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**GREEN PAPER**

**on mutual recognition of non-custodial pre-trial supervision measures**

(presented by the Commission)

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## GREEN PAPER

### on mutual recognition of non-custodial pre-trial supervision measures

The purpose of this Green Paper is to serve as a basis for discussions about the preparation of a Commission proposal for a new legislative instrument on mutual recognition of judicial decisions relating to non-custodial pre-trial supervision measures. A *Commission Staff Working Paper* associated with the Green Paper (SEC(2004) 1046) contains a detailed analysis of the relevant legal framework in this area and the Commission's thinking on how such an instrument could be drawn up.

#### 1. WHY IS THE COMMISSION PRESENTING A GREEN PAPER.

##### 1.1. Identification of the problem

The excessive use (and length) of pre-trial detention is one of the main causes of prison overpopulation. Owing to the risk of flight, non-resident suspects are often remanded in custody, while residents benefit from alternative measures.

According to general principles of law, custody pending trial shall be regarded as an exceptional measure and the widest possible use should be made of non-custodial supervision measures. However, the different alternatives to pre-trial detention that exist in national law (*e.g.* reporting to the police authorities or travel prohibition) cannot presently be transposed or transferred across borders as States do not recognise foreign judicial decisions on these matters.

The introduction of a legal instrument, which would enable the EU Member States to mutually recognise non-custodial pre-trial supervision measures, would help reduce the number of non-resident pre-trial detainees in the European Union. At the same time, the introduction of such an instrument would reinforce the right to liberty and the presumption of innocence in the European Union seen as a whole (*i.e.* in the *common* area of freedom, security and justice) and would decrease the risk of unequal treatment of non-resident suspected persons.

##### 1.2. Need for action

There is a clear mandate to take action on this issue under the measures 9 and 10 of the *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters* of November 2000<sup>1</sup> (hereinafter the "mutual recognition programme"), which was adopted at the request of the Tampere European Council. The details of this mandate are set out in chapter 2.2.1.3. of the Commission Staff Working Paper.

The need for action at European level has been stressed by the European Parliament in several resolutions, as well as identified by other regional cooperation bodies such as the Council of Europe and the Commissioner of the Baltic Sea States. It has also been highlighted by various Non Governmental Organisations (NGOs) operating in the field.

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<sup>1</sup> OJ C 12, 15.1.2001, p. 10.

### 1.3. Possible solution

The main idea of a new instrument on mutual recognition of non-custodial pre-trial supervision measures is to substitute pre-trial detention with a non-custodial supervision measure and to transfer this measure to the Member State where the suspected person normally has his or her residence. This would allow the suspected person to be subject to a supervision measure in his or her normal environment until the trial takes place in the foreign Member State. Different models on how to implement this idea are discussed in the Commission Staff Working Paper.

In order to ensure the compliance with a non-custodial supervision measure, the new instrument must contain, as a last resort, a coercive mechanism to return an uncooperative suspected person to the trial State, if necessary by force. It is rather the mere existence of such a possibility than its actual use that ensures the smooth functioning of the new instrument. It should be underlined that in the absence of possible recourse to coercive measures, there would be a risk (in the short and in the long run) that the relevant category of persons will not benefit from alternative measures at all. The different aspects of such a coercive mechanism are also considered in the Commission Staff Working Paper.

## 2. THE CONSULTATION PROCESS

The present Green Paper is the *third step* in the consultation process on alternatives to pre-trial detention.

The *first step* was to draw up and send out a *questionnaire* on pre-trial detention and alternatives to such detention in order to identify possible obstacles to cooperation between Member States in this area. The then 15 EU Member States submitted replies to the questionnaire. A summary of the replies concerning, *i.a.*, non-custodial supervision measures (alternatives to pre-trial detention) and applicable penalties in the event of non-compliance (as required under measure 9 of the mutual recognition programme) is in the Commission Staff Working Paper (annex 2).

The *second step* was to write a *Discussion Paper* on the basis of the replies to the questionnaire and to organise an *experts' meeting*. The Discussion Paper (of 24 April 2003), which was sent to a number of experts on pre-trial detention and alternatives to such detention in the EU Member States (and the then acceding countries), proposes, *i.a.*, the introduction of a so-called European order to report to an authority as a non-custodial pre-trial supervision measures at European Union level. The Discussion Paper further considers the limits and possibilities for taking action in the field of pre-trial detention in general. The *experts' meeting* was held in Brussels on 12 May 2003. Several experts, including representatives of NGOs, had been invited on an individual basis, while other experts represented their Member States. Eurojust was also represented. At this meeting, different aspects of pre-trial detention and alternatives to such detention were discussed, in particular the Commission's thinking on the European order to report. The Green Paper takes fully into account the outcome of that meeting (for further details, see the Commission Staff Working Paper).

### **3. OBJECTIVES OF THIS GREEN PAPER**

#### **3.1. To extend the debate to a wider audience**

The main objective of this Green Paper is to extend this consultation process to a wider audience, including, *i.a.*, practitioners, such as judges, prosecutors and defence lawyers, people working in the social and probation services, pre-detention establishments and prisons, professional organisations, academic circles, relevant NGOs and public authorities.

#### **3.2. To focus on mutual recognition of non-custodial pre-trial supervision measures**

The present Green Paper focuses on mutual recognition of non-custodial pre-trial supervision measures. Some relevant items (legal assistance, interpreter and translator, vulnerable categories, *e.g.* children and juveniles, consular assistance/right to communication and the “letter of rights”) have already been dealt with by the Green Paper<sup>2</sup> and the Proposal for a Council Framework Decision on certain procedural rights.<sup>3</sup> Although linked to the legal framework of pre-trial detention and alternatives to such detention, the Commission Staff Working Paper does not enter into details on those questions, unless this is deemed necessary.

#### **3.3 To explore the possibilities of taking action**

The introduction of a mutual recognition scheme for non-custodial pre-trial supervision measures at European Union level must, however, not be separated from the legal framework that governs pre-trial detention in general. It should be remembered that supervision measures in principle are *alternatives* to pre-trial detention. Certain fundamental principles that are applicable to pre-trial detention in general are *mutatis mutandis* also applicable to non-custodial supervision measures. Consequently these principles must be considered when drawing up an instrument on mutual recognition and enforcement of non-custodial pre-trial supervision measures.

The Commission Staff Working Paper explores the possibilities of taking action in this area in the light of existing conventions, case law and national legislation.

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<sup>2</sup> COM(2003) 75 final.

<sup>3</sup> COM(2004) 328 final.

The Commission invites you to comment on this Green Paper (including the Commission Staff Working Paper) and in particular on the questions listed below. The Commission would also welcome your comments on new developments in the field of alternatives to pre-trial detention in the Member States (including applicable penalties in the event of non-compliance with an obligation under a non-custodial supervision measure).

To facilitate exchange of views, a website is opened, hosting this Green Paper and a series of relevant links.

[http://europa.eu.int/xxx/livre\\_vert](http://europa.eu.int/xxx/livre_vert)

Until x x 2004, answers may be given, preferably to the following address:

[xxx-livre-vert@cec.eu.int](mailto:xxx-livre-vert@cec.eu.int)

or by post to:

*European Commission*  
*Directorate-General Justice and Home Affairs*  
*Unit D3 – Criminal justice*  
*B-1049 Brussels*  
*Belgium*  
*Marked for the attention of Mr. Thomas Ljungquist*

The Commission intends to organise a public hearing in 2004.

Question 1:

Considering the negative consequences of the present legal framework as regards the treatment of non-resident suspects in the area of alternatives to pre-trial detention:

- (a) Do you agree with the approach of the Commission with respect to mutual recognition of non-custodial pre-trial supervision measure as described in chapter 4.3. of the Commission Staff Working Paper (*i.e.* the possibility of monitoring the suspected person in his or her country of normal residence and the necessity to introduce a mechanism that ensures the presence of the accused person at the trial unless this person can be judged in his or her absence) in order to ensure the full EU-wide implementation of the right to liberty and the presumption of innocence?
- (b) If not, are there alternative solutions?
- (c) Please describe them.

- (d) Should a mechanism for mutual recognition of non-custodial supervision measures also cover less serious offences (*i.e.* below the threshold of Article 2(1) of the FD-EAW)?

Question 2:

Should a mechanism for mutual recognition of non-custodial supervision measures cover

- the situation when a suspected person, who already is subject to such measures and who, permanently or temporarily, wants to go to another Member State, makes a request for transfer of these measures to that Member State (as described in chapter 4.2.2.3. of the Commission Staff Working Paper)?
- if yes, under which conditions?
- the situation when the suspect has already gone to another Member State (as described in chapters 4.2.3.1., “suspect in breach of an obligation under non-custodial pre-trial supervision measure” and 4.2.3.2., “late application for non-custodial supervision measures”, of the Commission Staff Working Paper)?
- if yes, under which conditions?

Question 3:

- (a) Should the new instrument contain a provision on a specific non-custodial pre-trial supervision measure, such as the European order to report, possibly in combination with a travel prohibition order, as described above?
- (b) Would it be appropriate to let the *issuing* authority decide the non-custodial pre-trial supervision measures to be applied during the monitoring phase (in accordance to its national law) or in what way the suspected person should comply with a European order to report (*i.e.* how oft he or she should report, to what authority etc.)?
- (c) Would it be more suitable to let the *executing* authority choose the appropriate coercive measures in accordance with its national law, leaving to the issuing authority only to specify the objective to be monitored?
- (d) Would the Eurobail model be suitable?

Question 4:

- (a) Should the new instrument contain any mandatory grounds of refusal in the event of amnesty, final judgment and other final decisions or relating to the age of criminal responsibility?
- (b) Are the other grounds for refusal, contained in Article 4 of the FD-EAW, relevant in the context of an order for transfer of alternative measures?
- (c) In particular, should the executing authority have the right to refuse the execution on the ground of lack of double criminality?

Question 5:

Could there be conditions for enforcing an order for transfer of alternative measures other than:

- return to the State of residence for serving the sentence?
- possibility of revision in case of life imprisonment?

Question 6:

- (a) Should the issuing authority specify the obligation (relating to the three “classical dangers”, *i.e.* the dangers of re-offending, flight and suppression of evidence) to be complied with by the suspected person under the non-custodial pre-trial supervision measure in a form (in line with what has been said above) letting the executing authority decide coercive measures other than detention in the event of non-compliance?
- (b) Should the executing authority be obliged to report a (severe) breach of an obligation relating to the “three classical dangers”?
- (c) Should the executing authority be allowed to remand the suspected person in custody in the event of non-compliance with an obligation under a supervision measure and detain him or her until the trial takes place or should this authority return the suspect immediately to the issuing authority?
- (d) Could the participation of the suspected person through a video link from the executing Member State replace the physical presence of this person in the proceedings before the issuing authority as regards (only) the question whether he or she should be remanded in custody in the issuing Member State?
- (e) How should the situation be resolved where the issuing and the executing authorities have different views on whether a person who is in breach of an obligation should be remanded in custody or whether the danger can be eliminated by imposing a new obligation?
- (f) Should a mechanism to return the suspected person from the executing Member State to the issuing Member State apply to both the monitoring phase and to the trial phase?
- (g) Should the issuing authority specify the obligation to come to the trial or/and that the person in question could be judged *in absentia* in the event that he or she does not attend the trial and would this person have to consent to this obligation before he or she can benefit from an alternative measure in the executing Member State?
- (h) Should the executing authority, during the monitoring phase and the trial phase, be allowed to postpone the return of the suspected person?
- (i) In particular, should the executing authority have the possibility to postpone the return of a person who is suspected of having committed a new offence within its territory?