

RECOMMENDATIONS

COMMISSION RECOMMENDATION (EU) 2023/681

of 8 December 2022

on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) In accordance with Article 2 of the Treaty on European Union, the European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Articles 1, 4 and 6 of the Charter of Fundamental Rights of the European Union (the Charter) provide that human dignity is inviolable and must be respected and protected, that no one shall be subjected to torture or to inhuman or degrading treatment or punishment and that everyone has the right to liberty and security. Articles 7 and 24 of the Charter enshrine the right to family life and the rights of the child. Article 21 of the Charter provides that no one shall be subject to discrimination. Articles 47 and 48 of the Charter recognise the right to an effective remedy and to a fair trial as well as the presumption of innocence and the right of defence. Article 52 of the Charter provides that any limitation to the exercise of fundamental rights recognised therein must be provided for by law and must respect the essence of those rights and freedoms as well as the principles of necessity and proportionality.
- (2) The Member States are already legally bound by existing Council of Europe instruments on human rights and the prohibition of torture and inhuman or degrading treatment, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the protocols to that Convention, the case law of the European Court of Human Rights and the 1987 European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment. All Member States are furthermore parties to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).
- (3) A number of non-legally binding instruments that deal more specifically with the rights of persons who have been deprived of their liberty have also to be taken into account, in particular: at United Nations level, the United Nations standard minimum rules on the treatment of prisoners (Nelson Mandela Rules); the United Nations standard minimum rules for non-custodial measures (Tokyo Rules); as well as, at the Council of Europe level, Recommendation Rec(2006)2-Rev on the European Prison Rules; the Recommendation Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse; Recommendation CM/Rec(2017)3 on the European Rules on community sanctions and measures; Recommendation CM/Rec(2014)4 on electronic monitoring; Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules; and the White Paper on Prison Overcrowding.
- (4) In addition other instruments exist that target specific groups of persons deprived of liberty, in particular: at the United Nations level, the United Nations Rules for the protection of juveniles deprived of their liberty and the United Nations Rules for the treatment of women prisoners and non-custodial measures for women offenders (Bangkok Rules); the United National Convention on the Rights of the Child (UNCRC); as well as, at the Council of Europe level, Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures; and the Recommendation CM/Rec(2018)5 concerning children with imprisoned parents; Recommendation CM/Rec (2012)12 concerning foreign prisoners; as well as, at an international non-governmental level, the Principles on the application of international human rights law in relation to sexual orientation and gender identity (Yogyakarta Principles), developed by the International Commission of Jurists and the International Service for Human Rights.

- (5) The Court of Justice of the European Union has acknowledged, in the *Aranyosi/Căldăraru* and follow-up judgments ⁽¹⁾, the importance of detention conditions in the context of mutual recognition and the operation of Council Framework Decision 2002/584/JHA ⁽²⁾ on the European arrest warrant. The European Court of Human Rights has also ruled on the impact of poor detention conditions on the operation of the European arrest warrant ⁽³⁾.
- (6) In the December 2018 Council conclusions on promoting mutual recognition by enhancing mutual trust, Member States were encouraged to make use of alternative measures to detention in order to reduce the population in their detention facilities, thereby furthering the aim of social rehabilitation and also addressing the fact that mutual trust is often hampered by poor detention conditions and the problem of overcrowded detention facilities ⁽⁴⁾.
- (7) In the December 2019 Council conclusions on alternatives to detention, Member States committed to taking several actions in the field of detention at national level, such as to adopt alternative measures to detention ⁽⁵⁾.
- (8) In the June 2019 Council conclusions on preventing and combating radicalisation in prisons and on dealing with terrorist and violent extremist offenders after release, Member States committed urgently to take effective measures in this area ⁽⁶⁾.
- (9) For several years, the European Parliament has urged the Commission to take action to address the issue of material prison conditions and to ensure that pre-trial detention remains an exceptional measure, to be used in compliance with the presumption of innocence. This request was repeated in the European Parliament report on the European arrest warrant ⁽⁷⁾.
- (10) At the request of, and funded by, the Commission, the Fundamental Rights Agency has developed a database on detention conditions, which was launched in December 2019 and which is publicly accessible ⁽⁸⁾. The Agency's Criminal Detention Database collates information on detention conditions in all Member States. Drawing on national, Union and international standards, case law and monitoring reports, it informs about selected core aspects of detention conditions, including cell space, sanitary conditions, access to healthcare and protection against violence.
- (11) Available statistics on the European arrest warrant demonstrate that, since 2016, Member States have refused or delayed execution on grounds related to a real risk of breach of fundamental rights in close to 300 cases, including on the basis of inadequate material conditions of detention ⁽⁹⁾.
- (12) National judicial authorities have requested more concrete guidance on how to deal with such cases. The problems identified by practitioners concerns the lack of harmonisation, dispersion and lack of clarity of detention standards across the Union as a challenge for judicial cooperation in criminal matters ⁽¹⁰⁾.

⁽¹⁾ Judgment of the Court of Justice of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198. Judgment of the Court of Justice of 25 July 2018, *Generalstaatsanwaltschaft*, C-220/18 PPU, ECLI:EU:C:2018:589 and Judgment of the Court of Justice of 15 October 2019, *Dimitru-Tudor Dorobantu*, C-128/18, ECLI:EU:C:2019:857.

⁽²⁾ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

⁽³⁾ *Bivolaru and Moldovan v France*, Judgment of 25 March 2021, 40324/16 and 12623/17.

⁽⁴⁾ <https://data.consilium.europa.eu/doc/document/ST-14540-2018-INIT/en/pdf>

⁽⁵⁾ <https://data.consilium.europa.eu/doc/document/ST-14075-2019-INIT/en/pdf>

⁽⁶⁾ <https://data.consilium.europa.eu/doc/document/ST-9727-2019-INIT/en/pdf>

⁽⁷⁾ (2019/2207(INI)) as adopted on 20 January 2021.

⁽⁸⁾ Visit <https://fra.europa.eu/en/databases/criminal-detention>

⁽⁹⁾ Period covered 2016-2019. For further reference see: https://ec.europa.eu/info/publications/replies-questionnaire-quantitative-information-practical-operation-european-arrest-warrant_en

⁽¹⁰⁾ The 9th round of mutual evaluations and conclusions of the High-Level Conference on the European arrest warrant, organised by the German Presidency of the Council of the European Union in September 2020.

- (13) Half of the Member States that provided to the Commission statistics on their detention populations indicated that they have a problem of overcrowding in their detention facilities with an occupancy rate of more than 100 per cent. The excessive or unnecessary use and length of pre-trial detention also contributes to the phenomenon of overcrowding in detention facilities, which seriously undermines improvements in conditions of detention.
- (14) Substantial divergences exist among Member States in relation to important aspects of pre-trial detention, such as the use of pre-trial detention as a last resort and the review of pre-trial detention decisions ⁽¹¹⁾. The maximum time limit for pre-trial detention also differs from one Member State to another, ranging from less than 1 year to more than 5 years ⁽¹²⁾. In 2020, the average length of pre-trial detention in the different Member States varied from 2 months to 13 months ⁽¹³⁾. The number of pre-trial detainees as a proportion of the total prison population also varies significantly from one Member State to another, ranging from less than 10 % to more than 40 % ⁽¹⁴⁾. Such vast divergences appear unjustified in a common EU area of freedom, security and justice.
- (15) Recent reports of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment draw attention to the persistence of certain serious problems in some Member States, such as ill-treatment, the unsuitability of detention facilities as well as a lack of meaningful activities and of appropriate provision of healthcare.
- (16) In addition, the European Court of Human Rights still continues to find Member States in violation of Article 3 or 5 of the ECHR in the context of detention.
- (17) Given the vast number of recommendations developed by international organisations in the area of criminal detention, these may not always be easily accessible for individual judges and prosecutors in the Member States who have to assess detention conditions before taking their decisions, either in the context of a European arrest warrant or at national level.
- (18) In the Union and, in particular, within the area of freedom, security and justice, Union specific minimum standards, applicable to all Member States' detention systems alike, are required in order to strengthen mutual trust between Member States and facilitate mutual recognition of judgments and judicial decisions.

⁽¹¹⁾ See Directorate-General for Justice and Consumers, *Rights of suspects and accused persons who are in pre-trial detention (exploratory study): final report*, Publications Office of the European Union, 2022, <https://data.europa.eu/doi/10.2838/293366>; Directorate-General for Justice and Consumers, *Rights of suspects and accused persons who are in pre-trial detention (exploratory study). Annex 2, Country fiches*, Publications Office of the European Union, 2022, <https://data.europa.eu/doi/10.2838/184080>

⁽¹²⁾ Less than 1 year in Austria, Germany, Denmark, Estonia, Latvia, Sweden and Slovakia; Between 1 year and 2 years in Bulgaria, Greece, Lithuania, Malta, Poland and Portugal; Between 2 and 5 years in the Czechia, France, Spain, Croatia and Hungary; More than 5 years in Italy and Romania; No time limit in Belgium, Cyprus, Finland, Ireland, Luxembourg, Netherlands.

⁽¹³⁾ In 2020, from just under 2 and a half months in Malta to nearly 13 months in Slovenia. Average per Member State: Austria – 2,9 months; Bulgaria – 6,5 months; Czechia – 5,1 months; Estonia – 4,7 months; Finland – 3,7 months; Greece – 11,5 months; Hungary – 12,3 months; Ireland – 2,5 months; Italy – 6,5 months; Lithuania – 2,8 months; Luxembourg – 5,2 months; Malta 2,4 months; Netherlands – 3,7 months; Portugal – 11 months; Romania – 5,3 months; Slovakia – 3,9 months; Slovenia – 12,9 months; Spain – 5,9 months. No data was available for the year 2020 for Belgium, Denmark, France, Latvia, Poland, Germany, Croatia, Cyprus and Sweden.

⁽¹⁴⁾ Less than 10 % in Bulgaria, Czechia and Romania and more than 45 % in Luxembourg in 2019.

- (19) To strengthen the trust of Member States in each other's criminal justice systems and thus to improve mutual recognition of decisions in criminal matters, notably six measures on procedural rights in criminal proceedings, namely Directives 2010/64/EU ⁽¹⁵⁾, 2012/13/EU ⁽¹⁶⁾, 2013/48/EU ⁽¹⁷⁾, (EU) 2016/343 ⁽¹⁸⁾, (EU) 2016/800 ⁽¹⁹⁾ and (EU) 2016/1919 ⁽²⁰⁾ of the European Parliament and of the Council, as well as Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings ⁽²¹⁾, have already been adopted. These measures aim to ensure that the procedural rights of suspects and accused persons in criminal proceedings are respected, including where pre-trial detention is imposed. For this purpose, these Directives contain specific procedural safeguards for suspects and accused persons who are deprived of liberty. Directive (EU) 2016/800 contains specific provisions on conditions of pre-trial detention for children; these aim to safeguard their well-being where subject to such a coercive measure. It is necessary to complement the procedural rights standards established in these Directives and the 2013 Recommendation, as well as, in the case of Directive (EU) 2016/800, relevant standards on material detention conditions for children who are subject to pre-trial detention.
- (20) The Commission aims to consolidate and build on those minimum standards established within the framework of the Council of Europe as well as the case law of the Court of Justice and of the European Court of Human Rights. To this end, it is necessary to provide an overview of selected minimum standards for procedural rights of suspects and accused persons subject to pre-trial detention and material conditions of detention in key priority areas for judicial cooperation in criminal matters between Member States.
- (21) With respect to procedural rights of suspects and accused persons subject to pre-trial detention, the guidance in this Recommendation should cover key standards on the use of pre-trial detention as a measure of last resort and alternatives to detention, grounds for pre-trial detention, requirements for decision-making by judicial authorities, periodic review of pre-trial detention, the hearing of suspect or accused persons for decisions on pre-trial detention, effective remedies and the right to appeal, the length of pre-trial detention and the recognition of time spent in pre-trial detention in terms of a deduction from the final sentence.
- (22) With respect to material conditions of detention, guidance should be given on key standards in the areas of accommodation, the allocation of detainees, hygiene and sanitation, nutrition, detention regimes with regard to out-of-cell exercise and activities, work and education, healthcare, prevention of violence and ill-treatment, contact with the outside world, access to legal assistance, request and complaint procedures, and inspections and monitoring. Furthermore guidance should be provided on safeguarding the rights of persons for whom deprivation of liberty constitutes a situation of particular vulnerability, such as women, children, persons with disabilities or serious health conditions, LGBTIQ and foreign nationals, as well as the prevention of radicalisation in prisons.

⁽¹⁵⁾ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).

⁽¹⁶⁾ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1).

⁽¹⁷⁾ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1).

⁽¹⁸⁾ 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 (OJ L 65, 11.3.2016, p. 1).

⁽¹⁹⁾ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p. 1).

⁽²⁰⁾ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297, 4.11.2016, p. 1).

⁽²¹⁾ OJ C 378, 24.12.2013, p. 8.

- (23) Pre-trial detention should always be used as a measure of last resort based on a case-by-case assessment. The widest possible range of less restrictive measures alternative to detention (alternative measures) should be made available and applied wherever possible. Member States should also ensure that pre-trial detention decisions are not discriminatory and are not automatically imposed on suspects and accused persons based on certain characteristics, such as foreign nationality.
- (24) Adequate material conditions of detention are fundamental for safeguarding the rights and dignity of persons deprived of liberty and to prevent violations of the prohibition of torture and inhuman or degrading treatment or punishment (ill-treatment).
- (25) To ensure appropriate detention standards, Member States should provide each detainee with a minimum amount of personal living space in accordance with the recommendations of the European Committee for Prevention of Torture (CPT) and the case law of the European Court of Human Rights.
- (26) Where persons are deprived of liberty, they are rendered particularly vulnerable to violence and ill-treatment as well as social isolation. To ensure their safety and to support their social reintegration, the allocation and separation of detainees should take into account differences in detention regimes as well as the need to protect detainees in situations of particular vulnerability from abuse.
- (27) Detention regimes should not unduly limit detainees' freedom of movement inside the detention facility and their access to exercise, outdoor spaces, and meaningful activities and social interaction, to allow them to maintain their physical and mental health and to promote their social reintegration.
- (28) Victims of crime committed in detention often have limited access to justice notwithstanding the obligation of States to provide for effective remedies in cases where their rights have been violated. In line with the objectives of the EU Strategy on victims' rights (2020-2025), it is recommended that Member States ensure effective remedies for violations of detainees' rights as well as protection and support measures. Legal assistance, and mechanisms for submitting requests and complaints, should be easily accessible, confidential and effective.
- (29) Member States should take into account the special needs of particular groups of detainees, including women, children, elderly persons, persons with disabilities or serious health conditions, LGBTIQ, persons with a minority racial or ethnic background and foreign nationals, in all decisions relating to their detention. In particular, where children are detained, the child's best interest must always be a primary consideration.
- (30) With respect to terrorist and violent extremist offenders, Member States should take effective measures to prevent radicalisation in prisons, and to implement rehabilitation and reintegration strategies given the risk posed by terrorist and violent extremist offenders or offenders radicalised while serving time in prison, and the fact that a number of these offenders will be released within a short period of time.
- (31) Only an overview of selected standards is provided in this Recommendation and it should be considered in light of, and without prejudice to, the more detailed guidance provided in the Council of Europe standards and of the case law of the Court of Justice and of the European Court of Human Rights. It is without prejudice to existing Union law and its future development. It is also without prejudice to the authoritative interpretation of Union law, which may be given by the Court of Justice of the European Union.
- (32) This Recommendation should also facilitate the execution of European arrest warrants under Framework Decision 2002/584/JHA, as well as the recognition of judgments and the enforcement of sentences under Council Framework Decision 2008/909/JHA ⁽²²⁾ on the application of the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty.

⁽²²⁾ 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 (OJ L 327, 5.12.2008, p. 27).

- (33) This Recommendation respects and promotes fundamental rights recognised by the Charter of Fundamental Rights of the European Union. In particular, this Recommendation seeks to promote respect for human dignity, the right to liberty, the right to family life, the rights of the child, the right to an effective remedy and to a fair trial as well as the presumption of innocence and the right of defence.
- (34) References in this Recommendation to appropriate measures to ensure effective access to justice for persons with disabilities should be understood in light of the rights and obligations under the United Nations Convention on the Rights of Persons with Disabilities to which the European Union and all its Member States are parties. In addition, it should be ensured that if persons with disabilities are deprived of their liberty in criminal proceedings, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the United Nations Convention on the Rights of Persons with Disabilities, including by providing reasonable accommodation for special needs and by ensuring accessibility,

HAS ADOPTED THIS RECOMMENDATION:

PURPOSE OF THE RECOMMENDATION

- (1) This Recommendation sets out guidance for Member States to take effective, appropriate and proportionate measures to strengthen the rights of all suspects and accused persons in criminal proceedings who are deprived of their liberty, in relation both to the procedural rights of persons subject to pre-trial detention and to material detention conditions, in order to ensure that persons subject to deprivation of liberty are treated with dignity, that their fundamental rights are upheld and that they are deprived of their liberty only as a measure of last resort.
- (2) This Recommendation consolidates standards established under existing policies at national, Union and international level on the rights of persons deprived of their liberty as a result of proceedings in criminal matters, which are of key relevance in the context of judicial cooperation in criminal matters between Member States.
- (3) Member States may extend the guidance set out in this Recommendation in order to provide a higher level of protection. Such higher levels of protection should not constitute an obstacle to the mutual recognition of judicial decisions that this guidance is designed to facilitate. The level of protection should never fall below the standards provided by the Charter or by the ECHR, as interpreted by the case law of the Court of Justice and of the European Court of Human Rights.

DEFINITIONS

- (4) Under this Recommendation, 'pre-trial detention' should be understood as any period of detention of a suspect or accused person in criminal proceedings ordered by a judicial authority and prior to conviction. It should not include the initial deprivation of liberty by a police or law enforcement officer (or by anyone else so authorised to act) for the purposes of questioning or securing the suspect or accused person until a decision on pre-trial detention has been made.
- (5) Under this Recommendation, 'alternative measures' should be understood as less restrictive measures as an alternative to detention.
- (6) Under this Recommendation, 'detainee' should be understood to cover persons deprived of liberty in pre-trial detention and convicted persons serving a sentence of imprisonment. 'Detention facility' should be understood as any prison or other facility for the holding of detainees as defined in this Recommendation.
- (7) Under this Recommendation, 'child' should be understood as a person below the age of 18.

- (8) Under this Recommendation, 'young adult' should be understood as a person above the age of 18 and below the age of 21.
- (9) Under this Recommendation, 'persons with disabilities' should be understood in accordance with Article 1 of the United Nations Convention on the Rights of persons with Disabilities to include those persons who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

GENERAL PRINCIPLES

- (10) Member States should use pre-trial detention only as a measure of last resort. Alternative measures to detention should be preferred, in particular where the offence is punishable only by a short sentence of imprisonment or where the offender is a child.
- (11) Member States should ensure that detainees are treated with respect and dignity and in line with their respective human rights obligations, including the prohibition of torture and inhuman or degrading treatment or punishment as laid down in Article 3 of the European Convention on Human Rights and Article 4 of the Charter of Fundamental Rights of the European Union.
- (12) Member States are encouraged to manage detention in such a way as to facilitate the social reintegration of detainees, with a view to preventing recidivism.
- (13) Member States should apply this Recommendation without distinction of any kind, such as racial or ethnic origin, colour, sex, age, disability, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or any other status.

MIMINUM STANDARDS FOR PROCEDURAL RIGHTS OF SUSPECTS AND ACCUSED PERSONS SUBJECT TO PRE-TRIAL DETENTION

Pre-trial detention as a measure of last resort and alternatives to detention

- (14) Member States should impose pre-trial detention only where strictly necessary and as a measure of last resort, taking due account of the specific circumstances of each individual case. To this end, Member States should apply alternative measures where possible.
- (15) Member States should adopt a presumption in favour of release. Member States should require the competent national authorities to bear the burden of proof for demonstrating the necessity of imposing pre-trial detention.
- (16) To avoid inappropriate use of pre-trial detention, Member States should make available the widest possible range of alternative measures, such as the alternative measures mentioned in Council Framework Decision 2009/829/JHA ⁽²³⁾ on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.
- (17) Such measures could include: (a) undertakings to appear before a judicial authority as and when required, not to interfere with the course of justice and not to engage in particular conduct, including that involved in a profession or particular employment; (b) requirements to report on a daily or periodic basis to a judicial authority, the police or other authority; (c) requirements to accept supervision by an agency appointed by the judicial authority; (d) requirements to submit to electronic monitoring; (e) requirements to reside at a specified address, with or without conditions as to the hours to be spent there; (f) requirements not to leave or enter specified places or districts without

⁽²³⁾ 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 (OJ L 294, 11.11.2009, p. 20).

authorisation; (g) requirements not to meet specified persons without authorisation; (h) requirements to surrender passports or other identification papers; and (i) requirements to provide or secure financial or other forms of guarantees as to conduct pending trial.

- (18) Member States should furthermore require that, where a financial surety is fixed as a condition for release, the amount is proportionate to the suspect's or accused person's means.

Reasonable suspicion and grounds for pre-trial detention

- (19) Member States should impose pre-trial detention only on the basis of a reasonable suspicion, established through a careful case-by-case assessment, that the suspect has committed the offence in question, and should limit the legal grounds for pre-trial detention to: (a) risk of absconding; (b) risk of re-offending; (c) risk of the suspect or accused person interfering with the course of justice; or (d) risk of a threat to public order.
- (20) Member States should ensure that the determination of any risk is based on the individual circumstances of the case, but that particular consideration be given to: (a) the nature and seriousness of the alleged offence; (b) the penalty likely to be incurred in the event of conviction; (c) the age, health, character, previous convictions and personal and social circumstances of the suspect, and in particular their community ties; and (d) the conduct of the suspect, especially how they have fulfilled any obligations that may have been imposed on them in the course of previous criminal proceedings. The fact that the suspect is not a national of, or has no other links with, the state where the offence is assumed to have been committed is not in itself sufficient to conclude that there is a risk of flight.
- (21) Member States are encouraged to impose pre-trial detention only for offences that carry a minimum custodial sentence of 1 year.

Reasoning of pre-trial detention decisions

- (22) Member States should ensure that every decision by a judicial authority to impose pre-trial detention, to prolong such pre-trial detention, or to impose alternative measures is duly reasoned and justified and refers to the specific circumstances of the suspect or accused person justifying their detention. The person affected should be provided with a copy of the decision, which should also include reasons why alternatives to pre-trial detention are not considered appropriate.

Periodic review of pre-trial detention

- (23) Member States should ensure that the continued validity of the grounds on which a suspect or accused person is held in pre-trial detention is periodically reviewed by a judicial authority. As soon as the grounds for detaining the person cease to exist, Member States should ensure that the suspect or accused person is released without undue delay.
- (24) Member States should permit the periodic review of pre-trial detention decisions to be initiated upon request by the defendant or, *ex officio*, by a judicial authority.
- (25) Member States should, in principle, limit the interval between reviews to a maximum of 1 month, except in cases where the suspect or accused person has the right to submit, at any time, an application for release and to receive a decision on this application without undue delay.

Hearing of the suspect or accused person

- (26) Member States should ensure that a suspect or accused person is heard in person or through a legal representative by way of an adversarial oral hearing before the competent judicial authority making a decision on pre-trial detention. Member States should ensure that decisions on pre-trial detention are made without undue delay.

- (27) Member States should uphold the suspect or accused person's right to a trial within a reasonable time. In particular, Member States should ensure that cases in which pre-trial detention has been imposed are treated as a matter of urgency and with due diligence.

Effective remedies and the right to appeal

- (28) Member States should guarantee that suspects or accused persons who are deprived of their liberty have recourse to proceedings before a court, which is competent to review the lawfulness of their detention and, where appropriate, to order their release.
- (29) Member States should grant suspects or accused persons subject to a decision on pre-trial detention the right of appeal against such a decision and inform them of this right when the decision is made.

Length of pre-trial detention

- (30) Member States should ensure that the length of pre-trial detention does not exceed, and is not disproportionate to, the penalty that may be imposed for the offence concerned.
- (31) Member States should ensure that the length of pre-trial detention imposed does not conflict with the right of a detained person to be tried within a reasonable time.
- (32) Member States should consider as a priority cases involving a person subject to pre-trial detention.

Deduction of time spent in pre-trial detention from the final sentence

- (33) Member States should deduct any period of pre-trial detention prior to conviction, including where enforced through alternative measures, from the length of any sentence of imprisonment subsequently imposed.

MINIMUM STANDARDS FOR MATERIAL DETENTION CONDITIONS

Accommodation

- (34) Member States should assign each detainee a minimum amount of surface area of at least 6 m² in single occupancy cells and 4 m² in multi-occupancy cells. Member States should guarantee that the absolute minimum personal space available to each detainee, including in a multi-occupancy cell, amounts to the equivalent of at least 3 m² surface area per detainee. Where the personal space available to a detainee is below 3 m², a strong presumption of a violation of Article 3 of the ECHR arises. The calculation of the available space should include the area occupied by furniture but not that occupied by sanitary facilities.
- (35) Member States should ensure that any exceptional reduction of the absolute minimum surface area per detainee of 3 m² is short, occasional, minor and accompanied by sufficient freedom of movement outside the cell and appropriate out-of-cell activities. Furthermore, Member States should ensure that, in such cases, the general conditions of detention at the facility are appropriate and that there are no other aggravating factors in the conditions of the concerned person's detention, such as other shortcomings in minimum structural requirements for cells or sanitary facilities.
- (36) Member States should guarantee that detainees have access to natural light and fresh air in their cells.

Allocation

- (37) Member States are encouraged, and in the case of children, should make sure, to allocate detainees, as far as possible, to detention facilities close to their homes or other places suitable for the purpose of their social rehabilitation.

- (38) Member States should ensure that pre-trial detainees are held separately from convicted detainees. Women should be held separately from men. Children should not be detained with adults, unless it is considered to be in the child's best interests to do so.
- (39) When a detained child reaches the age of 18 and, where appropriate, for young adults under the age of 21, Member States should provide for the possibility to continue to hold that person separately from other detained adults where warranted, taking into account the circumstances of the person concerned and provided that this is compatible with the best interests of children who are detained with that person.

Hygiene and sanitary conditions

- (40) Member States should ensure that sanitary facilities are accessible at all times and that they offer sufficient privacy to detainees, including effective structural separation from living spaces in multi-occupancy cells.
- (41) Member States should establish effective measures to maintain good hygienic standards through disinfection and fumigation. Member States should furthermore ensure that basic sanitary products, including hygienic towels, are provided to detainees and that warm and running water is available in cells.
- (42) Member States should provide detainees with appropriate clean clothing and bedding, and with the means to keep such items clean.

Nutrition

- (43) Member States should ensure that food is provided in sufficient quantity and quality to meet the detainee's nutritional needs and that food is prepared and served under hygienic conditions. Furthermore, Member States should guarantee that clean drinking water is available to detainees at all times.
- (44) Member States should provide detainees with a nutritious diet that takes into account their age, disability, health, physical condition, religion, culture and the nature of their work.

Time spent outside the cell and outdoors

- (45) Member States should allow detainees to exercise in the open air for at least 1 hour per day and should provide spacious and appropriate facilities and equipment for this purpose.
- (46) Member States should allow detainees to spend a reasonable amount of time outside their cells to engage in work, education, and recreational activities as are necessary for an appropriate level of human and social interaction. To prevent a violation of the prohibition of torture and inhuman or degrading treatment or punishment, Member States should ensure that any exceptions to this rule in the context of special security regimes and measures, including solitary confinement, are necessary and proportionate.

Work and education of detainees to promote their social reintegration

- (47) Member States should invest in the social rehabilitation of detainees, taking into account their individual needs. To that effect, Member States should strive to provide remunerated work of a useful nature. With a view to promoting the detainee's successful reintegration into society and the labour market, Member States should give preference to work that involves vocational training.
- (48) To help detainees prepare for their release and to facilitate their reintegration into society, Member States should ensure that all detainees have access to safe, inclusive and accessible educational programmes (including distance learning) that meet their individual needs while taking into account their aspirations.

Healthcare

- (49) Member States should guarantee that detainees have access in a timely manner to the medical, including psychological, assistance they require to maintain their physical and mental health. To this end, Member States should ensure that healthcare in detention facilities meets the same standards as that provided by the national public health system, including with regard to psychiatric treatment.
- (50) Member States should provide regular medical supervision and should encourage vaccination and health screening programmes including communicable (HIV, viral hepatitis B and C, tuberculosis and sexually transmitted diseases) and non-communicable diseases (especially cancer screening), followed up by diagnosis and initiation of treatment where required. Health education programmes can contribute to improving screening rates and health literacy. In particular, Member States should ensure that special attention is paid to treatment for detainees with drug addiction, infectious diseases prevention and care, mental health and suicide prevention.
- (51) Member States should require that a medical examination is carried out without undue delay at the beginning of any period of deprivation of liberty and subsequent to any transfer.

Prevention of violence and ill-treatment

- (52) Member States should take all reasonable measures to ensure the safety of detainees and to prevent any form of torture or ill-treatment. In particular, Member States should take all reasonable measures to ensure that detainees are not subject to violence or ill-treatment by staff in the detention facility and that they are treated with respect for their dignity. Member States should also require staff in the detention facility and all competent authorities to protect detainees from violence or ill-treatment by other detainees.
- (53) Member States should ensure that the fulfilment of this duty of care and any use of force by staff in the detention facility are subject to supervision.

Contact with the outside world

- (54) Member States should allow detainees to receive visits from their families and other persons, such as legal representatives, social workers and medical practitioners. Member States should also allow detainees to correspond freely with such persons by letter and, as often as possible, by telephone or other forms of communication including alternative means of communication for persons with disabilities.
- (55) Member States should provide suitable facilities to accommodate family visits under child-friendly conditions, compatible with the demands of security but less traumatic for children. Such family visits should ensure the maintenance of regular and meaningful contact between family members.
- (56) Member States should consider enabling communication via digital means, such as video calls, in order to, inter alia, enable detainees to maintain contact with their families, to apply for jobs, to take training courses or to look for accommodation in preparation for release.
- (57) Member States should ensure that, where detainees are exceptionally prohibited from communicating with the outside world, such a restrictive measure is strictly necessary and proportionate and is not applied for a prolonged period of time.

Legal assistance

- (58) Member States should ensure that detainees have effective access to a lawyer.
- (59) Member States should respect the confidentiality of meetings and other forms of communication, including legal correspondence, between detainees and their legal advisers.

- (60) Member States should grant detainees access to, or allow them to keep in their possession, documents relating to their legal proceedings.

Requests and complaints

- (61) Member States should ensure that all detainees are clearly informed of the rules applicable in their specific detention facility.
- (62) Member States should facilitate effective access to a procedure enabling detainees to officially challenge aspects of their life in detention. In particular, Member States should ensure that detainees can freely submit confidential requests and complaints about their treatment, through both internal and external complaint mechanisms.
- (63) Member States should ensure that detainee complaints are handled promptly and diligently by an independent authority or tribunal empowered to order measures of relief, in particular measures to terminate any violation of the right not to be subjected to torture or inhuman or degrading treatment.

Special measures for women and girls

- (64) Member States should take into account women's and girls' specific physical, vocational, social and psychological needs, as well as sanitary and healthcare requirements, when making decisions that affect any aspect of their detention.
- (65) Member States should allow detainees to give birth in a hospital outside of the detention facility. Where a child is nevertheless born in the detention facility, Member States should arrange all necessary support and facilities to protect the bond between mother and child and to safeguard their physical and mental well-being, including appropriate pre-natal and post-natal health care.
- (66) Member States should allow detainees who have infant children to keep such children with them in the detention facility to the extent that this is compatible with the best interests of the child. Member States should provide special accommodation and take all reasonable child-friendly measures to ensure the health and welfare of affected children throughout the execution of the sentence.

Special measures for foreign nationals

- (67) Member States should ensure that foreign nationals and other detainees with particular linguistic needs deprived of liberty have reasonable access to professional interpretation services and translations of written materials in a language that they understand.
- (68) Member States should ensure that foreign nationals are informed, without undue delay, of their right to request contact, and be allowed reasonable facilities to communicate, with the diplomatic or consular service of their country of nationality.
- (69) Member States should ensure that information about legal assistance is provided.
- (70) Member States should ensure that foreign nationals are informed of the possibility to request that the execution of their sentence or pre-trial supervision measures be transferred to their country of nationality or permanent residence, such as under Framework Decision 2008/909/JHA and Framework Decision 2009/829/JHA.

Special measures for children and young adults

- (71) Member States should ensure that the child's best interests are a primary consideration in all matters relating to their detention, and that their specific rights and needs are taken into account when making decisions that affect any aspect of their detention.

- (72) For children, Member States should establish an appropriate and multidisciplinary detention regime, that ensures and preserves their health and their physical, mental and emotional development, their right to education and training, the effective and regular exercise of their right to family life, and their access to programmes that foster their reintegration into society.
- (73) Any use of disciplinary measures, including solitary confinement, use of restraints or use of force should be subject to strict necessity and proportionality considerations.
- (74) Where appropriate, Member States are encouraged to apply the juvenile detention regime to young offenders under the age of 21.

Special measures for persons with disabilities or serious medical conditions

- (75) Member States should ensure that persons with disabilities or other persons with serious medical conditions receive appropriate care comparable to that provided by the national public health system which meets their specific needs. In particular, Member States should ensure that persons who are diagnosed with mental health related medical conditions receive specialised professional care, where needed in specialised institutions or dedicated sections of the detention facility under medical supervision, and that continuity of healthcare is provided for detainees in preparation of release, where necessary.
- (76) Member States should take special care to meet the needs of and ensure accessibility for detainees with disabilities or serious medical conditions with regards to material detention conditions and detention regimes. This should include the provision of appropriate activities for such detainees.

Special measures to protect other detainees with special needs or vulnerabilities

- (77) Member States should ensure that placement in detention does not further aggravate the marginalisation of persons because of their sexual orientation, racial or ethnic origin or religious beliefs or on the basis of any other ground.
- (78) Member States should take all reasonable measures to prevent any violence or other ill-treatment, such as physical, mental or sexual abuse, against persons because of their sexual orientation, racial or ethnic origin, religious beliefs or on the basis of any other ground by staff in the detention facility or other detainees. Member States should ensure that special protection measures are applied where there is a risk of such violence or ill-treatment.

Inspections and monitoring

- (79) Member States should facilitate regular inspections by an independent authority to assess whether detention facilities are administered in accordance with the requirements of national and international law. In particular, Member States should grant unhindered access to the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and to the National Preventive Mechanisms network.
- (80) Member States should grant access to detention facilities to national parliamentarians and are encouraged to grant similar access to members of the European Parliament.
- (81) Member States should also consider organising regular visits to detention facilities and other detention centres for judges, prosecutors and defence lawyers as part of their judicial training.

Specific measures to address radicalisation in prisons

- (82) Member States are encouraged to carry out an initial risk assessment to determine the appropriate detention regime applicable to detainees suspected or convicted of terrorist and violent extremist offences.

- (83) Based on this risk assessment, these detainees may be placed together in a separate terrorist wing or may be dispersed among the general prison population. In the latter case, Member States should prevent such individuals from having direct contact with detainees in situations of particular vulnerability in detention.
- (84) Member States should ensure that further risk assessments are carried out on a regular basis by the prison administration (at the beginning of detention, during detention and prior to release of detainees suspected or convicted of terrorist and violent extremist offences).
- (85) Member States are encouraged to provide general awareness training to all staff, and training to specialised staff, to recognise signs of radicalisation at an early stage. Member States should also consider providing an appropriate number of well-trained prison chaplains representing a variety of religions.
- (86) Member States should implement measures providing for rehabilitation, deradicalisation and disengagement programmes in prison, in preparation of release, and programmes after release to promote reintegration of detainees convicted of terrorist and violent extremist offences.

MONITORING

- (87) Member States should inform the Commission on their follow-up to this Recommendation within 18 months of its adoption. Based on this information, the Commission should monitor and assess the measures taken by Member States and submit a report to the European Parliament and to the Council within 24 months of its adoption.

Done at Brussels, 8 December 2022.

For the Commission
Didier REYNDERS
Member of the Commission
