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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

TABLE OF CONTENTS

1.	Purpose of the Impact Assessment	5
2.	Stakeholders' consultation	5
3.	Problem definition	6
3.1.	Introduction	6
3.2.	Numbers of people in pre-trial detention	7
3.3.	Problems and issues experienced by EU-nationals in pre-trial detention	8
3.4.	Costs of pre-trial detention to people involved and to public authorities	11
3.4.1.	Costs to people involved	11
3.4.2.	Costs to public authorities	12
3.5.	Future trends	14
4.	Policy objectives	14
5.	Policy Options applicable to pre-trial supervision measures in the eu	16
5.1.	Introduction	16
5.2.	Summary of different policy options	16
5.2.1.	Summary of policy option 1: 'Do nothing' (Status quo)	16
5.2.2.	Summary of policy option 2: 'New legislative instrument for mutual recognition of pre-trial supervision measures'	17
5.2.3.	Summary of policy option 3: 'New legislative instrument for mutual recognition of pre-trial supervision measures and Extension of European Arrest Warrant to cover all offences'	18
5.2.4.	Summary of policy option 4: 'Co-operation programme'	18
5.2.5.	Summary of policy option 5: 'Eurobail'	18
6.	Assessment of the policy options	19
6.1.	Introduction	19
6.2.	Assessment of policy options	19
6.2.1.	Assessment of policy option 1: 'Do nothing' (Status quo)	19
6.2.2.	Assessment of policy option 2: 'New legislative instrument for mutual recognition of pre-trial supervision measures'	21
6.2.3.	Assessment of policy option 3: 'New legislative instrument for mutual recognition of pre-trial supervision measures and Extension of European Arrest Warrant to cover all offences	23

6.2.4. Assessment of policy option 4: 'Co-operation programme' 26
6.2.5.. Assessment of policy option 5 'Eurobail' 27
6.3. Conclusions 29
7. Assessment of the preferred option 30
7.1. Introduction 30
7.2. Benefits of the preferred policy option 31
7.3. Costs associated with the preferred policy option 32
7.4. Proportionality and European added value 33
7.5. Other considerations in the implementation of the policy option 33
7.5.1. Ensuring fundamental rights of a suspect 33
7.5.2. Operational concerns 34
8. Monitoring and Evaluation 34
Annex 1 - Statistical analysis of the problem 36
Annex 2 - alternatives to pre-trial detention in the new member states 47

Glossary

EU nationals	Citizens of 25 EU Member States who are abroad in other EU countries. These can be 'EU residents' and 'EU non-residents'.
EU residents	Citizens of 25 EU Member States who are normally registered in a Member State other than their country of citizenship, e.g. a French citizen residing in Germany
EU non-residents	Citizens of 25 EU Member States who are in a territory of a Member State other than their normal place of residence, e.g. a French citizen visiting Germany on a tourist trip. These are the main beneficiaries/objects of the proposal for the mutual recognition of non-custodial pre-trial supervision measures
Pre-trial detention	People in custody after being charged, or on remand in custody
Detention	Can involve being in prison without being charged
Issuing authority/Member State	Authority/Member State where a crime has occurred and which can subject an EU non-resident to an alternative non-custodial pre-trial supervision measure
Executing authority/Member State	Authority/Member State where an alternative non-custodial pre-trial supervision measure is executed

Acronyms used in this document:

EAW – European Arrest Warrant

EU – European Union

FD – Framework Decision

FD EAW – Framework Decision on the European Arrest Warrant

NGO – Non-governmental organisation

1. Purpose of the Impact Assessment

The possibility of a proposing a Framework Decision on mutual recognition of non-custodial pre-trial supervision measures has been on the agenda of the Commission since the adoption of the mutual recognition programme in criminal matters (2001). The proposal is in the work programme of the Commission for 2005 (2005/JLS/035) and set as a priority in the Commission communication on the Hague Programme (2004) as well as the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (2005).

A possible Framework Decision in this area was discussed in three experts' meetings (2003, 2004 and 2005) - to which the representatives of the Member States, judicial practitioners, academics and NGOs were invited – 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 and lack of other information (in particular as regards the legislation on non-custodial pre-trial supervision measures in the 10 new Member States that joined the Union in 2004) was not sufficient to fully inform any proposal on the mutual recognition of non-custodial pre-trial supervision measures. In order to provide the Commission with further statistical data (and national legislation) for its assessment of the question whether a Framework Decision in this area would constitute an added value, it decided to consult an external contractor. The Commission further decided that the responsible services (Directorate General Justice, Freedom and Security) would be assisted by an inter-service steering group including the most concerned services. The task of this steering group was to define the scope, to monitor the progress of the preparatory work for the extended impact assessment and to supervise the completion of the final report of the 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 - including a rough estimation of the costs/savings involved - defined after a careful analysis of the problems and objectives by using the appropriate analytical methods and participatory approaches in the framework of meetings of the inter-service steering group. The external contractor also had numerous contacts with different stakeholders.

2. Stakeholders' consultation

To prepare the Impact Assessment, the external contractor studied the above-mentioned documents produced by the Commission and the written responses and comments from the Member States and the civil society.

In the course of the preparatory study for the impact assessment, the following consultations

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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/.

have been undertaken.

– Contact with the authorities of the Member States to collect more up-to-date information on the numbers of people involved in the pre-trial detention and prison population overall. This was done in a number of ways:

  – Distribution of a questionnaire to the permanent representatives of the Member States in Brussels and follow-up contact to ensure the maximum returns of replies;

  – Direct contact with the prison administrations in the Member States.

– Direct contact with authorities and experts in several Member States to further explore the information and data provided. This was undertaken in the UK, the Netherlands and Finland.

– Review of responses of the Member States and other stakeholders to the Commission's Green Paper on mutual recognition of non-custodial pre-trial supervision measures.

– Consultations with the relevant stakeholders in the area – interviews with Fair Trials Abroad, Amnesty International, JUSTICE, EU Network of Independent Experts in Fundamental Rights, European Criminal Bar Association and European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of the Council of Europe.

– Review of the criminal codes and codes of criminal procedure of the New Member States to identify alternatives to pre-trial detention laid down in law, and contact with national legal experts in the New Member States – via the European Sourcebook, EU Network of Independent Experts in Fundamental Rights, and Open Society Justice Initiative.

3. Problem definition

3.1. Introduction

Citizens of the European Union are mobile and travel to other Member States of the Union for purposes of work or leisure. Geographic mobility is widespread and essential in ensuring prosperous and competitive European societies. Intra-EU tourism makes up a substantial proportion of the EU25 GDP. The challenge is to ensure that EU citizens enjoy the same rights whilst abroad in EU Member States other than their normal country of residence. This should also be ensured in the pre-trial process. In the current situation, there are EU nationals who, when present in the territory of another Member State that is not their normal place of residence, are suspected of a crime and are more likely to be remanded in pre-trial detention than the residents of that country.

This section considers the following:

– Numbers of people involved in pre-trial process – the number of EU citizens who are in pre-trial detention in the Member State other than their normal country of

residence, the average length of time they spend in pre-trial detention,

– Problems and issues experienced by such pre-trial detainees, including real life case studies,

– Costs associated with pre-trial detention, for individuals concerned and public authorities.

3.2. Numbers of people in pre-trial detention

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.

Some of the 10,000 EU nationals detained per year would, were they are residents of the country in which they are 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 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.[4]

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 non-custodial 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 non-custodial measure.

3.3. 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

[4] 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.

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. 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.

Table 3.1. – EU nationals in pre-trial detention and in the total prison population

Country	**Proportion of EU nationals in pre-trial detention**	**Proportion of EU nationals in total prison population**
Czech Republic	6%	1%
Finland	6%	4%
Germany	12%	6%
Ireland	8%	4%
Lithuania	2%	1%
Netherlands	4%	4%
Portugal	5%	2%
Spain	7%	4%

Source: Member States' replies to EPEC questionnaire.

Some real life case examples of such differential treatment of EU non-residents whilst abroad in other EU Member States are provided in Box 1.

Box 1 Real life examples of differential treatment

Case 1

One NGO consulted during the course of the study quoted a case where a motor yacht with a consignment of illegal drugs was intercepted in Member State A by the customs and police. All the nationals of Member State A on the boat (with the exception of the ring-leader) and the gang members waiting to unload it were bailed, but the two other EU nationals on the boat (one of them was the cook) were placed in pre-trial detention. These two were in custody for 13 months before being released when the prosecution brought no evidence against them.

Source: NGO dealing with individual rights.

Case 2

In August 1998 a citizen of Member State A, Mr X, was remanded in pre-trial detention in Member State B as he (and 5 other suspects) were suspected of having committed aggravated economic crime. He was released from pre-trial detention four months later (in December 1998) but, not being a resident in Member State B, placed under a travel prohibition which resulted in the loss of his passport to the authorities of Member State B. While the first hearing of his trial was set to start in 1999 and was due to finish in 2001, a combination of procedural issues, illnesses and re-trials meant that a full hearing and judgement did not take place until 2003 – five years after the travel prohibition was issued. During these five years, several appeals by Mr X to have the travel restriction lifted were denied by the relevant courts. Equally, a request by Mr X to be detained in Member State B, made on economic grounds (the defendant found it difficult to sustain himself), was denied. The sentence issued in the 2003 judgement (5 years imprisonment and a fine) subsequently triggered a series of appeals and referrals which put the case back into the hands of the prosecutor who in turn has appealed against the decision to refer the case back to him. Towards the end of 2005, the case is thus in limbo – but the travel prohibition is still in place: further appeals of having it lifted since 2003 have been denied, the last time in September 2005.

Source: Officials, news paper articles.

Case 3

A few years ago, a woman - a national of Member State A - travelling in a car with a man of the same nationality in Member State B, was stopped by police on the roadside. The officers found a large amount of cash in the car and the two nationals of Member State A were subsequently arrested for money laundering. Even though the investigation revealed that the woman knew nothing of the money, she was placed into pre-trial detention for two to three months. This arguably excessive use of pre-trial detention has been ascribed to the fact that the woman was a national of Member State A: Officials of Member State B were concerned that should she be released the woman would go back to her home Member State A and would be impossible to track down for sentencing. Ultimately, the woman was fined 75 EUR because of possession of a small amount of cannabis, which was found on her at the time of the investigation.

Source: A lawyer consulted in the course of the study.

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 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, the average length of pre-trial detention is 5.5 months, though there are wide variations between the Member States. 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…'.

Table 3.2 - Average length of pre-trial detention in Member States of the EU[5]

Country	Year	Length of pre-trial detention (days)
Austria	2002	68
Belgium	2002	80
Czech Republic	not specified	154
Denmark	2001	55
Estonia	not specified	180
Finland	2004	93
France	2002	116
Germany	2003	120
Greece	2002	365
Hungary	2002	364
Ireland	2001	84
Italy	2002	175
Latvia	not specified	365
Lithuania	2004	163
Luxembourg	2002	243
Netherlands	2002	245
Slovakia	not specified	213
Sweden	2004	55

[5] The information on the length of pre-trial detention was sought for all the 25 Member States, however, it was possible to obtain such information only for 19 countries.

UK	2002	42.5
EU 19 average		167

Sources: Replies to EPEC questionnaire, replies to 2003 Commission's questionnaire, Revised analysis of questionnaire on the law and practice of the Member States regarding remand in custody. Report by Jeremy McBride, Council of Europe, 2003, Strasbourg (PC - DP).

3.4. Costs of pre-trial detention to people involved and to public authorities

3.4.1. Costs to people involved

There are costs associated with this differential treatment for the EU nationals in the form of:

– Loss of freedom,

– Loss of earnings and professional standing,

– Stigma and breakdown of families and relationships,

– Costs of family and friends visiting whilst in detention.

These costs apply both to those people who are eventually convicted but more so to those who are eventually acquitted. These costs can be estimated on the basis of the levels of compensation that have been awarded for those detained under wrongful convictions. These are in the order of 2,000 euro per month of detention. Pre-trial detention involves a cost to the individual concerned in the following three kinds of circumstances:

– When a suspect is detained and acquitted at trial. In such cases, the cost to the individual would be around 11,000 euros (average length of detention 5.5 months x 2,000 euro).

– When a suspect is detained in pre-trial detention, sentenced but no account is taken of the length of the pre-trial detention period in sentencing. In such cases, the cost to the individual would be around 10,000 euros (average length of detention 5 months x 2,000 euro). It is not possible to estimate the overall cost in all cases where sentencing has not taken into account the period of pre-trial detention. However, such notional costs are likely to be small, given that most sentencing takes into account the pre-trial period.

When a suspect is detained, sentenced and full account is taken of pre-trial in sentencing, there would not be any additional costs to the individual, as the period of pre-trial detention would be taken into account.

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 shows sentencing and acquittal rates in other EU Member States, where these vary to a significant extent.

Table 3.3 – Rates of sentencing and acquittals in the EU Member States, 2000

Country	Persons prosecuted	Total adults sentenced	Total not sentenced (Acquitted)	Proportion of not sentenced in the total of prosecuted
Czech Republic	110,808	58,959	51,849	47%
England and Wales	1,866,683	1,142,214	24,469	39%
Estonia	13,297	10,261	3,036	23%
Finland	176,921	161,705	5,216	9%
Germany	697,257	463,102	234,155	34%
Hungary	122,860	87,689	35,171	29%
Latvia	17,807	10,892	6,915	39%
Portugal	108,948	46,189	62,759	58%
Slovakia	36,779	19,357	17,422	47%
Slovenia	26,526	6,304	20,222	76%
Sweden	136,535	106,647	29,888	22%
Average				38%

Source: Seventh United Nations Survey of Crime Trends and Operations of Criminal Justice Systems, covering the period 1998 – 2000.

Given that it was earlier estimated that there 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).

3.4.2. Costs to public authorities

Pre-trial detention also has a cost implication for the public authorities. Table 3.4 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).

Table 3.4 – Cost of pre-trial detention in some Member States

Country	Cost per person per year (€)	Cost per person per month (€)	Source
Czech Republic	10,537	866	Reply to EPEC questionnaire
Germany	24,000	2,000	Reply to EPEC questionnaire
Finland	42,000	3,500	Reply to EPEC questionnaire
Ireland	76,128	6,344	Reply to EPEC questionnaire
Italy (Bologna)	32,400	2,670	Detention in Europe', Jesuit Refugee Service Europe, Observation and Position Paper 2004
Netherlands	69,000	5,750	Reply to EPEC questionnaire
Latvia	3,168	264	Reply to EPEC questionnaire
Lithuania	3,984	332	Reply to EPEC questionnaire
Sweden	72,270	6,023	Reply to EPEC questionnaire
UK	36,473	3,039	Annual 2004/2005 Report of UK Prison Service
Average	36,996	3,079	

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

Electronic tagging

One estimate[6] of the costs of electronic monitoring puts the average cost per day around €50, or around €1,500 per month (based on experiences of France, England and Wales, Belgium, Portugal, the Netherlands, and Sweden). In Germany (Land of Hesse) each person tagged costs around €2,000 per month, which is around €60 per day.

However, in England and Wales, electronic monitoring of a pre-trial person costs around €11 (£8) per day plus around €200 (£140) per case, resulting in an annual cost of around €4,400 (£3,000) per one person (or €360 monthly cost). This is significantly cheaper than estimates for electronic monitoring provided above. This could be connected to the different types of electronic monitoring available and various types of technologies used, depending on the seriousness of crime the suspect is accused of.

Reporting to the police

As an alternative to the custodial measure, reporting to the police is rather likely to be applied in case of EU non-residents transferred back to their country of residence during the pre-trial

[6] http://www.iuscrim.mpg.de/forsch/onlinepub/albrecht.pdf

period. This is because it can be anticipated that such people are accused of relatively minor crimes, and thus reporting to the police authorities could be the most effective measure. Review of current police practice in terms of reporting to the police (e.g. in the UK) suggests that carrying out police duties associated with this measure takes up such a small proportion of police time that the cost to the police is officially considered negligible.

Use of video-conferencing

Video-conferencing offers another means of reducing costs of pre-trial proceedings, used already in the majority of the Member States to hear witnesses, for example. Video-conferencing 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.

3.5. Future trends

It can be anticipated that a number of tendencies are likely to influence the situation of EU non-residents pre-trial detainees in the EU:

– There will be more travelling and short stays across the EU. Cross border mobility is expected to increase, and is indeed supported as one of the policy objectives in the common European space. It can therefore be anticipated that the numbers of people affected are likely to increase.

– Other aspects of approximation in criminal matters could make the proposal for mutual recognition of non-custodial pre-trial supervision measures easier to apply. For example, such measures as EU initiative in the area of procedural safeguards (also subject of the Green Paper) and Council of Europe's work on common standards in detention conditions can be mentioned in this regard.

4. Policy objectives

One of the fundamental goals of the European Union is to ensure that the rights of its individual citizens are guaranteed across its territory. The right to justice and right to non-discrimination are two of the most important rights of EU citizens, and should be enjoyed by all citizens across the Union. All EU citizens should have equal access to justice and be treated by the courts and authorities in any Member State in the same fair and just way as in their own country.

This goal has been continuously stressed in the development of a genuinely European area of justice, freedom and security, in particular since the Amsterdam Treaty and the adoption of the 1999 Tampere programme for implementing a single area of justice in the EU. Most recently, in setting the objectives for implementing the area of justice, freedom and security for 2005-2010 within the framework of the Hague programme, the Council has called on the Member States to "*…improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice…*"[7]

Some of the most fundamental rights enjoyed by European citizens are the right to liberty, the

[7] The Hague programme: Strengthening freedom, security and justice in the European Union, 16054/04, 13 December 2004, Brussels.

presumption of innocence and the rules regulating detention of a citizen by the state.

All EU Member States have ratified both the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the International Covenant on Civil and Political Rights (1966), which established these rights in international law. These instruments also established that a person may be deprived of his/her liberty on a reasonable suspicion of having committed a criminal offence, but that there must be a reasoned ground for detaining a person, such as a danger of re-offending, suppression of evidence or danger of absconding.

With these rights in mind, in a genuinely single European area of justice the treatment of a EU citizen suspected of committing a crime in another EU Member State should be the same as their treatment in their own country. EU citizens should enjoy the same access to justice in other Member States as in their own country and be treated in the same way as the nationals of that Member State.

The European Union has recognised the importance of ensuring that citizens' rights are respected across the borders and that citizens have equal access to justice, irrespective of where in the Union they find themselves. Judicial co-operation in criminal matters amongst the Member States, based on mutual recognition of decisions taken by judges and authorities, has been key to effective enforcement of individual rights, as well as ensuring that justice is achieved in criminal cases.

At the request of the Tampere European Council in 1999, a programme on mutual recognition in criminal matters was drawn up in 2001.[8] The programme called for the implementation of the principle of mutual recognition of decisions in criminal matters. Mutual recognition is expected to enhance the protection of individual rights, contribute to legal certainty in the EU and strengthen cooperation between Member States. The programme has also explicitly recognised that "*…certain aspects of mutual recognition have not been addressed in an international context, and in particular, those concerning pre-trial orders…*" and called that mutual recognition be *"...sought at all stages of criminal proceedings, before, during and after conviction…".* Consequently, the Union has committed itself to

"..Consider the adoption of an instrument enabling control, supervision or preventive measures ordered by a judicial authority pending the trial court's decision to be recognised and immediately enforced. This instrument should apply to any person against whom criminal proceedings have been brought in one Member State and who may have gone to another Member State and should specify how such measures would be supervised and the penalties applicable in the event of non-compliance with them…"

In the Hague programme for 2005-2010, the Council has called again for the implementation of the programme of mutual recognition of judicial decisions in criminal matters. In the Action Plan implementing the Hague programme[9], the Council and Commission have called for adoption of a proposal for mutual recognition of non-custodial pre-trial supervision measures in 2005.

To sum up, the implementation of a genuinely European area of justice entails the achievement of the following policy aims:

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8 OJ C12/02, 15 January 2001.

9 9778/2/05 REV2, JAI 207, 10 June 2005, Brussels.

– Supporting the free movement of people,

– Ensuring that individual rights in pre-trial process are guaranteed throughout the Union,

– Ensuring that the EU citizens enjoy equal access to justice in pre-trial process,

– Ensuring that Member States co-operate in ensuring the individual rights and access to justice for their citizens.

Such general policy aims could be interpreted to translate into the following operational policy objectives:

– Avoiding discrimination of EU nationals in pre-trial detention in Member States other than their own country of residence,

– Reducing costs of detention to public authorities and limiting the use of pre-trial detention to cases where a serious crime is suspected,

– Encouraging police and judicial co-operation.

5. Policy Options applicable to pre-trial supervision measures in the eu

5.1. Introduction

This section provides an overview of policy options available to address the problems identified in section 3 and to reach the policy objectives of the Union described in section 4. Each policy option would contribute differently to the solution of problems and to the achievement of the specific objectives. Following the normal practice of Commission Impact Assessment work, the first policy option is in effect a 'do nothing' or 'status quo' option.

5.2. Summary of different policy options

The policy options can be described as follows.

5.2.1. Summary of policy option 1: 'Do nothing' (Status quo)

This option would entail that the status quo is maintained, and no special legislative action is taken by the EU.

In effect, this would mean reliance on the current legal framework in regulating pre-trial process where citizens of another Member State are involved, and in particular reliance on the Framework Decision on the European Arrest Warrant (FD-EAW).[10] The FD regulates the arrest of persons who are fleeing from justice after being sentenced and those persons who are suspected of having committed an offence. It establishes a system of free movement of judicial decision in such cases, whereby a decision to arrest a person in one Member State is recognised and executed in another Member State for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. The European Arrest

[10] Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, 13 June 2002, OJ L190, 18 July 2002.

Warrant assumes that the suspect has left the territory of the Member State where he/she is suspected of committing a crime.

Importantly, a European Arrest Warrant may be issued for acts punishable in the law of the issuing Member State by a prison sentence of at least 12 months. The FD-EAW also allows the executing judicial authority to detain the person requested, in accordance with the national law. It further stipulates that the person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the authorities of the executing state take all measures necessary to prevent the person absconding.

However, even if no special legislative action is taken by the EU, the following developments, which have some potential to contribute to the achievement of policy objectives outlined in section 4, would proceed. Even if no special legislative action takes place, the following developments can be anticipated:

– Other aspects of judicial co-operation and approximation in criminal matters proceed and are further implemented. For example, instruments of judicial co-operation are further developed to minimise the grounds on which authorities can refuse assistance to the authorities of other Member States.

– Bilateral and multilateral co-operation measures in the pre-trial process might be adopted by several or a group of Member States at their own initiative. For example, currently the Nordic Extradition Acts between Denmark, Finland and Sweden cover, inter alia, pre-trial detention and are applicable in cases where a request has been made for an inter-Nordic extradition. The Acts provide that to ensure extradition the coercive measures such as pre-trial detention, travel prohibition and order to report to the police might be used.

5.2.2. Summary of policy option 2: 'New legislative instrument for mutual recognition of pre-trial supervision measures'

In this policy option, as requested in the Hague programme, a legislative intervention from the EU would change the current legal situation to ensure that Member States recognise each other's pre-trial supervision measures, and in particular measures of non-custodial nature (*e.g.* reporting to the police). In practice, it would mean that a decision by a court in the trial state to impose a pre-trial measure would be recognised and could be enforced in the state of residence of a suspect. This would mean that such a suspect can be returned to his/her country of residence, where authorities would enforce a non-custodial supervision measure upon him/her, and ensure that the suspect attends the proceedings in the trial state.

In addition, this policy option would contain a specific return mechanism to ensure that those suspects who fail to appear at their trial are returned to the trial state by the state where the non-custodial supervision measure is implemented. The time periods set for detaining such persons prior to sending him/her to the trial state would be very short.

5.2.3. Summary of policy option 3: 'New legislative instrument for mutual recognition of pre-trial supervision measures and Extension of European Arrest Warrant to cover all offences'

Similarly to the policy option 2, the policy option 3 would include mutual recognition of pre-trial supervision measures. However, the enforcement mechanism in this policy option would

be an extended EAW, as opposed to a specific return mechanism envisaged under policy option 2.

At the moment, the EAW covers the arrest and detention in another Member State of those persons who are suspected of committing an offence punishable by at least 12 months of imprisonment. However, many EU non-residents are detained in other Member States when suspected of committing crimes which carry a smaller penalty than 12 months of imprisonment. Therefore, in policy option 3 the FD-EAW would be amended and extended to cover to all offences, i.e. those punishable by up to 1 year of imprisonment and those punishable by more than 1 year of imprisonment. In addition, a new offence would be created whereby a breach of a pre-trial supervision measure would be classified as an offence punishable by an imprisonment of 1 year.

5.2.4. Summary of policy option 4: 'Co-operation programme'

Under this policy option, Member States would run a pilot co-operation programme in the area of pre-trial process. Such pilot schemes would be funded and supported by the EU.

In practice, this would probably primarily involve big Member States, since, as shown in section 3, this is where the biggest flows of visitors from other EU Member States occur. Such bilateral co-operation programmes would entail close co-operation between the judicial and police authorities of the Member States involved and could involve agreements on implementing alternatives to pre-trial detention in the country of residence of a suspect.

5.2.5. Summary of policy option 5: 'Eurobail'

Another policy option would be to create a system of 'Eurobail'. Some stakeholders have suggested ways in which such a system might be implemented in practice.[11] In the model suggested so far, there would be a division of functions between the trial court and the court of the suspected person's country of residence. The trial court makes a preliminary assessment whether the offence is "bailable". If the answer is positive, the suspected person is sent back to his or her country of residence, where the court makes the final decision on the provisional release. In this scenario, the State of residence is responsible for ensuring that the suspect appears before the trial court (if required).

6. Assessment of the policy options

6.1. Introduction

This section presents assessments of the five policy options outlined in section 5. The policy options have been assessed using the following criteria:

– The extent to which policy options ensure individual rights in pre-trial process and equal access to justice for EU nationals in pre-trial process in other Member States.

– The extent to which policy options reduce 'notional costs' of injustice (experienced in pre-trial detention) to individuals. In addition to moral cost associated with the loss of freedom, stigma and breakdown of families and relationships, such 'financial' costs

[11] In particular, Fair Trials Abroad (2003), Rights of European citizens awaiting trial. Alternatives to pre-trial detention: the Eurobail model.

include loss of earnings and professional standing as well as costs for the families and friends visiting the suspect in the state of detention.

– The extent to which policy options contribute to decreasing the risk of suspects absconding and ensuring that the suspect appears in the trial proceedings.

– The extent to which policy options contribute to reducing the net costs of detention in prison to public authorities. (It was earlier estimated that it costs around €3,000 per month to keep a person in prison.)

– The extent to which policy options can contribute to the following spin-off effects:

  – Aspects of judicial cooperation – encouraging/discouraging intra-EU judicial co-operation.

  – Aspects of police cooperation – encouraging/discouraging intra-EU police co-operation.

– The extent to which policy options would be supported by various groups of stakeholders.

6.2. Assessment of policy options

Each of the policy options is assessed below.

6.2.1. Assessment of *policy option 1: 'Do nothing' (Status quo)*

Table 6.1. Assessment of policy option 1 'Do nothing' (Status quo)

Assessment Criteria	Ranking[12]	Assessment
Ensuring individual rights and equal access to justice	No effect	In the current situation, the problem will remain unchanged. EU non-residents suspected of a crime in another Member State than their own country of residence would be put in pre-trial detention even on suspicion of such crimes where own nationals would be subject to alternative non-custodial measures. The right to liberty of EU non-residents in pre-trial process would continue to be not fully ensured.
Reducing notional costs of injustice	No effect	Status quo option will not contribute to a reduction of costs of injustice to the people in pre-trial detention, as there would be no change to the levels of pre-trial detention.
Decreasing the risk of absconding	No effect	As at present, suspects are detained in the trial state for all the period before the trial process, thus securing their appearance at the trial proceedings.

[12] The rating in the cells indicates the relative effectiveness of the policy option, 1 star being the least effective and 5 stars the most effective.

Reducing the costs of detention	No effect	Status quo option will not contribute to a reduction of costs of detention, as there would be no change to the number of people detained in pre-trial process.
Influence on judicial co-operation	*	Status quo option will not provide any additional impetus for judicial co-operation across the EU, as there would be no additional incentives or arrangements for such co-operation enacted. Some co-operation existing in the current situation is expected to continue.
Influence on police co-operation	*	Status quo will not provide any additional impetus for police co-operation across the EU, as there would be no additional incentives or arrangements for such co-operation enacted. Some co-operation existing in the current situation is expected to continue.
Benefits of the policy option	No additional benefits	
Constraints of the policy option	Due to increasing intra-EU travel and visitor flows, the number of people implicated in cross-border pre-trial process is likely to increase. The problem of ensuring the right to liberty in pre-trial process is likely to get worse in the future with the EU lacking an appropriate mechanism to deal with this problem.	

Political acceptability

Some Member States have expressed preference for this policy option for the following reasons:

– The issue is not important. The number of people affected is low, and they stay in detention for short periods of time. However, it was demonstrated in section 2 that the number of people who are potentially affected is as high as 8,000 (per year). In addition, the average pre-trial detention period is around 5 months. Such average period disguises however wide variations between pre-trial detention periods between the Member States.

– The measure is not a priority in the Hague programme. Other measures are more important. For example, the proposal of the conflicts of jurisdiction is considered to be of primary importance.

6.2.2. Assessment of policy option 2: 'New legislative instrument for mutual recognition of pre-trial supervision measures'

Table 6.2. Assessment of policy option 2 'New legislative instrument for mutual recognition of non-custodial supervision measures'

Assessment Criteria	Ranking[13]	Assessment

Ensuring individual rights and equal access to justice	*****	In the policy option 2, EU non-residents will not be detained in pre-trial process due to the danger of absconding. The trial court would be able to impose an alternative non-custodial measure which could be implemented, due to mutual recognition, in the suspect's country of residence. As a result, the individual would be deprived of liberty in pre-trial process proportionate to an offence, rather than due to the place of residence.
Reducing notional costs of injustice	*****	In the policy option 2, EU non-residents would be less likely to be detained in pre-trial detention, thus reducing the costs of injustice associated with pre-trial detention.
Decreasing the risk of absconding	**	In the policy option 2, the suspect would be allowed to return to his/her normal country of residence where alternative non-custodial pre-trial supervision measures would apply. As is the case with all non-custodial supervision measures (also with own nationals), there is always a risk of a suspect breaching the sanctions. However, the existence of a specific return mechanism would ensure that uncooperative persons are present at their trials.
Reducing the costs of detention	*****	In the policy option 2, EU non-residents would be less likely to be detained in pre-trial detention, which would reduce significantly the costs of detention to the public authorities.
Influence on judicial co-operation	*****	Mutual recognition would require close co-operation between judicial authorities and would thus provide a strong impetus to the development of a single area of justice in the EU.
Influence on police co-operation	*****	Mutual recognition would require close co-operation between police authorities, especially in the implementation of the alternative measures, and would thus provide a strong impetus to the development of a single area of justice in the EU.

[13] The rating in the cells indicates the relative effectiveness of the policy option, 1 star being the least effective and 5 stars the most effective.

Benefits of the policy option	Problems in the current situation are addressed to a significant degree. Special return mechanism with short detention periods in order to transport the suspect to the issuing Member State would ensure that the mechanism for enforcement is proportionate and in line with the aim to limit the use of pre-trial detention. Policy objectives in the area of developing a single European area of freedom and justice are met.
Constraints of the policy option	Costs of enforcing alternative non-custodial measures would be transferred to the authorities of the country of residence of suspect. If a suspect disappears, they could be blamed, whereas they would get no credit for a successful prosecution. The policy option would require authorities to develop a substantial knowledge of the laws and legal systems in other Member States.
Issues raised in the consultations so far[14]	System of mutual recognition should not evade the core human rights protections of the European Convention of Human Rights. The FD-EAW contains 3 mandatory and 7 optional grounds for refusal to execute a EAW to protect fundamental and often constitutional rights of people subject to EAW. A system of mutual recognition without such similar safeguards could be perceived as an attempt to circumvent such protections.

Political acceptability

Some Member States do not support the measure for mutual recognition of non-custodial pre-trial supervision measures. A number of arguments have been voiced:

– The issue of EU nationals in pre-trial detention in the Member States other than their normal country of residence is not important. The number of people affected is low, and they stay in detention for short periods of time. It is questionable whether such a weighty instrument is the need to address a minor and narrow issue. However, it was demonstrated in section 2 that the number of people who would be subject to pre-trial transfer 'home' could be around 8,000 during a year. Moreover, the average length of detention is around 5.5 months. This entails not only significant cost to the suspect, but also to the public authorities.

– The measure is not a priority in the Hague programme as other measures are more important.

Operational considerations

One of key operational concerns in this policy option would be the challenge of ensuring that

[14] This is based on the summary paper of responses to the Commission's Green Paper, the minutes of experts' meetings provided to EPEC by DG JLS and consultations undertaken by EPEC.

the suspects do return to a trial from their normal country of residence. In the absence of any mechanism to return the suspects to the trial state and secure their presence in the trial proceedings, mutual recognition of non-custodial alternative pre-trial measures alone would not secure such presence. This could provide a disincentive for the authorities in the Member State where an offence was committed to use the instrument of mutual recognition of non-custodial alternative supervision measures and thereby limit the use of pre-trial detention.

6.2.3. Assessment of policy option 3: 'New legislative instrument for mutual recognition of pre-trial supervision measures and Extension of European Arrest Warrant to cover all offences

Table 6.3. Assessment of policy option 3 'Extension of the European Arrest Warrant to cover all offences'

Assessment Criteria	Ranking[15]	Assessment
Ensuring individual rights and equal access to justice	*****	In the policy option 3, EU non-residents will not be detained in pre-trial process due to the danger of absconding. The trial court would be able to impose an alternative non-custodial measure which could be implemented, due to mutual recognition, in the suspect's country of residence. As a result, individuals would be deprived of liberty in pre-trial process proportionate to an offence, rather than due to the place of residence.
Reducing notional costs of injustice	*****	In the policy option 3, EU non-residents would be less likely to be detained in pre-trial detention, thus reducing the costs of injustice associated with pre-trial detention.
Decreasing the risk of absconding	*****	On the execution of EAW, suspects would be detained in the country of residence, which would be responsible for ensuring that the suspect appears before the trial court. It would provide a fallback option if non-custodial measures do not work or if the suspect absconds from the trial.
Reducing the costs of detention	*****	It can be anticipated that non-custodial supervision measures would be applied to a greater extent, thus reducing the level of pre-trial detention.
Influence on judicial co-operation	****	Under policy option 3, courts in the trial state and the state of suspect's residence would have to co-operate extensively.

[15] The rating in the cells indicates the relative effectiveness of the policy option, 1star being the least effective and 5 stars the most effective.

Influence on police co-operation	********	Under policy option 3, police authorities would have to co-operate extensively in the implementation of alternative non-custodial pre-trial measures and execution of the EAW.
Benefits of the policy option	Existence of implementation mechanism to ensure that the suspects appear at the trial (in the form of EAW) would provide assurances to the authorities of the trial state which might be otherwise reluctant to use alternative measures to pre-trial detention. The use of EAW as the implementation and back-up mechanism would avoid creating a system of enforcement parallel to EAW, as might be envisaged under policy option 2. This might increase the support for a new EU intervention in the Member States which have recently completed the implementation of EAW. The protections of individual rights in the existing EAW mechanism would also apply in this policy option (e.g. right to assistance of legal counsel and interpreter).	

[16] Recommendation No. R (80) 11 of The Committee of Ministers of the Council of Europe to Member States Concerning Custody Pending Trial (Adopted by the Committee of Ministers on 27June 1980 at the 321st meeting of the Ministers' Deputies) specifies (in rule 84) that such breaches of pre-trial supervision measures should not be considered a punishable offence.

Constraints of the policy option	The implementation process for the FD EAW has been recently completed. The extension of EAW to cover all offences would entail amendments to the existing arrangements. In its current form, the EAW can take up to 60 days to execute, which might not be quick enough to secure suspects' presence at a trial. The use of EAW would increase the use of pre-trial detention as the suspects would be arrested to return them to the issuing Member State. In addition, the time limits for detention in the EAW are very long (up to 60 days, which can be extended by a further 30 days), which could be disproportionate in the circumstances of the suspects detained. The creation of a new offence for the breach of pre-trial non-custodial supervision measures would be disproportionate to the policy aims of mutual recognition as this policy option would establish a new offence across the Member States. Also, legal problems could arise as the executing state would be asked to arrest the person for an offence (a breach of pre-trial non-custodial measure) in its territory, using an EAW. However, such a warrant could only be executed when the suspect has left the territory of the executing state. Also, the creation of an offence for the breach of pre-trial non-custodial would contradict the policy recommendations in this area.[16]
Issues raised in the consultations so far[17]	Concerns in the NGO community that the EAW only provides minimal guarantees for the individual. For example, an obligation to return to the trial state would be enforced in all cases even if the suspect could face an unfair trial abroad. Also, the long detention periods envisaged under the EAW can cause concerns about the respect of the fundamental rights. EAW has been created to address serious crimes and ensure that serious criminals do not abscond from justice. In contrast, the mutual recognition of non-custodial supervision measures would involve people charged with far less serious offences than those envisaged by the EAW. The aims and philosophy of the two instruments are not compatible. Council of Europe recommended that the breach of non-custodial measure should not constitute a punishable offence.

Political acceptability

16 Recommendation No. R (80) 11 of The Committee of Ministers of the Council of Europe to Member States Concerning Custody Pending Trial (Adopted by the Committee of Ministers on 27June 1980 at the 321st meeting of the Ministers' Deputies) specifies (in rule 84) that such breaches of pre-trial supervision measures should not be considered a punishable offence.

17 This is based on the summary paper of responses to the Commission's Green Paper, the minutes of experts' meetings provided to EPEC by DG JLS and consultations undertaken by EPEC.

This policy option is not acceptable to some Member States who believe that such a legislative intervention would be disproportionate to the principle of proportionality and state that pre-trial detention is very seldom used in those cases where minor offences are involved. In addition, the creation of a new offence for breaching the conditions of pre-trial supervision measures is likely to meet some opposition from the Member States which would resist a harmonisation of the criminal justice systems.

Operational considerations

There would be a number of operational concerns in this policy option:

– The additional workload imposed on the authorities of the trial and residence state could be quite substantial, and procedures should not be made cumbersome.

– Legal advice should be made available after the suspect is transferred to his/her normal country of residence.

6.2.4. Assessment of policy option 4: 'Co-operation programme'

Table 6.4. Assessment of policy option 4 'Co-operation programme'

Assessment Criteria	Ranking[18]	Assessment
Ensuring individual rights and equal access to justice	***	Policy option 4 would help to ensure that the right to liberty is respected amongst the Member States with the largest flows of people in pre-trial process. Under such co-operation programme, the country of suspect's residence could implement alternative measures to pre-trial detention. However, this option risks creating a two-class Union where nationals of countries not part of co-operation programme are being systematically treated differently than those of countries with bilateral agreements.
Reducing notional costs of injustice	***	It can be anticipated that in the co-operation programme the country of residence would make less use of pre-trial detention, as the danger of absconding would be less once the suspect is in his/her country of residence.
Decreasing the risk of absconding	***	Under the co-operation programme, the country of residence would ensure that the suspect appears at the trial court.

[18] The rating in the cells indicates the relative effectiveness of the policy option, 1star being the least effective and 5 stars the most effective.

Reducing the costs of detention	***	It can be anticipated that in the co-operation programme the country of residence would make less use of pre-trial detention, as the danger of absconding would be less once the suspect is in his/her country of residence. Thus, the levels of pre-trial detention can be expected to decrease, leading to savings.
Influence on judicial co-operation	**	The co-operation programme would involve close co-operation in all stages of pre-trial process. It would however involve only several Member States, and not the whole of the Union.
Influence on police co-operation	**	The co-operation programme would involve close co-operation in all stages of pre-trial process. It would however involve only several Member States, and not the whole of the Union.
Benefits of the policy option	If pilot projects prove to be successful in terms of securing right to liberty and successful prosecutions of criminals and feasible to implement in practice, it would easier to implement a pan-EU system. Pilot schemes would allow identification of potential problems and issues for the implementation before a EU wide solution is implemented.	
Constraints of the policy option	Would only operate amongst several Member States. It could be argued that every EU citizen deserves justice. Could be open to legal challenges due to a lack of legal basis as pre-trial cross-border transfers would involve informal agreements between foreign jurisdictions. Such programme could undermine the development of a single European area of justice, as some Member States would apply different arrangements to the rest. Could be dealt with if this is considered clearly as a pilot project. It will not present a EU solution to the problem.	
Issues raised in the consultations so far[19]	Not considered as an option before.	

Political acceptability

Smaller countries unlikely to be included in bilateral agreements are likely to resent this option because:

[19] This is based on the summary paper of responses to the Commission's Green Paper, the minutes of experts' meetings provided to EPEC by DG JLS and consultations undertaken by EPEC.

– Their citizens would be discriminated against compared to other EU nationals.

– The mechanism may foster prejudice amongst EU countries rather than combat it.

Operational considerations

There are a number of issues that would have to be taken account of in the implementation of this option:

– Who is going to manage bilateral process?

– How can consistency between individual partnerships and their rules be ensured?

– How can it be ensured that the door for EU level regulation is not closed by these bilateral agreements?

6.2.5. Assessment of policy option 5 'Eurobail'

Table 6.5. Assessment of policy option 5 'Eurobail'

Assessment Criteria	Ranking[20]	Assessment
Ensuring individual rights and equal access to justice	****	Eurobail would ensure that the right to liberty is guaranteed to EU non-residents. Eurobail would be a EU solution relating to all EU nationals.
Reducing notional costs of injustice	****	Eurobail would ensure that the right to liberty is guaranteed to EU non-residents
Decreasing the risk of absconding	**	The trial state could lose all control over the proceedings
Reducing the costs of detention	****	Eurobail would ensure that the right to liberty is guaranteed to EU non-residents
Influence on judicial co-operation	**	Co-operation might be difficult in practice. Some co-operation might occur depending the model of implementation
Influence on police co-operation	**	Co-operation might be difficult in practice. Some co-operation might occur depending on the method of implementation.

[20] The rating in the cells indicates the relative effectiveness of the policy option, 1star being the least effective and 5 stars the most effective.

Benefits of the policy option	The introduction of Eurobail is technically feasible and legally possible. If this system only would cover provision of a surety/a monetary sum - which most Member States have – it would reduce the risk of jumping "bail". However, some suspects would jump "bail", as it is the case in the current situation as well.
Constraints of the policy option	Division of responsibilities between trial court and court of the country of residence may be difficult to implement in practice. If this system only would cover provision of a surety/a monetary sum, it must be noted that not all Member States are in the habit of using "bail", which could create problems if an EU wide bail system is introduced.

Political acceptability

Some stakeholders oppose the Eurobail model for the following reasons:

- Depending on the implementation of this model, the trial state could lose control over the pre-trial process and the executing state would be in charge of proceedings when the crime was not committed in its territory. The trial state authorities would have no control over how the supervision measures are implemented and therefore would be reluctant to use such alternatives in the first place.

- The Eurobail model would not always secure the important objective of equal treatment between residents and non-residents in the issuing state.

- The creation of an EU model of provisional liberty exceeds the scope and mandate of policy objective of mutual recognition of decisions.

Operational considerations

Under this policy option (if it is understood as only covering provision of a surety/a monetary sum), technical issues for the trial state of recovering "bail" money from another country would be present.

6.3. Conclusions

The following conclusions can be drawn on the basis of the assessments presented in this section:

- The 'do nothing' policy option (Option 1) will not meet the policy objectives established by the Council in the area of strengthening justice, freedom and security in the EU. Although the idea of doing nothing was supported by some Member States, this preference was expressed in the context of the lack of information on the numbers of people involved and on the period that they spend in pre-trial detention. This policy option will also do nothing to address the problems in the current situation.

– Policy option 'Co-operation programme' (Option 4) would to a certain extent address the problems in the current situation. It would also provide a useful way to explore the co-operation in the area of mutually recognising non-custodial measures in practice, before going through a legal process of establishing a pan-EU system of formal mutual recognition. Our consultations have revealed that such co-operation is happening to a certain extent between some Member States (an example of the UK and the Netherlands was provided). However, it is very informal and based on personal knowledge of each other's systems amongst the officials. In that respect, the EU could finance a much wider and more structured official co-operation programme to trial 'mutual recognition'. This would allow identifying pitfalls and areas for improvement in the pan-EU system. However, such co-operation programme could lead to perceptions of dual standards emerging in the EU, which is contrary to the policy objectives of a single European area of justice.

– Policy option 'Eurobail' (Option 5) would to a certain extent address the problems in the current situation. It has already met a strong opposition from the Member States, who argued that in this model, the trial State would lose control over the pre-trial process and the executing state would be in charge of proceedings when the crime was not committed in its territory. In addition, if it would be understood as covering only provision of a surety/a monetary sum, not all Member States are in the habit of using such a system. Thus this policy option could be difficult to implement operationally.

Such assessments point to the policy option 2 (mutual recognition) and policy option 3 (mutual recognition and European Arrest Warrant for all offences) as the best remaining options to deal with the problems in the current situation and meet the policy objectives set by the Council. Both policy option 3 and 4 would be effective in ensuring individual rights and equal access to justice in the pre-trial process and reducing in that way the notional costs of injustice to the individuals concerned. Both policy options would entail the establishment of the principle of mutual recognition of non-custodial pre-trial supervision measures, which would a pan-EU solution.

However, policy option 2 would be more effective and appropriate in that it would provide a special return mechanism, for those cases where a suspect transferred to his/her home state does not appear at the court and/or breaches the conditions of the alternative pre-trial supervision measure.

Policy option 3 would be a more disproportionate and inappropriate response to the problems in the current situation. Member States are just beginning to use the system, and the changes so quickly after the establishment of the EAW are likely to meet resistance. The use of EAW would increase the use of pre-trial detention as the suspects would be arrested to return them to the issuing Member State. In addition, the time limits for detention in the EAW are very long (up to 60 days, which can be extended by a further 30 days), which could be disproportionate in the circumstances of the suspects detained. EAW has been created to address serious crimes and ensure that serious criminals do not abscond from justice. In contrast, the mutual recognition of non-custodial supervision measures would involve people charged with far less serious offences than those envisaged by the EAW. The aims and philosophy of the EAW are different from the aims of an instrument to increase the use of non-

custodial pre-trial supervision measures.

The creation of a new offence for the breach of pre-trial non-custodial supervision measures in the policy option 3 would also be disproportionate to the policy aims of mutual recognition as this policy option would establish a new offence across the Member States. Also, legal problems could arise as the executing state would be asked to arrest the person for an offence (a breach of pre-trial non-custodial measure) in its territory, using an EAW. However, such a warrant could only be executed when the suspect has left the territory of the executing state. Also, the creation of an offence for the breach of pre-trial non-custodial would contradict the policy recommendations in this area.

It is also possible that in its current form the EAW could pose problems as an enforcement mechanism in the pre-trial process. The use of EAW would not limit the use of pre-trial detention, as person would be arrested, and could be held in detention for considerable periods of time. The general philosophy of the EAW is to arrest and surrender person for the purposes of prosecution of executing a custodial sentence – to deprive a person of liberty, and for considerable periods of time. The long detention periods could also reduce the legal certainty to the individuals concerned.

7. Assessment of the preferred option

7.1. Introduction

In section 6, it was considered that the preferred policy option is policy option 2, mutual recognition of non-custodial supervision measures, incorporating a specific return mechanism to reduce the risk of a suspect absconding from justice. Therefore, this section presents a detailed assessment of this policy option in the following areas:

– Benefits of policy option,

– Its costs, especially costs associated with enforcement mechanism,

– Proportionality of the policy option,

– European added value,

– Operational considerations.

7.2. 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 beenin their country of ordinary residence. The mutual recognition would mean that the courts in the trial state could apply supervision measures other than pre-trial detention. The reasons for not applying such measures in the current situation – lack of social ties, risk of absconding, no permanent residence address in the trial state – would not apply in the

situation where there is confidence that alternative supervision measures would be implemented in the state of residence, and there would an enforcement mechanism to ensure the suspect's presence at the trial.

– *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 non-custodial alternative supervision measures is backed up by an implementation mechanism, the risk of a suspect absconding would be reduced. Such risk would not be eliminated (and indeed, criminal justice systems have not succeeded in achieving this within the national boundaries), but with the enforcement mechanism it would be reduced. An 'EU summons' could be issued if a suspect does not appear at the trial, and implemented in the state of residence of suspect.

– *Reducing the costs of detention*. This policy option is very likely to increase the use of non-custodial supervision measures in relation to EU non-residents. Therefore, it can be anticipated that the use of pre-trial detention in relation to EU non-residents would be limited to those people whose crimes are so serious that any alternative measure is not an option. In this way, significant savings of detention costs (and a significant reason of prison overcrowding) can be anticipated.

– *Influence on judicial and policy co-operation*. In this policy option, it can be anticipated that the judicial authorities would have to co-operate in establishing non-custodial 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 non-custodial measures (*e.g.* reporting to the police) and ensuring the enforcement if the suspect fails to appear before the trial.

7.3. 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 non-custodial 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.[21] 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 non-custodial supervision measures could lead to significant cost savings in a number of circumstances such as:

– If a suspect has breached the conditions of alternative non-custodial 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 non-custodial 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 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.

7.4. Proportionality and European added value

The EU added value through the mutual recognition of non-custodial 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

[21] '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.

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 non-custodial 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.

7.5. Other considerations in the implementation of the policy option

7.5.1. Ensuring fundamental rights of a suspect

In the implementation of this policy option, it must be ensured that the protections of individual rights are respected. Indeed, the implementation of the policy option would require that fundamental rights are respected throughout the stages of proceedings. Most immediately, this would require that a suspect's right to assistance of legal counsel and interpreter is maintained. The person concerned would have to be fully informed about his/her legal rights in the legal system right at the outset, in a way and the language the suspect understands.

Moreover, this policy option would also need to ensure that other individual rights are guaranteed, such as the right not to be extradited if there is a risk of an unfair trial abroad. In many cases, a return where a suspect has absconded following the issuing of a pre-trial supervision order would be straightforward. There may be cases, however, where surrender would raise human rights issues which had not been clear at the time that the person agreed to the alternative pre-trial supervision measure. For example, it may come to light, during the time of the pre-trial supervision, that evidence will be used in the trial that has been extracted through the use of torture or other inhuman and degrading treatment and that this would undermine the possibility of a fair trial according to Article 6 European Convention of Human Rights and Fundamental Freedoms (ECHR). If the measure is to be compliant with ensuring fundamental rights of the suspect, there must be a possibility of review to ensure that surrender is not carried out in breach of the person's rights. For example, it might be necessary to ensure that the person has the means and possibility to challenge the competence of prosecution in the trial state.

At minimum, the presumption of innocence, the right to liberty and the proportionality principle should be included in the instrument as fundamental rights clauses.

7.5.2. Operational concerns

Additional workload imposed on the authorities of the trial and residence state could be quite substantial, and procedures should not be cumbersome. A degree of flexibility in work between the authorities in the trial state and the state of residence of the suspect is necessary. Otherwise, there could be a danger that the transfer of supervision measures could slow down proceedings.

In addition, there is also a question of costs (e.g. costs of ensuring legal aid, costs to the

executing state in escorting the suspect to the trial state) which would have to be addressed for the policy option to be implemented successfully.

The policy option would require authorities to develop a substantial knowledge of the laws and legal systems in other Member States. The implementation of the policy option would also require addressing language issues faced by the police and judicial authorities in the process of international co-operation.

8. Monitoring and Evaluation

Monitoring and evaluation of the policy option of mutual recognition of non-custodial pre-trial supervision measures are important elements to ensure its efficiency and effectiveness. Table 8.1 suggests several indicators to evaluate the implementation and practical operation of such an instrument. Such information should be collected annually from the authorities of the Member States. The instrument should also be subject to an external evaluation every three years of its operation. Such an external evaluation, in addition to covering the questions of efficiency and effectiveness, should also consider the following questions:

– The instrument's place in, and contribution to, the area of justice, freedom and security (as a means of delivering on Community policy objectives),

– The coherence of the implementation of the instrument with other instruments in the area of mutual recognition in criminal matters,

– The longer-term impact of the instrument on citizens and the reduction of overall pre-trial detention levels across the Union.

Table 8.1 - Potential monitoring and evaluation indicators of the instrument

Objectives	**Potential monitoring indicators**
Avoid discrimination against EU nationals in pre-trial detention in Member States other than their own country of residence	Number of EU non-residents in pre-trial detention (monitored in terms of multi-annual trends) Number of EU non-residents for whom alternative non-custodial pre-trial supervision measures have been applied (monitored in terms of multi-annual trends)
Reduce the notional costs of injustice	Number of EU non-residents for whom alternative non-custodial pre-trial supervision measures have been applied (monitored in terms of multi-annual trends) and costs saved in the course of implementation of non-custodial measures

Reduce costs of detention to the public authorities	Number of EU non-residents in pre-trial detention (monitored in terms of multi-annual trends) and cost savings associated with the decrease of pre-trial detention
Limit the use of pre-trial detention to cases where a serious crime is suspected	Number of EU non-residents in pre-trial detention (monitored in terms of multi-annual trends), broken down by type of offence suspected
Encourage police and judicial co-operation	Number of EU non-residents for whom alternative non-custodial pre-trial supervision measures have been applied (monitored in terms of multi-annual trends)
Reduce the risk of absconding	Number of EU non-residents for whom alternative non-custodial pre-trial supervision measures have been applied (monitored in terms of multi-annual trends) and who have absconded since

Annex 1 - Statistical analysis of the problem

The tables overleaf present the following information collected in the study:

- The level of pre-trial detention in the EU25 (Table 1);
- The number of 'EU nationals' amongst pre-trial detainees in the EU25 (Table 2);
- The number of EU tourists in the EU25 (Table 3).
- The number of EU residents in the EU25 (Table 4).

As shown in Table 1, the number of people in pre-trial detention in the EU25 is over 130,000 (at any one time).[22] However, upon closer examination of these figures it was noted that in some countries the number described as being in pre-trial detention included several groups of people in the criminal process – mainly untried people, but also those who had been convicted but had not received their final sentence. It thus was necessary to calculate the number of **untried** detainees, who are the ones that could be subject to alternative supervision measures. The calculation shows that the total number of untried persons in pre-trial detention on a specific day in a year in the EU25 is about **110,000**.[23]

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[22] Authorities in the Member States collect information about the pre-trial detention levels throughout the year. However, it has become customary to report the statistics to the Council of Europe in respect of the situation on the 1st September of each year. Thus, most of data shown in Table 1 refer to the situation at 1 September of the year.

[23] Firstly, it was checked countries affected by studying the latest Council of Europe Annual Penal Statistics, covering the situation at 1.9.03. Thirteen of the 25 are affected, but two of them – Netherlands and Portugal - have provided the numbers of untried detainees and these have been used. In remaining 11 countries, it was estimated how much the total number of pre-trial detainees at any one time (over 130,000) should be reduced by in order to remove those among them who are a) convicted but not yet sentenced or b) already sentenced but still in pre-trial detention while awaiting the result of their statutory right to appeal. For each of the 11 countries the percentage, of the total number of PTDs at 1.9.03, who were not untried was checked. That percentage of the number of pre-trial detainees shown in table 1 was then calculated. The sum of these calculations is the amount that should be removed from the total number of pre-trial detainees. These are the country figures: Belgium. 21.5% of the (3,186) pre-trial detainees at 1.9.03 were not untried. So take off 21.5% of 3,614 = 777. Denmark. 17.6% of the (1,055) PTDs at 1.9.03 were not untried. So take off 17.6% of 1,053 = 185. France. 7.8% of the (21,278) PTDs at 1.9.03 were not untried. So take off 7.8% of 19,126 = 1,492. Italy. 43.0% of the (21,184) PTDs at 1.9.03 were not untried. So take off 43.0% of 20,442 = 8,790. Luxembourg. 32.7% of the (217) PTDs at 1.9.03 were not untried. So take off 32.7% of 300 = 98. UK: England &Wales. 36.4 % of the (13,416) PTDs at 31.8.05 were not untried. So take off 36.4% of 12,864 = 4,682. Estonia. 75.2% of the (1,544) PTDs at 1.9.03 were not untried. So take off 75.2% of 990 = 744. Hungary. 23.9% of the (4,018) PTDs at 1.9.03 were not untried. So take off 23.9% of 4,040 = 966. Latvia. 82.3% of the (2,567) PTDs at 1.9.03 were not untried. So take off 82.3% of 2,726 = 2,243. Lithuania. 27.6% of the (1,570) PTDs at 1.9.03 were not untried. So take off 27.6% of 1,643 = 453. Slovenia. 83.1% of the (338) PTDs at 1.9.03 were not untried. So take off 83.1% of

In terms of absolute numbers, pre-trial detainees in six Member States - France, Germany, Spain, UK, Italy and Poland - constitute around 73% of all pre-trial detainees in the EU25.

As shown in Table 2, there are around 6,000 'EU nationals' amongst pre-trial detainees in the 25 EU Member States. These are 'EU nationals' detained before their trial in a Member State other than their normal country of residence at any one time.

The number of 6,000 'EU nationals' in pre-trial detention includes both 'EU nationals' who are residents and those who are not residents in a Member State where pre-trial detention is taking place. Only those people who are non-residents would be subject to a future possible instrument of mutual recognition and transferred back to their normal country of residence.

The data on residency of a pre-trial detainee is not available in the Member States. Such data may be recorded by the penal administration authorities, but it is not routinely collected and compiled. Therefore, the following alternative methods of estimating the proportion of EU non-residents amongst pre-trial detainees in the EU 25 have been applied.

The category of 'EU nationals' detained before their trial consist of those 'EU nationals' who live in a Member State where pre-trial detention is taking place (i.e. EU residents) and those 'EU nationals' who are visiting a Member State of detention, for example, for the purposes of tourism.

Data in tables 3 and 4 show that the number of 'EU residents' in the EU25 is around 6 million. The number of 'EU nationals' visiting other EU Member States at a specific date in the year is around 20 million people. In total, thus, the number of 'EU nationals' living and visiting other EU Member States may be estimated to consist of around 26 million people. 6 million 'EU residents' constitute around a quarter of the group of 26 million EU citizens who are, at a given time, in another Member State than their country of citizenship.

Earlier it was estimated that around 6,000 'EU nationals' (both residents and non-residents) are detained before their trial in the EU25. It could be assumed that a quarter of these people could be EU residents. This is based on the estimate in the previous paragraph, where it was shown that 'EU residents' constitute around a quarter of all EU citizens who are, at a given time, in the territory of Member State other than their country of citizenship.

So, if this assumption is accepted and it is supposed that 'EU residents' constitute around a quarter of 'EU nationals' (both residents and non-residents) in pre-trial detention, the number of EU non-residents amongst pre-trial detainees (i.e. those who would be subject

341 = 283. The total of these 11 amounts to be taken off is 20,713. So when this is taken off 131,502 there are 110,789 untried pre-trial detainees.

to a future instrument on mutual recognition) **at a specific point in a year could be around 4,500 people**.

To arrive at the annual estimates of people who would be affected by a future instrument on mutual recognition, the average length of pre-trial detention has to be considered. As shown in table 2.1, the average length of time spent awaiting a trial in 19 Member States where data is available is around 167 days - 5.5 months. Therefore, on average **during a year, number of EU non-resident pre-trial detainees** could be almost **10,000 people** (4,500 people at a specific point in a year x 2.2).

Table 1 Total number of pre-trial detainees in EU25[24]

	1999		2000		2001		2002		2004/5	
	No.	**% of EU 25**	**No.**	**% of EU 25**	**No.**	**% of EU 25**	**No.**	**% of EU 25**	**No.**	**% of EU 25**
Austria	1,570	1%	1,669	1%	1,723	1%	1,947	1%	1,970	1%
Belgium	2,554	2%	3,023	2%	2,951	2%	3,238	2%	3,614	3%
Denmark	929	1%	911	1%	883	1%	1,023	1%	1,053	1%
Finland	354	0%	376	0%	457	0%	478	0%	467	0%
France	19,212	14%	16,990	13%	15,080	11%	15,246	11%	19,126	15%
Germany	19,138	14%	17,784	13%	17,805	13%	18,063	14%	15,999	12%
Greece	2,313	2%	2,226	2%	1,915	1%	2,061	2%	2,469	2%
Ireland	300	0%	379	0%	457	0%	480	0%	462	0%
Italy	23,370	18%	23,456	17%	23,405	18%	21,682	16%	20,442	16%
Luxembourg	139	0%	185	0%	202	0%	152	0%	300	0%
Netherlands	4,830	4%	5,126	4%	5,451	4%	5,754	4%	5,239	4%
Portugal	4,052	3%	3,854	3%	3,690	3%	4,219	3%	2,255	2%
Spain	10,781	8%	9,084	7%	10,201	8%	11,543	9%	12,688	10%
Sweden	1,142	1%	1,167	1%	1,277	1%	1,384	1%	2,089	2%
UK (England & Wales)	7,932	6%	7,219	5%	6,801	5%	7,877	6%	12,864	10%
Cyprus	n/a		n/a		50	0%	32	0%	47	0%
Czech Republic	6,934	5%	5,967	4%	4,583	3%	3,384	3%	3,269	2%
Estonia	1,623	1%	1,639	1%	1,541	1%	1,505	1%	990	1%
Hungary	4,114	3%	4,105	3%	4,263	3%	4,329	3%	4,040	3%
Latvia	3,561	3%	3,641	3%	3,653	3%	3,750	3%	2,726	2%
Lithuania	2,155	2%	1,587	1%	1,766	1%	1,252	1%	1,643	1%
Malta	n/a		n/a		79	0%	84	0%	92	0%
Poland	14,565	11%	22,032	16%	22,730	17%	20,896	16%	14,394	11%
Slovakia	1,878	1%	1,902	1%	1,946	1%	2,301	2%	2,923	2%
Slovenia	57	0%	89	0%	96	0%	44	0%	341	0%
EU 25 Total	**133,503**	**100%**	**134,411**	**100%**	**133,005**	**100%**	**132,724**	**100%**	**131,502**	**100%**

[24] The total number of pre-trial detainees is traditionally measured at a specific day of the year, usually 1 September. This is a convention widely used in the international and national criminal system statistics, which was also followed in this report. A closer analysis of statistical trends over longer periods reveals little fluctuation in the numbers of pre-trial detainees month-by-month, which supports the use of 1 September as representative of the number of people in pre-trial detention over the course of the year.

Table 2 Total number of 'EU nationals' amongst pre-trial detainees

	1999		2000		2001		2002		2004/5		TOTAL[25]
	No.	% of all pre-trial detainees	**No.**	% of all pre-trial detainees	**No.**	% of all pre-trial detainees	**No.**	% of all pre-trial detainees	No.	% of all pre-trial detainees	
Austria									205	10%	205
Belgium	351	14%	444	15%	446	15%	434	13%			419
Denmark									59	6%	59
Finland	23	6%	36	10%	66	14%	60	13%	30	6%	43
France26							604	3%			604
Germany									1850	12%	1,850
Greece	41	7%	38	2%	32	1%	59	3%			43
Ireland									39	8%	39
Italy	410	2%	382	2%	448	2%	502	2%			436
Luxembourg									159	53%	159
Netherlands	235	5%	303	6%	320	6%	299	5%	234	4%	278
Portugal									120	5%	120
Spain									907	7%	907
Sweden27	n/a										
UK England & Wales									340	3%	340
Cyprus	27	6%	67	13%	47	7%	39	7%			45
Czech Republic									216	7%	216
Estonia									10	1%	10
Hungary									36	1%	36
Latvia28	n/a										
Lithuania									5	0.3%	5
Malta	13	5%	15	6%	17	7%	15	5%			15
Poland	126	1%	230	1%	230	1%	150	1%	55	0.4%	158
Slovakia	21	1%	41	2%	54	3%	33	1%			37

[25] Total number of EU nationals in the Member States has been calculated using the average number of EU nationals over the years 1999-2004/05. Where no such data is available, the figures from the latest available year were used to calculate the total number of EU nationals pre-trial detainees in the EU25.

[26] France, in its reply to 2003 Commission questionnaire, indicated the nationality information is available only for all prison population, and is not available separately for people detained before trial. To estimate the numbers of EU nationals amongst pre-trial detainees in France, it was therefore assumed that the proportion of EU nationals amongst pre-trial detainees would be the same as the proportion of EU nationals amongst all the detained people (i.e. around 3%).

[27] In its reply to EPEC questionnaire, it was indicated that the Swedish Ministry of Justice does not collect information on nationality or residence of pre-trial detainees.

[28] In its reply to EPEC questionnaire, it was indicated that the Latvian Prison Administration can only provide the citizenship information for convicted prisoners. This information is not available for people in pre-trial detention.

Slovenia									20	6%	20
EU25 TOTAL											**6,044**

Table 3 - Tourism flows in the EU25

Arrivals of non-residents from EU25, 1999-2002

	Aug-99	Sep-99	1999 total	Aug-00	Sep-00	2000 total	Aug-01	Sep-01	2001 total	Aug-02	Sep-02	2002 total
Belgium	571,673	481,065	5,282,038	578,326	481,034	5,224,065	569,284	486,435	5,349,587	627,754	505,826	5,557,913
Czech Republic	-	-	-	-	-	2,949,575	-	-	3,269,671	344,605	328,712	3,673,594
Denmark	269,562	90,946	1,355,775	266,020	101,445	1,376,046	242,088	92,331	1,305,699	218,956	91,885	1,280,337
Germany (including ex-GDR from 1991)	-	-	10,440,962	-	-	10,716,497	-	-	10,791,422	-	-	10,867,289
Estonia	-	-	596,799	-	-	704,250	-	-	762,686	110,089	72,438	848,595
Greece	1,006,676	844,047	5,331,770	1,051,101	892,103	5,496,094	929,035	810,911	5,095,529	939,030	800,712	5,001,148
Spain	3,223,597	2,631,192	22,679,053	4,043,658	3,343,281	29,629,403	4,002,902	3,278,444	29,550,632	4,233,462	3,181,704	29,564,066
France	6,182,094	3,073,811	30,042,161	5,674,815	3,037,403	30,031,592	5,764,688	3,035,139	29,966,402	5,468,550	3,093,674	30,061,635
Ireland	346,000	289,000	2,910,000	1,378,000	702,000	7,246,000	-	-	-	-	-	-
Italy	2,852,460	2,477,589	19,888,559	3,108,745	2,923,828	21,349,548	3,173,846	2,955,373	23,244,830	3,243,653	2,767,856	22,698,386

Cyprus	-	-	-	-	-	1,784,359	-	-	1,860,072	203,676	203,150	1,607,583
Latvia	-	-	125,670	-	-	133,659	-	-	170,210	-	-	180,687
Lithuania	-	-	125,304	-	-	131,658	-	-	135,182	-	-	204,486
Luxembourg (Grand-Duché)	-	-	755,736	107,905	63,744	734,852	99,261	55,203	732,144	113,719	65,635	771,265
Hungary	-	-	1,708,867	-	-	1,865,300	772,620	499,829	5,141,828	774,712	487,050	5,268,568
Malta	-	-	-	-	-	-	-	-	-	-	-	-
Netherlands	520,762	419,982	7,047,000	915,472	631,618	7,064,279	519,000	428,000	4,872,000	964,900	617,400	7,053,300
Austria	1,710,357	1,072,409	12,063,185	1,546,882	1,130,432	11,895,573	1,614,650	1,053,076	12,568,264	1,638,397	4,397,175	12,942,617
Poland	-	-	-	-	-	-	-	-	1,956,849	-	-	1,964,381
Portugal	-	-	4,387,578	-	-	4,475,467	653,254	483,486	4,409,984	743,684	531,720	4,593,461
Slovenia	-	-	575,747	-	-	724,776	150,685	99,271	897,392	160,075	100,841	937,725
Slovakia	-	-	273,379	-	-	302,138	-	-	349,496	-	-	388,963
Finland	-	-	1,106,408	-	-	1,128,265	-	-	1,153,152	-	-	1,193,090
Sweden	-	-	-	-	-	-	497,937	114,530	2,292,732	479,225	128,892	2,334,987

United Kingdom	1,526,126	996,596	9,624,345	889,089	673,384	7,807,000	832,076	678,598	7,270,590	1,008,000	812,000	7,942,000
EU20 TOTAL	18,332,598	12,439,879	136,320,336	19,560,013	13,980,272	152,770,396	19,821,326	14,070,626	153,146,353	21,272,487	18,186,670	156,936,076

Source: Eurostat

Table 4 - EU and third country residents in the population, EU23, 1999-2003

	Residents who are Nationals of other EU Member State		Residents who are not EU Nationals	
	No.	% of all resident population	No.	% of all resident population
Belgium	564,152	5.5%	296,790	2.9%
Czech Republic	13,098	0.1%	167,163	1.6%
Denmark	54,310	1.0%	204,320	3.8%
Germany	1,872,655	2.3%	5,424,162	6.6%
Estonia	1,401	0.1%	273,094	20.0%
Greece	46,869	0.4%	714,569	6.8%
Spain	375,486	0.9%	548,394	1.4%
France	1,357,885	2.3%	2,361,538	4.0%
Ireland	102,655	2.7%	52,873	1.4%
Italy	153,825	0.3%	1,310,764	2.3%
Cyprus	32,214	4.2%	32,596	4.3%
Latvia	993	0.0%	580,515	24.6%
Lithuania	534	0.0%	34,560	1.0%
Luxembourg	139,691	31.8%	22,594	5.1%
Hungary	12,783	0.1%	103,026	1.0%
Malta	n/a			

Netherlands	201,574	1.3%	466,228	2.9%
Austria	106,173	1.3%	604,753	7.4%
Poland	n/a			
Portugal	56,783	0.6%	151,415	1.5%
Slovenia	1,197	0.1%	41,082	2.1%
Slovakia	1,165	0.0%	108,634	2.0%
Finland	16,656	0.3%	74,418	1.4%
Sweden	180,191	2.0%	297,121	3.3%
United Kingdom	856,156	1.4%	1,603,778	2.7%
TOTAL	6,148,446	1.4%	15,474,387	3.4%

Source: Eurostat.

Annex 2 - alternatives to pre-trial detention in the new member states

One of the tasks of the study has been to map the existing alternatives to pre-trial detention in the 10 new Member States. The results of this task are presented below.

The Czech Republic

The response of the Czech Republic to the Commission Green Paper[29] and reply to the EPEC questionnaire list the following alternatives to pre-trial detention:

- Guarantee by a trustworthy person and an association of citizens (entails the same obligations and restrictions as for an oath) (Para. 73 (1) (a) Code of Criminal Procedure (CCP))
- An undertaking by the accused to duly appear before bodies involved in the criminal prosecution, not to commit any criminal acts, always to give notice in advance of departure from the place of residence and to submit to any stipulated restrictions (Para. 73 (1) (b) CCP)
- Supervision of the accused by a probation officer together with the imposition of restrictions similar to the foregoing (Para 73 (1) (c) CCP)
- Bail - pecuniary guarantees (Para. 73a CCP)
- For Juveniles (15-18 years olds), in addition to above alternatives, placement into the care of a trustworthy person (Para. 50 of the Act on jurisdiction in juvenile cases).

The Czech Code of Criminal Procedure does not appear to have been translated from the original language. The Czech government response to 2003 Commission's questionnaire lists measures alternative to the sentence of imprisonment.

Cyprus

In Cyprus, the alternative measure to pre-trial detention is bail (§ of the Criminal Procedure Law).

Estonia

According to the Estonian reply to the 2003 questionnaire, alternative measures to pre-trial detention:

- Security,
- Signed undertaking not to leave the place of residence

[29] Available at http://www.europa.eu.int/comm/justice_home/news/consulting_public/gp_30112004/news_contributions_gp30112004_en.htm

- Other.

The Estonian Code of Criminal Procedure[30] mentions the following alternatives to pre-trial detention:

- Prohibition on departure from residence – an obligation of a suspect or accused not to leave his/her residence for more than 24 hours without the permission of the body conducting the proceedings (§ 128).

- Bail, at the request of a suspect or accused (a sum of money paid as a preventive measure to the deposit account of the court) (§ 135).

Hungary

In its reply to the 2003 Commission questionnaire, Hungary did not indicate the use of alternatives to pre-trial detention.

The Hungarian Code on Criminal Procedure (Act XIX of 1998) mentions the following alternatives to pre-trial detention in the country:

- The prohibition of leaving a determined region, restricting the suspect's right to free movement and to free choice of residence (§ 137).

- Reporting to the police.

- Supervision by a probation officer.

- House arrest.

- Release on bail (§ 147 and 148).

Latvia

In its reply to the 2003 Commission questionnaire, Latvia did not indicate the use of alternatives to pre-trial detention.

According to the new Latvian Code of Criminal Procedure which will come into force on 1 October 2005, the following are alternatives to pre-trial detention:

- Notification of address for the receipt of messages (§ 252).

- Protection order – prohibition to approach a person or place (§ 253).

- Restrictions to exercise a particular occupation (§ 254).

- Ban to leave the country (§255).

- Residing at a fixed address (§256).

[30] Adopted on 14 March 2002 No. IX-785, amended on 9 November 2004, No. IX-2553.

- Bail (§257).
- Personal warranty by a trustworthy person (§258).
- Placement under police supervision (§261).
- House arrest (§282).

Lithuania

The Lithuanian Code of Criminal Procedure[31] mentions the following alternatives to pre-trial detention:

- House arrest (§132) – obligation for the suspect to be at his/her place of residence, and not to appear in public places and not communicate with certain persons,
- Obligation to live separately from the victim (§132 -1)
- Bail (§133),
- Confiscation of personal documents (§134), such as passport, personal ID card, driving licence.
- Obligation to report to the police on a regular basis (§135),
- Written oath not to leave the place of residence (§136) without a permission.

Malta

In its reply to the 2003 Commission questionnaire, Malta did not indicate the use of alternatives to pre-trial detention.

The Maltese Code of Criminal Procedure foresees the following alternatives to pre-trial detention:

- Release on the condition that the person will not attempt to leave Malta without the authority of the investigating officer under whose authority he was arrested and that he will attend at such police station at such time as the custody officer may appoint and, or that he will attend before the Court of Magistrates at such time and such place as the court may appoint. (355 AL 3 CCP)
- Bail (355 AL 4 CCP).

Poland

The Polish reply to 2003 Commission questionnaire details the following alternative measures to pre-trial detention:

- Bail

[31] Adopted on 14 March 2002 No. IX-785, amended on 9 November 2004, No. IX-2553.

- Surveillance of the police
- Prohibition to leave the country
- Seizure of passport or other personal documents
- Suspension from person's official function or performance of person's profession
- Refrain from a specific type of activity
- Refrain from driving specific types of vehicles.

The Polish Code on Criminal Procedure[32] details the following alternative measures to pre-trial detention:

- Bail (§ 266), in form of cash, securities, a bond.
- A guarantee from a trustworthy source that the accused will appear whenever summoned (§ 271).
- Surveillance by the police (§ 275), which may consist in the prohibition of absenting himself/herself from a designated area of residence, having to report to the police in specified time intervals, and other limitations on the freedom of movement.
- Suspension from official function or performance of his/her profession, refrain from specific type of activity or driving specific types of vehicles (§ 276).
- Prohibition to leave the country, combined with seizure of passport or other documents, or prohibition to issue such a document (§ 277).

Slovakia

The Slovakian reply to 2003 questionnaire stated that the current legal system of Slovakia does not regulate alternative measures to pre-trial detention.

The Slovakian Code of Criminal Procedure details the following two alternatives to pre-trial detention:

- A guarantee from a trustworthy person that the accused will appear before the court (§ 73).
- Bail (§ 73a).

Response of the Slovak government to the Commission's Green Paper[33] also mentions proposed amendments to the criminal law which envisage the following alternatives:

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[32] 6 June 1997, Dz.U.97.89.555.

[33] Available at http://www.europa.eu.int/comm/justice_home/news/consulting_public/gp_30112004/news_contributions_gp30112004_en.htm.

- an injunction against travelling abroad;
- an injunction against engaging in the activity in the course of which the criminal offence was committed;
- an injunction against visiting certain places;
- a requirement to hand in a legally held weapon;
- an injunction against leaving the place of residence or dwelling, except in limited circumstances;
- an obligation to report regularly to a State authority stipulated by the court;
- a driving ban and surrender of driving licence;
- an injunction against contact with certain individuals or deliberately coming closer than 5 metres to a given individual;
- a requirement to pay money to cover the victim's claim for damages.

Slovenia

The Slovenian Code of Criminal Procedure provides for the following alternatives to pre-trial detention:[34]

- Promise of the accused not to absent himself/herself from his/her place of residence (§ 195), including the possibility of confiscating his/her passport.
- Prohibition of approaching a specific place or person (§ 195a).
- Reporting to a police station (§ 195 b).
- Bail (§ 196-199).
- House arrest (§ 199a).

[34] The Code of Criminal Procedure 1994 (No.012-01/94-123), including subsequent Act amending the criminal procedure act (LCP-A).