



Directorate-General Justice  
Unit B1 - Procedural Criminal Law  
MQ50 03/068  
B-1049 BRUSSELS  
BELGIUM

COM(2011)327 final

**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**

Please find attached the answers of Finland to the 10 questions.

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## **Answers of Finland**

### **General comments:**

Under section 22 of the Constitution of Finland, the public authorities shall guarantee the observance of basic rights and liberties and human rights. These rights also include the idea of strengthening procedural rights in criminal proceedings. Finland finds it important for the work already begun within the EU to strengthen procedural rights in criminal proceedings to be continued. Minimum rules governing procedural rights may be deemed to enhance mutual trust among Member States. Mutual trust in turn facilitates the effective practical application of the principle of reciprocal recognition. Finland supports the enforcement in full of the mutual recognition instruments already adopted in the field of detention as the best means of ensuring the re-integration of offenders into society. Finland furthermore supports evaluation of the practical effectiveness of instruments already enforced. In addition, the exchange of best practices between the prison administrations of EU Member States should be promoted and the enforcement of the European Prison Rules adopted by the Council of Europe supported.

The purpose of pre-trial detention is to safeguard pre-trial investigation, court proceedings and enforcement of sentences as well as to prevent the continuation of criminal activity, which purpose shall be taken into account when considering alternatives to loss of liberty before and during trial. The prerequisites for detention are explained in the response to Question 4. Pre-trial detention in Finland is subject to no maximum duration and the length of pre-trial detention is decided by the courts.

### **Responses to the questions put in the Green Paper:**

*Question 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?*

In Finland, an alternative to pre-trial detention is the travel ban, which may be imposed instead of arrest or detention on a person suspected with probable cause of an offence when the maximum penalty provided for the offence is at least one year's imprisonment. A further prerequisite applies of there being reason to presume, on the basis of the personal circumstances of the accused or other factors, that the accused will abscond or attempt to evade pre-trial investigation, trial or enforcement of sentence, or will continue his/her criminal activities. The travel ban entails restriction of movement. The person on whom the ban is imposed must stay within a certain area or in a certain location. The person may also be prohibited from entering a certain area. A travel ban may be accompanied by an obligation to be available at home or work at a certain time, to report to the police, or an obligation to stay in a hospital or other facility. A person on whom a travel ban is imposed must hand over his/her passport to the police. The decision to impose a travel ban is taken by a pre-trial investigation authority, the prosecutor or the court depending on the stage of consideration of the case.

The new Coercive Measures Act will enter into force on 1 January 2014. The provisions governing the travel ban will be clarified and amended i.a. by making the travel ban an option also on the grounds of complicating the investigation of the case.

Pursuant to section 44 of the Customs Act, bail may be used as an alternative to pre-trial detention. If the person arrested or detained has no habitual residence in Finland and it is likely that he/she will attempt to evade trial or enforcement of the sentence by leaving the country, release may be made conditional on the person posting bail in an amount deemed to ensure appearance at trial and service of any sanctions that may be imposed. If the person released on bail fails to appear in court or to serve his/her sentence during the period in which a sentence may be imposed or a sentence imposed may be enforced, the court may order the bail forfeited to the State either in part or in full. Any fine imposed or other claim by the State to be collected pursuant to the Act on the Enforcement of Fines may be collected from the bail money. In practice, this alternative has been seldom used in recent years.

No other alternatives to pre-trial detention are currently available in Finland. However, Finland is looking into the possibility of electronically monitored travel bans.

The travel ban is an effective alternative to pre-trial detention under certain circumstances but it is not very widely used in Finland. Alternatives to pre-trial detention could be fostered at the EU level e.g. by the timely implementation of the Council Framework Decision concerning the European Supervision Order (2009/829/JHA) and subsequently encouragement to the authorities in its application.

*Question 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 most important sanctions alternative to imprisonment in Finland are community service and conditional imprisonment (suspended sentence). The electronically monitored sentence will be introduced at the beginning of November 2011.

**Community service.** Under Chapter 6:11 of the Criminal Code, an offender who is sentenced to a fixed term of unconditional imprisonment of at most eight months shall be sentenced instead to community service, unless unconditional sentences of imprisonment, earlier community service orders or other weighty reasons are to be considered bars to the imposition of the community service order. Community service may be ordered in the form of 20–200 hours of unpaid work or other supervised activity. In Finland – unlike in many other countries – community service is expressly an alternative to unconditional imprisonment. The court first imposes a sentence of unconditional imprisonment and then commutes it into community service. Community service is an effective and widely used alternative to unconditional imprisonment.

**Monitoring sentence.** As of 1 November 2011, an electronically monitored sentence may be imposed instead of unconditional imprisonment of no more than six months when there is a bar to an order of community service and the other prerequisites mentioned in Chapter 6:11a of the Criminal Code are satisfied. The prerequisites state i.a. that the monitoring sentence be justified in the interest of maintaining and promoting the

social coping of the offender. The consent of the offender and all other persons living in the same residence is furthermore required.

**Conditional imprisonment.** A fixed term of imprisonment of no more than two years may be imposed as a conditional sentence if the severity of the offence, the culpability of the offender as manifested in the offence or the previous criminal history of the offender does not require the imposition of a sentence of unconditional imprisonment. A sentence of unconditional imprisonment may not be imposed for offences committed under the age of 18 unless there are compelling reasons for doing so. A sentence of conditional imprisonment may be accompanied by a fine or 20–90 hours of community service. Conditional imprisonment is an important and much-used component of the criminal sanctions system in Finland. Persons under the age of 21 may be ordered subject to supervision for a period of one year and three months during their conditional imprisonment when this is deemed justified in order to promote the offender's social coping and to prevent recidivism. Subject to certain conditions provided in law, an offence committed under the age of 18 may also result in the imposition of a **juvenile penalty** consisting of supervision, programmes to promote social rehabilitation, support and guidance. The length of the juvenile penalty may run from four months to one year.

**Conditional release.** In Finland, a prisoner serving a sentence of unconditional imprisonment is granted conditional release after serving half of their sentence (persons who have not served a sentence of imprisonment during the three years preceding the offence) or two thirds of their sentence (persons who have served a sentence of imprisonment during the three years preceding the offence). The equivalent figures for young offenders who were under the age of 21 when they committed their offence are one third and half, respectively. Conditional release is a regular part of the sentence of imprisonment for persons serving fixed-term sentences.

Conditional release for prisoners serving a sentence of life imprisonment is subject to discretion. The decision on their conditional release is taken by Helsinki Court of Appeal and they may petition for conditional release after serving 12 years of their life sentence. Young offenders who were under the age of 21 when they committed their offence may petition for conditional release after serving 10 years. In practice, persons sentenced to life imprisonment are granted conditional release after serving an average of 14 years of their sentence.

Persons conditionally released are subject to supervision when the probationary period (the length of the sentence remaining) exceeds one year, the offence was committed before the age of 21, or the prisoner requests supervision. The probationary period (and period of supervision) for prisoners granted conditional release from life imprisonment is three years.

The system of conditional release represents an important step in the systematic and stage-wise prisoner release process. It is also an important tool for managing prison populations.

**Probationary liberty under supervision.** In Finland, a prisoner may be granted discretionary probationary liberty under supervision no earlier than six months before statutory conditional release. The system of probationary liberty under supervision has proven effective. The means of supervision at present is the mobile phone, but with legislation

currently under preparation the aim is to switch over to electronic supervision methods. Probationary liberty under supervision represents an essential component in the orderly stage-wise prisoner release process.

Alternative measures to imprisonment in the EU may be promoted by the timely implementation of the Council Framework Decision (2008/947/JHA) on the application of the principle of mutual recognition of probation decisions and alternative sanctions and subsequent encouragement to the authorities in its application. In Finland, the Government Bill on transposing the framework decision into national legislation (Bill HE 10/2011 vp) has been submitted to Parliament, which passed it on 11 October 2011. The national legislation will enter into force within the timetable required in the framework decision. Systems of regular conditional release and probationary release under supervision could be promoted in EU Member States i.a. through dissemination of information on the good experiences obtained therewith. Increased exchange of information between the authorities about their systems would be beneficial not only upon the development of national measures but also because it would promote mutual trust among Member States regarding the use of conditional and alternative sanctions.

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

Prison conditions have been invoked in extradition requests received by Finland concerning extradition to certain Member States. It is alleged in these situations that prison conditions in the relevant State would constitute grounds for refusal under section 5(1)(6) of the Finnish EU Extradition Act, the instrument for transposition in Finland of the framework decision on the European Arrest Warrant. The said grounds for refusal are not expressly included in Articles 3 or 4 of the framework decision, yet it is stated in the legislative history of the national Act transposition that the provision may be derived from the other provisions of the framework decision as well as from Finland's human rights obligations, which apply also to extradition in accordance with the framework decision. The said grounds for refusal are mandatory under the transposing Act but require there to be justifiable ground to suspect that the requested person is threatened by capital punishment, torture or other degrading treatment or that he or she would be subjected, on the basis of origin, membership in a certain social group, religion, belief or political opinion, to persecution that threatens his or her life or liberty or to other persecution, or there is justifiable cause to assume that he or she would be subjected to a violation of his or her human rights or constitutionally protected due process, freedom of speech or freedom of association. The grounds for refusal are intended as an exceptional provision to be applied with caution. Mere allegations regarding prison conditions have been given no weight in decisions by national courts and no further information on the matter has been submitted. The fact that EU Member States have undertaken to comply with the Human Rights Convention and that their legal systems as a rule are deemed trustworthy have provided additional justification.

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

The Government Bill on the transposition of the framework decision into national legislation (Bill HE 10/2011 vp) has been submitted to Parliament, which passed it on 11 October 2011. The legislation will enter into force by the expiration of the transposition pe-

riod in December 2011. Experiences as to the operation of the Transfer of Prisoners Framework Decision are thus yet to be obtained.

#### 4. Pre-trial detention

*Question 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?*

Provisions on the prerequisites for detention are laid down in Chapter 1:8 of the Coercive Measures Act (450/1987). These prerequisites also apply to post-detention review as to whether detention should be continued. Separate provisions are laid down in section 26 of the same Chapter concerning the detention or continued detention in connection with the sentencing of a person sentenced to unconditional imprisonment. Based on Chapter 1:8(1) of the Coercive Measures Act, a person suspected of an offence with probable cause may be detained,

- (1) where a less severe penalty than imprisonment for two years has not been provided for the offence;
- (2) where a less severe penalty than imprisonment for two years has been provided for the offence, but the most severe penalty exceeds imprisonment for one year and, having regard to the personal circumstances of the suspect or other factors, there is reason to suspect that:
  - (a) the suspect will abscond or otherwise attempt to evade criminal investigation, trial or enforcement of sentence;
  - (b) the suspect will hinder the investigation of the offence by destroying, defacing, altering or concealing evidence or by influencing a witness, a complainant, an expert or an accomplice; or
  - (c) the suspect will continue his/her criminal activity.
- (3) where the identity of the suspect is not known and the suspect refuses to divulge his/her name or address, or gives manifestly false information; or
- (4) where the suspect does not have a permanent residence in Finland and it is probable that the suspect will attempt to evade criminal investigation, trial or enforcement of sentence by leaving the country.

When there is cause to suspect a person of an offence, he/she may be detained even in the absence of probable cause, provided that the prerequisites for detention are otherwise in place and detention is of the utmost importance in view of anticipated additional evidence. A person suspected of an offence with probable cause whose extradition to Finland will be requested may be detained if the most severe penalty provided for the offence is not less than one year's imprisonment and if the personal circumstances of the suspect, the number or nature of the offences to be included in the extradition request, or other similar factors give reason to suspect that the person will not arrive in Finland voluntarily to face prosecution. No one may be detained or the continuation of his/her detention ordered when this would be unreasonable due to the nature of the matter or the age or other personal circumstances of the suspect or convict.

Upon consideration of detention and when reviewing a detention matter to decide whether the detention ordered earlier shall be continued, the court may impose a travel ban instead of detention. In accordance with the principle of least harm applied in the exercise of coercive measures, no one's rights may be restricted to an extent beyond that

absolutely necessary in order to accomplish the purpose of the pre-trial investigation. In other words, the travel ban shall be used whenever it is deemed an adequate measure, as it represents less of a restriction of the suspect's rights.

No maximum duration has been set for pre-trial detention in Finland. According to the relevant law, a deadline by which charges must be brought shall be set in connection with the order of detention. The deadline shall not be set for later than what is necessary for the completion of the criminal investigation and the preparation of the charges.

The deadline for bringing charges does not mean that the suspect would have to remain in detention until its expiration. A detainee shall be released when the prerequisites for detention have ceased to exist. At the request of the detainee, the court shall take up the case for review without delay and no later than within four days of the request. However, a detention matter need not be taken up for review before two weeks have elapsed from the previous hearing in the matter. The court shall take up the matter for review also before this time when there is reason for doing so owing to circumstances coming to light after the previous hearing. The lead investigator has a duty to inform the court and the detainee immediately of any circumstance that renders the detention unnecessary. When the lawful prerequisites for detention no longer exist, the suspect shall be released.

*Question 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?*

5 (a). A statutory maximum length of pre-trial detention would have little effect on reducing the periods of pre-trial detention. To the contrary, such statutory time limits might often be capable of extending rather than reducing pre-trial detention periods. This conclusion finds support from the Council of Europe Annual Penal Statistics (SPACE), according to which several European states with a statutory maximum pre-trial detention period have been unsuccessful in their efforts to reduce the number of pre-trial detainees.

5 (b). The grounds for detention shall be taken up for review at regular intervals to determine whether the prerequisites for detention continue to exist. This principle is also expressed in the Human Rights Convention, the Charter of Fundamental Rights of the European Union, and the Council of Europe Recommendation (Rec(2006) 13) on remands in custody. According to the recommendation, the interval between reviews should be no longer than one month.

Periods of pre-trial detention could be reduced by developing credible and effective alternatives to detention. One such alternative is the electronically monitored travel ban. Alternatives mentioned in the Council of Europe Recommendation (Rec(2006) 13) include duty to report, supervision, electronic monitoring, house arrest, restrictions on movement, surrender of passport, prohibition of meeting specified persons, and bail. Other means designed to expedite the criminal process and enhance its efficiency also contribute to the length of periods of pre-trial detention. Such means are a pre-trial investigation plan drawn up by a pre-trial investigation authority and the prosecutor together, and a procedural plan drawn up by the court.

The average duration of pre-trial detention in Finland is approximately 3.5 months. Persons held in pre-trial detention account for roughly 19% of the entire prison population, a fairly low figure compared to that in several Member States.

Increased exchange of information between the authorities about their systems is beneficial to the development of national measures. The exchange of information also promotes mutual trust between Member States and thus serves to foster the use of alternatives to pre-trial detention.

*Question 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?*

In Finland, foreign defendants either remain in detention until their trial or are served with the summons during their arrest and their case is eventually resolved even in their absence. In certain situations, the case is heard at trial as quickly as possible. The arrest warrant is usually not used for this purpose.

*Question 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?*

See the response to Question 5 above. The Council of Europe has only recently adopted a recommendation on remand in custody and the recommendation contains an Article governing the intervals between reviews of detention. Finland sees no obstacle to the adoption of European Union minimum rules on review as well.

However, minimum rules to govern the maximum duration of detention should only be created when it can be established that such rules can in fact reduce periods of pre-trial detention. Regulation in this matter should be left to the Member States for adoption in their national legislation.

## 5. Children

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

The European Court of Human Rights has stressed that the detention of a child shall be used only as a measure of last resort and for the shortest appropriate period of time (e.g. *Nart v. Turkey*, 6.5. 2008) The same principle has been expressed in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules,” Rule 13), stating that whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home. Children are only rarely detained in Finland. The age limit for criminal liability in Finland is fifteen years. The cases of offenders younger than this are dealt with by the child protection authorities.

It might be justified in respect of minors in particular to allow for the possibility of ordering electronic monitoring as an alternative to pre-trial detention. This might serve bet-

ter to safeguard the school attendance and family relationships of a minor. In addition, a minor would in such a case be better placed to assist with the preparation of his/her defence than if the minor were held in pre-trial detention. Restrictions on movement could be limited to evenings and weekends specifically.

## 6.2 Monitoring of detention conditions by the Member States

*Question 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?*

In Finland, prison inspections are within the ambit of the Parliamentary Ombudsman, who carries out a total of 4–6 inspections of prisons each year, both scheduled and unannounced. The Internal Inspection unit within the Central Administration unit of the Criminal Sanctions Agency conducts 3–4 inspections of prisons each year. These inspections are announced in advance.

The European Committee for the Prevention of Torture (CPT) visits Finland at intervals of roughly five years and inspects 3–5 prisons during each of its visits. Finland is currently in the process of ratifying the Optional Protocol to the United Nations Convention against Torture. The Parliamentary Ombudsman is to be designated to serve as the national preventive mechanism referred to in the Protocol.

A forum might be established in the European Union for the purpose of disseminating good practices, exchanging experiences and improving prison conditions, and in fact preparations for precisely such a forum are already underway. The organisations responsible for the enforcement of prison sentences in the EU Member States, Norway, Iceland, Switzerland and Liechtenstein were invited to attend a meeting held in late October in Edinburgh, Scotland, at which meeting the decision was taken to establish an organisation by the name of EuroPris. The aims of EuroPris include the exchange of experiences and the promotion of good practices as well as the development of prison conditions. The organisation was established in cooperation with representatives of the EU Commission and the Council of Europe. The establishment of similar forums should be accomplished in cooperation with the Council of Europe, the CPT and the preventive mechanisms established under OPCAT. Duplication of the efforts of the CoE should be avoided. The EU or the Commission could be assigned the role of coordinator.

Prison administration networks meeting at regular intervals could also be established and participation in these supported within the EU. Meetings and networking should also be enhanced in respect of supervisory bodies. The EU might serve in the capacity of coordinating and convening body.

The Commission and the Council of Europe might also organise theme meetings on various topics for delegates to be sent by the Member States as need be. Attendance at such meetings should also be allocated financial support. This would promote the exchange of information among Member States and thus also foster mutual trust.

## 6.3 European Prison Rules

*Question 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 work of the Council of Europe and of the Member States towards putting good detention standards into practice could be supported by e.g. organising meetings of the bodies entrusted with supervision (in Finland, the Parliamentary Ombudsman), which meetings could also be attended by prison administration representatives.

Further knowledge about the situation and good practices in other States might also be beneficial in embracing the rules. The EU might allocate further funding to bilateral and multilateral development undertakings.

Finland does not support making the prison rules binding, at least not in all respects, as this entails the risk of the rules, owing i.a. to a lack of financial resources and the disparities between the Member States, becoming more of a set of minimums rather than retaining their current status of recommendations.