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FUTURE OF JUSTICE: DETENTION AND ITS ALTERNATIVES

According to the new Strategic Agenda for the Union (2019-2024), adopted by the June European Council, the Union is committed to building on and strengthening the fight against terrorism and cross-border crime and improving cooperation. Judicial cooperation in criminal matters plays an important role in the EU's efforts to protect citizens and ensure security. Effective cooperation is necessary for cross-border investigations of crimes such as terrorism or human trafficking. Without a well-functioning mutual recognition system, the EU would also lack the tools for the effective surrender or transfer of prisoners, for instance. Since the cornerstone of this cooperation is the principle of mutual recognition of judgments and judicial decisions, our emphasis must be on eliminating obstacles to mutual recognition. Recent case-law of the Court of Justice of the European Union (CJEU) shows that some of these obstacles relate to detention issues such as prison conditions and prison overcrowding¹.

The EU has recognised the importance of issues related to detention by launching, for instance, strengthened EU cooperation to prevent and combat radicalisation in prisons. This experience has shown that the EU has an important role to play as a forum for sharing best practices and identifying the need for common action. The EU should also play this role in the future, since new developments are emerging in the field of detention and its alternatives. More cooperation is needed also between the EU and the Council of Europe in order to improve synergies.

Consequently, the Finnish Presidency invites the Member States to continue discussions initiated by the previous Presidencies on ensuring effective judicial cooperation in criminal matters by overcoming obstacles of mutual recognition, with a particular focus on the use of alternatives to imprisonment.

Detention and its alternatives as an important part of EU justice policy

It is clear that serious offences require appropriate responses, and that detention is a necessary instrument in a criminal sanctions system. Detention should, however, be used as a last resort, and the criminal sanctions used should be both effective and proportionate. Detention and its alternatives have already been recognised as an important area of EU justice policy in the Hague Programme (2004)² and the Stockholm Programme (2009)³. In 2011, the Commission presented a Green Paper on 'The application of EU criminal justice legislation in the field of detention'⁴. The

¹ C-404/15, 659/15 PPU, Aranyosi and Caldaru.

² OJ C 53, 3.3.2005, pp. 1-14.

³ OJ C 115, 4.5.2010, pp. 1-38.

⁴ COM(2011) 327 final.

Green Paper recognised that it could be difficult to develop closer judicial cooperation between Member States unless further efforts are made to improve detention conditions and to promote alternatives to imprisonment. It also stated that the correct application of the Council Framework Decision on the application of the principle of mutual recognition on probation decisions and alternative sanctions⁵ would mean that probation measures and alternatives to imprisonment would be available in all legal systems across the Union. So far, however, use of the Framework Decision in practice has been limited. The same can be said of the Framework Decision on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention⁶. The next round of mutual evaluations will provide valuable information on why this is the case.

The European Parliament has also acknowledged the current issues relating to mutual trust and prison conditions in the EU. In its resolution of 5 October 2017 on prison systems and conditions⁷, the Parliament said that increasing prison capacity was not the sole solution to overcrowding. It stressed that efficient long-term management of penitentiary systems should be implemented, reducing the number of prisoners by more frequent use of non-custodial punishments – such as community service orders or electronic tagging – and minimising recourse to pre-trial detention.

In addition to the challenges of mutual recognition, poor prison conditions have also been linked to the EU-level discussions regarding radicalisation. In the conclusions of 20 November 2015 of the Council of the European Union and of the Member States meeting within the Council on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism⁸, alternatives to detention at all stages of criminal proceedings were mentioned as possible action when considering criminal justice responses to radicalisation.

Strengthening mutual recognition, mutual trust and the use of alternative sanctions

According to the December 2018 Council conclusions on mutual recognition in criminal matters⁹, the Member States are encouraged 'to have legislation in place that allows, where appropriate, to make use of alternative measures to detention in order to reduce the population in their detention facilities, thereby furthering the aim of social rehabilitation and also addressing the fact that mutual trust is often hampered by poor detention conditions and the problem of overcrowded prisons'.

In the June 2019 Justice and Home Affairs Council meeting, the Council took note of a Presidency report¹⁰ in which several issues relating to detention conditions and how they affect the use of mutual recognition instruments were pointed out. Several

⁵ 2008/947/JHA.

⁶ 2009/829/JHA.

⁷ A8-0251/2017.

⁸ 14419/15.

⁹ OJ C 449, 13.12.2018, p. 6.

¹⁰ 9728/19, 'The way forward in the field of mutual recognition in criminal matters'.

short-term measures that could be used to build up mutual trust and improve judicial cooperation were addressed. The suggested measures are valuable and can provide partial solutions to the issues encountered in the use of mutual recognition instruments. For instance, at the request of the European Commission, the EU Fundamental Rights Agency is currently building an online database consisting of a comparative table comparing the basic conditions of detention in all Member States against international standards.

In addition, long-term solutions to the underlying problem – namely, poor prison conditions and prison overcrowding – should be sought as well. As suggested in the abovementioned report, the most effective solution for dealing with these challenges would be to eliminate potential violations of human rights, notably with regard to prison conditions. Although it is the responsibility of Member States to solve issues regarding prison conditions at domestic level, it would seem crucial to try to find ways to meet these challenges at EU level as well. Poor prison conditions do not only pose an obstacle to the use of mutual recognition instruments but are also contrary to the core values that the European Union espouses. As stated in the Court of Justice Aranyosi judgement, the Charter of Fundamental Rights and the European Convention on Human Rights prohibit in absolute terms torture and inhuman or degrading treatment or punishment. The European Court of Human Rights has ruled on, and continues to rule on, a vast number of cases regarding detention conditions and prison overcrowding¹¹. This inevitably has an impact on mutual trust within the EU as well, as some of these cases concern EU Member States. There is thus a clear need for action.

Towards sustainable solutions

Despite joint and repeated recognition of the role alternative sanctions can play in strengthening mutual recognition and mutual trust, the possible benefits of increased use of alternatives to imprisonment need further analysis and attention. In addition to offering a partial solution to the problem of prison overcrowding – and lack of mutual trust – the use of alternatives to imprisonment can have various other benefits. These relate to the effectiveness of criminal sanctions. A long-term tradition of research¹² indicates that alternatives to imprisonment, such as community sanctions, use of open prisons or restorative justice, have societal benefits, e.g. fewer costs for maintaining prisons, better prospects for social rehabilitation and accordingly, less recidivism. In cases, where a prison sentence is deemed to be the correct criminal sanction, different systems of early release,

¹¹ There are currently around 12 000 pending applications raising issues relating to conditions of detention. Key note speech by Judge Siofra O’Leary, European Court of Human Rights; [https://www.coe.int/en/web/cdpc/high-level-conference-on-prison-overcrowding#{"43963802":1}](https://www.coe.int/en/web/cdpc/high-level-conference-on-prison-overcrowding#{)

¹² For example Andersen, L. H. and Andersen, S. H. Effect of electronic monitoring on social welfare dependence. *Criminology and Public Policy*, 13(3) (2014). p. 1-31; Andersen, S. H. Serving time or serving the community? Exploiting a policy reform to assess the causal effects of community service on income, social benefit dependency and recidivism. *Journal of Quantitative Criminology*. 31(4) (2015), p. 537–563; Bäckman, Olaf, Filipe Estrada and Anders Nilsson (2018). Locked Up and Locked Out? The Impact of Imprisonment on Labour Market Attachment. *British Journal of Criminology*, 58, 1044-1065; Klement, Christian. Comparing the effects of community service and imprisonment on reconviction: results from a quasi-experimental Danish study. *Journal of Experimental Criminology* 11(2). June 2015.

including adequate control and support during this process, may lead to offenders being more fit for society upon release. This in turn leads to a more secure society.

Exchanging best practices between Member States, combined with other efforts, could subsequently lead to enhanced mutual trust, and also serve as a tool in solving some of the problems related to prison conditions. The Commission already supports a number of prison-related activities via different financial programmes. During the Finnish Presidency, project partners¹³ will be invited to present in more detail the ongoing detention-related activities they support, particularly those related to alternatives to imprisonment, prison overcrowding and detention conditions.

Joint reflection is needed, for instance, on whether or not there is a lack of alternatives to imprisonment in Member States, or whether alternatives to imprisonment are used efficiently. It is also important to assess the use of alternatives to imprisonment throughout the entire criminal justice chain, from the pre-trial to the post-trial phase.

A common political commitment is needed to taking decisive steps towards eliminating the problem of prison conditions and prison overcrowding in EU. The focus during the next years should be in finding sustainable solutions to these issues. Synergy can be achieved by continuing the close cooperation with the Council of Europe and other organisations¹⁴.

Questions:

In light of the above, Ministers are kindly invited to debate the following questions:

- *In your country, what role do alternative sanctions play in criminal policy, and what are the best practices you would wish to share with other EU Member States?*
- *Do you agree that long-term efforts and joint commitment by EU Member States, the Commission and the Council of Europe are needed to tackle all obstacles to judicial cooperation in criminal justice? Do you agree that in this context attention must be given to the use of alternative sanctions, as they could provide partial solutions to problems related to mutual recognition and prison overcrowding?*

¹³ Such as European Organisation of Prison and Correctional Services (EuroPris) and Confederation of European Probation (CEP).

¹⁴ Since 2016, the Commission has been providing a direct grant to the Council of Europe under the Justice programme aimed at the operation of an EU Forum of independent prison monitoring bodies (National Preventive Mechanisms or NPMs). Under this direct grant, the Commission is also financing the collection of the Council of Europe's Annual Penal Statistics, better known as SPACE (Statistiques Pénales Annuelles du Conseil de l'Europe), by ensuring that a common working methodology is applied to enhance comparability of data across Europe.

- *What role could the EU play in supporting the efforts of the Member States to reduce prison overcrowding, especially with the focus on exploring possibilities to increase the use of alternatives to detention and on non-legislative measures?*