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Annex to the

GREEN PAPER

on mutual recognition of non-custodial pre-trial supervision measures

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1. INTRODUCTION

1.1. Why is the Commission presenting a Green Paper

The excessive use (and length) of pre-trial detention is one of the main causes of prison overpopulation. Owing to the risk of flight, non-resident suspects are often remanded in custody, while residents benefit from alternative measures.

According to general principles of law, custody pending trial shall be regarded as an exceptional measure and the widest possible use should be made of non-custodial supervision measures. However, the different alternatives to pre-trial detention that exist in national law (*e.g.* reporting to the police authorities or travel prohibition) cannot presently be transposed or transferred across borders as States do not recognise foreign judicial decisions on these matters.

The introduction of a legal instrument, which would enable the EU Member States to mutually recognise non-custodial pre-trial supervision measures, would help reduce the number of non-resident pre-trial detainees in the European Union. At the same time, the introduction of such an instrument would reinforce the right to liberty and the presumption of innocence in the European Union seen as a whole (*i.e.* in the *common* area of freedom, security and justice) and would decrease unequal treatment of non-resident suspected persons.

There is a clear mandate to take action on this issue under the measures 9 and 10 of the *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters* of November 2000¹ (hereinafter the “mutual recognition programme”), which was adopted at the request of the Tampere European Council. The details of this mandate will be set out in chapter 2.2.1.3.²

The need for action at European level has been stressed by the European Parliament in several resolutions, as well as identified by other regional cooperation bodies such as the Council of Europe and the Commissioner of the Baltic Sea States. It has also been highlighted by various Non Governmental Organisations (NGOs) operating in the field.³

The purpose of the Green Paper is to serve as a basis for discussions about the preparation of a Commission proposal for a new legislative instrument on mutual recognition of judicial decisions relating to non-custodial pre-trial supervision measures.

1.2. The consultation process

The Green Paper is the *third step* in the consultation process on alternatives to pre-trial detention.

The *first step* was to draw up and send out a *questionnaire* on pre-trial detention and alternatives to such detention in order to identify possible obstacles to cooperation between Member States in this area. The then 15 EU Member States submitted replies to the questionnaire. The Green Paper takes into account the information provided in these replies.

¹ OJ C 12, 15.1.2001, p. 10.

² See also chapter 4.1.

³ The reasons for taking action are set out in detail in chapter 2 (“Background and mandate”).

A summary of the replies concerning, *i.a.*, non-custodial supervision measures (alternatives to pre-trial detention) and applicable penalties in the event of non-compliance (as required under measure 9 of the mutual recognition programme) is in annex 2 to this Commission Staff Working Paper.

The Commission has also had access to documents of the Committee of Experts on remand in custody and its implications for the management of penal institutions (PC-DP)⁴ of the Council of Europe, in particular a questionnaire on the law and practice of Member States regarding remand in custody⁵, including an analysis⁶ of the replies to this questionnaire.

The *second step* was to write a *Discussion Paper* on the basis of the replies to the questionnaire and to organise an *experts' meeting*. The Discussion Paper (of 24 April 2003), which was sent to a number of experts on pre-trial detention and alternatives to such detention in the EU Member States (and the then acceding countries), proposes, *i.a.*, the introduction of a so-called European order to report to an authority as a non-custodial pre-trial supervision measures at European Union level. The Discussion Paper further considers the limits and possibilities for taking action in the field of pre-trial detention in general. The *experts' meeting* was held in Brussels on 12 May 2003. Several experts, including representatives of NGOs, had been invited on an individual basis, while other experts represented their Member States. Eurojust was also represented. At this meeting, different aspects of pre-trial detention and alternatives to such detention were discussed, in particular the Commission's thinking on the European order to report. The Green Paper takes fully into account the outcome of that meeting.

1.3. Objectives of the Green Paper

1.3.1. To extend the debate to a wider audience

The main objective of the Green Paper is to extend this consultation process to a wider audience, including, *i.a.*, practitioners, such as judges, prosecutors and defence lawyers, people working in the social and probation services, pre-detention establishments and prisons, professional organisations, academic circles, relevant NGOs and public authorities.

1.3.2. To focus on mutual recognition of non-custodial pre-trial supervision measures

The present Commission Staff Working Paper will focus on mutual recognition of non-custodial pre-trial supervision measures. Some relevant items (legal assistance, interpreter and translator, vulnerable categories, consular assistance/right to communication and the "letter of rights") have already been dealt with by the Green Paper and the Proposal for a Council Framework Decision on certain procedural rights.⁷ Although linked to the legal framework of

⁴ where the Commission participates as an observer.

⁵ Appendix IV to the Summary report of the 1st meeting of the PC-DP on 9-11 December 2002 in Strasbourg, Secretariat Memorandum prepared by the Directorate General I – Legal Affairs, Strasbourg 17 March 2003, pc-dp/docs 2003/pc-dp (2003) 4 – e.

⁶ Analysis of the replies to the questionnaire on the law and practice of Member States regarding remand in custody, Report by Jeremy McBride, Strasbourg, 13 May 2003, pc-dp/docs 2003/pc-dp (2003) 9 – e.

⁷ COM(2004) 328 final.

pre-trial detention and alternatives to such detention, the present Commission Staff Working Paper will not enter into details on those questions, unless this is deemed necessary.⁸

1.3.3. *To explore the possibilities of taking action*

The introduction of a mutual recognition scheme for non-custodial pre-trial supervision measures at European Union level must not be separated from the legal framework that governs pre-trial detention in general. It should be remembered that supervision measures in principle are *alternatives* to pre-trial detention. Certain fundamental principles that are applicable to pre-trial detention in general are *mutatis mutandis* also applicable to non-custodial supervision measures. Consequently these principles must be considered when drawing up an instrument on mutual recognition and enforcement of non-custodial pre-trial supervision measures.

The present Commission Staff Working Paper will therefore explore the possibilities of taking action in this area in the light of existing conventions, case law and national legislation.

With this end in mind, the Commission Staff Working Paper will be structured in the following way:

Chapter 2 (“*Background and mandate*”) will introduce the problem and a possible solution that will be developed in more detail at the end of the Paper. This chapter also sets out the mandate under the mutual recognition programme and the reasons for taking action.

In **chapter 3** (“*Basic principles*”) an overview will be made of the relevant legal framework that govern the use of pre-trial detention and alternatives to such in the EU Member States.

Subchapter 3.1. will describe the basic principles in this area, such as the right to liberty, the presumption of innocence and the principles of proportionality and legality. The understanding of those principles is of paramount importance when considering a new instrument on mutual recognition of non-custodial pre-trial supervision measures.

In the following subchapter (3.2.) the legitimate grounds for pre-trial detention will be analysed on the basis of the relevant conventions (taking into account the status of ratification), recommendations and case-law. *Subchapter 3.3.* sets out the relevant international recommendations on alternatives to pre-trial detention. Both subchapters have a section on the national framework. The objective is, however, not to present a complete comparative analysis of the legislation of the Member States in these areas, but only to point out possible problems. Detailed information is presented in annex 2 to this Paper.

On the basis of the overview of the relevant legal framework, **chapter 4** will consider “*A new instrument on mutual recognition of alternatives to pre-trial detention*” in accordance with measure 10 of the mutual recognition programme. Different situations where the new instrument could be applied will be identified (*subchapter 4.2.*). Solutions that are available under the present legal framework will be analysed in order to explore whether the new

⁸ The present Commission Staff Working Paper will not specifically deal with the trial as such, covered by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union (CFREU), or with the detention of foreigners for unauthorised entry with a view to their deportation, covered by Article 5(1) f of the ECHR.

instrument constitutes an added value (*subchapters 4.4.2. and 4.6.4.*). The elaboration of the new instrument will be considered in detail in the *subchapters 4.1., 4.3. – 4.6.*

The Commission invites you to comment on the Green Paper and in particular on the questions set out in boxed items and listed in annex 1 to the Commission Staff Working Paper. The Commission would also welcome your comments to the overview of national legislation in the field of pre-trial detention in annex 2, taking into account new developments in the Member States. In particular, the Commission would be interested in comments regarding alternative measures to pre-trial detention and applicable penalties in the event of non-compliance with an obligation under a non-custodial supervision measure.

To facilitate exchange of views, a website is opened, hosting the Green Paper and a series of relevant links.

http://europa.eu.int/xxx/livre_vert

Until x x 2004, answers may be given, preferably to the following address:

xxx-livre-vert@cec.eu.int

or by post to:

European Commission

Directorate-General Justice and Home Affairs

Unit D3 – Criminal justice

B-1049 Brussels

Belgium

Marked for the attention of Mr. Thomas Ljungquist

The Commission intends to organise a public hearing in 2004.

2. BACKGROUND AND MANDATE

2.1. Outline of the problem and possible solution

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR, 1950), the *International Covenant on Civil and Political Rights* (ICCPR, 1966) and the *Charter of Fundamental Rights of the European Union* (CFREU, 2000) provide that everyone has the right to liberty and that everyone who has been charged with a criminal offence shall be presumed innocent until proved guilty according to law. These international instruments also provide that a person may be deprived of his or her liberty on a reasonable suspicion of having committed a criminal offence. In addition there must be one or several special grounds for detention relating to the dangers of re-offending, suppression of evidence and flight.

It should be noted that the international instruments do not contain any provisions on the threshold for pre-trial detention: the threshold for pre-trial detention follows the national law of the Member States. Thresholds vary from Member State to Member State. In some Member States the penalty for the offence in question is not a factor that is taken into account when making remand decisions. Some Member States allow pre-trial detention irrespective of the penalty of the offence when the suspect person has no fixed abode in the territory and there is a risk that this person will abscond, although the general threshold for pre-trial detention is much higher.

There are presently no international instruments that specifically allow the transfer of non-custodial pre-trial supervision measures from one Member State to another. A person suspected of having committed an offence in a Member State where he or she is not a resident can therefore, owing to the risk of flight, often not go back to his or her Member State of normal residence awaiting the upcoming trial in the foreign Member State.

There is a risk of unequal treatment between residents and non-residents as foreigners are often arrested for minor offences, while residents are released or benefit from alternative measures.

The main idea of a new instrument on mutual recognition of non-custodial pre-trial supervision measures is to substitute pre-trial detention with a non-custodial supervision measure and to transfer this measure to the Member State where the suspected person normally has his or her residence. This would allow the suspected person to be subject to a supervision measure in his or her normal environment until the trial takes place in the foreign Member State. Different models on how to implement this idea are discussed in the Green Paper.

In order to ensure the compliance with a non-custodial supervision measure, the new instrument must contain, as a last resort, a coercive mechanism to return an uncooperative suspected person to the trial State, if necessary by force. It is rather the mere existence of such a possibility than its actual use that ensures the smooth functioning of the new instrument. It should be underlined that in the absence of possible recourse to coercive measures, there would be a risk (in the short and in the long run) that the relevant category of persons will not benefit from alternative measures at all. The different aspects of such a coercive mechanism are also considered in this Paper.

2.2. Reasons for taking action and mandate

2.2.1. European Union

2.2.1.1. Studies on problems in connection with pre-trial detention

Several studies point out serious problems in connection with pre-trial detention in the European Union:

In its *Report on the situation of fundamental rights in the European Union and its Member States in 2002*⁹, the EU network of independent experts in fundamental rights referred to statistics of the Council of Europe that show that, on 1 September 2001, 39,2% of detainees in Luxembourg had not been sentenced yet, not even in the first instance. High levels were also found in France (28,5%), Greece (27,4%), Austria (24,9%) and in Italy (24,6%). Belgium (22,9%), Spain (21,7%) and Denmark (20,3%) were in the middle league. In the UK, England and Wales had a low level (10,5%).¹⁰

Moreover, the replies to a *questionnaire on statistical data on the prison population, including pre-trial detention* that the Commission drew up in 2003 at the request of the *Italian Presidency*¹¹, show that there are considerable differences between the EU Member States both as regards the rate of pre-trial detention per 100 000 inhabitants and the proportion of own nationals in relation to foreign detainees. The general tendency regarding the use of pre-trial detention is raising.¹²

2.2.1.2. Resolutions of the European Parliament

In this context, it should also be noted that the *European Parliament* in its *Resolutions on the situation concerning basic rights in the European Union*¹³, which are based on the *Charter of Fundamental Rights of the European Union* (hereinafter “CFREU”) has urged the Commission to take action regarding various aspects in the area of pre-trial detention and alternatives to such detention.

In its *Resolution* for the year 2001,¹⁴ the European Parliament¹⁵ points out that Article 4 of the CFREU stipulates that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment” and calls for that article to be scrupulously observed in all the Member States (paragraph 29) and considers that the Member States should step up their efforts in this area *id est* by *restricting detention as far as possible* and completely avoiding taking children into custody save in absolutely exceptional cases (paragraph 31).¹⁶ The

⁹ The report, which was drafted under request of the European Commission, Directorate-General Justice and Home Affairs, Unit A.5 (Citizenship, Charter of fundamental rights, Racism, Xenophobia, Daphne program, was submitted on 31 March 2003.

¹⁰ P. 67 – 68 (under the heading “Detention on remand”). These figures correspond to table 4.2.1. c (“Percentage of untried prisoners [i.e. no court decision yet reached]) of the Annual Penal Statistics of the Council of Europe, SPACE I: 2001.

¹¹ In its Programme for 1 July – 31 December 2003, the Italian Presidency stated that it would take an “initiative” for *monitoring prison conditions* throughout the Union, with a view to drawing up new forms of social defence and prevention.

¹² For details see Annex 3: Pre-trial detention rates in the EU Member States.

¹³ These resolutions are presented continuously once a year.

¹⁴ Adopted on 15 January 2003: P5_TA(2003)0012, rapporteur Joke Swiebel (A5-0451/2002).

¹⁵ Under the heading *Prohibition of torture and inhuman treatment*.

¹⁶ See chapters 3.3. and 4. below.

European Parliament is of the opinion that serious violations of human rights in one Member State are not just the responsibility of that country but should also be the proper concern of the EU as a whole (paragraph 32).

The European Parliament¹⁷ further urges the Commission to present proposals in the near future on standards for criminal proceedings that should apply in the European Union (paragraph 143). It calls on the Council to adopt a framework decision on common standards for procedural law, for instance on *rules covering pre-trial orders*, so as to guarantee a common level of fundamental rights protection throughout the EU (paragraph 144). The European Parliament is concerned by the large number of serious violations reported by the European Court of Human Rights (ECtHR) in Strasbourg, *i.e.* on the *presumption of innocence* (paragraph 148)¹⁸. It urges the Member States to comply scrupulously and in good time with the judgments of the ECtHR concerning procedural safeguards and to ensure that legislation is brought into line with those judgments (paragraph 149) and, *inter alia*, to guarantee the effective application of the presumption of innocence of the person charged until judgment is delivered (paragraph 151).

In its *Resolution on the situation concerning basic rights in the European Union for the year 2002*¹⁹, the European Parliament²⁰ notes that the situation of prisoners in the EU deteriorated in some Member States in 2002, mainly as a result of overcrowding in prisons (paragraph 19).

The European Parliament considers it essential, especially as the EU prepares for enlargement, that the *Member States, i.a.* take far more determined measures with a view to allow prisoners to have access to a lawyer from the outset, ensuring at least minimum standards for the health and living conditions of prisoners and, in particular, *examine detention procedures in order to ensure that human rights are not violated, that detention periods are not unnecessarily long and that grounds for detention are reviewed regularly* (paragraph 20).²¹ Moreover, the European Parliament considers that, at a *general level*, efforts must be made in a European area of freedom, security and justice to improve the operation of the police and prison system (paragraph 23).²²

The European Parliament²³ further reiterates that the Commission swiftly should submit the proposal for a framework decision on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union (paragraph 140).²⁴ It, once again, calls on the Council to adopt a framework decision on *common standards* governing procedural law, for example on the *rules concerning pre-trial orders*, with a view to guaranteeing a uniform level of protection of fundamental rights throughout the EU (paragraph 142). Finally, the European Parliament underlines the importance of the right to have judgment given within a *reasonable time* (paragraphs 146 – 148).

¹⁷ Under the heading *Administration of justice*.

¹⁸ See chapter 3.1.3. below.

¹⁹ Adopted on 4 September 2003: P5_TA(2003)0376, rapporteur Fodé Sylla (A5-0281/2003).

²⁰ Under the heading *Prohibition of torture and inhuman treatment*.

²¹ See, in particular, chapter 3.2. below.

²² On 9 March 2004, the European Parliament adopted a Recommendation on the rights of prisoners in the European Union on the initiative of the rapporteur Maurizio Turco (A5-0094/2004) of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (LIBE).

²³ Under *chapter VI: Fair access to justice*.

²⁴ On 29 April 2004, the Commission presented a Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328 final..

2.2.1.3. Mandate under the mutual recognition programme

The mutual recognition programme lists 24 specific mutual recognition measures, including measure 9 (priority 3²⁵) and measure 10 (priority 5), which are placed under the headings 2.2.2. Non-custodial supervision measures, 2.2. Orders relating to persons and 2. Enforcement of pre-trial orders.

The aim of measures 9 and 10 is “[t]o ensure cooperation when a person is subject to obligations or supervision as part of judicial supervision pending a court decision.”²⁶

Pursuant to *measure 9*, the measures potentially concerned, the methods of supervision ensuring compliance by the individuals to whom they apply, and the penalties applicable in the event of non-compliance shall be catalogued.

Measure 10 says that on the basis of the above catalogue, the adoption of an instrument enabling control, supervision or preventive measures ordered by a judicial authority pending the trial court’s decision to be recognised and immediately enforced should be considered. This instrument should apply to any person against whom criminal proceedings have been brought in one Member State and who may have gone to another Member State and should specify how such measures would be supervised and the penalties applicable in the event of non-compliance with them.

It should be underlined that the drawing up of such an instrument must be considered in the light of the other measures listed in the *mutual recognition programme*.²⁷ According to this programme, mutual recognition is designed not only to strengthen cooperation between Member States but also to enhance the protection of individual rights. The implementation of the principle of mutual recognition of decisions in the area of freedom, security and justice presupposes that Member States have trust in each others' criminal justice systems. The mutual recognition programme also states that in each of the 24 listed mutual recognition measures “the extent of mutual recognition is very much dependent on a number of parameters which determine its effectiveness”. These parameters include “mechanisms for safeguarding the rights of [...] suspects” (*parameter 3*) and “the definition of common minimum standards necessary to facilitate the application of the principle of mutual recognition” (*parameter 4*).

This is also the reasoning behind the Commission’s *Green Paper* of 19 February 2003 *on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union*²⁸ (hereinafter the “Green Paper on procedural safeguards”) and the *Commission’s Proposal for a Council Framework Decision* of 28 April 2004 *on certain procedural rights in criminal proceedings throughout the European Union*²⁹ (hereinafter

²⁵ Although no time-limits are set for these measures, they have been marked with priorities from 1 to 6 (1 being the most urgent).

²⁶ This wording implies that the situation before trial in a court of first instance (*i.e.* after an apprehension or an arrest) is covered, but also that the situation after such a trial (*i.e.* after an appeal against a decision to detain a person in custody in the court of first or second instance). A condition is that the decision or judgment in question has not yet become legally binding.

²⁷ The relationship between the measures of this programme that are relevant for a new instrument on mutual recognition of non-custodial pre-trial supervision measures will be considered in more detail in chapter 4.1. below.

²⁸ COM(2003) 75 final.

²⁹ COM(2004) 328 final.

“Proposal for a Council Framework Decision on certain procedural rights”). The Green Paper and the Proposal focus on the following questions: The right to legal assistance and representation, the right to a competent, qualified interpreter and/or translator, proper protection for especially vulnerable categories, consular assistance and the knowledge of the existence of rights (“letter of rights”). These questions are of course also relevant for people in pre-trial detention. The Green Paper on procedural safeguards mentions that the right to bail (provisional release pending trial) will be dealt with separately.³⁰

2.2.2. Council of Europe

In its publication “*The CPT standards*” (15 September 2003)³¹, the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (the CPT Committee) of the Council of Europe also underlines that the phenomenon of prison overcrowding continues to blight penitentiary systems across Europe and seriously undermines improvements in conditions of detention. Overcrowding is often particularly acute in pre-trial detention establishments. In such circumstances, the CPT Committee notes that throwing increasing amounts of money at the prison estate will not offer a solution. Instead, *current law and practice* in relation to *custody pending trial* and sentencing as well as the range of non-custodial sentences *need to be reviewed*.³²

It should also be mentioned that the *Committee of Experts on remand in custody and its implications for the management of penal institutions (PC-DP)* of the Council of Europe is working on a non-binding recommendation on pre-trial detention. In particular, the PC-DP committee is considering the need to update the CoE Recommendation No. (80) 11 concerning custody pending trial.³³ The members of the PC-DP committee have expressed the wish to coordinate the work of the committee with the work of the Commission in this field.

2.2.3. Commissioner of the Baltic Sea States (CBSS)

Finally, the *Commissioner of the Baltic Sea States (CBSS)* has initiated a project on “Pre-Trial Detention in the Baltic Sea Area”, which intends to support the ongoing efforts in all its member States to improve and modernise their present pre-trial detention systems. As a first step in that direction, information available on pre-trial detention and its current

³⁰ In chapter 2.6. (“Rights not covered in the Green Paper”).

³¹ The CPT standards. “Substantive sections of the CPT’s General Reports, available on the website of the CPT Committee (<http://www.cpt.coe.int/>). The publication “The CPT Standards” consists of the “substantive” sections of the General Reports of the CPT Committee on police custody, pre-trial detention, imprisonment, training of law enforcement personnel, health care services in prisons etc. in the member States of the Council of Europe.

³² Paragraph 28, p. 24 (under the heading “Prison overcrowding”) of “The CPT standards”, September 2003. The question of alternative sanctions is dealt with separately by the Commission: See the Commission Green Paper of 30.4.2004 on the approximation, recognition and enforcement of criminal sanctions in the European Union, COM(2004) 334 final.

³³ The PC-DP Committee, which has held meetings on 9 – 11 December 2002, on 19 – 21 May, 8 – 10 December 2003 and 10 – 12 May 2004, shall examine the contemporary use legal and judicial justification for the use of remand in custody, the desirability of developing risk assessment instruments and the use of alternatives to remand in custody. It shall further examine ways to improve the conditions of detention of remand prisoners and ways to prevent undue restriction of rights and ill-treatment of remand prisoners. The study conducted by the committee shall lead to a Report and a Recommendation setting out guidelines for good practice, bearing in mind the ECHR, the European Prison Rules, Recommendation No. R (80) 11 as well as the reports by the CPT Committee.

implementation in the Baltic Sea Area has been compiled and published in a report.³⁴ According to the report, all CBSS member States seem still far from having found adequate responses to problems such as long periods of detention due to pending cases, overcrowded prisons, violent, physical or verbal abuse of detainees, long periods of isolation, insufficient and out-dated training for the police and the prison staff, or the lack of relevant occupation for pre-trial detainees, to name only a few.

Representatives of the CBSS working group on pre-trial detention³⁵ have stressed the need for coordination between the three bodies working on standards in this field: The Council of Europe, the European Commission and the CBSS.

³⁴ *Pre-trial Detention in the Baltic Sea Area. A Survey with Conference Proceedings and Recommendations*, Norwegian Ministry of Justice and the Police and the Council of the Baltic Sea States, June 2003.

³⁵ On 2 – 4 February 2003 the CBSS also held a conference in St Petersburg on “Pre-trial Detention in the Baltic Sea Area”. The participants agreed upon a set of recommendations, the so-called *Pushkin Recommendations* (annexed to the above mentioned report). According to these recommendations, the CBSS Commissioner shall appoint a *Working Group on pre-trial Detention*, which shall address and monitor concerns regarding pre-trial detention.

3. BASIC PRINCIPLES

3.1. Introduction

In this chapter, an overview of a number of important principles that govern pre-trial detention and alternatives to such detention will be made.

3.1.1. *Freedom, security and justice*

Article 6(1) of the *Treaty on European Union* (TEU) provides that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. Article 6(2) TEU provides that the Union shall respect fundamental rights, as guaranteed by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR, 1950)³⁶ and as they result from the constitutional traditions common to the Member States, as general principles of Community law. This compliance with fundamental rights principles is also affirmed in the Charter of Fundamental Rights of the European Union (CFREU, 2000).

The individual has fundamental rights that must not be violated. The basic characteristic is the non-interference by the State in an area of *freedom* for the individual. Freedom in the legal sense of the word is thus the same as the absence of legal limitations.

On the other hand, freedom ends where the individual seeks to deny or interfere with the freedom of others. All individuals have a right to *security*. It is therefore sometimes necessary to deprive one individual of his freedom in order to prevent him or her from interfering with the criminal investigation, or committing new offences, which undermine the security and hence the freedom of others, or absconding (which would undermine the interests of justice).

The individual has also a right to *justice*. The decision to detain a person must never be arbitrary and can only be allowed in certain conditions and in accordance with a procedure established by law.

A number of protective measures ensuring that individuals are not arbitrarily deprived of their liberty and establishing safeguards against abuse by the state authorities have been developed during the second half of the 20th century. Some of these measures are binding upon States, while others only are minimum standards to which States should aspire.³⁷

3.1.2. *Right to liberty*

The most important right or fundamental freedom is the *right to liberty*. Article 5(1) of the *ECHR* and provides that “everyone has the right to liberty and security of person”. The right to liberty is also reflected in the (UN) *International Covenant on Civil and Political Rights*

³⁶ Ratified (etc) by all EU Member States.

³⁷ The first instrument that was adopted in this context was the *Universal Declaration of Human Rights* (UDHR, 1948). It is not a legally binding instrument, but is recognised by the international community as the basic catalogue of fundamental human rights, which should be respected by all States.

(ICCPR, 1966)³⁸ and Article 6 of the CFREU.³⁹

The right to liberty under Article 5(1) of the ECHR has been made subject to six exceptions (a – f), which prescribe when a person may be deprived of his or her liberty. The ECtHR has stated that the list of exceptions to this right is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim and purpose of that provision.⁴⁰

The exception to the right to liberty which relates to pre-trial detention is on the grounds of suspicion that a person has committed an offence (Article 5(1)c of the ECHR⁴¹). It is clear both from the use of the terms *deprived of his liberty*, *arrest* and *detention*, which appear also in paragraphs 2 - 5 of Article 5 of the ECHR, and from a comparison between Article 5 and the other normative provisions of the Convention and its Protocols, that the *right to liberty* of Article 5(1) addresses individual liberty in its “classic” sense, that is to say the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion.

Article 52(3) (Scope of guaranteed rights) of the CFREU provides that insofar the CFREU contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR and that Article 52(3) shall not prevent Union law providing more extensive protection.⁴²

3.1.3. *Presumption of innocence*

The right to liberty is closely linked to the *presumption of innocence*.

Article 6(2) of the ECHR provides that “[e]veryone charged with a criminal offence shall be *presumed innocent* until proved guilty according to law [emphasis added]”. Article 14(2)⁴³ of the ICCPR and Article 48 (1)⁴⁴ of the CFREU have a similar wording.

³⁸ Article 9(1): *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*” The ICCPR has also been ratified (or acceded/succeeded) by all EU Member States - Cyprus (2.4.1969), Sweden (6.12.1971), Denmark (6.1.1972), Germany (17.12.1973), Hungary (17.1.1974), Finland (19.8.1975), the United Kingdom (20.5.1976), Poland (18.3.1977), Spain (27.4.1977), Portugal (15.6.1978), Austria (10.9.1978), Italy (15.9.1978), the Netherlands (11.12.1978), France (*accession* 4.11.1980), Belgium (21.4.1983), Luxembourg (18.8.1983), Ireland (8.12.1983), Malta (13.9.1990), Estonia (21.10.1991), Lithuania (20.11.1991), Latvia (14.4.1992), Slovenia (6.7.1992), the Czech Republic (22.2.1993), Slovakia (28.5.1993) and Greece (*accession* 5.5.1997) - and its provisions are subsequently binding upon them. It should, however, be noted that some Member States have made reservations to Articles 9 and 10 of the ICCPR.

³⁹ Article 6 (Right to liberty and security): *Everyone has the right to liberty and security of person*
⁴⁰ See, *i.a.*, the judgments of 18 January 1979 in the case of *Ireland v. UK*, of 21 February 1990 in the case of *Van der Leer v. the Netherlands*, of 27 September 1990 in the case of *Wassink v. the Netherlands*, and of 22 March 1995 in the case of *Quinn v. France*.

⁴¹ Article 9(3) of the ICCPR uses the expression *on a criminal charge*.

⁴² Pursuant to Article II-53 (Level of protection) of the draft Treaty establishing a Constitution for Europe, “[n]othing in [the CFREU] shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States’ constitutions”.

⁴³ Article 14(2) ICCPR: *“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”*

The presumption of innocence implies a right to be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial. Pre-trial detention must therefore never be compulsory nor be used for punitive reasons. The legitimate grounds for detention must be thoroughly checked and reviewed.⁴⁵ If pre-trial detention is considered necessary, pre-trial detainees must be treated in accordance with certain minimum standards.

The presumption of innocence is evidently also applicable to persons subject to alternative measures to pre-trial detention.⁴⁶

3.1.4. *Principle of proportionality*

An important principle in the area of pre-trial detention is further the *principle of proportionality*, which is covered by several recommendations of the Committee of Ministers of the Council of Europe. The principle of proportionality must be seen in the light of the two above-mentioned principles: the right to liberty and the presumption of innocence. The principle of proportionality implies that coercive measures, such as pre-trial detention or alternatives to such detention, only should be used when this is absolutely necessary and only as long as required. The judicial authority must further use the most lenient coercive measure appropriate, *i.e.* choose an alternative measure to pre-trial detention, if this is sufficient to eliminate the danger of the suspect's absconding, the danger of his or her interfering with the course of justice and the danger of his or her committing a serious offence. Sometimes this issue also is referred to as the *principle of necessity*.⁴⁷

3.1.5. *Principle of legality*

Article 5(1) c of the ECHR provides that the deprivation of liberty must be “in accordance with a procedure prescribed by law”.⁴⁸ Article 9(1) of the ICCPR has a similar provision.⁴⁹

It can also be noted that the ECtHR - in cases involving a deprivation of liberty - always makes an independent assessment of whether the requirements of national law have been met in each case.

There can be situations where it is unclear whether a *deprivation of liberty* has occurred. According to established case-law of the ECtHR, Article 5(1) does not concern mere *restrictions upon liberty of movement*, which is dealt with in Article 2 of Protocol no. 4 to the

⁴⁴ Article 48(1) CFREU: “Everyone who has been charged shall be presumed innocent until proved guilty according to law”

⁴⁵ For further details, see chapter 3.2., “Legitimate grounds for detention, threshold and duration”.

⁴⁶ For further details see chapters 3.3., “Alternatives to pre-trial detention”, and 4, “A new instrument on mutual recognition of alternatives to pre-trial detention”.

⁴⁷ See, *i.a.* Torleif Bylund, *Tvångsmedel I*, Iustus förlag, Gothenburg 1993, p. 58.

⁴⁸ Article 5(1) ECHR: “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure *prescribed by law* [...] (c) the *lawful* arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;”

⁴⁹ Article 9(1) ICCPR, last sentence: “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are *established by law*.”

ECHR.⁵⁰ The ECtHR has, however, pointed out that the distinction between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance.⁵¹

Moreover, Article 5(3) ECHR provides that arrested or detained persons shall be entitled to trial within a reasonable time or to *release pending trial* and that release may be conditioned by guarantees to appear for trial. This means that alternative measures to pre-trial detention, in principle, are considered as restrictions on the liberty of such persons. They may therefore only be ordered when there is a reasonable suspicion that the person has committed an offence and in certain specified circumstances.

One can therefore say that *coercive measures*, such as arrest and pre-trial detention (and alternative measures to detention), are subject to the *principle of legality*. This also follows from the Constitutions and other legislative instruments of the Member States.⁵²

3.1.6. *The implementation of Article 6 TEU in the area of freedom, security and justice*

As expected, the replies to the questionnaire show that all Member States of the European Union guarantee the above-mentioned principles. This follows from the first paragraph of Article 6 TEU. It should also be remembered that Article 49 TEU requires that new EU Member States must respect the principles set out in Article 6(1).

Pursuant to the second paragraph of Article 6 TEU, the European Union shall further respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. All EU Member States have ratified⁵³ the ECHR and are under a legal duty to ensure that their national law conforms to the standards of the Convention and that everyone within their jurisdiction enjoys the rights and freedoms set out in it.⁵⁴ The explicit reference in the TEU has important legal consequences for the conditions of pre-trial detention and alternatives to such detention in the European Union.

⁵⁰ Article 2 – Freedom of movement – of Protocol no. 4 has the following wording: “(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. (2) Everyone shall be free to leave any country, including his own. (3) No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. (5) The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”

⁵¹ See, *i.a.*, the judgment of 28 May 1985 in the case of *Ashingdane v. UK* (paragraph 41).

⁵² See, *i.a.*, Article 12 of the Belgian Constitution, Article 5(3) of the Greek Constitution, and Chapter 1, § 1, and chapter 2 § 12 of the Swedish Constitution (“*Regeringsformen*”).

⁵³ United Kingdom (8.3.1951), Sweden (4.2.1952), Germany (5.12.1952), Ireland (25.2.1953), Denmark (13.4.1953), Luxembourg (3.9.1953), Belgium (14.6.1955), Italy (26.10.1955), the Netherlands (31.8.1954), Austria (3.9.1958), Cyprus (6.10.1962), Malta (23.1.1967), France (3.5.1974), Greece (28.11.1974), Portugal (9.11.1978), Spain (4.10.1979), Finland (10.5.1990), Czech Republic (18.3.1992), Slovakia (18.3.1992), Hungary (5.11.1992), Poland (19.1.1993), Slovenia (28.6.1994), Lithuania (20.6.1995), Estonia (16.4.1996) and Latvia (27.6.1997).

⁵⁴ Cf. Articles 1 and 46 of the ECHR.

Most EU Member States have incorporated the text of the ECHR⁵⁵ into their national law or are planning to do so. If not, it is applicable on the basis of ratification.

A question to be asked in this context is, however, in what way the standards set out in Article 6 TEU and in the CFREU, are implemented and applied in the area of freedom, security and justice of the European Union. As stated in the Green Paper on procedural safeguards⁵⁶, differences in the way human rights are translated into practice in national procedural rules do not necessarily imply violations of the ECHR. However divergent practices run risk of hindering mutual trust and confidence, which is the basis of mutual recognition.

Another question is whether there are areas in the field of pre-trial detention and alternatives to such detention that are *not* covered by the ECHR.

3.2. Legitimate grounds for detention, threshold and duration

3.2.1. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

This overview of the legitimate grounds for pre-trial detention, including the threshold and duration of such detention, takes as its departure point the ECHR. What is said is, however, in principle, also true for the *ICCPR*: Differences and similarities in relation to the ECHR will be set out in the footnotes to this chapter.

Article 5(1) c of the ECHR provides that a person may be *arrested* or detained for the purpose of bringing him or her before the competent legal authority on reasonable suspicion⁵⁷ of having committed an offence⁵⁸ or when it is reasonably considered necessary to prevent his or her committing an offence or fleeing after having done so.⁵⁹

⁵⁵ E.g. the United Kingdom, the Human Rights Act 1998, and Sweden, Lag (1994:1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna. Cf. Question 2 of annex 4 (Has your country incorporated the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950) as a whole into the national legal system?).

⁵⁶ P. 9.

⁵⁷ Obviously, the “facts which raise a suspicion [at this initial stage covered by Article 5(1) c of the ECHR] need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigations” (paragraph 55 of the judgment of the ECtHR of 28 October 1994 in the case of *Murray v. UK*).

⁵⁸ What constitutes an offence is primarily a matter of national law.

⁵⁹ It can be noted that the wording of the *ICCPR* is not identical to the ECHR, although the substance is the same. *ICCPR* remains, however, silent on the degree of suspicion. Article 9(3) *ICCPR* uses the wording “on a criminal charge” instead of “reasonable suspicion”.

Article 5(1) c and (3) of the ECHR⁶⁰ require that arrested or detained persons shall be brought *promptly* before a competent *legal authority*.⁶¹

In addition to the right to be brought before a competent legal authority, Article 5(4) of the ECHR⁶² provides that a detainee has the right to take proceedings before a *court* (in the “strict” sense of the word), which shall decide on the detention and order his or her release if the detention is not lawful. This means that, in the event that the detention has been ordered by a body other than a court, the detained person has the right to challenge the legality of the detention before a court in the strict sense. This may also be the case, if the detained person wants to have his or her detention scrutinised by a court at periodic intervals or appeals against a decision by a lower court.

It can be noted that principle 11 of *Recommendation No. R(80) 11* of the Committee of Ministers of the Council of Europe establishes that “[a]ny person against whom custody pending trial is ordered shall be entitled to appeal against the decision and apply for release”. Under principle 14 “[c]ustody pending trial shall be *reviewed* at reasonably short intervals, which the law or the judicial authority shall fix”.

Pursuant to Article 5(4) of the ECHR, the court must decide on the lawfulness of the detention *speedily*. No indications can be found in the text on what is meant by “speedily”, but the fact that the person has a right to court proceedings within a reasonable time, implies that the time limit must be very short.

Article 5(3) of the ECHR clearly implies that the persistence of suspicion does not suffice to justify - after a certain lapse of time - the prolongation of the detention. The detention must thus not exceed a *reasonable time*. But what does “reasonable time” mean?

This concept cannot be translated into a fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the offence. It can be mentioned that the ECHR organs have approved very long pre-trial detentions (up to two and a half years), but detention will be found justified only if it was necessary in pursuit of a legitimate purpose. When examining the question whether Article 5(3) has been observed, the ECtHR always considers and assesses the reasonableness of the grounds for detention on the basis of the rules of respect for individual liberty and of the presumption of innocence which is involved in every detention without a conviction.⁶³

⁶⁰ This wording corresponds to Article 9(3), first sentence, of the ICCPR: “*Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.*”

⁶¹ This is a synonym, or abbreviated form, for *judge or other officer authorised by law to exercise judicial power*. The competent legal authority need thus not be a “court” in the “strict” sense of the word, but the ECtHR has stated that it must be independent, impartial and apply a procedure giving the detained person suitable guarantees of fairness. See, *i.a.*, the judgments of 28 October 1998 in the case of *Assenov v. Bulgaria*, of 27 September 1990 in the case of *Wassink v. Netherlands* and of 4 December 1979 in the case of *Schiesser v. Switzerland*. Article 9(3) of the ICCPR also uses the expression *a judge or other officer authorised by law to exercise judicial power*. The ECtHR has repeatedly stated that Article 5(1)c must be read in conjunction with Article 5(3) with which it forms a whole.

⁶² Article 9(4) of the ICCPR establishes that *[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that [the] court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*

⁶³ See, *i.a.*, the judgments of 20 January 2004 in the case of *D.P. v. Poland* (paragraph 83) and of 10 November 1969 in the case of *Stögmüller v. Austria*.

It is clear that the persistence of the *reasonable suspicion* is a condition *sine qua non* for the validity of the continued detention of the person concerned.⁶⁴

Principle 13 of *Recommendation No. R(80) 11 of the Committee of Ministers* states that “[c]ustody pending trial shall not be continued beyond what is required [...], nor shall it be continued if the period spent in custody awaiting trial would be *disproportionate* to the sentence likely to be served in the event of conviction [emphasis added].”

As regards the *special grounds* for detention, the ECtHR has recognised the *danger of flight* (absconding), the *danger of suppression of evidence*⁶⁵ and the *danger of repetition of offences* (hereinafter the “*classical grounds*”).⁶⁶ These grounds are also mentioned in *Recommendation No. R(80) 11* of the Committee of Ministers of the Council of Europe, which states that “[c]ustody pending trial shall be regarded as an exceptional measure and shall never be compulsory nor be used for punitive reasons” (principle 1) and that “[it] may be ordered only if there is reasonable suspicion that the person concerned has committed the alleged offence, *and* if there are substantial reasons for believing that there is a danger of his absconding or of his interfering with the course of justice or if his committing a serious offence [emphasis added]” (principle 3). Under principle 14, mentioned above, the review of the detention, shall take into account all the changes in circumstances, which have occurred since the person concerned was placed in custody. An example would be that there is no longer any risk that the suspect suppresses evidence, because all evidence have been secured by the prosecution authorities.

Pursuant to principle 4 of the same recommendation, custody pending trial may nevertheless exceptionally be justified in certain cases of particularly serious offences, even where the existence of these grounds cannot be established.

As mentioned above (chapter 3.1.5.), the ECHR⁶⁷ requires that the deprivation of liberty must be in accordance with a procedure prescribed by law. This requirement also covers pre-trial measures involving a restriction of liberty at the initial stage. The ECHR⁶⁸ remains, however,

⁶⁴ See the judgment of 20 January 2004 in the case of *D.P. v. Poland* (paragraph 85). The (other) initial grounds for arrest or detention mentioned in Article 5(1)c are not a sufficient basis for continued detention at this stage. The detention must be subjected to judicial scrutiny, which should not only consider whether the arrest or detention was justified in the first place, but also whether deprivation of liberty is *still* appropriate. Although the reasonable suspicion that the suspect has committed the offence in question is a *sine qua non* for continued detention, one or more relevant and sufficient *special grounds* for continued detention must also be established (cf. PC-DP [2003] 24 prov, Jeremy McBride).

⁶⁵ This ground is not explicitly mentioned in Article 5(1)c of the ECHR. However, the ECtHR has recognised this a ground for detention, *i.a.*, in its judgments of 27 June 1968 in the case of *Wemhoff v. Germany* and of 26 January 1993 in the case of *W v. Switzerland*.

⁶⁶ See, *i.a.*, the judgments of 27 June 1968 in the case of *Wemhoff v. Germany* and of 10 November 1969 in the case of *Matznetter v. Austria*. It should also be mentioned that the ECtHR, in *exceptional cases*, has recognised the *need to maintain public order*, including concern for the protection of an accused person, as a special ground for continuing of deprivation of liberty (see the judgments of 26 June 1991 in the case of *Letellier v. France* and of 23 September in the case of *IA v. France*, paragraph 104).

⁶⁷ And the ICCPR.

⁶⁸ And the ICCPR.

silent on *who* may initially arrest or apprehend such a person.⁶⁹

Finally, it should be underlined that the ECHR⁷⁰ does *not* contain any rules about a *common threshold* for *pre-detention* linked to the penalty for the offence in question. This has important implications for the mutual recognition of alternative measures in the European Union and will be discussed in detail in chapter 4 below.

3.2.2. National framework⁷¹

The replies to a questionnaire⁷² on different aspects of pre-trial detention of the PC-DP Committee show that there is a considerable variation between the member States of the Council of Europe in the period that can elapse between a person suspected of involvement in an offence first being deprived of his or her liberty by the police or other law enforcement officers and a decision having to be taken about remanding him or her in custody.⁷³

As regards the *threshold*, most - but not all – EU Member States link the possibility of ordering pre-trial detention to the penalty for the offence. The threshold varies, however, depending on the Member State.⁷⁴

Some EU Member States allow pre-trial detention irrespective of the penalty for the offence when the suspect has no fixed abode in its territory and there is a risk that he or she will abscond, although the general threshold is higher. For example in Sweden, the normal threshold for pre-trial is one year. However, any person suspected on probable cause of an offence may be detained regardless of the nature of the offence if he or she does not reside in

⁶⁹ It can be noted that EU Member States recognise a right for anyone to apprehend a person observed in the act of committing an offence (*in flagrante delicto*) or fleeing from it. If this is the case, the person apprehended should “promptly” be turned over to the nearest police officer. In most cases, however, apprehensions are made by police officers. If there are grounds to arrest a person, a policeman is - in the case of urgency - empowered to apprehend the suspect without a decision for arrest by a prosecutor or a court.

⁷⁰ The same is true for the ICCPR. It should also be noted that the ECHR does not contain many provisions that even indirectly concern extradition and other cross-border issues. An example is Article 5(1) f ECHR, which provides that it is allowed to arrest a person if the action taken against him or her is aiming at deportation or extradition. An explanation for this is that the ECHR was not drafted in order to create a *common* judicial area for the Member States of the Council of Europe, but rather to set minimum standards applicable to each of the national legal systems (Iain Cameron, *An Introduction to the European Convention on Human Rights*, 3d edition, Uppsala 1998, p. 26). This is, *mutatis mutandis*, of course also true for the International Covenant on Civil and Political Rights (ICCPR).

⁷¹ The content of the chapters with the heading “National framework” is to a large extent based on the replies to the above-mentioned questionnaire that was sent to the then 15 EU Member States (annex 4 to this Paper). For further details on the replies see annex 2.

⁷² *Nota bene*: This is not the questionnaire that is in annex 4 to this present Paper, although many questions are very similar.

⁷³ Analysis of the replies to the questionnaire on the law and practice of Member States regarding remand in custody, Report by Jeremy McBride, Strasbourg, 13 May 2003, , pc-dp/docs 2003/pc-dp (2003) 9 – e., p. 4 – 6.

⁷⁴ In *Italy* the threshold for detention is provided by Article 280 of the Code of Criminal Procedure: Imprisonment for more than 4 years in the maximum of the sanction. In *Sweden*, Chapter 24 section 1 of the Code of procedure provides that pre-trial detention in principle is possible only if the offence is punishable by imprisonment for a term of one year or more. There are, however, exceptions to this rule. In *Germany*, the general rule is to be found in Article 113 of the Code of Criminal Procedure. Pre-trial detention is, in principle, possible also for less serious offences, although there are certain limitations.

the realm and there is a reasonable risk that he or she will avoid legal proceedings or a penalty by fleeing the country.

The government of the United Kingdom has replied that, in England & Wales the penalty for the offence is not a factor that is taken into account when making remand decisions. The decision to remand or bail a defendant is at the discretion of the court under the provisions set out in the Bail Act 1976. In Northern Ireland the situation is similar. Bail can be granted for any offence so there is no pre-trial detention threshold as such, though the severity of the offence may bear on whether a person is likely to turn up for trial.

In some EU Member States, *i.a.* Austria, Greece, Italy and the United Kingdom (Scotland), there are *maximum time limits* for pre-trial detention.

In most EU Member States, however, specific time limits regarding pre-trial detention do not exist. The period of pre-trial detention must, however, not be *disproportionate*.

Under national law, including case-law, special grounds for detention are also required, although the three *classical grounds* are not always explicitly mentioned. The government of the United Kingdom has replied that, in England & Wales, the Bail Act provides a presumption to bail (“release from custody”) for all those accused or convicted of an offence, but the defendant “*need not* be granted bail”, where he or she presents a bail risk.

A *presumption* to remand persons who are suspected of having committed *serious offences* in custody exists in several (*i.a.* Austria, Sweden, Italy and the United Kingdom [England & Wales]) - but not all – EU Member States.

3.2.3. *Comments*

A conclusion that can be drawn from the above considerations is thus that the international legal instruments do not contain any rules on a *maximum length* of pre-trial detention in the strict sense of the term, which can be translated into a fixed number of days, weeks, months or years. Some EU Member States provide for specific time limits as regards the length of pre-trial detention.

It is further important to note that the international legal instruments do not contain a common *threshold* for pre-trial detention. The threshold for detention varies between the different EU Member States. In some EU Member States, a suspect, who has no fixed abode in the territory, may be detained irrespective of the penalty for the offence, when there is a risk that he or she will abscond. In most cases such persons are foreigners, including nationals of other EU Member States. This means that the “normal” (higher) thresholds apply to residents, while no threshold requirements exist with regard to non-residents. This could probably be considered as a source of a difference in treatment and an impediment to the free movement within the European Union. Moreover, it is probably contrary to the principle of proportionality.

In some Member States there is a *presumption* to remand persons who are suspected of having committed serious offences in custody, although the special grounds for detention cannot be fully established. It is highly doubtful whether this is acceptable, considering the principle of liberty and the presumption of innocence.

3.3. Alternatives to pre-trial detention

3.3.1. Introduction

The aim of alternative measures⁷⁵ to pre-trial detention is to manage the different risks that can arise pending trial – such as the danger of the person’s absconding, the danger of his or her interfering with the course of justice and the danger of his or her committing a serious offence – by the use of more lenient measures than pre-trial detention. Custody pending trial should be an exceptional measure.

3.3.2. Council of Europe

Article 5(3) of the ECHR establishes that release pending trial may be conditioned by guarantees to appear for trial.

3.3.2.1. CoE Recommendation No. R(80) 11 on Custody Pending Trial

Recommendation No. R(80) 11 of the Committee of Ministers of the Council of Europe concerning *Custody Pending Trial* says that it is desirable for humanitarian and social reasons to reduce the application of custody pending trial to the minimum compatible with the interests of justice and that certain standards should be established, at European level, to be applied to persons awaiting trial. With the view to implement those aims, the Committee of Ministers has adopted a number of principles. In this context, the following principles should be noted:

- Custody pending trial shall be regarded as an exceptional measure and shall never be compulsory nor be used for punitive reasons (principle 1).
- Whenever custody pending trial can be ordered, the judicial authority shall consider whether the use of custody can be avoided by imposing *alternative measures* such as those mentioned in principle 15 (principle 9), *i.e.*:
 - a promise of the person concerned to appear before the judicial authority as and when required and not to interfere with the course of justice (principle 15, measure 1),
 - a requirement to reside at a specified address (*e.g.* the home, a bail hostel, a specialised institution for young offenders, etc.) under conditions laid down by the judicial authority (principle 15, measure 2),
 - a restriction on leaving or entering a specified place or district without authorisation (principle 15, measure 3),
 - an order to report periodically to certain authorities (*e.g.* court, police, etc., principle 15, measure 4),

⁷⁵ It should be mentioned that there are non-custodial supervision measures that, strictly speaking, are not substitutes for pre-trial detention. Pursuant to chapter 25, section 1, of the Swedish Code of Procedure, for example, the threshold for a travel prohibition order or an order to report to the police is imprisonment, without specification. The general threshold for pre-trial detention is, however, higher: one year (chapter 24, section 1, of the Code of Procedure).

- surrender of passport or other identification papers (principle 15, measure 5),
- provision of bail or other forms of security by the person concerned, having regard to his means (principle 15, measure 6),
- provision of surety (principle 15, measure 7), supervision and assistance by an agency nominated by the judicial authority (principle 15, measure 8).

As noted above (chapter 1.1.2., second paragraph), there is ongoing work in the Council of Europe to update Recommendation No R(80) 11, in particular as regards contemporary legal and judicial justification for the use of remand in custody and the use of *alternatives to custody*.

3.3.2.2. Recommendation No. R(99) concerning Prison Overcrowding etc.

Recommendation No. R(99) 22 of the Committee of Ministers concerning Prison Overcrowding and Prison Inflation, which *i.a.* refers to the above-mentioned Recommendation No. R(80) 11 and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, considers that prison overcrowding and prison population growth represent a major challenge to prison administrations and the criminal justice system as a whole, both in terms of human rights and of the efficient management of penal institutions. As regards measures relating to the pre-trial stage, the following recommendations should be noted:

- The application of pre-trial detention and its length should be reduced to the minimum compatible with the interests of justice. To this effect, member states should ensure that their law and practice are in conformity with the relevant provisions of the European Convention on Human Rights and the case-law of its control organs (measure 11)
- The widest possible use should be made of alternatives to pre-trial detention, such as the requirement of the suspected offender to reside at a specified address, a restriction on leaving or entering a specified place without authorisation, the provision of bail or supervision and assistance by an agency specified by the judicial authority. In this connection attention should be paid to the possibilities for supervising a requirement to remain in a specified place through electronic surveillance devices (measure 12).

3.3.3. *United Nations*

Article 9(3), second sentence, of the *ICCPR* explicitly provides that “[it] shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment”.

Pursuant to rule 6 of the *United Nations Standard Minimum Rules of 14 December 1990 for Non-custodial Measures* (the so-called *Tokyo Rules*) pre-trial detention shall be used as a

means of last resort in criminal proceedings (6.1) and alternatives to pre-trial detention shall be employed at as early a stage as possible (6.2).⁷⁶

3.3.4. National framework⁷⁷

3.3.4.1. Alternative measures

A conclusion to be drawn from the replies to questions 12 – 16 (concerning alternatives to pre-trial detention) of the above-mentioned questionnaire (annex 4), is that most Member States have some kind of *travel prohibition* (instruction not to leave a certain area) and an *obligation to report* (instruction to report regularly to a court, a prosecutor, the police or other authority) as alternatives to pre-trial detention. They can usually be combined with one another or with other measures. A number of Member States also provide that the suspect may be released or the pre-trial detention imposed on him may be revoked against him, if he or she provides a *surety*.

In the common law countries the decision to remand a suspect in custody or to release him or her (to grant bail) is at the discretion of the court (not linked to any threshold). In granting bail the court also has discretion to impose *any* condition, which it considers appropriate to ensure that the suspect attends the trial.

3.3.4.2. Applicable penalties

Question 14 of the questionnaire referred to penalties in the event of non-compliance of a bail condition. As regards the replies to this question, all Member States provide that the question of pre-trial detention shall be considered again and that the person may be remanded in custody.

Only in two jurisdictions, breach of a bail condition is a separate offence and is liable to a separate fine or imprisonment: Ireland and Scotland.

3.4. Summary of the present legal framework

The above analysis has shown that the EU Member States apply the same fundamental principles regarding pre-trial detention. This is, indeed, not surprising as they have all ratified the ECHR and the ICCPR.

Areas that, in principle, *are* covered by those binding international legal instruments, relevant recommendations and case-law are 1) the right to liberty and the presumption of innocence, 2) the legal grounds for detention, 3) the competent authorities that are entitled to decide on the detention, 4) the right of the detained person to challenge the legality of the detention before a court in the strict sense and 5) *approximate* time limits for the different steps at the pre-trial stage and 6) that release from pre-trial detention may be conditioned by guarantees to appear for trial (*i.e.* alternatives to pre-trial detention). The presumption that remand in

⁷⁶ The Tokyo Rules cover both the pre- and the post-trial stage.

⁷⁷ As noted above, measure 9 of the mutual recognition programme requires that the supervision measures potentially concerned and the penalties in the event of non-compliance with them shall be catalogued. For further details on the replies, see annex 2.

custody should be ordered for serious offences is only covered by a recommendation of the Council of Europe.⁷⁸

Areas that are *not* covered by those international instruments are, *i.a.*, 1) the threshold for pre-trial detention, 2) who may initially apprehend or arrest a suspect, 3) a *fixed* maximum length for pre-trial detention (and alternatives to such detention) and 4) mutual recognition of alternative measures to pre-trial detention.

Areas where there are significant divergences between the Member States, are, *i.a.*, 1) the threshold for detention, 2) the presumption that remand in custody should be ordered for serious offences and 3) (a fixed maximum) length of pre-trial detention (including alternatives to such detention).

⁷⁸ Principle 4 of Recommendation R(80) 11 concerning Custody Pending Trial.

4. A NEW INSTRUMENT ON MUTUAL RECOGNITION OF NON-CUSTODIAL PRE-TRIAL SUPERVISION MEASURES

4.1. The mutual recognition programme

As noted above (chapter 2.2.1.3.), the drawing up of a new instrument on mutual recognition of non-custodial pre-trial supervision measures must be considered in the light of the *mutual recognition programme* seen as a whole. The measures of this programme cannot be separated from one another, but are designed to interact with one another.

A decision by a court to impose an order to report regularly to the police instead of remanding the suspect in custody, presupposes, for example, that the court is able to make a reliable *risk assessment*. In particular, when the suspect is a foreigner or has his or her residence in another Member State, the reliability of the risk assessment is dependent on whether the court has access to information of any foreign criminal judgments. This situation is dealt with by *measure 2* of the mutual recognition programme. It foresees the adoption of one or more instruments establishing the principle that a court in one Member State must be able to take account of final criminal judgments rendered by the courts in other Member States for the purposes of assessing the offender's criminal record and establishing whether he has reoffended. The Commission will issue a proposal on this issue before the end of 2004.

In some situations (*e.g.* when a person is suspected of having committed an offence in the territory of an Member State where he or she is not a resident), it may also be desirable to *transfer the proceedings* to the suspect's Member State of normal residence. *Measure 11* of the mutual recognition programme foresees the drafting of an instrument enabling criminal proceedings to be transferred to other Member States, and encouraging appropriate coordination between the Member States.

The *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*⁷⁹, (the "FD-EAW") is the first instrument that was adopted under the mutual recognition programme (*measures 8, 13 and 15*). On the *one hand*, it could be argued that the FD-EAW is sufficient for the purposes of bringing back an accused person to stand trial⁸⁰ in the EU Member State where the alleged was committed. A new instrument on mutual recognition of non-custodial pre-trial supervision measures would therefore add little or no value to the legal framework already put in place. On the *other hand*, it should be remembered that the FD-EAW contains several limitations (*i.a.* relating to the threshold, the grounds for refusal and the time limits)⁸¹ and that it is not designed specifically to ensure the smooth functioning of a new mutual recognition mechanism regarding non-custodial supervision measures (covered by *measures 9 and 10* of the mutual recognition programme). In particular, the FD-EAW does not contain any provisions on non-custodial pre-trial supervision measures.

The mutual recognition programme mentions that certain aspects of mutual recognition, in particular those concerning pre-trial orders, have still not been addressed in an international

⁷⁹ OJ L 190, 18.7.2002, p. 1.

⁸⁰ Article 1(1) of the FD-EAW uses the wording "for the purposes of conducting a criminal prosecution", which would cover also the trial stage.

⁸¹ The limitations of the FD-EAW in relation to mutual recognition of non-custodial pre-trial supervision measures will be analysed in more detail below.

context.⁸² It seems therefore necessary to explore (other) possibilities of taking action as regards mutual recognition of alternatives to pre-trial detention:

Pursuant to *measure 10*, the adoption of an instrument enabling control, supervision or preventive measures ordered by a judicial authority pending the trial court's decision to be recognised and immediately enforced shall be considered.

In particular, the new instrument should;

- (1) apply to any person against whom criminal proceedings have been brought in one Member State and who may have gone to another Member State;
- (2) specify how such measures would be supervised⁸³; and
- (3) specify the penalties applicable in the event of non compliance.⁸⁴

To define further the type of instrument, which would best fulfil that mandate, it is necessary to make an analysis of possible situations, where the new instrument could be applied and constitute an added value.

4.2. Identification and description of the problem

4.2.1. Introduction

According to the first indent mentioned immediately above the new instrument should

- apply to any person against whom criminal proceedings have been brought in one Member State and
- who *may* have gone to another Member State.

Theoretically, a number of situations can be envisaged, where the suspected person has *left* the Member State, where the alleged offence was committed. The wording “*may have gone*” implies, however, that the new instrument could cover situations, where the suspected person still is *present* in the State, where the alleged offence was committed and the judicial authority is considering whether it should allow the suspect to return to his or her Member State of residence or, possibly to another Member State. Different situations that are covered by measure 10 will be described below.

4.2.2. Suspect⁸⁵ is still present in the Member State where the alleged offence was committed

Situations where the suspected person is still *present* in the Member State where the alleged offence was committed could be the following:

⁸² See the mutual recognition programme, OJ C 12, 15.1.2001, p 11, paragraph 6.

⁸³ This will be considered in chapters 4.4. and 4.5. below.

⁸⁴ This will be considered in chapter 4.6. below.

⁸⁵ In this and the following chapters, the word suspect is used for all persons suspected of having committed a criminal offence until finally judged, irrespective of the terminology in national legislation (accused etc.).

4.2.2.1. Serious offences (covered by the FD-EAW)

A person is suspected of having committed a serious offence (covered by the FD-EAW, *i.e.* punishability of one year) in the territory of a Member State where he or she is not ordinarily a resident. After the termination of the preliminary investigation (and evidence gathered), the suspect is either (still) detained in custody or is subject to another coercive measure, such as a travel prohibition order combined with an obligation to report to the local police authority. The ground for the coercive measures is that there are reasons to fear that the person will abscond. The competent judicial authority considers, in other words, that the presence of the suspected person cannot be ensured at the upcoming trial, if such measures are not ordered.

A concrete example could be a tourist, who during his or her visit to another Member State is suspected of assault and causing grievously bodily harm to a resident of that other Member State.

If the suspected person is in pre-trial detention, this will cause him or her much suffering, in particular if the person is not familiar with the habits or language of the country. Most important: the person could lose his or her job. The suspected person will also be cut off from contacts with family and friends, who could have come to visit the person if he or she was detained in the home country. It will also entail costs for State of detention. In the event that the suspect only is subject to a travel prohibition order and must report to the local police authority, this will still have a negative influence. Apart from the inconvenience caused by the obligation to stay in a foreign country, the risk of losing his or her job and the restrictions on the liberty of the person, this also entails extra costs for accommodation and food. Typically a foreign suspect will therefore be in a more vulnerable position than a person who normally is resident in the country.

4.2.2.2. Less serious offences (not covered by the FD-EAW)

Pre-trial detention is also possible for less serious offences (not covered by the FD-EAW, *i.e.* below the threshold of one year):

As noted above (chapter 3.2.2.), some Member States detain suspected persons in custody, if they do not reside in the territory of the Member State and there is a reasonable risk that the person will avoid legal proceedings or a penalty by fleeing the country. In some Member States this possibility exists also in relation to acts punishable only by a fine (even if the threshold for pre-trial detention generally is much higher). The judicial authorities of these Member States therefore sometimes consider that they must remand such a person in custody.⁸⁶ This means that foreigners (but not residents) can be held in pre-trial detention for minor offences.

4.2.2.3. Request for transfer of non-custodial supervision measures

It should further be considered whether a suspected person, who is already subject to a non-custodial pre-trial supervision measure in one Member State, and, who, permanently or temporarily, wants to go to another Member State should be allowed to make a *request* for transfer of the non-custodial pre-trial supervision measure to the latter Member State.

⁸⁶ If the suspect does not confess the offence and the matter cannot be resolved by issuing an order of summary punishment, the judicial authority may be inclined not release him or her if it wants to ensure the trial.

4.2.3. Suspect has *left* the Member State where the alleged offence was committed

Situations where the suspected person has *left* the Member State where the alleged offence was committed could be the following:

4.2.3.1. Suspect in breach of an obligation under a non-custodial supervision measure

A suspect person, who is already subject to a non-custodial supervision measure, such as a travel prohibition order, has fled the Member State which ordered this measure and has gone to another Member State. The suspect is, in other words, in breach of an obligation under a supervision measure. As different solutions would be possible depending on whether a European arrest warrant could be issued, a distinction should also be made between serious and less serious offences. This problem is linked to the question on what consequences should follow in the event of a non-compliance with an obligation under a non-custodial supervision measure (chapter 3.6.).

4.2.3.2. Late application for non-custodial supervision measures

Finally, one could, at least theoretically, envisage the situation where a person has gone to another Member State without being subject to any coercive measures. During the preliminary investigation or before the hearing takes place, the competent judicial authority discovers elements that indicate the need to order coercive measures in order to eliminate one or several of the “classical dangers” that justify pre-trial detention. A question to be asked is whether this authority should be allowed to make an application to the Member State where the suspected person now resides to apply less coercive measures than detention for the purposes of ensuring the presence of the suspect at the upcoming trial.

It could of course be argued that the above reasoning would push the principle of free movement of persons too far. On the other hand, nothing in the wording of measure 10 of the mutual recognition programme seems to prevent such an alternative. Besides, the application of an alternative measure to pre-trial detention in the State of residence of the suspected person would constitute a more lenient coercive measure than issuing a European arrest warrant.⁸⁷

Question 1:

Should a mechanism for mutual recognition of non-custodial supervision measures cover

- the situation where a suspected person, who already is subject to such measures and who, permanently or temporarily, wants to go to another Member State, makes a request for transfer of these measures to that Member State (as described in chapter 4.2.2.3. above)?

- if yes, under which conditions?

⁸⁷ Cf. chapter 4.4.2.2., (Nordic Extradition Acts). This possibility would not, strictly speaking, substitute pre-trial detention in the *trial*-State with a non-custodial supervision measure. It would, however, be an alternative to issuing a European arrest warrant. Cf. also Article 12, last sentence, of the FD-EAW.

- the situation where the suspect has already gone to another Member State (as described in chapters 4.2.3.1., “suspect in breach of an obligation under a non-custodial pre-trial supervision measure” and 4.2.3.2., “late application for non-custodial supervision measures”, above)?

- if yes, under which conditions?

4.3. General considerations

4.3.1. Introduction

This Commission Staff Working Paper will focus on the situations described in chapter 4.2.2. (Suspect is still present in the Member State where the alleged offence was committed) above.

The drawing up of an instrument on pre-trial non-custodial supervision measures should be considered in the light of the principles that are applicable for pre-trial detention in general, as described in chapter 3 (“Basic principles”) above. This implies, in particular, that no one shall be deprived of his or her liberty unless this is absolutely necessary, and, in general, that coercive measures must be proportionate in relation to the aim pursued.

It is also important to take into account changes in the situation of the suspect during the whole period where he or she is subject to coercive measures. The basic principles described in chapter 3 above require that the existence of the grounds for such coercive measures must be reviewed regularly.

4.3.2. Aim

The general aim of the new instrument would be to reinforce the right to liberty and the presumption of innocence in the European Union seen as a whole, while, at the same time, ensuring that the trial-State (*i.e.* the State that issues an order to transfer⁸⁸ the non-custodial pre-trial supervision measure - the issuing Member State - to the State that executes this order - the executing Member State) receives some kind of guarantee that the suspect does not escape from justice.

4.3.2.1. Monitoring in the executing Member State

Measure 10 of the mutual recognition programme says that the new instrument should cover “control, supervision or preventive measures”. In line with the title of that part of the programme, this means that the new instrument only should cover *non-custodial pre-trial supervision measures*⁸⁹ that are aiming at eliminating the above-mentioned classical special grounds for detention (*i.e.* flight, suppression of evidence and re-offending) from the moment when these measures are decided by the judicial authority of the issuing EU Member State until the trial takes place. The monitoring will thus take place in the executing Member State. The scope of the new instrument, the choice of appropriate supervision measures to be taken over, how they shall be applied by the judicial authority in the executing EU Member State

⁸⁸ Depending on the scope of the future instrument (*e.g.* it would not be correct to speak of a “transfer” if the new instrument would cover the situation described in chapter 4.2.3.2. (Late application for non-custodial supervision measures).

⁸⁹ See chapter 1.2. above.

and whether the latter State should have any grounds to refuse an order to monitor the suspected person will be discussed below.

4.3.2.2. Return to the issuing Member State

The principle that only non-custodial supervision measures should be used during the monitoring phase, does not mean that the new instrument should not contain a possibility, as a last resort, to return an uncooperative suspected person to the trial State, if necessary by force. It is rather the mere existence of such a possibility than its actual use that would ensure the smooth functioning of any new instrument. It should be underlined that in the absence of possible recourse to coercive measures, there would be a risk (in the short and in the long run) that the relevant category of persons will not benefit from alternative measures at all. The consequences in the event of non-compliance with an obligation under a non-custodial pre-trial supervision measure will be discussed in chapter 4.6. below.

4.3.2.3. Added value

The introduction of an instrument on mutual recognition and enforcement of non-custodial supervision measures would constitute an added value;

firstly, as it would enable a suspect to go back to his or her country of normal residence, eliminating the negative consequences of the present legal framework (as described above).

secondly, as it would allow the trial-State to ensure the monitoring of the suspect and that he or she does not escape the course of justice.

thirdly, as it would be more appropriate than the European arrest warrant to ensure the return of the suspected person to the issuing authority, thereby implementing the principle of proportionality. (*i.e.* during the monitoring of the compliance with such a measure in the executing Member State).

4.3.3. *The three classical dangers*

4.3.3.1. Dangers of suppression of evidence and of re-offending

A new instrument on mutual recognition of non-custodial supervision measures will probably mostly be used, where there is a danger of the suspect's absconding.

It could also be used to minimise the other two dangers, *i.e.* the risk of suppression of evidence and the risk of repetition of offences. In the former case, the suspect could be subject to an obligation not to contact a witness or a victim. In the latter case, the suspect could be ordered to undergo a medical treatment (for drug addicts etc.).⁹⁰

The *danger of suppression of evidence* obviously relates to the offence for which there is a reasonable suspicion. The aim of the corresponding non-custodial supervision measure would be to eliminate that the suspect interferes with the course of justice and endangers the outcome of the upcoming trial relating to that *specific* offence.

⁹⁰ See chapter 2.2. ("Legitimate grounds for detention, threshold and duration") above, in particular subchapter 2.2.1., paragraphs 11 and 12, with references to the relevant case law of the ECtHR..

As regards the *danger of re-offending*, it could be argued that the question of what is meant by “new” offences also should be interpreted in the light of the criminal law of the issuing Member State. In a *purely national context*, it is clear that the “new” offences must be offences as defined under the criminal law of the issuing authority (*i.e.* the judicial authority that decides whether alternative measures should be applied, *nullum crimen sine lege*). In a *European Union context*, the situation is more complex. As described above, the monitoring of the suspected person will take place in the executing Member State. The elimination of the danger of committing new offences will therefore probably be more in the interest of the executing Member State. The problem will be analysed in the chapter dealing with non-compliance with an obligation aiming at eliminating the danger of re-offending (4.6.2.4.).

4.3.3.2. Danger of flight (absconding)

What does the *danger of the suspect’s absconding* mean?

Pursuant to Article 5(1) c of the ECHR it is, *i.a.*, permitted to deprive a person of his or her liberty when there is

- a reasonable suspicion that he or she has committed an offence and
- when it is reasonably considered necessary to prevent his or her *fleeing* after having done so.

The word “fleeing”, which is a synonym of “absconding” cannot be interpreted in the abstract. The risk of flight must always be seen in relation to something else.

It should be noted that the *last sentence* of Article 5(3) provides that “[r]elease may be conditioned by *guarantees to appear for trial* [emphasis added]”. This sentence should be read in conjunction with the first sentence of the same Article and the first sentence of Article 6(1), which give the accused the right to trial (hearing) within a reasonable time (or to release pending trial). It should be noted that the word “right” indicates that the accused may have the choice whether to attend the trial or not.⁹¹

The risk that must be eliminated under Article 5(1) c is thus that the suspect avoids the “determination of [...] any criminal charge against him [or her]” (Article 6(1), first sentence), *i.e.* in a trial, where the suspect is present or absent. It is difficult to see that the danger of the suspect’s absconding could be interpreted otherwise.⁹²

⁹¹ Several national legal systems allow that an accused person may be tried in his or her absence under certain conditions. See, *i.a.*, Article 420 quater (“contumacia”) and Articles 165 – 296 (“latitanza”) of the Italian Code of Criminal Procedure, Articles 232 and 233 of the German Code of Criminal Procedure and chapter 46, section 15, of the Swedish Code of Procedure.

⁹² This interpretation seems also to be in accordance with the case-law of the ECtHR. See, *i.a.*, the two judgments of 26 June 1968 in the case of *Neumeister v. Austria* (paragraph 9, in particular the last sentence of the second sub-paragraph, and paragraph 12) and in the case of *Wemhoff v. Germany* (paragraph 15). It could also be noted that Article 112 of the German Code of Criminal Procedure defines the danger of absconding (“Fluchtgefahr”) as the danger that the accused will avoid the criminal proceedings. Chapter 24, section 1, point 1, of the Swedish Code of Procedure uses the wording “flee or otherwise evade legal proceedings”. See further, *i.a.*, paragraph 175, point 2, of the Austrian Code of Criminal Procedure.

In accordance with the principle of proportionality, non-custodial supervision measures should, whenever possible, be used to ensure the presence of the suspected person at the trial: The ECtHR has “emphasise[d] that the concluding words of Article 5(3) of the Convention show that, when the only remaining reasons for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, his release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance”.⁹³

Therefore (as has been noted above), the new instrument would probably need a mechanism that ensures the appearance of the suspected person at the trial (unless he or she can be judged *in absentia*) in order to pre-empt any potential problems in case that the suspect decides not to come to the trial at a later stage (the “trial phase”, *i.e.* when the date of the trial has been decided). This problem will be considered in more detail below (chapter 4.6.3.).

4.3.4. Scope

Measure 10 of the mutual recognition programme seems to imply that the instrument should *not* be limited to serious (or “extraditable”) offences. In fact, nothing is said about what offences should be covered, whether the envisaged instrument should be linked to a certain level of penalty for the offence in question, or about a threshold for ordering of coercive measures.⁹⁴

As there is no such thing as a common threshold for pre-trial detention in the Member States of the European Union, it could be argued that the new instrument also should cover *less* serious offences, *i.e.* that it should not be linked to the threshold for issuing a European arrest warrant (which is one year for the pre-trial situation).⁹⁵ As noted in chapter 3.2.2., in the common law countries, pre-trial detention is not linked to a threshold.

The question of whether to include less serious offences in a new instrument on mutual recognition of non-custodial pre-trial supervision measures was discussed in the experts’ meeting on 12 May 2003. Several participants pointed out that foreigners often are arrested for minor offences: “Indeed, such an instrument should be available for less serious offences, where currently non-residents are sometimes kept in pre-trial detention, while residents benefit from alternative measures.”

It could be argued that the provisions on pre-trial detention in the Member States are a source of *difference in treatment* between residents and non-residents. As noted above (chapter 2.2.1.), principle 13 of Recommendation No. R(80) 11 of the Committee of Ministers of the Council of Europe states that custody pending trial shall not be continued if the period spent in custody awaiting trial would be disproportionate to the sentence likely to be served in the event of conviction. There is therefore reason to ask whether prolonged pre-trial detention of

⁹³ Judgment of 26 June 1968 in the case of *Wemhoff v. Germany* (paragraph 15).

⁹⁴ The ECHR neither covers the question of the threshold for pre-trial detention nor for non-custodial supervision measures that are not substitutes for pre-trial detention. Pursuant to chapter 25, section 1, of the Swedish Code of Procedure, for example, the threshold for a travel prohibition order or an order to report to the police is imprisonment, without specification. The general threshold for pre-trial detention is, however, higher: One year (chapter 24, section 1, of the Code of Procedure).

⁹⁵ Pursuant to Article 2(1) of the FD-EAW, a European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months (in the pre-trial situation).

non-residents for, at least, *less* serious offences constitutes a breach of the *proportionality principle*.

The new instrument should therefore not only cover serious offences, but should, in principle, be extended to *all* kinds of offences irrespective of penalty.

Differences between the Member States regarding the threshold for detention should not be an obstacle when a more lenient measure than pre-trial detention is considered. In other words it would be an option whenever there is a possibility under the criminal procedural law of the *issuing* Member State⁹⁶ to order that a suspect be remanded in custody.

4.3.5. Promoting equality of treatment

One of the most important objectives of the European Union is to develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured. *At present*, however, residents of the Union sometimes are kept in pre-trial detention in a foreign Member State, although they could have been subject to less severe coercive measures in their State of normal residence, if the right to liberty and presumption of innocence would have existed in relation to the European Union as a whole.⁹⁷

The *Court of Justice of the European Communities* has consistently held that the EC rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria, lead to the same result.⁹⁸ The CFREU confirms this by providing, in Article 21(1), that “within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union [...] any discrimination on grounds of nationality shall be prohibited”. The Court of Justice has also held that a national rule which draws a distinction on the basis of residence, in that non-residents are denied certain benefits which are, conversely, granted to persons residing within the national territory, is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners, constitutes indirect discrimination by reason of nationality.⁹⁹ A difference in treatment between resident and non-resident offenders may, however be allowed when this is justified by objective circumstances.¹⁰⁰ The penalties chosen by a Member State must, however, not go beyond what is necessary in order to achieve the aim pursued.¹⁰¹

⁹⁶ *i.e.* the Member State where the alleged offence has been committed (trial State).

⁹⁷ Pursuant to Article 5(1) ECHR the deprivation of the liberty of a person must follow in accordance with a procedure prescribed by law, *i.e.* the *national law* of each of the Contracting Parties. It should, however, be noted that the ECHR was not drafted to create a *common* judicial area for the member States of the Council of Europe, but rather to set minimum standards to each of the national jurisdictions. The ECHR contains very few provisions on cross-border issues.

⁹⁸ Case 22/80, *Boussac v Gerstenmeier* [1980] ECR 3427, paragraph 9; Case C-175/88, *Biehl v Administration des Contributions* [1990] ECR I-1779, paragraph 13.

⁹⁹ Case C-279/93, *Finanzamt Köln v Schumacker* [1995] ECR I-225, paragraphs 28 and 29.

¹⁰⁰ Case C-398/92, *Mund & Fester v Hatrex International Transport* [1994] ECR I-467, paragraphs 16 and 17.

¹⁰¹ See the judgment of the Court of Justice of the 11 February 2003 in Case C-29/95 (*Eckehard Pastoors and Trans-Cap GmbH v. Belgian State*), where the Court discussed the legality of a requirement to pay a sum of money upon discovery that certain road transport offences had been committed (in particular paragraph 26 and the summary).

In order to ensure the full implementation of the right to liberty and the presumption of innocence in the area of freedom, security and justice, the Member States must cooperate to avoid that suspects (*i.e.* including non-resident suspects) are remanded into custody when it is not absolutely necessary. In other words the right to liberty and the presumption of innocence should be applicable to all Member States jointly. One could therefore talk of a *principle of loyal cooperation* between Member States to implement the right to liberty and the presumption of innocence within the European Union as a whole.¹⁰²

Question 2:

Considering the negative consequences of the present legal framework as regards the treatment of non-resident suspects in the area of alternatives to pre-trial detention:

(a) Do you agree with the approach of the Commission with respect to mutual recognition of non-custodial pre-trial supervision measure as described above (*i.e.* the possibility of monitoring the suspected person in his or her country of normal residence and the necessity to introduce a mechanism that ensures the presence of the accused person at the trial unless this person can be judged in his or her absence) in order to ensure the full EU-wide implementation of the right to liberty and the presumption of innocence?

(b) If not, are there alternative solutions?

(c) If yes, please describe them.

(d) Should a mechanism for mutual recognition of non-custodial supervision measures also cover less serious offences (*i.e.* below the threshold of Article 2(1) of the FD-EAW)?

4.4. Choice of appropriate non-custodial pre-trial supervision measures

4.4.1. Introduction

As required by measure 9 of the mutual recognition programme, an inventory of the potentially concerned obligations or supervision measures has been established in annex 2. Pursuant to measure 10 of this programme, the new instrument should specify how such measures should be supervised.

Several models to implement measure 10 are possible and will be discussed below.

4.4.2. Possible models under the present legal framework

In order to find out whether there are any provisions on recognition of foreign decisions on alternatives to pre-trial detention that are applied between Member States, which could be

¹⁰² See also Article 10 TEC. Pursuant to Article 5(2) of the draft Treaty establishing a Constitution for Europe, the Union and the Member States shall, following the *principle of loyal cooperation*, in full mutual respect assist each other in carrying out tasks which flow from the Constitution. Article 7 (fundamental rights) provides that the Union shall recognise the rights, freedoms and principles set out in the CFREU, which constitutes Part II of the Constitution, *i.a.* the right to liberty (Article II-6) and the presumption of innocence Article II-48. Article II-53 (Level of protection) provides that nothing in the CFREU shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms.

used as a model for the new instrument, the European Commission asked the Member States to reply to questions 15 and 16 of the questionnaire.¹⁰³ The answers are in the negative as regards foreign decisions on alternatives to *pre*-trial detention.

The question is whether there are any solutions under the present legal framework in related areas that should be considered in this context.

4.4.2.1. European Convention on the Supervision of Conditionally Sentenced Offenders etc.

A number of conventions on recognition of foreign decisions in penal matters have been adopted under the framework of the Council of Europe. Although these conventions mostly cover the *post*-trial situation, it should be considered whether they could contain elements that might be useful for the of adoption of an instrument on mutual recognition on enforcement non-custodial *pre*-trial supervision measures in accordance with measure 10 of the mutual recognition programme.¹⁰⁴

An instrument that could contain such elements is the *European Convention of 30 November 1964 on the Supervision of Conditionally Sentenced or Conditionally Released Offenders* (ETS No 51).¹⁰⁵

This convention contains rules on supervision of conditionally released persons. It is a classical convention based on the principle of double criminality. Article 4 provides that the offence on which any request is based shall be one punishable under the legislation of both the requesting and the requested State. There are a number of mandatory or optional grounds to refuse a request. Under Article 6, supervision, enforcement or complete application of the sentence shall be carried out, at the request of the State in which the sentence was pronounced, by the State in whose territory the offender establishes his ordinary residence. Pursuant to Article 10, the requesting State shall inform the requested State of the conditions imposed on the offender and of any supervisory measures with which he or she must comply during his period of probation. Article 11 provides that in complying with a request for supervision, the requested State shall, if necessary, adapt the prescribed supervisory measures

¹⁰³ Question 15: Does your country recognise or transpose decisions by legal authorities of foreign countries regarding supervision or other alternatives to *pre*-trial detention?, and question 16: If this is the case, please describe these rules.

¹⁰⁴ Legal instruments of the Council of Europe that should be mentioned in this context are the European Convention of 28 May 1970 on the International Validity of Criminal Judgments (ETS No. 70), the European Convention of 21 March 1983 on the Transfer of Sentenced Persons (ETS No. 112) and the Additional Protocol of 18 December 1997 to the latter Convention (ETS No. 167). See also the Convention of 13 November 1991 between the member states of the European Communities on the enforcement of foreign criminal sentences (which was adopted to facilitate the application of the CoE Convention on the International Validity of Criminal Judgments) and the Agreement of 25 May 1987 on the application among the EC Member States of the CoE Convention on the transfer of sentenced persons. An analysis of these conventions can be found in the Commission Green Paper on the approximation, recognition and enforcement of criminal sanctions in the European Union, COM(2004) 334 final.

¹⁰⁵ The replies to questions 15 and 16 of the above-mentioned questionnaire show that some EU Member States have ratified and transposed this convention. The convention has been ratified by 11 (old and new) Member States (entry into force within brackets): Austria, 1.4.1980 (1.7.1980), Belgium, 21.9.1970 (22.8.1975), France, 16.9.1968 (22.8.1975), Italy 21.5.1975 (22.8.1975), Luxembourg, 22.9.1976 (23.12.1976), Netherlands, 30.9.1987 (1.1.1988), Portugal, 16.11.1994 (17.2.1995) and Sweden, 27.2.1979 (28.5.1979), Czech Republic, 10.4.2002 (11.7.2002), Slovakia, 21.7.2003 (22.10.2003) and Slovenia, 20.12.1992 (21.1.1993).

in accordance with its own laws. In no case may the supervisory measures applied by the requested State, as regards either their nature or their duration, be more severe than those prescribed by the requesting State.

Although there are some elements of this convention that could be useful for an instrument on mutual recognition and enforcement of non-custodial supervision measures, the aim is different. The supervisory measures regarding conditionally sentenced or released persons aim at securing and reinserting a convicted person into society. The supervisory measures regarding the alternatives to pre-trial detention in principle only aim to eliminate the three classical dangers that allow deprivation of liberty. An instrument on non-custodial supervision measures must be drawn up against the background of the presumption of innocence.

4.4.2.2. Nordic Extradition Acts

The Nordic Member States replied (to questions 15 and 16 of the above-mentioned questionnaire) that the *Nordic Extradition Acts* could contain elements that would be useful in this context. The Nordic Extradition Acts, which, *i.a.* cover pre-trial detention, are applicable in cases where a request has been made for an inter-Nordic extradition. Denmark, Finland and Sweden apply uniform legislation in force between them relating to inter-Nordic extradition¹⁰⁶ (the Swedish Act has been translated to English: *Act [1959:254] concerning extradition to Denmark, Finland, Iceland and Norway for criminal offences*). Section 12 of the Swedish Act provides that the prosecutor, in order to ensure extradition, may – if the offence is punishable by Swedish law – use and in the court demand the use of coercive measures in accordance with what is generally provided in criminal proceedings. These measures are pre-trial detention, travel prohibition and order to report to the police. Pursuant to Section 17 of the Swedish Act, a person who is suspected, accused (or convicted) of a crime, which, under the Act, can give rise to an extradition may also, at the request of a police or prosecution authority in the *foreign* state or by reason of arrest issued there, pending extradition, be immediately arrested or issued with a travel prohibition or reporting order by a prosecutor in accordance with the provisions generally applicable in criminal proceedings, if the offence or an offence of a corresponding nature is punishable under Swedish law by imprisonment.

Less coercive measures than pre-trial detention, *i.e.* travel prohibition and order to report to the police, are thus available under the Nordic extradition acts in order to ensure extradition.¹⁰⁷

¹⁰⁶ In Sweden: *Lag (1959:254) om utlämning för brott till Danmark, Finland, Island och Norge* (This Act has been translated into English by the Swedish Ministry of Foreign Affairs - Act (1959:254) concerning extradition to Denmark, Finland, Iceland and Norway for criminal offences). In Denmark: *Lov nr. 27 af 03.02.1960 om udlevering af lovovertrædere til Finland, Island, Norge og Sverige*. In Finland: *Lagen om utlämning för brott Finland och de övriga nordiska länderna emellan* (270/1960). St 402 (Swedish) and *Laki rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden pohjoismaiden välillä* 3.6.1960/270 (Finnish).

¹⁰⁷ It should be noted that Article 12 of the FD-EAW provides that a person arrested on the basis of a European arrest warrant may be released provisionally, provided that the executing Member State takes all measures necessary to prevent the person absconding. A difference in relation to the FDEAW is that the Nordic Extradition Acts have a lower threshold for surrender. Section 3 of the Swedish Act provides that “[e]xtradition may *not* take place if the act is punishable in the foreign state by *fines only*, unless extradition also takes place for an offence for which a heavier penalty than fines can be imposed”. Moreover they do not require double criminality and do not contain any fixed time limits for surrender.

4.4.2.3. Summary

There are presently no international instruments that specifically allow the transfer of alternative measures to pre-trial detention or other coercive measures from one EU Member State to another. The solutions that are available under the present legal framework in related areas are insufficient or inadequate in relation to the specific aim of measures 9 and 10 of the mutual recognition programme, *i.e.* cooperation between EU Member States regarding persons subject to “obligations or supervision as part of judicial supervision pending a court decision”. It is therefore necessary to consider the adoption of a new instrument covering this issue.

4.4.3. Possible solutions in the new instrument

4.4.3.1. European order to report

The choice of alternatives to pre-trial detention to be taken over in an instrument on non-custodial supervision measures was analysed in the experts’ meeting of 12 May 2003. In the Discussion Paper of 24 April 2003, which was sent to the experts in order to prepare the meeting, it was suggested to use an order to report to an authority, possibly in combination with a travel prohibition order (“European reporting order”). Most participants of the experts’ meeting also came to the conclusion that the most appropriate measure would be “an order to report periodically to certain authorities (in particular the police authorities)”.

An order to report periodically to an authority in combination with a travel prohibition order would probably be a good choice: most Member States have these alternatives in their legal systems and they are mentioned in Recommendation No. R(80) 11 (principle 15, measures 3 and 4). This solution would therefore not impose a legal instrument that is foreign to the legal traditions of the EU Member States.

Some participants pointed out that, in some Member States, there were more lenient measures than reporting to the police. These measures also had to be taken into consideration (principle of proportionality).

4.4.3.2. Degree of involvement of the issuing authority

Different degrees of involvement of the issuing authority are possible:

According to a *first model*, the *issuing* judicial authority would decide the non-custodial pre-trial supervision measures to be applied during the monitoring phase (in accordance with its national law) or in what way the suspect should comply with his or her obligation to report to an authority (combined with a travel prohibition order); for example, by reporting to the police (and not to a court) every day (and not merely once a week), that the suspect shall wear an electronic tag, etc. The executing Member State would simply execute the detailed order of the issuing Member State.

Under a *second model* the role of the *issuing* judicial authority would merely be to decide that the suspect should report to an authority. It would be left to the executing Member State to designate this authority (police, prosecutor, court, other authority), to decide how often the suspect shall report and to impose additional obligations.

4.4.3.3. Discretion left to the executing authority

Alternatively, the choice of coercive measures could be left entirely to the *executing* Member State. The judicial authority in the Member State where the alleged offence has been committed (issuing Member State), would only specify the objective of monitoring the individual and send the suspected person back to his or her country of normal residence (the executing Member State).

The executing Member State would simply be under an obligation to cooperate with the issuing Member State regarding the specified objective. The executing authority would, however, apply its own national law, which means that it would impose the most suitable supervision measures among those available in its domestic law. The executing Member State should also have the obligation to send the summons to attend the trial to the suspected person.

A reason to let the executing judicial authority decide on the coercive measures is that it is best placed to take into account changes in the situation of the suspect. An additional reason is that equality of treatment would be ensured.

4.4.3.4. Eurobail

In the experts' meeting on 12 May 2003, an alternative model, the so-called *Eurobail* model, was presented: This model - which presents some (though limited) similarities with the model presented above - is based on a division of functions between the trial court and the court of the suspect's country of residence. The trial court makes a preliminary assessment whether the offence is "bailable". If the answer is yes, the suspected person is sent back to his or her country of residence, where the court makes the final decision on the provisional release. According to the Eurobail model, the court of the country of residence is in a better position to make the *risk assessment* than the trial court. The State of residence is responsible for sending the person back to the trial-State. In order for the European arrest warrant to be applicable, it is suggested that a new category of "enforceable offence" be created and added to the FD-EAW. The category might be called "Fugitive from Justice".¹⁰⁸

Question 3:

(a) Should the new instrument contain a provision on a specific non-custodial pre-trial supervision measure, such as the European order to report, possibly in combination with a travel prohibition order, as described above?

(b) Would it be appropriate to let the *issuing* authority decide the non-custodial pre-trial supervision measures to be applied during the monitoring phase (in accordance to its national law) or in what way the suspected person should comply with a European order to report (*i.e.* how oft he or she should report, to what authority etc.)?

(c) Would it be more suitable to let the *executing* authority choose the appropriate coercive measures in accordance with its national law, leaving to the issuing authority only to specify the objective to be monitored?

¹⁰⁸ For further details, see the website of the NGO "Fair Trials Abroad": <http://www.f-t-a.freeseerve.co.uk/reports/>.

(d) Would the Eurobail model be suitable?

4.5. Procedure

4.5.1. Competent authorities

Quite logically, according to measure 10 of the mutual recognition programme, the *issuing authority* should be a judicial authority: It is indeed the same authority which may order either that a person is remanded in custody, or that alternative measures are imposed to ensure pre-trial control.

Regarding the *executing authority*, it should, by analogy with the previous instruments or draft instruments, be provided that this authority should be a judicial authority having jurisdiction at the suspect's place of residence.

4.5.2. Grounds for refusal

4.5.2.1. General considerations

Should the *executing authority* have any grounds to *refuse* the execution of an order of transfer of a non-custodial supervision measure under the new instrument? In this context, it should be considered that the *objective* of the new instrument, in principle¹⁰⁹, is to substitute pre-trial detention in the issuing Member State with a non-custodial supervision measure in the executing Member State, *i.e.* rather the inverse situation compared to the FD-EAW. It should also be born in mind that the threshold of the FD-EAW is punishability of one year, while the new instrument possibly should cover all offences, *i.e.* also *less* serious offences.

Articles 3 and 4 of the FD-EAW list a number of mandatory and optional grounds for refusal. It should be considered whether all of them are relevant in this context, and whether the status of some of them should not be adapted to the new instrument.

The starting point is that the grounds for refusal should be very limited (if any): The consequence of a refusal will in many situations be that the trial-State keeps the suspect in detention.

4.5.2.2. Ne bis in idem

A ground for refusal that clearly is to the advantage of the suspect is when the executing Member State discovers that this person has already been tried for the same offence (*ne bis in idem*). The right not to be tried or punished twice in criminal proceedings for the same criminal offence is enshrined in Article 50 of the CFREU. This is a mandatory ground for refusal under Article 3(2) of the FD-EAW. If, in such a case, the grounds for refusal are communicated to the issuing judicial authority, this authority will hopefully reconsider whether it should impose any coercive measures at all and release the suspect from custody (and halt the proceedings). This ground for refusal would, in other words, operate as a safeguard for the suspect.

In its judgment of the 11 February 2003 in Joined Cases C-187/01, *Gözütok*, and C-385/01, *Brügge*, the European Court of Justice held that the *ne bis in idem* principle, laid down in

¹⁰⁹ Depending on the scope of a future instrument (see chapters 3.2.2. and 3.2.3. above).

Article 54 of the 1990 Schengen Implementation Convention¹¹⁰, also applies to procedures whereby further prosecution is barred by which the public prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the public prosecutor.

That situation corresponds to Article 4(3) of the FD-EAW and this ground for refusal is for the benefit of the suspect. Possibly the burden of proof of such a decision should be put on the suspect.

4.5.2.3. Amnesty

Pursuant to Article 3(1) of the FD-EAW, *amnesty* in the executing Member State for the offence on which the European arrest warrant is based constitutes a mandatory ground for refusal. A condition is that the executing State had jurisdiction to prosecute the offence under its own criminal law. Should this also constitute a mandatory ground for refusal under the new instrument?

4.5.2.4. Age of criminal responsibility

Another mandatory ground for refusal under the FD-EAW relates to the *age of criminal responsibility* for the acts on which the European arrest warrant is based (Article 3(3)). In a situation where it is possible to prosecute the suspect in the issuing State, but not in the executing State because of his or her age, the executing State may be of the opinion that it would be against its “*ordre public*” to give any assistance at all to the issuing State.¹¹¹

The international instruments¹¹² regarding children and juveniles indicate that pre-trial detention should be avoided as far as possible for this category. Article 37 of the *Convention of the Rights of the Child (CRC)*¹¹³ emphasises, *i.a.*, that arrest and detention of a child shall be used only as a measure of last resort and for the shortest period of time.

It should be noted that the international instruments do not contain any binding rules on the age of criminal responsibility. In the European Union the minimum age of criminal responsibility varies from 7 years in Ireland to 16 years in Portugal.¹¹⁴

As the objective of the new instrument is to extend the use of non-custodial supervision measures as an alternative to pre-trial detention, it seems justified that differences in the age

¹¹⁰ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 at Schengen.

¹¹¹ This situation was discussed in the experts’ meeting of 12 May 2003: A participant pointed out that the ‘age of criminal responsibility’ should possibly not be included as a mandatory ground for refusal, as this in some Member States would have the consequence that minors would be kept in detention. This is, indeed, true.

¹¹² See also the United Nations Standards Minimum Rules of 29 November 1985 for the Administration of Juvenile Justice (the so-called Beijing Rules) and the United Nations Rules of 14 December 1990 for the Protection of Juveniles Deprived of their Liberty.

¹¹³ The CRC has been ratified by almost all of the member States of the United States. The only exceptions are Somalia and the United States of America, which only are signatories.

¹¹⁴ On the age of criminal responsibility in the member States of the Council of Europe in relation to Article 3 of the ECHR and other questions in this context, see the judgment of the ECtHR of 24 November 1999 in the case of *T. v. UK* (in particular, paragraphs 48, 71, 72 and 78).

of criminal responsibility should not be accepted as grounds for refusal for mutual recognition of non-custodial pre-trial measures.

The following situation should be considered: A young non-resident person is suspected of having committed a serious offence. Under the criminal law of the trial-State, it could be possible to remand him or her in custody (owing to a low age of criminal responsibility). Under the criminal law of the child's State of normal residence, the age of criminal responsibility could be much higher than in the trial-State. Pursuant to Article 37 of the CRC, pre-trial detention shall be used only as a measure of last resort. If the trial-State releases the young person and he or she goes back the Member State of normal residence, it cannot make use of the European arrest warrant, as the judicial authority of the Member State of the young person's residence *must* refuse the execution of a European arrest warrant under Article 3(3) of the FD-EAW. Under certain circumstances, the trial-State may well be forced to keep the young non-resident in pre-trial detention, as the danger of absconding is too high. This problem could be resolved, if the trial-State¹¹⁵ receives a guarantee from the executing State¹¹⁶ that it will return the suspect to the upcoming trial.

4.5.2.5. (Other) optional grounds for refusal

Other grounds of refusal are provided in Article 4 of the FD-EAW, in particular:

- lack of dual criminality,
- suspect being prosecuted in the executing Member State for the same act, offence having become statute barred in the executing State,
- suspect having been sentenced in a third country,
- issuing Member State having exercised extraterritorial jurisdiction (under certain conditions).

They are all optional under the FD-EAW.

These grounds for refusal should be carefully considered. Problems may arise, if the executing authority has the right to refuse an order for transfer, for example, when the conduct is criminalized in the issuing State, but not in the executing State (*i.e.* lack of double criminality). If this would be the case, the issuing State might not want to release the suspect in such a case, as the executing State probably would not be able to give it any assistance according to its national law. The same reasoning could be applied to the situation, when the offence is statute-barred in the executing Member State, but not in the issuing Member State.

Question 4:

(a) Would it be acceptable to provide for mandatory grounds of refusal in the event of amnesty, final judgment and other final decisions or relating to the age of criminal responsibility?

¹¹⁵ *i.e.* the issuing Member State (where the trial takes place).

¹¹⁶ *i.e.* the Member State where the suspect is supervised (normally the Member State of normal residence).

(b) Are the other grounds for refusal, contained in Article 4 of the FD-EAW, relevant in the context of an order for transfer of alternative measures?

(c) In particular, should the executing authority have the right to refuse the execution on the ground of lack of double criminality?

4.5.3. *Guarantees*

The new instrument would be a measure aimed at allowing a suspect to enjoy as close as possible to a normal life for the period before the trial, while ensuring that he or she would not abscond, interfere with the course of justice or commit other offences. Pursuing the same primary goal would naturally lead to the conclusion that the executing authority could impose as a condition that the person, if sentenced, would be returned to his or her State of residence, by definition the executing state, in order to serve the sentence there. Such a provision corresponds to Article 5(3) of the FD-EAW.

It would also be conceivable to provide that the executing authority could subordinate the enforcement of the new instrument to the condition that, in case the person be sentenced to life imprisonment, a possibility of revision or similar guarantees be foreseen by the judicial system of the issuing Member State, along the lines of Article 5(2) of the FD-EAW on European arrest warrant.

Question 5:

Could there be conditions for enforcing an order for transfer of alternative measures other than:

-return to the State of residence for serving the sentence?

-possibility of revision in case of life imprisonment?

4.6. Consequences in the event of non-compliance

4.6.1. *Introduction*

4.6.1.1. Meaning of “penalty” under the mutual recognition programme

Measure 10 of the mutual recognition programme indicates that the new instrument should “specify [...] the *penalties* applicable in the event of non-compliance with [‘control, supervision or preventive measures’] ordered by a judicial authority”, considering the solutions provided for in national law.

The objective of the penalty should thus, more particularly, be to ensure the compliance with a non-custodial pre-trial supervision measure during what could be called the monitoring phase.

Although the mutual recognition programme does not explain what is meant by “penalty”, it seems reasonable to interpret this word in the light of the basic principles that are applicable for pre-trial detention in general (see chapter 3, above).

In the event of non-compliance with a non-custodial obligation, all Member States provide that the question of pre-trial detention shall be considered again and that the suspect *may* be

remanded in custody: The alternative to pre-trial detention has proved inefficient, therefore the judicial authority returns to the basic option. Only in two jurisdictions, breach of a bail condition is also a separate offence and liable to a separate fine or imprisonment: Ireland and Scotland (see chapter 3.3.4.2. above).

The question of penalties was discussed in the experts' meeting of 12 May 2003. Most participants were of the opinion that there should be no separate penalties for breach of bail conditions in the sense of imprisonment or fines in the new instrument. One participant was of the opinion that this would be contrary to the *principle of innocence*.

4.6.1.2. The European Union context

It must be born in mind that the consequences of a breach of an obligation under a non-custodial supervision measure in a cross-border situation could imply particular problems in relation to the corresponding situation within a single national jurisdiction.

The problem is that the person in question passes a border. In the European Union anyone is free to move between different Member States, but cannot be forced to pass a border, unless there is a legal basis for this, such as the FD-EAW. To identify the problems that could arise in a cross-border situation, the following should be considered.

Before a legal authority makes its decision on whether to remand a suspected person in custody or to impose alternative measures to pre-trial detention, there must always be a reasonable suspicion that the person has committed an offence. In addition, the authority has to make a *risk assessment* in relation to the actual danger.¹¹⁷ If the suspected person does not comply with his or her obligations under the alternative measure, the legal authority always has the possibility to reconsider the question of pre-trial detention. This possibility exists at least when it can be assumed that the person will not leave the country, *i.e.* if the person is a resident (national) of the trial-State without any family or other ties to another State.

However, if the suspected person is a non-resident (foreign national) without any ties to the trial-State, it is clear that the danger of his or her absconding is considerable, where there are only few instruments on judicial cooperation or these instruments still contain many grounds for refusal of assistance.

In particular if the suspected person is a non-resident, the legal authority that makes the decision on whether granting this person bail must always consider that this person may abscond if released. There is, in other words, always a risk that the legal authority will be *cut off* from reconsidering the question of pre-trial detention in the event that the suspect does not cooperate on a voluntary basis.¹¹⁸

¹¹⁷ In principle one of the three “classical” special grounds for detention that justifies pre-trial detention (see chapter 3.2.1., paragraph 11, above).

¹¹⁸ In a purely national context, the fact that the trial will take place in a different place than the normal residence of the accused person, does not mean that the person's appearance at the trial is at risk. In a European Union context the situation is more complex. It should, however, be considered whether a person who is suspected (accused) of having committed an offence in Member State A and who only wants to go back to his or her normal country of residence (Member State B) awaiting the trial in his or her normal social environment really should be regarded as being fundamentally different in an area of freedom, security and justice. The adoption of a number of measures (*e.g.* the Schengen Information System (SIS), also facilitates the tracking down and surrender of suspects within the European Union. The fact that the suspected person is present in another EU Member State rather than in the Member

4.6.2. Breach of an obligation under a non-custodial pre-trial supervision measure

4.6.2.1. Introduction

As noted above, a new instrument on mutual recognition of non-custodial supervision measures would probably mostly be used, where there is a danger of the suspect's *absconding*. A non-custodial pre-trial supervision measure aiming at eliminating this danger could, for example, be an obligation for the suspected person to report to the police once a week in combination with a travel prohibition order. Depending on the model for supervision measures (degree of involvement of the executing Member State), which is taken over in the new instrument, other obligations could also be used (*e.g.* prohibition of driving a vehicle in combination with temporary withdrawal of the driving licence).

An obligation under a non-custodial supervision measure could also be aimed at reducing the other two special dangers that allow pre-trial detention or alternative measures. As regards the danger of *suppression of evidence*, the suspected person could be under an obligation not to contact certain persons or otherwise tamper with evidence. An obligation aiming at eliminating the danger of *re-offending* could be an order to undergo medical treatment for drug addicts.

4.6.2.2. Measures to be taken in the event of a breach of an obligation

In a purely national context, the competent judicial authority would be informed by other national authorities in case the suspected persons does not comply with an obligation under a non-custodial supervision measure and would (at least regarding severe breaches) reconsider the question of pre-trial detention, alternatively to impose a different obligation.

In a European Union context, however, the issuing judicial authority would need the assistance of the executing judicial authority (and indirectly other authorities of the executing Member State) to solve the problem. The executing judicial authority should therefore *report* at least severe breaches to the issuing judicial authority without delay.

An important question in this context is whether the issuing judicial authority in this situation should have the competence to require that the suspected person be returned already before the date of the trial has been decided.

If the executing judicial authority can eliminate the actual danger by a less coercive measure than remanding the suspect in custody (*e.g.* by imposing a new obligation) the return of the suspected person would possibly not be necessary. This would allow the suspect to stay in his or her normal environment awaiting the trial and would also be in accordance with both the logic of the new instrument and the principle of proportionality. Pre-trial detention shall be regarded as an exceptional measure and shall never be compulsory nor be used for punitive reasons.¹¹⁹ Theoretically, an alternative to sending back the person to the issuing judicial

State where the trial will take place, no longer necessarily means *per se* that this person is beyond reach of the trial court. However, in order to allow a suspected person to benefit from an alternative measure to pre-trial detention, the new instrument on mutual recognition of non-custodial pre-trial supervision measures would have to contain a coercive mechanism to bring back the person to the trial-State. For further details, see chapters 4.6.3. below.

¹¹⁹ See principle 1 of Recommendation No. R(80) 11 of the Committee of Ministers of the Council of Europe concerning custody pending trial.

authority could also be to let the executing authority remand the suspect in custody under its national law (where the danger cannot be eliminated with less coercive measures than detention) and keep him or her in pre-trial detention until the trial takes place in the issuing Member State.¹²⁰ The new instrument must resolve the question whether the executing judicial authority should be allowed to postpone the surrender of the suspected person to the issuing Member State during the monitoring and the trial phase.¹²¹

Moreover, the issuing and executing judicial authorities may have different views on whether a person who is in breach of an obligation should be remanded in custody or whether the danger can be eliminated by imposing a new obligation. The new instrument must therefore also resolve this kind of problems.

Different problems that could arise from breaches of obligations aiming at eliminating the dangers of suppression of evidence, re-offending and flight (absconding), respectively, and possible solutions will be considered in more detail below.

4.6.2.3. Danger of suppression of evidence

If the executing authority receives information that the suspect tries to contact a witness (for example by telephone or e-mail) in order to influence him or her, or to suppress or alter a piece of written evidence, the outcome of the upcoming trial (regarding the offence for which the non-custodial supervision measure has been decided) could be endangered. A solution to this situation, could – in line with the above reasoning - be to provide (in the new instrument) that the executing authority should report the breach to the issuing authority without delay. In the event that there is an imminent danger of suppression of evidence, the executing authority could be allowed or even required to use coercive measures in accordance with its national law in order to eliminate this danger.¹²² A condition would be that the issuing authority provides the executing authority with sufficient information on the case already when the monitoring is initialised. Maybe this could be done in a form (in line with the annex to the FD-EAW). Otherwise the executing authority would not be in a position to make an independent assessment at the monitoring stage.

4.6.2.4. Danger of re-offending

As regards the danger of re-offending a distinction must be made between a breach of an obligation aiming at eliminating this danger and the fact that the person in question is suspected of actually having committed a “new” offence.¹²³ If the suspected person has committed a “new” offence, he or she is obviously in breach of an obligation not to re-offend. However, the important question for the issuing authority in this context is whether this can

¹²⁰ This solution may be problematic where the offence on which the original supervision measure is based is not covered by the double criminality condition. The same reasoning could be applied to the situation where less coercive measures are used.

¹²¹ See, e.g., Article 23, in particular, paragraphs 3 and 4, and Article 24 of the FD-EAW.

¹²² Provisional arrest in a cross-border context is already a possibility under several international agreements. Apart from the FD-EAW, the Nordic Extradition Acts (chapter 3.5.2.2.) and Article 27(1) b of the *European Convention on the Transfer of Proceedings in Criminal Matters* (chapter 3.5.2.1.) could be mentioned.

¹²³ In this context, a distinction must also be made between the *original offence*, on which the non-custodial pre-trial supervision measure is based (which relates to the criminal law of the issuing Member State) and the condition not to commit “*new offences*” while on bail (which, during the monitoring phase, primarily relates to the criminal law of the executing Member State).

be seen as an indication that there still is a danger of re-offending. If the competent judicial authority in the executing Member has remanded this person in custody for the “new” offence, which is an act that is criminalised under the law of the executing Member State, this danger is eliminated, at least as long as the person is in pre-trial detention.

Even if the executing judicial authority should report a severe breach of an obligation aiming at eliminating the danger of re-offending (e.g. an order to undergo medical treatment for drug addicts), it is not obvious that it is necessary to return the person to the issuing judicial authority at this stage. The executing judicial authority may be better placed to assess the situation and could use less coercive measures than pre-trial detention under its national law in order to enforce the obligation.

The fact that the person in question is suspected of having committed a “new” offence could be seen as an indication that he or she will continue to commit further “new” offences. If the suspected person is not in pre-trial detention the danger of re-offending still exists.

The question is, however, whether the elimination of this danger primarily is in the interest of the issuing Member State or whether it should be seen in relation to the maintenance of law and order of the executing Member State. Difficult problems as regards the procedure against a person suspected of having committed a “new” offence could arise depending on differences between the issuing and the executing Member States concerning jurisdiction.¹²⁴ For principal or practical reasons, it seems difficult to require that the executing Member State reacts to or reports “new” offences that are not criminalised in the executing Member State (principles of legality and double criminality). On the other hand, all EU Member States have a common interest to combat (at least) particularly serious offences.¹²⁵ It should further be born in mind that, to a large extent, the same type of offences can be found in all of the Criminal Codes of the Member States. This does, however, not mean that all the constituent elements are exactly the same.

Another question is when and how the executing judicial authority should report “new” offences to the issuing authority, *i.e.* at what stage of the procedure (degree of suspicion).

A practical *solution* could be to let the issuing authority *specify* which *offences* should be covered by the *condition not to re-offend* (*i.e.* the objective of the monitoring, chapter 3.4.3.3.). The specification could be provided in a form (in line with what has been said above) by the issuing authority, which should give it to the executing authority and the person in question. This would also be to the benefit of the suspected person, who would know the limits of his or her obligation not to re-offend *under the non-custodial supervision measure*.¹²⁶ To put the executing authority under an obligation to make a report regarding (a reasonable suspicion) of “new” offences only when the double criminality condition is fulfilled to 100% would probably reduce the added value of the new instrument significantly and would not be feasible. It would probably be sufficient to provide (in the new instrument) that the issuing

¹²⁴ In principle (at least) the following situations are possible: 1) Both the *issuing* and the *executing* Member States have jurisdiction; 2) Only the *issuing* Member State has jurisdiction; and 3) Only the *executing* Member State has jurisdiction.

¹²⁵ See the “list” of serious offences contained in Article 2(2) of the FD-EAW for which the double criminality condition has been abolished.

¹²⁶ A different matter is that the suspect is under a legal obligation, generally speaking, not to commit *any* offences under the criminal law of the executing Member State when staying in the territory of that State.

authority should list the categories of offences that are covered by the condition not to re-offend so that the executing authority can “translate” those offences to the corresponding offences under its own criminal law. The executing authority should report a “new” offence under its criminal law that is of the same *type* as the corresponding offence in the specification of the issuing authority.¹²⁷

4.6.2.5. Coordination of prosecutions between the issuing and the executing Member States as regards “new” offences

In the event that a suspected person, who is subject to a supervision measure under the new instrument, commits a “new” offence, which falls within the jurisdiction of the executing Member State that is more serious than the “old” offence (on which the supervision measure is based), the executing judicial authority may not want to return this person to the issuing judicial authority, at least not immediately. This would, in particular be the case when the suspect has been remanded in custody by the executing Member State. Should the executing judicial authority have the possibility to refuse the return of a person who is suspected of having committed a “new offence” (irrespective of whether it is more serious than the “old” offence) which could be prosecuted by both the issuing and the executing Member States? Other situations, where such problems could arise are “new” offences that fall within the exclusive jurisdiction of either the issuing or the executing Member State.

Should the new instrument contain any provisions that resolve this kind of conflict of interests?

A possibility would be to transfer the proceedings to the Member State that is most suitable with due consideration of all the circumstances.

A convention that should be mentioned in this context is the *European Convention of 15 May 1972 on the Transfer of Proceedings in Criminal Matters* (ETS No. 73).¹²⁸ Article 6 of this convention states that, when a person is suspected of having committed an offence under the law of a Contracting State, that State may request another Contracting State to take proceedings in the case. The convention is based on the principle of double criminality (Article 7). Article 8 indicates the cases (subparagraphs (a) to (h))¹²⁹ in which one Contracting State may request the taking of proceedings in another Contracting State. The list is

¹²⁷ This is also how the concept of double criminality is applied in practice. In the past (as regards extradition) a requested State often has found that there is double criminality, when the offence under the criminal law of the requesting State and the corresponding offence under the criminal law of the requested State belong to the same type of offences: If it is a criminal offence in State A for an accused person to lie under oath and this State makes a request to State B for a person based on this offence, the requested State (B) may be of the opinion that the double criminality condition is fulfilled even if lying under oath is criminalised in State B only for witnesses but not for accused persons.

¹²⁸ Ratified by 5 old Member States (entry into force within brackets): Austria, 1.4.1980 (1.7.1980), Denmark, 13.11.1975 (3.3.1978), Netherlands, 18.4.1985 (19.7.1985), Spain, 11.8.1988 (12.11.1988) and Sweden, 7.4.1978 (30.3.1978) and; 6 new Member States: Cyprus, 19.12.2001 (20.3.2002), Czech Republic, 15.4.1992 (1.1.1993), Estonia, 28.4.1997 (29.7.1997), Latvia, 2.6.1997 (3.9.1997), Lithuania, 23.11.1999 (24.2.2000) and Slovakia, 15.4.1992 (1.1.1993).

¹²⁹ *I.a.* (a) if the suspected person is ordinarily resident in the requested State, (d) if proceedings for the same or other offences are being taken against the suspected person in the requested State, (f) if it considers that the enforcement in the requested State of a sentence if one were passed is likely to improve the prospects for the social rehabilitation of the person sentenced and (g) if it considers that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting State and that his presence in person at the hearing of proceedings in the requested State can be ensured.

exhaustive. The grounds for refusal are provided in Article 11, which, *i.a.* allows refusal because the suspect is not ordinarily a resident in the requested State. The effects of a request for proceedings is in principle that the requesting State loses the right to prosecute the suspect for offence for which the proceedings have been requested (Article 21), *i.e.* to avoid double jeopardy. It could, however, be difficult to choose the “right” Member State. If the items of evidence are located in the Member State where the “old” offence was committed and the witnesses are residents of that State, it would often be unpractical to make a request for transfer of proceedings to the Member State where the suspect ordinarily is a resident (in the event that this Member State has ratified the European Convention on the Transfer of Proceedings in Criminal Matters, 1972).

It should be noted that Article 16 of the FD-EAW contains a rule on the decision in the event of multiple requests that could be “translated” to the situation of conflicting prosecutions in the event of “new” offences as described above. The new instrument could thus provide that the decision on which prosecution shall take precedence shall be taken with due consideration of all circumstances and especially the relative seriousness and place of the offences and the date of the offences in line with. Both States could seek the advice of Eurojust (under the conditions provided in the Council Decision setting up this body).¹³⁰

The new instrument could further provide that the return of the person could be postponed until the proceedings in the executing Member State with regard to the “new” offence have been finished or/and that temporary surrender could take place in the meantime. This solution would be in line with Article 24 of the FD-EAW.

4.6.2.6. Danger of flight (absconding)

The meaning of the danger of flight (absconding) has been explained above (chapter 4.3.3.2.). The aim of the obligation (*e.g.* reporting to the police in combination with a travel prohibition order) is to eliminate the danger of the suspect’s absconding, *i.e.* that the suspected person avoids the determination of any criminal charge against him or her. The suspect must not always come to his or her trial (depending on the law of the issuing Member State in question and the penalty of the offence), but must, in principle, at least be in a position to receive a summons so that he or she can be judged *in absentia*.

If the suspect does not report to the police and cannot be located by the authorities of the executing Member State, the executing authority should immediately make a report to the issuing authority. The executing judicial authority could (be required to) use coercive measures under its national law, including arrest, to assist the issuing judicial authority. If in such a situation, no immediate coercive measures are taken, it may not be possible at a later stage to bring the person in question to the trial. The suspect may have gone to a third State. Both the issuing and the executing authorities could issue an alert for the suspected person in the Schengen Information System (SIS).

If the person in question is found and the danger of his or her absconding still exists, the issuing judicial authority could order the executing judicial authority to send back the suspect. Alternatively, the executing authority could use coercive measures under its national law in line with the reasoning above.

¹³⁰ See Articles 3(1) and 4 of the Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 63, 6.3.2002, p. 1).

4.6.3. *Non-compliance with an obligation to be available to receive a summons or to come to the trial*

At this stage (“trial-stage”), the issuing judicial authority has fixed the date of the trial. It will then send a summons through the executing judicial authority. Where the person has complied with the obligations under the non-custodial supervision measure, he or she should always be given the opportunity of attending the trial voluntarily. However, the new instrument would also have to solve the problems that arise when this person refuses to cooperate on a voluntary basis. The new instrument should provide that the person in question should be under a legal obligation to be available to receive the summons and to come to his or her trial (where a judgment *in absentia* is not possible). Non-compliance with that legal obligation would consist in; 1) the person not being available to receive the summons or 2) choosing not to come to the trial, although legally summoned.¹³¹

Under the present legal framework, the national court of the trial-State would – in the situation where the accused person does not come to the trial - have the choice between 1) issuing a European arrest warrant under the conditions provided under the FD-EAW, 2) issuing a national arrest warrant, 3) issuing an order to bring the person before the court or 4) waiting for the suspected person to enter into the territory spontaneously.

As noted above (chapter 4.1., paragraph 4), the European arrest warrant seems, however, not to be appropriate to ensure the smooth functioning of a new mechanism on mutual recognition of non-custodial pre-trial supervision measures, which is designed to reinforce the right to liberty in a European context and not to limit this right.

The two possibilities mentioned under 2) and 3) above, are, for instance, explicitly provided in Article 133, second subparagraph, of the German Code of Criminal Procedure. Under the Swedish Code of Procedure the two possibilities also exist and are applied in practice, although under different chapters. The issuing of an arrest warrant is covered by chapter 24, sections 1, 2, 8 and 17. As regards the second possibility (the issuing of an order to bring the person before the court), chapter 46, section 15, provides that the court – in the event that the defendant fails to appear at a main hearing or appears only by counsel although directed to appear in person - either shall direct him or her to appear in person under penalty of a default

¹³¹ At this stage of the procedure the legal status of the person changes from suspect to accused

fine or shall order that he be brought before the court immediately or on a later date.¹³² The latter possibility constitutes a more lenient coercive measure than an arrest warrant and its scope of application seems wider. It could, for example, probably be used where the reasons to assume that the person in question will avoid the criminal proceedings are *not sufficient* to constitute a real *danger of flight* (*i.e.* does not fulfil the requirements of an arrest warrant).¹³³ The question is whether the possibility mentioned under 3) above, could be taken over in a European Union context. This will be considered in more detail in chapter 4.6.5. below.

4.6.4. Available solutions, limitations and problems

The following mechanisms exist, which could be seen as addressing the circumstances of a breach of an obligation under a non-custodial pre-trial supervision measure. They have, however, little relevance with regard to the problems of interfering with the gathering of evidence or of possible re-offending.

4.6.4.1. European arrest warrant

The trial-State could consider issuing a *European arrest warrant* in accordance with the provisions of the Framework Decision of 13 June 2002. Article 1(1) of the FD-EAW provides that a European arrest warrant may be issued “for the purposes of conducting a criminal prosecution”, which, in principle, would cover the situation where the suspect is in breach of an obligation under a non-custodial pre-trial supervision measure (at least where one of the three “classical” dangers still exists) as well as the situation where the suspected person voluntarily fails to come to his or her trial (at least where there is a real danger of the suspect’s absconding). A condition is, however, that the offence is a serious offence under the national law of the issuing Member State covered by the *threshold* in Article 2(1) of the FD-EAW (*i.e.* punishability of one year). It should also be remembered that a EAW can or must be *refused* on one or several of the grounds listed in the Articles 3 and 4 of the FD-EAW. In this context, special attention should be drawn to the situation of *particularly young offenders* (see chapter 4.5.2.4. above).¹³⁴

This means that there are several situations where the system of the FD-EAW will not lead to the surrender of the requested person to the issuing Member State.¹³⁵ If the new instrument (which also should cover *less* serious offences below the threshold of the FD-EAW) only would mean that non-custodial supervision measures are enforced in the country of residence (the executing Member State), without any obligation to return the suspected person, if

¹³² See also paragraphs 174, 175, 221 and 413 of the Austrian Code of Criminal Procedure, Articles 122 and following Articles of the French Code of Criminal Procedure (Article 122, last paragraph, of the French Code of Criminal Procedure provides that “[a]n arrest warrant [mandate d’arrêt] is the order given to the law-enforcement authorities to collect the person against whom it is made and to bring him to the remand prison mentioned on the warrant, where he will be received and detained”), Articles 486 and following Articles (in particular Article 487) of the Spanish Code of Criminal Procedure and chapter II (Du mandate d’amener), paragraphs 3 – 15, and chapter III, Article 16, in particular the second paragraph, of the Belgian Act of 20 July 1990 on pre-trial detention.

¹³³ In this context, see also paragraph 413 of the Austrian Code of Criminal Procedure.

¹³⁴ Similar problems could also arise, when the executing judicial authority can invoke an *optional ground* for refusal: For example, under Articles 2(4) and 3(1) of the FD-EAW, the executing judicial authority may refuse to execute a European arrest warrant for an act – not covered by the list in Article 2(2) – which does not constitute an offence under its national law (*i.e.* *lack of double criminality*).

¹³⁵ See also Article 24 of the FD-EAW on postponed or conditional surrender and Article 33 of the FD-EAW regarding Austria(ns).

necessary by coercion, its added value could well be very limited and its use significantly reduced. In this case, the trial-State would take the risk that the person goes back to his or her State of residence, knowing in advance that the European arrest warrant could not be issued in case he or she does not appear voluntarily (for offences not covered by that instrument) or, if issued, that the executing authority could refuse to execute the European arrest warrant on the basis of one or several of the grounds provided by the FD-EAW.

In the event that a judicial authority in the State where the suspect has his or her residence refuses to cooperate with the trial-State, it is likely that the suspect will be detained by the judicial authority of the trial-State instead of benefiting from an alternative measure. This would probably also mean that the right to liberty and the presumption of innocence is put at risk in the European Union seen as a whole.

Subsequently the question arises instead whether the new instrument should allow arrest and surrender under conditions different from those in the FD-EAW or where the offence falls outside the scope of the European arrest warrant.

Moreover, in the case that a European arrest warrant could be issued (*i.e.* that the offence is sufficiently serious and that there are no grounds of refusal), the following should be considered. The issuing of such a warrant would, in principle, imply that the suspected person is arrested and surrendered by the executing Member State to the issuing Member State within the *time limits* provided in the FD-EAW.¹³⁶ In principle, a suspected person could thus be detained for several weeks before the actual surrender takes place. Although detention is not mandatory under the FD-EAW¹³⁷, it is not obvious that this solution is the most suitable for the specific situation dealt with by measures 9 and 10 of the mutual recognition programme. Legal certainty requires that shorter time limits be explicitly provided in the new instrument as its objective precisely would be to avoid the use of pre-trial detention.

It could thus be argued that the *principle of proportionality* (chapter 3.1.4.) constitutes an impediment for issuing a European arrest warrant in a situation, where it would be theoretically possible to do so.¹³⁸

4.6.4.2. *In absentia* judgments

Another solution to the problem that an accused person tries to avoid the determination of criminal charges could be to judge him or her *in absentia*.¹³⁹

¹³⁶ Article 17 of the FD-EAW provides that the final decision on the execution of the EAW should be taken within 60 days after the arrest of the person and within 10 days if consent has been given. These time limits can, however be extended by a further 30 days. Pursuant to Article 23 the surrender of the person shall take place within 10 days after the decision on the execution of the EAW. Under certain circumstances this time limit can be extended. Article 24 deals with the question of postponed or conditional surrender.

¹³⁷ Article 12, last sentence, of the FD-EAW provides that “[t]he person may be released provisionally at any time in conformity with the domestic law of the executing Member, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding”.

¹³⁸ See also chapter 4.6.2. (Breach of an obligation under a non-custodial pre-trial supervision measure). If the elimination of the danger that justifies the use of pre-trial detention can be obtained by a less coercive measure, this is indeed an argument in favour of dealing with all aspects of mutual recognition of non-custodial pre-trial supervision measures in a separate instrument.

The ECtHR¹⁴⁰ has held that proceedings that take place in the accused's absence will not of themselves be incompatible with the right to a fair trial under Article 6 of the ECHR¹⁴¹, if the accused may subsequently obtain, from a court which has heard him in person, a fresh determination of the merits of the charge. In principle (and at least for serious offences), the accused should also have the right to be effectively defended by a lawyer, assigned officially if need be. This would imply that the accused, at least in some Member States, has the choice as to attend the trial or not.

But what happens, if the accused person cannot be found or summonsed? He or she could have gone to a third Member State, *i.e.* where he or she is *not* normally a resident. In some Member States, an accused person, who wilfully tries to avoid the proceedings or cannot be summoned, could be tried *in absentia*¹⁴², while this would be impossible in other Member States. There could also be differences between the Member States as regards the possibility of judging someone *in absentia* relating to the penalty of the offence.¹⁴³

4.6.4.3. Provision of a surety

It should also be noted that under the national law of several Member States the suspect may be released from custody, if he or she provides a *surety* (see annex 2). The provision of a surety does not require the involvement of another Member State and allows the suspect to go back to his or her country of normal residence.

The provision of a surety is, however, not a guarantee the suspect will be available at the trial. The judicial authority of the trial-State may consider that a surety is not sufficient (if available under its national law).

4.6.4.4. Long distance proceedings through videoconference

Some EU Member States (Italy¹⁴⁴ and Sweden¹⁴⁵) have – as an experiment – introduced the possibility of using video links in criminal proceedings. The Swedish legislation on long distance proceedings through videoconference does not only cover examination of witnesses,

¹³⁹ This solution seems, however, not to be appropriate when the transfer of the non-custodial pre-trial supervision measures takes place before the preliminary investigation has been terminated and there is a danger that the suspected person tampers with evidence.

¹⁴⁰ See, *i.a.*, the judgments of the ECtHR of 27 February 1980 in the case of *Deweere v. Belgium* (paragraphs 49 and 51), 12 February 1985 in the case of *Colozza v. Italy* (paragraphs 29 and 30) and of 13 February 2001 in the case of *Krombach v. France* (paragraph 85, first sentence).

¹⁴¹ Article 6 of the ECHR: “1. [...] everyone is entitled to a fair [...] hearing [...] by an independent and impartial tribunal [...]; 3. Everyone charged with a criminal offence has the following minimum rights: [...] (c) to defend himself in person or through legal assistance of his own choosing [...]

¹⁴² Under Italian law, this would be possible under the conditions provided in Articles 156-171 (“*latitanza*”) of the Code of Criminal Procedure.

¹⁴³ In Sweden: imprisonment for a maximum of three months under certain conditions (see chapter 46, section 15, of the Code of Procedure). In Italy there are no such limitations.

¹⁴⁴ See “Long distance proceedings through videoconference”: The Italian experience”, Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10-11 April 2000, Paper of the Italian Ministry of Justice, which refers to the legislative Act nr. 11 of 7 January 1998.

¹⁴⁵ See ”Lag (1999:613) om försöksverksamhet med videokonferens i rättegång”, ”Förordning (1999:856) om försöksverksamhet med videokonferens i rättegång”, Regeringens proposition 1998/99:65 om videokonferens i rättegång and Domstolsverkets slutrapport – försöksverksamhet med videokonferens i allmän domstol (available at: www.dom.se)

but is also applicable to the main proceedings and to the proceedings concerning the question on whether a suspect should be remanded in custody.

The reason for the introduction of this system is to avoid costs and difficulties for the transport of the person in question over long distances.¹⁴⁶ If a court in the extreme south of Sweden has issued an arrest warrant for a suspected person and this person is arrested in the extreme north of the country, that person would have to travel 1500 km to attend the proceedings before the issuing court. The participation of the arrested person through a video link is considered to be equal to the person being present before the issuing court.¹⁴⁷ According to the preparatory work to the Swedish Act on videoconferences, participation through a video link is considered to be compatible with Article 5(3) of the ECHR, which requires that “[e]veryone arrested or detained in accordance with the provisions of paragraph 1.c of [Article 5] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power”.

4.6.5. *Compatibility of a coercive measure under the new instrument with Article 5 of the ECHR*

4.6.5.1. Introduction

The above analysis of the present legal framework has shown that the FD-EAW is insufficient or inadequate to ensure the smooth functioning of the new instrument on mutual recognition on non-custodial pre-trial supervision measures. The same is true for judgments *in absentia* and provision of a surety (these possibilities are available only in relation to certain Member States). Although the possibility of using long distance proceedings through videoconference could contain some useful elements for the return mechanism (see chapter 4.6.7.2. below), it is difficult to see that it could be seen as a real alternative to the accused being physically present in the main proceedings in the trial-State in the cross-border situation considered in the present Paper. Consequently the new instrument on mutual recognition of non-custodial pre-trial supervision measures would need a different coercive mechanism to return an uncooperative person to the trial-State.

As the EU Member States are under a legal obligation to respect the provisions of the ECHR¹⁴⁸, the coercive measure under the new instrument must be compatible with at least one of the six exceptions to the right to liberty under Article 5(1) of the ECHR.

4.6.5.2. Compatibility with Article 5(1) c of the ECHR

The most logical approach seems to be to let a coercive mechanism follow the requirements of Article 5(1) c of the ECHR. Article 5(1) c is the legal basis under the ECHR for the initial arrest of the suspected person under the national law of the issuing authority (see chapter 3.2. above) before the transfer of the alternative measure to the executing authority. If the suspected person has not complied with a non-custodial supervision measure, the issuing authority should have the possibility to reconsider the question of pre-trial detention: The alternative to pre-trial detention has proved inefficient, therefore the issuing authority returns to the basic option.

¹⁴⁶ See Article 2 of the Swedish Act.

¹⁴⁷ Chapter 24, section 14 of the Swedish Code of Procedure.

¹⁴⁸ On the basis of their ratification of this convention as well as Article 6(2) TEU.

A condition under Article 5(1) c of the ECHR is, however, that there is a reasonable suspicion that the person in question has committed the offence on which the supervision measure is based *and* that there still is at least one *special ground* for detention. The danger of re-offending would, for example, be excluded where the executing authority has remanded the suspect in custody on the reasonable suspicion of having committed a new offence (which is an act that is criminalised under its law), at least as long as this person is in pre-trial detention (see chapter 4.6.2.2. above). The executing authority could also have decided other coercive measures under its national law that have eliminated the actual danger

The aim of the arrest and detention of the suspected person by the executing authority in the situation described above should be the return of this person to the issuing authority. The “*competent legal authority*” to which the suspect would be brought pursuant to Article 5(1) c of the ECHR, would in this case be the judicial authority of the *issuing* Member State that has decided the transfer of the non-custodial pre-trial supervision measure to the executing Member State.

The executing authority would have to inform the issuing authority of a (serious) breach that could not be solved by less coercive measures than arrest and detention under the law of the executing Member State. The issuing authority would decide whether the suspect should be returned.¹⁴⁹ The legal authorities of the executing Member State would then simply act on behalf of the issuing authority in accordance with their national law. If those measures would be the arrest of the person in question, the time limits (including the return of the suspect to the issuing authority) would have to be very short and in any case much shorter than those provided in the FD-EAW. Although Article 5(1) c of the ECHR remains silent on the threshold for pre-trial detention linked to the offence in question (see, in particular, chapter 3.2.1., last paragraph, and chapter 3.2.2., above), it seems not to be in accordance with the principle of proportionality to allow more than very short time limits, at least as regards *less* serious offences. Those EU Member States that have high thresholds for pre-trial detention (*e.g.* where the offence must be punishable by imprisonment for two years) would also have to adapt their legislation to the requirements of the new instrument concerning the return of suspects as described above.

Immediately after the physical return of the suspected person to the issuing authority, there must be full judicial protection under Article 5(3 and 4) of the ECHR. This would, however, not be a problem in this context as it would follow from the existing legislation of the issuing EU Member State, which is under a legal obligation to respect the provisions of the ECHR.

The coercive mechanism under the new instrument (even as regards *less* serious offences) would thus be compatible with Article 5(1) c of the ECHR. The general aim of the new instrument on mutual recognition of non-custodial pre-trial supervision is reducing pre-trial detention in the European Union seen as a whole. This means that it is compatible with the aim of Article 5, which (under the established case law of the ECtHR) is to ensure the right to liberty and that no one is deprived of this right in an arbitrary manner.

¹⁴⁹ As regards possible grounds for the executing judicial authority to refuse the return at this stage of the procedure and the coordination of prosecutions between the issuing and the executing Member States see chapter 3.6.2. above.

4.6.5.3. Compatibility with Article 5(1) **b** of the ECHR

An alternative or additional solution would be to let the coercive mechanism follow the requirements of Article 5(1) **b** of the ECHR, *i.e.* “*the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law*”.

Article 5(1) **b** of the ECHR allows arrest and detention for the purposes of bringing accused persons (and witnesses) to the main hearing. It can also be used for the purposes of bringing suspects before legal authorities at earlier stages of the criminal investigation.¹⁵⁰

In all those situations very short time limits are applicable. The time limits seem to vary from Member State to Member State, but do usually not exceed 24 hours.¹⁵¹

The wording of Article 5(1) **b** of the ECHR seems to cover the order of the issuing authority (provided that it is a court) to comply with the obligations under the non-custodial pre-trial supervision measure that replaces pre-trial detention. This interpretation would probably also be consistent with the aim of Article 5 as the new instrument on mutual recognition of non-custodial supervision measures, seen as a whole, is designed to strengthen the right to liberty in the common area of freedom, security and justice, not to limit it.

A condition is, however, that the issuing authority sufficiently specifies the obligations that the suspected person has to follow under the supervision measure.¹⁵² The ECtHR has held that the words “secure the fulfilment of any obligation prescribed by law” concern only cases where the law permits the detention of a person to compel him or her to fulfil a “specific and concrete” obligation which he or she has failed to satisfy.¹⁵³ The arrest and detention must further not be punitive in character.¹⁵⁴

An obligation not to contact certain persons (danger of suppression of evidence) or to undergo medical treatment for drug addicts (danger of re-offending) seems to satisfy the requirement that the obligation must be “specific and concrete”. As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5(1) **b** ceases to exist. An obligation not to commit criminal offences in general seems not to fulfil this requirement.¹⁵⁵ The type of offences would, at least, have to be specified (and not in too general terms) by the issuing authority (in line with what has been said above). There would still have to be a danger of committing certain specified offences. As has been noted above, this danger could be

¹⁵⁰ Pursuant to chapter II, Article 3, of the Belgian Act of 20 July on pre-trial detention, the investigating judge may issue an order for the purposes of questioning a person on serious suspicion of having committed an offence that is not considered as being minor.

¹⁵¹ See, for example Article 127 of the French Code of Criminal Procedure.

¹⁵² In its judgment of 22 February 1989 in the case of *Ciulla v. Italy*, the ECtHR held that an obligation to go and live in a designated locality was sufficiently specific and concrete for the purposes of Article 5(1) **b** of the ECHR, but the obligation on a mafia suspect to change his behaviour generally speaking was not (paragraphs 36 and 46)

¹⁵³ See the judgments of the ECtHR of 8 June 1976 in the case of *Engel and others v. Netherlands* (paragraph 69) and of 6 November 1980 in the case of *Guzzardi v. Italy* (paragraph 101).

¹⁵⁴ See the judgments of the ECtHR of 25 September 2003 in the case of *Vasileva v. Denmark* (paragraphs 36 and 37) and of 3 December 2002 in the case of *Nowicka v. Poland* (paragraphs 60 and 61) and the Commission decision of 18 March 1981 in *McVeigh and Others v. UK*.

¹⁵⁵ Cf. what has been said about the suspect being under an obligation not to commit any offences under the criminal law of the executing Member State, generally speaking.

excluded in certain situations (*e.g.*, where the suspect is in pre-trial detention in the executing Member State).

The fact that there is only a reasonable suspicion that the person in question has committed an offence would probably not prevent the use of Article 5(1) **b**. A period of detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. For this reason the Strasbourg organs have consistently refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by the appellate courts to have been based on errors of fact or law.¹⁵⁶

As regards, the length of the detention under Article 5(1) **b**, the Commission for Human Rights has approved a detention period of 45 hours. The circumstances in that particular case were, however, rather exceptional.¹⁵⁷ In principle, it is also possible to detain a person under Article 5(1) **b** to secure the fulfilment of the obligation to pay of a sum of money¹⁵⁸ or for the purposes of ascertaining identity, where a person does not have any identifications documents (an offence punishable by a fine).¹⁵⁹ In the latter case, the person was detained 13,5 hours, which the ECtHR considered not to be proportionate to the cause of detention.

4.6.5.4. Compatibility with Article 5(1) **f** of the ECHR

Finally, it should be mentioned that Article 5(1) **f** of the ECHR allows “*the lawful arrest or detention [...] of a person against whom action is being taken with a view of deportation or extradition*”. Even if the “return” of a suspected person from the executing Member State to the issuing Member State, as described above, is not called “extradition” it contains an extraterritorial element, which probably also would be covered by this sixth exception to the right to liberty.

The remaining three exceptions to the right to liberty in Article 5(1) of the ECHR, *i.e.* **a**), **d**) and **e**), seem not be relevant for the purposes of the new instrument on mutual recognition of non-custodial pre-trial supervision measures.

4.6.6. Possible objections

There are, however, reasons in favour as well as against including a mechanism in order to return an uncooperative suspect to the issuing authority in the new instrument. A main objection would be that this would constitute a disguised form of “extradition”. One should not introduce a *parallel system* for *surrender* between EU Member States as this is already covered by the FD-EAW. In particular, it could be argued that less serious offences should

¹⁵⁶ See the judgments of the ECtHR of 10 June 1996 in the case of *Benham v. UK* (paragraphs 39 and 42) and in the case of *Bozano v. France* of 18 December 1986 (paragraph 55).

¹⁵⁷ Commission decision of 18 March 1981 in *McVeigh and Others v. UK*. The obligation in question was on people entering Great Britain to submit to “further examination” at an entry port to determine if they were involved in acts of terrorism.

¹⁵⁸ See the judgment of the ECtHR of 10 June 1996 in the case of *Benham v. UK*.

¹⁵⁹ See the judgment of the ECtHR of 25 September 2003 in the case of *Vasileva v. Denmark*. Mrs. Vasileva had refused to disclose her identity to the police. Section 750 of the Danish Administration of Justice Act provides that failure to do so is punishable by a fine. The ECtHR held that “[i]n these circumstances [...] it was in accordance with the [Act] and Article 5(1) b [of the ECHR] to detain the applicant in order to establish her identity” (paragraph 40, last sentence).

not be covered, as this would mean the introduction of a lower threshold for surrender than under the European arrest warrant. It could be contrary to the *principle of proportionality* to extend the guarantee or mechanism to coercively return persons, who are only suspected of less serious offences.

These arguments seem, however, not to take into account that the new instrument is aiming at reducing pre-trial detention in the European Union seen as a whole. A coercive mechanism (as a last resort) is necessary to make this system work.

Within a single national jurisdiction, reconsidering pre-trial detention regarding a suspect, who does not comply with his or her obligations under an alternative measure, or the use of other legal possibilities to bring an accused person before a court, would not necessarily be contrary to the principle of proportionality. The question is whether to take over this possibility in a European Union context.

4.6.7. Possible solution in a new instrument

4.6.7.1. Conditions for transfer to the executing Member State

Before the issuing authority decides whether a non-custodial pre-trial supervision measure should be transferred to the executing authority (*i.e.* that the suspected person can be sent back to his or her country of normal residence and benefit from an alternative measure), it should obtain a *consent* by the suspected person (or by his or her legal representative) 1) to come to the trial 2) alternatively to let the issuing authority judge him or her *in absentia* and 3) to the consequences of his or her non-appearance at the trial.

The idea of obtaining the consent of the suspect (discussed at the experts' meeting of 12 May 2003 and in the above mentioned Discussion Paper of 24 April 2003) to come to the trial seems to be a logical approach. All pre-trial measures apart from detention require confidence on the part of the individual concerned.¹⁶⁰

Although the suspected person, strictly speaking, cannot be forced to cooperate, the new instrument could provide *incentives* for him or her to do so. The suspected person should therefore be aware that he or she could be returned *by force* to stand trial (in case the *in absentia* alternative is not available).

The conditions for an *in absentia* judgment should logically follow the national law of the issuing State.

For the same reason, the suspected person should *reimburse* the *costs* for bringing him or her by force to the trial, regardless of how litigation costs in the case would otherwise be apportioned.¹⁶¹ The suspect may further also, in certain conditions, partly receive

¹⁶⁰ In this context it can be noted that Article 3(1) d of the *European Convention of 21 March 1983 on the Transfer of Sentenced Persons* (ratified and in force between all (new and old) EU Member States) requires that the transfer is consented to by the sentenced person or, where in view of his or her age or his physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative. Under the *Additional Protocol* of 18 December 1997 to that Convention, transfer can, in certain conditions, take place without the consent of the sentenced person. The latter solution seems, however, not to be appropriate for the purposes of the new instrument on mutual recognition of non-custodial *pre-trial* supervision measures.

¹⁶¹ Cf. chapter 31, section 4 of the Swedish Code of Procedure.

compensation for the costs he or she incurred by attending court voluntarily. This could possibly be done in accordance with the national law of the issuing authority, which normally covers this issue.

Moreover, the suspect should be informed by the issuing authority of his or her obligations under the non-custodial pre-trial supervision measure (in line with what has been said above) and that he or she must consent to them in order to benefit from the alternative measure.

The suspected person should only benefit from an alternative measure, if he or she consents to the conditions mentioned above.

Finally, the suspected person should be under an obligation to inform the executing (and the issuing) authority of his or her address for the summons.

After this has been done, the issuing authority should give the executing authority the opportunity to evoke any *grounds for refusal* (and guarantees) relating to the *monitoring phase* (see chapters 4.5.2. and 4.5.3. above).

If there are no such grounds, the transfer can take place. A question is whether both or one of the Member States involved should assist the suspected person to travel back to his or her country of normal residence. There could be certain risks involved, especially where there is a danger of the suspect's absconding.

The issuing authority should also hand over the form with the specification of the obligation(s) of the suspected person to the executing authority.

4.6.7.2. Monitoring phase

Theoretically, the coercive mechanism could be applied to monitoring phase as well as the trial phase. The reasons for this have been discussed above.

In the event that the suspected person breaches an obligation under the supervision measure during the monitoring phase, the question arises whether the executing authority should be allowed to postpone the return of the suspect to the issuing authority. It seems clear that the executing State should have the possibility to postpone the return of the suspect, in particular where he or she has been remanded in custody in the executing Member State.¹⁶², or for serious humanitarian reasons relating to the health of the person in question¹⁶³, but to allow other grounds for refusal at this stage of the procedure would probably make the coercive mechanism under the new instrument useless.

If this is not the case, the suspected person can be arrested on the basis of a court order of the issuing authority and be returned to the issuing authority.

¹⁶² As mentioned in chapter 4.6.2. above, this could also be the case when the executing judicial authority can eliminate the danger in question by using a less coercive measure than detention.

¹⁶³ Cf. Article 23 of the FD-EAW, in particular paragraph 4, which provides that the surrender exceptionally may be postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. In such a case the execution of a European arrest warrant shall take place as soon as these grounds have ceased to exist.

In this context, it could be discussed whether a videoconference between the executing and issuing Member States could, in certain conditions, replace the physical presence of the suspected person in the proceedings before the issuing judicial authority as regards only the question whether this person should be remanded in custody (see chapter 4.6.4.4. above). The participation of the suspected person in these proceedings through a video link would enable the issuing judicial authority to make a quicker decision, which would be to the benefit of the suspect (travel costs and other practical problems would also be avoided) and would probably be in accordance with the aim of Article 5 of the ECHR.¹⁶⁴

The *time limits* for the entire procedure (covering the report of a breach of an obligation under a supervision measure to the issuing authority, the evocation of any additional grounds for postponement, the issuing of an order to return the person to the issuing authority and the arrest and transfer of the person in question) would have to be very short as the aim of the new instrument, seen as a whole, is to reduce pre-trial detention. In particular, the time limits of the coercive measure (arrest and return of the person) would have to be much shorter than the time limits of the FD-EAW, perhaps one day. Possibly there could be different time limits depending on the seriousness of the offence on which the non-custodial pre-trial supervision measure is based. All periods of detention arising from the application of the coercive measure of the new instrument should, in line with Article 26 of the FD-EAW, be *deducted* from the final sentence in the event that the suspect is found guilty by the issuing authority. It could, for practical reasons, be discussed whether the time limits could be linked to the distance between the executing and the issuing authority (or the place where the suspect is arrested) or whether this would be contrary to the principle of equality of treatment.

Finally, the law enforcement authorities should accompany the suspected person to the issuing Member State. A question is whether they should be allowed to accompany the suspect to the issuing authority or only to the border.

4.6.7.3. Trial phase

Alternatively, the coercive mechanism would only be applicable to the trial phase. The same reasoning as above can be applied to this phase.

At this stage, the date of the trial has been fixed: The suspected person would be under a legal obligation to be available to receive the summons to come to the trial and be aware of the consequences of a breach of this obligation. The issuing State shall then send the summons to the executing authority, which in its turn takes responsibility that the suspect is legally summoned. The executing State shall inform the issuing State of the result. In the event that the suspect, after having been legally summoned, does not come to the trial or has not been located by the executing Member State and there is reason to believe that he or she tries to avoid the criminal proceedings in the trial-State, the issuing authority should communicate to the executing authority whether it demands that the suspect shall be arrested for the purposes of standing trial at a later date (in the situation when the suspect could not be judged *in absentia*).¹⁶⁵

¹⁶⁴ See the preparatory work to the Swedish Act on proceedings through videoconference: Regeringens proposition 1998/99:65, p. 17 – 19.

¹⁶⁵ Alternatively, it could be left to the executing authority to decide which coercive measures should be used in accordance with its national law.

As regards the legal basis for the coercive measure during the trial phase, the time limits would have to be extremely short. The uncooperative suspect could probably be arrested maximum one day before the trial (main hearing) takes place.

Question 6:

(a) Should the issuing authority specify the obligation (relating to the three “classical dangers”) to be complied with by the suspected person under the non-custodial pre-trial supervision measure in a form (in line with what has been said above) letting the executing authority decide coercive measures other than detention in the event of non-compliance?

(b) Should the executing authority be obliged to report a (severe) breach of an obligation relating to the “three classical dangers”?

(c) Should the executing authority be allowed to remand the suspected person in custody in the event of non-compliance with an obligation under a supervision measure and detain him or her until the trial takes place or should this authority return the suspect immediately to the issuing authority?

(d) Could the participation of the suspected person through a video link from the executing Member State replace the physical presence of this person in the proceedings before the issuing authority as regards (only) the question whether he or she should be remanded in custody in the issuing Member State?

(e) How should the situation be resolved where the issuing and the executing authorities have different views on whether a person who is in breach of an obligation should be remanded in custody or whether the danger can be eliminated by imposing a new obligation?

(f) Should a mechanism to return the suspected person from the executing Member State to the issuing Member State apply to both the monitoring phase and to the trial phase?

(g) Should the issuing authority specify the obligation to come to the trial or/and that the person in question could be judged *in absentia* in the event that he or she does not attend the trial and would this person have to consent to this obligation before he or she can benefit from an alternative measure in the executing Member State?

(h) Should the executing authority, during the monitoring phase and the trial phase, be allowed to postpone the return of the suspected person?

(i) In particular, should the executing authority have the possibility to postpone the return of a person who is suspected of having committed a new offence within its territory?

ANNEX 1

Questions to consider

Question 1:

Should a mechanism for mutual recognition of non-custodial supervision measures cover

- the situation when a suspected person, who already is subject to such measures and who, permanently or temporarily, wants to go to another Member State, makes a request for transfer of these measures to that Member State (as described in chapter 4.2.2.3. above)?

- if yes, under which conditions?

- the situation when the suspect has already gone to another Member State (as described in chapters 4.2.3.1., “suspect in breach of an obligation under non-custodial pre-trial supervision measure” and 4.2.3.2., “late application for non-custodial supervision measures”, above)?

- if yes, under which conditions?

Question 2:

Considering the negative consequences of the present legal framework as regards the treatment of non-resident suspects in the area of alternatives to pre-trial detention:

(a) Do you agree with the approach of the Commission with respect to mutual recognition of non-custodial pre-trial supervision measure as described above (*i.e.* the possibility of monitoring the suspected person in his or her country of normal residence and the necessity to introduce a mechanism that ensures the presence of the accused person at the trial unless this person can be judged in his or her absence) in order to ensure the full EU-wide implementation of the right to liberty and the presumption of innocence?

(b) If not, are there alternative solutions?

(c) If yes, please describe them.

(d) Should a mechanism for mutual recognition of non-custodial supervision measures also cover less serious offences (*i.e.* below the threshold of Article 2(1) of the FD-EAW)?

Question 3:

(a) Should the new instrument contain a provision on a specific non-custodial pre-trial supervision measure, such as the European order to report, possibly in combination with a travel prohibition order, as described above?

(b) Would it be appropriate to let the *issuing* authority decide the non-custodial pre-trial supervision measures to be applied during the monitoring phase (in accordance to its national law) or in what way the suspected person should comply with a European order to report (*i.e.* how oft he or she should report, to what authority etc.)?

(c) Would it be more suitable to let the *executing* authority choose the appropriate coercive measures in accordance with its national law, leaving to the issuing authority only to specify the objective to be monitored?

(d) Would the Eurobail model be suitable?

Question 4:

(a) Would it be acceptable to provide for mandatory grounds of refusal in the event of amnesty, final judgment and other final decisions or relating to the age of criminal responsibility?

(b) Are the other grounds for refusal, contained in Article 4 of the FD-EAW, relevant in the context of an order for transfer of alternative measures?

(c) In particular, should the executing authority have the right to refuse the execution on the ground of lack of double criminality?

Question 5:

Could there be conditions for enforcing an order for transfer of alternative measures other than:

-return to the State of residence for serving the sentence?

-possibility of revision in case of life imprisonment?

Question 6:

(a) Should the issuing authority specify the obligation (relating to the three “classical dangers”) to be complied with by the suspected person under the non-custodial pre-trial supervision measure in a form (in line with what has been said above) letting the executing authority decide coercive measures other than detention in the event of non-compliance?

(b) Should the executing authority be obliged to report a (severe) breach of an obligation relating to the “three classical dangers”?

(c) Should the executing authority be allowed to remand the suspected person in custody in the event of non-compliance with an obligation under a supervision measure and detain him or her until the trial takes place or should this authority return the suspect immediately to the issuing authority?

(d) Could the participation of the suspected person through a video link from the executing Member State replace the physical presence of this person in the proceedings before the issuing authority as regards (only) the question whether he or she should be remanded in custody in the issuing Member State?

(e) How should the situation be resolved where the issuing and the executing authorities have different views on whether a person who is in breach of an obligation should be remanded in custody or whether the danger can be eliminated by imposing a new obligation?

(f) Should a mechanism to return the suspected person from the executing Member State to the issuing Member State apply to both the monitoring phase and to the trial phase?

(g) Should the issuing authority specify the obligation to come to the trial or/and that the person in question could be judged *in absentia* in the event that he or she does not attend the trial and would this person have to consent to this obligation before he or she can benefit from an alternative measure in the executing Member State?

(h) Should the executing authority, during the monitoring phase and the trial phase, be allowed to postpone the return of the suspected person?

(i) In particular, should the executing authority have the possibility to postpone the return of a person who is suspected of having committed a new offence within its territory?

ANNEX 2

National legislation in the area of pre-trial detention

Legitimate grounds for detention, duration and threshold¹⁶⁶

Threshold for detention¹⁶⁷

In *Belgium*, the threshold is linked to the penalty of the offence: Imprisonment of one year or more (Article 16, paragraph 1, of the Act of 20 July 1990).

In *Sweden*, the normal threshold for pre-trial detention is also one year. Pursuant to chapter 24, section 2, paragraph 2, of the Code of Procedure, any person suspected on probable cause of an offence may, however, be detained regardless of the nature of the offence, if he or she does not reside in the realm and there is a reasonable risk that he or she will avoid legal proceedings or a penalty by fleeing the country.

Finland has a similar provision (chapter 1, section 3, paragraph 4, of the Coercive Means Act).

In *Germany*, the general rule is to be found in Article 113 of the Code of Criminal Procedure: Pre-trial detention is, in principle, possible also for less serious offences. In cases of offences, which attract a custodial sentence not exceeding six months or a fine not exceeding 180 units of daily income, pre-trial detention may, however, not be ordered merely because there is a risk that course of justice will be perverted. Such an order may, further, only be issued if there is a risk that the accused will attempt to abscond if he has done so previously or has made preparations to do so, if he or she has no fixed place of abode in the area in which the Code of Criminal Procedure is effective, or cannot prove his or her identity. A special provision for certain offences is to be found in Article 112a, which provides that, in those cases, pre-trial detention only may be ordered if a custodial sentence of more than one year is expected.

Spanish law distinguishes between arrest (*detención*) and pre-trial detention (*prisión provisional* or *prisión preventiva*). The basic provision for both is Article 17(1) of the Constitution. In principle, the police can *arrest* a suspect suspected of having committed an offence, which is punished with a penalty of more than three years. The police may also arrest a person suspected of having committed an offence, which is punished by imprisonment of more than 6 months up to less than three years, when it can be expected that the suspect will not appear before the judge when summoned. Theoretically, there is also a possibility to arrest a suspect for minor offences, when he or she does not have a fixed abode and does not provide a surety. As regards *pre-trial detention*, the general rule is that the offence in question must be punished by imprisonment of more than three years. However, the judge may decide not to remand the suspect into custody, if there are grounds against pre-trial detention. On the other hand, pre-trial detention is also possible for offences below the threshold of one year, if the judge considers this necessary according to the circumstances.

In *England & Wales* the penalty for the offence is not a factor that is taken into account when making remand decisions. The decision to remand or bail a defendant is at the discretion of

¹⁶⁶ Chapter 2.2. of the Green Paper (chapter 2.2.2. National framework).

¹⁶⁷ Question 3 b of Annex 4.

the court under the provisions set out in the Bail Act 1976. In *Northern Ireland* the situation is similar. Bail can be granted for any offence so there is no pre-trial detention threshold as such, though the severity of the offence may bear on whether a person is likely to turn up for trial.

Maximum time limits for pre-trial detention

Some Member States have *maximum time limits* for pre-trial detention. Pursuant to § 194, section 1 of the *Austrian Code of Criminal Procedure*, pre-trial detention on the basis of the risk that evidence will be suppressed must not exceed two months. The accused must also be released from detention in any case, if he or she has already been in custody for six months, and the main proceedings have still not begun. Other time limits are, however, applicable for serious offences. If an offence has been committed wilfully and attracts a sentence exceeding three years of imprisonment, pre-trial detention until the start of the main proceedings is limited to one year, and if an offence has been committed wilfully and attracts a sentence five years of imprisonment, pre-trial detention until the start of the main proceedings is limited to two years (§ 194, section 2). In addition, pre-trial detention may only be maintained beyond six months, if this unavoidable on account of special difficulties or the specific scope of the examination with regard to the importance of the reason for detention (§ 194, section 3). Pre-trial detention and more lenient measures must be terminated as soon as the factors relating to them cease to exist or their continuation would be unreasonable (§ 193, section 2). The duration of a period of pre-trial detention is in any case inappropriate (disproportionate) in relation to the prescribed penalty if there can be no doubt that it has lasted as long as the prescribed penalty.

Article 6(4) of the *Greek Constitution* provides that the maximum duration of detention pending trial shall be specified by law. Such detention may not exceed a period of one year in the case of felonies or six months in the case of misdemeanours. In entirely exceptional cases, the maximum durations may be extended by six or three months respectively, by decision of the competent judicial council.

In *Italy*, Article 13 of the Constitution provides that the maximum time limit for pre-trial detention has to be fixed by law.¹⁶⁸

The Government of the *United Kingdom* has replied that, in *Scotland*, there are also different time limits depending on the seriousness of the offence. Where the accused is to be tried on indictment (before a judge and jury for a serious offence, he or she may not be detained in custody for more than 80 days without the indictment being served on him or her. Where an accused is to be tried on indictment, he or she may not be detained in custody for more than 110 days before being brought to trial. If the 110 day period is exceeded, the accused must be liberated immediately and is then free from any process in respect of the offence. The courts can, however, grant an extension or extensions to the 110-day period. Where the accused is to be tried summarily (by a judge sitting without a jury for an offence, which is not sufficiently serious to merit being tried on indictment), he or she may not be detained in custody for a total of more than 40 days after bringing of the complaint to court. If the 40-day period is exceeded, the accused must be liberated immediately and is then free from any process in respect of that offence. Extensions of this period can, however be granted.

¹⁶⁸ See Article 303 of the Code of Criminal Procedure.

In most Member States, specific time limits regarding pre-trial detention do not exist. The period of pre-trial detention must, however, not be disproportionate

*Special grounds for detention*¹⁶⁹

Under national law, including case-law, special grounds for detention are also required, although the three *classical grounds* are not always explicitly mentioned. In *England & Wales*, the Bail Act provides a presumption to bail (“release from custody”) for all those accused or convicted of an offence, but the defendant “need not be granted bail”, where he or she presents a bail risk. According to the reply to the questionnaire, examples where bail need not be granted are where there are substantial grounds for believing that if released on bail the defendant would fail to return to court, commit an offence, or interfere with witnesses or otherwise obstruct the course of justice. Another exception to bail is that the offence is indictable (*i.e.* a serious offence) and appears to have been committed while on bail for another offence.

*Presumption to remand suspects into custody for serious offences*¹⁷⁰

A *presumption* to remand persons who are suspected of having committed *serious offences* in custody exists in several - but not all - Member States. In *Austria* pre-trial detention will be imposed pursuant to § 180 section 7 of the Code of Criminal Procedure, in the case of crimes for which a minimum sentence of ten years’ imprisonment is prescribed. In *Italy* Article 275, paragraph 3, of the Code of Criminal Procedure states that where there is strong evidence of guilt with regard to Mafia-type association (Article 416 *bis* of the Criminal Code), pre-trial custodial detention is applied, except where evidence has been acquired of the non-existence of pre-trial remedies. In *Sweden* Chapter 24 section 1, second paragraph of the Code of Criminal Procedure provides that if a penalty less severe than imprisonment for two years is not prescribed for the offence, the suspect shall be detained unless it is clear that detention is unwarranted. Another example is *England & Wales*, where Section 25 of the Criminal Justice and Public Order Act 1994 provides a presumption against bail in cases of murder, manslaughter, rape (including attempts) if the defendant has a previous conviction for one of those serious offences.

Alternatives to pre-trial detention and applicable penalties¹⁷¹

Alternative measures

In *Austria*, § 180 Section 5 of the Code of Criminal Procedure provides an exhaustive list of the more lenient measures than pre-trial detention. The alternative measures are the following: 1) An *oath* neither to abscond or go into hiding, not to change address, before the effective completion of legal proceedings without the approval of the preliminary examining judge (paragraph 1). 2) An *oath* not to make any attempt to frustrate investigations (paragraph 2). 3) An *order* to live at a specified location, with a specified family, at a specified address, avoiding specified locations or associates, to refrain from alcoholic beverages and other intoxicants or engage in specified employment (paragraph 3). 4) An *order to report* any change of address, or report to a court or other office at specified intervals (paragraph 4). 5) With the consent of the suspect, an *order to undergo treatment* to cure addiction or other

¹⁶⁹ Question 4 of annex 4.

¹⁷⁰ Question 5 of annex 4.

¹⁷¹ Questions 12 – 16 of annex 4.

medical treatment or psychotherapy or health-related action (paragraph 4a). 6) Temporary *withdrawal* of all *travel documents* (paragraph 5). 7) Temporary *withdrawal* of all *documents* required to *drive a vehicle* (paragraph 6). 8) The provision of a *surety* (paragraph 7). 9) The arrangement of temporary *probation* (paragraph 8). Pre-trial detention may not be imposed if the purposes of detention can also be achieved by means of simultaneous imprisonment or other form of detention.

Belgian law provides that the suspect may be released on certain conditions or if he or she provides a *surety* (Article 35 § 3 of the Act of 20 July 1990)

In *Denmark*, the following alternative measures may be considered, with the consent of the suspect and if the conditions for pre-trial detention are otherwise fulfilled: 1) Submitting to supervision imposed by the court. 2) Complying with special provisions concerning place of residence, work, use of free time and association with certain persons. 3) Staying in a suitable home or institution. 4) Submitting to psychiatric treatment or treatment for alcohol abuse or similar, if necessary in a hospital or special institution. 5) *Reporting to the police* at specified times. 6) Surrendering passport or other identity documents to the police. Provision of a *surety* set by the court in order to ensure the appearance at the hearing (Section 765, paragraph 2, of the Administration of Justice Act).

In *Finland*, *travel prohibition* is used as an alternative to pre-trial detention. This means that a suspect's freedom to travel is restricted in order to prevent him or her from escaping or continuing his or her criminal activity, *i.e.* the suspect is not allowed to leave an area stated in the prohibition order. The suspected person may also be subjected to *other restrictions*, such as being required to be available at certain times at home or at the work place or to *report to the police*. The suspect cannot get a passport and if he or she already possesses one, it must be submitted to the police. A travel prohibition can be ordered for a maximum period of 60 days, but the court can order its extension.

In *France*, Article 138a 12 of the Code of Criminal Procedure provides that the judge, *i.a.*, may prohibit the suspected person to leave an area defined by the judge, to leave his or her place of abode or residence, or to visit certain places. The judge may also demand that the suspected person reports when he or she leaves a specified area. Moreover, the judge may order the suspected person to appear before an authority at regular intervals and to surrender certain identity documents.

In *Germany*, § 116, paragraph 1, of the Code of Criminal Procedure, provides that the judge shall defer the execution of an arrest warrant, which is only justified by the risk that the suspect will attempt to abscond, if less coercive measures are sufficient. The following measures may be considered: 1) An *instruction to report* to a judge, criminal prosecution authority or other office appointed by them at a given time. 2) An *instruction not to leave* a place of abode or residence or a *specified area* without the permission of the judge or the criminal prosecution authority. 3) An instruction to leave his home only in the charge of a specified person. 4) The furnishing of an appropriate *surety* by the suspect or other person. The list of measures is not exhaustive and combinations between these measures are also possible.

Greece has similar provisions: The provision of *surety*, the obligation of the suspect to appear before an authority at regular intervals, the prohibition to travel and/or reside in a specific area and/or abroad and/or the prohibition of association with and/or meeting with certain persons (Article 282, paragraphs 1 and 2, of the Civil Procedure Code).

In *Ireland*, Section 6(1) of the Bail Act (1997) sets down the conditions which may be attached to bail (release pending trial). In addition to the requirement of attendance at the court at the end of the period of remand, they include that the accused must not commit an offence while on bail and must be of good behaviour. It is also open to the court to impose *any* conditions which it considers appropriate having regard to the circumstances of the accused. These conditions may include that the accused 1) reside or remain in a particular place, 2) reports to a specified police station at specific intervals, 3) surrenders any passport or travel document or refrains from applying such, 4) keeps away from any specified premises or place and 5) does not have contact with a specified person or persons.

The *Italian* Code of Criminal Procedure provides following alternative to pre-trial detention: Prohibition to leave the country (Article 281); obligation to appear before the judicial police (Article 282) prohibition or obligation to remain in a certain place (Article 283) and house arrest (Article 284, paragraph 5).

In *Luxembourg*, release may be ordered if the suspect provides a surety (Article 114 of the Code of Criminal Procedure).

In *The Netherlands*, pre-trial detention may be suspended if, by imposing certain conditions, it is possible to avoid depriving the suspect of his or her liberty. In order to ensure compliance with the conditions, the suspect or a third party must provide a surety (Article 80 of the Code of Criminal Procedure). The suspect might also be required to surrender his or her passport or to commit himself or herself to an institution.

Portuguese law allows house arrest¹⁷², provision of surety, prohibition to contact certain persons, performing certain public functions and travelling abroad, further restrictions on residence. According to the Portuguese reply to the questionnaire, the most widely used alternative measure is the *obligation to report* at regular intervals to the *police*. In addition, anyone who is a defendant in criminal proceedings must make a declaration in respect of his or her identity and residence, and may not leave his or her declared residence for more than five days without first informing the court of his or her new residence.

According to *Spanish* reply to the questionnaire, the judge can *order* the suspect *to report* to a *court* regularly. The judge can also impose restrictions on residing in a particular area or to stay in a certain locality, *prohibiting* him or her from *travelling* inside or outside the country without prior authorisation from the court. Spanish law also provides for “attenuated detention”, *i.e.* arrest at the suspect’s residence. Attenuated detention occurs if the defendant’s health would be at risk, if kept in “normal” pre-trial detention.

In *Sweden*, the alternative measures to pre-trial detention are travel prohibition and order to report to the police (chapter 25, section 1, of the Code of Procedure).

In *England & Wales*, the court has discretion to impose any condition while granting bail, including curfew and restrictions on entering into a particular area (*i.e.* the home area of the alleged victim). The court may also decide not to impose any conditions.

In *Scotland* there are three alternatives to pre-trial detention: 1) The police have the power to decide whether the person should be detained in custody or released when a person has been

¹⁷² The time spent in house arrest is deducted from the actual prison sentence imposed.

arrested and charged with a minor offence. If the person is released it can be with or without an undertaking to appear at a specific court at a specific time. 2) The courts have the power to release the person on bail when a person has been arrested and charged with an offence. 3) The accused may simply be ordained by the court to appear in summary proceedings at an intimated time and date. In granting bail, the judge imposes on the accused the standard conditions on bail and any further conditions considered necessary to secure that the standard conditions are observed and that the accused makes himself available for the purpose of participating in an identification parade or of enabling any print, impression or sample be taken from him. The *standard conditions* are that the accused a) appears at the appointed time at every diet relating to the offence with which he or she is charged of which he or she is given due notice, b) does not commit an offence while on bail, c) does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or herself or any other person, and d) makes himself or herself available for the purpose of enabling enquiries or a report to be made to assist the court in dealing with him or her for the offence with which he or she is charged. Examples of *further conditions*, which may be imposed, are a) the imposition of money bail as caution, b) a curfew (not electronic tagging), c) the requirement to report to a police station at a certain time every day, d) for the accused to keep away from a specific place or person, e) the requirement to live at a specific address, and f) in relation to young offenders under the age of 16 years, the requirement to report to a social worker or community worker.

According to the reply from *Northern Ireland*, the alternative to pre-trial detention is bail.

Applicable penalties

As regards the replies to this question¹⁷³, the legislation of the EU Member States provides that the question of pre-trial detention shall be considered again and that the person may be remanded in custody:

Austria (§ 180, section 6, of the Code of Criminal Procedure), *Belgium*, *Denmark*, *Finland* (chapter 2, section 9 of the Coercive Measures Act), *France* (irrespective of the penalty for the offence, Article 141-2 of the Code of Criminal Procedure), *Germany* (§ 116, paragraph 4, of the Code of Criminal Procedure), *Greece* (Article 282(4) of the Civil Procedure Code), *Italy* (Article 276 of the Code of Criminal Procedure), *Luxembourg* (Article 125 of the Code of Criminal Procedure), *The Netherlands* (Article 82 of the Code of Criminal Procedure. The surety will be forfeited and remain in the possession of the State, Article 83 of the Code of Criminal Procedure), *Portugal*, *Spain*, *Sweden* (chapter 25, section 9, of the Code of Procedure), the *United Kingdom - England & Wales* (and forfeiture of any money that the defendant, or other person, has agreed to pay if the defendant violates his or her bail condition), and *Northern Ireland* (including forfeiture of the surety, Article 138(1) (2).

In two jurisdictions, breach of a bail condition is also a separate offence and is liable to a separate fine or imprisonment:

In *Ireland*, section 13 of the Criminal Justice Act of 1984, provides that it is an offence for a person released on bail to appear in court in accordance with the recognisance into which he or she has entered on being granted bail. On conviction of the offence the person will be liable to a fine to up to 1269 EURO or to imprisonment for up to twelve months or both. The section

¹⁷³ Question 14 of annex 4.

also provides that any sentence imposed on a person under the section must be consecutive to any sentence passed on the person for a previous offence in accordance with the provisions of section 11 of the same Act.

In *Scotland*, breach of a bail condition (other than the condition that an accused should not commit an offence while on bail) is an offence, normally punishable by imprisonment for not more than three months and/or a fine not exceeding £ 1000. Failure to appear at a diet in respect of solemn proceedings is also an offence and liable on conviction on indictment to a fine and imprisonment for a period not exceeding two years. A sentence imposed for a breach of a bail condition may be imposed in addition to any other penalty competent to the court. Offending while subject to an earlier bail order now falls to be disposed of as an aggravation of the substantive offence.

ANNEX 3

Pre-trial detention rates in the EU Member States

The below figures (rounded up to one decimal point) are based on the replies of the (old and new) EU Member States to the *questionnaire on statistical data on the prison population, including pre-trial detention* (mentioned in chapter 1.1.1) that was drawn up by unit D.3 (criminal justice), Directorate D (Internal security and criminal justice) of the Directorate-General Justice and Home Affairs, European Commission, in 2003 at the request of the Italian Presidency.

The *figures* must, however, only be seen as *indicative*. The dates of reference for the statistics vary from Member State to Member State. Statistics on the rate between nationals and non-nationals are not always available. Most important: there are no figures that indicate whether nationals and non-nationals are *residents* of the Member State of detention. In some instances, the Commission has not received any reply at all (or only to some of the questions). The symbol “X” below indicates that statistics are not available (or have not been provided or checked). The figures provided by the Member States on the pre-trial detention rate and the total prison population per 100 000 inhabitants have (as regards the years 2002 and 2001) been checked against the figures under the Annual Penal Statistics of the Council of Europe. Differences between those figures and the figures provided by the Member States are indicated in the footnotes.

This being said, it seems, however, clear that the rate of non-nationals in pre-trial detention is very high in several old EU Member States (see, in particular, Austria and Belgium, but also Italy and The Netherlands). However, in most new EU Member States (with the exception of Cyprus), there are very few non-nationals in pre-trial detention. As regards the figures on the total prison population, the high rates of the Baltic Member States should be noted

1. The pre-trial detention rate in the EU Member

a) Period: 2002

	Pre-trial detention rate per 100.000 inhabitants	Total prison population (including pre-trial detainees) per 100.000 inhabitants	Pre-trial detention % between		Pre-trial detention % between foreigners:	
			Nationals	Foreigners	EU nationals (not including new EU MS)	Third country nationals
Austria	22,5 ¹⁷⁴	97,5 ¹⁷⁵	45,4	54,6	X ¹⁷⁶	X
Belgium	26,2 ¹⁷⁷	84,9 ¹⁷⁸	47 ¹⁷⁹	53	21,2 ¹⁸⁰	78,8
Denmark	19 ¹⁸¹	64 ¹⁸²	X ¹⁸³	X	X	X
Finland	9,7	66	78,7 ¹⁸⁴	21,3	7,1 ¹⁸⁵	92,9
France	34 ¹⁸⁶	90,3 ¹⁸⁷	X ¹⁸⁸	X	X	X

¹⁷⁴ For 2002. No specific date indicated. According to the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d) as of 1 September 2002, this rate is 23,9.

¹⁷⁵ For 2002. No specific date indicated. According to the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) as of 1 September 2002 this rate is: 92,3.

¹⁷⁶ According to the Austrian reply, a breakdown by nationality of non-Austrian nationals cannot be given. Moreover, no data can be provided on the place of residence of non-nationals. A study (“Die Entwicklung der Haftzahlen in Österreich – Darstellung und Analyse der Ursachen”, carried out by Dr. Arno Pilgram, of the Institute for Sociology of Law and Criminology, Vienna), annexed to the reply, shows that the number of non-Austrian nationals in prisons in the Federal Länder were relatively stable during the period 2000 – 2002, but two groups of non-nationals accounted for the marked increase in new prisoners in Vienna: these are nationals of eastern European States (not the 2004 accession countries) and of African States. The increase in those two groups in the jurisdiction of the Vienna District Court account for most of the increase in Austria as a whole.

¹⁷⁷ Source: Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d) as of 1 September 2002.

¹⁷⁸ On 1 October 2002. The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) as of 1 September 2002 is 90,2.

¹⁷⁹ On 1 March 2002.

¹⁸⁰ On 1 March 2002.

¹⁸¹ For 2002. No specific date indicated. According to the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d) as of 1 September 2002, this rate is 14,5.

¹⁸² For 2002. No specific date indicated.

¹⁸³ No figures on the *pre-trial* rate (in %) between nationals and foreigners are available. It could, however, be noted that the rate between those categories regarding *sentenced* prisoners is 83 % (nationals) and 16,4 % (foreigners).

¹⁸⁴ Yearly average.

¹⁸⁵ On 1 October 2002.

Germany ¹⁸⁹	X	94,6 ¹⁹⁰	X	X	X	X
Greece	X	78,4 ¹⁹¹	58,3 ¹⁹²	41,7	4,8 ¹⁹³	95,2
Ireland	X	78 ¹⁹⁴	X	X	X	X
Italy	21,5 ¹⁹⁵	99,8 ¹⁹⁶	58	42	2,6	95,2
Luxembourg	34,2	76,6	X	X	X	X
Netherlands ¹⁹⁷	35,5	71,4 ¹⁹⁸	66,1	33,9	10,8	89,2
Portugal ¹⁹⁹	40,8	133,2	76,2	23,8	X	X
Spain	X	126,2 ²⁰⁰	X	X	X	X
Sweden ²⁰¹	X	73 ²⁰²	X ²⁰³	X	X	X

¹⁸⁶ On 1 January 2003. The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d) as of 1 September is 27,7.

¹⁸⁷ On 1. January 2003.

¹⁸⁸ Under the French statistics it is not possible to make a distinction between sentenced prisoners and pre-trial detainees among foreigners. It could, however, be noted that the rate (in %) as regards the total prison population is 78 % (for nationals) and 22 % (for foreigners).

¹⁸⁹ The German statistics do not include cases of pre-trial detention, where proceedings were dropped or a final decision was taken not to institute proceedings. Moreover, the figures do not include pre-trial detention in the new Länder or the relation between national and non-national prisoners (pre-trial detainees).

¹⁹⁰ On 31 March 2003. The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) as of 1 September 2002 is 95,2.

¹⁹¹ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) as of 1 September 2002.

¹⁹² These figures were calculated on the basis of the total number of (national and non-national) pre-trial detainees on 16 December 2002 and the figures for the non-national pre-trial detainees on 1 January 2002.

¹⁹³ On 1 January 2002.

¹⁹⁴ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) as of 1 September 2002.

¹⁹⁵ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d) as of 1 September 2002.

¹⁹⁶ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) as of 1 September 2002.

¹⁹⁷ On 31 December 2002.

¹⁹⁸ The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) is 100,8 as of 1 September 2002.

¹⁹⁹ On 31 December 2002.

²⁰⁰ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) as of 1 September 2002.

²⁰¹ Sweden had not yet published the exact data for 2002, when the questionnaire was sent.

²⁰² Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) as of 1 September 2002.

²⁰³ No figures on the relation between nationals and non-nationals are available under the Swedish statistics.

UK ²⁰⁴	25,5 ²⁰⁵	137 ²⁰⁶	89,2	10,8	X	X
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b) Period: 2001

	Pre-trial detention rate per 100.000 inhabitants	Total prison population (including pre-trial detainees) per 100.000 inhabitants	Pre-trial detention % between		Pre-trial detention % between foreigners	
			Nationals	Foreigners	EU nationals (not including new EU MS)	Third country nationals
Austria	21,2 ²⁰⁷	85,1 ²⁰⁸	49,7	50,3	X	X
Belgium	19,6 ²⁰⁹	85,4 ²¹⁰	45,8 ²¹¹	54,2	21,9 ²¹²	78,1
Denmark	16 ²¹³	58,9	X ²¹⁴	X	X	X
Finland	X	58,7 ²¹⁵	80,3 ²¹⁶	19,7	6,8 ²¹⁷	93,2
France	21,9 ²¹⁸	77,1 ²¹⁹	X ²²⁰	X	X	X

²⁰⁴ Statistics for England & Wales only (as of 30 June 2002. The pre-trial detention rate for England & Wales include persons, who are convicted, but not yet sentenced.

²⁰⁵ The corresponding figure for England & Wales in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d) is 14,8 as of 1 September 2002.

²⁰⁶ Corresponds to the figure of the Council of Europe (137,1)

²⁰⁷ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) as of 1 September 2001.

²⁰⁸ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) as of 1 September 2001.

²⁰⁹ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) as of 1 September 2001.

²¹⁰ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) as of 1 September 2001.

²¹¹ On 1 March 2001.

²¹² On 1 March 2001.

²¹³ The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) is 12. Table b "rate of prisoners without final sentence per 100 000 inhabitants" has 16,1.

²¹⁴ No figures on the *pre-trial* rate (in %) between nationals and foreigners are available. It could, however, be noted that the rate between those categories regarding *sentenced* prisoners is 84,1 % (nationals) and 15,9 % (foreigners).

²¹⁵ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1).

²¹⁶ Yearly average.

²¹⁷ On 1 October 2001.

²¹⁸ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) as of 1 September 2001.

²¹⁹ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) as of 1 September 2001.

Germany	X	95,8 ²²¹	X	X	X	X
Greece	21,6 ²²²	79 ²²³	57,1 ²²⁴	42,9	2,6 ²²⁵	97,4
Ireland	X	80 ²²⁶	X	X	X	X
Italy	23,4 ²²⁷	95,3 ²²⁸	64	36	2,6	97,4
Luxembourg	45,9 ²²⁹	90,7 ²³⁰	X	X	X	X
Netherlands ²³¹	33,8 ²³²	69 ²³³	66,8	33,2	14	86
Portugal ²³⁴	36,9 ²³⁵	131,1 ²³⁶	82,9	17,1	X	X
Spain	25,4 ²³⁷	117 ²³⁸	X	X	X	X
Sweden	X	70 ²³⁹	X	X	X	X

²²⁰ Under the French statistics it is not possible to make a distinction between sentenced prisoners and pre-trial detainees among foreigners. It could, however, be noted that the rate (in %) as regards the total prison population is 78,1 % (for nationals) and 21,9 % (for foreigners).

²²¹ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) as of 1 September 2001.

²²² Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d)

²²³ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1).

²²⁴ These figures were calculated on the basis of the total number of (national and non-national) pre-trial detainees on 16 December 2001 and the figures for the non-national pre-trial detainees on 1 January 2001.

²²⁵ On 1 January 2001.

²²⁶ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) as of 1 September 2001.

²²⁷ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) as of 1 September 2001.

²²⁸ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) as of 1 September 2001.

²²⁹ Although no definition is given for “pre-trial detainee”, it can be assumed that it means “prisoner without final sentence”. The figure according to the Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) is 31,7 (table 4.2.1. a, has 45,1).

²³⁰ The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2001 is 80,9 (table 1).

²³¹ On 31 December 2001.

²³² No figure available under the statistics of the Council of Europe.

²³³ The corresponding figure in the Annual Statistics of the Council of Europe, SPACE I: 2001 is 95,4 (table 1) as of 1 September 2001.

²³⁴ On 31 December 2001.

²³⁵ No figure available under the statistics of the Council of Europe.

²³⁶ The corresponding figure in the Annual Statistics of the Council of Europe, SPACE I: 2001 is 132 (table 1) as of 1 September 2001.

²³⁷ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) as of 1 September 2001.

²³⁸ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) as of 1 September 2001.

UK ²⁴⁰	21,5 ²⁴¹	127 ²⁴²	88,3	11,7	X	X
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c) Period: 2000

	Pre-trial detention rate per 100.000 inhabitants	Total prison population (including pre-trial detainees) per 100.000 inhabitants	Pre-trial detention %/ between		Pre-trial detention % between foreigners	
			Nationals	Foreigners	EU nationals (not including new EU MS)	Third country nationals
Austria	X	X	49,7	50,3	X	X
Belgium	29,5	84,7 ²⁴³	50 ²⁴⁴	50	26,8 ²⁴⁵	73,2
Denmark	16,6	61,5	X ²⁴⁶	X	X	X
Finland	X	X	85,6 ²⁴⁷	14,4	9,9 ²⁴⁸	90,1
France	28,3	75,6	²⁴⁹ X	X	X	X
Germany	X	X	X	X	X	X
Greece	X	X	56,7 ²⁵⁰	43,3	3 ²⁵¹	97

²³⁹ On 1 October 2001. The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) is 68,5 as of 1 September 2001.

²⁴⁰ England & Wales on 30 June 2001.

²⁴¹ The corresponding figure for England & Wales in the Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) is 13,3 as of 1 September 2001

²⁴² The corresponding figure for England & Wales in the Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) is 126 as of 1 September 2001.

²⁴³ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2000.

²⁴⁴ The addition of the figures on pre-trial detainees from Belgium, old EU MS, new EU MS and third countries (1437+385+59+993=2874) does not correspond to the figure on the total number of people in pre-trial detention (3023) forwarded by Belgium. The pre-trial detention rate between nationals and foreigners is calculated on the basis of the former figures (as of 1 March 2000).

²⁴⁵ On 1 March 2000.

²⁴⁶ No figures on the *pre-trial* rate (in %) between nationals and foreigners are available. It could, however, be noted that the rate between those categories regarding *sentenced* prisoners is 83,8 % (nationals) and 16,2 % (foreigners).

²⁴⁷ Yearly average.

²⁴⁸ On 1 October 2000.

²⁴⁹ Under the French statistics it is not possible to make a distinction between sentenced prisoners and pre-trial detainees among foreigners. It could, however, be noted that the rate (in %) as regards the total prison population is 77 % (for nationals) and 23 % (for foreigners).

²⁵⁰ These figures were calculated on the basis of the total number of (national and non-national) pre-trial detainees on 1 December 2000 and the figures for the non-national pre-trial detainees on the same date.

Ireland	X	X	X	X	X	X
Italy	X	X	58,4	41,6	2,2	97,8
Luxembourg	43	89,3	X	X	X	X
Netherlands ²⁵²	32,1	65,3	67,9	32,1	15,4	84,6
Portugal ²⁵³	39,3	128	X	X	X	X
Spain	X	X	X	X	X	X
Sweden	12,6	65 ²⁵⁴	X	X	X	X
UK ²⁵⁵	22	124	90	10	X	X

²⁵¹ On 1 December 2000.
²⁵² On 1 December 2000.
²⁵³ On 31 December 2000.
²⁵⁴ On 1 October 2000.
²⁵⁵ England & Wales.

2. The pre-trial detention rate in the new EU Member States

a) Period: 2002

	Pre-trial detention rate per 100.000 inhabitants	Total prison population (including pre-trial detainees) per 100.000 inhabitants	Pre-trial detention % between		Pre-trial detention % between foreigners	
			Nationals	Foreigners	EU nationals (not including new EU MS)	Third country nationals
Cyprus	X	252,4	52,8	47,2	15	85
Czech Republic ²⁵⁶	15,8 ²⁵⁷	159	72	28 ²⁵⁸	X	X
Estonia	95,4 ²⁵⁹	225,6 ²⁶⁰	X	X	X	X
Hungary	42,7 ²⁶¹	130,8 ²⁶²	92,8	7,2	X	X
Latvia ²⁶³	151 ²⁶⁴	354 ²⁶⁵	X	X	X	X
Lithuania	36 ²⁶⁶	326,4 ²⁶⁷	X	X	X	X

²⁵⁶ On 31 December 2002.

²⁵⁷ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d) as of 1 September 2002.

²⁵⁸ Including persons concerning whom there exist doubts whether they are citizens of the Czech or the Slovak Republics.

²⁵⁹ April 2003.

²⁶⁰ On 1 January 2003. The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) is 340,9 as of 1 September 2002.

²⁶¹ The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d) is 33,2 as of 1 September 2002.

²⁶² The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) is 177,4 as of 1 September 2002.

²⁶³ On 15 August 2003.

²⁶⁴ The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d “rate of untried prisoners – no court decision yet reached – per 100 000 inhabitants”) is 20,9 as of 1 September 2002. The corresponding figure in table 5 b (“rate of prisoners without final sentence per 100 000 inhabitants”) is 160,1.

²⁶⁵ The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) is 363,1 as of 1 September 2002.

Malta	21,3 ²⁶⁸	71,4	61,6	38,4	13,5	86,5
Poland ²⁶⁹	X	210,3 ²⁷⁰	95,8	4,2	5,6	94,4
Slovakia	43 ²⁷¹	144	94,8	5,2	3,3	96,7
Slovenia	2,2 ²⁷²	56,2 ²⁷³				

b) Period: 2001

	Pre-trial detention rate per 100.000 inhabitants	Total prison population (including pre-trial detainees) per 100.000 inhabitants	Pre-trial detention % between		Pre-trial detention % between foreigners	
			Nationals	Foreigners	EU nationals (not including new EU MS)	Third country nationals
Cyprus	6,6 ²⁷⁴	285,6	53,6	46,4	14,1	85,9
Czech Republic ²⁷⁵	27,3 ²⁷⁶	188 ²⁷⁷	70,7	29,3 ²⁷⁸	X	X

²⁶⁶ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d) as of 1 September 2002.

²⁶⁷ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) as of 1 September 2002.

²⁶⁸ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d) as of 1 September 2002.

²⁶⁹ On 31 December 2002.

²⁷⁰ The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) is 208,7 as of 1 September 2002.

²⁷¹ No figure available under the Council of Europe statistics.

²⁷² Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d) as of 1 September 2002.

²⁷³ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d) as of 1 September 2002.

²⁷⁴ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) as of 1 September 2002.

²⁷⁵ On 31 December 2001.

²⁷⁶ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) as of 1 September 2001

²⁷⁷ The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) is 207 as of 1 September 2001

²⁷⁸ Including persons concerning whom there exist doubts whether they are citizens of the Czech or the Slovak Republics.

Estonia	104,3 ²⁷⁹	350 ²⁸⁰	X	X	X	X
Hungary	33,6 ²⁸¹	171 ²⁸²	87,6	12,4	X	X
Latvia	26 ²⁸³	364 ²⁸⁴	X	X	X	X
Lithuania	47,8 ²⁸⁵	291 ²⁸⁶	X	X	X	X
Malta	20,7 ²⁸⁷	70,8 ²⁸⁸	63,3	36,7	18	82
Poland ²⁸⁹	1,1 ²⁹⁰	207 ²⁹¹	95,1	4,9	4,7	95,3
Slovakia	X ²⁹²	139 ²⁹³	94,3	5,7	5,5	94,5
Slovenia	4,8 ²⁹⁴	56 ²⁹⁵	X	X	X	X

²⁷⁹ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) as of 1 September 2001.

²⁸⁰ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) as of 1 September 2001.

²⁸¹ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) as of 1 September 2001.

²⁸² Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) as of 1 September 2001.

²⁸³ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) as of 1 September 2001.

²⁸⁴ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) as of 1 September 2001.

²⁸⁵ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) as of 1 September 2001.

²⁸⁶ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) as of 1 September 2001.

²⁸⁷ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) as of 1 September 2001.

²⁸⁸ The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I (table 1) is 67,2 as of 1 September 2001.

²⁸⁹ On 31 December 2001.

²⁹⁰ Reference: Annual Penal Statistics of the Council of Europe, SPACE I (table 4.2.1. d) as of 1 September 2001.

²⁹¹ Reference: Annual Penal Statistics of the Council of Europe, SPACE I (table 1) as of 1 September 2001.

²⁹² No figure available under the Council of Europe statistics.

²⁹³ Reference: Annual Penal Statistics of the Council of Europe, SPACE I (table 1) as of 1 September 2001.

c) Period: 2000

	Pre-trial detention rate per 100.000 inhabitants	Total prison population (including pre-trial detainees) per 100.000 inhabitants	Pre-trial detention % between		Pre-trial detention % between foreigners	
			Nationals	Foreigners	EU nationals (not including new EU MS)	Third country nationals
Cyprus	X	236,9	52,9	47,1	24,8	75,2
Czech Republic	X	209	69,5	30,5 ²⁹⁶	X	X
Estonia	X	X	X	X	X	X
Hungary	X	X	86,8	13,2	X	X
Latvia	X	X	X	X	X	X
Lithuania	X	X	X	X	X	X
Malta	X	65,8	57,2	42,8	13,5	86,5
Poland ²⁹⁷	X	X	94,7	5,3	4,5	95,5

²⁹⁴ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) as of 1 September 2001.

²⁹⁵ Reference: Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) as of 1 September 2001.

²⁹⁶ Including persons concerning whom there exist doubts whether they are citizens of the Czech or the Slovak Republics.

²⁹⁷ On 31 December 2000.

Slovakia	X	X	93,6	6,4	4.9	95.1
Slovenia	X	X	X	X	X	X

ANNEX 4

Questionnaire on different aspects of pre-trial detention sent to the EU Member States

Right to liberty

Q. 1) Which general (constitutional) provisions regarding the right to liberty exist in your national legal system?

European Convention on Human Rights

Q. 2) Has your country incorporated the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950) as a whole into the national legal system?

Legitimate grounds for detention

Q. 3) Which are the general conditions in which a person may be detained:

- a) Which is the degree (or degrees) of reasonable suspicion of having committed an offence?
- b) Which is/are the (possible) threshold/thresholds for pre-trial detention in relation to the prescribed penalty of the offence?

Q. 4) Which are the special conditions for pre-trial detention:

- a) risk of failing to attend trial (absconding)?
- b) risk of interfering with evidence or witnesses, or otherwise obstruct the course of justice?
- c) risk of committing an offence on bail (if not detained)?
- d) be at risk of harm against which he or she would be inadequately protected or to be a disturbance to public order?
- e) other?

Q. 5) Is pre-trial detention mandatory in certain conditions?

Who may initially arrest a suspect

Q. 6) Who may initially arrest a suspect and which time limits must be observed:

- a) Does your country recognise a right for anyone to apprehend a person observed in the act of committing an offence (*in flagrante delicto*) or fleeing from it?
- b) If this is the case, which is the time limit for turning over such a person to the competent authorities?

- c) Which authorities/officials may take the initial decision on arrest/apprehension?
- d) Which is the time limit for contacting the prosecutor/other legal authority/court after the initial decision on arrest/apprehension?

Competent legal authorities

Q. 7) Which legal authorities may decide on the detention:

- a) If your legal system provides that there may be a preliminary decision on detention, which legal authority is empowered to take such a decision (prosecutor/other legal authority/police)?
- b) Is there an obligation for the prosecutor/other authority to present the case for a court?
- c) If this is the case, which is the time limit?
- d) Which is the time limit for the court to decide on the detention?
- e) Are there any remedies against the decision of the court?
- f) Are there any remedies against the decision of a court in the second instance, third instance?
- g) If this is the case, which are the time limits (e and f)?
- h) Is there an obligation to review the decision on detention after a certain time limit?
- i) If this is the case, which are the time limits and are there any remedies against that decision?
- j) Pursuant to Article 5(3) ECHR a detained person is entitled to trial within a “reasonable time”. Is it possible, under your legal system, to translate this concept into a specific time period (is it, *i.e.*, related to the gravity or nature of the offence)?

Special categories

Q. 8) Are there any special provisions for certain categories of suspects (such as juveniles, terrorists, mentally ill)?

Treatment of detainees

Q. 9) How are pre-trial detainees to be treated:

- a) Are there any minimum rules regarding the treatment of remand prisoners in your country?
- b) If this is the case, please describe these rules.

- c) Are detainees only suspected of having committed an offence segregated from convicted persons?

International covenant on Civil and Political Rights

Q. 10) Has your country made any reservations with respect to Articles 9 and 10 of the (UN) International Covenant on Civil and Political Rights (ICCPR, 1966)?

Q. 11) Does your country accept the optional procedure under Article 41 of the ICCPR?

Alternatives to pre-trial detention

Q. 12) Which are the alternatives to pre-trial detention in your legal system?

Q. 13) Which different methods of supervision exist in your legal system?

- a) electronic tagging [so-called bail curfew]?
- b) reporting to the police, restrictions to reside in a special area?
- c) other?

Q. 14) Which penalties are applicable in the event of non-compliance?

Q. 15) Does your country recognise or transpose decisions by legal authorities of foreign countries regarding supervision or other alternatives to pre-trial detention?

Q. 16) If this is the case, please describe these rules.

"12) Which are the alternatives to pre-trial detention in your legal system?

13) Which different methods of supervision exist in your legal system?

- a) electronic tagging [so-called bail curfew]?
- b) reporting to the police, restrictions to reside in a special area?
- c) other?

14) Which penalties are applicable in the event of non-compliance?

15) Does your country recognise or transpose decisions by legal authorities of foreign countries regarding supervision or other alternatives to pre-trial detention?

16) If this is the case, please describe these rules."