CCBE RESPONSE TO 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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"Strengthening mutual trust in the European Judicial area – a Green Paper on the application of EU Criminal Justice legislation in the field of detention"

CCBE (General Introductory paragraph)

The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries.

The CCBE is pleased to respond to the important Green Paper on detention. It agrees entirely with the expression on the part of the Commission that whilst detention conditions in prison management are the responsibility of Member States, there is clearly a close association between the conditions of detention of prisoners on the one hand and the principle of mutual recognition on the other. It is fair to say that when the Commission promotes measures facilitating the trans-national prosecution of crime it has a responsibility to ensure that the consequences of those measures, whether reflected in pre-trial detention, or in the conditions in which a sentence is served, adequately uphold the fundamental rights guaranteed either by Article 3 of the European Convention on Human Rights or Article 4 of the Charter.

In addition to the examples quoted in the Green Paper, whether a person is being surrendered to an issuing State for trial or returned to a home State to serve a sentence, there is the important trend promoted by EU directives of State's claiming extra territorial jurisdiction in respect of a broad range of serious offences with a consequence that a citizen may be tried and imprisoned in a Member State in which they have never physically been present beforehand.

Improving conditions of detention throughout the European Union is an entirely appropriate area of interest and activity on behalf of the Commission. Regrettably, it is a fact of life that the humane treatment of prisoners is rarely a key political priority for Member State governments, and particularly presently at a time when there is pressure on all governments in terms of the use of available resources, there is a danger that the humane treatment of prisoners will be among the first casualties of budgetary cuts. For these reasons, intervention at a European Union level is an essential step to ensure that the protections provided by the Charter of fundamental Rights and the European Convention on Human Rights (ECHR) are meaningful, and are applied on an even-handed basis to all citizens no matter what Member State they find themselves detained in.

The CCBE wholly subscribes to the principles promoted by bodies charged with the protection of human rights that imprisonment ought to be the sanction of last resort, particularly so in relation to pre-trial detention and the treatment of minors. It is beyond argument of course that there are many situations where imprisonment is the only realistic sanction, however, the CCBE, has concerns based on the wide experience of its members in all Member States that unfortunately issues of resources and training have led to the practical consequence that imprisonment is often the first rather than the last resort considered by judicial authority. This therefore is a further reason why action at a European Union level to promote an awareness of the importance of the "last resort" principle is timely.

The CCBE agrees with the observations made in relation to the European Arrest Warrant - one of the most frequently argued issues when surrenders are being challenged are the issue of prison conditions in the issuing State. Evidence provided to national courts, often from the Council of Europe sponsored Committee for the Prevention of Torture, has demonstrated very serious shortcomings in human rights terms in the conditions of imprisonment in Member States. Until action is taken to raise standards of detention across the board there will continue to be tensions in this area where some Member States will refuse to surrender persons to other Member States based on their poor prison conditions. This naturally undermines the principle of mutual recognition and will lead to tensions, inappropriately expressed as being frustration, on the part of the issuing State at the refusal of the executing State to surrender, when it ought to reflect itself in deep embarrassment on the part of the issuing State that their prison conditions warranted refusal.

Of equal, if not greater concern, will be the danger that some Member States will surrender prisoners to other Member States with an unacceptable prison regime simply because the executing State has in its own domestic prison system equal if not greater shortcomings. It ought to be a source of significant public disquiet that an accused person sought for trial in Member State A will be surrendered for trial if the warrant is executed in Member State B, but would not be surrendered if the warrant was executed in Member State C, solely because Member State B cannot assert that it treats its prisoners in accordance with the standards guaranteed by Articles 3 ECHR and 4 of the European Charter.

It goes without saying that it should only be in the most exceptional case that liberty is deprived prior to conviction and that the debate relating to prison conditions should be confined to a very limited number of cases.

Insofar as the transfer of prisoners is concerned the Commission has made an extremely important point in the Green Paper. An obligation to transfer a prisoner to his home State to serve a sentence is a worthy objective, but becomes wholly devalued if that has the effect of turning a Member State into an instrument of oppression by having to transfer the prisoner to a home State where prison conditions are in violation of Articles 3 and 4 of the respective instruments. There is obviously a concern that there will be cases where the conditions are unacceptable, but the evidence is not available to demonstrate that to the level that a Member State would require before refusing to transfer a serving prisoner. In addition, it is likely that many affected persons will not have adequate legal representation, or be inadequately personally equipped to advance arguments in relation to the conditions to which they are to be exposed (and they may not even be personally aware of them). Without swift action to raise standards of detention throughout the European Union there is likely to be a situation where there will be wholly negative tension between Member States on this topic.

The Commission has identified a real difficulty in relation to the administration of sentences where either more or less favourable regimes apply between the two States concerned. At present if a prisoner applies for a transfer to a State where his defacto sentence will in fact be longer than the sentence that he would have suffered in the sentencing State, at least the argument can be advanced that this was a matter of choice. In reality of course, in many cases there is no real choice as the prisoner sentenced in a foreign country is completely without family and community contact and is desperate to return to his home State even at the price of serving a lengthier sentence.

That is injustice enough, but it would be compounded in a situation where having suffered the appropriate sentence in the State where the offence was committed, the prisoner finds himself by virtue of the framework decision transferred to his home State where even less favourable terms will be endured by him. This appears to the CCBE to constitute effectively a double penalty, but without the benefit of fair trial rights to guard against it. In the view of the CCBE the time has now come for the Commission to promote a measure to the effect that under no circumstances can a transferred prisoner be subjected to a regime any less advantageous than that from which he has been transferred. We believe that it is not beyond the capacity of Member States to create the necessary exceptions to their domestic prison regime to cater for transfer cases. It is unconvincing to suggest, as some commentators have done, that it would lead to disquiet within any given Member State's prison system, that prisoners who have been transferred into it are obtaining more generous remissions/early release because of the State from which they have been transferred. That is to suggest that "domestic" prisoners are incapable of distinguishing between their situation and those of their fellow inmates who are transfer prisoners. This is an argument devoid of principle.

In the experience of the CCBE, the European Supervision Order is not yet adequately understood nor is it implemented widely enough. This, coupled with the increased familiarity on the part of the courts in all Member States with the efficacy of the European Arrest Warrant, ought to have achieved a situation where an application for conditional release ought not to be disadvantaged simply by virtue of their intention to reside in their home State, subject to suitable conditions pending trial. There is a natural concern on the part of the CCBE that a much greater effort has been directed towards ensuring that prosecuting authorities can easily and effectively enforce measures such as the European Arrest Warrant, with less and inadequate attention being given to ensuring that accused persons can effectively enforce their rights, including the right not to be detained pending conviction.

Turning to the specific questions we would observe as follows.

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 a European Union level?

   If yes, how?

The most effective measure is that of conditional release. It should be open to judicial authority to be imaginative in relation to the conditions that are attached, to ensure that a fair balance is struck between the rights of the accused person to his freedom, and the entitlement of broader society to see the effective prosecution of crime and that the rights of all affected parties, including complainants are adequately respected in the period prior to trial. Dealing specifically with transnational crime the starting point should be that given that the arrest warrant procedure is in place to secure the swift return of persons who seek to evade trial that the presumption must be in favour of admitting all accused persons to conditional release/bail pending trial. The exception should be extremely limited and flight risk as an exception ought to be re-examined in the context of the availability of the arrest warrant. Instead of taking the view that a person has no concrete ties to the State where the trial is to take place, the view should be whether the person has concrete ties within the European Union generally. Flight risks should not now be considered as including a likelihood that a person will move to another part of the European Union. Public protection concerns such as restraining interference with witnesses, or abstaining from particular conduct can be addressed by conditions being attached to a European Supervision Order and those conditions being respected and effectively supervised in the home State. In the view of the CCBE there has been a lack of leadership and training at a judicial level throughout the European Union to emphasise that the circumstances which pertained prior to the introduction of the European Arrest warrant have now changed and a court's attitude to determining conditional release in transnational cases must also change. Not all judges charged with dealing with the issue of conditional release have direct personal experience of the arrest warrant procedure. Judicial and practitioner training should be provided on this subject and on the opportunities provided by the European Supervision Order.

Prosecutors similarly need training to understand that the traditional objections to conditional release in transnational cases ought not now to be an automatic reaction and that their submissions to courts must reflect the new options available.

Defence lawyers similarly will benefit from training in relation to the types of conditions successfully included in European Supervision Orders in order that they may effectively present to a court considering the issue of conditional release measures that are calculated to strike a fair balance between their client's entitlement to liberty and society's entitlement to the efficient prosecution of offences.

2. **Post- trial:**

   What 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 a European Union level?

   If Yes, how?

This is a most complex question and depends on any given case on where the appropriate balance is to be struck between the various sentencing objectives of punishment, deterrence (both in general and specifically to the offender) and rehabilitation.

Proceeding on the basis that incarceration is the least preferred option and to be reserved for those most serious cases where public protection requires nothing else, the range of alternatives are very broad.

In cases where the offending conduct is isolated in its nature and wholly out of character the simple fact of engagement with the criminal process may in itself be adequate punishment and an absolute discharge free from a recorded conviction may be appropriate.

In those cases where there is reason to believe that an absolute discharge may in time be merited, but the accused has yet to demonstrate in a verifiable way a change in his personal circumstances a period under the supervision of the probation services would be appropriate.

In some cases where society's disapproval of the conduct by recording a conviction is required and there must also be an element of punishment, a monetary fine is an option. To be effective the fine must be calibrated to the specific circumstances of the offender in order that it constitutes a real punishment, without being unrealistic in terms of the offender's capacity to pay.

There will then be a category of cases where the offending conduct clearly warrants imprisonment, but the change in the circumstances of the offender gives the judicial authority reason to believe that there may be no repeat offending. In such cases the imposition of a custodial sentence, but suspended for a specific period of time and perhaps on specific conditions is an option. Accordingly, any punishment (save the fact of recording of a conviction which is punishment in itself) is deferred and might never take place at all.

In other cases immediate punishment is required but it does not need to be in a custodial setting. In such cases, a sentence of service within the community is an option that might be considered.

Each of the sentencing options discussed above may have as an element a requirement that there be continuing cooperation of a specific kind from the offender. The cooperation might include abstinence from alcohol or narcotics; participation is rehabilitative courses such as anger management or periods where there are restrictions on liberty such as curfews, reporting obligations to police stations etc.

In some jurisdictions technology in the form of electronic tagging has been employed to effectively restrict the movements of the offender in a form of "house arrest" without incurring any of the negative consequences of lodging the offender in a penal institution.

In order that Member States make full use of the entire range of sentencing options that have been discussed above it is the view of the CCBE that at a European Union level leadership must be given to ensure that there are adequate resources put in place specifically in terms of providing expert probation services, but also in terms of judicial training so that there is not an automatic recourse to the default position of custodial sentences.

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?

As discussed above it is natural that those Member States who take their obligations under Article 3 of the European Convention of Human Rights and Article 4 of the Charter of European Union seriously, that there will be great reluctance in surrendering/transferring prisoners to jurisdictions where it is to be anticipated that their human rights will be negated. There will be cases where transfers will be refused on the stated reason that conditions of detention amount to inhuman and degrading treatment. Such judgments are likely to cause tensions between Member States. This naturally will undermine the entire principle of mutual recognition and judicial cooperation.

However, and equally possible, a situation might develop where a court will have grave concerns about the prison conditions in Member State X but may not feel that there has been an adequate evidential basis laid to justify a refusal of surrender. This might very well be because an individual prisoner has inadequate legal representation and points that ought to have been advanced, backed by evidence, on behalf of the prisoner have not been and the court is uncomfortable that this is so.

This may very well lead, as occurs in every jurisdiction, to result-oriented decisions where surrender is refused on another, and perhaps spurious, technical ground where a court is unwilling to subject the prisoner to the prison conditions but does not have an evidential basis to make that Order, and instead refuses surrender for non-compliance with some technical requirements. Such decisions can hardly be considered as enhancing the process of mutual recognition and judicial cooperation.

4. Questions on pre-trial detention

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?

While the general principle is well known, the reality is that some judicial authorities do not apply the principle in practice. This may be partly due to the particular courts having inadequate regard to the presumption of innocence, and commencing the punishment phase of the process before the trial phase is complete.

There are also cases where courts have either acknowledged or withheld concerns in relation to the possible interference with witnesses, the commission of further crimes or absconding prior to trial. In such instances, bail or conditional release is frequently refused. In cases that are less serious (on the overall spectrum of offences), but obviously very significant in terms of any individual offender, the period of time between a decision to remand in custody, and any possible judicial review by way of appeal may very well render the appeal an ineffective remedy.

It is undoubtedly the position that offenders who are not in their home State are at a particular disadvantage in relation to the prospect of being remanded in custody prior to trial. This is partly because of a lack of general appreciation that as members of the European Union they should be treated no differently in terms of being amenable to further prosecution than if they were from the home Member State. Training and leadership at a European Union level to emphasise that concomitant with the European Arrest warrant must be an acceptance that to all intents and purposes the offender is now as amenable to arrest in the event of absconding as if he had simply moved to another part of the Member State concerned. Another difficulty encountered by those who are before the courts in a State other than their home State are the difficulties in accessing effective legal representation and perhaps accessing adequate translation facilities. These issues have been addressed in Measures A, B and C and it is to be hoped that in due course there will be greater equality in this regard.

As of the present however, the CCBE would wish to record its concern that there are a substantial number of persons remanded in custody not because the circumstances of their cases justify such a course, but because they are personally unaware of their entitlements and by virtue of the disadvantage of appearing in the courts of a Member State other than their own they have not had access to early and effective legal assistance.

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?

Obviously the starting point is to remind Member States of their obligations to ensure that every accused is provided with a trial with due expedition. This is an Article 6 right which unfortunately is breached to a certain degree in most Member States. It is however important to bear in mind that this is only one of a bundle of fair trial rights guaranteed by Article 6 and that it would be unacceptable for Member States to artificially expedite trials where the sole consequence is a "rush to judgment" depriving the accused of a fair opportunity to prepare for trial. The following steps are suggested as useful measures to avoid excessive detention in custody prior to trial:

1. To reinforce the presumption against detention prior to trial there should be a requirement for a written ruling giving reasons in each case where conditional release is refused.
2. Refusal to grant conditional release must be subject to an appeal.
3. Whether appealed or otherwise a decision to refuse conditional release must be re-visited on a regular basis e.g. every two months to ensure that the authorities are preparing the prosecution with reasonable expedition and to enquire as to whether or not safeguards are now available that might not have been available at the time of the original decision which would enable a court to reverse the decision to refuse.
4. To emphasise the importance of the authorities preparing prosecutions swiftly there should be an indicative time frame for the submission of the prosecution file for trial. Whether this is 42 days, 100 days or 365 days may very well fall to the individual Member States, but the important thing is that there is at the outset of the process a clear indication of the expectation of the court with an underlying understanding that any failure to meet the indicative time line will be the subject of anxious scrutiny upon review.
5. Where it is not already stated in national law it should be clear that the period of time spent in pre-trial detention be calculated as part of any sentence subsequently imposed.
6. Where an accused is acquitted, or where convicted but not subjected to a custodial sentence, there must be in place an effective compensation system intended to restore the accused to the position in which he would have been were it not for the (subsequently unjustified) decision to remand in custody. This would include compensation in respect of lost earnings together with general damages, and exceptionally, punitive or aggravated damages.

6. **Courts can issue an 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?

In the view of the CCBE this point is currently under appreciated in the courts of the Member States. The change that occurred with the introduction of the European Arrest warrant was not accompanied by adequate information exchanges specifically with inadequate judicial training and practitioner training. What is required at this stage is to reinvigorate the process by the provision of educational resources in terms of seminars and materials to equip judges and practitioners to deal with this issue. In order to demonstrate that the information has been received and applied, it should be a requirement in every case whether with or without a transnational element, that written reasons be given where pre-trial conditional release is refused. Such a general practice would therefore obviously encompass those cases where the accused wishes to return to his home State pending trial in the Member State where he stands accused. It would in due course simply become unacceptable for conditional release to be refused on the sole ground that the accused is a resident of a Member State other than the State of trial and by this exercise courts would realise that to give effective support to the European Arrest warrant mechanism they would have to acknowledge and respect the efficacy of the measures.

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 will reduce pre-trial detention?

To an extent some of this ground has already been addressed in question 5. Naturally, and whether forming part of a reasoned judgment or simply a factor that colours the thinking of a court, some Member State courts will have grave reservations about surrendering persons to Member States where the trial process is perceived to be unduly slow and the period in detention unnecessarily oppressive. Where for cultural or traditional reasons it is difficult for individual Member States to reform their legal processes, then the admission to conditional release pre-trial coupled with an entitlement to reside in an accused own Member State is a solution. In what would hopefully be a limited number of cases where that does not arise then indeed it would be appropriate for the European Union to indicate maximum periods for pre-trial detention. It is obviously impossible to be completely prescriptive in this regard as every case will turn on its own facts. However an indicative maximum, which can be extended only with good and stated reason adjudicated on by an independent judicial authority would be a welcome development. The additional steps identified in the reply to question 5 would also be relevant in this context.

Above all, there should be in place an adequate deterrent to ensure that prosecuting authorities do not have the comfort of effectively holding somebody in preventative detention when there is in fact inadequate evidence to sustain a conviction.

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

Clearly children before the courts where an application is made to remand them in custody are in a position of special vulnerability. In many cases, due to inadequate family support, they will not be in a position to offer to a court the guarantees that might otherwise be forthcoming from a person who is applying for conditional release. To reinforce and to make effective the presumption against pre-trial detention it should be necessary for the Member State to put in place a care solution where the State would provide adequately resourced and expert social workers to advise and if necessary to act in loco parentis. This would involve the provision of suitably supervised accommodation which can be proffered to a court as an alternative custody. This would effectively require the State to provide resources at the very outset of the criminal process, rather than confining the provision of those resources to pre-sentence reports at the end. There can be no gain saying but that even the briefest remand of a child in a custodial penal institution is wholly undesirable and absolutely inimical to any process of reform. In those Member States where by virtue of overcrowding or otherwise, juveniles are detained with adults, or even appear before the same courts in custody as adult offenders, the situation is even graver.

9. **How could monitoring of detention conditions by the Member States be better promoted?**

   How could the EU encourage prison administration to network and establish best practice?

Each Member State should have an adequately resourced and independent inspectorate of prisons. Their reports should be frequent, at least annually, and made public. There should be real political accountability where violations of Articles 3 or 4 are detected by the inspectorate. Separately additional resources should be provided to independent supervisory bodies such as CPT so that there is again available, at least annually, an independent and accessible report in relation to prison conditions in any given Member State. The fact that there are two independent reviews of any Member State's prison conditions on an annual basis will ensure transparency and accountability. A welcome recent development has been the proposal in Measure C to the effect that defence lawyers

ought to have the opportunity to inspect the conditions of detention of their clients. In order for this measure to be effective adequate training must be given to defence lawyers, and to those in charge of penal institutions, so that this right is effectively and regularly exercised.

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

This is primarily a function of training to ensure that all stakeholders are aware of the availability of the reports provided by the Council of Europe – CPT so that for arguments sake Member States issuing an arrest warrant do so in the clear understanding that this is likely to trigger an examination by the requested Member State of prison conditions in the issuing Member State. The presumption ought to be that the CPT reports are both independent and authoritative and therefore the consequences of a negative finding by the CPT on any Member State would be real and immediate.