

# WHERE'S MY LAWYER?

*Making legal assistance in  
pre-trial detention effective*



Fair

Trials

**“A person in detention is essentially helpless – detention leads to self-incrimination, in the sense that the defendant is wholly unable to defend themselves.”**

*– lawyer, Greece*

## About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused.

Its work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and

academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

In Europe, we coordinate the Legal Experts Advisory Panel – the leading criminal justice network in Europe consisting of over 180 criminal defence law firms, academic institutions and civil society organizations. More information about this network and its work on the right to a fair trial in Europe can be found at: <https://www.fairtrials.org/legal-experts-advisory-panel>



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Hungarian Helsinki Committee

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# Executive Summary

## Background

The EU is facing a long-standing crisis in prison overcrowding. The excessive use of pre-trial detention (which is supposed to be a measure of last resort) is fuelling this. The decision to order pre-trial detention carries grave and wide-ranging consequences for people who have not been convicted of any offence. The European Commission and Parliament have, over many years, repeatedly recognised the need to act to address the overuse of pre-trial detention. Recent decisions from the Court of Justice of the European Union have pushed this to the fore: inhumane prison conditions are threatening mutual trust and judicial cooperation in Europe. But, to date, there is still no proposal for EU legislation on pre-trial detention.

Although the EU has so far failed to create robust standards on pre-trial detention, it has created other legislation protecting procedural rights for suspects, which have the potential to improve the fairness of decision-making on pre-trial detention. These rights, including access to a lawyer at the initial stages of the criminal process, can prevent unfairness and increase the chance that a person will be released (perhaps with alternative measures like electronic monitoring), contributing to lower rates of pre-trial detention.

Over the past two years, Fair Trials and its partners in Bulgaria, Greece, Hungary, Italy and Romania have engaged criminal justice stakeholders (civil society, lawyers, prosecutors, judges, and ministry of justice officials) to assess what impact these procedural rights protections are having on the fairness of pre-trial detention decision-making; in particular, whether suspects are receiving effective legal assistance. Our aim has been to empower local practitioners to improve practice and to advocate for ways to address persistent failures to implement EU law effectively.

## Findings

EU standards on the procedural rights of suspects have the potential to make a positive impact on pre-trial detention decision-making. In practice, however, persistent legal and practical obstacles remain. Our research highlights five key areas of concern:

1. **Knowledge of defence rights:** You can't exercise your rights if you don't know what they are, including crucially your right to a lawyer and to legal aid. Therefore, without effective communication to suspects about their rights, detained persons may not have the chance to consult a lawyer before the first judicial hearing at which decisions on pre-trial detention may be made, and by which time, they will likely have already been interviewed by the police. Thanks to EU law, all suspects must now promptly be given a written Letter of Rights (in accessible language). However, further action is required. Letters of Rights need to be reviewed to ensure that they are drafted in plain language that suspects can understand. A rigorous process is needed to ensure Letters of Rights are promptly provided upon arrest. Further, Letters of Rights should be available in a broader range of language. Effective judicial remedies must also be available where the right to information has been violated.
2. **Right to access to a lawyer and legal aid:** When you are detained prior to trial, your ability to participate in the preparation of your defence is dramatically impaired. In this respect, the right to access to a lawyer and legal aid serves as a 'gateway' for other procedural safeguards. EU law recognises this and requires Member States to give suspects access to a lawyer in police custody, including to provide confidential legal advice prior to questioning, and to assist suspects during questioning. In reality, there are significant obstacles to this crucial right. Not all countries properly protect this right in their domestic laws; this requires urgent reform. Even where the law on paper is good, practical implementation remains a challenge. For example, mechanisms for the early appointment of lawyers make it very hard for some suspects to exercise their right to a lawyer. Despite the right for suspects to consult their lawyer confidentially, in many places facilities for this are not available.

3. **Access to the case file:** In order to develop a defence strategy (including to argue for their clients to be released pre-trial) lawyers need to be granted access to information in the case file. EU law now recognises this, but the law in many Member States fails to protect this right, for example by giving prosecutors overly broad discretion to restrict access to the case file. Moreover, in practice, lawyers can face administrative burdens to obtaining access, or copies of materials. The procedure to obtain access to the case file, in particular the question of timing, requires further clarity.
4. **Right to interpretation services:** With prison statistics showing the extent to which non-nationals are over-represented among detainees across the EU, effective legal representation requires access to interpretation services, not only during police questioning, but also during the initial consultation with the suspect's lawyer. Thanks to EU law, we've seen changes in Member States to protect this right. However, there are still persistent problems in this area, in particular the poor quality of the interpretation offered to suspects, coupled with the lack of training and evaluation of interpreters. Generally, poor working conditions undermine the ability of interpreters to perform their important role in pre-trial proceedings.
5. **Ineffectiveness of requests for alternative measures to pre-trial detention:** Most legal systems recognise that pre-trial detention is a measure of last resort and have adopted a range of alternative measures. Despite this, in practice, judges tend to rule in favour of prosecutors' requests for detention, rather than applying alternatives or simply ordering suspects' unconditional release. Lawyers should advocate for their clients to be released or for alternative measures, but this is hard without time to prepare for the hearing, consult their client and consider the case file. If lawyers were better equipped, effective advocacy could gradually change the attitudes of judges and help reduce prison overcrowding.

### The need for further action (at domestic and regional levels)

Existing EU standards on procedural rights have a huge potential to improve the fairness of pre-trial detention proceedings. But even where the law in Member States appears to respect those rights on paper (which is not universally the case), practical barriers get in the way. These cannot be removed through the action of local practitioners in individual cases. We need Member States to fully engage in making these human rights a reality, and where Member States fail to do so or need support, we need the European Commission to take action.

## EU'S PRE-TRIAL DETENTION CRISIS



Over 100,000 people in the EU are in pre-trial detention.



1 in 6 of all prisoners in the EU haven't been found guilty of any crime.

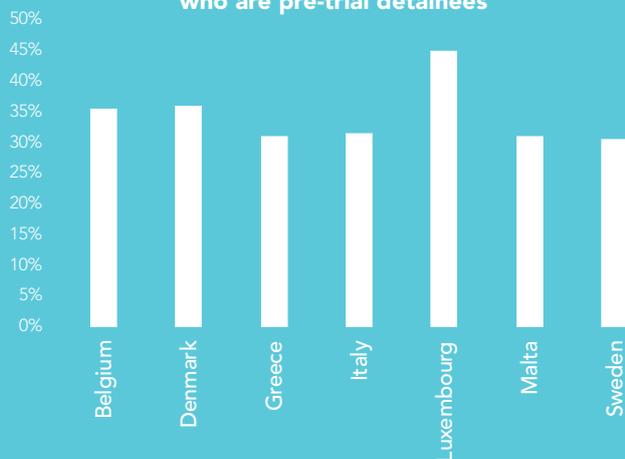


Only 1 in 3 arrest warrants result in surrender: human rights are a growing reason for refusal.

€1.6bn

Annual cost of pre-trial detention in the EU.

Percentage of prison population who are pre-trial detainees



**“The EU is facing a long-standing crisis in prison overcrowding. The excessive use of pre-trial detention (which is supposed to be a measure of last resort) is fuelling this. The decision to order pre-trial detention carries grave and wide-ranging consequences for people who have not been convicted of any offence. But, to date, there is still no proposal for EU legislation on pre-trial detention.”**

Sources: Fair Trials, [www.fairtrials.org](http://www.fairtrials.org)  
World Prison Brief, [www.prisonstudies.org](http://www.prisonstudies.org)  
European Parliamentary Research Service, [www.europarl.europa.eu](http://www.europarl.europa.eu)

# Introduction

## Pre-trial detention in the EU

Pre-trial detention (depriving suspects of their liberty) is intended to be an exceptional measure, only to be used as necessary and proportionate and in compliance with the presumption of innocence and the right to liberty. Pre-trial detention, by its nature, removes the right to liberty from a legally innocent person who has not been convicted of any crime. In addition to the loss of liberty, detained individuals experience serious and sometimes irreversible impacts to their livelihood, family, and health. According to international and regional human rights standards, such a severe state action against an individual can therefore only be imposed in strictly limited circumstances. Its use must always remain a measure of last resort. Unfortunately, in the EU as around the world, these strict limitations are frequently not respected.

The EU is facing a long-standing crisis in prison overcrowding that threatens to undermine mutual trust and the functioning and legality of mutual recognition instruments like the European Arrest Warrant (**the EAW**).<sup>1</sup> Pre-trial detainees make up a sizeable proportion of the EU's overcrowded prisons – approximately 23% of the total prison population by the most recent measure, comprised of some 115,112 individuals held on remand or awaiting a final sentence.<sup>2</sup> The number of pre-trial detainees and the proportion they make up of overall prisoners varies widely between Member States, in project partner countries ranging from 9.1% in Romania (prison occupancy level: 111%)<sup>3</sup> to 31.5% in Italy (prison occupancy level: 119.6%) in 2019.<sup>4</sup> Given the large population of pre-trial detainees and the number of overcrowded prisons in the EU, efforts to reduce the overuse of pre-trial detention could have a substantial impact on attempts to curtail the growth of prison populations. Thus, these efforts would improve the overall inhumane prison conditions.

Overuse of pre-trial detention also has significant cost implications. A recent study published by the European Parliamentary Research Service highlighted the economic cost of pre-trial detention of around €1.6 billion per year for EU Member States.<sup>5</sup> Depending on the Member State, "one day [in pre-trial detention] per detainee costs on average

about €115." The study concluded that "this amount could be reduced by either €162 or €707 million per year spent on 'excessive' pre-trial detention."<sup>6</sup>

The question of whether the EU should act to address the excessive use of pre-trial detention has been a key issue in EU criminal justice policy-making for nearly a decade. The 2009 Roadmap on Criminal Procedural Rights (**the Roadmap**) states that "[e]xcessively long periods of pre-trial detention are detrimental for the individual, can prejudice judicial cooperation between the Member States and do not represent the values for which the European Union stands."<sup>7</sup> This was followed by the Green Paper on Detention (**the Green Paper**) published by the European Commission (**the Commission**) in 2011, which recognised that detention issues "come within the purview of the European Union as [...] they are a relevant aspect of the rights that must be safeguarded in order to promote mutual trust."<sup>8</sup> In response to the Green Paper, the cross-party resolution of the European Parliament (**the Parliament**) called for legislative minimum standards due to the fact that "detention issues have an impact on mutual trust, and consequently on mutual recognition and judicial cooperation."<sup>9</sup> In its resolutions on reform of the EAW<sup>10</sup> and fundamental rights in the European Union,<sup>11</sup> the Parliament reiterated its call.

Recent decisions from the Court of Justice of the European Union (**the CJEU**) have again pushed for regional legislation to address detention in the EU. Since its *Aranyosi & Caldaru* judgments,<sup>12</sup> executing judicial authorities are required to defer the execution of a EAW until the requesting Member State has provided sufficient information to make clear whether, "in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment."<sup>13</sup> It further specifies that the executing authority must request of the issuing Member State "all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State."<sup>14</sup> If sufficient information is not forthcoming within a reasonable period of time, the judicial authority may decide to end surrender proceedings.<sup>15</sup>

1 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

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

3 See <https://www.apador.org/en/cum-rezolva-romania-supraaglomerarea-din-penitenciare-la-doi-ani-dupa-condamnarea-la-cedo/>.

4 See World Prison Brief, International Centre for Prison Studies, <http://www.prisonstudies.org/map/europe>.

5 This includes the cost to the public related to running pre-trial facilities (including prisons) and compensation paid to individuals acquitted, as well as individual costs related to average income and property loss. See Wouter van Ballegooij, European Parliamentary Research Service, December 2017, *Procedural Rights and Detention Conditions - Cost of non-Europe Report*, p. 35, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS\\_STU\(2017\)611008\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf).

6 *Ibid.*, p. 34.

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

8 Green Paper from the Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM (2011) 327, Brussels 14 June 2011, available at: [http://ec.europa.eu/justice/policies/criminal/procedural/docs/com\\_2011\\_327\\_en.pdf](http://ec.europa.eu/justice/policies/criminal/procedural/docs/com_2011_327_en.pdf).

9 *Ibid.*, p. 2.

10 European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), P7\_TA (2014)0174, para. 17.

11 European Parliament resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015, P8\_TA-PROV(2016)0485, para. 43.

12 Court of Justice of the European Union, Judgement of 5 April 2016 in the Joined Cases C 404/15 and C 659/15.

13 *Ibid.*, para 94.

14 *Ibid.*, para 95.

15 *Ibid.*, para 103.

In addition, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (**the CPT**) concluded in its annual report of 2016 that poor detention conditions are largely linked to overcrowding resulting from the overuse of pre-trial detention and a lack of enforceable regional-level safeguards.<sup>16</sup>

Despite the absence of EU legislation addressing directly pre-trial detention, developments in EU law on procedural rights of suspects have had some impact on pre-trial detention decision-making. Under the programme laid out in the Roadmap, the EU has adopted six directives on criminal procedural rights (together, **the Directives**):

- a) Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (the **Interpretation and Translation Directive**);<sup>17</sup>
- b) Directive 2012/13/EU on the right to information in criminal proceedings (the **Right to Information Directive**);<sup>18</sup>
- c) Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings (the **Access to a Lawyer Directive**);<sup>19</sup>
- d) Directive on the presumption of innocence and the right to be present at one's trial (the **Presumption of Innocence Directive**);<sup>20</sup>
- e) Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings (the **Children's Rights Directive**);<sup>21</sup> and
- f) Directive on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (the **Legal Aid Directive**).<sup>22</sup>

Because each of these Directives focuses at least in part on procedural protections during the pre-trial period, they have

the potential to improve the administration of pre-trial detention and constrain its excessive use. However, the Presumption of Innocence Directive,<sup>23</sup> while noting the 'clear link' between the presumption of innocence and the right to pre-trial liberty,<sup>24</sup> explicitly excludes pre-trial detention from its scope on the basis that the topic was dealt with by other initiatives.<sup>25</sup> The Directive makes reference to the Commission's Green Paper on Detention and the resulting Parliamentary vote in favour of a legislative tool to address the EU-wide problem of overuse of pre-trial detention.

### Fair Trials' work on pre-trial detention

Fair Trials has called for pre-trial detention reform in the EU since 2011, with the publication of *Detained without Trial*<sup>26</sup> – our response to the Green Paper. Fair Trials was one of over 50 NGOs that echoed the call for improved protection of minimum standards of procedural rights in relation to pre-trial detention, and six Member States supported legislation in this area.<sup>27</sup> In the following year, Fair Trials, with the Legal Experts Advisory Panel (**LEAP**) network of lawyers, academics and NGOs wrote to all Members of Parliament asking them to call on the Commission to act on their 2011 vote and propose minimum standards on pre-trial detention.<sup>28</sup> In 2013, in coalition with over 20 other European NGOs, Fair Trials wrote to then-Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding,<sup>29</sup> to call for progress on better regional procedural protections and data collection on pre-trial detention, and made further appeals in a submission to the Commission's "Assises de la Justice" later that year.<sup>30</sup>

Following research across ten EU jurisdictions (England and Wales,<sup>31</sup> Greece,<sup>32</sup> Hungary,<sup>33</sup> Italy,<sup>34</sup> Ireland,<sup>35</sup> Lithuania,<sup>36</sup> Netherlands,<sup>37</sup> Poland,<sup>38</sup> Romania,<sup>39</sup> and Spain<sup>40</sup>) on the practice of pre-trial detention decision-making and the use of alternatives to detention, in 2016, Fair Trials released the

16 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 26th General Report of the CPT, 1 January - 31 December 2016, available at: <https://rm.coe.int/168070af7a>.

17 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0064&from=EN>.

18 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0013&from=EN>.

19 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0048&from=EN>.

20 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0343&from=EN>.

21 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0800&from=EN>.

22 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1919&from=EN>.

23 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

24 *Ibid.*, para. 1.14.

25 *Ibid.*, para. 1.16.

26 Fair Trials, *Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention*, October 2011, available at: <https://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>.

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

28 Letter (15 June 2012), available at: [https://www.fairtrials.org/documents/Final\\_PTD\\_Letter\\_to\\_MEPs.pdf](https://www.fairtrials.org/documents/Final_PTD_Letter_to_MEPs.pdf).

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

30 Fair Trials, December 2013, Submission to the European Commission, Assises de la Justice Consultation, available at: [http://ec.europa.eu/justice/events/assises-justice2013/files/contributions/76.fair\\_trials\\_international\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice2013/files/contributions/76.fair_trials_international_en.pdf).

31 University of the West of England.

32 Centre for European and Constitutional Law.

33 Hungarian Helsinki Committee.

34 Associazione Antigone.

35 Irish Penal Reform Trust.

36 Human Rights Monitoring Institute.

37 University of Leiden.

38 Helsinki Foundation for Human Rights Poland.

39 APADOR-CH Romania.

40 Asociación Pro Derechos Humanos España.

report entitled *A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU*. The report highlighted systemic failures resulting in the unjustified and excessive use of pre-trial detention<sup>41</sup> and was updated in 2018.<sup>42</sup> The lack of effective legal assistance prior to and during detention hearings was identified as a key barrier to fair and effective decision-making and gave rise to the work that underlies this report.

Examining more closely the link between the lack of effective legal assistance and pre-trial detention is all the more relevant today because, since the publication of our research in 2016, all the Roadmap Directives should have been implemented into national legal systems. This includes in particular the Access to Lawyer Directive, which requires Member States to ensure that suspects and accused persons can access a lawyer in such time and manner so as to allow the exercise of their rights of defence 'practically and effectively'.<sup>43</sup>

## Effective legal assistance in pre-trial detention decision-making

The decision to order pre-trial detention is one that carries grave consequences for the defendant and places them at a significant procedural disadvantage. The very fact of being in custody can make it much harder to prepare a defence. Lawyers play a key role in limiting the use of pre-trial detention to cases in which it is really justified. For this reason, European human rights standards require detention hearings to be oral, adversarial and to involve the effective participation of the defence.<sup>44</sup> This protects suspects' right to liberty, and provides valuable information to prosecutors, judges and probation services notably on the appropriateness of alternatives to detention.

A lawyer's presence and active participation in the proceedings from the moment of initial custody helps a suspect to understand the legal situation and the consequences of choices made at this crucial stage. If complied with, the lawyer's presence at the initial stages of the criminal process serves as a 'gateway' to other rights and helps not only to prevent prejudice to the suspect's defence, but can also increase the chance that alternative measures to detention are applied and as a result contribute to lower rates of pre-trial detention and reductions in prison overcrowding.

Research shows, however, that many suspects find it impossible to obtain timely and meaningful access to a lawyer while in detention.<sup>45</sup> In some cases, due to variations in legal regimes and the complexities of securing legal aid appointments, defendants face judicial authorities in initial hearings on pre-trial detention without the assistance of a

lawyer. Even where they are present, lawyers do not always provide a sufficient level of representation to safeguard the rights of their client.

## Methodology

This report builds on work commenced in September 2017 which aims to improve the effectiveness of the legal assistance that suspects receive during the pre-trial stages and address the risk of them being subjected to unjustified pre-trial detention. With local partners in Bulgaria, Greece, Hungary, Italy and Romania, we have engaged groups of local practitioners to identify and advocate for solutions to address the barriers in law and in practice that prevent defence lawyers from effectively participating in the pre-trial decision-making process.<sup>46</sup>

Each partner updated existing research on the law, policy and practice on pre-trial detention in their country and created working groups of domestic stakeholders to work with them and address the overuse of pre-trial detention (including lawyers, prosecutors, judges, probation officers, and other criminal justice actors). The working groups met several times over the course of 2018-2019 to discuss the key issues and obstacles to effective legal assistance in pre-trial detention decision-making and drew up action plans for each country. These action plans focus on solutions and recommendations of how to tackle the identified obstacles in each country, targeting the justice sector, bar associations and policy-makers.

Roundtable meetings were held with a broader range of criminal justice actors to discuss the obstacles and proposed solutions. In parallel, each partner held training sessions for lawyers on pre-trial detention and produced practical handbooks which explain the domestic and regional standards that lawyers can seek to rely upon. The handbooks also seek to offer practical solutions to overcome, where possible, the obstacles that lawyers may face. In addition, Fair Trials produced a handbook focused on regional standards, available at <https://fairtrials.org/publication/legal-assistance-pretrial-detention-handbook>.

In the present report, we highlight the key common obstacles across jurisdictions to effective legal assistance in pre-trial detention decision-making; solutions that may be applicable in other EU Member States; as well as the key gaps in the existing legal framework that require legislative intervention at a regional level (Part 1). The report also provides an overview of the discussions and main outcomes of the activities undertaken by each of the five partner countries with a view to highlighting good practices that may serve as models in other countries (Part 2).

41 Fair Trials, May 2016, "A measure of Last Resort? The practice of pre-trial detention decision making in the EU", available at: <https://www.fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf>.

42 Fair Trials, May 2018, "Update Report: A measure of Last Resort? The practice of pre-trial detention decision-making in the EU", 2016, available at: [https://www.fairtrials.org/sites/default/files/publication\\_pdf/LEAP%20Update%20policy%20paper%20PTD.pdf](https://www.fairtrials.org/sites/default/files/publication_pdf/LEAP%20Update%20policy%20paper%20PTD.pdf).

43 Article 3(1), Access to a Lawyer Directive.

44 European Court of Human Rights, *Göç v. Turkey*, Judgment of 11 July 2002, App. no. 36590/97, para. 62.

45 Fair Trials, May 2016, "A measure of Last Resort? The practice of pre-trial detention decision making in the EU", p. 14.

46 Bulgaria: Bulgarian Helsinki Committee (BHC); Greece: Centre for European Constitutional Law (CECL); Hungary: Hungarian Helsinki Committee (HHC); Italy: Associazione Antigone (Antigone); and Romania: Association for the Defense of Human Rights in Romania – the Helsinki Committee (APADOR-CH).

# **Part 1 – Regional trends and recommendations**

Fair Trials' 2016 study on pre-trial detention<sup>47</sup> found that, despite laws that protect concepts such as detention as a measure of last resort, presumption of release, equality of arms and proportionality, there are systematic failures to implement these standards effectively in practice. Researchers observed proceedings in which judges made

poorly-reasoned decisions to detain suspects unnecessarily, relying on minimal information. Judicial reasoning was often vague and formulaic, and failed to engage sufficiently with practical alternatives to pre-trial detention that can protect the investigation, limit the possibility of reoffending and ensure defendants' presence at trial.

## Overview of 2016 findings

**Procedure:** Defendants did not always have access to adequate legal assistance or sufficient access to case materials essential to challenging detention. Even where access was sufficient, lawyers typically did not have enough time to study the case materials prior to a hearing. Many lawyers perceived, and researchers were able to establish, that judges credited the arguments of the prosecution over those of the defence. In some cases, pre-trial detention was used for unlawful ends, such as in order to coerce a confession, or for punitive purposes.

**Substance:** Human rights standards set out certain limited grounds for imposing pre-trial detention, but judges sometimes relied on unlawful grounds, such as exclusive or primary reliance on the nature of the offence, or flight risk-based evidence solely

by foreign nationality. Reasoning was often formulaic and did not engage with the specific evidence in each case. In some countries, certain suspects including women and foreign nationals were disproportionately detained.

**Reviews:** Because pre-trial detention is intended as an exceptional measure, regular reviews are necessary to ensure that detention remains justified. But reviews in practice did not always provide sufficient oversight. Defendants and/or their lawyers don't always have a right to be present at review hearings. Decisions to detain are rarely overturned or even seriously questioned, and reasoning tended to be even more generic and formulaic than in the first instance. Detention was sometimes extended to protect the integrity of the investigation long after relevant

investigative tasks were complete. The frequency with which reviews take place varies widely between Member States, as does the average duration of pre-trial detention.

**Alternatives:** Judges were often reluctant to use alternatives. Electronic monitoring and house arrest are increasingly available in many Member States, but these were seldom used due to their novelty and court actors' lack of experience in administering them. As a result of a lack of data collection, access to bail information services or pre-trial risk assessments, training, investment and enforcement of alternatives to detention, judges and prosecutors lacked faith in the efficacy of alternatives and continued to rely instead on detention. Some examples of good practice exist and could be duplicated elsewhere.

The work we have undertaken with our partners over the past two years confirms that the findings from 2016 remain broadly pertinent today, even though since the publication of the report, Member States were due to have transposed and implemented the Directives on procedural rights of suspects and accused persons. This report highlights the potential of the Directives to reinforce key safeguards during the pre-trial detention decision-making proceedings, as well as the persistent problems across Member States that hinder the potential of the Directives to improve the fairness in pre-trial detention decision-making. The key concerns are grouped by area in which, on paper, the Directives have the potential to bring change, provided they are effectively implemented by Member States.

- **Knowledge of your rights** is a precondition of being able to exercise them. In the field of pre-trial detention, it is key that suspects and accused persons are aware of

their rights to challenge pre-trial detention and of the rights that make this possible, in particular the rights to a lawyer (including free legal advice) and to access the case file. **Section 1** addresses issues identified by partners regarding access to information about rights in detention.

- Problems concerning the exercise of the **right to access to a lawyer and legal aid** are highlighted in **section 2**. When a person is detained prior to trial, their ability to participate in the preparation of their defence is dramatically impaired. With the prosecutor having the entire state machinery behind them, it is crucial that a defendant is provided with legal assistance from the earliest possible moment in proceedings. In particular, the early involvement of a lawyer is key to preparing for detention hearings, including developing counter-arguments to pre-trial detention requests and advocating for release or alternative measures.

47 Fair Trials, *A measure of last resort?*, 2016, available at: [https://www.fairtrials.org/sites/default/files/publication\\_pdf/A-Measure-of-Last-Resort-Full-Version.pdf](https://www.fairtrials.org/sites/default/files/publication_pdf/A-Measure-of-Last-Resort-Full-Version.pdf).

- It is the lawyer's role to prepare for an effective challenge to a request for imposing or maintaining a pre-trial detention order. To do so effectively, access to the case file is crucial. Existing deficits concerning the scope and modalities of **access to the case file**, impacting the effectiveness of legal assistance in pre-trial detention, are considered in **section 3**.
- Pre-trial detention measures tend to be disproportionately ordered in respect to foreign suspects, due to a presumed flight risk.<sup>48</sup> A further key obstacle that lawyers face in all the jurisdictions covered here is the ability to communicate with their clients, where clients speak another language. **Section 4** focuses on problems relating to the availability of **interpretation services** and, where available, the poor quality of interpretation.
- Finally, **section 5** focuses on **judicial practice in respect to alternative measures to pre-trial detention**, and specifically the impact of the failure to exercise key defence rights on the willingness of judges to order alternatives – in particular the right to a lawyer from the beginning of the proceedings and access to the case file.

48 See Wouter van Ballegooij, European Parliamentary Research Service, December 2017, *Procedural Rights and Detention Conditions – Cost of non-Europe Report*, p. 28, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS\\_STU\(2017\)611008\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf).

## 1. Access to information on rights

You can't exercise your rights if you don't know what they are, including crucially your right to a lawyer and to legal aid, where you can't afford to pay for legal advice. Therefore, without effective communication to suspects about their rights, they may not have the chance to consult a lawyer before their first judicial hearing at which decisions on pre-trial detention may be made, and by which time they will likely have already been interviewed by the police. Thanks to EU law,<sup>49</sup> all suspects must promptly be given a written Letter of Rights (in accessible language) and be allowed to keep it for as long as they are detained. The letter must contain crucial information on, for example, the right to challenge detention, the right to silence and the right to a lawyer (including free legal advice).

On paper, Member States had to amend their laws to require that suspects be given a written Letter of Rights when they are taken into custody by the police.<sup>50</sup> The reality, however, does not always live up to this. There are both legal and practical challenges which pose major obstacles to obtaining information about rights at a time when suspects have just been arrested and are in the most vulnerable position. In Greece, for instance, stakeholders noted that the limited information provided to people in police custody is highly problematic and a major bottleneck as regards the exercise of the right to legal aid at the outset of proceedings.

- **Timing:** In some cases, due to vague legal provisions regarding when information about rights must be provided to detainees, letters are not provided immediately upon arrest.<sup>51</sup>
  - The Letter of Rights should be provided immediately after suspects are detained. Internal instructions should be developed for police officers regarding the timing of the provision of this information to detainees.
  - A more active role is required by national human rights institutions and national preventive mechanisms to monitor the transposition of EU law in this area in police stations (both in law and practice).
  - Police stations should be required to implement a thorough 'custody record' in which the timing of the provision of the Letter of Rights is specified.
  - Specifically, it is crucial to address the situation in Bulgaria where the rights protected by EU law do not effectively extend to police custody because it is considered to be an administrative measure rather than part of a 'criminal investigation'.<sup>52</sup>

### Advocacy initiative: Bulgaria

At present, police detention is non-compliant with EU law and requires urgent reform, including recognising the applicability of the Directives to people detained in police custody. In so far as they are detained on suspicion of having committed an offence, they must be recognised as 'suspects' for the purposes of the Directives. **This fundamental problem has not been addressed by the legislative amendments adopted in January 2019 to the Criminal Procedure Code.** In a letter to the European Commission, the Bulgarian Helsinki Committee laid out in detail the current gaps in national legislation and practice regarding defence rights, and detailed recommendations based on four years of research devoted to the transposition and implementation of the Directives in criminal proceedings in Bulgaria.

### Good practice: Croatia

Just as in Bulgaria, the Croatian criminal justice system did not recognise the stage of police investigations as part of the criminal proceedings (treating it, instead, as administrative). It was considered necessary for the police to be free to act in order to resolve crimes and courts did not have any supervision over what happened at the police station. A detainee did not have a right of access to a lawyer until officially treated as a 'suspect'.<sup>53</sup> The requirement to transpose and implement the Roadmap Directives led to changes in law and practice which made police detention part of the criminal proceedings with appropriate procedural rights.

- An effective remedy should be provided in case of refusal or omission to provide a Letter of Rights to detainees.
- **Accessibility:** A key challenge, as highlighted by partners in Romania, Bulgaria and Italy, is the drafting of Letters of Rights. They are not easy to understand, are drafted in legal terms (effectively, a copy of the relevant legislative provisions) and are too long and formalistic. Arrest and detention put the suspect in an exceptionally stressful situation and the implications of the decisions made at these preliminary stages may have far-reaching consequences, in particular on pre-trial detention. Even if a suspect is given a letter, it may be necessary to follow up with an oral explanation, which some lawyers tend to do.

49 Article 4, Right to Information Directive.

50 See status of notification of transposing measures for the implementation of the Right to Information Directive: <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32012L0013>.

51 As is the case, for example, in Bulgaria.

52 Pursuant to the Ministry of Interior Act (**the MoIA**), Article 72(1)(1) (available in Bulgarian at: <http://www.lex.bg/laws/ldoc/2136243824>). Police detainees are, in principle, formally informed of their defence rights, including on their rights of access to a lawyer and legal aid, both orally and in writing (Article 30(2) of the MoIA). But BHC research reveals that persons who are *de facto* detained by the police – without an official order, but who are summoned to appear at the police and are obliged to remain for a 'conversation' with the officers – are not informed of their rights, neither orally, nor in writing.

53 See European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), 18 March 2014, *Report to the Croatian Government on the visit to Croatia from 19 to 27 September 2012*, CPT/Inf (2014) 9.

### Advocacy initiative

Fair Trials – together with partners in Hungary (HHC), Romania (APADOR) and Italy (Antigone) – is currently participating in a partly EU-funded project on 'Demystifying Justice: Training for justice actors on the use of plain language and developing clear and accessible Letters of Rights.'<sup>54</sup> Our aim is to improve access to justice in criminal proceedings by stimulating a movement for an open and accessible European legal culture grounded in the use of plain language. In particular, we want to develop alternative, more accessible Letters of Rights for defendants at the time of their arrest in EU Member States.

- It is critical to ensure Letters of Rights are redrafted in plain and accessible language, which is possible for a non-lawyer to understand even at a time of stress. In this respect, involving plain language experts can be very helpful. Good practice examples exist which show that this is possible (even for the most vulnerable suspects, such as children or persons with mental or other disabilities).<sup>55</sup>
- Detainees should be provided with sufficient time to read and process the content of the Letter of Rights and be given the opportunity to ask for clarification or additional information on the procedure for exercising the rights. In addition, sufficient time should be allowed for confidential consultation with a lawyer before the police interview takes place, to allow for an oral explanation of rights, where necessary, to ensure a defendant's proper understanding.
- A procedure should be put in place to ensure the identification of a suspect's vulnerability, so that the necessary support, including accessible information and legal support, is provided.<sup>56</sup>
- **Translations of Letters of Rights** tend to exist only in a limited number of languages, causing difficulties for non-native speakers who have no or insufficient understanding of the national language.
  - It is necessary to ensure that translations of the Letter of Rights are readily available in the most common foreign languages so that non-native speakers can understand and effectively make use of their rights.
  - Where this is not possible (for example, with a very unusual language) additional time should be allowed for confidential communication with a lawyer (with the assistance of an interpreter) in advance of any police interview.
- The lack of **effective judicial remedies** in cases where authorities have failed to provide suspects with accessible information on their rights is a key gap, which limits the incentive for law enforcement authorities to comply with this legal requirement.
  - A remedy in the form of exclusion of evidence from the case file should be introduced in the legislation to deter violations of the right to information during police detention.

<sup>54</sup> The project started on 1 October 2018 and runs for 23 months.

<sup>55</sup> See, for example the Belgian Letter of Rights presented as a comic strip for children: <http://www.childrensrighsbehindbars.eu/outputs/crb-2-0-outputs/children-s-empowerment>.

<sup>56</sup> For detailed recommendations on enhancing the procedural safeguards for suspects with intellectual and psychosocial disabilities, please see the report of the Ludwig Boltzmann Institute of Human Rights, *Dignity at Trial*, 2018: [https://bim.lbg.ac.at/sites/files/bim/attachments/1\\_handbook\\_dignity\\_at\\_trial.pdf](https://bim.lbg.ac.at/sites/files/bim/attachments/1_handbook_dignity_at_trial.pdf).

## 2. Access to lawyer

When you are detained prior to trial, your ability to participate in the preparation of your defence is dramatically impaired. One lawyer in Greece described the person in detention as “essentially helpless,” and that detention leads to self-incrimination, in the sense that the defendant is wholly unable to defend themselves. With the police and prosecution having the entire state machinery behind them, it is crucial that a defendant is provided with legal assistance from the earliest possible moment in the proceedings to be able to make effective use of their defence rights. In particular, the role of the lawyer is key to ensuring that defendants understand their rights, gather evidence about the case, prepare the defendant for hearings and counter arguments for pre-trial detention as well as to advocate for the application of alternative measures to detention.

Where pre-trial detention is requested by the prosecution, it is the lawyer's role to prepare for an effective challenge of a pre-trial detention order. Defendants should not appear unrepresented at pre-trial detention hearings unless they have specifically, knowingly and intelligently waived the right to a lawyer. Despite EU law requiring early access to a lawyer,<sup>57</sup> which was due to be implemented by Member States by 27 November 2016, practice shows significant obstacles and limitations to this crucial right for the defendant, meaning many people are denied practical access to effective legal representation.

### a. Ability to pay

Insufficient financial means is a key impediment to effective legal assistance for suspects in pre-trial detention. The inability to afford a lawyer or the threat of having to reimburse the state for the costs of legal representation in the event of a conviction has a severe effect on a suspect's ability to enjoy the rights enshrined in EU law.

- **Exclusion of police detention:** The situation in Bulgaria is of particularly grave concern. Police custody is not treated as part of criminal proceedings and, as such, even if a detainee can in principle, have access to a lawyer in police detention<sup>58</sup> (see practical obstacles below), legal aid in practice is not free as detainees must reimburse legal aid costs later in the proceedings if convicted. There are no rules on how legal aid is provided during detention, and no system in place for appointing lawyers. With a few exceptions, in practice, suspects do not benefit from effective legal assistance while they are detained, and as a rule, are interviewed by police officers during ‘exploratory talks’ without the presence of a lawyer. The information they share at this stage may be directly entered into their case files though testimonies provided by the police officers, although in principle they cannot serve as a ground for conviction.

### Advocacy initiative: Romania

In the wake of a lawyers' strike in Romania in February 2019, APADOR-CH and the working group of criminal justice experts created under this project argued for higher legal aid remuneration during the negotiations for a new Legal Aid Fee Protocol. In the negotiating process, the Romanian Bar Association asked the Ministry of Justice for an increase of the fee from 48 to 210 Euros for legal assistance in pre-trial detention. The Ministry of Justice replied to this request by asking a substantiation of the claim based on objective criteria. The working group, in its meeting on 12 December 2018, followed up on this request by drafting objective indicators. APADOR-CH released a public statement of solidarity with the legal aid lawyers, in which it reiterated the main findings of the working group in this project.<sup>59</sup> On 14 February 2019, the Ministry of Justice, Public Ministry and the National Union of the Bar Associations adopted a new Protocol concerning the increased fee for legal aid lawyers, including new rules for calculations.<sup>60</sup> The conclusions of the working group and some of its recommendations served as important input in the negotiating process. The involvement of a known NGO such as APADOR-CH was crucial. However, as of April 2019 there was still no budget allocated to cover the increase in the legal aid fees and judges could still arbitrarily decide to decrease the legal aid fee of certain lawyers, a practice expressly prohibited by the new Protocol.

- A proper transposition of EU norms into national legal orders and monitoring of their practical implementation is key to ensuring effective legal assistance by legal aid lawyers.
- Bar associations should be involved in the transposition and monitoring of the practical implementation of EU norms.
- Cooperation among lawyers' associations is necessary to increase awareness of procedural rights and the benefits of the Directives.
- The state should bear the cost of legal aid, irrespective of the outcome of the proceedings, in order to allow for poor defendants to avail themselves of their right to a lawyer.
- **Lawyers unwilling to engage:** Lawyers may not be willing to engage properly in the case or to provide effective legal representation at the early stages of proceedings. This is understandably connected to inadequate remuneration (and late payment of fees) which impact lawyers' willingness to take on legal aid cases and to work actively for clients to challenge pre-trial detention. Effective legal assistance in pre-trial detention should not depend on a defendant's financial situation, with those

57 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

58 Article 72 (5), Ministry of Interior Act.

59 The statement is available at: <http://www.apador.org/solidaritate-cu-protestul-avocatorilor-din-oficiu/>.

60 See: <http://www.unbr.ro/protocol-14-02-2019-onorarii-avocati/>.

who cannot afford to pay privately for a lawyer at a higher risk of being held in detention, due to inadequate legal representation. Such issues were identified in Romania and Italy.

- As in Romania (discussed on page 17) a change in policy is required to ensure fair compensation for legal aid lawyers. It is also key to remove bureaucratic obstacles for legal aid (as in Italy), and to put in place mechanisms to ensure timely payment of fees.

## b. Mechanisms for early appointment

Where a suspect does not have the financial means to afford a lawyer of choice, it is crucial to have a system in place to provide for free legal aid from the beginning of the proceedings. The Access to a Lawyer Directive leaves the mechanism for early appointment up to the individual Member States.

- **Practical inequalities in the exercise of rights:** Significant practical issues exist in countries which provide for *ex-officio* appointments of legal aid lawyers. In Greece, there is insufficient use of legal aid at the pre-trial detention stage and it is far more common that the investigating judge appoints a lawyer *ex-officio* when the suspect is brought before them to provide their statement during the hearing (which ultimately determines if they are going to be placed in pre-trial detention). This means that, in effect, until the very recent amendments of the Criminal Procedure Code,<sup>61</sup> the person was without representation in the police station and that the lawyer did not have an opportunity to consult their client and to prepare for the hearing beforehand. Legal aid appointment systems should be put in place to ensure that a suspect received legal assistance from the earliest moment on.
  - Implementation of new schemes for the early appointment of lawyers (see Hungary, box, above right) and the practical implementation of recent amendments of the law (as in Greece), should be closely monitored.
  - Local bar associations should get involved in the transposition of the Legal Aid Directive, particularly in respect to key notions such as ‘adequate quality,’ which require the establishment of objective criteria to enable the effective monitoring of quality of legal aid services.
- **Dysfunctional early appointment mechanisms:** Practical challenges were highlighted in a number of countries. In Italy, instances were cited of lawyers being called outside office hours on their office landline instead

### Good practice: Hungary

Hungary recently reformed its appointment system,<sup>62</sup> making the appointment of a legal aid lawyer the responsibility of the local bar associations. The selection is now done via an IT system which the national bar association operates, and which randomly selects a lawyer from the list of lawyers through a secured internet site who must then be notified by the authorities and are equally notified by the bar association about the appointment. Bar associations also have an obligation to maintain an on-call list of lawyers who can be appointed outside of working hours (however, this on-call list is still missing in certain areas of the country, including the capital). If there are not enough volunteers on the on-call list of lawyers, the county bar association obliges lawyers in the county to take part in the appointment system.

The main purpose of the new system of appointing legal aid lawyers was to ensure that defendants receive more effective protection in criminal proceedings.<sup>63</sup> The new system ensures a ‘rotation’ of lawyers and helps avoid the practice of certain authorities to repeatedly choose the same lawyer.

of their (publicly available) cell phone number. In Greece, communication over the phone was identified as a practical challenge for suspects. Suspects are required to initiate the contact, but no access is provided to a phone or the suspect is unable to cover the cost of phone cards. In Bulgaria, very often the selection of legal aid lawyers is not made by the bar association, as required by the law, but by the investigating authorities themselves. Circumventing the statutory procedure, the investigative authorities were only choosing lawyers who they knew would cooperate with the prosecution.

- The proper implementation of EU norms in respect to early appointment of a lawyer during the context of police custody must be monitored. In particular, the Commission should offer technical support to Member States to set up an early appointment mechanism.
- Suspects and accused persons must be provided with access to a list of lawyers on duty and a telephone to enable them to contact a lawyer of their choice and it must be ensured that this access is free of charge.
- Adequate guidance must be in place in all police stations specifying what policer officers are required to do to ensure that a lawyer can be appointed and is able to communicate with their client.

61 On 11 June 2019, the Government Gazette published the new Criminal Code and Criminal Procedure Code, laws 4619 and 4620. The new laws apply for all criminal court proceedings beginning as of 1 July 2019.

62 Act XC of 2017 on the Code of Criminal Procedure, in force since 1 July 2018.

63 In this context, Fair Trials submitted a third-party intervention before the European Court of Human Rights in the case *Application No 62676/11 Magyar Helsinki Bizottság v Hungary (No 2)*, see <https://www.fairtrials.org/wp-content/uploads/HHC-v-Hungary.pdf>.

### Good practice: Belgium

A good example comes from Belgium and the "Salduz"<sup>64</sup> appointment process created in recent years. Prior to the Salduz judgment, legislation provided for legal assistance only after interrogation by the investigating judge. The Law of 13 August 2011 (known as the "loi Salduz") recognised the right of a suspect held in custody to consult confidentially with a lawyer from the beginning of the interrogation and before the first questioning by the police, as well as the right to be assisted by a lawyer during questioning. In November 2016, a second law known as "Salduz bis" came into force extending the right to a lawyer to all suspects. Alongside this law, a new online database of the names and contact details of lawyers available on-call to assist suspects in police custody ("Salduzweb") was created to enable suspects to identify and connect as quickly as possible with an available legal counsel from the earliest moment after arrest.<sup>65</sup>

- A remedy must be adopted for cases where the presence and effective participation of a lawyer (including of a legal aid lawyer) during police detention is not allowed.
- Legal aid services should be in place to ensure that lawyers are available to assist detainees during non-working hours, and in remote areas.

### c. Confidential consultation

The right setting, a sufficient amount of time and a confidential space to talk to the client are crucial for a lawyer to be able to provide effective legal assistance. The obligation to respect confidentiality between a lawyer and their client is recognised in the Access to a Lawyer Directive.<sup>66</sup> In practice, however, this right is frequently not respected and confidential communication is often *ad hoc* and takes place in unsatisfactory facilities.

But even in countries where the law guarantees confidentiality, such as in Bulgaria,<sup>67</sup> there are significant practical barriers.

- **Absence of legal protection of confidentiality:** In Greece the requirement for confidential communication with a lawyer has not been transposed into national law and lawyers report having to "plead" with police to obtain a suitable space for consultation with clients.
  - The European Commission should review the extent to which this aspect of the Access to a Lawyer Directive is being transposed into national law.

- **Inadequate facilities:** the first meeting between a lawyer and a client typically takes place in police corridors, empty offices or cells, often in the presence of other people (including the police) or in the corridors outside or even inside the courtroom. This lack of privacy makes a confidential consultation impossible.
  - States must provide adequate facilities in police stations and in courtrooms where pre-trial detention hearings take place, dedicated to consultations with a lawyer that effectively ensure confidentiality.
  - Bar associations should be involved in the transposition and monitoring of the practical implementation of EU norms.
- **Time pressure:** Where suspects are able to consult with their lawyer (either before the interview or pre-trial detention hearing), the meetings tend to be short and to take place just before the interview or hearing. This is mostly due to the lack of adequate facilities, the late notification of the arrest to the lawyer or delayed finalisation of the case file by the prosecutor, resulting in late access to the case file for the defence (sometimes right before the hearing, as in Italy). In these circumstances, it is impossible for a lawyer to prepare adequately and, in particular, to obtain all the information from the client that is necessary to challenge a request for pre-trial detention. In Romania, the law does not prescribe a time limit within which the suspect or accused person has to be provided with access to a lawyer once they have been deprived of their liberty.
  - A minimum mandatory amount of time for consultation with the lawyer prior to the suspect's interview by the police should be established.
  - A minimum mandatory amount of time for consultation with the lawyer well ahead of the pre-trial detention hearing should be established.

### d. Presence and participation of a lawyer

The presence and participation of a lawyer during questioning is a key procedural safeguard. The lawyer can ensure that his or her client exercises their procedural rights, understands the questions asked and ask for clarifications. However, in some Member States, such as Greece, the law does not define how a lawyer may participate during questioning. In practice, the lack of regulation leaves discretion to the official in charge of the questioning to determine the extent of the participation of the lawyer. Limitations or obstacles to a lawyer's active participation during questioning were identified in most project partner countries.

<sup>64</sup> European Court of Human Rights, *Salduz v. Turkey* [GC], Judgment of 27 November 2008, App. no. 36391/02.

<sup>65</sup> See: <https://www.salduzweb.be/>.

<sup>66</sup> Article 4, Access to Lawyer Directive.

<sup>67</sup> By virtue of Article 30(5) of the Bulgarian Constitution and the Ministry of Interior Act, which stipulates the right of detainees to consult with lawyers in 'specially designated soundproofed premises'; but such premises are not available.

- **Lawyers' competence:** Even where lawyers are present, their assistance is not always enough to protect the defendant's rights. A passive attitude and insufficient engagement in the individual case was highlighted where lawyers are not sufficiently trained in pre-trial detention issues or where legal aid lawyers are not specialised in criminal law, particularly in Romania. Another barrier to adequate and effective legal representation was the involvement of various lawyers at different stages of the proceedings, which increases the likelihood that they have not established a relationship with the defendant and are not sufficiently acquainted with the circumstances of the case to provide effective legal assistance.
  - In general, the same lawyer should represent the client through the entire criminal proceedings to ensure sufficient knowledge of the case file and build trust with the client.
  - Training opportunities must be provided on the legal framework and judicial practice on pre-trial detention and a competence test should be undertaken for lawyers before they are placed on the list of legal aid lawyers (through, for instance, an accreditation mechanism).
  - Bar associations should set out clearly and in sufficient detail the role of the lawyer during pre-trial detention hearings.
- **Defendants are not universally represented in hearings.** Defendants should not appear unrepresented at pre-trial detention hearings unless they have specifically, knowingly and intelligently waived the right to a lawyer. However, the presence of a lawyer at pre-trial detention hearings is not compulsory in all Member States, such as in Hungary.
  - Where the lawyer cannot attend the questioning in person, domestic law should expressly provide for the right of suspects and accused persons in detention to consult with a lawyer via telephone prior to any interrogation.
  - A mandatory minimum time should be prescribed between notification of a hearing and the date of the hearing to enable defence lawyers to attend and to prepare for hearings.
  - If there has been some practical challenge to appointing a lawyer, or if a lawyer has elected not to appear at a pre-trial detention hearing without the consent of the defendant, pre-trial detention should be strictly limited to a time period in which a lawyer can be appointed or be present, with a *de novo* hearing held as soon as possible following that appointment.
- A remedy should be available in cases where a lawyer (including a legal aid lawyer) encounters obstacles to be present and/or effectively participate in the hearings.
- **Information about consequences of exercising the waiver to the right to a lawyer:** The Access to a Lawyer Directive requires that suspects/defendants be fully informed of the possible consequences of waiver.<sup>68</sup> This implies a positive obligation on the criminal investigation authorities to explain the consequences of a waiver. However, Member States, including Romania have not implemented such an obligation. In a number of countries, including Bulgaria, partners reported active practices by police officers to discourage the exercise of the right of access to a lawyer, through manipulation and threats of ill-treatment.<sup>69</sup>
  - The legal obligation to explain the consequences of a waiver to consulting a lawyer must be explicitly implemented, as well as the obligation to record the grounds for the waiver.
  - Police officers must be trained not to discourage the exercise of rights; and their interactions with people in detention must be actively supervised and tactics to discourage the exercise of rights should be sanctioned through disciplinary measures.
- **Restrictions on role of lawyers.** Further obstacles to effective legal assistance exist, for example where the law does not permit defence lawyers to adduce evidence in pre-trial detention hearings (as in Romania); or where lawyers are not permitted to intervene during questioning by the police and/or judges (as reported in Greece), or even to be present during questioning (as in Bulgaria).
  - Laws restricting the role of lawyers in a way that is contrary to the Directives require urgent reform.
  - The proper implementation of the Directives in law and practice must be monitored to ensure that lawyers are not confronted with restrictions to effectively assist their clients.
  - Audio-visual recordings of interrogations should be envisaged as a way of monitoring the ability of lawyers to participate effectively during questioning.

<sup>68</sup> Article 9, Access to a Lawyer Directive.

<sup>69</sup> This was also a finding in Ed Lloyd-Cape's Inside Police Custody 2 report of December 2018 in other Member States, such as Lithuania (p. 47). Available at: <https://www.iccl.ie/wp-content/uploads/2018/12/Inside-Police-Custody.pdf>.

### 3. Access to case file

Limitations on the access to case file are contrary to the fundamental principle of equality of arms, “an inherent feature of a fair trial. It requires that each party be given a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent.”<sup>70</sup> Equality of arms requires “that a fair balance be struck between the parties, and applies to criminal and civil cases.”<sup>71</sup> The CJEU has recognised the principle of equality of arms or procedural equality as falling within Article 47 of the Charter of Fundamental Rights of the European Union, as a component of the principle of effective judicial protection.<sup>72</sup>

Beyond the information about charges, lawyers need access to information on the case file as early as possible to start developing a defence strategy. This is important in order to challenge pre-trial detention, for example to show that it is not justified because the necessary evidence has already been gathered and that there would no longer be a possibility for the client to tamper with it; or, more generally, to question the existence of reasonable suspicion that the person committed the offence which is required to justify the pre-trial detention.

#### a. Restricted access

Despite the obligation for all EU Member States to implement into national law a provision on providing defendants with the necessary access to the case file in order to challenge their detention,<sup>73</sup> this is far from being a reality in the project partner countries.

- **Discretion of prosecutors to refuse access to the case file:** In Romania, for example, broad and vague legal provisions allow prosecutors to restrict defence access to the case file. Also, legal provisions guaranteeing access to the case file for an unrepresented defendant in pre-trial detention are lacking, which leaves these defendants without access to the file at all. Even for represented defendants, access to the case file will depend on the assertiveness of the defence.
  - Except in exceptional cases where restricted access is justified, access to the case file should be automatic, without having to request it from the prosecution, to enable a detained person to challenge effectively their detention. Proof of the lawyer being appointed by the detainee should be enough.

- The decision on what parts of the case file are required to be disclosed to the defence should not be left up to the prosecutor alone, as there is a clear conflict of interest and risk of abuse of the possibility to restrict access.
- Any legal restrictions to limit access to the case file should be formulated in concrete and clear terms.
- If the prosecutor refuses to grant or limits access to the case file, he/she should be required to provide reasons for this which can be challenged before a more superior prosecutor or court.
- Legislation should clearly specify the maximum number of days for which restriction to a case file may be ordered by the prosecutor.
- Where access to the case file depends on prosecutorial discretion on a case-by-case basis, judicial remedies must be made available if the case file was not reviewed in time before a hearing, requiring the court for instance to provide the defence with additional time to review the materials.

#### Positive development: Hungary

As stated in our 2016 report,<sup>74</sup> in parts of Hungary outside of Budapest, prosecutors used to be able to decide which documents are essential for the defence to view, potentially censoring key documents. But in Budapest, access to the full case file was typically available, demonstrating that such selective access was not in conformity with the law and hindered the right to defence. The recently adopted Criminal Procedure Code (**the New CCP**)<sup>75</sup> provides for full access to the case file as the rule, with possible restrictions imposed on a case-by-case basis by the prosecution or the investigating authority, and the introduction by default of access to all the case materials during the investigation.<sup>76</sup> Additionally, the new law introduces the concept of ‘case material,’ which includes not only documents but also ‘other evidence.’<sup>77</sup> Further, it provides for a formal decision to be delivered about the restriction of the access or the manner of access, and a remedy may be sought against this decision.

70 European Court of Human Rights, *Öcalan v. Turkey* [GC], Judgment of 12 May 2005, App. no. 46221/99, para. 140; *Foucher v. France*, Judgment of 18 March 1997, App. no. 22209/93, para. 34; *Bulut v. Austria*, Judgment of 22 February 1996, App. no. 17358/90; *Faig Mammadov v. Azerbaijan*, Judgment of 26 January 2017, App. no. 60802/09, para. 19.

71 European court of Human Rights, Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb), updated on 31 August 2019, p. 28.

72 Court of Justice of the European Union, Judgment of 17 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, para. 48.

73 Article 7(1), Right to Information Directive.

74 Fair Trials, 2016, *A measure of last resort?*, p. 15, para. 47.

75 Act XC of 2017 on the Code of Criminal Procedure, entered into force on 1 July 2018.

76 Article 100, the New CCP and explanatory memorandum.

77 Article 100(2), the New CCP.

## b. Modalities of access

Even where the defence lawyer has access to the case file and relevant case materials in advance of the pre-trial detention hearing, the scope of access may be limited to certain documents, or access may only have been granted too late in the proceedings to enable the lawyer to effectively challenge the legality of detention.

- **Administrative burdens:** Some lawyers (for example, in Romania) reported delaying tactics by law enforcement officials, which are possible because the legislation implementing the Access to Information Directive is too vague.
  - Lawyers should not be faced with bureaucratic hurdles such as a formal request procedure to study the case file, as is the case in Romania.
  - Elimination of administrative burdens – a proof of being the person’s lawyer should be enough.
  - A prior phone call or an email from the lawyer should be enough to access the case file.
- **Late access:** Defence lawyers in most project partner countries tend to receive the file or notice of the hearing at a late stage in pre-trial proceedings. On average, a defence lawyer in Italy and Romania has around 30 minutes to prepare for the initial judicial hearing to detain, causing significant challenges to getting acquainted with the facts of the case and to preparing themselves and their clients adequately for the hearing.
  - Strict statutory time frames in respect of access to the case file should be set by the law.
- The authority in charge of the investigation should be required to include an inventory of the contents of the case file, to make navigating a complex file easier for the defence and other persons who have access to the file.
- **Obtaining copies of the case materials:** Lawyers in Romania, for example, complained about difficulties in obtaining their own paper copies of the case file to use in consultation with their client. Photocopying the documents was identified as a practical obstacle in some Member States, including in Greece and Romania, where despite the positive example of timeframes for access to the case file, the defendant must bear the costs of all copies. An obligation to cover this cost has a discriminatory impact on defendants with restricted financial means, particularly if photocopying of files is excluded from the scope of legal aid.
  - Consider alternatives to traditional photocopies, such as taking photos with a phone, as proposed in Romania. Access to the case file and making photocopies (also for legal aid cases) should be free of charge. The establishment of electronic case files should be explored.
  - Studying the case file should be possible during the working hours of the police officer/prosecutor, based on a prior phone/email from the lawyer.
  - The main documents of the prosecutor’s file should be at least be included in the notice to the lawyer about hearings at which decisions about detention are made.

## 4. Adequate interpretation

Non-nationals are over-represented among the prison population in all five project partner countries, with particularly high rates of imprisoned foreigners in Greece (52.7% of the total prison population) and Italy (33.5%).<sup>78</sup> Beyond the EU, among all Council of Europe Member States, some 40% of the total foreign prison population are held in pre-trial detention,<sup>79</sup> which often is due to a lack of address or residence permit; or insufficient language skills.<sup>80</sup> In order to ensure the effective legal representation of non-nationals in police interviews and in pre-trial detention hearings, it is key that interpreters are provided so that lawyers are able to communicate with their clients, where they are not able to speak the same language.

### a. Lack of access to interpretation services in police custody

National legal frameworks provide for free interpretation services throughout the entire criminal proceedings for suspects and defendants who do not understand or cannot communicate in the local language (except in Bulgaria, as police detention is not considered to be part of the criminal proceedings). When legal assistance is mandatory, the suspect has the right of interpretation, also free of charge, for communicating with his/her lawyer. However, in practice, partners report numerous obstacles to accessing interpretation services during police custody. Particularly in Greece lawyers reported relying on other detainees to help with interpretation due to the severe shortage of interpreters at the pre-trial stage of the criminal proceedings.

- **Inadequate language assessment:** Problems were identified in all project countries in respect to the assessment of the detained person's knowledge and understanding of the national language, in order to determine whether interpretation is necessary. There is no standard assessment procedure or process to appoint a qualified interpreter.
  - The modalities to test an accused person's knowledge and comprehension of the national language should be reviewed and standardised across police stations.
  - Reduce the bureaucratic obstacles to ensuring access to an interpreter or translator.
  - Make available judicial remedies to challenge a refusal of translation and interpretation.
- **Interpretation of consultation:** In most partner countries, the right to interpretation is not sufficiently guaranteed for the consultation between a lawyer and his or her client before a person is interviewed by the police.

### Positive development: Italy

Recent amendments to the Italian Criminal Procedure Code provide for the interpretation of the consultation with a lawyer before a police interview.<sup>81</sup> It further provides for written translation of a series of essential documents and requires the State to bear the costs for interpretation or translation services, irrespective of the ultimate outcome of the proceedings.<sup>82</sup>

- Ensure the availability of interpretation services from the outset of detention, including for the initial consultation between a suspect and a lawyer.
- If necessary, interpretation should be available using communication technology, such as via teleconference, telephone or the internet, where the physical presence of the interpreter is not possible.
- The participation of an interpreter should be recorded in a 'custody' record held by the police throughout the period of detention.

### b. Quality of interpretation services

Even where translation and interpretation services are available, issues arise regarding their quality. In Romania for instance, even though there are strict conditions for certification of legal interpreters and translators, there is no mechanism in place for the verification of the quality and accuracy of the interpretation/translation. The interpreter is not always fluent in the language or may not have even a basic understanding of the criminal proceedings. Where interpretation services are of insufficient quality, the defendant will not be in a position to understand the proceedings and to participate effectively, which has a direct impact on the lawyer's ability to offer an effective assistance.

- **Accreditation of interpreters:** The lack of mechanisms for the accreditation of listed interpreters remains a concern, including in Bulgaria, Greece and Italy, where there is no guarantee of a minimum standard of quality of interpretation.
  - National accreditation systems for interpreters should be set up with strict and objective criteria for admission to the list to ensure the quality of interpretation for an extended number of languages.
  - Special registers for rare languages and dialects should be set up.
- **Lack of training and evaluation:** Specific training, including on the criminal justice system, for interpreters and translators was typically not available, for example

78 See <https://www.prisonstudies.org/map/europe> (access: 12 September 2019).

79 Council of Europe, 2017, *CPT urges European states to hold persons in remand detention only as a measure of last resort and in adequate conditions*, available at: <http://www.coe.int/en/web/cpt/-/cpt-urges-european-states-to-hold-persons-in-remand-detention-only-as-a-measure-of-last-resort-and-in-adequate-conditions>.

80 Wouter van Ballegooij, European Parliamentary Research Service, December 2017, *Procedural Rights and Detention Conditions - Cost of non-Europe Report*, p. 133, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS\\_STU\(2017\)611008\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf).

81 Article 143 (1), Criminal Procedure Code.

82 Articles 3, Amendment to the consolidated law on the costs of justice.

in Italy and Greece. At the same time, evaluation systems for interpreters are not in place, and it is not possible to apply for the recusal of an interpreter.

- Interpreters and translators should have basic knowledge of the criminal justice system they work in as a precondition for accreditation, and inclusion on the list of interpreters that can be called upon for persons in police custody and pre-trial detention.
- In addition, standardised mechanisms to train, supervise and evaluate interpreters and translators should be organised and implemented.
- In order to monitor the quality of interpretation services, a mandatory video recording of the interrogation and/or hearing during which interpretation services are provided should be required.
- A right to apply for the recusal of an interpreter, or an ability to request substitution, should be established to enable the person concerned to contest the competence and the work of the interpreter.
- **Poor working conditions:** Bad quality interpretation is exacerbated by poor working conditions. Low remuneration, which is not comparable with market rates, and significant delays in payment, particularly in Bulgaria, make it (understandably) unattractive for better-skilled interpreters to work for law enforcement authorities.

- Adequate working conditions for interpreters and translators should be guaranteed, including establishing a mechanism to ensure timely payment and salaries in accordance with market rates to raise the quality of interpreters.

### c. Inability to challenge the failure to provide interpretation

A proper assessment of whether interpretation and translation services are required must be paired with the ability, if such services are denied, for the suspect or accused person to challenge the negative decision (decision to refuse interpretation services).

- **Lack of judicial remedies:** Despite EU law setting out a possibility to challenge a refusal to provide interpretation or translation,<sup>83</sup> judicial remedies are not available across all EU Member States.
  - The proper transposition of EU norms into national law and their practical implementation should be monitored, including the availability of judicial redress in the event of a violation of the right to interpretation.
  - Bar associations should be involved in the transposition and monitoring of the practical implementation of EU norms.

83 Article 2 (5), Interpretation and Translation Directive.

## 5. Alternatives to detention

In principle, pre-trial detention is a measure of last resort and, as a matter of law, most countries define it as such. In parallel, many Member States (including all the project partner countries) have adopted alternative measures to detention, such as house arrest and/or electronic supervision, cash bail, etc. In practice, however, it tends to be up to the lawyer to argue for alternative measures to detention to counter the prosecutor's application for pre-trial detention. It is therefore key that lawyers are in a position to suggest and argue for individualised alternatives to detention, but research shows that they continue to face numerous obstacles in this respect. Alternatives to detention remain the exception and pre-trial detention the norm.

### a. Judges tend to follow prosecutors

Many of the challenges faced by lawyers, highlighted in the sections above, mean that the defence is often ill-prepared for detention hearings. Lawyers regularly report that judges tend to favour the prosecutor's arguments. For instance, HFHR's recent report shows that in Poland, each year since 2013, over 90% of the examined prosecutorial requests for pre-trial detention were successful.<sup>84</sup> Our report from 2016 showed that "as a result of the insufficient time and resources for independent judicial review, lawyers in many of the studied countries noted a judicial bias toward the prosecution." This was found to be in part "due to inequality of arms, such as unequal access to information, evidence and resources"; in other cases, this bias resulted from "a cultural product of judicial mind-sets."<sup>85</sup>

- The **continued bias toward the prosecution** was identified in all project partner countries as a significant impact on the use of alternatives to pre-trial detention. For instance, in Greece, practitioners reported that judicial authorities appear to have more confidence in the arguments of the prosecution while there is some prejudice against the honesty of the arguments and evidence put forward by the defence. As an example, it was noted that witnesses proposed by the accused are not examined. In Hungary, with an overreliance on prosecutorial motions even though prosecutors rarely provided actual evidence to justify the specific reasons for the initiation of the strictest coercive measures. Practitioners also noted that criminal justice actors were not sufficiently aware of the aim of pre-trial detention and of the deficiencies of the practice when compared to international standards.

- Prosecutors should be required by law to base their arguments in favour of detention only on individualised evidence which was shared with the defence prior to the pre-trial detention hearing.
- Lawyers should be allowed to put forward evidence against pre-trial detention.
- Judges should actively ensure that the defence has had sufficient time to examine and comment on prosecution arguments (and supporting evidence) for detention, prior to making a decision, and must not rely on any evidence that has not been sufficiently examined by the defence.
- Judges should be required to refer to both the arguments of the prosecution and the defence (insofar as they are made by each side). This could potentially impact not only the quality of judicial decision-making but may also have the effect of encouraging better quality advocacy by both parties.
- Judges should be required to state publicly in their decisions why all available alternatives are not enough to ensure that the defendant will appear at court and refrain from further offences or interference with the investigation.
- Criminal justice actors should receive more training on regional standards of pre-trial detention decision-making.
- **Lawyers' unwillingness to engage and lack of knowledge:** Legal and practical barriers to the ability of the defence to prepare effectively and recognition that judges are inclined to follow the prosecutor, make lawyers (understandably) less inclined to dedicate time and effort at the pre-trial stage, despite its significant impact on their client's liberty and the ultimate outcome of the case. In addition, it was noted in Hungary that lawyers do not have sufficient knowledge about the possibilities and conditions of turning to international bodies to challenge pre-trial detention orders issued by national courts.
- The obstacles to effective legal assistance in pre-trial detention proceedings, as highlighted in this report, should be removed.
- In addition, lawyers (including legal aid lawyers) should receive more training on regional standards and using regional bodies to challenge pre-trial detention orders.

84 Helsinki Foundation for Human Rights, 2019, *The trials of pre-trial detention – A review of the existing practice of application of pre-trial detention in Poland*, page 13. Available here: [http://www.hfhr.pl/wp-content/uploads/2019/07/HFPC\\_Raport\\_-Tymczasowe-aresztowanie-nietymczasowy-problem-EN.pdf](http://www.hfhr.pl/wp-content/uploads/2019/07/HFPC_Raport_-Tymczasowe-aresztowanie-nietymczasowy-problem-EN.pdf).

85 Fair Trials, 2016, *A measure of last resort?*, p. 12, para. 38.

## b. Lack of trust in alternatives to pre-trial detention

Alternative measures to detention which offer the court a wider choice of tools to be applied according to each individual case exist in the laws of all project partner countries. In practice, however, each partner reported that the lack of effectiveness of the defence strategy leads judges to rule in favour of the prosecution's request for pre-trial detention, rather than make use of the possible alternative measures. Lawyers in Greece report that alternative measures tend to be ordered as a precaution instead of unconditional release, rather than instead of pre-trial detention.<sup>86</sup>

- **Lack of confidence:** The consequence of the low use of alternatives measures is that judicial authorities have limited experience of, and therefore limited confidence, in alternatives. These measures are often new (e.g. electronic supervision of house arrest) and have not yet been 'tried and tested.'
  - Resources should be allocated to evaluating the outcome of alternatives to pre-trial detention and producing reliable data. This would contribute to enhancing trust in their proper functioning and increase in their use.
- **Social factors:** Social factors place certain suspects at a higher risk of being placed in pre-trial detention, such as lack of housing, which is often perceived as flight risk. In Greece for instance, pre-trial detention is ordered quasi-automatically when the accused does not have a known residence in the country.
  - Protected homes should be established to reduce the overuse of pre-trial detention, as the availability of a domicile was found to often play an important role for judges when deciding whether alternative measures to detention could be taken.

- **Regular reviews:** Human rights laws require pre-trial detention to be subject to regular judicial review,<sup>87</sup> which all stakeholders (defendant, judicial body, and prosecutor) must be able to initiate.<sup>88</sup> A review hearing has to take the form of an adversarial oral hearing with the equality of arms of the parties ensured.<sup>89</sup> The decision on continuing detention must be taken speedily and reasons must be given for the need for continued detention.<sup>90</sup> Previous decisions should not simply be reproduced.<sup>91</sup> However, despite this, regular review of the necessity and proportionality of continued pre-trial detention is not systematically available. In particular, the Italian legal system provides for the possibility of proposing a revision of the precautionary measures anytime during the proceeding but does not set out an obligation to review pre-trial detention at regular intervals. Procedures for reviewing the measure are decided with the mandatory participation of the lawyer, while the accused doesn't have an obligation to take part in the hearing.
  - Reviews within specified time frames should take place automatically with the additional ability of the defence or prosecution to ask for ad hoc reviews based on changed circumstances.
  - Defendants and defence lawyers should be present at all review hearings.
  - Judges should be required to substantiate their decisions to extend pre-trial detention.
  - Legislation could further provide that defendants have the option of requesting that a judge independent of the investigation review detention.

<sup>86</sup> However, the legal framework in Greece has changed: Under the previous framework which did not establish a specific order for pre-trial decision-making, as envisioned in the current Article 288 CCP, there appeared to be a practice of examining the possibility to impose pre-trial detention before deciding on restrictive conditions. This practice went contrary to the nature of pre-trial detention as an *ultimum refugium*.

<sup>87</sup> European Court of Human Rights, *De Wilde, Ooms and Versyp v. Belgium*, Judgment of 18 June 1971, App. nos. 2832/66, 2835/66, 2899/66, para. 76.

<sup>88</sup> European Court of Human Rights, *Rakevich v. Russia*, Judgment of 28 October 2003, App. no. 58973/00, para. 43.

<sup>89</sup> European Court of Human Rights, *Singh v. UK*, Judgment of 21 February 1996, App. no. 23389/94, para. 65.

<sup>90</sup> European Court of Human Rights, *Ilijkov v. Bulgaria*, Judgment of 26 July 2001, App. no. 33977/96, para. 84.

<sup>91</sup> European Court of Human Rights, *Michalko v. Slovakia*, Judgment of 21 December 2010, App. no. 35377/05, para 145.

**“With the police and prosecution having the entire state machinery behind them, it is crucial that a defendant is provided with legal assistance from the earliest possible moment in the proceedings to be able to make effective use of their defence rights.”**

# Conclusions

Since our research on pre-trial detention decision-making in Europe was published in 2016, little has changed. The findings and recommendations of that report, *A Measure of Last Resort?*, still hold true today. This is the case, despite the fact that since 2016, all of the Directives protecting key procedural safeguards for suspects should have been transposed into national law.

### EU law can and does make a difference

The Directives provide many safeguards which should allow the defence to participate effectively in pre-trial detention proceedings: timely access to the case file; attending police questioning and pre-trial detention hearings; consulting with their clients in police custody; and the assistance of an interpreter when needed.

The Directives have brought welcome changes into Member States' laws, and to a certain extent practices, that can contribute towards enhancing the fairness of pre-trial detention proceedings. We've seen important and promising reforms in Hungary for instance, where the appointment system for lawyers has been changed to end the practice of law enforcement choosing suspects' lawyers (repeatedly the same ones). The principle of full access to the case file is now also enshrined in law. In February 2019, we've also seen an increase in the level of fees for legal aid lawyers in Romania to pay for the work involved in actively engaging in the early stages of criminal cases.

But the discussions we've held with stakeholders from five different EU countries over the past two years show that more action is needed, at both domestic and regional levels, to ensure that the Directives reach their full potential.

### Recommendations to support the effective implementation of procedural safeguards

Conformity and compliance studies assessing the transposition of the Directives in national legislation are ongoing. Member States continue to need to focus on effective implementation of the Directives, and the European Commission has without doubt a key role to play to ensure that Member States' laws and practices meet EU standards.

We continue to see legal impediments to the implementation of the Directives. In Bulgaria, despite legislative reforms to criminal procedure earlier this year,

police custody continues to be excluded from the scope of the Directives altogether. In Greece, confidentiality of communications with lawyers is not enshrined in law. In Romania, the law continues to prevent defence lawyers from adducing evidence at pre-trial hearings. These are issues of grave and urgent concern.

Even where Member States appear to have transposed all the provisions of the Directives into law, practical barriers persist and prevent the effective implementation of these safeguards. Member States need to put more resources into the implementation of EU standards in order to realise their full potential to enhance the fairness of pre-trial detention proceedings.

Our report highlights five key areas of concern:

1. **Knowledge of defence rights:** You can't exercise your rights if you don't know what they are, including crucially your right to a lawyer and to legal aid. Therefore, without effective communication to suspects about their rights, detained persons may not have the chance to consult a lawyer before the first judicial hearing at which decisions on pre-trial detention may be made, and by which time, they will likely have already been interviewed by the police. Thanks to EU law, all suspects must now promptly be given a written Letter of Rights (in accessible language). However, further action is required. Letters of Rights need to be reviewed to ensure that they are drafted in plain language that suspects can understand. A rigorous process is needed to ensure Letters of Rights are promptly provided upon arrest. Further, Letters of Rights should be available in a broader range of language. Effective judicial remedies must also be available where the right to information has been violated.
2. **Right to access to a lawyer and legal aid:** When you are detained prior to trial, your ability to participate in the preparation of your defence is dramatically impaired. In this respect, the right to access to a lawyer and legal aid serves as a 'gateway' for other procedural safeguards. EU law recognises this and requires Member States to give suspects access to a lawyer in police custody, including to provide confidential legal advice prior to questioning, and to assist suspects during questioning. In reality, there are significant obstacles to this crucial right. Not all countries properly protect this right in their domestic laws;

this requires urgent reform. Even where the law on paper is good, practical implementation remains a challenge. For example, ineffective mechanisms for the early appointment of lawyers make it very hard for some suspects to exercise their right to a lawyer. Despite the right for suspects to consult their lawyer confidentially, in many places facilities for this are not available.

3. **Access to the case file:** In order to develop a defence strategy (including to argue for their clients to be released pre-trial) lawyers need to be granted access to information in the case file. EU law now recognises this, but the law in many Member States fails to protect this right, for example by giving prosecutors overly broad discretion to restrict access to the case file. Moreover, in practice, lawyers can face administrative burdens to obtaining access, or obstacles to obtaining copies of materials. The procedure to obtain access to the case file, in particular the question of timing, requires further clarity.
4. **Right to interpretation:** With prison statistics showing the extent to which non-nationals are over-represented among detainees across the EU, effective legal representation requires access to interpretation services, not only during police questioning, but also during the initial consultation with the suspect's lawyer. Thanks to EU law, we've seen changes in Member States to protect this right. However, there are still persistent problems in this area, in particular the poor quality of the interpretation offered to suspects, coupled with the lack of training and evaluation of interpreters. Generally, poor working conditions undermine the ability of interpreters to perform their important role in pre-trial proceedings.
5. **Ineffectiveness of requests for alternative measures to pre-trial detention:** Most legal systems recognise that pre-trial detention is a measure of last resort and have adopted a range of alternative measures. Despite this, in practice, judges tend to rule in favour of prosecutors' requests for detention, rather than applying alternatives or simply ordering suspects' unconditional

release. Lawyers should advocate for their clients to be released or for alternative measures, but this is hard without time to prepare for the hearing, consult their client and consider the case file. If lawyers were better equipped, effective advocacy could gradually change the attitudes of judges and help reduce prison overcrowding.

In parallel, the European Commission needs to closely monitor the transposition of the Directives in practice, not just in law, and tackle Member States that fail to implement the Directives adequately. Further, our research suggests that Member States would benefit from further guidance on implementation. In this respect, the European Commission, but also the Court of Justice of the EU, can play an important role. There is a clear need for training on EU law, both for lawyers and judicial authorities; as well as for the provision of technical support (for instance, to enable Member States to set up a 'duty scheme' for lawyers attending police custody). In the long-term, it is also key that the European Commission seeks to collect reliable data showing the impact of the Directives (e.g. How many people now have access to a lawyer in police custody and in pre-trial detention hearings?).

### The continued need for regional action on pre-trial detention

Even if existing procedural safeguards were fully implemented, they would not provide a complete answer to the overuse of pre-trial detention across the EU and would not tackle the overcrowding in Europe's detention facilities that this creates. The excessive use of pre-trial detention is an EU-wide problem, with EU-wide impacts. It requires an EU-wide solution. Regional action should take the form of EU legislation that is binding on Member States. This should build on existing ECtHR standards, making them clearer, more practical and more accessible to Member States (we refer to the recommendations in our 2016 report). Legislation is within the EU's competency and would help tackle a grave threat to human rights in Europe.<sup>92</sup>

92 For more detailed recommendations on pre-trial detention legislation, please refer to our 2016 report, pp. 41-46: [https://www.fairtrials.org/sites/default/files/publication\\_pdf/A-Measure-of-Last-Resort-Full-Version.pdf](https://www.fairtrials.org/sites/default/files/publication_pdf/A-Measure-of-Last-Resort-Full-Version.pdf).

**“Even if existing procedural safeguards were fully implemented, they would not provide a complete answer to the overuse of pre-trial detention across the EU and would not tackle the overcrowding in Europe’s detention facilities that this creates. The excessive use of pre-trial detention is an EU-wide problem, with EU-wide impacts. It requires an EU-wide solution.”**

# Part 2 – Overview of project impact by country

The second part of this report provides an overview of the main findings and key challenges identified in each of the project partner countries regarding the effectiveness of legal assistance in pre-trial detention proceedings. For more details on the work undertaken by project partners, see above, chapter Methodology.



BULGARIAN  
HELSINKI  
COMMITTEE

# 1. Bulgaria

## Main findings and key challenges

In Bulgaria, the Roadmap Directives are considered not to apply to police detention, leaving persons in police custody without the defence rights connected with the status of a suspect. Thus, the Bulgarian criminal justice system shows significant discrepancies with the requirements of the Directives. Key safeguards, required to ensure the effectiveness of legal assistance in the context of pre-trial detention decision-making, are not transposed in the Bulgarian justice system.<sup>93</sup>

The main inconsistencies between, on the one hand, the period after the initiation of criminal proceeding and bringing the charges against the accused person and, on the other, police detention when the person is a suspect, are as follows:

### Right to access to a lawyer and legal assistance:

In practice, suspects in police detention are, with a few exceptions, deprived access to a lawyer. 'Preliminary talks' are permitted without a lawyer even when the detainee has requested legal assistance. There is also no mandatory legal aid for vulnerable groups of detainees and no system for appointing lawyers where they have been requested. The pressure on the detainee to waive his/her right to a lawyer also plays a significant role in deprivation of the detainees' right to a lawyer during police detention.

### Use of evidence obtained in police detention without a lawyer:

As a rule, suspects are interrogated for alleged crimes by police officers during 'preliminary talks' without a lawyer. The information they share may be directly entered into their case files though testimonies provided by the police officers, which may serve as a ground for keeping a suspect or accused person in pre-trial detention.

### Right to information:

The legislation allows significant flexibility in terms of the moment when the detention order should be handed to the detainee. In practice, it is often provided several hours after the actual detention of the person has commenced and does not contain information about the factual grounds for the detention. Also, detainees are provided with a Letter of Rights ('declaration of rights') not immediately upon arrest but at a much later stage, leaving detainees without any information as to their rights. Also, the letter does not explain the rights in an easy-to-understand manner, which is adapted to the understanding of the detained person. If the detainee does not have sufficient knowledge of Bulgarian, neither the detention order, nor the declaration of rights are handed out in a language they understand that would enable them to make use of their rights. Detained persons cannot keep a copy of the declaration with them while in police custody.

### Right to interpretation and translation:

Interpretation during police detention is not a right and is provided only for the purpose of informing detainees about the grounds for police actions and his/her rights. There is no mechanism in place for checking whether a suspect or an accused person speaks or understands Bulgarian. In practice interpretation of any detainee-lawyer consultations is not provided, creating significant obstacles for lawyers to effectively communicate with their client and to provide adequate legal assistance. Additionally, remuneration of the interpreters is extremely low which discourages professional interpreters to provide their services.

<sup>93</sup> Pursuant to Article 72(1)(1) of the Ministry of Interior Act (MoIA), the police may detain a person suspected of having committed an offence for up to 24 hours. Police detention measure as administrative in nature, regulated by administrative law, falling outside the scope of the national criminal proceedings.

## Recommendations

In the meetings of the national working group<sup>94</sup> and at subsequent roundtable events<sup>95</sup>, the following recommendations to the challenges identified above were elaborated upon:

- Legislation is required to ensure that the rights protected by the Directives apply equally to people in police detention and in detention following formal accusation.
- Effective access to a lawyer of the suspect's choice immediately after detention should be ensured as a matter of law and detailed instructions should be issued setting out the practical steps police officers must take to ensure detainees' access to a lawyer.<sup>96</sup>
- The written information that is provided to suspects should be re-written to ensure that it is in plain and accessible language, followed by an oral explanation and a recording of the process of provision of the information.
- Investigation authorities should have access to an electronic register for legal and non-legal aid lawyers.
- Immediate access of lawyers to their clients and a need to facilitate effective assistance by a lawyer prior to any interrogation should be introduced to eliminate any chance of admitting manipulated or coerced statements as evidence in the case.
- Police officers should be trained on the standards required by the Directives and ECtHR jurisprudence and in investigation techniques to eliminate manipulation and undue compulsion, to abandon the current interrogation practice in 'preliminary talks' to obtain self-incriminating statements from detainees.

<sup>94</sup> The national working group was set up in September 2018.

<sup>95</sup> Two roundtable events were held, one in Sofia on 11 October 2018 and one in Plovdiv on 5 November 2018. The events were attended by defence lawyers, judges, prosecutors, interpreters, officials from the Ministry of Interior, and representatives from civil society organisations.

<sup>96</sup> Instruction 81213-78 of 24 January 2015 of the Ministry of Interior, available in Bulgarian at: <http://dv.parliament.bg/DVWeb/showMaterialDV.jsp;jsessionid=C90D4AE4E1A53C0CD2D603FEF8CF166D?idMat=91688>.

## 2. Greece



CENTRE FOR  
EUROPEAN  
CONSTITUTIONAL  
LAW

THEMISTOKLES AND DIMITRIS TSATSOS FOUNDATION

### Main findings and key challenges

Research indicates that Greek law is generally compliant with EU and fundamental rights standards in the area of pre-trial detention. Recently, both the Criminal Code and the Criminal Procedure Code (**the CPC**) underwent significant amendments.<sup>97</sup> However, serious shortcomings are observed in practice, particularly concerning access to a lawyer at the stage of police custody. More specifically, the following challenges were identified:

#### Access to lawyer in police custody:

- Lawyers' attempts to contact and communicate with their clients immediately upon arrest depend on the officers handling of the case, including obstacles like hours of waiting for the lawyer to see the client without being informed about the reasons for it. Research has shown that communication over the phone is challenging, since contact must be made by the suspect, and they often do not have access to a phone or are not provided with phone cards in order to make the call.

#### Information about rights:

- The Letter of Rights is worded in a standardised manner and it is not clear that it can be understood by suspects without legal training. Furthermore, its availability in a sufficient number of languages is not ensured.
- In addition, serious infractions regarding the obligation to inform the suspect or the accused of their right to have their lawyer present and of their right to remain silent were reported. In particular, the meaning of the term immediately was found not to be sufficiently clear, especially in cases where there is no arrest or detention.

#### Legal aid:

- Legal aid is rarely made use of at the pre-trial stage and the police rarely inform suspects or accused persons of their rights to legal aid while they are in police custody. The situation was found to be different regarding the *ex-officio* appointment of a lawyer by the investigating judge. The limited access to legal aid and, in particular,

the limited information provided to persons in police custody was found to be highly problematic and a major bottleneck concerning the goal of legal assistance from the very beginning of criminal proceedings. The recent amendments of the CPC extend the possibility of *ex-officio* appointments also to persons in police custody.

- The compensation process in the legal aid system needs improvement, as it is currently riddled with bureaucratic obstacles and significant delays.

#### Confidentiality of consultation:

- Privacy and confidentiality of consultations with the defence lawyer are not sufficiently ensured.

#### Adequate time to prepare for the initial pre-trial detention hearing:

- The time available for preparation varies considerably, depending on the type of proceedings. For crimes caught in the act, there is a statutory deadline of three days within which the accused must appear before the investigating judge and during which the defence can be prepared. In other cases, a longer deadline for the hearing is usually provided.

#### Translation and interpretation:

- Despite the legal position setting out the right to an interpreter and the obligation to provide interpretation without delay, in practice, there is a severe shortage of interpreters at the pre-trial stage of the criminal proceedings.<sup>98</sup> Interpretation services are available when the accused provide their statement but seldom during other times.
- Furthermore, there is a lack of credible accreditation schemes for interpreters which often results in low-quality services.<sup>99</sup> Locating interpreters of 'rare' languages, which may nonetheless concern a significant number of accused persons, is difficult.

<sup>97</sup> On 11 June 2019, the Government Gazette published the new Criminal Code and Criminal Procedure Code, laws 4619 and 4620. The new laws apply for all criminal court proceedings beginning as of 1 July 2019.

<sup>98</sup> Article 101, Greek Criminal Procedure Code. Suspects who do not speak or do not sufficiently comprehend the Greek language have the right to an interpreter. Interpretation is provided without delay at any stage of the criminal proceedings and includes, if necessary, communications between the accused and their lawyer.

<sup>99</sup> In accordance with Ministerial Decree 67299 (O.G.G. Issue B No 2711/10.10.2014) which determines the qualifications of listed interpreters, it is sufficient to hold a high school diploma from a Greek or foreign school as well as a certificate of knowledge of the Greek language, if the interpreter is a non-national.

### Access to case file:

- The Greek legal framework secures wide access to the case file.<sup>100</sup> In practice, challenges exist in situations where the accused is still in police custody. Often, the police will claim that they have not yet transcribed the hearing, or one needs to access files from different government agencies, which is difficult without a mandate, exacerbated also by the geography of the country (mainland/islands).

### Alternatives:

- Restrictive measures are often used as an alternative to unconditional release and not to pre-trial detention. Also, a certain reluctance to order house arrest with electronic monitoring has been observed (there have been instances whereby the electronic equipment has been violated). An additional barrier in this case is the obligation for the defendant to pay in advance for the – considerable – expenses related to the measure's implementation.
- Pre-trial detention is ordered quasi-automatically when the accused does not have a known residence in the country. The recent influx of third-country nationals in Greece, has led to a large number of non-EU nationals in pre-trial detention.<sup>101</sup> It remains to be seen whether the intent to abscond required under the new law is going to be interpreted as prohibiting this type of decision-making in cases of lack of known residence.<sup>102</sup>

### Recommendations

In the meetings of the national working group<sup>103</sup> and subsequent roundtable events,<sup>104</sup> the following main steps were identified in order to tackle the above challenges:

#### Arbitrariness in police custody:

- Disparity between law and practice: a main observation stemming from the research is that the law and practice of pre-trial detention in Greece are two different things. While the provisions applicable to the regime largely comply with the standards set in the Directives and the ECHR, in practice severe infractions are observed, particularly regarding police custody.
- Major differences in the ability of suspects/defendants to exercise their rights were observed depending on whether a suspect/accused was held in police detention. This essentially creates a two-tier system, where some accused persons are subjected to severe violations of their

fundamental fair trial rights. Arbitrariness while in police custody should be the subject of further research in a separate project which will provide insight into police practices through primary research and offer targeted capacity building, as well as policy interventions.

#### The low use and quality of legal aid:

- Legal aid should be improved through policy changes aimed at engaging more lawyers in the relevant scheme. These should include improvements in the compensation process, which is currently riddled with bureaucratic obstacles and significant delays.
- Furthermore, accreditation mechanisms should be in place for lawyers admitted in the legal aid lists for criminal law cases, which should include competence tests.
- Trainings on the legal framework and judicial practice on pre-trial detention should also be organised in collaboration with bar associations across Greece.
- Monitoring the quality of legal aid lawyers and a need for reforms of the legal aid system as well as the creation of a mechanism to monitor and evaluate lawyers.

#### The lack of confidentiality of communication:

- The lack of confidentiality in client-lawyer communications was identified as problematic. It was proposed that privacy during the pre-trial proceedings should become a requirement in national law. An amendment of the current legal framework in compliance with the standards of the access to a lawyer directive should, therefore, be proposed and implemented.

#### Poor quality of translation and interpretation:

- Another specific issue was poor interpretation services. A national accreditation system for interpreters and translators should be established, alongside a mechanism to supervise interpreters and translators and to monitor the quality of their work, as well as to provide trainings for them.
- The criteria for admission to the relevant lists should be strict and ensure the good quality of interpretation for an extended number of languages.
- At the same time, trainings for interpreters should be organised and implemented, perhaps through a collaboration between the Ministry of Justice and the bar associations.

<sup>100</sup> Pursuant to Article 100 and following of the Greek Criminal Procedure Code, the accused is informed on the full content of the charges and investigation documents by the investigating judge when they appear for their hearing. They may, then, request a deadline of a minimum of 48 hours to provide their statement. The accused or their lawyer may study the charges and investigation documents and receive copies – the accused bearing the relevant expenses. The same applies to all subsequent hearings. The accused who does not speak or understand the Greek language has the right to have all essential documents translated. Any restrictions to this right are, in principle, temporary and due to practical reasons (e.g. the file is with the prosecutor). The possibility to extend the deadline for the hearing beyond 48 hours at the accused person's request is particularly important for the effective exercise of the right to access the case file, especially in complex cases with large case files.

<sup>101</sup> See general prisoner/penalty statistics provided by the Ministry of Justice, Transparency and Human Rights, available in Greek.

<sup>102</sup> Article 286 (1) Greek Criminal Procedure Code.

<sup>103</sup> The national working group was composed of eight criminal justice experts, four of whom are or were investigating judges. It further included one criminologist and three defence lawyers. The working group first met on 4 July 2018 in Athens, three follow-up meetings took place.

<sup>104</sup> On 7 December 2018 in Nafplion, on 21 February 2019 in Komotini and 26 February 2019 in Athens, three roundtable events were held in Greece. Representatives from different legal professions contributed to the discussions, including judges, investigating judges, public prosecutors and defence lawyers.



Hungarian Helsinki Committee

## 3. Hungary

### Main findings and key challenges

Since 2014, the number of persons in pre-trial detention has gradually decreased. Research has shown that the reason behind this development is a decrease in the number of police proposals and prosecutorial motions aimed at ordering pre-trial detention.<sup>105</sup> In addition, prosecutorial motions have been slightly less successful before the courts in recent years (success rate going down from over 90% in 2014 and earlier to 87.8% in 2017). At the same time, the number and proportion of alternative coercive measures motioned by the prosecution and/or applied by the courts is still rather low and has not increased in the same proportion as pre-trial detentions decreased. Hence the authorities are not applying alternative coercive measures instead of pre-trial detention. Present research shows a change in practice of the authorities (especially in certain parts of the country, like Budapest) towards a slight improvement in recent years, although the approaches taken by prosecutors and judges differ significantly across the country.<sup>106</sup>

As of 1 July 2018 a new Code of Criminal Procedure (the **New CCP**)<sup>107</sup> entered into force, replacing the old law. The New CCP brought a positive conceptual change in the area of pre-trial measures: it is explicitly aimed at ensuring that the principles of gradual approach, necessity and proportionality are complied with and so pre-trial detention is ordered only if the purpose of the coercive measure cannot be achieved by applying a less restrictive coercive measure.<sup>108</sup> The New CCP also broadened the scope of alternative coercive measures available, allowing the authorities to reach more individualized decisions. In addition, the rules on bail were modified in a way that extends the possibility of posting bail. Nevertheless, the practice of the stakeholders (both that of the authorities and of the defence counsels) needs to adapt to these legislative changes for the new rules to result in positive change in practice.

Where pre-trial detention is requested by the prosecutor, problems still exist:

- The prosecution's arguments are more frequently accepted than those of the defence. Courts often fail to respond in their decisions to the reasoning of the defence counsel, including the motion for a less restrictive coercive measure.
- Court decisions on pre-trial detention tend to be abstract and fail to assess the defendant's individual circumstances as well as the possibility of applying alternative coercive measures.
- This is coupled with the frequent lack of criminal justice actors, including defence lawyers, to apply international standards or refer to them during the criminal procedure. As a result, in many cases the pre-trial detention of defendants is ordered and maintained unlawfully.
- Hungarian courts, for example, fail to consider the applicable case-law of the ECtHR. The ECtHR has repeatedly condemned Hungary for violating Article 5 of the European Convention on Human Rights in pre-trial detention cases for similar reasons.<sup>106</sup> In 2018, in the case *Lakatos v. Hungary*,<sup>110</sup> the ECtHR ruled that the 3-year-and-8-month long pre-trial detention of the applicant and the lack of consideration of the alternative coercive measures, as well as the 'standardized' wording of the reasoning violated Article 5 § 3 of the Convention.
- Also, as a result of 'penal populism,' judges are sometimes under strong pressure to order strict coercive measures. Recent research has highlighted how the presumption of innocence is being undermined in Hungary in the case of migrants. Press coverage underscores the non-national origin of the suspect especially in cases involving alleged crimes seen in populist-fuelled public discourse as linked to the dangers of migration, such as sexual assault.<sup>111</sup>

105 In 2013, prosecutors submitted 6,673 pre-trial motions, compared to 4,552 in 2017. This amounts to a decrease of 31.8%. Between 2013 and 2014, the number of prosecutorial motions dropped by 20.3%.

106 András Kádár, *Pre-trial measures in Hungary*, in: Fair Trials and Criminal Justice Policy Program at Harvard Law School, *Bail and Jail: A Comparative Look at Pretrial Detention Reform in the UAS and Europe*, Conference Paper, 2 April 2019.

107 Act XC of 2017 on the Code of Criminal Procedure.

108 The New CCP introduced 'criminal supervision' as an overarching category which covers 'alternative' coercive measures which limit personal liberty. It includes house arrest, geographical ban, ban on visits to certain public places or events, and the obligation to regularly check in with the respective police organ (New CCP, Article 281). Criminal supervision measures may be supervised by an electronic monitoring device and may be accompanied by the requirement of posting bail (New CCP, Article 282). Posting bail may also result in criminal supervision to be terminated or a less severe coercive measure to be ordered (New CCP, Article 285).

109 See judgments of the European Court of Human Rights, e.g.: *A.B. v. Hungary* (Judgment of 16 April 2013, App. no. 33292/09), *Baksza v. Hungary* (Judgment of 23 April 2013, App. no. 59196/08), *Bandur v. Hungary* (Judgment of 5 July 2016, App. no. 50130/12), *Darvas v. Hungary* (Judgment of 11 January 2011, App. no. 19547/07), *Kovács Ferencné v. Hungary* (Judgment of 20 December 2011, App. no. 19325/09), *X.Y. v. Hungary* (Judgment of 19 March 2013, App. no. 43888/08). In these cases Hungarian authorities were condemned for more or less same reasons: the deprivation of liberty which may be considered justified in the beginning is upheld for an unreasonably long time, in a way that the personal circumstances of the procedure and the defendant are not taken into account, they refer to the risk of frustrating the procedure and/or the risk of absconding automatically (with regard to the latter, usually taking into account exclusively the gravity of the punishment that may be imposed), and do not consider in reality the possibility of applying a less restrictive coercive measure even if the individual circumstances would make it reasonable.

110 European Court of Human Rights, *Lakatos v. Hungary*, Judgment of 26 June 2018, App. no. 21786/15.

111 Fair Trials, *Innocent until proven guilty? The presentation of suspects in criminal proceedings*, 2019.

The implementation of the Right to Information Directive brought along positive changes for the access to case files in the investigation phase of the criminal procedure. This was enhanced by the New CCP, according to which the defence is, by default, entitled to access all the case materials. Access must be provided at a time and in a manner that enables the defence to prepare, but in any case, at least an hour before the pre-trial detention hearing starts.<sup>112</sup>

The performance of appointed defence counsels needs to be monitored, along with the practical implementation and execution of the appointment process itself. The most prominent aim of the reform was to ensure that defendants receive more effective defence and substantive assistance from their lawyers during the procedure. With the New CCP, selecting the appointed defence counsels became a task of the bar associations, so the task of supervising and improving the system falls primarily on them. However, the reform was introduced by the legislation, hence the task of examining the implementation also falls upon the Ministry of Justice, but the cooperation with other criminal justice actors (such as courts, prosecution and police) in the supervision of the new system is necessary.

## Recommendations

In the meetings of the national working group<sup>113</sup> and at subsequent roundtable events,<sup>110</sup> the following recommendations to the challenges identified above were elaborated upon:

### Assessment of implementation:

- As the legal framework has changed recently and practical experience with its application and implementation is lacking, it is important to focus on developing improved practices that are compliant with the standards of the EU and the ECtHR. The national and regional bar associations play a prominent role in institutionalised discussions in which members of different legal professions assess the practice and submit recommendations to the legislator, providing feedback on their practical experiences with the new legal framework. Their members will carry out advocacy activities.

### Appointment system:

- The new system for the appointment of defence lawyers should be monitored and improved to assess the performance of lawyers, including case file review and interviews (with defendants, lawyers and other criminal justice actors).
- Training and experience sharing should be strengthened to increase criminal justice actors' application of international standards. Improving their knowledge and approach in pre-trial criminal procedure is required to ensure that the procedure complies with the spirit of the domestic law and with the international standards.

### Awareness-raising:

- Criminal justice actors are not sufficiently aware of the aim of pre-trial detention and of gaps in practice when compared to the international standards.
- Lawyers require training about seeking remedies in the European regional courts.

112 In detail, see: András Kristóf Kádár – Nóra Novoszádek – Dóra Szegő: *Inside Police Custody 2 – Country report for Hungary*. Hungarian Helsinki Committee, December 2018, [https://www.helsinki.hu/wp-content/uploads/IPC\\_Country\\_Report\\_Hungary\\_Eng\\_fin.pdf](https://www.helsinki.hu/wp-content/uploads/IPC_Country_Report_Hungary_Eng_fin.pdf), pp. 59–71.

113 The national working group was comprised primarily of defence lawyers, public prosecutors and NGO representatives. They were provided with the research report and the first draft of the action plan. Subsequently, at a meeting held on 11 July 2018, the experts involved in the national working group discussed and commented on the two documents. The action plan was revised on the basis of their recommendations.

114 Roundtable events were held on 28 November 2018, 30 January and 6 May 2019.

## 4. Italy

### Main findings and key challenges

In Italy, the Directives were transposed with the exception of a few normative prescriptions regarding the Interpretation and Translation Directive. Challenges in the area of pre-trial detention stem above all from the practical obstacles to the effective implementation of the Directives. These obstacles prevent the full benefit of the rights prescribed by the Directives at the time of the validation hearing and the fast-track trial (*Giudizio direttissimo*). In these cases, suspects or accused are generally arrested during the night and the lawyer is notified of the arrest and of the time of the validation hearing that generally takes place the following day. The police rarely interrogate the arrested person at this time.

More specifically, the following challenges were identified:

#### Confidentiality of consultation:

- Due to the absence of adequate facilities, there is a lack of confidentiality in the first consultation with the lawyer taking place before the validation hearings and fast-track trials. In many tribunals, consultations take place in the corridor in front of the courtroom and in the presence of the police officers. Furthermore, it seems common practice on the part of the police to call the lawyers at dawn or at night at the landline office number rather than on the cell phone number.

#### Lack of adequate facilities and sufficient time:

- When preparing the defence for fast-track trials, the lack of facilities for confidential consultation between lawyer and client, as well as the lack of adequate time to meet a client and get acquainted with the circumstances of a case was highlighted.
- In the cases of fast-track trials, the case file is often handed to the lawyer a few minutes before the trial, so she/he has an average of 10 to 30 minutes to get acquainted with the facts of the case and to be able to prepare a defence. For this reason, the judge relies heavily on the arguments presented by the prosecution.

#### Translation and interpretation:

- In cases involving foreign defendants, the assessment mechanism of a defendant's Italian language skills is problematic, and interpreters are often only called if the suspect's or accused person's knowledge or understanding of Italian is minimal. Interpreters are mostly absent during a defendant's consultation with their lawyer. But even where interpretation services are provided, their quality is often insufficient, as interpreters generally lack knowledge of the legal framework.



#### Pre-trial detention orders:

- In addition, it was observed that the justification for pre-trial detention orders is extremely stereotypical and relies excessively on the existence of a criminal record of committed crimes. The seriousness of the alleged offense is often the decisive factor in justifying pre-trial detention.

#### Lack of trust in alternative measures:

- Judges and, above all, prosecutors do not believe in the effectiveness of alternative measures to pre-trial detention. House arrest and the obligation to report to the police are the most commonly used alternatives, whereas the number of electronic control bracelets is not adequate to meet the demand.

#### Discrimination:

- Vulnerable defendants who lack housing and a network of social relations are usually placed in pre-trial detention even when house arrest would have been sufficient.
- Also, discrimination against certain groups of persons is an issue of concern. Regarding foreigners, a significant difference in treatment has been observed between irregular migrants from third countries, who tend to be placed in pre-trial detention, and EU nationals who are more likely to be subjected to less restrictive measures. This is mostly due, like in the case of vulnerable defendants, to the lack of housing and a network of social relations.

#### Review of pre-trial detention:

- The Italian legal system provides for the possibility of proposing a revision of the precautionary measures anytime during the proceeding and does not set out an obligation to review pre-trial detention at regular intervals. Procedures for reviewing measures are decided with the mandatory participation of the lawyer, while the accused doesn't have an obligation to take part in the hearing. A periodic revision of the measure could be introduced in addition to the existing possibility to propose a revision anytime with the objective to better guarantee the rights of those defendants who don't benefit from an effective legal assistance.

## Recommendations

The national working group<sup>115</sup> in its action plan and in further roundtable events,<sup>116</sup> presented the following recommendations on how to tackle the challenges identified above.

### The Directives and their implementation:

- New laws are needed that fully transpose the Directives, together with monitoring their practical implementation, in particular at a local level, in order to safeguard the rights of the arrested person.
- A better cooperation between lawyers' associations and tribunals was identified as necessary in order to increase awareness-raising actions on procedural rights and on the benefits of the Directives.

### Information about rights:

- Regarding the delivery of the Letter of Rights (actual and in written form), the introduction of more guarantees, particularly judicial remedies in cases of violation, was recommended.
- Similarly, more guarantees and judicial remedies should be established in cases of violation regarding a suspect's/an accused person's actual knowledge and comprehension of the right to silence.
- On the right to information, it was noted that simply handing the Letter of Rights was not sufficient to guarantee that the arrested person understood his/her rights but would require oral explanation.

### The lack of confidentiality of communication:

- More guarantees of the confidentiality of lawyer/client communications, such as adequate facilities for consultations, are necessary.

### The lack of time to consult with a client:

- The need for the establishment of a minimum timing of the consultation between the suspected/accused person and their lawyer before the validation hearing or the fast-track trial was highlighted. Even if there is no time limitation to the consultation between the lawyer and the client, it could be useful to set a minimum time so that lawyers don't feel pressured by the environmental circumstances to speed up the necessary consultation.

### Legal aid and remuneration:

- The rules concerning legal aid and a severe delay in payments to lawyers by the Italian state should be adopted.

### Access to main documents:

- The national action plan suggests the inclusion of some documents of the prosecutor's file in the notice of the hearing to the lawyer, at a minimum the relevant procedural documents, such as the provisional charge of the client.

### The right to translation and interpretation:

- The modalities of testing a suspect's knowledge and comprehension of the Italian language should be reviewed.
- Judicial remedies to challenge a negative decision regarding the possibility to benefit from translation or interpretation services and a review of judicial remedies regarding the translation of documents should be introduced.

### Poor quality of translation and interpretation:

- In order to monitor the quality of interpretation services, a mandatory video recording of the interpretation during the proceedings should be established and judicial remedies should be introduced to make it possible to assess the work of the interpreter.
- In addition, a specific, mandatory register must be set up, requiring translators and interpreters to have specific knowledge in the legal field.
- For the suspect/accused, a rule on the recusal (substitution request) of the interpreter should be introduced.
- Regarding the poor quality of interpretation services, it was proposed to set up a register which was considered especially useful for rare languages or dialects. For big tribunals, it was suggested that an office within the tribunal be set up with specialized interpreters.

<sup>115</sup> The working group was composed of nine lawyers. It met on 25 July 2018 via videoconference.

<sup>116</sup> Roundtable events were held on 22 May 2019 in Bari, on 30 May in Bologna and on 6 June in Rome. Representatives from different legal professions contributed to the discussions, including defence lawyers, judges, public prosecutors, academics and ombudspersons for people deprived of personal liberty.

## 5. Romania

### Main findings and key challenges

The institutional and legal framework in relation to pre-trial detention in Romania has not changed since the adoption of the 2014 Criminal Procedure Code (**the CPC**). Although the Access to a Lawyer Directive has been fully transposed into national law,<sup>117</sup> significant issues were identified with regard to its proper implementation. The most important aspect relates to creating the necessary conditions for effective participation of the defence during police/court hearings, which is closely linked to access to the case file in due time.<sup>118</sup>

The lack in quality of legal aid used to be a major problem in Romania and was directly linked to the low level of fees of state paid legal aid lawyers. In the wake of a lawyers' strike in February 2019, the fees for legal aid lawyers were raised and new rules for their calculations have been adopted.<sup>119</sup> This allowed APADOR-CH and the working group set up for this project to put forward the arguments developed in the action plan during the negotiation around the new Legal Aid Fee Protocol. APADOR-CH released a public statement of solidarity with the legal aid lawyers which became very popular, in which it reiterated the main findings of the working group in this project.<sup>120</sup> In the negotiating process, the Bar Association asked the Ministry of Justice for an increase of the fee from 48 to 210 Euros for legal assistance in pre-trial detention. The Ministry of Justice replied to this request by asking for the claim to be substantiated based on objective criteria. The working group, in its meeting on 12 December 2018, followed up on this request by drafting objective indicators. On 14 February 2019, finally, the Ministry of Justice, Public Ministry and the National Union of the Bar Associations adopted a new Protocol concerning the increased fee of legal aid lawyers, including new rules for calculations. The conclusions of the working group and some of its recommendations served as important input in the negotiating process.

But despite such positive developments, several key challenges remain:

#### Legal aid:

- Legal aid lawyers attending pre-trial detention hearings are often not specialised in criminal law and lack understanding and training in the relevant legal framework and judicial practice required to provide effective assistance to their client.

#### Confidentiality of consultation:

- Due to a lack in adequate facilities, the privacy of consultation between lawyers and client is not ensured.

#### Access to case file:

- The lack of time for lawyers to consult the case file or communicate with the defendants in detention before the first hearing is problematic. On average, the defence lawyer has 30 minutes to prepare for the initial hearing and many cases were found to exist where the lawyer consults the file and meets the client a few minutes before the hearing.
- Complex case files reach the courts without an inventory list, which makes the work of both judges and lawyers very difficult. Although there is an order of the Prosecutor General to provide a copy of an inventory to the lawyer, it is generally not respected.
- The possibility of case file restriction by the prosecutor is formulated in broad and ambiguous terms, creating uncertainty as to when restrictions are legitimate.
- Whereas studying the case materials is free of charge, photocopying the documents is not and it can be quite costly for a defendant who is in pre-trial detention and has no financial means. Moreover, legal aid does not cover the cost of making these copies.
- The CPC does not provide for a consultation of the case file by defendants themselves who are in pre-trial detention, leaving them without possibility to study the case file if they do not have a lawyer, even if they make a request.

#### Imbalance between defence and prosecution:

- A strong imbalance between defence and prosecution remains, where the 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 briefly presented to the court.



117 Ministry of Justice official letter of 22 December 2017, responding to APADOR-CH's FOI request. According to it, the EU Directive on the Right of access to a lawyer has been finalised through the adoption of Law no. 236/2017 on modifying and completing law 302/2004 concerning the international judicial cooperation in criminal matters.

118 Report on the implementation of Directive 2012/13/EU on the right to access to a lawyer in criminal proceedings in Romania <http://www.apador.org/en/dreptul-la-un-avocat-in-procedurile-penale/>, APADOR-CH, December 2017.

119 <http://www.unbr.ro/protocol-14-02-2019-onorarii-avocati/>.

120 <http://www.apador.org/solidaritate-cu-protestul-avocailor-din-oficiu/>.

## Recommendations

In the meetings of the national working group<sup>121</sup> and at the roundtable events,<sup>122</sup> Romanian criminal justice actors proposed the following recommendations to tackle the above challenges:

### Legal aid:

- The National Union of Bar Associations (**UNBR**) should get involved in the draft law transposing the Legal Aid Directive.<sup>123</sup> Objective criteria should be established in the law of what 'adequate/sufficient quality' of legal aid means.
- A specific course on legal assistance during the criminal investigation should be set up for lawyers who choose to provide legal aid and should be included in the mandatory curriculum in their first three years of practice.
- The Bar Association should clearly set out the role of the lawyer during the pre-trial detention procedure. It should also consider an accreditation scheme for lawyers providing assistance in pre-trial detention hearings.

### The lack of time to consult the case file:

- Legislative change ('lawyer tied to the case file') should be initiated, ensuring that the same legal aid lawyer who is familiar with the case should assist the defendant through the whole criminal proceedings.
- The prosecutor's office should prepare a copy of the case file for lawyers which should also contain an inventory to make it easier for the defence lawyer to navigate complex information in limited time. The General Prosecutor should be engaged and involved in these practical changes.

### The possibility to restrict access to the case file:

- The lawyer should not be obliged to make requests to study the case file. Rather, proof of him/her being a suspect's counsel should be enough.
- If the prosecutor refuses to grant access, he/she should give a reasoned decision to this effect which can be challenged before the hierarchically superior prosecutor.
- Studying the case file should be done during the working hours of the police officer/prosecutor, based on a prior phone call/email from the lawyer.

### Photocopying case file materials:

- Photocopying case file materials should be free of charge and reimbursed by the Ministry of Justice as part of legal aid services.

### The imbalance between the defence and prosecution:

- The working group will propose a legislative change for the lawyer to have the right to present evidence before the pre-trial detention hearing.

121 Four working group meetings were held in Bucharest between 27 September and 12 December 2018 with participation ranging between 11 and 16 experts, covering lawyers, police officers, prosecutors and civil society representatives. The first meeting took place on 27 September 2018, with 14 participants on 27 September (11 lawyers, 1 police officer, 1 FTE representative, 1 APADOR-CH staff); the second meeting was held on 25 October 2018, with 11 participants on 25 October (9 lawyers, 1 prosecutor, 1 APADOR-CH staff); the third meeting took place on 20 November 2018, with 16 participants on 20 November (12 lawyers, 1 prosecutor, 1 police officer, 2 APADOR-CH staff); and the fourth meeting was held on 12 December 2018, with 13 participants on 12 December (12 lawyers, 1 APADOR-CH staff).

122 Two roundtable events were held, one on 21 March and one on 4 April 2019.

123 Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

**“Meaningful change to prevent the overuse of pre-trial detention demands, more than anything else, that decision-makers reckon with the costs of pre-trial detention, human and social. That demands greater recognition of the potentially devastating consequences of detention for the individual suspect (not only the risk that release could pose, like failure to appear or committing an offence); proper consideration of more proportionate alternatives to detention; effective advocacy for release by well-prepared defence lawyers (who have access to the information they need to do their jobs and who have been able to consult their clients); and more time for courts properly to reach, and to explain, the life-changing decision to order pre-trial detention.”**

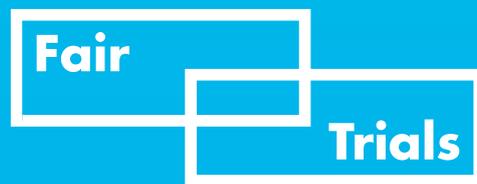
*– Jago Russell, Fair Trials’ Chief Executive*





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