MEMO

from the French *Contrôleur général des lieux de privation de liberté*

REGARDING THE GREEN PAPER
on the application of EU legislation on criminal matters
in the area of custody

On 14 June 2011 the European Commission adopted a "Green Paper" on custody in the European Union. It has launched a public consultation process on the contents. This memo constitutes the response of the French *Contrôleur général des lieux de privation de liberté* (inspector-general of custodial establishments) to this consultation.

It should be remembered first that the *Contrôleur général*, a national preventive mechanism instituted largely on the basis of Article 18 of the United Nations Optional Protocol to the Convention against torture and other cruel, inhuman and degrading treatment, is an institution whose independence (from government and from any other individual or legal entity) is guaranteed by law and whose mission is not only to prevent torture and any other inhuman and degrading treatment in custodial establishments but also to ensure the respect of all the fundamental rights of persons deprived of liberty.

In this connection, he has visited four hundred and thirty custodial establishments, of all kinds (prisons, police stations, secure educational centres for minors, psychiatric hospitals, detention centres for foreigners etc.), and during these visits hundreds of persons deprived of liberty and those employed in the sector were interviewed in confidence; currently, he receives about three thousand five hundred letters each year, 80% of which come from detainees or their families; he is in close contact with professional organisations, associations and individuals working in the custodial establishments.

He can therefore lay claim to both experience and independence in matters of custody.

*

Regarding the methodology adopted

1/ - As indicated by the actual title of the Green Paper, and as shown in its exposition, the intention of the authors was to divert the approach of instruments already existing in European legislation, in criminal matters.

They note the existence of four mechanisms already in force or shortly to come into force: the European arrest warrant; the scheme for prisoner transfer between Member States; the mutual recognition of probation orders and alternative penalties; and the mutual recognition of decisions made as an alternative to remand in custody (judicial supervision). They raise the principle that the application of these mutual recognition mechanisms relies on the principle of mutual trust. Their deduction is that this trust can itself only be established if, among other things, acceptable custody conditions exist throughout the Union: "Overcrowding of prisons and allegations of mistreatment of prisoners can undermine the trust upon which judicial cooperation within the European Union is built."

This reasoning is based on indisputable data. Firstly, the approach to criminal law in the Union has been based since its origins on the principle of mutual recognition, "the cornerstone of judicial cooperation in both civil and criminal matters"[1]. Secondly, mutual trust has indeed been set up as the foundation for effective cooperation: in constructing its criminal justice chain, each Member State needs to rely not only on its domestic legislation, but also "on the different legal systems in the Member States"[2]. Finally, although the Green Paper does not say much on this point, the advances of the Union on matters of liberty, security and justice, and therefore on prison affairs, are still subject to "respect for the principles of proportionality and subsidiarity"[3]; no-one will be unaware that prison systems are firmly anchored to the competences and therefore prerogatives of the Member States.

More immediately, the editors of the Green Paper have restricted themselves to what they considered to be the mandate given by the Stockholm Programme, which raises the issue of detention[4], in terms that are explicitly reproduced starting from page two of the document. The main point of this exposition lies in the concept of extending the principle of mutual recognition to the "field of detention".

2/ - While they are, of course, indisputable, the basis of this approach means that, in matters of custody, it covers only some of the issues posed by the juxtaposition in the European Union of substantially different prison systems and, in particular, the existence of situations that are absolutely incompatible with the values that it defends.

[1] *Conclusions of the Presidency of the Tampere European Council, 16 October 1999, § 33.*

[2] *Stockholm Programme, § 1.2.1, OJEU, C115, p. 5*

[3] *Ibid. § 1.2.3, p. 5.*

[4] *§ 3.2.6, ibid. p. 14.*

It seems that further aspects could be introduced without rejecting theapproach chosen.

3/ - Firstly, the question of fundamental rights and freedoms is worthy of consideration. In this context it is most definitely not irrelevant. The political priorities of the Stockholm Programme mentioned above are “respect for fundamental rights and freedoms and integrity of the person” and, at the same time, “security in Europe”[5]. Specific reference is made to respect for the human person and human dignity “and [to] the other rights set out in the Charter of Fundamental Rights of the European Union and the European Convention for the protection of Human Rights and fundamental freedoms”, particularly in the case of “vulnerable people”.

On the one hand, Article 4 of the Charter of Fundamental Rights states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment” and Article 6 reads: “Everyone has the right to ... security of person”. Using comparable premises of the European Convention on Human Rights (Article 3), the case law of the European Court of Human Rights has, in the words of Professor Flauss, built up what amounts to an “Article 3a of the Convention” regarding the rights of detainees, detailing the conditions under which, notwithstanding the prerogatives of the States, they could be protected, searched, looked after, respected etc. It is legitimate to wonder whether a similar evolution is not possible within the context of the Union, where legislation needs to play an active role in the matter. This possibility is not mentioned anywhere in the Green Paper. The Union should be filled with a desire to express and apply the strength of the principles of the Charter in particular fields.

On the other hand, it is hardly necessary to restate that, in the dissymmetry characterising the relations between the prisoner and his warden, between weakness and strength, and between power and constraint, detainees are more likely than others (whatever the offence of which they have been accused or convicted) to be exposed to the risk that their fundamental rights and freedoms will be seriously endangered. These violations concern not only the organisation of prison systems, or decisions made about them, but also the everyday functioning of incarceration. It should also be remembered that the ability of these people to make a complaint or an appeal is necessarily limited because of the shortage of resources, the paucity of information and the lack of opportunity for retaliatory action. Consequently, detainees – and not only children in detention, as seems to be implicitly implied by the Green Paper – do indeed figure among the “vulnerable people” for whom protection should be actively sought. Again, this aspect is not included in the Green Paper.

4/ - Secondly, the indisputable and very profitable system of mutual recognition is of necessity limited in the area of custody. As indicated by the key legislation adopted by the Councils and by Parliament, the principle of mutual recognition can apply only to decisions:court decisions, other forms of decisions by judges, “pre-trial orders”[6],pre-

[5] *Ibid. § 1.1, p. 4.*

[6] *Conclusions of the Tampere European Council, ibid., § 36.*

and post-sentencing decisions such as probation orders[7], decisions relating to supervision measures as an alternative to remand in custody[8] etc. In relation to prisons, decisions do exist, but there are much fewer of these since enforcement of the sentence itself makes them pretty much redundant. The Green Paper does in any case extensively cover the "conditions" of custody. Indeed, either the prison regime is limited to enforcing a court order; or its chief characteristics (cell size; amount of food; amount of work offered etc.) do not make it possible to refer to clearly identifiable decisions; or else deviations from the rule are the result of unspoken, unlawful decisions (disciplinary punishment not provided by law, harassment, brutality etc.) that obviously cannot be mutually recognised. Consequently, before any consideration of prisons, it should be noted that the mutual recognition system in this instance will have a very limited and, ultimately, marginal scope with regard to prison systems. It is the Commission's responsibility first to be aware of this and then to deduce its consequences by judging the principle of mutual recognition to be clearly inadequate for "conditions of custody".

5/ - Thirdly, the Green Paper unduly restricts the question of detention to just the aspects of remand in custody and the detention of children. However, neither the Stockholm Programme nor the framework decisions already adopted involve such restrictions. The Programme refers expressly to the European prison rules of the Council of Europe, which cover all detainees and all prison data. What is more, the implementation of the framework decisions already adopted involves consideration of the whole prison population: this is true for approaches regarding the European arrest warrant, or probation and sentence adjustment, or else prisoner transfer. In these circumstances, the Green Paper seems to have unnecessarily restricted its scope.

6/ - In summary, if we are to be realistic about how we deal with custody matters, we must not treat them as matters related to the court systems in the strict sense. The protection of people in pursuit of respect for fundamental rights and freedoms, which apply throughout the Union, is much more appropriate. The Commission is therefore requested to press this point of view, which has already been taken up by the United Nations and the Council of Europe. In terms of the right not to be subjected to inhuman or degrading treatment, the right to security, the right to respect for private and family life[9], the right to freedom of thought, conscience and religion[10], the right to freedom of expression[11], life in prison obviously becomes much more significant and highlights the weaknesses that the Union needs to address urgently.

The responses given below to the questions raised in the Green Paper must be interpreted strictly in the light of the previous comments.

*

[7] *Framework decision no. 2008/947/JHA, OJEU L 337 of 16 February 2008, p. 102.*

[8] *Framework decision no. 2008/829/JHA, OJEU L 294 of 11 November 2009, p. 20.*

[9] *Charter of Fundamental Rights, Article 7.*

[10] *Ibid., Article 10.*

[11] *Ibid., Article 11.*

Questions 1 to 3 regarding mutual recognition instruments

7/ - It is falls mainly to the French minister of justice, and not some prison supervisory body, to set out what falls within the province of an alternative to pre- and post-sentencing incarceration and to point out any aspects that compromise the correct operation of the European arrest warrant and the transfer of detainees. What is relevant to supervision is not the nature of existing rights, but their effectiveness. For some thirty years, in French criminal law and doubtless that of other Member States, there has been a considerable increase in measures intended to avoid incarceration, but consideration should only be given to their use and in particular their relative use (i.e. in comparison with custodial sentences).

On this point, we shall in general be content to point out certain obvious trends, in the medium and long term retrospectively, in French prisons.

8/ - For the last forty years the number of prison admissions has remained fairly stable. It has varied over time between 75,000 and 85,000 people. However, over the same period, the number of detainees has continued to increase (with short-term fluctuations), rising from around 35,000 people to 64,000 today. This is an 82% increase. At the same time, the number of prosecutions brought before the courts has risen from roughly 500,000 to 670,000; in other words, an increase of 34%. Consequently, alternative sentences, assuming that they have been developed, have not had the moderating effect on detention that might have been expected. That having been said, there are various explanations for this difference between the rate of increase in prosecutions and that of the rise in prisoner numbers. They certainly include an effect related to the trend to increase the length of sentences handed down, in France and other countries of the Union alike.

The alternatives to incarceration have doubtless had a positive effect on the (relative) number of remand prisoners. While, for a long time (until the 1960s), France had a high percentage of remand prisoners in its jails (up to forty percent and even higher), this rate has since fallen to the average for European countries, i.e. around twenty-five percent. This fall is as substantial as an absolute value, and while the prison population has grown, the number of remand prisoners has fallen from twenty thousand to sixteen thousand over twenty years. All this is happening as if the alternatives to prison had encouraged the fall in the number of remand prisoners, but without changing the number of convicted persons. However, there are many explanations for this too.

9/ - In terms of the imprisonment of convicted persons, nevertheless, the introduction some ten years ago (actually, seven years ago) of electronic monitoring[12] has made it essential now to distinguish the number of people taken into custody, i.e. those entered in the registers of a penal institution after sentence has been passed, from the number of people actually imprisoned, i.e. essentially, those taken into custody minus those placed under electronic monitoring. As at 1 September 2011, there were 71,742 persons in custody but 63,602 people in custody, the figure for electronic monitoring being above 7,000. The rise in use of this devicehas been rapid: 2,500 as at 1 January 2008; + 34.1% one year later; + another 30.8% in 2010/2009. In 2010, the minister of justice expressed the wish

[12] *Commonly referred to as "electronic tagging".*

to rapidly reach the number of twelve thousand people monitored in this way. It should be mentioned, however, that experience shows that electronic monitoring is only a short-term measure; it is very poorly tolerated after a few months' application. It is by no means a universal measure for sentence adjustment.

10/ - Finally, while electronic monitoring has grown rapidly and judicial supervision is being applied to large populations, community work has not had the take-up intended by the courts, because not enough people have applied for the jobs.

Question 4: the principle of exception when using remand in custody

11/ - As has just been stated, France has been in line with most European practice in its use of remand in custody. It has therefore reached the conclusion, after forty years or so, that the use of remand in custody should be markedly limited. Recent legislation (2000, 2007, 2009) has amended the code of criminal procedure so as to limit the use of this measure. In particular, one of the grounds justifying its use, which was the most open to interpretation, that of "putting an end to a disruption of public order", has been restricted somewhat ("exceptional and persistent disruption"). There are still two series of conditions, one relating to the severity of the sentence imposed, and the other to the fact that remand in custody is "the only way"[13] (in the form of seven distinct items) to complete the investigation and prevent the offence from being repeated.

12/ - The most important thing to point out is that remand in custody is the strictest penal system applied in French prisons, for reasons of law and of fact.

In law, the remand prisoner stays in jail under the supervision of the judge dealing with the case, who may restrict his or her right of communication[14]. Remand prisoners are always detained in a closed facility (i.e. kept in the cell for 24 hours a day except for exercise).

In fact, remand prisons, where remand prisoners are housed, are the most overcrowded penal institutions; overcrowding naturally makes custody conditions worse (for example access to work). It brings together populations that differ widely in terms of age and origin. Fighting between detainees is not rare and there are not enough wardens to ensure proper management in recently built remand prisons.

Finally, remand prisoners constitute the most fragile prison population: many of them, despite the recent implementation of "newcomer sections"in the prisons (influenced by the European prison rules), cope badly with the transition from liberty to incarceration (a significant number of prison suicides occur in the first few days of custody); investigations, trials in lower courts or on appeal, make for great vulnerability.

[13] *Article 144 of the code of criminal procedure.*

[14] *The right of remand prisoners to make telephone calls, subject to authorisation by the judge involved, was recognised only with the prisons law of 24 November 2009.*

Question 5: The range of different provisional detention methods and options for reducing them in number

13/ - It is also more a matter for the Justice Minister than a prison monitoring body to define how the justice system should be regulated in this respect.

14/ - With regard to the matter of who should be in charge of the monitoring of places of deprivation of liberty, we can only regret the general lack of awareness of detention conditions at the time when the decision is made to place a person in provisional detention. This obviously refers to the lack of awareness of the public opinion, which customarily demands the exemplary punishment of the "guilty", but also the lack of awareness of judges, who ultimately have the task of deciding on placing an accused person in detention. How many judges who deliberate upon on imprisonment have actually made the effort to visit the prisons connected to their court? How many of them are worried about the number of places already occupied in these establishments? How many bother to find out whether the feelings of those already accommodated there will actually ensure "the protection"[15] of the detainee? Precious few. Contrary to other forms of provisional detention, which depend on what is available, in economic terms prisons are a "demand-driven" market: prisons cannot turn away the people who are sent there. This is why some French prisons, notably those overseas, have occupation rates above 200%.

15/ - There is therefore a requirement to devise strict alternatives to provisional detention, and they should be implemented with greater efficiency than is seen under the traditional methods of legal supervision. In this respect, there are types of home detention or rather "arrest" in certain EU countries that are producing results that warrant examination as an alternative. The level of sentence needs to be proportionate to the gravity of the crime[16]. Research needs to be carried out into new and effective forms of legal supervision (where public opinion is concerned, there needs to be no impunity). It would also be beneficial to tailor investigation resources to requirements, making investigation periods as brief as possible. In a world of highly developed communications resources, it is most important that the inability to contact others is restricted to as brief a period as possible[17]. In short, we require a consistent series of measures, as a single measure alone is no guarantee of reducing provisional detention levels. However, as I said in Brussels on 25 January 2011 at the meeting of national prevention systems, organised by the Vice President of the Commission for Justice, Fundamental Rights and Citizenship, it is a matter for the EU to state that the principle of excluding the use of provisional detention should be the rule, while using it the exception. Above all else, we need to harmonise reasons for the use of provisional detention and the legal and material resources that enable us to avoid this, as stated above.

Question 6: Replacing provisional detention with the European arrest warrant

[15] *Cf. 4° of article 144 préc.*

[16] *The recent recidivism laws increase this figure mechanically, hence the possibility of using provisional detention.*

[17] *What use is provisional detention if ordered to prevent communication between an offender and his accomplices, when there are so many mobile phones (forbidden in theory) in prisons?*

16/ - Only the French Minister of Justice is empowered to answer this question, in the name of the practices adopted by French judges.

Question 7 : Towards minimal rules relating to the length of provisional detention periods?

17/ - The reasons authorising the use of provisional detention in France relate to the length of sentence incurred and various reasons relating to the investigation and the crime.

18/ - Due to the discrepancy between the lengths of sentences within EU States, it would appear to be very difficult to harmonise the former of the two sets of conditions. Moreover, this is a matter of mutual recognition, which excludes harmonisation from the outset.

19/ - On the other hand, the efficiency of investigations and the dangers of a crime being punished cannot vary between one country and another, the less so because the misdemeanours or crimes referred to in this way frequently relate to international offences. There would be no disadvantage to a pooling of reasons in this area, thus reinforcing the principle of mutual trust.

20/ - In more general terms, as stated at the beginning of this note, anything that does come within the strict remit of court decisions and criminal offences may be subject to research into harmonisation in the form of minimal rules for either aligning (and unifying) reasons for using provisional detention, or in fact excluding it.

21/ - The final question relating to a reduction in the use of provisional detention has already been addressed in question 5 above.

Question 8 : Alternatives to provisional detention for children

22/ - This question is one that is most affected in terms of the perspective adopted, which is detailed in the first section of this note. The provisional detention of children may not be reasonably separated from either the detention of children or other forms of constraint used with regard to juvenile offenders.

It is to be noted that, in France, whilst the number of acts of delinquency (or criminal acts) involving children has increased greatly over the long term, the actual number of children incarcerated has thankfully levelled out (between 600 and 800 children as part of the prison “stock”). Nevertheless, there has been a noticeable change in distribution in terms of numbers of detainees and convicted persons. Whilst in the past detained children made up the great majority of minors placed in detention, this proportion is constantly decreasing. It is now in the order of 60%. This change reveals a dual trend: a relative downturn in the number of provisional detentions, as observed for the provisional detention

of those who have reached the age of majority, but also an increase in the number of children involved in serious delinquency or crime, for which they are sentenced to fixed terms of imprisonment.

23/ - It is regrettable that the Green Paper is silent on the question of the wide variations in approach to the age of criminal responsibility across the EU. There are major discrepancies between the States in this regard. Here too, it would appear that harmonisation is required. EU States need to have a shared concept for the application of the 1989 International Convention on the Rights of the Child, in particular article 37b[18].

24/ - For the great majority of children, there are alternatives to incarceration (and therefore provisional detention). The French law on juvenile delinquency clearly advocates educational measures over totally repressive approaches. There is therefore a range of different solutions for custody including education. Two new types of establishment were created ten years ago, the first being closed education facilities, where most of the children placed there have received suspended sentences with probation. The second, legal supervision, takes the form of correctional facilities for minors, which are true prisons, but where primarily education, followed by collective life in small groups, have been encouraged or instituted[19].

Concerns were raised when these institutions were created, raising doubts as to whether educational initiatives could exist within a closed environment. Without going into any detail about the basis of this patently senseless line of thinking, a number of years after these establishments were opened we can see that forms of education do now exist, at least where elements were put in place as appropriate. It is important to mention the conditions prevailing: a small number of children; high levels of good quality facilities; an educational approach in all facilities, but also respecting children's freedom; well-defined planning for a better future for the individual, working together with the family; possible links with psychological or psychiatric support; continuity of care for the child from the various public institutions, notably ensured by a specialist judge.

In many situations, there are clear alternatives to provisional detention, for which the EU should at least be able to exchange good practices with a view to rapidly finding equivalent ways of receiving juvenile delinquents in all Member States.

25/ - In the spirit of the stipulations of the International Convention referred to above, the EU should promote the harmonisation of the Rights of the Child in these

[18] *Article 37 b : "States Parties shall ensure that: (…)The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;". The final point should not only apply to the length of the sentence, but also to the age when it applies.*

[19] *On the subject of these establishments, see the recent report by Gilles CHANTRAINE et al., Les prisons pour mineurs, controverses sociales, pratiques professionnelles, expériences de réclusion. Centre lillois d'études et de recherches sociologiques et économiques, CNRS, Lille I.*

educational establishments, as in prisons where children are placed. In this particularly sensitive area, it should be clear that the principal of mutual recognition is not enough on its own to ensure the protection of persons who are doubly vulnerable: because of their age and because they have been separated from their parents.

Question 9 : State monitoring of the detention conditions and the spread of good practice

26/ - First of all, the EU needs to clarify what we are to understand by "monitoring detention conditions", which is not stated in the Green Paper.

27/ - It needs to be clear from the start that each member State has to ensure that prison services are able to carry out the inspections and audits required for regulating the work of prison officers: this means giving them the appropriate management training (including continuous training), the support that they need[20] and the necessary resources, but most importantly ensuring that their daily activities and interaction with detainees are subject to essential assessment and inspection, taking the feedback from prisoners into account. It is no less obvious that each State should ensure that the competent authorities carry out checks on security (fire…), health, food and facility hygiene and working conditions so that security is not the only criterion for structuring prison life.

Most importantly, it is the efficiency of these checks that the EU is in a position to encourage.

28/ - However, such administrative checks are not enough on their own. National studies, some of them dating back some time, have demonstrated the need for external controls, in itself an additional guarantee for care in compliance with the rights of people in custody, as has been observed. Certain States have implemented independent inspections of this type ahead of time. The 2002 Optional Protocol (and not 2006 as referred to in the Green Paper) relating to the 1984 UN Convention against Torture made such independent monitoring compulsory for all Signatory States.

Given that it is accepted that the independent monitoring of detention conditions is a powerful tool for ensuring the basic rights of detainees, the EU, which, as referred to in the first section of this note, has prioritised these rights, needs to question Member States on their intentions with regard to signing the Protocol, its ratification and implementation. In this respect, it would seem regrettable that some EU States have still not completed this procedure or set up a "national prevention system" as required by the Protocol. This needs to be a joint objective, included in the strategies behind the Stockholm Programme or those that will lead to the future programme.

[20] *The Controller General of Places of Deprivation of Liberty published an opinion on the supervision of staff (Journal officiel de la République française, 12 July 2011).*

29/ - Where monitoring does exist, it is likely to have been developed according to one of two distinct models. In many countries (such as Estonia and Spain), it is attached to the existing equivalent of the *Ombudsman*; in others (United Kingdom, Germany…), a national prevention system has been created that is totally separate from any existing body. Naturally, considerations of dimension (territory, population, number of establishments concerned) may be involved in such a choice, and the French Parliament has stated on a number of occasions (even recently, on the institution of the Ombudsman) that it was preferable to have an independent *Ombudsman*, primarily because the independent monitoring of prison facilities is indivisible, and that belonging to another authority with its own objectives constitutes a type of dependence. It is also because mediation work, which is essentially what *Ombudsmen* do, is separate from that of prevention, which comes under national monitoring systems.

30/ - Finally, the implementation of such prevention tools is of no value if it is not also mirrored by effective monitoring. It should be noted that this is no simple matter, in that it can come up against firmly embedded ways of doing things and public opinion, leading to public criticism. There is a temptation to reduce monitoring to mere appearance: "Our censor absolves the crow and passes judgment on the pigeon!", writes Juvenal. As a consequence, the UN Subcommittee for the Prevention of Torture (SPT) needs to harmonise practices as much as possible, and the mechanisms themselves are also important. We also require bi-lateral and multi-lateral exchange mechanisms, and we need to safeguard their independence and promote strict monitoring practices.

Until now the EU has helped finance the exchange network set up by the Council of Europe. It was important to support the creation of national control mechanisms and establish a basis for operations. With the passage of time, it has now become necessary to revert to more tangible operational exchanges. This puts the EU in a perfect position to help finance bi-lateral exchanges, multi-lateral group exchanges and national prevention mechanisms across the 27 Member States. The Controller General of Places of Deprivation of Liberty has been trying to do this for a number of months now, working with Czech Republic and the United Kingdom: he sees such exchanges as extremely positive, and that it would be greatly beneficial to extend them through European funding. The Commission would need to monitor funding on a regular basis, bringing the heads of national monitoring bodies together once a year, for example, as it has already done twice in the past[21].

Question 10 : Encouraging efforts towards creating good detention conditions

31/ - In general terms, there are three main drivers for improving detention conditions.

[21] *It is desirable that prison services, which run according to a different system, should not be invited to these meetings, but they should still be made aware of the results. Information gathered might also be used in other ways, such as for drafting texts relating to judicial cooperation.*

Firstly, governments and administrations may be perfectly aware of the need for some progress, notably with regard to security conditions, but also prison over-population. They may also make recommendations drawn from international bodies; the European Prison Rules are the best example of this. The smoothest reforms are those combining the interests of both staff and detainees. In France, the installation of showers in cells obviously enables prisoners to raise their levels of personal hygiene considerably, but also to improve how they use their time; it also saves on time and security measures for officers, who do not have to organise the movements necessary to take prisoners to the showers.

Secondly, the national or international judge (with specific reference to the European Court of Human Rights - ECHR) may intervene to censure such and such practices or behaviour. For example, a certain number of judgments and orders have set the conditions for access to care, provided a framework for disciplinary sanctions and exercised control over transfers from one detention facility to another. In France, at least, controls issued by judges are becoming tighter year by year.

Finally, national and international control mechanisms (essentially the CPT, possibly the SPT) have the role of recommending to governments and administrations the changes that are necessary for the prevention of torture and other cruel, inhumane and degrading treatment, at least for the situation in France, in order to safeguard the basic rights of persons deprived of liberty. Reports from visits by the CPT and national monitoring bodies make many references to this.

32/ - In the case of judges and monitoring bodies, it is also necessary for the public authorities to pay close attention. This is why the EU and each country should pay special attention to the following points:

- Persons deprived of liberty need to be in a position to know their rights; this means that they must be given access to knowledge of the rules that apply to them, whether they relate to the detention facility or are of a more general nature;

- Persons deprived of liberty must be able to contest any procedures against them before an inspection body or impartial judge, both in form through a solicitor and in substance; in particular, as provided by article 21 of the UN Optional Protocol, no sanctions of any kind shall be tolerated against persons exercising this right.

- Court rulings need to be executed and case law settling general matters applied. With regard to the ECHR, the Committee of Ministers of the Council of Europe has the task of checking that such orders are followed effectively. It is no doubt possible for the EU to encourage governments to make known their response to national rulings relating to prison issues.

- The same applies to recommendations from bodies monitoring detention conditions, even if such bodies are obviously able – as the CPT has done for the last twenty years – to monitor the consequences of their observations.

- There is the question of knowing whether the EU wishes to adopt the European Prison Rules and intends to promote them. The answer to this is outside the remit of the Green Paper, and depends on understanding what the EU intends to do with its

membership of the Council of Europe. But we may at least think that such membership implies that the EU will adopt instruments determined in Strasbourg. The European Commission, European Parliament and European Council might formally recognise these Rules, consequently monitoring effective application in Member States via their respective jurisdictions.

Paris, 24 October 2011

Jean-Marie Delarue

French Controller General of Places of Deprivation of Liberty