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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) 327/3)

Response by the Quaker Council for European Affairs

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	An NGO working on issues of peace, human rights, economic justice, climate change and democratic accountability. We have been active in these areas at European level since 1979. We represent the views and concerns of European members of the Religious Society of Friends (Quakers), one of the traditional peace churches.
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1. Introduction

1.1. Our interest in detention

Quakers have taken an interest in prison conditions and criminal justice issues since the 1660s, when many Quakers in England were imprisoned and tortured for their beliefs. Our belief that there is that of God in everyone prompts us to see offenders as human beings with dignity and rights, and to care for their welfare no matter what their crimes. We do not believe that anyone is beyond redemption. Crime is an area where both forgiveness and justice are needed. Quakers' engagement with social and political problems, and in particular their work as volunteers within criminal justice systems, mean that we are conscious of the root causes of crime, and their effects on individuals' behaviour.

QCEA has been working on criminal justice issues since 2004. Our research has chiefly centred around prison conditions, rather than those in other forms of detention. Since our criminal justice programme started in 2004, it has resulted in three research reports, *Women in Prison* (2007), *Investigating Alternatives to Imprisonment in Council of Europe Member States* (2010), and *The Social Reintegration of Ex-Prisoners in Council of Europe Member States* (2011). The main thread running through these is an interest in detention conditions.

Our research comparing the operation of prison systems across Europe has led us to certain conclusions, which we clarify here because they inform our thinking about the questions in the Green Paper. We support the Basic Principles contained in the Council of Europe's (CoE's) 2006 revision of the European Prison Rules (EPR), which have already been agreed to by every Member State of the European Union. These state in particular that imprisonment is to be used as a last resort, that the human rights of prisoners are to be respected, that all detention is to be managed with rehabilitation and reintegration to society as its end, and that lack of resources is no justification for infringing prisoners' human rights. Separate CoE guidelines on the use of pre-trial detention (Rec(2006)13) outline how the use of pre-trial detention (PTD) should take place: again, it is envisaged as a last resort, to be used where no alternative is possible, and to be managed consistently with the legal status of presumed innocence.

However, it is well-known, not least from the work of the European Committee for the Prevention of Torture (CPT) that the application of these standards varies widely among the Member States of the EU. Our work in this area has led us to believe that:

- In some countries, detention is used not as a last resort, but as the default option, especially in the case of pre-trial detention.
- Detention damages those who are detained, especially (but not only) in systems that operate above 100% capacity.
- In some cases, this damage is disproportionate to the harm done by the original offence.

- Effective alternatives to imprisonment, which do more to prevent reoffending, exist for some types of offenders.
- Effective alternatives to PTD, which satisfy the aims served by detaining suspects, exist for some criminal suspects.
- Reducing the unnecessary use of detention both pre- and post-trial is among the most effective ways to reduce overall prison populations.
- It is unacceptable for prisons to operate for extended periods at above 100 per cent of their capacity, because of the extent to which this compromises their rehabilitative function.

1.2. The policy context

We believe that the problems created by inadequate and uneven detention standards have been apparent for some time. Also apparent has been the extent to which this damages 'the trust that underpins judicial cooperation' among Member States. This can be seen from high-profile challenges to existing mutual recognition instruments, such as the Rettinger case in Ireland. Such cases suggest that the questions asked in the Green Paper are belated, though we welcome them as a step in the right direction.

The Commission's interest in detention conditions is also timely in view of the increased importance that such conditions will acquire as more mutual recognition instruments come into effect. We believe that such cases will increase in number after the implementation of Council Framework Decision 2008/909/JHA, which is due to be incorporated into national law by December 2011. Prisoners who can no longer refuse consent to their transfer (as was the case under the previous Council of Europe agreement) may express concern about detention conditions in the state to which they may be transferred.

Information from several sources suggests that these concerns would be legitimate. Not only our own researches, but also the reports of the CPT and other inspection authorities, as well as the case law of the European Court of Human Rights, suggest that detention conditions in some EU Member States fall far short of the levels required by the European Convention on Human Rights. The statistical research quoted in the Green Paper points to significant overcrowding, which never results in improved conditions of detention.

The reasons for these differences are numerous and complex, and in some cases, Member States' prison estates require many years of continuous investment. In the current economic climate, that is a challenge. Even so, the EU itself has undertaken to accede to the European Convention on Human Rights and ought to be concerned not only by the efficiency of its mutual recognition instruments, but also by the very real problems that exist in Member States' detention arrangements.

Though the administration of prisons and places of detention remains a Member State competence, we believe that the unevenness of detention standards in different Member States of the EU, along with the lack of progress in raising them so far, means

that there is a strong case for EU action in this area. We would also argue that in some areas, the diversity of Member States' practice (if not of actual legislation) is such that the Council's power to set minimum standards to underpin mutual trust may be required.[1] It is our belief that there is sufficient concern within the European Parliament about detention conditions for the Council to secure the Parliamentary consent necessary for such a step.

Even so, the record of the EU in legislating matters such as the European Arrest Warrant shows that hurried legislation can do harm as well as good. If the EU sets minimum standards to guide its members, these must not dilute or undermine the standards that exist in the European Prison Rules, or otherwise undermine the work of the CoE. We therefore believe that the EU's action in this area should be to assist Member States in raising standards to the levels expressed by Recommendations of the Council of Ministers of the CoE, through incorporating those standards to binding legislation if necessary.

2. Our responses to specific questions in the Green Paper

We represent Quakers from around Europe, and do not have points to make from a particular nation's point of view. Where the questions in the Green Paper enquire about the experiences of individual countries, therefore, we have replied by using such information as we are aware of from an international perspective.

2.1. Questions on mutual recognition instruments

Question 1

[Pre-trial]: What non-custodial alternatives to pre-trial detention are available? Do they work? Could alternatives to pre-trial detention be promoted at EU level? If yes, how*?*

Member States of the EU have a range of different measures that can be used as alternatives to pre-trial detention. These range from bail (the requirement to make financial guarantees to appear at trial) to the requirement to give undertakings of various sorts, such as the undertaking to reside at a particular address, not to have contact with the victims or witnesses, or to wear an electronic monitoring device that will help locate the suspect.

We are aware of no rigorous academic studies specifically intended to assess the effectiveness of alternatives to pre-trial detention. It is extremely hard to make meaningful comparisons between the practices followed by individual EU countries because of the wide variations in how they apply alternatives, and in the way in which they define pre-trial detention. There is, therefore, a clear need for further study in this area, and the EU should give whatever support it can to efforts to carry it carry it out.

[1] See Article 82 (2) of the Treaty on the Functioning of the European Union, downloaded 5 September 2011, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF

What we do know, however, is that non-custodial measures are considerably cheaper than custodial measures - roughly 20% of the cost of being held in custody - so unlike other roadmap rights, Member States cannot block them on cost grounds. The annual cost of pre-trial detention is €5 million.

The situation with non-nationals is discriminatory, because if the case is serious and the suspect considered a flight risk, the decision is always made to detain the suspect. Some states do not have a transparent process around bail-making procedures and as such there is scope for arbitrary decision-making.

It is worth recapping the acceptable grounds for pre-trial detention according to Recommendation (2006)13 of the Council of Europe on Remand in Custody. The Recommendation states that remand may be used to:

- Prevent a suspect from absconding, and ensure that s/he appears for trial;
- Preventing a serious offence from taking place[2];
- Preventing a suspect from interfering with the course of justice, and
- Preventing the suspect from posing a serious threat to public order.

Of these, the first three are used by all or nearly all EU Member States. The final one only applies in four countries, where it is exclusively linked to the threat of very serious offences such as terrorism.[3]

Legal systems in Europe fall into two broad categories when it comes to PTD: those where PTD is assumed to be the norm, the default option, and those where it is not. All EU countries possess provisions for alternatives to PTD, but only some have explicitly prescribed in law that it should only be used where its purposes cannot be achieved by other means. In countries that use bail widely, bail is the starting point, with PTD used only if there are reasons not to grant it.[4]

Bail is legally available in most EU countries, but is used very sparingly in non-common-law legal systems. The requirement that a suspect must provide a financial guarantee is seen in many judicial systems as discriminatory against the poor, who cannot afford such guarantees. EU action is unlikely to change this perception, but bail can be set at a level proportionate to the suspect's income. We believe that if this is done, it can be among the most effective alternatives.

What is clear, however, is that the simple fact that alternatives to pre-trial detention exist is no guarantee that the overall number of pre-trial detainees will fall. For example, in Belgium a study found that although alternatives exist, prosecutors request that suspects be detained pending trial in 92 per cent of cases.[5] In 63 per cent of those cases, the suspect is detained; in 30 per cent, the suspect is released;

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[2] There is usually a 'bar' in place determining how serious the threat of reoffending has to be for this to be used as a reason for PTD, but the precise placement of the bar varies greatly from country to country.

[3] van Kalmthout et. al. (eds.), *Pre-Trial Detention in the European Union*, p. 73

[4] *ibid.*

[5] *ibid.*, p. 173

and in only eight per cent of cases do judges impose freedom with conditions. In other words, the existence of alternatives is not preventing decisions about remand from being essentially binary – detain, or not detain. The authors of the Belgian study cite three main factors:

- The influence upon judges of the opinions of the police and prosecutors, who tended to favour PTD;
- The workload of judges, and the fact that they are expected to make decisions within 24 hours, and
- The fact that monitoring and supervision arrangements can be complicated and time-consuming to set up, meaning that in constrained timeframes, detention often appears (falsely) to be the only option.

This highlights larger problems that face judicial authorities making decisions on whether to detain suspects. If the suspect is homeless (often the case with criminal suspects), setting them free on condition that they reside at a certain address will not satisfy a judge that they will appear for trial. Likewise, if suspects are addicted to drugs or alcohol, or living chaotic lifestyles, judicial authorities may feel that they have no option other than detention. The Belgian study we have quoted argues that decisions to detain by default might be avoided if social and probation services have staff based at the court. Within the timeframe, they could respond quickly, making the necessary arrangements so that suspects may be assessed and appropriate non-custodial measures put in place.

This points towards one area for EU action: **to support projects that aim to create new alternatives to PTD, or to increase their use in practice, or to share the conclusions of projects that have worked**.

The other action that could be taken by the EU in this area is to set **common minimum standards for Member States to incorporate into their national law**. These common minimum standards should include:

- The requirement that PTD should only be used where its aims could not be satisfied by non-custodial alternatives;
- The requirement that judicial authorities explain their reasoning in writing, if they choose PTD over non-custodial alternatives;
- The requirement that any financial guarantees set to ensure a suspect's attendance at a court hearing be set at a level proportionate and appropriate to the suspect's income.

Common minimum standards of this nature would go a long way to establishing a baseline for mutual trust. A final option that is available to the EU concerns pre-trial detainees who are not nationals of the country where they are subject to criminal proceedings. Such prisoners are far more likely to be detained than non-foreigners, because judicial authorities have tended automatically to regard them as a flight risk.

It is plain that this stance is not justified. The existence of the European Supervision Order (ESO), which allows suspects to be supervised pending a trial by the relevant authorities in their home country, and of the European Arrest Warrant (EAW), which allows for an absconded suspect's rapid surrender to the prosecuting country, mean that the assumption that foreigners will not appear for trial is unsustainable. In some countries the number of foreign prisoners who come from within the EU makes up a significant proportion of the prison population held in PTD. If the European Union is serious about reducing the use of PTD, it should alter the wording of the ESO so that Member States are compelled to use an ESO as the default option when preparing criminal charges against an EU foreign national, and forced to explain any decisions to remand suspects rather than requesting an ESO.

Question 2

[Post-trial] What are the most important alternative measures to custody (such as community service or probation) in your legal system? Do they work? Could probation and other alternative measures to detention be promoted at European Union level? If yes,how?

QCEA published a study on this subject, *Investigating Alternatives to Imprisonment in Council of Europe Member States*, in 2010.[6] The resulting report gathered information from members of the Council of Europe, including eighteen EU Member States. In our survey, 17 countries answered a question about the kind of alternatives that were available in their justice systems.[7] The results can be seen in Table 1.

Table 1: Alternative sentencing options used by 17 CoE member states (including nine EU members)

Sentencing option	Countries from our sample using this option
Imprisonment	100%
Fines	100%
Conditional release / freedom	100%
Suspended sentence	93%
Community service	88%
Supervision by probation services	71%
Non-custodial drug rehabilitation	63%
Pre-court proceedings	57%
Restorative justice interventions	47%
Electronic monitoring	25%
Non-custodial sex-offender rehabilitation	12%

All EU Member States who answered the question had some pre-trial detention alternatives in their legislation, but there was a problem of lack of funds to assist in their practical implementation.

[6] The study can be downloaded from our website, at http://www.qcea.org/work/human-rights/alternatives-to-imprisonment/

[7] All countries surveyed had a different set of sanctions specific to their systems of juvenile justice. These are dealt with in our answer to question eight.

It is worth saying that few such alternative sentencing options are yet backed by the 'gold standard' evidence for social interventions, namely randomised control trials. There are several reasons, the most important of which is that it is extremely difficult to create control groups and to isolate the effects of single interventions. This conclusion was reinforced by our study, *Alternatives to Imprisonment*; governments consistently told us that they did not systematically collect statistics comparing the effectiveness of alternative sentencing options. Even so, there is strong anecdotal (if not outcome-based) evidence that the use of alternative sentences can reduce the likelihood of reoffending and assist offenders to reform their lives.

Alternative sanctions, where they do exist, are seen as an option mainly for less serious crimes, for example as a means of diverting youth offenders away from the formal justice system, or as a means of making amends for the damage done by a crime. Seven of the ten ministries of justice who answered the relevant question in *Alternatives to Imprisonment* said they believed that alternative sentences were more effective for less serious crimes. This may reflect a belief that alternatives are a 'soft' option, incapable of satisfying the public desire for retribution. Retribution as an aim is inimical to our Quaker way of thinking. We believe that methods such as restorative justice mediation offer offenders the chance to make genuine amends for their actions.

The EU cannot force Member States to use alternative sanctions but it has a good track record of supporting research and other projects that have increased understanding of them. Alternative measures to custody post-trial can be promoted at European Union level in a number of ways:

- Funding for rigorous research into their effectiveness
- Funding projects to share best practice among professionals
- Facilitating the exchange of information among Member States about the use and effectiveness of their alternative measures
- Regular reviews of the extent to which Council Framework Decisions 2008/947/JHA and 2008/909/JHA are being used. Such reviews must emphasise the experience of those whose sentences have been transferred, so that the rehabilitative success of the measures may be assessed.

Question 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?

The effect of poor detention conditions on mutual trust can only be negative. Although the EU has its charter of fundamental rights, and is in the process of acceding to the European Convention on Human Rights, countless reports by NGOs and the CPT underline wide variations in the degree to which detainees' and prisoners' human rights are respected in EU Member States.

We have already seen with the Rettinger case how an individual nation's detention conditions can disrupt the smooth operation of the EAW. It appears that this judgment has made its mark in Ireland: the case MJELR v. Nowakowski, heard on 29 June 2011, saw the subject of an EAW challenging his extradition to Poland, again on the basis of poor detention conditions there. If that appeal were accepted, it would appear to create a bilateral exception to the EAW between Ireland and Poland, for at least as long as the most recent CPT report on Polish detention facilities is unfavourable. We are not aware of further similar cases – we do not have the resources to carry out the kind of legal monitoring that would be required – but it seems unlikely that such challenges to EAW extradition will end there, at least not when it is known that detention conditions in the issuing state are poor. The failure to attend to uneven detention standards must not be allowed to continue, lest it result in the creation of a series of bilateral exceptions to mutual recognition instruments, on the grounds that country A's judges feel that country B's detention standards are unacceptable.

The problems are likely to be equally pronounced whether the EAW is issued to bring in a suspect before their trial/charge, or whether it is issued for someone who has already been sentenced and subsequently fled justice by seeking refuge in another Member State. In either case, the detention conditions are of direct relevance.

For pre-trial detention, this is the more so because of the disproportionate number of pre-trial detainees who are foreign nationals. If a foreign national is extradited to the issuing state, he or she is far more likely to be held in detention than for the same kind of crime in his or her own state, and therefore the issue of the conditions of detention becomes relevant.

Post-trial, detention conditions are clearly an issue, whether the prisoner in question is being extradited under a European Arrest Warrant or whether he or she is being transferred under Council Framework Decision 2008/909/JHA. Either way, a transfer to a system with widespread poor conditions of detention is unlikely to serve the interests of rehabilitation, and in some cases may constitute cruel, inhuman or degrading punishment or treatment.

It seems clear to us that there is a relationship between poor detention conditions and the proper operation not only of the EAW, but also of the forthcoming prisoner transfer agreement. Another unfortunate aspect of the situation is that there has been little rigorous research into the number of prisoners who would fall under the ambit of the prisoner transfer framework; this means that states may have little or no idea of how many inward and outward transfers they can expect under the new system.

It is also of concern that the Framework Decision contains no explicit requirement that prisoners (or their lawyers) should be given information about detention in the country to which they are to be transferred. As previously noted, there is also no requirement that prisoners must consent to their transfer. In these circumstances,

the potential that prisoners' fundamental rights may be infringed by transfers to a system with inferior detention conditions seems large. That underlines the potential of poor detention conditions to undermine mutual trust.

Likewise, mutual trust for extradition cannot exist if something is not done about the excessive and premature use of the EAW. There are well-documented cases cited by Fair Trials International in their excellent report of October 2011[8] of suspects being extradited prematurely and then held for long periods in pre-trial detention. QCEA advocates deferred extradition where possible with suspects not being extradited until the issuing state is trial- ready.

In cases of premature extradition there is also the issue of access to a lawyer, a limited ability to store case papers securely and for the suspect to be active in his or her own defence.

We would ask: is the proper operation of police and judicial cooperation measures in fact the most important problem here? That may be the Commission's reason for considering action here, but the more important problem is that there exist within the EU conditions of detention that are an affront to human dignity and the EU's own Charter of Fundamental Rights. If Member States are unable to resolve these issues, the EU needs to consider seriously what it can do to support them, and not only because it makes a piece of legislation less efficient.

2.2. Questions on pre-trial detention

Question 4

There is an obligation to release an accused person unless there are overriding reasons for keeping them in custody. How is this principle applied in your legal system?

As an international NGO based in Belgium, we do not have the legal expertise to answer this question in detail. Member States and NGOs in other countries are better placed to provide this kind of information and also to comment on the application of the law as it stands.

However, the Commission has recently funded research into PTD, and we have no reason to believe that the summaries in the resulting 2009 publication, *Pre-Trial Detention in the European Union*[9], are significantly out-of-date or incorrect. What is striking in reading those summaries is the fact that the use of PTD in many countries is not in fact a last resort but is, in practice, the norm. There are a variety of alternatives available – in fact, all countries possess alternatives in some form – but in some places they are not used. The problem seems to be a lack of funds to assist practical implementation.

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[8] Fair Trials International, Report: Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention, October 2011

[9] Van Kalmthout, A., Knapen, M., and Morgenstern, C. (eds.), *Pre-Trial Detention in the European Union* (Nijmegen: Wolf Legal, 2009)

Therefore we would remind the Commission: in considering the detailed responses to this question that will come in from governments and national NGOs, it must not forget that there is a contrast between legal theory and reality as it exists in practice. We recommend that the Commission fund meetings between lawyers in Member States (via their lawyers' associations) to discuss the position in practice in their particular Member State and to facilitate the exchange of best practice. The Better Bail decisions survey could be updated[10].

Question 5

Different practices between Member States in relation to rules on a) statutory maximum length of pre-trial detention and b) regularity of review of pre-trial detention may constitute an obstacle to mutual confidence. What is your view? What is the best way to reduce pre-trial detention?

Detaining those who are legally presumed to be innocent is a particularly severe infringement of the fundamental right to liberty. The suspension of that right may be justified under certain circumstances in the interests of the administration of justice, but the longer the delay in bringing a detainee to trial, the greater is the sacrifice of their rights.

Member States currently use a combination of maximum limits and regular reviews to reduce the use of PTD. An outline of some existing Member State practices shows how complex the picture is.

Most countries set time limits of some sort, but there is wide variation in how these are defined. Some countries (for example Cyprus, Germany or Lithuania) set time limits for the maximum length of PTD before a trial begins; others (for example Poland, Hungary, or Spain), define the maximum period of PTD as being up until the conclusion of a trial. Two countries (for example, Romania and Slovakia) have statutory maximum limits of both sorts. Yet another group of nations make no mention of specific maximum limits in their laws: Belgium, Finland, Luxembourg, Malta and Sweden.

There is also great variation among the actual statutory limits that are set. Among the nations who set a limit for the maximum length of PTD before the beginning of a trial, the limits range from three months (in Cyprus), to 25 months (in Slovakia). For nations who set limits on PTD before the conclusion of a trial, the limits range from eighteen months (in Portugal) to six years (in Italy).[11] And to make the situation more complicated still, not all of the limits that are set are absolute: in Poland and Spain (for example), PTD can be extended during appeals, in the Czech Republic, France and Spain, the total limit for PTD is calibrated according to the gravity of the crime; and in Germany, exceptions to the six-month limit are available in cases where the investigation is unusually complex.

[10] Better Bail Decisions, Law Society of England and Wales, 2003

[11] All of these figures on statutory maximum PTD lengths are taken from *ibid.*, pp. 81-82. In this consultation response we do not use them as a comprehensive guide, but to illustrate the complexity of existing Member States' law on this subject.

Despite the different arrangements that are in place, there is apparently little connection between the existence of a statutory maximum limit and the length of PTD, in practice, in that country, and not only because most countries' statutory maximum periods can, in practice, be extended. Although the different methods of counting PTD make comparisons difficult, neither Sweden nor Finland have statutory maximum limits of any kind, yet nor is the average length of PTD markedly prolonged in either country. In both countries, shorter periods of PTD are achieved solely through the use of regular reviews of PTD. Nor does the mere existence of a limit reduce the use of PTD. Italy has a six-year limit on PTD, and yet still has more remand detainees in its prison system than any other country in Europe apart from Luxembourg.[12] Indeed there is some evidence that in cases where there is a maximum period of detention, this is often used to the full.

In view of this, QCEA calls for a directive on rules for the decision-making process as to how PTD is ordered which would set out issues that the courts must and must not take into account. There should be an express requirement for a presumption in favour of release pending trial. The court must listen to defence submissions, must be independent and should consider the personal circumstances of the defendant. Poor case management should no longer be an acceptable reason for extending timescales.

Just as with time limits for pre-trial detention, there is a wide variation in how different Member States' legal systems apply the right of pre-trial detainees to have their detention reviewed. Most countries allow detainees to appeal once or more against the initial judicial decision to remand them in custody, though many also place restrictions on how frequently this may happen. Some countries require their prosecutors to regularly review pre-trial detention before a judge; others place the emphasis on the defendant to apply for release.[13] Where a regular review is specified, the period specified between different reviews can be identical, or at different intervals.

Both approaches (maximum time limits and regular review procedures) may be effective in reducing the use of PTD, but neither will succeed alone. If there is an upper limit for the length of PTD, the court and investigative systems must function efficiently enough to allow the majority of trials to take place before the limit. This in itself requires different elements of the investigative, prosecuting, and judicial systems to cooperate effectively. In the same way, creating a system of regular reviews is not sufficient on its own to prevent those reviews becoming a 'rubber-stamping' exercise. Considerable administrative skill is required to ensure that rights defined and guaranteed in law are in fact enjoyed in practice.

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[12] The comparison of the number of pre-trial detainees is taken from the statistics annexed to the Green Paper. Luxembourg's high proportion of pre-trial detainees is partly a result of the unusually high proportion of foreign nationals in its criminal justice system; as noted above, foreign nationals are far more likely to be seen as a flight risk and therefore to be remanded in custody.

[13] Such applications for release are procedurally different from a legal appeal against the original decision to detain, as spelled out in Council of Europe guidelines.

There may be other methods which, combined with the measures described above, may help to reduce the use of PTD. For all that PTD should be avoided where possible, there will be cases (for example, where the defendant has no fixed address) where judges may not be satisfied that an alternative to pre-trial detention can be made immediately available.

However, in such a situation, it may be possible to set up an alternative arrangement at a later date. In certain courts in England and Wales, Bail Support Officers (BSO) have the task of reducing the number of young offenders who are being placed on PTD. At a first court appearance, or a subsequent review hearing after PTD has been imposed, the BSO may offer a programme of support and monitoring to pre-empt a possible custodial remand. Such support may include accommodation, supervision meetings, and liaison with the young person's family and municipal authority. This offers an example of the value of regular reviews of PTD, but also the importance of having proper resources to ensure that alternative measures are not only available but workable too.

Although not binding, Council of Europe guidelines on pre-trial detention, Rec(2006)13, are useful tools for Member States and encapsulate Article 5 of ECHR case law.

Question 6

Courts can issue an 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?

As an international NGO we do not have the in-depth knowledge to answer this question on the operation of the EAW in different national contexts in detail. However, discussion with defence practitioners brought to light the fact that although they routinely ask for bail for non-nationals and refer to the availability of the EAW where the person in question does not comply with bail conditions, this does not trump flight risk in the eyes of most judges. The key would be to have the EAW and the ESO working in tandem.

QCEA recommends that once the ESO has come into force in December 2012, the Commission should issue an annual report on the ESO and produce a handbook on its use to assist Member States. The Commission should issue guidelines on the use of the ESO to judges, prosecutors and defence lawyers setting out how the ESO and the EAW can work together in tandem.

Question 7

Would there be merit in having European Union minimum rules for maximum pre-trial detention periods and the regular review of such detention in order to strengthen mutual trust? If so, how could this be better achieved? What other measures would reduce pre-trial detention?

The existence of such enormous variety in how different states try to limit PTD makes it hard to draw conclusions, but the unacceptable overuse of PTD in some countries indicates that there is a real obstacle to mutual trust and confidence in some of these arrangements; and if that is the case, then there is certainly a need for the EU to spell out minimum standards.

QCEA believes that maximum time limits are not the best way to achieve a reduction overall. Although they may be appropriately set at national level, identifying a single limit to be used as a minimum standard across the EU would be ineffective. This is because in most cases, maximum limits are not in fact absolute, and can in practice be extended. It is also because the imposition of a single limit would ignore the genuine differences between Member States' legal systems. Finding an appropriate level for a common limit would also be near-impossible: too high, and it would lower standards in countries which had a lower limit beforehand; too low, and it would set unrealistic targets for some countries.

We believe that a more effective option for the EU would be to set minimum standards for pre-trial detainees' procedural rights to a review hearing, much as the European Council has recently set minimum standards for the procedural rights of suspects in criminal cases. A properly-operating review system has better potential to reduce the use of PTD than does a system of maximum lengths whose parameters would have, to some extent, to be selected arbitrarily.

We would argue that the following points must be included:

- There must be a separate legal mechanism by which pre-trial detainees may apply for their freedom. Such a mechanism must be distinct from the procedures by which they may appeal to a higher legal authority for the review of the original decision to impose PTD;
- There must be defined minimum time limits after which a review of PTD becomes automatic, whether or not it has been requested by the detainee, and in which the burden of proof is on the prosecuting authorities to demonstrate that PTD continues to be necessary;
- Judicial authorities who impose or prolong PTD must publish written judgments in which they outline their reasons for imposing detention, and the reasons why alternative measures are not appropriate;
- In cases where one or more reviews of an initial decision take place, prosecuting authorities should be required to demonstrate that they have

explored any alternatives to PTD which might not have been available at earlier reviews because of the time it would have taken to arrange them;
- Decisions to impose or prolong PTD may only be justified on the grounds contained in §7 of the Council of Europe's Recommendation (2006)13 on the use of remand in custody, and not on the grounds of the severity of the alleged offence.

If the EU legislates to set minimum standards, Member States should also be required to monitor the extent to which different groups of suspects are detained before trials, so that potential discrimination against minorities and foreign nationals could be detected.

If the EU does not legislate to set minimum standards, it should move beyond merely encouraging and monitoring legislative reforms, and should become directly involved in sanctioning or supporting (for example by financial aid) Member States whose detention standards do not comply with established European and international standards.

Such a system would undoubtedly raise the bar on standards of detention, but this is justified by the unacceptable overuse and excessive length of PTD currently, as well as by the obstacle that uneven standards present to mutual recognition among EU Member States.

2.3. Questions relating to children

Question 8

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

The detention of children is not our area of main expertise and it is likely that other NGOs will be better placed to answer this question in detail. However, we believe that children should only be held in detention in genuinely exceptional cases. In some cases, children who have committed serious offences may require treatment in a secure setting, but such settings should never be the same as prisons, and in general we believe that the detention of children should be avoided at all costs. Alternative sanctions, which allow young people to remain in their families and their communities to address the underlying causes of their offending, should be favoured as a general rule.

Such alternatives exist in many EU Member States. Mediation and other forms of restorative justice, for example, are more typically available for juvenile offenders than for adults, and supervision in various forms by probation, education and health authorities is widespread. The problem here is not that there is a lack of alternatives to detention for children, though there is a lack of rigorous evidence on the success of different interventions.[14] Continued efforts to support research on

[14] Whyte, B., 'Effectiveness, Research and Youth Justice', 4 (1) *Youth Justice*, (2004), pp. 3-21

the subject should therefore be one strand of EU action. Increased coordination between the Council of Europe and Eurostat on the collection of relevant statistics should also be encouraged.

We have seen from the UK example of bail support officers that there are alternatives, and that they have been deployed specifically for young offenders. Many EU Member States prefer to avoid the use of monetary bail because poorer people do not have ready money to deposit with the court. Even if that is so, the existence of dedicated workers to liaise with social services allows judicial authorities to choose from a fuller range of non-custodial alternatives. So does the possibility of making an accused person surrender their travel documents, or report regularly at a police station. The issue here is not the lack of alternatives to detention that exist for child suspects. The issue is compliance with existing commitments.

All EU Member States are party to the UN Convention on the Rights of the Child, and to the Convention for the Prevention of Torture. Reports from the relevant monitoring Committees reveal concerns about the increasing use of detention, as well as its disproportionate use for children from minority groups, in a range of different EU Member States.[15]

This means that the problem facing the EU is essentially one of ensuring that its members comply with commitments they have already made. Although the EU cannot and should not supplant the relevant Committees and institutions monitoring these, it should recognise that the disparities between the practices of Member States in relation to child detention are potentially even more destructive to mutual trust. There exist major differences between EU Member States, even on such fundamental matters as the age of criminal responsibility. The possibility that a child national of country B could be held in PTD in country A is unlikely to be considered acceptable in country A if the offence (or the child suspect) cannot even be held criminally responsible under A's own laws.

The number of international criminal cases involving juveniles is likely to be relatively small compared to international cases involving adults. Nevertheless the extra potential for damage to mutual trust means that these cases should still be seen as important. Though there is a need for continuing research and comparisons between nations, it is hard to know whether the EU should legislate to create minimum standards in this area. We suspect that it is politically unrealistic for the EU to legislate and set a common age of criminal responsibility.

Therefore any future legislation cooperation measures should guarantee that judicial authorities in the executing state have the right to turn down an application for cooperation on the grounds that the executing state does not consider a child to be capable of trial for the crime in question. Providing for

[15] Kilkelly, U., *Measures of Deprivation of Liberty for young offenders: how to enrich International Standards in Juvenile Justice and promote alternatives to detention?* (Brussels: European Juvenile Justice Observatory, 2011), pp. 32-33

states to refuse cooperation requests may seem to be an odd way of achieving mutual trust and cooperation, but an important part of mutual trust is the survival, at a national level, of the integrity of certain fundamental principles.

In addition, the EU should urgently explore how it may encourage and reward Member States who are complying with international law on the detention of children, and alternatives to it.

2.4. Questions concerning detention conditions

Questions nine and ten of the Green Paper concern detention monitoring and detention standards; they ask what the EU could do to promote the guidelines put in place by the Council of Europe, and what the EU could do to support better monitoring by Member States of detention conditions.

We believe that these questions are closely connected and therefore lay out our response to them as a single answer. We have conducted research and gathered suggestions from Council of Europe papers, and also from conversations with stakeholders including National Preventive Mechanism coordinators (NPMs) in Member States that have ratified the Optional Protocol to the UN Convention Against Torture (OPCAT), a member of the European CPT, and others.

Question 9

How could monitoring of detention conditions by the Member States be better promoted? How could the EU encourage prison administrations to network and establish best practice?

Question 10

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

There is some existing cooperation between the EU and the Council of Europe. A conference on this subject was hosted by the Council of Europe in 2009.[16] Several themes emerge in the conference papers:

- **Resources**. Both OPCAT NPMs on the one hand, and the UN Subcommittee on the Prevention of Torture (SPT) and CPT on the other, complain that they lack sufficient secretariat support and resources to do their jobs properly.
- **Consistency of standards**. Much discussion focused on the problem that there were wide differences between detention conditions in different member states of the Council of Europe.[17] Some delegates were concerned that the interpretation of the OPCAT by the different NPMs could also vary in practice.

[16] Council of Europe, *New Partnerships for Torture Prevention in Europe*, proceedings of a 2009 conference, accessed 23 June 2011, available from http://www.cpt.coe.int/en/documents/cpt-apt-proceedings.pdf

[17] The same could be said of the Member States of the EU.

- **Coordination**. Another theme at the conference was the risk of overlap between the OPCAT system, which is administered by the UN Subcommittee on the Prevention of Torture, and the Council of Europe system, which is administered by the European Committee for the Prevention of Torture. Discussion focused on the ways in which they might be better able support one another, and on the risks of duplication and redundancy if they do not.[18]

In general, the CPT and the OPCAT are workable structures, but their effectiveness varies in practice. The EU is not the right body (and should not aim) to set and monitor its own detention standards – in other words, to replace them. It should instead expand the level of financial and organisational support it offers to these existing systems.

This is also the right time for the EU to act decisively in support of better detention standards, and to support better detention monitoring. Forthcoming EU instruments are likely to place significant strain upon prisons in some countries, while relieving pressure elsewhere. One likely result of Council Framework Decision 2008/909/JHA on prisoner transfer will be a net transfer of prisoners from Western European prisons to those in Eastern Europe. This is partly because there are far more Eastern European nationals in the prisons of Western Europe than vice versa, and partly because it is rarer for the foreign nationals in the prisons of Eastern Europe to be EU nationals, meaning the possible compensatory flow of prisoners from east to west is likely to be smaller.[19]

In general, and despite the existence of better conditions in some countries than in others, prison overcrowding is generally more pronounced in Eastern European countries, and the associated drop in detention standards is more pronounced. CPT visits to Eastern European states, including Member States of the EU, frequently highlight these and other issues. In addition, several Eastern European states (see table 2 on the next page) are among the EU members who have either not ratified the OPCAT, or have not designated their National Preventive Mechanisms, which means that the most internationally-accepted, politically independent model of inspection of detention facilities does not apply in those countries. The combination of latent overcrowding, inadequate inspection, and a likely influx of prisoners is a dangerous one and the EU should be mindful that a bad situation has partly worsened as a result

[18] A strong undercurrent in this discussion was certain structural blockages that need resolving before progress in this area can be made. For example, the principle of confidentiality, which is enshrined in the working methods of both systems, makes it hard for different monitoring bodies to share information, except in terms of what they have published. Thus the NPMs find it hard to support the work of the CPT, because they cannot (for example) follow up on specific problems that were identified by the CPT on a visit. The same applies in reverse. If the various Conventions could be amended so as to facilitate the disclosure of information without breaching confidentiality, it would enable the different parts of different systems to focus far more closely on the same problems. In March 2011, the Parliamentary Assembly of the Council of Europe recommended that the Convention be amended so as to address the confidentiality issue. We do not know if similar discussion has taken place around amending the OPCAT, but understand that it would need to happen before confidential information could be passed the other way, from the SPT or the NPMs to the CPT. For details of the PACE discussion and recommendation, visit the PACE website, at http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/EREC1968.htm [accessed 16 September 2011].

[19] Figures on the current distribution of EU nationals imprisoned in Member States other than their own are notoriously hard to come by, but there is enough reason to worry about the impact of the CFD. We have extrapolated some conclusions from the information included in a European Commission-funded study: van Kalmthout, A., Hofstee-van der Meulen, F., and Dünkel, F. (eds.), *Foreigners in European Prisons, Volume I* (Nijmegen: Wolf Legal, 2007), pp. 70-72

of the rushed promotion of mutual cooperation instruments, without careful attention to detention conditions.

There are still countries within the EU who have not ratified or signed the OPCAT. Full details can be seen in the table below:

Table 2: EU Member States and the OPCAT

	Signed?	Ratified?	NPM designated?	Notes
Austria	yes	no	no	Signed on 25 Sep 2003
Belgium	yes	no	no	Signed on 24 Oct 2005
Bulgaria	yes	yes	no	Ratified on 1 Jun 2011[20]
Cyprus	yes	yes	yes	
Czech Republic	yes	yes	yes	
Denmark	yes	yes	yes	
Estonia	yes	yes	yes	
Finland	yes	no	no	Signed on 28 Sep 2003
France	yes	yes	yes	
Germany	yes	yes	yes	
Greece	yes	no	no	Signed on 3 Mar 2011
Hungary	no	no	no	
Ireland	yes	no	no	Signed on 2 Oct 2007
Italy	yes	no	no	Signed on 20 Aug 2003
Latvia	no	no	no	
Lithuania	no	no	no	
Luxembourg	yes	yes	yes	
Malta	yes	yes	yes	
Netherlands	yes	yes	no	Ratified on 28 Sep 2010[21]

[20] Under the OPCAT, countries that ratify the OPCAT must designate their National Preventive Mechanism (NPM). They must provide the UN Subcommittee for the Prevention of Torture with the details of the NPM within one year and one month of the date of ratification. This means that Bulgaria has until 1 July 2012 to designate its NPM.

[21] The Netherlands had until 28 October 2011 to notify the SPT of the details for its NPM. Detailed planning has already taken place and the NPM will be led by the Netherlands' pre-existing prison inspectorate, *Inspectie voor de Sanctietoepassing*. See also footnote 20.

	Signed?	Ratified?	NPM designated?	Notes
Poland	yes	yes	yes	
Portugal	yes	no	no	Signed on 15 Feb 2006
Romania	yes	yes	no	Ratified on 2 July 2009[22]
Slovakia	no	no	no	
Slovenia	yes	yes	yes	
Spain	yes	yes	yes	
Sweden	yes	yes	yes	
UK	yes	yes	yes	

It is worth noting that a country's having signed and ratified the OPCAT, and designated its National Preventive Mechanism, is no guarantee that the NPM is organised or funded to the extent necessary to do its work. The quality of NPMs is crucially important for their independence. Many NPMs have complained of a lack of funding, and in some cases NPMs who have been staffed chiefly with lawyers have found themselves needing to make alternative arrangements so that they have suitably qualified psychiatric staff to ensure that they can carry out (for example) inspections of secure mental health facilities. So even if the EU finds a way to encourage or pressurise Member States to sign and ratify the OPCAT, there will be a need for ongoing support and networking so that individual NPMs can both share information with each other, and enlist the EU's support for their vital work, but which like much important work improving detention conditions, is sometimes vulnerable to changing political priorities.

It is also worth noting that the EU is making ratification of the OPCAT a condition of associating with nearby countries which have questionable records in protecting human rights records. [23] This is a case of double standards, at best.

It is high time the EU supported mutual recognition and cooperation measures with the requisite level of protection for the rights of detainees. It is well-placed to do so, and the issue has been, thus far, neglected in planning and preparation for new mutual recognition measures. We believe the following specific measures should be considered.

- **Practical and financial support for existing monitoring efforts**

[22] Article 24 of the OPCAT permits states to make a declaration postponing the nomination of their NPM by three years. Romania has done this, and so the fact that it has not yet designated its NPM should not be interpreted to mean that it is in breach of its obligations. See also footnotes 20 and 21.

[23] The Georgian OPCAT NPM has been implemented in a project led by Penal Reform International, and funded under the EU Neighbourhood Policy. For more details, see http://www.pri.ge/eng/TorturePrevention.php (accessed 14 September 2011).

- EU should make every effort to ensure Member States ratify and implement the OPCAT.
- Support networking efforts between different NPMs to encourage them to learn from each other's expertise, but…
- … NPMs generally struggle to fulfil their role on the money available, and the additional strain of taking time to share best practice with other NPMs is a significant burden. EU could financially support the exchange of ideas, practices and standards with regard to NPMs.
- Financially support the provision of training for countries who are ratifying OPCAT and creating NPMs; at present most of this is done by the CPT (which is stretched) and the Association for the Prevention of Torture (a charity).
- Grants to be made available to assist Member States in implementing the recommendations of their NPMs/the CPT
- Greater financial support to the work of the CPT, especially with regard to their secretariat support.

- **Other practical and financial support**
  - Consider grants to countries that are likely to receive a large influx of prisoners after the Framework Decision on prisoner transfer is implemented.
  - Support development of permanent liaison among prison administrations (The European Organisation of Prison and Correctional Services, known as EuroPris, was launched in October 2011 with EU funding support), with a specific brief to look at and share best practice relating to the implementation of the European Prison Rules
  - Make grants available to specific projects that will improve application of the EPRs.

- **EU's own actions**
  - If there are situations where the EU itself is responsible for holding people in detention, ensuring that its detention facilities are monitored, preferably by independent bodies, as a matter of course (currently, we believe the only example of EU-managed detention is the joint deportation flights organised by Frontex)
  - Create an information 'clearing house' for Member States to find information about each other's CJ systems and make informed decisions about cooperative measures; for example, where differences in normal practices for conditional release mean that a prisoner sentenced in nation A might be considered for release sooner than if transferred to nation B, prison officials in A will need to take this kind of information into account when taking decisions about how to deal with the prisoner.
  - Explore how it could assist CoE and UN to improve standards of collaboration between CPT and OPCAT NPMs – especially with regard to

how they might be able to share information and follow up each other's work.

- The EU should strongly endorse the Council of Europe's initiative to draft a European Code of Ethics for Prison Staff which if accepted by Member States would increase mutual confidence in detention conditions
- The EU should also support the call of the 16th Conference of the Directors of Prison Administration (CDAP) with the participation of Directors of Probation Services (organised by the Council of Europe on 13-14 October 2011) for the Council of Europe to consider drafting a European Code of Ethics for Probation Staff, which would likewise serve to increase mutual confidence among EU Member States.