Reasonable length of pre-trial detention: rigid or flexible time limits? A study on Italy from a European perspective

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I. Introduction

After nearly a decade since the adoption of Framework Decision 2002/584/JHA, the European Commission reviewed the implementation of the European Arrest Warrant (hereinafter the EAW). In spite of a more than satisfactory implementation rate, some problems have emerged, such as those related to the extended pre-trial custody of surrendered persons[1]. It is perfectly understandable that "Member States executing EAWs may object to the use of an instrument designed for the rapid surrender of persons to face trial if those persons then risk spending months awaiting trial in a foreign prison when they could have remained in their home environment until the authorities in the issuing State were ready for trial"[2].

It is well known that the EAW is an instrument based upon mutual recognition of criminal judgments and consequently on mutual trust between Member States' criminal justice systems. To a certain extent, this trust stems from the national systems' capacity to safeguard the rights of persons subject to criminal proceedings. Personal liberty is the first fundamental right, provided for by Art. 5 of the European Convention on Human Rights (hereinafter the ECHR) and Art. 6 of the Charter of Nice. As a rule, a person under investigation is entitled to liberty, whereas pre-trial detention should be an exception, that is to say a *status* which, in the light of the presumption of innocence, has to be limited in time. From this perspective, the right to a reasonable length of pre-trial custody, enshrined in Art. 5 para. 3 ECHR, is of paramount importance.

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[1] See the Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June, 2002, on the European arrest warrant and the surrender procedures between Member States, COM (2011) 175 final, p. 6.

[2] See the Green Paper. Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM (2011) 327 final, p. 5.

As far as procedural systems are concerned, the above-mentioned right is safeguarded in a very different way, thus leading the Council of the European Union to take a stance on the matter. On the one hand, it acknowledged that "the time that a person can spend in detention before being tried in court and during the court proceedings varies considerably between the Member States";on the other hand, the Council specified that "excessively long periods of pre-trial detention are detrimental for the individual" and "can prejudice the judicial cooperation between the Member States"[3]. For this reason, the European Commission – in implementing the roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings – has raised a specific question in the public consultation on detention: "would there be merit in having European Union minimum rules for maximum pre-trial detention periods and the regular review of such detention in order to strengthen mutual trust? If so, how could this be better achieved?"[4].

The length of pre-trial detention is also an issue at a domestic level. In some countries, it is envisaged by the Constitution that sets a maximum time limit (Article 11 of the Cyprian Constitution; Article 6 of the Greek Constitution; Article 23 of the Romanian Constitution; Article 20 of the Slovenian Constitution) or charges the ordinary legislator with the single task of indicating a specific time limit (Article 13 of the Italian Constitution; Article 28 of the Portuguese Constitution; Article 17 of the Slovak Constitution; Article 17 of the Spanish Constitution); in other countries these kinds of provisions are to be found only in ordinary legislation.

Basically, among the several mechanisms provided for by the European States to ensure a reasonable length of pre-trial custody, three different approaches can be identified.

The first one is a very stringent approach: the law establishes maximum time limits for the whole length of the proceedings.

The second approach is flexible in nature: it is adopted both by countries where time limits are not fixed – i. e. extendable without any limitations – and by countries where, pursuant to the law, the length of pre-trial detention is established by the judge.

The third approach is a mixed one: maximum mandatory time limits are only prescribed for a stage or instance of proceedings[5].

With a view to answering the European Commission's questions, an analysis of the right to a reasonable length of pre-trial detention will be carried out, focusing first on the Strasbourg flexible model (para. 2), and afterwards on the Italian experience of rigid time limits (para. 3), underlining the shortcomings of both models.

The aim of the present paper is to demonstrate that neither the flexible model, nor the rigid model are *per se* fully convincing. Indeed, we believe that the

[3] See the Resolution of the Council of 30 November, 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ2009 C295/3.

[4] Green Paper (fn. 2), p. 10.

[5] To have a clearer picture of the different levels of pre-trial detention around Europe, see *R. Vogler*, The introduction, in: R.Vogler/B. Huber (eds), Criminal procedure in Europe, 2008, pp. 26 et seq.

hybridization of the two models is the best solution to create a system based on the respect of liberty, as a fundamental condition for mutual trust and effective cooperation. Hybridization does not mean, however, accommodating a traditional mixed model that sets a term only for a few stages of the proceedings. Instead, it implies setting a maximum duration of the remand in custody and, before the deadline, a system of judicial checks to verify whether it is reasonable to extend the detention's length.

II. The conventional system

1. A flexible model

Notwithstanding the ambiguous wording of Art.5, para. 3 ECHR, the European Court – by means of a slightly creative interpretation – inferred the right of the defendant to be released pending trial from the day on which detention exceeds the time limits of a reasonable length[6]: if the liberty of the defendant is the rule and detention is the exception, the defendant has to be released once his continuing detention ceases to be reasonable[7].

Obviously, the extent of the safeguard depends on two factors.

The first one is linked to the identification of the part of proceedings to be taken into account: the starting date does not give rise to any problem as it corresponds to the day on which liberty was restricted, whereas more difficulties arise with the expiry date. As a matter of fact, it has to be established whether this shall be the day on which a judgment has become final or the day on which a decision is made as to the substance of the charge, even if it is a first-instance decision.

The Strasbourg case-law has accepted this approach, establishing that, for the purposes of the safeguard provided for by Art. 5, para. 3, ECHR, only detention preceding a first-instance judgment has to be taken into account. This is due to the fact that restriction of liberty following a first-instance conviction is provided for by Art. 5, para. 1, lett. *a*[8]. This interpretation has been questioned not only by scholars[9], but also by the European Commission itself, at least as far as that which concerns the definition of pre-trial detention for the purposes of the Green Paper, explaining that "likewise in most EU Member States, the notion 'pre-trial detention' in the Green Paper is used in a 'broad' sense and includes all prisoners who have not been finally judged"[10].

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[6] European Court of Human Rights (ECtHR), Neumeister v. Austria, Application no. 1936/63, Judgement 27 June, 1968, margin no. 4; ECHR, McKay v. United Kingdom, Application no. 543/03, Judgement 3 October, 2006, margin no. 41.

[7] ECtHR, Bykov v. Russia, Application no. 4378/02, Judgement 10 March, 2009, margin no.61.

[8] See ECtHR, Wemhoff v. Germany, Application no. 2122/64, Judgement 27 June, 1968, margin no. 9; as well as, afterwards, ECtHR, Labita v. Italy, Application no. 26772/95, Judgement 6 April, 2000, margin no. 147; ECtHR, Kudla v. Poland, Application no. 30210/96, Judgement 26 October, 2000, margin no. 104. Upon the discrepancy between the English and French text, *J. Pradel – G. Corstens*, Droit pénal européen, 1999, p. 335.

[9] See S. *Trechsel*, Human Rights in Criminal Proceedings, 2005, p. 519.

[10] Green Paper (fn. 2), p. 8, fn. 19.

The second factor is related to the definition of 'reasonableness'. The term is, undoubtedly rather inaccurate, but it has been used intentionally to make the guarantee compatible with the Member States' heterogeneous systems[11]. Clearly, the decision over a reasonable length cannot be taken in abstract terms, but requires the analysis of the distinctive features of the specific case[12].The crucial elements in assessing the reasonable length of custody should be clearly identified.

2. A reasonable length of custody

The Court has adopted a two-step approach. First of all, it has to be ascertained whether there are relevant and sufficient reasons to substantiate the extension of pre-trial detention. Should this be the case, it has to be assessed whether the extension of detention is effectively evaluating the characteristics of the single case[13].

The first fundamental phase is directed at assessing whether there are actual grounds to justify detention: Art. 5, para. 1, lett. *c* authorises the arrest and detention of a person for the purposes of bringing him before the competent judicial authority on reasonable suspicion of having committed an offence. However, after a lapse of time, such reasonable suspicion of having committed an offence – even if serious – cannot by itself justify the extension of pre-trial custody for an allegedly innocent person[14].

The stay in prison of a defendant can only be admitted for concrete reasons of public order which, notwithstanding the presumption of innocence, will prevail over the rule of the right to individual liberty[15].

These elements correspond to four *pericula libertatis*: danger of escape, danger of evidence tainting, danger of offence commission and danger to public order[16]. On the one hand, they correspond to the prevailing approach in the continental legal systems, at least as far as the classical triad is concerned[17]; on the other hand, the four dangers have been adopted by Recommendation Rec (2006)13, of 27 September, 2006, on the use of pre-trial detention, the conditions for its application and the safeguards against its abuse. Pursuant to this recommendation, pre-trial detention can only be applied if there are substantive reasons to believe that a defendant, if released, "would either (i) abscond, or (ii) commit a serious offence, or (iii) interfere with the course of justice, or (iv) pose a serious threat to public order" (Art. 7, letter b).

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[11] *P. Pouget*, Les délais en matière de rétention, garde à vue et détention provisoire au regard de la Convention européenne de sauvegarde des droits de l'homme, Revue Science Criminelle (RSC) 1989, 79.

[12] See ECtHR, Kudla v. Poland (fn. 8), margin no. 110.

[13] *J. Murdoch*, L'article 5 de la Convention européenne des droits de l'homme, 2003, p. 81.

[14] ECtHR, Stögmuller v. Austria, Application no. 1602/62, Judgement 10 November, 1969, margin no. 4; ECHR, McKay v. United Kingdom (fn. 6), margin no. 45.

[15] ECtHR, Contrada v. Italy, Application no. 27143/95, Judgement 24 August, 1998, margin no. 54.

[16] See *M. Macovei*, The right to liberty and security of the person, 2002, p. 28; *R.C.A. White – C. Ovey*, The European Convention on Human Rights, 2010, p. 222.

[17] See the recognition made by *A.M. van Kalmthout/M. M. Knapen/C. Morgenstern*, Introductory Summary, in: *A. M. van Kalmthout/M. M. Knapen/C. Morgenstern* (eds.), Pre-trial Detention in the European Union, 2009, p. 71.

Even when there are relevant and sufficient reasons to justify the extension of detention, it has to be ascertained whether the period of detention is reasonable, considering the circumstances of the case. As a matter of fact, it is evident that it is not possible to translate the notion of 'reasonable length' "into a precise number of days, weeks, months or years or periods varying according to the seriousness of the offence"[18]. In order to evaluate the reasonableness of single proceedings, the Court applies rather similar criteria – although in some respect more cogent ones[19]– to those adopted to establish a reasonable length as per Art. 6 para. 1 ECHR. These criteria are: a. the complexity of the case in terms of facts and legal contexts; b. the behaviour of the defendant; c. the behaviour of the competent authorities.

As far as the first criterion is concerned, the Court takes into consideration the number of defendants, the need to execute letters of request abroad, and the difficulties in ascertaining given offences or the high number of witnesses to be heard[20].

The conduct of the defendant is the most sensitive issue: it is quite difficult to draw a line between the exercise of a right and its abuse for dilatory purposes. This is why the Court adopts a rather cautious approach and tends to exclude that a defendant filing appeals and applications can justify the extension of detention[21].

The fundamental criterion is the assessment of the authorities' behaviour: it has to be ascertained whether they have effectively displayed special diligence in conducting the proceedings against a defendant. This is what the Court calls '*Labita* test'[22]. In this respect, particular importance has to be attached to the presence of 'downtimes' in the proceedings. As a matter of fact, if it is sure that the time necessary to carry out procedural activities – either investigations in the strict sense of the term or preliminary hearings – is basically 'made neutral' for the purposes of evaluating the reasonableness of pre-trial custody, the Court tends to regard a prolonged trial against a defendant as unreasonable, in the presence of 'inactivity' periods[23]. Nor can the excessive workload of investigative or judicial authorities or the lack of human resources be a justification thereof: Member States are bound to take the necessary steps within their domestic justice systems so as to enable national courts to comply with the requirement of the *speedy trial* provided for in Art. 5 ECHR[24].

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[18] See ECtHR, Stögmuller v. Austria (fn. 14) margin no. 4.

[19] See *A. Khol*, Implications de l'article 5 de la Convention européenne des droits de l'homme en procédure pénale, Journal des Tribunaux (JDT) 1989, p. 507; *O. Mazza*, La libertà personale nella Costituzione europea, in: *Profili del processo penale nella Costituzione europea*, 2005, p. 67.

[20] See ECtHR, Naudo v. France, Application no. 35469/06, Judgement 8 October, 2009, margin no. 46; ECtHR, Dzeilli v. Germany, Application no. 65745/01, Judgement 10 November, 2005, margin no. 76; ECtHR, Contrada v. Italy (fn. 15), margin no. 67; ECtHR, Chraidi v. Germany, Application no. 65655/01, Judgement 26 October, 2006, margin no. 43.

[21] See ECtHR, Toth v. Austria, Application no. 11894/85, Judgment 12 December, 1991, margin no. 77.

[22] See ECtHR, Castravet v. Moldova, Application no. 23393/05, Judgement 13 March, 2007, margin no. 35.

[23] See ECtHR, Kornakovs v. Latvia, Application no. 61005/00, Judgement 15 June, 2006, margin no. 108; ECtHR, Gosselin v. France, Application 66224/01, Judgement 13 September, 2005, margin no. 34; ECtHR, Kalashnikov v. Russia, Application no. 47095/99, Judgement 15 July, 2002, margin no. 120.

[24] See ECtHR, Naudo v. France (fn. 20), margin no. 46; ECtHR, Gosselin v. France (fn. 23), margin no. 34. See*A. Khol*, JDT 1989, p. 508; *S. Trechsel* (fn. 9), p. 530.

3. A form of rigidity in a flexible model

The model deriving from the analysis of the conventional system is strictly flexible[25]: there are no pre-established time limits, but general directives which have to be applied on a case-by-case basis by judges who are constantly in charge of assessing the reasonableness of custody.

One of the main problems of this system is the fact that the reasonableness of the length depends, ultimately, on the circumstances of the case, on the authorities' behaviour and especially on their diligence. Apparently, there is not a maximum constraint.

Nevertheless, based on an analysis of the Court of Strasbourg case-law any detention lasting more than two years is likely to be considered unreasonable under Art. 5, par. 3, ECHR[26]. The time limit is merely illustrative: the Court has denied the violation of Art. 5, par. 3, in several cases of detention exceeding two years and has recognized instead the violation of the right of a reasonable length in many cases of detention lasting less than two years[27].

Indeed, the above–mentioned Recommendation Rec(2006)13codifies to a large extent the Strasbourg case-law, setting three fundamental rules (paragraph 22).

First of all, the principle of the persistence of the conditions for the measure's application; secondly, the rule of proportionality between the duration of pre-trial custody and the penalty ("In any case its duration shall not exceed, nor normally be disproportionate to, the penalty that may be imposed for the offence concerned"); finally, the so-called principle of reasonableness in the strict sense of the term, that is the relation between the length of custody and the time necessary to carry out the relevant procedural activity, or, in other words, the downtimes of proceedings.

From our perspective, the second rule of proportionality is particularly relevant. According to this rule, a first upper limit corresponding to the punishment that may be imposed for the offence concerned is set. Moreover, it refers to a stringent constraint that in some countries translates into a limit of two-thirds of the relevant sanction[28].

Interestingly, even in a flexible model, a maximum time limit for remand in custody shall be identified, that is a time lapse that cannot exceed the punishment period, but should preferably last less than the corresponding punishment.

III. The Italian system

1. Pre-trail detention in Italy

The Italian Code of criminal procedure provides that a judge has the authority to impose a form of pre-trial detention, but only upon the prosecutor's request and if

[25] See *C. Conti*, La sospensione dei termini di custodia cautelare. Modelli rigidi e flessibili a confronto, 2001, p. 52.
[26] *D. Harris/M. O'Boyle/E. Bates/C. Buckley*, Law of the European Convention on Human Rights, 2009, p. 181.
[27] *S. Trechsel* (fn. 9), pp. 530-531.
[28] Reference is made here to Italy and Denmark.

there is well-founded evidence relating to an offence of sufficient seriousness (Art. 273) as well as reasons to believe that it would be dangerous for the individual concerned to remain at liberty. These reasons, often referred to as dangers, are: danger of suppression of evidence; danger of flight; danger of re-offending (Art. 274). The judge has to consider whether the measure is proportionate to the seriousness of the matter and the corresponding punishment (Art. 275); it may only be invoked in the case of an offence punishable by life imprisonment or in the event of a sentence exceeding four years (Art. 280). Remand in custody may only be applied if all other measures seem inadequate, except for extremely serious offences for which there is a reversal of the rule entailing that pre-trial detention must be used as the last resort[29]. In these cases, there is a sort of presumption of dangerousness for those individuals against whom there is serious evidence of specific serious offences (for example in case of organized crime, and in particular Mafia-related crimes). Therefore, it has to be demonstrated that there are no reasons for remanding them in custody: the choice is between freedom and custody, since non custodial measures are inadmissible. Even though this is not a system of mandatory detention, there is still the risk of lapsing into one.

In addition to remand in custody, which is the most serious restriction of liberty, the Code of criminal procedure provides for other alternatives to custody, namely non custodial measures (*id est*, house arrest, travel prohibition, police supervision, reporting to the police following a certain timetable, a sort of protection order, etc.) or prohibitive measures (suspension of parental authority, suspension from public office or work in a public organization, temporary bans on exercising certain professional or commercial activities). No financial guarantees are requested in Italy.

Due to the absence of periodic controls, possible ways of ensuring a reasonable length of detention are currently being discussed in Italy.

2. The Constitutional model of rigid time limits

The Italian system is a typical example of rigid time limits. According to the Italian Constitution, more specifically Article 13 paragraph 5, the ordinary legislator is in charge of determining "the maximum time limits of pre-trial detention". This means, as set out in constitutional case-law, that provision shall be made in ordinary legislation for the maximum length of detention *ante iudicatum* for each specific crime, thus avoiding that deprivation of personal liberty is "entirely dependent upon the course of proceedings"[30]. There is a maximum time limit "exceeding which the persistence of a coercive measure is considered to be 'out of proportion', because it goes beyond the very maximum tolerable terms envisaged by the legal system"[31]. As to the Constitution, a fundamental role is also played by Article 27, paragraph 2,

[29] See *G. Chiara*, Italy, in; *S. Ruggeri* (ed.), Liberty and Security in Europe. A comparative analysis of pre–trial precautionary meassures in criminal proceedings, 2012, pp. 131 et seqq.; *A. Perrodet*, The Italian system, in: *M. Delmas-Marty/J. R. Spencer* (eds.), European criminal procedures, 2006, p. 410.

[30] See *Corte costituzionale* 64/1970 (all the judgments delivered by the Constitutional Court are published on its website at www.cortecostituzionale.it).

[31] See *Corte costituzionale* 299/2005.

sanctioning the presumption of innocence, which applies up to the final judgment. This presumption implies a distinction between sentence and pre-trial detention with respect to their function and structure[32]: if a defendant is presumed to be innocent, remand in custody shall not consist in a penalty served in advance[33]. This provides a serious warning against the ever-present risk of transforming remand in custody into anticipatory punishment[34].

In conclusion, pursuant to Article 13 and Article 27, paragraph 2, of the Constitution, there is a constitutional protection of the right of a defendant to have a maximum time limit for pre-trial detention that is clearly set out. Such time limit cannot be exceeded: beyond this limit, the detention could be justified only by a final judgement of conviction[35].

Consequently, the constitutional legislator strikes a balance between the risk of procedural delays to be suffered by a single individual (as it would be the case if an indefinite length, resulting in an indefinite extension of detention pending trial, were allowed) and the risk of possibly releasing even extremely dangerous persons.

The Constitution imposes that maximum time limits are established for every stage of proceedings. Furthermore, such time limits shall be proportionate, on the one hand, to the sentence envisaged for the offence charged or ascertained in a judgment and, on the other hand, to the actual course of the trial and its various stages. The measures restricting personal liberty can only be referred to as "reasonable" if they are proportionate to the evolution of the procedural status of a defendant[36]. If the established time limits are exceeded, the person involved shall be immediately (automatically) released. Consequently, as opposed to the conventional system, the provisions of the Italian Code of criminal procedure cover the whole proceedings rather than exclusively the stage before a first-instance decision, because the presumption of innocence is maintained up to a final judgment of conviction. Moreover, a person shall be entitled to be released from custody simply because the relevant time limit has been exceeded irrespective of whether the requirements for the application of pre-trial detention are still fulfilled.

3. Time limits in the Italian Code of criminal procedure

In the Italian Code of criminal procedure, time can have a different impact on pre-trial detention. There are time limits that shall not be exceeded without adopting specific measures, while others are strictly connected to specific mechanisms of pre-trial detention.

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[32] See *Corte costituzionale* 265/2010.

[33] See *V. Grevi*, Libertà personale e Costituzione, 1976, pp. 67-68.

[34] See *M. Chiavario*, Private parties: the rights of defendant and the victim, in: *M. Delmas-Marty/J. R. Spencer* (eds.) (fn. 29), p. 578.

[35] See *P. Ferrua*, I termini massimi della custodia cautelare al centro della riforma, in: La nuova disciplina della libertà personale nel processo penale, 1985, p. 287. As to the close link between both Constituional provisions, see: *G. Illuminati*, La presunzione di innocenza dell'imputato, 1979, p. 35; *M. Pisani*, Caducazione, in: Enciclopedia del diritto, V, 1959, p. 776.

[36] See the above– mentioned *Corte costituzionale* 299/2005.

In the first scenario, which is relevant to our study, the system seems rather complex. A distinction is made between different types of time limits. As a matter of fact, there are 'stage time limits', whose length varies depending on two factors: the nature of the offence and the stage of the procedure. For example, during the preliminary investigations, a suspect may be held from three months to one year depending on the punishment prescribed for the alleged offence (see Art. 303, a). There are also 'overall time limits' that refer to the entire length of the proceedings. This type, as with the previous one, may vary depending on the nature of the offence. A further distinction is drawn between "overall final time limits" and "final stage time limits".

The first type depends on a maximum length that cannot be exceeded (up to nine years when the law imposes life imprisonment or imprisonment over 20 years), whereas the second type depends on the maximum length for each single stage of the proceedings (twice the length of the stage limits at the most)[37].

The *dies a quo* begins, as a rule, the day on which the person is deprived of his or her personal liberty (Article 297 of the Code of Criminal Procedure)[38].

It is important to underline that this is an automatic mechanism: the lapse of time leads to the release from custody, irrespective of whether the conditions for applying pre-trial detention are fulfilled or not. Even though there is sufficient circumstantial evidence and requirements for applying pre-trial detention, the expiry of a statutory time limit leads to release from custody.

However, the course of proceedings may affect detention time limits by causing them to be extended. Reference is made here to suspension of terms which can only be ordered in the trial stage (for example, due to an impediment of the defendant), and to extension which is possible both during the investigation stage (due to particularly complex enquiries) and during the trial stage (due to the collection of an expert's opinion). In these cases, the period of time elapsed during the suspension or the extension of terms shall only be calculated in consideration of the final expiry date.

4. A form of flexibility in a rigid model

In addition to time limits, in Italy, a form of 'constant' control is prescribed by Article 299, entitled revocation and replacement of measures. This provision should ensure the guarantees underpinning the structure of Art. 5, par. 1, lett. c and paragraph 3 ECHR.

Under Article 299 of the Code of criminal procedure, the judge may – even *ex officio* in some cases – either revoke the measure, even by reassessing the situation which has given rise to the application of remand in custody, or replace the measure if there are facts clearly showing a change in the situation that has led to the adoption of remand in custody: for example, the dangers are not yet present[39].

[37] This distinction is based on the above mentioned *Corte costituzionale* 299/2005.

[38] See *A. Perrodet* (fn. 29), p. 402.

[39] See with regard to the remark that even lapse of time may constitute a new element: Cass., Sez. IV, 3 October 1997, n. 2395, Cassazione penale (CP) 1999, p. 237.

We can say that time limits of pre-trial detention should have a 'negative' impact on detention[40], that is, limiting it to a given period of time, while the requests, as per Article 299 of the Code of criminal procedure, should be a *positive* test to check whether the requirements for the application of pre-trial detention are still met.

Even though the provisions of the Code of criminal procedure do allow for the introduction of a certain degree of flexibility into a stringent model, still these mechanisms do not introduce a system of regular checks at short intervals because, as a rule, the defendant is required to file an application to challenge his or her detention.

IV. Conclusions

As described in the previous sections, the Italian system provides for a number of procedural safeguards[41], that are very protective. Nevertheless, in Italy there are shocking statistics for the number of individuals remanded for long periods in custody. The system, therefore, has various drawbacks.

The splitting up of time limits, which gives rise to autonomous and separate terms, acts as a spur to save energy and time. However, time limits are irrespective whether procedural steps are taken (as in the case of particularly complex taking of evidence). Moreover, time limits, which are theoretically quite long, are difficult to predict *a priori* because potential suspensions, extensions, freezing and neutralizing measures that cause interruption of terms must be considered. As a result, the Italian system actually fails to guarantee a clear time limit in advance.

Furthermore, a time limit is established depending on the seriousness of the offence without considering potential complex investigations and trials. In some cases, the applicable term may end up being rather short and in other cases even too long.

Such a system is likely to show two different shortcomings at the same time: on the one hand, very long periods of detention for persons who may turn out to be innocent, and, on the other hand, release from custody of highly dangerous persons. Due to stringent time limits, there is indeed a lack of that flexibility that would be necessary on a case-to-case basis.

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[40] See *M. Chiavario*, Profili di disciplina della libertà personale nell'Italia degli anni '70, in: *L. Elia/M. Chiavario*, Libertà personale, 1977, p. 246.

[41] For a brief analysis of the Italian adversarial reform, see *E. Amodio*, The accusatorial system lost and regained: reforming criminal procedure in Italy, 52 American Journal of Comparative Law (AJCL) 2004, p. 489; *E. Amodio/E. Selvaggi*, An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure, 62 Temple Law Review (1989), p. 1211 et seq.; *E.Grande*, Italian Criminal Justice: Borrowing and Resistance, 48 American Journal of Comparative Law (AJCL) 2000, p. 230 et seq.; *M. Panzavolta*, Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System, 30 North Carolina Journal of International Law and Commercial Regulation (NCJILCR) 2005, p. 577 et seq.; *W. Pizzi/L. Marafioti*, The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation, 17 Yale Journal of International Law (YJIL) 1992, p. 1 et seq.; *W. Pizzi/M. Montagna*, The Battle to Establish an Adversarial Trial System in Italy, 25 Michigan Journal of International Law (MJIL) 2004, p. 429 et seq.

Principally, the rigid time limits give rise to the misconception that maximum time limits are to be regarded as the physiological and reasonable length of pre-trial detention; instead, they should be a natural barrier and be applied as a last resort[42]. The provision of maximum time limits could also relieve judges of their responsibility and they may renounce the tendency to check the pre-requisites justifying the application of remand in custody, as if the forthcoming expiry of the terms were their only cause for concern[43].

In conclusion, the system fails to ensure a truly reasonable duration of detention in practice. The problem might be linked to deep-rooted structural causes. The cases are usually heard before at least three levels of court, and the presumption of innocence provides that the conviction is not 'final' until all possible appeals are used up or time-barred.

In the light of the above considerations, two possible scenarios can be outlined.

At a national level, if the European Convention on Human Rights were definitively recognised as a parameter of constitutional legitimacy and awareness were raised as to the value of the Strasbourg Court case-law[44], a virtuous circle could be triggered. This would ensure both a maximum time limit for pre-trial detention – thus providing an ultimate safeguard by limiting its length – and a system of periodical and actual checks without renouncing the Italian constitutional tradition in favour of a stringent regime for pre-trial time limits. The two models are not incompatible and they can coexist well in an innovative hybrid system. However, such a system can only fit into, and work in, fast-track procedures. It is precisely the length of proceedings that requires very serious effort.

At a European level, the application of non-custodial measures should be significantly enhanced so as to ensure surrender and appearance in the trial. In this way, custody in prison would actually be considered as a last resort rather than a common co-operation instrument. In this perspective, the implementation of Framework Decision 2009/829/JHA of 23rd October, 2009, on the application of the principle of mutual recognition of decisions on alternative measures to pre-trial detention is pivotal. Moreover, to provide an answer to the questions raised in the Green Paper, it would certainly be appropriate to introduce minimum standards that prescribe to check periodically *ex officio* whether the requirements for the application of pre-trial detention are still fulfilled and whether its extension is reasonable. The above-mentioned checks are by no means incompatible with stringent models[45], and indeed their introduction could contribute to countering a negative trend whereby the end of reasonable length of remand in custody often coincides with its maximum length, as envisaged in abstract by the legislator.

As the systems in place in the Member States vary one from the other, it seems quite difficult to introduce a set of rules establishing a maximum length of pre-trial

[42] See *P. Tonini/C. Conti*, Custodia cautelare e struttura del processo: come perseguire una durata ragionevole, Diritto penale e processo (DPP) 2003, p. 361. See previously *M. Chiavario* (fn. 40), p. 245.

[43] See *M. Chiavario*, Libertà personale e processo penale, Indice penale (IP) 1987, p. 240.

[44] Reference is made here to *Corte costituzionale* 348 and 349 of 2007.

[45] See paragraph 23 of the above mentioned Recommendation Rec(2006)13.

detention. A maximum time limit could be identified at the most, by enhancing the principle of proportionality between the restriction of personal liberty and the sentence that may be imposed for the offence charged or ascertained in a judgment. As mentioned earlier, this is a general rule outlined by RecommendationRec(2006) 13. In some countries, this limit shall be two thirds of the relevant sanction. Irrespective of the different opinions concerning any specific time limit, only a pre-trial custody term that is shorter than the length of the sanction seems to be reasonable in the light of the presumption of innocence.

On the other hand, emphasis could be placed again on the link between the length of pre-trial detention and the actual length of proceedings with a view to harmonizing Member States' legal systems so as to strengthen mutual trust. Restricting the personal liberty of an individual who is presumed to be innocent can be considered reasonable only when procedural activity is conducted, whereas it becomes unreasonable when proceedings have stalled for quite a while. This distinction is worth mentioning. Using the language of the Court of Strasbourg, it is hard to sustain that when proceedings have come to a standstill, the application of pre-trial detention is in the public interest and prevails over the right to personal liberty[46].

[46] On the close link between the diligence assessment and the assessment of the grounds, see *L. Stevens*, Pre-Trial Detention: The Presumption of Innocence and Article 5 of the European Convention on Human Rights Cannot and Does Not Limit its Increasing Use, European Journal of Crime, Criminal Law and Criminal Justice (EJCCLCJ) 2009, p. 175.