try to find alternatives wherever possible.

**Bohacik Branislav (SK Ministry of Justice):** In SK, the pre-trial detention of juveniles is limited to exceptional cases. It is not necessary to harmonise the rules in this area and it would be difficult to find a common definition of "juvenile". There are already a number of instruments from the Council of Europe which deal with juveniles. The age of criminal responsibility is a ground for refusal in the context of mutual recognition instruments rather than obstacle to mutual confidence; need to accept that there are separate systems of law.

**Stephen Jakobi (Fair Trials Abroad, UK):** As stated in the case law of the ECHR, the purpose of that instrument is not to give remedies that are theoretical and illusory but rather practical and effective. Unfortunately, that is not the case in practice. The issue of pre-trial detention is extremely worrying when considering juveniles and the age of criminal responsibility; we are talking about individuals who may be innocent and stuck in a foreign jail. We need a treaty in order to achieve concrete progress. There must be agreement on a common age of criminal responsibility; it is ridiculous that children could be placed in detention in a foreign country without any possibility of being returned home. Should also have agreement as to what that means in practice e.g. the children's hearing system in Scotland.

**Susanne Södersten (SE Ministry of Justice):** Juveniles are a special case and we could possibly reach some minimum rules regarding their treatment.

**Carmen Prior (AT Ministry of Justice):** Support comments made by SK. Is there a need to harmonise the age of criminal responsibility? Are there any studies available on this issue?

**Manuel Rubio-Gullon (Ministry of Justice FR):** Having a single age for criminal responsibility should not be discussed in this forum. Support view of AT and SK. IN FR, following the *Outreau* case, certain suspects, later acquitted,

were subjected to very long periods of pre-trial detention. A parliamentary commission set up to analyse what had occurred and to look into pre-trial procedure more generally. A questionnaire was issued with a view to finding out what the situation was in other countries. As hearings before the commission ended on 6 June, it is difficult to say what reforms will be introduced.

#### **Theme 4- Statistics**

**Susanne Södersten (SE Ministry of Justice):** A possible topic on which statistics could be collected might be the length of pre-trial detention periods and what action might be taken to reduce them.

**Pierre Tournier (Directeur de Recherche au Centre National de la Recherche Scientifique, Paris):** Many delegations have said that matters should be left to the Council of Europe – that is the wrong attitude. SPACE does not have a funding problem (it only costs €40 per state per year), it is a problem of bureaucracy. The EU needs its own statistics - statistics are political tools. There are problems of definition and not all countries have developed their statistical tools in a uniform fashion.

**COM:** In order to determine the need for future EU measures and the evaluation of existing measures COM will publish a Communication that will contain an action plan on statistics. In order to implement this action plan, COM will set up an expert group to which each MS will be invited to send a member. International organizations will also be represented.

**Bohacik Branislav (SK Ministry of Justice):** Statistics are a good idea as on the basis of statistics, we can determine what the problems are and how to solve them. However, we need to avoid overlap and have to be clear as to the purpose for collecting the information and the legal basis for action.

**Elsa Garcia Maltras de Blas (Ministry of Justice ES):** ES welcomes the forthcoming Communication and expert group. Need to make advances in the system of collecting statistics and on the processing of the results.

#### **Conclusions**

COM thanked participants for some illustrative and interesting interventions; this had been a useful exercise in getting to grips with a very complex area of law and policy. It is clear that the Council of Europe has undertaken considerable work which should be used as the starting point for any future work at EU level. In addition, the concerns expressed on the question of the legal basis are noted, although it should be recalled that there is no legislative proposal is on the table at this time.