EUROPEAN COMMISSION

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GREEN PAPER

Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention

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1. PURPOSE

The Commission wishes to explore the extent to which detention issues[1] impact on mutual trust, and consequently on mutual recognition and judicial cooperation generally within the European Union. Whilst detention conditions and prison management are the responsibility of Member States, the Commission is interested in this issue because of the central importance of the principle of mutual recognition of judicial decisions for the area of freedom, security and justice.

For mutual recognition to operate effectively there must be a common basis of trust between judicial authorities. Member States need to have better knowledge of each other's criminal justice systems.

In its Resolution on a Roadmap for strengthening procedural rights of suspected persons in criminal proceedings[2], the Council states that *"The time that a person can spend in detention before being tried in court and during the court proceedings varies a lot between the Member States. Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands"*.

The Council invited the Commission to present a Green Paper on pre-trial detention. This Paper – which is part of the procedural rights package – is the Commission's response to the Council's request.

The Green Paper covers the interplay between detention conditions and mutual recognition instruments such as the European Arrest Warrant as well as pre-trial detention, and opens up a wide public consultation based on ten questions set out in the Paper.

The Stockholm Programme[3] encourages the Commission to reflect about detention and related issues: "*The European Council considers that 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."*

The European Parliament has for several years urged the Commission to take action on various issues in the area of detention. In its Resolution on the Stockholm Programme[4], the European Parliament calls for the construction of an EU criminal justice area to be developed through, *inter alia* minimum standards for prison and detention conditions and a common set of prisoners' rights in the EU. This is reiterated in the European Parliament's February 2011 Written Declaration on infringement of the fundamental rights of detainees in the European Union[5].

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1 Detention here is understood to mean detention in accordance with Article 5(1)(a), (b) and (c) ECHR following a criminal offence and not for other purpose (for example detention of migrants).

2 Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ C 295, 4.12.2010, p. 1).

3 OJ C 115, 4.4.2010, p. 1.

4 European Parliament resolution of 25 November 2009 on the Communication from the Commission – An area of freedom, security and justice serving the citizen – Stockholm programme, P7_TA(2009)0090.

5 Written Declaration on infringement of the fundamental rights of detainees, from MEPs - 06/2011, 14.02.2011.

2. WHAT IS THE EU'S INTEREST IN THIS AREA?

Detention issues, whether they relate to pre-trial detainees or convicted persons, are the responsibility of Member States. There are, however, reasons for the European Union to look into these issues, notwithstanding the principle of subsidiarity.

Detention issues come within the purview of the European Union as first they are a relevant aspect of the rights that must be safeguarded in order to promote mutual trust and ensure the smooth functioning of mutual recognition instruments, and second, the European Union has certain values to uphold.

To promote mutual trust, the Commission's priorities in the area of criminal justice are to strengthen procedural rights by way of minimum rules for suspects or accused persons in criminal proceedings. A minimum standard of protection for individual rights will not only benefit individuals across the Union but also promote the mutual trust that is the necessary counterbalance to judicial co-operation measures that enhance the powers of prosecutors, courts and investigating officers.

To this end, the Commission has designed a package of measures on the procedural rights of suspected and accused persons[6] that will assist in achieving the necessary mutual trust between judicial practitioners, whilst taking into account the differences between the legal traditions and systems of the Member States.

The Commission has already highlighted that respect for fundamental rights within the EU is vital to help build mutual trust between the Member States. A lack of confidence in the effectiveness of fundamental rights in the Member States when they implement Union law would hinder the operation and strengthening of cooperation instruments in the area of freedom, security and justice[7].

The Charter of Fundamental Rights of the European Union (EU Charter) sets a standard with which all EU Member States must comply when implementing EU law. The European Court of Human Rights (ECtHR) has ruled that unacceptable detention conditions can constitute a violation of Article 3 of the European Convention on Human Rights (ECHR). Article 4 of the EU Charter is worded identically to Article 3 of the ECHR, these two provisions have the same scope and meaning. Article 19(2) of the EU Charter also states that no one may be handed over to a State where there is a serious risk that the person concerned would be subjected in particular to inhuman or degrading treatment.

Despite the fact that the law and criminal procedures of all Member States are subject to ECHR standards and must comply with the EU Charter when applying EU Law, there are still doubts about the way in which standards are upheld across the EU.

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6 The proposals will cover the right to interpretation and translation in criminal proceedings (Directive 2010/64/EU adopted in October 2010), the right to information in criminal proceedings, access to a lawyer, the right to communicate while in detention, protection for vulnerable suspects and accused person and access to legal aid.

7 "Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union" - COM(2010) 573.

3. THE RELATIONSHIP BETWEEN MUTUAL RECOGNITION INSTRUMENTS AND DETENTION

Detention conditions can have a direct impact on the smooth functioning of the principle of mutual recognition of judicial decisions. Pre-trial detainees and convicted prisoners alike are entitled to a reasonable standard of detention conditions. Prison overcrowding and allegations of poor treatment of detainees may undermine the trust that is necessary to underpin judicial cooperation within the European Union.

The principle of mutual recognition rests on the idea of mutual trust between Member States. Judicial decisions are to be recognised as equivalent and executed throughout the Union regardless of where the decision was taken. This is based on the presumption that criminal justice systems within the European Union, whilst not the same, are at least equivalent. Judicial decisions are usually executed by judges in the executing state. Those judges need to be satisfied that the initial decision was taken fairly (i.e. that the person's rights were not violated when the decision was taken) and that the person's rights will be respected fully when returned to another Member State.

Without mutual confidence in the area of detention, European Union mutual recognition instruments that have a bearing on detention will not work properly, because a Member State might be reluctant to recognise and enforce the decision taken by another Member State's authorities. It could be difficult to develop closer judicial cooperation between Member States unless further efforts are made to improve detention conditions and to promote alternatives to custody.

A number of mutual recognition instruments are potentially affected by the issue of detention conditions: The instruments in question are the Council Framework Decisions on the European Arrest Warrant, the transfer of prisoners, mutual recognition of alternative sanctions and probation and the European Supervision Order.

3.1. The European Arrest Warrant (EAW)[8]

The EAW requires the surrender between Member States of persons wanted both for trial and to serve sentences in respect of convictions and is therefore relevant for both pre-trial and post-trial detention.

While the EAW has proved to be a very useful tool to ensure that criminals cannot use borders to evade justice, particularly in relation to serious and organised crime with a cross-border dimension, its implementation, including the core principle of mutual recognition on which it is based, must respect fundamental rights. Article 1(3) EAW provides that Member States must respect fundamental rights and fundamental legal principles, including Article 4 of the EU Charter and Article 3 ECHR and does not oblige judicial authorities to surrender a person where they are satisfied, while taking into account all the circumstances of the case, that such surrender would result in a breach of the person's fundamental rights arising from unacceptable detention conditions.

However, treatment of detainees subject to an EAW must reach a minimum level of severity to fall within the scope of Article 4 of the EU Charter and Article 3 ECHR. The latter was

[8] Council Framework Decision of 13 June 2002 (OJ L 190, 18.7.2002, p. 1).

recently invoked in an EAW proceeding where surrender was contested on the grounds that detention conditions in the issuing State were allegedly inadequate (see box below).

Example: In a recent judgment, The Minister for Justice Equality and Law Reform v Robert Rettinger, 23 July 2010, the Irish Supreme Court overturned on appeal a decision by the Irish High Court to surrender a suspected person subject to a European Arrest Warrant to an issuing State. The Supreme Court referred the matter to the High Court to be reconsidered taking into account all the material before it in a rigorous examination to establish whether there was a real risk of a surrendered person being subject to treatment contrary to Article 3 of the ECHR. In its decision the Irish Supreme Court referred to a number of European Court of Human Rights (ECtHR) cases on detention conditions where the ECtHR concluded that complainants have been detained in conditions that were inhuman and degrading.

In this casesurrender was therefore contested on grounds related to detention issues. as conditions in the issuing State were perceived as not being in conformity with EU Charter and ECHR standards. .

The problems arise at both the pre- and post-trial stages[9]. A judicial authority may find such a detention-related argument compelling in a particular case and refuse surrender. Even where refusal is not the outcome, the "high level of confidence between Member States" (cited as the basis of the EAW system in recital 10 of the Framework Decision) is eroded where judicial authorities must repeatedly weigh this confidence against acknowledged detention-related deficiencies.

Given the right to an expeditious trial enshrined in Article 6(1) ECHR, where pre-trial detention periods are excessively long, Member States executing EAWs may object to the use of an instrument designed for the rapid surrender of persons to face trial if those persons then risk spending months awaiting trial in a foreign prison when they could have remained in their home environment until the authorities in the issuing State were ready for trial.

3.2. The Transfer of Prisoners

Council Framework Decision 2008/909/JHA of 27 November 2008[10] on the application of the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty is to be implemented by 5 December 2011. It establishes a system for transferring convicted prisoners back to the Member State of nationality or habitual residence (or to a Member State with which they have close ties). Article 3(4) provides that Member States must respect fundamental rights and fundamental legal principles. It should facilitate the social rehabilitation of the sentenced person by ensuring that they serve their sentence in their home country.

Example: Peter is a national of Member State A. He is convicted of an offence in Member State B where he habitually lives and sentenced to 2 years in prison. The authorities of Member State B may return him to Member State A to serve the sentence without seeking his consent.

Perceived poor detention conditions, or conditions that risk falling below the minimum standards required by the Council of Europe European Prison Rules, could be an impediment to the transfer of prisoners. Convicted persons who do not wish to be transferred could seek to argue that the transfer could risk subjecting them to inhuman or degrading treatment.

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9 See report from the Commission on the implementation of the EAW - COM(2011) 175, 11.4.2011.

10 Council Framework Decision 2008/909/JHA of 27 November 2008 (OJ L 327, 5.12.2008, p. 27).

The Framework Decision removes the requirement that the sentenced person must consent to transfer. This means that even greater attention must be paid to the possible infringement of fundamental rights post-transfer. Greater access to information on prison conditions and criminal justice systems in other States will enable issuing States to take all relevant factors into account before initiating transfer.

There is a risk that transfers may be used to ease overcrowding in one Member State, possibly exacerbating overcrowding in another. This could be a particular problem where one Member State has a high proportion of prisoners who are nationals of another, perhaps neighbouring, Member State.

The diversity between Member States' laws on the enforcement of custodial sentences poses potential problems for the successful operation of the Framework Decision. If someone is sentenced in one Member State to a term of imprisonment that will be served in another, it is relevant for the person to know how much of that sentence he will actually have to serve. Member States have different rules regarding conditional or early release[11], and this could become an obstacle to transfers if the person concerned were to end up serving a longer sentence in the Member State to which they are transferred than they would serve in the one in which they were sentenced. There is a risk that the executing (administering) State has a less generous system of early release than the issuing (sentencing) State. The ECtHR held[12] that, where this was the case, it did not "exclude the possibility that a flagrantly longer *de facto* term of imprisonment in the administering (executing) State could give rise to an issue under Article 5 ECHR (right to liberty and security), and hence engage the responsibility of the sentencing (issuing) State under that Article"[13].

3.3. Probation and Alternative Sanctions

Council Framework Decision 2008/947/JHA of 27 November 2008[14] on the application of the principle of mutual recognition of probation decisions and alternative sanctions is to be implemented by 6 December 2011.

The Framework Decision relates to the post-trial stage. It applies the principle of mutual recognition to many of the alternatives to custody and measures facilitating early release. Article 1(4) provides that Member States must respect fundamental rights and fundamental legal principles. The probation decision or other alternative sanction would be executed in a Member State other than the one in which the person was sentenced, and can be executed in any Member State as long as the person concerned has consented.

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11 Some Member States have provisions for automatic early release of prisoners, some have discretionary mechanisms and others combine both discretionary and automatic provisions. Variations also exist in the monitoring arrangements for offenders released early from prison and the ability (or otherwise) of prisoners to earn remission from their sentence as a result of work carried out whilst in prison. There are also variations between Member States with regard to the manner in which custodial sentences can be served. Some States make provision for prisoners to serve a custodial sentence during the weekend or evening, whilst others make provision for daytime detention. In contrast, these types of sentence execution are not available at all in a number of Member States which rely instead on the use of imprisonment in its more "traditional" sense.

12 Final decision as to the admissibility of application no. 28578/03 by *Szabó v Sweden*, 27 June 2006.

13 See Dirk van Zyl Smit and Sonja Snacken, Principles of European Prison Law and Policy. Penology and Human Rights, OUP, 2009, Chapter 8, Release.

14 Council Framework Decision 2008/947/JHA of 27 November 2008 (OJ L 337, 16.12.2008, p. 102).

Example: Anna is a national of Member State A but is on holiday in Member State B. She is convicted of an offence in Member State B and sentenced to carry out community service in lieu of a custodial sentence. She can return to her home Member State and the authorities of that Member State are obliged to recognise the community sentence and to supervise Anna's execution of it.

The Framework Decision applies the principle of mutual recognition to many of these alternatives to custody and measures facilitating early release. Its correct application would imply that probation measures and alternatives to imprisonment would be available in all legal systems across the Union. These measures may then have to be promoted at Union level for a proper and efficient application of the rules by Member States.

3.4. European Supervision Order (ESO)

Council Framework Decision 2009/829/JHA of 23 October 2009[15] on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention is to be implemented by 1 December 2012. Article 5 provides that Member States must respect fundamental rights and fundamental legal principles.

The ESO concerns provisional release in the pre-trial stage. It will enable a non-custodial supervision measure to be transferred from the Member State where the non-resident is suspected of having committed an offence to the Member State where he is normally resident. This will allow a suspected person to be subject to a supervision measure in his home Member State until the trial takes place in the foreign Member State, and thus provides a way to reduce pre-trial detention of non-resident European Union citizens in the future.

Example: Hans, who is a resident of Member State A is arrested and charged with an offence in Member State B. His trial will not start for 6 months. If he was a resident of Member State A, the judge would be inclined to release him on bail, with a condition of reporting to the police station, but the judge is reluctant to do so because Hans lives in another Member State and will return there pending trial. The judge fears that Hans will not return and may even flee. Under the ESO, the judge can allow Hans to return home imposing a reporting condition, and can ask the authorities in Member State A to ensure that Hans does report to the police station in accordance with the order of the court in Member State B.

The ESO provides for several alternative types of supervision to be applied instead of pre-trial detention, such as an obligation for the person to inform the competent authority in the executing State of any change of residence for the purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings; an obligation not to enter certain localities in the issuing or executing State; an obligation to remain at a specified place, during specified times; a limitation on leaving the territory of the executing State; an obligation to report at specified times to a specific authority, an obligation to deposit a certain sum of money or to give another type of guarantee or an obligation to undergo treatment for addiction.

The ESO system is discretionary for the issuing Member State, which makes it hard to predict how national courts will apply it and how it will interact with the EAW. Questions also arise as to how frequently the ESO will be used.

Mutual trust is central to the ESO's successful operation. However, there is a risk that the instrument will not be used uniformly across all Member States, but only between those countries where mutual trust exists.

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[15] Council Framework Decision 2009/829/JHA of 23 October 2009 (OJ L 294, 11.11.2009 p. 20).

The use of alternative measures to pre-trial detention could be encouraged. With the application of the ESO, the use of alternative measures such as, for example, surveillance via electronic devices should be promoted for a proper and efficient application of the ESO rules by Member States and to reduce pre-trial detention.

3.5. Implementation

The question whether detention conditions are such as to enable mutual trust to take root so that there is no impediment to the application of mutual recognition instruments across the Union should be addressed before the Framework Decisions are to be transposed (in 2011 and 2012 respectively).

It is important that Member States transpose them into their national legislation promptly and apply them correctly. The Commission is available to give Member States assistance and guidance on good practice and will continue its regional implementation workshops from 2010, as these were considered an important aspect of the implementation process.

QUESTIONS ON MUTUAL RECOGNITION INSTRUMENTS

1) *Pre-trial*: What non-custodial alternatives to pre-trial detention are available? Do they work? Could alternatives to pre-trial detention be promoted at European Union level? If yes, how?

2) *Post trial*: What are the most important alternative measures to custody (such as community service or probation) in your legal system? Do they work? Could probation and other alternative measures to detention be promoted at European Union level? If yes, how?

3) How do you think that detention conditions may have an effect on the proper operation of the EAW? And what about the operation of the Transfer of Prisoners Framework Decision?

4. THE ISSUE OF PRE-TRIAL DETENTION

Detention may only be ordered when it complies with the duty to respect the right to liberty (Article 5(1) ECHR) which is closely linked to the presumption of innocence.[16] The EU Charter, Article 48(1), provides that "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law". Article 6(2) ECHR and the ICCPR[17] also have provisions on the presumption of innocence[18]. Pre-trial detention in the context of this Green Paper covers the period until the sentence is final[19]. Pre-trial detention is a measure of an exceptional nature in all Member States' judicial systems. It is to be applied only when all other measures are judged to be insufficient. In some European systems pre-trial detention is even set by a constitutional norm revealing a bias in favour of liberty in line with the presumption of innocence. This limits the circumstances under which pre-trial detention is authorised and establishes specific criteria and procedures for its use. For example, it should only apply after the court determines that defendants pose a substantial risk of flight, a threat to the safety of the community, victims or witnesses, or a risk of hindering investigations. The

16 See Commission Green Paper on the presumption of innocence - COM(2006) 174, 26.4.2006.

17 International Covenant on Civil and Political Rights.

18 Article 48(1) of the Charter, Article 14(2) of the ICCPR.

19 Likewise in most EU Member States, the notion "pre-trial detention" in the Green Paper is used in a 'broad' sense and includes all prisoners who have not been finally judged.

status of detained defendants should, however, be monitored in all cases and their eligibility for release reviewed throughout the adjudication period. The cases of detained defendants should be given priority in scheduling for trial. The proportionality principle in criminal matters requires that coercive measures, such as pre-trial detention or alternatives to such detention, are only used when this is absolutely necessary and only for as long as required. It falls to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time and complies with the principle of the presumption of innocence and the right to liberty whilst meeting the necessities of the investigation of criminal offenses.

4.1. Length of pre-trial detention

The time a person spends in pre-trial detention varies widely from one Member State to another. ECtHR case law establishes that pre-trial detention must be regarded as an exceptional measure and the widest possible use should be made of non-custodial supervision measures. In practice, however, non-nationals are often at a disadvantage in obtaining bail because they are seen as a greater flight risk than national defendants. The result is that other defendants are regularly denied release, and consequently their right to liberty, simply because they have fewer ties with the jurisdiction.

Some countries have no legal maximum length of pre-trial detention. In some, a person can be held in pre-trial detention for up to 4 years[20]. Excessively long periods of pre-trial detention are detrimental for the individual, and a pattern of excessively long pre-trial detention in a particular Member State can undermine mutual trust.

A judicial authority must apply the most lenient coercive measure appropriate, i.e. choose an alternative measure to pre-trial detention, if this is sufficient to eliminate the risks of absconding or reoffending. These authorities can issue a EAW to ensure the return of someone wanted for trial who has been released and allowed to return to his home State instead of placing him in pre-trial detention. This possibility could enable judges to make a more balanced use of pre-trial detention to release persons accused of committing offences not permanently resident in their jurisdiction and thus reduce periods of pre-trial detention

Finally, Article 47 of the EU Charter and the ECHR[21] provide that everyone shall be entitled to trial within a reasonable time or to release pending trial, and that release may be subject to guarantees to appear for trial.

4.2. Regular review of the grounds for pre-trial detention/statutory maximum periods

The question arises whether minimum standards in respect of provisions on review of the grounds of pre-trial detention and/or statutory maximum time limits on pre-trial detention would enhance mutual confidence between Member States.

The right to an expeditious trial and to pre-trial release (unless there are overriding reasons for keeping the individual in pre-trial custody) is an important right. Some Member States have

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[20] See Study on "Pre-trial detention in the European Union, An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU" carried out by the Universities of Tilburg, NL, and Greifswald, DE.

[21] Article 5(3) ECHR.

statutory maximum time limits for pre-trial detention. There is a requirement for judicial review of pre-trial detention under Article 5 ECHR, and this is to be interpreted as a recurring obligation for authorities in charge of investigation and prosecution to justify the extension of the suspect's pre-trial detention regularly.

Council of Europe Recommendation 2006-13[22] on remands in custody lays down conditions for remands in custody and safeguards against abuse. It recommends measures for periodic review, by a judicial authority, of the justification for remanding someone in custody.

The Commission wants to assess whether legally binding rules, for instance EU minimum rules on regular review of the grounds for detention, would improve mutual confidence.

QUESTIONS ON PRE-TRIAL DETENTION

4) There is an obligation to release an accused person unless there are overriding reasons for keeping them in custody. How is this principle applied in your legal system?

5) Different practices between Member States in relation to rules on (a) statutory maximum length of pre-trial detention and (b) regularity of review of pre-trial detention may constitute an obstacle to mutual confidence. What is your view? What is the best way to reduce pre-trial detention?

6) Courts can issue a EAW to ensure the return of someone wanted for trial who has been released and allowed to return to his home State instead of placing him in pre-trial detention. Is this possibility already used by judges, and if so, how?

7) Would there be merit in having European Union minimum rules for maximum pre-trial detention periods and the regular review of such detention in order to strengthen mutual trust? If so, how could this be better achieved? What other measures would reduce pre-trial detention?

5. CHILDREN

Children are in a particularly vulnerable position in relation to pre-trial detention. Deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers their reintegration in society. A recent study[23] reveals differences regarding the way in which children are treated in the different legal systems. Within the EU, the minimum age of criminal responsibility varies from 8 years in Scotland to 16 years in Portugal. Generally, Member States have special regulations for juveniles.

A number of measures have been taken at international level to protect the rights of children in criminal proceedings, including as regards detention. Article 37 of the UN Convention on the Rights of the Child provides that arrest and detention of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. Children shall be treated in a manner that takes into account the needs of persons of their age, including being kept separate from adults and have the right to maintain contact with their families. Every child

[22] Adopted by the Committee of Ministers of the Council of Europe on 27 September 2006.

[23] Document, Strasbourg 6 June 2006, PC-CP (2006) 09, "Youth custody and the balance between education and punishment – an international comparison of developments and prospects".

deprived of their liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of liberty before a court or other competent authority.

QUESTION ON CHILDREN

8) Are there any specific alternative measures to detention that could be developed in respect of children?

6. DETENTION CONDITIONS

A number of judgments from the ECtHR have highlighted deficiencies in some prisons within the EU[24]. The Stockholm Programme states that "[..] Efforts to promote the exchange of best practice should be pursued and the implementation of the Council of Europe's European Prison Rules supported. Issues such as alternatives to imprisonment, pilot projects on detention and best practices in prison management could also be addressed".

6.1. Current activities related to detention at EU level

The Commission supports a number of prison related activities via different financial programmes[25]. Activities range from studies on prison conditions to practical projects on education and training, and social inclusion, as well as on the re-integration of ex-offenders.

6.2. Monitoring of detention conditions by the Member States

Good detention conditions are a prerequisite to the rehabilitation of offenders. Several reports on the detention conditions in EU prisons reveal that some fall below international standards, including the Council of Europe European Prison Rules and the UN Standard Minimum Rules for the Treatment of Prisoners[26].

Prison standards in Europe are mainly developed by the Council of Europe, including the ECtHR, the CPT and the Committee of Ministers. The standards contained in the European Prison Rules, whilst non-binding, have largely been endorsed.

The 2006 Optional Protocol to the United Nations Convention against Torture (OPCAT), created a new system of regular visits to places of detention to prevent ill-treatment of detainees. At the national level, States Parties to OPCAT[27] must set up or designate National Preventive Mechanisms (NPMs) to carry out the monitoring of prisons.

The EU and the Council of Europe jointly fund a project promoting the establishment of an active network of National Preventive Mechanisms in Europe to foster peer exchange and critical reflection.

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24 See, *inter alia*, the judgments in the cases *Peers v. Greece* (19 April 2001), *Salejmanovic v Italy* (16 July 2009), *Orchowski v Poland* (22 January 2010).

25 See Table 2.

26 Recommendation of the Council of Europe (2006)2 on the European Prison Rules and the United Nations Standard Minimum Rules for the Treatment of Prisoners (1995).

27 The following Member States have ratified OPCAT as of 2 February 2011: CY, CZ, DK, EE, FR, DE, LU, MT, NL, PL, RO, SI, ES, SE and UK. The following Member States have signed OPCAT: AT, BE, BG, FI, IE, IT and PT.

The question of how better to coordinate the work of these monitoring bodies so as to avoid duplication and to foster synergies is regularly discussed between the Commission and the Council of Europe. The National Preventive Mechanisms consider that it is important for them to meet regularly within an informal network to discuss detention matters and exchange best practice in this field. It would also be worth encouraging the administrators of prisons in the European Union to meet regularly. However, it is clear that there is no need for the creation of an additional European Union network of monitoring of prisons. In the two roundtables organised to bring together national monitoring bodies and administrators, it was felt that the EU added value would be in promoting better coordination of the different networks.

QUESTION ON MONITORING OF DETENTION CONDITIONS

9) How could monitoring of detention conditions by the Member States be better promoted? How could the EU encourage prison administrations to network and establish best practice?

6.3. European Prison Rules

The European Prison Rules, adopted by the Council of Europe in January 2006, contain comprehensive guidance on the running of prisons and the treatment of prisoners. They aim to protect prisoners' fundamental rights in a manner that is consistent with the legitimate purpose of their detention and to provide that conditions should facilitate reintegration after release from prison.

The European Prison Rules are not binding, although the ECtHR has used them as a basis when assessing complaints about prison conditions. ECtHR case-law seeks to correct excessively poor prison conditions in individual cases, but cannot achieve uniform compliance in all Member States.

Given its substantial experience and work in this area, the Council of Europe has a leading role. Future European Union action in this field could play a part in ensuring equivalent prison standards for the proper operation of the mutual recognition instruments set out in section 3.

QUESTION ON DETENTION STANDARDS

10) How could the work of the Council of Europe and and that of Member States be better promoted as they endeavour to put good detention standards into practice?

7. PUBLIC CONSULTATION

The Commission hopes that this Green Paper reaches a wide audience and stimulates interest in many quarters. The paper contains 10 questions, and the Commission is interested in receiving feedback, comments and replies from practitioners, such as judges, prosecutors and lawyers and other legal practitioners, directors of prison administrations, people working in the social and probation services, pre-trial detention centres and prisons, academic circles, relevant NGOs and government bodies.

Responses should be sent, by 30 November 2011, to:

European Commission
Directorate-General Justice
Unit B1 – Procedural Criminal Law
MO59 03/068
B-1049 Brussels
Belgium

or by email to:

JUST-CRIMINAL-JUSTICE@ec.europa.eu

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ANNEXES

TABLE 1: PRISON POPULATION IN THE EUROPEAN UNION 2009-2010

Statistics: Prison population in the European Union
(Sources: International Centre for Prison Studies – King's College – University of London available at:

http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/?search=europe&x=Europe

and Eurostat – statistics in focus – 58/2010)

EU Member States Data from 2009/2010	Prison population total (including pre-trial detainees/ remand prisoners)	Pre-trial detainees (percentage of prison population)	Occupancy level (based on official capacity)	Prison population rate (per 100 000 of national population)	Non-national prisoners (percentage of prison population, incl. non-national EU citizens) and 3rd country nationals)	Juveniles / minors (percentage of prison population)
Austria	8 671	23,7%	102,9%	103	45,8%	2,6 %
Belgium	10 501	35%	118,9%	97	41,1%	0,3 %
Bulgaria	9 071	10,4%	155,6%	120	1,9%	0,5 %
Cyprus	831	38,4%	150,5%	105	59,6%	0,6 %
Czech Republic	22 575	11,3%	111,9%	214	7,3%	0,7 %
Denmark	3 967	34,9%	96%	71	21,9%	0,5 %

Estonia	**3 436**	**21,9%**	**97,2%**	**256**	**39,4%**	**1 %**
Finland	**3 231**	**17,1%**	**98,2%**	**60**	**10,3%**	**0,1 %**
France	**59 655**	**27,7%**	**118,1%**	**96**	**19,2%**	**1,1 %**
Germany	**69 385**	**15,5%**	**89,0%**	**85**	**26,3%**	**3,5 % (of pre-trial prisoners**
Greece	**11 547**	**27,4%**	**129,6%**	**102**	**43,9%** -	**4,4 %**
Hungary	**15 373**	**29,3%**	**127,7%**	**153**	**3,8%**	**3 %**
Ireland	**4 409**	**14,9%**	**103,7%**	**99**	**10,8%**	**2,4 %**
Italy	**68 795**	**43,6%**	**153%**	**113**	**36,9%**	**0,5 %**
Latvia	**7 055**	**28,3%**	**70,4%**	**314**	**1%**	**2,1 %**
Lithuania	**8 655**	**14%**	**85,5%**	**260**	**1,2%**	**2,5 %**
Luxembourg	**706**	**47,2%**	**99,3%**	**139**	**69,5%**	**0,7 %**
Malta	**583**	**35,2%**	**84,5%**	**140**	**40,1%**	**6,1 %**
The Netherlands	**15 604**	**36,3%**	**86,4%**	**94**	**27,7%**	**4,7 %**
Poland	**82 794**	**10,3%**	**97,4%**	**217**	**0,7%**	**0,3 %**
Portugal	**11 896**	**19,4%**	**98,5%**	**112**	**20,2%**	**0,7 %**

Romania	**28 481**	**16,5%**	**81,4%**	**133**	**0,7%**	**1,6 %**
Slovakia	**10 044**	**17,4%**	**94,6%**	**185**	**1,8%**	**0,8 %**
Slovenia	**1 385**	**24,4%**	**124,2%**	**67**	**10,8%**	**2 %**
Spain	**73 520**	**18,7%**	**136,3%**	**159**	**35,5%**	**0 % (2,1 % under 21)**
Sweden	**7 286**	**24,7%**	**105,4%**	**78**	**28,7%**	**0,1 %**
United Kingdom [28]						
a) England & Wales	**85 206**	**14,9%**	**107,2%**	**154**	**12,9%**	**1,9 %**
b) Scotland	**7 781**	**20,2%**	**105,2%**	**149**	**3,4%**	**1,5 %**
c) Northern Ireland	**1 557**	**36,8%**	**82,7%**	**86**	**8%**	**1 %**
EU AVERAGE		**24,7%**	**107,3%**	**137**	**21,7%**	**1,6%**

[28] Figures for the UK are reported separately as a) England & Wales, b) Scotland and c) Northern Ireland owing to the existence of three separate jurisdictions.

TABLE 2: CURRENT SUPPORT ACTIVITIES AT EU LEVEL

Title	Nature of activity	Description
Criminal Justice Programme (JPEN)		**JPEN finances projects relating to criminal justice.**
	"Study on detention in the EU"	**The "Study on detention in the EU" is being carried out by the Institute for International Research on Criminal Policy, of the Universities of Ghent, BE, and Tilburg, NL. It is an empirical EU-wide questionnaire-based survey of detention conditions in all Member States. It examines prison conditions, length of detention periods, early release provisions, health of prisoners, good order (compliance with international standards) and inspection and monitoring, and contains a special section on juveniles. To be published in summer 2011.**
	"Pre-trial detention in the European Union"	**"Pre-trial detention in the European Union, An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU" carried out by the Universities of Tilburg, NL, and Greifswald, DE. It contains a statistical analysis and individual chapters for each EU Member State.**
Pathways for Inclusion	**European Conference on Prison Education**	**In February 2010, the European Commission organised a European Conference on Prison Education, Pathways for Inclusion. Its results were instrumental in shaping pathways for future development of prison education modules.**
Lifelong Learning Programme (LLP) **&** **Youth in Action programme**	**Initiatives targeting offender rehabilitation**	**Education and training are a vital component in effective rehabilitation strategies, as are measures to engage young people at risk. The main EU instruments are the Lifelong Learning Programme (LLP) and the Youth in Action programme. Initiatives specifically targeting offender rehabilitation account for over 100 grants totalling some 12 million €.**
European Social Fund	**Supports vocational and social re-integration of ex-offenders.**	**The European Social Fund supports both the vocational and the social re-integration of ex-offenders. Common consensus is that the single most important factor in reducing reoffending is that the offender has a**

		job on release. Around 10 billion € over the period 2007-2013 is earmarked for actions promoting the social inclusion of the most disadvantaged groups, which include prisoners and ex-offenders.
EQUAL Community Initiative etc	**Aims to strengthen the employability of ex-offenders**	**The EQUAL Community Initiative aims to strengthen the employability of ex-offenders. A Learning Network for the Re-integration of Ex-Offenders bringing together 11 Member States has been established and is funded until the beginning of 2012.. The Structural Funds are used in several programmes to provide vocational training facilities in correctional centres. These are European Regional Development Fund (ERDF) investments in areas such as educational training workplaces and are supplemented by European Social Fund actions designed to help reintegrate ex prisoners into society.**
Peer-to-Peer II Project	**The aim is to reduce poor treatment of prison inmates at national level in Europe**	**The European Commission, the Council of Europe and the newly created Human Rights Trust Fund are co-funding a large project, the Peer-to-Peer II Project which includes funding for the European NPM Project. The overall objective of the project is to reduce poor treatment of prison inmates at national level..**