

Translation of letter

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To: JUST B1

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Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention (COM(2011) 327)

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The Austrian Law Society (Österreichischer Rechtsanwaltskammertag or "ÖRAK") is the statutory representative body for lawyers in Austria and acts in this capacity to protect the rights and interests of Austrian lawyers and to represent them at national, European and international levels. ÖRAK is therefore particularly concerned with proposing and giving opinions on draft legislation, notifying defects in the administration of justice and public affairs to the competent authority and making proposals for improving the administration of justice and public affairs.

ÖRAK wishes to submit the following opinions on "Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention" (COM(2011) 327)

I. Introduction

In this Green Paper, the Commission, as requested by the Council, wishes to explore the extent to which detention issues (within the meaning of Article 5(1)(a), (b) and (c) ECHR) impact on mutual trust, and consequently on mutual recognition and judicial cooperation generally within the European Union. Although the Commission clearly states that detention issues are fundamentally the responsibility of the Member States, it also points out that this field is particularly strongly affected by mutual trust between the Member States. In particular, detention conditions can have a direct impact on the operation of the principle of mutual recognition of judgments; the Commission demonstrates this with reference to the Council Framework Decisions on the European Arrest Warrant, the transfer of prisoners, mutual recognition of alternative sanctions and probation and the European Supervision Order.

The Commission points out that the **European Arrest Warrant (EAW)** requires the Member States to respect fundamental rights and fundamental legal principles and thus also takes account of Article 3 ECHR. Hence surrender of a prisoner might be refused if there were concerns that he or she might be subjected to unacceptable detention conditions in the issuing State. Moreover, under Article 6(1) ECHR, where pre-trial detention periods are excessively long, Member States executing EAWs may reject the use of an instrument designed for the rapid surrender of persons to face trial if, because of dilatory proceedings in the issuing State, those persons then risk spending months

awaiting trial in a foreign prison when they could have remained in their home environment until the authorities in the issuing State were ready for trial.

With reference to the **transfer of prisoners**, the Commission points out that Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty (to be implemented by 5 December 2011) establishes a system for transferring convicted prisoners back to the Member State of nationality or habitual residence. In this case too, Member States must respect fundamental rights and fundamental legal principles. Precisely for this reason, bad prison conditions in the home country of the prisoner may again (particularly in the light of Article 3 ECHR) constitute an obstacle to the transfer, particularly since such transfers are not conditional upon the consent of the person concerned. The Commission also acknowledges the risk that some Member States might use the system to empty their over-populated prisons, which might lead to extensive use of the system. Moreover, the rules on conditional release vary greatly between Member States, and there are also other reasons why a prisoner might spend longer in prison in his or her home country. Referring to the final decision as to the admissibility of application no. 28578/03, *Szabó v Sweden*, 27 June 2006, the Commission considers that the possibility cannot be ruled out that a substantially longer period of detention in the home country which ultimately enforces the sentence might infringe Article 5 ECHR.

The Commission then refers to Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to **probation decisions and alternative sanctions** (to be implemented by 06.12.2011). This Decision concerns many alternatives to custody and measures facilitating early release. For instance, a person could be sentenced to community service in one Member State and performance of that service would then have to be supervised in that person's home Member State. In this case too, fundamental rights and fundamental legal principles must be respected.

Lastly, the Commission refers to Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (**European Supervision Order**, to be implemented by 01.12.2012). Under this Decision, a Member State could order a non-custodial supervision measure (e.g. an order to report regularly to the police station or an order to undergo treatment to cure addiction) which another Member State would then have to implement, meaning that a suspect/defendant could remain in their home Member State until the beginning of the principal proceedings. In this case too, Member States are required to respect fundamental rights and general fundamental legal principles.

II. Questions

The Green Paper then raises the question of whether detention conditions are such as to enable mutual trust to take root so that there is no impediment to the application of mutual recognition instruments across the Union.

It then asks the following questions concerning mutual recognition instruments:

1.) Pre-trial:

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

Austrian law on criminal proceedings provides for many alternatives to pre-trial detention, most of which are termed "more lenient measures" ["*gelindere Mittel*"] and are listed in Section 173(5) of the Austrian Criminal Proceedings Code ["StPO"]. These are:

1. an oath not to abscond, go into hiding or leave their current place of residence without the approval of the public prosecutor's office until the effective completion of legal proceedings;
2. an oath to make no attempt to obstruct the investigation;

3. in cases of domestic violence, an oath to refrain from any form of contact with the victim, and an order not to enter a particular home or its immediate environment or not to infringe an existing restraining order or interim injunction, as well as confiscation of all keys to the home;
4. an order to live at a specified location, with a specified family and not to enter a specified address or specified locations or not to frequent specified persons, to abstain from alcoholic beverages and other intoxicants or to engage in specified employment;
5. an order to report any change of address or report to the criminal police or other specified office at specified intervals;
6. the provisional confiscation of ID documents, driving and vehicle licences or other entitlement documents;
7. provisional probation or parole;
8. lodging a security;
9. with the consent of the suspect, an order to undergo treatment to cure addiction or other medical treatment or psychotherapy or health-related measure.

In addition, at the request of the public prosecutor's office or the accused, pre-trial detention can be continued as house arrest at the residential address of the accused in Austria. Under Section 173a StPO, a house arrest order may be issued if pre-trial detention has not been replaced by more lenient measures but the purpose of the detention (ensuring that the accused does not abscond, suppress evidence or commit an offence) can be achieved by this form of detention because the accused lives in settled circumstances and consents to electronic surveillance. In such cases an electronic tag is attached to the accused and he/she is allowed to leave home only to reach his/her place or work or education, to procure basic necessities and to seek medical assistance; in all these cases he/she must take the shortest route (Section 173a(2) StPO).

As to whether these alternatives work, in the opinion of the Austrian Law Society the more lenient measures provided for in Section 173(5) StPO are still used far too little, particularly house arrest. In practice these instruments are used very restrictively in Austria. As in the past, pre-trial detention still predominates in cases in which the general preconditions for detention are fulfilled.

Since the many alternatives to detention provided for in Austrian law are used far too rarely in practice, we cannot answer the question of whether the European Union should promote these alternatives. What is needed is for the courts to rethink their attitudes and start actually making use of the many legal possibilities available.

Certainly, when it comes to implementation of the European Supervision Order, the European Union should intensify efforts to ensure that, thanks to the possibility of supervision in the home Member state, more lenient measures are not constantly eschewed because of the supposed danger that "EU foreigners" will abscond. In particular, efforts should be made to extend the possibility of house arrest under Section 173a StPO to include places of residence in other Member States; this does however mean that all Member States would have to have the necessary technical conditions in place for electronic tagging.

2.) Post trial:

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

The primary alternative to custody under Austrian law is the **possibility of a suspended sentence [bedingte Strafnachsicht]**. It is true that this is not really an "alternative" to custody, since suspension of the sentence is announced at the same time as the sentence itself and consequently imprisonment is not even on the cards at this stage. Under Section 43(1) of the Criminal Code (StGB), where

someone is sentenced to not more than two years' imprisonment, the court must suspend the sentence, while stipulating a probation period of a minimum of one year and a maximum of three years, if it can be assumed that the threat of enforcement of the sentence alone, or in conjunction with other measures, will be sufficient to deter the convicted person from other criminal actions and enforcement of the sentence is not necessary to deter others from committing criminal offences. Under Section 43a StGB, longer sentences may be suspended only for part of their duration. If the offender offends¹ again during the probation period, the suspension of sentence can be revoked and the offender would then have to serve the sentence.

Under Section 46 StGB, a convicted offender who has already begun serving the sentence can also be **conditionally released** from prison. Section 46(1) StGB allows conditional release after half the sentence has been served if, in addition to the other conditions being fulfilled, it can be assumed that the convicted person will not be less deterred from committing further offences than he would be by continuing to serve the sentence. However, if a convicted offender has served half the sentence, but not yet two thirds, then even if the special deterrence conditions of Section 46(1) StGB are fulfilled, he cannot be conditionally released where, in view of the seriousness of the offence, further service of the sentence is required to deter others from committing offences (General Deterrence, Section 46(2) StGB). In the case of conditional release too, the person concerned must undergo a period of probation of one (minimum) to three (maximum) years (Section 48(1) StGB). If he offends again during the probation period, the conditional release - like the suspended sentence - can be revoked when he is being sentenced for the new offence (Section 53 StGB). If the convicted person has already served half or two thirds of the sentence, counting the detention pending trial, when the new sentence is handed down, the conditional release may be granted at the same time as the judgment is pronounced.

For some time now, the Austrian Penal System Act (StVG) has provided for another alternative to the traditional prison sentence, namely **house arrest under electronic surveillance**. A person serving their sentence in this form must stay in his own home, seek suitable occupation (in particular paid employment, training, childcare, community service or other comparable activity likely to help with reintegration) and submit to appropriate requirements regarding the life he leads outside the prison. The person under house arrest is not allowed to leave his home except to engage in his employment, procure basic necessities and seek medical assistance, or for other reasons specified in the conditions of house arrest. He is subject to remote surveillance by means of electronic tagging (Section 156b StVG). This alternative to serving a sentence in the traditional way is however allowed only if the sentence to be served, or the sentence remaining to be served (after some time already spent in custody) does not exceed twelve months or is not expected to exceed twelve months in view of probable conditional release and provided that, in addition to other requirements, the offender has suitable accommodation available in Austria (Section 156c(1) StVG). Under certain conditions house arrest can also be revoked (Section 156c(2) StVG).

As a further alternative to prison, Sections 3 *et seq* StVG provide for the possibility of doing **community service** instead of serving an alternative prison sentence (imprisonment as a substitute for a fine that cannot be collected).

As to whether the alternatives to custody work, we note that all the possibilities outlined above are frequently made use of. It is true that, where conditional release is concerned, very restrictive use is made of release half way through the sentence in Austria. Nevertheless, it is questionable whether matters can really be improved at EU level, because the results always depend on the personal evaluation of the courts responsible for implementation. The existing law already provides opportunities for liberal application of its provisions.

On the other hand, it would certainly be a good thing if steps were also taken at EU level to extend electronic tagging arrangements to EU citizens with their place of residence in a "foreign" EU Member State.

¹ Translator's note: The German actually says "does not offend", but this makes no sense in the context of this sentence and I am assuming a moment of distraction on the part of the author.

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

In Austrian legal practice there is no evidence of account being taken of the detention conditions in other Member States. On the contrary, when persons concerned are handed over, in most cases attention is paid only to compliance with the formal conditions for Austrian implementation of the EAW (Federal Act on judicial cooperation in criminal matters with the Member States of the European Union). There is no indication that courts concern themselves with the human rights aspects of detention conditions in the issuing Member State.

III. Pre-trial detention

The Commission next examines issues relating to pre-trial detention, focusing in particular on the length of such detention and regular review thereof in the form of detention proceedings. It points out that the time a person spends in pre-trial detention varies widely from one Member State to another. It also stresses that, according to the case law of the European Court of Human Rights, pre-trial detention must always be imposed only as a last resort, and in most cases alternatives should be preferred. Foreigners in particular are often kept in detention on the grounds that there is more danger of their absconding because they are not integrated in the judicial area concerned. However, in just these cases account could be taken of the possibility of issuing a European Arrest Warrant to guarantee the return of the accused for trial. This would increase the chances of pre-trial detention being used far more proportionately even in the case of EU citizens of other Member States.

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

IV. Questions on pre-trial detention

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

This principle is protected in Austria by the requirement that imposing pre-trial detention must be subject not only to the fulfilment of other preconditions of detention (e.g. strong suspicion of guilt and the risk of the accused absconding, suppressing evidence or re-offending), but also to compliance with the principle of proportionality. Hence pre-trial detention may not be ordered or continued if it is out of proportion to the significance of the case or to the likely sentence, or its objective can be achieved by the application of more lenient measures (Section 173(1) StPO). Moreover, Section 173(3) StPO provides that, as a matter of law, a risk of abscondment may not be assumed if the accused is suspected of a crime that is not subject to a sentence of more than five years' imprisonment, lives in settled circumstances and has a fixed place of residence in Austria, unless he has already made preparations to abscond.

The legislator thus stipulates a number of conditions which, taken together, are intended to prevent pre-trial detention being imposed or maintained for minor offences. Despite this, however, pre-trial detention is imposed far too extensively in Austria, and in some jurisdictions its use is quite out of hand.

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

If, as the Commission says, pre-trial detention in certain Member States can last for many years and/or is only reviewed at very irregular intervals, then this situation must be rejected absolutely. However, reduced periods of pre-trial detention can only be achieved by introducing an actual, absolute maximum limit on the duration of pre-trial detention, since this is the only way that some pressure can be exercised on the processing of criminal cases by national law-enforcement institutions.

In Austria, for example, there is a fixed maximum duration for pre-trial detention (two months when the only risk assumed is suppression of evidence, otherwise six months for an assumed minor offence, one year for a crime, two years for a crime to which a prison sentence of more than five years is attached), but only until the trial begins. Once the trial has begun, the only reference point is the proportionality principle referred to above.

It is true that Sections 9(2) and 177(1) StPO contain a special requirement for rapid action in detention cases, corresponding to the second sentence of Article 5(3) of the EHRC, but the Austrian courts only compensate for regular violations of this basic right by reducing sentences (this happens at the end of the criminal proceedings and is de facto unverifiable), and almost never react by releasing the person detained. This means that the motivation for the authorities/courts involved in the prosecution to accelerate proceedings is very limited. If instead an absolute maximum duration were set for pre-trial detention, the result would be specially accelerated proceedings, as the courts themselves would have an increased interest in concluding the trial before the accused had to be released.

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

Although the Austrian Supreme Court held in Decision 11 Os 31/31/08f that the social integration of a person in an EU Member State, taken together with the provisions on the EAW, was an argument against assuming a risk of abscondment, it must be frankly said that the Austrian courts as good as never make use of this possibility. On the contrary, in such cases it is mostly assumed that there is a risk of the accused escaping by returning to his home country, and pre-trial detention in Austria is upheld.

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

In our opinion it is a matter of the utmost importance to introduce an absolute maximum pre-trial detention period, which should apply irrespective of when the trial starts², as otherwise there would still be the possibility of the trial itself being conducted in a dilatory fashion. An absolute maximum pre-trial² detention period of between six months and two years, depending on the seriousness of the alleged offence, would be appropriate.

For the rest, see answer to Question 5. Other measures would not create the necessary pressure to speed up judicial processing of cases.

V. Children

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

In terms of pre-trial detention, the most obvious alternative would seem to be supervised accommodation in public care institutions. As an alternative to requiring children to serve a prison sentence, greater use should be made of the community service option, which has a far more meaningful rehabilitation effect than simple custody.

VI. Detention conditions

The Commission points out that good detention conditions are a prerequisite for the rehabilitation of offenders. It says that many prisons in the EU fall below international standards. It raises the question

² Translator's note: the German term for "pre-trial detention" is "Untersuchungshaft", meaning detention while under investigation - hence the proposal here concerns a maximum period of detention up to the end of the trial.

of how to monitor these standards and how to better coordinate the work of monitoring bodies.

- 9.)** *How could monitoring of detention conditions by the Member States be better promoted? How could the EU encourage prison administrations to network and establish best practice?*
- 10.)** *How could the work of the Council of Europe and that of Member States be better promoted as they endeavour to put good detention standards into practice?*

The Austrian Law Society supports the Commission's efforts to improve and/or monitor detention conditions in the Member States. However, as monitoring arrangements within the Member States are clearly inadequate, effective monitoring will probably only work at EU level. A monitoring committee should be set up for this specific purpose; it should not only give advice on how to improve conditions, but also carry out on-the-spot inspections, draw up its own report on any failings found, and present it to the national governments for implementation of the proposed improvements.