Is pre-trial detention used as last resort measure in Romania?

Research Report

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About the Association for the Defence of Human Rights in Romania-the Helsinki Committee (APADOR-CH)

The association for the Defence of Human Rights in Romania –the Helsinki Committee (APADOR-CH) is a non-governmental, not-for profit organization established in 1990. Its mission is to take action for the protection of human rights and the establishment of equilibrium when they are in danger or infringed upon.

APADOR-CH works for: the development of efficient legal and institutional mechanisms for respecting human rights and monitoring relevant institutions; the improvement of the legislative framework and of the practices regarding the right to free assembly and association, freedom of expression, right to private life; the development of practices and institutional mechanisms for increasing transparency and good governance; initiation of strategic litigation in cases which deal with infringement upon human rights; the monitoring of: police abuses, regulations and practices in the field of national security which have an impact on human rights; regulations and practices concerning deprivation of liberty.

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I. Executive Summary

Pre-trial detention in Romania is applied significantly more often than other alternative preventive measures. Recent changes to the law have reduced the use of pre-trial detention, but there is little research analysing the nature of pre-trial detention decision-making and whether pre-trial detention is applied lawfully and the defence's rights are safeguarded throughout the procedure. These aspects are assessed in this report.

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

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

1. **Decision-making procedure:** Despite extensive defence rights provided by law, in reality the practical enjoyment of these rights remains limited. Lawyers are often only notified shortly before hearings, and have only 30 minutes to study the case file. Even judges will sometimes have insufficient time to read the file, and therefore rely too strongly on the prosecutor's arguments. Evidence in favour of detention is rarely provided by the prosecution, and lawyers are not able to provide evidence to counter the arguments for detention.
2. **The substance of decisions:** Many national courts fail to provide substantial reasoning for pre-trial detention orders. The research demonstrated that the most common reason given for ordering detention is that the accused presents a potential danger to the public, followed by the risk of reoffending and flight risk. Yet, the researchers discovered that in fact the severity of the offence is usually the real reason for ordering pre-trial detention, albeit in violation of ECtHR-standards. 70% of lawyers surveyed have encountered pre-trial detention being ordered on unlawful grounds. The researchers observed several cases in which the pre-trial detention order was poorly motivated and a less restrictive alternative measure would arguably have been sufficient.
3. **Use of alternatives to detention:** Despite different alternatives to detention being available by law, including house arrest, judicial supervision and bail, they are rarely used. Judges are reluctant to consider non-custodial alternatives to detention as they consider them to be less effective. In the vast majority of cases reviewed during the research, alternatives to pre-trial detention were not even considered.
4. **Review of pre-trial detention:** Although in all cases observed and case files reviewed, the pre-trial detention decision was reviewed in compliance with the law, the initial

decision to detain was generally upheld, often based on the same reasons as in the previous order, and alternatives were never ordered. In the cases observed and reviewed, no new evidence was provided at the review stage.

5. **Case outcomes:** None of the defendants in the case files reviewed were acquitted; in fact the vast majority was convicted to a custodial sentence longer than the time spent in detention pre-trial. However, a chosen lawyer might enhance the likelihood of a lower sentence as these have less clients and more time to prepare each case. 68% of all defendants in the case files reviewed pleaded guilty.

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

- Urgent adoption of the Interpretation and Translation Directive (2010/64/EU) which is crucial in ensuring the right to trial and the right to defence guaranteed by the ECHR to defendants, who do not speak or understand the language of the court. Proactive measures also need to be taken by the state to oversee the proper and effective implementation of the Right to Information Directive (2012/13/EU), and the Access to a Lawyer Directive (2013/48/EU). In particular the implementation of the Right to Information Directive which provides access to case-file is essential to effectively challenge the lawfulness of detention.
- An increase in the fee of legal aid lawyers and an increase in the number of judges who deal with pre-trial detention cases, to ensure both can spend more time on each case.
- Trainings regarding the national law and the standards of the ECtHR concerning pre-trial detention should be provided to all lawyers involved in the procedure of pre-trial detention, especially to the ones who are appointed by the state.
- Judges and prosecutors should also be trained in the application of ECHR-standards in the context of pre-trial detention. Despite judgments of the ECtHR against Romania for breaching Article 5 ECHR, the situation has not changed systemically in the areas identified by the ECtHR as problematic. All responsible authorities for the implementation of judgments should present action plans to address the underlying issues.
- The provisions of the new criminal procedure code concerning non-custodial alternatives for detention should be completed by secondary legislation concerning the practical application of preventive measures.
- Judicial supervision should also verify the correct application of these preventive measures.
- Sufficient resources (both human and technical) must be put in place to ensure the effectiveness of non-custodial measures, which would lead to increased judicial confidence.

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

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

II. Introduction

1. Background and objectives

This report is one of 10 country reports outlining the findings of an EU-funded research project conducted in 10 EU Member States in 2014 – 2015.

More than 100,000 suspects are currently detained pre-trial across the EU. While pre-trial detention has an important part to play in some criminal proceedings, ensuring that certain defendants will be brought to trial, it is being used excessively at huge cost to the national economies. Unjustified and excessive pre-trial detention clearly impacts on the right to liberty and to be presumed innocent until proven guilty. It also affects the ability of the detained person to access fully their right to a fair trial, particularly due to restrictions on their ability to prepare their defence and gain access to a lawyer. Furthermore, prison conditions may also endanger the suspect's well-being.[1] For these reasons, international human rights standards including the European Convention on Human Rights (ECHR) require that pre-trial detention is used as an exceptional measure of last resort.

While there have been numerous studies on the legal framework governing pre-trial detention in EU Member States, limited research into the practice of pre-trial detention decision-making has been carried out to date. This lack of reliable evidence motivated this major project in which NGOs and academics from 10 EU Member States, coordinated by Fair Trials International (Fair Trials), researched pre-trial decision-making procedures. The objective of the project is to provide a unique evidence base regarding what, in practice, is causing the use of pre-trial detention. In this research, the procedures of decision-making were reviewed to understand the motivations and incentives of the stakeholders involved (defence practitioners, judges, prosecutors). It is hoped that these findings will inform the development of future initiatives aiming at reducing the use of pre-trial detention at domestic and EU-level.

This project also complements current EU-level developments relating to procedural rights. Under the Procedural Rights Roadmap, adopted in 2009, the EU institutions have examined issues arising from the inadequate protection of procedural rights within the context of mutual recognition, such as the difficulties arising from the application of the European Arrest Warrant.

[1] For more detail see: http://website-pace.net/documents/10643/1264407/pre-trialajdoc1862015-E.pdf/37e1f8c6-ff22-4724-b71e-58106798bad5.

Three procedural rights directives (legal acts which oblige the Member States to adopt domestic provisions that will achieve the aims outlined) have already been adopted: the *Interpretation and Translation Directive* (2010/64/EU), the *Right to Information Directive* (2012/13/EU), and the *Access to a Lawyer Directive* (2013/48/EU). Three further measures are currently under negotiation – on legal aid, safeguards for children, and the presumption of innocence and the right to be present at trial.

The Roadmap also included the task of examining issues relating to detention, including pre-trial, through a Green Paper published in 2011. Based on its case work experience and input sought through its Legal Expert Advisory Panel (LEAP[2]), Fair Trials responded to the Green Paper in the report "Detained without trial" and outlined the necessity for EU-legislation as fundamental rights of individuals are too often violated in the process of ordering and requesting pre-trial detention. Subsequent Expert meetings in 2012 – 2013 in Amsterdam, London, Paris, Poland, Greece and Lithuania affirmed the understanding that problems with decision-making processes might be responsible for the overuse of pre-trial detention, and highlighted the need for an evidence base clarifying this presumption. Regrettably, no action has been taken to date with regards to strengthening the rights of suspects facing pre-trial detention. However, the European Commission is currently conducting an Impact Assessment for an EU measure on pre-trial detention, which will hopefully be informed by the reports published under this research project.

2. Regional standards

The current regional standards on pre-trial detention decision-making are outlined in Article 5 of the European Convention on Human Rights ("ECHR"). Article 5(1)(c) ECHR states that a person's arrest or detention may be "effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so". Anyone deprived of liberty under the exceptions set out in Article 5 "shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful" (Article 5(4) ECHR). The European Court of Human Rights (ECtHR) has developed general principles on the implementation of Article 5 that should govern pre-trial decision-making and would strengthen defence rights if applied accordingly. These standards have developed over a large corpus of ever-growing case law.

[2] http://www.fairtrials.org/fair-trials-defenders/legal-experts/.

i) Procedure

The ECtHR has ruled that a person detained on the grounds of being suspected of an offence must be brought promptly[3] or "speedily"[4] before a judicial authority, and the "scope for flexibility in interpreting and applying the notion of promptness is very limited".[5] The trial must take place within a "reasonable" time according to Article 5(3) ECHR and generally the proceedings involving a pre-trial detainee must be conducted with special diligence and speed.[6] Whether this has happened must be determined by considering the individual facts of the case.[7] The ECtHR has found periods of pre-trial detention lasting between 2.5 and 5 years to be excessive.[8]

According to the ECtHR, the court imposing the pre-trial decision must have the authority to release the suspect[9] and be a body independent from the executive and from both parties of the proceedings.[10] The detention hearing must be an oral and adversarial hearing, in which the defence must be given the opportunity to participate effectively.[11]

ii) Substance

The ECtHR has repeatedly emphasised the presumption in favour of release[12] and clarified that the state bears the burden of proof on showing that a less intrusive alternative to detention would not serve the respective purpose.[13] The detention decision must be sufficiently reasoned and should not use "stereotyped"[14] forms of words. The arguments for and against pre-trial detention must not be "general and abstract".[15] The court must engage with the reasons for pre-trial detention and for dismissing the application for release.[16]

[3] *Rehbock v Slovenia*, App. 29462/95, 28 November 2000, para 84.
[4] The limit of acceptable preliminary detention has not been defined by the ECtHR, however in *Brogan and others v UK*, App. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988, the court held that periods of preliminary detention ranging from four to six days violated Article 5(3).
[5] Ibid 4 para 62.
[6] *Stogmuller v Austria*, App 1602/62, 10 November 1969, para 5.
[7] *Buzadj v. Moldova*, App 23755/07, 16 December 2014, para 3.
[8] *PB v France*, App 38781/97, 1 August 2000, para 34.
[9] *Singh v UK*, App 23389/94, 21 February 1996, para 65.
[10] *Neumeister v Austria*, App 1936/63, 27 June 1968, para 24.
[11] *Göç v Turkey, Application* No 36590/97, 11 July 2002, para 62.
[12] *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 145.
[13] *Ilijkov v Bulgaria*, App 33977/96, 26 July 2001, para 85.
[14] *Yagci and Sargin v Turkey*, App 16419/90, 16426/90, 8 June 1995, para 52.
[15] *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, para 63.
[16] *Buzadj v. Moldova*, App 23755/07, 16 December 2014, para 3.

The ECtHR has also outlined the lawful grounds for ordering pre-trial detention to be: (1) the risk that the suspect will fail to appear for trial;[17] (2) the risk the suspect will spoil evidence or intimidate witnesses;[18] (3) the risk that the suspect will commit further offences;[19] (4) the risk that the release will cause public disorder;[20] or (5) the need to protect the safety of a person under investigation in exceptional cases.[21] The mere fact of having committed an offence is not a sufficient reason for ordering pre-trial detention, no matter how serious the offence and the strength of the evidence against the suspect.[22] Pre-trial detention based on "the need to preserve public order from the disturbance caused by the offence"[23] can only be legitimate if public order actually remains threatened. Pre-trial detention cannot be extended just because the judge expects a custodial sentence at trial.[24]

With regards to flight risk, the ECtHR has clarified that the lack of fixed residence[25] alone or the risk of facing long term imprisonment if convicted does not justify ordering pre-trial detention.[26] The risk of reoffending can only justify pre-trial detention if there is actual evidence of the definite risk of reoffending available;[27] merely a lack of job or local family ties would be insufficient.[28]

iii) Alternatives to detention

The case law of the European Court of Human Rights (ECtHR) has strongly advocated that pre-trial detention be imposed only as an exceptional measure. In *Ambruszkiewicz v Poland*,[29] the Court stated that the "detention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it also must be necessary in the circumstances."

[17] *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003,, para 59.
[18] Ibid 17.
[19] *Muller v. France*, App 21802/93, 17 March 1997, para 44.
[20] *I.A. v. France*, App 28213/95, 23 September 1988, para 104.
[21] Ibid para 108.
[22] *Tomasi v France*, App 12850/87, 27 August 1992, para 102.
[23] *I.A. v. France*, App 28213/95, 23 September 1988, para 104.
[24] *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 149.
[25] *Sulaoja v Estonia*, App 55939/00, 15 February 2005, para 64.
[26] *Tomasi v France*, App 12850/87, 27 August 1992, para 87.
[27] *Matznetter v Austria*, App 2178/64, 10 November 1969, concurring opinion of Judge Balladore Pallieri, para 1.
[28] *Sulaoja v Estonia*, App 55939/00, 15 February 2005, para 64.
[29] *Ambruszkiewicz v Poland*, App 38797/03. 4 May 2006, para 31.

Furthermore, the ECtHR has emphasised the use of proportionality in decision-making, in that the authorities should consider less stringent alternatives prior to resorting to detention,[30] and the authorities must also consider whether the "accused's continued detention is indispensable".[31]

One such alternative is to release the suspect within their state of residence subject to supervision. States may not justify detention in reference to the non-national status of the suspect but must consider whether supervision measures would suffice to guarantee the suspect's attendance at trial.

iv) Review of pre-trial detention

Pre-trial detention must be subject to regular judicial review,[32] which all stakeholders (defendant, judicial body, and prosecutor) must be able to initiate.[33] A review hearing has to take the form of an adversarial oral hearing with the equality of arms of the parties ensured.[34] This might require access to the case files,[35] which has now been confirmed in Article 7(1) of the *Right to Information Directive*. The decision on continuing detention must be taken speedily and reasons must be given for the need for continued detention.[36] Previous decisions should not simply be reproduced.[37]

When reviewing a pre-trial detention decision, the ECtHR demands that the court be mindful that a presumption in favour of release remains[38] and continued detention "can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention".[39] The authorities remain under an ongoing duty to consider whether alternative measures could be used.[40]

[30] *Ladent v Poland*, App 11036/03, 18 March 2008, para 55.
[31] Ibid, para 79.
[32] *De Wilde, Ooms and Versyp v Belgium*, App 2832/66, 2835/66, 2899/66, 18 June 1971, para 76.
[33] *Rakevich v Russia*, App 58973/00, 28 October 2003, para 43.
[34] See above, note 11.
[35] *Wloch v Poland*, App 27785/95, 19 October 2000, para 127.
[36] See above, note 3, para 84.
[37] See above, note 13.
[38] See above, note 12, para 145.
[39] *McKay v UK*, App 543/03, 3 October 2006, para 42.
[40] *Darvas v Hungary*, App 19574/07, 11 January 2011, para 27.

v) Implementation

Yet, these guidelines are not being upheld in national courts and EU countries have been found in violation of Article 5 ECHR in more than 400 cases in 2010 - 2014.[41]

Notwithstanding any possible EU-action on this issue at a later stage, the ultimate responsibility for ensuring that the suspects rights to a fair trial and right to liberty are respected and promoted lies with the Member States that must ensure that at least the minimum standards developed by the ECtHR are complied with.

3. Pre-trial detention in Romania

APADOR-CH has been involved in activities concerning deprivation of liberty since its early existence 25 years ago. The association constantly monitors detention conditions, police abuses and the laws and practices which affect the liberty and security of individuals. One of the conclusions reached based on the organization's experience is that police lock-ups and prisons are overcrowded and one of the causes might be the insufficient use of alternatives to detention.[42]This research has been conducted with the intention of providing valuable insight into the factors which determine this practice and what needs to be done to correct the situation.

In February 2014 a new criminal code and a criminal procedure code entered into force introducing new alternatives to pre-trial detention (house arrest and judicial oversight with bail). To the extent that the methodology used permitted it, APADOR-CH has assessed how the provisions regulating alternatives to pre-trial detention are implemented into practice.

Aside from the stakeholders directly interested in the recommendations in this research, it is also important to raise awareness on the subject among Romanian citizens more generally. Sometimes, excessive media coverage of some court cases, based on the prosecutor's account for pre-trial detention request only, uses misinformation about the meaning and use of pre-trial detention.[43]

III. Methodology of the research project

1. General methodology

This project was designed to develop an improved understanding of the process of the judicial decision-making on pre-trial detention in 10 EU Member States. This research was carried out in

[41] http://echr.coe.int/Documents/Overview_19592014_ENG.pdf.
[42] APADOR-CH (2014), Comments regarding the draft project for the criminal procedure code, http://www.apador.org/publicatii/comentarii_proiect_cod_penal.pdf, p. 3.
[43] Discursul Președintelui României, domnul Klaus Iohannis, la ședința plenului Consiliului Superior al Magistraturii, 6 January 2015, http://presidency.ro/index.php?_RID=det&tb=date&id=15406&_PRID=search.

10 Member States with different legal systems (common and civil law), legal traditions and heritage (for example Soviet, Roman and Napoleonic influences), differing economical situations, and importantly strongly varying usage of pre-trial detention in criminal proceedings (for example 12.7% of all detainees in Ireland have not yet been convicted[44] whereas in the Netherlands 39.9% of all prisoners have not yet been convicted[45]). The choice of participating countries allows for identifying good and bad practices, and proposing reform at the national level as well as developing recommendations that would ensure enhanced minimum standards across the EU. The individual country reports focusing on the situation in each participating country will provide in-depth input to the regional report which will outline common problems across the region as well as highlighting examples of good practice, and will provide a comprehensive understanding of pan-EU pre-trial decision-making.

Five research elements were developed to gain insight into domestic decision-making processes, with the expectation that this would allow for a) analysing shortfalls within pre-trial detention decision-making, understanding the reasons for high pre-trial detention rates in some countries and establish an understanding the merits in this process of other countries, b) assessing similarities and differences across the different jurisdictions, and c) the development of substantial recommendations that can guide policy makers in their reform efforts.

The five-stages of the research were as follows:

(1) Desk-based research, in which the partners examined the national law and practical procedures with regards to pre-trial detention, collated publicly available statistics on the use of pre-trial detention and available alternatives, as well as information on recent or forthcoming legislative reforms.
Based on this research, Fair Trials and the partners drafted research tools which – with small adaptations to specific local conditions – explore practice and motivations of pre-trial decisions and capture the perceptions of the stakeholders in all participating countries.

(2) A defence practitioner survey, which asked lawyers for their experiences with regards to the procedures and substance of pre-trial detention decisions.

(3) Monitoring pre-trial detention hearings, thereby gaining a unique insight into the procedures of such hearings, as well as the substance of submissions and arguments provided by lawyers and prosecutors and judicial decisions at initial and review hearings.

(4) Case file reviews, which enabled researchers to get an understanding of the full life of a pre-trial detention case, as opposed to the snapshot obtained through the hearing monitoring.

[44] http://www.prisonstudies.org/country/ireland-republic, data provided by International Centre for Prison Studies, 18 June 2015.
[45] http://www.prisonstudies.org/country/netherlands, data provided by International Centre for Prison Studies, 18 June 2015.

(5) Structured interviews with judges and prosecutors, capturing their intentions and motivation in cases involving pre-trial detention decisions. In addition to the common questions that formed the main part of the interviews, the researchers developed country-specific questions based on the previous findings to follow-up on specific local issues.

2. Methodology in Romania

According to the methodology described above desk-based research was conducted first in order to have an overview of pre-trial detention law and a review of the available statistical information. For this purpose APADOR-CH analysed the Constitution, the Criminal Code, and the Criminal Procedure Code and gathered information through freedom of information (FOI) requests. Reference is made during this country report to all relevant ECtHR decisions against Romania concerning the violation of Article 5 (right to liberty and security) of the Convention.

In order to obtain statistical data related to pre-trial detention freedom of information (FOI) requests were sent to public authorities such as: the National Administration of Penitentiaries, the Superior Council of Magistracy, the Ministry of Justice, the General Inspectorate of the Romanian Police, the Public Ministry (the Prosecutor's Office attached to the High Court of Cassation and Justice). For some of the questions asked there was no data available or no reply was received.

Data on the pre-trial detention practice in Romania is also based on 23 defence practitioners' survey concerning the pre-trial detention in Romania (see Annex 1). Although 151 questionnaires were sent by e-mail and regular mail most of the answers received were from lawyers that previously cooperated with APADOR-CH or from personal acquaintances of the organizations' staff. Unfortunately, despite all efforts, there was a low rate of response. 56, 5% of the lawyers who completed the survey are practitioners in Bucharest, the rest of them work in different counties all over the country.

APADOR-CH has also studied case-files (that were closed in the time span 2010-2014) in which the measure of pre-trial detention was ordered (a total of 67 in 5 different courts - Bucharest Tribunal, Cluj Tribunal, Giurgiu Tribunal, Ialomița Tribunal and Prahova Tribunal. The review took place between October 2014 and March 20015 (see Annex 2). The courts are situated all over the country and are under the jurisdiction of three different courts of appeal. The access to files depended entirely on the good will of the presidents of the courts.

Moreover, representatives of APADOR-CH spent a total of 8 days (February-April 2015) at the Bucharest Tribunal monitoring 19 court hearings. All of them involved review of the lawfulness of maintaining pre-trial detention, which is an obligation of the court (none of them were initial pre-trial detention hearings) (Annex 3). In Romania hearings held during the investigatory period are not open to the public, so one can only attend hearings that occur when the case file is transferred from the prosecutor's office to the trial judge for a hearing and decision on the merits of the case. However, there is no guarantee that pre-trial detention will be reviewed at trial so collection of sufficient data has proved quite challenging and time-consuming. Despite the planning, it was not possible to attend more court hearings. The process has been unpredictable,

in some days the pre-trial detention hearings scheduled did not take place and two times the judge adjourned all hearings.

For the purposes of this research 6 judges and 2 prosecutors were also interviewd (April and May 2015). Five of the judges are practicing at the Bucharest Tribunal and one of them at the High Court of Cassation and Justice. The president of the Bucharest Tribunal (who was approched through a written letter followed by a discussion on the project) facilitated five interviews with judges while the sixth interview was organised through a professional connection of APADOR-CH.

It proved very difficult to obtain interviews with prosecutors. One possible exaplantion for this is that the time the methodolody was being applied coincided with political turmoil related to the fact that many public officials were sent to pre-trial detention based on the alleged offences of corruption.[46] Unsuccessful attempts were made to approach prosecutors through the president of the Bucharest Tribunal. Requests to agree to interviews were sent via e-mail to the Head Prosecutor in prosecutor's offices attached to the courts in the first, second, third, fourth, fifth and sixth sectors of Bucharest; to the prime prosecutor in the prosecutor's office attached to the Bucharest Court of Appeal; to the prime prosecutors in the prosecutor's offices attached to Giurgiu, Ialomița and Prahova Tribunal. No replies were received except from two prosecutors in the prosecutor's offices attached to the Giurgiu Tribunal, who were subsequently interviewed.

In addition to the common questions that formed the main part of the interviews in all 10 countries participating in this research, APADOR-CH also added country specific ones[47].

It must be stated from the start that there are limitations to the methodology used in this country report. It includes no case-files reviews which show how alternatives to pre-trial detention are used. It also contains but two interviews with prosecutors (therefore not a representative sample) and few days (eight) spent monitoring court hearings at the Bucharest Tribunal. The lack of geographical spread to the court monitoring was a limiting factor as well as the fact that it was not possible to have access to initial pre-trial detention hearings but only review hearings.
Moreover, not all public authorities provided the information requested. Despite these methodological shortcomings, APADOR-CH has gathered sufficient information on the practice of pre-trial detention to draw the attention on those patterns and situations which are not in compliance with national and ECHR law. And, based on the problematic issues identified to also make recommendations to various stakeholders which will hopefully improve the way pre-trial detention is used in Romania.

[46] Mediafax (2014) http://www.mediafax.ro/social/sefa-diicot-alina-bica-a-fost-arestata-in-dosarul-despagubirii-de-la-anrp-foto-13617967, article about the fact that the Chief Prosecutor of the Direction for the Investigation of Organized Crime and Terrorism Offences was put in pre-trial detention on 22 November 2014 on suspicion of corruption related offences.

[47] The questionnaire for judges included the question "how important is the defendant's hearing and how important is the study of the content of the case file when deciding to order pre-trial detention? Can an approximate percentage be estimated?", while the one for prosecutors covered issues such as "do you take into consideration the detention conditions when making an order for pre-trial detention?"

IV. Context

Romania is situated in south-eastern Europe, has a total land area of 237,500 sq km and a population of about 20.000.000. More than 2.000.000 Romanians live abroad. According to the latest census the largest minority groups are Hungarians (6.5% of the population) and Roma (3.2% of the population). Romania is administratively organized in 40 counties and the municipality of Bucharest. Bucharest is the capital of the country and its largest city.

The most important social problems that Romanians are facing are the low standard of living and the unemployment rate. The medium net income was about 420 Euros in April 2015[48]. At the end of the first term of 2015 655.000 people were unemployed (7.4% of the active population)[49].

The country is a constitutional republic with a multiparty bicameral parliamentary system. The president of Romania is elected by direct, popular vote for a maximum of two five-year terms. He or she represents the country in matters of foreign affairs and is the commander of the armed forces. The president appoints a prime minister to head the government; the prime minister is generally the leader of the party with the majority of seats in Parliament.

Romania has a civil law system. The judicial power is exercised by the High Court of Cassation and Justice and by the other courts established by the law: courts of appeal, tribunals and courts of first instance. Both the Constitution and the laws provide guarantees of independence of the judges. Prosecutors' offices are attached to the courts, independent in relation to them but under hierarchical control of the Ministry of Justice. The Superior Council of Magistracy (SCM) is the institution that guarantees the independence of the judiciary. The competences regarding the administration of justice as a public service lies with the Ministry of Justice. Lawyers are organized as a liberal profession and have their own organization – The National Union of Romanian Bars as well as local Bars at the level of every county. The Constitutional Court safeguards the compliance of legislative acts with the constitutional provisions. Although not part of the judiciary it has the important role of ensuring the observance of the rule of law.

New criminal codes entered into force in February 2014. Although some good measures were introduced (such as house arrest), the codes are imperfect and have already been amended several times. As will later come up in this report (in relation to the Vaslui case[50]) the Romanian society - the press, the politicians and the public – do not understand issues related to pre-trial detention and when situations arise when this measure is required they cannot have balanced, rational and decent discussions on the matter.

[48] http://cursdeguvernare.ro/salariul-mediu-net-420-de-euro-nominal-si-aproape-900-de-euro-ca-putere-de-cumparare-occidentala.html.
[49] http://www.mediafax.ro/social/rata-somajului-a-crescut-in-primul-trimestru-la-7-4-14488589.
[50] See page 35 of this country report.

1. Legal framework of pre-trial detention

The Constitution and the Criminal Procedure Code (CPC) constitute the legal framework for pre-trial detention decisions in Romania. In this report pre-trial detention is defined as the period between the time of the initial arrest by the police/prosecutor and the moment of the final judgement in the case.[51] If the defendant is released during trial, it would be the period between the moment of the arrest and that of release. The Constitution does not explicitly mention the grounds for which pre-trial detention can be ordered. It only sets the general rules regarding deprivation of liberty in article 23**,** which covers individual freedom. It establishes that police detention cannot exceed 24 hours – this is the limit for the initial police arrest.[52]

For a person who is under police arrest (up to 24 hours) if the prosecutor wants that person to stay in pre-trial detention after this period then the prosecutor has to notify the judge 6 hours before the expiry of the 24 hours, and ask the judge to place that person under pre-trial detention[53]. In this case the judge has to rule on the prosecutors' request within the 24 hours period.[54] Due to the maximum of 24h of police arrest provided by the Constitution, the date of the arrest is almost always the same as the date of the first hearing. This is a procedural aspect which is respected in practice.[55]

By law in Romania a judge can order pre-trial detention based on the evidence of a reasonable suspicion that there is a flight risk[56], the defendant is likely to interfere with investigation/ evidence[57] and he/she poses a threat to the public order, there being a risk of reoffending if this measure would not be applied.[58]

[51] The reason APADOR-CH chose to define pre-trial detention as being the period between the initial arrests until a final judgement is because the detention regime does not change after the first judgement is reached. More specifically, until a final conviction is ordered the detainee is kept in a police lock-up or a special pre-trial detention section in prison and does not benefit from the same rights as a person detained after a conviction.
[52] Romanian Constitution, article 23 (4).
[53] CPC, article 209 (16).
[54] CPC, article 225 (2).
[55] Based on information gathered in the 67 case-files reviews.
[56] CPC, article 223 (1) "he ran or hid with the purpose of avoiding the criminal investigation or trial - or he prepared in any way to run or hide".
[57] CPC, article 223 (1) "the suspect is trying to influence one of the other co-accused, a witness, expert or he is trying to tamper with evidence or trying to persuade another person to do one of these acts; the defendant is trying to influence the victim or to reach an illegal settlement with the victim"
[58] CPC, article 223 (2), "Pre-trial detention can also be applied when there are reasonable suspicions based on evidence that the accused committed one of the following crimes: a crime against someone's life, a crime which lead to serious injuries for the victim or to the victim's death, a crime against national security, drugs trafficking, arms trafficking, human trafficking, terrorism, money laundering, counterfeit currency, blackmail, rape, deprivation of liberty, tax fraud, aggression of a public officer or a judicial officer, corruption related crimes, crime committed through means of electronic communication or any other crime which carries a prison sentence of 5 years or more, and based on the gravity of the acts and the way the crime was committed, circumstances, background of the perpetrator, criminal record or any other aspect relating to the perpetrator, it is established that deprivation of liberty is necessary in order to remove a threat to public order.

The principle of last resort is embedded in the CPC which specifies that any deprivation of liberty should be used as an exception and according to the law.[59] Pre-trial detention is never mandatory.

The new Criminal Code (CC) and CPC[60] stipulate maximum lengths of pre-trial detention depending on whether it is imposed during the investigation phase or the trial phase of the criminal procedure. During the investigation phase of the criminal procedure the maximum length of cannot exceed 180 days.[61] During the trial phase, pre-trial detention cannot be longer than half of the maximum sentence prescribed by law for the particular crime for which the defendant is accused of and must not exceed 5 years.[62]

In addition, the CPC introduced a set of new institutions which affect the process of pre-trial detention decision-making. The judge on rights and freedoms (justice of the peace) will decide upon a prosecutors' request during the criminal investigation phase. When this phase ends, an intermediary one begins before the trial, the preliminary chamber procedure. The preliminary chamber judge looks only at the lawfulness of the evidence obtained (in other words he/she looks if the evidence can be used in court).[63] Both the court and the preliminary chamber judge can order that the defendant be placed under pre-trial detention when they are responsible for the case.[64]

The CPC also provides for non-custodial alternatives to detention: judicial oversight[65], judicial oversight with bail[66]and house arrest [67] (bail and house arrest were the most important additions to the 2014 CPC). These provisions will be discussed in more detail in the chapter dedicated to the alternatives to pre-trial detention.

Below, a diagram illustrating the process for pre-trial detention decision-making. [68]

[59] CPC, article 9 (2).
[60] We will not make an extensive analysis of the provisions of the old CPC despite the fact that we analysed case-files from the period 2011-2013. This is because no substantial changes took place, the legal and constitutional criteria for applying pre-trial detention were still the same. The only notable differences is that house arrest was introduced as an alternative measure to pre-trial detention and being a recidivist provided sufficient grounds to be remanded in pre-trial detention (however it was rarely used and this is the reason why it was abolished in the New Criminal Code).
[61] CPC, article 236 (4).
[62] CPC, article 239 (1).
[63] CPC, article 54.
[64] CPC, article 238.
[65] CPC, article 215.
[66] CPC, article 216, 217.
[67] CPC, article 218 (3).
[68] Cosmin Pojoranu, copywriter.

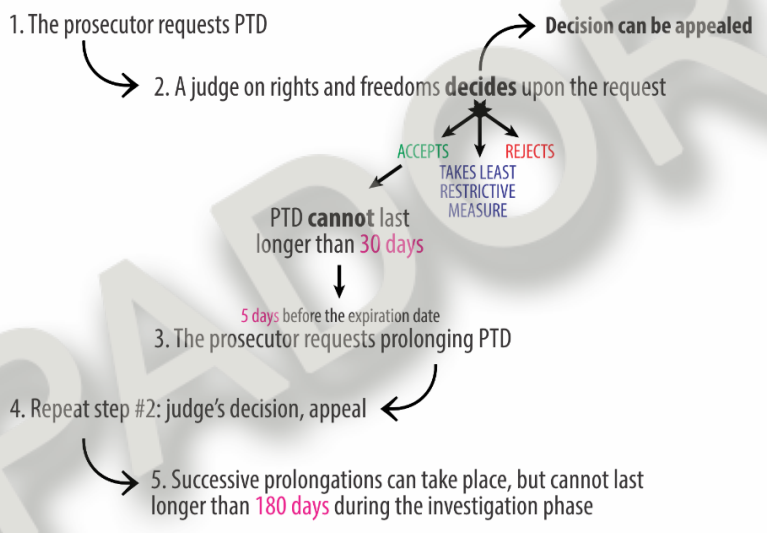
THE PROCESS FOR PRE-TRIAL DETENTION (PTD) DECISION-MAKING

1 criminal investigation — 2 the preliminary chamber procedure — 3 the trial

There are three phases of the PTD decision-making.
PTD can be ordered by three judges, one judge / corresponding phase

PHASE	JUDGE
criminal investigation	a judge on rights and freedoms
the preliminary chamber procedure	the preliminary chamber judge
the trial	a panel of judges

DURING CRIMINAL INVESTIGATION



DURING PRELIMINARY CHAMBER PROCEDURE

Ex officio or by prosecutor request PTD can be ordered by the preliminary chamber judge on the same grounds and in the same conditions as PTD ordered by the judge on rights and freedoms (same cycle: decision, appeal)

DURING TRIAL

During trial a panel of judges can also order PTD, verifying periodically the necessity for maintaining it during an interval of maximum 60 days. The length of PTD cannot exceed half of the maximum sentence prescribed by for a crime. (same cycle: decision, appeal)

If duration of PTD expires or the grounds on which it was ordered disappear, the measure has to be revoked.

The decision to remand a suspect in pre-trial detention is taken by a judge, in a hearing in which the prosecutor and the defendant's lawyer have to be present. The defendant has the right to participate as well although it is not mandatory that he/she be present.[69] The lawyer of the defendant can – upon request – get access to the case-file before the first hearing on pre-trial detention.

A decision to apply pre-trial detention can be challenged within 48 hours from the time it is taken, or from when the defendant is informed (if he wasn't present during the hearing). The appeal does not suspend the execution of the pre-trial detention order. The judicial authority needs to rule on the appeal in a hearing (where the prosecutor has to be present, the detainee and his lawyer have the right to be present) within 5 days.[70]

If pre-trial detention is imposed, the defendant can ask for it to be replaced when the reasons for which it was ordered no longer exist, or there are new circumstances which warrant a more lenient measure.[71] In order to seek the replacement of pre-trial detention with another measure the detainee has to submit a formal request to the judge, in writing[72]. The competent judicial authority rules on the request after hearing the detainee – during the hearing he/she has the right to be present together with his lawyer, the prosecutor's presence is mandatory. [73]

Review processes of pre-trial detention orders

As already mentioned previously, during the investigation phase the maximum length of pre-trial detention cannot exceed 180 days. It can be ordered for a maximum of 30 days[74] and can be renewed repeatedly for another 30 days. During the preliminary chamber procedure pre-trial detention should be reviewed periodically and no later than every 30 days if the reasons for which pre-trial detention ordered still persist.[75] In the trial phase the judge will verify if the reasons for ordering pre-trial detention still persist, no later than every 60 days.[76] The review is carried out by the same judge of each phase of the criminal procedure. An appeal can be made in 48 hours from when the decision is reached (or communicated to the defendant if he wasn't present). The appeal is brought to the judicial authority which decided placement in pre-trial detention and that judicial authority forwards the appeal, within 48 hours from when it is registered, together with the whole case documentation to the superior corresponding judicial authority[77].The judicial authority has to decide on the appeal within 5 days form when the appeal is made.

It is mandatory to have legal representation during a pre-trial detention hearing – either a lawyer chosen by the defendant or, if he can't afford one, a legal aid lawyer.[78] Anyone in police arrest or

[69] CPC, article 225 (4-6).
[70] CPC, articles 204, 205.
[71] CPC, article 242 (1).
[72] CPC, article 242 (5).
[73] CPC, article 242 (8-9).
[74] CPC, article 233 (1), article 238 (1).
[75] CPC, article 207 (6).
[76] CPC, article 208 (4).
[77] CPC, articles 204, 206.
[78] CPC, article 225 (5).

placed in pre-trial detention has the right to talk to his/her lawyer. [79]The meeting is confidential with only visual supervision but without having the conversation recorded or intercepted. [80]

A new provision in the law on the execution of criminal sentences[81] stipulates that persons who are in pre-trial detention can only receive visits and talk to the press if the prosecutor investigating the case gives his approval. In some police arrests this has been interpreted as meaning that detainees can only talk to their lawyers if the prosecutor gives them permission, as was the case in Mureș[82] where the County Prosecutor's office issued a rule saying that a detainee needed the permission of the prosecutor for visits from his family and lawyer. This goes against the right to communicate to one's lawyer which is an essential part of the right to a fair trial. It also goes against the provisions of the EU Directive on the Right to Access a Lawyer in criminal proceedings **(**2013/48/EU). This stipulation was also used to deny APADOR-CH's representative the possibility to talk to detainees in Mureș. Also, in Iași[83] the police only allowed the monitoring team to talk to a detainee after the prosecutor said they could, over the phone. Proper implementation of the Directive is recommended so that in the future such situations will be avoided.

Only two of the procedural rights directives- the Right to Information Directive (2012/13/ EU) and the Access to a Lawyer Directive (2013/48/EU) have been transposed into national law. The first directive mentioned guarantees suspects/accused persons' minimum safeguards to be informed about their rights and the charges brought against them. For example, article 7 (1) of the directive stipulates that the person arrested or detained or his/her lawyer should have early access to documents related to the specific case so that the lawfulness of the arrest/ detention is challenged effectively.[84] The second directive ensures a basic defence right: access to a lawyer. There are no assessment reports about the manner in which the two directives are implemented in practice, but based on APADOR-CH's experience mentioned above, some practices go against their provisions.

The Interpretation and Translation Directive (2010/64/EU) is not yet part of the Romanian law. Its aim is to improve the right to trial and the right to defence guaranteed by the ECHR of persons who do not speak or understand the language of the criminal proceedings.[85] The right to interpretation and translation must be provided to persons from the time they have been informed of being suspects or accused of a criminal offence until the end of the criminal proceedings.[86]Thus, interpretation must be available for persons who want to communicate with

[79] CPC, article 89.
[80] Ibid 79.
[81] Law 254/2013, article 110 (2).
[82] See full report in Romanian at: http://www.apador.org/raport-asupra-vizitei-in-centrul-de-retinere-si-arestare-preventiva-mures/ (last visited on the 3rd of September 2014).
[83] See full report in Romanian at: http://www.apador.org/raport-asupra-vizitei-in-centrul-de-retinere-si-arestare-preventiva-din-subordinea-inspectoratului-de-politie-al-judetului-iasi/ (last visited on the 3rd of September 2014)
[84] Right to Information Directive (2012/13/ EU), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:en:PDF.
[85] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF.
[86] The Interpretation and Translation Directive (2010/64/EU), article 1.

their lawyers about any questioning or hearing during the proceedings.[87] Written translation of at least essential documents (decision depriving one of liberty, charge or indictment, judgment) must be provided.[88] The persons concerned must have the right to challenge any decision by which these rights are refused and also have the right to complain about the quality of the interpretation and translation.[89] A register of registers of independent and qualified interpreters and translators should be set up.[90]

In none of the case-files analysed or court hearings monitored did the suspects need a translator/ interpreter, therefore it is not possible to draw a conclusion related to how the right to defence is guaranteed for people who do not speak or understand the language of the criminal proceedings. Only on 15th of January 2015 did the Ministry of Justice publish a draft law concerning legal translators and interpreters. Its declared aim is to reform the profession of authorized legal translators and interpreters and their activity in line with the Directive. On 25 March the draft law was subject to public debate and on 19 august it was adopted by the Government and is, at the moment of writing this report[91], in the process of being sent to the Parliament for debate and adoption**.** APADOR-CH urges the Romanian Parliament to transpose as soon as possible this Directive-long overdue-into national law. The lack of regulations concerning the quality of translation and interpretation in judicial proceedings poses serious questions about the manner in which the rights of persons who do not speak/ understand the language of the criminal proceedings are protected.

Concerning costs of pre-trial detention, according to data from the National Association of Romanian Bars (N.A.R.B), in the last 5 years Romania spent on legal aid lawyers for services provided during criminal investigation a total of 154 481 466 RON (approximately 34 million euros).[92]It was not possible to estimate how much of this sum is spent only on pre-trial detention cases. There is no official data available from the Ministry of Justice concerning the fee of the legal aid lawyer. According to information present in legal journals, the current fees of the legal aid lawyer working in the criminal justice system (based on the 2008 protocol between the Ministry and N.A.R.B) vary between 100 lei- 400 lei (22- 90 euros respectively) per case.[93]The lawyer receives this sum only once, regardless of the length of the trial.[94] It is also predicted that in the near future (2015) the fees will increase, varying between a minimum of 230 lei (approximately 53 euros) and a maximum of 920 lei (approximately 208 euros) per case.[95]

[87] Ibid. article 2
[88] Ibid. article 3.
[89] Ibid. article 2 (5).
[90] Ibid. article 5 (2)
[91] 20 august 2015.
[92] Figures from the Ministry of Justice, received by APADOR-CH on 8.09.2014 through a FOI request.
[93] Lumea Justiţiei, Mai mulţi bani pentru avocaţii din oficiu, 27 July 2014, http://www.luju.ro/avocati/barouri/mai-multi-bani-pentru-avocatii-din-oficiu-unbr-propune-un-nou-protocol-cu-ministerul-justitiei-privind-remuneratiile-acordate-pentru-asistenta-juridica-onorariile-cresc-in-unele-cazuri-de-zece-ori-fata-de-protocolul-din-2008-in-materie-penala-cel-mai-mic-.
[94] Ibid 93.
[95] Cluj Just, Onorariile avocaţilor din oficiu s-ar putea modiifca anul acesta. Vezi sumele propuse, 22 January 2015, http://www.clujust.ro/onorariile-avocatilor-din-oficiu-s-ar-putea-modifica-anul-acesta-vezi-sumele-propuse/

The fees of the private lawyers in Romania are confidential and there is not sufficient information available to make a comprehensive comparison between the fee of the legal aid lawyer and that of a private one in the criminal justice system. But considering that the latter can perceive, for example, 500 lei (113 euros) for only one hour of consultation[96], it is very clear that there is a high discrepancy between the levels in fees of the two types of lawyers. The legal aid lawyer earns during the entire length of the trial in a case less than what a private lawyer perceives for an hour of consultation. It was already mentioned that the medium net average income in April 2015 was 420 euros, so in general a private lawyer is not accessible to everyone.

2. Statistical information on pre-trial detention

Below is a chart showing the proportion of arrests which lead to pre-trial detention (according to figures from the National Police Agency :[97]

Year	**2010**	**2011**	**2012**	**2013**	**2014**
No. persons in police arrest (24 h)	11.860	13117	14416	14549	7578
No. of persons in PTD	6.299	6068	5717	5909	2658
Ration of persons who end up in PTD after being arrested	**53%**	**46%**	**40%**	**41%**	**35%**

Also the annual report of the National Administration of Penitentiaries provides the following figures[98]:

Year	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**
Total number of inmates	26.212	26.716	28.244	30.694	31.817	33.434	30.156
No. of persons in PTD and first instance convicts (absolute no.)	3.112	4430	4.630	3.313	3.179	3.447	2514
No. of persons in PTD and first instance convicts (percentage)	11.87%	16.5%	16.39%	10.79%	9.99%	10.31%	8.34%

It must be added that according to the report quoted above, the deficit of accommodation places (4 sq.m/inmate) was 11.170 places on 31st December 2014.[99] More specifically, 30.156 inmates shared 18.986 4 sq.m accommodation places, 159 percent rate of overcrowding.

[96] Onorarii estimative avocațiale, http://www.avocat-consultanta.com/colaborare/onorarii-avocat/onorarii-estimative-avocatiale/, September 2015.
[97] Figures from the National Police Agency, received by APADOR-CH on 17.09.2014 through a FOI request.
[98] 2014 Annual Report of the National Administration of Penitentiaries, p 3, available in English at: http://www.anp.gov.ro/documents/10180/4605968/Activity+Report+2014+NAP.pdf/ea7c0dbd-26e9-4ad3-99fa-c220548480a1 (last visited on the 22th of July 2015).

All these sources identify important fluctuations of percentage of persons in pre-trial detention out of the total prison population. They can be explained in terms of legislative changes as well as sociologically. The growth of the percentage that occurred in 2009 can be explained by a modification in the criminal code that increased the limits of some sanctions. According to the CPC in force at that time, pre-trial detention could be ordered if the sanction stipulated by the law for the offence the person was accused of was bigger than 4 years.[100] The growth can be also explained through a real increase in the criminal behaviour due to the economic crisis. The decrease that occurred starting with 2011 is due to a law that aimed at accelerating the judicial proceedings. The most recent decrease is to be explained by the entering into force of the new criminal code at the beginning of 2014.

According to data from the Public Ministry 961 persons were sent to trial in 2014 and 4. 226 had been placed in pre-trial detention (37, 6% less than in 2013).[101]A number of 1.418 defendants were acquitted of which 63 were placed in pre-trial detention (57% more than in 2013). This institution suggests that the decrease in the number of persons placed in pre-trial detention is caused on one hand by the decrease in the maximum limits for some offences and on the other hand by the increased use of alternative measures. In other words, the CPC stipulates that pre-trial detention can be ordered if the sanction stipulated by the law for the offence the person is accused of is bigger than 5 years[102]. However, the maximum limit of time for some offences has decreased. This, combined with the provision of alternative measures has led to a decrease in the number of pre-trial detention.

According to data from the General Prosecutor's office the annual number of defendants subject to pre-trial detention for 2009-2014 are as follow:[103]

Year	**No. of defendants against who official charges were pressed**		**No. of defendants against who official charges were not pressed**		**Total No. of persons with a request to apply PTD**	**Total No. of persons in PTD**	**Percentage of requests for PTD granted**
	With a request to apply PTD	Placed in PTD	With a request to apply PTD	Placed in PTD			
2009	7980	6984	49	43	**8029**	**7027**	**87.5%**
2010	10036	8659	46	34	**10082**	**8693**	**86.2%**

[99] 2014 Annual Report of the National Administration of Penitentiaries, p 17, available in English at: http://www.anp.gov.ro/documents/10180/4605968/Activity+Report+2014+NAP.pdf/ea7c0dbd-26e9-4ad3-99fa-c220548480a1 (last visited on the 20th of August 2015).
[100] CPC enforced in 2009, article 148.
[101] Activity Report for 2014, Public Ministry, Prosecutor's Office attached to the High Court of Cassation and Justice in 2014, p. 41, http://www.mpublic.ro/presa/2015/raport_activitate_2014.pdf
[102] See footnote 58 of this report.
[103] Figures from the General Prosecutor's office, received by APADOR-CH on 12.09.2014 through a FOI request.

2011	10518	8941	46	41	**10564**	**8982**	**85%**
2012	11645	9988	78	51	**11723**	**10039**	**85.6%**
2013	12008	10431	105	42	**12113**	**10473**	**86.5%**

The similarity in the percentages in the tables above lead to the conclusion that judges' practice of granting pre-trial detention requests has not changed in the recent years. The figures also indicate that in only 15% or less of the cases are the requests for pre-trial detention not granted.

3. ECHR decisions against Romania concerning pre-trial detention

The European Court of Human Rights (ECtHR) jurisprudence and the European Convention on Human Rights (ECHR) it is based on are part of the national law. All judges and prosecutors interviewed claimed to use them when deciding upon pre-trial detention orders and requests. However, in 2013 only the ECtHR condemned Romania in 7 cases for the violation of article 5 of the Convention[104].

As the ECtHR cases below suggest there are systemic problems, which are confirmed by the findings in this research: the unreasonable length of pre-trial detention, the failure of courts to provide substantial reasoning for pre-trial detention orders or for extension of the measure, the lack of access of the detainees to effective defence, the lack of celerity of some courts in examining appeals and in considering non-custodial alternatives to detention. The state needs to address them through the implementation of counter measures.

In the case of *Leontin Pop v. Romania*[105] the applicant complained that he had been held in pre-trial detention for an unreasonably long period of time and that the domestic courts had provided only summary reasoning for their decision to keep him in pre-trial detention. Moreover, the Court emphasized that, by failing to address the specific facts of the case or consider alternative "preventive measures", the authorities extended the applicants' detention on grounds which, although "relevant", cannot be regarded as "sufficient" to justify the applicant's remaining in custody such a long period of time. In the case of *Gonța v. Romania*[106], the applicant alleged, *inter alia*, that the excessive length of his detention during the investigation and trial and the failure of the domestic courts to provide reasons for its repeated extension had breached his rights guaranteed by Article 5 of the Convention. In *Anderco v. Romania*[107] the applicant also complained about the superficial manner in which the courts had analysed his objections to the extension of the pre-trial measure.

[104] The Government's Agent for ECtHR within the Ministry of External Affairs annual activity report for 2014, http://www.mae.ro/sites/default/files/file/2014/agent_guvernamental/2014-05-05_rap_act_2013_agent.pdf.
[105] *Leontin Pop v Romania*, App 1956/ 06, 1 October 2013.
[106] *Gonța v Romania*, App 38494/04, 1 October 2013.
[107] *Anderco v Romania*, App 3910/04, 29 October 2013.

Hamvas v. Romania,[108] concerned the case of a man who claimed he was put in pre-trial detention without the existence of enough evidence that he committed a crime and without having benefited from the presumption of innocence.

In *Catană v. Romania*[109] the examination of the appeal made by the prosecutor against the order to release the applicant was done in the absence of the applicant or his lawyer, no measures being taken to notify in due time of the hearing. The appointed lawyer did not know the accused and benefited from little time to prepare for defence. This infringed upon the right to effective appeal concerning the legality of pre-trial detention guaranteed by article 5 ECHR. Similarly, the in case of *Lauruc v. Romania* [110] a 21 days delay in analysing the request to revoke pre-trial detention did not respect the principle of celerity in examining the appeal on the legality of liberty deprivation.

In the case of *Emilian George-Igna v. Romania*[111], the applicant alleged that, at a hearing on 3 December 2004, his lawyer's request to be allowed to consult all of the materials submitted by the prosecutor in support of the prosecutor's proposal for the applicant's detention to be extended had been dismissed by the Alba-Iulia Court of Appeal on the grounds that the evidence in question only concerned the merits of the case. This did not respect equality of arms which has to characterize also the appeal against the legality of liberty deprivation. The Court found that there has been a violation of Article 5 (4) of the Convention.

In July 2013 the ECtHR condemned the Romanian state in the case of *Hamvas v. Romania*[112] for breach of article 5 of the Convention. The case concerned a man who claimed he was put in pre-trial detention without the existence of enough evidence that he committed a crime and without having benefited from the presumption of innocence. The Court appreciated that the maintenance of pre-trial detention for a period of two years, without examining the situation in that particular case or without analysing the possibility of ordering an alternative measure, infringed upon the right of the person to be trialled during a reasonable time or released during the procedure.

A case which warns against the negative consequence of unlawful use of pre-trial detention is that of a woman who was wrongfully detained for 21 months, acquitted and rehabilitated 15 years later, in 2015.[113] In 2001 Daniela Tarău was accused of fraud and remanded in pre-trial detention where she remained for 21 months. In 2002 the first instance court convicted her to 3 years and 3 months in prison. Subsequently, on appeal, following a re-classification of the offence, it was changed to conditional suspension of carrying out of the sentence. She addressed the ECtHR complaining of the excessive duration of the pre-trial detention measure and infringement on the right to fair trial. She had always pleaded innocent and requested the hearing of several witnesses, a right which had been denied by all national courts. In 2009 the ECtHR ruled that there had been a violation of her right to liberty and security and the right to fair trial. Following the ruling, her case was reopened and after 4 years, in March 2015, she was acquitted

[108] *Hamvas v Romania,* App 6025/05, 9 July 2013.
[109] *Catană v Romania,* App 10473/05, 29 January 2013.
[110] *Lauruc v Romania*, App 34236/03, 23 April 2013.
[111] *Emilian George-Igna v Romania*, App 21249/05, 26 November 2013.
[112] *Hamvas v Romania*, App 6025/05, 9 July 2013.
[113] *Daniela Tarău v Romania*, App 3584/02, 24 February 2009.

through a final and irreversible decision of the Bucharest Court of Appeal which ruled that she had been wrongfully accused, arrested and condemned. [114]

V. Procedure of pre-trial detention decision-making

Correct and fair procedures are fundamental to ensuring that pre-trial detention is only applied in accordance with lawful proceedings that safeguard the rights of the suspect. In practice this means taking all necessary steps to ensure that suspects end up in pre-trial detention only when absolutely necessary because there is strong evidence that they have committed a crime and that there is ground for pre-trial detention.

This section of the report will address the issue of the procedures for pre-trial decision-making in Romania and will analyse whether or not they are in compliance with national law and ECtHR jurisprudence on Article 5 of the Convention. The ECtHR has emphasized that a person detained on grounds of being suspected of an offence must be brought speedily before a judicial authority[115], the scope of interpreting and applying this notion being very limited.[116] The length of pre-trial detention must take place within reasonable" time.[117] This is determined by assessing if the pre-trial period has "imposed a greater sacrifice than could, in the circumstances of the case, reasonably be expected of a person presumed innocent".[118] The hearing must be an oral and adversarial one in which the defence must be given the opportunity to effectively participate. [119]

As already mentioned previously in this report, the Romanian Constitution establishes a maximum of 24 hours for the initial police arrest.[120] Because of this, the date of the arrest is almost always the same as the date of the first hearing. This is a procedural aspect which is respected in practice.[121] If the prosecutor wants for a person to stay in pre-trial detention after this period he/she has to notify the judge 6 hours before the expiry of the 24 hours, and ask the judge to place that person under pre-trial detention[122]. In this case the judge has to rule on the prosecutors' request within the 24 hours period.[123] The new CC and CPC stipulate the maximum length of pre-trial detention depending on whether it is imposed during the investigation phase or the trial phase of the criminal procedure. During the investigation phase of the criminal procedure the maximum length of cannot exceed 180 days.[124] During the trial phase, pre-trial detention cannot be longer that half of the maximum sentence prescribed by law for the particular crime for which the defendant is accused of and must not exceed 5 years.[125] It is

[114] Romania, Bucharest Court of Appeal (Curtea de Apel Bucureşti), Dosar nr. 23611/299/2011 (4563/2014), 31 March 2015.
[115] The limit of acceptable preliminary detention has not been defined by the ECtHR, however in *Brogan and others v UK*, App. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988, the court held that periods of preliminary detention ranging from four to six days violated Article 5(3).
[116] Ibid 115 para 62.
[117] *Stogmuller v Austria*, App 1602/62, 10 November 1969, para 5.
[118] *Buzadj v. Moldova*, App 23755/07, 16 December 2014, para 3.
[119] *Göç v Turkey, Application* No 36590/97, 11 July 2002, para 62.
[120] Romanian Constitution, article 23 para 4.
[121] Based on information gathered in the 67 case-files reviews.
[122] CPC, article 209 (16).
[123] CPC, article 225 (2).
[124] CPC, article 236 (4).
[125] CPC, article 239 (1).

mandatory to have legal representation during a pre-trial detention hearing – either a lawyer chosen by the defendant or, if he cannot afford one, a legal aid lawyer.[126]

1. Effective participation of the defence

In the first judicial hearing to detain the defendant was present in 97% of the case-files reviewed and during all 19 court hearings monitored. 82.6% of the defence lawyers surveyed confirmed this practice. Still, 17% of them (quite a significant percentage) stated that there were also cases in which the defendant was not present. They claimed that this was mainly due to medical reasons and the absence was voluntarily consented to. It is also mandatory to have legal representation during a pre-trial detention hearing – either a lawyer chosen by the defendant or, if he can't afford one, a legal aid lawyer.[127] In 80.5% of the case files reviewed it was the legal aid lawyer who provided assistance at this stage.[128] Although there is no official data available to confirm that this is the practice in general, all judges and prosecutors interviewed also believe that it is the legal aid lawyer who generally provides assistance in the first judicial hearing to detain.[129]

However, defence rights provided by law does not equal effective participation in the pre-trial detention decision-making process. Although the defence lawyer has access to the case file and relevant case materials in advance of the pre-trial detention hearing it is not sufficient to the extent necessary to challenge effectively the legality of detention as 79% of the lawyers participating in our survey acknowledged.[130] On average, the defence lawyer has around 30 minutes to prepare for the initial judicial hearing to detain. There are also cases in which the lawyer consults the case-file a few minutes before the hearing takes place, 13% of the lawyers questioned complained that they have been in such situations.

We cannot speak of equality of arms in the conditions in which the prosecutor has a well prepared account of the request for pre-trial detention and thorough knowledge of the case-file while the lawyer studies it before the beginning of the procedure. 65.2% of the lawyers who participated in the survey believe that the defence's and the prosecution's submissions are not treated equally during pre-trial decisions, the latter being favoured by the courts.[131] This is confirmed by the case-file analysis: in 98.5 % of the cases the judges' reasoning relied mainly on the arguments of the prosecution. In regards to court hearings monitoring at the Bucharest tribunal, the lawyer's arguments did not influence the outcome of the decision (which was detention) in 79.9% of the cases.

[126] CPC, article 225 (5).
[127] CPC, article 225 (5).
[128] Case File Review Annex 2, p. 4.
[129] Interview with J.C, Judge at the Bucharest Tribunal, 1.04.2015, Interview with N.R.A, Judge at the Bucharest Tribunal, 2.04.2015, Interview with L.P, judge at the Bucharest Tribunal, 2.04.2015, Interview with G.C.A, Judge at the Bucharest Tribunal, 8.04.2015, Interview with A.C, Prosecutor at the Prosecutor's Office attached to the Giurgiu Tribunal, 21.04.2015, Interview with A.P, Prosecutor at the Prosecutor's Office attached to the Giurgiu Tribunal, 21.04.2015.
[130] Defence Practitioners' Survey Annex 1, p. 4.
[131] Defense Practitioners' Survey Annex 1, p. 3.

All judges interviewed claim to take into consideration arguments of both parties as long as they are supported by the evidence in the case-file. However, there remains a strong imbalance between defence and prosecution as the Romanian legislation does not provide for the possibility for the lawyer to produce evidence or to probe the lack of validity of evidence during the procedure of pre-trial detention decision-making, with the exception of some official documents which can be presented to the court in a short time. In 85.1% of the case-files studied there was no evidence submitted in support the defence arguments.[132]

2. The role of judges

One important reason that makes judges rely mostly on the prosecutor's account is the lack of time to prepare the file. All judges and prosecutors interviewed admitted that, depending on the court and complexity of the case, they do not always have the time to comprehensively prepare/order a pre-trial detention requests "*decently as to present it before the court yes, but thoroughly very rarely where serious offences are concerned".*[133] This is because they have to act under the pressure of expiration of the 24 hours period of police arrest. The quality of requests and orders is thus affected by the lack of time, with consequences for the defendant "*there are situations when I am pressed by the time and not satisfied by the act of deliberation. The pressure which mostly bothers me is related to the fact that I have to go in the court room and hear the defendant. Or if I don't have time to study the file I cannot efficiently hear the defendant. It is damaging to the image of the justice system if a judge appears hesitant and does not know what to ask and how".*[134]

Additionally, one judge interviewed stated that she does not have the time to study the case-file before the hearing because she'd rather leave the case-file to the lawyer to be able to prepare. Therefore the judges' motivations are mostly based on the prosecutors' accounts. [135]"*It really depends who the prosecutor in the case is, he knows the file better than anyone so I tend to give preference to him. Generally the lawyer does not analyse or contest evidence. If the prosecutor is well prepared and the lawyer poor prepared you do not have what to appreciate, the defendant is clearly disadvantaged by the system."* [136]

The two prosecutors interviewed claim that they generally have sufficient evidence when requesting pre-trial detention. Nevertheless, one stated in the interview that "*it can be proved and sometimes I must admit that I did not have sufficient information, but when I requested it my intimate belief was that I was doing the right thing (…) In any case I do not consider it is used excessively as long as the court orders it and there are means to appeal it. There are sufficient guarantees against a subjective and discretionary attitude".*[137]

[132] Case-file Review Annex 2, p. 15.
[133] Interview with A.C, Prosecutor at the Prosecutor's Office attached to the Giurgiu Tribunal, 21.04.2015.
[134] Interview with J.C, Judge at the Bucharest Tribunal, 1.04.2015.
[135] In 98, 5% of the case-files studied the motivation of the judge was based on reference to the arguments of the prosecutor.
[136] Interview with N.R.A, Judge at the Bucharest Tribunal, 2.04.2015.
[137] Interview with A.P, Prosecutor at the Prosecutor's Office attached to the Giurgiu Tribunal, 21.04.2015.

There is a consensus among lawyers surveyed, prosecutors and judges interviewed, backed up by the analysis of case-files that there is no equality between defence and accusation and that the defendant is disadvantaged by the system in the first judicial decision to detain. We cannot speak about equality of arms: the prosecutor has more influence and success rate to influence the court in the first judicial decision to detain. The lawyer cannot produce evidence or probe the lack of validity of evidence during the procedure, having limited time at their disposal to study the case file before the hearing.

Therefore it can be stated that the most important aspect detected in violation of Romanian law and ECtHR jurisprudence on lawful procedures of pre-trial detention is the impossibility of the defence lawyer to effectively participate during the hearing. It is recommended that criminal investigation bodies send the prosecutors' account to the lawyers in due time so that he/she has enough time to prepare for the first judicial decision to detain. This issue is on one hand a matter of resource allocation, and organization – and we suggest that a second case file for defence practitioner should be prepared in all cases that involve an arrest and pre-trial detention decision. On the other hand the issue is a matter of cooperation between lawyers and prosecutors. APADOR-CH recommends the Ministry of Justice to take proactive measures to oversee the proper and effective implementation of Article 7 (right to access to the materials of the case)[138] of the Right to Information Directive (2012/13/EU) and Article 3 (the right to access to a lawyer in criminal proceedings)[139] of the Access to a Lawyer Directive (2013/48/EU).

The lack of time of judges is also an aspect which affects the outcome of the first judicial decision to detain, often at the disadvantage of the defendant as argued above. As according to the present legislation the prosecutor has to notify the judge 6 hours before the expiry of the 24 hours police period, it is suggested that this notification be done earlier. APADOR-CH also recommends the Ministry of Justice to employ more judges in order to deal with pre-trial detention cases.

Although the absence of the defendant from the pre-trial detention hearing raises serious questions about the decision-making process and is not encouraged, in terms of a better supervision of proceedings and also ensuring the participation of the defendant even in cases in which he cannot be present, it is suggested that resources be made available to enable the use of videoconferencing facilities. The law provides for the possibility of videoconferencing facilities to enable defendant's participation but it is rarely used, due, mainly to insufficient technical equipment.[140]

[138] Right to Information Directive (2012/13/EU), article 7 (1) (right to access to the materials of the case) "where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers".

[139] Access to a Lawyer Directive (2013/48/EU), article 3 (1) (right to access to the materials of the case) "Member States shall ensure that suspects and accused persons have the right to access to a lawyer in such time and in such a manner so that to allow the persons concerned to exercise their right to defence practically and effectively"

[140] Defense Practitioners' Survey Annex 1, p. 3.

VI. Substance of pre-trial detention decision-making

This section of the report will address the issue of the substance of pre-trial detention decision-making in Romania. It will provide insight into the most common grounds for ordering such a measure and the most likely offences to result in pre-trial detention. It will also present the kind of reasoning judges engage with when ordering this preventive measure. First, the legal and constitutional criteria for applying pre-trial detention will be considered. Emphasize will be put on the principles developed by the ECtHR. Based on the information collected throughout the research an analysis will be made regarding the extent to which the practice of pre-trial detention decision making is in compliance with the standards established by the ECtHR and Romanian law, or if, in practice unlawful motivations and procedures are used to justify pre-trial detention orders.

As already mentioned when describing the legal framework of pre-trial detention in Romania, by law a judge can order pre-trial detention based on the evidence of a reasonable suspicion that there is a flight risk[141], the defendant is likely to interfere with investigation/ evidence[142] and he/she poses a threat to the public order, there being a risk of reoffending if this measure would not be applied.[143]

ECtHR jurisprudence has established that when authorities believe a flight risk exists, they are under the obligation to consider alternatives to detention that might ensure that the defendant appears in trial. [144] It has also outlined the lawful grounds for ordering pre-trial detention to be: (1) the risk that the suspect will fail to appear for trial;[145] (2) the risk the suspect will spoil evidence or intimidate witnesses;[146] (3) the risk that the suspect will commit further offences;[147] (4) the risk that the release will cause public disorder;[148] or (5) the need to protect the safety of a person under investigation in exceptional cases.[149]

[141] CPC, article 223 (1) "he ran or hid with the purpose of avoiding the criminal investigation or trial - or he prepared in any way to run or hide".
[142] CPC, article 223 (1) "the suspect is trying to influence one of the other co-accused, a witness, expert or he is trying to tamper with evidence or trying to persuade another person to do one of these acts; the defendant is trying to influence the victim or to reach an illegal settlement with the victim"
[143] CPC, article 223 (2), "Pre-trial detention can also be applied when there are reasonable suspicions based on evidence that the accused committed one of the following crimes: a crime against someone's life, a crime which lead to serious injuries for the victim or to the victim's death, a crime against national security, drugs trafficking, arms trafficking, human trafficking, terrorism, money laundering, counterfeit currency, blackmail, rape, deprivation of liberty, tax fraud, aggression of a public officer or a judicial officer, corruption related crimes, crime committed through means of electronic communication or any other crime which carries a prison sentence of 5 years or more, and based on the gravity of the acts and the way the crime was committed, circumstances, background of the perpetrator, criminal record or any other aspect relating to the perpetrator, it is established that deprivation of liberty is necessary in order to remove a threat to public order.
[144] *Ilijkov v Bulgaria*, App 33977/96, 26 July 2001, para 85.
[145] See above, note 15, para 59.
[146] Ibid 145.
[147] *Muller v. France*, App 21802/93, 17 March 1997, para 44.
[148] *I.A. v. France*, App 28213/95, 23 September 1988, para 104.
[149] Ibid para 108.

Additionally, the ECtHR has emphasized in its case-law that committing an offence is insufficient as a reason for ordering pre-trial detention no matter how serious the offence is and the strength of the evidence against the accused are.[150] Detention based on "the need to preserve public order from the disturbance caused by the offence" can only be legitimate if the public order actually remains threatened.[151] The risk of facing long term imprisonment if convicted does not justify ordering pre-trial detention.[152] When deciding on whether or not to order pre-trial detention the court must always presume in favour of release.[153] The kind of reasoning they must engage with should not be "general and abstract",[154] using stereotyped words[155], but substantial, based on arguments as to why the application of release should be dismissed.[156]

1. Most common grounds for ordering pre-trial detention

All judges interviewed stated that the danger the accused poses for society if released due to the seriousness of the offence committed was one of the main grounds for ordering pre-trial detention. In all 67 case-files studied the fact that the accused represented a danger to the public (likelihood of reoffending) was one of the reasons for ordering pre-trial detention in the first judicial hearing. In 47.8% of the cases which invoked the public danger the reasoning was formalistic[157] (meaning that that in terms of structure and wording the judges' decision reflects exactly what the prosecutor has requested). He/she did not proceed to demonstrate what that would exactly mean in the specific case.

The risk of reoffending was mentioned in 49.2% of the cases; in only 45.5% of those cases the reasoning was specific and tailored to the respective case. For the two prosecutors interviewed this was an important ground to request pre-trial detention, even in the case of smaller offences such as continuous qualified theft. Flight risk was also an important ground for both of them. One of them admitted that "*it is much easier to find the accused if he is in pre-trial detention, much easier to hear him because most of the times they tend to elude criminal investigation. I am not sure if what I said is correct but for us it is beneficial because we know where he is, where to take him from"*[158]. Flight risk was the reason for ordering-trial detention in 22% of the case-files analysed. In 80% of these cases the reasoning used was specific which is a good percentage compared to the case tailored reasoning used for other grounds.

The criminal record of the accused weights a lot for the two prosecutors interviewed. In 19, 4% of the case-files analysed and in 73, 7% of the court hearings monitored prior convictions or arrests were one of the grounds for requesting pre-trial detention.

In spite of the national and regional legal standards enumerated above, judges' reasoning (in the case files reviewed and court hearings monitored) relied mainly on the arguments of the

[150] *Tomasi v France*, App 12850/87, 27 August 1992, para 102.
[151] *Tomasi v France*, App 12850/87, 27 August 1992, para 20.
[152] *Sulaoja v Estonia*, App 55939/00, 15 February 2005, para 87.
[153] *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 145.
[154] *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, para 63.
[155] *Yagci and Sargin v Turkey*, App 16419/90, 16426/90, 8 June 1995, para 52.
[156] *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, note 7.
[157] The words "formalistic" and "standard" are used interchangeably in this report.
[158] Interview with A.C, Prosecutor within the Prosecutor's Office attached to the Giurgiu Tribunal, 21.04.2015.

prosecution which most often invoked severity of the potential sanction and the seriousness of the offence. Reasoning was not tailored to the specific case, thereby violating ECtHR jurisprudence.

2. Offences most likely to result in pre-trial detention

As previously mentioned in the methodology section of this report, APADOR-CH has studied 67 closed case files in which pre-trial detention was ordered. Out of this small sample of case files 26.8% concerned the alleged offence of attempt to murder, 11.9% were related to first degree murder, 10.4% concerned murder, 6.0% aggravated murder and 4.5% rape. Economic offences, deceit, traffic of influence, trafficking of human beings and violation of domicile accounted each for 3% of the pre-trial detention orders. In respect of court hearings monitored at the Bucharest Tribunal, 36.9% of cases dealt with the alleged offence of aggravated theft and 21% with deceit. All judges and prosecutors interviewed stated that the offences which are more likely to result in pre-trial detention are the violent ones such as those enumerated above.

They also all agreed that high risk drug traffic is an offence particularly susceptible to pre-trial detention. One judge interviewed stated "*in the case of drug consumers, especially young people, minors, if this measure is not ordered they won't become aware of what they did. But if the family comes to see them in detention and they start crying, maybe they will realize the gravity of what they did. In this case, pre-trial detention can be an educational measure"*[159]. It should be emphasized however that the educational ground is not a lawful legal pre-trial detention ground but a personal belief of the judge, who applies his own reasoning for ordering pre-trial detention.

69.6% of the lawyers surveyed stated that in detention decisions they have detected the application of unlawful presumptions or justifications for detention. The majority of lawyers did not give specific examples to support their claim but there was one lawyer who emphasized that in some cases pre-trial detention can be used as a pressure on the defendant to admit to being guilty. Four other lawyers mentioned that the criminal record of the persons is the reason behind the pre-trial detention orders and one declared that the fact that a suspect did not formulate a declaration was interpreted as a risk factor, being deprived of his liberty because of that.

3. Judge's reasoning in the first judicial hearing to detain

One judges' opinion on ordering pre-trial detention summarizes perfectly the conclusion reached, having analysed 67 case-files, on the kind of stereotyped reasoning contained in the first judicial decisions to detain *"It is my impression that the legal provision allows for an excessive use of pre-trial detention. You can legally deprive someone of their liberty even though the concrete situation of the case would not dictate such a measure. It bothers me that we excessively use article 223 paragraph 2*[160]*, which stipulates that deprivation of liberty is justified for the purposes of removing a danger for the public order. It is being said that we don't bother too*

[159] Interview with L.P, judge at the Bucharest Tribunal, 2.04.2015.

[160] The article in the New Criminal Code stipulating the conditions and circumstances in which pre-trial detention is ordered, it also provides that deprivation of liberty in necessary in order to remove a danger for the public order.

much to reason pre-trial detention orders because we will later have time to complete them during reviews. The rationale behind this is to avoid stereotyped formulations.[161]

As a conclusion after reviewing the case-files, APADOR-CH considers that in relation to the offences of deceit, traffic of influence and economic crimes the order of pre-trial detention was not justified in all cases, pre-trial detention was overused and more lenient measures should have been taken. For example, in two cases concerning the offence of electronic commerce two defendants spent more than 4 years in pre-trial detention. This length was not reasonable, especially since it was justified using the public danger ground without there being specific reasoning demonstrating what exactly that meant in practice and without there being any consideration of other alternatives.

The analysis of the first judicial decision to detain shows that the judge's reasoning is not built as such as to presume in favour of release, but it is based on the prosecutors' account of the pre-trial detention request (in many cases copy pasted) arguing for pre-trial detention. This practice is in violation of Romanian law and the ECtHR jurisprudence. One judge interviewed stated that "*for me it is very important the way the prosecutors' account looks like. He has to summarize the work of his team very well. I don't read the files all the time, so this account is important for me. It is the prosecutor who knows the case very well. Often, the lawyer is poorly prepared, he does not contest or analyse the evidence. So I rely on this account. The defendant is indeed disadvantaged by the system"*[162].

In 98.5 % of the case-files studied the judges' reasoning relied mainly on the arguments of the prosecution, which invoked the severity of the potential sanction (95.5% of the cases analysed) and the seriousness of the offence (97% of the cases analysed). It is a standard phrase in all cases analysed stating "*the sentence stipulated by the law for committing the alleged offence is longer than four/five years of imprisonment*[163]*therefore the defendant's release would represent a concrete danger for the public order*". Even in those cases in which the judge engaged with the relevant evidence of the prosecutor, no sufficient reasons are given for pre-trial detention in relation to the risk of posing a danger to the public order. In 70.8% of the case-files in which this argument is used this type of reasoning is formalistic. 60.9% of the lawyers who participated in the survey also believe that judges never make a fair, substantiated and individualized assessment of such risks.

The reasoning of the first judicial decision to detain did not engage with the arguments of the defence: in 23.9% of the cases the lawyer argued that the defendant is employed, in 14.9% cases that he has a family he needs to support; 41.8 of lawyers invoked the argument of lack of prior arrests and 16.4% indicated the lack of evidence for guilt. 25.4% also pointed out that the prosecutor's arguments were not proved with evidence. In only 14.9% of the cases did the defence submit evidence in support of their arguments. It must however be mentioned that the arguments of the defence lawyers seemed fitted to combat the prosecutors' and not to individualise the defendant. The most encountered argument invoked by the defence was the lack of prior arrest/convictions (in 41.8% of studied cases). Although the second most invoked

[161] Interview with J.C, Judge at the Bucharest Tribunal, 1.04.2015.
[162] Interview with N.R.A, Judge at the Bucharest Tribunal, 2.04.2015.
[163] Depending on which Criminal Code you refer to.

argument was the fact that the defendant is employed this seems to be rather an automatic one since it is present in every case in which the accused did have a job (23.9% cases).

Yet, in all 67 cases analysed the requests for pre-trial detention were approved by the judge. We already established that there is a national average of 83% approved pre-trial detention requests out of the total number, with little variation according to the various courts.[164] However, this is not surprising considering that the defence arguments are not treated equally to the prosecutor's arguments. As outlined above, the judges – for lack of time – do not engage with the defences' argument but simply rely on the prosecutor to present the case, evidence and reasoning for pre-trial detention. In comparison, the defences' argument are rarely engaged with, and the lawyer has less of an opportunity to prepare the case and effectively challenge the pre-trial detention request. One reason is the defence's lack of time while another one might be the low level of the legal aid lawyer's fee. As already mentioned at the beginning at this report, based on a 2008 protocol between the Ministry of Justice and the N.A.R.B, the current fees for those working in the criminal justice system vary between 22 and 90 euros, a sum they only receive once, regardless of the length of the trial.

APADOR-CH urges the Ministry of Justice to consider an increase in the fees of legal aid lawyers working in the criminal justice system as soon as possible. Without a doubt, the low level of these fees affects the quality of representation in pre-trial detention cases.

With the risk of overemphasizing, the analysis of the first judicial decision to detain shows that the judge's reasoning is not built as such as to presume in favour of release, but-as already mentioned previously- it reflects exactly what the prosecutor has requested. This is in violation of Romanian law and ECtHR jurisprudence. It is recommended that judges, prosecutors and lawyers are provided with trainings regarding the European legal standards on deprivation of liberty in the procedure of pre-trial detention.

VII. Alternatives to Detention

Pre-trial detention is never mandatory. This principle of pre-trial detention as last resort is embedded in the CPC which specifies that any deprivation of liberty should be used as an exception and according to the law.[165] Although not expressly stated it is implied that the judicial bodies have to consider alternatives to detention first[166]. In order to safeguard the fundamental right to liberty of the person and to act upon a presumption of innocence of the accused, judges need to consider carefully and prefer all available alternatives to pre-trial detention analysing the extent to which non-custodial measures could safeguard proceedings the same way as pre-trial detention would. Automatic order of the most severe preventive measure could have a negative impact upon the person and his/her ability to prepare for trial. Judicial oversight, judicial oversight with bail and house arrest are the least restrictive preventive measures provided by the Romanian legislation.

[164] Figures from the Superior Council of Magistracy, received by APADOR-CH on 10.09.2014 through a FOI request.
[165] CPC, article 9 (2).
[166] CPC, Article 202 (4).

In Romania judicial oversight means that the defendant has to appear before court when summoned, has to inform the court of any change of address and additionally has to see a supervision officer from the police on a given schedule and when summoned[167]. Also, the court can impose a number of obligations on the defendant – including to seek medical help, not to go in certain places or carry out certain activities, and even electronic monitoring[168].This measure can be imposed when there is clear evidence based on which a reasonable suspicion can be drawn that the defendant committed a crime and that it is necessary, for the proper administration of justice, to prevent that the accused escapes justice or commits another crime[169].

Judicial oversight with bail can be chosen by the judge or the prosecutor when they believe that it is sufficient to prevent that the accused escapes justice or commits another crime.[170] The value of the bail must be higher than 1000 RON (about 225 Euro) and it can be placed in money or goods.[171]

House arrest is a new non-custodial alternative introduced by the reform of the CPC in 2014. This measure cannot be imposed on suspects accused of having committed a crime against a member of the family and against an accused who was previously convicted for escape.[172] For these people other alternatives such as judicial oversight can be considered, a pre-trial detention order is never automatic.

On 7th of May 2015 the Constitutional Court declared the provisions of article 222 of the CPC unconstitutional because they ommitted to regulate the maximum period of time for which house arrest can be ordered. On 30th of June 2015, through a government emergency order this period was established to a maximum of 180 days during the criminal investigation, so the house arrest is again inforced.[173] In the preliminary procedure chamber and during trial the house arrest period cannot exceed half of the maximum sentence stipulated by law for the offence the defendant is accused of and cannot exceed 5 years.

As pointed above, for 18 days (12 of June - 30 of June 2015) the measure of house arrest was unconstitutional. In practice this legislative void has pointed to anomalies in the system of alternative measures to pre-trial detention and has also emphasized the public's opinion on the matter in an unfortunate case known to the media as the "Vaslui rape case" described below.

In 2014 public opinion was outraged by the news that 7 men with ages between 18-27 years had sexually abused a teenager for three hours in the Vaslui city in Romania. On 12 November they were placed in pre-trial detention and one month later sent to trial accused of rape and deprivation of liberty.

On 2nd of April 2015 the Vaslui court decided to replace pre-trial detention with house arrest for three of the defendants in the case, reasoning that they had already spent 5 months in detention,

[167] CPC, Article 215 (1).
[168] CPC, article 215.
[169] CPC, Article 211 (1).
[170] CPC, Article 216.
[171] CPC, Article 217.
[172] CPC, article 218 (3).
[173] Following a decision which was published in the Official Gazette on 12th of June 2015.

were first-time offenders showing remorse, were willing to pay moral damages and had cooperated with judicial authorities.

On 9th of April the Vaslui Tribunal ordered house arrest for the remaining four defendants, who had appealed the decision of the Vaslui court which maintained pre-trial detention in their case. Placing the latter four defendants in house arrest generated at that time a lot of controversy.[174]There was indignation related to the fact that there were no legal arguments for this change in the preventive measures, the alleged aggressors were not cooperating and in addition defiant and had not confessed. There was no understanding as to why the court had treated them so generous and how did it establish that house arrest would be a sufficient measure for the good development of the trial.

In the midst of this controversy, the Constitutional Court's decision made house arrest unconstitutional and as a consequence all 7 men were set free. On 19th of June the Vaslui Court ordered the stricter judicial oversight as an alternative measure to house arrest. Replacing a preventive measure with a stricter one has to be justified by the prosecutor[175].

The courts' decisions as well as the circumstances which made possible that the seven men were set free caused public hysteria[176]which was also amplified when the victim's identity was revealed on TV and the story was given a face. Many people adopted extreme views about the measures that should be applied in the cases of the aggressors[177], those who held more balanced views on the matter (including the Ministry of Justice[178]and some judges) were publically shamed.

What this case has shown, besides the anomalies that a legislative void can cause, is that the Romanian society - the press, the politicians and the public - cannot discuss issues related to pre-trial detention in a balanced manner, rationally and decently.

The case law of ECtHR has strongly encouraged the use of pre-trial detention as an exceptional measure. In *Ambruszkiewicz v Poland*[179], the Court stated that the

> 'detention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained.

[174] The Adevărul newspaper carried out a campaign called "Dreptate pentru fata violată în Vaslui" (Justice for the girl raped in Vaslui) http://adevarul.ro/continut/stiri/dreptate-pentru-fata-violata-din-vaslui.
[175] CPC, article 242 (3).
[176] "200, 000 people signed the petition for the arrest of the 7 rapists in Vaslui. One deputy asks for doubling the rape sentence", http://stirileprotv.ro/stiri/actualitate/200-000-de-oameni-au-semnat-petitia-pentru-arestarea-celor-7-violatori-din-vaslui-urmarile-cazului-care-a-indignat-romania.html.
[177] Firea despre violul din Vaslui: Ar fi oportună reluarea dezbaterilor despre castrarea chimică a violatorilor, http://www.romaniatv.net/firea_233925.html. This article presents the view of senator Gabriela Firea who believes that the chemical castration of rapists should be reintroduced on the Parliaments' agenda.
[178] Mediafax (2015), Cazanciuc despre cei şapte acuzaţi de viol în Vaslui, Justiţia se face în sala de judecată şi atât, http://www.mediafax.ro/social/cazanciuc-despre-cei-sapte-acuzati-de-viol-in-vaslui-justitia-se-face-in-sala-de-judecata-si-atat-14622438.
[179] *Ambruszkiewicz v Poland*, App 38797/03. 4 May 2006, para 31.

That means that it does not suffice that the deprivation of liberty is in conformity with national law, it also must be necessary in the circumstances.'

Furthermore, the ECtHR has emphasised the use of 'proportionality' in decision-making, in that the authorities should consider less stringent alternatives prior to resorting to detention[180] and they must also consider whether the "accused's continued detention is indispensable".[181]

In Romania, as already mentioned in the chapter concerning the procedure of pre-trial detention decision-making, there is an average of 83% approved pre-trial detention requests out of the total number, with little variation according to the various courts.[182]

In none of the 67 case files studied did the reasoning in the first judicial hearing to detain contain any consideration of alternatives. Lawyers are able to propose them but 41.2% of the ones surveyed answered that alternatives are rejected while 41.2% stated that they are briefly considered, there being no assessment done by the judge concerning their use in particular cases. In only 8.9% of cases studied was detention replaced with a non-custodial measure at the first review of pre-trial detention. In the rest of the cases, pre-trial detention was extended until the final conviction.

67 % of the lawyers in the case-files studied requested for judicial oversight instead of pre-trial detention and 4.5% for house arrest.[183] None of the arguments were considered relevant by the judge (defendant employed 23%, defendant has family 14.9%, lack of prior arrests 41.8%, lack of evidence of guilt 16.4% , evidence already collected 10.4%).[184] In all cases pre-trial detention was ordered instead of a less intrusive alternative.

In one case reviewed at the Bucharest Tribunal the defendant was accused of holding drugs for his own consumption. He argued that he was a cannabis consumer with a permanent disability (degenerative disease) and that the drug consumption was acting as a relief. At one point during the review procedure the lawyer claimed that he was not hospitalized during pre-trial detention and that his health deteriorated. He made the case several times for change of pre-trial detention with judicial oversight, but his arguments did not influence the decision to prolong detention. This is just one example encountered which is illustrative of the kind of stereotypical reasoning of judges, especially biased towards ordering pre-trial when it comes to certain offences like drug consumption. APADOR-CH considers that given the health issues the defendant experienced other more lenient preventive measures should have been considered first and that such situations are in breach of international human rights law.

We have also identified three cases in which persons with mental illness were placed in pre-trial detention. One case reviewed at the Bucharest Tribunal involved a first degree murder offence and a defendant with diminished capacity. Although the lawyer argued that pre-trial detention

[180] *Ladent v Poland*, App 11036/03, 18 March 2008, para 55.
[181] Ibid 180, para 79.
[182] In the case-files studied 100% of the prosecutor's requests for pre-trial detention were granted by the judge
[183] See Annex 1.
[184] See Annex, p. 9-15.

should be replaced with judicial oversight the accused spent 4 months in detention before being put in a medical treatment program. In another case reviewed at the Cluj Tribunal, involving an attempt to murder, the defendant had a psychiatric disease and was also an alcohol consumer. The latter characteristic of the accused was used as argument by the judge to order pre-trial detention as it was considered it was highly likely to reoffend because of this reason. There is no information available as to whether he received medical treatment or not during his detention period. In the Ialomița Tribunal a defendant with a dissocial personality disorder spent more than 1 year in pre-trial detention. His special condition did not determine the judge to order a more lenient preventive measure, the main argument for detention being that the sentence stipulated by the law for the offence alleged was bigger than four years.

Pre-trial detainees with mental illness are an especially vulnerable category of suspects whose medical condition should be treated accordingly in special psychiatric wards. It is very clear that the individual situations of these three defendants required the use of milder preventive measures. By not doing so, judges breached both national and ECtHR law.

Concerning the issue of the most ordered non-custodial measure all judges and prosecutors interviewed stated that the most used alternative in Romania is judicial oversight. 43.5% of the lawyers surveyed also agree that judicial oversight is the most used alternative, while 38.9% also mentioned house arrest. Unfortunately, there is no data available on how often these alternatives are used. An assessment regarding the effectiveness of these alternatives cannot be done if such data does not exist, therefore APADOR-CH recommends that the Ministry of Justice starts collecting this information.

All the eight judges interviewed claimed they are not reluctant when it comes to considering alternatives to pre-trial detention but expressed reservations about the capacity of the judicial bodies to supervise either judicial oversight or house arrest. On judge declared that "*I once had a situation in which a 15 year old drug-consumer with a record of dozens of offences during a 2 months period was placed in pre-trial detention as a way to isolate her. Initially she was under judicial oversight, than put in house arrest but she obliged with none of these measures"*[185]. Another one said it was much safer to order pre-trial detention, on the assumption it will be used for a reasonable time "*I think pre-trial detention is used excessively. I personally am inclined to order this measure, for example in the case of a drug trafficker, because there are no other alternatives. There have been situations when pre-trial detention was not justified and didn't feel right, but there should be better supervision of alternative measures because there are many situations in which obligations are not respected"*[186].

Five of the six judges interviewed do not think it is fair that house arrest is deducted from the final sentence the same way pre-trial detention is. They do not regard it as deprivation of liberty similar to the way of pre-trial detention is: "*i also personally have days when I consider I am*

[185] Interview with G.C.A, Judge at the Bucharest Tribunal, 8.04.2015.
[186] Interview with G.C.A, Judge at the Bucharest Tribunal, 8.04.2015.

house arrested. But it is one thing to stay in the comfort of your own home and yet another to be deprived of liberty in the conditions of pre-trial detention"[187].

There is no available data on how often judicial oversight with bail is used. All judges interviewed but one claimed to never have used it.

The majority of lawyers surveyed (73.8%) consider that in the decision-making process concerning the defendant's suitability for release judges do not take into consideration professional services which make a risk assessment and recommendations on the issue. The belief that the Probation Service[188] where professional psychologists have the capacity to evaluate risk is rarely used when considering alternatives to pre-trial detention is also confirmed by case-file analysis. In only 2 cases of 67 analysed was this service used. Moreover, such an evaluation report is never an issue at stake during the first judicial hearing. It is only used during the procedure in which it is decided whether pre-trial detention is maintained or not and only in the case of minors.

Provided that judges are willing to use more regularly professional services involved in assessment of risk during the phase of the first decision to detain (which already exist), combined with better administrative guarantees for the supervision of alternatives would make them more responsive to lawyer's proposals and decrease in time the number of pre-trial detention orders *"which don't feel right".*

Based on the findings of this research APADOR-CH considers that the provisions of the CPC concerning non-custodial alternatives for detention should be completed by secondary legislation concerning the concrete application of preventive measures in practice. The Superior Council of Magistracy should issue detailed guides in order to assure a unitary practice concerning the conditions and the practical criteria for the application of each measure in accordance to the nature of the offence and the personal data of the suspect/ defendant.

Such a detailed guide issued by the Superior Council of Magistracy is also needed for establishing value "levels" for bail, in accordance to the nature of the offence and the data which characterizes the defendant. All judges interviewed appear hesitant to order this alternative, arguing that there is no criteria for setting a certain amount of the bail, there being also no unitary practice.

Although the CPC has provided for the alternative of house arrest no practical arrangements were made for its implementation in practice. In addition, concerning house arrest the legislator did not take into account the situation of persons who have no family or friends and who can rely on no one in the situation where they cannot leave their apartment (to provide with food for example). Also, the legal framework in which house arrest operates- in the sense that each day of house arrest is deducted from the sentence the same way as pre-trial detention is- generates in practice reluctance on behalf of judges to order this measure. Since house arrest is a milder measure compared to pre-trial detention they consider there should be two different regimes of

[187] Interview with L.P, Judge at the Bucharest Tribunal, 2.04.2015.

[188] The Probation System is embedded in the Criminal Code and Criminal Procedure Code, as well as other special laws and has as core mission the social rehabilitation of offenders as well as diminishing the risk of reoffending.

deducting the preventive measures from the final sentence. There is a need for a discussion regarding these different regimes which would make judges more inclined to order house arrest (different versions could be introduced, for example 2 days of house arrest equals 1 day spent in pre-trial detention etc.).

Through judicial inspection the Superior Council of Magistracy should verify the correct application of preventive measures. The inadequacy of a certain preventive measure in a case can compromise the whole system of non-custodial alternatives to detention though the public scandal created (this is the lesson learned from the Vaslui case presented above).

A decrease in the use of pre-trial detention could happen if enough resources (both human and technical) would be used to better ensure supervision of non-custodial measures. Although electronic monitoring is provided by the CPC[189] there are no practical arrangements for its implementation in practice. To this aim the Ministry of Justice and the Ministry of Internal Affairs should collaborate to work out a plan of assessing the needs and allocating the appropriate resources.

It is clear that the quality of the defence affects the underuse of alternatives to detention. Trainings regarding the national law and the standards of the ECtHR on deprivation of liberty should be made to all lawyers involved in the procedure of pre-trial detention, especially the ones who are appointed by the state. The legal aid fees of criminal justice lawyers should also be increased by the Ministry of Justice, this will additionally motivate better representation of pre-trial detainees. Also, more time should be available to them in order to prepare an effective defence. For this purpose the prosecutors account for pre-trial detention request should be made available to them several hours before the initial hearing to detain.

Judges should resort to professional services involved in assessment of risk (which already exist) during the phase of the first judicial decision to detain on a regular basis. This will decrease in time the use of wrongful pre-trial detention and will make them more responsive to lawyers' requests. Practical trainings should also be provided to judges and prosecutors on the application of alternatives to detention in order to improve their skills regarding good pre-trial detention practice.

VIII. Review of pre-trial detention

As deprivation of liberty continues and increases over time the presumption in favour of release increases. Pre-trial detention must be subject to regular review and all stakeholders must be able to initiate it. Effective review of pre-trial detention means that the judge regularly ensures that the need for pre-trial detention outweighs the rights of the suspects. This implies demanding updates on evidence of the continued need for detention and look at the diligence with which the criminal investigation/ trial proceeds.

The ECtHR case-law on lawful pre-trial detention reviews also indicates that the review of detention must take the form of an adversarial oral hearing with the equality of arms of the

[189] CPC, article 139.

parties ensured.[190] The decision on detention must be taken speedily and reasons must be given for the need to continued detention.[191] Continued detention "can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention".[192] The authorities remain under an ongoing duty to consider whether alternative measures could be used.[193]

According to the Romanian Constitution a judge can order for the accused to be placed in pre-trial detention for up to 30 days, which can be renewed repeatedly for a maximum of 30 days but without having the overall length exceed 180 days during criminal proceedings[194]. After the trial has begun, the court is bound, according to the law, to check, on a regular basis and no later than 60 days, the lawfulness of maintaining pre-trial detention and to order at once the release of the defendant if the grounds for it have ceased to exist or if the court finds there are no new grounds justifying the continuance of the custody.[195]

During the preliminary chamber procedure introduced by the new code pre-trial detention should be reviewed periodically and no later than every 30 days if the reasons for which pre-trial detention was ordered still persist.[196] In the trial phase the judge will verify if the reasons for ordering pre-trial detention still persist, at least every 60 days.[197] The review is carried out by the same judge of each phase of the criminal procedure.

Data gathered from the National Police Agency indicates that people who were held in pre-trial detention facilities in police lock-ups (excluding those held in prisons) spent on average 42 days in police-lock-ups.[198] This average applies for persons who are under investigation (before a final conviction is reached). There is no official data available regarding the average time spent by suspects in the special pre-trial detention sections in prison.

Suspects in the case-files analysed spent pre-trial detention both in police lock-ups and prisons. According to the findings the period between the dates of first pre-trial detention hearing compared to the first appearance before a judicial authority (first judgement) varied from 7 days to 4 years and 3 months. In 47.8% of cases the persons spent between 1 month and 3 months in detention until the first judgement, in other 23.9% the period was between 3 and 6 months. In only 6% of the cases was the duration less than a month. In 6 cases (8.9%) defendants spent more than 1 year in pre-trial detention before a first judgment in their case (out of which 2 more than 4 years for offences concerning electronic commerce). APADOR-CH considers that in the

[190] *Rakevich v Russia*, App 58973/00, 28 October 2003, para 43.
[191] *Wloch v Poland*, App 27785/95, 19 October 2000, para 127, para 84.
[192] *McKay v UK*, App 543/03, 3 October 2006, para 42.
[193] *Darvas v Hungary*, App 19574/07, 11 January 2011, para 27.
[194] Romanian Constitution, article 23 (5).
[195] Romanian Constitution, article 23 (6).
[196] CPC, article 207 (6).
[197] CPC, article 208 (4).
[198] Figures from the National Police Agency, received by APADOR-CH on 17.09.2014 through a FOI request.

cases concerning the offence of electronic commerce the use of pre-trial detention for so long was not justified.

25% of the defendants in the case-files reviewed spent in total more than 1 year in pre-trial detention, while 20, 7% spent between 6 months and 1 year before a final conviction. For 19, 4% of the defendants the total length of pre-trial detention varied between 3 to 6 months. As already mentioned, during the trial phase, pre-trial detention cannot be longer that half of the maximum sentence prescribed by law for the particular crime for which the defendant is accused of and must not exceed 5 years. From this perspective, the length of pre-trial detention was within the limits of the law, but as will be shown further in this report, in many cases ordering pre-trial detention was not justified and other more lenient measures could have been taken until a final conviction. There were two cases concerning the offence of electronic commerce in which two defendants spent more than 4 years in pre-trial detention, this length was not reasonable and clearly not justified.

Regular review

In Romania the procedural aspect of regular review is respected, all stakeholders being able to initiate and participate in it. The terms are also respected although it is more likely that detention be renewed for a period of the maximum of 30 days rather than for shorter periods of time. In 85.1% of the case-files analysed the time limit for the renewal was 30 days.

Two judges interviewed claim to renew detention for a shorter period of time (10 days) in order to stimulate the activity of the prosecution. Three of them also stated that they rejected pre-trial detention requests because the prosecution had done nothing to advance the criminal investigation: "*I recently rejected a proposal for pre-trial renewal on grounds that the prosecution had done absolutely nothing in the period between the previous renewal and the one I was invested with. And I motivated my decision that way"*[199]. This practice is unfortunately not reflected in the findings in the case-file analysis and monitoring of court hearings. They are exceptions to the practice identified which should be used as examples of good practice when considering orders of pre-trial detention.

In all 67 case-files analysed-all of which included review processes- with the exception of a time limit imposed there are no other specific requirements for the prosecution.[200] 56.5% of the lawyers who participated in the survey also believe that courts do not take any other measures to control the efficiency of the investigation.[201]

When considering renewing detention all six judges who participated in the study claimed they look at the activity of the prosecution in the period between the last review and the review before them. Three of them claim to consider the ECtHR jurisprudence which establishes the reasonable terms for pre-trial detention. All judges interviewed enumerated the following as other reasons taken into consideration during review: the risk of reoffending, awareness of the seriousness of the offence and if the person can influence witnesses.

[199] Interview with G.C.A, Judge at the Bucharest Tribunal, 8.04.2015.
[200] This was the case for all the case-files reviewed.
[201] Defense Practitioner Survey Annex, p. 8.

Although 85% of the lawyers surveyed believe that review hearings are carried out with the frequency provided for by the law and the terms are respected, 60.1 % of them consider that judges never give adequate consideration to the relevant factors during review hearings.

The procedural aspect of regular reviews was respected in all 67 case files studied in various courts in the country. Despite this, reviews are not effective because the reasoning given for the need to continued detention is formalistic. In the first review of the pre-trial detention order, in all cases, the judge's rationale for prolonging detention was that "*the legal grounds which stood at the basis of ordering this measure in the first place are still the same*". In 92.5 % of the cases no new evidence was presented in the first review by the prosecution and in 91% of the cases no counter-argument was made by the defence.

During the time between the first judicial order to detain and the final judgments, in 70% of the cases the reasoning given for continued detention consisted of a maximum of two paragraphs containing the same standard phrase mentioned above.

All of the 19 court hearings monitored involved review of the lawfulness of maintaining pre-trial detention, which is an obligation of the court. All of them were very short, with an average of the prosecution's arguments of two minutes and that of the defence arguments of three minutes. In 89.5% of the cases the lawyers requested the change of pre-trial detention either with house arrest or judicial oversight. In 15.8 % of the cases the lawyer argued that the defendant was employed, in 47.4% of all hearings the argument was brought forward that he has a family, 47.4% that he was motivated to attend trial, 21% of them invoked health reasons of the accused and the same percentage argued that the offence was not as serious as to warrant pre-trial detention (for 36.9% of the cases the alleged offence was aggravated theft, while 21% involved the offence of deceit) and also invoked exceptional circumstances.

The lawyer's arguments did not influence the outcome of the decision (which was detention) in 79.9% of the cases (in the rest of 21% the outcome is unknown). The only reasoning given was that the legal grounds which stood at the basis of ordering this measure in the first place are still the same, the sentence stipulated for the alleged offence is bigger than 4 years therefore the defendant's release would represent a concrete danger for the public order. The fact that the severity of the crime determines that pre-trial detention will be ordered is, as mentioned several times in this report, against the ECtHR jurisprudence. [202]

It is recommended that judges demand for regular updates on evidence of the continued need for detention in each case and look at the diligence with which the criminal investigation/ trial proceeds. The example of the judge who rejected a proposal for pre-trial detention on grounds that the prosecution had done absolutely nothing in the case should be used as an example of good practice and should become the rule rather than the exception in such situations.

[202] [202] *Tomasi v France,* App 12850/87, 27 August 1992, para 102.

IX. Outcomes

None of the 67 cases analysed during this research had as final outcome acquittal. It must be said that in 68.7% of cases the defendants pleaded guilty.

85.1% of the cases analysed resulted in a custodial sentence and the rest of 13.4 % in a non-custodial sentence but still a conviction - suspension of execution of a custodial sentence. In all cases the period spent in pre-trial detention was deduced from the sentence[203] and in all custodial sentences cases the length of the sentence was bigger than the time already served. There was no sentence shorter than one year.

Still, there are some interesting conclusions to be made in regard to the effectiveness of lawyers participating in the trial in relation to the outcome. As mentioned before no case ended in an acquittal but some of them (13.4% = 9 cases) concluded in conviction with the suspension of execution of the sentence. In 5 out of these 9 (55%) cases the accused had a chosen defence lawyer. Bearing in mind that in only 13 of the 67 cases the suspect was represented by a chosen and not court-appointed lawyer and that therefore these results might not be representative, it is a strong indication that having a chosen lawyer increases the chances of a better defence and lower sentence. We presume that the reason is that appointed lawyers who earn significantly more than legal aid lawyers, take on less cases and therefore have more time to prepare each defence strategy. Legal aid lawyers are paid much worse (see above) and therefore have to take many cases and then do not have as much time to prepare for each case. APADOR-CH recommends the Ministry of Justice to increase the fee of the legal aid lawyer and thus increase the chances of better representation of those defendants who cannot afford a chosen lawyer.

X. Conclusions and recommendations

The most important aspect detected in violation of Romanian law and ECtHR jurisprudence on lawful procedures of pre-trial detention is the impossibility of the defence lawyer to effectively participate during the first judicial hearing to detain. Lawyers are often only informed shortly prior to hearings, and have only 30 minutes to study the case file. It is recommended that criminal investigation bodies send the prosecutors' account to the lawyers in due time so that they have enough time to prepare for the first judicial decision to detain. To this aim APADOR-CH recommends the **Ministry of Justice** to take proactive measures to oversee the proper and effective implementation of Article 7 (right to access to the materials of the case) [204] of the Right

[203] Article 72 of the Criminal Code provides that the period in which a person was deprived of his/ her liberty as a consequence of preventive measures is deduced from the sentence period ordered by the court in a final judgement.

[204] Right to Information Directive (2012/13/EU), article 7 (1) (right to access to the materials of the case) "where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers".

to Information Directive (2012/13/EU) and Article 3 (the right to access to a lawyer in criminal proceedings)[205] of the Access to a Lawyer Directive (2013/48/EU).

It also urges the **Romanian Parliament** to adopt the Interpretation and Translation Directive (2010/64/EU) as soon as possible. It is unacceptable that there is no regulation to day concerning the quality of translation and interpretation for persons who do not speak or understand the language of the criminal proceedings. Articles 2 (right to interpretation), 3 (translation of essential documents), 5 (quality of interpretation and translation) must be immediately adopted and implemented. [206]

The organization also recommends the **Ministry of Justice** to consider an increase in the fees of legal aid lawyers working in the criminal justice system as soon as possible. Without a doubt, the low level of these fees affects the quality of representation in pre-trial detention cases.

The lack of time of judges to prepare the file is also an aspect which affects the outcome of the first judicial decision to detain, often at the disadvantage of the defendant. The **Ministry of Justice** should also employ more judges in order to deal with pre-trial detention cases.

The provisions of the CPC concerning non-custodial alternatives for detention should be completed by secondary legislation concerning the concrete application of preventive measures in practice. The **Superior Council of Magistracy** should issue detailed guides in order to assure a unitary practice concerning the conditions and the practical criteria for the application of each measure in accordance to the nature of the offence and the personal data of the suspect/ defendant.

Such a detailed guide issued by the **Superior Council of Magistracy** is also needed for establishing value "levels" for bail, in accordance to the nature of the offence and the data which characterizes the defendant. All judges interviewed appear hesitant to order this alternative, arguing that there is no criteria for setting a certain amount of the bail, there being also no unitary practice.

Through judicial inspection the **Superior Council of Magistracy** should verify the correct application of preventive measures. The inadequacy of a certain preventive measure in a case can compromise the whole system of non-custodial alternatives to detention though the public scandal created (this is one lesson learned from the Vaslui case presented above).

A decrease in the use of pre-trial detention could happen if enough resources (both human and technical) would be used to better ensure supervision of non-custodial measures. Although electronic monitoring is provided by the CPC[207] there are no practical arrangements for its implementation in practice. To this aim the **Ministry of Justice and the Ministry of Internal Affairs** should collaborate to work out a plan of assessing the needs and allocating the

[205] Access to a Lawyer Directive (2013/48/EU), article 3 (1) (right to access to the materials of the case) "Member States shall ensure that suspects and accused persons have the right to access to a lawyer in such time and in such a manner so that to allow the persons concerned to exercise their right to defence practically and effectively".
[206] Their content has been explained in more detail in pages 17-18 of this report.
[207] CPC, article 139.

appropriate resources. In terms of a better supervision of pre-trial detention proceedings and also ensuring the participation of the defendant even in cases in which he cannot be present, it is suggested that they find the resources to enable the use of videoconferencing facilities.

It is clear that the quality of the defence affects the underuse of alternatives to detention. Trainings regarding the national law and the standards of the ECtHR on deprivation of liberty should be made to all lawyers involved in the procedure of pre-trial detention, especially the ones who are appointed by the state.

Judges should also resort to professional services involved in assessment of risk during the phase of the first judicial decision to detain on a regular basis. Practical trainings should also be provided to judges and prosecutors on standards embedded in the ECtHR jurisprudence related to pre-trial detention and on the application of alternatives to detention in order to improve their skills regarding good practice.

Last but not least, despite judgments of the ECtHR against Romania for breach of Article 5 the situation has not changed at the systemic level in the areas identified by the Court as problematic. The **Governmental Agent within the Ministry of Foreign Affairs** responsible for the implementation of judgments should present action plans related to general measures to be taken in relation to pre-trial detention cases/ issues.

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Annex 1

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

Defence Practitioners Survey

The following survey is being administered as part of an EU-funded research project studying the quality of judicial decision-making in relation to pre-trial detention in 10 EU Member States. The research will also consist of, where possible, hearing monitoring and case-file reviews. The purpose of the survey is to understand pre-trial detention procedures as they happen in real life from the perspective of the defence, as opposed to the laws and regulations as they exist on paper. For that reason, we would appreciate as much detail and candor as possible from you, based on your experience, and examples (anonymized) from real life wherever you can provide them.

Please circle or write your answer and provide comments in the space provided below. Add any additional comments in the space provided at the end of the survey. Feel free to add further comments at the end or on additional sheets of paper.

A. Information about you

1. How long have you been a practising lawyer?
2. In what region or city do you practice?
3. Does your practice consist of: **(a)** only (100%) **(b)** mainly (over 50%) **(c)** some (under 50%) or **(d)** no criminal cases?
4. How many criminal cases have you personally dealt with in the past year?
5. How many pre-trial detention hearings have you acted in the last month?_____ 6 months_____ 1 year? _____
6. Do you conduct any legal aid cases? **Y/N**

B. Procedure: impartiality, effectiveness, and access to justice

1. Is the defendant always physically present during hearings at which pre-trial detention is decided? **Y/N** If not, why not?_____
   Is there an option for videoconferencing facilitites to enable participation? **Y/N** If yes, how often are they used? _____
2. Is the defence lawyer always present during such hearings? **Y/N**
   If not, why not?
   _____
   _____
3. Is the defence able to make submissions (oral or written) during such hearings? **Y/N**

4. Are the defence and prosecution's submissions treated equally during pre-trial detention decisions? **Y/N**_____
   _____
   _____
   _____
   _____
5. How long on average is the defence lawyer given to prepare (i.e. consult case file, speak to defendant, gather or check veracity of evidence) for the initial hearing on which a decision on pre-trial detention is made? **(a)** Less than 5 minutes **(b)** 5-10 minutes **(c)** less than 30 minutes **(d)** around 30 minutes **(e)** 30 minutes – 1 hour **(f)** more than 1 hour
   ---
   ---
6. Does the defence have access to the case-file or to relevant case materials in advance of the pre-trial detenion hearing? **Y/N**
   If yes, is sufficient access provided to the extent necessary to challenge effectively the legality of detention? **Y/N**

   _____
7. Are there obstacles in practice to effective review of, or appeal against, decisions to detain? **Y/N**

C. Substance: judges' assessment and decision-making

8. Do judges make fair and substantiated assessments of the likelihood of absconding, tampering with evidence, reoffending, or posing a danger to the public? **Y/N**

   _____
9. Do judges assess or take into account the specific facts and evidence in the particular case? **Y/N**_____
   _____
   _____
10. Do judges routinely provide written pre-trial detention decisions? **Y/N**
    If yes, do they contain case-specific reasoning? **Y/N**
11. Do you detect, in detention decisions, the application of unlawful presumptions or justifications for detention, whether explicit or implicit (for example, undue weight placed upon the existence of previous convictions, or detention imposed in order to pressure a defendant to testify or plead guilty)? **Y/N**

_____

D. Alternatives to Detention

12. Do judges have access to professional services which make a risk assessment and recommendation of the defendant's suitability for release? **Y/N**
    If not, how do judges assess whether conditions or pre-trial supervision are sufficient to ensure attendance at trial, the integrity of the investigation, and/or that the defendant does not re-offend?
    _____
    _____
    _____
13. Are you able to propose conditions to judges as alternatives to detention? **Y/N**
    How are your proposals received?
    _____
    _____
    _____
14. Do judges have confidence in alternative measures **(Y/N)**? Do they seriously consider them before ordering detention? **Y/N**

    ---
15. Are alternative measure, when imposed, done so with regard to the particular characteristics of the defendant and his/her ability to comply with the conditions (e.g., financial means to meet a money security, fixed residence for house arrest or a condition of residence, proximity to police station for regular check-ins, etc.)? **Y/N**
    _____
    _____
    _____
16. Are there alternatives to detention provided for in legislation that are underused? **Y/N**
    If yes, which ones and why?

    ---
17. Which alternatives to detention are used the most?
18. Does the use of alternatives to detention impact on the length of time to trial? **Y/N**
    _____
    _____

E. 'Special Diligence,' regular reviews, and excessive detention

19. Do you think that defendants who are kept in pre-trial detention are prosecuted more efficiently or more speedily than those who are released pre-trial? **Y/N**

    _____

    _____

20. In cases where pre-trial detention is lengthy, what are the main reasons for this? **Y/N**
    If yes, please explain the common reasons:

    _____

    _____

    _____

21. In cases where pre-trial detention is lengthy, does the court impose deadlines for completion of stages of the investigation? **Y/N**
    What other measures do courts use to control the efficiency of the investigation?

    _____

    _____

22. Is the need for continued detention, and the insufficiency of alternatives, periodically reviewed? **Y/N**
    If yes, are the hearings carried out with the frequency provided for by law? **Y/N**
    In your opinion, is this often enough to take account of changed circumstances or other factors? **Y/N**
    At any review hearing, does the judge give adequate consideration to the relevant factors? **Y/N**

    _____

    _____

    _____

    _____

Please provide any additional comments you may have on the use of pre-trial detention in Romania as well as any case examples which illustrate your comments below.

Annex 2

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

Please consider whether copies of key documents can be taken, i.e. detention order, renewal orders, and key evidence, where possible. Where information is not available, please write in "unknown" or circle "u." If the question is not applicable, circle or write in "Na." Please assign each case a code for ease of data collection and analysis, for example date/court/number). Please add explanatory narrative comments wherever possible/necessary.

Case code	
Date of arrest	
Date of first hearing	

Demographic Information

Age upon arrest		
Sex		
Nationality		
Ethnicity		
Speaks/Understands language of the court?	Y/N/U/Na	
	If no, interpreter present?	Y/N/U/Na
	If interpreter available at some, not all hearings, please note the hearings at which interpreter was not present:	
	Quality of interpretation sufficient?	Y/N/U/Na
	If interpretation sufficient at some, not all hearings, please note the hearings at which interpretation was not of sufficient quality:	
	Essential documents translated?	Y/N/U/Na
Ordinarily resident in country?	Y/N/U/Na	
Lawfully resident in country?	Y/N/U/Na	

Fixed abode?	Y/N/U/Na	
Married/Co-habiting/Civil Partnership?	Y/N/U/Na	
Dependent children/other dependents?	Y/N/U/Na	If yes, how many?
Employed?	Y/N/U/Na	If yes, what?
Student?	Y/N/U/Na	
Drug user?	Y/N/U/Na	
Other health problem?	Y/N/U/Na	
Other disability?	Y/N/U/Na	
Level of education?		
Other relevant characteristic?		

Representation of the Accused

Date Defence lawyer first appointed or retained?	
Officially appointed/duty lawyer or chosen by suspect?	Appointed
	Chosen
Publically or privately funded?	Publically funded
	Privately funded
Did defence lawyer meet in person w. accused before hearing?	Y/N/U/Na
Present at all PTD hearings?	Y/N/U/Na

Information about the Accusation

Legal situation of arrest	Caught in *flagrante delicto*
	Arrested on warrant
	Surrendered
	In pre-trial detention (on review)
	Unknown
Offence alleged (most serious/carrying longest potential sentence)	
Number of counts?	
Classification	
Max potential length of sentence (months/years)	

First PTD Hearing/Determination of Pre-trial conditions

Accused present at hearing?	Y/N/U/Na

Prosecution Arguments

Nature of argument		Fully oral		Y/N/U/Na
		Partially written, partially oral		Y/N/U/Na
		Mostly or entirely written		Y/N/U/Na
Pre-trial measures requested?		Unconditional release		Y/N/U/Na
		Conditional release	Y/N/U/Na If Y, specify below	
			Electronic Monitoring	Y/N/U/Na
			Money bail	Y/N/U/Na
			House Arrest	Y/N/U/Na
			Check ins at police station	Y/N/U/Na
			Drug treatment program	Y/N/U/Na
			Other med program (e.g psychiatric facility)	Y/N/U/Na
			Stay away order from person	Y/N/U/Na
			Stay away order from location	Y/N/U/Na
			Money bail	Y/N/U/Na
			Agreement to reside in certain location	Y/N/U/Na
			Other (specify)	
		Pre-trial detention	Y/N/U/Na	
If PTD requested, ground for request	Flight Risk	Foreign national		Y/N/U/Na
		No fixed residence		Y/N/U/Na
		National with residence in different part of country		Y/N/U/Na
		Unemployed or informal labourer		Y/N/U/Na
		Lack of dependants		Y/N/U/Na
		Drug user		Y/N/U/Na
		Prior failures to attend court/comply with conditions of release		Y/N/U/Na
		Prior convictions or arrests		Y/N/U/Na
		Prior breach of conditions of release		Y/N/U/Na
		Severity of potential sanction		Y/N/U/Na
		Other (specify)		Y/N/U/Na
	Seriousness of the offence	Y/N/U/Na		
	Danger to the Public	Y/N/U/Na		
	Danger to the Investigation	Threat of spoliation of evidence		Y/N/U/Na
		Threat to witness		Y/N/U/Na
		Threat of conforming testimony to co-defendants		Y/N/U/Na

		Other (Specify)	Y/N/U/Na
	Likelihood of reoffending	Y/N/U/Na	
	Other	(Specify)	
Evidence provided in support of prosecution arguments?	Y/N/U/Na If Y - List evidence		
Additional observations?			

Defence Arguments

Defence lawyer made submissions?	Y/N/U/Na		
	If no, was defence given opportunity to do so?		Y/N/U/Na
Nature of argument	Fully oral	Y/N/U/Na	
	Partially written, partially oral	Y/N/U/Na	
	Mostly or entirely written	Y/N/U/Na	
Defence request for more time (i.e., to consult with client or study file?)	Y/N/U/Na		
	If yes, time granted?		Y/N/U/Na
Does defence have access to case file?	Y/N/U/Na		
Defence request for evidence from prosecutor or court?	Y/N/U/Na		
	If yes, request granted?		Y/N/U/Na
What pre-trial measures requested by defence?	No conditions		Y/N/U/Na
	Electronic monitoring		Y/N/U/Na
	House arrest		Y/N/U/Na
	Check-ins at police station		Y/N/U/Na
	Drug treatment program		Y/N/U/Na
	Other medical program – e.g. psychiatric facility		Y/N/U/Na
	Stay away orders from victims, witnesses, or co-conspirators		Y/N/U/Na
	Stay away orders from locations		Y/N/U/Na
	Money bail		Y/N/U/Na
	Agreement to reside in certain location		Y/N/U/Na
	Other (specify)		Y/N/U/Na
Arguments employed by defence	To counter flight risk:	Defendant employed	Y/N/U/Na
		Able to post bail	Y/N/U/Na
		Willing to report	Y/N/U/Na
		Defendant has family	Y/N/U/Na
		Defendant a student	Y/N/U/Na
		Defendant has fixed	Y/N/U/Na

		residence	
		Few resources to travel	Y/N/U/Na
		Motivated to attend trial	Y/N/U/Na
		Lack of prior arrests/convictions	Y/N/U/Na
		Good attendance during previous court contact	Y/N/U/Na
		Surrendered voluntarily	Y/N/U/Na
		Medical/addiction treatment	Y/N/U/Na
		Health reasons	Y/N/U/Na
		Other compassionate grounds	Y/N/U/Na
		Offence not serious	Y/N/U/Na
		Exceptional circumstances	Y/N/U/Na
		Poor detention conditions	Y/N/U/Na
		Suspect likely to suffer disproportionately in detention by virtue of personal circumstances	Y/N/U/Na
		Other (specify)	Y/N/U/Na
	To counter dangerousness:	Nature of the allegation	Y/N/U/Na
		Lack of evidence of guilt	Y/N/U/Na
		Lack of history of violence	Y/N/U/Na
		Other (specify)	
	General	Presumption of Innocence	Y/N/U/Na
		Lack of legal basis to impose measures	Y/N/U/Na
		Prosecution arguments not proved with evidence	Y/N/U/Na
		Procedural irregularities/police misconduct	Y/N/U/Na
		Unlawfulness of arrest	Y/N/U/Na
	To counter danger to the investigation:	Evidence already collected; relevant investigation complete	Y/N/U/Na
Evidence submitted in support of defence arguments?	Y/N/U/Na If Y - List evidence		
Additional observations?			

Decision at first PTD hearing

Pre-trial conditions ordered	Detention			Y/N/U/Na	
	Conditional Release			Y/N/U/Na	
	Unconditional release			Y/N/U/Na	
If detention ordered:	Basis for Detention?	**Flight Risk**		Y/N/U/Na	
			Reasoning given?	Y/N/U/Na	
			If yes, reasoning formalistic or specific?		
		Danger to the Public		Y/N/U/Na	
			Reasoning given?	Y/N/U/Na	
			If yes, reasoning formalistic or specific?		
		Public Order		Y/N/U/Na	
			Reasoning given?	Y/N/U/Na	
			If yes, reasoning formalistic or specific?		
		Risk of Reoffending		Y/N/U/Na	
			Reasoning given?	Y/N/U/Na	
			If yes, reasoning formalistic or specific?		
		Danger to the Investigation		To witness	Y/N/U/Na
			Reasoning given? Y/N/U/Na	To victim	Y/N/U/Na
			If y, specific or formalistic?	To evidence	Y/N/U/Na
		Other (specify)			
	Detention subject to any conditions?			Y/N/U/Na	Length of time
					Specific action by prosecution
					In particular conditions
					Other (specify)
If conditional release ordered, what conditions imposed?	Electronic Monitoring			Y/N/U/Na	
	House Arrest			Y/N/U/Na	

	Money Bail/Bond		Y/N/U/Na	
	Check in to police station		Y/N/U/Na	
	Stay away from locations		Y/N/U/Na	
	Drug treatment program		Y/N/U/Na	
	Stay away order from victim, witness or co-conspirator		Y/N/U/Na	
	Other (specify)			
If conditional release ordered, were conditions later violated by accused?	Y/N/U/Na	If yes, explain:		
If conditional release ordered, how long was condition ordered to last?		How long did it actually last?		
Written decision provided?	Y/N/U/Na			
Observer able to review written decision?	Y/N/U/Na			
Reasoning given?	Y/N/U/Na			
	If yes, reference to evidence/arguments of parties?			Y/N/U/Na
	Prosecution – Y/N/U/Na	Defence – Y/N/U/Na		
	If yes, what was the reasoning? (summarise)			
Decision appealed?	Y/N/U/Na	By defence	Y/N/U/Na	
		By prosecution	Y/N/U/Na	

Reviews (this section can be repeated as often as necessary to capture information on all reviews)

Date of Review:		
Accused present at review?	Y/N/U/Na	
Defence lawyer present at review?	Y/N/U/Na	
Prosecution present at review?	Y/N/U/Na	
Review initiated by:	Defence Request	Y/N/U/Na
	Judicial Request	Y/N/U/Na
	Statutory Requirement	Y/N/U/Na
Oral hearing?	Y/N/U/Na	
Decision made on review?	Detention renewed	Y/N/U/Na
	Conditional release	Y/N/U/Na
	Unconditional release	Y/N/U/Na
If detention or conditions renewed or imposed, time limit on renewal imposed?	Y/N/U/Na	(Specify)

Any other conditions imposed (i.e. requirements for prosecution to take certain action during the period before next review?)	Y/N/U/Na	(Specify)
Rationale provided for renewal or change in conditions/detention?	Y/N/U/Na	(Specify)
New evidence to support renewal requested?	By judge?	Y/N/U/Na
	By defence?	Y/N/U/Na
New evidence presented by prosecution?	Y/N/U/Na	
Counter-argument by defence?	Y/N/U/Na	
Appeal?	Y/N/U/Na	By defence
		By prosecution

Outcome of the Case

Conviction	Y/N/U/Na		Charge:	
Acquittal	Y/N/U/Na		Charge:	
Case dropped	Y/N/U/Na		Reason:	
Guilty plea	Y/N/U/Na			
Custodial sentence:	Y/N/U/Na	If Y, Length of sentence in years/months:	Reduction for PTD?	Y/N/U/Na
Non-custodial sentence (specify)				

Duration of pre-trial detention

Total length of pre-trial detention		
Length of time between arrest and first appearance before judicial authority		
Reasons for delays	Prosecution request for more time for investigation	(date)
	Defence request for more time	(date)
	Delays for court administrative purposes	(date)
	Witness or interpreter did not show	(date)

OBSERVATIONS:

Annex 3

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

Hearing Monitoring Tool

For all questions, circle yes or no and/or fill out the answer section with the appropriate written answer. Where the entry cannot be established, please so indicate by writing in "U" (for unknown). If the question is not applicable in your jurisdiction, please fill out the blank as N/A. Please assign each case a code for ease of data collection and analysis, for example date/court/number. Please add explanatory narrative comments wherever possible/necessary.

Date of hearing	
Case code	
Court	
Initial hearing or review of detention?	
Id of observer	
Time at beginning of individual hearing	
Time at end of individual hearing	
Charge number/ref:	
Judge/Prosecutor aware observer present?	
Number of detainees per hearing	

Demographic information on accused

Age		
Sex		
Nationality		
Ethnicity		
Speaks/Understands language of the court?	Y/N/U/Na	
	If no, interpreter present?	Y/N/U/Na
	Quality of interpretation sufficient?	Y/N/U/Na
Ordinarily resident in country?	Y/N/U/Na	
Lawfully resident in country?	Y/N/U/Na	
Fixed abode?	Y/N/U/Na	
Married/Co-habiting/civil partnership?	Y/N/U/Na	
Dependent children/other dependants?	Y/N/U/Na	If yes, how many dependents?
Employed?	Y/N/U/Na	If yes, specify?
Student?	Y/N/U/Na	

Drug user?	Y/N/U/Na
Other health problem?	Y/N/U/Na
Other disability?	Y/N/U/Na
Level of education?	
Other relevant characteristic?	

Representation of the Accused

Accused present?	Y/N/U/Na
Defence lawyer present?	Y/N/U/Na
Officially appointed/duty lawyer or chosen by suspect?	Appointed
	Chosen
Publically or privately funded?	Publically funded
	Privately funded
Did defence lawyer meet in person w. accused before hearing?	Y/N/U/Na

Information on Accusation

Legal situation of arrest	Caught *in flagrante delicto*
	Arrested on warrant
	Surrendered
	In pre-trial detention (on review)
	Unknown
Offence alleged (most serious/carrying longest potential sentence)	
Number of counts?	
Classification	
Max Potential length of sentence (months/years)	

Conduct of hearing

Prosecution Arguments

Duration of initial argument (minutes)			
Nature of argument	Fully oral		Y/N/U/Na
	Partially written, partially oral		Y/N/U/Na
	Mostly or entirely written		Y/N/U/Na
Pre-trial measures requested?	Unconditional release		Y/N/U/Na
	Conditional release	Y/N/U/Na If Y, specify below	
		Electronic monitoring	Y/N/U/Na

			Money bail	Y/N/U/Na
			House Arrest	Y/N/U/Na
			Check ins at police station	Y/N/U/Na
			Drug treatment program	Y/N/U/Na
			Other med program (e.g psychiatric facility)	Y/N/U/Na
			Stay away order from person	Y/N/U/Na
			Stay away order from location	Y/N/U/Na
			Money bail	Y/N/U/Na
			Agreement to reside in certain location	Y/N/U/Na
			Other (specify)	
		Pre-trial detention	Y/N/U/Na	
If PTD requested, ground for request	Flight Risk	Foreign national		Y/N/U/Na
		No fixed residence		Y/N/U/Na
		National with residence in different part of country		Y/N/U/Na
		Unemployed or informal labourer		Y/N/U/Na
		Lack of dependants		Y/N/U/Na
		Drug user		Y/N/U/Na
		Prior failures to attend court/comply with conditions of release		Y/N/U/Na
		Prior convictions or arrests		Y/N/U/Na
		Prior breach of conditions of release		Y/N/U/Na
		Severity of potential sanction		Y/N/U/Na
		Other (specify)		Y/N/U/Na
	Seriousness of the offence	Y/N/U/Na		
	Danger to the Public	Y/N/U/Na		
	Danger to the Investigation	Threat of spoliation of evidence		Y/N/U/Na
		Threat to witness		Y/N/U/Na
		Threat of conforming testimony to co-defendants		Y/N/U/Na
		Other (Specify)		Y/N/U/Na
	Likelihood of reoffending	Y/N/U/Na		
	Other	(Specify)		
Evidence provided in support of prosecution	Y/N/U/Na If Y - List evidence			

arguments?	
Additional observations?	

Defence Arguments

Defence made submissions?	Y/N/U/Na		
	If no, was defence given opportunity to do so?		Y/N/U/Na
Nature of argument	Fully oral	Y/N/U/Na	
	Partially written, partially oral	Y/N/U/Na	
	Mostly or entirely written	Y/N/U/Na	
Length of defence submissions (minutes)?			
Defence request for more time (i.e., to consult with client or study file?)	Y/N/U/Na		
	If yes, amount of time granted?		
Does defence have access to case file?	Y/N/U/Na		
Defence request for evidence from prosecutor or court?	Y/N/U/Na		
	If yes, request granted?		Y/N/U/Na
What pre-trial measures requested by defence?	No conditions		Y/N/U/Na
	Electronic monitoring		Y/N/U/Na
	House arrest		Y/N/U/Na
	Check-ins at police station		Y/N/U/Na
	Drug treatment program		Y/N/U/Na
	Other medical program – e.g. psychiatric facility.		Y/N/U/Na
	Stay away orders from victims, witnesses, or co-conspirators		Y/N/U/Na
	Stay away orders from locations		Y/N/U/Na
	Money bail		Y/N/U/Na
	Agreement to reside in certain location		Y/N/U/Na
	Other (specify)		Y/N/U/Na
Arguments employed by defence	To counter flight risk:	Defendant employed	Y/N/U/Na
		Able to post bail	Y/N/U/Na
		Willing to report	Y/N/U/Na
		Defendant has family	Y/N/U/Na
		Defendant a student	Y/N/U/Na
		Defendant has fixed residence	Y/N/U/Na
		Few resources to travel	Y/N/U/Na
		Motivated to attend trial	Y/N/U/Na
		Lack of prior arrests/convictions	Y/N/U/Na
		Good attendance during previous court contact	Y/N/U/Na

		Surrendered voluntarily	Y/N/U/Na
		Medical/addiction treatment	Y/N/U/Na
		Health reasons	Y/N/U/Na
		Other compassionate grounds	Y/N/U/Na
		Offence not serious	Y/N/U/Na
		Exceptional circumstances	Y/N/U/Na
		Poor detention conditions	Y/N/U/Na
		Suspect likely to suffer disproportionately in detention by virtue of personal circumstances	Y/N/U/Na
		Other (specify)	
	To counter dangerousness	Nature of the allegation	Y/N/U/Na
		Lack of evidence of guilt	Y/N/U/Na
		Lack of history of violence	Y/N/U/Na
		Other (specify)	
	General	Lack of legal basis to impose measures	Y/N/U/Na
		Prosecution arguments not proved with evidence	Y/N/U/Na
		Procedural irregularities/police misconduct	Y/N/U/Na
		Unlawfulness of arrest	Y/N/U/Na
		Presumption of Innocence	Y/N/U/Na
	To counter danger to the investigation:	Evidence already collected; relevant investigation complete	Y/N/U/Na
Evidence submitted in support of defence arguments?	Y/N/U/Na If Y - List evidence		
Additional observations?			

Decision of the Judge in relation to pre-trial measures

Pre-trial conditions ordered	Detention			Y/N/U/Na	
	Conditional Release			Y/N/U/Na	
	Unconditional release			Y/N/U/Na	
If detention ordered:	Basis for Detention?	**Flight Risk**		Y/N/U/Na	
			Reasoning given?	Y/N/U/Na	
			If yes, reasoning formalistic or specific?		
		Danger to the Public		Y/N/U/Na	
			Reasoning given?	Y/N/U/Na	
			If yes, reasoning formalistic or specific?		
		Public Order		Y/N/U/Na	
			Reasoning given?	Y/N/U/Na	
			If yes, reasoning formalistic or specific?		
		Risk of Reoffending		Y/N/U/Na	
			Reasoning given?	Y/N/U/Na	
			If yes, reasoning formalistic or specific?		
		Danger to the Investigation		To witness	Y/N/U/Na
			Reasoning given? Y/N/U/Na	To victim	Y/N/U/Na
			If y, specific or formalistic?	To evidence	Y/N/U/Na
		Other (specify)			
	Detention subject to any conditions?			Y/N/U/Na	Length of time
					Specific action by prosecution
					In particular conditions
					Other (specify)
If conditional release ordered, what conditions imposed?	Electronic Monitoring			Y/N/U/Na	
	House Arrest			Y/N/U/Na	

	Money Bail/Bond		Y/N/U/Na	
	Check in to police station		Y/N/U/Na	
	Stay away from locations		Y/N/U/Na	
	Drug treatment program		Y/N/U/Na	
	Stay away order from victim, witness or co-conspirator		Y/N/U/Na	
	Other (specify)			
If conditional release ordered, were conditions later violated by accused?	Y/N/U/Na	If yes, explain:		
If conditional release ordered, how long was condition ordered to last?		How long did it actually last?		
Written decision provided?	Y/N/U/Na			
Observer able to review written decision?	Y/N/U/Na			
Reasoning given?	Y/N/U/Na			
	If yes, reference to evidence/arguments of parties?			Y/N/U/Na
	Prosecution – Y/N/U/Na	Defence – Y/N/U/Na		
	If yes, what was the reasoning? (summarise)			
Decision appealed?	Y/N/U/Na	By defence	Y/N/U/Na	
		By prosecution	Y/N/U/Na	

OBSERVATIONS:

Annex 4

Questionnaire for Judges

1. Date of interview:

2. Identity of interviewer:

3. Name/code of interviewee:

4. Designation of judge (eg. district judge):

5. Length of experience as judge?

6. Length of experience in previous legal professions?

7. What are your primary considerations (not just legal grounds for PTD but personal concerns) when deciding whether or not to order pre-trial detention in any particular case? Please could you explain why?

8. Are there any specific characteristics of defendants which would make you more likely to place them in PTD?

9. Are there particular types of offences which will most likely lead you to order pre-trial detention? If so, what?

10. Do you think that you have sufficient time to prepare and deal with pre-trial detention decisions? (On average, how long do pre-trial detention hearings last?)

11. What is your approach to the representations made by the prosecutor? And to the representations by the defence lawyer?

12. What concerns, if any, do you have about ordering alternatives to detention? Which alternatives are you most likely to order and why? (Are there some alternatives you do not use? If so, why not?)

13. When carrying out a review of an existing detention order, what considerations do you take into account before renewing detention or ordering release?

14. What concerns do you have, if any, about the impact which pre-trial detention, and particularly detention conditions, will have on the ability of the defendant to prepare for trial? And therefore on the outcome of the case?

15. What impact does time spent in PTD have on your decisions on sentencing?

16. What is your response to concerns raised about the excessive use of pre-trial detention?

17. Are you conscious of any pressures on you regarding your pre-trial detention decisions, eg. from supervisors, any government organisation or institution, from the public or the media?

18. Are you aware of any adverse consequences for judges if they release a defendant, and they subsequently commit an offence or do not turn up in court?

19. To what extent do the jurisprudence of the European Court of Human Rights and other regional/international human rights standards inform your detention decision-making? How much training do you receive on such standards?

20. If you could make changes to the law or practice governing pre-trial detention, what change or changes would you like to see?

Questionnaire for Prosecutors

1. Date of interview:

2. Identity of interviewer:

3. Name/code of interviewee:

4. Designation as prosecutor (eg. senior prosecutor):

5. Length of experience as prosecutor?

6. Length of experience in other previous legal professions?

7. What are your primary motivations for seeking a detention order in a particular case?

8. What information do you have (to rely on) when you are making a pre-trial detention application? (Generally, do you think that the information that you have is sufficient? Do you have sufficient information about the availability of alternatives to detention in specific cases? How do you get the information you need?)

9. What beneficial impact, if any, does the detention of a defendant have on your ability to conduct your investigation and / or prosecution?

10. What negative impact, if any, does the detention of a defendant have on your ability to conduct your investigation and / or prosecution?

11. Are there any specific characteristics of defendants which would make you more likely to place them in PTD?

12. Are there particular types of offences for which you will most likely seek pre-trial detention? If so, what?

13. Do you think that you have sufficient time to prepare for pre-trial detention applications?

14. What is your response to concerns raised about the excessive use of pre-trial detention?

15. What concerns, if any, do you have about seeking or agreeing to alternatives to detention? (Which alternatives are you most likely to seek and why?)

16. Are you conscious of any pressures on you regarding your pre-trial detention requests, eg. from supervisors, any government organisation or institution, from the public or the media?

17. Are you aware of any adverse consequences for you if a defendant is released, and they subsequently commit an offence or do not turn up in court?

18. How do you think judges approach representations made by you? And by the defence?

19. What is your approach to the representations made by the defence? And in your view, are defence lawyers given sufficient information about the reasons and/or evidence concerning your requests for pre-trial detention?

20. To what extent do the jurisprudence of the European Court of Human Rights and other regional/international human rights standards inform your decisions as to whether or not to seek detention in a particular case? How much training do you receive on these standards?

21. If you could make changes to the law or practice governing pre-trial detention, what change or changes would you like to see?