Parlamentul României
Senat

Bucharest, 29 November, 2011

Courtesy translation

OPINION

of the ROMANIAN SENATE, on the

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

The Senate of Romania has analyzed the detention issues in criminal justice considering that it should be a common legislative framework that could be applied and interpreted uniformly in all the Member States, so that the mutual recognition to operate effectively.

Taking into account the report of our permanent Juridical Committee on Nominations, Discipline, Immunities and Validations, during its session of the 29-th of November 2011, **the Plenum of the Senate** adopted the following:

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?

a) In order to ensure smooth operation of the criminal proceedings or to prevent the thefting from prosecution, from the trial or the execution of punishment of the accused or the defendant, the Criminal Procedure Code of Romania establishes two main alternative measures to arrest: the order to not leave the city and the order not to leave the country. In light of provisions of the new Criminal Procedure Code the non-detention measures which can be taken as alternatives to detention are: provisional release under judicial control, under judicial control on bail and house arrest. Any preventive measure must be proportionate to the offense committed and with the gravity of the accusation against the person to be taken.

b) Yes, the measures are operational and are currently used by the courts. The choice of measure to be taken shall be made taking into account its purpose, the degree of social danger of the crime, health, age, history and other circumstances concerning the person to be taken.

c) In addition to the instruments already adopted, such as the European Supervision Order and Council Decision Framework on the probation, it is considered that a directive may be adopted, which establishes minimum standards of criminal procedure law, including in terms of these alternative measures to arrest. These rules must relate to the existence of appropriate measures for preventing and combating the phenomen of crime, in order to achieve the goal of the Union

to provide for its citizens an area of freedom, security and justice without internal frontiers within which the free movement of persons.

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?

a) According to the Criminal Code, the only alternative to imprisonment or life imprisonment is penalty fine.

The alternatives provided for the establishment or enforcement of penalty of imprisonment are the following:
i) conditioned suspension of the sentence, which may be ordered, with the imposition of probation, if are fulfilled certain conditions established by law;
ii) the suspension of sentence under supervision, aimed at straightening and social reintegration of persons sentenced to imprisonment, which sentence was pardoned tolal by law and shall be established if certain conditions established by law;
iii) the execution of the punishment at work when sentenced person is obliged to perform all the duties at work, in correlation with the limitation of rights conferred upon it the law.

The court may order the conditional release of a person sentenced to imprisonment or life imprisonment, if the conditions required by law are fulfilled, among them the execution of a minimum fraction of the sentence imposed.

The new Criminal Code set out the following measures: the warning, the waiver of penalty application, the delay of penalty application and the suspension of execution of the sentence under supervision. The only alternative to the imprisonment and to the conditional release terms, the provisions relating to the penalty fine will be maintained.

Each of the above sanctions is associated with a number of impose obligations on the offender, for exemple the community service which is not an independent sanction in future legislation.

b) Although there are no currently up specialized studies that can give us an answer to this question as accurately, the measures are commonly used by the courts.

Regarding the suspension of execution of the sentence under supervision and taking into account data held by the empowered institutions in this moment, we can say that this measure is functional. Over time, judges have begun to trust in the work of probation services and the number of convicted persons who have applied this measure it demonstrate this.

As an example we can mention that in 2000 there were 924 people supervised in 2004 their number increased to 4471, and currently there are a number of 11 380 people under supervision. During this time, the counselors of probation have attended training courses, where they were taught how to work with people under supervision, and how to use modern tools and intervention methods, such as certain structured programs working with offenders. It requires a study to determine the rate of recidivism among people who were in the probation service record and have completed the test period, as well as potential causes and indicators of recidivism phenomenon.

c) Promotion at European level of alternative measures to imprisonment may be directed rather to a phasing-in process of these alternative measures, than to promote them as measures per se. Thus, any partnership that ends in the European Union must take into account mainly the realities of the country where alternative measures to be implemented deprivation of liberty. We recommend a prior assessment of the European region where it is intended to establish such measures, to build an overview and to identify the needs and opportunities of the area offered by other countries with experience in this field.

We consider that a proper application of the instruments on mutual recognition in this area is very important that all Member States to make efforts in this regard. It would be in support of all Member States to know the non-custodial penalties, both in legislative terms and

in terms of how effective they are applied in practice in each Member States separately. In this respect, we believe that twinning projects or any other bilateral projects would add value in this field.

Given the growing movement of persons between Member States we encourage the creation of common databases for probation service, joint training courses probation staff, the development of comparative studies on legislation and practices on variation jurisdiction probation, under the umbrella of the European Organisation for Probation and/or bilateral projects.

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

a) In Romania, the Framework Decision on the European arrest warrant was transposed into law on international judicial cooperation in criminal matters and applies from 1 January 2007. Also to Romania the appreciation was positive in the forth round of mutual evaluation on the European arrest warrant and on the surrender procedures between Member States.

We consider that all Member States shall ensure a minimum standard that allow the application of Framework Decision on the European arrest warrant. Only to the extend that they would not allow effective delivery of the requested person the prison condition could affect the application of Framework Decision on the European arrest warrant.

This issue may occur in the event of refusal of surrender under an European arrest warrant. In such situation is easy to create a priori assumption to conduct assessments on a whole system concerned on the condition of detention in a country and not only in connection with that isolated case. These general issues relating to legal and institutional framework of a Member State on this issue should be beyond doubt, as they have practically done subject of assessment of pre-accession. Given the possibility of dangerous precedents that could lead to undermining the applicability of the principle of mutual recognition at EU level we consider necessary to analyze carefully these aspects.

In case that starting with December 2011 it will be implemented the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union some prison system will be facing with more lack of places of detention.

In this context, it may be considered as questionable to eliminate the requirement that the convicted person be obliged to consent to transfer, because they could not provide guarantees in respect of providing the necessary material condition of accomodation, such as a single bed.

More acces to information concerning to the condition of prison and criminal justice systems of the countries gives to the person arrested/convicted the possibility of taking a decision on change the place of detention on an informed choice.

This kind of information which includes the prisons crowding index of states for which can be chose as option generates an uniformity number of persons deprived of liberty dictated by their own interests. Thus, it can be avoid the situation that the person deprived of liberty should be made to bear the condition offered by the prison system in a country of which the binding limits, necessary and sufficient to execute an European arrest warrant may be questionable from certain points of view.

b) Since the Transfer of Prisoners Framework Decision is not yet in force we have no information about how it operates. Romania has a rich casuistry in the application of the Council of Europe's Convention on the Transfer of Sentenced Persons opened for signature at Strasbourg on 21 March 1983. Basically, in this moment this convention is the legal instrument applicable in the field between Romania and other EU countries. In general, the condition of detention have not been invoked to the Romanian authorities as a reason for transfer, neither the Romania was state of execution nor was state of condemnation. In fact, the main reason

invoked by people who want to be transferred out off or to Romania is the social reintegration in 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?

According to the Romanian legislation in force, the preventive detention is the most severe preventive measure that may be taken against the person whom there are a serious grounds that had committed a crime.

This measure may cease or may be replaced during the criminal investigation or criminal process, with the obligation not to leave the city or the obligation not to leave the country if it is found that the reasons which led to the preventive arrest no longer exists.

In Romanian judicial system, when the preventive measure was taken in breach of legal provisions or when there is no longer any reason to justify maintaining the preventive measure, it shall revoke ex officio or on request, ordering release of the accused or defendant in the case of arrest and pre-trial detention.

Also, if the preventive measure was taken during prosecution, by the court or prosecutor, criminal investigation body is obliged to immediately inform the prosecutor about the change or cessation of the grounds of which it was taking the preventive measure.

The prosecutor or court during criminal investigation has taken preventive measure, may seize the court or, where appropriate, provide replacement or extend the measure if it considers that the information received from the criminal investigation is justified.

If the medical documents shows that the preventive arrest person suffering from a disease that cannot be treated in the medical network of the National Administration of Penitentiaries, the administration of the detention shall arrange to have the treatment under permanent guard in the medical network of Ministry of Health.

The reasons for taking such measures shall be notified immediately to the prosecutor during criminal prosecution or to the court during the trial.

The current Code of Criminal Procedure and, de lege ferenda, the new Code of Criminal Procedure set out very clear aspects of the procedure to repair the damage material or moral damage in case of miscarriage of justice and illegal deprivation or restriction of freedom. Thus, are stipulated the people who have the prerogative to establish the occurrence of these errors, way to determining the extent to entitled for compensation for the person who has suffered unfairly and how to grant such repairs.

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?

a) The Senate considers that the difference between Member States' practices relating to the legal rules concerning the maximum duration of preventive arrest and regularity of the review concerning the preventive arrest is liable to create a negative impact on mutual trust. However, it is not creates major dysfunctions in relationships and mutual trust between Member States, because the European Union building the area of freedom, security and justice on compliance with the values of human dignity, liberty, democracy, equality, rule of law and respect for human rights. These values are common to the Member States in a society characterized by pluralism, non-discrimination, tolerance and justice. All EU Member States are also members of the Council of Europe and signed the Charter of Fundamental Rights of the European Union, so that they comply with the provisions of the Charter, of the ECHR and the principles of interpretation laid down by the Court, in the matter of pre-trial detention.

b) In an overall assessment, reducing the duration of pre-trial detention, whether or not to set a maximum duration of such measures into national law may be achieved by the creation of

judicial procedures characterized by celerity, which guarantees of the defendant its proceedings within a reasonable period, in accordance with the principles of the rules of law.

For example, In 25 October 2010, for example the Romanian Parliament adopted Law No. 202 on the measures to accelerate the settlement of the process, whereby the court of the trial, may lay down shorter times even from one day to other, or have the attendance by any means of communication.

We consider appropriate to adopt a Directive of the European Parliament and of the Council, under to Article 82 (2) and (3) of the TFUE, to establish minimum standards on the field.

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?

Yes, this possibility is already being used when those preventive arrested and subsequently release circumvent the criminal investigation or trial.

Romania has not yet transposed the Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union. For this reason, the Romanian courts may still be reluctant to give freedom under judicial control or on bail a foreigner, as Romania is not a part to the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offender.

Therefore, there are rare cases when an European arrest warrant issued for people who circumvent the obligations imposed by release under judicial control or bail. Most often the mandates of the European arrest warrant shall be issued in the case of persons prosecuted which circumvent the tracking or sue on the territory of another Member State, in which case an internal preventive arrest warrant in absentia is issued, under which is issued the European arrest warrant.

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?

Senate considers that it would be useful to have the European minimum standards on the maximum remand periods and to review periodically the cases of preventive detention, in view of the increasing cross-border crime and thereby the need for an effective international judicial cooperation.

In Romania the preventive arrest ceases when the duration of the arrest reached half of the maximum penalty prescribed by law for the offence forming the subject of accusations, before the pronouncement of a judgment of conviction at first instance.

We consider appropriate to adopt a Directive of the European Parliament and of the Council, under to Article 82 (2) and (3) of the TFUE, to establish minimum standards on the field.

Another way to reduce preventive detention is to shorten the duration of court proceedings.

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

In Romania the children under 14 years are not criminally liable, and those between 14 and 16 years are criminal liable only if it is proved that they have committed the act with discernment.

The Romanian Criminal Code provides for a series of non-custodial measures: reproving and supervised freedom. Measures involving deprivation of liberty are the internment in a re-education centre and internment in a medical-educational centre.

In the new Criminal Code the educational measures for juvenile offenders are: the civic education programme, the monitoring, stand-by duty at the weekend and daily assistance. The coordination of all these measures is carried out by the probation service and with the involvement of other institutions and organizations, and family.

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?

a) Starting with 2010, the Romanian penitentiary system monitors the ECHR pending cases and those pronounced against the Romanian State, the information being used in order to harmonise the legal framework of national criminal law with the European standards.

We consider that at the level of the European system, it is necessary to identify relevant indicators to reflect the application of European standards of detention. Following the establishment of indicators, in order to achieve an image of the whole, the Member States shall complete the required data. Following the conduct of meetings, it can set a reporting mechanism by mutual agreement. In this regard, we appreciate that it is necessary to establish contacts/liaisons by every place of detention with tasks in the collection and transmission the necessary information.

b) To achieve these goats, we consider that it might help to establish a mechanism of mutual evaluation and to create an European networks of cooperation between the administrations of national penitentiaries, which has a task among other the development of guidelines for ensuring the uniform interpretation of the standards in the field of treatment of persons deprived of liberty and detention conditions and the organisation of exchanges of good practices between Member States.

In addition, consolidated data at the level of the Council of Europe and the communication of good practices in the field, can constitute benchmarks for the improvement of national legislation with a view to harmonizing them with that applied by other countries of Europe.

10) How could the work of the Council of Europe and that of Member States be better promoted as they endeavor to put good detention standards into practice?

At the level of information offices operating in the Member States it may appoint persons who shall monitor the application of the rules of detention, informing the Council of Europe in this respect. The data and the information may be collected, analyzed and disseminated by the competent Ministers of the Member States.

We consider that the European penitentiary rules must be distributed by the prison administrations and/or ministries at every place of detention and to organize training sessions for staff of penitentiary and judicial and police authorities.

In addition, we consider that it would be necessary and useful to draw up guidelines to ensure the uniform interpretation of the standards in the field of treatment of persons deprived of freedom and of the conditions of detention but also initiating exchanges of good practices between Member States.

President
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