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A world where every person's right to a fair trial is respected.

Communiqué

The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making

24 September 2015

Fair Trials

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Introduction

1. On 24 September 2014, Fair Trials convened an expert seminar in London as part of the research project 'The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making'. 51 participants from 24 EU Member States attended, with 9 project partners summarising their findings from the research and legal practitioners speaking about their experience with pre-trial detention issues in other Member States not covered by the research.

2. The pre-trial detention research project, which is partially funded by the European Commission, began in June 2014 and will be completed at the end of May 2016. It was coordinated by Fair Trials and the research was conducted by the 10 research partners (NGOs and academics) based in 10 different EU Member States: England and Wales, Greece, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania and Spain. The overall objective of the project is to inform the development of future initiatives aiming to reduce the unnecessary use of pre-trial detention within the EU by assessing good and bad practice with regards to pre-trial decision-making.

3. Fair Trials has been working on pre-trial detention issues since the publication of the European Commission's Green Paper on detention in 2011, which formed part of the Procedural Rights Roadmap agreed by the European Institutions in 2009. In response to the Green Paper, Fair Trials published its report 'Detained without Trial'[1]. Drawing on its extensive casework experience and input through the LEAP network (Legal Expert Advisory Panel, currently consisting of 132 defence lawyers, NGOs and academics from all EU Member States), we concluded that Member States across the EU are violating regional standards relating to the right to liberty and the right to a fair trial in the context of pre-trial decision-making and that the EU should legislate to create enforceable minimum standards to address this.

4. These conclusions were further supported through 5 country-specific roundtable meetings conducted by Fair Trials in 2012-2013 in Hungary,[2] Spain,[3] Poland,[4] Greece[5] and Lithuania,[6] which were attended by legal practitioners with strong expertise in the field of criminal justice.

5. In May 2014, Fair Trials began coordinating this research project which involved research partners in 10 different EU Member States.

   The research partners are:

   - University of West England, England and Wales.

[1] The full report is available at: https://www.fairtrials.org/documents/DetentionWithoutTrial1.pdf.
[2] The communiqué is available at: https://www.fairtrials.org/wp-content/uploads/Hungary-PTD-communique.pdf.
[3] The communiqué is available at: https://www.fairtrials.org/wp-content/uploads/Spain-PTD-communique.pdf.
[4] The communiqué is available at: https://www.fairtrials.org/wp-content/uploads/Poland-PTD-communique.pdf.
[5] The communiqué is available at: https://www.fairtrials.org/publications/greece-report-highlights-misuse-of-pre-trial-detention.
[6] The communiqué is available at: https://www.fairtrials.org/wp-content/uploads/130910_Lithuania-PTD_Final_EN.pdf.

- Centre for European Constitutional Law (CECL), Greece
- Hungarian Helsinki Committee (HHC), Hungary
- Irish Penal Reform Trust (IPRT), Ireland
- Antigone, Italy
- Human Rights Monitoring Institute (HRMI), Lithuania
- University of Leiden, Netherlands
- Polish Helsinki Committee (HFHR), Poland
- Apador-CH, Romania
- APDHE, Spain

6. In developing the research tools Fair Trials was strongly supported by the Advisory Board consisting of: Ed Cape, University of West England, András Kadár, Hungarian Helsinki Committee, Martin Schoenteich and Zaza Namoradze, both working for the Open Society Justice Initiative. The Advisory Board has provided strong support and expertise with regards to developing the research tools and the guidelines on the analysis of the data collected, for which we are very grateful.

7. All partners conducted the research methodology developed by Fair Trials, the Advisory Board and the partners. It consisted of desk-based research on the national law in relation to pre-trial detention, statistics and media portrayal of pre-trial detention and a survey that was completed by more than 20 defence practitioners to gain an understanding of their experiences in cases involving pre-trial detention decisions. Additionally, to gain objective insight into pre-trial decisions over 50 case files were reviewed and judicial hearings attended and monitored. Finally, to include views from all stakeholders involved in pre-trial detention decision-making process, the researchers interviewed at least 5 judges and 5 prosecutors.

8. After collecting the data, the partners analysed the data and drafted comparable country reports using guidance and a report template provided by Fair Trials and the Advisory Board. The data and the conclusions of the reports are already being used to support national advocacy. Based on these reports Fair Trials is drafting a Regional Report, which will be launched at the European Parliament in April 2016.

9. The expert seminar provided all partners (save for CECL, Greece, which was unable to attend) the opportunity to share their research findings, as well as giving experts from Member States in which research was not conducted the opportunity to speak about their experiences. The objective of the meeting was to give attendees insight into the most important findings of the research partners as well as insight into the processes in other EU-jurisdictions that provide examples of bad or good practice on specific issues.

10. Prior to the expert seminar, seminar participants were invited to participate in an online survey on pre-trial detention decision-making. The information collated through the survey is also covered in this communique.

11. The seminar involved sessions on four different themes which have emerged through the research: (1) pre-trial detention decision-making procedure, (2) the substance of pre-trial detention decisions, (3) use of alternatives to detention, and (4) review processes, special

diligence & length of pre-trial detention. Speakers were allocated to each panel according to their research findings or specifically relevant experiences and developments in their country.

Session 1: Pre-trial detention decision-making procedure

12. In this session the speakers focused on identifying challenges and best practice relating to procedural aspects of the pre-trial detention decision-making process, including access to legal representation, the ability of the defence to access the case-file and prepare adequately for the hearing and the relative weight given to prosecution and defence arguments.

Georgiana Gheorghe, APADOR, Romania, Project Partner

13. The overuse of pre-trial detention is an openly acknowledged issue of concern in Romania and a new criminal code introducing more accessible alternatives to detention with the aim of reducing the use of pre-trial detention was passed in February 2014.[7] This reform is sorely needed as the main finding of the research was an excessive overuse of pre-trial detention and underuse of alternative measures.

14. The main cause for concern is the imbalance between the limited ability of defendants to enforce their defence rights and their consequential inability to influence judges to the same extent the prosecutors can. Despite a right to access the case files, lawyers surveyed complained that they are often only provided such access 30 minutes prior to the hearing, which they consider to be insufficient time to prepare an effective challenge to a prosecutorial detention submission. Accordingly, in 85% of the case-files reviewed, no evidence was submitted by the defence during the pre-trial detention hearing.

15. This conundrum is heightened by the lack of time judges have for studying the case file themselves which almost forces them to rely on the prosecution's arguments, as judges interviewed explained. Accordingly, 65% of the lawyers surveyed have the impression that the prosecution is favoured by the court.

16. Furthermore, the quality of defence is often insufficient in legal aid cases, as the fee ranges between only €29-90 per case per trial, which results in legal aid lawyers taking on a high number of cases to pay for their own expenses. APADOR therefore recommends increasing the fees for legal aid lawyers.

Katarzyna Wisniewska, HFHR, Poland, Project Partner

17. The main findings of the research in Poland were that the disparity between the legal provisions and their application presents the main challenge in relation to pre-trial detention decision-making. While pre-trial detainees make up only 6.2% of all detainees in Poland,[8] which is one of the lowest rates in the EU, the research concluded that the rights of suspects at the pre-trial phase are still not fully compatible with the human rights standards.

[7] http://www.avocatura.com/ll491-noul-cod-penal.html.
[8] Institute for Criminal Policy Research, World Prison Brief, Poland, statistics on 31 August 2015, available at: http://www.prisonstudies.org/country/poland.

18. The number of prosecutorial motions requesting pre-trial detention has decreased in recent years[9]. However, 91% of all motions were approved in 2014.[10] Similarly to the situation in Romania, Polish judges too explained in the interviews that they have insufficient time to study the case-file before the initial hearing in complex cases involving economic crimes or multiple suspects. For that reason, judges interviewed explained it is of special importance that a motion for pre-trial detention in such cases is thoroughly prepared by a public prosecutor and contain references to concrete evidence.

19. This discrepancy is heightened as the majority of lawyers participating in the survey explained that they do not have enough time to prepare for the first hearing with access to the case-file (sometimes it is only 15 minutes or less), which contributes to an inequality of arms between defence and prosecution.

20. Additionally, the researchers found that the suspect or his defence lawyer are not always present at each of the subsequent hearings, which HFHR recommends should be addressed by requiring obligatory defence attendance at all hearings.

21. On a more general note HFHR suggests a general maximum upper limit to pre-trial detention in all cases, as well as the provision of more accessible alternatives to detention.

Dominique Tricaud, Tricaud-Traynard Avocats Associés, France, LEAP Advisory Board Member

22. While the aim of reducing the number of pre-trial detainees in France has been achieved, there are risks associated with some of the reform initiatives which have been implemented. Some reform initiatives achieve their aim of tackling the overuse of pre-trial detention by sacrificing other defence rights.

23. Pre-trial detention decisions are formally made by the 'judge des libertés et de la detention (JLD)', during very fast and usually insufficiently prepared hearings as the suspect must generally appear before the judge within 20 hours after police custody has exceeded its time limit (it can generally last for a maximum of 24 or 48 hours). As a result of the high case load and hasty timelines, the judge generally approves the prosecution's request for pre-trial detention and rarely applies alternatives. So in fact the prosecution holds the power over the case and also classifies the alleged office, which has an impact on the time spent in pre-trial detention, without real judicial oversight.

24. Defence lawyers are given 1 – 2 hours to study the case file in order to prevent interference with tight schedules. If more time is requested the hearing will be postponed for 4 days, with the consequence of pre-trial detention being ordered until that hearing.

25. Overall the number of pre-trial detainees has been reduced, but those detained are now spending more time in French prisons pre-trial; in complex cases up to 4 years while the

[9] Annual reports of the Prosecutor General on the prosecution service, statistics on 01.09.2015, available at: http://pg.gov.pl/sprawozdania/sprawozdania-prokuratora-generalnego-1133-2.html.
[10] Ibid.

prosecution gathers the evidence to charge. Obliging the prosecution to explain the facts of the case more clearly at the early stages of any case, would be the only way to reduce the use of pre-trial detention.

> 16,000 people are in pre-trial detention in France but only 3,000 cases concern offences with a maximum sentence of more than 3 years.

Jaanus Tehver, Tehver and Partners, LEAP Advisory Board Member, Estonia

26. Pre-trial detention is readily ordered in Estonia. Despite a population of 1.3 million people, more than 700 suspects are currently detained pre-trial.[11]

> Case study from Estonia
>
> A person suspected of drug dealing was arrested, although no drugs were found when his home and car were searched. The prosecution requested pre-trial detention, suggesting that the iPhone 6 and €300 in cash which he had in his possession indicated he was a drug dealer, as he had declared not to have had an income over the past 3 years. Pre-trial detention was ordered.

27. The presentation focused on access to the case-file issues as the procedural problems related to pre-trial detention are too plentiful for this panel. Following the ECtHR judgment *Ovsjannikov v Estonia*[12] and the provisions of the Right to Information Directive[13] which grant the defence access to the case file, legislation granting access to the case file was introduced for the first time in July 2014.

28. Section 34(2) of the Code of Criminal Procedure provides the suspect with the right to examine the materials of the case-file prior to pre-trial detention hearings, however, in violation of Article 7(1) of the Right to Information Directive, the prosecution has the right to restrict the access "if this may significantly damage the rights of another person or if this may damage the criminal proceedings". Indeed, this derogation is applied widely and access to the case-file is often restricted at this stage.

29. As a result, the defence lawyer can regularly only suggest to the suspect to remain silent to ensure that they do not give a statement, which the prosecution considers would support their suspicion. However, pre-trial detention often lasts several years in Estonia. Additionally, the defence cannot really develop a defence strategy until they access the case files shortly before the trial begins. This leaves the defence little time to prepare and as a result of the long time passed, it may be impossible to obtain reliable evidence that supports the defence position.

Milen Shopov, Mandzhukova, Shopov, Petrov Law Firm, Bulgaria, LEAP Member

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[11] Institute for Criminal Policy Research, World Prison Brief, Estonia, statistics on 26 October 2015, available at: http://www.prisonstudies.org/country/estonia.

[12] *Ovsjannikov v Estonia* App. No 1346/12 (Judgment on 20 April 2014).

[13] *Right to Information Directive* (2012/13/EU), 22 May 2012.

30. There is a discrepancy between Bulgarian law, which is broadly in alignment with regional and international requirements, and practices which do not provide the same level of safeguards of fair proceedings.

31. Prior to a pre-trial hearing, the suspect can be detained for 24 hours by the police and another 72 hours upon a prosecutorial decision; both these periods are in practice used as a means of intimidation and harassment as the police misuses its unsupervised power.

32. In practice judicial hearings take place promptly, and the decision to detain is taken upon reviewing the evidence, the criminal record and the defendant's behaviour, as well as consideration of whether detention would be of public interest – as the police and government are currently keen to demonstrate they are fighting heavy and/or organised crime.

33. However, the defence cannot adequately participate in these hearings, as they often only have access to the case file for 30 minutes beforehand, during which period they also want to discuss the case with the suspect for the first time. More access to the case file can only be gained, if the defence "chases" the case file when it is handed between the prosecution, police and court before the hearing.

34. Maximum periods for pre-trial detention are clearly regulated with suspects of most crimes only being subject to detention for a maximum of 2 months, or 8 months if the offence could be punished for more than 5 years and no more than 18 months for the most serious offences (punishable for more than 15 years of imprisonment). Bail, house arrest and judicial supervision are available as alternatives to detention.

Open discussion

35. In the ensuing discussion it became clear that there are very different experiences regarding access to the case-file across the EU. For example, while lawyers in England and Wales have sufficient time to access the case-files from 8:30am on the morning of the hearing, lawyers in Luxembourg often have less than 10 minutes to study the case-file in Luxembourg.

36. Insufficient access to case files is also an issue in Hungary. Interviews suggested that in certain parts of the country the defence is not always granted access to the full case file. Similarly, in the Czech Republic, in practice, access is only granted to those documents which concern the charges, the orders on pre-trial detention and the detention conditions ordered.

37. An example of good practice can be found in some areas of the Netherlands, where the case-file which is held and collated by the police is submitted to the defence counsel in electronic form. It is submitted usually on the day of the first hearing which takes place within 4 days of arrest. Updates and amendments to the file can be immediately submitted to the defence, allowing them to prepare a defence strategy or even collect counter evidence.

38. However, another participant from the Netherlands added through the survey, that there are issues in the Netherlands in relation to the time available for lawyers and clients to meet prior to pre-trial detention hearings, with this often being limited to not more than 10 minutes. It can

also be difficult to convene these meetings in a private space in which the principle of confidentially can be upheld, as not all courts have sufficient rooms to do so; privacy in the court room prior to the hearing is limited as a guard will never leave that room.

Session 2: The substance of pre-trial detention decisions

39. The next session focused on the substance of judicial decisions relating to pre-trial detention, including the justifications relied upon and the extent to which adequate reasoning is provided.

Karolis Liutkevicius, Legal Officer at HRMI, Lithuania, research project patner

40. Pre-trial detention is overused in Lithuania, and, as observed by the research team, is often ordered in violation of ECtHR-jurisprudence which is not well-known by judges and prosecutors. Training of judges and prosecutors is therefore recommended.

41. Through reviews of case-files and the monitoring of pre-trial detention hearings, the researchers identified that pre-trial detention was most likely to be ordered in cases involving violence, drugs or financial fraud. Flight risk is the most commonly used reason to justify pre-trial detention, followed by the risk of reoffending and then the risk of tampering with evidence.

42. In contradiction to the ECtHR case law, which states that the severity of the offence may never justify pre-trial detention itself,[14] most judges and prosecutors interviewed by the research team stated they consider it a sufficient reason to order this measure.

43. With regards to the quality of reasoning decisions to detain, the researchers analysed whether decisions were clear and tailored specifically to the case or formal and abstract. Less than a third of the decisions justifying pre-trial detention to counter the risk of reoffending drew on case-specific factors (in fact reoffending is generally concluded from previous convictions); and less than half of the justifications for flight risk were deemed appropriate. In the latter case the possibility of a long-term sentence was often considered a sufficient argument, which is contrary to the the standard set by the ECtHR. [15]

44. More than 80% of the lawyers surveyed during the research believe they had encountered unlawful pre-trial detention orders and believe that the media pressurises judges to order pre-trial detention. Worryingly, several lawyers commented they believe that pre-trial detention is often applied to pressure the suspect into confessing to the crime, especially if the evidence is insufficient to convict.

Bas Leeuw, lecturer at Leiden University, Netherlands, Project Partner

45. The research in the Netherlands contribtutes to an ongoing debate on pre-trial detention by defence lawyers, academics and judges, resulting from the fact that the Netherlands is considered the ”European champion”[16] with 39.9% of detainees not yet convicted.[17] The

[14] *Tomasi v France* App. No 12850/87 (Judgments 27 August 1992) para 102.
[15] *Ibid.*
[16] A.H. Klip, ‘Voorlopige hechtenis’, Delikt et Delinkwent, 2012, 8.

research suggests that there are three issues related to the substance of pre-trial decisions that result in these high detention rates: the grounds for pre-trial detention, the reasoning when ordering pre-trial detention, and insufficient adherence to the principle of last resort.

46. Regarding the grounds for pre-trial detention orders, the law stipulates that generally the offence involved should carry a minimum sentence of 4 years imprisonment. In addition to the common grounds for pre-trial detention (flight risk, reoffending, interfering with evidence), two additional grounds can justify pre-trial detention in the Netherlands: (1) a suspect who commits an offence against a public official can be detained pre-trial, but the trial must begin within 17 days, and (2) if the suspect is accused of an offence that carries a sentence of more than 12 years imprisonment the suspect can be detained if the offence "shocked the legal order" or the release of the suspect would "shock the legal order".

47. In 127 out of 164 cases reviewed and monitored, pre-trial detention was ordered. 80% of detention orders cited the risk of reoffending and 30% of cases were justified because of shocks to the legal order.[18] The reasoning however is often only given to the defendant in a tick-box-exercise by way of formalistic reasoning, with only specific issues raised by the defence responded to.

48. After the first pre-trial order that allows for the suspect to be detained for 14 days, a 3-judge panel will make a new decision upon request by the prosecutor to continue detention.

49. Regarding the principle of applying pre-trial detention as a measure of last resort, the research found that the lack of feasible and practical alternatives results in pre-trial detention being the default option if the grounds and circumstances required are given.

Alessio Scandurra, Antigone, Italy, Project Partner

50. While pre-trial detention is still applied too often in Italy, in violation of ECtHR-standards, and decisions are too often prejudiced against non-EU-foreigners, real efforts are being made in law and practice to reduce the use of pre-trial detention. In 2010, 42% of all prisoners were waiting for a final sentence; this figure has been reduced to 34.5% within 5 years.[19]

51. Most pre-trial orders are justified on the ground of reoffending, yet the reasoning itself was observed to be frequently superficial and non-case-specific. However, recent amendments to the Procedural Act,[20] which came into force after the conclusion of the research, require judges to state their reasons for ordering pre-trial detention and why they considered alternatives insufficient.

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[17] Institute for Criminal Policy Research, World Prison Brief, The Netherlands, statistics on 30 September 2013, available at: http://www.prisonstudies.org/country/netherlands.

[18] An order for pre-trial detention can be based on more than one ground.

[19] Institute for Criminal Policy Research, World Prison Brief, Italy, statistics on 31 August 2015, available at: http://www.prisonstudies.org/country/italy.

[20] Amendment 47/2015.

52. Irregular migrants are placed in pre-trial detention disproportionally, as the status of being an irregular foreign national in some cases is deemed to be a sufficient reason to not consider alternatives to pre-trial detention and thus order pre-trial detention. Indeed, recent statistics confirm that irregular migrants are overrepresented in Italian prisons.[21] In particular irregular migrants do not have equal access health care services, labour market and social housing, and therefore ordering alternatives to PTD, and in particular house arrest, is not considered feasible by judges.

53. Language issues might contribute to this issue as the requirements and rights under the Interpretation and Translation Directive[22] are not well-known or respected in Italy. Judges and lawyers often don't believe there is a need for translation and interpretation and simply assume that a foreigner will understand enough Italian to participate in questioning, even if details remain unclear to the suspect and/or the judge.

Ann Marie Spiteri, Lawyer and lecturer at Malta University of International law, Malta

54. Pre-trial detention is also overused in Malta, with 23.2% of the prison population having not been convicted.[23] Further, pre-trial detention decisions are often insufficiently justified in substance and rarely reasoned. The lack of open reasoning makes it basically impossible for the defence to challenge or appeal against any detention decision. Appeals are additionally heard by the same judge, rendering it a primarily theoretical oversight mechanism.

> Case study
> The defendant had been in pre-trial detention for 3.5 years. The client had no criminal history at all, not even a traffic ticket. Yet, the appeal calling for his release was rejected to counter a risk of reoffending, which was not further substantiated.

55. The situation is particularly dire for foreign nationals in Malta, who are disproportionately detained in Malta. Courts seem to regard foreign nationality alone as proof of flight risk, but considering that Malta is an island this appears to be unreasonable. The inability of the authorities to monitor borders should not be used against the defendant.

Open discussion

56. 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.

57. In Slovakia, another LEAP member added, detention too is often justified merely on the basis of the seriousness of the charge, or the lack of social ties, which are considered to evidence a high

[21] Ministry of Justice, available at: https://www.giustizia.it/giustizia/it/homepage.wp/
[22] Directive on the Right to Interpretation and Translation in criminal proceedings, (2010/64/EU) 20 October 2010.
[23] Institute for Criminal Policy Research, World Prison Brief, Malta, statistics on 1 September 2013, available at: http://www.prisonstudies.org/country/malta.

risk of absconding, but this approach violates ECtHR-jurisprudence.[24] A similar observation was made by a representative from the Czech Republic.*

58. In Sweden, if the offence in question has a minimum sentence of 2 years, the defence needs to show that detaining pre-trial is not necessary. In practice this reversal of the burden of proof is hard to combat, and one lawyer confirmed that he is never successful in doing so. He has even heard of a case in which a suspect who was in a coma was detained.

59. A representative from Germany confirmed that in Germany,pre-trial detention requires both a high probability of conviction and a flight risk. The estimation of the flight risk has to be based on factual evidence. Alternatives are used appropriately; most common are police supervision and surrender of the passport. Another example of good practice came from Ireland, where High Court orders are well and clearly reasoned, however, in the lower courts, the orders were often short and in some cases inappropriate.

> Case study from Ireland
> The suspect had missed a bail hearing and thereby violated her bail conditions. At the hearing the defence explained the suspect had missed the hearing as she was meeting her child who in care. But the judge said "I'm not disposed to grant bail today", and without any further explanation that would explain the existence of a pre-trial ground (absconding, interfering with evidence, reoffending) the suspect was remanded in custody for one week.

Session 3: Use of alternatives to detention

60. In this session, the panelists explored the extent to which alternatives to detention are available and used appropriately in different Member States. The approaches to the use of alternatives vary greatly between Member States, with such differencespartly driven by the availability of alternatives but also by the overall attititude of the judiciary and prosection towards the risks that the use of alternatives carry.

Ed Cape, Professor at UWE Bristol, criminal justice expert in the UK / Tom Smith, Senior Research Fellow at UWE Bristol, Lecturer at Bristol Law School, Project Partner for England & Wales

61. The bail system used in England and Wales is generally an example of good practice. By law, every defendant has a prima facie right to bail, which must be granted unless statutory grounds for withholding it are satisfied. The research found that, subject to a number of caveats, in practice this provision is complied with. However, in some cases and noncompliant with legislation the researchers found that the 'burden' shifted. Instead of the prosecution having to prove the need to detain, the defence had to prove the need for release.

62. By law the judge has a wide discretion to order almost any condition for bail, as long as it complies with the statutory purpose such as securing attendance at court or ensuring that the defendant does not reoffend or interfere with evidence. According to the results of the research, bail was granted in approximately two-thirds of initial pre-trial hearings, which

[24] *Sulaoja v Estonia* App. No 55939/00 (Judgment 15 February 2005) para 64.

included serious offences, although the research team found that bail conditions were breached in 40% of cases reviewed and analysed. Generally the requests by the prosecution were confirmed in most cases by the judge and had a higher success rate than defence submissions. However, generally the defence does not need to prove the case for release due to the presumption of bail.

63. The most frequently imposed conditions include a residence condition (which was imposed in 58% of the cases), a stay away from a specific person (ordered in 52% of the cases), stay away from a location (47%), and/or curfew or electronic tagging (26%).[25]

64. However, the pre-trial detention decision-making process throughout England and Wales would be enhanced if bail information services were routinely available to support judges and prosecutors. Bail hostels are an important facility enabling the release of suspects without fixed abode on bail, but these are not readily available. Lastly, prosecutors and judges struggle to monitor certain conditions such as residence and police supervision.

Jane Mulcahy, researcher for the Irish Penal Reform Trust, project partner

65. Based on the findings of the research, pre-trial detention is generally ordered with restraint and bail on conditions is the "default position".

Irish judge: 'If you oppose bail, there must be a reason. Bail is the default position.'

66. In the application of conditions, courts have used their legally provided discretion to develop pragmatic alternatives to detention, for example by ordering a so called "mobile phone condition" which requires the suspect to carry a fully-charged phone at all times and answer the phone whenever the police calls. Other orders may include money bail, which was ordered in 35% of the cases studied. In small cases concerning less severe offences the bond required might be €100, but in a murder case it may reach €10,000.

67. While alternatives to bail are often and readily ordered by the courts, the judiciary and prosecution take an almost "pro forma" approach, ordering many onerous conditions simultaneously without consideration of the needs in the specific case. The judges were repeatedly heard to ask 'Any other requests, Gardai?'' and would just accept and apply any condition suggested by the prosecution. Suspects of less grave crimes were often treated similarly to suspects of more serious crimes. Yet these conditions are in practice not being monitored, enhancing the suspicion that they were not in fact required to satisfy the statutory purpose.

68. As Ireland is currently in the process of reforming its Bail Act, the findings of the research will be used to advocate for the introduction of an obligation for judges to attach the least onerous condition necessary to address the risk identified in the specific case, and each condition applied should be reasoned. Lastly, introducing bail hostels would further reduce the use of pre-trial detention.

[25] Conditions are often ordered cumulatively.

Ondřej Múka, Krutina & Co., Czech Republic, LEAP Advisory Board Member

69. In the Czech Republic, as in other post-communist countries, the default approach of the judge is to order detention if requested by the prosecution, which is a reversal of the ECtHR-standard that provides for a presumption of release.[26]

70. While there are alternatives to detention available, such as surrender of the passport, supervision by a probation officer, financial securities as well as a written statement by the suspect to comply with his bail condition, these are not trusted by judges and are accordingly rarely used.

71. In March 2016 electronic tagging should become available as an alternative to pre-trial detention, but there is little hope that this will be used in practice. It has been available for defendants on parole, but has not been used effectively. Electronic tagging will cost the suspect €2 per day.

Satu Wartiovaara, Turku & Wartiovaara, Finland, LEAP Advisory Board Member

72. Generally, the pre-trial detention system in Finland can be described as conservative and restrictive for the suspect. Finnish law does not really provide for alternatives to detention, apart from applying a travel ban on the suspect, which is rarely used.

73. Unlike in many other countries, the police are the powerful driving force in pre-trial procedures and request pre-trial detention orders in court. Reducing the use of pre-trial detention will therefore depend on engaging the police and changing their attitude towards suspects as well as introducing accessible alternatives.

74. Foreigners suspected of having committed an offence are regularly placed in pre-trial detention, as the travel ban appears often to be understood by judges to be only applicable if the suspect has permanent residence in Finland. Additionally, defence rights for foreign suspects are further reduced if they are prosecuted in "expedited criminal trials" within a few days after arrest, without previously being brought before a judge who decides on the lawfulness of the detention. As this "expedited criminal trial" has not developed out of legislative procedure but merely through practice, the defence cannot refer to legal sources to interpret and analyse, such as "travaux prépartoires". This innovation was introduced to reduce detention periods, but provides another example of how well-intentioned but incomprehensive reforms can further undermine fair trail rights.

75. A working group set up by the Finnish Ministry of Justice is currently preparing a proposal for alternatives to detention and it is predicted that the main recommendation will be the introduction of electronic tagging.

[26] *Michalko v. Slovakia* App. No 35377/05 (Judgment 21 December 2010), para 145.

Open discussion

76. A representative from England and Wales commented that alternatives to detention will only be effective if the system has been deliberately developed and accordingly funded by state, as alternatives are only effective if the necessary human and financial resources are invested. In England and Wales for example, a private company provides all electronic tagging services. In many countries the prosecution is the most powerful stakeholder driving the use of pre-trial detention, as judges, for a variety of reasons, will often comply with their request. It would therefore be crucial to influence prosecutors to request an alternative, to effectively and efficiently reduce the use of pre-trial detention or unconditional bail.

77. This is an experience also shared by a representative from Bulgaria, who noted that the judges rarely order or even consider ordering an alternative to detention when detention has been requested by the prosecution. Similarly, a representative from Luxembourg, believes that judges never really consider ordering an alternative, as they do not trust them. Accordingly, ordering pre-trial detention is "the rule".

Session 4: Review processes, special diligence & length of pre-trial detention

78. The final session of the day focused on identifying challenges and good practice in relation to the ongoing oversight of pre-trial detention, as well as looking at processes for review of pre-trial detention decisions and the special diligence exercised in the investigation.

Nuria Garcia Sanz, criminal lawyer working for APDHE, project partner, Spain

79. The biggest challenge in Spain is the length of pre-trial detention. While the legal rule states that it should not last longer than necessary, and the law provides for strict maximum periods, in practice the investigation is often not concluded as swiftly as possible which prolongs the pre-trial detention.

80. In half of the case files analysed, pre-trial detention continued for over a year, and in three of the 56 cases, it lasted for more than 2.5 years. While the complexity of the case clearly has an influence on its length, new measures such as deadlines for conducting review hearings or shortening the maximum period of pre-trial detention to less than the current 4 years, would speed the investigations up and reduce the periods the suspect is detained prior to their conviction.

81. Through the review of case file and the lawyer's survey the researchers found that, similar to findings in other countries, the severity of the offence is usually considered a sufficient reasoning to justify a pre-trial detention order on the basis of countering a perceived flight risk. Upon the legally requested review procedure, the initial decision is rarely amended in favour of the suspect; in fact, it is common for the defence counsel to request the release of their client unsuccessfully three to four times per year.

Nóra Novoszádek, Hungarian Helsinki Committee, Project Partner

82. In Hungary, 23.3% of the prison population are detained pre-trial.[27] The main findings of the research confirmed previous ECtHR judgments that criticised Hungary with regards to different aspects in the process of pre-trial decision-making and conditions.[28] In *X. Y. v. Hungary*[29] for example, the duration of pre-trial detention was condemned for being unreasonable.

83. With regards to the reasoning of decisions that review previous pre-trial detention decisions, the research team found it problematic that in 73 cases analysed „interference with the course of justice" was also evoked after the bill of indictment was filed. In addition, several review decisions repeated in essence or word by word the reasoning of previous pre-trial decisions.

84. Despite the legal principle that pre-trial detention should only last as long as absolutely necessary, the legal maximum period for pre-trial detention was removed in 2013 (with regard to the period prior to the first instance judgment) for cases in which the suspect could face imprisonment for up to or more than 15 years.

85. Based on the reviews of the case files the majority (67.5%) of the suspects were detained for more than 6 months. The main causes for lengthy pre-trial detention as identified through survey amongst lawyers are high workloads, delays in obtaining expert opinions and the lack of control judges can apply to ensure the efficiency of investigations.

Daniel Roos – LEAP advisory board member, practising lawyer in Sweden

86. In Sweden, investigations and review hearings are not conducted diligently, although review hearings do take place every 2 weeks.

87. As a result of the "the immediate testimony" principle, which means that a statement given in court is given precedence over statements at an earlier stage, pre-trial detention is ordered readily to prevent the suspect from drafting a different statement at court than at the police station, after having spoken to co-suspects for example.

88. The review hearing itself is attended by the suspect via a television screen from prison. Access to the case file is not provided automatically to the defence at this stage but only upon request to the prosecution, which will often only provide access for a limited period of time, providing an obstacle to full preparation of a strategy to challenge the detention.

89. Generally, the courts require little evidence at this stage and will still simply repeat a previous decision to detain, despite there being insufficient grounds. The suspect is however likely to be released if the prosecution requests such an order. In 2011, out of 11,500 individuals who were detained pre-trial, 1,500 (more than 10%) were financially compensated for their unlawful arrest and detention.

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[27] Institute for Criminal Policy Research, World Prison Brief, Hungary, statistics on 13.10.2015, available at: http://www.prisonstudies.org/country/hungary.

[28] See e.g.: *X.Y. v Hungary* App. No 43888/08 (Judgment 19 March 2013); *A.B. v Hungary* App. No 33292/09 (Judgment 16 April 2013); *Baksza v Hungary* App. No 59196/08 (Judgment 23 April 2013); *Hagyó v Hungary* App. No 52624/10 (Judgment 23 April 2013).

[29] *X.Y. v Hungary* App 43888/08 (Judgment 19 March 2013).

Open discussion

90. In the ensuing discussion, a representative from Austria explained that prior to an order to detain, legal representation is not mandatory. As pre-trial detention is deduced from a final sentence, it is often considered the beginning of the sentence and is therefore regarded less critically.

91. A representative from the Netherlands explained how in some case the pre-trial detention can last beyond the legally defined limit. Pre-trial detention should only last a maximum of 104 days in the Netherlands, however, in serious or complex cases, the case will often not be trial-ready, so when the trial commences it is adjourned at regular intervals. In that time further research can be done and the defence can also request for additional investigative measures or the hearing of witnesses. The suspect's detention will however be reviewed every 3 months, the judges can then review regularly whether pre-trial detention is still justified.

92. A representative from Slovakia commented that cases involving a detainee are in fact prosecuted more efficiently than a case not involving a detainee. This had also been voiced during the interviews by English prosecutors, who explained to the researchers that the required speed of the investigations and the accordingly increased workload is in fact an issue they consider when requesting to detain.

93. A representative from England and Wales highlighted that the suspect has an absolute right to be present at his first hearing, yet at the review by the (higher) Crown Court, the defendant is not present and is in fact represented by a barrister he might never have met but is only instructed by his solicitor. This raises questions as to whether the personal appearance of the suspect in court might have an impact on the outcome of his hearing.

Case study from Hungary
In a case known to the Hungarian Helsinki Committee, a suspect was put under house arrest having been heard by a court orally. Upon appeal, which was conducted without the suspect present, he was ordered in pre-trial detention, to be released again on review after 7 months of detention, where he was present at the hearing. Finally, he was detained again pre-trial by the trial judge, before he had met the suspect in person.

94. The research team from England and Wales further reported that in interviews they had encountered several judges at the (lower) Magistrates Court who explained that they would generally review a case involving pre-trial detention on the assumption that the previous decision had been made correctly. Such assumptions reverse the burden of proof from the prosecution to the defence.

Concluding comments

95. The concluding comments did not provide a comprehensive overview of the discussion, but rather highlighted a few key themes as follows:

    (1) the access to the case file is often restricted or limited;

(2) the initial judicial decision to detain is often made hastily but then regularly repeated at subsequent hearings and reviews. This issue highlights a real tension between the need for a judicial hearing within a short period of time and the risk of inappropriate decisions being taken as a result of the speedy proceedings that are then rarely reversed at the review stage;

(3) judges appear to be under pressure to follow the prosecution's submission, which raises questions as to whether prosecutors are the real stakeholder to engage with in order to effectively reduce the use of pre-trial detention; and lastly,

(4) especially learning from the example of France, it is important to carefully consider if "fast-track" trials that reduce the use of pre-trial detention might result in the restriction of other fair trial rights.

Fair Trials

December 2015

Annex 1 – Participants

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7	Zuzana Candigliota	Czech Republic	Human Rights League
8	Jaanus Tehver	Estonia	Tehver & Partners
9	Satu Wartiovaara	Finland	Turku & Wartiovaara Attorneys
10	Dominique Tricaud	France	Tricaud-Traynard Avocats Associés
11	Oliver Kyrieleis	Germany	Rechtsanwalt Oliver Kyrieleis
12	Andras Kadar	Hungary	Hungarian Helsinki Committee
13	Nora Novoszadek	Hungary	Hungarian Helsinki Committee
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20	Jurate Suzevicinte	Lithuania	Human Rights Monitoring Institute
21	Ann Spiteri	Malta	Mfisud Bonnici and Camilleri Advocates
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31	John Stauffer	Sweden	Civil Rights Defenders

32	Ed Cape	UK	University of West England
33	Richard Glencross	UK	Centre for Strategic Evaluation and Services
34	Tom Smith	UK	University of West England
35	Matylda Pogorzelska	-	Fundamental Rights Agency
36	Martin Schoenteich	-	Open Society Justice Initiative
37	Marion Isobel	-	Open Society Justice Initiative
38	Kersty McCourt	-	Open Society Justice Initiative
39	Marina Ilminska		Open Society Justice Initiative
40	Greg Mayne		Oak Foundation
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42	Voislav Stojanovski	Macedonia	Macedonian Helsinki Committee
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45	Leslie Solis	Mexico	Mexico Evalua
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50	Simeon Koroma	Sierra Leone	Timap for Justice
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63	Miriam Smith		Legal and Policy Intern
64	Kate Strange		Campaign and Communications Intern

Annex 2 – Executive Summaries of Country Research Reports

Country Report – England and Wales

Executive summary[30]

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-based NGO Fair Trials International. It was funded by the European Commission 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 kept in custody at the first court hearing, they have 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 V.**

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,

[30] This is Executive Summary is in no way to be cited or reproduced as it has not yet been finalised.

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 VI.**

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 VII.**

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. **See Chapter VIII.**

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 IX.**

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 it is always for the prosecution to persuade a court that bail should be withheld.

- 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.

Country Report - Greece

DRAFT EXECUTIVE SUMMARY

The overuse of pre-trial detention, 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. The scope of the research and the data collected is limited and cannot offer a precise representation of the scope of problems associated with PTD. It does however highlight some important issues relating to the use of PTD in Greece.

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 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 the limited data 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; and
- 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;
- 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;

Country Report - Hungary

DRAFT 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 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 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 EU legislation.

The research project "The Practice of Pre-trial Detention: Monitoring Alternatives and Judicial Decision-making", funded by the European Union, was conducted in 10 different EU Member States in 2014–2015, in Hungary by the Hungarian Helsinki Committee (HHC). The project's research results presented below are based on (i) a desk-based 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 (vi) written responses to questions provided by 10 judges.

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. One prosecutor explained that outside Budapest, not the full case file, but only the documents deemed relevant by the prosecution can be accessed by the defence lawyer, which may be problematic from the point of view of Art. 7(1) of the Right to Information Directive, while in Budapest, access to the full case file is granted.

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 HHC 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 decision). 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 shows 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 in relation to the substance of initial pre-trial detention decisions above apply also 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 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 they are applying ECtHR-standards when making decisions related to pre-trial detention.
- The law should be amended to ensure that review and 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.

Country Report – Italy

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 legislator has recently introduced 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 reduce, 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 layers surveyed, and 5 judges and 3 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 guarded, 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, there is often insufficient interpretation provided.
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 alternative 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.

Country Report – Ireland[31]

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. It did however identify some concerning practices which we hope will be addressed through the recommendations set out below.

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 Irish research, 91 PTD hearings were observed, 84 case-files analysed, 30 defence lawyers surveyed, and 4 judges and 7 prosecutors interviewed.

Decision-making procedure

Defendants are legally represented in pre-trial detention hearings. While the majority of stakeholders believe that the pre-trial detention system works well in practice, 20% of defence practitioners surveyed were, 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. The research also suggested 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. Additionally, many of the initial pre-trial detention hearings are conducted in first instance within a very short period of time.

The Substance of Decisions

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)[32]. The empirical research indicated that the prosecution frequently objects to bail on multiple grounds, the most common of which is the likelihood of committing further offences. The prosecution raised previous convictions and offences committed on bail in relation to 40% of bail applicants (n=37). Judges only cited the risk of reoffending as a ground for refusing bail in respect of 13% of applicants (n=12). While flight risk was the second most common basis of bail objections (invoked in respect of 35% (n=32) of bail applicants in hearings monitored) judges referred to flight risk as a reason for refusing bail in 18% of cases (n=16). Non-Irish defendants appear to be more likely to be remanded in custody to counter the risk of absconding.

[31] The Irish Penal Reform Trust www.iprt.ie commissioned Jane Mulcahy, Independent Research Consultant to conduct this research, Aug 2014 - Aug 2015

[32] The remaining 7 cases monitored did not relate to bail matters in the pre-trial context.

Use of alternatives to detention

In Ireland release on bail is *the* alternative to detention. The research revealed both (1) an over-use of conditions and (2) inadequate monitoring of compliance with those 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 related to a wide range of offences. While Gardaí (police) were often reluctant to see a defendant released on bail without onerous conditions, the research also suggested that the monitoring of such conditions is, at best, sporadic.

Review of pre-trial detention

People denied bail in the District Court have a right at any point to apply for bail in the High Court where a more comprehensive hearing is common. In the High Court defence counsel have the scope and time to cross-examine witnesses, to draw the court's attention to existing legal precedents, and call evidence on failure to adhere to conditions/circumstances ordered in the previous pre-trial detention hearing. The research suggests that the depth of the participation of the defence team (a solicitor and barrister) in High Court bail applications has an impact on the outcome for the applicant. Review hearings are sometimes delayed due to many detention cases awaiting review. However, 70% of defence lawyers surveyed believe that pre-trial detention cases are investigated faster than other cases. 60% of lawyers surveyed stated that where pre-trial detention is lengthy, judges impose deadlines for the completion of various stages of investigation.

Plans for legislative reform of bail laws

Legislative reform in this area is currently underway in Ireland. The *General Scheme of the Bail Bill, 2015* was published in July 2015 and consolidates the existing law in the area while also introducing some new provisions including a requirement that the Court to give reasons for its bail decisions. Head 27(8) of the Bill provides that where a prosecutor intends to raise on objection to bail to prevent the commission of a serious offence such an application must be on notice. Unfortunately, the legislation also introduces a power of arrest without warrant for breach of bail conditions and omits any statutory provision for the establishment of bail supports, hostels or bail information schemes in prisons.

Summary of Recommendations

In light of these findings the recommendations are as follows:

Compilation and Publication of Official Statistics

- The Department of Justice and Equality in conjunction with An Garda Síochána, the Courts Services, the Director of Public Prosecutions, the Irish Prison Service and the Central Statistics Office should compile and share more comprehensive statistics relating to the use of remand, with a view to enhancing knowledge and understanding of statistical trends in this complex area of law and practice.

Procedure of pre-trial detention decision-making

- Consideration should be given to both extending daily court sitting times, utilizing additional hearing days and by provision of additional courts for bail applications in order to avoid any delay in hearing bail applications
- Official guidelines on the conduct of bail applications should be developed by An Garda Síochana for prosecuting Gardaí and Court Presenters
- Training, including refresher and/or online courses on bail law, guidelines and practice should be provided to all Gardaí and Court Presenters
- Prosecuting counsel in the High Court should be vigilant to conduct individual critical assessments as to whether conditions are necessary and proportionate to meet the identified risk in each application
- Judges should be satisfied in every case that the legal representative making a bail application has been provided sufficient time to take full instructions from their client before permitting any bail application to proceed.
- Gardaí should request the least onerous conditions possible to meet any risk(s) identified.
- Legal representatives should be vigilant in advising clients on appropriate conditions where necessary and in robustly challenging any proposals for unnecessary, disproportionate or unduly onerous conditions

Substance of pre-trial detention decision-making

- Judges should be required to give written reasons for refusing or granting bail with specific reference to any objection(s), the rationale for conditions, as well as the consequences of any breach.
- Judges should be vigilant to adopt an individualised approach when considering the imposition of conditions, taking into account the circumstances of the accused, the offence(s) charged and the objections raised and only attach such conditions as are strictly necessary and proportionate to meet those objection(s).
- Regular judicial training (including refresher courses) in bail matters should be provided and should incorporate the evolving jurisprudence of the European Court of Human Rights in respect of bail and pre-trial detention.

Characteristics of defendants

- Supported bail placements for women suitable to their needs should be developed as part of the Joint Irish Prison Service and Probation Service Strategy for Women Offenders.
- In bail applications involving non-national defendants the court should always consider granting bail with conditions such as surrender of passport to meet objections of flight risk before considering pre-trial detention.

Alternatives to Detention

- Well-resourced and community based bail support programmes should be made available across the country to provide a realistic alternative to pre-trial detention.
- There should be an audit undertaken by An Garda Síochana of bail conditions and the role/duty of prosecuting Gardaí to monitor them.

- Judges should impose the least onerous conditions possible to meet the risk(s) identified and should avoid imposing conditions which set defendants up to fail

Review of pre-trial detention

- Defence lawyers should be regularly review whether a fresh application for bail is possible, especially where there is any change in circumstances.
- There should be clear legislative provision for time served on remand to be credited towards any custodial sentence imposed after trial

Country Report – Lithuania

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 the 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 (see page 20-28).

2. The substance of decisions: PTD is most often ordered to prevent flight of the suspect, 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 (see page 29-33).

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 (see page 34-37).

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 (see page 38-40).

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 give 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 (see page 41-43).

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 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 submission 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.

Country Report - Netherlands

Draft Summary of the Dutch Report[33]

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 will we assess whether this criticism is justified, and if so, what steps need to be taken to alleviate the concerns that exist regarding pre-trial detention. The main overarching conclusion of our research is that the Dutch legislation on pre-trial detention is in conformity with ECHR standards and EU law. This leads us to conclude 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.

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 Dutch research, 9 courts were visited, 56 case-files analysed, 27 defence lawyers surveyed, and 3 judges and 3 prosecutors interviewed.

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

1. **Decision-making procedure:** The Dutch procedure in practice appears to meet the standards set by the Strasbourg Court and EU law; suspects have legal representation 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. Some defence lawyers point out that the case file that is available at the first hearing is sometimes too limited.

2. **The substance of decisions:** When looking at the substantive aspects of the practice of pre-trial detention, the high number of cases in which pre-trial detention that is being ordered must be highlighted as a point of concern. This raises questions as to 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 he feels that such a request will be granted by the judges, also in the Netherlands not all offences quality for pre-trial detention. In most cases the reasoning of decisions on pre-trial detention is quite brief and in general and abstract terms. Grounds for pre-trial detention are easily accepted.

3. **Use of Alternatives to detention:** Alternatives to pre-trial detention currently only exist as conditions to a suspension of the pre-trial detention. This means that judges first have to

[33] This draft summary is not to be cited or reproduced in any form, as it has not been finalised or approved by crucial stakeholders.

consider whether pre-trial detention is justified, before making a second consideration on whether the pre-trial detention should be suspended. This raises the question whether judges will appropriately consider a suspension given that they have already decided that pre-trial detention could be lawfully applied. Alternatives to pre-trial detention are underused, especially in the first phase of the pre-trial detention. More research and discussion is necessary to fully develop these alternatives in terms of new legislation and better use of existing alternatives like bail and electronic detention. For instance with regard to bail, judges are reluctant to set bail conditions but prefer ordering pre-trial detention. Some judges explained during the interviews that they are unfamiliar with bail as an alternative, and others fear that it will lead to inequality since poor suspects will not be able to meet the financial requirements to receive bail.

4. **Review of pre-trial detention:** Review of pre-trial detention procedures takes place at the end of each period of pre-trial detention ordered (assuming the prosecutor wants to keep the suspect in pre-trial detention). Alternatively, a defence lawyer can always request a hearing to review the pre-trial detention if he feels that the conditions for pre-trial detention are no longer met or when he wants to request a suspension of the pre-trial detention.

5. **Case outcome:** In all cases the time served in pre-trial detention is deducted from the sentence in case of a conviction. If the suspect is acquitted of all charges he can claim financial compensation for the time served in pre-trial detention. No compensation is provided if the final sentence is lower than the time served in pre-trial detention.

Recommendations

Based on the preliminary findings of the research the main recommendations are as follows:

- Pre-trial detention orders should be better reasoned.
- In order to make the use of alternatives to pre-trial detention more common, a change in the legislative framework could be considered in the sense that alternatives to pre-trial detention could be considered independent from the decision as to whether pre-trial detention is allowed.
- Further research should be done into the effectiveness of alternatives to pre-trial detention. Two main alternatives are mentioned often in this regard; electronic detention and (money) bail. Both measures exist in Dutch legislation but are not used often in practice.

As mentioned above, the research has not demonstrated that major legislative changes are necessary in order to change the practice of pre-trial detention decision making in the Netherlands. In our view a culture change is necessary within the judiciary and the prosecution service. We hope that the discussion which is already underway regarding pre-trial detention amongst the judiciary, with a particular focus on whether it is necessary in most cases, will continue.

Country Report - Poland

Draft Executive Summary

1. As of 31 July 2015, 5 300 people remain in prisons as pre-trial detainees in Poland. At the same time, the overall prison population in the country amounts to 75 691 and is the second highest in the European Union. This means that pre-trial detainees constitute 7.0 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 pre-trial detention hearings, analysing case files, as well as surveying defence lawyers and interviewing judges and prosecutors. In the course of the Polish research, 4 pre-trial detention 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. The majority of lawyers surveyed explained that they have 30 minutes or less to prepare for the hearing, including access 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.

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 about 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 file analysis confirmed the notion that courts of higher instance rarely change the decisions of lower level courts but 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. The preparation of review hearings is often 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 introduce a provision on the defendant's obligatory presence at all pre-trial detention hearings.
b. The legislator should introduce obligatory legal representation in cases where a prosecutor requests pre-trial detention or alternatives to detention.
c. 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.
d. 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.
e. 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.
f. The legislator should consider introducing new preventive measures (home detention and electronic monitoring) into the Code of Criminal Procedure.
g. The Institute of Justice could undertake further research on non-custodial preventive measures, including their perception among the representatives of the justice system.
h. The amounts awarded as compensation in cases of unlawful pre-trial detention should be increased.

Country Report - Romania

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 defense 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 favor 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.

Country Report – Spain

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.

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.

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.

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.

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.

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;
- Legal reform should 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.