

*A Measure of Last Resort?
The practice of pre-trial
detention decision making
in the EU*

Fair

Trials

About Fair Trials

Fair Trials is a non-governmental organisation that works for fair trials according to internationally recognised standards of justice. Our vision is a world where every person's right to a fair trial is respected. Fair Trials pursues its mission by helping people to understand and defend their fair trial rights; by addressing the root causes of injustice through our legal and policy work; and through targeted training and network activities to equip lawyers to defend their clients' fair trial rights.

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I. Executive Summary

1. Background:

1. Pre-trial detention (depriving suspects and accused people of their liberty before the conclusion of a criminal case) is intended to be an exceptional measure, only to be used as necessary and proportionate and in compliance with the presumption of innocence and the right to liberty. Its use is only acceptable as a measure of last resort, in very limited circumstances. Unfortunately, in the EU as around the world, these strict limitations are not always respected.
2. The EU is facing a long-standing crisis in prison overcrowding that threatens to undermine mutual trust and the functioning and legality of mutual recognition instruments like the European Arrest Warrant. Overcrowding, and the rights violations it causes, is driven in part by excessive use of pre-trial detention, in contravention of regional and international standards. The European Commission and Parliament have, for the past five years, repeatedly recognised the need for improved standards of pre-trial detention. Recent decisions from the Court of Justice of the European Union have again pushed the need for regional legislation to the fore.
3. Given the concern expressed about excessive use of pre-trial detention in the EU, there is a surprising lack of information on the practical operation of procedural rules designed to ensure that detention is only used when strictly legal and necessary. In order to gain a realistic view of problems in practice on which to develop targeted national and regional solutions, Fair Trials has coordinated research in ten EU Member States (England and Wales, Greece, Hungary, Italy, Ireland, Lithuania, Netherlands, Poland, Romania, and Spain) to analyse the practice of pre-trial detention decision-making and the use of alternatives to detention. The research consisted of legal and statistical analysis, hearing monitoring, case-file reviews, a survey of defence lawyers, and qualitative interviews with prosecutors and judges, resulting in detailed reports. This report provides a high-level overview of the research and analysis from an EU regional perspective.

2. Findings:

4. Despite laws that protect in principle concepts like detention as a last resort, presumption of release, equality of arms, and proportionality, researchers across the studied jurisdictions found systematic failures to respect these standards effectively in practice. Researchers observed proceedings in which judges made poorly-reasoned decisions to detain suspects unnecessarily, relying on minimal information. Judicial reasoning was often vague and formulaic, and failed to engage sufficiently with practical alternatives to pre-trial detention that can protect the investigation, limit the possibility of reoffending and ensure defendants' presence at trial.
5. **Procedure:** Defendants did not always have access to adequate legal assistance or sufficient access to case materials essential to challenging detention. Even where access was sufficient, in most jurisdictions lawyers did not have enough time to study the material prior to a hearing. Many lawyers perceived, and researchers were able to establish, that judges credited the arguments of the prosecution over those of the defence. Lawyers in some jurisdictions believed that pre-trial detention was used for unlawful ends, such as in order to coerce a confession, and some judges admitted using pre-trial detention for punitive purposes.

6. **Substance:** Human rights standards set out certain limited grounds for imposing pre-trial detention but judges sometimes relied on unlawful grounds, such as exclusive or primary reliance on the nature of the offences, or findings of flight risk based on suspect justifications such as lack of fixed residence or foreign nationality. Reasoning was often formulaic and did not engage with the specific evidence in each case. In some countries, certain suspects including women and foreign nationals were disproportionately detained.
7. **Reviews:** Because pre-trial detention is intended as an exceptional measure, countries should provide regular reviews of detention to ensure that it is still justified. But reviews in practice did not always provide sufficient oversight. In some countries, defendants and/or their lawyers are not being guaranteed presence at review hearings. Decisions to detain were rarely overturned or even seriously questioned on review in most countries, and reasoning tended to be even more generic and formulaic than in the first instance. Detention was sometimes extended to protect the integrity of the investigation long after relevant investigative tasks were complete. The frequency with which reviews takes place varies widely between Member States, as does the average duration of pre-trial detention.
8. **Alternatives:** Researchers observed that judges were often reluctant to use alternatives. Electronic monitoring and house arrest are increasingly available in many Member States, but these were seldom used due to their novelty and court actors' lack of experience in administering them. As a result of a lack of data collection, access to bail information services or pre-trial risk assessments, training, investment and enforcement of alternatives to detention, judges and prosecutors lacked faith in the efficacy of alternatives and continued to rely instead on pre-trial detention. Some examples of good practice exist and could be duplicated elsewhere. Alternatives to detention can also infringe the right to liberty, and human rights impacts of their extended use must also be considered, especially with regard to electronic monitoring and house arrest.

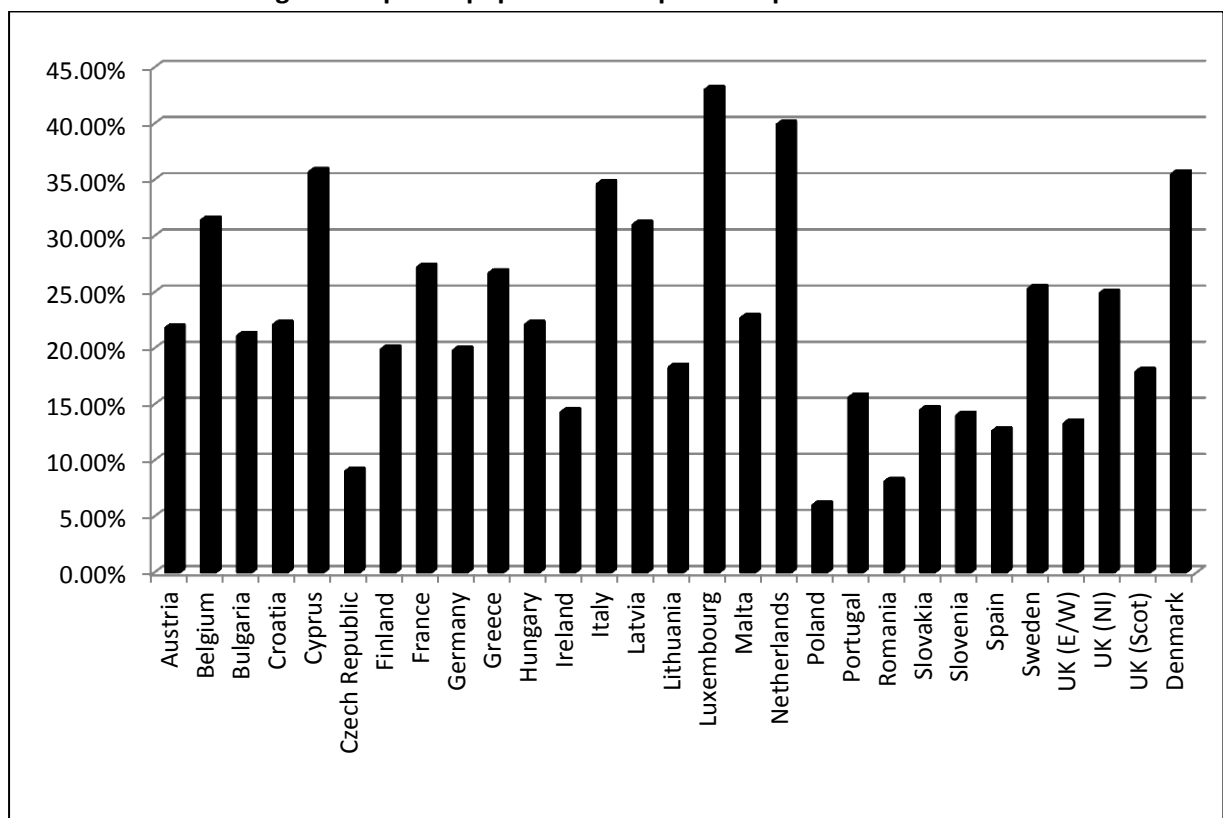
3. Recommendations

9. Fair Trials recommends that regional action should take the form of an EU legislative instrument that is binding on Member States and codifies existing ECHR standards which are currently inaccessibly buried in an ever-growing corpus of ECtHR case law. Legislation is within the EU's competency and would add value by setting out procedural guidelines to ensure that domestic legislation adequately assists judges to give effect to those standards in practice.
10. Greater financial investment in prisons is not the answer to the problems presented by overcrowding, which will continue to grow in the absence of clear and effective legal frameworks to prevent excessive pre-trial detention over the long term.
11. Member States are experiencing significant tension in balancing the importance of mutual recognition measures like the European Arrest Warrant (**EAW**) with their obligation to protect the fundamental rights of individuals subject to them. Repeated cases of injustice have demonstrated that regional action on pre-trial detention reform is necessary to support the EU legal order, achieve economic efficiency in the administration of criminal justice, and to protect public safety.

II. Introduction

12. The imposition of pre-trial detention, by its nature, removes the right to liberty from a legally innocent person who has not been convicted of any crime, on the basis of evidence that has not yet been fully examined. In addition to the loss of liberty, detained individuals experience serious and sometimes irreversible impacts to their livelihood, family, and health. Such a severe state action against an individual can therefore only be imposed in strictly limited circumstances according to international and regional human rights standards. Its use must always remain a measure of last resort.
13. Pre-trial detainees make up a sizeable proportion of the European Union's bloated prisons – approximately 22% by the most recent measure, comprised of 120,539 individuals held on remand or awaiting a final sentence.¹ The number of pre-trial detainees and the proportion they make up of overall prisoners varies widely between Member States, ranging from 6% in Poland to 39.9% in the Netherlands.² Given the large population of pre-trial detainees and the number of overcrowded prisons in the EU, efforts to reduce the overuse of pre-trial detention could have a substantial impact on attempts to curtail the growth of prison populations and to thus improve overall conditions that lead to human rights violations in the EU.

Percentage of EU prison population comprised of pre-trial detainees³



¹ Data gathered from World Prison Brief, International Centre for Prison Studies. Date of recording of actual data varies. See <http://www.prisonstudies.org/map/europe> for more detail.

² Ibid.

³ Ibid.

14. The question of whether the EU should take action to address the excessive use of pre-trial detention has featured as a key issue in EU criminal justice policy-making for nearly a decade. The 2009 Roadmap on Criminal Procedural Rights⁴ (**the Roadmap**) states that “Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice judicial cooperation between the Member States and do not represent the values for which the European Union stands.” This was followed by the Green Paper on Detention⁵ (**the Green Paper**) published by the European Commission (**the Commission**) in 2011, which recognised that detention issues “come within the purview of the European Union as [...] they are a relevant aspect of the rights that must be safeguarded in order to promote mutual trust.” In response to the Green Paper, the cross-party resolution of the European Parliament (**the Parliament**) in favour of legislative minimum standards due to the fact that “detention issues have an impact on mutual trust, and consequently on mutual recognition and judicial cooperation.”⁶
15. Fair Trials has called for pre-trial detention reform in the EU since 2011, with the publication of *Detained without Trial*⁷ - our response to the Green Paper. Fair Trials was one of over 50 NGOs that echoed the call for improved protection of minimum standards of procedural rights in relation to pre-trial detention, and six member states responded to support legislation in this area.⁸ In the following year Fair Trials, with the Legal Experts Advisory Panel (**LEAP**) network of lawyers, academics and NGOs engaged in fair trial rights advocacy in the EU, wrote to all Members of the Parliament to ask them to call on the Commission to act on their 2011 vote and propose minimum standards on pre-trial detention.⁹ In 2013, in coalition with over 20 other European NGOs, Fair Trials wrote to then-Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding¹⁰ to call for progress on better regional procedural protections and data collection on pre-trial detention, and made further appeals in a submission to the Commission’s “Assises de la Justice” later that year.¹¹
16. Alongside this advocacy, in 2012-13, Fair Trials conducted roundtable meetings with legal experts in Spain,¹² Hungary,¹³ Poland,¹⁴ Lithuania,¹⁵ Greece¹⁶ and France¹⁷ in order to develop a

⁴Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009/C 295/01, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF>

⁵ Green Paper from the Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM (2011) 327, Brussels 14 June 2011, available at: http://ec.europa.eu/justice/policies/criminal/procedural/docs/com_2011_327_en.pdf

⁶ Ibid, p.2.

⁷ Fair Trials, *Detained without trial: Fair Trials International’s response to the European Commission’s Green Paper on detention*, October 2011, available at:

<https://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>

⁸ For a summary of the responses to the Green Paper, see Fair Trials’ Pre-Trial Detention Update Report, 4 May 2012, available at <https://www.fairtrials.org/publications/pre-trial-detention-update-report/>

⁹ Letter (15 June 2012) available at: https://www.fairtrials.org/documents/Final_PTD_Letter_to_MEPs.pdf.

¹⁰ Letter (10 Sep 2013) available at: <https://www.fairtrials.org/wp-content/uploads/Letter-to-Viviane-Reding-on-PTD.pdf>.

¹¹ Fair Trials, Submission to the European Commission, Assises de la Justice Consultation, December 2013, available at: http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/76.fair_trials_international_en.pdf.

¹² Communiqué, 18 Oct 2012, available at: <https://www.fairtrials.org/publications/spanish-meeting-on-pre-trial-detention/>.

better understanding of problems in practice in jurisdictions around the EU. Participants at these roundtables, largely practising lawyers, confirmed that, in practice, unconvicted defendants were being subjected to detention for excessive periods of time, for unlawful reasons.

17. Despite this, the Commission in recent years has focused on monitoring the implementation of three framework decisions¹⁸ on common European standards of detention – only one of which, the European Supervision Order, stood any chance of affecting pre-trial detention. Unfortunately, by the Commission’s own reckoning, the European Supervision Order has been virtually unused,¹⁹ and is not fit for the purpose of reducing over-reliance on pre-trial detention. The absence of legislative progress in the area of minimum standards in pre-trial detention (and the resulting poor detention conditions) has raised concern within the European Parliament, where the Committee on Civil Liberties, Justice and Home Affairs have reiterated the need for an EU instrument dealing with this issue.²⁰

18. Despite this clear record of political concern over the impact of excessive pre-trial detention, legislative action on pre-trial detention has lagged behind the rest of the Roadmap, and data on

¹³ Communiqué, 21 Feb 2013, available at: <https://www.fairtrials.org/publications/hungarian-experts-concern-over-pre-trial-detention-2/>

¹⁴ Communiqué, 4 December 2012, available at: <https://www.fairtrials.org/press/fair-trials-publishes-communique-on-pre-trial-detention/>

¹⁵ Communiqué, 9 May 2013, <https://www.fairtrials.org/publications/communique-on-excessive-pre-trial-detention-in-lithuania/>

¹⁶ Communiqué, 27 April 2013, available at: <https://www.fairtrials.org/publications/greece-report-highlights-misuse-of-pre-trial-detention/>

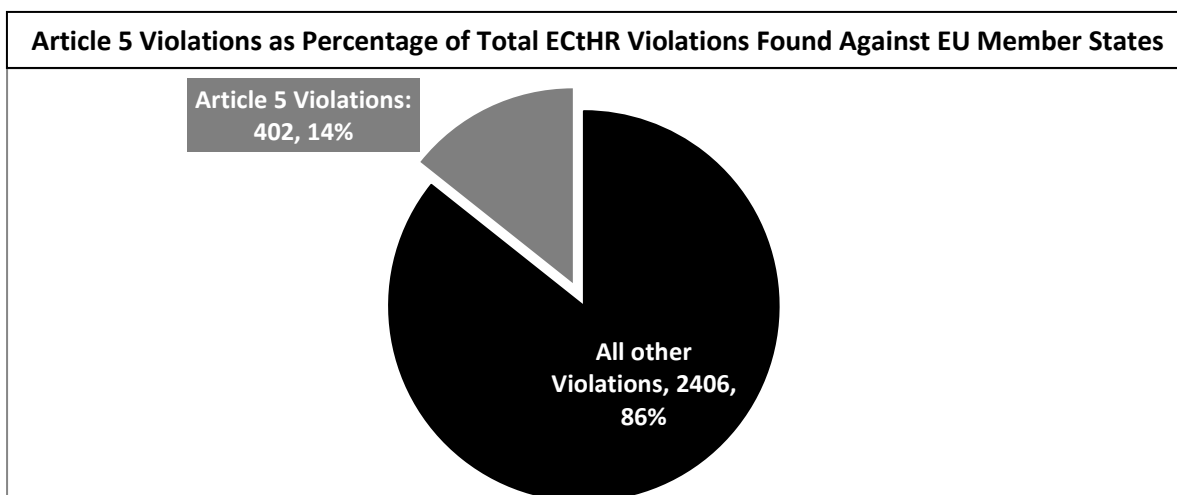
¹⁷ Communiqué, 13 June 2013, available at: <https://www.fairtrials.org/publications/communique-pre-trial-detention-in-france/>

¹⁸ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions; 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 (**‘the European Supervision Order’**).

¹⁹ Fair Trials is aware of only two instances of its use, both of which occurred in early 2016, one in England and one in Portugal in relation to Spanish residents. Apart from these exceptions, for a general overview on its lack of uptake, see, European Commission, Report on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/ 829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, COM (2014) 57 final, Brussels, 5 February 2014, available at: http://ec.europa.eu/justice/criminal/files/com_2014_57_en.pdf. See also *Press Release: Detention: Commission calls on Member States to implement commonly agreed rules for people sentenced or awaiting trial in another EU country*, available at: http://europa.eu/rapid/press-release_IP-14-100_en.htm.

²⁰ See *Motion for a European Parliament Resolution on the situation of Fundamental Rights in the European Union (2013-2014)*, (2014/2254(INI)), (Rapporteur Laura Ferrara), paras 151-154. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2015-0230+0+DOC+XML+V0//EN>. See also *European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL))*, (Rapporteur Sarah Ludford), para 17. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0174+0+DOC+XML+V0//EN>

the practical operation and impact of pre-trial detention is still lacking. Meanwhile, the European Court of Human Rights (**ECtHR**) continues to find repeated violations of Article 5²¹ in the context of pre-trial detention against EU Member States (over 400 such findings in the past five years alone, 14 percent of the total violations found against EU Member States and more than any other Article except for Article 3 [475] and Article 6 [1079]).²²



19. Excessive detention in poor conditions is also raised regularly in courts considering whether to execute European Arrest Warrants (**EAWs**), delaying and sometimes preventing surrender and subjecting individuals to risks of human rights violations in their execution. The Court of Justice of the European Union (**CJEU**) recently published a decision in the joined cases of *Aranyosi* and *Căldăraru*²³ which confirmed that Member States must defer and may discharge execution of the EU to Member States in which the requested individual faces a real risk of fundamental rights violations due to poor conditions of detention. The impact of this case is likely to mean that arguments against surrender based on poor prison conditions in the requesting state will arise more frequently, and may in time undermine the effectiveness of mutual recognition in the EAW context.

²¹ See, e.g. *Süveges v Hungary*, App. 50255/12, 5 January 2016. See also *Varga and Others v. Hungary*, Apps. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015, which has been made a 'pilot case' for review by the court, which mentioned the reduction of pre-trial detention as one of the possible means to reduce overcrowding. The Court will not adjourn similar pending cases that would serve to remind Hungary its obligations under the ECHR.

²² Data gathered from the European Court of Human Rights Annual Reports, relevant years available at:

http://www.echr.coe.int/Documents/Stats_violation_2015_ENG.pdf;
http://www.echr.coe.int/Documents/Facts_Figures_2014_ENG.pdf;
http://www.echr.coe.int/Documents/Facts_Figures_2013_ENG.pdf;
http://www.echr.coe.int/Documents/Facts_Figures_2012_ENG.pdf; and
http://www.echr.coe.int/Documents/Facts_Figures_2011_ENG.pdf

²³ Case C-404/15 *Aranyosi* and C-659/15 PPU *Căldăraru*, [2016].

20. In recent weeks there has been evidence that progress on an EU legislative measure may be forthcoming at last. Commissioner Jourová has announced that the development of minimum procedural safeguards for pre-trial detention is a priority.²⁴ She stated,

“The lack of minimum procedural safeguards for pre-trial detention can hinder judicial cooperation. Poor detention conditions can indeed lead to refusal of extradition under the European Arrest Warrant, as the European Court of Justice has recently made clear. Furthermore, pre-trial detention should only be a last resort solution. We see however that it is often used too early. Conditions in pre-trial detention are often worse than those in regular prisons.”

21. In recognition of the need for further enquiry to inform any future legislative measure, Fair Trials and its ten partners (NGOs and academic institutions) have undertaken a study of pre-trial detention decision-making. Although it cannot substitute for comprehensive, government-led data gathering, the findings of the research clearly indicate that the need for better protection of minimum standards of pre-trial detention persists with as much urgency as ever.

²⁴ Speech by Commissioner Jourová at the European Criminal Law Academic Network, 2016 Annual Conference, 10th Anniversary, available at: http://europa.eu/rapid/press-release_SPEECH-16-1582_en.htm.

III. Methodology

22. The project which commenced in June 2014 involved ten partners conducting research in ten different EU Member States into the practice of pre-trial detention decision-making. The project partners were:
- 1) **England and Wales:** University of the West of England
 - 2) **Greece:** Centre for European Constitutional Law
 - 3) **Hungary:** Hungarian Helsinki Committee
 - 4) **Ireland:** Irish Penal Reform Trust
 - 5) **Italy:** Associazione Antigone
 - 6) **Lithuania:** Human Rights Monitoring Institute
 - 7) **Netherlands:** University of Leiden
 - 8) **Poland:** Helsinki Foundation for Human Rights, Poland
 - 9) **Romania:** Association for the Defence of Human Rights in Romania
 - 10) **Spain:** Asociación Pro-Derechos Humanos España
23. An Advisory Board was also convened, consisting of experts with extensive experience in criminal justice research, which reviewed research tools and provided advice on methodological challenges. The Advisory Board was comprised of: András Kádár, co-chair of the Hungarian Helsinki Committee; Professor Ed Lloyd-Cape of the University of the West of England; Martin Schoenteich, Senior Legal Officer on national criminal justice reform at the Open Society Foundation; and Zaza Namoradze, Director of the Budapest office of the Open Society Justice Initiative.
24. Each partner undertook the following research elements: a) Desk Review of existing law and statistics; b) Survey of defence practitioners, c) Review of Case Files and/or d) Monitoring of hearings at which decisions on pre-trial detention were made; and e) Qualitative, one to one interviews with judges and prosecutors. In addition to in-country research, Fair Trials hosted a regional experts' seminar, consisting of 51 participants from 24 EU Member States in order to reflect on the research findings in the ten project countries and to seek input from lawyers and experts from Member States not involved in the research. We have sought to incorporate this input throughout the report where relevant, which is why there are occasional references to countries other than those involved in the study.
25. Fair Trials developed template research tools for each element of the project with input from the partners and Advisory Board. These were adapted slightly by each partner to reflect jurisdiction-specific characteristics, while retaining as much commonality as possible across the ten in-country research teams.
26. The level of openness of proceedings and case files varies widely throughout the represented jurisdictions, and researchers encountered different challenges to accessing the necessary data depending on the legal regime for such access in each country. The project was designed so that much of the same data was sought from hearing monitoring and case file reviews, with the understanding that access would not be possible to both hearings and case files in all jurisdictions. Most country teams were able to achieve data collection both from hearing monitoring and from case file reviews, but in some jurisdictions, only one or the other was

possible. In some jurisdictions, researchers were only able to access data with the collaboration of local defence lawyers, as official permission was not possible. Due to these and other constraints, selection criteria in relation to which individual hearings were monitored and case files were reviewed by each research team also differed significantly.

27. Due to the different methodological approaches, data collected in different countries cannot always be compared like for like. However, a general sense of the issues can be gathered from the extensive data compiled by each partner for their jurisdiction. In all, researchers were able to collect the following data:

Defence Practitioner Surveys: **544 lawyers surveyed**

Case file review: **672 files reviewed**

Hearing monitoring: **242 hearings attended**

Judges interviews: **56 judges interviewed**

Prosecutor interviews: **45 prosecutors interviewed**

IV. Findings

28. Researchers across the ten jurisdictions have collected a huge amount of data and have provided detailed analyses and recommendations for national jurisdictions in each country report. This overview represents a high-level outline of the key common findings which are relevant for the consideration of regional action.
29. Comprehensive information on key elements of pre-trial detention (including, for example, data on duration of pre-trial detention, impact of pre-trial detention on final case outcomes, rates of requests for pre-trial detention and their success rate, and use and effectiveness of alternatives) within which the findings of this research should be properly contextualized is lacking in most EU Member States. Governments are unlikely to collect such information in the absence of regulation requiring them to do so and until that time, the legality of pre-trial detention as practised cannot be fully assessed.

1. Pre-trial detention decision-making procedure

a) Relevant ECHR Standards

30. The ECtHR has ruled that a person detained on the grounds of being suspected of an offence must be brought promptly²⁵ or “speedily”²⁶ before a judicial authority, and the “scope for flexibility in interpreting and applying the notion of promptness is very limited”.²⁷
31. According to the ECtHR, the court imposing the pre-trial decision must have the authority to release the suspect²⁸ and must be a body independent from the executive and from both parties of the proceedings.²⁹ The detention hearing must be an oral and adversarial hearing, in which the defence must be given the opportunity to participate effectively.³⁰

b) Relevant EU Law Standards

32. Recent developments in EU law on procedural rights` have had some impact on pre-trial detention decision-making procedure. Under the programme laid out in the Council’s Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (**the Roadmap**)³¹, the EU has adopted four Directives on criminal procedural rights: a) Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (**the Interpretation and Translation Directive**);³² Directive 2012/13/EU on the right to information in

²⁵ *Rehbock v Slovenia*, App. 29462/95, 28 November 2000, para 84.

²⁶ The limit of acceptable preliminary detention has not been defined by the ECtHR, however in *Brogan and others v UK*, App. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988, the court held that periods of preliminary detention ranging from four to six days violated Article 5(3).

²⁷ *Ibid*, para 62.

²⁸ *Singh v UK*, App. 23389/94, 21 February 1996, para 65.

²⁹ *Neumeister v Austria*, App. 1936/63, 27 June 1968, para 24.

³⁰ *Göç v Turkey*, App. 36590/97, 11 July 2002, para 62.

³¹ Council Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 30 November 2009, (2009/C 295/01).

³² Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, 20 October 2010, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF>

criminal proceedings (**the Right to Information Directive**);³³ Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings (**the Access to a Lawyer Directive**),³⁴ and the Directive (adopted but not yet published) on the presumption of innocence and the right to be present at one's trial (**the Presumption of Innocence Directive**).³⁵

33. Because each of these Directives focus at least in part on procedural protections during the pre-trial period, they have the potential to improve rights protection in the administration of pre-trial detention in ways that could help to constrain its excessive use. For example, the Interpretation and Translation Directive provides not only interpretation during court hearings but also for necessary private conferences between lawyers and defendants,³⁶ as well as translations of essential documents, which include “any decision depriving a person of liberty, any charge or indictment.”³⁷
34. In relation to access to a lawyer, the Access to a Lawyer Directive provides that defendants appearing at pre-trial detention hearings have had access to a lawyer “in such time and in such a manner that they are able to exercise their rights of defence practically and effectively.”³⁸ This, according to the Access to a Lawyer Directive, means that access must occur (*inter alia*) **before** they are questioned by a judicial authority;³⁹ and in “due time” before any court appearance. Access to a lawyer in these earliest stages of criminal proceedings is of particular importance in the context of initial pre-trial detention hearings, which often occur at a juncture in proceedings during which suspects and defendants have had minimal contact with a lawyer. The Access to a Lawyer Directive also provides that defence lawyers be able to “be present, and participate effectively,”⁴⁰ and that Member States should “make the necessary arrangements to ensure that defendants are in a position to access effectively their right to a lawyer.”⁴¹ These provisions should ensure that the right to a lawyer at pre-trial detention hearings is meaningful; for example that bureaucratic challenges to obtaining provisional legal aid has not made access to a lawyer practically impossible, and that lawyers are able to intervene effectively in proceedings.
35. In relation to the right of access to information, Article 7.1 of the Right to Information Directive provides for the right of arrested and detained persons to have access to case materials “in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention.” This provision is made

³³ Directive 2012/13/EU of the European Parliament and the council on the right to information in criminal proceedings, 22 May 2012, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0014>

³⁴ Directive 2013/48/EU of the European Parliament and the council on the right of access to a lawyer in criminal proceedings, 22 October 2013, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2013.294.01.0001.01.ENG

³⁵ The Directive on the presumption of innocence and the right to be present at one's trial, as agreed, 20 October 2015, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52013PC0821>

³⁶ Interpretation and Translation Directive, Article 3.1

³⁷ *Ibid*, Article 3.2

³⁸ Access to a Lawyer Directive, Article 3.1.

³⁹ *Ibid*, Article 3.2(a)

⁴⁰ *Ibid*, Article 3.3(b)

⁴¹ *Ibid*, Article 4.

without derogation, and therefore should ensure that defendants or their lawyers are equitably armed with information necessary to challenge prosecutorial requests for pre-trial detention.

36. The Presumption of Innocence Directive, while noting the “clear link” between the presumption of innocence and the right to pre-trial liberty,⁴² explicitly declines to deal with pre-trial detention directly because the topic was being dealt with by other initiatives,⁴³ making reference to the Commission’s Green Paper on Detention and the resulting Parliamentary vote in favour of a legislative tool to address the EU-wide problem of overuse of pre-trial detention.

c) Equal Treatment of Prosecution and Defence

37. Across the jurisdictions represented in the study, under-resourced courts and lawyers have insufficient time to devote to pre-trial detention hearings, meaning that judges are making decisions about whether to deprive legally innocent people of liberty on the basis of insufficient information and consideration, in hearings which last a matter of minutes in most cases.⁴⁴ In addition to resource constraints, some of the time pressures placed on court actors may also be related to the need to present accused people before a judicial authority as quickly as possible, as was the case in France, where an accused person must be presented before a judge within 20 hours.⁴⁵
38. Partially as a result of the insufficient time and resources for independent judicial review, lawyers in many of the studied countries noted a judicial bias toward the prosecution. In some cases this is due to inequality of arms, such as unequal access to information, evidence and resources; in others this bias is a cultural product of judicial mind-sets. In Poland, one of the judges interviewed admitted that he was rarely convinced by defence arguments, saying “*to be honest, I have probably never faced a situation where whatever a defence lawyer had to say persuaded me not to apply pre-trial detention.*” In Spain, one prosecutor described the role of the investigative judge as “an undercover public prosecutor.”
39. Research from case file reviews and hearing monitoring in many Member States bore out lawyers’ concerns that judges tend to credit prosecutorial arguments in favour of detention. In Hungary, for example, researchers found that in 92.4 % of reviewed case files, judges referred to the prosecution’s arguments, while they only referred to defence arguments in 50% of cases. Similarly in Lithuania, judges referred to defence arguments in only 15% of cases reviewed, relying on prosecutors’ arguments in 70% of cases. In Romania, surveys and interviews with defence lawyers, judges and prosecutors, confirmed “consensus” that the prosecutor has markedly more influence in the decision to impose pre-trial detention and that equality of arms is not present, and research bore this out – 98.55% of case files examined showed that judges relied mainly or entirely on prosecution arguments.

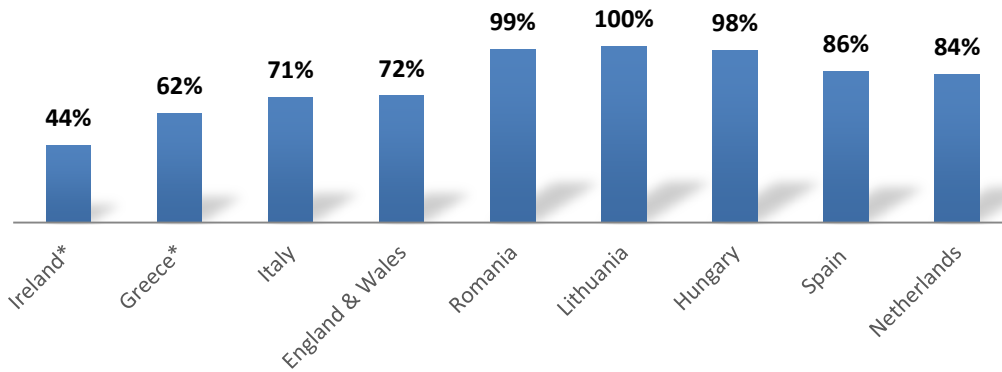
⁴² Presumption of Innocence Directive, para 1.14.

⁴³ Ibid, para 1.16

⁴⁴ In Ireland, for example, researchers found that the average length of time for a pre-trial hearing was six minutes, with most lasting three to four minutes.

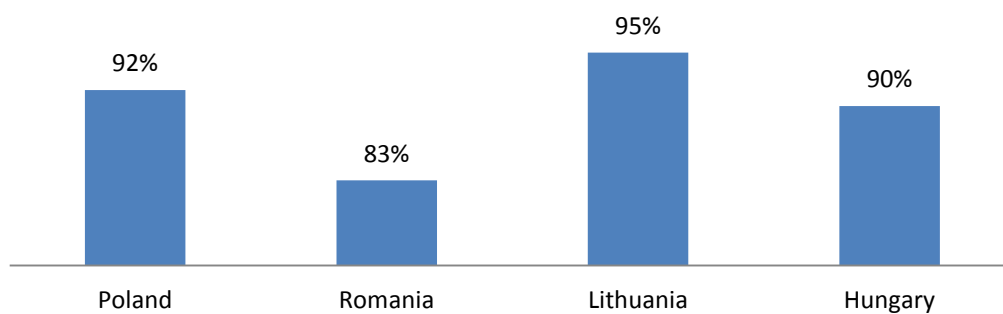
⁴⁵ This information was provided by a French expert at the regional experts’ seminar.

Judicial grants of prosecutorial request for pre-trial detention according to data gathered by researchers ⁴⁶



40. In some countries, national data on judicial assent to prosecutorial requests for detention are collected. These are noted in the chart below for the purpose of comparison to the research findings, and also indicate a high level of judicial assent to prosecutorial motions for detention.

Judicial grants of prosecutorial requests for pre-trial detention according to national data



⁴⁶ NB: this information was not documented by Polish researchers. Please note that in the Lithuanian case file review, from which the numbers relating to Lithuania in this chart are drawn, only cases where pre-trial detention was ordered were included. However, in 100% of the hearings monitored (20 hearings) judges also agreed to prosecutorial requests for pre-trial detention.

d) Access to a Lawyer

41. Although in principle defendants across the studied jurisdictions have a legal right to be represented at pre-trial detention hearings, defendants observed in the research did not always have practical access to effective legal representation. Defendants were not universally represented in detention hearings in certain jurisdictions, and even where lawyers were present, their assistance was not always sufficient to safeguard the defendant's rights.

i) Presence of a lawyer

42. Though most defendants were represented at pre-trial detention hearings in many of the studied jurisdictions, this was not always the case. In Poland and Hungary researchers observed reviewed case files involving pre-trial detention hearings at which defendants appeared without a lawyer. Research in Poland found that, if a lawyer had already been retained, the lawyer would be present at the pre-trial detention hearing. However in legal aid cases where a particular defender had not yet been assigned, suspects and defendants frequently appeared unrepresented at the first hearing. Similarly in Hungary, the presence of a defence lawyer is optional in judicial hearings on pre-trial detention in the investigation phase and in fact ex-officio appointed lawyers rarely appear at the hearing.

ii) Effective participation of the defence

43. Even where lawyers are present, their advocacy is often passive or non-existent due to insufficient financial compensation and crushing workloads that often leave only minutes to prepare for hearings. Time and resource constraints were noted in nearly all of the studied countries, with especially acute challenges observed in legal aid cases. In Spain, legal aid lawyers receive only 150-350 euro for representation from pre-trial detention to sentencing, making it difficult for legal aid lawyers to dedicate sufficient time to developing effective defences to pre-trial detention. Researchers in Italy recorded several cases from the case file review which demonstrated that the lawyer had not met with the defendant at all prior to the pre-trial detention hearing. In Lithuania, researchers described the practice of substituting a legal aid lawyer where a contracted lawyer was not available to attend a pre-trial detention hearing. This practice was often to the detriment of the defendant, since the legal aid lawyer had no knowledge of the case.

Observed situation from Lithuania research: In a single instance a suspect who was brought to the court for a PTD hearing had no defence lawyer. As participation of a defence lawyer in PTD hearings is mandatory, this would have resulted in a procedural violation. However, when the problem became apparent, the prosecutor simply stopped and brought in another legal aid lawyer who by chance happened to be walking down the court corridor next to the court room. The lack of knowledge of any of the case-related facts and not meeting the client beforehand did not stop the lawyer from representing the suspect. PTD was ordered.

44. Besides time, and resource constraints, in some countries legal barriers to an effective defence remain: for example in Romania, legislation does not permit the defence to adduce evidence at pre-trial hearings, making the participation of the defence systematically inadequate.

e) Inadequate translation and interpretation

45. Some represented jurisdictions do not regularly translate essential evidence as required by the Interpretation and Translation Directive; for example in Greece, none of the case files researchers examined had been translated at all, despite the fact that 43% of defendants were foreign nationals. In Greek cases that did feature interpretation, more than a quarter (27%) of the interpretations were judged to be of insufficient quality. Similarly, in Italy only 23% of cases involving foreign nationals featured interpretation. At the time of the research, the Interpretation and Translation Directive has not yet been transposed.⁴⁷

46. The impact of inadequate translation and interpretation falls disproportionately on foreign national defendants, and has the effect of intensifying discrimination against these defendants. In Greece, lawyers reported that foreign national defendants were not always aware of the right to a lawyer and thus went unrepresented in court. In Italy, only 23% of the analysed cases involving non-national defendants made use of interpreters, raising concern on the part of researchers that interpreters were not always appointed in situations where they should have been. Despite having a legal right to representation, a failure to provide information on rights in a language suspects and defendants could understand meant that in practice some foreign nationals were deprived of those rights.

f) Insufficient defence access to case materials essential for challenging pre-trial detention

47. Despite the adoption and implementation of Article 7(1) of the Right to Information Directive, researchers from several Member States noted an ongoing lack of full access to essential case materials. Obstacles to full access to these materials took three forms:

- a. **Limitations on access:** In some countries, despite the non-derogable nature of the right of access to case materials essential to challenge arrest or detention in Article 7(1) of the Right to Information Directive, prosecutors still restricted access to certain materials. Estonian law, for example, permits prosecutors to restrict access to the case file “if this may significantly damage the rights of another person or if this may damage the criminal proceedings.”⁴⁸ In parts of Hungary outside of Budapest, the prosecution decides which documents are essential for the defence to view, potentially censoring key documents. The fact that access to the full case file is available, apparently without issue, within most of Budapest demonstrates that such selective access is not necessary. Insufficient case file access was also noted in Lithuania, Poland, Romania, and Spain (where, in addition to routine problems accessing case files, 13% of cases reviewed by researchers involved the invocation of

⁴⁷ As of 28 April 2016 Articles 5.1. and 5.3 of the Interpretation and Translation Directive were transposed in Romania, but the impact of these legislative changes is still unclear.

⁴⁸ This information was provided by an Estonian lawyer at the expert seminar.

secrecy provisions formally preventing defence access. In Sweden, access is not automatic; the defence must request the case file from the prosecution and their access to it is usually limited in time.⁴⁹

- b. **Issues regarding the modalities of access:** Apart from refusals to provide evidence, practical challenges also prevented sufficient access to relevant case materials. For example, in some jurisdictions lawyers complained of the difficulty in obtaining their own paper copies of the case file in order to use it in consultations with their client. Inability to obtain paper copies particularly impacts upon defendants in pre-trial detention who will not otherwise be able to view the evidence in detail.
- c. **Problems relating to the timing of access** – Besides inaccurate and incomplete evidence, access to case materials is often granted too late for the defence to be able to make sufficient use of it. This was routinely the case in Hungary. In Ireland, 69% of survey respondents reported that lawyers do not have access to the case file prior to the initial bail hearing. In Luxembourg, it was reported, lawyers frequently have only ten minutes to prepare.⁵⁰ In England and Wales, a majority of defence lawyers surveyed by researchers cited delays in evidence disclosure as one of the major driving forces behind lengthy detention periods, and 30% of surveyed lawyers reported not always having access to case materials before the first detention hearing. In Spain, access to the police report was granted only minutes before the hearing, leaving no time for the defence to respond.

2. Substance

a) Relevant ECHR Standards

48. The ECtHR has repeatedly emphasised the presumption in favour of release⁵¹ and clarified that the state bears the burden of proof to show that a less intrusive alternative to detention would not serve the respective purpose.⁵² The detention decision must be sufficiently reasoned and should not use “stereotyped”⁵³ forms of words. The arguments for and against pre-trial detention must not be “general and abstract”.⁵⁴ The court must engage with the reasons for pre-trial detention and for dismissing the application for release.⁵⁵

49. The ECtHR has also outlined the lawful grounds for ordering pre-trial detention to be: (1) the risk that the suspect will fail to appear for trial;⁵⁶ (2) the risk the suspect will spoil evidence or intimidate witnesses;⁵⁷ (3) the risk that the suspect will commit further offences;⁵⁸ (4) the risk

⁴⁹ Information provided by Swedish lawyer at expert seminar.

⁵⁰ Information provided at regional seminar.

⁵¹ *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 145.

⁵² *Ilijkov v Bulgaria*, App 33977/96, 26 July 2001, para 85.

⁵³ *Yagci and Sargin v Turkey*, App 16419/90, 16426/90, 8 June 1995, para 52.

⁵⁴ *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, para 63.

⁵⁵ *Buzadj v. Moldova*, App 23755/07, 16 December 2014, para 3.

⁵⁶ *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, para 59.

⁵⁷ *Ibid.*

⁵⁸ *Muller v. France*, App 21802/93, 17 March 1997, para 44.

that the release will cause public disorder;⁵⁹ or (5) the need to protect the safety of a person under investigation in exceptional cases.⁶⁰ The mere fact of having allegedly committed an offence is not a sufficient reason for ordering pre-trial detention, no matter how serious the offence and the strength of the evidence against the suspect.⁶¹ Pre-trial detention based on “the need to preserve public order from the disturbance caused by the offence”⁶² can only be legitimate if public order actually remains threatened. Pre-trial detention cannot be extended just because the judge expects a custodial sentence at trial.⁶³

50. With regard to flight risk, the ECtHR has clarified that neither the lack of fixed residence⁶⁴ or the risk of facing long-term imprisonment⁶⁵ if convicted can alone justify ordering pre-trial detention. The risk of reoffending can only justify pre-trial detention if there is actual evidence of the definite risk of reoffending available;⁶⁶ merely a lack of job or local family ties would be insufficient.⁶⁷

51. In addition to the limitations on lawful grounds, the ECtHR has also stated that a person may be detained only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence.⁶⁸ The persistence of reasonable suspicion that an arrested person has committed an offence is a prerequisite for the lawfulness of his continued detention. Accordingly, while reasonable suspicion must exist at the time of the arrest and initial detention, in cases of prolonged detention it must also be shown that the suspicion persisted and remained reasonable throughout the detention.⁶⁹

⁵⁹ *I.A. v. France*, App 28213/95, 23 September 1988, para 104.

⁶⁰ *Ibid*, para 108.

⁶¹ *Tomasi v France*, App 12850/87, 27 August 1992, para 102.

⁶² *I.A. v. France*, App 28213/95, 23 September 1988, para 104.

⁶³ *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 149.

⁶⁴ *Sulaoja v Estonia*, App 55939/00, 15 February 2005, para 64.

⁶⁵ *Tomasi v France*, App 12850/87, 27 August 1992, para 87.

⁶⁶ *Matznetter v Austria*, App 2178/64, 10 November 1969, concurring opinion of Judge Balladore Pallieri, para 1.

⁶⁷ *Sulaoja v Estonia*, App 55939/00, 15 February 2005, para 64.

⁶⁸ *Rasul Jafarov v. Azerbaijan*, App 69981/14, 17 March 2016, para 114.

⁶⁹ *Ibid*, para 119.

| Legislative Grounds for Pre-trial detention | Gr | Hu | Ir | It | Lt | NL | Po | Ro | Sp | E&W |
|---|----|----|----|----|----|----|----|----|----|-----|
| Risk of interference with investigation/proceedings | • | • | • | • | • | • | • | • | • | • |
| Risk of reoffending | • | • | • | • | • | • | • | • | • | • |
| Need to protect victims | • | • | | • | • | • | | • | • | • |
| Flight/absconding risk | • | • | • | • | • | • | • | • | • | • |
| Criminal record | • | | • | • | | • | | • | | • |
| Public interest | | • | | | | • | | | | • |
| Threat to public order | • | | • | • | | • | | • | | |
| Public Violence (speedy proceeding) | | | | | | • | | | | |

b) Impact of ECHR standards

52. While legislation in the studied jurisdictions appears to comply with ECHR standards in defining the limited grounds in relation to which pre-trial detention can be ordered, the research demonstrated a dilution of the standards due to the unlawful application of apparently lawful grounds of detention. This was particularly so in relation to certain marginalized groups including non-nationals. Furthermore, an overall lack of case-specific reasoning makes it difficult to identify the grounds on which pre-trial detention has been ordered and therefore to identify and challenge unlawful application of lawful grounds again. In practice, therefore, the principle of pre-trial detention as a measure of last resort is not consistently upheld.

53. Interviews undertaken with judges and prosecutors demonstrated a lack of awareness or understanding of ECHR standards and their application in the domestic context. All but two of the Greek judges interviewed reported not having direct knowledge of the ECHR standards that apply to pre-trial detention, due to time pressures and a lack of easy access to ECHR case law. Only one of the Irish judges interviewed were of the opinion that the case law of the ECtHR was relevant to Ireland in the bail context. None of the Polish prosecutors reported paying close attention to ECtHR rulings concerning Poland. Prosecutors and judges across the studied jurisdictions reported little to no access to specialised training in ECHR standards as they apply to pre-trial detention.

c) Lawful basis for detention

54. Despite criminal codes which incorporate the limited lawful bases for pre-trial detention defined by the ECtHR, some researchers observed detention being ordered for patently unlawful reasons, such as the severity of the crime alleged – this was in fact the most common reason invoked for imposing pre-trial detention in Romania, where it featured in 97% of studied case files. In Spain, the ground of “public concern” for imposing pre-trial detention was removed from the statute books as a legal basis for pre-trial detention, but was nonetheless observed by researchers being used in several cases. 64% of the surveyed lawyers (20 out of 31) in Spain agreed that they had observed unlawful grounds of detention being used, and three out of five

of the judges interviewed there admitted using the severity of the offence as a criterion for the imposition of pre-trial detention. In Hungary, Spain and Greece, in many cases in which risk of absconding was the given basis for detention, the only evidence on which this was based was the severity of the alleged offence.

55. Contrary to ECHR standards, in Bulgaria, the likelihood of the offence having been committed will not be considered until trial, so the pre-trial detention hearing (which involves the same judge as the subsequent trial) only involves consideration of the probability of absconding/reoffending.⁷⁰ In Sweden, if the offence in question has a minimum sentence of at least 2 years, the defence needs to show that detaining pre-trial is not necessary.⁷¹ In practice this reversal of the burden of proof is hard to combat.
56. Another factor in the unlawful use of pre-trial detention is the judge's desire to see justice done in cases where a sentence was not assured. One Greek judge, for example, pointed to a case involving a young woman who accidentally killed her fiancée; it was clear from the facts of the case that none of the grounds of pre-trial detention applied and also that, if convicted, no prison sentence would be served. Yet there was public outrage about the killing and public outcry for justice. On this basis, the judge ordered pre-trial detention. Other judges interviewed across jurisdictions expressed similar feelings. Four out of five Spanish judges admitted to feeling pressured to detain suspects in high profile cases. This punitive use of pre-trial detention would seem to explicitly violate the presumption of innocence.
57. In some jurisdictions, lawyers felt that pre-trial detention was sometimes used to extract confessions. In Lithuania, for example, 80% of defence lawyers felt this was the case. One lawyer there reported, "in 9 out of ten cases, the prosecutor negotiates no detention if the defendant provides the evidence he needs and a confession." Some lawyers recognized similar motives for pre-trial detention in Romania.
58. In the Netherlands (and in Romania), use is made of the "public order" ground of detention, which requires both that the accusations carry a punishment of at least 12 years in prison, and that the conduct alleged "shocks the legal order." However lawyers in the Dutch research survey described judges conflating the two requirements, assuming that any offence with a long sentence will have shocked the legal order. This broad application of the public order ground is not compatible with ECHR standards. The ECtHR has held that, while the public order ground can justify pre-trial detention, it can only do so when there are sufficient reasons based on relevant facts capable of showing that the release of the accused would actually disturb public order, and that detention will continue to be legitimate only if public order remains actually threatened. Its continuation cannot be an anticipation of a custodial sentence.⁷² It is not enough for courts to make reference to the seriousness of the offences, the circumstances in which the offences

⁷⁰ Information provided by Bulgarian lawyer at expert seminar.

⁷¹ Information provided by Swedish lawyer at expert seminar.

⁷² *Letellier v. France*, App. 12369/86, 26 June 1991, para 51.

were allegedly committed or the severity of the potential sentence in order to establish that public order will be actually threatened.⁷³

59. As an example of good practice, in Ireland the presumption of bail appears to be maintained even in cases involving serious charges. Out of five cases observed by researchers involving allegations of murder, three of the defendants were granted bail. The two defendants facing murder charges who were remanded to custody were found on specific evidence to be a flight risk and prone to random bouts of unpredictable violence respectively, and in each case the remandees' co-defendants were in fact released with conditions.

d) Lack of case-specific reasoning

60. Even where detention was ordered on grounds that were formally lawful, insufficient attention was paid to the specific circumstances of the defendant or concrete evidence of the alleged risks of flight, interference with the evidence, or reoffending. Risk of flight was routinely invoked disproportionately against foreign nationals in Italy, Ireland and Spain, while alternatives such as confiscation of passport and travel bans were not usually considered. Certain crimes, such as drug offences, gave rise to a presumption of risk of reoffending.

61. Judges commonly used vague repetitions of applicable law with no reference to specific facts (as was observed in Greece, Hungary, Italy, Lithuania, Netherlands, Poland, Romania, and Spain). In Lithuania, vague and abstract reasoning was especially noted in relation to findings of "risk of re-offending", the leading ground for pre-trial detention (80% of cases) in theft and drug cases. This finding was justified by formulaic reasoning applied in every theft case; i.e. that "the criminal activity in question is likely to have become the suspect's primary source of income and it will be pursued further if the person is not detained," with no reference to specific facts about the accused.

62. Findings of risk to the investigation were not always based on sufficient evidence. In Spain, researchers noted that only half of the cases reviewed in which pre-trial detention was justified due to risk to the investigation made reference to specific reasons why the risk existed. In some cases, detention was maintained beyond the length of the investigation which gave rise to the justification for detention, meaning that even if detention had been lawfully ordered, it was not lawfully maintained. This was particularly notable in Hungary, where researchers observed one case where detention was maintained on the basis of interference with the investigation even after the delivery of the first instance judgment.

⁷³ *Riccardi v. Romania*, App 3048/04, 3 April 2012, para 76.

Case study: Poland

Maciej was detained in May 2012 on charges of drug trafficking from the Netherlands to Poland. Despite the lack of evidence (including any drugs), Maciej was arrested only on the word of a crown witness, a man who he met once on a car trip to a football match. The witness later denied knowing him. Despite the lack of evidence or previous offences, Maciej was listed as a dangerous detainee, with no right to make phone calls and kept isolated from other prisoners. Detention was prolonged every three months with no legal justification for 3 years and 4 months, when public outcry about his case led to his release in September 2015. He is currently complying with the terms of his release (weekly check-ins at the police station), working and awaiting his trial, which his lawyers estimate will take several more years to complete.

e) Discrimination

63. In some of the jurisdictions, researchers noted unequal treatment of certain defendants, including non-nationals and ethnic minorities, people with insecure housing, women and drug users, each of whom was in some jurisdictions routinely detained in situations where others would not be.

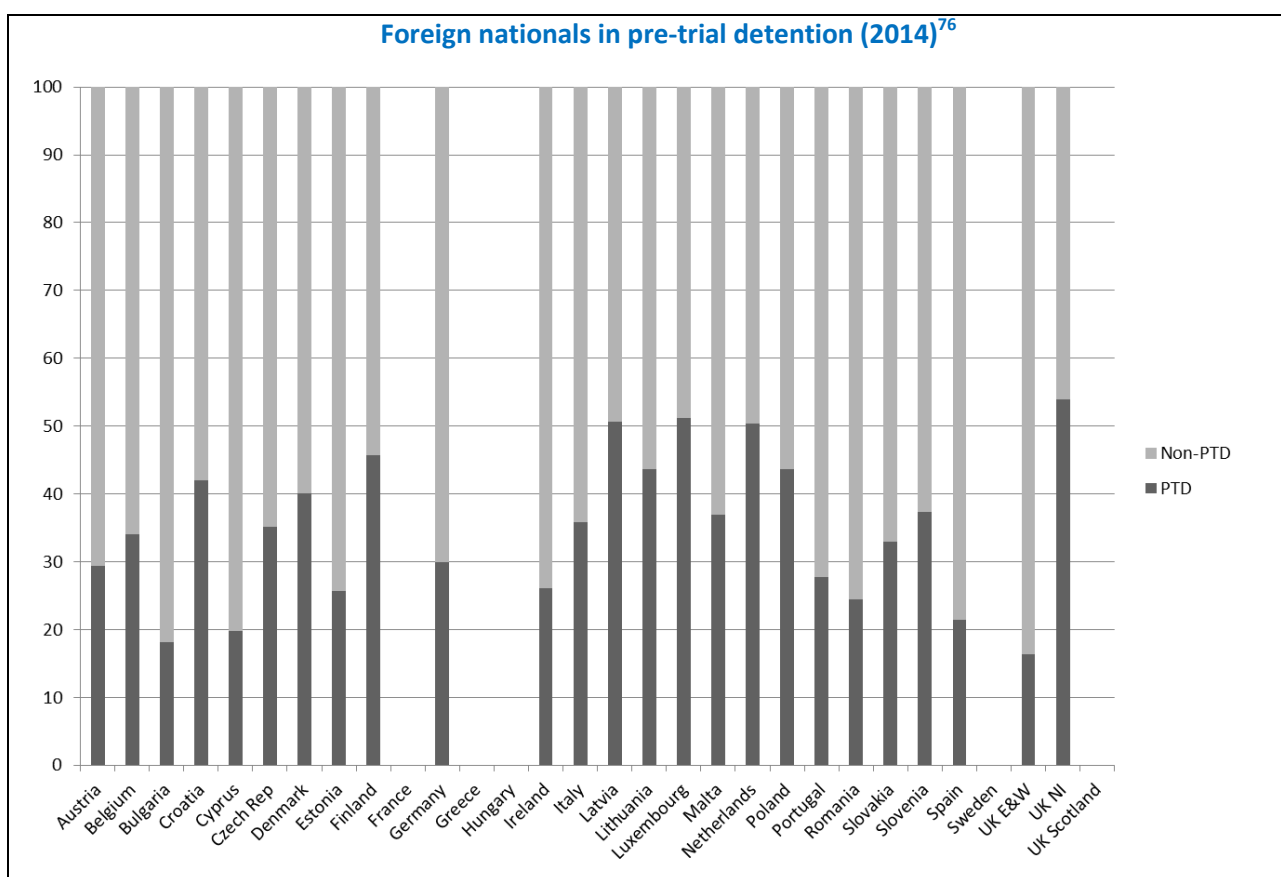
i) Foreign Nationals and Ethnic Minorities:

64. A number of the researchers reported that foreign nationals were at higher risk of being detained pre-trial than nationals. In Italy, national data demonstrates that foreign nationals are detained disproportionately -- they make up 8.9% of the total population but comprise roughly 40% of pre-trial detainees. The research from Italy documented several cases in which flight risk was evidenced by foreign nationality without reference to any other factor (i.e. family and local ties, employment, history of flight, health, etc.). Italian researchers described several cases from their case file review involving unjustified pre-trial detention imposed against non-national defendants later acquitted. One of these men had been detained for a year and a half before finally being acquitted. These cases featured poor quality and lack of access to interpretation, which led to an ineffective defence and poorly reasoned judgments relying on an assumption of risk due to the defendant's foreign nationality. As a result, ongoing indicia of guilt were not properly established on an ongoing basis to justify sustained detention.

65. A similar picture was painted by researchers from Greece, who pointed to the over-representation of foreign nationals in detention (where they make up over half of the prison population) as a major driver of endemic overcrowding. Greek defence practitioners pointed to a lack of quality interpretation and lack of information about rights, which sometimes led to an inability to obtain counsel, as contributing factors to their over-representation.

66. Similarly, Spanish lawyers opined that risk of absconding was "assumed" in cases involving foreign nationals, whose cases made up fully half of the case files researchers reviewed (despite a majority of these being legal residents with strong local ties). A judge and a public prosecutor interviewed in Spain both admitted that they considered Roma defendants to be at greater risk

of absconding, due to their “way of life.” In Malta, too, foreign nationality gave rise to an assumption of flight risk, despite the fact that undetected flight from Malta would be practically difficult given the fact that it is an island.⁷⁴



67. Sometimes this discrimination is inherent in national law. The Dutch criminal procedural code widens the scope of the circumstances for which pre-trial detention can be ordered if a suspect has no fixed abode. In Luxembourg, Article 94 of the Code of Criminal Investigation provides that, in the case of suspects who do not reside in the Grand-Duchy, the judge may order detention even absent findings of a lawful ground of detention “if there are serious indications of his having committed the offence and the latter carries a criminal or correctional custodial penalty.” The same requirement does not apply to residents.⁷⁵

ii) Other marginalised groups: women, drug users, and insecurely housed suspects

68. Besides foreign nationals, other marginalised groups experienced pre-trial detention disproportionately. Irish researchers observed women being remanded more frequently than men for minor offences unlikely to lead to a custodial sentence. Though women made up only a small proportion of defendants in observed hearings (10 out of 81), the majority of those involving bail matters (5 out of 8 observed) were remanded into custody. In one case, involving a

⁷⁴ Information provided by Maltese lawyer at regional conference.

⁷⁵ Information provided by Luxembourgish lawyer at regional conference.

⁷⁶ Council of Europe Annual Penal Statistics, SPACE 1 – Prison Populations, 2014 pg. 70-71. NB some countries (France, Greece, Hungary, Sweden) did not provide the requested information.

female defendant who had failed to appear at an interim hearing due to having to attend an access visit with her child in care, the judge remanded the woman into custody giving no reasons at all. Researchers also described cases where women appeared in court obviously ill due to drug or alcohol use, and were remanded into detention regardless. The researchers' conclusions were that in some cases women were being remanded into custody "for their own good," rather than for one of the limited legal grounds on which pre-trial detention can be justified.

69. Defendants, women and men alike, who were drug users were observed being detained excessively in several jurisdictions. All the judges and prosecutors interviewed in Romania admitted that they considered pre-trial detention an appropriate measure in drugs cases. One judge stated, *"in the case of drug consumers, especially young people, minors, if this measure is not ordered they won't become aware of what they did. But if the family comes to see them in detention and they start crying, maybe they will realize the gravity of what they did. In this case, pre-trial detention can be an educational measure"*. This attitude that pre-trial detention can play a positive role in drug users' rehabilitation is not consistent with the limited legal grounds allowed for pre-trial detention, and can lead to drug users being inappropriately detained.
70. Finally, defendants who were insecurely housed were also at risk of excessive pre-trial detention in many jurisdictions. While the lack of a consistent residence can sometimes pose legitimate difficulties in ensuring that defendants will be present for trial, some researchers noted an over-reliance on the fact of insecure housing to preclude alternatives to detention that did not properly respect the principle of detention as a measure of last resort. In Hungary, researchers observed a case where a defendant residing at a homeless shelter (where he could be supervised and contacted) was nonetheless detained on the basis that he "conducted a homeless lifestyle" and was therefore a flight risk. Ireland demonstrated good practice in this regard by using mobile phone monitoring to help ensure that defendants without secure housing could be supervised to ensure court attendance. This practice shows that detention need not be the only solution for insecurely housed defendants.

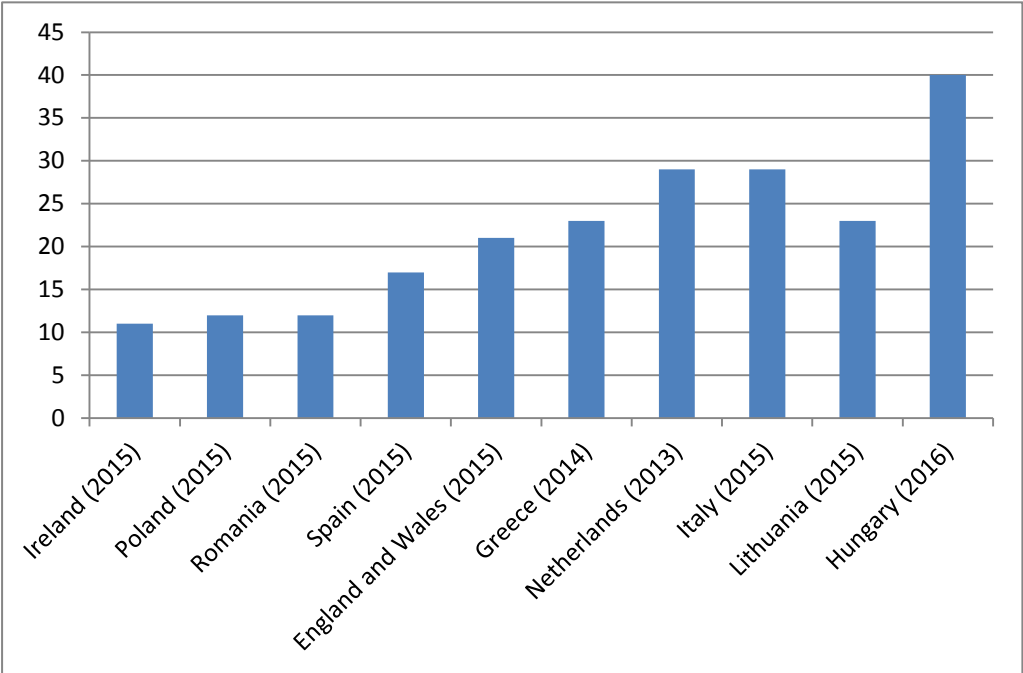
Case study: Italy

Mr. Ahn, an Italian resident of Algerian nationality (and father of a young son) living in Rome, was detained in relation to charges of extortion while working as a parking attendant. The charges were based on the verbal complaint of an acquaintance of Mr AHN and the fact that prosecutors considered the amount of money in his bank account too large to be accounted for by his informal employment. However, the complainant never appeared in court to give testimony and his evidence was never validated. Nonetheless, Mr Ahn was held in pre-trial detention based on the gravity of the accusations and the risk of reoffending, without reference to any evidence independent of the allegations themselves. Although he did not speak Italian, he was denied access to an interpreter, making it even more difficult for him to demonstrate his innocence. Though he maintained his innocence and regularly appealed against the decision to detain him, and despite the prosecution's failure to develop any further evidence, he was held in pre-trial detention for 445 days until being acquitted for lack of evidence.

f) Principle of detention as a last resort

71. Apart from indications that detention is sometimes imposed on unlawful grounds or applied in a discriminatory manner, the overall frequency of pre-trial detention raised concern in some jurisdictions. The variation in rates of pre-trial detention amongst Member States calls into question the validity of practices in countries consistently applying detention in a relatively larger proportion of cases. This is particularly the case in the Netherlands, where pre-trial detainees comprise nearly 40% of total prison population, and Hungary, where the rate of pre-trial detention on a population level is relatively high for the EU, at a rate of 45 people in pre-trial detention per 100,000 residents. The relatively high rate and proportion of pre-trial detention occurring only in certain Member States raises the question of whether the principle of detention as a measure of last resort is adequately enforced. Researchers in the Netherlands also pointed to the high yearly rate of compensation the Netherlands is obliged to pay defendants held in pre-trial detention who are later acquitted as evidence that detention is excessively used there.

Number of pre-trial detainees per 100,000 residents ⁷⁷



72. England and Wales is an example of good practice in relation to respecting the principle of detention as a last resort, with an explicit statutory presumption of bail and a healthy use of release with minimal conditions. In hearings in England and Wales, in contrast to many of the other studied jurisdictions, researchers recorded that prosecutors requested or consented to unconditional bail in over half of the observed cases, and requested conditional release a further 19% of the time. All cases of requests for conditional release were approved, but judges only approved prosecutorial requests for pre-trial detention in around 70% of cases where prosecutors requested it.

⁷⁷ Data gathered from World Prison Brief, 2016 available at: <http://www.prisonstudies.org/map/europe>.

| Statistics from England and Wales pre-trial detention hearing observation | | |
|---|-----------|----------------|
| Prosecution application | Number | % |
| Unconditional bail | 28 | 37.84 |
| Conditional bail | 9 | 12.16 |
| Pre-trial detention | 26 | 35.13 |
| No application | 11 | 14.87 |
| Total | 74 | 100.00% |

3. Alternatives

a) Relevant ECHR standards

73. The ECtHR has emphasised that pre-trial detention should be imposed only as an exceptional measure. In *Ambruszkiewicz v Poland*,⁷⁸ the Court stated that the “detention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it also must be necessary in the circumstances.”
74. Furthermore, the ECtHR has emphasised the use of proportionality in decision-making, in that the authorities should consider less stringent alternatives prior to resorting to detention,⁷⁹ and the authorities must also consider whether the “accused’s continued detention is indispensable”.⁸⁰
75. One such alternative is to release the suspect within their state of residence subject to supervision. States may not justify detention with reference to the non-national status of the suspect but must consider whether supervision measures would suffice to guarantee the suspect’s attendance at trial. If the risk of absconding can be avoided by bail or other guarantees, the accused must be released, bearing in mind that where a lighter sentence could be anticipated, the reduced incentive for the accused to abscond should be taken into account.⁸¹
76. The robust use of alternatives to detention faced a number of challenges across the studied jurisdictions, and is linked to poor quality of reasoning and the failure to ensure that pre-trial detention is a measure of last resort. In general, alternatives are available and detention is, by

⁷⁸ *Ambruszkiewicz v Poland*, App 38797/03, 4 May 2006, para 31.

⁷⁹ *Ladent v Poland*, App 11036/03, 18 March 2008, para 55.

⁸⁰ *Ibid*, para 79.

⁸¹ *Mangouras v Spain*, App 12050/04, 28 September 2010, para 79.

law, limited to situations in which no alternative can be used. Nonetheless alternatives to detention remain little used in 8 out of ten of the countries studied (with Ireland and England and Wales as exceptional examples of relatively good practice in the use of alternatives to detention).

b) Available alternatives

77. A variety of alternatives to detention are available and utilised across the EU, usually comprised of a selection of sureties, travel bans and other geographic and residence limitations, judicial or police supervision, and in some countries, electronic monitoring and house arrest. Poland does not yet provide for electronic monitoring or home detention. In Lithuania, Greece, and the Czech Republic, electronic monitoring has been introduced but is not yet widely used, and in Italy electronic monitoring and house arrest are considered forms of pre-trial detention rather than alternatives to it. In Romania, house arrest is similarly newly introduced and not yet used much. In Ireland and England and Wales, judges have wide discretion to craft conditions, which may include for example residence conditions, medical treatment and driving bans.

c) Legislative limits

78. Legislation in some countries is drafted in such a way that it discourages the creative use of alternatives to detention. In some jurisdictions, such as Spain and Poland, statute limits the alternatives available to an exhaustive list, which has the effect of limiting innovation and case-specific solutions to individualised determinations of risk. Recent legislative changes have been made in Lithuania to allow judges to suggest and impose alternatives, but this is a new legal innovation and not yet fully utilised. In some countries, mandatory pre-trial detention still exists in relation to certain classes of allegations; for example, In Italy, pre-trial detention is still mandatory presumptively applied in offences related to mafia crimes, terrorist associations, and subversive association.

79. In some jurisdictions legislation does not properly restrain the imposition of pre-trial detention to situations where it is a last resort. For example, in Romania, the duty to consider alternatives before imposing pre-trial detention is not explicitly stated in the Criminal Procedure Code. In the Netherlands, alternatives are available in the form of conditions linked to suspension of pre-trial detention, which discourages their use. This means that the judge will firstly assess whether the circumstances and grounds to order pre-trial detention are given. Once it is decided that this is the case, the judge can suspend pre-trial detention under certain specific conditions. This form of reasoning is not compatible with the strict requirement by ECHR standards that pre-trial detention only be imposed where alternatives to detention will not suffice. Rather, the judge should be required to first consider whether any alternative could address the risk identified to the investigation, only moving on to consider detention if all available alternatives would be insufficient to secure it.

d) Practical limits

80. Even where available in law, practical challenges to the use of alternatives persist. In Greece, for example, the defendant is obliged to purchase the necessary devices for electronic monitoring, which is still in a pilot phase, meaning that uptake of the technology is poor. In the Czech Republic too, electronic monitoring is expected to cost defendants two euro per day. In Italy, electronic monitoring is not available at all. In Ireland, and in England and Wales, where pre-trial release is common, coordination between courts and social services such as bail hostels and bail information schemes require improvement to help address judicial concerns about insecurely housed defendants fleeing or reoffending. Where conditions are applied, better enforcement would increase public and court trust in release and could support the greater use of alternatives to detention.

e) Lack of faith in alternatives

81. Court actors lack sufficient faith and experience in administering in the available measures such that, even if practical and legal challenges are overcome, they remain underutilised in all studied countries save England and Wales and Ireland. However, in most countries, data is not generally collected regarding defendants' compliance with conditions of release, and most of the studied countries fail to regularly utilise professional pre-trial services and risk assessments. In the absence of reliable data, fear and lack of experience in the use of alternatives tends to trump the principle of detention as a last resort.

82. Lack of faith in alternatives was reflected in lawyers' surveys and interviews with judges and prosecutors as well as in the data which reflected limited use of alternatives. In Greece, both prosecutors and judges described bail as ineffective, citing the fact that defendants subject to it tend to request that it be suspended in favour of alternative conditions. All eight judges interviewed in Romania expressed concern that conditions of pre-trial release would not be enforced; one offered, "There have been situations when pre-trial detention was not justified and didn't feel right, but there should be better supervision of alternative measures because there are many situations in which obligations are not respected." Most of the Polish judges admitted that police supervision was currently illusory, as defendants did not comply with it, while one judge went as far as to call it "a legal fiction."

f) Inadequate reasoning

83. The culture of distrust in alternatives even in the face of inadequate reasons to detain leaves judges unable to provide fully reasoned decisions that explain why detention, as a measure of last resort, is necessary and alternatives insufficient. In this way the lack of alternatives and the lack of reasoned decision-making on the grounds of detention are linked. In hearing monitoring in Lithuania, researchers noted that alternatives to detention were rarely explored by any of the parties, leading to generic, one-sentence statements that detention was necessary, for example "other measures are unsuitable because there is a risk that the suspect might abscond or flee from the investigation," with no mention, for example, of why police station check-ins and confiscation of a passport would not be sufficient to ensure the defendant's presence at trial. In

the Netherlands, too, researchers described judges' reasoning as repetitive, undifferentiated and failing to engage with alternatives as practical solutions to individualised situations.

g) Good practices

84. Good practices in the use of alternatives can be identified in England and Wales and Ireland, including most significantly a substantial reliance on conditional and unconditional bail as a regular alternative to detention. Legal decisions on pre-trial detention are framed in those two jurisdictions as suspensions of bail, with release being the presumptive norm as an exceptional measure. Ireland has also pioneered a low-cost method of supervision via mobile phones, and in recent years has produced helpful jurisprudence on the proportional setting of money bail.⁸² In France, some organisations routinely undertake risk assessments and produce bail reports in advance of pre-trial detention hearings to provide an independent evidence base on which decisions about pre-trial detention can be taken.⁸³

j) Risks involved in the use of alternatives to detention

85. While the use of alternatives to detention is a legal obligation and is generally preferable in all but exceptional cases, reliance on them does bring its own risks to liberty. For example, where alternatives are readily used, they sometimes become alternatives to unconditional bail, while rates of detention may not be much reduced. In Ireland, for example, bail is too often accompanied by unnecessary and excessive conditions when it should be more frequently unconditional; the researcher in Ireland did not observe a single case in which unconditional bail was used. Use of conditions on release must be treated as infringements of liberty, with regular reviews and consideration given as to their human rights impact on defendants subject to them. Human rights considerations are particularly urgent with cumbersome and intrusive forms of supervision such as electronic monitoring and house arrest, and the potential for socio-economic discrimination in the application of money bail.

4. Review

a) Relevant ECHR Standards

86. The trial must take place within a "reasonable" time according to Article 5(3) ECHR and generally the proceedings involving a pre-trial detainee must be conducted with special diligence and speed.⁸⁴ Whether this has happened must be determined by considering the individual facts of the case.⁸⁵ The ECtHR has found periods of pre-trial detention lasting between 2.5 and 5 years to be excessive.⁸⁶

⁸² See, e.g. *DPP v Broderick* [2006] IESC 34; *DPP v Bell*, Supreme Court, ex-tempore, 13 June 2013. For a full discussion of these cases see Irish country report.

⁸³ See, e.g. APCARS: <http://www.apcars.fr/>

⁸⁴ *Stogmuller v Austria*, App 1602/62, 10 November 1969, para 5.

⁸⁵ *Buzadj v. Moldova*, App 23755/07, 16 December 2014, para 3.

⁸⁶ *PB v France*, App 38781/97, 1 August 2000, para 34.

87. Pre-trial detention must be subject to regular judicial review,⁸⁷ which all stakeholders (defendant, judicial body, and prosecutor) must be able to initiate.⁸⁸ A review hearing has to take the form of an adversarial oral hearing with the equality of arms of the parties ensured.⁸⁹ This might require access to the case files,⁹⁰ which has now been confirmed in Article 7(1) of the Right to Information Directive. The decision on continuing detention must be taken speedily and reasons must be given for the need for continued detention.⁹¹ Previous decisions should not simply be reproduced.⁹²
88. When reviewing a pre-trial detention decision, the ECtHR demands that the court be mindful that a presumption in favour of release remains⁹³ and continued detention “can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention”.⁹⁴ The authorities remain under an ongoing duty to consider whether alternative measures could be used.⁹⁵
89. According to ECHR standards, review of pre-trial detention (as opposed to a defendant’s right to immediately appeal a judicial decision to detain) must occur automatically (without the defendant having to apply for it)⁹⁶ at “reasonable intervals” in order that “the detainee should not run the risk of remaining in detention long after the time when his deprivation of liberty has become unjustified.”⁹⁷
90. Research highlighted a number of problems in reviews of pre-trial detention, in both procedure and substance. Overall, review processes throughout the EU are not providing rigorous scrutiny of the ongoing lawfulness of detention. The impact is that once an initial decision to detain has been made, it is an uphill battle for the defendant to obtain release.

b) Procedure

91. The presence of the defendant is not guaranteed in review hearings in many jurisdictions (including Poland, Spain, Greece, Italy, Lithuania, and England and Wales) and reviews are often conducted without an oral hearing, on papers alone. For example in Spain, the defendant was present in only one of 28 cases reviewed in which appeals against detention occurred. In England and Wales, review hearings held in the Crown Court are often closed to the public, in contrast to first instance decisions at magistrate’s court hearings which are open.

⁸⁷ *De Wilde, Ooms and Versyp v Belgium*, App 2832/66, 2835/66, 2899/66, 18 June 1971, para 76.

⁸⁸ *Rakevich v Russia*, App 58973/00, 28 October 2003, para 43.

⁸⁹ *Singh v UK*, App 23389/94, 21 February 1996, para 65.

⁹⁰ *Wloch v Poland*, App 27785/95, 19 October 2000, para 127.

⁹¹ *Ilijkov v Bulgaria*, App 33977/96, 26 July 2001, para 84.

⁹² *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 145.

⁹³ *Ibid.*

⁹⁴ *McKay v UK*, App 543/03, 3 October 2006, para 42.

⁹⁵ *Darvas v Hungary*, App 19574/07, 11 January 2011, para 27.

⁹⁶ *McKay v. The United Kingdom*, App 543/03, 3 October 2006, para 34.

⁹⁷ *Abdulkhakov v. Russia*, App 14743/11, 2 October 2012, para 209.

92. Furthermore in some jurisdictions, such as Italy, detention is not automatically reviewed, but only done so at the request of the defendant. In practice, Italian researchers found that in the majority (84%) of cases in the case file review, defence lawyers requested a review at least once during the duration of detention. In 72% of these cases, judges agreed to release the defendant from detention to alternative measures shortly after the initial hearing at which detention was ordered. The release from detention was usually justified by reliance on additional information provided by the defence as to the defendant's steady employment and residence, which could have been adduced at the initial hearing had there been sufficient time and information provided. This pointed, in the opinion of Italian researchers, to a pattern of unnecessary periods of detention early in the proceedings due to procedural failings in the initial hearing.
93. For those who remained detained for longer periods, problems enforcing special diligence and the irregularity of review meant that pre-trial detention and intrusive alternative measures were often prolonged in Italy.⁹⁸ In Hungary too, there was no time limit in which courts had to take decisions appeals against detention orders and review decisions, with cases uncovered by researchers in which courts took one or two months to decide.
94. Ireland provides an exception to this pattern, where reviews of bail are heard in oral proceedings which ensure a rigorous assessment of whether the grounds for continued detention exist. Irish reviews of detention occur at the High Court and are conducted *de novo*, rather than simply reviewing previous decisions, which researchers found provides crucial oversight of initial decisions by district courts. Accordingly at the High Court review proceedings last nearly three times as long on average as in district court. As an example of the kind of particularised and case-specific enquiry conducted by the High Court in reviews of pre-trial detention, researchers pointed to one instance in which prosecutors argued that a defendant was at risk of reoffending in theft in order to support his heroin addiction; the judge enquired as to how much money the defendant's habit actually cost. This kind of detailed, case-specific judicial enquiry was unfortunately uncommon in many jurisdictions.

c) Substance

95. It was observed in most studied jurisdictions that the burden of persuading review courts that defendants should be released is effectively shifted to the defendant, contrary to standards established by the ECtHR. In Poland in 2014, there was only a 3% success rate for defendants seeking review of their detention in regional courts.⁹⁹ In Hungary, researchers noted that defendants appealed initial orders of detention in 95.9% of cases reviewed, but were never successful in overturning them. On later reviews of prolonged detention, Hungarian researchers found only three instances in which judges agreed to end pre-trial detention. Another problem is

⁹⁸ See, e.g. *Luberti v. Italy*, App 42644/02, 9 June 2005, in which the Italian court took over five months to deliver a decision challenging the imposition of pre-trial detention. NB newly adopted Italian aw 47/2015 imposes a time limit (between 30 and 45 days) in which the Court of Appeal must file grounds under penalty of loss of the cautionary measure, which has the potential to positively impact on Italy's observance of special diligence in the cases of detained defendants.

⁹⁹ Researchers cited national data to substantiate this statistic: Annual reports of the Prosecutor General on the prosecution service, available at: <http://pg.gov.pl/sprawozdania/sprawozdania-prokuratora-generalnego-1133-2.html> (date of access: 1.09.2015). Regional courts will generally be dealing with more serious cases e.g. felonies, which may mean that success rates are somewhat lower in this context.

that Article 371 (4) of the CCP sets out that the reasoning of the second instance decisions “shall include the reasons for upholding [the first instance decisions] briefly”, as a result of which decisions on appeals against both the ordering and the prolongation of pre-trial detention fail to adequately address the arguments of the defence and give detailed reasons for rejecting the appeal.” In Romania, every single review studied by researchers in the course of the project stated verbatim, “the legal grounds which stood at the basis of ordering this measure in the first place are still the same.”

96. It was viewed as vanishingly difficult to persuade courts to release defendants once orders for detention have been made, even if the factual basis for the initial detention has been disproved or has become irrelevant in the intervening period. For example, in Hungary defendants are often detained on the basis of the risk of interfering with the investigation [in 86-96% of the cases reviewed by researchers), but are not released even when the relevant investigative acts have been carried out. This was complicated by delays in court decisions in reviews of pre-trial detention, which kept the court from responding to developments in the investigation.
97. Prosecutors in many of the studied jurisdictions (including Romania, Hungary, Spain and Italy) rarely produced fresh evidence or arguments to justify extensions to detention periods. For example, they did so less than 10% of the time according to the Romanian research. Decisions extending detention were often automatic and without reference to prosecutors’ compliance with special diligence in relation to specific investigative acts. In Spain, researchers observed that renewals of detention after an initial two year period happened automatically, without interrogation as to the progress of the investigation and usually on the same grounds as first ordered, though some reviews alluded (arguably unlawfully) to the “short time spent in prison in relation to the sentence that could be given to the detainee,” thereby anticipating both a finding of guilt and the imposition of a lengthy sentence. Researchers noted that prosecutors and judges tended to refer only to the legal maximum lengths of detention, and not to any particular facts of the case. Accordingly, Spanish judges upheld detention in 85% of the cases Spanish researchers reviewed.
98. This can be contrasted with the situation in England and Wales, in which custody time limits are routinely tracked by the electronic case management system to ensure that cases involving detained suspects are prioritised. This system has worked so well to ensure special diligence that one prosecutor stated that it was “far easier to have people on bail than it is to lock them up.”

V. Case for Action

99. Research findings have shown that the practice of pre-trial detention decision-making does not comply with ECHR standards in many of the countries studied, even where legislation appears compliant on paper. Detailed, country-specific recommendations are set out in each of the ten country reports. The relevant questions here relate instead to the impact of the challenges presented by the research to the EU from a regional standpoint: What are potential solutions to the persistent problems in operationalizing well-established ECHR standards in practice? Given the variations of practice and recent reforms amongst Member States, why is excessive pre-trial detention an EU problem, with an EU-level solution?

1. Mutual Recognition/EU Legal Order

100. The unjustified and unlawful use of pre-trial detention is in itself a violation of the fundamental right to liberty. It is also a driver of high prison populations, resulting in prison overcrowding which impacts on the fundamental right to be free from torture, inhuman and degrading treatment. For these reasons, excessive use of pre-trial detention is presenting challenges to the effective operation of mutual recognition.

Angelo Spiteri: Malta

Maltese national, Angelo Spiteri is resisting extradition to Lithuania on fraud charges, due in part to poor conditions in Lithuanian prisons (with Article 3 violations found by the ECtHR in the context of Lithuanian pre-trial detention as recently as December 2015). The case is now before the Constitutional Court of Malta, where the process could take an additional 7 to 8 months, during which time Maltese law requires Mr Spiteri to remain detained in Malta (despite earlier compliance with terms of unconditional release), where conditions are also far from sufficient and there has recently been an outbreak of swine flu.

101. In response to the challenge that excessive use of pre-trial detention and resulting poor detention conditions pose to mutual recognition, domestic courts have taken one of two courses of action: (1) they surrender individuals to poor detention conditions or lengthy pre-trial detention that risk infringing on the fundamental rights of the surrendered; or (2) they refuse surrender. Both responses are problematic from the point of view of mutual recognition and the EU legal order. When surrenders are delayed or blocked due to the risk of fundamental rights infringements in the requesting state, there is a clear impact on the operation of mutual recognition. However, it is equally problematic for surrenders to be carried out in these circumstances, as mutual recognition then operates to undermine fundamental rights protection, rather than to uphold it. As the CJEU expressed in its opinion on accession of the EU to the ECHR,¹⁰⁰ the EU's own legal mechanisms pursuant to the Charter of Fundamental Rights should be sufficient to ensure fundamental rights compliance. However, fundamental rights violations that occur pursuant to the operation of the EAW demonstrate that the EU order is in fact not functioning effectively.

¹⁰⁰ Opinion 2/13 of the Court, 18 December 2014, para 179, available at: <http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN>

102. The undermining of mutual recognition and the EU legal order are evidenced by the following.

- a. **High profile cases of individuals surrendered to face lengthy pre-trial detention in poor conditions.** Well-known Fair Trials cases outlined in *Detained Without Trial*, including Andrew Symeou and Robert Horchner, are emblematic of this pattern but are not unique. Courts which order the surrender of individuals on EAWs despite concerns about detention conditions in the requesting state consider that doing so is what mutual recognition requires. However, cases like Andrew Symeou and Robert Horchner's are not examples of successful EAWs. Where mutual recognition is being upheld to the detriment of fundamental rights protection, the system is not functioning as it should.

Andrew Symeou:

Andrew was a young British student recently returned from a holiday in Greece when he was arrested in relation to the death of another British tourist in Greece, a young man Andrew had never met. The only evidence inculcating Andrew were witness statements obtained through police abuse. Following a battle in the UK courts in which Andrew argued that his fundamental rights would be infringed if he were surrendered to Greece, the UK nonetheless ordered his surrender in June 2009. Upon arrival in Greece, Andrew spent ten months in pre-trial detention including six months in abysmal conditions in Korydallos Prison (which Amnesty International called one of the worst in Europe) as its youngest resident. He was later released from pre-trial detention and finally tried in March 2011. Andrew was acquitted in June 2011, more than four years after the events in question.

- b. **The prominence of pre-trial detention reform in the recommendations of the European Parliament's review of the EAW.** The European Parliament has recognised the threat posed to mutual recognition by a failure of the EU to sufficiently safeguard fundamental rights in the detention context, most prominently in its review of the EAW in 2014.¹⁰¹The review highlighted both the risk of lengthy pre-trial detention¹⁰² as a result of delays in investigation and prosecution and, as well as the impact of poor detention conditions exacerbated by excessive reliance on pre-trial detention.¹⁰³
- c. **National reforms to the EAW:** Some Member States have taken matters into their own hands in recognition of the way the EAW can operate to undermine fundamental rights, and have introduced their own national level reforms to the EAW. In the UK, for example, an amendment to the Extradition Act¹⁰⁴ was adopted in direct response to Andrew Symeou's case, with the aim of preventing individuals being held for lengthy periods of pre-trial detention following surrender. The amendment bars extradition where a case is not sufficiently advanced to prosecute

¹⁰¹ See above, *European Parliament resolution of 27 February 2014*, (2013/2109(INL)).

¹⁰² *Ibid*, para 3.

¹⁰³ *Ibid*, para 16.

¹⁰⁴ Section 12^a, Extradition Act 2003. Available at: <http://www.legislation.gov.uk/ukpga/2003/41/section/12A>

speedily upon surrender. The fact that Member States feel it necessary to enact national reforms to the operation of the EAW demonstrates that fundamental rights are not sufficiently protected by existing EU instruments. This lack of trust in the EU instruments, as well as resulting variation in national practice, further undermines mutual recognition.

a) Refusals to surrender and reliance on assurances

103. Ongoing ECtHR findings of Article 5 and Article 3 violations by EU Member States, in particular pilot judgments¹⁰⁵ that indicate systematic failings by certain Member States, further demonstrate the fragile basis on which mutual recognition rests and provide the evidence base on which challenges to surrender are made. These cannot be ignored and in fact are central to the looming crisis of legitimacy posed to mutual recognition by poor pre-trial detention conditions. Such cases serve to undermine mutual trust and present increasing challenges for domestic courts considering EAWs from other Member States. In some Member States, courts have refused to surrender suspects to countries where detention conditions routinely infringe fundamental rights.¹⁰⁶ In practice, concerns in executing countries about poor detention conditions in requesting Member States have sometimes been resolved through the use of assurances as to the conditions in which particular suspects will be held post-extradition. In the UK for example, extradition courts have required assurances as to conditions in detention from Italy,¹⁰⁷ Hungary¹⁰⁸, Romania¹⁰⁹, Lithuania¹¹⁰, Bulgaria¹¹¹ and Greece.¹¹²

¹⁰⁵ E.g. *Varga and Others v. Hungary*, cited above note 22 (Article 5) and *Neshkov and Others v. Bulgaria* Apps. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 Jan 2015 (Article 3).

¹⁰⁶ See, e.g. *Badre v Court of Florence, Italy* [2014] EWHC 614 (Admin) (11 March 2014). See also *Lithuania v. Liam Campbell*, [2013] NIQB 19, available at http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2013/%5B2013%5D%20NIQB%2019/j_j_GIR8753Final.htm

¹⁰⁷ *Ibid*, *Badre v. Court of Florence, Italy*.

¹⁰⁸ *GS & Ors v Central District of Pest Hungary & Ors*, Court of Appeal - Administrative Court, January 21, 2016, [2016] EWHC 64 (Admin), available at <http://high-court-justice.vlex.co.uk/vid/co-451-2015-592366730>. Lawyers for the extradited persons, together with Fair Trials, are currently attempting to determine whether assurances given by Hungarian authorities in this case as to the amount of space afforded to each detainee are being enforced.

¹⁰⁹ *Florea v Judicial Authority Carei Courthouse*, Satu Mare County, Romania, [2014] EWHC 2528 (Admin), available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2014/2528.html>; see also *Blaj v Romania* [2015] EWHC 1710 (Admin) (concerning assurances as to individual personal space).

¹¹⁰ *Aleksynas v Lithuania* [2014] EWHC 437 (Admin) (assurance given as to detention in a specific prison where conditions were compliant with Art 3).

¹¹¹ *Vasilev v Bulgaria*, App 10302/05, 10 April 2016.

¹¹² *Ilija v Greece* [2015] EWHC 547 (Admin), available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2015/547.html> (assurance given that requested individual would be held at a new prison which was at the relevant time Article 3-compliant.)

Case study: Germany

A German citizen, suspected of being part of a fraud scheme as a result of his partnership with a group of companies, has been held in pre-trial detention since 19th February 2013. This decision was initially justified by the risk of absconsion, based on the assertion that he held money in Singapore on which he could depend post-flight. Even though the inaccuracy of this assertion has been proved, no alternative measures have been granted or accepted during this process with bail having been denied twice. The risk of absconsion is now based upon the fact that he speaks English fluently, studied in the US and would therefore be able to live and maintain himself abroad. The case has been on trial since September 2015, two and a half years after the arrest. Due to the complexity of the case, trial might go on for years. Visits by relatives are limited to two hours per month. His youngest son was two years old when he was arrested, and will start school this summer. He has hardly ever seen his three sons since his arrest, as he is held 500 kilometres away from his home town.

104. However, reliance on assurances can also be problematic from the perspective of fundamental rights protection. Fair Trials is not aware of any national court or body which systematically monitors compliance with assurances (for example, to ensure that suspects are not moved to facilities with worse conditions than those promised in the assurance). The lack of systematic monitoring of assurances makes it impossible to know how often these are used, what the content of the assurances is, and whether they are complied with. The ECtHR has provided guidance on safeguards in the use of assurances,¹¹³ but without sufficient monitoring, it is difficult to see how these are being respected in practice in the context of EAW cases. The factors the Court considers when assessing the quality of assurances are as follows:

- (i) whether the terms of the assurances have been disclosed to the Court;
- (ii) whether the assurances are specific or are general and vague;
- (iii) who has given the assurances and whether that person can bind the receiving State;
- (iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them;
- (v) whether the assurances concerns treatment which is legal or illegal in the receiving;
- (vi) whether they have been given by a Contracting State;
- (vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances;
- (viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;

¹¹³ *Othman (Abu Qatada) v The United Kingdom*, App. 8139/09, 9 May 2012, para 189.

(ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;

(x) whether the applicant has previously been ill-treated in the receiving State; and

(xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.¹¹⁴

105. The practice of routinely relying on assurances as a compromise for courts faced with the dilemma of whether to discharge extradition or allow surrender to potentially rights-infringing conditions has been viewed with concern by many experts and practitioners,¹¹⁵ as a tacit admission that human rights violations are indeed endemic but that protection from them should only be provided as an exceptional, case-by-case measure. A further consideration in relation to reliance on assurances to protect the fundamental rights of extradited people is the risk that people subject to extradition, often foreign nationals in the country of prosecution, will perversely enjoy a higher degree of rights protection in a kind of positive discrimination *vis a vis* nationals detained purely according to domestic procedures in which no particularised assurances are given.

b) Aranyosi and Căldăraru cases

106. The impact of poor detention conditions on the functioning of the EAW and the role of assurances in protecting fundamental rights has recently come to a head. The CJEU on 5th April handed down judgment in two cases from Germany¹¹⁶ in relation to requests from Hungary and Romania respectively, each of which raised concerns regarding detention conditions in those countries. The CJEU confirmed that Member States have a duty to respect the fundamental rights of requested people when considering EAWs. It made clear that Member States must conduct rigorous human rights enquiries prior to approving surrender, and to suspend surrender where there is a real risk that requested individuals would be subjected to detention conditions that infringe their fundamental rights (specifically, Article 4 of the EU Charter of Fundamental Rights).

107. In practical terms, the judgment obliges judicial authorities to defer execution of an EAW until the requesting Member State has provided sufficient information to make clear whether, “in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment.”¹¹⁷ It further specifies that the executing authority must request of the issuing Member State “all necessary supplementary information on the conditions in which it is envisaged that the individual

¹¹⁴ *Id.*

¹¹⁵ See, for example, House of Lords Select Committee on Extradition Law, *Extradition: UK law and practice*, 25 February 2015, available at:

<http://www.publications.parliament.uk/pa/ld201415/ldselect/ldextradition/126/126.pdf>.

¹¹⁶ C-404/15 *Aranyosi*, July 2015, and C-659/15 *PPU Caldararu*, 9 December 2015.

¹¹⁷ *Ibid.*, para 94.

concerned will be detained in that Member State.”¹¹⁸ If sufficient information is not forthcoming within a reasonable period of time, the judicial authority may decide to end surrender proceedings.¹¹⁹

108. The kind of particularised information from requesting Member State that the decision envisages being provided is comparable to the assurances which some executing state judicial authorities have already required in cases raising issues relating to detention conditions. As such, the same set of concerns regarding assurances will continue to apply: lack of centralised, comprehensive, reliable, contemporaneous sources of information on detention conditions; lack of monitoring mechanisms to ensure enforcement of particular guarantees; and the insufficiency of case-by-case assurances as a durable solution to the persistent problem of prison conditions in the EU which require a systematic and regional approach to resolve.

109. While welcoming the recognition that mutual recognition must operate within a framework of respect for human rights, the clear confirmation of the CJEU that judicial authorities are obliged to refuse surrender where it would result in a real risk of infringements of rights means that such decisions are likely to be taken by a wider swath of authorities across the EU. The continuous exposure, through enquiries pursuant to EAWs, of poor detention conditions and their impact on mutual recognition is likely to have a deleterious effect on mutual trust over time.

110. The limitations on the ability of individual courts to effectively protect individuals from the risk of fundamental rights violations in the face of systematically poor detention conditions confirms again the need for a coordinated, institutional response to those conditions in the form of regional legislation. Advocate-General Bot concluded his opinion in the Aranyosi case with an acknowledgement of the role of such legislation, and an invitation to the EU lawmaking bodies to produce it:¹²⁰

“Although the Commission, in 2011, painted a disheartening picture of the detention conditions in certain Member States and the consequences for the implementation of the Framework Decision, I note that neither the Council nor the Commission has undertaken action to ensure that the Member States meet all their obligations or, at least, take the necessary measures. However, Article 82 TFEU provides them with a legal basis for doing so.”

2. Other benefits to an EU regional response to excessive pre-trial detention

111. In addition to the functioning of mutual recognition, there are other benefits for the EU in adopting a regional response to this regional problem. From both an economic and a public safety perspective, pre-trial detention reform is an imperative for the EU regionally.

a) Economic benefits to pre-trial detention reform

¹¹⁸ Ibid, para 95.

¹¹⁹ Ibid, para 103.

¹²⁰ Opinion of Advocate-General Yves Bot, 3 March 2016, Paras 180-181 available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=174759&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=306463>

112. Several Member States, including Italy and Romania, have recently written to (Vice President of the European Commission) Frans Timmermans requesting funding and support to reduce overcrowding and improve conditions in their prisons.¹²¹ Clearly, prison overcrowding is a source of concern in many Member States, which lack sufficient funds to improve matters. Limiting the unlawful use of pre-trial detention is a cost-effective means of reducing prison populations, lowering the financial burden which overcrowding places on Member States. Pre-trial detainees make up roughly one fifth of all occupants of EU prisons.¹²² Given the EU's limited mandate to legislate directly in relation to prison conditions, the opportunity to address the procedural challenges that lead to overuse of pre-trial detention presents a key point of intervention to bolster both the legal and economic health of the EU.

b) Public safety benefits to pre-trial detention reform

113. Some Member States, including Romania and Italy, have expressed concern that overcrowding and resulting poor detention conditions could increase the risk of radicalisation in prisons.¹²³ This view has found support in some research, which concludes that radicalised prisoners typically come out of “badly managed, violent and overcrowded prisons.”¹²⁴

114. Indeed, research has established broader concerns about the impact of excessive pre-trial detention on public safety, as even short periods of time spent in pre-trial detention (2-3 days) correlated with further offences committed both within the pre-trial period and for two years following the termination of the case.¹²⁵ Furthermore, the evidence has demonstrated that those detained pre-trial are more likely to be sentenced to a prison term, and for longer lengths of time compared with other similarly situated defendants alike in age, gender, race, marital status, risk level, offence type, incarceration history and other factors. Reducing the excessive use of pre-trial detention is therefore an important step in reducing onward criminality and incarceration levels.

¹²¹ High Level Ministerial conference: The criminal justice response to radicalization, Brussels 19 October 2015, pg 9, available at: http://ec.europa.eu/justice/events/response-radicalisation-2015/index_en.htm. NB The Commission is taking steps to provide financial support in response to this request.

¹²² International Centre for Prison Studies “World Pre-trial Detention/Imprisonment List, 2015. Available at: http://www.prisonstudies.org/sites/default/files/resources/downloads/world_pre-trial_imprisonment_list_2nd_edition_1.pdf

¹²³ High Level Ministerial conference, pages 10-11

¹²⁴ Ibid.

¹²⁵ Lowenkamp, C. T., VanNostrand, M., and Holsinger, A. (2013). The hidden costs of pretrial detention. Houston: Laura and John Arnold Foundation, and Laura and John Arnold Foundation (2013). Pretrial criminal justice research. summarised at: http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/FOJ%2003-14_Issue1.pdf. See also Wheeler and Fry, ‘Project Orange Jumpsuit: Effects of Pre-trial status on Felony and Misdemeanor Case Disposition in Harris County,’ finding that in comparable cases, detained defendants are less likely dismissed or deferred and more likely sentenced to incarceration than their counterparts on pre-trial release with money bond. Working document available at: <https://www.scribd.com/doc/168593229/Project-Orange-Jumpsuit>. See also: US Department of Justice, Office of Justice Programs, ‘Pre-trial Services Programs: Responsibilities and Potential’, (March 2001), finding that statistically, defendants detained prior to trial plead guilty more often, are convicted more often, and are more likely to be sentenced to prison than are similarly situated defendants who are released prior to trial. Available at: <https://www.ncjrs.gov/pdffiles1/nij/181939.pdf>.

3. Pre-trial detention legislation as global priority

115. The EU is not alone in considering the development of improved standards in the area of pre-trial detention. Indeed it is increasingly the focus of regional and international human rights and legal bodies in the years since the Commission published the Green Paper. By legislating minimum European Union standards of pre-trial detention, the EU would be joining a global movement to improve protections for defendants and reduce the excessive use of pre-trial detention.
116. Reducing excessive use of pre-trial detention has been recognised as an essential element of good governance. Goal 16 of the United Nations Sustainable Development Goals¹²⁶ aims to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.” It will include measurement of unsentenced prisoners as a percentage of overall prison population as an indicator of progress in achieving access to justice.¹²⁷ UN Member States will be required to report against the indicators at regular intervals, meaning that they will be obliged to collect data relating to the use of pre-trial detention. Some have already agreed to do so during the first batch of reporting in July of this year.
117. The UN Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment (**SPT**) also focused on pre-trial detention in its 2015 Annual Report as a driver of overcrowding and resulting conditions that can infringe on the right of prisoners to be free from inhuman and degrading treatment.¹²⁸ In that report, the SPT identified abuses of procedural rights as contributing factors to the excessive use of pre-trial detention, including poor case management, limited availability of lawyers, and lack of legislative provision for or use of alternatives to pre-trial detention.¹²⁹ It also urges States Parties to “reduce the number of persons in pre-trial detention by respecting the presumption against pre-trial detention and using alternatives to remand in custody.”¹³⁰
118. Turning to the regional level, in 2014, the African Commission on Human and Peoples’ Rights adopted the Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (**the Luanda Guidelines**),¹³¹ Section 4 of the Luanda Guidelines provides detailed guidance for authorities engaged in the administration of pre-trial detention which cover, inter alia: lawful grounds of detention; the necessity of limiting infringements of liberty to the least restrictive conditions necessary; reasoned, written decisions clearly demonstrating that alternatives to detention were considered; the defendant’s right to challenge detention orders in hearings where the defendant has the right to be present, to access legal advice and relevant

¹²⁶ See: <https://sustainabledevelopment.un.org/sdg16>.

¹²⁷ Suggested Indicator 16.3.2, plus sub-indicators, available at “Goal 16: the Indicators We Want,” Virtual network sourcebook on measuring peace, justice and effective institutions, UNDP, pg. 46, available at: <http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/the-indicators-we-want.html>

¹²⁸ Eighth Annual Report of the Subcommittee on Torture, and other Cruel, Inhuman or Degrading Treatment, CAT/C/54/2, para 77.

¹²⁹ Ibid, para 85.

¹³⁰ Ibid, para 89.

¹³¹ Available at: http://www.achpr.org/files/special-mechanisms/prisons-and-conditions-of-detention/guidelines_arrest_police_custody_detention.pdf

documents and evidence, and which maintain the state's burden of proof. It then further provides judicial authorities with guidance on addressing delays in the investigation which contribute to extended periods of pre-trial detention.

119. Closer to home, the Parliamentary Assembly of the Council of Europe published a report, "Abuse of Pre-trial Detention in States Parties to the European Convention on Human Rights"¹³² in October 2015 which observed a number of factors contributing to abusive uses of pre-trial detention that reflect the findings of the researchers on this project. For example, the Committee on Legal Affairs and Human Rights found, among other observations:

- a. "That the laws of most Member States are generally in line with Convention standards, but their application by the prosecutorial authorities and the courts is frequently not," a phenomenon which "threatens the effectiveness of international legal cooperation," with special reference to the EU.¹³³
- b. That the high number of pre-trial detainees in Europe "is an indication that the permissible grounds for pre-trial detention, notably to prevent a suspect from absconding or interfering with witnesses and evidence are generally interpreted too widely or invoked pro forma in order to justify pre-trial detention for other, abusive purposes."¹³⁴ The report calls on States Parties to ensure greater equality of arms by ensuring that defence lawyers have "unfettered access to detainees," "access to the investigation file ahead of the decision imposing or prolonging pre-trial detention, and by providing sufficient funding for legal aid."¹³⁵

It also urges States to redress discriminatory application of pre-trial detention against foreign nationals, "in particular by clarifying that being a foreign national does not per se constitute an increased risk of absconding."¹³⁶

120. Given the growing consensus among international and regional human rights bodies that States must make the reduction of pre-trial detention a priority, legislative action from the EU would join a global movement for progress on this issue, and would ensure that the EU remains at the forefront of both standards and practice in human rights protection.

¹³² Abuse of pretrial detention in States Parties to the European Convention on Human Rights, Resolution 2077 (2015) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22206&lang=en>.

¹³³ Ibid, para 4.

¹³⁴ Ibid, para 6.

¹³⁵ Ibid, para 12.

¹³⁶ Ibid.

VI. Recommendations

1. Legislation

121. As the research findings make clear, standards of procedural protections in pre-trial detention decision-making continue to be insufficient to protect the fundamental rights of criminal defendants in the EU. These insufficiencies drive overcrowding, weaken mutual trust and undermine mutual recognition. Due to this impact on EU legal measures and the regional impact of poor detention conditions and decision-making in individual Member States, EU legislation is required to enhance these protections.
122. Unfortunately, “soft-law” measures such as guidelines or handbooks will not be sufficient to improve rights protection in this field. Indeed, existing soft law setting out standards relating to pre-trial detention, promulgated by the Council of Europe¹³⁷ and the United Nations,¹³⁸ has not yet succeeded in raising rights protection to the necessary levels. Further, non-binding standards from the EU in the area of criminal procedural rights, such as the Commission Recommendations on Vulnerable Suspects¹³⁹ and Legal Aid,¹⁴⁰ have not resulted in legal or behavioural change amongst Member States.
123. Financial support from the EU alone to help Member States struggling with poor prison conditions, in the absence of procedural safeguards, is unlikely to produce sustainable benefits. Rather the example of countries that have prioritised funding prison expansion, such as the USA, have highlighted the way in which spending on criminal justice and punishment continues to increase as a proportion of public funds without legal reform to stem its growth. The EU has the opportunity to demonstrate the way in which efficiencies can be found in a rights-protective model.
124. Legislation in this area, as in all the Roadmap measures, brings the benefit of a simple, coherent restatement of ECHR standards that is easier for prosecutors, lawyers and judges to apply and defendants to understand. Given the limited access many prosecutors and judges described having to regular training on ECHR standards in the area of pre-trial detention procedure, the greater clarity could have a real impact on judges’ ability to apply these standards in practice. Furthermore, an EU measure would provide additional regional

¹³⁷ Recommendation Rec(2006)13 of the Committee of Ministers to Member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, 27 September 2006, available at <https://wcd.coe.int/ViewDoc.jsp?id=1041281&Site=CM>

¹³⁸ For example, United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955 and 1977, Articles 8, 84-93, available at: https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoner_s.pdf; International Covenant on Civil and Political Rights, 1966, Article 10; Minimum Rules for Non-Custodial Measures (The Tokyo Rules), G.A. Res. 45/110, U.N. Doc.; Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment, 1988, principles 8, 19-27. A/RES/45/110 (Dec. 14, 1990).

¹³⁹ Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, 2013/C 378/02, available at: [http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32013H1224\(02\)](http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32013H1224(02)).

¹⁴⁰ Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings, 2013/C 378/03, available at: [http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32013H1224\(03\)](http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32013H1224(03)).

enforcement mechanisms through the powers of the Commission and the interpretive powers of the CJEU.

125. Legislation should not only aim to restate ECHR standards, however, but should also aim to provide guidance on the procedures through which these standards can be operationalised. Legislation can provide authorities with concrete, step-by-step procedures through which they can ensure that the principled standards of the ECHR are made real and practical. A legislative measure in this field can be compared to the other Roadmap measures, in which, for example, the letter of rights now required by Article 4 of the Right to Information Directive operationalises ECtHR standards on informed waivers of rights. Such a step-by-step approach would benefit decision-makers most not only by identifying all the factors which need to be considered and addressed (and those which must not come into consideration), but also the order in which they should be considered, to ensure (for example) that thresholds of suspicion and access to evidence are established, and that arguments from both parties and alternatives are fully considered before detention is ordered.

126. Considerable efforts have been made in some Member States studied for this research, including Poland, Lithuania and Italy, to reform domestic pre-trial detention procedures and reduce the risk of findings of Article 5 violations. However, these efforts are happening in a piece-meal manner. The excessive use of pre-trial detention is an EU-wide problem, with EU-wide impacts, and therefore requires an EU-wide solution. Nonetheless some of these domestic legal reforms may provide useful examples of the kind of guidance that EU legislation can provide.

127. In particular, recent reforms to the Italian system introduced to reduce overcrowding as a result of the *Toreggiani* decision¹⁴¹ provide pragmatic solutions to many of the problems identified through this research, which could provide a model for EU legislation in some respects. These reforms are set out in detail in the Italy country report, but due to the timing of the implementation of these reforms, are not caught by the research.

128. Below are set out some initial suggestions for what EU legislation on pre-trial detention decision making could contribute to current national practice. These recommendations are directed at the European Commission, but could equally apply to the European Parliament who also have the ability to introduce legislation in this area.

2. Procedure

129. Prompt initial hearing and de novo initial review: An initial hearing evaluating the validity of arrest and deciding about whether suspects and accused people will be held in pre-trial detention as a preliminary matter should happen as promptly as possible following arrest. A prompt initial hearing is important for a host of human rights-based reasons (for example, the vulnerability of recently arrested individuals to mistreatment). However, the speed with which this initial hearing must be held often makes it difficult for defendants to enjoy fully the procedural rights which will ensure that a decision to detain or release a suspect pre-trial is effective and lawful (for example, the ability to examine the evidence and consult with a lawyer).

¹⁴¹ *Toreggiani and Others v. Italy*, App 43517/09, 46882/09, 55400/09, 8 Jan 2013.

Given the long term implications of initial decisions to detain, a substantive detention hearing could be required to be held shortly after the initial hearing, on a *de novo* basis, to evaluate the lawfulness of detention after the suspect has had time to access a lawyer, review the evidence, and obtain interpretation and translation where necessary.

130. Full implementation, clarification and expansion of rights within Roadmap Directives: A new Directive could build on the content of the other Roadmap Directives with a particular focus on the implications for pre-trial detention decision-making; especially in relation to the Right of Access to a Lawyer Directive and the Right to Information Directive (including both notification of rights and access to case materials).

a. Particular clarification and enhancement of the timely right of access to materials essential for challenging detention: Prosecutors must limit their arguments in favour of detention to evidence which has already been shared with the defence. The judge must ensure that the defence has had sufficient time to examine and make comment on that evidence prior to making a decision ordering pre-trial detention, and must not rely on any evidence that has not been sufficiently examined by the defence. Furthermore, Member States could be required to use their best endeavours to introduce best practices in relation to access to the case file, for example an amendable electronic case file (with paper copies still available where necessary for easier review by suspects and defendants in detention).

b. Safeguarding the right of access to a lawyer: Defendants should not appear unrepresented at pre-trial detention hearings unless they have specifically, knowingly and intelligently waived the right to a lawyer. If there has been some practical challenge to appointing a lawyer, or if a lawyer has elected not to appear at a pre-trial detention hearing without the consent of the defendant, pre-trial detention should be strictly limited to a time period in which a lawyer can be appointed or be present, with a *de novo* hearing held as soon as possible following that appointment. Lawyers must be afforded sufficient time to consult with case materials and with defendants prior to any hearing.

131. Ensuring that prosecution and defence arguments are treated equally: Judges could be required to make reference to both the arguments of the prosecution and the defence (insofar as they are made by each side). This could potentially impact not only on the quality of judicial decision-making, but may also have the effect of encouraging better quality advocacy by both parties.

3. Substance

132. Reasonable suspicion and threshold of crime: In order to ensure that pre-trial detention is not used excessively, a threshold of possible punishment can be introduced to exempt minor offenders from the possibility of pre-trial detention. In the Italian reforms, in addition to a statutory minimum sentence necessary before imposing pre-trial detention, the judge must also refrain from imposing pre-trial detention if he or she believes that the sentence will be suspended following any eventual conviction. A similar provision could be replicated in an EU instrument.

133. Grounds for pre-trial detention: Apart from the controversial use of the “public order” ground in the Netherlands, France, and Romania (among others) the biggest concern raised by the research regarding the grounds of pre-trial detention is the “smuggling in” of unlawful grounds (such as the seriousness of the offence, foreign national status of the accused, or punitive motivation) under the guise of ostensibly lawful ones. To improve the practical application of the strict grounds for pre-trial detention, legislation could, propose some of the following:

- a. Overtly prohibit decisions to detain made exclusively on the basis of the seriousness of the offence or the length of the eventual sentence (often disguised as evidence of risk of flight).
- b. Pro-actively require reference to be made to evidence in the case file which both parties have had an opportunity to examine.
- c. As in the Italian and Polish reforms, clarify that any pre-trial measure must be withdrawn when serious indicia of guilt or reasons for precautionary measures no longer exist. Enforcement of this expiration can be supported through limited time periods in which pre-trial detention can be imposed for reasons of the integrity of the investigation (for example, 90 days in Italian law).
- d. Require that individualised assessments are made in relation to risks of reoffending and flight.

134. Pre-trial detention as a measure of last resort: The best way to ensure that pre-trial detention is used as a measure of last resort is to require judges to state publicly in their decisions why all available alternatives are not sufficient to ensure that the defendant will appear at court and refrain from further offences or interference with the investigation.

135. Reasoned Decisions: Decision makers should be required to make reference to both the prosecution and the defence arguments (as is now required by Italian law) to better protect equality of arms and to motivate defence counsel to improve their argumentation. Reasoning must also be required to make reference to the specific facts of each case (beyond the nature of the allegation itself), demonstrating why the generic grounds are relevant to each individual case. This would prohibit, for example, a finding of reoffending risk based purely on the nature of the offence and not on an assessment of the individual.

4. Review

136. Individualised, evidence-based determinations: Legislation should ensure that reviews are meaningful, not mechanistic, and that they provide a probing enquiry into whether ongoing developments in each case justify the harms of prolonged pre-trial detention. As with first instance decisions, review decisions should be taken at an oral, adversarial hearing at which the defendant and his counsel can attend. Judges should have to make reference to arguments and evidence from both prosecution and defence, and must take into consideration the enduring strength of the reasons given for detention at first instance to ensure that continued detention is justified.

137. Regular Review and Hearing: Reviews should be required automatically at key junctures (e.g., monthly) with the additional ability of the defence or prosecution to ask for ad hoc reviews on the basis of changed circumstances. Judges should be encouraged to impose interim time limits in relation to specific investigative acts as a means of ensuring that special diligence is observed during the investigation. Defendants and defence lawyers should be present (or otherwise be required to actively participate, where hearings are not held) at all reviews, and the requirements as to reasoning should apply to reviews as well as first-instance decisions. Legislation could further provide that defendants have the option of requesting that a judge independent of the investigation review detention (as is now provided by Italian law).
138. Duration of pre-trial detention: As earlier recommended, time limits should be imposed for specific investigative acts to protect against excessive pre-trial detention and encourage special diligence, with the presumption of release applying at each application for renewal of detention. Overall time limits should be considered, perhaps on a scale to the eventual sentence possible, so that individuals are not serving their entire sentence on remand, and time served on remand should be deducted from final sentence.

5. Alternatives

139. Alternatives to pre-trial detention: Because Member States each have different practices, and face different legal and resource constraints, an exhaustive list of alternatives to detention would not be appropriate in EU legislation. However judges should be required to demonstrate that they have considered all relevant alternatives before pre-trial detention can be imposed. Both the prosecution and defence should be permitted to suggest individualised alternatives, such as drug treatment, holding a job and maintaining a mailing or physical address. Alternatives should always be the least restrictive means necessary to ensure the purpose for which restrictions were deemed necessary, and should be regularly reviewed and reduced in severity where possible. Under a step-by-step approach, judges must first establish what the risk is the court seeks to prevent, before examining what alternative measure might mitigate that risk. Only if all available alternatives would be inadequate to address that particular risk can detention be imposed. Further research should be conducted in the area of alternatives, with a view to developing further soft-law guidance on, for example, the development of pre-trial services, risk assessments, and bail information services and bail hostels.

6. Other considerations

140. Effective Remedy/Compensation: Member States should ensure that their domestic law provides a right to challenge unlawful pre-trial detention and an effective remedy provision for individuals detained in contravention of the standards set out in any legislation, including in cases involving unlawful pre-trial detention or acquittal following pre-trial detention.¹⁴²

¹⁴² See, i.e. *Affaire Vlieeland Boddy et Marcelo Lanni v. Espagne*, Apps 53465/11 and 9634/12, 16 Feb 2016, finding that Spain's failure to provide compensation for pre-trial detention following acquittal and termination of the case respectively infringed on the presumption of innocence.

141. Data collection: Member States should be required to collect comprehensive data on pre-trial detention practice.¹⁴³ This data should be disaggregated at least according to nationality, ethnicity, and sex of defendants, and should include (but not be limited to) the following:

- a. Rate of arrest (number of people arrested per 100,000 of the general population);
- b. Volume of pre-trial detention (number of people in pre-trial detention);
- c. Rates at which pre-trial detention is requested and imposed, duration of pre-trial detention (average length as well as number of defendants kept in detention longer than a prescribed period);
- d. Rate of use of alternatives to detention and unconditional release;
- e. Number or proportion of defendants complying with terms of release, and outcomes of cases involving pre-trial detention compared with those which do not.

7. Conclusion

142. This report only summarises what is a wealth of information and recommendations contained in the ten country reports, and is only the beginning of a more detailed conversation on the need for and content of EU legislation protecting minimum standards of pre-trial detention. As the Commission considers its next steps, Fair Trials urges it to engage fully with civil society, including NGOs, defence practitioners and academics to ensure that any proposed measure is informed by on-the-ground practice and priorities. Fair Trials, the project partners, and the LEAP network remain willing and able to assist in this process.

¹⁴³ For a discussion on the role of data in assessing pre-trial detention, see *Presumption of Guilt: The Global Overuse of Pretrial Detention*, Schöenteich, Martin, Open Society Justice Initiative, pg 137 – 140, “The Role of Data in Assessing the Problem.”

VII. Annex 1: (List of links to online versions of 10 country reports in English and national language)

England & Wales

<https://www.fairtrials.org/wp-content/uploads/Country-Report-England-and-Wales-MASTER-Final-PRINT.pdf>

Greece

<https://www.fairtrials.org/wp-content/uploads/The-Practice-of-pre-trial-detention-in-Greece.pdf>

Hungary

English

https://www.fairtrials.org/wp-content/uploads/PTD_country_report_Hungary_HHC_2015.pdf

Hungarian

https://www.fairtrials.org/wp-content/uploads/MHB_kutatasi_jelentes_elozetes letartoztatas_2015.pdf

Ireland

<http://www.iprt.ie/pre-trial-detention>

Italy

English

<http://www.associazioneantigone.it/upload2/uploads/docs/The%20practice%20of%20pre-trial%20detention%20in%20Italy.pdf>

Italian

<https://www.fairtrials.org/wp-content/uploads/fairtrials.pdf>

Lithuania

English

<http://www.hrmi.lt/uploaded/TYRIMAI/Pre-Trial%20Detention%20in%20Lithuania%20-%202015.pdf>

Lithuanian

<https://www.fairtrials.org/wp-content/uploads/Suemimo-taikymas-Lietuvoje-2015.pdf>

Poland

http://www.hfhr.pl/wp-content/uploads/2016/02/HFHR_PTD_2015_EN.pdf

Romania

English

<https://www.fairtrials.org/wp-content/uploads/Pre-trial-detention-in-Romania-by-APADOR-CH.pdf>

Romanian

<https://www.fairtrials.org/wp-content/uploads/Raport-arestare-preventiva-final.pdf>

Spain

https://www.fairtrials.org/wp-content/uploads/INFORME_LA-PRACTICA-DE-LA-PRISION-PROVISIONAL.pdf

The Netherlands

<https://www.fairtrials.org/wp-content/uploads/j.h.-crijns2c-b.j.g.-leeuw-h.t.-wermink-pre-trial-detention-in-the-netherlands.-legal-principles-versus-practical-reality.pdf>

Country Report - England & Wales

Executive summary

This study of pre-trial detention decision-making in England and Wales was carried out as part of a wider project conducted in 10 European Union jurisdictions led by the London and Brussels-based NGO Fair Trials. It was funded by the European Commission



University of the
West of England

under its Criminal Justice Programme (Grant No. JUST/2013/JPEN/AG/4533). The fieldwork for the research was carried out between November 2014 and June 2015. In order to gather data we: distributed an on-line questionnaire which was completed by 141 defence lawyers; observed 68 pre-trial detention hearings in three magistrates' courts and one Crown Court over 17 days; examined 76 Crown Prosecution Service case files that included at least one pre-trial detention (bail) hearing; and interviewed five judges and magistrates, and five Crown prosecutors. Whilst the size of the research samples was constrained by the available time and resources, the information obtained from them provides some important insights into the way in which pre-trial detention is regulated and how that works in practice, and lays the foundation for a number of significant conclusions and recommendations.

The proportion of those in prison in England and Wales who have not been found guilty, or who have not been sentenced, is one of the lowest in Europe and, indeed, the world. At the same time, England and Wales has one of the highest per capita prison populations in Europe. As a result, in 2014 over 80,000 people spent some time in prison without having been sentenced for a criminal offence, and on any particular day almost 12,000 people are in prison awaiting trial or sentence. One of the objectives of this project was to establish whether and how it may be possible to reduce this number.

The key findings regarding pre-trial detention decision-making in England and Wales are as follows.

- 1. The decision-making process** The way in which pre-trial detention is regulated in England and Wales, primarily by the Bail Act 1976, is largely (although not completely) compliant with international standards and has many positive attributes. A person charged with a criminal offence is produced promptly in court, and has a *prima facie* right to be released on bail. They

can only be kept in custody if the court is satisfied that certain conditions are met, such as a well-grounded fear that they will commit offences, fail to turn up in court, or interfere with witnesses. The defendant is normally represented by a lawyer, and if they are remanded in custody at the first court hearing they have, as of right, up to two further opportunities to apply to be released. However, the courts devote little time to pre-trial detention hearings, caused in part by high case-loads and a lack of resources. The provision of relevant information to defence lawyers, and to a certain extent to the courts, is often limited and very dependent on case summaries provided by the police. As a result, decisions are made by the courts without full knowledge of the relevant facts. **See Chapter IV.**

- 2. The substance of pre-trial detention decisions** The law on pre-trial detention has become very complex and it was not fully understood by all of the criminal justice personnel who have to implement it. Whilst the law requires judges and magistrates to fully explain to a defendant why bail is denied, with specific reference to the facts of the case and the circumstances of the defendant, this often does not happen in practice. This means that many defendants may not understand why they are being remanded in custody, and leads many defence lawyers to believe that the courts favour the prosecution. **See Chapter V.**
- 3. The use of alternatives to detention** The courts make extensive use of conditional and unconditional bail, so that the majority of people facing a criminal charge are not locked up unless and until they are found guilty and given a custodial sentence. However, the use of alternatives to custody, in particular conditional bail, is limited by a lack of bail information schemes and facilities such as bail hostels. In addition, confidence in conditional bail is weakened by a lack of faith that conditions are adequately enforced. **See Chapter VI.**
- 4. Review of pre-trial detention** Whilst the *prima facie* right to bail is respected in practice on the first occasion that a defendant appears in court, if the court remands them in custody the burden of persuading a subsequent court that they should be released often effectively shifts to the defendant. This is compounded by the fact that defendants who have been remanded in custody are not normally produced in person at review hearings in the Crown Court, which are routinely conducted in private. **See Chapter VII.**
- 5. 5. Outcomes** We found that nearly half of those people who are kept in custody at some stage before their trial or sentence were either found not guilty, or if found guilty, were given a non-custodial sentence. **See Chapter VIII.**

In the context of these findings we make the following recommendations.

- The law governing pre-trial detention should be codified and simplified so that all of those who have to implement it, or are affected by it, understand it and in order to ensure that it fully complies with all relevant ECHR standards. The training of judges, magistrates and prosecutors should be improved so that all are fully aware of both domestic legislation and the requirements of international human rights standards, especially ECtHR standards.
- The Bail Act 1976 (or legislation that replaces it) and the Criminal Procedure Rules should be modified to ensure that the defence have full access to the information that they need, and have automatic access in accordance with the EU Directive on the Right to Information. Training for the police should be improved so that the summaries that they provide to the prosecution are fair and objective.
- The Bail Act 1976 (or any legislation that replaces it) should be amended to make it absolutely clear that the burden is always on the prosecution to persuade a court that bail should be withheld, both at the initial pre-trial detention hearing and at subsequent review hearings. The law should require review hearings to be conducted on a regular basis, and that decisions should be made having regard to all relevant factors and circumstances.
- The courts and the Crown Prosecution Service should be adequately funded so that they can devote sufficient time to their decisions regarding pre-trial detention, and training should specifically deal with the practical implications of the *prima facie* right to bail at second or subsequent hearings.
- The Criminal Procedure Rules should be amended to make it absolutely clear that courts must explain their decisions by reference to the specific facts of the case and to the representations made by the prosecutor and the defence lawyer. This should be reinforced by improving the training that magistrates are given, and consideration should be given to introducing a right for the defendant or their lawyer to apply to the court for a full explanation of the decision.
- Sufficient resources should be provided to ensure that bail information schemes are available in all magistrates' courts and at all hearings, and to establish and maintain a sufficient number of bail hostels in appropriate locations. In addition, the mechanisms for monitoring and enforcing bail conditions should be reviewed with a view to building confidence in their effectiveness.

A full list of recommendations is set out in **Chapter IX**.

Executive Summary

The overuse of pre-trial detention ('PTD'), increasing numbers of detainees of foreign nationality and overcrowding of prisons are chronic problems facing the Greek criminal justice system. Pre-trial detention is a measure of last resort according to the Greek



Criminal Procedure Code and specific and strict criteria govern its application, where alternatives cannot safeguard the presence of the accused at the trial. Despite the persistent nature of the problem, little research has been conducted on the key factors contributing to the overuse of PTD and the ineffectiveness of alternatives.

In this research, data was gathered through a) desk research b) a survey in which 166 defence practitioners took part c) the review of 44 case files d) interviews with 5 investigating judges and e) interviews with 4 prosecutors. Whilst the size of the research samples was constrained by the available time and resources, the information obtained from them provides some important insights into the way in which PTD is regulated and how that works in practice in Greece, and lays the foundation for a number of significant conclusions and recommendations.

The key findings regarding pre-trial detention decision-making in Greece were as follows:

1. Decision-making procedure: Defendants do generally have legal representation at pre-trial hearings. 30% of the lawyers surveyed stated that in cases that have to be tried within 3 days of arrest ("in flagrante delicto" cases) their ability to prepare for pre-trial detention hearings is limited by limited time of notice of such hearings. In none of the cases analysed during which interpretation was provided was the evidence in the case file translated into the language of the defendant.

2. The substance of decisions: The research revealed that PTD is most often ordered in order to address the risk of reoffending and the risk of absconsion and that, in violation of ECtHR-standards, the severity of the crime is often a determining factor. The evidence in case files forms the basis for decision making on PTD. Pre-trial detention orders are often based on general arguments and assumptions, without due attention to the specific circumstances of the case at hand. References to specific evidence or claims of the defence are rarely found in the reasoning provided in pre-trial detention orders.

3. Use of alternatives to detention: The research revealed a lack of judicial faith in the effectiveness of alternative measures, especially with regard to their capacity to prevent reoffending and ensure

the presence of the accused at the trial. The use of electronic monitoring is very restricted, as the defendant is obliged to purchase the devices necessary. Additionally, the lack of faith in alternatives to detention often leaves the judges no alternative to ordering pre-trial detention as they feel compelled to protect the public.

4. Review of pre-trial detention and special diligence: Pre-trial detention orders are rarely reversed unless compelling evidence or changes in the circumstances are proven. The research revealed that organisational issues (workload of judges and courts, delays in investigation) are often responsible for the relatively long duration of PTD (which is on average 6-12 months according to available statistics and supported by the data collated through the research produced through the project). However, the statutory limits (1 years or 18 months) appear to have a positive impact on the overall length of the trial, which is overall shorter for pre-trial detainees compared to others as it is usually concluded before the statutory limits expire.

In light of these findings, the main **recommendations** are that:

- The EU Right to Interpretation and Translation Directive and the EU Right to Information Directive should be implemented effectively so as to guarantee access to the case file and to protect foreign defendants;
- Unified standards on pre-trial detention which comply with ECtHR-standards should be developed in the form of legislative reform, so as to provide clear guidance which judges and prosecutors can rely on in their daily work;
- Specific training/continuous training should be provided to investigating judges and prosecutors who participate in decision making on PTD, especially in relation to ECHR standards and case law;
- Evidence and reasons for ordering PTD, including the inadequacy of alternatives, should be individualised and clearly stated in pre-trial orders and review decisions;
- The use of pre-trial detention and alternative measures should be monitored through comprehensive data collection so as to identify problematic points and positive practices; and
- The effectiveness of alternative measures should be enhanced by increasing accessibility for all defendants and by providing specific training to judges and prosecutors to increase their trust in these measures.

A full list of recommendations will be found at the end of the Country Report.

Executive Summary

During the past few years, pre-trial detainees have made up almost one-third of the prison population in Hungary, contributing to the overcrowding of the penitentiary system, which, according to a 2015 judgment of the European Court of Human Rights (ECtHR), constitutes a structural problem in Hungary. For over half a decade until 2013, the number of pre-trial detainees in Hungary had increased constantly. However, since 2014, significant positive developments have been detected in the statistical data: there has been a reduction of around 20% in the number of cases in which



Hungarian Helsinki Committee

pre-trial detention is ordered, corresponding to a decrease in the number of prosecutorial motions aimed at ordering this coercive measure. This decrease in the use of pre-trial detention does not, however, guarantee that judicial decisions and indeed the decision-making process as a whole are consistently compliant with standards established by the higher Hungarian judicial forums, the ECtHR and relevant European Union (EU) legislation.

The research project “The Practice of Pre-trial Detention: Monitoring Alternatives and Judicial Decision-making”, funded by the EU, was conducted in 10 different EU Member States in 2014–2015, in Hungary by the Hungarian Helsinki Committee. The project’s research results presented below are based on (i) a desk-research, (ii) a survey conducted among 31 defence counsels, (iii) review of the case files of 116 defendants convicted primarily for robbery, (iv) interviews with five prosecutors, and (v) written responses provided by 10 judges to a standard set of questions. An overview of the results of the research is as follows:

1. Decision-making procedure

The presence of a defence lawyer is optional at judicial hearings on pre-trial detention and in fact ex officio appointed lawyers rarely appear at the hearing. Where they are present, their level of activity is often low. While the reasons for this were not identified through the research, such situations jeopardise the effectiveness of the suspect’s defence. 45% of lawyers surveyed explained that they have only 30 minutes or less with access to the case file in which to prepare for the hearing. While the amendments of the Hungarian Code of Criminal Procedure aimed at transposing Article 7 of

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (Right to Information Directive) have brought along substantial improvement in the defence's access to evidence related to pre-trial detention, the practice of authorities can pose significant obstacles to the effective exercise of this right.

2. The substance of decisions

Pre-trial detention was ordered in the vast majority of cases observed and reviewed. The most common reasons for ordering pre-trial detention were the risk of absconding, interfering with the course of justice and the risk of reoffending. The reasons given by judges for ordering pre-trial detention are often abstract and not specific to the case, repeating the prosecutorial motions requesting a pre-trial detention order. The analysis of the data supports a long-standing complaint of defence counsels, namely that courts seem to pay no or little attention to the arguments put forth by the defence: in the sample, judges referred to the evidence or arguments of the prosecution in 83.3% of the decisions, and only in 29.7% did they refer to the arguments of the defence.

In violation of ECtHR-standards, the risk of absconding is often established solely or primarily on the basis of the gravity of the offence and the prospective punishment. The courts also tend to attribute great relevance to circumstances that, according to the jurisprudence of the ECtHR, may not serve as decisive factors. The Hungarian Helsinki Committee encountered a number of decisions in the case files that referred to the risk of interfering with the course of justice on the basis of very abstract arguments and often in phases of the procedure when such risks are minuscule or non-existent (after the closing of the investigation and, in one case, even after the delivery of the first instance judgment). With regard to the risk of reoffending, court decisions referring to convictions that took place long before the suspected perpetration of the offence serving as the basis of the actual proceeding, or convictions of completely different nature, as well as the substantiation of detention with nothing but the lack of regular income were encountered, in contradiction with ECtHR jurisprudence.

3. Use of alternatives to detention

Statistical data show that existing alternatives to pre-trial detention (house arrest, etc.) are heavily underused. Interviews with judges and prosecutors seem to support defence counsels' perception that there is little confidence in alternatives, and that this has not changed significantly with the introduction of electronic tagging in 2013.

4. Review of pre-trial detention

The statistical analysis of further decisions on pre-trial detention (prolonging, upholding or reviewing pre-trial detention) provides evidence for the continuous lack of tailored reasoning for the ongoing deprivation of liberty. The concerns raised above in relation to the substance of initial pre-trial detention decisions also apply to these further decisions.

In relation to appeals against pre-trial detention, second instance courts deciding on pre-trial detention never meet the defendant in person, which may be a violation of the ECtHR standards. In addition, it sometimes takes a very long time to deliver the second instance decisions, which is a violation of the obligation to proceed with adequate speed in cases where the defendant is deprived of his/her liberty.

The research shows that investigating authorities often do not conduct more efficient investigations when cases involve a detainee. These instances result in a number of cases in which the length of detention violates the relevant provisions of the European Convention on Human Rights and Hungarian law. In addition, the elimination of the statutory upper limit of pre-trial detention in some cases gives the dangerous message that the legislator is willing to accept serious delays in procedures even when the defendants are deprived of their liberty.

Recommendations

The conclusions of the research indicate that the practice of pre-trial detention decision-making in Hungary falls short of the ECtHR standards in a number of areas. In light of these findings, the main recommendations are the following:

- The presence of defence counsel at hearings related to pre-trial detention should be made mandatory, and a deadline for notifying the defence counsel about the hearings related to pre-trial detention should be established, which ensures that defence counsel can participate in the hearing.
- The legal amendment that allows for unlimited periods for pre-trial detention in certain cases should be abolished and fair time limits imposed.
- Various legislative steps seem desirable with the purpose of guaranteeing the reasonable length of pre-trial detention. E.g. judges should be authorised to terminate pre-trial

detention on the basis of the authorities' failure to conduct the proceeding in a fast track manner if the suspect is detained.

- In order to ensure unrestricted access to the case files, the respective legal provisions should be further amended to ensure the effective implementation of the Right to Information Directive.
- Alternatives to pre-trial detention should be used more often. The underuse of these should be examined by one of the jurisprudence-analysis groups established by the president of the highest judicial forum.
- Reasoning of pre-trial detention orders at all levels could be improved by respective judicial and prosecutorial training, including information on the related ECtHR case-law to ensure ECtHR-standards are applied when making decisions related to pre-trial detention.
- The law should be amended to ensure that appeal decisions in the pre-trial detention context can or in certain cases must only be taken after an oral hearing.
- Legislative reform should further impose deadlines to ensure that second instance decisions are delivered within an adequate timeframe.

Executive Summary

“Obviously, the starting position is these are innocent people. We shouldn’t be interfering with their liberty either by detaining them or imposing conditions.” High Court Judge



This Report confines the terms ‘remand’ and ‘remand in custody’ to prisoners who are untried and un-convicted as this accords with the categorisation of the Irish Prison Service¹⁴⁴ and Rules 71-74 of the *Prison Rules 2007* and is limited to the scheme for adult accused persons.

The general consensus among those working in the Irish criminal justice system, including members of An Garda Síochána (the police force), defence practitioners, prosecutors and the judiciary is that Ireland operates a comparatively fair bail system. As observed from the hearings and case files, people refused bail and remanded in custody at the District Court level can lodge a fresh application in the High Court which holds a special bail list every Monday. During High Court bail applications, the researcher observed that the applicant has a good prospect of being granted bail with conditions, unless the objection(s) under the *O’Callaghan* rules, or section 2 of the *Bail Act 1997* are such that the judge does not accept that the perceived risk(s) may be effectively met with conditions. Bail was granted in 22 of the 47 cases observed in the High Court.

The research suggests that there are different approaches to bail in urban and rural districts, with judges in courts outside Dublin more likely to remand a person in pre-trial detention even where the number of previous bench warrants (warrants issued by a court for failing to turn up to court on criminal charges) received was relatively low. A knowledge/practice exchange between Gardaí, lawyers and judges in both urban and rural areas might contribute to addressing the inconsistency in approach nationally,. The research data also reveals that there is a general over-use of bail conditions. Indeed, something of a ‘pro forma’ rather than an individualised approach is perceptible in the setting of conditions.

¹⁴⁴ See, for example, *Irish Prison Service Annual Report 2014*, p. 20 available at http://www.irishprisons.ie/images/pdf/ar2014_english.pdf.

In the pre-trial context, there is a right to release on bail in Ireland, but it is not an absolute right. This research found widespread agreement among defence lawyers, An Garda Síochána (the police force), prosecutors and the judiciary that the Irish court bail system works reasonably well in practice. A minority of defence practitioners surveyed (20%, n=6) were, however, of the opinion that the judiciary are unduly deferential to members of An Garda Síochána and tend to accept their objections to bail regardless of their merit. There may also be an urban/rural divide in terms of the depth of understanding on the part of Gardaí and District Court judges about the precise application and limits of the bail laws.

Only one out of four judge interviewed expressed the view that the case-law of the European Court of Human Rights (ECtHR) relating to pre-trial detention was relevant in the Irish bail context. According to the other 10 interviewees, the rules on granting bail in Ireland are governed by the Irish Constitution, the *O'Callaghan Rules* and section 2 of the *Bail Act, 1997*.

Out of the 91 bail hearings attended, judges ordered pre-trial detention in 44% of cases (n=40); that is, they refused bail, or revoked it on review. Bail with conditions was granted in 48% of hearings (n=44). The prosecution raised previous convictions and offences committed on bail in relation to 40% applicants (n=37), as a basis for persuading the court of the risk of future offending under section 2 of the *Bail Act, 1997*. Judges only cited the risk of reoffending as a ground for refusing bail in respect of 13% of applicants (n=12).

The research reveals that there is both an over-use of conditions and inadequate monitoring of compliance with bail conditions. **Not a single case of release on court bail without conditions was observed during the course of the research.** This is a startling finding, since the 91 bail applications observed were drawn from a wide range of offences, from very minor matters involving first-time offenders, to charges of murder, with mostly property offences in between. People at the lower end of the offending scale were routinely granted bail subject to onerous multiple conditions. Granting bail with onerous multiple conditions will in some cases have significant implications and in some cases will constitute an interference with liberty. Since those subject to bail conditions have, in the most part, not yet been convicted of any offence, such infringements can only be justified if necessary, proportionate and lawful. While Gardaí are frequently reluctant to see a defendant released on bail without onerous conditions, their monitoring of such conditions seems to be, at best, haphazard. A Garda Court Presenter stated that in 40% of the cases that come before him in his weekly applications to revoke bail, the conditions are not being monitored properly.

A key recommendation of this research is that Gardaí should regularly receive comprehensive training in Irish bail law and request only those bail conditions they believe are absolutely necessary to meet any reasonable objection to bail. Requiring Gardaí to proactively monitor conditions imposed may encourage a more nuanced and proportionate approach to the proposal of conditions. The absence of any grant of completely unconditional court bail from the research raises the issue of the role of judiciary in considering objections in bail matters. Conditions should be selected and imposed on the basis that they are reasonable, proportionate and objectively necessary to meet an identified risk. Even where there are strong objections submitted by the Prosecution, the judiciary should avoid any appearance of a 'pro forma' approach to bail conditions, i.e. imposition of a standard set of conditions in every case without a consideration of the individual circumstances or risk level. Onerous conditions should be reserved for those who present as flight risks or pose a significant threat to society.

Legislative reform in this area is currently underway in Ireland. Head 11(1) of the *General Scheme of the Bail Bill, 2015* requires judges to give their reasons for their bail decisions, including the conditions set. This is a welcome development, since a legal obligation to explain the rationale for the imposition of conditions in every case should operate to reinforce the duty to adopt an individualised, proportionate approach. Head 11(2) of the Bill states that where requested by the defence or prosecution, the judge may approve a written record of their decision in a bail application. It would be preferable if the judge was required to keep a written record of their decisions in all cases, whether or not they are requested to do so by the defence or prosecution. Providing written reasons for all decisions relating to bail would enhance transparency in this complex area of law, better supporting evidence-based policy formulation in the future.

Executive Summary

Italy is among the European countries with the highest percentage of prisoners in pre-trial detention and the frequent violation of Article 5 of the



European Convention of Human Rights (ECHR) in the course of pre-trial decision-making is a recognised issue. The European Court of Human Rights (ECtHR) has issued numerous judgments finding such violations especially with regards to the excessive length of pre-trial detention and insufficient safeguards of the defendant's fair trial rights.

The Italian Parliament has recently enacted new laws which have the potential to address these concerns, including, for example, by limiting the offences for which pre-trial detention can be lawfully ordered, and by allowing judges to order the cumulative application of alternative measures. If these laws are implemented effectively, the ECtHR-standards should be more consistently upheld and the number of pre-trial detainees should fall, thereby alleviating the pressure on Italy's overcrowded prisons and enhancing the conditions for those incarcerated. Some of these laws came into effect on May 2015 so the effect has yet to be seen. Despite these complex difficulties, there is little research analysing the nature of pre-trial detention decision-making.

As part of an EU-funded project, a common research methodology was applied in 10 EU Member States, with research data gathered through the monitoring of pre-trial detention hearings, analysing case files as well as surveying defence lawyers and interviewing judges and prosecutors. In the course of the Italian research, 19 pre-trial hearings were observed, 43 case files analysed, 35 defence lawyers surveyed, and five judges and three prosecutors interviewed.

The key findings regarding pre-trial detention decision-making in Italy were as follows:

1. **Decision-making procedure:** Every pre-trial detainee has obligatory legal representation. The equality of arms between the defence and the prosecution is not sufficiently safeguarded, as defence lawyers gain access to the case files only 10 – 30 minutes before the hearing and thus cannot prepare sufficiently, despite having been informed of the hearing 12 – 24 hours in advance. Accordingly the judge places too much reliance on the arguments of the prosecution, and the lack of

independent bail advice services is notable. In cases involving foreign defendants, the interpreting is often insufficient.

2. The substance of decisions: The reasoning of pre-trial detention orders is very formulaic, relying excessively on previous offences to justify an order based on the ground of re-offending risks but otherwise not tailored to the specific defendant and case. The seriousness of the offence is often the decisive factor used to justify pre-trial detention orders, despite this reason being unlawful according to ECtHR jurisprudence. The researchers observed a notable difference in the treatment of irregular migrants from outside the EU, who will generally be placed in pre-trial detention, while EU-citizens have higher chances of being placed under less restrictive measures. Vulnerable defendants lacking housing and social networks are commonly placed in pre-trial detention, as in such cases, judges are not able to order the common alternative of house arrest.

3. Use of alternatives to detention: Judges and prosecutors do not trust alternatives to detention to be effective; in the view of the researchers, such alternative measures are therefore underused. However, house arrest and police supervision are the most commonly used alternatives. Electronic monitoring has not yet been adopted by law as an alternative.

4. Review of pre-trial detention: There is no legal requirement for reviews to be conducted at regular intervals. All reviews observed during the research were initiated by the defence. Reviews are often conducted without the defendant being present or heard. Cases involving pre-trial detention are conducted faster than cases which do not involve a detainee.

The conclusions of the research indicate that pre-trial detention decision-making in Italy still falls short of the ECtHR standards in a number of areas. In light of these findings, the main recommendations are as follows:

- The defence lawyer should be provided with the case file upon notification of the first judicial hearing, and the implementation of a system of electronic case files could facilitate this. This would meet the requirements of Art. 7(1) of the EU Right to Information Directive which is currently not effectively implemented.
- The recent legislative amendments relating to pre-trial detention should be effectively implemented.
- Independent bail information services should be involved in the pre-trial hearings.
- Pre-trial hearings at all review and appeal levels should always be conducted orally with the defendant being present.

- The EU Directive on the Right to Interpretation and Translation should be effectively implemented, thereby enhancing the standards of interpretation during hearings for non-nationals.
- Funds should be allocated to implement the electronic monitoring of defendants in law and practice, to reduce the use of pre-trial detention for people without a residence suitable for house arrest.
- Guidance and training on the standards of ECtHR-jurisprudence should be delivered to judges, prosecutors and lawyers ensuring that all stakeholders are aware of what factors may and may not be considered when deciding between pre-trial detention or alternative measures.
- The Ministry of Justice should be required to provide reliable and comprehensive statistical data on the use of pre-trial detention and its alternatives.

For a full list of recommendations see chapter X. at page 50.

Executive Summary

Overuse of pre-trial detention (PTD) is a recognised issue in Lithuania: PTD is applied significantly more often than its closest alternatives and prosecutors' applications for it enjoy a success rate of over 95%.



Although this problem is oft-talked about in the media and in professional discussions amongst legal practitioners, there is little research analysing the nature of pre-trial detention decision-making and the extent to which it contributes to the overuse of PTD.

As part of an EU funded project, a common research methodology was applied in 10 EU Member States, with research data gathered through monitoring of PTD hearings, analysing case files, as well as surveying defence lawyers and interviewing judges and prosecutors. In the course of the Lithuanian research, 20 PTD hearings were observed, 61 case-files analysed, 36 defence lawyers surveyed, and 4 judges and 5 prosecutors interviewed.

The key findings regarding pre-trial detention decision-making in Lithuania were as follows:

1. Decision-making procedure: Although the presence of a defence lawyer is ensured in all PTD hearings, the majority of suspects are represented by legal aid lawyers who often provide legal services of insufficient quality. In a significant number of cases it was observed that the legal aid lawyer first met with the defendant in the court room and was inadequately prepared for the hearing. While the reasons for this were not identified through this research, such situations do jeopardise the suspect's defence. Research findings also indicate a lack of real equality of arms between the defence and the prosecution, as the defence has limited access to case-file, and the arguments put forward by the prosecution are often given more weight than those of the defence.

2. The substance of decisions: PTD is most often ordered to prevent suspect's flight, with the possibility of a long-term prison sentence, weak social ties and previous convictions being the predominant reasons given to justify a finding of this risk. Risk of re-offending is also a fairly often employed PTD ground, with the likelihood of criminal activities having become the suspect's primary source of income being cited as the source of such risk. However, PTD on these grounds is often ordered based on very general arguments and assumptions, without due attention to specific

circumstances and individualization of the decision to the case at hand. A tendency to overly-rely on the possibility of a long-term prison sentence as a basis for ordering PTD, which is in contravention to the European Convention of Human Rights, was also observed.

3. Use of alternatives to detention: Decisions ordering PTD rarely provide reasoning as to why alternative measures are unable to achieve the same goals. Where such reasons are given, they often rely on generic arguments without relating specifically to the case at hand. Alternative measures to PTD are not trusted by judges and prosecution and are accordingly underused.

4. Review of pre-trial detention: Decisions extending the period of PTD often rely on overly general and formulaic arguments and in almost all cases PTD extension is ordered. Suspects are not always present in review hearings. Most defence lawyers believe that investigations involving pre-trial detainees are not conducted more diligently or efficiently, as the case law of the European Court of Human Rights suggests is required.

5. Case outcomes: Persons placed in PTD mostly receive custodial sentences. Situations where a person serves the full sentence in PTD are not uncommon, and make up over 10% of the cases analysed in the course of this research. However, no instances were observed where a custodial sentence shorter than the period of PTD was ordered. This circumstance gives reasons to believe that judges may be unwilling to order imprisonment for shorter periods than those actually spent in PTD so as not to raise questions about the legality of the PTD period.

The conclusions of the research indicate that the practice of pre-trial detention decision-making in Lithuania falls short of the European Court of Human Rights standards in a number of areas. In light of these findings, the main recommendations are the following:

- Further research into the reasons for the unsatisfactory quality of legal aid must be conducted and a mechanism for ensuring effective supervision of the legal aid lawyers' services quality must be established by the Lithuanian Bar Association and Ministry of Justice in mutual cooperation;
- The courts must ensure observance of equality of arms between prosecution and defence in all PTD hearings, and equal weight must be given to submissions of both the prosecution and the defence;

- There needs to be further guidance to prosecutors and judges on the standards of ECtHR jurisprudence available for judges and prosecutors, informing them when applying for and deciding on PTD;
- Courts deciding on PTD must request specific evidence and reasons for ordering and extending PTD, as opposed to general and vague arguments, and must ensure the decisions ordering PTD give clear and individualized reasons for doing so;
- Courts should ensure that the possibility of using alternatives to PTD is extensively discussed and analysed in PTD hearings and decisions.

For a full list of conclusions and recommendations please see section X, “Conclusions and recommendations”, at the end of this report.

Executive Summary

1. As of 31 October 2015, 4 356 people remain in prisons as pre-trial detainees in Poland. At the same time, the overall prison population in the country amounts to 72 195. This means that pre-trial detainees constitute 6.0 per cent of all detainees. Even though this percentage seems low and the number of motions for pre-trial detention decreased by almost 30% between 2009 - 2014, the research revealed that Poland still faces serious challenges with respect to pre-trial detention.



2. As part of an EU funded project, a common research methodology was applied in 10 EU Member States, with research data gathered through the monitoring of PTD hearings, analysing case files, as well as surveying defence lawyers and interviewing judges and prosecutors. In the course of the Polish research, 4 PTD hearings were observed, 70 case-files analysed, 24 defence lawyers surveyed, and 9 judges and 7 prosecutors interviewed.

3. On 1 July 2015, a fundamental reform of the Code of Criminal Procedure and important changes to the Criminal Code entered into force. The reform introduced an adversarial model of proceedings, which places more emphasis on the activity of prosecutors and lawyers, and leaves the judge as an impartial arbitrator. It is important to view the results of the research in the light of these recent legislative changes, which address several of the identified limitations to the fairness of the proceedings.

The key findings regarding the pre-trial detention decision-making in Poland were as follows:

4. **Decision-making procedure:** According to the law, before applying a preventive measure the court or the prosecutor shall hear the defendant. This means that the defendant has to be present at the first pre-trial detention hearing. This obligation does not, however, extend to other pre-trial detention hearings, which is why the equality of arms may not be secured throughout the whole pre-trial detention proceedings. The research showed that the defendant, if not in hiding or otherwise unavailable to the justice system, is present at the first pre-trial detention hearing. The defendant is not always present at other pre-trial detention hearings, especially if he has been appointed a lawyer. Equally, defendants who do attend hearings are often not represented by a

lawyer. Additionally, the defence's preparation of the hearing is sometimes limited by insufficient access to the case files. It should, however, be noted that the regulation on access to case files has recently been changed as a result of legislative changes in the European Union and the case-law of the European Court of Human Rights and the Polish Constitutional Tribunal, The access has been widened for the defendant. Still, the majority of lawyers surveyed explained that they have 30 minutes or less to prepare for the hearing, with access to the case file.

5. The substance of decisions: Case file research revealed that the risk of the suspect perverting the course of justice, the risk of the suspect absconding and the fact that a severe penalty may be imposed on the suspect are the most commonly used justifications for ordering pre-trial detention. The reasoning given is often formulaic and not tailored to the specific case, repeating the arguments raised by the prosecution. This can be partly explained with the swiftness of the proceedings which limits the time for judges to read the case file and forces them to rely on the evidence provided by the prosecution. However, the provisions of the Code of Criminal Procedure were changed in relation to the content of justifications of pre-trial detention orders. The amendments may contribute to a more careful and diligent judicial consideration of matters that involve pre-trial detention, as judges will be obliged to refer in their justifications directly to the circumstances listed in the new provision. We hope that the explicit designation of the assumed line of reasoning which should accompany judicial resolution of pre-trial detention matters will persuade courts to examine more thoroughly whether a need to apply pre-trial detention actually exists.

6. Use of alternatives to detention: The conducted research and official statistics show that police supervision and money bail are the most commonly used non-custodial, preventive measures. At the same time, the interviewed judges and prosecutors do not perceive non-custodial preventive measures as effective and trustworthy alternatives to pre-trial detention. What is more, case file research and surveys conducted among defence practitioners show that judicial consideration of alternatives to detention is limited to a single-sentence argument that such alternatives would not protect the integrity of the proceedings.

7. Review of pre-trial detention: The success rate of complaints against pre-trial detention orders of regional courts was about 3% in 2014. Defence practitioners surveyed complained of the automatism and superficiality of judicial decisions which lack proper justifications based on the facts of the case and substantiated presumptions, even in cases being reviewed and appealed against. The case files research confirmed the notion that courts of higher instance rarely change the decisions of

lower level courts. The decisions of higher level courts often repeat previous decisions. Defence practitioners also commented in the survey that reviews are not frequent enough to take account of changed circumstances of the case or other factors. Preparation of review is often also challenged by the defence's insufficient access to the case file. The majority of lawyers surveyed believe that the proceedings and investigations are not conducted more diligently and effectively because a pre-trial detainee is involved.

8. Recommendations

The conclusions of the research indicate that the practice of pre-trial detention decision-making in Poland falls short of the European Court of Human Rights standards in a number of areas. In light of these findings, the main recommendations are the following:

- a. The legislator should consider clarifying the prerequisites for pre-trial detention contained in the Code of Criminal Procedure.
- b. The legislator should introduce a maximum duration of pre-trial detention. Optionally, the authority to extend the duration of pre-trial detention beyond the limit in exceptional circumstances should be vested in the Supreme Court.
- c. The legislator should introduce the rule that cases of persons in pre-trial detention should take precedence over other cases on a judge's docket.
- d. The legislator should introduce a provision on the defendant's obligatory presence at all pre-trial detention hearings.
- e. The legislator should introduce obligatory legal representation in cases where a prosecutor requests pre-trial detention or alternatives to detention.
- f. The amounts awarded as compensation in cases of unlawful pre-trial detention should be increased.
- g. The legislator should consider introducing new preventive measures (home detention and electronic monitoring) into the Code of Criminal Procedure.
- h. The Institute of Justice could undertake further research on non-custodial preventive measures, including their perception among the representatives of the justice system.
- i. The Ministry of Justice, the National School of Judiciary and Public Prosecution and the Prosecutor General should conduct more training on pre-trial detention standards.
- j. The authorities should ensure effective implementation of the Code of Criminal Procedure in relation to access to case files and guidance on pre-trial decision-making.

k. The authorities should also ensure proper implementation of the case-law of the European Court of Human Rights.

8. A full list of recommendations can be found at the end of the country report in section IX.

Executive Summary

Pre-trial detention in Romania is applied significantly more often than other alternative preventive measures. Recent changes to the law have reduced the use of pre-trial detention, but there is little research analysing the nature of pre-trial detention



decision-making and whether pre-trial detention is applied lawfully and the defence's rights are safeguarded throughout the procedure. These aspects are assessed in this report.

As part of an EU-funded project, a common research methodology was applied in 10 EU Member States, with research data gathered through the monitoring of pre-trial detention hearings, analysing case files, as well as surveying defence lawyers and interviewing judges and prosecutors. In the course of the Romanian research, 19 hearings were observed, 67 case-files analysed, 23 defence lawyers surveyed, and 6 judges and 2 prosecutors interviewed.

APADOR-CH has identified a serious of problematic issues that require the attention of various stakeholders at the national level.

1. **Decision-making procedure:** Despite extensive defence rights provided by law, in reality the practical enjoyment of these rights remains limited. Lawyers are often only notified shortly before hearings, and have only 30 minutes to study the case file. Even judges will sometimes have insufficient time to read the file, and therefore rely too strongly on the prosecutor's arguments. Evidence in favour of detention is rarely provided by the prosecution, and lawyers are not able to provide evidence to counter the arguments for detention.
2. **The substance of decisions:** Many national courts fail to provide substantial reasoning for pre-trial detention orders. The research demonstrated that the most common reason given for ordering detention is that the accused presents a potential danger to the public, followed by the risk of reoffending and flight risk. Yet, the researchers discovered that in fact the severity of the offence is usually the real reason for ordering pre-trial detention, albeit in violation of ECtHR-standards. 70% of lawyers surveyed have encountered pre-trial detention being ordered on unlawful grounds. The researchers observed several cases in which the pre-trial detention order was poorly motivated and a less restrictive alternative measure would arguably have been sufficient.

3. **Use of alternatives to detention:** Despite different alternatives to detention being available by law, including house arrest, judicial supervision and bail, they are rarely used. Judges are reluctant to consider non-custodial alternatives to detention as they consider them to be less effective. In the vast majority of cases reviewed during the research, alternatives to pre-trial detention were not even considered.
4. **Review of pre-trial detention:** Although in all cases observed and case files reviewed, the pre-trial detention decision was reviewed in compliance with the law, the initial decision to detain was generally upheld, often based on the same reasons as in the previous order, and alternatives were never ordered. In the cases observed and reviewed, no new evidence was provided at the review stage.
5. **Case outcomes:** None of the defendants in the case files reviewed were acquitted; in fact the vast majority was convicted to a custodial sentence longer than the time spent in detention pre-trial. However, a chosen lawyer might enhance the likelihood of a lower sentence as these have less clients and more time to prepare each case. 68% of all defendants in the case files reviewed pleaded guilty.

Given that the ECtHR-standards are often not upheld in practice during the judicial decision-making process on pre-trial detention, it is recommended that a number of priorities need to be identified in order to tackle these problems. The main recommendations are the following:

- Urgent adoption of the Interpretation and Translation Directive (2010/64/EU) which is crucial in ensuring the right to trial and the right to defence guaranteed by the ECHR to defendants, who do not speak or understand the language of the court. Proactive measures also need to be taken by the state to oversee the proper and effective implementation of the Right to Information Directive (2012/13/EU), and the Access to a Lawyer Directive (2013/48/EU). In particular the implementation of the Right to Information Directive which provides access to case-file is essential to effectively challenge the lawfulness of detention.
- An increase in the fee of legal aid lawyers and an increase in the number of judges who deal with pre-trial detention cases, to ensure both can spend more time on each case.
- Trainings regarding the national law and the standards of the ECtHR concerning pre-trial detention should be provided to all lawyers involved in the procedure of pre-trial detention, especially to the ones who are appointed by the state.
- Judges and prosecutors should also be trained in the application of ECHR-standards in the context of pre-trial detention. Despite judgments of the ECtHR against Romania for breaching Article 5 ECHR, the situation has not changed systemically in the areas identified

by the ECtHR as problematic. All responsible authorities for the implementation of judgments should present action plans to address the underlying issues.

- The provisions of the new criminal procedure code concerning non-custodial alternatives for detention should be completed by secondary legislation concerning the practical application of preventive measures.
- Judicial supervision should also verify the correct application of these preventive measures.
- Sufficient resources (both human and technical) must be put in place to ensure the effectiveness of non-custodial measures, which would lead to increased judicial confidence.

APADOR-CH is aware of the fact that some recommendations require financial resources and therefore might take time to be addressed. But this report also includes practical steps to be taken to correct some of the gaps identified in the application of the law and practice related to pre-trial detention in Romania. The organisation will continue to work with all parties interested in the promotion of good practices in the field.

For a full list of recommendations see in Section X on page 44 – 46.

Executive Summary

Under Spanish law pre-trial detention is a precautionary measure which, in exceptional circumstances where the principle of proportionality is safeguarded, may be ordered for a suspect accused of having committed a serious offence in order to prevent (a) absconding from trial and prosecution, (b) reoffending, (c) further infringement of the victim's rights, or (d) tampering with the evidence.



However, to date little research has been conducted to analyse the nature of pre-trial detention decision-making and to assess whether it is in practice only used proportionally and lawfully in exceptional cases.

As part of an EU funded project, a common research methodology was applied in 10 EU Member States, with research data gathered through the monitoring of PTD hearings, analysing case files, as well as surveying defence lawyers and interviewing judges and prosecutors. In the course of the Spanish research, 12 pre-trial detention hearings were observed, 55 case-files analysed, 31 defence lawyers surveyed, and 5 judges and 4 prosecutors interviewed.

The key findings regarding pre-trial detention decision-making in Spain were as follows:

1. Decision-making procedure: The presence of a defence lawyer is ensured in all PTD hearings and the suspect is always present in the initial pre-trial hearing, but not always in review or extension hearings. The lawyer often has insufficient time to prepare the hearing, as s/he is provided access to the case-file only shortly before the hearing. The case-file is not provided in “secreto de las actuaciones” procedures that are not uncommon in Spain, which is a significant disadvantage for the defence. Generally, arguments put forward by the prosecution are given more weight than those of the defence. Some lawyers commented that the decision is in fact made beforehand in informal discussion between the prosecution and the judge (see pages 19-25)

2. The substance of decisions: Pre-trial detention is most often ordered to prevent flight of the suspect, with the possibility of a long-term prison sentence as a result of the severe offence, a lack of fixed abode and foreign nationality being the predominant reasons for a finding of this risk. Pre-trial

detention is often ordered based on very general arguments and assumptions, without due attention to specific circumstances and individualization of the decision to the case at hand (see pages 26-32)

3. Use of alternatives to detention: Alternative measures to pre-trial detention orders are more readily ordered in cases that concern less severe crimes, as judges distrust the alternatives to be sufficiently effective. The most frequently ordered alternatives are summons to appear before court regularly and surrender of the passport followed by release on bail. Some lawyers commented that budgetary constraints appear to limit the use of electronic tagging (see pages 33-35)

4. Review of pre-trial detention: The suspect is not necessarily produced at the review hearing; a review can also take place in writing. In the vast majority of review hearings monitored during this research, the initial decision to detain is upheld. Pre-trial detention is often renewed on the basis of very general arguments and assumptions, without due attention to the specific circumstances of the defendant or the case (see pages 36-38)

5. Case outcomes: Official statistics regarding the outcomes of cases involving pre-trial detainees are not available. In the research the conviction rate was 65%, in most cases to custodial sentences. As pre-trial detainees, do not have the rights to visit their families as convicted detainees can have, long periods of pre-trial detention can incentivise defendants to accept a plea bargain and not appeal against a judgment, in order to be treated like a convicted and not like a pre-trial detainee (see pages 39-40)

The practice of pre-trial detention procedures in some areas in fact falls short of ECtHR standards and suffers from insufficient implementation of binding EU-law.

In light of these findings, the main recommendations are that:

- Through legal reform the EU Directive 2012/13 on the right to information in criminal proceedings is effectively enforced to give defence full access to case files and sufficient time to prepare hearings;
- Ensure that pre-trial decisions at all stages include specific reasoning tailored to the individual case to ensure judges engage with the personal circumstances;
- Electronic monitoring should be provided as an alternative measure in law and in practice;

- More alternative measures should be provided in law and in practice, or reinstate measures such as house arrest which are not currently used;
- The law should be amended to include shorter maximum terms of duration of pre-trial detention, which is known to accelerate investigations and proceedings in other countries;
- The Ministry of Justice should take on the responsibility of ensuring that mechanisms are put in place that record data that concerns pre-trial detention decision-making processes, such as outcomes of trials, usage of alternatives and violations of bail conditions.

A full set of recommendations can be found at the end of the report on pages 41-44.

Executive Summary

The goal of this report is to provide an overview of the use of pre-trial detention in practice in the Netherlands. In recent years there has been a lot of discussion and criticism of the (extensive) use of pre-trial detention in Dutch criminal procedures. In this report we will assess whether this criticism is justified, and if so, what steps



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need to be taken to alleviate the concerns that exist regarding pre-trial detention. The overarching conclusion of our research is that the Dutch legislation on pre-trial detention meets the relevant standards of the European Court of Human Rights (ECtHR). This leads us to the conclusion that legislative changes are not strictly necessary. However, our research shows that the way in which the legal rules on pre-trial detention are applied in practice is rightly criticised by defence lawyers, academics and even judges themselves.

This report starts in chapter IV with a description of the context in which it should be read. An overview of the Dutch legal framework on pre-trial detention is given, as well as a brief description of the debate that has taken place in the Netherlands in recent years on the topic of pre-trial detention. Five chapters in which the results of the research are discussed follow this chapter on context. These chapters concern the procedural aspects of the decision making process on pre-trial detention (chapter V), the substantive aspects (chapter VI), alternatives to pre-trial detention (chapter VII), review of pre-trial detention orders (chapter VIII) and the outcomes of cases in which pre-trial detention is applied (chapter IX). The report concludes in chapter X with the conclusions of our research and recommendations for the various stakeholders dealing with pre-trial detention.

Over the course of the research project we visited nine of the eleven District Courts in the Netherlands, resulting in observations of 109 hearings on pre-trial detention. We also reviewed 56 case files and interviewed six judges and three prosecutors. The defence lawyers survey was completed by 35 defence lawyers.

Decision-making procedure

Although depending on the complexity of the individual case hearings on pre-trial detention in the Netherlands can be quite brief, Dutch procedure on pre-trial detention in practice generally meets the standards set by the Strasbourg Court and EU law. Suspects have legal representation, for free in case they cannot afford it themselves, and are brought before a judge within a reasonable time.

Suspects who do not speak the Dutch language are provided with an interpreter and receive a letter of rights in their own language. The only point of concern is that some defence lawyers point out that the content of the case file available at the first hearing is sometimes too limited given that the investigation is still ongoing and not all the information is available yet.

The substance of decisions

When looking at the substantive aspects of the practice of pre-trial detention, the high frequency of pre-trial detention that is being ordered must be highlighted as a point of concern. This raises questions on whether the principle of pre-trial detention as a measure of last resort is sufficiently protected. In most cases that were analysed in the case file review and hearing monitoring, requests by the prosecutor for applying pre-trial detention are granted by the judge(s). One caveat that should be made is that there might be a selection effect, meaning that prosecutors might only request pre-trial detention in cases where they feel that such a request will be granted by the judge. Besides the high number of pre-trial detention orders, another pressing concern is that in most cases the reasoning of decisions on pre-trial detention is quite brief and in general and abstract terms, which is problematic in light of Strasbourg case law. Finally, grounds for pre-trial detention are easily accepted by the judges. Especially defence lawyers indicate that grounds like the recidivism ground and the shocked legal order ground are accepted in a lot of cases, even though the existence of those grounds in the specific case is not proven sufficiently.

Use of alternatives to detention

Closely connected with pre-trial detention being applied in a lot of cases is the fact that alternatives to pre-trial detention currently only exist as conditions to a suspension of the pretrial detention. This means that a judge first has to consider whether pre-trial detention should be ordered, before making a second consideration on whether the pre-trial detention should (conditionally) be suspended. This raises the question whether judges will appropriately consider a suspension given that they have already decided that pre-trial detention will be ordered. We feel that alternatives to pre-trial detention are underused, especially in the first phase of pre-trial detention. More research and discussion is necessary to fully develop alternatives in terms of new legislation and better use of existing alternatives such as bail and electronic monitoring. For instance with regard to bail, judges are reluctant to set bail conditions, because they are either unfamiliar with this alternative or they fear that this will lead to inequality and class justice since poor suspects will not be able to meet the financial requirements to receive bail.

Review of pre-trial detention

Reviews of pre-trial detention orders take place regularly. All orders for pre-trial detention are subjected to a specific time limit. Once this limit is reached a review of the pre-trial detention order will take place (assuming the prosecutor wants to keep the suspect in pre-trial detention). Alternatively, a suspect or his defence lawyer can always request a hearing to review the pre-trial detention if they believe that the conditions for pre-trial detention are no longer met or when they want to request a suspension of the pre-trial detention. If a case is not ready for trial, but the suspect has been in pre-trial detention for 104 days, a pro forma trial is held to assess the progress of the investigation and to see whether the suspect should stay in detention. These pro forma trials take place every three months until the substantive trial takes place or the suspect is (conditionally) released from detention.

Case outcomes

With regard to the outcome of trials where pre-trial detention is ordered we found in the case file review that in almost all cases the criminal process ended in a conviction. In these cases the time served in pre-trial detention is deducted from the sentence in case of a conviction (article 27 CCP). If the suspect is acquitted of all charges he can claim financial compensation for the time served in pre-trial detention (article 89 CCP). No compensation is provided if the final sentence is lower than the time served in pre-trial detention.

Recommendations

Our research leads us to the following recommendations to the various stakeholders dealing with pre-trial detention.

i. To the legislator

1. In order to make alternatives to pre-trial detention more common, these should be made available independent of the decision whether pre-trial detention is allowed. The proposals in this regard the Government is currently considering, are a step in the right direction.

ii. To the Public Prosecution Service

2. Public prosecutors should be more critical in their assessment whether pre-trial detention is strictly necessary in a specific case.
3. Public prosecutors could be more active in proposing alternatives to pre-trial detention (for instance suggesting specific conditions for the suspension of pre-trial detention to the court),

possibly after discussing this with the defence lawyer before a scheduled pre-trial detention hearing.

iii. To the courts

4. The recent discussion amongst judges on whether pre-trial detention is necessary as often as it is used, should be continued and intensified.
5. When considering alternatives to pre-trial detention, judges should take the principle that pre-trial detention must be a measure of last resort, more into account, especially when alternatives to pre-trial detention become more available, as recommended in this report.
6. Decisions to apply pre-trial detention should be better reasoned, giving more insight in the reasons for applying pre-trial detention in a specific case. This in order to conform with European and national obligations.
7. The existence of grounds for pre-trial detention must be viewed more critically. Especially with regard to the shocked legal order the question can be raised whether this ground should be used as often as it currently is.

iv. To the Council of the Judiciary and/or the Ministry of Security and Justice

8. More funds should be made available to provide time for judges to substantiate their pre-trial detention decisions more extensively.
9. Research should be done into the effectiveness of alternatives to pre-trial detention, in particular electronic monitoring and (money) bail. This research should also focus on ways to make these alternatives function properly in the Dutch system.