



GREEN PAPER

Strengthening mutual trust in the European judicial area A Green Paper on the application of EU criminal justice legislation in the field of detention

PUBLIC CONSULTATION

1) Pre-trial: What non-custodial alternatives to pre-trial detention are available?

In Spanish procedural law there are various types of precautionary measures that may be imposed by judges during the pre-trial investigation and sentencing. All these measures are contained in the Criminal Procedure Act and are as follows:

1 .- Freedom without bail, which shall include the obligation to appear before the appellate court or before the competent court (usually on days 1 and 15 of each month) and every time it is called by it. This is what is known as Apud Acta appearance. Furthermore, to ensure its compliance/fulfilment shall be accompanied by the withholding of passports, which normally only occurs in the case of foreigners. This measure restricts freedom of ambulatory person, although it is preferable to serious.

2 .- Free on bail, which may be money, other property or personal property owned or provided by a guarantor. This measure will be accompanied usually by appearance of Apud Acta requirement, and the judge may, as in the previous case, remove the passport.

3 .- Deprivation provisional driving license, which shall in the only case that the measure is expected as a penalty for the offense charged, and must compute the time for precautionary measures. This measure may also be accompanied by Apud Acta requirement and retention of the passport.

4 .- For certain crimes (murder, abortion, injuries, against freedom, torture and against the person, sexual freedom, privacy and domestic privacy, honor, heritage and socio-economic) may impose measures to protect the victim may include:

- Deprivation of the right to reside or go to certain places.



- The prohibition of approaching the victim, or those of their relatives or other persons identified by the judge or court.

- The prohibition of communication with the victim, or others persons identified by the judge or court.

5.- Protection Ordinance, applicable in cases of crimes or offenses against life, physical integrity or moral, sexual freedom, liberty or security, being the victim about the accused's spouse or person who is or has been bound by an analogous of relationship even without cohabitation, descendant, parent, adoption or affinity, self or spouse or partner, minor or incompetent person living with him or which is subject to the custody, guardianship, tutelage or any other person protected by the relationship that is built into the core of his family life, who by their special vulnerability is in custody or stored in public or private.

The protection order was introduced by Law No 27/2003 of 31 July for victims of gender violence.

It will the following precautionary measures:

- Of a criminal (any of the mentioned above).

- In a civil (allocation of housing, type of custody, visitation, communications and stays with children, food allowance, any other to remove the child from danger or to avoid injury).

Social protection (necessary interventions with the relevant authorities).

6.- Replacing the pre-trial detention by entering a drug treatment center if the accused was in treatment and imprisonment could hinder the result.

7.- Provisional reduced detention for ill persons. It may be executed in the domicile of the accused with security measures, if imprisonment could cause serious danger to his/her health.

Do they work?

The effectiveness of these measures depends on what the purpose for which the judge granted to establish, within the legitimate measures laid down in law. Of course, if we assume the negative consequences of prison on people who suffer it from physical or mental health to social inclusion, any measure used in place of the prison will seem more appropriate.



We don't know the official statistic of how many of these measures are broken. This information is relevant because its breach is considered a crime. Also keep in mind that the imposition of a bail is only applicable to people with an economic status that allows them to spend a lot of money to avoid prison, which is not possible in many cases.

Could alternatives to pre-trial detention be promoted at European Union level? If yes, how?

It is desirable that the EU work in this line and we are convinced that it's possible a major effort to promote other preventive measures in order to prevent the imprisonment of those who still must be presumed innocent under our constitutional system. It seeks to promote the existence of a greater number of alternatives and flexibility for its application.

There are member States with an important experience in this area, it would be good to create working groups that involves civil society, in order to identify and disseminate good practices.

On the other hand, common rules should be established for binding on member states to limit the use of pretrial detention. This aspect is developed further in Question 7.

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?

In the Spanish criminal law penalties system revolves around the prison sentence, which as a rule, can range from 3 months to 20 years. In addition, the penalty of daily fines of some importance, especially as a penalty added to the number of crimes in prison or as a punishment only in less serious offenses. On other penalties such as WORK FOR THE COMMUNITY or permanent location, its use is more limited. For its part, the fine penalty finishes, in many cases, such as imprisonment if it is not effectively paid.



About other penalties such as bans, disqualifications, etc... are commonly used as an additional punishment and not as principal for the crime.

Article 33 of the Penal Code contains a list of penalties available, depending on its severity and its duration. According to Art. 33 CP are severe penalties:

- a) The imprisonment exceeding five years.
- b) The disqualification.
- c) The special disqualifications of over five years.
- d) The suspension of public employment or public office for longer than five years.
- e) The disqualifications from driving motor vehicles and motorcycles for longer than eight years.
- f) Deprivation of the right to possess and bear arms for longer than eight years.
- g) Deprivation of the right to reside in certain places or go to them for longer than five years.
- h) The prohibition of approaching the victim or those of their relatives or other persons identified by the judge or court for longer than five years.
- i) The prohibition of communication with the victim or those of their relatives or other persons identified by the judge or court for longer than five years.
- j) The deprivation of parental authority".

PENALTIES are less serious

The imprisonment of three months to five years.

The special disqualifications five years.

Suspension from public office for five years

Disqualifications from driving motor vehicles and motorcycles a year and a day to eight years.

The deprivation of the right to possess and carry weapons a year and a day to eight years.

Deprivation of the right to reside in certain places or go to them, for a period of six months to five years.

The prohibition of approaching the victim or those of their relatives or other persons identified by the judge or court, for a period of six months to five years.

The prohibition of communication with the victim or those of their relatives or other persons identified by the judge or court, for a period of six months to five years.



A fine of more than two months.

The fine proportion, whatever its amount, except as provided in paragraph 7 of this article.

The work for the benefit of the community from 31 to 180 days.

The permanent location of three months and one day to six months.

The loss of the possibility of obtaining subsidies or aid and entitled to benefits or tax or Social Security, whatever their duration. "

And they are light sentences:

- a) Deprivation of the right to drive motor vehicles and motorcycles from three months to one year.
- b) Deprivation of the right to possess and bear arms for three months to one year.
- c) Deprivation of the right to reside in certain places or go to them for less than six months.
- d) The prohibition of approaching the victim or those of their relatives or other persons identified by the judge or court for a full month less than six months.
- e) The prohibition of communication with the victim or those of their relatives or other persons identified by the judge or court for a full month less than six months.
- f) The penalty of 10 days to two months.
- g) The permanent location of a day to three months.
- h) The work for the benefit of the community from one to 30 days. "

The Spanish Penal Code only provides for alternatives to prison when there is a final decision with particular conviction. And later, in phase of execution of sentence, when it can apply any of the alternatives found in Articles 80 to 88 and which may include:

1 .- Suspension of execution of sentence of imprisonment to prison penalty for up to 2 years, for people who have no prior convictions (offenders). In cases of people with serious illnesses and the elderly, lighten.

2 .- Suspension of imprisonment of up to 5 years for persons who have committed crimes because of their drug addiction if it is established that it is undergoing treatment. There is no requirement that the person has a first offender recidivism but will be taken into account.

3 .- Replacement of imprisonment of up to 1 year for work on behalf of the Community or a fine and exceptionally substitution of imprisonment for up to 2 years for work on behalf of the Community.



In all three cases, the judge or court may impose, in addition, any obligation or rule of conduct to the person punished.

As we see the system of alternatives to prison in Spain is very poor, offering few options and hindering the implementation of which there are, given the rigidity of the requirements. Furthermore, the fact that there are no multi-disciplinary teams assigned to the courts to advise them on matters such as drugs dependency or psychosocial development, education, etc.. of the person punished, is another obstacle for these measures.

There is no release on probation as an alternative to prison. We missed a real alternative sentence of probation, for which it is imperative that there multidisciplinary support teams to monitor the real-compliance penalty in the community. On the other hand, the Spanish legislation makes no provision for adults (yes for children) the alternative measures process at other times. It is highly desirable that mediation could avoid the criminal sentence, as in other neighboring states, and that there is the possibility of alternative measures, community monitoring before sentence. It would be very useful to have comparative law studies on alternatives to prison in the different States as well as research focused on the test / demonstration of the effectiveness of various alternative measures and their impact on the recurrence of crime. Also interesting are the studies demonstrating the economic viability of restorative justice and alternatives to prison for the public purse. Finally, it is necessary to disseminate among the public the advantages of this type of measure.

3) How do you think that detention conditions may have an effect on the proper operation of the EAW?

To facilitate the proper functioning of the ODE is required to exist mutual trust between States about the correct application of the fundamental rights of detainees and prisoners in the other States, eliminating the fear of any abuse.

We believe that in some states, such as Spanish, still have to produce some progress so that other states can trust on the treatment that is given to these people. In this sense, the solitary confinement in Spain can be an important obstacle to considerate Spain as a



state worthy of this "mutual trust" that is the basis of the ODE. In this way would not be surprising that the effectiveness of the OED will be reduced when, due to the above reasons, Member States refuse to apply it depending on the trust they have among them. To avoid these problematic situations should set minimum standards common to all states that contain at least mentioned in Question 7.

And what about the operation of the Transfer of Prisoners Framework Decision?

We believe that member states should establish the practical measures necessary to facilitate the transfer of prisoners and, of course, the European Union must ensure the implementation in all Member States of the European Prison Rules and the Rules for the Treatment of Prisoners of the United Nations. In addition, all States, as recipients of detainees / prisoners, should ensure the possibility to apply alternative measures to prison similar to those of the country of origin.

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?

In the Spanish legal system, Article 24 of the Constitution establishes the right to effective protection of the courts, the judge predetermined by law, the legal defense, to a public trial with all guarantees and without undue delay, to use all evidence relevant to his defense, not to testify against themselves and the presumption of innocence. On the other hand, pretrial detention is theoretically conceived as an exceptional measure, being picked up this principle of uniqueness in the Criminal Procedure Act.

These general principles must have a direct practical application and also inspire ordinary legislation. But not always. In practice, the complex regulation of pre-trial detention in Article 504 and following of the Criminal Procedure Act (LECr), the slow processing of court proceedings and the inertia of the courts decreeing preventive custody automatically in certain cases, make to these principles less effective.

Article 504 of the LECr says that detention will last as long as needed to achieve any of



the purposes outlined in art. 503 LECr and persist as the reasons that justify its adoption, wherever they appear in the cause sufficient grounds to consider a crime is criminally liable for the person against whom it is to issue the arrest warrant.

These purposes are:

1 .- Ensure the presence of the accused in the process when it can reasonably infer a escape risk.

To evaluate/assess the existence of this danger will be addressed jointly to the nature of the event, the severity of the penalty that may be imposed on the accused (more than two years), to the family situation and economic level, as well as the imminent conclusion of the trial, particularly in those cases where appropriate to bring the procedure for the rapid prosecution governed by title III of Book IV of this Act. According with this, shall be remanded in custody the person concerned when, in view of the background arising from the proceedings, had been given at least two requisitions for his calling and looking for any judicial body in the two previous years. In such cases shall not apply to limit the penalty when the offense in question is less than two years.

2 .- Avoid alteration or destruction of relevant sources of evidence for prosecution in cases where there is a substantial risk and concrete.

Shall not agree to remand this cause when he tries to infer that danger only of the right of defense or lack of cooperation of the accused in the course of the investigation.

To assess the existence of danger shall address the defendant's ability to access by themselves or through third-party sources of evidence or to influence other defendants, witnesses or experts or who might be.

3 .- Do not allow the defendant to act against the victim's legal rights, especially when it is one of the enumerated persons in the article 173.2 of the Penal Code.

In these cases no limit penalty shall be applicable when agreeing to pretrial detention.



4.- To avoid the risk that the accused committed other crimes seriously malicious.

To assess the existence of this risk is to address the circumstances of fact and the gravity of the crimes.

It is only possible to decide the pre-trial detention when the offense charged is malicious. However, the limit for a year or two at most, depending on the length of imprisonment for the crime committed regulated, shall not apply when from charged's background and other facts or circumstances might reasonably be inferred that the charged is acting in concert with another or others in an organized way to commit criminal acts.

Similarly, our legal system regulates the maximum duration of pre-trial detention:

1.- Not exceeding one year or two: in the case of preventive detention has been issued to ensure the presence of the charged in the process or to prevent the defendant can act against legal rights of the victim. This detention can not exceed one year if the offense hath appointed imprisonment not exceeding three years, or two years if the sentence of imprisonment for the offense indicated for more than three years.

Extension of detention: However, when circumstances indicate the cause can not be judged in those terms, the court may, on the terms provided for in Article 505, to establish a single extension of up to two years if the offense was designated imprisonment exceeding three years or six months if the offense was designated penalty not exceeding three years.

If the charged is sentenced, pretrial detention may be extended to the limit of half of the punishment actually imposed in the sentence, when it shall have been appealed.

2.- Not exceeding six months: When pre-trial detention being established to avoid the danger of concealment, alteration or destruction of sources of evidence relevant to the case, its duration may not exceed six months.



Released after time limits for pretrial detention, after the expiry of the maximum deadlines established for the provisional detention shall be accorded the freedom of the accused, but this can not avoid a new pre-trial detention if the accused doesn't appear without just cause.

To calculate the time limits set for release on bail, will take into account the time that the accused has been arrested or detained pending trial for the same cause. Be excluded, however, of this computation, the time delay is affected by the cause not attributable to the administration of justice.

When pre-trial detention far exceed the established two-thirds of its maximum, the judge or court and public prosecutors respectively communicate this fact to the President of the Board of Government and the Attorney General, in order to adopt the measures necessary to print the proceedings as quickly as possible. To this end, the proceedings and shall have preference over all others.

As we see the uniqueness of pre-trial detention in the Spanish State is a formal statement. It not a correct translation into legislation and its practical application. It offers such discretion to the judges to agree, that has allowed an interim measure as burdensome, be used without embarrassment in the Spanish courts coming to represent nearly 20% of persons deprived of liberty. This temporary situation is stretched excess because of the slow processing of court proceedings. To this we must add that there is no real system of alternatives to incarceration while judicial proceedings are pending.

As evidenced by the Green Paper, Spain is one of the European states which can reach longer length of detention, which may be up to 2 years to 4 years and even more (up to half of the death sentence imposed if no firm has been appealed), something that seems completely incompatible with the principle of presumption of innocence.

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?

Spain is one of the countries that in recent years have expanded the circumstances that can lead to order preventive detention for a person, having exceeded the cases for which it was initially designed this exceptional measure, that is, when existing escape risk, risk of obstructing the investigation or risk to the victim, witnesses or others, there is no other preventive measures less burdensome for the charged. To this we must add the extension of the maximum term of pretrial detention and lack of interim measures alternative to imprisonment as well as its limited application, except for the financial bond, which tax is only possible in cases of persons with sufficient reliability/solvency.

On the one hand, in relation to the offenses to which is applicable, in addition to the traditional assumptions related to behavior of great significance and relevance, it can remand a person suspected of committing serious violations by non-malicious due to simple fact of having a criminal record or because there is a suspicion that such person or group acting in common, regardless of the seriousness of the charged.

In relation to the aim pursued by the provisional measure, for the purposes mentioned above (to avoid risks of escape, prevent destruction of evidence and others), the detention can be used by the courts to prevent future crimes, what is prejudging and violating the presumption of innocence. In this way, preventive detention has ceased to be an exceptional resource.

On the other hand, in relation to time limits, at present it is in 4 years, even reaching half of the sentence imposed in Case no firm / appeal. We can not fail to mention the criticism solitary confinement (arrest and detention), which favors the existence of cases of torture and mistreatment, relentlessly denounced by organizations defending human rights and for which the Spanish government continually ignores harsh criticism and recommendations issued by international organizations.

The prison is far more damaging that can be imposed on a person being judged and carries dire consequences for the sufferer. His regime is outside the prison treatment, the third degree, probation or prison benefits, only fully accessible to people punished, so that the time spent on remand is even more burdensome than the after serving a



sentence of imprisonment. It is important to remember also that on many occasions the person is finally acquitted or sentenced to different prison or less suffering, difficult situations compensable.

The current system is not serving to curb certain deviations or offences that occur in some states. A clear example is the solitary confinement in Spain. We know that this situation remains confident to Spain by the other Member States of the European Union within the meaning given in the Green Paper. To avoid this and ensure a truly exceptional pre-trial detention, we believe it is necessary and even urgent to establish minimum rules at European Union level through directives or other binding rules in order to standardize the regulatory principles of preventive detention by all member states. From there it necessary to establish minimum as the maximum detention period and the requirements for its application, the right to oppose the legality of this, and the right of access to resources. This regulation by reference to the more guarantees and respectful of human rights among which has been implemented in member states.

If so, how could this be better achieved?

1 .- Develop legislation binding on Member States and directly applicable, so the compliancer Member States have a series of sanctions or economic damage and that any citizen can report non-compliance.

Such legislation should contain at least:

Exceptional circumstances in which preventive detention can be applied (only as a last resort when no other less burdensome and malicious offences with a particular entity and / or denote a certain danger).

Aims pursued: to avoid risk of escape, destruction of evidence or obstruction in the investigation and protection of victims or witnesses.

Mandating a procedure, with the assistance of lawyer for the accused.

Mandatory periodic review of office of the reasons that preventive detention was ordered.

Maximum period: 2 years on the most serious cases.

Prohibition of arrest or solitary confinement.

Right to choice of lawyer in all cases.



Right to be seen by a medical examiner in all cases and can also be examined by another doctor at the expense of the charged.

Right to be assisted by lawyer before testifying in the presence of the security forces and the state.

Maximum duration of detention of 48 hours.

All other rights enshrined in Article 520 LECri, about which there is international consensus.

2.- Create a European Monitoring Centre for Prison / pre-trial detention to consider the various laws and their actual implementation, including excesses, and to identify those alternatives to prison with better results. This observatory could exercise oversight functions over the proper development of all these measures and how they are met in each state.

What other measures would reduce pre-trial detention?

First, it could reduce the abuse of preventive detention measures promoting the use of non-custodial existing state law (Spanish Criminal Procedure Act, for example) and the Council Framework Decision 2009/829 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 custody (European supervision order).

On the other hand, it is essential to extend the provisional measures in some countries like Spain, leaving detention as a last resort. It is about developing a system of alternative measures similarly, even wider, for people to existing punished, which include, in addition to the deposit:

- Requirement that the court assess any personal circumstances of the accused, so that if necessary, request or they can make reports to the public and / or private sector can learn this information.
- Treatment of drug addiction in residential or outpatient center approved or accredited (voluntary).
- Performing other therapeutic program (voluntary).
- Follow-up individualized timely administrative services with or without the establishment of rules of conduct.



- Use of telematics controls.
- Monitoring by the security forces and the state.
- House arrest orders.
- Custody by family or social entities.

Reducing the duration of court proceedings is another measure that can lead us to a reduction of people on pre-trial detention. To do this, on the one hand, it should encourage the implementation of the move in court proceedings technologies (videoconferencing, electronic communication between the various courts, police, ... of the member states) and would reduce the time of the preventive detention people who are prosecuted and provide confidence to the judiciary and the public at a faster processing procedures. On the other hand, this system would be completed to improve procedures for responsibility to defaults on the terms of legal proceedings, and an effective and simple patrimonial claim against the Administration of Justice when suffering this prolonged and unjustified delays.

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

In criminal law for children between 14 and 18 years old Spanish law provides for a wide range of protective factors that include probation, bans on approaching or contacting the victim or those of family members or other persons identified by the judge, living with another person, family or educational group. Along with these non-custodial measures is also the traditional measure of detention, which can be in open or closed center. To impose one measure or another, should be valued personal and social circumstances of the child, the existence of risk of flight and recidivism or not the child, as well as the seriousness of the facts. We believe that the legislation should clearly prioritize the interests of children, their needs for educational process over the seriousness of the facts, and use all available means of control community and family prior to placement in detention centers, in ultimately, become jails for juveniles. As in the case of elderly people, in the minors, would be very useful to speed up criminal proceedings to minimize the time that precautionary measures may be



suffering without a conviction, especially as so burdensome that such as custodial, always respecting the limits of all procedural safeguards

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?

1 .- By forcing member states to integrate into their national legislation the content of the European Prison Rules and the Rules for the Treatment of Prisoners of the United Nations.

2 .- Starting from the Protocol of the United Nations Convention Against Torture 2002, establish minimum conditions to be met by the National Mechanisms for the Prevention of Torture in the EU Member States, ensuring its complete independence from the governments and civil society participation through associations defending human rights organizations working with persons deprived of liberty, law bars/schools, and so on.

3 .- Creating a European body that brings together all of National Preventive Mechanisms, whose function is to monitor the reports and activities conducted in each State and coordinate efforts to comply with the standards mentioned in the above two points.

4.- Enabling European citizenship crossing their complaints about abuse situations produced in prisons and detention centers.

5 .- Ensuring the presence of a Orientation and Independent Legal Service which provides information to detainees and prisoners about their rights and prison conditions in all prisons or detention centers of the member states.

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?



- 1 .- With measures to make known the work done in the European Union in relation to the reduction of the arrest and detention.
- 2 .- Through the performance or promotion of comparative research in the European Union.
- 3 .- Setting concrete measures in the plans of political actions in this matter by the Council of Europe as well as their translation into policies of each Member State.
- 4 .- Carrying out a review and evaluation of these agendas and European and State plans periodically, by involving all: competent authorities, bodies of state security courts, prosecutors, lawyers, NGOs working in the promotion of human rights and in relation to criminal justice, and so on.