

OVERVIEW OF ADOPTED AND PROPOSED LEGISLATION REGARDING PRE-TRIAL DETENTION IN EUROPE

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Abstract

This study discusses the most important international legal instruments with regard to pre-trial detention in chronological order of their adoption or proposal, independently for the two European levels of international law - the Council of Europe and the European Union. The legal acts discussed are in the form of conventions, directives, framework decisions, resolutions, minimum rules and standards, principles, recommendations, action plans, road maps, and green papers.

Keywords

Pre-trial detention, Justice, Human rights, European Union, Lisbon treaty, EU Directives.

1. BACKGROUND

As of today, there is no single legally binding international instrument that addresses pre-trial detention separately. However, obligations stemming from international law with regard to pre-trial detention can be found scattered across numerous provisions of legal acts with both binding and non-binding character. The Member States of the European Union are bound by three different levels of international law. The first one involves instruments adopted by the United Nations (international level); the second level includes acts adopted by the Council of Europe (regional level), and the third one acts adopted by the European Union (sub-regional level). These legal documents can be in a form of conventions, covenants, directives, framework decisions, declarations, resolutions, minimum rules and standards, codes of conduct, general comments, principles, guidelines, recommendations, action plans, road maps and green papers.

While conventions, covenants and EU directives and framework decisions have binding character on signatories, the other instruments lack binding legal force but provide useful interpretation and application of human rights issues. This study discusses the most important international legal instruments with regard to pre-trial detention in chronological order of their adoption and independently for the two European levels of international law.

2. COUNCIL OF EUROPE

The first and most important instrument in the field of human rights in Europe, the European Convention on Human Rights (hereinafter: ECHR), was adopted in 1950.¹ Article 5 provides an exhaustive list of cases in which detention is permissible. Namely, for the purpose of bringing a suspect to court following a reasonable suspicion that he has committed a crime, to prevent a suspect from committing further crimes, and if there is a danger that he might flee after committing a crime. It prohibits arbitrary arrest or detention and stipulates that any deprivation of liberty must be in accordance with law; it provides the rights to information for the reasons of arrest or detention as well as information regarding the charges against the detainee. The detainee must be brought promptly before a judge and is entitled to trial within a reasonable time or release. Every detainee must be entitled to take proceedings before a court that is required to decide on the lawfulness of the detention and release the detainee if such detention is not lawful. Finally, if the detention was not lawful, the detainee enjoys an enforceable right to compensation.

Article 6 relates to the right to a fair trial and stipulates that everyone suspected of a criminal offence must be presumed innocent until proven guilty and be informed about the charges against him in language that he understands. Furthermore, suspects must be provided with adequate time and facilities and the possibility to communicate with a defense council of their own choosing or – assuming they lack the necessary financial means – be provided with free legal aid for the preparation of their defense. Detainees are also allowed to examine witnesses and call witnesses who would testify on his behalf. They can not be compelled to testify against

¹ Opened for signature by the member States of the Council of Europe in Rome on 4 November 1950, entry into force 3 September 1953.

themselves or admit guilt. Finally, detainees must be able to appeal to a higher court against a conviction made by a court of lesser instance. Other relevant provisions from this Convention can be found in Article 3 which prohibits torture or other cruel, inhuman or degrading treatment or punishment.

Recommendation No. R (80) 11 concerning custody pending trial is the first 'soft law' instrument in the field of pre-trial detention in Europe.² Besides including the rights and procedures prescribed by the ICCPR and legal acts adopted by the UN until 1980 (see above, 2.1 United Nations) and the ECHR, it also contains a number of novelties. It states that pre-trial detention shall never be compulsory and its use should not be of a punitive nature. Paragraph 5 contains a recommendation on the use of pre-trial detention in specific circumstances only and requires that judges take into account the following when ordering detention:

the nature and seriousness of the alleged offence,

the strength of the evidence of the person concerned having committed the offence,

the penalty likely to be incurred in the event of conviction,

the character, antecedents and personal and social circumstances of the person concerned, and in particular his community ties and

the conduct of the person concerned, especially how he has fulfilled any obligations which may have been imposed on him in the course of previous criminal proceedings.

Other novelties include a requirement for pre-trial detention decisions to be always proportional regarding the nature of the suspected crime and the penalty prescribed (Paragraph 7). The decision to place a person in pre-trial detention should state as precisely as possible the type of criminal charge as well as the reasons as to why a judicial officer has decided to use a detention measure (Paragraph 8). Time spent in pre-trial detention should never be longer than the expected length of the sentence likely to be served; pre-trial detention must be reviewed at reasonably short intervals and time spent in detention must be deducted from the length of the final sentence (Paragraph

² Adopted by the Committee of Ministers on 27 June 1980. This Recommendation was preceded by Resolution (65) 11 on remand in custody (Adopted by the Ministers' Deputies on 9th April 1965).

13-14 and 17). Finally, Paragraph 15 lists a number of alternative measures to pre-trial detention.

Recommendation No. R (87) 3 on the European Prison Rules³ in its Part V, titled 'untried prisoners' stipulates that pre-trial detainees should be allowed to inform a member of their family immediately after they have been detained. If the detainee does not want a member of his family informed, the authorities should not do this on own initiative and against the wish of the detainee (except in cases of juveniles or persons with mental incapacity). In general, detainees should be placed in single rooms, be allowed to wear their own clothes, buy books and newspapers on their own expense and be visited by their personal doctor or dentist.

Recommendation No. R (97) 12 on staff concerned with the implementation of sanctions and measures⁴ deals with the recruitment, selection, training, conditions of work, management of responsibilities, mobility and ethical requirements of staff in pre-trial detention centers. Recommendation No R (98) 7 concerning the ethical and organisational aspects of health care in prison⁵ on the other hand deals with issues such as access to medical services, equivalence of care (same health services as available for the general public), consent of the pre-trial detainee and doctor-patient confidentiality, as well as training of prison health care staff.

Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation⁶ as its name says, addresses an increasing problem with insufficient space for detainees all around Europe. In the EU there are 13 countries experiencing prison overcrowding. Conditions are worst in countries like Bulgaria (135 prisoners per 100 places), Spain (142 prisoners per 100 places) and Cyprus (150 prisoners per 100 places).⁷ According to the Council of Europe building new detention centers does not offer a lasting solution to this problem (R (99) 22, Principle 2). Crime control, setting maximum capacity for detention centers, and rational distribution of detainees are recommended as steps for tackling prison overcrowding.

³ (Adopted by the Committee of Ministers on 12 February 1987 at the 404th meeting of the Ministers' Deputies.

⁴ Adopted by the Committee of Ministers on 10 September 1997.

⁵ Adopted by the Committee of Ministers on 8 April 1998, at the 627th meeting of the Ministers' Deputies.

⁶ Adopted by the Committee of Ministers on 30 September 1999 at the 681st meeting of the Ministers' Deputies.

⁷ See *Council of Europe Annual Penal Statistics – SPACE I – 2008*. p. 32 at supra note 2.

Section III titled ‘Measures relating to the pre-trial stage’ calls for widest possible use of alternatives to pre-trial detention. It is the first instrument to promote the use of electronic surveillance devices. The recommendation calls for adequate funding and human resources so that member states can ensure that pre-trial detention is managed in a humane and an efficient manner.

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 1987⁸ established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter CPT). The CPT has developed standards regarding the treatment of persons deprived of their liberty. The so called CPT Standards were first devised in 2002 with the last revision being made in 2010.⁹ They contain numerous remarks regarding the way suspects and detainees are treated, pointing out practices that are not in line with the basic rights of suspects in Europe. They include practices and treatment by police officers, prison staff and other public authorities. For example, the CPT reports that due to various metal coverings placed over the windows in many pre-trial detention centers detainees are deprived from natural light and fresh air in their cells.¹⁰

It confirms that the problem of prison overcrowding is particularly acute in pre-trial detention centers.¹¹ The Committee is on the view that in order to avoid ill-treatment by police officers, questioning of suspects should take place in detention centers rather than in police stations.¹² It furthermore proposes that pre-trial detainees be given the possibility to spend 8 or more hours out of their cells and be “engaged in purposeful activity of a varied nature” such is work, sport, education etc.

Recommendation Rec (2006) 2 on the European Prison Rules¹³ in its Part VII titled ‘Untried prisoners’ introduces a couple of novelties in relation to the rights of pre-trial detainees. Beside the rights and procedures discussed so far, the recommendation states that the regime applied to

⁸ European Treaty Series - No. 126. Text amended according to the provisions of Protocols No. 1 (ETS No. 151) and No. 2 (ETS No. 152) which entered into force on 1 March 2002.

⁹ CPT/Inf/E (2002) 1 - Rev. 2010. URL: <<http://www.cpt.coe.int/en/docsstandards.htm>>. Last accessed 30 June 2011.

¹⁰ *Ibid* p. 23 (Extract from the 2nd General Report [CPT/Inf (92) 3]).

¹¹ *Ibid* p. 19 (Extract from the 7th General Report [CPT/Inf (97) 10]).

¹² *Ibid* p.13 (Extract from the 12th General Report [CPT/Inf (2002) 15]).

¹³ Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies.

detainees in pre-trial detention centers may not be influenced by the presumption that a pre-trial detainee will be convicted in the future. Detainees are allowed to wear their own clothes or (in cases where they do not own clothes) be provided with clothing that will not be the same as the uniforms provided to prisoners. Finally, if a detainee chooses to follow the regime for sentenced prisoners, the authorities should approve such request.

Recommendation Rec (2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse¹⁴ addresses pre-trial detention specifically and in detail. It replaces Resolution (65) 11 on remand in custody and Recommendation No. R (80) 11 on custody pending trial (see above). Recommendations regarding pre-trial detention not mentioned so far include a requirement that pre-trial detention should only be imposed for offences that carry prison terms; regarding the grounds for refusing release, the sole fact that a suspect is a foreigner shall not by itself satisfy a decision containing reasoning that he might abscond and must be therefore detained. The period between initial deprivation of liberty by the police and the appearance before a judicial officer shall not exceed 48 hours, but in many cases it should be even shorter. Reasons for detaining a person become less convincing with the passage of time and therefore they should be reviewed periodically. The interval between such reviews should not be longer than one month. It is a responsibility of the prosecution authorities to conduct reviews and if no application has been lodged by them, the detainee should be released from detention.

Legally prescribing a maximum period for pre-trial detention can not suspend the need for periodical reviews. Furthermore, breach of an alternative measure can not by itself justify pre-trial detention. Pre-trial detainees and their lawyers must have access to the detention decision and be allowed to personally appear at pre-trial proceedings. For the detainee, this condition might be satisfied by way of video-links. Regarding compensation as a result of unlawful detention, pecuniary, non-pecuniary, as well as damages for loss of an opportunity might be sought and awarded. Pre-trial detainees should not be restrained to send and receive written correspondence and there should be no limit as to the number of letters they can send. Finally, pre-trial detainees must be allowed to take part in elections or referendums taking place while they are in detention. Most of

¹⁴ Adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers' Deputies.

these recommendations stem from established case law of the ECtHR which will be discussed in more detail below in this text.

Recommendation CM/Rec (2008) 11 on the European Rules for juvenile offenders subject to sanctions or measures¹⁵ is the last legal instrument relating to penitentiary issues adopted by the Council of Europe. Pre-trial detention is addressed in Part III (F. Special part). The recommendation recognizes the initial vulnerability of juveniles admitted to pre-trial detention (suicide and self-harm risks) and requires that member states treat these detainees with “full respect of their dignity and integrity at all times” (Rule 109). Juveniles can not be obligated to work or be compelled to engage in activities which are not allowed for other juveniles in the community who are at their age (Rule 111). Juveniles should also be able to continue their education and those who have not completed compulsory education may be compelled to do so (Rule 78.4 and 79.2 respectively).

3. EUROPEAN UNION

The competence of the EU in the field of criminal justice began with the signing of the Maastricht Treaty in 1992¹⁶ which marked the creation of the “Third Pillar”. The EU pledged to “respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms” which will “constitute general principles” of EU law (Art. F(2)). Art. B stipulates that one of the objectives of the EU shall be the development of close cooperation in the fields of “justice and home affairs”. The provisions relating to this sphere can be found in Title VI, Art. K. “Judicial cooperation in criminal matters” was one of the areas identified for achieving the objectives of the EU.

In 1997 the Treaty of Amsterdam was signed.¹⁷ With it, the EU set an even more ambitious objective – the establishment of an “area of freedom, security and justice”. Justice and Home Affairs pillar was renamed into

¹⁵ Adopted by the Committee of Ministers on 5 November 2008 at the 1040th meeting of the Ministers’ Deputies.

¹⁶ *Official Journal of the European Union*, C 191, 29 July 1992. Treaty on European Union.

¹⁷ *Official Journal of the European Union*, C 340, 10 November 1997. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts.

“Police and Judicial Cooperation in Criminal Matters.” The Treaty introduced a new legal instrument – the “Framework Decision”. Such decisions were to contain certain standards and objectives addressed to member states which were supposed to amend national laws in order to achieve a common goal. At that time, this pillar was characterized by intergovernmental cooperation, meaning that passing legislation required unanimity amongst all Member States. Council of the European Union was the main legislative organ, with the European Parliament acting as a consultative body (Art. 73o and 189b). Furthermore – by virtue of Article 35 – the European Court of Justice was given minimum jurisdiction regarding justice and home affairs legal acts.

Following a special thematic European Council meeting in Tampere in 1999, conclusions regarding the creation of an area of freedom, security and justice in the EU were adopted.¹⁸ The meeting resulted with the introduction of the “mutual recognition of judicial decisions” principle. It was to become the “cornerstone of judicial cooperation”. The principle of mutual recognition in criminal matters means that a judicial decision issued by a competent authority in one member state will be directly recognized and enforced by a competent authority in another member state.¹⁹ For the first time in the history of the EU, it was concluded that member states should engage in a process of approximation of criminal law and procedure, albeit in the field of money laundering only.

The Charter of Fundamental Rights of the European Union (hereinafter: CFREU) was adopted in 2000.²⁰ Art. 47-50 guarantee the procedural rights to effective remedy, fair trial, access to legal aid, and the presumption of innocence, while Art. 6 guarantees the right to liberty and security. Art. 53 states “In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention.” The EU will however be authorized to provide “more extensive protection.” Until 2009, the CFREU lacked a legal binding force but by virtue of Art. 6(1) of the Treaty of Lisbon it was given the “same legal value” as the EU treaties.

¹⁸ *Tampere European Council*, 15-16 October 1999, Presidency Conclusions.

¹⁹ STOJANOVSKI, V., The European Evidence Warrant. *In Dny práva – 2009 – Days of Law: the Conference Proceedings*, 1. edition. Brno : Masaryk University, p. 501.

²⁰ *Official Journal of the European Union*, C 364/1, 18 August 2000.

In 2002, the European Arrest Warrant and the surrender procedures between Member States (hereinafter: EAW), one of the first and most significant instruments under the principle of mutual recognition of judicial decisions was adopted in the form of a Framework Decision.²¹ Member states were required to implement it by the end of 2003. An EAW is issued by a requesting to a receiving member state after which the latter proceeds to arrest the required person and surrender him to a foreign (EU) country irrespective of his nationality for the conduct of criminal proceedings. The requested person can be a suspect, person already charged with a crime, convicted or sentenced to imprisonment. This opens up the possibility for a person to be placed in pre-trial detention following his surrender.

In 2004 a Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the EU was adopted by the European Commission.²² Five “basic rights” were identified and proposed:

access to legal advice, both before the trial and at trial,

access to free interpretation and translation,

ensuring that persons who are not capable of understanding or following the proceedings receive appropriate attention,

the right to communicate, inter alia, with consular authorities in the case of foreign suspects, and

notifying suspected persons of their rights (by giving them a written “Letter of Rights”).²³

This proposal was preceded by a Green Paper regarding procedural safeguards for suspects and defendants in criminal proceedings throughout the EU prepared by the European Commission in 2003.²⁴ During the same year, a Resolution of the European Parliament in which it called on the Council “to adopt a framework decision on common standards for procedural law, for instance on rules covering pre-trial orders and the rights of the defense (...) so as to guarantee a common level of fundamental rights

²¹ *Official Journal of the European Union*, L 190, 18 July 2002.

²² COM(2004) 328 final, Brussels, 28 April 2004

²³ *Ibid.*, Explanatory memorandum, para. 24.

²⁴ COM(2003) 75 final, Brussels, 19 April 2003

protection throughout the EU” was adopted.²⁵ This same call was repeated in another Resolution from 2004. In it, Parliament added that in its view, such Framework Decision should enter into force at the same time as the EAW.²⁶ The proposal was however never adopted due to disapproval by six member states who claimed that it was “too ambitious” and would be “only replacing ECHR rights” which could lead to “diverging interpretations” between the ECJ and ECtHR.²⁷ The way forward was seen in a “step by step” approach, gradually adopting one legal instrument per specific procedural right.

The Hague Programme (subtitled strengthening freedom, security and justice in the European Union) was adopted in 2004.²⁸ Together with its Action Plan²⁹ it set a five-year agenda with a view to further develop the principle of mutual recognition of judicial decisions in criminal matters. It called for further proposals for approximation in the field of criminal procedure in fields “such as the gathering and admissibility of evidence, conflicts of jurisdiction and (...) the execution of final sentences of imprisonment or other (alternative) sanctions” (see 3.3.1 Mutual Recognition). Section 4.2 of the Action Plan titled “Judicial Cooperation in Criminal Matters” called for a “Proposal on mutual recognition of non-custodial pre-trial supervision measures” to be prepared in 2005. It is widely considered that this Programme did not archive its objectives.³⁰

In 2006, a Green Paper on the Presumption of Innocence was prepared by the European Commission.³¹ With regards to pre-trial detention it states that no one shall be proclaimed guilty prior such quilt to be confirmed by court and that “overriding reasons” must exist for a person to be placed in pre-trial detention. Furthermore, a person placed in pre-trial detention “should

²⁵ *Official Journal of the European Union* (C 38 E/247), 12 February 2004, European Parliament resolution on the situation concerning basic rights in the European Union (2001) (2001/2014(INI)) para. 144.

²⁶ *Official Journal of the European Union* (C 76 E/412), 25 March 2004, European Parliament resolution on the situation as regards fundamental rights in the European Union (2002) (2002/2013(INI)), para. 141.

²⁷ *Justice issues in Europe: Seventh Report of Session 2009-10*, Report, together with formal minutes, House of Commons Justice Committee, 6 April 2010, p. 29.

²⁸ *Official Journal of the European Union*, C 53, 3 March 2005.

²⁹ *Official Journal of the European Union*, C 198, 12 August 2005.

³⁰ See for example *Justice issues in Europe: Seventh Report of Session 2009-10*, Report, together with formal minutes, House of Commons Justice Committee, 6 April 2010, p. 10.

³¹ COM(2006) 174 final, Brussels, 26 April 2006.

benefit from detention conditions consistent with his presumed innocence” (Section 2). Since the publishing of this Green Paper, the idea for adoption of an instrument protecting the presumption of innocence principle seems to have been postponed indefinitely and the European Commission is not actively working on an official proposal.

In 2008 the European Evidence Warrant (hereinafter: EEW) was adopted.³² Member states were supposed to implement its provisions by the beginning of 2011. The purpose of this legal instrument is obtaining of objects, documents and data for use in proceedings in criminal matters. This instrument can be particularly useful in the sphere of cross-border crimes. It will potentially give a possibility to pre-trial detainees to demand from a national court to send a request to another member state and request evidence that can be used in the defense proceedings. This instrument can be used for requesting evidence that already exists, however taking of statements from suspects, witnesses and experts in real time, or ordering real time interception of communications or monitoring of bank accounts is not possible.³³ In 2010 and 2011, 8 member states of the EU submitted initiatives proposing a new instrument – European Investigation Order to replace the EEW.³⁴

In 2009, the Framework Decision on supervision measures as an alternative to provisional detention was adopted.³⁵ Member states are expected to implement it by the end of 2013. The proposal was preceded by a Green Paper on mutual recognition of non-custodial pre-trial supervision measures.³⁶ This instrument is intended for foreign suspects and accused persons residents of one member state facing a trial in another member state. Due to the risk of absconding, foreign nationals are usually kept in pre-trial detention although for the same or similar suspected offense a national

³² *Official Journal of the European Union* L 350/72, 30 December 2008, Council Framework Decision 2008/978 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

³³ STOJANOVSKI, V., The European Evidence Warrant. *In Dny práva – 2009 – Days of Law: the Conference Proceedings*, 1. edition. Brno : Masaryk University, p. 509.

³⁴ Interinstitutional File: 2010/0817 (COD), Brussels 19 April 2011, Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters.

³⁵ *Official Journal of the European Union* L 294/20, 11 November 2009.

³⁶ COM(2004) 562 final, Brussels, 17.8.2004.

would be allowed to defend himself out of detention. The Framework Decision aims to reduce the number of foreign (EU) pre-trial detainees and assure due course of justice for suspects from another member state by surrendering them to their country of origin where they are a subject to alternative measure (to report to the police, home arrest, avoid contact with persons connected to the offense etc.) instead of a pre-trial detention order. The suspect will be monitored by the authorities in his country of residence and they will be obliged to surrender him to the issuing state should he fail to respect the alternative measures imposed on him.

The Lisbon Treaty entered into force on 1 December 2009.³⁷ It abolished the three-pillar structure and incorporated “Police and Judicial Cooperation in Criminal Matters” into the competences of the EU. Article 6(2) states that the EU “shall accede to the [ECHR].” Legal acts in the area of criminal justice will be adopted in the form of “Directives” instead of “Framework Decisions” and such adoption will follow the ordinary legislative procedure.³⁸ The most important provisions regarding pre-trial detention can be found in the fourth chapter titled “Judicial Cooperation in Criminal Matters”. For the first time, the EU was authorized to adopt minimum rules by means of directives which can concern “rights of individuals in criminal procedure” as well as “mutual admissibility of evidence” (Art. 82(2)(a-b)). These directives will undoubtedly lead to further approximation of criminal procedure laws in the member states.

However, when adopting legislation in this field, the EU “shall take into account the differences between the legal traditions and systems of the Member States” (Art. 82(2)). The ordinary legislative procedure may be suspended if a member state considers that a proposed directive will “affect fundamental aspects of its criminal justice system” (Art. 82(3)). Ultimately, this so called “emergency brake” can lead to efforts for a consensus to be reached by all member states before a proposed directive can be adopted. If consensus is not reached, “at least nine Member States” may decide to “establish enhanced cooperation” and proceed to adopt the proposed directive which will then apply only in those countries who took part in its adoption (Art. 82(3)). Furthermore, two member states (the United Kingdom and Ireland) were allowed opt-outs in this field, meaning that

³⁷ *Official Journal of the European Union* C 115/1, 9 May 2008, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union.

³⁸ Majority rule and co-decision by Council and Parliament (see Art. 294 TFEU).

directives will not have legal force in their national laws. However, opt-ins will be possible on a case by case basis if these countries so decide.³⁹

Soon after the entry into force of the Lisbon Treaty, the Stockholm Programme (subtitled an open and secure Europe serving and protecting citizens) was adopted.⁴⁰ It incorporated the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings adopted as a Resolution by the Council of the EU.⁴¹ As its predecessor – the Hague Programme, it is supplemented by an Action Plan for its implementation⁴² and sets a five-year agenda with a view to further develop the principle of mutual recognition of judicial decisions in criminal matters. In relation to pre-trial detention it calls the European Commission to prepare a green paper on detention issues during 2011 and “examine further elements of minimum procedural rights for suspected and accused persons, and to assess whether other issues, for instance the presumption of innocence, needs to be addressed” (see 2.4. Rights of the individual in criminal proceedings). The latter requirement should be fulfilled by 2014.⁴³ Finally, it calls for a strategy that will respect “subsidiarity and coherence” that will “guide the EU's policy for the approximation of substantive and procedural criminal law.”⁴⁴

Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings adopted in 2010 is the first Directive in the field of criminal justice in the EU.⁴⁵ Member states are expected to transpose it by the end of 2013. It stipulates that the right to interpretation and translation applies from the time a person is notified that he is suspected or accused of a criminal offense and exists until the very end of the criminal proceedings. It states that it will be an obligation of the member states to ascertain if the suspect speaks or understands the language of the proceedings (Art. 2). Member states will have to provide the suspect with written documents from

³⁹ *Official Journal of the European Union* C 83/201, 30 March 2010. Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security, and Justice, p. 295.

⁴⁰ *Official Journal of the European Union* C 115/1, 4 May 2010.

⁴¹ *Official Journal of the European Union* C 295/1, 4 December 2009.

⁴² COM(2010) 171 final, Brussels, 20.4.2010. (Not published in the Official Journal of the European Union).

⁴³ *Ibid.*, p. 14.

⁴⁴ *Ibid.*, p. 5.

⁴⁵ *Official Journal of the European Union* L 280/1, 26 October 2010.

which he will be able to understand the charges against him. A “decision depriving a person of his liberty, any charge or indictment, and any judgment” are considered as essential documents which the suspect must receive (Art. 3). The costs for interpretation and translation must be borne by the state (Art. 4) and the quality of interpretation and translation should be “sufficient to safeguard the fairness of the proceedings” (Art 5). Further rights stemming from this Directive will be discussed in more detail below in this text.

A Proposal for a Directive on the right to information in criminal proceedings was adopted by the European Commission in 2010.⁴⁶ It is expected that this will be the second legal instrument adopted in the form of a Directive in the field of judicial cooperation in criminal matters. It states that the right to information applies from the time a suspect or an accused person is made aware of the fact that he is under criminal investigation due to an alleged criminal offense. Such person must be informed about four basic rights: right to access to a lawyer, entitlement to legal advice free of charge, right to translation and interpretation, and the right to remain silent. Such information is to be “provided in simple and accessible language” in a form of a Letter of Rights (Art. 3 and 4 respectively). The proposed Directive will also guarantee access to the materials of the case in “due time” for the “effective use of the rights of the defense” (Art. 7).

Finally, other legislative proposals for directives envisaged by the Stockholm Programme until the end of 2014 relate to “legal advice and legal aid” (2011), “communication with relatives, employers and consular authorities” (2012), and “special safeguards for suspected or accused persons who are vulnerable” (2013). Green papers are also envisaged and relate to “detention” (2011) and further procedural rights which are not covered by the Action Plan of the Stockholm Programme (2014) but might be needed for further promotion of the mutual recognition principle.⁴⁷

⁴⁶ 14816/10, Brussels, 15 October 2010.

⁴⁷ COM(2010) 171 final, Brussels, 20.4.2010. (Not published in the Official Journal of the European Union), p. 14-15.