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COMMISSION STAFF WORKING DOCUMENT

Accompanying document to the

Proposal for a

COUNCIL FRAMEWORK DECISION

on the European supervision order in pre-trial procedures between Member States of the European Union

{COM(2006) 468 final}

IMPACT ASSESSMENT SUMMARY

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SUMMARY

1. INTRODUCTION

The possibility of a proposing a Framework Decision relating to mutual recognition of pre-trial supervision measures has been on the agenda of the Commission since several years. A possible Framework Decision in this area was discussed in three experts' meetings (2003, 2004 and 2005) as well as in different reflection documents, the most important being the Green Paper[1] and the annexed Commission Staff Working Paper.[2] The Commission has also received a large number of responses and comments from the Member States and the civil society on the issue.[3]

During the consultation process it became clear that the available statistics on the numbers of people involved was not sufficient to fully inform any proposal in this area. In order to provide the Commission with further statistical data for its assessment of the question whether a Framework Decision would constitute an added value, it decided to consult an external contractor. The external contractor provided the methodological tools in line with the Commission's guidelines and the handbook on impact assessments. He carried out an integrated assessment of the direct and indirect impacts of a range of policy options – which are described in the explanatory memorandum to the proposal ("impact assessment"[4].

2. NUMBERS OF NON-RESIDENT PRE-TRIAL DETAINEES AFFECTED BY A NEW INSTRUMENT

During each calendar year, it is estimated that almost 10,000 EU nationals are detained in pre-trial detention in EU countries other than their normal country of residence. At any moment, there are around 4,500 EU nationals in pre-trial detention in EU countries other than their normal country of residence.

This information is based on the analysis of the existing criminal justice statistics and information collected directly from the Member States' authorities during this study. Full information and assumptions underlying such assessment of the numbers of EU nationals in pre-trial detention are given in Annex 1 of the Impact Assessment.[5]

Some of the 10,000 EU nationals detained per year would, even if they were residents of the country in which they were suspected of committing the crime, still have been detained. If the nature of the crime is particularly serious and/or the suspect is considered to be dangerous if

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1 COM(2004) 562 final.
2 SEC(2004) 1046.
3 Available at http://europa.eu.int/comm/justice_home/news/consulting_public/.
4 p.6 – p. 8.
5 p. 36 – p. 38.

at liberty, then pre-trial detention is applied both in the country of normal residence and 'abroad' in other EU Member States.

It is therefore necessary to estimate how many EU nationals in pre-trial detention are charged with very serious offences and would be unlikely to be transferred to their ordinary country of residence during the pre-trial period. In the absence of established statistics in this area, murder, rape and robbery were considered to be such serious offences. Based on the data from several countries, it was estimated that as many as 80% of EU nationals currently in pre-trial detention could be potentially subject to a pre-trial transfer order and application of alternative measure than pre-trial detention.[6]

Thus, assuming that the evidence base for prosecuting suspects (or beginning proceedings) is similar in all Member States then as many as 80% of EU nationals in pre-trial detention in a Member State other than their normal country of residence could be applied alternative pre-trial supervision measures. This would suggest that during a year as many as **8,000 EU non-resident pre-trial detainees** could be subjected to an alternative pre-trial supervision measure.

3. PROBLEMS AND ISSUES EXPERIENCED BY EU-NATIONALS IN PRE-TRIAL DETENTION

There is a danger that EU non-residents are remanded in custody in the pre-trial period more often than home nationals. This is because the courts perceive there to be a greater risk of flight due to the lack of social ties in the country where they are being accused of a crime. An important contributory factor to this perception might be a lack of verifiable information available to the issuing court. The court in a 'foreign' country is in a difficult position to make a risk assessment. There could be problems with interpretation and translation of key documents, there is a risk of xenophobia and culture clash in accepting evidence on the suspect from a foreign country. There is also a problem that the court has to rely on written documents, whereas home nationals may be able to call oral witnesses to vouch for them. There could be no questioning of the written documents, which could thus be given less weight by the court.

Such tendency is supported by data in Table 3.1 (of the Impact Assessment[7]). It shows that the proportion of EU nationals in general is much higher in pre-trial detention than in the overall prison population. In some countries, the difference between EU nationals in pre-trial detention and EU nationals in the overall prison population is striking.

EU nationals in pre-trial detention also face problems of language and understanding a legal system different from their own. Being in pre-trial process in a 'foreign' country, the language

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6 This is based on 2005 data obtained from the Netherlands and Finland, where around 40% of all pre-trial detainees were facing charges of murder, rape and robbery. However, on closer examination it appeared that EU nationals were half as likely to face such charges as home nationals. In the Netherlands, 4.4% of all pre-trial detainees were EU non-residents, but only 3.2% of those charged with murder, rape and robbery were EU non-residents. In Finland, similarly, 8.5% of all pre-trial detainees were EU non-residents whereas only 2.2% of those charged with murder, rape and robbery were EU non-residents. Therefore, it was estimated that only 20% of EU non-citizens in pre-trial detention would be facing charges of very serious crimes such as are likely to rule out the possibility of being eligible for a pre-trial transfer order.

7 p. 8.

problems, together with the distance from the support networks of family and friends, has serious repercussions, for example, difficulties to prepare a proper defence.

Such incidences of discrimination clearly jeopardise the common area of freedom, security and justice, one of the key objectives for the European Union and its Member States.

As shown in table 3.2 (of the Impact Assessment[8]), the average length of pre-trial detention is 5.5 months, though there are wide variations between the Member States (from 42,5 days to 365 days). This variation, and in particular the very long average periods of detention in some Member States, compound the discrimination that EU citizens can experience. Not only are they detained in circumstances where in their country of residence they might not be, but also the period of detention might also be longer than that they would have experienced as a suspect in their country of residence. There are also other variations in the circumstances surrounding pre-trial detention which although not a form of discrimination are inconsistent with the objective of a European area of freedom and justice. These include the types of crime for which pre-trial detention is applied and the conditions of detention.

According to one interviewee consulted in the course of the study, ' …the core problem in the Member States is the excessive use and length of pre-trial detention… there is a misapplication of traditional tests used to determine conditional release… other reasons for the excessive length of pre-trial detention are a backlog of cases, bureaucracy or underinvestment…'.

4. COSTS

Many people who have been held in pre-trial detention are eventually acquitted. For example, in the UK, that in 2003, of people who had spent at least part of their pre-trial period on remand in custody (i.e. pre-trial detention) 22% of males were acquitted and 19% of females. Only 49% of males and 40% of females finally received a custodial sentence (prison). So, around 1 in 5 pre-trial detainees are acquitted. Table 3.3 (of the Impact Assessment[9]) shows sentencing and acquittal rates in other EU Member States, where these vary to a significant extent.

Given that it was earlier estimated that there are around 10,000 EU non-resident pre-trial detainees, it could be expected that at least around 20%, or around 2,000 people, would be acquitted. The financial cost to these 2,000 people of pre-trial detention could be in the region of 22 million euros (assuming the cost to individual would be around 11,000 euro, based on average length of detention 5.5 months x 2,000 euro).

Pre-trial detention also has a cost implication for the public authorities. Table 3.4 (of the Impact Assessment[10]) presents data for some EU Member States on the average monthly and yearly cost of pre-trial detention. On average, it costs around 3,000 euros to keep a person in prison per month. Given that around 8,000 EU non-residents could be potentially transferred to their normal country of residence, the current cost of keeping them in prison in pre-trial circumstances is costing around 132 million euros (8,000 persons x 3,000 euros monthly cost x 5.5 month average pre-trial detention period).

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8 p. 10.
9 p. 11 – 12.
10 p. 12 – 13

On the contrary, alternatives to the pre-trial detention are significantly more cost-effective when compared to detention in prison.

5. ASSESSMENT OF THE PREFERRED POLICY OPTION

According to the explanatory memorandum, the preferred policy option is a "new legislative instrument for mutual recognition of pre-trial measures incorporating a specific return or pre-trial transfer mechanism".

5.1. Benefits of the preferred policy option

The following benefits could be attributed to the policy option where the mutual recognition is supported by an enforcement mechanism to reduce the risk of suspect absconding from justice:

– *Ensuring individual rights and equal access to justice*. This policy option would ensure that EU non-residents are not discriminated against in the pre-trial process in the Member State and are not treated other they would have been in their country of ordinary residence.

– *Reducing notional costs of injustice*. In the current situation, per year, as much as 10,000 EU non-residents spend on average 5.5 months in pre-trial detention. In this policy option, where cross-border alternative supervision measures would be mutually recognised, a significant proportion of these people could avoid a lengthy pre-trial detention period, which carries a significant cost, not least in the form of the loss of earnings.

– *Decreasing the risk of absconding*. If the mutual recognition of alternative pre-trial supervision measures is backed up by an implementation mechanism, the risk of a suspect absconding would be reduced. Such risk would of course not be eliminated, but with the enforcement mechanism it would be reduced.

– *Reducing the costs of detention*. This policy option is very likely to increase the use of pre-trial supervision measures in relation to EU non-residents. In this way, significant savings of detention costs (and a significant reason of prison overcrowding) can be anticipated.

– *Influence on judicial and police co-operation*. In this policy option, it can be anticipated that the judicial authorities would have to co-operate in establishing pre-trial supervision measures to a significant degree. However, police co-operation would be even greater, as it can be anticipated that police authorities would play a major role in implementing the supervision measures (*e.g.* reporting to the police) and ensuring the enforcement if the suspect fails to appear before the trial.

5.2. Costs associated with the preferred policy option

One of the considerations in assessing the cost effectiveness of alternative measures to pre-trial detention is the cost of ensuring that EU non-residents sent back to their normal country of residence are present at the court proceedings. At the moment, a significant proportion of EU non-residents are detained in the country where they are accused of committing a crime because of a risk they will fail to appear before a court.

If an instrument on mutual recognition of pre-trial supervision measures is implemented, and such persons are sent to their home country subject to alternative supervision measures, it could be anticipated that some of such people would abscond and not appear at the trial. In such cases, the enforcement mechanism would ensure that such people are detained in the country of their residence and transported securely back to the trial country. The costs of such enforcement would consist of the following:

– Wages of police staff escorting the suspect – it can be anticipated that on average 3 people would be needed for 2 days.

– Cost of flights for the police staff (average €600).

– Cost of hotel accommodation for the police staff (average €100).

It can therefore be anticipated that the cost of police authorities ensuring the suspect's appearance at the trial would be significant, and would probably have to be borne by the police authorities in the state of suspect's residence.

However, the use of technology in pre-trial process should also be taken into account in assessing the costs associated with the preferred policy option. In particular, the use of video-conferencing in pre-trial process should be considered. This is already supported within the framework of the European Convention on Mutual Assistance in Criminal Matters, which provides for the hearing of evidence by way of videoconference where this does not infringe any fundamental principles of law. A recent report surveying the practice of the laws of evidence in criminal proceedings throughout the EU found that most Member States are equipped with facilities to allow taking of evidence by video-conferencing means.[11] In addition, a small number of Member States indicated that procedures involving the presentation of evidence by way of video-conference were being considered for introduction or were under review. One of the findings of the study was also that the admission of evidence by video-conference is permitted in circumstances such as when the witness is abroad.

The use video-conferencing facilities in pre-trial process when an EU non-resident is subject to alternative pre-trial supervision measures could lead to significant cost savings in a number of circumstances such as:

– If a suspect has breached the conditions of alternative pre-trial supervision measures, the authorities in the trial state would usually hold a hearing to decide about the sanctions for such breach. If video-conferencing facilities are used in the state of residence, this would allow saving the costs for the suspect to travel to the trial state and, possibly, costs of accompanying staff in the state of residence.

– In a number of Member States, the suspect is required to appear regularly at the police and prosecuting authorities at several points in pre-trial process. If such a suspect is transferred to his/her country of residence and subjected to alternative pre-trial supervision measures, he/she would be required to travel to the trial state to appear in pre-trial process. However, if video-conferencing facilities are used on

[11] 'The study of the laws of evidence in criminal proceedings throughout the European Union', The Law Society of England and Wales, Summary Report October 2004.

such occasions, this would allow saving the costs for the suspect to travel to the trial state.

In conclusion, the use of video-conferencing facilities would help to maximise the likelihood that cost savings would be achieved in the preferred policy option.

5.3. Proportionality and European added value

The EU added value through the mutual recognition of pre-trial supervision measures can be identified in the following areas.

This policy option would provide a solution to the problems in the current situation of pre-trial detention where actions of the Member States have been clearly insufficient and an EU level intervention is required. Proportion of EU nationals in pre-trial detention is much higher compared to the proportion of EU nationals in the total prison population. EU non-residents are also less likely to be accused of committing serious crimes (such as murder, rape or robbery) than own country nationals. And yet, they are detained in pre-trial detention to a disproportionate degree and for offences in relation to which own country nationals would be subject to alternative measures rather than detention. Mutual recognition of pre-trial supervision measures amongst the EU Member States would certainly ensure that such discrimination of EU non-residents does not occur and that justice is guaranteed across the borders. Otherwise, the current situation, where the inherent principles of the criminal justice systems in the EU Member States lead to the discrimination of EU non-residents, would continue.