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The Commission Recommendation on procedural rights of persons held in pre-trial detention and on material detention conditions. A true step forward?

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1. The Recommendation adopted by the European Commission on 8 December 2022 (C(2022) 8987 final) (Recommendation) is the first EU act laying down common minimum (non-binding) standards on procedural rights of persons subject to pre-trial detention and on material detention conditions.

This act represents the latest step of the paradigm shift having characterised EU judicial cooperation in criminal matters since the 2009 Council's Roadmap on procedural rights, and which can be described by Advocate General Cruz Villalón's words: "[a]lthough mutual recognition is an instrument for strengthening the area of security, freedom and justice, […] the protection of fundamental rights and freedoms is a precondition which gives legitimacy to the existence and development of this area" (Opinion of Advocate General Cruz Villalón delivered on 6 July 2010, Case C-306/09, *B.*, para 43).

Such renewed attention to fundamental rights in criminal proceedings also affected the fields concerned by the present Recommendation, with particular regard to pre-trial detention. In fact, the Roadmap itself requested the Commission to issue a Green Paper, which the Commission did in 2011, to explore the possibility of EU legislation on the topic. Moreover, the need for EU legislation on pre-trial detention and prison conditions has been repeatedly addressed by the European Parliament, lastly in its Resolution on the implementation of the European Arrest Warrant of 2021 (para 37). Furthermore, the Court of Justice of the European Union (CJEU) has constantly provided a narrow interpretation of the Presumption of innocence Directive, thereby rendering it ineffective in protecting suspects remanded in custody. For instance, it held in *DK* that the allocation of the burden of proof in pre-trial proceedings falls out of the Directive's scope (Judgment of the

Court of 28 November 2019, Case C-653/19 PPU, *Spetsializirana prokuratura*, paras 25-42).

The urgency of common standards in the field of remand detention has been recently highlighted by a rich scholarly debate (A. MARTUFI, C. PERISTERIDOU, *Towards an Evidence-Based Approach to Pre-trial Detention in Europe*, in *European Journal on Criminal Policy and Research*, 2022, p. 357 ff.; S. MONTALDO, *Special Focus on Pre-Trial Detention and Its Alternatives Under EU Law: an Introduction*, in *europeanpapers.eu*, 2020, p. 1573 ff.). Nonetheless, under Article 82(2)(b) TFEU, the harmonisation of individual rights in criminal proceedings is designed as a mere means to pursue the higher objective of fostering mutual recognition (I. WIECZOREK, *EU Harmonisation of Norms Regulating Detention: Is EU Competence (Art. 82(2)b TFEU) Fit for Purpose?*, in *European Journal on Criminal Policy and Research*, 2022, p. 467; V. MITSILEGAS, *EU Criminal Law After Lisbon. Rights, Trust and the Transformation of Justice in Europe*, Oxford, 2016, p. 157). Such functional EU competence raises several concerns as regards the actual possibility of adopting a Directive on pre-trial detention (T. COVENTRY, *Pretrial Detention: Assessing European Union Competence Under Article 82(2) TFEU*, in *New Journal of European Criminal Law*, 2017).

Against this backdrop, a Non-paper was issued by the Commission in 2021, to stimulate discussions in the JHA Council about the adoption of common minimum rules on core aspects of pre-trial detention and prison standards. In response, the Council denied the need for an EU-law instrument, arguing that the existing international standards should simply be implemented more effectively (Outcome of the Council meeting, Justice and Home Affairs, 7 and 8 October 2021).

Among theoretical doubts on EU competence and the Council's political reluctance, the Commission opted for a soft-law act and adopted, after issuing a Call for evidence, the Recommendation under analysis.

The present contribution will summarise the content of the Recommendation (para 2) and will then provide a few considerations analysing it through the lens of its declared objectives, namely guaranteeing a better accessibility of existing standards, and the reinforcement of mutual trust (para 3).

2. The Recommendation sets out an "overview of selected minimum standards […] in key priority areas", providing Member States' legislatures with guidance in the adoption of national measures in the two areas covered. It lays down some definitions and general principles, and then recommends a number of standards regarding procedural rights of persons subject to pre-trial detention and material detention conditions.

Starting from the definitions, "pre-trial detention" consists of "any period of detention […] prior to conviction", with the exclusion of the initial arrest. "Alternative measures" are merely described as less restrictive alternatives. Other definitions include that of "detainee" (person held pre-trial or in execution of a prison sentence); "detention facility" (prison or other premises

aimed at holding detainees); "child" (person aged below eighteen), young adult (between eighteen and twenty-one); "persons with disability" (defined in conformity with the United Nations Convention on the Rights of persons with Disabilities).

As for the general principles, the Recommendation recalls that pre-trial detention shall be the *extrema ratio* and that inmates shall be "treated with respect and dignity". Furthermore, the importance of facilitating the social reintegration of offenders and avoiding discrimination on any ground are highlighted.

2.1. Concerning pre-trial detention, it is reiterated that a person may be remanded in custody only if strictly necessary and following an assessment of case-specific circumstances, where no less restrictive alternatives are available or adequate. The Recommendation stresses the importance of providing for the broadest array possible of alternatives, such as obligations to report, to reside at a certain place or to refrain from specific activities.

The burden of proving the necessity to remand and maintain that person in custody shall be borne by the competent authority. Remand in custody is only justified where there are a reasonable suspicion of the person having committed the alleged offence and a *periculum libertatis* among the risk of fleeing justice, reoffending, tampering with evidence or threatening public order. Such risks shall be established through a case-by-case assessment, with regard to personal and social circumstances, the gravity of the crime and the possible penalty. It is also recommended to avoid pre-trial detention if the minimum sentence available is of (up to) one year. In addition, the Recommendation underlines that the lack of citizenship or other links with the trial State shall not, in itself, equate to a risk of absconding. The decision remanding the person in custody, prolonging such detention or imposing less restrictive measures shall be "duly reasoned and justified" with regard to case-specific circumstances, and a copy of such statement of reasons shall be provided to the suspect or accused. Importantly, a system of periodic review either *ex officio* or upon the person's application shall be in place to ensure prompt release once the grounds for detention no longer exist. In the former case, the review should take place at least once a month. Moreover, the length of pre-trial detention shall not exceed, neither be disproportionate to, the available penalty, and cases with a remanded defendant shall be prioritised. As regards judicial guarantees, pre-trial hearings shall take place before a judicial authority, be oral and adversarial and guarantee that the person concerned be heard personally or through a representative. Furthermore, any remanded individual shall be entitled to seize a court competent to review the legality of his or her detention. Finally, the Recommendation prescribes the deduction from the final sentence of all periods served in custody or under alternative measures.

2.2. The set of recommendations devoted to material detention conditions prescribes at the outset the allocation to each detainee of at least 6 or 4 m^2 of

space, in single- or multi-occupancy cells. Additionally, it is clarified that the "absolute minimum" is 3 m^2, with the possibility of reducing it on an occasional basis, for a short time, guaranteeing out-of-cell movement and activities, and provided that the general conditions of the premises do not add further aggravating elements. The said cell-space includes the floor occupied by furniture but not the sanitary facilities. Concerning the allocation of detainees, the proximity to their home or other place facilitating their reintegration is prescribed, as well as the separation of detainee children and young adults, women and pre-trial prisoners from adults, males and convicts. Further recommendations prescribe the accessibility and privacy of sanitary facilities, the maintenance of "good hygienic standards through disinfection and fumigation" and the provision of detainees with sanitary products, warm running water, clothing and bedding. As for nutrition, it shall fit each detainee's necessities, be "prepared and served under hygienic conditions" and be accompanied by drinking water accessible at all times. Particular attention is then devoted to out-of-cell activities, such as outdoors exercise, recreation, work and education. Moreover, the physical and mental healthcare shall be protected at the same level as the national public health system, and examination shall take place "without undue delay" upon arrival and transfer. Concerning the prevention of violence, State authorities have an obligation to take "all reasonable measures" to avoid ill-treatment by staff or other prisoners, and staff's behaviour and use of force shall be subject to supervision. Attention is also paid to the opportunity for the detainee to keep regular contacts with family, lawyers and other persons from outside.

Furthermore, the recommendation prescribes to guarantee access to a lawyer, confidentiality of all communications and permission for the detainee to access or keep possession of documents concerning their proceedings. A system of requests and complaints shall be in place to allow the treatment of official claims about prison life, and detainees shall be informed of the rules applicable in their prison.

A number of recommendations is then devoted to the specific needs of certain categories of inmates, i.e. women and girls, foreigners, children, persons with disabilities, and those at risk of marginalization and ill-treatment on grounds such as "sexual orientation, racial or ethnic origin or religious beliefs". As regards the external supervision of prison premises, regular inspections by independent subjects shall be granted, in particular to the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and National Preventive Mechanisms (NPMs), and access by national and EU parliamentarians should be allowed. The last set of recommendations deals with the prevention of radicalisation, which shall be tackled through regular individual assessments of risk, proper staff training and specific programmes.

3. To provide a few initial considerations on this Recommendation, it is interesting to measure it against its objectives. Firstly, the act reflects a practical rationale, namely consolidating existing international and European

law standards (para 2) to render them more accessible to judicial authorities (recital 17), and to provide guidance to national legislatures (para 1). Particular attention was paid to the rules stemming from Council of Europe (CoE) soft-law acts and to the case-law of the ECtHR and the CJEU.

Starting from the notion of pre-trial detention, it is defined as "detention of a suspect or accused person in criminal proceedings ordered by a judicial authority and prior to conviction". Still, the notion of "detention" is not provided. In this regard, it follows from well-established ECtHR case-law that house-arrest amounts to deprivation of liberty equivalent to detention in prison (Judgment of the ECtHR of 5 July 2016, No. 23755/07, *Buzadji v. the Republic of Moldova*, para 104), while measures such as curfews with further restrictions attached require a case-by-case assessment, which may lead to consider them as equivalent to detention (Judgment of the ECtHR of 6 November 1980, No. 7367/76, *Guzzardi v. Italy*) or as mere restrictions on liberty (Judgment of the ECtHR of 20 April 2010, No. 19675/06, *Villa v. Italy*; Judgment of the Court of 28 July 2016, Case C-294/16 PPU, *JZ*). Discrepancies between the two European courts have also been observed (V. MITSILEGAS, *Autonomous concepts, diversity management and mutual trust in Europe's area of criminal justice*, in *Common Market Law Review*, 2020, p. 55). Therefore, while the "[obligation] to reside at a specified address" is one of the measures that shall be preferred to imprisonment (para 17(e)), in some cases the guarantees attached to this latter form of detention shall nonetheless apply. While this interpretative approach can be inferred from the ECtHR and CJEU case-law, it may have been wiser to specify it in the Recommendation.

More serious doubts may arise from the lack of a notion of "pre-trial", which is controversial and characterised by divergences within the CoE system, and between the CoE and the EU (A. MARTUFI, C. PERISTERIDOU, *Pre-Trial Detention and EU Law: Collecting Fragments of Harmonisation Within the Existing Legal Framework*, in *European Papers*, 2020, p. 1479 f.). Indeed, the ECtHR defines it as detention before the first-instance conviction (Judgment of the ECtHR of 27 June 1968, No. 2122/64, *Wemhoff v. Germany*, para 9 as to the law). Conversely, the CM/Rec(2006)13 allows for the application of guarantees attached to pre-trial detention also to persons awaiting the passing or the confirmation of that sentence, if considered unconvicted under national law (rule 1[2]). In the EU framework, the Green Paper on detention more sharply considered that "until the sentence is final" the time spent in prison shall be treated as pre-trial detention (Section 4). In this contradictory framework, the time extension of the guarantees attached to pre-trial detention could have been specified.

Apart from the definition, in the area of remand in custody the Recommendation essentially reproduces the core rules enshrined in CM/Rec(2006)13, as well as essential principles established by the ECtHR. In this context, it is particularly worth noting the Recommendation whereby the burden of proving the necessity of pre-trial detention shall rest with the competent authority, which introduces in EU (soft-)law a requirement that,

according to the CJEU judgment in *DK* (*supra*), is not prescribed by the Presumption of innocence Directive (Judgment of the Court of 28 November 2019, Case C-653/19 PPU, *Spetsializirana prokuratura*, paras 25-42).

Overall, a more EU-tailored approach could have been expected. This consideration is particularly true with regard to the promotion of the European Supervision Order (ESO), a measure whose underuse is a widespread concern (A. M. NEIRA-PENA, *The Reasons Behind the Failure of the European Supervision Order: the Defeat of Liberty Versus Security*, in *europeanpapers.eu*, 2020, pp. 1493-1509). In fact, the ESO Framework Decision (FD) is mentioned twice: in para 16, recommending the availability of a broad range of alternatives, and in para 70, prescribing the information of foreigners as to the possibility of applying for a pre-trial non-custodial alternative to be supervised in their Member State of residence. Still, the list of possible alternatives in para 17 does not seek to promote the measures enshrined in Article 8 ESO FD in any particular way, being a mere reproduction of rule 2[1] of CM/Rec(2006)13. In addition, the Recommendation does not even reiterate rule 2[2] of the CM/Rec, stating that "[w]herever practicable, alternative measures shall be applied in the state where a suspected offender is normally resident if this is not the state in which the offence was allegedly committed", which is the concept at the basis of the ESO FD. Finally, the Commission did not take the opportunity, while stating that alternatives should be preferred, to suggest that when the suspect or accused is a non-resident the ESO shall be specifically taken into consideration and discarded before remanding that individual in custody. In this sense, the Recommendation seemingly confirms the scholarly impression that the promotion of the ESO is not amongst the Commission's priorities (A. SOO, *Common Standards for Detention and Prison Conditions in the EU: Recommendations and the Need for Legislative Measures*, in *ERA Forum*, 2020, p. 334).

As regards material detention conditions, it is interesting to note at the outset that the recommendation does not provide an express definition of this concept. Hence, it may be simply assumed that in the Commission's view it encompasses all the issues addressed in recommendations 34 to 86, thereby widely exceeding the "physical conditions", referred to by the CJEU in the *Dorobantu* case, and comprising cell-space, outdoor exercise, natural light or air, ventilation, room temperature, toilets' privacy and basic sanitary and hygienic requirements (Judgment of the Court of 15 October 2019, Case C-128/18, *Dorobantu*, para 75).

Concerning the relevant standards, the Commission was faced with a plethora of European and international sources of inspiration. Starting from the standards on accommodation and cell-space, the Recommendation essentially adheres to the rule established in the landmark *Muršić* ECtHR case (Judgment of the ECtHR of 20 October 2016, No. 7334/13, *Muršić v. Croatia*), as the CJEU did in the aforementioned *Dorobantu* judgment. Indeed, the Recommendation sets the minimum cell-space at 4 and 6 m^2 per detainee, corresponding to the minimum CPT standards respectively for

multi- and single-occupancy cells, and defines the 3 m^2 deriving from the ECtHR case-law as an absolute minimum. This reflects the approach of the two European courts. Indeed, as clarified in *Dorobantu*, the 3 m^2 area is the very least acceptable before the State incurs in a presumption of breach of Article 4 of the Charter (*Dorobantu*, cit., paras 72-74). Nonetheless, between 3 and 4 m^2 (for multi-occupancy cells) the insufficiency of space keeps being an issue, while it is only above 4 that the surface ceases to be a problem in itself (*Dorobantu*, cit., paras 75-76). In addition, the Recommendation perfectly reflects the so-called totality-of-conditions approach, i.e. the one that the ECtHR and CJEU upheld by stating that the space factor should always be considered together with all the other conditions (K. KAMBER, *Prison Overcrowding and the Developing Case-Law of the European Court of Human Rights*, in C. BURBANO HERRERA, Y. HEACK (eds.), *Human Rights Behind Bars. Prison Overcrowding and the Developing Case-Law of the European Court of Human Rights*, 2022, Cham, pp. 64-65 and 75).

Subsequently, in many respects the Recommendation recalls the essence of the CoE European Prison Rules (Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules) (EPRs). Where necessary, the principles set out in the EPRs are complemented with rules deriving from EU law, ECtHR jurisprudence or CPT standards. To provide a few examples, the rules concerning the allocation of detainees reproduce EPRs 17.1 and 18.8, integrated with the recommendation concerning children offenders reaching eighteen and young adults which recalls Article 12(3) of Directive 2016/800. As regards the prevention of ill-treatment, the obligation to take all reasonable measure to prevent it can be inferred from EPRs 52.2 and 52.3 but was more openly affirmed with regard to inter-prisoner violence by the Strasbourg Court (Judgment of the ECtHR of 10 February 2011, No. 44973/04, *Premininy v. Russia*, paras 82-91). Finally, the recommendation of prompt medical examination at the beginning of detention and of any transfer (para 51) reflects a typical CPT standard (European Union Agency for Fundamental Rights, *Criminal detention conditions in the European Union: rules and reality*, Luxembourg, 2019, p. 33). Additionally, the Recommendation includes an essential synthesis of rules from other sources. By way of example, the recommendations concerning children and young adults devote particular attention to the development of the child in a multidisciplinary regime and the preservation of family ties, which reproduces the spirit of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, and of Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures. The same holds true for the principles concerning the contrast to radicalization, which in essence summarise the main points of the Council Conclusions on preventing and combatting radicalisation in prisons, and on dealing with terrorist and violent extremist offenders after release, as regards the need for an individual assessments, the choice between an *ad hoc* wing and dispersion, the importance of staff training.

Most importantly, the Recommendation also aims to foster mutual trust, thereby facilitating mutual recognition, consistently with the functional nature of EU competence highlighted *supra*.

In this regard, the Recommendation specifies that higher guarantees may be ensured by national legislation, but such higher protection "should not constitute an obstacle to the mutual recognition of judicial decisions" (para 3). This approach clearly corresponds to well-established CJEU case-law, according to which the level of fundamental rights protection that may exceptionally justify the refusal to execute an EAW is at most the one enshrined in EU law (Judgment of the Court of 26 February 2013, Case C-399/11, *Melloni*, paras 55-64; Judgment of the Court of 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, para 88). Still, concerning the EU-law level of protection, those two landmark cases referred to binding provisions, while it is quite peculiar to have considered non-binding standards to equally represent the level of fundamental-rights protection afforded by EU law.

In this sense, the (desired) harmonisation of fundamental rights by means of a soft-law act undoubtedly represents an element of novelty. If the Recommendation had suggested higher standards than the ECtHR, the CJEU might have been at some point faced with the question: can the execution of an EAW be refused on grounds of a real risk, for instance, of detention conditions consistent with Article 3 ECHR but falling short of the standard laid down in the Recommendation? In hypothetical terms, the CJEU would have two options. On one hand, it may answer in the affirmative. As recalled in *ML*, in *Aranyosi* the CJEU had relied on the ECtHR case-law "in the absence of EU law regarding detention conditions" (Judgment of the Court of 25 July 2018, Case C-220/18 PPU, *ML*, para 90), while a Recommendation is *pleno iure* EU law. Nonetheless, *vis-a-vis* a soft-law instrument, a negative reply would be more likely. Indeed, the *Aranyosi* case-law is founded on Article 1(3) EAW FD, whereby the recognition of foreign decisions "is not to have the effect of modifying the obligation to respect fundamental rights as enshrined in, *inter alia*, the Charter" (*Aranyosi and Căldăraru*, cit., para 83). Still, no fundamental rights obligation on the executing State can arise from an act which is not binding on it. As a consequence, in such a hypothetical scenario, a contrast would emerge between the level of fundamental-rights protection deemed relevant by the CJEU and the one promoted by the Commission, which would render the EU approach incoherent. In this sense, not trying to promote standards materially higher than those resulting from the ECtHR's case-law was probably a prudent choice.

In any event, the Recommendation may be applied by the CJEU *ad adiuvandum* in the interpretation of the ECtHR jurisprudence for the purposes of the *Aranyosi* test or, more broadly, of EU binding instruments. The latter may be the case of the allocation of the burden of proof in pre-trial proceedings. Contrary to the aforementioned *DK* case, the CJEU might now extend Article 6 of the Presumption of innocence Directive to remand decisions.

To conclude, the Recommendation is *per se* welcome, being the first EU act setting common standards in the two areas concerned. The choice of a non-binding instrument was probably the most realistic compromise between the need to eventually follow up to the repeated EP calls and the reluctancy of the Council to the imposition of EU standards. In addition, it circumvents the competence doubts arising from Article 82(2)(b) TFUE. Another undeniable asset of the Recommendation is that it compiles in a short act a series of rules from various sources, thereby attaining the objective of an increased accessibility of those standards.

Nonetheless, some questions remain open. First, the lack of promotion of the ESO is barely explicable *vis-à-vis* such a relevant and underused instrument which is relevant to the issue of pre-trial detention. Secondly, the aptness of a soft-law instrument as a trust-building measure is open to criticism. Not only are Member States free to disregard the principles set out in the Recommendation and no infringement proceedings can be initiated, but the trust in a Member State which persistently falls short of certain standards, despite the presence of an EU-law act upholding them, may even decrease.

It will now be interesting to observe whether and how Member States will follow up to this Recommendation, and if the latter just aimed at paving the way to the adoption of a proposal for a future binding act.