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From:	General Secretariat of the Council
To:	Delegations
Subject:	Non-paper from the Commission services on detention conditions and procedural rights in pre-trial detention

Delegations will find in the Annex the above-mentioned non-paper.

ANNEX

Non-paper from the Commission services on detention conditions and procedural rights in pre-trial detention

1. Introduction

The purpose of this non-paper, which will be the basis for the policy debate during the JHA Council on 7 October 2021, is to identify relevant aspects on material detention conditions and procedural rights in pre-trial detention resulting from existing international standards, where more convergence between Member States would help to strengthen EU judicial cooperation in criminal matters.

2. Background

According to the latest statistics, 11 EU Member States have a problem of prison overcrowding with a prison occupancy rate of more than 100%[1].

The latest case-law of the European Court of Human Rights (ECtHR) as well as recommendations by international and national torture prevention bodies show that several Member States are still confronted with the problem of ill-treatment in prisons and that there are significant disparities between penal systems within the EU. In 2020, there were 137 cases of violations of Article 3 of the European Convention of Human Rights (ECHR) (prohibition on torture or inhuman and degrading treatment) in the Council of Europe Member States, 34 of which concern EU Member States.[2]

Since last year, the COVID-19 pandemic has put further pressure on the already vulnerable position of detainees and overcrowded prisons have led to enhanced contamination risks. In the Council conclusions on Alternatives to Detention of December 2019, Member States agreed that detention should be used only as a last resort and that non-custodial sanctions and measures should be applied instead of detention, in particular with a view to the social rehabilitation and reintegration of offenders[3].

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1 See, Council of Europe SPACE I Final Report for 2020, https://wp.unil.ch/space/files/2021/04/210329_Key_Findings_SPACE_I_2020.pdf

2 See 'The European Court of Human Rights in Facts and Figures, https://www.echr.coe.int/Documents/Facts_Figures_2020_ENG.pdf.

3 https://data.consilium.europa.eu/doc/document/ST-14075-2019-INIT/en/pdf

It follows from various studies that, in many Member States, pre-trial detention is not used as a measure of last resort and that alternatives to pre-trial detention are used to a very limited extent. Moreover, decisions on pre-trial detention are often not sufficiently reasoned and are not open to regular review, leading to long periods of pre-trial detention[4]. An analysis of the case-law of the ECtHR of the last 5 years demonstrates that in respect of Article 5(3) ECHR (entitlement to a trial within a reasonable time or to be released pending trial) alone the ECtHR held in 14 cases that there was a violation in EU Member States, and in 19 cases a violation under Article 5(4) ECHR.

The differences in detention systems and the use of alternatives to detention raise problems for EU cross border cooperation in criminal matters[5].

3. Problems identified in the context of EU cross-border judicial cooperation

While from a legal perspective, material detention conditions such as cell space, access to healthcare and sanitary conditions are primarily a responsibility of the Member States, the importance of detention conditions has been acknowledged by the Court of Justice of the European Union (CJEU) in the context of mutual recognition and the efficient operation of the European Arrest Warrant (EAW) in the *Aranyosi/Căldăraru* judgment in 2016[6]. The latest available statistics concerning the EAW demonstrate that Member States have refused execution on grounds of fundamental rights issues in close to 300 cases since 2016[7].

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4 Fair Trials International, '*A Measure of Last Resort? The practice of pre-trial detention decision making in the EU*' (2016) CSES, '*Study on financial and Other Impacts for an Impact Assessment of a Measure Covering Rights for Suspects and Accused Persons wo are in Pre-Trial Detention*' (2016); W. Hammerschick, C. Morgenstern, and other, 'DETOUR - Towards Pre-trial Detention as Ultima Ratio: Comparative Report' (2018).

5 Such as in the context of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant (OJ L 190, 18.7.2002, p. 1), Council Framework Decision 2008/909/JHA of 27 November 2008 on Transfer of Prisoners (OJ L 327, 5.12.2008, p.27), Council Framework Decision 2008/947/JHA of 27 November 2008 on Probation and Alternative Sanctions (OJ L 337, 16.12.2008, p. 102) and Council Framework Decision 2009/829/JHA of 23 October 2009 on the European Supervision Order (OJ L 294, 11.11.2009 p.20).

6 See CJEU, Aranyosi and Căldăraru; Joined Cases C 404/15 and C 659/15 PPU, 5 April 2016.

7 https://ec.europa.eu/info/publications/replies-questionnaire-quantitative-information-practical-operation-european-arrest-warrant_en

Therefore, Member States are experiencing delays in execution of the EAW requests and national judicial authorities would wish to have more concrete guidance on how to deal with these cases. The problem identified by practitioners concerns the lack of harmonisation, dispersion and lack of clarity of detention standards across the EU as a challenge for judicial cooperation[8].

In accordance with Article 2 of the Treaty on European Union, the European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Article 4 of the Charter of Fundamental Rights of the EU provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The compatibility of detention conditions with fundamental human rights is thus a problem that goes beyond national contexts and has legal and practical relevance for the EU[9].

At present, there are no provisions regulating material detention conditions and procedural rights in pre-trial detention in the European Union. In the absence of EU rules, the CJEU has interpreted the prohibition of torture and inhuman and degrading treatment or punishment enshrined in Article 4 of the Charter with regard to detention conditions in EAW cases in the light of the case-law of the ECtHR in relation to Article 3 ECHR.

However, the problem is that there are limits to the Court developing case law in this area, as the setting of EU minimum standards falls within the remit of the EU legislator[10].

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8 9th round of mutual evaluations and conclusions of the High-Level Conference on the EAW, organised by the DE Presidency in September 2020.

9 The program of measures to implement the principle of mutual recognition of criminal decisions envisaged in the Tampere European Council Conclusions and adopted by the Council on 30 November 2000 OJ C 12 E, 15.1.2001, p. 10stated that: "*The principle of mutual recognition is founded on mutual trust developed through the shared values of Member States concerning respect for human dignity, freedom, democracy, equality, the rule of law and human rights, so that each authority has confidence that the other authorities apply equivalent standards of protection of rights across their criminal justice systems".*

10 See Opinion of Advocate General Pitruzzella delivered on 19 November 2019 in Case C-653/19 PPU, *Criminal proceedings against DK*, ECLI:EU:C:2019:983, paragraphs 20-22; Opinion of Advocate General Bot delivered on 3 March 2016 in Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:140; Opinion of Advocate General Campos Sánchez-Bordona delivered on 30 April 2019, Case C-128/18, *Dumitru-Tudor Dorobantu* ECLI:EU:C:2019:334.

In this context, Advocate-General Pitruzzella has urged the EU legislature "*to urgently address the question of harmonisation, however minimal, of detention conditions and pre-trial detention as it is ultimately the European area of criminal justice that is under threat. There can be judicial cooperation in criminal matters only if mutual trust between Member States is strengthened and trust cannot be soundly established if such contrasting standards are applied by Member States*"[11].

4. Working towards convergence in the area of detention

For illustrative purposes, this non-paper contains in the Annex a preliminary overview of the most relevant minimum standards for detention conditions and procedural rights in pre-trial detention. These standards have the potential to avoid, if adhered to by Member States, inhuman or degrading treatment concerns in the context of the EAW and therefore to enhance mutual trust and lead to a smoother surrender process.

The baseline of this overview is the case law of the ECtHR as well as the useful work performed by the Council of Europe in this area over the last decades. Their conclusions are mainly laid down in recommendations, such as the European Prison Rules and the Recommendation on the use of remand in custody[12].

In judgments *ML*[13] and *Dorobantu*[14] the CJEU explicitly recognised for example the applicable minimum standard of cell space as developed in the case law of the ECtHR . In this context, it should be pointed out that the CJEU has confirmed that the requirements laid down by the ECtHR are *minimum* standards. In the European Union and, in particular, within the area of freedom, security and justice, those requirements must ensure a uniform minimum requirement, applicable to all Member State prison systems alike. Such standards would also help to strengthen the mutual trust between Member States.

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11 Opinion of Advocate General Pitruzzella delivered on 19 November 2019 in Case C-653/19 PPU, *Criminal proceedings against DK*, ECLI:EU:C:2019:983, paragraphs 20-22. Other Opinions which are relevant in this context are those of Advocate General Bot delivered on 3 March 2016 in Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:140; Opinion of Advocate General Campos Sánchez-Bordona delivered on 30 April 2019, Case C-128/18, *Dumitru-Tudor Dorobantu* ECLI:EU:C:2019:334.

12 Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules: https://www.coe.int/en/web/human-rights-rule-of-law/european-prison-rules;
Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d743f.

13 Judgment of 25 July 2018, *ML*, C-220/18, ECLI:EU:C:2018:589, paragraphs 92,93.

14 Judgment of 15 October 2019, *Dumitru-Tudor Dorobantu*, C-128/18, ECLI:EU:C:2019:857, paras. 70-77.

However, they do not prevent that, at national level, Member States are free to set a more generous standard as regards the conditions of detention in their own prisons, which cannot be enforced against neighbouring States in the context of the execution of an EAW[15].

5. Conclusion

As demonstrated by the data gathered by the Council of Europe, material detention conditions in several Member States do not comply with the prohibition on inhuman and degrading treatment as laid down in Article 3 ECHR. Moreover, the diversity of pre-trial detention legal frameworks across the Member States and their interaction on a cross-border basis has a detrimental effect on mutual trust between judicial authorities. Minimum standards for detention conditions and procedural rights in pre-trial detention have the potential to avoid inhuman or degrading treatment concerns in the context of the EAW and to lead to a smoother surrender process.

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[15] See Opinion of Advocate General Campos Sánchez-Bordona delivered on 30 April 2019, Case C-128/18, Dumitru-Tudor Dorobantu ECLI:EU:C:2019:334, para. 73

Annex: Preliminary overview of the most relevant aspects of detention conditions and procedural rights in pre-trial detention

A. *Minimum standards for material detention conditions* [16]

1. Cell space

The ECtHR has summarized its line of jurisprudence on cell space in its judgment *Muršic v. Croatia*[17] confirming that the applicable minimum standard of personal space is a **3 m² surface area per detainee** (including space taken up by furniture but not the space taken up by sanitary facilities) **in a multi-occupancy cell**: when the surface area is below this minimum, it is regarded as giving rise to a strong presumption of a violation of Article 3 of the ECHR.

This same standard has been explicitly recognised by the CJEU in judgments *ML*[18] and *Dorobantu*[19].

The **majority of MS** (18) have national laws regulating (or partially regulating) national standards of **minimum cell space per prisoner**. Of these, minimum standards range from 3 m^2 to 10 m^2 per person in individual cells (the average is 5.8 m^2), and from 3 m^2 to 6 m^2 per prisoner in multi-occupancy cells.

Most of the MS which do not regulate minimum cell space have however set down general conditions, such as that cells should provide for **sufficient/ reasonable amount of space** (6 MS), or have standards laid down in detention facilities guidelines or administrative rules (2 MS).

2. Hygiene and sanitary conditions

The ECtHR has repeatedly held that sanitary facilities should be **accessible at all times**[20] and always available to offer adequate privacy to detainees. For multi-occupancy cells, sanitary facilities require proper **structural separation**, a simple partition is to be considered inadequate[21].

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[16] The information concerning the national practices is based on the information contained in the individual country reports in the FRA Database on detention conditions https://fra.europa.eu/en/databases/criminal-detention/criminal-detention

[17] ECtHR, *Muršić v. Croatia*, No. 7334/13, 20 October 2016, paragraphs 105-140; see also ECtHR, *Rezmives and others v. Romania*, Nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017.

[18] Judgment of 25 July 2018, *ML*, C-220/18, ECLI:EU:C:2018:589, paragraphs 92,93.

[19] Judgment of 15 October 2019, *Dumitru-Tudor Dorobantu*, C-128/18, ECLI:EU:C:2019:857, paragraphs 70-77.

[20] ECtHR, *Danilczuk v. Cyprus*, No. 21318/12, 3 April 2018, paragraphs 57 and 59

[21] ECtHR, *Sylla and Nollomont v. Belgium*, Nos. 37768/13 and 36467/14, 16 May 2017 ECtHR, *Szafrański v. Poland*, No. 17249/12, 15 December 2015; ECtHR, *Kalashnikov v. Russia*, No. 47095/99, 15 July 2002, paragraph 99. On the consideration of sanitary conditions as an aggravating factor in the consideration of a violation of Article 3 ECHR, see also: ECtHR, *Canali v. France*, No. 40119/09, 25 July 2013.

Moreover, national authorities must apply effective means to ensure good hygienic standards via disinfection and fumigation and provide sanitary products to detainees[22].

The European Prison Rules[23] and the Nelson Mandela Rules[24] have similar standards, stipulating that prisons are to be maintained clean at all times, toiletries and cleaning products should be provided to detainees and prisoners should have **access at any time to hygienic sanitary facilities** which ensure the respect of their privacy.

Most MS (25) regulate access to showers and hot water. A few MS (3) have provisions ensuring more frequent access to these facilities for specific groups (women, workers, sick inmates). The **majority of MS** (23) have regulations on minimum standards on access to sanitary facilities. The remaining MS have partial provisions (2 MS) or, while not having legislation in place, do refer to minimum conditions (2 MS).

3. Time spent outside the cell and outdoors

Time spent outside cells has been identified by the ECtHR as one of the "compensating" factors for the overcrowding of cells: the ECtHR case-law[25] follows the criteria as developed by the Committee for the Prevention of Torture (CPT)[26]. According to the CPT criteria, the European Prison Rules and the Nelson Mandela Rules, prisoners should be able to **exercise in open air at least one hour per day** and prison authorities should provide spacious and appropriate facilities and equipment. The CPT defines as a rule that all prisoners shall spend a minimum of eight hours a day outside their cells partaking in purposeful activities, such as education, vocational activities or recreation.

The European Prison Rules and Nelson Mandela Rules more generally stipulate that prisoners should be allowed to spend a reasonable time outside their cells in work, education and recreational activities.

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22 ECtHR, *Muršić v. Croatia*, No. 7334/13, 20 October 2016, paragraphs 48, 53, 55, 59, 63-64 and 140; see also, ECtHR, *Rezmives and others v. Romania*, Nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017, paragraphs 106-108.

23 Council of Europe minimum standards on prison conditions laid down in Recommendation Rec(2006)2 of the Committee of Ministers: https://www.coe.int/en/web/human-rights-rule-of-law/european-prison-rules. The European Prison Rules provide a general framework, while a growing number of specialist recommendations deal in more detail with a range of issues. The Rules and Recommendations are not legally binding.

24 United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the United Nations General Assembly on 17 December 2015 with resolution 70/175: https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf. The rules contain an update and expansion of the 1955 UN Standard Minimum Rules for the Treatment of Prisoners and provide States with detailed guidelines for protecting the rights of persons deprived of their liberty, from pre-trial detainees to sentenced prisoners.

25 ECtHR, *Muršić v. Croatia*, No. 7334/13, 20 October 2016, paragraph 133; ECtHR, *Tomov and others v. Russia*, Nos. 18255/10, 63058/10, 10270/11, 73227/11, 56201/13 and 41234/16, 9 April 2019, paragraph 128; ECtHR, *Clasens v. Belgium*, No. 26564/16, 28 May 2019, paragraph 35.

26 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is a monitoring mechanism of the Council of Europe, established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which came into force in 1989. The CPT organises visits to places of detention, in order to assess how persons deprived of their liberty are treated, and it then sends a detailed report to the State concerned. The CPT is not an investigative body, but it provides a non-judicial preventive mechanism to protect persons deprived of their liberty against torture and other forms of ill-treatment.

Almost all MS (26) have rules concerning the amount of time spent outdoors in open air, which is usually at least a **minimum of one hour per day**. A few MS (5) provide also more liberal standards of 2 hours or more. Possible time outdoors also differs at national level in relation to the different prison regimes. All Member States have indoor sports facilities, common rooms or libraries, which are used by prisoners to a varying extent.

4. Access to healthcare

The ECtHR held in its case-law[27] that prisoners must have access to the **medical assistance** they need in a timely manner and that medical treatment in prison facilities must be comparable to the one provided to the entire population. Authorities must ensure regular medical supervision and comprehensive therapeutic strategies when required.

The CPT identifies access to a doctor upon arrest as a right of the arrested person. A **medical examination** is required at the beginning of any period of custody and a doctor should always be called without delay when asked by the detainee.

All MS have legal provisions ensuring **access to healthcare** for detainees. Most MS (23) have provisions recognizing that healthcare in prison should be the same as the one provided by the public health system of the state. In all MS medical services are provided within the premises of detention facilities and access to outside doctors is limited. All MS have requirements stipulating that a person in custody must be **medically examined upon arrival**. A few MS (2) have defined standards in terms of timing for medical intervention and planned examinations.

5. Protection from inter-prisoner violence

On the basis of the ECtHR case-law[28], States are obliged to ensure that individuals are not subject to inhumane or degrading treatment and are required to protect inmates from violence at the hands of other inmates. Authorities are under an obligation to exercise supervision in this regard and to ensure prisoners' security by taking all **reasonable measures to prevent violence** from occurring.

The CPT stipulates that **adequate staff supervision** should be ensured and any signs of violence should be recorded by prison health services. The European Prison Rules promote a **duty of care** towards prisoners, who need to be able to contact guards at all time, even at night. Inmates should be having separate accommodations accordingly: women should be held separately from men and children should not be detained with adults.

Many MS (22) have a general rule of a **duty of care** towards prisoners by prison authorities. Almost **half MS** (13) have very detailed provisions to prevent inter-prisoner violence such as facility arrangements, technical measures (camera monitoring) and organizational measures.

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[27] ECtHR, *Kudła v. Poland*, No. 30210/96, 26 October 2000, paragraph 94; ECtHR, *Nogin v. Russia*, No. 58530/08, 15 January 2015, para. 83. ECtHR, *Topekhin v. Russia*, No. 78774/13, 10 May 2016, paragraph 69.

[28] ECtHR, *Premininy v. Russia*, No. 44973/04, 10 February 2011, paragraphs 82-88; ECtHR, *Gjini v. Serbia*, No. 1128/16, 15 January 2019, paragraphs 78-80.

All MS have specific rules in relation to children and young offenders: almost half MS have **specialized detention facilities for children and young offenders**. The remaining MS detain them in separate units within regular detention facilities. Only a few MS (4) have some guidelines and strategies in place in order to ensure special protection to LGBTI prisoners.

B. Minimum standards for procedural rights in pre-trial detention (PTD)

1. Reasonable suspicion and grounds for PTD

The relevant Council of Europe's Recommendation[29] contains, essentially, two prerequisite conditions to PTD:

- There should be a reasonable degree of suspicion that the suspect has committed the offence in question.
- Remand in custody should generally be reserved for persons suspected of committing offences that carry a custodial sentence.

The majority of MS (25) have a "reasonable suspicion" requirement (or an equivalent or higher evidential requirement) as well as a threshold for imposing PTD. In 14 MS this threshold refers to alleged offences carrying a maximum custodial sentence of 1 year or more.

As well as 'reasonable suspicion', the case law of the ECtHR and the Recommendation require that national courts establish one or more (of a possible four) relevant and sufficient special grounds for continued detention.

Three of the four grounds (risk of absconding, risk of committing a serious offence, risk of suspect interfering with the course of justice) are currently reflected in the national laws of all MS. The 'public order' ground is reflected in the legislation of 12 MS but is seen by some stakeholders (NGOs such as Fair Trials) as controversial, due to its subjective nature.

2. Measure of last resort

The Recommendation provides at Article 3(3) that *'in individual cases remand in custody shall only be used when strictly necessary and as a measure of last resort*.'

MS' legislation is to a large degree in line with ECHR standards and the Recommendation requiring that PTD be used by national courts as a measure of last resort. In practice, however, the field research undertaken to date appears to support the conclusions of previous academic studies and NGO reports that the last resort principle is not applied on a regular or consistent basis in a significant number of MS (12).

[29] Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

3. Alternatives to PTD

The ECtHR observes that under Article 5 § 3 the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his appearance at trial. Indeed, that Article lays down not only the right to *"trial within a reasonable time or release pending trial"* but also provides that *"release may be conditioned by guarantees to appear for trial"*(Jablonski v Poland, Application No. 33492/96, 1 December 2000).

The Recommendation provides in Article 3(4) that *'In order to avoid inappropriate use of remand in custody the widest possible range of alternative, less restrictive measures relating to the conduct of a suspected offender shall be made available.'*

Alternative measures such as electronic monitoring, regular reporting, etc. are currently available in the national legislation of all EU jurisdictions, and are often being developed. In at least 6 MS alternative measures are not frequently used in practice, particularly for serious crimes. Different reasons have been given for this, including bureaucratic or decentralised implementation/ administration of alternative measures; media pressure to use PTD and lack of judicial training and awareness; and the courts' perception that non-custodial options would not achieve the aim of ensuring the suspect's presence at trial since s/he would be likely to abscond.

4. Reasoned decisions on PTD

The ECtHR considers that the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time may be incompatible with the principle of the protection from arbitrariness enshrined in Article 5 § 1 (Stasaitis v. Lithuania, 47679/99, 21 March 2002).

The Recommendation provides in Article 21(1) that: *" Every ruling by a judicial authority to remand someone in custody, to continue such remand or to impose alternative measures shall be reasoned and the person affected shall be provided with a copy of the reasons".*

26 EU MS have an obligation in law to give a written as well as a reasoned decision on PTD. There are some disparities however as regards standard forms used by the decision maker to give reasons for the decision.

5. Decision-making on PTD

The Recommendation provides in Article 14(1) that: *"After his or her initial deprivation of liberty by a law enforcement officer (or by anyone else so authorised to act), someone suspected of having committed an offence shall be brought promptly before a judicial authority for the purpose of determining whether or not this deprivation of liberty is justified, whether or not it requires prolongation or whether or not the suspected offender shall be remanded in custody or subjected to alternative measures."*

In 26 MS the judge makes the ultimate decision to order PTD. In a few MS (5 or 6) the prosecutor and/or the police have a role in the decision-making procedure by way of proposing or expressing an opinion on the application of PTD.

6. Regular review of PTD cases

The Recommendation provides at Article 17 that:

"[1] The existence of a continued justification for remanding someone in custody shall be periodically reviewed by a judicial authority, which shall order the release of the suspected offender where it finds that one or more of the conditions in Rules 6 and 7 a, b, c and d are no longer fulfilled.

[2] The interval between reviews shall normally be no longer than a month unless the person concerned has the right to submit and have examined, at any time, an application for release.

[3] The responsibility for ensuring that such reviews take place shall rest with the prosecuting authority or investigating judicial authority, and in the event of no application being made by the prosecuting authority or investigating judicial authority to continue a remand in custody, any person subject to such a measure shall automatically be released."

22 MS have an obligation to carry out a regular review to PTD.

Many divergences can be observed in relation to the duration of the period within the provided PTD reviews and to the way revisions are carried out (for example, on the initiative of the judge or at the request of the detainee). The range goes from 6 months to 2 weeks.

7. Hearing the pre-trial detainee in person

The Recommendation provides in Article 16 that: *"The judicial authority responsible for remanding someone in custody or authorising its continuation, as well as for imposing alternative measures, shall hear and determine the matter without delay".*

24 MS have an obligation to hear the accused either in person or through a legal representative before any decision on PTD is taken. 20 MS provide an obligation to hear the detainee before any review decision on PTD.

8. Effective remedy and right to appeal

Article 5(4) ECHR provides : *"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful"*.

The Recommendation provides in Article 18: "*Any person remanded in custody, as well as anyone subjected to an extension of such remand or to alternative measures, shall have a right of appeal against such a ruling and shall be informed of this right when the ruling is made*".

At least 7 MS incorporate an equivalent protection to Article 5(4) ECHR at the level of their national constitutions. Mechanisms for judicial review of PTD exist in all MS.

All MS' legal systems provide a right of appeal in respect of judicial decisions ordering PTD. 6 MS do not, however, permit review decision appeals, and in a 2 MS, the appeal is only possible on points of law not fact.

9. Deduction of Time Spent in PTD from Final Sentence

Article 33(1) of the Recommendation states: *"The period of remand in custody prior to conviction, wherever spent, shall be deducted from the length of any sentence of imprisonment subsequently imposed."*

26 MS have legislation in place to ensure the respect for ECHR standards on the deduction of the PTD period from the final sentence. In this way, the legislation is in line with ECHR standards and the Recommendation requiring that period of remand in custody prior to conviction, wherever spent, shall be deducted from the length of any sentence of imprisonment subsequently imposed.

Nevertheless, the legal provisions differ. First, there is a difference between MS with regard to whether alternatives to PTD will be taken into consideration (15) or not (11). Second, MS' legislation differs in respect to the ratio of taking PTD/alternatives into account and the cases in which deprivation of liberty can be taken into account. Some MS' legislation clearly mentions that the ratio should be 1:1; i.e. one day of deprivation of liberty before the judgment has to account for one day less of the final sentence). Other laws merely mention that PTD should be taken into account or that time spent in PTD shall be reduced from the final sentence. In addition to that, some MS have the same ratio for PTD and alternatives while other countries have a different ration for each.