



INSIGHT

## PRE-TRIAL DETENTION AND EU LAW: COLLECTING FRAGMENTS OF HARMONISATION WITHIN THE EXISTING LEGAL FRAMEWORK

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**ABSTRACT:** Pre-trial detention has yet to be harmonised under EU law, although evidence points to an overuse that may affect mutual trust. Other instruments however exist that might impact on the way national authorities use pre-trial detention. In this *Insight*, we seek to detect fragments of harmonisation within the existing legal framework. The *Insight* thus looks at the EU area of criminal justice to highlight intersections between pre-trial detention and existing instruments, such as the procedural rights Directives and the European Arrest Warrant. Our findings show that the symbiosis of pre-trial detention and some procedures created by EU instruments (e.g. surrender proceedings) raise a plethora of questions regarding the legal standards of pre-trial detention. Several juncture points exist where current instruments could or should influence the manner in which pre-trial detention is regulated under national law. Despite these intersections, we conclude that the lack of an EU regulatory framework remains problematic.

**KEYWORDS:** pre-trial detention – harmonisation – EU criminal law – fundamental rights – procedural guarantees – detention conditions.

### I. INTRODUCTION

In this *Insight* we conduct a first inquiry into the existing interferences between EU criminal law and pre-trial detention. More specifically, this paper offers an inventory of relevant EU criminal justice sources to explore their impact on the law and practice of pre-trial detention.<sup>1</sup> To date, no EU instrument has directly harmonised key aspects such as procedure, time-limits or grounds for detention before or pending trial. However, some EU criminal law instruments may be of relevance and could affect the way national practitioners use pre-trial detention. Our hypothesis is that a thorough examination of

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<sup>1</sup> The definition of pre-trial detention in comparative criminal law is notoriously challenging, see A. MARTUFI, C. PERISTERIDOU, *The purposes of pre-trial detention and the quest for alternatives in European Journal of Crime, Criminal Law and Criminal Justice*, 2020, p. 153 et seq.



the existing legal framework might reveal an embryonic (if indirect) harmonisation of pre-trial detention in the EU; one that offers crucial indications as to the direction the EU might follow in regulating this matter.

In a previous work, we have maintained a critical stance towards the lack of harmonisation of pre-trial detention in EU law.<sup>2</sup> The reluctance of the EU to address pre-trial detention is puzzling. Admittedly, the question as to whether the EU has competence to set common standards in this area under Art. 82, para. 2, TFEU remains debatable.<sup>3</sup> Yet a demand for setting rules at the EU level is rising. Empirical studies critically highlight an overuse of this measure at the national level.<sup>4</sup> In the wake of the *Aranyosi*-saga, a widespread and prolonged use of imprisonment for non-convicted individuals could pose problems for mutual trust, as stated in the latest assessment report on the European Arrest Warrant conducted by the European Parliament Research Service.<sup>5</sup> Unsurprisingly, the European Parliament has called for action on pre-trial detention.<sup>6</sup> Even Advocate General Pitruzzella cautioned that: “the EU legislature must urgently address the question of harmonisation, however minimal, of pre-trial detention as it is ultimately the European area of criminal justice that is under threat”.<sup>7</sup> However, no initiative has been taken by the Commission (nor by the Member States) so far with the sole exception of a rather interlocutory Green Paper.<sup>8</sup> Within this legislative vacuum the Commission has not been inactive. Yet it has restricted its initiatives to rather uncontroversial actions, such as funding relevant projects to improve detention conditions.<sup>9</sup>

Be that as it may, before suggesting any further harmonisation, one should first verify what is already there. With this *Insight*, we would like to examine whether, and if so

<sup>2</sup> A. MARTUFI, C. PERISTERIDOU, *Pilate washing his hands. The CJEU on pre-trial detention*, in *European Law Analysis*, 5 December 2019, eulawanalysis.blogspot.com.

<sup>3</sup> T. COVENTRY, *Pretrial detention: Assessing European Union Competence under Article 82(2) TFEU*, in *New Journal of European Criminal Law*, 2017, p. 43 *et seq.*; A. SOO, *Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures*, in *ERA Forum 2020*, p. 327 *et seq.*

<sup>4</sup> W. HAMMERSCHICK, C. MORGENSTERN, S. BIKELIS, M. BOONE, I. DURNESCU, A. JONCKHEERE, J. LINDEMAN, E. MAES, M. ROGAN, *DETOUR – Towards Pre-trial Detention as Ultima Ratio. Comparative report*, Vienna: Institut für Recht- und Kriminalsoziologie, 2017, available at [www.irks.at](http://www.irks.at); Fair Trials, *A Measure of Last Resort? The practice of pre-trial detention decision making in the EU*, London: Fair Trials, 2016; Open Society Justice Initiative, *Presumption of Guilt: The Global Overuse of Pretrial Detention*, New York: Open Society, 2014; Open Society Justice Initiative & UNDP, *The Socioeconomic impact of pre-trial detention*, New York: Open Society, 2011.

<sup>5</sup> European Parliamentary Research Service, *European Arrest Warrant European Implementation Assessment*, June 2020, [op.europa.eu](http://op.europa.eu).

<sup>6</sup> European Parliament, Resolution P8\_TAPROV(2017)0385 of 5 October 2017 on prison systems and conditions, para. 3.

<sup>7</sup> Opinion of AG Pitruzzella delivered on 19 November 2019, case C-653/19 PPU, *DK*, para. 22.

<sup>8</sup> European Commission, Green paper on the application of EU criminal justice legislation in the field of detention of 14 June 2011, COM(2011)327.

<sup>9</sup> See the comprehensive overview by W. Van Ballegooij in European Parliamentary Research Service, *European Arrest Warrant European Implementation Assessment*, *cit.*, p. 31 *et seq.*

to what extent, EU law has currently an influence on pre-trial detention. Despite the lack of a harmonising instrument, one may detect some common narratives or threads underpinning the EU approach to pre-trial detention. Our work is by no means exhaustive and will confine itself to a quick scan of EU legislation and case law in order to highlight the current state of the art.

## II. DEFINING PRE-TRIAL DETENTION: TOWARDS AN AUTONOMOUS NOTION?

The discussion on pre-trial detention at the EU level poses a preliminary problem of definitions. Interestingly, pre-trial detention (often used as synonymous with remand in custody and, more rarely with preventive detention) is not defined by national legislation in several EU Member States.<sup>10</sup> Rather, domestic provisions emphasise its goals as inherently preventative; pre-trial detention is mostly conceived as a tool to prevent suspects from absconding, committing a crime, tampering with evidence or obstructing justice.<sup>11</sup> However, as we argued elsewhere, in some jurisdictions pre-trial detention may also be ordered for purposes as broad as to prevent re-offending or to protect the public order.<sup>12</sup>

The scope of this measure is notoriously problematic, as no common practice exists among Member States.<sup>13</sup> Some legal systems use a wide-ranging notion that comprises both prisoners awaiting trial or a final decision and prisoners convicted in first instance but still awaiting a confirmation of their conviction or sentence through an appeal process.<sup>14</sup> Other legal systems opt for a narrower scope including only prisoners before a conviction in first instance. Those are systems where a judicial decision may be immediately enforced after conviction and sentence (e.g. England and Wales).<sup>15</sup>

The European Court of Human Rights (ECtHR) has controversially endorsed a thin concept of pre-trial detention. The end date to assess the length of detention on re-

<sup>10</sup> C. MORGENSTERN, *Pre-trial/remand detention in Europe: facts and figures and the need for common minimum standards*, in *ERA Forum*, 2009, p. 527 *et seq.*; A. VAN KALMTHOUT, C. MORGENSTERN, S. BIKELIS, M. BOONE, I. DURNESCU, A. JONCKHEERE, J. LINDEMAN, E. MAES, M. ROGAN, *Introductory summary*, in A.M. VAN KALMTHOUT, M.M. KNAPEN, C. MORGENSTERN (eds), *Pre-trial detention in the European Union*, Nijmegen: Wolf Publisher, 2009, p. 49.

<sup>11</sup> A. VAN KALMTHOUT, C. MORGENSTERN, S. BIKELIS, M. BOONE, I. DURNESCU, A. JONCKHEERE, J. LINDEMAN, E. MAES, M. ROGAN, *Introductory summary*, *cit.*, p. 49.

<sup>12</sup> A. MARTUFI, C. PERISTERIDOU, *The purposes of pre-trial detention and the quest for alternatives*, *cit.*, p. 155.

<sup>13</sup> T. COVENTRY, *Pretrial detention: Assessing European Union Competence under Article 82(2) TFEU*, *cit.*, p. 46.

<sup>14</sup> Almost all Member States have chosen to regard this category of prisoners as pre-trial detainees, see A. VAN KALMTHOUT, C. MORGENSTERN, S. BIKELIS, M. BOONE, I. DURNESCU, A. JONCKHEERE, J. LINDEMAN, E. MAES, M. ROGAN, *Introductory summary*, *cit.*, p. 51.

<sup>15</sup> S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford: Oxford University Press, 2005, p. 518 *et seq.*; see also European Court of Human Rights, judgment of 2 March 1987, no. 9562/81 and 9818/82, *Monnell and Morris v. United Kingdom*, para. 41.

mand (under Art. 5, para. 3, of the European Convention on Human Rights, hereinafter ECHR) coincides with the moment of acquittal or conviction at first instance,<sup>16</sup> even if the defendant (or the public prosecutor) files an appeal. Arguably, during that time and until the determination of the appeal process, if the persons concerned remain in custody the special safeguards of Art. 5, para. 3, ECHR will not apply.<sup>17</sup> By contrast, elsewhere the Council of Europe broadly defines remand in custody as any period of detention of a suspected offender ordered by a judicial authority prior to conviction.<sup>18</sup> This definition has been subject to criticism for being too comprehensive (it includes, among others, periods of detention awaiting extradition).<sup>19</sup> Yet this notion captures the need to treat prisoners appealing their convictions or sentences as un-convicted persons, thereby aiming at better standards or treatment for a larger category of prisoners.

Interestingly, the Commission's Green Paper while preferring the term pre-trial detention mirrors the broader scope of Council of Europe's Recommendation. The Commission has made clear that its understanding of pre-trial detention "covers the period until the sentence is final". Arguably, this is meant to reflect the practice of most EU Member States where the notion is "used in a 'broad' sense and includes all prisoners who have not been finally judged".<sup>20</sup> In this respect the Commission's stance seems to depart from the Strasbourg case law. Commentators have suggested that this may be seen as "an attempt to extend common standards to as many detainees as possible or to extend its competence for action as far as possible".<sup>21</sup> Be that as it may, the approach set out in the Green Paper seems to develop, albeit embryonically, an EU autonomous concept of pre-trial detention, one that could provide a benchmark for future law-making and interpretive processes.

While the end point of pre-trial detention is subject to debate among comparative lawyers, less controversial is the fact that any initial apprehension of suspects in the absence of a judicial order (during arrest or police custody) may not qualify as pre-trial detention. This reflects the ECtHR's jurisprudence on the first limb of Art. 5 para. 3,

<sup>16</sup> European Court of Human Rights: judgment of 27 June 1968, no. 2122/64, *Wemhoff v. Germany*, para. 9; judgment of 6 April 2000, no. 26772/95, *Labita v. Italy*, para. 147.

<sup>17</sup> For a strong critique of this case law, see S. TRECHSEL, *Human Rights in Criminal Proceedings*, cit., p. 520; contra T. COVENTRY, *Pretrial detention*, cit., p. 46.

<sup>18</sup> Committee of Ministers of the Council of Europe, Recommendation (2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse of 27 September 2006.

<sup>19</sup> C. MORGENSTERN, *Pre-trial/remand detention in Europe*, cit., p. 532.

<sup>20</sup> Green paper on the application of EU criminal justice legislation in the field of detention, cit., p. 8, footnote 19.

<sup>21</sup> T. COVENTRY, *Pretrial detention*, cit., p. 46.

ECHR,<sup>22</sup> as well as the stance taken by Council of Europe's Recommendations whose focus deliberately excludes "the initial deprivation of liberty by a police or a law enforcement officer (or by anyone else so authorised to act) for the purposes of questioning".<sup>23</sup> In this respect the Green Paper is rather inconclusive as it leaves the initial moment of pre-trial detention under EU law undetermined. By contrast, a systematic reading of this document along with other relevant EU instruments (see below) suggests that the notion of pre-trial detention does not cover periods of deprivation of liberty spent awaiting surrender in the context of European Arrest Warrant (EAW) proceedings.

Even the very definition of detention might be a point of disagreement. It is worth mentioning that in the ECtHR jurisprudence a dividing line exists between restrictive measures amounting to pre-trial detention falling under Art. 5 ECHR (e.g. retention in a detention centre, house arrest), and less intrusive measures (e.g. electronic monitoring, curfew), that fall under Art. 2 of Protocol 4 to the Convention. While all of these could be ordered as alternatives to detention on remand, content and scope of safeguards under the ECHR depends on whether they fall under the Convention or the Protocol. The Court of Justice apparently adopted a similar dichotomy whereby the term detention is reserved for more serious interferences with the right to liberty. In *JZ*, the Court of Justice limited the obligation stemming from Art. 26, para. 1) of the Framework Decision on the EAW to take into account the time in detention during an EAW. Accordingly, alternative measures to detention on remand, such as electronic monitoring, curfew, travel ban and obligations to report daily to the police station do not amount to detention under the terms of Art. 26 FD EAW.<sup>24</sup>

All of the above shows that the problem of pre-trial detention starts from its definition. The development of an autonomous terminology appears crucial before any further steps. Such necessity does not satisfy solely the desire of consistency and the proper application of EU law. It also reflects choices of systemic and normative value. In order to define the ambit of pre-trial detention under EU law one should make a normative choice on whether the presumption of innocence still applies pending appeal; concomitantly, if the scope of pre-trial detention is depended upon when judgments are executable and final, then these concepts would probably require harmonisation as well.

<sup>22</sup> The specific safeguards laid down under Art. 5, para. 3, may only apply after a first appearance in court, see A. MARTUFI, C. PERISTERIDOU, *The purposes of pre-trial detention and the quest for alternatives*, cit., p. 159.

<sup>23</sup> Committee of Ministers of the Council of Europe, Recommendation (2006) 13, cit.; see also the Explanatory Memorandum to this Recommendation.

<sup>24</sup> Court of Justice, judgment of 29 July 2016, case C-294/16 PPU, *JZ*, paras 47-53.

### III. EU SECONDARY LAW AND PRE-TRIAL DETENTION: MAPPING THE INTERSECTIONS

Whilst there is no instrument harmonising the material or procedural requirements for pre-trial detention, some provisions of EU secondary law exist that could potentially affect the way detention orders are issued in national proceedings. However, as will be shown, the existing interferences remain limited and any such effect is fragmentary. Arguably, one can distinguish between *direct intersections* with pre-trial detention and more *indirect* ones. Intuitively, a *direct intersection* with the law and practice of pre-trial detention can be found in the instruments that lay down minimum standards on defence rights and procedural safeguards. Such measures aim at harmonising segments of national procedure.

On the other hand, an *indirect* (and more nuanced) link to pre-trial detention can be found in the instruments that govern the use of detention in the context of judicial cooperation. One can think of the EAW which may result in a suspect spending time in pre-trial detention in the issuing State. The European Supervision Order (ESO) is another example, whose primary aim is transferring alternatives to pre-trial detention across the EU.<sup>25</sup>

#### III.1. THE DIRECTIVE ON THE RIGHT TO INFORMATION

The so-called procedural rights Directives have a direct impact on some aspects of pre-trial detention by establishing rights for the defence or obligations for the State. While to a large extent already recognised by the ECtHR's case law, these safeguards are now expressed in a more compelling way by EU law. The first instrument one needs to look at is Directive 2012/13/EU on the right to information in criminal proceedings. This instrument contains provisions that are evidently relevant for pre-trial detention. These include the right to be informed about charges and the right for suspects to access the case materials to challenge effectively the lawfulness of detention. More generally, this Directive recognises, with ad hoc guarantees, the special status of suspects and defendants deprived of liberty. In this connection, EU secondary law acknowledges the vulnerability of arrested and detained individuals.<sup>26</sup>

In doing so, the Directive expands on Strasbourg case law as regards Art. 6, para. 1, ECHR and, more importantly, Art. 5, para. 4, ECHR.<sup>27</sup> Art. 7 para. 1, of Directive 2012/13/EU essentially paraphrases key findings of ECtHR's jurisprudence concerning

<sup>25</sup> See E. MONTERO TUDELA, *Transferring Alternatives to Pre-trial detention in the European Union Context. Can European Agreements Be Trusted?*, in *Victims & Offenders*, 2020, p. 705 *et seq.*

<sup>26</sup> S. ALLEGREZZA, V. COVOLO, *The Directive 2012/13/EU on the right to information in criminal proceedings: Status quo or Step Forward*, in Z. ĐURĐEVIĆ, E. IVIČEVIĆ KARAS (eds), *European Criminal Procedure law in service of protection if the Union financial interests: State of Play and Challenges*, Zagreb: Croatian Association of European Criminal law, 2016, p. 41 *et seq.*

<sup>27</sup> S. CRAS, L. DE MATTEIS, *The Directive on the Right to Information. Genesis and Short Description*, in *Eu-crim*, 2013, p. 22 *et seq.*

the equality of arms between prosecution and defence when challenging the lawfulness of detention. It is a key corollary of the principle of *habeas corpus* that persons deprived of liberty may avail themselves of an effective and timely judicial remedy.<sup>28</sup> This guarantee includes the right to access and inspect case materials.<sup>29</sup> Yet this safeguard remains subject to much debate and the ECtHR has not dissipated doubts about whether and to what extent the interests of prosecution may be invoked to restrict access to the file.<sup>30</sup> The Directive refers to documents that are essential to challenge the lawfulness of arrest or detention. These should be made available to the defence.

Regrettably, however, the EU legislator has not provided relevant clues to establish when documents may be deemed essential. The scope of possible derogations to this right is even more difficult to narrow down. While the text of the Directive seems to indicate an absolute right to access case file information in remand proceedings,<sup>31</sup> the recitals suggest that this notion should be interpreted in light of ECtHR's case law, thereby allowing for grounds to refuse access to the file when strictly necessary.<sup>32</sup> The choice of avoiding any reference to possible derogations may be seen as an attempt to harmonise procedural safeguards in a way that goes beyond Strasbourg's case law. Unfortunately, however, the Directive's minimum rules refrain from providing clear guidance as to how the relevant safeguards should be operationalised. For instance, how long before a judicial hearing should defence lawyers be allowed to access documents necessary to challenge pre-trial detention?

The first remand hearing when suspects are brought for the first time before the judge (which is when – in most systems – detention on remand is ordered) takes place rather soon after the arrest. Experiences from practice show that lawyers must defend the liberty of suspects in bail hearings often without having met their clients or having no time to access the file of the case.<sup>33</sup> The Directive does not seem to address properly the needs of remand hearings in that respect.

Importantly, the Directive lays down an obligation for investigating authorities to provide a Letter of Rights when arrested or detained.<sup>34</sup> The Letter of Rights is meant to offer basic information concerning any possibility, under national law to challenge the lawfulness of the arrest, obtaining a review of detention or requesting provisional re-

<sup>28</sup> S. TRECHSEL, *Human Rights in Criminal Proceedings*, cit., p. 464.

<sup>29</sup> European Court of Human Rights, judgment of 9 July 2009, no. 11364/03, *Mooren v. Germany*, para. 121.

<sup>30</sup> European Court of Human Rights, judgment of 20 October 2015, no. 5201/11, *Sher and Others v. United Kingdom*.

<sup>31</sup> S. ALLEGREZZA, V. COVOLO, *The Directive 2012/13/EU on the right to information in criminal proceedings*, cit., p. 47.

<sup>32</sup> A. PIVATY, A. SOO, *Access to the Case Materials in Pre-Trial Stages: Critical Questions of Article 7 of Directive 2012/13/EU on the right to information in criminal proceedings*, in *Eu crim*, 2019, p. 62 et seq.

<sup>33</sup> FAIR TRIALS, *A Measure of Last Resort?*, cit., p. 14.

<sup>34</sup> See Art. 4, para. 4, Directive 2012/13/EU.

lease (e.g. bail). The Directive has not harmonised those guarantees as it only refers to the “possibility” of challenging a detention order.<sup>35</sup> Art. 4, however, stipulates the obligation of informing suspects, among other things, of the maximum number of hours or days they may be held in police, before being brought before a judicial authority. The wording of this provision is ambiguous as, while unequivocally referring to these safeguards as “rights” it alludes to the need of specific provisions under national law regulating their exercise. In this respect, the Directive is largely repetitive of ECtHR’s case law as regards the first limb of Art. 5, para. 3, ECHR.

### III.2. THE DIRECTIVE ON THE RIGHT TO INTERPRETATION AND OTHER SOURCES OF SECONDARY LAW

Under Directive 2010/64/EU suspects who do not speak or understand the language of the procedure are given the right to an interpreter and to translation of certain documents.<sup>36</sup> According to Art. 2, paras 1 and 2, the right to an interpreter applies to all hearings “before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings” – and thus also bail hearings. The translation of documents though is limited to documents that are essential for suspects to exercise their rights under Art. 4, para. 1. As with the previous instrument on the right to information, the right to translate essential documents remains vague and its realisation is left to the discretion of authorities.<sup>37</sup> Having said that, the Directive at least ensures that the right covers explicitly decisions on liberty in Art. 4, para. 2. EU law requires authorities to translate at least these judicial orders e.g. the warrant or the decision ordering/prolonging detention on remand. It remains unclear whether this includes also evidence that authorities rely upon to infer a reasonable suspicion or assess the grounds that justify detention. In Art. 4 para. 3, the counsel is given the right to request further translations in that regard.

Arguably to properly challenge remand decisions, one must have access to such evidence. This is all the more crucial for decisions ordering pre-trial detention. Research has shown that lacking, opaque and stereotypical reasoning behind these decisions is among the main causes of the overuse of pre-trial detention.<sup>38</sup> If one adds the linguistic barriers of foreign suspects and defendants, risks of an overall restriction of defence rights are even greater. It can be argued that a limited exercise of procedural rights

<sup>35</sup> Member States only have to provide this information if the relevant possibilities exist under their national law, see S. CRAS, L. DE MATTEIS, *The Directive on the Right to Information*, cit., p. 28.

<sup>36</sup> S. CRAS, L. DE MATTEIS, *The Directive on the Right to Interpretation and Translation in Criminal Proceedings*, in *Eu crim*, 2010, p. 153 *et seq.*

<sup>37</sup> M. FINGAS, *The Right to Interpretation and Translation in Criminal Proceedings. Challenges and Difficulties Stemming from the Implementation of the Directive 2010/64/EU*, in *European Criminal Law Review*, 2019, p. 175 *et seq.*

<sup>38</sup> FAIR TRIALS, *A Measure of Last Resort?*, cit., p. 14.



and/or a passive role by the defence may be at the origin of a lesser resort to alternatives, thus leading to a wider use of pre-trial detention.<sup>39</sup>

If one looks at the broader picture, EU law has made it easier for courts to conduct an evidence-based assessment of risks pertinent to detention on remand. Many judicial cooperation instruments facilitate the exchange of information regarding the behaviour and personal circumstances of suspects. Prior records and convictions that justify detention, e.g. risk of reoffending, and which are acquired from other Member States *must* be used following Framework Decision 2008/675/EU on taking into account prior convictions. According to Art. 3, paras 1 and 2, such obligation clearly extends to pre-trial procedures, “including those relating to provisional detention”.

Conclusively, one should mention the right to counsel established by Directive 2013/48/EU for suspects deprived of their liberty (Art. 3). This applies throughout the process (Art. 2); hence, also during bail hearings, the suspect has a right to have a lawyer. The Directive established some other rights that can improve the legitimacy of detention at the pre-trial stage, such as the right to inform and remain in contact with third persons and with consular authorities (Arts 5-7).

The above Directives might have brought an undoubtedly positive change to national proceedings in many respects.<sup>40</sup> Further research on the actual impact of those Directives on bail hearings is however needed to examine whether, and in so far, these Directives improved the legitimacy of this practice and/or contributed to limit the use of pre-trial detention. A first assessment shows that a context-sensitive approach would be necessary especially for bail hearings. As the first appearance is scheduled shortly after arrest it may be difficult to secure the full exercise of procedural rights (e.g. the ability to examine the evidence and consult with a lawyer) in order to argue against pre-trial detention. This would require an additional hearing to be held shortly after the first appearance “to evaluate the lawfulness of detention after the suspect has had time to access a lawyer, review the evidence, and obtain interpretation and translation where necessary”.<sup>41</sup>

More generally, it appears that pre-trial detention necessitates a different approach to secure a broader respect of defence rights. One can either tailor these rights to the needs of bail hearings or ensure that the procedure of bail hearings is apt to accommodate those rights. To this day, it appears the EU has made the implicit choice to follow the first solution. While implementing these Directives, national authorities must adjust them to the needs of national procedures (including bail proceedings). Whether this is

<sup>39</sup> M. BOONE, P. JACOBS, J. LINDEMAN, *Alternatieven voor voorlopige hechtenis in Europa en Nederland de advocaat als onterechte sleutelhouder*, in *Delikt en Delinkwent*, 2019, p. 170 et seq.

<sup>40</sup> A. KLIP, *Fair Trial Rights in the European Union: Reconciling Accused and Victims' Rights*, in T. RAFARACI, R. BELFIORE (eds), *EU Criminal Justice*, Cham: Springer, 2019, p. 3 et seq.; V. MITISLEGAS, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe*, London: Hart, 2016, p. 175 et seq.

<sup>41</sup> Fair Trials, *A Measure of Last Resort?*, cit., p. 42.

enough to ensure the proper realisation of defence rights and increase the use of bail is still up for debate.

### III.3. THE DIRECTIVE ON THE PRESUMPTION OF INNOCENCE

Directive 2016/343, which harmonises certain aspects of the presumption of innocence and the right to be present at trial, requires special attention. This is due to its intrinsic relevance for pre-trial detention and to the emergence of a recent line of Court of Justice's case law, which invested directly the applicability of certain national rules on remand proceedings.

The presumption of innocence under national law is a rather broad concept which is subject to various interpretations.<sup>42</sup> In its narrow version, this principle only applies to the trial phase: it dictates that the burden of proof bears on the prosecution. By contrast, a broader understanding of the same principle extends some of its safeguards to the pre-trial stage.<sup>43</sup> Such broader interpretation would generate more requirements, the most crucial being that pre-trial detention should be conducted as if the suspect were innocent.<sup>44</sup> Indeed, the safeguards for pre-trial detention laid down under the ECHR protect the presumption of innocence (along with the right to liberty).<sup>45</sup> Accordingly, pre-trial detention may only be ordered if there is a reasonable suspicion and where further precautionary grounds apply; the seriousness of the offence may not be the sole justification and the precautionary grounds are to serve public interests grounds other than the suspect's guilt.<sup>46</sup> Some commentators have argued that certain grounds e.g. risk of reoffending, would be at odds with the presumption, so that pre-trial detention would be unlawful in those cases.<sup>47</sup> Indeed, some legal systems have resisted the use of pre-trial detention in cases where the suspect is at risk of reoffending, e.g. the Irish and German legal systems.<sup>48</sup> All in all, the presumption of innocence is at the heart of the safeguards for pre-

<sup>42</sup> See for a collection of debating views, F. DE JONG, L. VAN LENT, *The Presumption of Innocence as a Counterfactual Principle*, in *Utrecht Law Review*, 2016, p. 34 *et seq.*; A. ASHWORTH, *Four threats to the presumption of innocence*, in *The International Journal of Evidence and Proof*, 2006, p. 241 *et seq.*

<sup>43</sup> A. ASHWORTH, *Four threats*, cit. p. 243.

<sup>44</sup> *Ibid.*

<sup>45</sup> European Court of Human Rights: judgment of 5 July 2016, no. 23755/07, *Buzadji v. Moldova*, paras 90-91, and judgment of 28 November 2017, no. 72508/13, *Merabishvili v. Georgia*, paras 233-235. Under EU law pre-trial detention is sometimes described as an instrument to avert risks pertinent to the investigation and should avoid being considered as a form of punishment, see Opinion AG Sharpston, delivered on 5 December 2006, case C-288/05, *Krentzinger*, para. 57.

<sup>46</sup> We have criticised the compatibility of the ECtHR's approach with the presumption of innocence in our previous contribution, see A. MARTUFI, C. PERISTERIDOU, *The purposes of pre-trial detention and the quest for alternatives*, cit., p. 159 *et seq.*

<sup>47</sup> A. DUFF, *Pre-trial detention and the presumption of innocence*, in A. ASHWORTH, L. ZEDNER, P. TOMLIN, (eds), *Prevention and the limits of criminal law*, Oxford: Oxford University Press, 2013, p. 128 *et seq.*

<sup>48</sup> See A. MARTUFI, C. PERISTERIDOU, *The purposes of pre-trial detention and the quest for alternatives*, cit., p. 164.

trial detention and depending on the definition of this concept, pre-trial detention rules and safeguards might change.<sup>49</sup> The question is therefore whether this Directive might have an added value for national safeguards on pre-trial detention.

*Prima facie*, the Directive embraces a seemingly broad interpretation of the presumption of innocence, as according to Art. 2 and recitals 12 and 16, it applies “from the moment when a person is suspected or accused of having committed a criminal offence” until the final judgment. However, a closer inspection reveals that the dichotomy between different aspects of presumption of innocence found in literature is of little use here. The EU legislator clearly approached the presumption from a more practical lens; the intention is to harmonise “certain aspects”, namely certain practical applications of the latter – as the title of the instrument betrays.

To provide an example of this piecemeal approach, the Directive applies to pre-trial and trial stages (which denotes a broad notion of the presumption of innocence) but is not applicable to remedies after the end of the trial (see recital 12 and Art. 2). This excludes the so-called second dimension of the presumption of innocence, which according to the ECtHR outlives the criminal trial and protects acquitted persons from lingering guilt in other proceedings, e.g. compensation proceedings.<sup>50</sup> The Directive furthermore does not apply to legal persons as, apparently, national law is perceived as too diverse on this point (recitals 13 and 14); at the same time, however, an extension of the scope of the Directive to legal persons through future case law developments cannot be ruled out – or at least this is how we understand the cryptic phrase in recital 15: “The presumption of innocence with regard to legal persons should be ensured by the existing legislative safeguards and case-law, the evolution of which is to determine whether there is a need for Union action”.

The uncertainty in the scope of the Directive persists as far as pre-trial detention is concerned. Art. 4 prohibits public references of guilt before the final judgment. However, this does not apply to preliminary decisions of procedural nature. Recital 16 explicitly exempts decisions on pre-trial detention from Art. 4 but this only “provided that such decisions do not refer to the suspect or accused person as being guilty”. This latter phrase, however, is not part of the body of the Directive per se. Would it violate the Directive if national authorities were to refer to the suspect as guilty in pre-trial detention decisions?

The opportunity to clarify this aspect came in *Milev*. The referring judge, the Bulgarian Specialised Criminal Court, wondered to what extent courts could examine evidence in bail hearings and provide opinions on the existence of suspicion in a way that would not violate the presumption of innocence. For ordering pre-trial detention, reasonable suspicion is a *sine qua non* condition, but it cannot be, under the ECHR, the sole justifica-

<sup>49</sup> R.L. LIPPKÉ, *Taming the presumption of innocence*, Oxford: Oxford University Press, 2016, p. 155 *et seq.*

<sup>50</sup> European Court of Human Rights: judgment of 12 July 2013, no. 25424/09, *Allen v. United Kingdom*, para. 94; judgment 25 Aug 1993, no. 13126/87, *Sekanina v. Austria*.

tion.<sup>51</sup> The Court of Justice did not provide a satisfying answer. It merely clarified that Art. 4 and recital 16 of the Directive allow for a regime where a national court has to give a reasoned opinion on the validity of suspicion and evidence presented, as long as the suspect is not presented as guilty in that decision.<sup>52</sup> The Court of Justice however warned that the Directive could not generate any further ground for a broader application of the presumption of innocence: “Accordingly, in light of the minimal degree of harmonisation pursued therein, Directive 2016/343 cannot be interpreted as being a complete and exhaustive instrument intended to lay down all the conditions for the adoption of decisions on pre-trial detention”.<sup>53</sup>

In *RH* the same Bulgarian court returned with more pressing questions regarding the possibility to infer from Art. 4, para. 1, of the Directive (read in conjunction with recital 16 thereof) a prohibition for national courts to rule on the objections raised by the defence when reviewing the legality of pre-trial detention. In essence, the referring court reiterated the idea that the Directive would make remand proceedings fully adversarial, thus precluding a national court from refuting the defence’s claims on the innocence of a suspect. The Court restated roughly the same reasoning of *Milev* but using a clearer tone on the limited effects of the Directive on pre-trial detention.<sup>54</sup>

Similarly, in *DK*, the Court of Justice ruled out any further effect of the Directive on pre-trial detention where the same referring court came back for a third time inquiring about the reversed burden of proof applicable under its national procedure.<sup>55</sup> The domestic court asked whether the burden of proof should be incumbent on the suspect when applying for a release from pre-trial detention. In that case, the Court of Justice took the view that the scope of Art. 6 of the Directive regarding the burden of proof should be restricted to decisions on guilt or innocence of defendants, thus trial decisions. Accordingly, the Bulgarian procedural rules that placed such burden of proof on suspects in remand proceedings would not be contrary to EU law, despite the existence of ECHR case law prohibiting such practice.<sup>56</sup> We have discussed elsewhere in detail the decision of the Court in *DK*, its unsatisfying reasoning, and the possible reasons for that.<sup>57</sup>

What lessons can be drawn from all of this? The Court of Justice has denied three times any possible effect of the Directive on pre-trial detention and has confined itself to say that decisions on pre-trial detention should not present suspects as guilty in their reasoning.

<sup>51</sup> *Buzadji v. Moldova*, cit., para. 90.

<sup>52</sup> Court of Justice, judgment of 19 September 2018, case C-10/18 PPU, *Milev*, para. 47.

<sup>53</sup> *Ibid.*

<sup>54</sup> Court of Justice, judgment of 12 February 2019, case C-8/19 PPU, *RH*, paras 57 and 59.

<sup>55</sup> Court of Justice, judgment of 28 November 2019, case C-653/19 PPU, *DK*.

<sup>56</sup> *Merabishvili v. Georgia*, cit., paras 233-235.

<sup>57</sup> A. MARTUFI, C. PERISTERIDOU, *Pilate washing his hands. The CJEU on pre-trial detention*, cit., para. 4; see also, in a similar vein, N. CANESTRINI, *Presunzione di innocenza e custodia cautelare: una occasione persa. Un commento alla sentenza della C.giust. UE, C-653/19 PPU*, in *Cassazione Penale*, 2020, p. 2118 et seq.

Yet this latter obligation seems redundant and limited. It appears to us that the Directive would be violated only in the rare and unlikely event where a national court would explicitly and directly refer to the suspect as guilty. In our view, the Court of Justice is reading the wording of the Directive too strictly when it comes to pre-trial detention. After all, on other occasions the Directive has been interpreted broadly so as to expand its scope and cover proceedings not entirely criminal in nature. For example, in *EP*, judicial proceedings for committing suspects into psychiatric hospitals were included in the scope of this Directive on grounds that such proceedings have a bearing on a person's right to liberty.

Comparing *EP* and *DK* is perplexing as these two cases show opposite criteria being marshalled to define the scope of the Directive. In *DK*, the decisive criterion was whether the national procedure at hand hinged decisively on the guilt of the individual. Therefore, as pre-trial detention hearings do not adjudicate on the suspect's guilt, the Directive would not apply. The fact that the national procedure concerned the liberty of the suspect was not mentioned as factor. In *EP*, by contrast, the Court openly recognises that the issue of the procedure at hand was not to adjudicate on guilt, thus explicitly ruling this out as a decisive factor. Yet, it stressed that a committal to a psychiatric hospital would bear on the right to the liberty, thus making the relevant procedure to fall within the scope of Directive 2016/343 "on account of its penal purpose".<sup>58</sup> Interestingly, both cases concerned the same aspect of the presumption of innocence, namely the burden of proof. One may ask why the Directive (and its rules on the burden of proof) apply to detention on mental health grounds, while they do not when it comes to pre-trial detention. To us the discrepancy between the two cases illustrates that the true motivation behind the Court's reasoning might be more political than legal. References to pre-trial detention that are able to attract relevant national rules under the umbrella of the EU directives (and the Charter) should be avoided at all costs.

#### III.4. THE EUROPEAN ARREST WARRANT AND THE EUROPEAN SUPERVISION ORDER

In this section we turn to the indirect intersections between EU secondary law and pre-trial detention. The EAW and ESO whilst not aiming at harmonising procedural rules might affect the way pre-trial detention is used under national law.<sup>59</sup>

For an EAW to be issued, the existence of a national judicial warrant is required.<sup>60</sup> But national and EAW warrants are not merged; on the contrary even the authorities enabled to issue them under national law may differ.<sup>61</sup> The EAW exists parallelly or on-top of national procedures on arrest and detention. What is more, the EAW usually af-

<sup>58</sup> Court of Justice, judgment of 19 September 2019, case C-467/18, *Criminal proceedings against EP*, para. 71.

<sup>59</sup> We of course refer to EAWs for the purpose of prosecution and not for the execution of a sentence.

<sup>60</sup> Court of Justice, judgment of 1 June 2016, case C-241/15, *Bob-Dogi*, paras 55-56.

<sup>61</sup> Court of Justice, judgment of 30 April 2019, case C-508/18 and C-82/19 PPU, *OG and PI*, para. 67.

fects only arrest and not detention on remand, which may or may not come after it. Nevertheless, a closer inspection points to the emergence of various questions generated from the symbiosis of EAW and detention on remand. In fact, we could speak of a potential *spill-over effect* from EAW proceedings to pre-trial detention.

The main question is whether the EAW might influence the use of pre-trial detention for suspects *after surrender*. Assuming that trial cannot start immediately, are suspects surrendered with a EAW more likely to be considered at risk of flight? The question is therefore whether the use of a EAW procedure influences the interpretation of a suspect's risk of absconding, thus leading to increased chances of detention on remand. A related question can be raised with regard to the likelihood of using alternatives to detention. Many surrendered with an EAW do not reside in the issuing state, and the lack of residence may affect the eligibility to some of these alternatives (e.g. house arrest).

More generally, the public interest in ensuring the presence of suspects at trial is arguably higher for those surrendered with an EAW, given the energy and resources spent for surrender. Such indication is further supported by the fact that for detention *pending surrender* (which is more similar to detention pending extradition), preserving the effectiveness of the EAW remains paramount. The Court has stated that not only the use of alternative measures (under Art. 12 FD EAW) but even the release of the suspect when the deadlines set by the Framework Decision (according to Art. 23, para. 5, FD EAW) are exceeded is conditional upon the prevention of a serious risk of absconding. What constitutes a serious risk of absconding and when national courts can release the suspect or order alternatives is left to the discretion of national authorities.<sup>62</sup>

The possible entanglements between EAW proceedings and pre-trial detention do not end here. One can also wonder whether the possible unlawfulness of a EAW may affect the validity of pre-trial detention after surrender. In recent years, two requests for preliminary ruling have been issued that dealt with this question, i.e. whether a potential violation of Art 4 of Directive 2012/13/EU on the access of materials could have an effect on the legality of pre-trial detention.<sup>63</sup> Both preliminary questions were withdrawn.<sup>64</sup>

But even outside surrender procedures, the mere abolition of the internal borders apparently impacts negatively on the chances of suspects to avoid pre-trial detention. Research shows that non-nationals are often overrepresented in pre-trial detention populations, many of whom are EU nationals residing in other Member States.<sup>65</sup> In 2009, the Court of Appeal of Amsterdam issued a request for a preliminary ruling (sub-

<sup>62</sup> Court of Justice: judgment of 12 February 2019, case C-492/18 PPU, *TC*, paras 76-77; judgment of 16 July 2015, case C-237/15 PPU, *lanigan*, paras 33 and 52.

<sup>63</sup> Court of Justice, judgment of 2 August 2017, case C-510/17, *Okresný súd Bratislava II (Slovakia) v. ML*.

<sup>64</sup> Court of Justice, judgment of 12 June 2019, case C-149/19, *Okresný súd Bratislava V (Slovakia) v. RB*.

<sup>65</sup> W. HAMMERSCHICK, C. MORGENSTERN, S. BIKELIS, M. BOONE, I. DURNESCU, A. JONCKHEERE, J. LINDEMAN, E. MAES, M. ROGAN, *DETOUR – Towards Pre-trial Detention as Ultima Ratio*, cit., p. 8; Fair Trials, *A Measure of Last Resort?*, cit., pp. 21-22.

sequently withdrawn), asking whether the pre-trial detention of EU citizens who do not reside in the Netherlands is a justifiable restriction of the free movement and discrimination on the basis of nationality.<sup>66</sup> This is exactly the problem that Framework Decision 2009/829 on the ESO was meant to tackle, by enhancing the use of alternatives to pre-trial detention in a cross-border setting.<sup>67</sup> Unfortunately, as explained in literature, the ESO has been hardly used, *inter alia* owing to the diverse standards of pre-trial detention and the general lack of trust towards alternative measures.<sup>68</sup> In any event, one needs to remind that the ECtHR has conceptualised an obligation to seek alternatives before issuing a detention order. Yet as we tried to explain elsewhere<sup>69</sup> this obligation has scarcely been operationalised and remains somewhat vague.

As other authors have suggested, the secret in improving the use of the EAW might be hidden in empowering the use of ESO, which in turn requires more attention to pre-trial detention standards. A look into the practice shows that rejected EAWs are mostly due to prison conditions, or to a seemingly disproportional use of this instrument for the particular circumstances of individuals.<sup>70</sup> These EAWs could have been spared and replaced by requests for enforcing alternative measures in the executing State via the use of ESO.<sup>71</sup>

#### IV. CONCLUSION

In this *Insight*, we wanted to offer an insight into the existing EU legal framework as far as pre-trial detention is concerned. Despite the lack of harmonisation at the EU level, our assumption was that existing EU criminal law instruments would have some impact on pre-trial detention. Our findings partially confirm such assumption. To sum up, what our study reveals are two main points:

<sup>66</sup> Court of Justice, order of 5 November 2009, case C-297/09, *Criminal proceedings against X*.

<sup>67</sup> See the explanatory memorandum of the Framework Decision, European Commission, *Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union*, SEC(2006)1080, p. 2; Recital 5, preamble of Council Framework Decision 2009/829/JHA of 23 October 2009. recognition to decisions on supervision measures as an alternative to provisional detention.

<sup>68</sup> A-M. NEIRA PENA, *The Reasons Behind the Failure of the European Supervision Order: The Defeat of Liberty Versus Security*, in *European Papers – European Forum*, *Insight* of 4 November 2020, [www.europeanpapers.eu](http://www.europeanpapers.eu).

<sup>69</sup> A. MARTUFI, C. PERISTERIDOU, *The purposes of pre-trial detention and the quest for alternatives*, cit., pp. 166-169.

<sup>70</sup> This finding is more than anecdotal information and has been gathered by the authors in the context of their respective research projects, involving observation and semi-structured interviews; such findings are still unpublished.

<sup>71</sup> A. RYAN, *The Interplay Between the European Supervision Order and the European Arrest Warrant: An Untapped Potential Waiting to Be Harvested*, in *European Papers – Forum*, *Insight* of 4 November 2020, [www.europeanpapers.eu](http://www.europeanpapers.eu).

First, harmonising procedural safeguards has strengthened fair trial and defence rights in Europe. But this cannot be enough for pre-trial detention. What is lacking is a context-sensitive approach to this particular area of criminal procedure. Defence rights are only part of a broader set of safeguards surrounding pre-trial detention.

Second, we need a more birds' eye view on the intricate way in which mutual recognition instruments are connected with pre-trial detention. We must gain more insight into the potential spill over effects of mutual recognition instruments (such as the EAW) on pre-trial detention and vice versa.

The EU Area of Freedom Security and Justice is guided by a piece-meal logic of intervention, but this disregards the very nature of criminal procedure. Even more than substantive criminal law, criminal procedure can be regarded as a living organism. It is a linear process, comprised by stages, measures and procedures that intersect and are connected in many ways. Change one bit of it, and the change will be felt all over it. It is unfortunate that the EU legislature has so far overlooked this special nature of criminal procedure, by choosing to harmonise only some bits and pieces thereof.