HIGHLIGHT

Special Focus on Pre-trial Detention and Its Alternatives Under EU Law: An Introduction

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The use and misuse of pre-trial detention is a recurring concern for national penal systems. While the deprivation of liberty pending judicial proceedings is generally labelled as a last resort measure at normative level, a significant part of the global prison population is made up of detainees not yet convicted of any crime.[1] Judicial practices in a pre-trial context have repeatedly triggered debate on the need to impose further limits on public coercive powers, as well as to improve the availability of alternatives to pre-trial detention and their actual use.

However, this controversial topic is far from settled, also due to the specific challenges posed by it, depending on variable factors, such as the State or group of States concerned, the rapidly evolving political contingencies and the normative choices reflecting them, along with the ever-evolving threats to public order and public security. In this respect, the EU scenario is particularly distinctive and provides an interesting illustration of the advances and shortcomings of the topic at issue.

From a practical point of view, Member States are not immune from the overuse of pre-trial detention referred to above.[2] Moreover, this situation has been exacerbated throughout decades of economic integration towards the establishment of a borderless

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[1] See R. Walmsley, *World Pre-Trial/Remand Imprisonment List*, 2016, available at www.prisonstudies.org.

[2] See Fair Trial International, *A measure of Last Resort? The practice of Pre-Trial detention decision making in the EU*, 2016, www.fairtrials.org.

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internal market. In fact, as widely acknowledged, freedom of movement has contributed to the rise of cross-border crimes and to the increase in the number of foreign EU nationals facing criminal proceedings in a host Member State. Intra-EU mobility and its side effects are particularly relevant in this regard, as it has been highlighted that pre-trial detention is often used in a discriminatory manner: in comparable situations, foreign nationals tend to be subject to pre-trial deprivation of liberty more frequently than domestic offenders. Judicial practice demonstrates a preference for remand in custody, due to the (either actual or perceived) greater risk of absconding. Notwithstanding the abstract availability of alternatives to custodial measures, foreign nationality and the existence of personal and societal connections to other Member States are still perceived as easily accessible opportunities to escape supervision by law enforcement authorities while the trial is still pending and, ultimately, to flee justice.

The European institutions have acknowledged this firmly rooted trend. Back in 2006, when the first steps was made towards adopting an EU instrument aimed at facilitating mutual recognition of judicial decisions imposing measures alternative to pre-trial detention, the Commission highlighted that about 8,000 people per year, in cross-border situations, were unnecessarily subjected to custodial measures.[3]

Precisely with a view to tackling this phenomenon, a few weeks before the entry into force of the Lisbon Treaty, the Council adopted Framework Decision 2009/829/JHA (hereafter ESO FD), establishing the so-called European Supervision Order (hereafter ESO).[4] This act was aimed at enabling the cross-border enforcement of pre-trial non-custodial measures, by allocating responsibility for their supervision to the authorities of the executing Member State.

This instrument was intended to replace previous intergovernmental mechanisms of mutual legal assistance and to complement Framework Decision 2002/584/JHA on the European Arrest Warrant, Framework Decision 2008/909/JHA on the cross-border transfer of prisoners, and Framework Decision 2008/947/JHA on the mutual recognition of judicial decisions on probation and substitutive sanctions.[5] With the threefold purpose of pre-

[3] Commission Staff Working Document SEC(2006) 1080 of 29 August 2006, accompanying document to the proposal for a Council Framework Decision on the European Supervision Order in pre-trial procedures between Member States of the European Union.

[4] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

[5] See, respectively, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

serving the accused person's personal and societal centre of gravity, while also protecting victims of crime and safeguarding public order, the European Supervision Order was designed to ignite an EU-wide paradigm shift in the domain of pre-trial custody.

However, these original ambitions were soon thwarted by the lukewarm reaction of the Member States. Compared to the success of the EAW and – at least in some Member States – of the FD on the transfer of prisoners, the ESO FD faced a turbulent implementation process.

Moreover, even now, when most of the concerns regarding its belated implementation have been put to rest, the level of application of this judicial cooperation mechanism is astonishingly unsatisfactory. Data from most of the Member States crucially reveal a few dozens of cases as the best scenario thus far.

Therefore, the tenth anniversary of the adoption of this instrument should be seen as an opportunity to assess more carefully the reasons for the failure of the ESO and to plan the possible remedies. The desired paradigm shift is yet to come, but it is now time to take this situation seriously and to trigger a debate with a view to urging action at both EU and domestic levels.

In this context, a second and parallel aspect is worthy of attention. As is the case for other mutual recognition instruments, the adoption of the ESO FD was seen by the Member States as an effective way of avoiding EU harmonisation in a much contended field, characterised by a significant degree of legal fragmentation. However, the debate on the appropriateness of EU intervention has continued over the years, fuelled by the favourable positions taken on some occasions by the EU institutions[6]. In fact, the fully-fledged effects of the EU Charter of Fundamental Rights and the need to comply with human rights protection standards stemming from the European Convention on Human Rights require further reflection, especially - although not only - from the viewpoint of the right to personal liberty. This debate now goes hand-in-hand with the complementary and equally topical call for EU action in the domain of shared standards on (dignified) detention conditions[7]. Similarly, there are concerns as to the real feasibility of such an initiative, mainly due to the blurred contours of EU competences *vis à vis* national sovereign powers. As demonstrated by the recent case law of the Court of Justice confirming the exclusion of pre-trial detention from the scope of application of Directive 2016/343 on the presumption of innocence[8], the case for EU action and the concurrent

[6] See, for instance, Communication COM(2011) 327 final of 14 June 2011 from the Commission, *Strengthening mutual trust in the European judicial area. A green paper on the application of EU criminal justice legislation in the field of detention*.

[7] See, *inter alia,* L. MANCANO, *Storming the Bastille. Detention conditions, the right to liberty and the case for approximation in EU law*, in *Common Market Law Review*, 2019, p. 61 *et seq*.

[8] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

quest for strengthened shared fundamental rights standards in this area is still a largely unresolved dilemma.

The board of the Forum has chosen to focus particularly on these topics in order to ignite debate between academics, researchers and practitioners. Proposals for contributions are welcome.