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Targeted Consultation on the European Commission's initiative on detention – recommendation on rights and conditions

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Stellungnahme

Die Bundesrechtsanwaltskammer bedankt sich für die Möglichkeit, an der öffentlichen Konsultation der Europäischen Kommission zur Targeted Consultation on the European Commission's initiative on detention – recommendation on rights and conditions teilnehmen zu dürfen. Auf den Fragebogen der Konsultation, antwortet sie auf Grundlage der Erfahrungen ihrer Expertinnen und Experten wie folgt:

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Targeted Consultation on the European Commission's initiative on detention – recommendation on rights and conditions

European Commission's initiative on detention – recommendation on rights and conditions

TARGETED CONSULTATION

Introduction

In 2016, the Commission carried out a comparative study on pre-trial detention in EU countries, which highlighted a number of problems arising from differences in pre-trial detention laws. There are currently no common EU standards on pre-trial detention and material conditions of detention.

This initiative aims to identify those aspects of existing international standards where more convergence between EU countries would help improve judicial cooperation in criminal matters.

Currently, an exploratory study on pre-trial detention is being carried out by an external contractor (Centre for Strategy & Evaluation Services (CSES)). This study will mainly focus on legislative developments in the Member States in the area of pre-trial detention and provide an overview of the existing Council of Europe standards and case law of the European Court of Human Rights.

Problems the initiative aims to tackle:

a) National practices in pre-trial detention and material detention conditions not meeting international standards Despite standards in this field developed by the Council of Europe, it appears that in many EU countries pre-trial decision-making amounts to a routine exercise that does not involve reasoned decisions. Available data show that some countries do not provide for pre-trial alternatives (e.g. bail, reporting to the police authorities, electronic monitoring or a travel ban), and even if these exist, they are rarely used by judges at this stage of the proceedings. It seems that there is also a lack of knowledge among judges and prosecutors of the applicable international standards as regards decision-making on pre-trial detention. Material detention conditions also vary considerably between EU countries and in some cases fall below the standards of the European Convention on Human Rights (ECHR) and other international human rights acts.

b) Negative impact on mutual trust and EU judicial cooperation in the area of criminal law The divergent national practices for pre-trial detention and in material detention conditions are detrimental to mutual trust between EU countries and might in particular affect the operation of EU judicial cooperation instruments,

such as the European arrest warrant. Indeed, there are an increasing number of cases where surrender under a European arrest warrant is contested because it is expected that the person concerned will be kept in pre-trial detention for an overly long period and suffer from poor conditions during that time. Such contestations may considerably delay the procedure and affect the efficiency and general credibility of the European arrest warrant.

About this consultation

Consultation period

20 May- 17 June 2022

Topics

Justice and fundamental rights

Type of act

Commission Recommendation

Departments

Justice and Consumers

For further information on this initiative, please see: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13173-Pre-trial-detention-EUrecommendation-on-rights-and-conditions_en

We would like to thank you in advance for your time and input.

If, in addition to completing this questionnaire, you wish to submit any relevant information, data or policy paper, or for any further questions please send it to:

JUST-CRIMINAL-JUSTICE@ec.europa.eu

* Please indicate the organisation/institution for which you provide the input:

Bundesrechtsanwaltskammer / The German Federal Bar (Transparency Register: 25412265365-88)

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I. Pre-trial detention

In the context of CSES study information has already been gathered on the national legislation on matters concerning pre-trial detention. The questions below will therefore focus on the **practical application** of measures in this field by Member States.

1. In practice, do Member States comply with the standards of the Council of Europe on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse?

See [Recommendation Rec\(2006\)13 on remand in custody, the conditions in which it takes place and the provision of safeguards against abuse](#)

Yes No

Please explain and provide any further information you consider relevant:

There are not strict limits on the use of remand in custody and alternative measures are used very rarely. There are no uniform guidelines and no minimum standards for living conditions in pre-trial detention (e.g. concerning use of free time, contact with family and friends, computer use, etc.). Many restrictions occur simply because of staff shortages. During the last years many excessive limitations occurred due to Covid restrictions, from which resulted undignified detention conditions in some cases (e.g. isolation of prisoners for many weeks at a time, meaning that they had to stay alone in their cells for 23 hours every day).

2. Is there any evidence of abuse and excessive use of pre-trial detention in practice (i.e. not in line with the principle that pre-trial detention should be a measure of last resort and that alternative measures should be considered first), including poor decision making practices (i.e. decisions are so called "rubber stamping exercises" which are not reasoned)?

Yes No

Please explain and provide any further information you consider relevant:

Pre-trial detention is often imposed on suspects of foreign origin / foreign nationals without there being any concrete indications of a risk of flight. Many courts, for example, reject the use of an electronical ankle bracelet to avoid detention without further explanation.

3. Are pre-trial decisions reviewed on a regular basis?

Yes (please specify below at what intervals) No

Please explain and provide any further information you consider relevant:

The defendant can regularly apply for a detention review. If he does not do so, there is a legally prescribed detention review after 6 months. These reviews must then be done every 3 months. But there is no obligation to such a review as long as the case is being heard in the main court hearing.

4. Are practices of regular review of pre-trial detention effective in reducing the recourse to pre-trial detention where applied?

Yes No

Please explain and provide any further information you consider relevant:

If the pre-trial detainee is not released shortly after the start of pre-trial detention, they are usually not released later either. The only exceptions are cases of serious procedural delays contrary to the rule of law: If the proceedings are not processed for a long time, e.g. due to a lack of judges, the courts partially release the pre-trial detainees.

5. Is the average duration of pre-trial detention excessively long (i.e. longer than 1 year)?

Yes No

Please explain and provide any further information you consider relevant:

No numbers known.

6. Are alternative measures to pre-trial detention available and used on a regular basis?

Yes (please specify) No

Please explain and provide any further information you consider relevant:

Execution of the arrest warrant is sometimes suspended against payment of a bail. Use of electronic monitoring is often generally refused by judges.

7. In your opinion, are the alternative measures used effective (in terms of enhancing social rehabilitation and reducing rates of re-offending)?

Yes No

Please explain and provide any further information you consider relevant:

Use of electronic monitoring can enhance social rehabilitation.

8. Do you have positive and/or negative experiences in applying alternatives at the pre-trial stage, including the use of new technologies, such as electronic monitoring?

Please explain and provide any further information you consider relevant:

Such alternatives are often considered ineffective by courts without ever having tried them.

9. What could be improved in order to enhance the use of alternatives to pre-trial detention?

Please explain and provide any further information you consider relevant:

Better education of the judiciary on the effectiveness of such measures, statistical recording of effectiveness, stricter obligation to justify refusal of use.

10. Are children or vulnerable persons placed in pre-trial detention only as a last resort (as demonstrated by the number of children and vulnerable persons in pre-trial detention and those serving alternative measures to pre-trial detention)?

Yes No

Please explain and provide any further information you consider relevant:

No numbers known.

11. Are residents of other Member States particularly affected by pre-trial detention?

Yes No

Please explain and provide any further information you consider relevant:

For persons with connections abroad, the risk of flight is emphasised more. But courts respect European case law, which prohibits discrimination against residents of other Member States.

12. Do courts apply alternatives to pre-trial detention also with respect to foreign nationals (nonresidents)?

Yes (please specify) No

Please explain and provide any further information you consider relevant:

13. Do courts make use of the European Supervision Order?

See [Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention \(OJ L 294, 11.11.2009 p.20\)](#)

Yes No

14. If limited use of the European Supervision Order is made by courts, what are, in your opinion, the reasons for such limited use?

Yes No

Please explain and provide any further information you consider relevant:

15. According to your experience, is it more likely that, once pre-trial detention has been ordered, a custodial sentence will be imposed post-trial, instead of probation or an alternative measure?

Yes No

Please explain and provide any further information you consider relevant:

The imposition of pre-trial detention depends, among other things, on the expected sentence. The courts are tempted to confirm this assumption afterwards – also in order to justify the pre-trial detention.

16. Are compensation schemes available for individuals placed in pre-trial detention who are finally acquitted?

Yes No

Please explain and provide any further information you consider relevant:

Compensation of 75 € per day of unjust pre-trial detention.

17. In your opinion, are there other obstacles to a further reduction of the use and length of pre-trial detention, such as judicial culture and mentality of practitioners involved, evolution of the occurrence and nature of crimes, societal or political issues?

Yes No

Please explain and provide any further information you consider relevant:

18. Do you consider that the divergent application of pre-trial detention standards (e.g. as regards reasoning of decisions imposing pre-trial detention, regular review or the existence of an effective legal remedy against those decisions, different time limits for the length of pre-trial detention) by the Member States has a negative impact on mutual trust and judicial cooperation in criminal matters, such as in the context of the European Arrest Warrant (EAW)?

Yes No

Please explain and provide any further information you consider relevant:

19. Could you provide examples of individual case studies of cooperation refusals (such as EAWs) resulting from poor pre-trial detention practices in certain Member States?

Please explain and provide any further information you consider relevant:

II. Poor material detention conditions

20. In practice, do Member States comply with the standards on material detention conditions as set out in recommendations of the Council of Europe such as the European Prison Rules or the rules and recommendations of the European Committee

for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)?

See [Recommendation Rec\(2006\)2 of the Committee of Ministers to member states on the European Prison Rules](#)

Yes No

Please explain and provide any further information you consider relevant:

21. Do you consider that the divergent application of material detention standards (such cell space, sanitary equipment, time outside the cell and access to health care) by the Member States has a negative impact on mutual trust and judicial cooperation in criminal matters, such as in the context of the European Arrest Warrant (EAW)?

Yes No

Please explain and provide any further information you consider relevant:

Only in extreme cases / a few countries.

22. Could you provide examples of individual case studies of cooperation refusals (such as EAWs) resulting from poor material detention conditions in certain Member States?

See [Judgment of the Court of Justice of 5 April 2016, Pál Aranyosi and Robert Căldăraru, Joined Cases C-404/15 and C-659/15, ECLI:EU:C:2016:198](#); [Judgement of the Court of Justice of 25 July 2018, ML, C 220/18, ECLI:EU:C: 2018:589](#); [Judgement of the Court of Justice 15 October 2019, Dumitru-Tudor Dorobantu, C-128/18, ECLI:EU:C: 2019:857](#).

Please explain and provide any further information you consider relevant:

23. Could you share experiences (positive and negative) with respect to (diplomatic) assurances, which have been obtained in order to avoid that the person who is surrendered will run a real risk of inhuman and degrading treatment in the issuing State?

Please explain and provide any further information you consider relevant:

24. Could you share best practice examples of actions in your Member State, which have been taken during the COVID-19 crisis to reduce the number of (pre-trial) prisoners?

Please explain and provide any further information you consider relevant:

25. Could you share best practice examples as regards alternatives to (pre-trial) detention, such as bail hostels, detention houses, restorative justice initiatives?

Please explain and provide any further information you consider relevant: