The EU Green Paper on Detention

Its objectives, an overview of contributions received and the way forward

13 February 2014

ERA Conference, Trier, Germany
Green Paper on detention
June 2011

81 replies (21 Member States, civil society, international organisations, NGOs)

Summary of replies published on website DG Justice
http://ec.europa.eu/justice/newsroom/criminal/opinion/

Main topics: pre-trial detention and detention conditions
EU interest in this area

Stockholm Programme 2010: "efforts should be undertaken to strengthen mutual trust and render more efficient the principle of mutual recognition in the area of detention. Efforts to promote the exchange of best practices should be pursued and implementation of the European Prison Rules, approved by the Council of Europe, supported. Issues such as alternatives to imprisonment, pilot projects on detention and best practices in prison management could also be addressed. The European Commission is invited to reflect on this issue further within the possibilities offered by the Lisbon Treaty."

Article 4 EU Charter: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment" (cf. Article 3 ECHR, unacceptable detention conditions can constitute a violation of Article 3)
EU interest in this area

Article 47 EU Charter: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law" (cf. Article 6 ECHR, long pre-trial detention periods can constitute a violation of Article 6)

Article 19(2) EU Charter: no one may be handed over to a State where there is a serious risk that the person concerned would be subject to inhuman or degrading treatment
EU interest in this area

When prison conditions in a Member States entail a serious risk of violating Article 3 ECHR/ Article 4 EU Charter, the well-functioning of mechanisms of criminal law cooperation could be hampered, in particular when judges are obliged to refuse a transfer under Article 19 (2) EU Charter.

Framework Decisions on Transfer of Prisoners (2008/909/JHA) and EAW (2002/584/JHA)

Situation of non-nationals
EU interest in this area

December 2011, Members of EP overwhelmingly supported a resolution on detention in the EU, which called for a legislative proposal on the rights of persons deprived of their liberty to ensure pre-trial detention remains an exceptional measure, used in compliance with the POI and right to liberty.

Around 20 Parliamentary Questions in 2013

Citizens' letters, petitions and complaints
Topics covered by Green Paper

- Alternatives (pre-trial and post-trial)
- Detention conditions v. mutual recognition
- Pre-trial detention
- Children
- Monitoring of detention conditions/role of CoE
Pre-trial alternatives to detention

- **Bail:** BG, PL, ES, EE, IE, BE, FR, CZ, SI, LV, PT, DK, MT
- **House arrest:** BG, AT, ES, EE, FR, UK, SI, RO, PT, MT
- **House arrest with electronic monitoring:** AT, ES, EE, FR, PT, UK (not Sc), and 1 Lander in DE. CZ and FI were looking into the possibility at the moment of the survey.
- **Restraining order to refrain from certain activities/types of behaviour** (injunction to stay away from a certain place or individual, residing in a particular place...). BG, AT, ES, EE, IT, FR, FI, LV, PT, DK
- **Ban on leaving the territory of the given Member State:** BG, PL, SE, FR, CZ, IT, FI
- **Obligation to report to the authorities at regular interval:** AT, SE, FR, IT, DE, FI, DK, SI, PT
Pre-trial alternatives to detention

- Temporary confiscation of ID documents, driving licences...: AT, PL, FR, DK
- Instruction to live in a particular place: AT, ES, IT, LV, DK
- Instruction to undergo medical treatment (for drug addiction, psychotherapy measure...): AT, ES, FR, DE
- Written promise (for appearance, to leave one's place of residence, not to hinder investigations): BG, AT, CZ
- Supervision by probation officers: AT, CZ, MT
Pre-trial alternatives to detention
Results Green Paper

- Majority of Member States/NGOs: European Supervision Order (FD 2009/829/JHA) should be assessed before developing new legal measures in this area.

- Non-legislative measures such as exchanges of best practices, trainings, funding projects.

- Only 3 Member States called for an EU legislative instrument which would promote alternatives.

- NGOs: only pre-trial detention where its purposes cannot be achieved by other means, duly motivated should be prescribed in law.
Pre-trial alternatives to detention
Results Green Paper

- Added value of alternatives: less costly, reduce overcrowding, improve detention conditions. Some not available (electronic monitoring/house arrest)
- Bail: discrimination of the poorest part of the population. Set bail at a level proportionate to the suspects income
- Electronic monitoring: only short term, poorly tolerated after a few months application
Post-trial alternatives to detention

- **Fines**: AT, PL, ES, SE, IE, DE, FI, LV, NL
- **Conditional release**: AT, ES, EE, BE, FR, IT, DE, FI, LV, RO
- **Conditional suspension of prison sentences**: AT, PL, ES, IE, BE, DE, SI, LV, RO, PT, MT, NL, DK
- **Community service**: AT, PL, ES, EE, IE, BE, FR, UK, FI, SI, LV, PT, MT, NL, DK
- **Supervision under electronic surveillance**: AT, PL, SE, EE, BE, FR, UK, FI, 1 DE Lander
- **Probation order**: BG, SE, PL, IE, BE, UK (no Sc), IT, SI, LV, PT, MT, NL
Post-trial alternatives to detention
Results Green Paper

- Vast majority of Member States called for assessment of implementation of FD 2008/947
- Increasing knowledge and promoting exchange of best practices, funding, training
- Support the role of probation services: common databases for probation, European organization for probation
- Information to media/public to boost confidence in these measures
Pre-trial detention

- Presumption of innocence, serious impact upon persons
- Case law Article 5 ECHR: subsidiarity/measure of last resort: only pre-trial detention if alternatives not available
- Once pre-trial detention has been imposed, greater change of obtaining a prison sentence post-trial
- Often automatic, self-evident act which it should not be
- Problem of overcrowding, detention conditions
- Regular reviews are often a simple formality
- Situation of non-nationals, risk of flight
Pre-trial detention rates in MS

Pre-trial detainees as a percentage of prison population 2009 (Council of Europe, SPACE 1, 2011)

<table>
<thead>
<tr>
<th>Country</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>82</td>
</tr>
<tr>
<td>Denmark</td>
<td>38</td>
</tr>
<tr>
<td>Netherlands</td>
<td>34</td>
</tr>
<tr>
<td>Hungary</td>
<td>31</td>
</tr>
<tr>
<td>Switzerland</td>
<td>31</td>
</tr>
<tr>
<td>Belgium</td>
<td>29</td>
</tr>
<tr>
<td>Latvia</td>
<td>28</td>
</tr>
<tr>
<td>Estonia</td>
<td>24</td>
</tr>
<tr>
<td>France</td>
<td>24</td>
</tr>
<tr>
<td>Norway</td>
<td>24</td>
</tr>
<tr>
<td>Spain</td>
<td>21</td>
</tr>
<tr>
<td>Sweden</td>
<td>20</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>17</td>
</tr>
<tr>
<td>Germany</td>
<td>16</td>
</tr>
<tr>
<td>Wales</td>
<td>16</td>
</tr>
<tr>
<td>Ireland</td>
<td>15</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>11</td>
</tr>
<tr>
<td>Poland</td>
<td>11</td>
</tr>
</tbody>
</table>
Pre-trial detention rates in MS

Also significant disparities on periods of pre-trial detention and a great variety between Member States in definition, terminology and practice of pre-trial detention

Pre-trial detention
Topics Green Paper

- Statutory maximum length
- Regularity of review, recurring obligation for authorities to justify extension of pre-trial detention
- Need for EU minimum rules in order to strengthen mutual trust?
Pre-trial detention

Results Green Paper

- 11 Member States/large majority of NGOs in favour EU minimum standards regarding obligatory and regular review of the grounds for detention

- Such standards could oblige national authorities to verify, at certain intervals, whether the prerequisites for detention continue to exist, to review the detention decision where there has been a change in circumstances

- Majority of Member States not in favour of harmonizing maximum time periods of detention
Pre-trial detention
Results Green Paper

- 9 Member States/2 NGOs did not support the adoption of EU minimum standards (no impact on mutual trust as long as in line with ECHR, subsidiarity, absence of legal basis)
- Effective alternative measures should be developed
- FD on European Supervision Order should be properly implemented
- Exchange of best practices between Member States
Detention conditions affecting mutual recognition instruments?

- Considerants FDs (EAW + 3 FDs)
- Implementation report EAW 2011
- No ground for refusal
- Directive European Investigation Order (EIO) ground for refusal
- EP Article 225 TFEU own initiative report EAW
- Will have more effect on FD 909, as no consent required, but needs to be seen in practice, not many cases under CoE Convention
Detention conditions

Framework Decision Transfer of Prisoners respects fundamental rights and adheres to the principles recognised in Article 6 TEU and EU Charter

Refusal because of prison conditions?

ECJ: N.S. case (C-411/10 and C-493/10)

Obligation for Member States to investigate the reality facing prisoners

ECtHR: MSS v. Belgium and Greece (2011)
Detention conditions
Topics Green Paper

- Monitoring of detention conditions
- Role of the EU in ensuring equivalent detention standards in the different Member States
- CoE: European Prison Rules/CPT Recommendations: non legally binding rules
Detention conditions
Results Green Paper

- Detention conditions and prison management: primarily competence of Member States
- All Member States bound by ECHR, mutual trust, litigation at national/ECtHR level
- Shared need to improve detention standards
- Most Member States against adoption of EU binding minimum rules on detention standards/NGOs in favour
- Majority of organisations support their adoption
Detention conditions
Results Green Paper

- Exchanges of information and best practice through networks such as Europris and CEP, CDAP
- EU financial support, such as training/guidelines for prison staff (alternatives, national litigation, follow-up ERA, FTI pre-trial detention, coordination NPMs, CPT and SPT)
Detention conditions
Results Green Paper

- No need for creation of a monitoring system at EU level, risk of duplication, close cooperation desirable
- Leading role of CoE in monitoring due to its substantial experience: European Prison Rules and CPT, OPCAT (not all Member States have yet signed/ratified)
- Network of NPMs could be strengthened, financing, joint missions
Children
Results Green Paper

Concerns about the differences concerning age of criminal responsibility, crucial importance of alternative measures, educational measures should always be prioritized.

See proposal Directive on procedural safeguards for children suspected or accused in criminal proceedings COM (2013)822: pre-trial detention measure of last resort, periodic review, alternative measures, right to specific treatment if detained (separate from adults, family life).

Precedent for further legislation on detention?
EU actions

Implementation of existing legal instruments (FDs):

- Poor state-of-play implementation
- Active role of COM: 3 implementation Workshops in 2010, 2 Experts' meetings in 2012 and 1 in 2013
- Implementation report 3 FDs, 5 February 2014 COM(2014)57/1
- Infringement actions from 1 December 2014
- Correct implementation contributes to social rehabilitation, provides alternatives, improves detention conditions by reducing overcrowding
EU actions

Promote the discussion and raise awareness of existing instruments

- Special Interest Group Framework Decisions
- EuroPris

Assistance in practical implementation

- Development of Fact Sheets for implementation of FDs (detention conditions, provisions on early/conditional release, prisoners' travel card)
EU actions

COM funding on practical action through grants by JPEN financial programme, such as:

- Raising awareness of alternatives to detention
- Training for judges, prosecutors and lawyers
- Exchange of best practices by training programmes and study visits
EU actions

Other EU initiatives Procedural Rights Roadmap having an impact on Detention:

Directives Translation and Interpretation (2010/64/EU), Information (2012/13/EU) and Access to a Lawyer (2013/48/EU)
Contact / Info:

European Commission
DG Justice
Procedural Criminal Law

Jesca Beneder
Legal Officer

Tel.: +32-2 29 67530
E-mail: jesca.beneder@ec.europa.eu

Website:
http://ec.europa.eu/justice/criminal/index_en.htm