

# EUROPEAN COMMISSION GREEN PAPER ON THE APPLICATION OF EU CRIMINAL JUSTICE LEGISLATION IN THE FIELD OF DETENTION

25 November 2011

## Submission to the Public Consultation on the Green Paper by:

1. Czech Helsinki Committee
2. Helsinki Foundation for Human Rights Poland
3. Human Rights Monitoring Institute Lithuania
4. Hungarian Helsinki Committee
5. The League of Human Rights Czech Republic
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## 1. INTRODUCTION

This submission is in response to a European Commission *Green Paper on the Application of EU Criminal Justice Legislation in the Field of Detention* published on 14 June 2011.<sup>1</sup>

The submission has been compiled by a consortium of non-governmental organisations dedicated to, inter alia, promoting national and regional pretrial detention laws, norms and standards in Europe to thereby reduce the arbitrary and excessive use of pretrial detention. Collectively, the organisations responsible for this submission have considerable experience in pretrial detention policy and practice within European Union Member States (“Member States”) and elsewhere. See *Annexure A* below for information on the submitting organisations.

The response to the Green Paper comes at a critical moment. Commissioner Hammarberg expressed concern in August 2011 over the “systematic and often poorly justified”<sup>2</sup> use of pretrial detention, noting that 25% of people in Europe’s prisons are detained on remand. In addition following the implementation of the European Arrest Warrant there is an urgent need to ensure that the requisite procedural safeguards and defendant’s rights are in place.

This submission primarily covers three interrelated aspects of pretrial detention laws and practice by Member States namely:

- non-custodial alternatives to pretrial detention;
- statutory maximum lengths of pretrial detention; and
- regular judicial review of pretrial detention.

The review also provides a number of limited recommendations on children and monitoring places of detention, in particular where they relate to pretrial detention.

Before discussing these aspects of pretrial detention laws and practice, following next is a brief review of the sweeping and harmful consequences of pretrial detention, especially in respect of the socioeconomic wellbeing of detainees, their families and communities.

## 2. WIDE-RANGING NEGATIVE CONSEQUENCES OF EXCESSIVE PRETRIAL DETENTION

The decision to detain a person before he is found guilty of a crime is one of the most draconian a State or individual can make. A decision made in an instant by the arresting officer can have a severe, lasting, and adverse impact. Whether or not it is justified, and regardless of whether due process is followed, the arrest is likely to have a traumatic effect on the detainee and those who love and depend on him. Pretrial detention is one of the worst things that can happen to a person: the detainee immediately loses his freedom, and can also lose his family, health, home, job, and community ties.

Using pretrial detention excessively and/or arbitrarily is not only a violation of international norms, but also often unnecessary. Most pretrial detainees pose no threat to society and should not be in detention. Many of those held in pretrial detention will have their charges withdrawn due to lack of evidence, while others will be acquitted at trial. Still others will be found guilty of minor, non-violent

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<sup>1</sup> COM(2011) 327 final.

<sup>2</sup> Human Rights Comment, 18 August 2011 <http://www.humanrightseurope.org/2011/08/hammarberg-excessive-use-of-pre-trial-detention-runs-against-human-rights/>

offenses for which jail time is inappropriate or for which the maximum sentence is less than the time spent awaiting trial.<sup>3</sup>

For example, in England and Wales, four out of ten pretrial detainees received a non-custodial sentence in 2009.<sup>4</sup> Moreover, around two-thirds of pretrial detainees in England and Wales are typically accused of non-violent offenses (62 percent in 2009).<sup>5</sup> Among juveniles, three-quarters of all pretrial detainees are either acquitted or given a non-custodial sentence.<sup>6</sup> In Scotland between a fifth and half of all pretrial detainees receive a non-custodial sentence.<sup>7</sup>

A report entitled *The Socioeconomic Impact of Pretrial Detention*, released in early 2011, found that the consequences of pretrial detention are profound, affecting not just the individuals detained, but their families, communities, and even States.<sup>8</sup> That impact is felt most keenly by the poor. The poor are more likely to come into conflict with the law, more likely to be confined pending trial, and less able to afford private counsel and money bail.

Pretrial detainees are often exposed to inhuman and degrading treatment, extortion, and disease. They are subject to the arbitrary actions of police, corrupt officials, and even other detainees. Throughout their ordeal, many never see a lawyer or legal advisor and often lack information on their basic rights. When they eventually reach trial – without representation and likely beaten down by months of confinement – the odds are stacked against them: persons in pretrial detention are more likely to be found guilty than defendants from similar backgrounds, facing similar charges, who are released awaiting trial.<sup>9</sup> The UN Working Group on Arbitrary Detention has noted that empirical research shows those in pretrial detention have a lower likelihood of obtaining an acquittal than those who remain at liberty before their trial; this “deepens further the disadvantages that the poor and marginalized face in the enjoyment of the right to a fair trial on an equal footing.”<sup>10</sup>

Pretrial detainees may lose their jobs, be forced to abandon their education, and be evicted from their homes. They are exposed to disease and suffer physical and psychological damage that lasts long after their detention ends. Their families also suffer from lost income and forfeited education opportunities, including a multi-generational effect in which the children of detainees suffer reduced educational attainment and lower lifetime income. For example, a study in the UK showed that for every ten fathers who are imprisoned, six of their children will also end up in detention later in life.<sup>11</sup> The ripple effect does not stop there: the communities and States marked by the over-use of pretrial detention also must absorb its socioeconomic impact.

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<sup>3</sup> See Martin Schönteich, *The Scale and Consequences of Pretrial Detention around the World*, *Justice Initiatives*, Open Society Justice Initiative, Spring 2008, pp 26-28.

<sup>4</sup> *Bromley Briefings Prison Factfile*, Prison Reform Trust, London, June 2011, p 18.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, p 13.

<sup>7</sup> *Scotland's Choice. Report of the Scottish Prison Commission*, Edinburgh, July 2008, p 29.

<sup>8</sup> David Berry, *The Socioeconomic Impact of Pretrial Detention. A Global Campaign for Pretrial Justice Report*, Open Society Justice Initiative, New York, 2011, [http://www.soros.org/initiatives/justice/articles\\_publications/publications/socioeconomic-impact-detention-20110201](http://www.soros.org/initiatives/justice/articles_publications/publications/socioeconomic-impact-detention-20110201).

<sup>9</sup> Clive Davies, 'Pre-Trial Imprisonment: A Liverpool Study,' *The British Journal of Criminology*, Jan. 1971, pp 32–48; Marian R. Williams, 'The Effect of Pretrial Detention on Imprisonment Decisions,' *Criminal Justice Review* 28, No. 2, Autumn 2003, pp 299–316.

<sup>10</sup> Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, Geneva: UN Commission on Human Rights, E/CN.4/2006/7, 2006, para. 66.

<sup>11</sup> Presentation by Corin Morgan-Armstrong at the 13<sup>th</sup> Annual International Prisons and Corrections Conference, September 2011.

Excessive pretrial detention pushes people toward poverty. People on low incomes often face unemployment, uncertainty, and the edge of poverty. It tips those on the edge of privation into poverty and plunges the already poor into even worse destitution. It limits the development of whole communities, wastes human potential, and misdirects State resources.

For the State, every pretrial detainee means increased expense (direct costs), reduced revenue (indirect costs), and fewer resources for other programmes (opportunity costs). According to a 2003 European Commission investigation, the average cost of incarcerating pretrial detainees in ten European countries for which data was available was 3,079 Euros per month.<sup>12</sup> Extrapolated over the 139,883 pretrial detainees in 2006,<sup>13</sup> this comes to an annual cost of 5.2 billion Euros. Moreover, these are only the direct costs and do not take into consideration the indirect and opportunity costs.

### 3. NON-CUSTODIAL ALTERNATIVES TO PRETRIAL DETENTION

Recommendation Rec(2006)13 of the Committee of Ministers<sup>14</sup> to Member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, provides that the use of pretrial detention should always be an exceptional measure and encourages the use of alternative measures “wherever possible”.<sup>15</sup>

Rule 2(1) of Recommendation Rec(2006)13 provides an illustrative list of alternatives to pretrial detention:

*“[U]ndertakings to appear before a judicial authority as and when required; not to interfere with the course of justice; not to engage in particular conduct, including that involved in a profession or particular employment; requirements to report on a daily or periodic basis to a judicial authority, the police or other authority; requirements to accept supervision by an agency appointed by the judicial authority; requirements to submit to electronic monitoring; requirements to reside at a specified address, with or without conditions as to the hours to be spent there; requirements not to leave or enter specified places or districts without authorisation; requirements not to meet specified persons without authorisation; requirements to surrender passports or other identification papers; and requirements to provide or secure financial or other forms of guarantees as to conduct pending trial.”*

A review of legislation and commentary by country-based experts from Member States has identified additional non-custodial alternatives to pretrial detention not listed under the aforementioned Rule 2(1) of Recommendation Rec(2006)13. These include house arrest; a prohibition on an accused person to carry a weapon; the requirement for an accused person to undergo medical or other treatment; and a

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<sup>12</sup> See Martin Schönleich, The Scale and Consequences of Pretrial Detention around the World, *Justice Initiatives*, Open Society Justice Initiative, Spring 2008, pp 26-28.

<sup>13</sup> , A M van Kalmthout, M M Knapen and C Morgenstern (ed.'s), *Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU*, Wolf Legal Publishers, Nijmegen, 2009

<sup>14</sup> Adopted by the Council of Europe's Committee of Ministers on 27 September 2006. *Appendix to Recommendation Rec(2006)13: Rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.*

<sup>15</sup> Preamble, Recommendation Rec(2006)13 of the Committee of Ministers.

guarantee by a responsible person or social entity that the accused person will abide by the conditions of his release.<sup>16</sup>

According to an extensive review of pretrial detention policies in Member States undertaken by Kalmthout et al, some of the alternatives to pretrial detention provided for under Rule 2(1) of Recommendation Rec(2006)13 are not available in a significant number of Member States.<sup>17</sup> For example, “an undertaking not to engage in particular conduct, including that involved in a particular profession, or requirements to accept supervision by an agency or trusted person appointed by the judicial authority” appears to be available in only 8 (out of 27) Member States; “electronic monitoring” is available in 7 Member States, “house arrest” in 8, and the “requirement to report to the police” in 14. On the face of it, there exists a need to provide judicial officers in a number of Member States with a greater variety of alternatives to pretrial detention.<sup>18</sup>

While comprehensive data is unavailable, it appears that alternatives to pretrial detention are rarely used in some Member States. For example, the introduction, by statute, of alternatives to pretrial detention in Belgium in 1990 does not appear to have reduced the number of pretrial detainees as a proportion of all prisoners (which is comparatively high in Belgium by European levels). This may partly be explained by a study published in 2004, showing that in virtually all cases (92 percent), Belgian prosecutors request pretrial detention from the investigating judge. The prosecutions’ request was granted in almost two-thirds (63 percent) of cases, while alternatives to pretrial detention with conditions were employed in only 8 percent of cases.<sup>19</sup>

In Latvia in 2006 and 2007, pretrial detention was applied in 27,000 cases, while house arrest was applied in only 15 cases and a security deposit (or money bail) in only 32 times.<sup>20</sup> In Hungary, there are limited legally available alternatives to pretrial detention such as various forms of house arrest, the requirement not to leave a specified geographic area without prior authorization (“geographic ban”), and the requirement not to meet specified persons or be at specified places.<sup>21</sup> In addition, the defense may file a motion for money bail with the appropriate court authorized to decide on pretrial detention.<sup>22</sup> Not only are the variety of alternatives to pretrial detention in Hungary relatively few, but their use is limited. For example, between 2003 and 2007, out of 26,475 orders of pretrial detention, only 464 offers of bail were accepted out of 1,139 applications. Release on bail therefore constitutes less than 2% of all preventive measures. Moreover, between 2005 and 2007, there were almost 15,000 orders of pretrial detention in Hungary, but a mere 381 orders of “geographic ban” and 153 orders of house arrest.<sup>23</sup>

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<sup>16</sup> Some of these alternatives overlap with the alternatives provided by Rule 2(1) of Recommendation Rec(2006)13. See, A M van Kalmthout, M M Knapen and C Morgenstern (ed.’s), *Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU*, Wolf Legal Publishers, Nijmegen, 2009, pp 92-93.

<sup>17</sup> Van Kalmthout, et al., op cit, pp 92-93.

<sup>18</sup> Such an analysis is complicated by the fact that It is difficult to produce an exhaustive list of non-custodial alternatives to pretrial detention within some Member States. In some jurisdictions, the prosecutor, the investigating judge or the court have discretionary power to conditionally suspend pretrial detention and to determine the most appropriate conditions for a specific case. Such conditions are not always explicitly enumerated by statute. See, A M van Kalmthout, M M Knapen and C Morgenstern (ed.’s), *Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU*, Wolf Legal Publishers, Nijmegen, 2009, p 92.

<sup>19</sup> See, An Raes and Sonja Snacken, ‘The Future of Remand Custody and its Alternatives in Belgium’, *Howard Journal of Criminal Justice*, Vol. 43, No. 5, December 2004, pp. 506-517.

<sup>20</sup> Van Kalmthout, et al. op cit, p 592.

<sup>21</sup> Van Kalmthout, et al., op cit, p 93.

<sup>22</sup> Ed Cape, Zaza Namoradze, Roger Smith, and Taru Spronken, *Effective Criminal Defense in Europe*, Intersentia, Antwerp, 2010, p 345.

<sup>23</sup> Ed Cape, et al., op cit, p 345.

The positive long term implications of an appropriate and sustained use of alternatives to pretrial detention should also be more widely recognized. For example, in Scotland, Glasgow's City Council in August 2009 introduced a program that offered alternatives to pretrial detention for young people. Those young people that were eligible were released pending trial, monitored and supported through a variety of social service programmes. The programme cost one-fifth of pretrial detention and reduced re-offending rates by 50 percent.<sup>24</sup>

#### Recommendations:

- The adoption of an **EU Directive** that compels Member States to utilize suitable and effective alternatives to pretrial detention and ensures that pretrial detention is only ordered when all other options have been judged insufficient. The Directive should:
  - require that a decision is made based on an oral hearing, at which the suspect has the opportunity to present arguments in favour of release;
  - require that the suspect has access to the full range of defence rights including interpretation and translation, information about their rights and has access to legal assistance, supported where necessary by legal aid;<sup>25</sup>
  - ensure that conditions of release take into account the suspect's financial and personal circumstances;
  - ensure that for children pretrial detention is the absolute last resort;
  - ensure that non-nationals are not discriminated against and that alternatives to pretrial detention are considered in line with supervision measures under the European Supervision Order which was adopted on 23 October 2009 and must be implemented by all Member States by 1 December 2012;
  - require that if pretrial release is refused that reasons are given in writing, that there is a mechanism by which the suspect can appeal and that an effective remedy is available if the established procedures are breached;
  - explicitly set out a wide but non-exhaustive range of alternatives to pretrial detention that Member States could utilize;
  - encourage Member States to devote sufficient financial and human resources to ensure that alternatives to pretrial detention are credible and enjoy the confidence of criminal justice decision makers;
  - require Member States to document and provide annual statistics on the use of alternatives to pretrial detention.<sup>26</sup>

<sup>24</sup> ISMS was introduced by the Antisocial Behaviour, etc. (Scotland) Act 2004 and The Intensive Support and Monitoring (Scotland) Regulations 2005, and came into force in April 2005. ISMS is a new type of disposal within the Children's Hearings System that involves issuing a young person with a Movement Restriction Condition (MRC), which by law must be monitored via an electronic tag, for a set period of time. This must be accompanied by Intensive Support during their assessment for ISMS, while on the MRC, and in a post-MRC phase for the same length of time that the young person was on the MRC. For more information, see:

[http://antisocialbehavioursotland.org/asb/controller?p\\_service=Content.show&p\\_applic=CCC&pContentID=2249&pMenuID=9&pElementID=348](http://antisocialbehavioursotland.org/asb/controller?p_service=Content.show&p_applic=CCC&pContentID=2249&pMenuID=9&pElementID=348).

<sup>25</sup> According to Directive 2010/64/EU of 20 October 2010, on the right to interpretation and translation in criminal proceedings, the draft Directive on the Right to Information in Criminal Proceedings approved by the European Parliament Civil Liberties Committee on 23 October 2011 and forthcoming Directives under the Procedural Rights Roadmap adopted by the European Council on 30 November 2009.

<sup>26</sup> Since 2007, the Council of Europe has sought to collect this data from Member States through its Annual Penal Statistics Space II, "Non-Custodial Sanctions and Measures Served in 2007", [http://www3.unil.ch/wpmu/space/files/2011/02/Council-of-Europe\\_SPACE-II-2007-E.pdf](http://www3.unil.ch/wpmu/space/files/2011/02/Council-of-Europe_SPACE-II-2007-E.pdf). The data collected is, however, incomplete and, at times, unclear.

- Given the limited use of alternatives across Member States the Commission should:
  - support the compilation of a **best practice guide** on the use of alternatives to pretrial detention including details of implementation, ways in which challenges were addressed and analyses of the costs and benefits;
  - set up a **correctional services fund** with a specific focus on supporting alternatives to pretrial detention. Member States could apply to pilot projects that test and develop pretrial release programmes and systematically collect data on the effectiveness of the alternative measures. The focus should be on reliably documenting the extent to which accused persons comply with the conditions of their pretrial release;<sup>27</sup>
  - set up a targeted **technical exchange programme**, to enable practitioners and policy makers from countries with limited practical experience of implementing pretrial release programmes to spend a period of time in another member state with a programme that has effectively implemented and monitored a pretrial release programme;
  - support the newly created **correctional services network** ‘Europris’ and encourage them to: place particular emphasis on the effective implementation of alternatives to pretrial detention; and to organise regular exchange with civil society, national preventive mechanisms and academic institutions;
  - support the regular collection, analysis and publication of **statistics** by the Council of Europe and Eurostat and agree a formal Memorandum of Understanding to ensure coordination and the formal recognition of statistics collected by each body. Statistics should be desegregated by sex, age and nationality. In the areas we have addressed in this submission statistics should include, but are not limited to:
    - the number of cases where pretrial release is granted;
    - the number of cases where pretrial release was granted and the applicant was unable to comply with the conditions;
    - the number of cases where the defendant was represented by a lawyer;
    - the number of cases where the defendant was released pending trial and he/she did / did not comply with the conditions; and
    - the average length of time that a suspect spends in pretrial detention.

#### 4. STATUTORY MAXIMUM LENGTHS OF PRETRIAL DETENTION

The European Convention on Human Rights does not provide for a specific maximum time limit for pretrial detention, providing rather that accused persons are entitled to a fair and public hearing within a “reasonable time”.<sup>28</sup> The European Court of Human Rights has not interpreted “reasonable time” to imply a specific time period or duration. Drawing on the case law of the European Court of Human Rights, the Council of Europe’s Recommendation (2006)13 is vague on a maximum permissible period of pretrial detention. The Recommendation provides for the following:

- The duration of pretrial detention shall not exceed, nor normally be disproportionate to, the penalty that may be imposed for the offence concerned.<sup>29</sup>

<sup>27</sup> Such data could be collected in terms of the regular SPACE II (“Non-Custodial Sanctions and Measures”) reports: <http://www3.unil.ch/wpmu/space/space-ii/>.

<sup>28</sup> Article 5(3), European Convention on Human Rights.

<sup>29</sup> Explanatory Memorandum to *Recommendation 2006 (13)*, paragraph 22(2).

- In no case shall remand in custody breach the right of a detained person to be tried within a reasonable time.<sup>30</sup>
- Priority shall be given to cases involving a person who has been remanded in custody.<sup>31</sup>

While some Member States have set maximum time limits for pretrial detention,<sup>32</sup> these often come with legislative provisions enabling prolongation of pretrial detention after expiration of the statutory time limit. This seems to enjoy the tacit approval of the Council of Europe. The Council in its Memorandum to Recommendation 2006(13) notes that “although the fulfillment of the requirements regarding the duration of remand in custody may be facilitated by the specification in legislation of a maximum period of remand in custody, the need to consider the particular circumstances of a given case means that such a period should not automatically be applied to all cases where remand in custody is justified”.<sup>33</sup>

A strict Europe-wide limit to the maximum period of pretrial detention is probably unrealistic at this stage. The diversity inherent to Member States’ criminal justice systems, their domestic laws, and the resources devoted to police investigations and prosecutions invariably make for different “reasonable” time periods of pretrial detention. Moreover, a EU-wide time limit may entice States who presently have very tight maxima to extend these to meet the (relatively) more relaxed or generous EU standards.

**Recommendation:**

- Introduce EU-wide standards for the **collection of data** on the duration of pretrial detention. This should include the collection of data on the extent to which existing statutory maxima are circumvented through prolongation of pretrial detention periods after expiration of the said maxima. This recommendation supplements the recommendation in section 3 on statistics.

## 5. REGULAR JUDICIAL REVIEW OF PRETRIAL DETENTION

Van Kalmthout et al. argue that “review and length of pre-trial detention are often interrelated subjects”.<sup>34</sup> They use as examples the cases of Finland and Sweden, countries which do not have a statutory time limit in respect of pretrial detention. The fact that neither country has long average periods of pretrial detention is attributed to the “consistent use of reviews [which] guarantees that periods of pre-trial detention do not become too long”.<sup>35</sup>

According to Article 5(4) of the European Convention on Human Rights, “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.” Article 5(4) confers the “right to periodic review of loss of liberty on the basis that the initial grounds for detention may no longer exist”.<sup>36</sup> In a 1989 ruling, the European Court of Human Rights held that since new issues might arise after the first consideration of bail, an opportunity to review the lawfulness of

<sup>30</sup> Explanatory Memorandum to *Recommendation 2006 (13)*, paragraph 22(3).

<sup>31</sup> Explanatory Memorandum to *Recommendation 2006 (13)*, paragraph 24(2).

<sup>32</sup> A M van Kalmthout, M M Knapen and C Morgenstern (ed.’s), *Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU*, Wolf Legal Publishers, Nijmegen, 2009, pp 81-82.

<sup>33</sup> Explanatory Memorandum to *Recommendation 2006 (13)*, paragraph 23.

<sup>34</sup> Van Kalmthout, et al., op cit, p 75.

<sup>35</sup> Van Kalmthout, et al., op cit, p 75.

<sup>36</sup> Van Kalmthout, et al., op cit, p 74.

pretrial detention must be provided at “reasonable intervals”.<sup>37</sup> That is, courts’ pretrial detention decisions should be reviewed at regular intervals to verify the lawfulness of detaining persons awaiting trial, as the initial grounds for pretrial detention may have changed in the interim.

An explanatory memorandum to Recommendation 2006(13) provides that the responsibility for initiating periodic judicial reviews as to whether the imposition of pretrial detention (or alternative measures) continues to be justified lies with “the prosecuting authority or the investigating judicial authority since the burden of proving that there is still a sufficient justification for either measure rests with that authority”.<sup>38</sup>

This explanatory memorandum holds that while “a monthly interval between such reviews ought to be observed, it is recognised that the objective of such reviews can be fulfilled by the existence of a possibility for a person remanded in custody to apply to a court for release him- or herself at any point during his or her remand. It is also recognised that the authorities may provide for restrictions on the ability to apply for release on account of the shortness of the time elapsing from a previous application or the failure to adduce any new basis for ordering his or her release.”<sup>39</sup>

All Member States reportedly have statutory provisions in respect of the judicial review of pretrial detention decisions. However, there exists considerable diversity in the rules governing judicial review among Member States “as to how (e.g. review *ex officio*, at the same (e.g. monthly) or different intervals), when (from the initial deprivation of liberty or from the initial imposition of pre-trial detention), and by whom (investigating judge, court, public prosecutor)”.<sup>40</sup> In some Member States, reviews take place on an automatic basis. That is, after the passage of a certain period of time (e.g. within 5 days in Belgium or after three months in Germany and Poland),<sup>41</sup> the judge / court / prosecutor must review the initial pretrial detention decision.

Care needs to be taken that automatic reviews do not become routine bureaucratic processes where judicial officers focus primarily on whether periods of detention should be extended (as the prosecution is likely to argue in the majority of cases). Rather, judicial officers should actively consider whether a prior judicial decision to detain someone awaiting trial can be rescinded (i.e. whether the order of pretrial detention can be terminated).

In some Member States, no legislative provisions for periodical review of pretrial detention decisions exist. In these countries, the accused person and/or his legal representative has to proactively seek such a review or appeal against the initial pretrial detention decision.

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<sup>37</sup> *Bezicheri vs. Italy*, judgement of 25 October 1989, Series A, No. 164

<sup>38</sup> Paragraph 17, *Explanatory memorandum: Rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*, CM(2006)122 Addendum, 30 August 2006, [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM\(2006\)122&Language=lanEnglish&Ver=add&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM(2006)122&Language=lanEnglish&Ver=add&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).

<sup>39</sup> Paragraph 17, *Explanatory memorandum: Rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*, CM(2006)122 Addendum 30 August 2006, [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM\(2006\)122&Language=lanEnglish&Ver=add&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM(2006)122&Language=lanEnglish&Ver=add&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).

<sup>40</sup> Van Kalmthout, et al., op cit, p 75.

<sup>41</sup> For a schedule of the moment of first *ex officio* review and the nature of reviews for all Member States see, Van Kalmthout, et al., op cit, p 77.

**Recommendations:**

- The adoption of an **EU Directive** that compels Member States to carry out automatic, regular judicial reviews of all pretrial detention decisions, whereby the reviewing authority explicitly interrogates the necessity of the continued pretrial detention. The review should be the norm for all Member States and should take into consideration:
  - the amount of time already spent in pretrial detention;
  - the right to be tried within a reasonable time period;
  - the reasons for any delays in bringing the case to trial
- Any request for a review should be promptly answered in writing. The review should ensure the same procedural guarantees as for the initial pretrial hearing.
- Develop EU-wide standards for the collection of data on both the quantity and quality of the judicial review of pretrial detention decisions and the outcome of such reviews.

## 6. CHILDREN

The UN Committee on the Rights of the Child has expressed concern about the increasing number of children in detention in a number of EU countries,<sup>42</sup> and questioned whether the deprivation of liberty is genuinely used as a measure of last resort. Failure to systematically utilise alternatives to pretrial detention has been cited as a concern,<sup>43</sup> as well as the lack of separation of juveniles in pretrial detention and in police custody.

**Recommendations:**

- Pretrial Detention should be considered only as an absolute **measure of last resort**. The Commission should place stringent requirements on Member States to demonstrate the insufficiency of other measures and encourage Member States to ensure that appropriate and practical alternatives are available. (See the Recommendations under Section 3).
- The needs and rights of children should be considered in all the Recommendations that we have made under section 3. For example particular emphasis should be placed to ensure that: sufficient statistics regarding children are collected and all statistics are disaggregated according to age; and alternatives to pretrial detention are available for children and they are specifically designed to meet the needs of the individual child.

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<sup>42</sup> Committee on the Rights of the Child, Concluding Observations: Austria CRC/C/15/Add.251, France CRC/C/15/Add.240, Bulgaria CRC/C/15/Add.66, Greece CRC/C/15/Add.170 and Lithuania CRC/C/LTU/CO/2.

<sup>43</sup> Including in Committee on the Rights of the Child, Concluding Observations: Greece CRC/C/15/Add.170 and Luxembourg CRC/C/15/Add.250

## 7. MONITORING DETENTION CONDITIONS

Independent monitoring is recognised as one of the main ways to prevent torture and other ill-treatment and ensure that detention conditions comply with international, regional and national standards. Opening places of detention to independent, unannounced scrutiny greatly contributes to the elimination of torture and other ill-treatment and helps promote a constructive dialogue to address concerns.<sup>44</sup>

### **Recommendations:**

- A number of Member States have not yet signed and ratified the OPCAT. In line with its recommendations to third countries the Commission should require Member States to immediately take action to **sign and ratify the OPCAT** and establish an effective, transparent National Preventive Mechanism.
- The OPCAT specifically provides for a broad definition of ‘deprivation of liberty’ which encompasses all types of pretrial detention. Actions should be taken, to ensure that NPMs are able to access and carry out regular and unannounced monitoring activities in pretrial facilities and police cells, and that they are sufficiently staffed and resourced to implement such activities.

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<sup>44</sup> UN Special Rapporteur on Torture. Manfred Nowak, A/61/259, para.72.

## **ANNEXURE A**

### **ORGANISATIONS RESPONSIBLE FOR THIS SUBMISSION**

**Czech Helsinki Committee** ([www.helcom.cz](http://www.helcom.cz))



The Czech Helsinki Committee is a non-governmental non-profit organization for human rights, has operated in Czechoslovakia since 1988 and in the Czech Republic since 1993. Mission is to foster and protect the basic values of our society, namely to protect the equal rights and personal liberty. Therefore we have been since long ago specialized to the problems of criminal procedure, confinement, the work of police and other bodies working in the justice and on the other side we are engaged in equal chances, in the problems of discrimination and racism. Our activities are directed to development and strengthening of the civil society.

**Helsinki Foundation for Human Rights Poland**



The Helsinki Foundation for Human Rights was founded in 1989 by the members of the Helsinki Committee in Poland. The Helsinki Foundation for Human Rights is one of the most experienced and professionally active non-governmental organizations engaged in the field of human rights in Europe. Since 2007, the Foundation has held consultancy status at the United Nations Economic and Social Council (ECOSOC). The Helsinki Foundation for Human Rights offers professional consultancy on issues concerning violations of personal and political rights, as well as on the implementation of educational programs, for many non-governmental organizations, as well as for State institutions (the Police, the Judiciary, the Prison Service, the Border Guard, etc.).

**Human Rights Monitoring Institute Lithuania** ([www.hrmi.lt](http://www.hrmi.lt))

The Human Rights Monitoring Institute (HRMI) is a Lithuania-based non-governmental organization which aims to promote an open democratic society through implementation of human rights and freedoms. Since 2003 HRMI works on the strategic goal of consolidation in Lithuania of a culture respectful of human rights. Focusing its efforts on civil and political rights, HRMI carries out research, prepares conclusions and recommendations, introduces the results of research and recommendations to the general public and State institutions, initiates strategic litigation, and presents alternative reports to international human rights bodies, implements awareness-raising and educational campaigns.

## **Hungarian Helsinki Committee ([www.helsinki.hu](http://www.helsinki.hu))**



The Hungarian Helsinki Committee (HHC) is a human rights watchdog NGO founded in 1989. It monitors the enforcement in Hungary of human rights enshrined in international human rights instruments, provides legal defence to victims of human rights abuses by state authorities and informs the public about rights violations. The HHC strives to ensure that domestic legislation guarantee the consistent implementation of human rights norms. The HHC promotes legal education and training in fields relevant to its activities, both in Hungary and abroad. Its main areas of activities are centred on protecting the rights of asylum seekers and foreigners in need of international protection, as well as monitoring the human rights performance of law enforcement agencies and the judicial system. It particularly focuses on the conditions of detention and the effective enforcement of the right to defence and equality before the law.

## **The League of Human Rights Czech Republic ([www.llp.cz](http://www.llp.cz))**

Liga lidských práv is a non-governmental organisation based in the Czech Republic, which works towards the protection of human rights by working within the scope of the rights guaranteed by the Charter of Fundamental Rights and Freedoms, and other binding international conventions. Liga also promotes human rights with the aid of research and education in order to improve the quality of life for all, and by undertaking strategic cases in Court, producing innovative arguments and landmark solutions. By 2010, we aim to have enhanced the rights of children within the Czech Republic, as well as the rights of victims within the Criminal Justice system. We also aim to significantly improved human rights within the health service. Its ultimate vision is to develop a society in which human rights are respected in daily life, and where citizens are able to defend and protect themselves easily and efficiently, and without hindrance, from encroachments and violations of their fundamental rights.

## **Open Society Justice Initiative (<http://www.soros.org/initiatives/justice>)**



The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. The Justice Initiative fosters accountability for international crimes, supports criminal justice reform, combats racial discrimination and statelessness, addresses abuses related to national security and counterterrorism, expands freedom of information and expression, and stems corruption linked to the exploitation of natural resources. Since 2009, the Justice Initiative is developing a Global Campaign for Pretrial Justice to promote alternatives to pretrial detention, expand access to legal aid services, and deploy paralegals to intervene earlier in the criminal justice process. Justice Initiative staff are based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, Freetown, The Hague, London, Mexico City, New York, Paris, Phnom Penh, Santo Domingo and Washington, D.C.