The Need for and Possible Content of EU Pre-trial Detention Rules

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ABSTRACT

Pre-trial detention (PTD) is an inherently problematic concept. Not only does it conflict with the right to liberty and the presumption of innocence but its use is associated with an extensive range of problems that affect pre-trial detainees, their families, the fair administration of criminal justice and wider society. Many of these problems have an EU dimension. Case law of the CJEU confirms, for example, that deficiencies in Member States' PTD regimes threaten to undermine mutual trust and thus the effective functioning of mutual recognition instruments, such as the European arrest warrant (cf. the cases of Aranyosi and Căldăraru). Against this background, the article examines the need for, and possible content of, EU PTD rules.

It begins by summarising the problems that are associated with PTD and identifies their causal connection with deep-seated systematic practices and/or political and legal cultures at national level that tend to promote an over-reliance on PTD while serving to foment distrust in alternatives. Referring to the 2009 Roadmap for Strengthening Procedural Rights and other relevant texts, it is argued that EU action is necessary to address these deficiencies. This will provide the added value of enhancing justice, fairness and the overall effectiveness of legal and judicial systems, on the one hand, and strengthening the Area of Freedom, Security and Justice, on the other. The article then makes a number of proposals for the nature of such action, the most significant being that the EU should adopt a directive based on Art. 82(2) TFEU that establishes minimum rules relating to the use of PTD. This though would be insufficient in itself and should be complemented by a range of other measures that relate to the implementation of existing EU legislation and engagement in a variety of soft law actions. A detailed analysis of the content of these measures, including recommendations for the content of the mooted directive, is provided.

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I. Introduction

Pre-trial detention (henceforth PTD) is an inherently problematic concept. Compulsorily to detain an individual who has not (yet) been convicted of an offence is in clear conflict with the right to liberty (Art. 5(1) ECHR) and the presumption of innocence (Art. 48(1) CFR; Art. 6(2) ECHR, Art. 14(2) ICCPR). It follows that PTD must be grounded in a lawful arrest and should always be an exceptional measure, to be used only (i) when doing so can be justified on objective grounds; (ii) if no other less intrusive means are available or effective in securing its aim; and (iii) for a reasonable length of time. The exceptionality of PTD is reflected in criminal laws of EU Member States, which specify the criteria and procedures for its use, requirements of regular monitoring, judicial review and priority in scheduling for trial. Measures of this type are meant to ensure that PTD is used sparingly but research demonstrates that they are not always respected.[1]

Many of PTD-related problems have an EU dimension. To cite one example, the notable differences between Member States in the legal conditions for, and actual execution of, PTD have provided grounds for challenging or even refusing the execution of European Arrest Warrants (EAWs) (cf. the cases of *Aranyosi and Căldăraru*).[2] They therefore have the capacity to compromise mutual trust, constituting an impediment to the functioning of mutual recognition and consequent effectiveness of existing EU criminal law instruments. A number of empirical studies, moreover, reveal several other problems with the practical implementation of PTD (see the list below), which reinforce the case for EU action in this area, particularly in light of the evolving CJEU case law.

II. Need and Reasons for EU Action

1. Existing problems and objectives of EU action

The problems that are associated with PTD can be grouped under four headings:

(1) Issues relating to the pattern of use of PTD by the Member States:

- Inconsistent use of PTD across the Member States, reflecting a significant divergence in PTD rules, e.g. the criteria for deciding on detention, and significant differences in the average duration,[3] providing prima facie evidence of arbitrariness of use;[4]
- Excessive use due to a presumption of PTD rather than a presumption of liberty or use of criteria that focus on the alleged offence rather than the risk posed by the individual;[5]
- Lack of alternatives to detention or excessive use of, or over-reliance on, PTD when alternatives are available or better suited (i.e. less intrusive means to achieve the same goal);[6]
- Over-representation of foreign nationals suggesting bias against them that is founded in the automatic assumption that they pose a flight risk;[7]
- Contribution of PTD to the general problem of prison overcrowding;[8]
- Evidence that PTD is associated with an increased risk of receiving a custodial sentence following conviction,[9] thereby exacerbating overcrowding and many other problems.

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(2) Issues relating to the conditions of detention and impact of PTD on pre-trial detainees[10]:

- The poor state of detention conditions in certain EU Member States that are often worse than for sentenced prisoners,[11] e.g. due to the use of facilities that are not designed for long-term detention,[12] lack of education and rehabilitative training courses, etc.;[13]
- Restrictions on contact with outside world, e.g. regarding entitlement to telephone calls or visits, or due to use of solitary confinement;[14]
- Risk of intimidation and ill-treatment by staff or officials;[15]
- Exposure to the violence and/or criminogenic influence of other inmates;[16]
- Risks to health, e.g. through spread of contagious disease or exposure to illicit drugs;[17]
- Adverse psychological impacts, e.g. the suicide rates among pre-trial detainees is known to be higher than for sentenced prisoners;[18]
- Particularly harmful impact on children[19] and other vulnerable groups, e.g. pregnant women, those with physical or mental disabilities, older people, etc.;
- Adverse impact of pre-trial detention experience on longer-term attitudes to custody, i.e. research suggests that the experience of PTD influences behaviour during any subsequent custodial sentence, attitudes to rehabilitation, etc.[20]

(3) Impact on fairness of criminal proceedings:

- Violations of fundamental rights, and consequent undermining of the credibility of mutual recognition and the EAW system;
- Increase in refusals to execute EAWs if issues are not addressed;
- Difficulties in preparing the case for the defence,[21] including those caused by the psycho-social consequences of PTD for the suspect;[22]
- Structural imbalances between the prosecution and defence in terms of power and resources, e.g. problems in securing access to a lawyer, access to translation, access to the case file, and legal aid;[23]
- Unjustified use of PTD, e.g. in order to coerce a confession;[24]
- Potential opportunities for corruption incurring the risk of undermining public confidence in the criminal justice system;[25]
- Failure to subtract the time spent in PTD from the final sentence;
- Absence of compensation for time spent in PTD that was unjustified/unlawful.

(4) Impact on persons other than the suspect and/or on wider society:

- Punitive impact on suspects' families: human consequences of prolonged separation,[26] impact on child care responsibilities, loss of income, loss of housing or accommodation,[27] exposure to spread of infectious disease contracted by suspects while in detention;[28]
- Direct economic costs to society: PTD is expensive compared with alternative measures;

- Indirect economic costs to society: loss of revenue linked to pre-trial detainees' loss of employment,[29] associated demand for social assistance for family members, equivalent costs relating to former employees in cases where PTD causes business failures;[30]
- Loss of harm reduction potential: resources devoted to unjustified PTD could be invested more productively, e.g. in rehabilitation or crime prevention measures or victim support.[31]

Many of these problems are associated with deep-seated systemic practices and/or political and legal cultures at national level that promote the perception that governments are "tough on crime" at the expense of the presumption of innocence.[32] The recent DETOUR comparative report, for example, identifies lack of prosecutorial restraint, closeness between prosecutors and judges, and societal pressure to focus on types of offences (e.g. burglary) and not the individual's unique circumstances as relevant factors.[33] Other research has pointed to a "culture of distrust in alternatives" to PTD.[34] As the DETOUR report highlights, the existence of these deeper factors militates against a consistent EU-wide approach to PTD as a last resort. Further practical problems concern the lack of resources that are needed to address deficiencies in the Member States and the existence of inconsistent terminology,[35] which can affect methodology of data collection and validity of comparisons.

Emphasising the need for EU action in view of obvious shortcomings, criminal defence lawyers and their organisations, such as the European Criminal Bar Association (ECBA), have stressed the following: [36]

[t]here are no EU standards for time limits for pre-trial detention or less intrusive measures or specific remedies and/or regular judicial control by the responsible authorities. […] Practical issues arise repeatedly regarding access to the file and intentional non-disclosure of (exculpatory) information by the state authorities throughout Europe […].

The main objective of EU action should be to address these issues based on sound and current empirical data through the provision of (legislative and soft-action) tools, thereby enhancing justice, fairness and overall effectiveness of legal and judicial systems in the EU and strengthening the Area of Freedom, Security, and Justice (AFSJ). Significant divergences among Member States affect the mutual trust between them, the internal legitimacy of their justice systems and consequently the quality of criminal justice (and the perception thereof) in the EU.[37] The 2009 Roadmap on Criminal Procedural Rights recognised that "excessively long periods of pre-trial detention are detrimental for the individual, can prejudice judicial cooperation between the Member States and do not represent the values for which the European Union stands."[38] The European Commission in its 2011 Green Paper[39] further recognised that while detention issues, including pre-trial detention, are the responsibility of Member States, "there are 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." The case law on the EAW in the eight years since the Green Paper was published has borne out the relevance of detention-related issues to its operation.

Minimum standards with respect to PTD, such as provisions on review of the grounds of PTD and maximum time limits on PTD, could thus enhance mutual trust between Member States, increase the effectiveness of mutual recognition instruments and demonstrate commitment to upholding the EU's fundamental values. Where applicable, measures that are taken as part of any initiative on PTD should align with other relevant EU policies, such as those relating to the combating of illicit drugs and the promotion of public health.

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2. EU legal basis and competence, possible added value of EU action

EU action on pre-trial detention could be grounded in Art. 82(2) TFEU. As regards the EU rule of PTD as a last resort[40] specifically, finding a legal basis for such an overarching EU rule to be applied in all (cross-border and domestic) cases would arguably have the effect of obliging parties in the process to recalibrate the embedded domestic practices that favour PTD (as identified in the DETOUR project) to lead to a focus on the individual accused person and fact-based assessments of risk. The current provision on decisions on pre-trial detention in the Framework Decision on the European Arrest Warrant (FD EAW) – Art. 12 – currently achieves the opposite in terms of default in providing that "the person may be released provisionally at any time in conformity with the domestic law of the executing Member State, *provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding"* (emphasis added). The possible added value of EU action would include:

- The promotion of a common platform of fundamental rights relating to PTD across the EU, based in the ECHR guarantees, but with the potential to offer more extensive protection (e.g. in relation to remedies);
- Further, logical development of the Area of Justice: EU action to tackle the problem of PTD would complement the existing directives on procedural rights and mutual recognition instruments, most notably the EAW, the Framework Decision on probation and alternative sanctions,[41] and the European Supervision Order;[42]
- Enhancement of mutual recognition through increased mutual confidence, fairness, effectiveness and legitimacy of EU criminal law, policy and justice;
- Elimination of obstacles to free movement through the promotion of fundamental rights and of unjustified discrimination based on nationality (i.e. by tackling the flight risk issue) and consequent enrichment of EU citizenship;
- Subsidiary impacts on public health and the combating of illicit drug use, strengthening EU policies in these areas.

These benefits would be difficult, if not impossible, to achieve through independent actions by the Member States because of their scale or effects.

III. Discussion

1. Possible contents of EU action

The contents of EU action could include:

- The introduction of a common legal framework for the use of PTD that lays down minimum rules relating to decision-making and minimum safeguards for suspects while they are in custody;
- The initiation of a dedicated programme of training for judges and prosecutors to support the adoption of the proposed directive and address other issues relevant to them, e.g. lack of prosecutorial restraint, closeness between prosecutors and judges, mistrust in alternatives to PTD;
- The development and facilitation of initiatives to encourage the transfer across the Member States of knowledge and best practice regarding PTD and how to combat the problems to which it gives rise;

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- The commissioning and dissemination of research into matters that are relevant to addressing problems that are associated with the use of PTD, e.g. the development of sophisticated risk assessment tools; the use of technology to develop effective, but less restrictive, alternatives to PTD; deepening understanding of cultural attitudes to PTD and its alternatives, and of trust in the alternatives by politicians, criminal justice professionals and the general public;
- The continuation of support for the work of the Council of Europe and its agencies in this field, including that of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT);[43]
- Consideration of whether the creation of an EU prisons inspectorate or network of prison inspectorates across the Member States would add value to existing mechanisms for monitoring, and encouraging the improvement of, detention conditions and, if so, of whether it is possible and feasible for the Union to engage in such an initiative;
- The taking of steps to ensure that measures taken in the PTD field are consistent with, and serve to promote, the Union's developing policies in other areas of its competence, e.g. the combating of illicit drugs, the promotion of public health and the safeguarding of the rights of children;
- The provision of financial and other resources to the Member States in order to support their efforts to address deficiencies in PTD;
- The publication of information in a variety of formats and via a variety of platforms to ensure transparency regarding the Union's initiatives in this field and explain their contribution to the fair and effective administration of criminal justice, the safeguarding of fundamental rights and the promotion of public safety;
- The development of a common terminology and set of statistical indicators that can be utilised for the purposes of monitoring impact and progress at national level, and inform the further development of policy in this field.

Regarding the specific question of legislation-related actions, EU interventions could take place at the level of the adoption of new EU legislation and at the level of implementation.

a) Adoption of EU legislation

Art. 82(2) TFEU can serve as a legal basis for EU legislation approximating elements of pre-trial detention in Member States.[44] The link to mutual recognition could render Art. 82(2) also an appropriate legal basis for inclusion of provisions on standards of detention (such as prison conditions) in such an instrument. This argument may be based on the extensive litigation on the EAW, especially post-*Aranyosi*. However, this view is contested and it is unclear how precise these standards could be (how much detail can in general be prescribed by EU law). However, some such standards have already been formulated in the ECtHR jurisprudence and EU action could start with codifying those.

Recent EU case law on standards of detention and the EAW, in particular the decision in *ML*,[45] clearly engages the rights of *individuals* in obliging the executing judicial authority to focus not on the general situation in an issuing state but on the specific and precise risk to an individual requested person of inhuman and degrading treatment arising from conditions they will experience in an issuing state. Where, as seems likely, legislation on EU minimum standards on detention conditions would be resisted in particular if sought to apply to both cross-border and domestic cases, a case could be made for 'Lisbonising' the FD EAW to at a

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minimum enshrine these court rules and introduce data provision obligations on Member States regarding conditions in their prisons.[46]

The adoption of a specific EU instrument on pre-trial detention would provide grounds for the Commission to monitor or scrutinise in detail the situation on the ground in Member States, which is another added value of such an action. However, there is currently scope – under the existing legal instruments – for a greater focus on implementation.

b) Implementation of EU legislation

The Commission would be encouraged to embark on the scrutiny of the implementation of the FD EAW focusing specifically on pre-trial detention. The evaluation procedure under Art. 70 TFEU can also be used with a mutual evaluation round devoted specifically to pre-trial detention.

Any evaluation of existing EU secondary law - – and in particular the FD EAW - – should include a detailed assessment of national detention regimes to the extent that they have an impact on the operation of the mutual recognition regime. The current evaluation round mentioned by the Commission (2019-–2021) is a first-class opportunity to focus on detention in this context. Evaluation should not be limited to monitoring the implementation of specific provisions of the FD, but should examine national systems as a whole in view of the range of issues arising before national courts and the CJEU regarding detention conditions as ground for refusal to execute EAWs. Evaluation reports must aim to provide credible sources for national courts to rely on in their scrutiny of fundamental rights in mutual recognition post-*Aranyosi*.

An Article 70 mutual evaluation round on pre-trial detention could take a cross-cutting approach looking at the provisions in the various mutual recognition and procedural rights instruments that already provide some provisions on pre-trial detention, e.g. Arts 12 and 26 FD EAW; the quite extensive provisions in Directive 2016/800 on childrens' rights; the rights of access to a lawyer and to third party / consular assistance in Directive 2013/48 on the right of access to a lawyer; and the information rights for detainees, including the right to challenge their detention, in Directive 2012/3 on the right to information.

The Commission can also be encouraged to focus on the evaluation of the implementation and use made of the European Supervision Order (ESO) as an alternative to detention. Such an evaluation could also investigate whether the availability of the ESO is having the unintended consequence of causing excessive restrictions on liberty. This would be the case if it is being used in cases where unrestricted liberty would be justified, backed by the potential to apply for an EAW in the event an accused person from another Member State fails to appear for trial. Consideration could also be given to the merits of incorporating the ESO provisions in a "Lisbonised" FD EAW.

2. Form (e.g. soft actions, legislative intervention)

There is a clear and growing case for EU legislation to establish minimum rules with respect to PTD. Similar to the existing measures to safeguard procedural rights,[47] this should be in the form of a directive based on Art. 82(2) TFEU. Consistent with their approach, the starting point for determining the contents of the new directive should be the principles that have been developed by the ECtHR in this field. Attention should also be paid to the European Prison Rules[48] and other relevant instruments to which the Member States are a party and to the norms that stem from their constitutional traditions. This is a sensible approach because it reflects established practice and, in principle, the Member States have already accepted that the relevant principles should apply to them. Where appropriate, the directive should seek to improve upon these existing guarantees, especially in cases where there is evidence that the Member States (or a critical mass of them) already provide superior protections.

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The adoption of a legislative instrument alone is, however, unlikely to prove sufficient in itself to tackle the complexity of problems to which PTD gives rise or which its use exacerbates. Therefore, as indicated above, the new directive should form one element in a package of measures, that also includes a wide variety of soft actions, through which to combat the deficiencies in PTD.

Soft measures might include the exchange of good practices, e.g. as regards alternatives to detention; the formulation of guidelines on the increased effectiveness of PTD-relevant judicial procedures and improving the quality of judicial decision-making;[49] actions to raise awareness of relevant ECtHR case law among national judges; and the scientific development of risk assessment tools (e.g. tools for assessing the risk of absconding) and EU-wide dissemination of information on their optimal use.

In addition, further empirical studies should be conducted (and include all EU Member States)[50] to ascertain the current practices and problems as regards PTD across the EU, including studies among judges examining their reasons for not imposing alternatives and opting for PTD instead; studies on the ways of deducting the time spent in PTD from the final custodial sentence; studies among national governments, scholars, civil society, defence practitioners, etc., as to the possibility and desirability of introducing the common law practice of bail into Continental jurisdictions and so forth. More rigorous collection of data on who is being detained (age-offences-foreigners/nationals-proportionality) is desirable, as is the development of communication, fact-finding and information mechanisms in partnership with the Council of Europe and key NGOs.

3. Scope of the intervention

Following the model of the existing procedural rights directives, the new directive should not be restricted to cross-border cases, but should apply to PTD in general. This would avoid legal complexity and uncertainty and double standards in national proceedings. An EAW-specific provision should be included; this would be consistent with the scope of the other procedural rights directives.

4. Issues to be regulated in the initiative – varying options

The proposed directive should enshrine the presumption of liberty and the complementary principle that PTD is to be used only as a last resort, when less restrictive alternatives would be inadequate or ineffective. PTD for minor offences (i.e. those for which a custodial sentence cannot, or is unlikely to, be imposed) should be ruled out.

Regarding the remainder of the directive, the issues can be divided into two categories: those where the approach appears (relatively) clear and that definitely should be regulated; and those where policy choices or other issues arise but that might be considered for inclusion.

(1) Issues where the approach appears (relatively) clear and that should be regulated:

- *Grounds upon which PTD can be justified*: the directive should provide an exhaustive list of grounds for PTD. They should reflect relevant ECtHR case law on Art. 5 ECHR,[51] including by requiring consistent application of the "reasonable suspicion" standard that it has established and by requiring an individual assessment in each case;[52]

- *Authority competent to make decisions on PTD*: substantive PTD decisions (excluding initial decisions on arrest and time-limited initial investigative detention) should be made by a court, having regard to the need for effective judicial protection; that is, incorporating judicial independence and access to remedies, in line with the requirements that the CJEU has established in the different, but relevant, context of Opinions and judgments on the issuing judicial authority in the context of the EAW;[53]

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- *Burden of proof*: the directive should stipulate that the burden of proof rests with the prosecution;[54]
- *Reasons for PTD:* the directive should stipulate the requirement to justify, i.e. provide relevant and sufficient reasons for pre-trial detention;
- *Foreign nationals/non-residents*: the directive should stipulate that foreign nationality and/or non-domestic residence are not in themselves evidence that a suspect poses a sufficient risk of absconding to justify PTD;
- *Judicial review of detention*: the directive should provide the right to judicial review of the initial decision to subject the suspect to PTD and, if s/he remains in custody, of the continuing grounds for detention at regular intervals thereafter. The criteria and standards to be applied should be consistent with relevant Convention law;[55]
- *Right to be heard/right to legal representation*: the directive should provide the right to be notified of judicial review hearings including appeals, and for the suspect and her/his legal representative to attend in person;[56]
- *Principle of 'special diligence'*: the directive should place an obligation on Member States, in bringing proceedings to trial, to prioritise cases where the suspect(s) are in PTD;[57]
- *Rights during PTD*: the directive should establish a minimum set of basic rights to be provided to all pre-trial detainees. They should include, e.g., rights to communication with the outside world; education; exercise and recreation; health care; nutrition; and work.[58] Some of these rights are afforded to children who are suspects in criminal proceedings under Directive 2016/800, which could therefore be used as a model. A provision could also be included to the effect that the provision of these specific rights or the conditions of detention in general should not be inferior to those enjoyed by sentenced prisoners;
- *Right of pre-trial detainees to be detained separately from sentenced prisoners*: the directive should provide this right[59] with a tightly drawn exception to cover circumstances where it is impossible to do so;
- *Special needs of certain detainees*: the directive should place a specific obligation on Member States to take account of the special needs of women, children,[60] those with physical or mental disabilities, older people, foreign and ethnic minority detainees and other minority/vulnerable groups;
- *Remedies:* the directive should enshrine a right to appeal / to an effective remedy against the decision to impose PTD;
- *Compensation*: the directive should provide the right to compensation for unjustified/unlawful detention;
- *Calculation of subsequent custodial sentence*: the directive should provide the right to have time in PTD deducted from any subsequent custodial sentence for the offence;
- *Provisions specific to EAW proceedings:* the directive should include a provision amending or repealing the current Art. 12 FD EAW, so that it will not be at variance with the principle that PTD is to be used only as a last resort in domestic and cross-border cases.
- *Alternatives to PTD*: to be effective, the provisions of the directive that relate to decision-making will need to refer to less restrictive alternatives. A number of issues arise in relation to this. For example,

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PTD having been ruled out, should the directive include criteria/principles to be applied in determining what an appropriate alternative might be? This can be a more complex decision than appears because the relevant considerations may not be limited to the degree of restriction on liberty and factors relating to the administration of justice and prevention of further offending. They may also include factors relating to the welfare of the suspect, including access to resources, such as facilities for religious observance.[61]

Secondly, there is the question of the alternatives themselves. In the absence of harmonisation, should the directive mirror the approach of Directive 2016/800, which merely states that "Member States shall ensure that, where possible, the competent authorities have recourse to measures alternative to detention […]"?[62] Or should it be more specific, and provide a list of some sort? A non-exhaustive list that named those alternatives that are already common to the Member States might be an effective approach. It would build on existing practice, promoting political agreement, and leave scope for future development, both through the transfer of practices between the Member States and technological innovation.

- *Length of PTD*: the aim of the directive should be to minimise the time that suspects spend in PTD. One approach is to follow the model of Directive 2016/800 and the ECHR/ECtHR. The former creates an obligation on Member States "to ensure that deprivation of liberty […] is limited to the shortest appropriate period of time".[63] The second creates the right "to trial within a reasonable time".[64] Another approach, akin to the EAW, is to specify time limits. In terms of setting the maximum length of pre-trial detention, there is also similar EU legislation in the context of the EU Return Directive (Directive 2008/115/EC), where maximum periods of detention serve as a safeguard for the individuals and have led the CJEU to develop important case law, setting limits to criminalisation and detention imposed by national law.[65] Bearing in mind the diverse range of circumstances to which the directive will apply, the first approach (which reflects that of the existing procedural rights directives) may be more feasible from a practical point of view.

(2) Issues where policy choices or other issues arise but that might be considered for inclusion:

- *Influence of PTD on subsequent decision to pass a custodial sentence*: the directive could contain a provision that requires Member States to ensure that courts exclude the fact that an offender has been subject to PTD when determining whether it is appropriate to impose a custodial sentence for the offence.

- *Relevance of alternatives to PTD to subsequent custodial sentence*: consideration should be given to whether the principle that time in PTD should be offset against a subsequent custodial sentence should also apply to alternatives to detention, notably those that entail considerable restrictions on liberty, e.g. house arrest.[66]

IV. Recommendations and Conclusions

1. Adoption of a directive on pre-trial detention under Art. 82(2) TFEU:

The directive could be drafted to apply specifically to mutual recognition instruments. However, we would support the approach that has been taken in the case of the existing procedural rights directives, which are not limited to cross-border cases but cover domestic cases as well. This would avoid legal complexity and uncertainty and double standards in national proceedings.

The legislation should cover, as a minimum, rules on the maximum length of pre-trial detention, and enshrine the presumption of liberty and the complementary principle that PTD is to be used only as a last resort. An EU instrument could also include rules on effective remedies and requirements to justify and give reasons for pre-trial detention and to introduce rules on alternatives to detention, rules on vulnerable persons as well as rules on compensation for unlawful detention and other issues listed above (in section III.4). The inclusion of rules on prison conditions can be further discussed.

As a practical matter, taking steps to refine the use of PTD, which is a primary aim of the suggested directive, would tend, indirectly, to have a beneficial impact upon detention conditions even in the absence of specific provisions to regulate the latter. By reducing the numbers of suspects/defendants made subject to PTD and restricting its duration, the degree of exposure to the problems that were identified above would be minimised. In addition, in principle, resources would be freed up that could then be redeployed in improving prison conditions for those pre-trial detainees who remained and, conceivably, for prisoners as a whole.

2. Scrutiny and implementation

The EU should also strengthen the scrutiny of national practices and implementation on the ground by doing the following:

- Embarking on the scrutiny of the implementation of the FD EAW focusing specifically on pre-trial detention;
- Using the evaluation procedure under Article 70 TFEU and initiating a mutual evaluation round devoted specifically to pre-trial detention (building on the upcoming findings of the 9th round of mutual evaluations on FD EAW, FD 2008/909, FD 2008/947 and FD 2009/829 -. (November 2019 to January 2021);
- Focusing on the evaluation of the implementation and use made of the European Supervision Order as an alternative to detention;
- Considering the merits of a "Lisbonised" FD EAW that codifies the CJEU case law relating to PTD, given the (perhaps originally unanticipated) significance of detention issues to its functioning;
- Setting up mechanisms to enable the rigorous collection of data on detainees (age-offences-foreigners/nationals-proportionality);
- Carrying out/commissioning further empirical studies on relevant PTD issues that include all Member States and gather quantitative and qualitative current data on issues mentioned above (e.g. judges' reasons for not considering alternatives to PTD);
- Setting up various soft actions (see above), aimed at providing awareness and support or guidance to national practitioners;
- Developing communication, fact-finding and information mechanisms in partnership with the Council of Europe and key NGOs.

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1. See e.g. the report by Fair Trials, "A Measure of Last Resort? The practice of pre-trial detention decision making in the EU",(2016), 1 <https://fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf> accessed 31 October 2020.↩
2. CJEU, 5 April 2016, case C-404/15, *Aranyosi*, and CJEU, 9 December 2015, case C-659/15 PPU, *Căldăraru*.↩
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6. Fair Trials, (2016), *op. cit.* (n. 1) 32.↩
7. "Risk of flight was routinely invoked disproportionately against foreign nationals in Italy, Ireland and Spain, while alternatives such as confiscation of passport and travel bans were not usually considered." Fair Trials, (2016), *op. cit.* (n. 1) 20; Quaker Council for European Affairs (2014), *op. cit.* (n. 4), p. 9; Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, "Abuse of Pre-Trial Detention in States Parties to the European Convention on Human Rights", 2015, AS/Jur 16, para A.8; CPT, (2017), *op. cit.* (n. 5).↩
8. CPT, (2017), *op. cit.* (n. 5).↩
9. Quaker Council for European Affairs, (2014), *op. cit.* (n. 4), p. 5.↩
10. We were not asked to address post-conviction detention. Therefore, prima facie, the potential for differential treatment between those subject to an EAW for prosecution and for execution is outside our remit. In principle, however, it is possible to argue that some difference in treatment (in the direction of preferential treatment of pre-trial detainees) can be justified on the basis that the former remain subject to the presumption of innocence, whereas the latter do not. This is not necessarily a position with which we agree. But regardless of the merits of that argument, we would also suggest that the fact that a directive on PTD might lead to adverse comparisons with the treatment of those subject to detention following conviction is not a good reason to fail to take action to improve PTD if it is possible to do so. Among other considerations, tackling the latter is liable to strengthen legal and political pressure to improve detention conditions for all prisoners.↩
11. CPT, (2017), *op. cit.* (n. 5).↩
12. CPT, (2017), *op. cit.* (n. 5).↩
13. Quaker Council for European Affairs (2014), *op. cit.* (n. 4), pp. 6–7.↩
14. CPT, (2017), *op. cit.* (n. 5).↩
15. CPT, (2017), *op. cit.* (n. 5).↩
16. Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, (2015), *op. cit.* (n. 7), para A.2.1.2.↩
17. Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, (2015), *op. cit.* (n. 7), para A.2.1.2.↩
18. CPT, (2017), *op. cit.* (n. 5).↩
19. Noted already in the Commission's 2011 Green Paper (Commission, "Green Paper from the Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention", COM (2011) 327 final,), p. 10-11.↩
20. Quaker Council for European Affairs (2014), *op. cit.* (n. 4), p. 7.↩
21. Quaker Council for European Affairs (2014), *op. cit.* (n. 4), p. 5.↩
22. Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, (2015), *op. cit.* (n. 7), para A.2.1.3.↩
23. Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, (2015), *op. cit.* (n. 7), para A.11.2.↩
24. Fair Trials, (2016), *op. cit.* (n. 1) 1.↩
25. Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, (2015), *op. cit.* (n. 7), para A.2.2.3.↩
26. Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, (2015), *op. cit.* (n. 7), para A.2.1.1.↩
27. Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, (2015), *op. cit.* (n. 7), para A.2.1.1.; CPT, (2017), *op. cit.* (n. 5).↩
28. Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, (2015), *op. cit.* (n. 7), para A.2.2.2.↩
29. Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, (2015), *op. cit.* (n. 7), para A.2.2.2.↩
30. Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, (2015), *op. cit.* (n. 7), para A.2.1.1; CPT, (2017), *op. cit.* (n. 5).↩
31. Quaker Council for European Affairs (2014), *op. cit.* (n. 4), pp. 5-6.↩
32. Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, (2015), *op. cit.* (n. 7), para A.11.1.↩
33. The report notes, at p. 71, the following: "Our research shows that, besides the official grounds for detention, there are also hidden and extra-legal motives influencing the decisions. In addition, some reports also referred to limited or weak reasoning for decision-making. PTD practice across most countries therefore appears somewhat arbitrary, and which does not pay sufficient attention to the ultima ratio principle and the drastic infringement PTD means for the personal rights. Understanding that this practice is longstanding and persistent, we do not assume this can be improved by directives or legal changes. Changing this situation requires continuing efforts including awareness raising and training for prosecutors and judges." See W. Hammerschick, C. Morgenstern, S. Bikelis, M. Boone, I. Durnescu, A. Jonckheere, J. Lindeman, E. Maes, and M. Rogan, *DETOUR: Towards Pre-Trial Detention as Ultima Ratio,* 2017.↩
34. Fair Trials, (2016), *op. cit.* (n. 1), 27.↩
35. PTD is used sometimes (as in the Commission's 2011 Green Paper) to cover the entire period of detention "until the sentence is final" (p. 8), while in other cases (as the name itself suggests), it is used to designate only the period of detention before the beginning of the trial.↩
36. ECBA, "ECBA Initiative 2017/2018: Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards", p. 3 <http://www.ecba.org/extdocserv/20180424_ECBA_Agenda2020_NewRoadMap.pdf> accessed 31 October 2020.↩
37. "In many respects the differences between legal systems and the lack of protection provided by national laws lead to mistrust and general scepticism in relation to Europe" (ibid., p. 1).↩
38. Resolution of the Council, "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings", 2009/C 295/01 (at C 295/3).↩
39. See above in n. 19.↩
40. Given that for pre-trial detention, the presumption of innocence (as guaranteed by Article 48 CFR) is engaged, some consider that TFEU provisions on free movement of persons (Article 21 and 45) might also be used as a legal basis – together with Article 82(2) – for rules at EU level stipulating that pre-trial detention must be a last resort. While Article 45(3) envisages limitations on this right, justified on grounds of public policy and public security, these exceptions must, however, be strictly construed and while they will be engaged in individual cases, they are arguably not a barrier to an EU-wide requirement that Member States must guarantee that systems are in place to ensure PTD is used as a last resort. It is worth noting that existing ECtHR case law already stipulates the exceptionality of PTD.↩

41. Council framework decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, *O.J.* L 337, 16.12.2008, 102.↩
42. Council framework decision 2009/829/JHA 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, *O.J.* L 294, 11.11.2009, 20.↩
43. Accession to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CETS 126), and thus acceptance of the jurisdiction of the CPT, is a compulsory element of the AFSJ *acquis*. Therefore, this should not be controversial.↩
44. In terms of the content of the proposed EU legislation, the issues to be regulated are set out in detail in section 4 below.↩
45. CJEU, 25 July 2018, case C-220/18 PPU, *ML*.↩
46. The ECBA agenda proposal (op. cit. n. 36) similarly suggests modernising and "Lisbonising" the FD EAW in this regard (p. 2). While we recommend the adoption of a directive on PTD, if there was too much resistance to such a directive, a case could be made for tackling problems relating to PTD that have been affecting the EAW by Lisbonising it to incorporate codification of relevant CJEU case law. However, this would be a far less satisfactory option than the adoption of a dedicated directive, as well as opening up a separate set of contentious issues to do with the EAW itself.↩
47. Directive (EU) 2010/64 on the right to interpretation and translation in criminal proceedings, *O.J.* L 280, 26.10.2010, 1; Directive (EU) 2012/13 on the right to information in criminal proceedings, *O.J.* L 142, 1.6.2012, 1; Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, *O.J.* L 294, 6.11.2013, 1; Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, *O.J.* L 65, 11.3.2016, 1; Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, *O.J.* L 132, 21.5.2016, 1; Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, *O.J.* L 297, 4.11.2016, 1.↩
48. Council of Europe, European Prison Rules (2006).↩
49. Fair Trials researchers, for example, observed "proceedings in which judges made poorly-reasoned decisions to detain suspects unnecessarily, relying on minimal information. Judicial reasoning was often vague and formulaic, and failed to engage sufficiently with practical alternatives to pre-trial detention that can protect the investigation, limit the possibility of reoffending and ensure defendants' presence at trial", Fair Trials, (2016), *op. cit.* (n. 1), p. 1.↩
50. The above-mentioned Fair Trials study, for example, included only ten EU Member States (England and Wales, Greece, Hungary, Italy, Ireland, Lithuania, Netherlands, Poland, Romania, and Spain)..↩
51. See, for example, ECtHR, 7 April 2009, *Tiron* v *Romania*, Appl. no. 17689/03.↩
52. Grounded in specific facts and the suspect's personal circumstances: ECtHR, 22 December 2008, *Aleksanyan v Russia*, Appl. no. 46468/06.↩
53. CJEU, 10 November 2016, case C-452/16 PPU, *Poltorak*; CJEU, 10 November 2016, case C-477/16 PPU, *Kovalkovas*; CJEU, 10 November, case C-453/16 PPU, *Özcelik*; CJEU, 27 May 2019, Joined Cases C-508/18, *OG*, and C-82/19 PPU, *PI*; CJEU, 29 July 2019, case 209/18, *PF*; CJEU, 9. October 2019, case C-489/19 PPU, *NJ*; CJEU, 12 December 2019, Joined cases C-566/19 PPU, *JR*, C-626/19 PPU, *YC*, C-625/19 PPU, *XD*, C-627/19 PPU, *ZB*.↩
54. ECtHR, 10 March 2009, *Bykov v Russia* (GC), Appl. no. 4378/02.↩
55. Articles 5(1)(c) and 5(3) ECHR and applicable ECtHR case law, e.g. ECtHR, 5 July 2016, *Buzadji v Republic of Moldova* (GC), Appl. no. 23755/07. Rules on regular review by the deciding judge of decisions to order PTD could be considered with provisions for a possibility to have a review very soon after the initial decision to order PTD is taken, acknowledging that this often happens against a background of inadequate information.↩
56. ECtHR, 11 July 2017, *Oravec v Croatia*, Appl. no. 51249/11. The right of access to the case file is already established under Article 7(1) of Directive 2012/13.↩
57. ECtHR, 18 December 1996, *Scott v Spain*, Appl. no. 21335/93.↩
58. See further European Prison Rules, Part II (Conditions of Imprisonment).↩
59. European Prison Rules, para 18.8.a.↩
60. See also Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, *O.J.* L 132, 21.5.2016, Articles 10-12. Of particular note, and as a useful precedent regarding legislation on PTD, is Art. 10, para. 2, stipulating that "deprivation of liberty, in particular detention, shall be imposed on children *only as a measure of last resort*."↩
61. See, e.g., ECtHR, 5 January 2016, *Süveges v Hungary*, Appl. no. 50255/12.↩
62. Art. 11.↩
63. Art. 10 Directive 2016/800.↩
64. Art. 5(3) ECHR.↩
65. E.g. CJEU, 28 April 2011, case C-61/11 PPU, *El Dridi*.↩
66. In this regard, see CJEU, 28. July 2016, Case C-294/16, *JZ*.↩

Authors statement

The authors are listed in alphabetical order. Additional note by Tricia Harkin: The views expressed are solely those of the contributor and are not an expression of the views of her employer.

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