

# FAIR TRIALS INTERNATIONAL



## Report

**Detained without trial:  
Fair Trials International's response to the  
European Commission's Green Paper on detention**

**October 2011**

## About Fair Trials International

Fair Trials International (“FTI”) is a UK-based non-governmental organisation that works for fair trials according to international standards of justice and defends the rights of those facing charges in a country other than their own. Our vision is a world where every person’s right to a fair trial is respected, whatever their nationality, wherever they are accused.

FTI pursues its mission by providing assistance to people arrested outside their own country through its expert casework practice. It also addresses the root causes of injustice through broader research and campaigning and builds local legal capacity through targeted training, mentoring and network activities.

Although FTI usually works on behalf of people facing criminal trials outside of their own country, we have a keen interest in criminal justice and fair trial rights issues more generally. We are active in the field of EU Criminal Justice policy and, through our expert casework practice, we are uniquely placed to provide evidence on how policy initiatives affect defendants throughout the EU.

[www.fairtrials.net](http://www.fairtrials.net)

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**C L I F F O R D**  
**C H A N C E**

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## Executive Summary

1. Fair Trials International welcomes this opportunity to respond to the European Commission's Green Paper on detention.<sup>1</sup> Detention is a vast area and this report focuses solely on pre-trial detention.<sup>2</sup> The European Council has rightly noted that:

*“Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice judicial cooperation between the member states and do not represent the values for which the European Union stands.”<sup>3</sup>*

2. We recognise that pre-trial detention offers important safeguards to ensure justice is served, evidence and witnesses are protected, and suspects do not escape prosecution. Yet depriving people of their liberty in the period before trial is supposed to be an exceptional measure, only to be used where absolutely necessary. Our cases, together with comparative research we have undertaken in collaboration with international law firm, Clifford Chance and FTI's Legal Experts Advisory Panel (“LEAP”), show there is a gulf between that legal theory and reality.

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**132,800**

*Approximate number  
of pre-trial detainees  
in the EU*

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3. This report presents the case studies of 11 FTI clients whose rights (and whose families' rights) have been gravely infringed due to excessive and unjustified pre-trial detention. The report analyses the pre-trial detention regimes of 15 Member States: the Czech Republic, France, England and Wales, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain and Sweden. Key statistical data are presented in Appendix 1.
4. Our report shows that:
  - across the EU, people who have not been convicted of any crime are being detained without good reason for months or even years, often in appalling conditions that make trial preparation impossible;
  - some countries' laws allow people to be detained for years before trial, others have no maximum period at all; few countries have an adequate review system;
  - non-nationals are far more likely than nationals to suffer the injustice of arbitrary and/or excessive pre-trial detention and be deprived of key fair trial protections;
  - growing numbers are being extradited under the European Arrest Warrant, only to be held for months in prison, hundreds of miles from home, waiting for trial;
  - Europe's over-use of pre-trial detention is ruining lives and costing EU countries billions every year; and

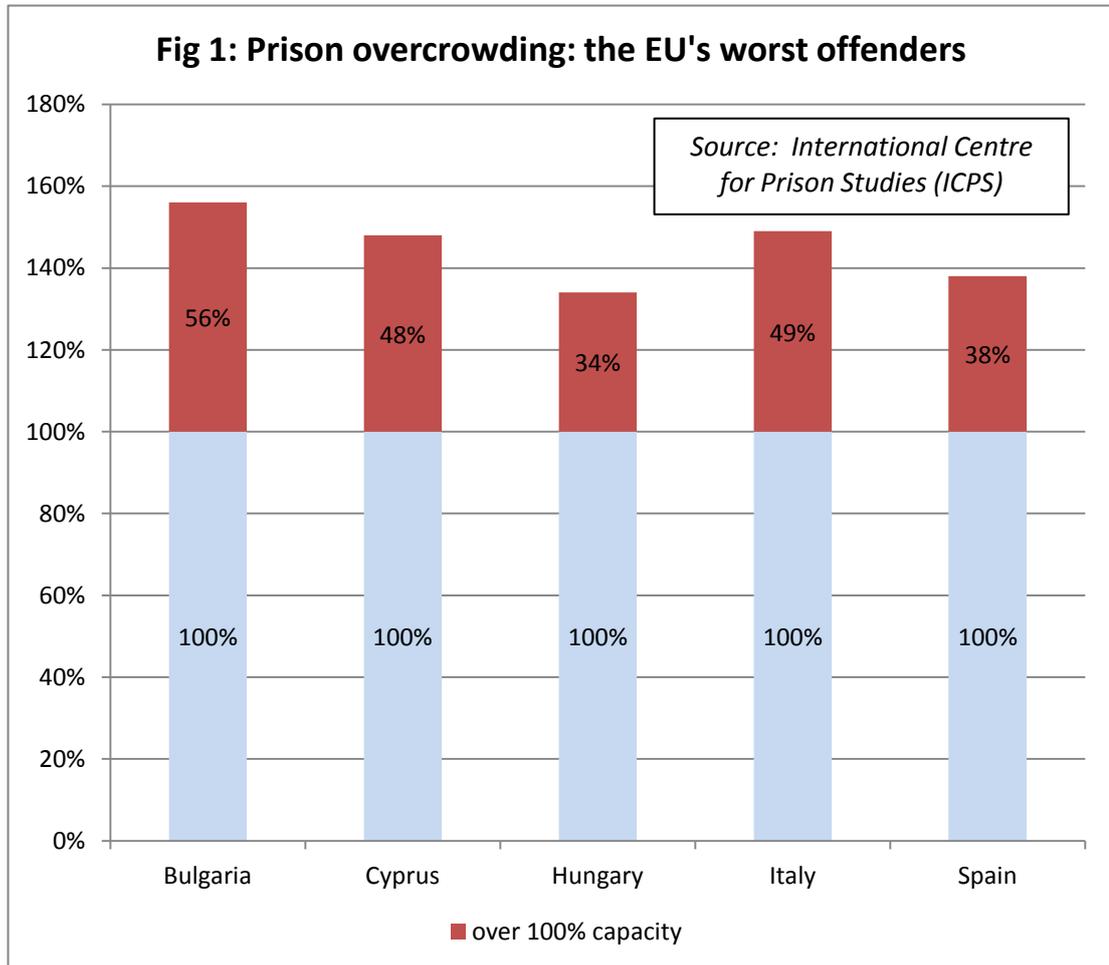
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<sup>1</sup> Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327, Brussels 14 June 2011

<sup>2</sup> Pre-trial detention is defined differently across the EU; this report defines pre-trial detention as the time spent in detention between charge and sentencing

<sup>3</sup> Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, (2009/C 295/01), 30 November 2009

- many EU countries' justice systems are not ready to make full use of the potentially valuable European Supervision Order ("ESO"), which could save resources<sup>4</sup> and ease the severe overcrowding that blights prisons in over half of all Member States (see Figure 1 below).



5. Given the serious effects of detention on proper trial preparation and on family life, we have reached the view that legislation at EU level is required. This would clarify the standards set by the European Convention on Human Rights ("ECHR") and the European Court of Human Rights ("ECtHR") and provide more effective protection against the use of pre-trial detention in contravention of fundamental rights. There is both an urgent need and a proper legal base for this legislation.
6. This report makes four recommendations:
  - 1) The EU should legislate<sup>5</sup> to set minimum standards for the use of pre-trial detention in the EU;
  - 2) Member States should implement the ESO in a way that ensures it represents a real alternative to pre-trial detention and operates consistently and effectively across the EU;

<sup>4</sup> See Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union – Impact Assessment, COM(2006) 468, 29 August 2006

<sup>5</sup> The EU's legislative competency in this area under Article 82(2)(b) of the Treaty on the Functioning of the European Union is dealt with in Section C

- 3) Deferred issue of EAWs and negotiated deferred surrender should be used to avoid unnecessary pre-trial detention post-extradition; and
- 4) The EU should take steps towards establishing a one year maximum pre-trial detention limit. The first step should be targeted research by the European Commission, to establish why practices differ so widely across Member States, both as to the amount of time defendants spend in detention awaiting trial and as to the way in which detention decisions are taken and reviewed.

## Introduction

7. Pre-trial detention, according to the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, has "harsh consequences for individuals". The Commissioner has called the overuse of pre-trial detention "systematic and poorly justified", stating:

*"It is surprising that governments have not done more to prevent these problems in spite of the fact that the prison system is both expensive and overburdened in many European countries. Too little use has been made of more humane and effective alternatives to pre-trial detention."*<sup>6</sup>

8. We share this concern. Our expertise in offering advice and assistance to those standing trial in a country other than their own puts us in a unique position to report on the pre-trial detention experiences of non-nationals and the impact that pre-trial detention has on fair trial rights in general.
9. Inappropriate and excessive pre-trial detention clearly impacts on the right to liberty and the right to be presumed innocent until proven guilty.<sup>7</sup> It also has a detrimental effect on the rights of the suspect's family members under Article 8 ECHR. This is particularly so when the suspect is detained overseas, as visiting will be more costly and difficult. There is also a wider socioeconomic cost of pre-trial detention, as lengthy detention will usually result in the suspect losing his or her job. Where the pre-trial detainee is also the family's main breadwinner this has a severe financial impact on other family members. These knock-on effects further increase the costs of pre-trial detention to the State.

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*Andrew Symeou: Andrew was a 20 year old student when he was extradited to Greece. Despite family links in Greece and the fact that his father rented a flat for him to stay at, he was denied release pending trial on the basis that he was foreign and a "flight risk" and had not shown "remorse". He was held in a filthy, overcrowded cell for almost a year. Andrew was acquitted and is now trying to rebuild his life. Full case summary: page 14.*

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10. Many of the people who approach us for help complain that they have been denied release pending trial simply because they are non-nationals. Our clients describe appalling pre-trial detention conditions which they have to endure for lengthy

<sup>6</sup> Human rights comment, 17 August 2011

<sup>7</sup> As guaranteed by Article 5 and Article 6(2) ECHR, respectively

periods, often far from their home and loved ones. While in pre-trial detention our clients have reported being denied access to a lawyer and information about their case.

11. The reality of varying standards in pre-trial detention regimes across the EU is at odds with the idea that all Member States have criminal justice systems that respect fundamental rights and deliver justice. This theoretical equivalence supposedly engenders mutual trust, which in turn enables enhanced cooperation in criminal justice matters. This trust is given as the justification that one Member State can execute a judicial decision made in another Member State with minimal checks; thus forming the basis for the operation of instruments like the EAW and the soon to be implemented Framework Decision on the mutual recognition of custodial sentences.<sup>8</sup> Inadequate systems for imposing pre-trial detention and poor pre-trial detention conditions undermine the trust needed for mutual recognition instruments to work effectively. As the Green Paper notes:

*“It could be difficult to develop closer judicial cooperation between Member States unless further efforts are made to improve detention conditions and to promote alternatives to custody.”<sup>9</sup>*

### **Section A: Pre-trial detention in today’s EU**

12. The total prison population of the EU is estimated to be 643,000.<sup>10</sup> Overcrowding is severe with over half of the 27 Member States running prisons with occupancy levels above capacity and the average occupancy level for EU prisons at 108%.<sup>11</sup> Bulgaria’s prisons are operating at 156% capacity, Italy’s at 149% capacity and Spain’s at 138%.<sup>12</sup> Overcrowding exacerbates poor prison conditions. There are approximately 132,800 pre-trial detainees in the EU, which represents approximately 21% of the total EU prison population.<sup>13</sup> Figures from 2009 show that over a quarter of these pre-trial detainees are foreign nationals (approximately 35,649).<sup>14</sup> Pre-trial detention has significant financial implications. According to figures from 2006 it costs €3,000 on average to keep a person in pre-

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**€4.8 billion**

*Approximate annual cost  
of pre-trial detention  
in the EU*

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<sup>8</sup> Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, 2008/909/JHA, 27 November 2008

<sup>9</sup> Green Paper, p.4

<sup>10</sup> Source: International Centre for Prison Studies (ICPS), based on figures for 2010/11 (retrieved July 2011), please note that two Member States (Bulgaria and Cyprus) did not provide data for 2010/11, figures for these countries are from 2009

<sup>11</sup> Ibid., please note that the data for six Member States is outside the 2010/11 range

<sup>12</sup> Ibid.

<sup>13</sup> Ibid., please note that this figure is derived from the percentage figures contained in ICPS reports, data for Bulgaria, Cyprus, Malta and Ireland has been obtained from the 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>14</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I, please note that Austria, France, Greece, Malta and Sweden did not provide figures to the Council of Europe

trial detention for a month.<sup>15</sup> This means that the current pre-trial prison population is costing almost €4.8 billion per year.<sup>16</sup> There are therefore compelling financial, as well as fundamental rights-based, reasons for curbing unnecessary or excessively long pre-trial detention.

### Standards in theory and problems in practice

13. A number of international instruments enshrine the right to liberty and the importance of avoiding arbitrary and unnecessary detention. Article 11 of the Universal Declaration of Human Rights, states: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty.” This is echoed in Article 48 of the Charter of Fundamental Rights, while Article 6 states: “Everyone has the right to liberty and security of person.” Article 9 of the International Covenant on Civil and Political Rights (“ICCPR”) states: “It shall not be the general rule that persons awaiting trial shall be detained in custody”. Article 5 of the ECHR protects the right to liberty and sets out when detention is acceptable and the safeguards which must accompany it.
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- Robert Hörchner: Robert, 59, was extradited from Holland to Poland and held for 10 months in appalling conditions. Sharing a filthy, overcrowded cell with convicted prisoners, he was offered early release if he signed a confession, but he insisted on a trial. With no information about the case and only limited access to a lawyer, his ability to prepare a defence was severely compromised. Full case summary: page 12.*
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14. The ECtHR’s jurisprudence on Article 5 and pre-trial detention sets out general principles, which can be summarised as follows:<sup>17</sup>
- A person who is detained on the grounds that he is suspected of an offence must be brought promptly before a judicial authority.
  - There must be a presumption in favour of release.
  - The burden is on the state to show why release pending trial cannot be granted.
  - Reasons must be given for refusing release and the judicial authority must consider alternatives to pre-trial detention which would deal with any concerns it had regarding the defendant’s release.
  - Pre-trial detention cannot be imposed:
    - Simply because the defendant is suspected of committing an offence (no matter how serious or the strength of the evidence against him);
    - On the grounds that the defendant represents a flight risk where the only reason for this decision is the absence of a fixed residence or that the defendant faces a long term of imprisonment if convicted at trial;
    - On the basis that the defendant will reoffend if released, unless there is evidence of a definite risk of a particular offence (the defendant’s lack of a job or family ties is not sufficient to establish this risk).

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<sup>15</sup> Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union – Impact Assessment, COM(2006) 468, 29 August 2006, Table 3.4

<sup>16</sup> 3,000 x 12 x 132,800 = 4,780,800,000

<sup>17</sup> For more detail see Section C

- If a financial surety is fixed as a condition of release, the amount fixed must take into account the defendant's means.
- Continued detention must be subject to regular review, which can be initiated by the defendant, or by a body of judicial character.
- The review of detention must take the form of an adversarial oral hearing with the equality of arms of the parties ensured.
- The decision on detention must be taken speedily and reasons must be given for the need for continued detention (previous decisions should not simply be reproduced).
- In any event, a defendant in pre-trial detention is entitled to a trial within a reasonable time; there must be special diligence in the conduct of the prosecution case.

15. The Council of Europe has also set out basic standards of detention in various instruments. The European Prison Rules ("EPR")<sup>18</sup> include a section on additional safeguards for pre-trial detainees which states: "The regime for untried prisoners may not be influenced by the possibility that they may be convicted of a criminal offence in the future".<sup>19</sup> According to the EPR untried prisoners must be provided with all necessary facilities to assist with preparation of their defence and to meet with their lawyers.<sup>20</sup> Pre-trial detention is also dealt with in the Council of Europe's

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*Anthony Reynolds: Anthony was arrested in Spain in 2006 and held under the notorious "secreto de sumario" regime. Anthony and his lawyer were denied access to information regarding the charges and the evidence until just before trial. After spending four years in pre-trial detention Anthony was acquitted on all charges. Full case summary: page 16.*

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*Recommendation on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.*<sup>21</sup> This states that defendants must not be deemed a flight risk (and thus be subject to pre-trial detention) purely because they are non-national.<sup>22</sup> Article 22[2] states that the length of pre-trial detention "shall not exceed, nor normally be disproportionate to, the penalty that may be imposed for the offence concerned".

16. These instruments are further bolstered by the reports of international bodies which conduct prison visits, such as the UN's Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("SPT")<sup>23</sup> and the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment ("CPT"). The CPT has utilised its experience to create a set of minimum detention standards. These include: adequate space and a lack of overcrowding; a satisfactory programme of recreation activities; ready access to proper toilet facilities; reasonably good contact with the outside world; the use of

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<sup>18</sup> Rec(2006)2, adopted by the Council of Europe Committee of Ministers to member states on 11 January 2006

<sup>19</sup> Part VII, 95.1

<sup>20</sup> Part VII, 98.2

<sup>21</sup> Rec(2006)13, adopted by the Council of Europe Committee of Ministers on 27 September 2006

<sup>22</sup> Article 9[2]

<sup>23</sup> Established pursuant to the provisions of the Optional Protocol of the Convention against Torture ("OPCAT")

solitary confinement only when proportionate (recognising the harmful consequences it can have); and access to fresh air and natural light.<sup>24</sup>

17. International legislation and guidelines based on best practice offer a valuable yardstick by which to measure pre-trial detention regimes in practice. Unfortunately, a comparison between law and practice reveals that many EU Member States are not meeting basic standards.

### Non-national defendants

18. Non-national defendants are often at greater risk of suffering a miscarriage of justice, particularly if they do not speak the local language or are unfamiliar with the local legal system. This can have a significant impact on their ability to prepare for trial and this factor is further exacerbated if they are held in pre-trial detention.

19. A large proportion of the EU's pre-trial prison population is made up of non-national defendants.<sup>25</sup> Non-nationals are often at a disadvantage in obtaining release pending trial because they are seen as a greater flight risk than national defendants.

26%

*Percentage of EU pre-trial detainees who were foreign nationals in 2009*

This risk is often identified by courts despite factors indicating that the person will not abscond, such as stable employment and long-time residence in the country. The result is that non-national defendants are regularly denied release pending trial simply because they are foreigners.

20. The problems non-nationals face when applying for release pending trial may be eased by the introduction of the ESO,<sup>26</sup> which was adopted by the EU on 23 October 2009. The ESO lays down rules according to which one Member State must recognise a decision on supervision measures issued by another Member State as an alternative to pre-trial detention. The Framework Decision must be implemented by all Member States by 1 December 2012.

21. Effective implementation of the ESO would help ensure the elimination of discrimination against non-nationals in decisions on release pending trial. It would also save significant resources. Member States spend millions each year imprisoning foreign pre-trial detainees.<sup>27</sup> However, The European Commission has

<sup>24</sup> CPT Standards, revised 2010

<sup>25</sup> 26%, source: 2009 Council of Europe Annual Penal Statistics – SPACE I, please note that this does not include figures for Austria, Finland, France, Greece, Malta, Portugal and Sweden

<sup>26</sup> Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, 2009/829/JHA, 23 October 2009

<sup>27</sup> The UK spends approximately €67,912,726 each year: €36,473 (average cost per pre-trial detainee per year, source: UK Prison Service Annual Report 2004/2005) x 1,862 (total number of foreigners in pre-trial detention, source: 2009 Council of Europe Annual Penal Statistics – SPACE I). Germany spends approximately €121,104,000 each year: €24,000 (average cost per pre-trial detainee per year, source: replies to 2003 questionnaire, *Revised analysis of questionnaire on the law and practice of the Member States regarding remand in custody*, Report by Jeremy McBride, Council of Europe, 2003, Strasbourg (PC-DP)) x 5,046 (total number of foreigners in pre-trial detention, source: 2009 Council of Europe Annual Penal Statistics – SPACE I). Italy spends approximately €595,066,176 each year: €44,256 (average cost per pre-trial detainee per year, source: 2009

estimated that up to 80% of the EU nationals in pre-trial detention in a Member State could be transferred to their “home” States prior to trial.<sup>28</sup>

22. The success of the ESO depends crucially on its full and consistent implementation across all Member States. However, as our comparative analysis shows (Section B below and Appendix 2), some EU countries have a long way to go before they can benefit fully from this measure: training, resources and legislative reform are needed and the EU must work together to ensure consistent implementation, and effective use, of the ESO.

### **Pre-trial detention and preparation for trial**

23. Pre-trial detention can have a devastating effect on a defendant’s ability to prepare for trial. Appalling prison conditions can mean that defendants concentrate on surviving their time on remand or considering plea bargains, rather than on preparing their defence. Access to a lawyer and to information about the case – vital components of effective trial preparation – are often much more limited if the defendant is detained. For non-national defendants these problems can be compounded by translation and interpretation issues.

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*Mohammed Abadi (not his real name): Mohammed was arrested in Spain and held incommunicado for long periods. Beaten by police, interrogated without a lawyer and denied any consular assistance or visits, he spent two years in detention before being released pending trial. Between release and trial he was not allowed either to work or to receive welfare, forcing him to sleep on the streets. He was acquitted for lack of evidence, the hearing lasting less than an hour. Full case summary: page 17.*

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24. Maximum pre-trial detention periods vary greatly across the EU. Some Member States, such as Spain, set maximum periods of four years.<sup>29</sup> Others, like Belgium, have no maximum limit.<sup>30</sup> Maximum legal lengths alone do not always provide an accurate picture of a country’s pre-trial detention regime as in practice average lengths may be quite short. However, the mere threat of an excessive period in pre-trial detention can lead defendants to enter inappropriate guilty pleas in a bid to expedite the trial process and their eventual release. Again, this can be exacerbated by a lack of effective legal advice. More generally, delay to the trial process (compounded by over-long pre-trial detention) compromises the fairness of the eventual trial due to the increased risk that vital evidence will be lost and witnesses will forget important details.

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Council of Europe Annual Penal Statistics – SPACE I) x 13,446 (total number of foreigners in pre-trial detention, source: 2009 Council of Europe Annual Penal Statistics – SPACE I).

<sup>28</sup> Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union – Impact Assessment, COM(2006) 468, 29 August 2006

<sup>29</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.889

<sup>30</sup> Ibid. p.170

25. Many of the criminal defence practitioners FTI works with belong to LEAP, our Legal Experts Advisory Panel, which has met on three occasions to discuss issues surrounding pre-trial detention in the EU, most recently on 22 September 2011. The Panel consists of 76 defence practitioners and academics from 19 EU Member States. Several panel members have regularly confirmed to us that detention practices in their jurisdictions are not compliant with Article 5 ECHR and that lengthy periods of pre-trial detention are often permitted without the court providing any valid justification. Members have described how courts often accept at face value prosecution arguments that continued detention is necessary in the interests of successful prosecution. Panel members have also reported that the problem of excessively long pre-trial detention is exacerbated in some jurisdictions where the defendant is acquitted, yet remains in custody pending appeal by the prosecution.<sup>31</sup>

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*Oliver Grant (not his real name): Oliver was extradited from the UK to the Netherlands in 2009 and has spent almost two years in pre-trial detention (longer than the period allowed under Dutch law). He was charged with several other defendants all of whom he believes are Dutch nationals and all of whom were granted release pending trial. In the prison where he is detained, tuberculosis is rife, the food is inedible and detainees are locked in their cells for 23 hours a day. He has not seen his two children during his detention. Full case summary: page 19.*

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<sup>31</sup> See LEAP Communiqué at Appendix 3

## Fair Trials International's cases

26. Our cases regularly demonstrate the damaging impact of excessive pre-trial detention. Over half of the individuals approaching FTI for assistance have been arrested in an EU jurisdiction.<sup>32</sup> In over 10% of these cases our clients complained about excessive time between charge and trial. By far the most complaints about this were received from clients who had been arrested in Spain. 40% of the clients who cited issues surrounding pre-trial detention complained that there was excess time between reviews, while 20% said that no reasons were given when they were refused release pending trial. Almost a third of our clients who have been arrested in the EU complained about being denied access to a lawyer at the pre-trial stage. FTI receives the most complaints about denial of access to a lawyer from clients in France, Greece and Spain. Below are some recent examples of our cases: more information can be found at [www.fairtrials.net/cases](http://www.fairtrials.net/cases).

### **Robert Hörchner – Poland**

*Robert's case highlights: the appalling pre-trial prison conditions in some Member States; the failure to allow detainees to prepare effectively for trial; and the discrimination against non-nationals which can take place in pre-trial detention.*



27. Robert Hörchner, a 59 year old father of two from Holland, was arrested under an EAW issued by Poland in 2007 to face allegations of leasing a Polish property where cannabis was cultivated. Robert has consistently denied the allegations, claiming that key evidence in the case was forged.

28. Robert resisted extradition to Poland, arguing that if he was surrendered he would be subjected to prison conditions which would breach his human rights and he would not receive a fair trial. Nevertheless a Dutch court ordered his extradition in October 2007. Following his surrender to Poland, Robert was initially held in a detention centre at the airport where he was strip-searched in front of armed guards with dogs. He was kept in a cell for six days where he was denied access to shower facilities and was not allowed water.

29. Robert was eventually transferred to a Polish prison in Bydgoszcz. He was held on remand for 10 months, during which time he had to endure filthy, overcrowded conditions, sharing a 3.5 by 4.5 metre cell with up to nine other inmates. Robert was held in the same cell as convicted murderers and gang members, as well as people suffering from severe mental illness. One cellmate was blind and would regularly soil himself. Inmates were not allowed hot water and were given two buckets of cold

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<sup>32</sup> Since 2009 FTI has received over 600 requests for help and advice and over half were from people facing charges in EU States.

water each day, which they were expected to use both for washing and for their laundry. There were several suicides during Robert's 10 months in the prison and each night he was kept awake by the cries of other detainees.

30. Violence was widespread and Robert was repeatedly attacked. A system operated throughout the prison whereby cellmates would use violence and extortion for control of the cell, with weaker detainees treated like slaves by the others. On one occasion, fighting in Robert's cell was so fierce that the floor was coated with blood. Prison guards took no steps to stop this violence and were often responsible for meting out brutality. Any complaints were met with severe mistreatment by prison staff, including being placed in a sound-proofed punishment cell, where inmates were bound and beaten by prison guards.
31. While on remand, Robert was only allowed visits from a friend on two occasions, whereas Polish inmates were allowed visits every two weeks. Furthermore, Polish prisoners were allowed to receive packages of food from their families – something denied to Robert as the only non-national in the prison. Robert was provided with limited access to a lawyer and could not properly prepare for his trial. He was denied a Dutch-speaking interpreter though he spoke no Polish, and his choice of legal adviser was highly restricted, as were his contact with that adviser and his access to information about the case against him.
32. At one point a Dutch film crew, who were making a documentary about Robert's case, visited the prison to interview him. Robert recalls that the prison staff redecorated a cell and placed a ping pong table in a communal area so the interview could take place there. The film crew were not allowed access to the rest of the prison.



33. After enduring these nightmarish conditions for several months, Robert attended a first hearing in his trial and came under pressure to confess in exchange for an early release, which he resisted. After a grossly unfair trial six months later, at which he was convicted, he was released and allowed to return to the Netherlands pending an appeal. His case is still not resolved and procedural unfairness has continued at

every stage. His physical health had deteriorated to such an extent that, on his return to Holland, his own wife did not recognise him, due to his drastic weight loss (approximately three stone). His entire body was covered with scars and blemishes resulting from severe and untreated scabies and ringworm he caught while in prison. Dutch doctors told him that normally such diseases cleared up after a few days of medication but as he had been untreated for so long, Robert's skin would take many months to heal. He is still suffering the mental effects of his ordeal in pre-trial detention.

### **Andrew Symeou – Greece**

*Andrew's case highlights:*

- *that human rights safeguards are often ineffective;*
- *standards must be raised across Europe in relation to pre-trial detention conditions and decisions on release pending trial; and*
- *that extraditions are being ordered too far in advance of trial.*



34. Andrew Symeou, then a 20-year-old student from the UK, was extradited to Greece under an EAW in July 2009 on manslaughter charges.
35. Following his surrender Andrew was denied release pending trial by a Greek court on the basis that he had not shown sufficient remorse for committing the crime which he was accused of – a clear violation of the presumption of innocence. Another “reason” Andrew was denied release pending trial was that he was a non-national and therefore was assumed to represent a flight risk. This was despite the fact that Andrew had met all his supervision conditions in the UK and his father had arranged to hire a flat for him to stay at during the run-up to the trial.
36. Following the decision of the court to impose pre-trial detention, Andrew spent a harrowing 11 months on remand in Greece. A university student with no previous criminal record who still lived with his parents, he spent his 21<sup>st</sup> birthday in the notoriously dangerous Korydallos prison. The prison conditions Andrew has described included: filthy and overcrowded cells (with up to six people in a single cell); sharing cells with prisoners convicted of rape and murder; violence among prisoners (one was beaten to death over a drug debt while Andrew was there); and violent rioting. The shower room floor was covered in excrement, there were cockroaches in the cells, fleas in the bedding, and the prison was infested with vermin.
37. This description conforms with information contained in numerous expert reports on Greek prison conditions placed before the English court prior to Andrew's extradition. Andrew argued that his extradition should be refused on the grounds

that he would be kept in prison conditions in Greece which would breach his human rights. The Committee for the Prevention of Torture had reported the previous year that persons deprived of their liberty in Greece “run a considerable risk of being ill-treated”. Amnesty International and other human rights NGOs had similarly criticised Greece’s prisons in the harshest terms. This evidence was held insufficient as a bar to extradition. The English court stated:

*[T]here is no sound evidence that the Appellant is at a real risk of being subjected to treatment which would breach article 3 ECHR, even if there is evidence that some police do sometimes inflict such treatment on those in detention. Regrettably, that is a sometime feature of police behaviour in all EU countries.*<sup>33</sup>

38. It is difficult to know what more Andrew could have done to bring the risk he faced to the court’s attention and invoke his Article 3 rights before his extradition.

39. Following numerous delays due to prosecution errors, Andrew was finally released pending trial in June 2010. His four-year ordeal finally came to an end on 17 June 2011, when he was acquitted by a Greek court.

40. Andrew was extradited despite the fact that Greek prosecutors were not yet ready for trial: prosecution delays meant that he did not stand trial until almost two years after his extradition. This is time he could have spent under supervised release in the UK, continuing with his studies at university, rather than being held in appalling detention conditions in Greece. After his extradition, he was at no point questioned by Greek investigators. It is therefore difficult to see what purpose was served by his time in pre-trial detention.

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**146%**

*In 2009 the occupancy of Greek prisons amounted to 146% of the official capacity (see comparative research in Appendix 2)*

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### **Michael Shields – Bulgaria**

*Michael’s case highlights the appalling pre-trial detention conditions in some Member States.*

41. When he was 18 Michael Shields travelled to Turkey to watch Liverpool Football Club play in the Champions League final in May 2005. While Michael was on a stopover in Bulgaria, a local man was attacked outside a café in an incident involving English football fans. Later that day, local police arrived at Michael's hotel to arrest him. The only evidence against Michael was identification by witnesses obtained after a manipulated identification parade. Despite this he was charged and remanded in custody.

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<sup>33</sup> *Symeou v Public Prosecutor’s Office at Court of Appeals, Patras, Greece* [2009] EWHC 897 (Admin) at para 65

42. While in pre-trial detention Michael was kept in overcrowded and unhygienic conditions – on one occasion he woke up covered in cockroaches. He was provided with inedible food and had to rely on food parcels from his family. Sometimes Michael would be kept awake at night by the screams of fellow inmates being beaten. Translation services provided to Michael were poor, and he attended court hearings on release pending trial where he did not understand what was going on.
43. After spending almost three months in pre-trial detention Michael was found guilty of attempted murder and sentenced to 15 years in prison despite evidence that he was asleep in his hotel room at the time of the incident. In fact, another man admitted to the crime and signed a confession but the Bulgarian courts refused to take this into account. In 2006, Michael Shields was transferred back to the UK to serve the remainder of his sentence. FTI continued to campaign for his release and in September 2009, Michael was granted a pardon by the UK government.

### **Anthony Reynolds – Spain**

*Anthony’s case highlights: the excessive lengths of pre-trial detention which are legally permitted in some Member States; and the fundamental rights impact of Spain’s “secreto de sumario” regime.*

44. Anthony Reynolds, a British national who had moved with his family to Spain, was arrested in Tenerife in December 2006. Spanish police told Anthony that if he did not admit to drug charges, his wife would be put in prison and their one-year-old daughter taken into care. Anthony denies any involvement in drug offences and believes he was targeted for resisting local police extortion.
45. Anthony’s case was dealt with under the notorious “secreto de sumario” regime. This means that a judge has imposed secrecy on the investigation: defendants and their lawyers are denied access to information regarding the charges or the evidence until just before trial. This results in defendants being denied effective legal assistance during detention, making it impossible to prepare a defence or argue effectively for release pending trial.
46. Anthony was eventually released after spending almost four years in pre-trial detention. Once he was freed, Anthony had to sleep rough as he was not allowed to work or receive benefits. He was acquitted at trial in June 2011. During his time in pre-trial detention he lost contact with his wife and daughter. He is now attempting to rebuild his life.

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**4 years**

*Maximum length of pre-trial detention in Spain (see comparative research in Appendix 2)*

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### **Michael Turner and Jason McGoldrick – Hungary**

*Michael and Jason's case highlights: how the misuse of the EAW for investigative purposes and how poor prison conditions in some Member States undermine faith in the "mutual recognition" concept.*



47. Michael Turner (pictured), a 27-year-old British national from Dorset, and business partner Jason McGoldrick, 37, were wanted by Hungarian authorities following the failure of their business venture in Budapest. Michael and Jason were extradited to Hungary under an EAW in November 2009. They were held in a former KGB prison for four months, but questioned only once. They were held in separate parts of the prison and denied family contact.
48. Michael had to share a cell with three others and was only allowed out of the cell for one hour a day. Two weeks into his detention, Michael was wearing the same clothes in which he had been arrested and had not been allowed to shower or clean his teeth. Prison officers refused to let him open parcels from his family containing basic items like toothpaste. After failing to decide whether or not to pursue any criminal case against them, the Hungarian authorities eventually released Michael and Jason and allowed them to return home. Hungary's investigation is still ongoing, showing that extradition was premature and should have been deferred until the case was trial-ready.

### **Mohamed Abadi – Spain**

*Mohammed's case highlights: the human rights abuses that are perpetrated during pre-trial detention in some Member States and the detrimental impact on detainees of the refusal to allow access to a lawyer and consular staff.*

49. Mohammed Abadi (not his real name), an Iraqi national with British refugee status, was arrested in Malaga, Spain in 2005 for alleged terrorist activities. Immediately after his arrest, Mohammed claims he was taken to a place which police officers referred to as a "medical facility", where he was stripped naked and humiliated. He was then driven in a car from Malaga to Madrid. During the journey he was interrogated without a lawyer present, subjected to verbal abuse from police officers and threatened with a gun.
50. Once in Madrid, Mohammed was told that he was not allowed access to a lawyer or any consular assistance. Over the course of five days he was kept in a freezing cold cell and subjected to sleep deprivation; his cell was lit with bright lights for 24 hours a day and if he fell asleep he was woken abruptly. He was refused water and all food except pork (which he cannot eat for religious reasons). He was interrogated during this period (again with no access to a lawyer) and was frequently beaten.

51. After five days in these conditions Mohammed was brought before a judge at a hearing where he was represented by a court-appointed lawyer. Mohammed was not allowed to speak to the lawyer before or after the proceedings. He was then moved to another prison where he spent two years in pre-trial detention. During this time he was again denied legal assistance.
52. Mohammed was kept in solitary confinement in a cell without air conditioning or heating, despite the fact that it snowed while Mohammed was in prison. On one occasion, a prison officer tore up a copy of the Quran in front of Mohammed. When he was finally granted release it was under stringent conditions, including the confiscation of his passport, weekly reporting at a police station in Madrid, and not being allowed to work. Trapped in Spain, unable to work and ineligible for benefits, Mohammed eventually became homeless and had to live on the street. When he did manage to find accommodation it was regularly searched by police officers and his belongings were taken away.
53. When Mohammed was finally brought to trial in summer of 2010, he was acquitted of all charges after a cursory hearing lasting minutes, apparently on the basis that there was no evidence against him. Since returning to the UK, Mohammed has been suffering from severe anxiety and depression as a result of his treatment when in pre-trial detention in Spain.

### **Marie Blake – France**

*Marie's case highlights the negative impact that pre-trial detention can have, even if the detention is only for a short period of time.*

54. Marie Blake (not her real name), a 27 year old Polish mother of three who lives in the UK, was arrested under an EAW in France in February 2009. The EAW had been issued by Poland so that Marie could stand trial in relation to an alleged incident seven years earlier, in 2002, when Marie was just 18 years old.
55. Following a brief court hearing Marie was taken to a prison in Lille where she was forced to strip in front of male guards. She was then sprayed with cold water and doused in white powder. Marie was given inedible food, placed in a cell with a broken toilet which would not flush, and was not allowed to wash with hot water. After being held in these conditions for four days Marie was provisionally released by a French court. She was freed without being told where she was or how to get home. Instead, knowing that Marie could not speak French, the police gave her a piece of paper with two sentences on it in French: "please show me the way to Lille station" and "can I have a ticket for the Eurostar to London, please?" Marie eventually managed to use this to get home to her family.

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**24%**

*Percentage of pre-trial detainees in the French prison population (see comparative research in Appendix 2)*

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56. Marie has described her time in pre-trial detention in France as “the worst days of my life”. She is still suffering the psychological effects of her time in detention and has trouble sleeping.

### **Jock Palfreeman – Bulgaria**

*Jock’s case highlights: how some Member States’ use of lengthy pre-trial detention, including solitary confinement, violates the presumption of innocence.*

57. While on holiday in Bulgaria in December 2007, Australian national and British Army recruit, Jock Palfreeman, was arrested and charged with murder following a fight which had broken out between Jock and 14 Bulgarian men. Jock claims that he had gone to the aid of two Roma men who were being attacked by the group. In the ensuing fight, a knife in Jock’s possession injured two of the Bulgarian men, one of whom died as a result of the injury. Jock maintains that he only used the knife to defend himself. Neutral witnesses have supported his version of events.
58. Jock was held in pre-trial detention for two years, during which time he spent a substantial period in solitary confinement. Almost completely without human contact, Jock was only allowed 90 minutes in the prison courtyard each day, without the company of other prisoners. In December 2009 Jock’s trial began. Incomplete initial investigations resulted in the failure to identify the two Roma men involved in the original altercation, as well as other key witnesses for the defence. Crucial CCTV footage of the incident was lost due to a delay in investigations. Despite this, Jock was found guilty and sentenced to 20 years’ imprisonment. He was also ordered to pay an excessively high amount in compensation – over €200,000.

### **Oliver Grant – the Netherlands**

*Oliver’s case highlights that non-nationals can face discrimination when it comes to decisions on release pending trial.*

59. Oliver Grant (not his real name), a 46 year old father of two from the UK, was extradited to the Netherlands to face charges of cannabis dealing in 2009. Since his surrender he has spent almost two years in pre-trial detention and has made several applications for release pending trial, all of which have been refused. Oliver was charged with several other defendants all of whom he believes are Dutch nationals and all of whom were granted release pending trial. Oliver’s partner travelled to the Netherlands and leased an apartment for Oliver to live in if he was able to obtain release pending trial. Despite this the Dutch courts still refused to release him.
60. During his time on remand Oliver was held for five days in solitary confinement. In the prison where he is detained there are many non-Dutch national prisoners. Tuberculosis is rife and the food is of a very poor quality. Detainees are locked in

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*Wider grounds for imposing pre-trial detention apply to non-nationals who are not resident in the Netherlands (see comparative research in Appendix 2)*

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their cells for 23 hours a day. Detention review hearings are supposed to take place every 90 days, but Oliver's last hearing in April 2011 was cancelled due to lack of prison staff to accompany him to the hearing. His trial is now due to start in November 2011.

### **Corinna Reid – Spain**

*Corinna's case highlights: the poor prison conditions in some Member States and the devastating effect that lengthy pre-trial periods can have on individuals and families.*

61. In January 2007 Corinna Reid and her partner Robert Cormack went on holiday to Tenerife with their children, including their 18-month-old son Aiden. During the holiday Aiden fell ill with bronchitis and, sadly, died in the early hours of 12 January. Corinna and Robert were devastated by the death of their child and returned to their home in Scotland for Aiden's funeral. In April 2008, the police in Spain released Aiden's toxicology results which showed that Aiden had a mixture of methadone and diazepam in his blood when he died. Robert had been prescribed methadone and diazepam to combat a drug problem.
62. The Spanish authorities issued a European Arrest Warrant in September 2008 and Corinna and Robert were arrested in Scotland. At this stage, Robert confessed that while in Tenerife he had been preparing to take his prescription drugs when Aiden, who was an exceptionally active child, spilt them all over himself. Not thinking that Aiden had swallowed any, Robert did not inform Corinna of the incident. Following the confession, Robert immediately told authorities that Corinna had nothing to do with the accident, and consented to extradition to Spain to face charges of murder/manslaughter. The Spanish authorities continued to demand Corinna's surrender. Despite the fact that she had a six-month-old daughter who was exclusively breastfeeding, her extradition was ordered in January 2009.
63. Once in Tenerife, Corinna spent a year on remand. During this time she was detained in a prison without any heating, despite the fact that it was located in a cold, mountainous area of Tenerife. Corinna has described how the cell she was kept in was so damp that mould would grow on the walls overnight. This environment had a severe impact on Corinna's pre-existing health conditions, which included muscular atrophy, arthritis and kidney damage. In March 2010, Corinna was finally granted provisional release, with the court pointing out that there was no evidence implicating Corinna in her son's death. However, she is not allowed to leave Spain and cannot care for her daughter who is still in the UK and now three. Corinna is struggling to find work and appropriate medical care.

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**52%**

*Percentage of pre-trial detainees in Spain who are foreign nationals (see comparative research in Appendix 2)*

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## **David Brown – Czech Republic**

*David’s case highlights: the appalling pre-trial detention conditions in some Member States and the extent to which they undermine trust in “mutual recognition” instruments like the EAW.*

64. David Brown (not his real name), a Czech citizen, was convicted in October 2003 of theft and robbery offences in the Czech Republic. David was sent to Valdice high security prison where, he says, two attempts were made on his life and he was raped by fellow prisoners. In December 2004 he was transferred to another prison where he was subjected to violent attacks by other inmates. His convictions were eventually quashed and he was released in April 2005.
65. David went to live in the UK but was shocked when, in 2010, he was arrested on a Czech European Arrest Warrant. He had no idea that his case had been retried in his absence following a prosecution appeal, resulting in a further term of imprisonment. David was worried that if he was returned to a Czech prison he would not receive adequate treatment for various medical conditions he now suffers from, including HIV and bipolar disorder. Despite this the UK ordered his extradition in April 2010. He appealed, but due to errors made by his previous lawyers his appeal was filed out of time and rejected. He was extradited in April 2011.

## **Detainees in English prison**

66. In July 2011, FTI visited a mixed gender prison in England which holds both convicted and pre-trial detainees. FTI interviewed eight female non-national prisoners (all from EU countries) about their experiences on remand. A summary of the information they provided is set out below (anonymised). All were generally happy with the conditions of detention. However, many felt that they had been denied release pending trial simply because they were non-nationals.

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**12,266**

*Approximate number of pre-trial detainees in England and Wales (see comparative research in Appendix 2)*

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Ms A

- Spent one month in pre-trial detention.
- Denied release as she was deemed a flight risk despite the fact that she has lived in the UK for six years, has a large family (including four children) in the UK and, prior to pre-trial detention, was in employment.
- Pre-trial detention hearing took place via video-link and she could not understand the proceedings.

Ms B

- Spent four months in pre-trial detention; denied release on the basis that she would abscond.
- She was unhappy with the range of recreational activities available for detainees and spent a lot of time locked up in her cell.

- She was also unhappy about the fact that she has not been able to talk with her partner, who is a detainee in a different facility.
- Held with convicted prisoners.
- She does not have information about her case, has been visited by a lawyer twice, and has not had any information provided to her about her legal rights.

#### Ms C and Ms D

- Spent one month in pre-trial detention.
- Arrested and bailed in their home country before consenting to extradition to the UK, once surrendered held in pre-trial detention despite the fact that they did not resist extradition and met all supervision conditions in their home countries.
- Kept with convicted prisoners who have mental health and drug problems.
- They have met with a lawyer just once.

#### Ms E

- Held in pre-trial detention for one month.
- Denied release on the basis that she would abscond, although she has lived in England for four years.
- Has had limited access to a solicitor.
- She has problems with hearing and had difficulties understanding the pre-trial detention hearing.

#### Ms F

- Held in pre-trial detention for over one year in relation to a serious offence.
- Denied bail despite the fact that she has been in the UK for six years, had a house, a job and was caring for her one year old daughter.
- Held with convicted prisoners during pre-trial detention.
- Complained of poor translation facilities at pre-trial detention hearing.

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**66%**

*Percentage by which the English and Welsh prison population increased from 1995 to 2009 (see comparative research in Appendix 2)*

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#### Ms G

- Spent six months in pre-trial detention.
- Unhappy with lawyer whom she claims dropped her case once she was convicted.
- She wrote to her lawyer three times and only received a generic feedback form; this led to her appeal deadline being missed.

#### Ms H

- Denied bail on the basis that she was a flight risk, despite the fact that she has lived in the UK for two years with her family.
- Lost home, possessions and documentation while in pre-trial detention.
- Currently serving sentence for conspiracy to commit £2,000 fraud.

- Pleaded guilty on the advice of solicitor because she didn't want to spend longer in pre-trial detention, however she was given a three and half year sentence.

## **Section B: Comparative research**

67. FTI has conducted detailed comparative research on the pre-trial detention regimes of 15 EU Member States: the Czech Republic, England and Wales, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain and Sweden. These countries were selected as they provide a representative picture across several distinct regions and legal systems in the EU. This selection also includes the five EU countries with the largest overall prison populations.<sup>34</sup> The legal research was carried out with the generous assistance of Clifford Chance LLP.
68. FTI's professional network, the Legal Experts Advisory Panel, has members in virtually all of these countries, thus enabling us to gather information on the reality on the ground in these Member States. Unfortunately, this reality often contrasts markedly with what the law provides. Our 15 country studies focus on the legal basis for imposing pre-trial detention, the available alternatives to remanding defendants in custody, and fundamental rights concerns in practice. The full country studies can be found in Appendix 2. Set out below are common areas of concern and issues of particular importance in the countries we have researched.

### **Pre-trial detention comparative research: summary of main findings**

69. Several countries have no maximum period of pre-trial detention laid down in their legal systems,<sup>35</sup> others allow extensions with no upper limit<sup>36</sup> and others have maximum periods which are, in FTI's view, too long (some, for example, extend to four years).<sup>37</sup>
70. Overcrowding and other poor material prison conditions that seriously undermine effective trial preparation have been reported in over half of the countries examined.<sup>38</sup> Restrictions on the right to a regular and reasoned review of the decision to remand in custody, and the right to regular confidential contact with a lawyer, have similarly been reported in the majority of countries examined.<sup>39</sup> Perhaps unsurprisingly, the ECtHR has made recent findings of Article 5 violations against several of these Member States.<sup>40</sup> Many countries have inadequate compensation mechanisms or make awards of nugatory value where a person is found to have been detained contrary to Article 5.
71. Particular concerns, by country, are summarised below. (For sources, please consult footnotes in the full country reports, Appendix 2.)

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<sup>34</sup> England and Wales, Poland, Spain, Germany and Italy, source: Commission Green Paper

<sup>35</sup> Romania, Spain, Ireland, Lithuania

<sup>36</sup> Poland, Germany

<sup>37</sup> Czech Republic: four years, France: four years, Slovakia four years, Spain four years (though these tend to apply to some offence categories and not others)

<sup>38</sup> Czech Republic, Greece, Ireland, Italy, Lithuania, Poland, Romania, Slovakia, Spain

<sup>39</sup> Czech Republic, Greece, Italy, Poland, Romania, Slovakia, Spain, Sweden

<sup>40</sup> Czech Republic, France, Germany, Greece, Poland, Romania, Slovakia, Spain

## **Czech Republic**

The ECtHR has found the Czech Republic to have imposed excessive periods of pre-trial detention and failed to use special diligence in the conduct of proceedings. In one case the defendant was held for four years on the grounds that he represented a flight risk because he was a foreign national, had family abroad and was facing a lengthy sentence. The ECtHR held that these reasons could not justify the conclusion he would abscond. Overcrowding is a problem, with Czech prisons operating at 113% capacity. This has a severe effect on conditions: cells in remand sections of some prisons are dilapidated and access to legal advice is insufficient for pre-trial detainees, who are sometimes questioned by police without the presence of a lawyer.

## **England and Wales**

England and Wales has the largest overall prison population in the EU. The maximum length of pre-trial detention is 182 days. This can be extended in exceptional cases. The pre-trial detention regime is rarely found to be in violation of the ECHR. Article 5 rulings against the UK stem from legislation that limits the possibility of release for defendants who have previously been convicted of serious offences such as murder, manslaughter and rape. Defence lawyers and non-national detainees complain of discrimination against non-nationals in pre-trial detention hearings. Prison overcrowding is a major problem. This has been exacerbated following the widespread riots in England in August 2011. Many suspected rioters were denied release pending trial: 70% of defendants were remanded in custody to await Crown Court trial, compared to a normal rate of 2%.

## **France**

The maximum lengths of pre-trial detention in France depend on the penalty the defendant would face if convicted, and can range from four months to four years. In one case the ECtHR found France in breach of Article 5 when a person was held for six years. The law allows considerations of "ordre public" (public policy) to be taken into account in decisions on pre-trial detention: this is an unusual factor and of questionable status in light of ECtHR case law. Despite the recent introduction of a "Liberty and Security Judge" independent of the investigating judge and prosecutor, concerns persist about this judge's genuine independence from the prosecution and about the lack of involvement of defence counsel.

## **Germany**

Germany has the fourth largest overall prison population in the EU. There has been a steady decrease in the number of pre-trial detainees as well as the general prison population in Germany over the past decade and, in 2009, 44% of Germany's pre-trial detainees were foreign nationals. Concerns have been raised by German defence lawyers that pre-trial detention is often used as a measure to "motivate" a

confession and speed the investigation process. There have also been reports that non-nationals are often remanded in custody in circumstances where German defendants would not.

### **Greece**

In 2010 pre-trial detainees in Greek prisons made up 31% of the total prison population. In 2008 64% of pre-trial detainees were foreign nationals. Although Greek law states that pre-trial detention is an exceptional measure, it has in practice become the norm, although recent legal reforms could herald a change. The seriousness of the alleged offence is often the main reason for imposing and extending pre-trial detention. Many pre-trial detainees have complained that they have not been provided with interpreters or legal advice in prison. Overcrowding is a serious problem, with 2009 occupancy levels at 146% of official capacity. Korydallos high security prison was at 300% capacity. Conditions have been heavily criticised, leading to hunger strikes and Article 3 violation findings.

### **Ireland**

There is no legal limit to the amount of time a defendant can spend in pre-trial detention in Ireland. Detainees can spend 12 months in custody without any intervening review of the grounds for detention. Non-nationals are more likely to be held in detention. 31% of pre-trial detainees were foreign nationals in 2009. Courts can take into account the nature and seriousness of the alleged offence. The law allows for electronic tagging but there is little use of this yet. Overcrowding is a growing problem.

### **Italy**

Italy has the fifth largest overall prison population in the EU and pre-trial detainees make up 42% of the total prison population. In 2009, 44% of pre-trial detainees were foreign nationals. The decision to order detention is not one in which the defendant plays any part. It is not made in public and does not represent a thorough, reasoned process of review. Italy is frequently found in breach of the "reasonable time" requirement in Article 6(1) ECHR and systemic delays in releasing defendants from pre-trial detention have also led the ECtHR to find Italy in violation of Article 5(3). As at February 2011, Italy's prisons were 49% above official capacity. A special regime applies to defendants accused of mafia and terrorist offences suspected of having links with criminal groups. They are not allowed to make calls to relatives for the first six months of detention and are subject to cell searches when absent, giving rise to concerns about the confidentiality of legal correspondence.

### **Luxembourg**

There is no legal limit to the length of pre-trial detention in Luxembourg. However, in practice, detention ends when the time spent on remand equals the expected sentence. In 2009, 85% of pre-trial detainees were foreign nationals. A non-national

without the right of residence in Luxembourg can be placed in pre-trial detention if serious indications of his guilt exist and if the alleged offence can attract a sanction reserved for the most severe category of offences or imprisonment. It has been reported that female pre-trial detainees have been held in the prison with their young children, who were forced to endure overcrowded conditions and excessive periods locked in a cell. There have also been reports of violence, racism and criminality at the Schrassig detention centre. Luxembourg's prison authorities have been criticised for using solitary confinement as a disciplinary measure and holding suspects in cages prior to interrogation.

### **The Netherlands**

In 2010 pre-trial detainees made up 36% of the total prison population. In 2009, 24% of pre-trial detainees were foreign nationals. The law differs in its treatment of nationals and non-resident non-nationals and the latter can be detained pre-trial on wider grounds than the former. Remand centres have been criticised for having harsher regimes than prisons for convicted persons.

### **Poland**

Poland has the second largest prison population in the EU. Pre-trial detention can be imposed for up to three months, which can be extended by a further nine months. However, the Appellate Court can extend this even further. It has been reported that despite pre-trial detention safeguards under Polish law, prosecutors and courts impose pre-trial detention automatically, without providing adequate justification. Polish Ministry of Justice figures show that between 2001 and 2007, 90% of the prosecutor's applications for pre-trial detention were successful. The ECtHR regularly criticises Poland for breaching Article 5(3) and Article 6 by imposing excessive lengths of pre-trial detention and failing to provide adequate reasons for, or to consider alternatives to, pre-trial detention. FTI has been told that pre-trial detainees are subjected to appalling prison conditions. The right of access to a lawyer is rarely exercised, as there is no legal aid available. Access to the case file is also limited, preventing the lawyer from accessing information which could be used to challenge continued pre-trial detention.

### **Portugal**

The law allows pre-trial detention of up to two years and six months where the case is particularly complex and involves serious crimes. In 2009, 36% of pre-trial detainees were foreign nationals. Although the average length of pre-trial detention is eight months, approximately 20% of pre-trial detainees spend more than one year in detention. It has been reported that these lengthy periods are a result of delayed investigations and judicial inefficiency. Concerns have also been raised about alleged ill-treatment of prisoners by custodial staff and the denial of access to a lawyer and a doctor for those in police custody.

## **Romania**

Under Romanian law the maximum period of detention during the criminal investigation phase is 180 days. There is no specified maximum period for which the defendant can be held in detention during the trial phase. Romania's pre-trial detention population has dropped significantly from 10,831 in 1999 to 3,946 in 2009. However, the country has been criticised for the ill-treatment of detainees and the use of brutal mistreatment to extract evidence which has then been adduced in court. The ECtHR has found Romania in breach of the ECHR due to lengthy delays before judicial authorisation of detention, excessive lengths of pre-trial detention, and inhuman and degrading pre-trial detention conditions.

## **Slovakia**

The maximum period of pre-trial detention is 4 years. Numerous violations of Article 5(1) and 5(4) have been found to have occurred as a result of excessive length of pre-trial detention and procedural shortcomings of review of pre-trial detention. The ECtHR has found Slovakia in violation of the Article 5(3) ECHR for imposing pre-trial detention for periods between two and three years without domestic courts displaying "special diligence" in the conduct of the proceedings. The court has also made Article 5 findings against Slovakia for imposing pre-trial detention without providing sufficient reasons.

## **Spain**

The maximum period of pre-trial detention in Spain is four years. Practitioners report that decisions on pre-trial detention are generally taken without a full consideration of whether detention is proportionate. In 2009 52% of pre-trial detainees were foreign nationals. Defendants facing serious charges, such as terrorism, can be held in *incommunicado* detention. Under this regime, the defendant can be held for up to 13 days during which certain fundamental rights are severely curtailed: no visits or communication with the outside world; no right to notify family or friends of detention or whereabouts; no right to choose own lawyer or have meaningful communication with state-appointed lawyer during the *incommunicado* period. In 2008 the International Commission of Jurists noted that "Prolonged incommunicado detention can itself amount to torture or cruel, inhuman or degrading treatment." Another feature of Spanish pre-trial detention includes the use of secret legal proceedings, or "secreto de sumario", which severely restricts access to the details of the case, including the charges and evidence in the case until up to 10 days before the closing of the investigative phase.

## **Sweden**

There is no maximum period of pre-trial detention in Sweden, but if no action towards conditional release has been taken within 14 days of detention, a new remand hearing is required. In 2010 the US State Department noted that although

prison conditions generally met international standards, pre-trial detainees were subject to extended isolation and severe restrictions on their activities. The court has no say over which restrictions should be imposed. Instead the prosecutor applies for general permission to impose restrictions it deems necessary. There are no means to appeal the decision to impose a specific restriction (e.g. isolation from family members). In 2005 the Swedish government set up a commission to propose new legislation on the treatment of persons remanded in custody. The commission reported in 2006, making proposals which included allowing defendants to appeal against restrictions in pre-trial detention. The proposals are still under consideration by the Ministry of Justice.

## **Section C: Pre-trial detention – general principles**

72. The ECtHR has made a range of findings in relation to the pre-trial detention. These decisions represent a set of minimum standards which all Convention signatories should observe. Set out below are the general principles regarding pre-trial detention established by the ECtHR.
73. Article 5 ECHR states that “everyone has the right to liberty and security of the person”. An exception to this right to liberty is lawful pre-trial detention. Article 5(1)(c) states that a person’s arrest or detention may be “effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”.
74. Article 5(3) contains a protection for pre-trial detainees, stating that anyone detained in accordance with Article 5(1)(c) must be “brought promptly<sup>41</sup> before a judge or other officer authorised by law to exercise judicial power”. The ECtHR has stated that “such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment”.<sup>42</sup> A pre-trial detainee “shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”<sup>43</sup>
75. Anyone deprived of liberty under the exceptions set out in Article 5 “shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful” (Article 5(4)).
76. The ECtHR has stressed the “fundamental importance” of the guarantees contained in Article 5, which contains “a corpus of substantive rights intended to ensure that the act of deprivation of liberty is amenable to independent judicial scrutiny and secures the accountability of the authorities for that measure”.<sup>44</sup> We set out below a detailed analysis of the key decisions of the Court.

### ***Release pending trial***

77. During the pre-trial period there is a presumption in favour of release; continued detention “can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention”.<sup>45</sup> The Court has never set out a comprehensive list of factors justifying pre-trial detention.

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<sup>41</sup> The limit of acceptable preliminary detention has not been defined by the ECtHR, however in *Brogan and others v UK* [1988] ECHR 24, the court held that periods of preliminary detention ranging from four to six days violated Article 5(3)

<sup>42</sup> *Medvedyev and others v France* [2010] ECHR 384, Para 118

<sup>43</sup> Article 5(3)

<sup>44</sup> *Bazorkina v Russia* [2006] ECHR 751, Para 146

<sup>45</sup> *McKay v UK* [2006] ECHR 820 Para 42

78. The burden is on the state to show why the defendant cannot be released: “Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention.”<sup>46</sup>
79. Suspicion that the defendant has committed an offence is not enough in itself to justify continuing detention, no matter how serious the offence and the strength of the evidence against him.<sup>47</sup> The Court has “repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand”.<sup>48</sup>
80. Release pending trial is often refused by national courts on the grounds that there is a risk that the person will abscond prior to trial.<sup>49</sup> The ECtHR has found that “the mere absence of a fixed residence does not give rise to a danger of flight”.<sup>50</sup> Although such a danger may exist where the sentence faced is a long term of imprisonment, “the risk of absconding cannot be gauged solely on the basis of the severity of the sentence faced”.<sup>51</sup> Where such a risk is deemed to exist, the authorities are under a duty to consider alternatives to detention which will ensure the defendant appears at trial.<sup>52</sup>
81. When release pending trial is refused on the basis that the defendant may commit further offences prior to trial<sup>53</sup> the national court must be satisfied that the risk is substantiated. A reference to the defendant’s antecedents does not suffice to justify continued detention on the grounds that there is a danger he will reoffend.<sup>54</sup> Instead, there must be evidence of the propensity to reoffend. A danger of reoffending in no way suffices to make pre-trial detention lawful where “it is a matter solely of a theoretical and general danger and not of a definite risk of a particular offence”.<sup>55</sup> Furthermore, it cannot be concluded from “the lack of a job or a family that a person is inclined to commit new offences”.<sup>56</sup>
82. When it comes to fixing a financial surety as a condition for release pending trial the national authorities must “take as much care in fixing appropriate bail as in deciding whether or not the accused’s continued detention is indispensable”.<sup>57</sup> The amount set must take into account the defendant’s means.<sup>58</sup>

### **Review of pre-trial detention**

83. As discussed above, Article 5(4) requires that the lawfulness of detention must be subject to review. The “court” referenced in Article 5(4) must be a body of “judicial character” offering “fundamental guarantees of procedure applied in matters of

<sup>46</sup> *Ilijkov v Bulgaria* [2001] ECHR 489, Para 85

<sup>47</sup> *Tomasi v France* [1992] ECHR 53, see also *Caballero v UK* [2000] ECHR 53

<sup>48</sup> *Ilijkov v Bulgaria* [2001] ECHR 489, Para 81

<sup>49</sup> Something specifically envisaged by Article 5(1)(c)

<sup>50</sup> *Sulaoja v Estonia* [2005] ECHR 104, Para 64

<sup>51</sup> *Muller v France* [1997] ECHR 11, Para 43, see also *Barfuss v Czech Republic* [2000] ECHR 403

<sup>52</sup> *Wemhoff v Germany* [1968] ECHR 2

<sup>53</sup> Again, a ground set out in Article 5(1)(c)

<sup>54</sup> *Muller v France* [1997] ECHR 11, Para 44

<sup>55</sup> *Matznetter v Austria* [1969] ECHR 1, concurring opinion of Judge Balladore Pallieri, Para 1

<sup>56</sup> *Sulaoja v Estonia* [2005] ECHR 104, Para 64

<sup>57</sup> *Mangouras v Spain* [2010] ECHR 1364, Para 79

<sup>58</sup> *Ibid.* Para 80

deprivation of liberty”.<sup>59</sup> This body must be “independent both of the executive and of the parties to the case”.<sup>60</sup> Furthermore, it must have the ability to order the defendant’s release if detention is deemed unlawful.<sup>61</sup> The court must give reasons for its decision regarding the detention and must not use identical or “stereotyped” forms of words.<sup>62</sup>

84. The review must be able to be initiated by the defendant,<sup>63</sup> and should “be wide enough to bear on those conditions which are essential for the ‘lawful’ detention of a person according to Article 5(1).”<sup>64</sup> It must be an adversarial oral hearing.<sup>65</sup> In “proceedings in which an appeal against a detention order is being examined, equality of arms between the parties, the prosecutor and the detained person must be ensured”.<sup>66</sup> In this context the opportunity of challenging prosecution arguments against release may, in certain instances, require that the defence be given access to the case file.<sup>67</sup>

85. Article 5(4) requires that the lawfulness of detention shall be decided “speedily”. Whether this has been complied with is determined on the facts of each case. In straightforward cases, the Court has held that a three week period between initial detention and an application for release pending trial was too long.<sup>68</sup> Where the justification for detention is liable to vary over time, Article 5(4) enables the defendant to apply for review of the legality of detention at regular intervals.<sup>69</sup>

### ***Length of pre-trial detention***

86. The right to trial within a reasonable time under Article 5(3) can only be invoked by those in pre-trial detention.<sup>70</sup> In determining whether a reasonable time has elapsed, national courts must consider whether the pre-trial period has “imposed a greater sacrifice than could, in the circumstances of the case, reasonably be expected of a person presumed to be innocent”.<sup>71</sup>

87. Article 5(3) “implies that there must be special diligence in the conduct of the prosecution” of pre-trial detainees’ cases.<sup>72</sup> A detained person is entitled to have the case given priority and conducted with particular expedition.<sup>73</sup> The ECtHR has found periods of pre-trial detention lasting between two and a half years<sup>74</sup> and almost five years<sup>75</sup> to be excessive.

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<sup>59</sup> *De Wilde, Ooms and Versyp v Belgium* [1971] ECHR 1, Para 76

<sup>60</sup> *Neumeister v Austria* [1968] ECHR 1, Para 24

<sup>61</sup> *Singh v UK* [1996] ECHR 9

<sup>62</sup> *Yagci and Sargin v Turkey* 1995 ECHR 20

<sup>63</sup> *Rakevich v Russia* [2003] ECHR 558

<sup>64</sup> *E v Norway* [1990] ECHR 17, Para 50

<sup>65</sup> *Assenov v Bulgaria* [1998] ECHR 98

<sup>66</sup> *Wloch v Poland* [2000] ECHR 504, Para 126

<sup>67</sup> *Ibid.* Para 127

<sup>68</sup> *Rehbock v Slovenia* (App. 29462/95) 28 November 2000

<sup>69</sup> *De Jong, Baljet and van der Brink v Netherlands* [1984] ECHR 5

<sup>70</sup> Once release pending trial is granted the situation is governed by Article 6(1)

<sup>71</sup> *Wemhoff v Germany* [1968] ECHR 2, Para 5 of “As regards Article 5(3) of the Convention”

<sup>72</sup> *Stogmuller v Austria* [1969] ECHR 25, Para 5 of “As to the law”

<sup>73</sup> *Wemhoff v Germany* [1968] ECHR 2

<sup>74</sup> *Punzelt v Czech Republic* [2000] ECHR 170

<sup>75</sup> *PB v France* (App. 38781/97) 1 August 2000

## **The need for legislation to set binding minimum standards**

88. The ECtHR's jurisprudence on Article 5 and pre-trial detention sets out general principles<sup>76</sup> which we believe should now be enshrined in an EU Directive, for the four reasons set out below.

### **1. ECtHR decisions insufficient**

89. All EU Member States, as signatories to the ECHR, must ensure that the principles espoused by the ECtHR in relation to pre-trial detention are observed in their domestic systems. Unfortunately, this is not happening in practice. As the European Commission noted in its latest report on the operation of the EAW, the fact that all EU States are subject to the standards set out in the ECHR as interpreted by the ECtHR "has not proved to be an effective means of ensuring that signatories comply with the Convention's standards".<sup>77</sup>

90. EU Member States are consistently found to have breached Convention rights. For example, last year alone EU Member States were found to have violated Article 5 in 70 separate cases. Between 2007 and 2010 the ECtHR found that EU Member States violated Article 6 rights in 1,696 cases.<sup>78</sup> Given the narrow admissibility criteria, the need to exhaust domestic remedies and the sheer impossibility for the majority of claimants to resource litigation in the Strasbourg court, this is only the tip of the iceberg.

### **2. Competence: impact on mutual recognition**

91. As the Commission notes in its Green Paper, 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>79</sup> Poor standards of protection for basic rights across the EU erode the trust necessary for mutual recognition and undermine confidence in existing<sup>80</sup> and forthcoming<sup>81</sup> mutual recognition measures.

92. There is therefore a clear legal base for legislation in this area under Article 82(2)(b) of the Treaty on the Functioning of the European Union, as pre-trial detention (indeed, all detention in the criminal justice context) engages with "the rights of individuals in criminal procedure". To limit this legislation's application to cross-border cases would be discriminatory – affording non-national defendants more rights than national ones – and for this reason it must have general effect.

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<sup>76</sup> See summary at Paragraph 14 above

<sup>77</sup> Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision on the EAW, 11 April 2011, p.6

<sup>78</sup> European Court of Human Rights: statistical information

<sup>79</sup> Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327 final, 14 June 2011, p.3

<sup>80</sup> Such as the European Arrest Warrant (2002/584/JHA)

<sup>81</sup> Such as the European Investigation Order

93. Varying standards in pre-trial detention across Europe not only weaken trust between Member States, they also undermine the EU's justice and home affairs policy mandate. Many of our cases at FTI illustrate the human impact of placing cooperation before defence rights. The EU's Roadmap for strengthening procedural rights<sup>82</sup> has represented a significant step forward in this regard and progress with the remaining measures is essential. Legislation in the field of pre-trial detention is the natural continuation of this important work.

### **3. Benefits of EU legislation for individuals – making rights enforceable**

94. Rather than the lengthy and costly process of exhausting domestic remedies before taking a case to the ECtHR, a Directive would ensure that basic rights are enshrined in domestic law and remedies available at national level if they are violated. The Commission would be able to take infringement proceedings against Member States who failed to implement or properly apply the Directive, and the legislation would enjoy precedence over conflicting domestic law due to the principle of direct effect.

### **4. Certainty and consolidation to aid training**

95. A Directive would consolidate and clarify all the principles which at present can be found in disparate judgments. This would create the certainty necessary to form the basis of guidance and training for judges, prosecution authorities and defence lawyers. This would ensure respect for these basic principles in practice.

96. While legislation is not the only option, FTI believes that these principles are so fundamental that this is by far the most effective way to ensure that they are observed in practice. Set out below are our initial proposals on the key elements of a Directive on pre-trial detention.<sup>83</sup>

#### **Article A – Release pending trial**

1. Member States shall ensure that once a person is detained on suspicion of having committed an offence he is brought promptly before a court so the lawfulness of his detention can be determined. For the purposes of this Article “promptly” shall mean no more than 24 hours after arrest except in exceptional circumstances.
2. The court must order the person's release unless it is satisfied, on the balance of probabilities, that there is a real risk that if released he will:

<sup>82</sup> Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, (2009/C 295/01), 30 November 2009

<sup>83</sup> Legislative suggestions in relation to detention conditions are beyond FTI's remit. However, regarding detention conditions, we recommend that all Member States which have not yet ratified the UN's Optional Protocol to the Convention against Torture (OPCAT), and implemented the necessary inspection regimes, do so as soon as possible

- a) Fail to appear at trial;
  - b) Interfere with evidence or witnesses in the case;
  - c) Commit an offence; or
  - d) Be at risk of suffering physical harm, either inflicted by himself or others.
3. The court must hold a presumption in favour of release which is to be rebutted by proper evidence only.
  4. A court is to be defined as an independent body of judicial character which has the power to order the person's release and holds hearings in an open and transparent manner.

### **Article B – The decision-making process**

1. The court must:
  - a) Make its decision following an oral hearing at which the person has the opportunity to present arguments in favour of release (the person must, if he so wishes, have legal representation at this hearing, legally aided if necessary);
  - b) Consider all relevant alternatives to pre-trial detention, including the use of Council Framework Decision 2009/829/JHA and Council Framework Decision 2002/584/JHA;
  - c) Give reasons for refusing to release the person; and
  - d) Take into account the person's means when fixing any financial surety.
2. The court must not:
  - a) Refuse release only on the basis of the seriousness of the alleged offence;
  - b) Find the person is at risk of failing to appear at trial only on the basis that he is a non-national or does not have a fixed residence; or
  - c) Find that the person is at risk of committing an offence on the basis of a theoretical or general risk.

### **Article C – Review of pre-trial detention**

1. Member States shall ensure that a person held in pre-trial detention has the right to request a monthly review of whether his continued detention is necessary.
2. When this review takes place it must be a genuine reassessment of the need for detention and must be conducted in the same manner as set out in Articles A and B.
3. When determining whether continued detention is necessary the court must consider:

- a) The amount of time the person has already spent in pre-trial detention;
- b) The principle that a person who is detained on the basis of being accused of having committed an offence is entitled to a trial within a reasonable time; and
- c) The reasons for any delays in bringing the case to trial.

#### **Article D – Pre-trial detention conditions and preparation for trial**

1. Prosecution authorities must conduct the preparation of a case with special diligence where the accused is being held in pre-trial detention.
2. Every effort must be made to ensure that the person's pre-trial detention does not impair his ability to prepare for trial. To this end a person in pre-trial detention must have adequate access to a lawyer and information necessary to prepare his defence (including, for example, information about the case against him and about applicable procedural rights).

#### **Article E – Remedies and compensation**

1. Member States shall ensure that a person has an effective remedy in instances where his rights as set out in the Articles above have been breached.
2. Member States shall ensure that their domestic law provides a person with an enforceable right to compensation where he is detained in contravention of these Articles.

#### **Article F – Non-regression**

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards enshrined in the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and Fundamental Freedoms, other relevant provisions of international law or the laws of any Member State that provides a higher level of protection.

## Concluding recommendations

97. Pre-trial detention provides an important way to ensure defendants attend trial, to protect the evidence and witnesses in a case, and prevent reoffending behaviour. However, pre-trial detention should only ever be used as a last resort, in a non-discriminatory manner and when all other alternatives have been considered and deemed inappropriate. In cases where remand in custody is absolutely necessary, steps should be taken to ensure that the trial preparation is conducted in a speedy manner and in a way that safeguards equality of arms.

98. Fair Trials International therefore makes the following recommendations:

**1) The EU should legislate to set minimum standards for the use of pre-trial detention in the EU and for effective and regular judicial review.**

The ECtHR, interpreting the ECHR, sets out minimum standards with which all Member States have agreed to comply. In practice, however, EU Member States are failing to meet these obligations, in particular in relation to pre-trial detention. This failure has a significant human and financial impact, both to the individuals concerned and their families, and also to wider society in terms of the costs of detaining suspects unnecessarily and the cost of supporting individuals and families when the main breadwinner is detained. Unlawful detention also jeopardises the good faith that exists between EU Member States and that is the foundation of mutual recognition. It is incumbent on the EU to take decisive legislative action in order to protect individuals and preserve the principle of mutual cooperation based on mutual trust. FTI's suggestions for legislation in this area are outlined above.

**2) Member States should implement the European Supervision Order in a way which means it represents a real and practical alternative to pre-trial detention.**

To be effective the ESO system must be seen by judges across the EU as a viable alternative to pre-trial detention. Mutual trust is central to the ESO's successful operation. However, there is a danger that the instrument will not be used consistently across all Member States, but only between those countries where mutual trust already exists. There is a further risk that the ESO will be used to return people to Member States that have more advanced supervision mechanisms and better-resourced police forces. Meanwhile, accused persons from countries deemed (by prosecuting States) to be less able to enforce supervision measures will remain in pre-trial detention. This would lead to inequality in the way defendants benefit from the ESO.

To ensure the proper functioning of the ESO, Member States, aided by the EU, must:

- Provide training for judges, prosecutors and lawyers on how the ESO can be used;
- Improve domestic mechanisms for monitoring conditional release if currently inadequate; and

- Facilitate easy access to details about other countries' arrangements for monitoring supervision measures so that judges can make informed decisions at review hearings about whether, and in what terms, to issue an ESO.

**3) Deferred surrender under the EAW should be used, in appropriate cases, to avoid unnecessary pre-trial detention post-extradition.**

Many people who approach FTI for assistance are facing imminent extradition under the EAW. Too often we see this fast-track system being used automatically, without prosecution authorities considering alternatives to immediate extradition. Defendants are often surrendered to a Member State where the fact they are non-national can mean they are denied release pending trial. As a result, they have to spend lengthy periods in pre-trial detention. This is unjust to the individuals involved and is a waste of resources. The ESO should remedy some of these problems.

However, the comprehensive use of the ESO must be accompanied by a “smarter” approach to extradition. The EAW was designed to achieve speedy surrender and therefore it should not be used if prosecuting authorities in the issuing State are nowhere near ready for trial. Deferred issue and negotiated deferred surrender should be used to ensure defendants are not surrendered speedily when there is no prospect of a speedy trial. This will clearly not be possible in all cases; however, as a general rule defendants able to meet supervision conditions in their home country should be allowed to do so until the case is ready for trial. This will reduce the personal and financial impact of extradition (and detention) – benefiting both individuals and the state.

**4) The EU should examine the viability of establishing a flexible one year maximum pre-trial detention limit.**

Article 6(1) ECHR states: “in the determination [...] of any criminal charge against him, everyone is entitled to a fair and public hearing in a reasonable time.” This is a right which is repeated in the pre-trial detention context in Article 5(3) ECHR. It is FTI’s position that it is inherently unreasonable to imprison someone who has not been found guilty of any offence for more than a year, unless there are exceptional prevailing circumstances (for example, the highly complex nature of the case). A 12 month limit, containing the requisite flexibility, is an ideal for which all democratic societies should strive.

FTI therefore believes that a debate is needed on why some countries regularly permit defendants to spend excessively long periods awaiting trial in custody and what the EU’s role should be in establishing constraints, including potentially setting a reasonable EU-wide limit. Our suggested legislation offers a starting point for achieving the goal of a 12 month limit, as it would create a context in which ECHR standards on pre-trial detention (standards which Member States are already obliged to meet) are observed in practice.

In our view, a useful first step in this process could be targeted research by the European Commission to understand the underlying reasons for the wide disparity

between EU countries' use of pre-trial detention and its varying lengths. The Commission must attempt to establish why some Member States can deal with complex cross-border cases in a matter of months and others take years. A programme of information-sharing and exchange of best practice between Member States' judicial and prosecutorial authorities could then be implemented, taking into account the Commission's research.

99. Action at EU level as recommended in this report would illustrate the EU's ability to add value to the ECHR and stop excessive periods of pre-trial detention in some Member States – a scandalous violation of the presumption of innocence and the right to liberty – as well as help promote efficient trial processes, which will benefit the overall interests of justice, including the interests of victims of crime. As we have explained, significant financial savings could also be made.

100. The EU's Roadmap for strengthening procedural rights sets out vital safeguards which will help ensure fundamental rights do not continue to be sidelined in the push for ever-increasing cooperation between Member States. The Commission's Green Paper signals an important first step in raising the standards of pre-trial detention decisions and conditions. It must be followed by concrete and concerted action to ensure that the presumption of innocence, a principle at the heart of any justice system with integrity, is respected in practice across the EU's detention regimes.

**Fair Trials International**

**October 2011**

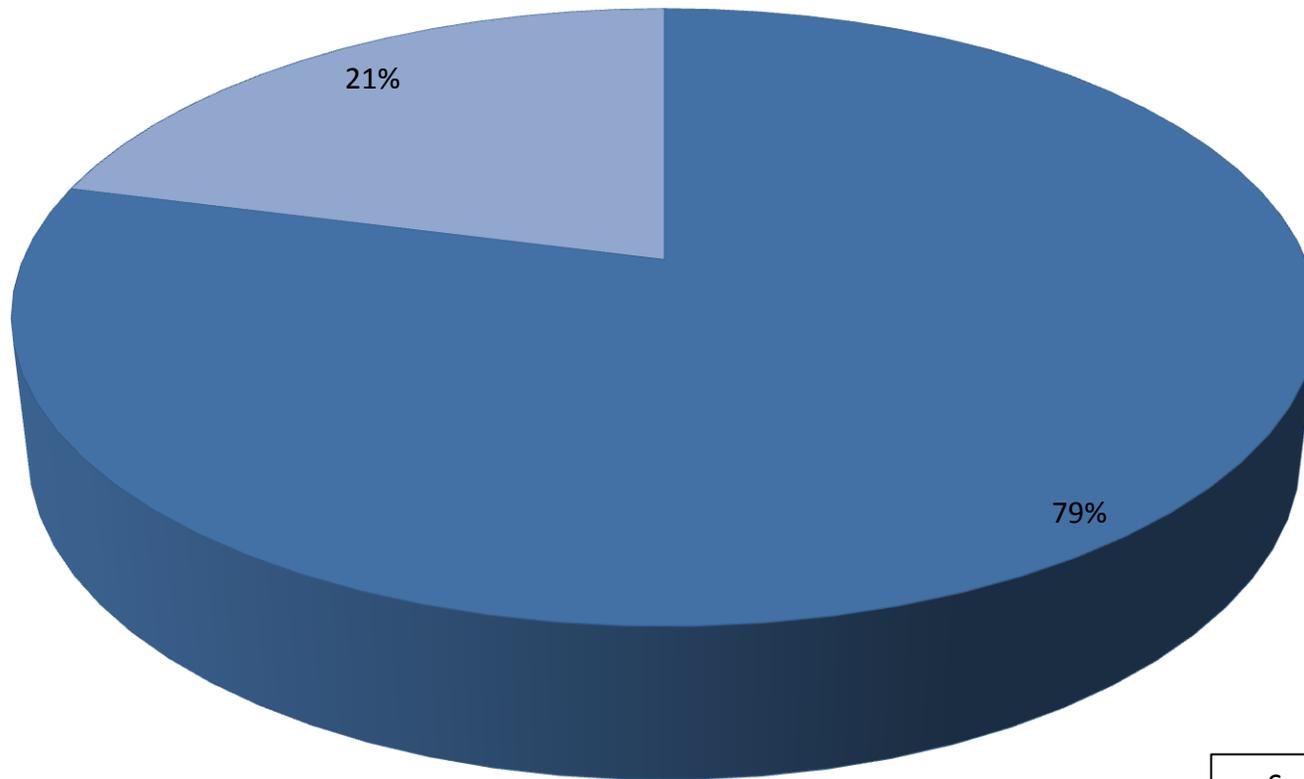
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APPENDIX 1 – Pre-trial Detention Statistics

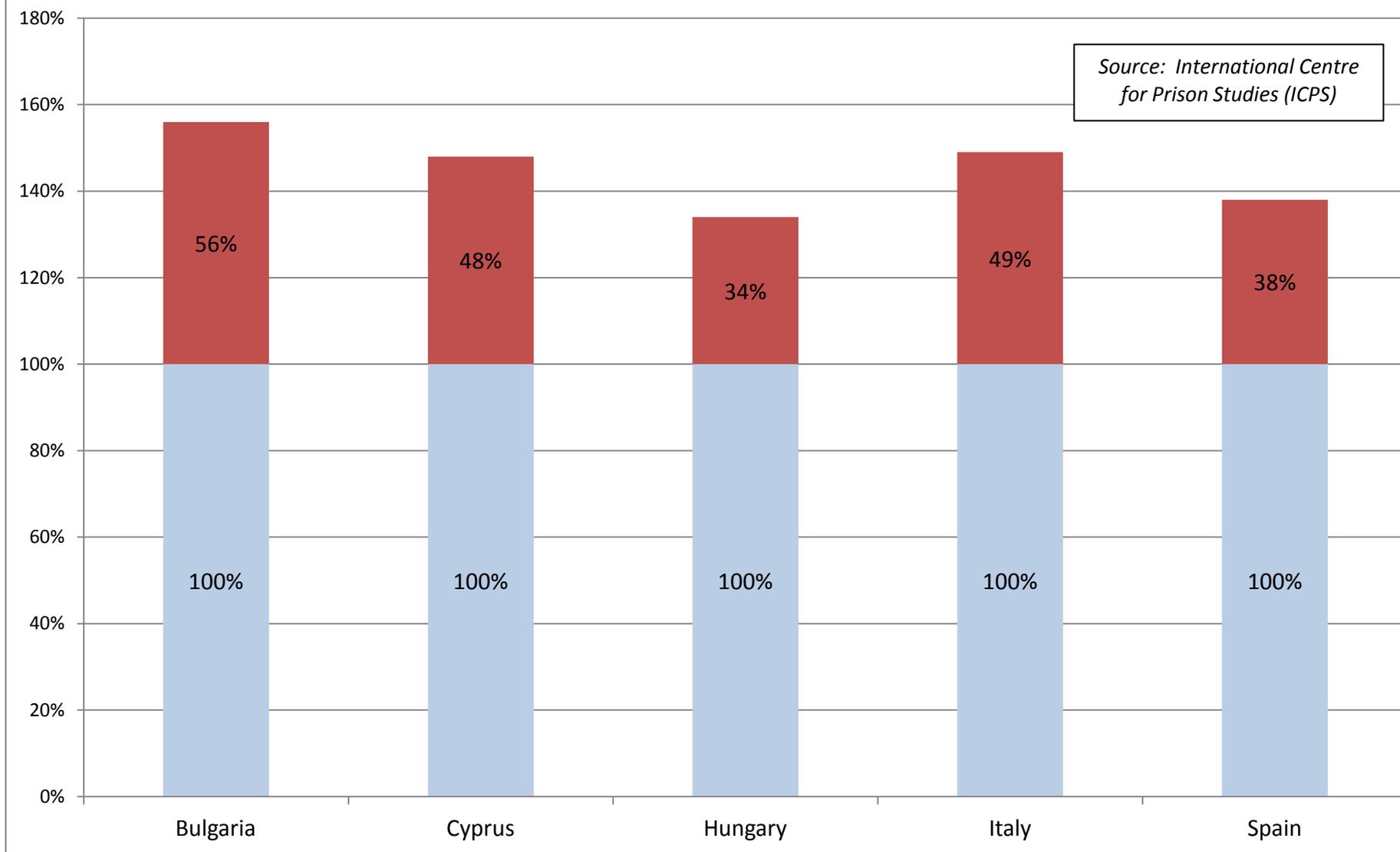
Fig. 1: Percentage of pre-trial detainees in the EU prison population 2010/11



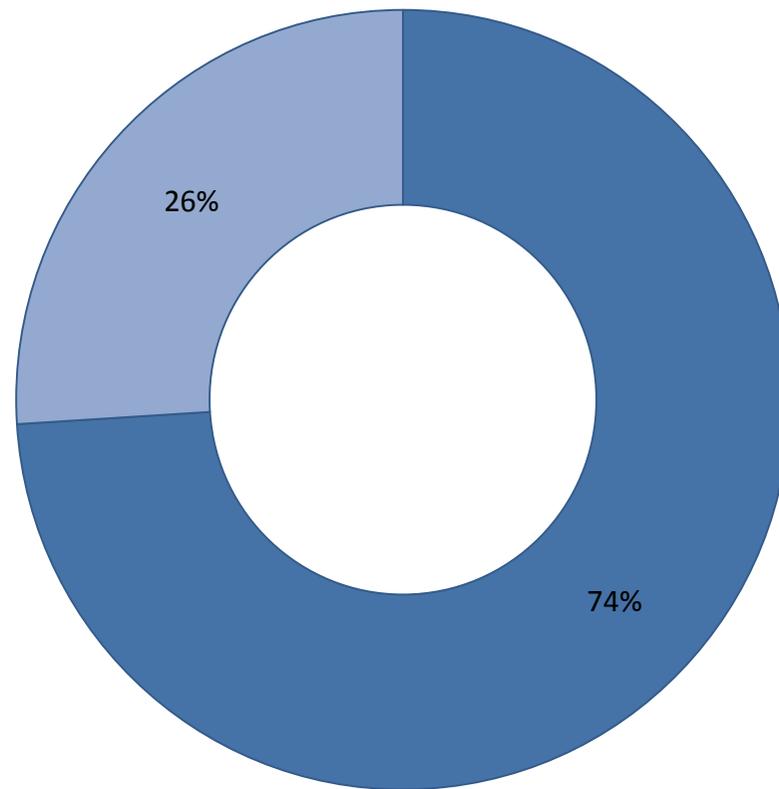
■ Convicted prisoners   ■ Pre-trial detainees

*Source: Council of Europe Annual Penal Statistics – SPACE I*

**Fig. 2: Prison overcrowding: the EU's worst offenders 2010/2011**



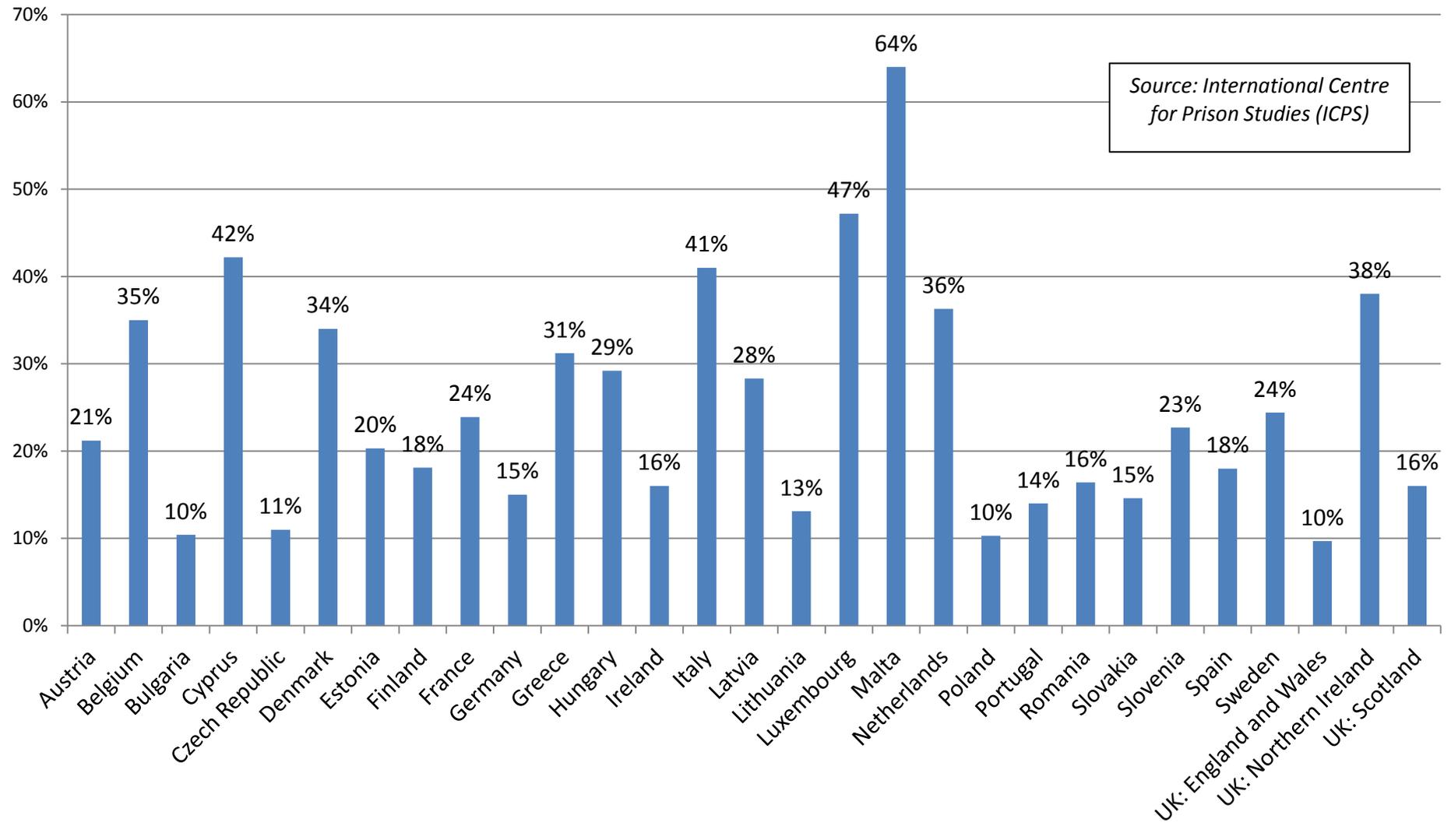
**Fig. 3: Percentage of foreign nationals in pre-trial detention in the EU 2009**



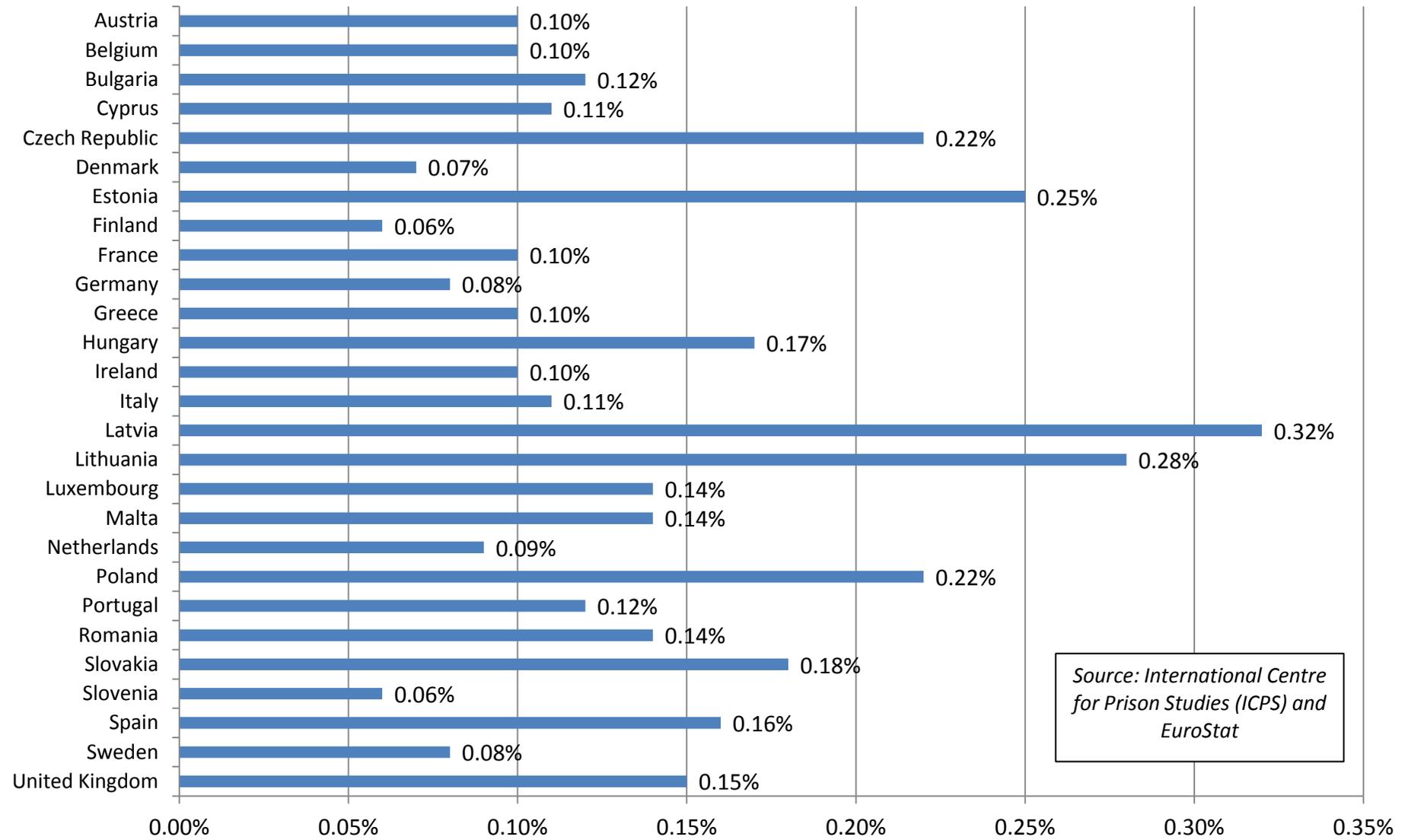
■ Nationals ■ Foreign nationals

*Source: Council of Europe  
Annual Penal Statistics –  
SPACE I*

**Fig. 4: Pre-trial detainees as percentage of prison population 2010/2011**



**Fig. 5: Prison population as percentage of population 2010/2011**



*Source: International Centre for Prison Studies (ICPS) and EuroStat*

# FAIR TRIALS INTERNATIONAL

## APPENDIX 2

### Pre-trial Detention Comparative Research

#### Thanks and acknowledgement

Fair Trials International wishes to thank Clifford Chance LLP for its hard work and support in compiling comparative research for this report. Thanks to the firm's EU-wide network of offices, we have been able to draw on a wealth of legal expertise to present data on how pre-trial detention regimes operate in 15 EU Member States. Thanks also to Emma Brown, Cailean MacLean and Gabriele Ruberto for additional research.

Finally, we would like to thank the following members of our Legal Experts Advisory Panel for reviewing the summaries for their jurisdictions and contributing, as practising defence lawyers, on what actually happens in practice in their countries: Danut-loan Bugnariu, Ben Cooper, Edward Grange, Christian Mesia, Ondrej Muka, Ali Norouzi, Nicholas Philpot, Mikolaj Pietrzak, Georgios Pyromallis, Jozef Rammelt, Dara Robinson, Federico Romoli, Daniel Roos, Zuzanna Rudzinska and Oliver Wallasch.

This comparative research sets out the law and practice in relation to pre-trial detention in the following countries:

- Czech Republic;
- France;
- England and Wales
- Germany;
- Greece;
- Ireland;
- Italy;
- Luxembourg;
- the Netherlands;
- Poland;
- Portugal;
- Romania;
- Slovakia;
- Spain; and
- Sweden.

## Czech Republic

The maximum length of pre-trial detention which may be imposed depends upon the nature of the alleged offence, for the most serious offences the maximum is 16 months.<sup>84</sup> In 2011 there were approximately 2,500 pre-trial detainees in Czech prisons, who made up 11% of the total prison population.<sup>85</sup> In 2010, 22% of pre-trial detainees were foreign nationals.<sup>86</sup>

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**16 months**

*Maximum length of pre-trial detention in the Czech Republic*

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### ***Release pending trial: the law***

Pre-trial detention (or a supervision measure as an alternative to detention) may be imposed if there is a justified concern that:

- the defendant will flee or hide, so as to avoid criminal prosecution or punishment (in particular if it is difficult to immediately determine his identity, when he does not have permanent residence, or if he is facing a severe penalty);
- the defendant will influence the witnesses or co-accused that have not yet given their testimonies or otherwise frustrate the investigation of facts relevant for criminal prosecution; or
- the defendant will repeat the criminal activity for which he is being prosecuted, or complete the criminal offence which he has attempted, or commit a criminal offence that he has planned to commit.<sup>87</sup>

In deciding whether to release the defendant pending trial or remand him in custody, all circumstances of the case, the nature and seriousness of the criminal act and seriousness of the reasons for remanding the accused person in custody must be considered.<sup>88</sup> The judge must hear the detained person before he decides whether to impose pre-trial detention.<sup>89</sup> Proposals for an alternative to pre-trial detention may be filed by the defendant, his lawyer, a public interest group,<sup>90</sup> or a trustworthy person deemed able to positively influence the defendant's behaviour.

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**22%**

*Percentage of pre-trial detainees in the Czech Republic who are foreign nationals*

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A defendant can be released rather than detained, where:

- a public interest group, or a trustworthy person, offers a guarantee for the future behaviour of the defendant (the judge must deem the guarantee to be sufficient and acceptable);

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<sup>84</sup> Section 71.8 of the Code of Criminal Procedure

<sup>85</sup> Source: Prison Service of the Czech Republic, Annual Report 2010

<sup>86</sup> Source: Prison Service of the Czech Republic, Annual Report 2010

<sup>87</sup> Section 67 of the Code of Criminal Procedure

<sup>88</sup> Section 72 of the Code of Criminal Procedure

<sup>89</sup> Section 77(2) of the Code of Criminal Procedure

<sup>90</sup> Defined by section 3(1) of the Code of Criminal Procedure as: trade unions, syndicates, and other civil societies except for political parties, charities, churches and other religious societies

- the defendant gives a written pledge to lead an orderly life, not commit any crime and comply with duties and restrictions imposed on him (the judge must deem the pledge to be sufficient and acceptable);
- the defendant will be supervised by a probation officer; or
- a surety of a designated amount is offered.<sup>91</sup>

Communications between a pre-trial detainee and his lawyer (both in person and in writing) may not be subjected to any monitoring by the authorities. The defendant has the right to file complaints to the Czech authorities.<sup>92</sup> The defendant is also entitled to speak to the director of the prison on demand. If the defendant has been held in pre-trial detention and the proceedings against him are discontinued, he is acquitted, or if the case is referred to another authority, then the defendant can claim compensation.<sup>93</sup>

### ***Release pending trial: in practice***

The ECtHR has found the Czech Republic in violation of Article 5(3) for imposing excessive periods of pre-trial detention when “special diligence was not displayed in the conduct of proceedings”.<sup>94</sup> In one case the applicant was held for four years on the grounds that he represented a flight risk because he was a foreign national, had family abroad and was facing a lengthy sentence.<sup>95</sup> The ECtHR held that these reasons could not justify the conclusion he would abscond and there had therefore been a violation of Article 5(3). Concerns about lengthy pre-trial detention were raised by the US State Department in its 2010 Human Rights Report on the Czech Republic.<sup>96</sup>

The CPT has reported that detainees in the Czech Republic are only provided with access to a lawyer once they have been held for some time, and that in some cases questioning takes place before a lawyer is present.<sup>97</sup> Overcrowding is another problem, with Czech prisons operating at 113% capacity.<sup>98</sup> This has a severe effect on conditions. The CPT reported that many of the cells in remand sections of prisons were dilapidated, with broken windows, peeling paint, broken furniture and poor toilet facilities.<sup>99</sup> Overcrowding meant that the ideal of 4m<sup>2</sup> of space per prisoner<sup>100</sup> was not being met in practice. In some prisons four pre-trial detainees had to share 9.6m<sup>2</sup>

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*Most serious pre-trial detention problem in the Czech Republic: lengthy detention and overcrowding*

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<sup>91</sup> Section 73 and s. 73a of the Code of Criminal Procedure

<sup>92</sup> Section 20 of the Detention Act

<sup>93</sup> Section 9 of the Liability of the State Act

<sup>94</sup> *Cesky v The Czech Republic* [2000] ECHR 214, Para 86, see also *Barfuss v The Czech Republic* [2000] ECHR 403

<sup>95</sup> *Tariq v the Czech Republic* [2006] ECHR 440

<sup>96</sup> US State Department, 2011 Human Rights Report: Czech Republic, p.6

<sup>97</sup> Report to the Government of the Czech Republic on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006, published 12 July 2007, p.17

<sup>98</sup> ICPS, 29 June 2011

<sup>99</sup> Report to the Government of the Czech Republic on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006, published 12 July 2007, p.34

<sup>100</sup> Introduced as an amendment to the Confinement Act and to the Remand Act in 2004

of space. Pre-trial detainees also faced limited recreational opportunities, and were often locked in their cells for up to 23 hours a day.<sup>101</sup>

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<sup>101</sup> Report to the Government of the Czech Republic on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006, published 12 July 2007, p.35

## England and Wales

Time limits have been established to limit the maximum length of pre-trial detention in England and Wales, which is set at 182 days.<sup>102</sup> However, this limit can be extended further if the prosecution can justify the time they are taking to bring the case to trial.<sup>103</sup> A 2009 report found that the average length of pre-trial detention was 13 weeks.<sup>104</sup> In 2011 there were approximately 12,266 pre-trial detainees in English and Welsh prisons, who made up 14% of the total prison population.<sup>105</sup> In 2009, 13% of pre-trial detainees were foreign nationals.<sup>106</sup>

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# 182 days

*Maximum length of pre-trial  
detention in England and Wales*

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### ***Release pending trial: the law***

Under English and Welsh law there is a presumption in favour of releasing the defendant pending trial.<sup>107</sup> This is subject to a number of exceptions,<sup>108</sup> including if the court is satisfied:

- that there are substantial grounds for believing that the defendant, if released (whether subject to conditions or not) would: fail to surrender to custody; commit an offence; or interfere with witnesses or otherwise obstruct the course of justice; or
- that the defendant should be kept in custody for his own protection.

(A short period of custodial remand may also be imposed if the court decides that there it has not been practicable to obtain sufficient information for the purpose of taking certain decisions required by the law on release pending trial.)

The legislation sets out a number of factors to be taken into account when the court takes the decision whether to refuse release,<sup>109</sup> including:

- the nature and seriousness of the offence;
- the character, antecedents, associations and community ties of the defendant;
- the defendant's record as respects the fulfilment of his obligations under previous grants of release; and
- any other factors considered to be relevant.

No conditions should be imposed on release pending trial unless it appears to the court that it is necessary to do so for the purpose of preventing the failure of the defendant to surrender to custody, the commission of an offence while released, the interference with witnesses or obstruction of the course of justice.<sup>110</sup> The following supervision measures may be imposed:

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<sup>102</sup> Prosecution of Offences (Custody Time Limits) Regulations 1987 (SI 1987/299)

<sup>103</sup> Section 22(3) of the Prosecution of Offences Act 1985

<sup>104</sup> Short Study on Women Offenders, Ministry of Justice and Cabinet Office Social Exclusion Task Force, May 2009, p.7

<sup>105</sup> Source: ICPS, 29 July 2011

<sup>106</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>107</sup> Section 4 of the Bail Act 1976

<sup>108</sup> Set out in Schedule 1 of the Bail Act 1976

<sup>109</sup> Set out in Schedule 1 of the Bail Act 1976

<sup>110</sup> Schedule 1 of the Bail Act 1976

- an order requiring the accused person to inform the competent authority of any change of residence;
- an order that the accused person not enter certain localities, places or defined areas;
- an order that the accused person remain at a specified place during specified times;
- an order limiting the right of the accused person to leave the UK;
- a requirement to report at specified times to a specific authority;
- an obligation to avoid contact with specific persons in relation to the alleged offence;
- an obligation not to engage in specified activities relating to the alleged offence, including work in a specified profession or employment;
- an obligation not to drive a vehicle;
- an obligation to provide a security or surety to the court;
- an obligation to undergo therapeutic treatment or treatment for addiction;
- an obligation to avoid contact with specific objects relating to the alleged offence;
- an obligation to wear an electronic tag; and
- an obligation to surrender travel documents (e.g. passport, ID card) and not to apply for any international travel documents.

Pre-trial detainees should be out of contact with convicted prisoners as far as reasonably possible, unless the pre-trial detainee has consented to share accommodation and participate in activities with convicted prisoners.<sup>111</sup> However, under no circumstances should an untried prisoner be required to share a cell with a convicted prisoner.<sup>112</sup>

While in pre-trial detention a defendant should have the right to communicate with a lawyer, the right to an interpreter and translation of documents, and the right to view codes of practice governing detainee rights.

English and Welsh law provides that, in certain circumstances, where a person has been convicted of a criminal offence and the conviction has been reversed or the person has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice.<sup>113</sup>

### ***Release pending trial: in practice***

The UK's pre-trial detention regime is rarely found to be in violation of the ECHR,<sup>114</sup> although many Article 5 findings against the UK stem from legislation<sup>115</sup> which limits the possibility of release for defendants who have previously been convicted of serious offences such as murder, manslaughter and rape.<sup>116</sup> The UK was also found to have breached Article 5(3)

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**13%**

*Percentage of pre-trial detainees in England and Wales who are foreign nationals*

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<sup>111</sup> Section 7(2) of the Prison Rules 1999

<sup>112</sup> Ibid.

<sup>113</sup> Section 133 of the Criminal Justice Act 1988

<sup>114</sup> From 2006 to 2010 the UK has been found to be in breach of Article 5 only eight times, source: European Court of Human Rights: statistical information

<sup>115</sup> Section 25 Criminal Justice and Public Order Act 1994

<sup>116</sup> See, for example, *Caballero v UK* [2000] ECHR 53

and 5(5) in a case where an applicant was held for six days before being brought before a judge.<sup>117</sup>

Defence lawyers and non-national detainees complain of discrimination against foreign defendants in pre-trial detention hearings, with courts deeming them a flight risk despite close ties to the UK.<sup>118</sup> The cursory nature of pre-trial detention hearings was criticised by Lord Justice Auld in his 2001 report on the criminal courts of England and Wales, which found that the average hearing lasted six minutes.<sup>119</sup>

Overcrowding is also a problem, with the prison population rising significantly over the past ten years; from 1995 to 2009 prison rates have risen by 32,500 (66%).<sup>120</sup> This overcrowding has meant that the statutory requirement that remand prisoners are not placed in cells with convicted prisoners has become impractical and is often not observed in practice.<sup>121</sup> In its 2009 report on the UK, the CPT found that 87 out of 142 detention institutions were operating above “certified normal accommodation.”<sup>122</sup> Recent inspections at Wandsworth prison in South London have noted numerous failings, with the Inspector of Prisons stating that conditions were “demeaning, unsafe and fell below what could be classed as decent.”<sup>123</sup> One pre-trial detainee held for three months reported that he has not once had access to a shower.<sup>124</sup>

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*Most serious pre-trial detention problem in the UK: overcrowding*

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Following the widespread riots in England in August 2011, overcrowding in the prison estate has been exacerbated, with the total number of prisoners reaching a record high of 87,120.<sup>125</sup> This is perhaps unsurprising given that courts have handed down sentences which are 25% longer than normal and many suspected offenders have been denied release pending trial.<sup>126</sup> 70% of defendants have been remanded in custody to await Crown Court trial, compared to a normal rate of 2%.<sup>127</sup>

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<sup>117</sup> *O'Hara v UK* [2001] ECHR 598

<sup>118</sup> FTI prison visit, July 2011

<sup>119</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.949

<sup>120</sup> Story of the prison population 1995-2009 England and Wales: Ministry of Justice statistics bulletin, 31 July 2009, p.2

<sup>121</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009 p.954

<sup>122</sup> Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008, 8 December 2009, p.20

<sup>123</sup> Report on an unannounced full follow-up inspection of HMP Wandsworth, 28 February – 4 March 2011, p.6

<sup>124</sup> *Ibid* p.62

<sup>125</sup> BBC News, Prison numbers in England and Wales reach record high, 16 September 2011

<sup>126</sup> *The Guardian*, Revealed: the full picture of sentences handed down to rioters, 18 August 2011

<sup>127</sup> *Ibid*.

## France

In principle, the length of the pre-trial detention in France must be "reasonable", given the seriousness of the offence and the complexity of the investigations.<sup>128</sup> The maximum lengths of pre-trial detention in France depend upon the maximum penalty the defendant would face if convicted and range from four months to four years.<sup>129</sup> The average length of pre-trial detention in 2005 was almost 9 months.<sup>130</sup> In 2011 there were approximately 16,007 pre-trial detainees in French prisons, who made up 24% of the total prison population.<sup>131</sup>

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**4 years**

*Maximum length of pre-trial  
detention in France*

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### ***Release pending trial: the law***

Pre-trial detention can only be imposed if the defendant is charged with an offence which is punishable by imprisonment for a minimum term of three years, and if alternative supervision measures are inadequate to fulfil the following objectives:<sup>132</sup>

- preserve evidence;
- prevent interference with victims or witnesses;
- prevent contact between the accused person and his accomplices;
- protect the accused person;
- ensure that the accused person remains at the disposal of the court;
- stop the offence or prevent re-offending; and
- put an end to exceptional disruption of the "ordre publique" due to the seriousness of the offence and of the damage caused.

The accused must be present and represented by a lawyer at the first hearing relating to pre-trial detention,<sup>133</sup> and at each subsequent hearing on the extension of pre-trial detention.<sup>134</sup> Requests for release or alternatives to detention can be submitted at any time by the accused person and his lawyer.<sup>135</sup> They can also be requested by the Public Prosecutor or ordered by the judge.<sup>136</sup>

The following are available under French law as alternatives to pre-trial detention:

- an order requiring the accused person to inform the competent authority of any change of residence;<sup>137</sup>
- an order that the accused person not enter certain localities, places or defined areas;<sup>138</sup>

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<sup>128</sup> Article 144-1 of the Code of Criminal Procedure

<sup>129</sup> Articles 145-1, 145-2 and 145-3 of the Code of Criminal Procedure

<sup>130</sup> Monitoring Committee of pre-trial detention (*Commission de suivi de la detention provisoire*) Report 2007, p.2

<sup>131</sup> Source: ICPS, 1 January 2011

<sup>132</sup> Article 144 of the Code of Criminal Procedure

<sup>133</sup> Article 145 of the Code of Criminal Procedure

<sup>134</sup> Article 145-1 of the Code of Criminal Procedure

<sup>135</sup> Articles 148 and 148-1 of the Code of Criminal Procedure

<sup>136</sup> Article 147 of the Code of Criminal Procedure

<sup>137</sup> Article 138, 4° of the Code of Criminal Procedure

<sup>138</sup> Article 138, 1° and 3° of the Code of Criminal Procedure

- an order that the accused person remain at a specified place during specified times;<sup>139</sup>
- an order limiting the right of the accused person to leave France (passports can be confiscated if the defendant poses a flight risk);<sup>140</sup>
- a requirement to report at specified times to a specific authority;<sup>141</sup>
- an obligation to avoid contact with specific persons in relation to the alleged offence;<sup>142</sup>
- an obligation not to engage in specified activities relating to the alleged offence, including work in a specified profession or employment;<sup>143</sup>
- an obligation not to drive a vehicle;<sup>144</sup>
- an obligation to deposit money as a guarantee (the amount depends on the financial resources of the suspect);<sup>145</sup>
- an obligation to undergo therapeutic treatment or treatment for addiction;<sup>146</sup>
- a restriction on the possession of weapons;<sup>147</sup> and
- electronic tagging and house arrest.<sup>148</sup>

If an accused person breaches the terms of one of these alternatives to pre-trial detention the judge has discretion to order the pre-trial detention of the person.<sup>149</sup> Pre-trial detainees are held in a *maison d'arrêt*, a prison specially designed for people awaiting trial or people sentenced to terms of imprisonment of less than one year.<sup>150</sup> A person who has served time in pre-trial detention and is finally acquitted has the right to be compensated to the level of his material losses.<sup>151</sup>

### **Release pending trial: in practice**

The ECtHR has found France in breach of Article 5(3) for imposing pre-trial detention lasting six years.<sup>152</sup> Although the reasons for imposing the detention were valid, the court found that such a long period could not be justified by the ordinary delays in trial preparation. France has also been found in violation of Article 5(3) for imposing pre-trial detention for four and a half years<sup>153</sup> and almost three years.<sup>154</sup> In the latter case the ECtHR noted that the reasons for imposing pre-trial detention had initially been valid but had ceased to be relevant over time. The CPT

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**24%**  
Percentage of pre-trial detainees in the  
French prison population

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<sup>139</sup> Article 138, 2° of the Code of Criminal Procedure  
<sup>140</sup> Article 138, 1° and 7° of the Code of Criminal Procedure  
<sup>141</sup> Article 138, 5° of the Code of Criminal Procedure  
<sup>142</sup> Article 138, 9° of the Code of Criminal Procedure  
<sup>143</sup> Article 138, 12° of the Code of Criminal Procedure  
<sup>144</sup> Article 138, 8° of the Code of Criminal Procedure  
<sup>145</sup> Article 138, 11° and 15° of the Code of Criminal Procedure  
<sup>146</sup> Article 138, 10° of the Code of Criminal Procedure  
<sup>147</sup> Article 138, 14° of the Code of Criminal Procedure  
<sup>148</sup> Article 142-5 of the Code of Criminal Procedure  
<sup>149</sup> Article 141-2 of the Code of Criminal Procedure  
<sup>150</sup> Article 714 of the Code of Criminal Procedure  
<sup>151</sup> Articles 149 and following of the Code of Criminal Procedure  
<sup>152</sup> *Naudo and Maloum v France* [2011] ECHR 1260  
<sup>153</sup> *Guarrigenc v France* (App no 21148/02) 10 July 2008  
<sup>154</sup> *Gérard Bernard v France* (App no 27678/02) 8 October 2009

has criticised French prison conditions, citing unhygienic conditions,<sup>155</sup> physical abuse by prison staff,<sup>156</sup> and inadequate cell size<sup>157</sup> as particular problems.

Decisions on pre-trial detention were formerly taken by the investigating judge in the case (this is now the role of the specialised Liberty and Security Judge). Research conducted between 1997 and 1999 showed that the decision to order remand was made jointly by the prosecutor and the investigative judge without the involvement of defence counsel prior to the detention hearing.<sup>158</sup> Concerns have been raised that this situation will persist despite the introduction of the Liberty and Security Judge, who tends to have been trained in the same institutions and has close professional contacts with investigative judges and prosecutors.<sup>159</sup>

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*Most serious pre-trial detention problem in France: lengthy pre-trial detention periods*

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<sup>155</sup> Report to the French Government on the visit to France carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 September to 9 October 2006, 15 December 2007, p.17

<sup>156</sup> Ibid. p.12

<sup>157</sup> Ibid. p.19

<sup>158</sup> French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France, Jacqueline Hodgson, 2005, p.215

<sup>159</sup> Effective Criminal defence in Europe, Cape et al, 2010, p.230, also see: French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France, Jacqueline Hodgson, 2005, p.215

## Germany

German law states that normally pre-trial detention should not exceed six months.<sup>160</sup> However, this can be extended, where “the particular difficulty or the unusual extent of the investigation or another important reason do not yet admit the pronouncement of judgment and justify continuation of remand detention.”<sup>161</sup> In 2010 there were

approximately 10,755 pre-trial detainees in German prisons, who made up 16% of the total prison population.<sup>162</sup> In 2009, 44% of pre-trial detainees were foreign nationals.<sup>163</sup>

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# 6 months

*Maximum length of pre-trial detention in Germany (subject to extension)*

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### ***Release pending trial: in practice***

The judge must take the decision whether to release the defendant pending trial taking into account a range of factors including: the risk the person will flee from justice; the likelihood that the person will re-offend unless held in custody; and the risk a person will interfere with witnesses and evidence. One of these factors must be present in order to remand someone in custody; however a lower threshold applies if the defendant is accused of a terrorist offence.<sup>164</sup>

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# 44%

*Percentage of pre-trial detainees in German who are foreign nationals*

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Alternatives to pre-trial detention include:

- an order requiring the defendant to inform the competent authority of any change of residence;
- an order that the accused person not enter certain localities, places or defined areas;
- an order that the accused person remain at a specified place during specified times;
- a restriction on the defendant leaving Germany;
- a requirement to report at specified times to a police station;
- an obligation not to engage in specified activities relating to the alleged offence, including work in a specified profession or employment;
- an obligation to deposit money as a guarantee;<sup>165</sup>
- an obligation to undergo therapeutic treatment or treatment for addiction;
- an obligation to avoid contact with specific objects relating to the alleged offence;
- an order to surrender passport and identity cards;
- an order to freeze the defendant’s bank account; or
- house arrest<sup>166</sup> and electronic tagging (rarely used).

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<sup>160</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.409

<sup>161</sup> Ibid. p.417

<sup>162</sup> Source: ICPS, 30 November 2010

<sup>163</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>164</sup> Sections 129a, 129b, section 112 Para 3 StPO, see also the 1965 decision of the German Federal Constitutional Court

<sup>165</sup> Section 116 Para 1 no 4 StPO

<sup>166</sup> Section 116 Para 1 no 3 StPO

The defendant and his lawyer may apply at any time for a review of the decision to remand in custody<sup>167</sup> and propose an alternative to detention. However, once one review has found the detention justified, the defendant has to wait two months before requesting a new hearing.<sup>168</sup> In any event the prosecutor has to check continuously whether the legal requirements for pre-trial detention still exist.

Remand prisoners should be kept separate from convicted prisoners unless exceptional circumstances apply. Untried prisoners should only be subject to restrictions which are necessary to serve the purpose of the detention or to maintain the order of the prison. Pre-trial detainees have to be allowed legal visits and communication with a lawyer must remain confidential. Since 2010 it has been a mandatory rule that pre-trial detainees have the right to a public defender.<sup>169</sup>

If the defendant is eventually acquitted he is entitled to compensation to the value of €25 for each day that he was held in pre-trial detention.<sup>170</sup> However, the defendant will not be entitled to compensation if he has contributed to his detention in a grossly negligent or an intentional way.

### ***Release pending trial: the law***

Lengthy periods of pre-trial detention from three years to five and a half years<sup>171</sup> have been found by the ECtHR to comply with the ECHR, as the German courts had provided adequate reasons for imposing detention and had dealt with the cases expeditiously. Where these elements are absent, however, the ECtHR has found Germany in breach of Article 5(3).<sup>172</sup> German law has recently been reformed in light of ECtHR findings that denial of access to the case file in sensitive cases resulted in unjustifiable restrictions on the defendant.<sup>173</sup>

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*Most serious pre-trial detention problem in Germany: some cases of excessive pre-trial detention*

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Concerns have been raised by German defence lawyers that pre-trial detention is often used as a measure to “motivate” a confession and speed the investigation process.<sup>174</sup> There have also been reports that non-nationals are often remanded in custody in circumstances where German defendants would not.<sup>175</sup> There has been a steady decrease in the number of pre-trial detainees as well as the general prison population in Germany over the past decade,

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<sup>167</sup> Sections 117, 118b StPO

<sup>168</sup> Section 118 Para 2 StPO

<sup>169</sup> Section 140 Para 1 no 4 StPO

<sup>170</sup> Section 7 Para 3 German Code of Compensation for Measures of Prosecution

<sup>171</sup> *Chraidi v Germany* [2006] ECHR 899

<sup>172</sup> See *Erdem v Germany* [1999] ECHR 193 and *Cevizovic v Germany* [2004] ECHR 399

<sup>173</sup> *Lietzow v Germany* [2001] ECHR 89 and *Garcia Alva v Germany* [2001] ECHR 86, See: Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the EU. Ed Cape et al. p.80-81

<sup>174</sup> Effective Criminal defence in Europe, Cape et al, p.271

<sup>175</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.426

which has been attributed to an increase in the use of non-custodial sentences such as fines and community service.<sup>176</sup>

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<sup>176</sup> Sentencing and Sanctions in Western Countries, Eds Tonry and Frase, p.188-221

## Greece

Under Greek law lengths of pre-trial detention vary according to the nature of the alleged offence, ranging from six months to one year. In exceptional circumstances the maximum length of pre-trial detention is 18 months.<sup>177</sup> In 2010 there were approximately 3,500 pre-trial detainees in Greek prisons, who made up 31% of the total prison population.<sup>178</sup> In 2008 64% of pre-trial detainees were foreign nationals.<sup>179</sup>

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**18 months**

*Maximum length of pre-trial  
detention in Greece*

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### ***Release pending trial: the law***

Pre-trial detention may be ordered if there are strong indications that the accused has committed an offence and is deemed a flight risk or it is thought highly likely that he will commit other offences if released (this can be based on previous final convictions for offences of the same kind<sup>180</sup>). A person will be deemed a flight risk if:

- the accused has no known residence in the country; or
- the accused has taken preparatory actions to facilitate his escape; or
- the accused has been a fugitive in the past; or
- the accused has previously been found guilty of helping a prisoner to escape or has violated restrictions concerning his place of residence.

Article 282.2 of the Greek Criminal Procedure Code sets out the conditions which can be attached to release pending trial. These may include: imposing an order which prohibits a defendant from living in, or moving to, a certain place; a restriction on the defendant leaving Greece; an order prohibiting communication with certain persons; and an obligation to pay a financial surety in order to secure release.

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**64%**

*Percentage of pre-trial detainees in Greece  
who are foreign nationals*

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If the pre-trial detention is based on a warrant from the investigating judge, the defendant can appeal against it within five days from the start of his pre-trial detention. The defendant has no right to appear and be heard before the appeal court<sup>181</sup> while it is considering his appeal. If the detention is based on a warrant of the appeal court itself, no legal remedy is provided.<sup>182</sup> If there are specific reasons which justify the use of the pre-trial detention and those reasons have ceased to exist, the defendant can apply for a release. In any event, once the detention has lasted for six months, the court must determine whether the accused should be released or whether there is cause for them to remain in custody. The accused has no right to appeal any such decision.

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<sup>177</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.451-453

<sup>178</sup> Source: ICPS, 1 January 2010

<sup>179</sup> 2008 Council of Europe Annual Penal Statistics – SPACE I

<sup>180</sup> Article 282.3 Code of Criminal Procedure

<sup>181</sup> The “Judicial Council”

<sup>182</sup> Article 285 Code of Criminal Procedure

The Greek Code of Criminal Procedure states that persons who have been detained on remand and subsequently acquitted shall be entitled to request compensation provided it has been established in the proceedings that the detained persons did not commit the criminal offence for which they were detained.<sup>183</sup>

### ***Release pending trial: in practice***

Although Greek law states that pre-trial detention should only be imposed as an exceptional measure,<sup>184</sup> according to defence lawyers pre-trial detention has become the norm,<sup>185</sup> although recent legislative reforms mean that this is beginning to change. It has also been reported that although Greek law expressly excludes the seriousness of the alleged offence as a factor to be considered by the court when making a decision whether to impose pre-trial detention,<sup>186</sup> in practice it is often the main reason for imposing and extending pre-trial detention.<sup>187</sup> Many pre-trial detainees claim that they meet their lawyer for the first time at the initial court hearing<sup>188</sup> and non-national defendants have complained that they have not been provided with court-appointed interpreters.<sup>189</sup>

Prison overcrowding is a serious problem in Greece. In 2009 the occupancy level of Greek prisons amounted to 146% of the official capacity, with Korydallos high security prison operating at 300% capacity.<sup>190</sup> Korydallos is where many pre-trial detainees are held, along with convicted prisoners<sup>191</sup> (see the case of Andrew Symeou above). In its 2010 report on Greece, the CPT stated that “the excessive overcrowding in a number of prisons in conjunction with severe understaffing, poor health-care provision, lack of a meaningful regime and unsuitable material conditions represent an even greater concern to the Committee today than they did in the past”.<sup>192</sup>

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*Most serious pre-trial detention  
problem in Greece:  
overcrowding and prison  
conditions*

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These conditions have led some prisoners to take protest action. In December 2010 approximately 8,000 prisoners detained all over the country refused meals and around 1,200 went on hunger strike, calling for improvements in overcrowding and detention conditions.<sup>193</sup> The ECtHR has found Greece in violation of Article 3 for holding pre-trial detainees in police

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<sup>183</sup> Article 533 Code of Criminal Procedure

<sup>184</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.451

<sup>185</sup> US State Department, 2008 Human Rights Report: Greece

<sup>186</sup> Article 282.3 Code of Criminal Procedure

<sup>187</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.452

<sup>188</sup> Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 29 September 2009, published 17 November 2010, p. 24

<sup>189</sup> US State Department, 2010 Human Rights Report: Greece, p.7

<sup>190</sup> *Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States*, Vermeulen et al, 2009, p. 456

<sup>191</sup> US State Department, 2008 Human Rights Report: Greece

<sup>192</sup> Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 29 September 2009, published 17 November 2010, p.13

<sup>193</sup> Amnesty International Annual Report 2011 – Greece

detention centres, and in breach of Article 5(3) on the grounds of excessive periods of pre-trial detention.<sup>194</sup>

The Greek courts have been unwilling to award compensation to pre-trial detainees in practice and have failed to provide sufficient reasons for when refusing to do so. This has led to the ECtHR finding Greece in violation of Article 6(1).<sup>195</sup>

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<sup>194</sup> *Vafiadis v Greece* (App no. 24981/07) 2 July 2009, *Shuvaev v Greece* (App no. 8249/07) 29 October 2009

<sup>195</sup> See, for example, *Karakasis v Greece* [2000] ECHR 483, *Sajtos v Greece* [2002] ECHR 326 and *Dimitrellos v Greece* [2005] ECHR 220

## Ireland

There is no legal limit to the amount of time a defendant can spend in pre-trial detention in Ireland, although time limits do apply in proceedings before lower courts.<sup>196</sup> At the first pre-trial detention hearing before the lower court, detention on remand may be

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*No legal maximum length of pre-trial detention in Ireland*

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ordered for up to eight days. At subsequent hearings before the judge in the lower court, pre-trial detention may be extended for 15 days or, with the defendant's and prosecutor's consent, up to 30 days before review is needed.<sup>197</sup> In 2009 there were approximately 569 pre-trial detainees in Irish prisons, who made up 15% of the total prison population.<sup>198</sup> In 2009, 31% of pre-trial detainees were foreign nationals.<sup>199</sup>

### ***Release pending trial: the law***

Pre-trial detention may be imposed where the court is satisfied that there is a flight risk, or a risk of interference with witnesses or evidence, or that detention is "reasonably considered necessary to prevent the commission of a serious offence by that person". In determining this, it is not necessary for the court to be satisfied that the commission of a specific offence by that person is foreseen.<sup>200</sup>

The court may consider the following factors when deciding whether to impose pre-trial detention:<sup>201</sup>

- the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction;
- the nature and strength of the evidence in support of the charge;
- any conviction of the accused person for an offence committed while he or she was released pending trial in the past;
- any previous convictions of the accused person including any conviction which is the subject of an appeal; and
- any other offence in respect of which the accused person is charged and is awaiting trial.

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**31%**

*Percentage of pre-trial detainees in Ireland who are foreign nationals*

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Where it has taken account of one or more of the above, the court may also take into account the fact that the accused person is addicted to a controlled drug.<sup>202</sup>

The powers of the court to impose conditions on release are stated to be unlimited.<sup>203</sup> The following supervision measures are regularly imposed:

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<sup>196</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.519

<sup>197</sup> Ibid. p.515

<sup>198</sup> Source: ICPS, 1 September 2009

<sup>199</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>200</sup> Section 2(3) Bail Act 1997

<sup>201</sup> Section 2(2) Bail Act 1997

<sup>202</sup> Within the meaning of the Misuse of Drugs Act 1977

<sup>203</sup> Section 6(b) Bail Act 1997

- an order requiring the accused person to inform the competent authority of any change of residence;
- an order that the accused person not enter certain localities, places or defined areas;
- an order that the accused person remain at a specified place during specified times;
- an order limiting the right of the accused person to leave Ireland;
- a requirement to report at specified times to a specific authority;
- an obligation to avoid contact with specific persons in relation to the alleged offence;
- an obligation to deposit money as a guarantee; and
- an obligation to wear an electronic tag (serious offences only).

Normally, the defendant would be present and represented by a lawyer at all hearings in relation to pre-trial detention. Officially under the Irish Prison Rules, defendants who are remanded in custody are housed in the same facilities as sentenced prisoners, but guiding principles of the Prison Service state that they should be separated so far as is practicable. Compensation is available to defendants who have been unlawfully and unnecessarily detained (consistent with Article 5(5) ECHR). In particular, detention is unlawful if the defendant is not informed of the reasons of his arrest. If the detention is lawful, but the defendant is later acquitted, this does not provide a ground for awarding compensation.

### ***Release pending trial: in practice***

In practice it is not unusual for those remanded in custody to spend up to 12 months in pre-trial detention with no intervening legal review of the grounds for detention. Non-nationals are worst affected. While there is provision for tagging in law, in practice it is not yet being used. The most common release condition imposed is surrender of passport.

There have been few cases before the ECtHR in relation to pre-trial detention,<sup>204</sup> however, domestic courts have criticised remand conditions. In one case a pre-trial detainee was held in an isolated padded cell, normally used to house mentally disturbed prisoners who posed a threat to themselves or others.<sup>205</sup> Sensory deprivation was severe in the 3m<sup>2</sup> cell, and the detainee had no access to television, radio, or exercise facilities.

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*Most serious pre-trial detention problem in Ireland: overcrowding in some prisons*

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The severe overcrowding in some Irish prisons has also been criticised. In 2010 the Irish prison estate was operating at just over 100% capacity.<sup>206</sup> The CPT has noted that overcrowding has led to detainees having to sleep on mattresses on the floor,<sup>207</sup> enduring unhygienic conditions and being denied access to sufficient recreational activities.<sup>208</sup> The

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<sup>204</sup> There has only been one case before the ECtHR in relation to Article 5 in the past five years, source: European Court of Human Rights: statistical information

<sup>205</sup> *Kinsella v the Governor of Mountjoy Prison [2011] IEHC 235*

<sup>206</sup> Source: ICPS, 1 March 2010

<sup>207</sup> Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 January to 5 February 2006, 10 February 2011, p.15

<sup>208</sup> Ibid. p.16

CPT has also reported regional disparities regarding drug abuse, violence, and gang formation.<sup>209</sup>

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<sup>209</sup> Ibid. p.18

## Italy

The maximum pre-trial detention period varies depending on the phase of the proceedings and the nature of the alleged offence.<sup>210</sup> The maximum period of detention during proceedings at first instance is 18 months.<sup>211</sup> In 2011 there were approximately 28,000 pre-trial detainees in Italian prisons, who made up 42% of the total prison population.<sup>212</sup> In 2009, 26% of pre-trial detainees were foreign nationals.<sup>213</sup>

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# 18 months

*Maximum length of  
detention during the  
proceedings in first instance*

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### **Release pending trial: the law**

Pre-trial detention or a coercive alternative to pre-trial detention can only be ordered if the judge finds that there is serious circumstantial evidence that a crime has been committed<sup>214</sup> and there is the risk that:

- the suspect may commit further offences;
- the suspect may tamper with the evidence and/or obstruct the investigation; or
- the suspect may abscond.<sup>215</sup>

In the event of serious circumstantial evidence of certain specific crimes, pre-trial detention is mandatory.<sup>216</sup>

Under the Code of Criminal Procedure, pre-trial detention can be ordered only if no other pre-trial measures are appropriate.<sup>217</sup> Alternatives to pre-trial detention are:

- an order to live in a specific city or area;
- an order limiting the right of the suspect to leave the territory of the State;
- an order to report at specified times to a specific authority (e.g. a police station);
- an order to leave the family with whom the detainee lives;
- house arrest and an order to remain at home during certain hours of the day;
- an order that the suspect not enter specific places without previous authorisation of the court;
- an obligation to avoid contact with specific persons in relation to the alleged offence;
- an obligation to stay in a mental institution or drug rehabilitation centre;
- a ban on the exercise of parental authority;
- a ban from the exercise of a public office or service;
- a temporary ban on the exercise of professional or business activity; and
- a ban on being the director of a company.

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# 26%

*Percentage of pre-trial detainees in Italy  
who are foreign nationals*

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<sup>210</sup> Article 303(1)(a) of the Code of Criminal Procedure

<sup>211</sup> Section 303(1)(b)(3)

<sup>212</sup> Source: ICPS, 1 January 2010

<sup>213</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>214</sup> Article 274 of the Code of Criminal Procedure

<sup>215</sup> Article 274 of the Code of Criminal Procedure

<sup>216</sup> Article 274 of the Code of Criminal Procedure

<sup>217</sup> Section 275 paragraph 3 of the Code of Criminal Procedure

The decision to impose pre-trial detention and alternatives to pre-trial detention are not taken in open court, but by the judge in chambers. The defendant has no right to take part in this decision making process and is not represented by a lawyer. Once the decision is made the defendant can, within 10 days, lodge an application to the competent “Tribunal of Freedom” for a full review of the decision to impose the particular pre-trial measure. The defendant can also request the judge or the court which issued the original order to revoke or substitute the measure imposed in the event that the relevant requirements are no longer met.

A pre-trial detainee is entitled to compensation if he is eventually acquitted. The acquittal must be on the basis that: the defendant did not commit the alleged act; the alleged act never took place; or the alleged act does not constitute an offence. Compensation is also available if the person obtains a final judgment ruling that the original pre-trial detention order did not meet the requisite legal requirements or that the pre-trial detention was unjustifiable based on the person’s behaviour.

The amount of compensation to be awarded is decided by the judge having regard to the defendant’s financial position and the nature of the damage suffered. In any event the amount of compensation awarded cannot exceed approximately €500,000. If the person is unsuccessful they may appeal to the Court of Cassation. The case can last two to three years.

### ***Release pending trial: in practice***

Italy holds the record for the highest number of applications to the ECtHR in relation to alleged violations of the “reasonable time” requirement in Article 6(1) ECHR.<sup>218</sup> The Council of Europe’s Committee of Ministers intervened most recently on this issue, identifying a total of 2,183 cases lodged against Italy with regard to excessive length of judicial proceedings.<sup>219</sup> As the reasons for imposing pre-trial detention tend to lose their force over time, systemic delays have led the ECtHR to find Italy in violation of Article 5(3).<sup>220</sup>

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*Most serious pre-trial detention problem in Italy: delays and overcrowding*

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Officially Italian law requires that pre-trial detainees should be kept out of contact with convicted prisoners. However, this has become impractical due to prison overcrowding and remand prisoners are generally mixed into the prison population at large. In 2010 the Italian government declared a state of emergency in relation to its overcrowded prisons.<sup>221</sup> As of February 2011, Italy’s prisons were 49% over official capacity.<sup>222</sup> In 2010 the CPT reported that Brescia prison, which mainly houses pre-trial detainees, was chronically overcrowded.

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<sup>218</sup> Council of Europe Directorate General of Human Rights, The improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings, 2006, p.38

<sup>219</sup> Interim Resolution CM/ResDH(2009)42

<sup>220</sup> See, for example, *Labita v Italy* [2000] ECHR 161, *Vaccaro v Italy* [2000] ECHR 614, and *Sardinas Albo v Italy* [2005] ECHR 117

<sup>221</sup> Italy declares state of emergency on jail overcrowding, BBC News, 13 January 2010

<sup>222</sup> ICPS, 28 February 2011

With an official capacity of 206 places, Brescia was accommodating 454 prisoners, of whom 64 were sentenced prisoners.<sup>223</sup>

The CPT has also noted its concerns that access to a lawyer is often denied at the outset of detention and that informal questioning takes place without the presence of a lawyer.<sup>224</sup> While officially foreign prisoners are treated no differently from domestic ones, Italy has been criticised for only providing written information on rights in Italian, thus placing non-nationals at a disadvantage.<sup>225</sup> Furthermore, Italian defence lawyers have complained about an overall lack of effectiveness of the judicial review of pre-trial measures, and a delay before decisions are made by the review Tribunal.<sup>226</sup>

Concerns have also been raised about a special detention regime which only applies to defendants accused of mafia and terrorist offences who are suspected of maintaining links with criminal groups. People detained under this regime are subject to a blanket policy which denies them the right to make telephone calls to relatives or cohabitants for the first six months of detention.<sup>227</sup> This regime also involves cell searches when the prisoner is absent, giving rise to concerns about the confidentiality of legal correspondence.<sup>228</sup>

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<sup>223</sup> Report to the Government of Italy on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 26 September 2008, published 20 April 2010, p.26

<sup>224</sup> Report to the Government of Italy on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 26 September 2008, published 20 April 2010, p.15

<sup>225</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.558

<sup>226</sup> The review Tribunal has no deadlines for returning in writing the legal and factual basis of its decision on pre-trial detention (and without them the detainee may not appeal to the Supreme Court)

<sup>227</sup> Report to the Government of Italy on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 26 September 2009, published 20 April 2010, p.36

<sup>228</sup> Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States, Vermeulen et al, 2009, p.581

## Luxembourg

There is no legal limit to the length of pre-trial detention in Luxembourg,<sup>229</sup> however, in practice, detention ends when the time spent on remand equals the expected sentence.<sup>230</sup> In 2010 there were approximately 300 pre-trial detainees in Luxembourg, who made up 47% of the total prison population.<sup>231</sup> In 2009, 85% of pre-trial detainees were foreign nationals.<sup>232</sup>

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*No maximum length of pre-trial detention in Luxembourg*

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### **Release pending trial: the law**

Pre-trial detention is only possible if there are serious indications of the defendant's guilt and if the alleged offence can be punished with a prison sentence of at least two years.<sup>233</sup> In addition, one of the following conditions has to be met:

- there is a risk that the accused will abscond (this risk is presumed if the offence committed is an offence that can be punished with a prison sentence of at least five years);
- there is a danger that the accused will suppress evidence; or
- there is reason to believe that the accused, if released, will commit new offences.

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**85%**

*Percentage of pre-trial detainees in Luxembourg who are foreign nationals*

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A foreigner without residence in Luxembourg can be placed in pre-trial detention if serious indications of his guilt exist and if the alleged offence can attract a sanction reserved for the most severe category of offences or imprisonment.<sup>234</sup>

The judge can order the defendant to comply with one or more of the following supervision measures:

- not to proceed outside a particular area or to refrain from entering certain areas;
- not to leave home or appointed residence, without permission;
- to report on a regular basis to the authorities;
- to cooperate with the process of identification;
- to refrain from driving vehicles;
- to refrain from contacting certain persons;
- to submit to certain control measures, for example in relation to drugs;
- to pay money as a security;
- to refrain from carrying weapons; and
- to comply with financial obligations towards family members.

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<sup>229</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.655

<sup>230</sup> Ibid. p.655, see Article 153 Regulation on the administration and the internal regime of penitentiary institutions

<sup>231</sup> Source: ICPS, 1 June 2010

<sup>232</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>233</sup> Article 107 of the Luxembourg Code of Criminal Procedure (“CCP”)

<sup>234</sup> Article 94 CCP

The defendant is always represented by a lawyer at pre-trial detention hearings, as this is generally mandatory (however, this can be waived). The defendant has the right to attend the hearings in person. Pre-trial detainees are not required to be kept separate from convicted prisoners and are held with the general prison population.

Pre-trial detainees are entitled to compensation if they have been detained in a manner incompatible with Article 5 ECHR.<sup>235</sup> Furthermore, those who have been held in detention for more than three days can claim compensation, provided the detention was not their fault and they have been acquitted or the limitation period has been met in their case.<sup>236</sup>

### ***Release pending trial: in practice***

Luxembourg has one primary prison and sole remand centre: the *Centre Pénitentiaire de Luxembourg à Schrassig*. Concerns have been raised about the housing of women and juveniles at this facility.<sup>237</sup> It has been reported that female pre-trial detainees have been held in the prison with their young children, who were forced to endure overcrowded conditions and excessive periods locked in a cell.<sup>238</sup> There have also been numerous reports of violence, racism and criminality within the prison.<sup>239</sup> Luxembourg's prison authorities have also been criticised for using solitary confinement as a disciplinary measure, and holding suspects in cages prior to interrogation.<sup>240</sup>

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*Most serious pre-trial detention problem in Luxembourg: poor conditions in the main remand prison*

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<sup>235</sup> Article 1 of the Law dated 30 December 1981 on compensation in case of ineffective pre-trial detention

<sup>236</sup> Ibid. Article 2

<sup>237</sup> Report to the authorities of Luxembourg on the visits carried out to Luxembourg by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 to 27 April 2009, 28 October 2010, p.17

<sup>238</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.660-661, citing 2006 report of the Ombudscommittee on the Rights of the Child

<sup>239</sup> ACAT's Luxembourg and FIACAT's concerns regarding torture and ill treatment in Luxembourg, July 2008, p.2

<sup>240</sup> US State Department, 2010 Human Rights Report: Luxembourg, p.2

## The Netherlands

Once a defendant has been remanded in custody the trial must commence within 104 days.<sup>241</sup> In 2007 the average time between a case being registered with the Public Prosecution Service and dealt with at first instance was 180 days (for a single police judge court) and 248 days (for a three-judge court).<sup>242</sup> In 2010 there were approximately 5,664 pre-trial detainees in Dutch prisons, who made up 36% of the total prison population.<sup>243</sup> In 2009, 24% of pre-trial detainees were foreign nationals.<sup>244</sup>

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**104 days**

*Maximum length of pre-trial detention in the Netherlands*

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### ***Release pending trial: the law***

In order to impose pre-trial detention there must be serious grounds for suspecting that the defendant committed a serious offence (within the meaning of Article 67 Dutch Code of Criminal Procedure). Furthermore, the judge must find that there is either: an imminent risk that the defendant will flee (the judge will assess this risk based on the actions and personal circumstances of the defendant); or that there are public interest reasons why the defendant should be detained, i.e.:

- he is accused of having committed an offence which has seriously disturbed public order and attracts a sentence of 12 years or more;
- there is a serious chance that the suspect will commit another crime that carries a jail sentence of six years or more, or that will endanger the safety of the state, health or safety of persons, or that will cause a general danger to property;
- there is a considerable risk that the defendant will commit a serious offence<sup>245</sup> and he has been convicted of a similarly serious offence in the last five years; or
- his detention is deemed reasonably necessary to uncover the truth.

In addition pre-trial detention should not be imposed if the judge decides that the person is unlikely to receive a custodial sentence if convicted or if the pre-trial detention period is likely to be longer than the eventual sentence passed.

Wider grounds for imposing pre-trial detention apply to non-nationals who do not have a place of residence in the Netherlands. People in this position can be subject to pre-trial detention even if they have not been accused of committing a serious offence (within the meaning of Article 67 Dutch Code of Criminal Procedure).<sup>246</sup>

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**24%**

*Percentage of pre-trial detainees in the Netherlands who are foreign nationals*

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There are no limitations on the kind of conditions the judge can attach to release pending trial. The following are supervision measures which may be imposed:

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<sup>241</sup> Article 66 Dutch Code of Criminal Procedure ("DCCP")

<sup>242</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.170.

<sup>243</sup> Source: ICPS, 30 April 2010

<sup>244</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>245</sup> One of those set out in Article 67a(2)(3) DCCP (mostly crimes with a maximum prison sentence of four years)

<sup>246</sup> Article 67 DCCP, please note that this does not apply to less serious offences (misdemeanours)

- an order requiring the accused person to inform the competent authority of any change of residence;
- an order that the accused person not enter certain localities, places or defined areas (e.g. a ban on entering a sports stadium);
- an order that the accused person remain at a specified place during specified times;
- an order limiting the right of the accused person to leave the Netherlands (defendants can be ordered to surrender their passports);
- a requirement to report at specified times to a specific authority;
- an obligation to avoid contact with specific persons in relation to the alleged offence;
- an obligation not to engage in specified activities relating to the alleged offence, including work in a specified profession or employment;
- an obligation not to drive a vehicle;
- an obligation to deposit money as a guarantee;
- an obligation to undergo therapeutic treatment or treatment for addiction;
- an obligation to avoid contact with specific objects relating to the alleged offence; and
- house arrest and electronic tagging.

The court, prosecutor and the defendant himself can apply for an alternative to pre-trial detention to be imposed. Pre-trial detainees must be held in special remand centres. Compensation is available for persons who have been held in pre-trial detention and then have been subsequently acquitted. Compensation is also available if the person has not been acquitted, but the pre-trial detention was imposed without an adequate basis or was unlawful. However, the court is under no obligation to award compensation and will only do so if, taking into account all the circumstances of the case, it considers it reasonable.

### ***Release pending trial: in practice***

There have been relatively few findings against the Netherlands in relation to its pre-trial detention regime, although conditions for remand prisoners held in the maximum security prison in the town of Vught (the Extra Beveiligde Inrichting or “EBI”) have been found to violate Article 3.<sup>247</sup> Although pre-trial detainees are kept separate from convicted prisoners in specialised remand centres, these centres have been criticised for being more severe than regular prisons.<sup>248</sup>

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*Most serious pre-trial detention problem in the Netherlands: discrimination against non-nationals in pre-trial detention decisions*

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The Netherlands is one of the few countries in Europe which has minimal crowding in its prison estate.<sup>249</sup> Despite this, in 2007 the CPT reported that police cells, which lacked the extensive facilities available at remand centres, were being used to house pre-trial detainees

<sup>247</sup> *Lorsé and others v The Netherlands* [2003] ECHR 59, *Van der Ven v The Netherlands* [2003] ECHR 62, *Salah v The Netherlands* [2006] ECHR 692

<sup>248</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.709

<sup>249</sup> In 2010 Dutch prisons were operating at 86%, source: ICPS, 30 April 2010

for extensive periods in order to ensure that occupation rates on the prison system remained below 100%.<sup>250</sup>

Normally detention on remand is limited to crimes with a possible sentence of four years or more. An additional ground for detention is made available for those who do not live in the Netherlands and whose sentence can be punished by imprisonment of any length.<sup>251</sup>

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<sup>250</sup> Report to the authorities of the Kingdom of the Netherlands on the visits carried out to the Kingdom in Europe, Aruba, and the Netherlands Antilles by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in June 2007, 5 February 2008, p.14

<sup>251</sup> Article 67 DCCP

## Poland

Polish law dictates that pre-trial detention can be imposed for a period of three months, which can be extended by a further nine months.<sup>252</sup> However, the Appellate Court can extend this even further.<sup>253</sup> In 2011 there were approximately 8,500 pre-trial detainees in Polish prisons, who made up 10% of the total prison population.<sup>254</sup> In 2009, 3% of pre-trial detainees were foreign nationals.<sup>255</sup>

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# 9 months

*Maximum length of pre-trial detention in Poland (subject to extension)*

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### ***Release pending trial: the law***

According to Polish law a defendant cannot be held in pre-trial detention where another preventive measure would suffice. The grounds upon which pre-trial detention can be imposed are listed in Article 258 of the Polish Code of Criminal Procedure. They are:

- a justified belief that the suspect would flee or go into hiding, in particular when the identity of the suspect cannot be established or where the suspect does not have a permanent residence; and
- a justified belief that the suspect would interfere with the course of criminal proceedings.

The decision on pre-trial detention may also exceptionally be based on a justified suspicion that the accused would commit a serious offence (i.e. an offence against life, health or common security).

Pre-trial detention should not be ordered if the facts of the case suggest that the sentence following conviction would not be a custodial one, or if the term of pre-trial detention would exceed the expected sentence. According to Article 249(3) of the Polish Code of Criminal Procedure, before making a decision whether to impose pre-trial detention, the court or the Public Prosecutor must hear from the defendant.

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# 3%

*Percentage of pre-trial detainees in Poland who are foreign nationals*

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Article 275 of the Polish Code on Criminal Procedure sets out the conditions which can be attached to release pending trial. These include:

- an order requiring the defendant to inform the competent authority of any change of residence;
- imposing an order which prohibits a defendant from living in, or moving to, a certain place;
- an order that the accused person remain at a specified place during specified times;
- a restriction on the defendant leaving Poland;
- a requirement to report at specified times to a police station;

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<sup>252</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.733

<sup>253</sup> US State Department, 2010 Human Rights Report: Poland, p.6

<sup>254</sup> Source: ICPS, 31 May 2011

<sup>255</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

- an obligation to avoid contact with specific persons;
- an obligation not to engage in specified activities relating to the alleged offence;
- an obligation not to drive a vehicle;
- an obligation to pay a financial surety in order to secure release; and
- an obligation to undergo treatment for addiction.

According to Polish law the defendant, and his legal representative, may suggest that an alternative to pre-trial detention be imposed at any time. The Public Prosecutor must make a decision on this within three days of the motion being filed. The court itself should order a person's release (even if the defendant has not requested this) if the reasons for placing the defendant in pre-trial detention cease to exist or reasons for releasing the defendant emerge.

Article 41(5) of the Polish Constitution states that "anyone who has been unlawfully deprived of liberty shall have a right to compensation". The Polish Code of Criminal Procedure states that a person may seek compensation for "manifestly unjustified preliminary detention or arrest".<sup>256</sup>

### ***Release pending trial: in practice***

It has been reported that despite the pre-trial safeguards under Polish law, prosecutors and courts impose pre-trial detention automatically, without providing adequate justification.<sup>257</sup> Polish Ministry of Justice figures show that between 2001 and 2007 approximately 90% of the prosecutor's applications for pre-trial detention were allowed by the courts.<sup>258</sup> The ECtHR has consistently criticised Poland for breaching Article 5(3) and Article 6 by imposing excessive lengths of pre-trial detention, failing to provide adequate reasons why pre-trial detention is necessary and failing to consider alternatives to pre-trial detention.<sup>259</sup>

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*Most serious pre-trial detention problem in Poland: inadequate justification for imposing pre-trial detention and poor prison conditions*

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In one case, where the defendant was held for over seven years in pre-trial detention, the ECtHR noted that "numerous cases have demonstrated that the excessive length of pre-trial detention in Poland reveals a structural problem consisting of 'a practice that is incompatible with the Convention'".<sup>260</sup> This echoed concerns raised by the Council of Europe's Committee of Ministers in its 2007 Resolution encouraging Poland to take steps to deal with the "systemic problem concerning the excessive length of detention on remand".<sup>261</sup>

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<sup>256</sup> Article 552(4)

<sup>257</sup> Helsinki Foundation for Human Rights, *Władysław Jamroz v Poland – Written Comments*, 4 March 2008, p.4

<sup>258</sup> Helsinki Foundation for Human Rights, *Władysław Jamroz v Poland – Written Comments*, 4 March 2008, p.3

<sup>259</sup> See. For example, *Kudła v Poland* [2000] ECHR 512, *Olstowski v Poland* [2001] ECHR 759, and *Kulikowski v Poland* [2009] ECHR 779

<sup>260</sup> *Kauczor v Poland* [2009] ECHR 197, Para 60

<sup>261</sup> Interim Resolution CM/ResDH(2007)75 concerning the judgments of the European Court of Human Rights in 44 cases against Poland relating to the excessive length of detention on remand, adopted by the Committee of Ministers on 6 June 2007

The court has also found Poland in violation of Article 3 due to overcrowded prison conditions, and has drawn attention to the connection between lengthy pre-trial detention and overcrowding.<sup>262</sup> FTI clients have described how pre-trial detainees are subjected to appalling prison conditions and held with prisoners convicted of serious offences.<sup>263</sup> We have also received reports that vulnerable pre-trial detainees are targeted for violence by convicts, particularly if they have been charged with a sexual offence. In 2010 the Polish Human Rights Ombudsman received 7,233 complaints about prison conditions, mostly concerning mistreatment by prison staff, poor living conditions, and inadequate access to medical care.<sup>264</sup> (See case of Robert Hörtchner above.)

Although Polish detainees have the right to access a lawyer at an early stage, it is rarely exercised as there is no legal aid available and few detainees can afford to pay legal fees.<sup>265</sup> Suspects can demand that the court appoint an advocate; however, this usually takes several weeks by which time important procedural stages have passed. Where legal advice is accessed, Article 245(1) of the Polish Code of Criminal Procedure allows a police officer to be present during the conversation between the detainee and lawyer for the first 14 days of arrest. Effective legal assistance and trial preparation can also be hampered by the fact that access to the case file for the defence can be limited, thus preventing the lawyer from accessing important information which could be used to challenge continued pre-trial detention.<sup>266</sup>

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<sup>262</sup> *Orchowski v Poland* [2010] ECHR 2280

<sup>263</sup> See, for example, the case of Robert Hörtchner, above

<sup>264</sup> US State Department, 2010 Human Rights Report: Poland, p.4

<sup>265</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.736

<sup>266</sup> Helsinki Foundation for Human Rights, *Władysław Jamroz v Poland – Written Comments*, 4 March 2008, p.8

## Portugal

In Portugal the maximum length of pre-trial detention (before conviction at first instance) is two years and six months, where the case is particularly complex and involves serious crimes.<sup>267</sup> In 2011 there were approximately 2,400 pre-trial detainees in Portugal, who made up 19% of the total prison population.<sup>268</sup>

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**2 years and 6 months**

*Maximum length of pre-trial detention in Portugal*

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### **Release pending trial: the law**

Pre-trial detention is an exceptional measure which may not be imposed or continued “where it can be replaced by bail or any other more favourable measure provided by the law”.<sup>269</sup> Pre-trial detention can only be imposed if there is a strong indication that an offence has been committed which is punishable by a prison sentence of more than five years and one of the following situations applies:

- the suspect or defendant has fled or there is a risk that he may flee;<sup>270</sup>
- there is a danger of interference with the inquiry and, in particular, with the collection, preservation or veracity of evidence;<sup>271</sup> or
- there is a danger of disturbance of the public order or of continuation of the criminal activity.<sup>272</sup>

If these factors no longer apply the judge must replace pre-trial detention with an alternative measure.<sup>273</sup> Pre-trial detention can be revoked on the initiative of the judge, or on a proposal of the Public Prosecutor or the defendant. The judge must reconsider the grounds for pre-trial detention every three months.<sup>274</sup>

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**19%**

*Percentage of the prison population who are pre-trial detainees in Portugal*

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Alternatives to pre-trial detention include:

- an order requiring the accused person to inform the competent authority of any change of residence;
- an order that the accused person not enter certain localities, places or defined areas (this can only be imposed if the defendant is charged with a crime punishable with a sentence of three years or more);<sup>275</sup>
- house arrest with or without electronic monitoring;<sup>276</sup>
- an order limiting the right of the accused person to leave Portugal, this will involve confiscation of the defendant's passport (this can only be imposed if the defendant is charged with a crime punishable with a sentence of three years or more);<sup>277</sup>

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<sup>267</sup> Article 215 of the Criminal Procedure Code ("CPP")

<sup>268</sup> Source: ICPS, 1 October 2011

<sup>269</sup> Article 28(2) of the Constitution and Arts. 193(2) and 202(1) CPP

<sup>270</sup> Article 204(a) CPP

<sup>271</sup> Article 204(b) CPP

<sup>272</sup> Article 204(c) CPP

<sup>273</sup> Article 212(3) CPP

<sup>274</sup> Article 213(1) CPP

<sup>275</sup> Article 200(1)(a)(b)(c)(d) CPP

<sup>276</sup> Article 201 CPP and Law no. 122 of 20 August 1999

- a requirement to report at specified times to a specific authority (e.g. a police station or probation service);<sup>278</sup>
- an obligation not to contact certain people by any means, (this can only be imposed if the defendant is charged with a crime punishable with a sentence of three years or more);<sup>279</sup>
- an obligation not to engage in specified activities relating to the alleged offence, including work in a specified profession or employment;<sup>280</sup>
- an obligation to deposit money as a guarantee;<sup>281</sup>
- undergoing therapeutic treatment or treatment for addiction (only with consent and where the defendant is charged with a crime punishable with a sentence of three years or more);<sup>282</sup> and
- an obligation not to use or deliver weapons or objects that are capable of facilitating another crime (this can only be imposed if the defendant is charged with a crime punishable with a sentence of three years or more).<sup>283</sup>

A defendant in pre-trial detention has the right to be heard by the court whenever it takes a decision which personally affects him, and the right to be assisted by a lawyer during any such proceedings.<sup>284</sup> While detained a defendant has the right to communicate in private with his counsel. Further restrictions may be imposed on defendants who are subject to incommunicado detention.<sup>285</sup> If acquitted at trial the defendant has the right to claim compensation for time spent in pre-trial detention.<sup>286</sup>

### ***Release pending trial: in practice***

Lengthy pre-trial detention remains a problem in Portugal despite improvements in recent years.<sup>287</sup> Although the average length of pre-trial detention is eight months, approximately 20% of pre-trial detainees spend more than one year on remand.<sup>288</sup>

It has been reported that these lengthy periods of pre-trial detention are a result of delayed investigations and judicial inefficiency.<sup>289</sup> Concerns have also been raised about the high number of allegations of physical ill-treatment of prisoners by custodial staff and the denial of access to a lawyer and a doctor for those in police custody.<sup>290</sup>

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*Most serious pre-trial detention problem in Portugal: lengthy pre-trial detention*

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<sup>277</sup> Article 200 CPP

<sup>278</sup> Article 198 CPP

<sup>279</sup> Article 200(1)(d) CPP

<sup>280</sup> Article 199 CPP

<sup>281</sup> Article 197 CPP

<sup>282</sup> Article 200(1)(f) CPP

<sup>283</sup> Article 200(1)(e) CPP

<sup>284</sup> Article 61 CPP

<sup>285</sup> Article 211(1) CPP

<sup>286</sup> Articles 225 and 226 of the CPP

<sup>287</sup> US State Department, 2010 Human Rights Report: Portugal, pages 5-6

<sup>288</sup> Ibid. p.6

<sup>289</sup> Ibid. p.6

<sup>290</sup> Report to the Portuguese Government on the visit to Portugal carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 25 January 2008, 19 March 2009, pages 12,17-18, 24

Portuguese law expressly provides for the separation of convicted prisoners and pre-trial detainees, with regional prisons designed to house pre-trial detainees and convicted low-level offenders serving sentences of up to six months imprisonment.<sup>291</sup> However, the US State Department<sup>292</sup> and the CPT<sup>293</sup> report that, in practice, remand detainees are often held with the general population of convicted prisoners.

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<sup>291</sup> Article 158 of Decree-Law no. 265 of 1 August 1979

<sup>292</sup> US State Department, 2010 Human Rights Report: Portugal, p.3

<sup>293</sup> Report to the Portuguese Government on the visit to Portugal carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 25 January 2008, 19 March 2009, p.30

## Romania

Under Romanian law the maximum period of detention during the criminal investigation phase is 180 days.<sup>294</sup> There is no specified maximum period for which the defendant can be held in detention during the trial phase. However, as soon as half the duration of the possible sentence for the offence is reached during the first phase of the trial, the defendant is released even if the first phase of the trial is not over.<sup>295</sup> At the end of 2010 there were approximately 4,900 pre-trial detainees in Romanian prisons, who made up 16.4% of the total prison population.<sup>296</sup> In 2009, 0.7% of pre-trial detainees were foreign nationals.<sup>297</sup>

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*No maximum length of pre-trial detention in Romania*

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### ***Release pending trial: the law***

Pre-trial detention may be imposed if there is evidence that the defendant has committed an offence and the judge decides that pre-trial detention is necessary in order to ensure the good running of the criminal trial or to prevent the accused or defendant from evading justice.<sup>298</sup> The judge must take one of the following into account:

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**0.7%**

*Percentage of pre-trial detainees in Romania who are foreign nationals*

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- the defendant has previously fled or there is evidence to suggest that the defendant will flee to avoid the criminal investigation, judgment or enforcement of the sentence;
- the defendant has breached measures imposed as alternatives to pre-trial detention;
- there is evidence that the defendant is trying to impede, directly or indirectly, the criminal investigation;
- there is evidence that the defendant is preparing to commit a new criminal offence;
- the defendant has intentionally committed a new criminal offence;
- there is evidence that the defendant is exerting pressure on the victim or is trying to reach a fraudulent compromise with the victim; or
- there is evidence that the defendant has committed an offence which is punishable with life imprisonment or imprisonment for more than four years,<sup>299</sup> and there is evidence that releasing the defendant would represent an actual danger to public order.

The Romanian Criminal Procedure Code sets out the conditions which can be attached to release pending trial. These include:

- an order requiring the defendant to obtain prior consent from the authorities before changing residence;

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<sup>294</sup> Article 159(13) Romanian Criminal Procedure Code

<sup>295</sup> Article 140 (2) Romanian Criminal Procedure Code. Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, pages 806-807

<sup>296</sup> Source: ICPS, 31/12/2010

<sup>297</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>298</sup> Articles 136 and 143 Romanian Criminal Procedure Code

<sup>299</sup> Articles 146 and 148 Romanian Criminal Procedure Code

- imposing an order which prohibits a defendant from living in, or moving to, a certain place (including prohibiting the defendant from attending sports or cultural events);
- a restriction on the defendant leaving Romania;
- a requirement to report at specified times to a police station;
- an obligation to avoid contact with specific persons;
- an obligation not to engage in specified activities relating to the alleged offence;
- an obligation not to drive a vehicle;
- an obligation to pay a financial surety in order to secure release; and
- an obligation to undergo treatment for addiction.

When under a movement restriction order, the defendant can be forced to wear an electronic tagging device. New powers, due to come into force in 2012, will allow courts to impose house arrest as an alternative to pre-trial detention.

Alternatives to pre-trial detention may be proposed by the defendant, his or her lawyer, close family members or the prosecutor. Some of the alternative measures to pre-trial detention can be imposed by the judge of his own motion.

Compensation is available for persons who have been held in pre-trial detention or whose freedom has been wrongfully restricted by alternatives to pre-trial detention. However, compensation is only available if the measure has been taken by the judicial authorities without observing the relevant legal provisions.<sup>300</sup>

### ***Release pending trial: in practice***

Romania's pre-trial detention population has dropped significantly from 10,831 in 1999 to 3,946 in 2009.<sup>301</sup> However, the country has been criticised for the ill-treatment of detainees and the use of brutal mistreatment to extract evidence which has then been adduced in court.<sup>302</sup> According to the 2010 US State Department Report, the regime for release pending trial is rarely used in practice.<sup>303</sup> In 2008 the CPT raised concerns about the use of police cells to house pre-trial detainees.<sup>304</sup>

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*Most serious pre-trial detention problem in Romania: mistreatment of detainees and lengthy periods before judicial authorisation of detention*

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In *Pantea v Romania*<sup>305</sup> the ECtHR made findings of multiple ECHR violations in relation to the applicant's treatment in pre-trial detention, which included being savagely beaten, denied medical treatment and transported for several days in a railway wagon in appalling conditions. It was almost four months before the applicant was brought before a judge, which the ECtHR found violated Article 5(4) ECHR. The *Pantea* case led to widespread reforms in

<sup>300</sup> Article 504 of the Romanian Criminal Procedure Code

<sup>301</sup> Source: Council of Europe Annual Penal Statistics – SPACE I

<sup>302</sup> Amnesty International, Annual Report 2011: Romania

<sup>303</sup> US State Department, 2010 Human Rights Report: Romania, p.6

<sup>304</sup> Report to the Government of Romania on the visit to Romania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 9 June 2006, published 11 December 2008

<sup>305</sup> [2003] ECHR 266

Romania.<sup>306</sup> However, more recently the ECtHR has found Romania in breach of the ECHR due to lengthy delays before judicial authorisation of detention,<sup>307</sup> excessive lengths of pre-trial detention,<sup>308</sup> and inhuman and degrading pre-trial detention conditions.<sup>309</sup>

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<sup>306</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p. 807

<sup>307</sup> *Samoila and Cionca v Romania* (App no. 33065/03), 4 March 2008, *Toma v Romania* (App no. 42716/02), 24 February 2009

<sup>308</sup> *Tanase v Romania* (App no. 5269/02), 12 May 2009

<sup>309</sup> *Ciupercescu v Romania* (App no. 35555/03), 15 June 2010, *Carabulea v Romania* (App no. 45661/99), 13 July 2010

## Slovakia

The maximum period of pre-trial detention in Slovakia is 4 years.<sup>310</sup> In 2010 there were approximately 1,500 pre-trial detainees in Slovakian prisons, who made up 15% of the total prison population.<sup>311</sup> In 2009, 5% of pre-trial detainees were foreign nationals.<sup>312</sup>

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**4 years**

*Maximum length of pre-trial detention in Slovakia*

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### **Release pending trial: the law**

Under the Slovakian criminal code pre-trial detention is only allowed if there is a justified concern that the defendant will:

- flee or hide, so as to avoid criminal prosecution or punishment (deemed particularly likely if: it is difficult to immediately determine the defendant's identity, he does not have permanent residence, or he would face a severe penalty if convicted);
- obstruct the criminal investigation; or
- repeat the criminal activity for which he is being prosecuted, or complete the criminal offence which he allegedly attempted.<sup>313</sup>

When considering whether to impose pre-trial detention the judge must hear from the defendant<sup>314</sup> (whose presence is obligatory) and take into account his assets, the nature of the alleged offence and its consequences, and other circumstances of the case.

If the judge finds that one of the justified concerns exists then the defendant may still be released pending trial if:

- a trustworthy person offers a guarantee for the future behaviour of the defendant (the judge must deem the guarantee to be sufficient and acceptable);<sup>315</sup>
- the defendant gives a written pledge to lead an orderly life, particularly that he will not commit any crime and he will comply with any duties and restrictions imposed on him (the judge must deem the pledge to be sufficient and acceptable);<sup>316</sup> or
- the custody can be replaced by the supervision of a probation officer,<sup>317</sup> or the payment of a surety of a designated amount.<sup>318</sup>

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**5%**

*Percentage of pre-trial detainees in Slovakia who are foreign nationals*

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Alternatives to pre-trial detention include:

- an obligation on the accused to notify to a police officer, a prosecutor or a court of any change in residence;<sup>319</sup>

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<sup>310</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.833

<sup>311</sup> Source: ICPS, 31 December 2010

<sup>312</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>313</sup> Section 71(1) Code of Criminal Procedure ("CCP")

<sup>314</sup> Section 72(2) CCP

<sup>315</sup> Section 80(1)(a) CCP

<sup>316</sup> Section 80(1)(b) CCP

<sup>317</sup> Section 80(1)(c) CCP

<sup>318</sup> Section 81 CCP

- an order that the accused person not enter certain localities, places or defined areas;<sup>320</sup>
- an order that the accused person remain at a specified place during specified times;<sup>321</sup>
- a ban on travel abroad;<sup>322</sup>
- a duty to report regularly to an office determined by the court;<sup>323</sup>
- a ban on contacting certain people or a ban on approaching a certain person at a distance closer than five metres;<sup>324</sup>
- a ban on executing an activity similar to which led to the commission of the crime;<sup>325</sup>
- a ban on driving a car and a duty to handover a driving licence;<sup>326</sup>
- an obligation to deposit money as a guarantee;<sup>327</sup>
- an obligation to undergo therapeutic treatment or treatment for addiction; and
- a duty to give up carrying a gun and other objects if appropriate.<sup>328</sup>

If one of these obligations is imposed as an alternative to pre-trial detention and is subsequently breached, the judge must reconsider whether pre-trial detention is necessary (i.e. it is not imposed automatically).<sup>329</sup>

Persons remanded in custody have the right to access legal advice without any third party hearing their conversation. Pre-trial detainees must be held in special remand prisons or in separate sections of normal prisons.<sup>330</sup> Once they are admitted to the remand centre, non-national defendants must be informed of their right to contact their consular authority.

The Constitution states: "Everyone shall have the right to compensation for damage caused by an unlawful decision of a court, of other public authority or of a body of public administration or by improper official procedure."<sup>331</sup> A person held in custody on the basis of an unlawful decision or incorrect administrative procedure is entitled to compensation amounting to one thirtieth of the national average salary for each day spent in custody. However, in order for compensation to be awarded the decision to impose pre-trial detention has to be annulled or amended, i.e. a mere acquittal does not suffice.

### ***Release pending trial: in practice***

Numerous violations of Article 5(1) and 5(4) have been found to have occurred as a result of excessive length of pre-trial detention and procedural shortcomings of review of pre-trial detention.<sup>332</sup> The ECtHR has found Slovakia in violation of the Article 5(3) ECHR for imposing pre-trial detention for periods between two and three years without domestic courts

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<sup>319</sup> Section 80(2) CCP

<sup>320</sup> Section 82(1)(c) CCP

<sup>321</sup> Section 82(1)(e) CCP

<sup>322</sup> Section 82(1)(a) CCP

<sup>323</sup> Section 82(1)(f) CCP

<sup>324</sup> Section 82(1)(h) CCP

<sup>325</sup> Section 82(1)(b) CCP

<sup>326</sup> Section 82(1)(g) CCP

<sup>327</sup> Section 81 and 82(1)(i) CCP

<sup>328</sup> Section 82(1)(d) CCP

<sup>329</sup> Section 80(3) CCP

<sup>330</sup> Section 3(1) of the Execution Act

<sup>331</sup> Article 46(3)

<sup>332</sup> See, for example, *Karlin v Slovakia* [2011] ECHR 1050, *Gál v Slovakia* [2010] ECHR 1905, *Stetiar and Sutek v Slovakia* [2010] ECHR 1820, and *Lexa v Slovakia* [2008] ECHR 886

displaying “special diligence” in the conduct of the proceedings.<sup>333</sup> The court has also made Article 5 findings against Slovakia for imposing pre-trial detention without providing sufficient or relevant reasons.<sup>334</sup> Despite the Slovakian constitution containing a right to compensation for pre-trial detainees, the ECtHR has found the country in violation of Article 5(5) ECHR for failing to adequately compensate defendants detained unjustly.<sup>335</sup>

Although detainees have the right to access a lawyer it has been reported that this right is rarely respected in practice, with many people claiming that they were first informed of their right to a lawyer at the first court hearing.<sup>336</sup> Overcrowding in Slovakia’s prisons has improved, although a recent CPT report noted that the average amount of space stood at 3.5m<sup>2</sup> per prisoner,<sup>337</sup> thus falling short of the CPT’s recommended standard of 4m<sup>2</sup>. The lack of recreational activities for remand prisoners has also been criticised by the CPT. However, recent changes have seen the introduction of a “mitigated regime” for 25-30% of remand prisoners which allows them access to the corridor and a TV room for most of the day.<sup>338</sup> Despite this, many remand prisoners face 23 hours a day locked in their cells.<sup>339</sup>

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*Most serious pre-trial detention problem in Slovakia: lengthy pre-trial detention*

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<sup>333</sup> *Pavletic v Slovakia* [2004] ECHR 280, *Rosselet-Christ v Slovakia* [2010] ECHR 1634

<sup>334</sup> *Kucera v Slovakia* [2007] ECHR 609, *Michalko v Slovakia* [2010] ECHR 2078

<sup>335</sup> *Michalko v Slovakia* [2010] ECHR 2078, *Aydemir v Slovakia* [2011] ECHR 224, *Osváthová v Slovakia* [2010] ECHR 2099, *Karlin v Slovakia* [2011] ECHR 1050, *Pavletic v Slovakia* [2004] ECHR 280

<sup>336</sup> Report to the Government of the Slovak Republic on the visit to the Slovak Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 24 March to 2 April 2009, 11 February 2010, p.18

<sup>337</sup> *Ibid.* p.26

<sup>338</sup> *Ibid.* p.43

<sup>339</sup> *Ibid.* p.43

## Spain

The maximum period of pre-trial detention in Spain is four years,<sup>340</sup> although whether or not detention can be extended to this maximum period depends on factors such as the basis for pre-trial detention, the nature of the alleged offence, and the sentence which could eventually be imposed. In 2011 there

were approximately 12,800 pre-trial detainees in Spanish prisons, who made up 18% of the total prison population.<sup>341</sup> In 2009 52% of pre-trial detainees were foreign nationals.<sup>342</sup>

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# 4 years

*Maximum length of pre-trial  
detention in Spain*

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### ***Release pending trial: the law***

The law states that pre-trial detention may not be imposed if alternative measures will be equally effective to achieve the aims of pre-trial detention<sup>343</sup>. In order to impose pre-trial detention there must be a reasonable suspicion that the person has committed a serious offence (i.e. an offence punishable by a maximum prison sentence of two years or more, or a shorter sentence in the event that the accused has a criminal record). Also, detention must be necessary in order to:

- guarantee the presence of the defendant at trial, if it is deemed that the defendant represents a flight risk;
- avoid the alteration, destruction or hiding of evidence which may be relevant to the case;
- prevent the defendant from taking action against the (legal) interests of the victim; or
- avoid the risk that the defendant will commit another offence.<sup>344</sup>

A decision to impose pre-trial detention may be revisited at any time before trial, either by a judge or a court of first instance.<sup>345</sup> The judge or court is not entitled to replace release pending trial with pre-trial detention without a petition from the Public Prosecutor. In order to ensure that the rights of pre-trial detainees are respected, the examining judge must visit the local prisons once a week, without providing the prison authorities with prior warning.<sup>346</sup>

Defendants facing serious charges, such as terrorism charges, can be held in “incommunicado detention”. Under this regime, the defendant is allowed to be held for a maximum of 13 days, during which certain fundamental rights are severely curtailed. For example, during this period the defendant is not entitled to receive visits,<sup>347</sup> communicate with the outside world,<sup>348</sup> or notify family or friends of the fact that they are detained or where they are being detained.<sup>349</sup> Incommunicado detainees are also not allowed to choose their own lawyer; instead they are assigned a legal aid attorney for the duration of the incommunicado period. The role of this lawyer is limited: they are not allowed to confer in

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<sup>340</sup> Article 504(2) **Ley de Enjuiciamiento Criminal (“LECrin”)**

<sup>341</sup> Source: ICPS, 29 July 2011

<sup>342</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>343</sup> Article 502(2) LECrim

<sup>344</sup> Article 503(1)(3) LECrim

<sup>345</sup> Article 539 LECrim

<sup>346</sup> Article 526 LECrim

<sup>347</sup> Article 523 LECrim

<sup>348</sup> Article 524 LECrim

<sup>349</sup> Article 520(2)(d) LECrim

private with the client and are unable to address the detainee directly, either to ask questions or to provide legal advice.

Another feature of pre-trial detention in “serious cases” includes the use of secret legal proceedings, or “secreto de sumario”.<sup>350</sup> This measure severely restricts access by defence lawyers to the details of the case, including the charges against their client and evidence in the case. This measure must be lifted at least 10 days before the closing of the investigative phase.

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52%

*Percentage of pre-trial detainees in Spain who are foreign nationals*

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Under Spanish law certain conditions may be attached to release pending trial. These include:

- an order that the accused person not enter certain localities, places or defined areas;
- a requirement to report at specified times to a specific authority, e.g. a police station or court;<sup>351</sup>
- an obligation to avoid contact with specific persons in relation to the alleged offence;
- an obligation not to drive a vehicle;<sup>352</sup>
- an obligation to pay a financial surety in order to secure release,<sup>353</sup> and
- an obligation to undergo treatment for addiction.<sup>354</sup>

Another alternative to pre-trial detention is “prisión atenuada” which is comparable to house arrest. The judge or court may decree that pre-trial detention shall be carried out, under surveillance, at the home of the accused if imprisonment will be of great danger to the accused, because of medical reasons.<sup>355</sup>

A person who has been subject to pre-trial detention is entitled to compensation for the harm caused to him due to his unnecessary stay in prison, if he is found not guilty of the offence, or if the proceedings against him are definitively dropped.<sup>356</sup> These requirements limit the right to compensation. However, a person can also claim compensation for damage caused by judicial errors or irregularities in the administration of justice.<sup>357</sup>

### ***Release pending trial: in practice***

Incommunicado detention raises significant fundamental rights concerns (see the case of Mohammed Abadi above). In 2008 the International Commission of Jurists noted that “Prolonged incommunicado detention can itself amount to torture or cruel, inhuman or degrading treatment.”<sup>358</sup> There is also evidence that, in practice, even the limited rights that incommunicado detainees have are being denied them. There have been reports that incommunicado detainees are subjected to informal questioning before the arrival of the

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<sup>350</sup> Article 302 LECrim

<sup>351</sup> Article 530 LECrim

<sup>352</sup> Article 529bis and 764(4) LECrim

<sup>353</sup> Article 530 LECrim

<sup>354</sup> Article 508(2) LECrim

<sup>355</sup> Article 508(1) LECrim

<sup>356</sup> Article 294(1) of the Organic Law on the Judiciary

<sup>357</sup> Article 121 of the Constitution and Article 292 of the Organic Law

<sup>358</sup> International Commission of Jurists, Submission to the Human Rights Committee regarding the consideration of the 5<sup>th</sup> Periodic Report submitted by Spain, 10 October 2008, p.3

appointed lawyer,<sup>359</sup> that evidence obtained during this questioning is being adduced in court,<sup>360</sup> and that defence lawyers who attempt to put questions to their clients (which they are allowed to do under the law) are being deterred from doing so by police intimidation.<sup>361</sup>

Pre-trial detention in Spain in general has drawn criticism. The US State Department has identified lengthy pre-trial detention periods as a problem,<sup>362</sup> with some sources claiming that extension of pre-trial detention is “practically automatic” in terrorism cases.<sup>363</sup> The CPT has reported that detainees in Spain can face mistreatment at the hands of the authorities.<sup>364</sup> Important safeguards to prevent this from happening have not been observed in practice; in one case a defendant was remanded in custody without the judge having actually seen him.<sup>365</sup>

The CPT has noted that, in the autonomous region of Catalonia, little effort is made to assist non-national detainees to integrate into the prison system.<sup>366</sup> There have also been reports that non-nationals were prejudiced in criminal proceedings because communication was poor and/or they were not properly informed about the functioning of Spanish criminal procedure.<sup>367</sup> Practitioners FTI has spoken to claim that decisions on pre-trial detention generally are taken in an inadequate fashion, without a full consideration of whether detention is proportionate.

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*Most serious pre-trial detention problem in Spain: incommunicado detention and excessive pre-trial detention maximum periods*

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<sup>359</sup> Ibid. p.10

<sup>360</sup> Ibid. p.10

<sup>361</sup> Ibid. p.12

<sup>362</sup> US State Department, 2010 Human Rights Report: Spain, p.5

<sup>363</sup> Human Rights Watch, Setting an Example? Counter-Terrorism Measures in Spain, 1 January 2005

<sup>364</sup> Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States, Vermeulen et al, 2011, p.929

<sup>365</sup> Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 12 to 19 December 2005, 10 July 2007, p.20

<sup>366</sup> Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 19 September to 1 October 2007, 25 March 2011, p.51

<sup>367</sup> Better Bail Decisions: A project to improve the quality and consistency of bail decision making by courts in England and Wales, Spain and the Czech Republic, 2003, p.7

## Sweden

There is no maximum period of pre-trial detention in Sweden. However, if no legal action has been taken within 14 days, a new remand hearing is required.<sup>368</sup> In 2010 there were approximately 1,700 pre-trial detainees in Sweden, who made up 24% of the total prison population.<sup>369</sup>

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*No maximum length of pre-trial detention in Sweden*

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### **Release pending trial: the law**

Pre-trial detention may only be imposed on a person who is reasonably suspected on probable cause of committing an offence punishable by imprisonment for a term of one year or more. Furthermore there must be a reasonable risk that the person will:

- flee or otherwise evade legal proceedings or punishment;
- impede the investigation by, for example, destroying evidence; or
- commit further offences.<sup>370</sup>

Any person may also be detained on probable cause, regardless of the nature of the offence, if: their identity is unknown and they refuse to provide it; or, they do not reside within Sweden and there is a reasonable risk that they will avoid legal proceedings or a penalty by fleeing the country.<sup>371</sup> The defendant's age, health status and similar factors must be considered in determining whether release should be granted.

The defendant attends the hearing on pre-trial detention unless there are exceptional reasons for his absence. The defendant may request the right to freedom at any time via his lawyer<sup>372</sup> and has the right to appeal the decision to impose pre-trial detention.<sup>373</sup> Female defendants should be held in specially designated women-only prisons (there are six prisons for female detainees in the Sweden).<sup>374</sup>

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**24%**

*Percentage of the prison population who are pre-trial detainees in Sweden*

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Alternatives to pre-trial detention include:

- a supervision order which requires a suspect to be at a place of residence or work at specified times;
- a prohibition on travel:<sup>375</sup> this may be ordered only if the reasons for the measure outweigh the detriment to the suspect's interests; and
- an obligation to report.<sup>376</sup>

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<sup>368</sup> The Swedish Prison and Probation Service – Basic Facts, p.9

<sup>369</sup> Source: ICPS, 1 October 2010

<sup>370</sup> Chapter 24, section 1 Code of Judicial Procedure

<sup>371</sup> Chapter 24, section 2 Code of Judicial Procedure

<sup>372</sup> Chapter 21, section 8 Code of Judicial Procedure

<sup>373</sup> Chapter 52, section 1 Code of Judicial Procedure

<sup>374</sup> Prison Treatment Act, Section 8a.

<sup>375</sup> Chapter 25, section 1 Code of Judicial Procedure

<sup>376</sup> Chapter 26, section 1 Code of Judicial Procedure

Defendants held for 24 hours or more have the right to compensation if they are eventually acquitted at trial.<sup>377</sup> Compensation can be refused or adjusted if the detainee has caused the detention through his own conduct or “if for other reasons it would be unreasonable to grant compensation”.

### ***Release pending trial: in practice***

In its 2010 human rights report on Sweden, the US State Department noted that although prison conditions generally met international standards, pre-trial detainees were subject to extended isolation and severe restrictions on their activities.<sup>378</sup> These included restrictions on visits, phone calls, correspondence, contact with other detainees, and access to newspapers, radio and television.<sup>379</sup>

These measures are supposed to be imposed when there is a risk that defendants will attempt to contact associates who will tamper with evidence and impede the investigation. However, it appears that they are imposed almost automatically; according to the Swedish Prison and Probation Service approximately 45% of pre-trial detainees in 2010 were subject to restrictions.<sup>380</sup> The court has no say over which restrictions should be imposed. Instead the prosecutor applies for general permission to impose restrictions it deems necessary. There are no means to appeal the decision to impose a specific restriction (e.g. isolation from family members).<sup>381</sup>

The CPT has reported that the issue of restrictions on pre-trial detainees has formed a central part of its ongoing dialogue with the Swedish authorities since the Committee’s first visit in 1991.<sup>382</sup> Many detainees claim that they are provided with no explanation as to why the restrictions have been imposed on them.<sup>383</sup> The President of the International Prison Chaplains' Association has branded Swedish remand prisons as the worst in Europe, claiming that the isolation of pre-trial detainees is impeding their ability to prepare for trial.<sup>384</sup>

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*Most serious pre-trial detention problem in Sweden: restrictions imposed on pre-trial detainees including isolation from other prisoners*

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In 2005 the Swedish government set up a commission to propose new legislation on the treatment of persons arrested or remanded in custody. The commission reported back in 2006, making a range of proposals which included allowing defendants to appeal against the

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<sup>377</sup> Act on Compensation for Deprivation 1998

<sup>378</sup> US State Department, 2010 Human Rights Report: Sweden, p.2

<sup>379</sup> Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 18 June 2009, 11 December 2009, p.25

<sup>380</sup> US State Department, 2010 Human Rights Report: Sweden, p.2

<sup>381</sup> Chapter 24, section 5a Code of Judicial Procedure

<sup>382</sup> Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 18 June 2009, 11 December 2009, p.25

<sup>383</sup> Ibid. p.26

<sup>384</sup> Swedish Prisons, Engineering and Technology Magazine, 19 January 2011: <http://eandt.theiet.org/blog/blogpost.cfm?threadid=39294&catid=368>

court's decision to impose restrictions on them while in pre-trial detention. The proposals are still under consideration by the Ministry of Justice.

# FAIR TRIALS INTERNATIONAL



Communiqué issued after the Fair Trials International Legal Experts  
Advisory Panel Meeting (London, 22 September 2011)

Pre-trial detention in today's European Union



Criminal Justice 2010  
With financial support from  
Criminal Justice Programme  
European Commission –  
Directorate-General Justice

The logo for the OAK Foundation. The word "OAK" is in a large, blue, serif font, with a small globe icon integrated into the letter "O". Below "OAK", the word "FOUNDATION" is written in a smaller, blue, serif font.

## Introduction

1. Fair Trials International (“FTI”) formed the Legal Experts Advisory Panel (“LEAP”) in 2008 to provide an opportunity for experts in criminal justice, fundamental rights and access to justice in the EU to meet and discuss issues of mutual concern and to provide advice, information and recommendations to inform FTI's work. The eighth meeting of LEAP under the current EU action grant took place at the London offices of Clifford Chance LLP on 22 September 2011. 52 LEAP members representing 18 European jurisdictions attended.
  2. Since the February 2011 meeting when detention issues were last discussed by LEAP, the European Commission has launched a Green Paper consultation on detention. This was issued in June 2011 and ends on 30 November 2011. It is designed to establish what action is required at EU level to raise standards across all EU countries in the whole area of detention.
  3. FTI has since undertaken significant research on pre-trial detention in the EU and has been working on a detailed report to submit in response to the Green Paper. The report was circulated in draft before the meeting. It contains comparative research on the pre-trial detention laws of 15 EU Member States,<sup>385</sup> undertaken in collaboration with Clifford Chance LLP and LEAP members in those 15 EU jurisdictions.
  4. Europe's excessive use of pre-trial detention is ruining lives and costing billions every year. The European Supervision Order could save billions and ease the severe overcrowding in prisons in over half of all Member States. However, many EU countries' systems do not yet have the requisite mechanisms in place in order to make full use of it.
  5. Due to the large number of LEAP attendees the meeting was divided into three smaller workshop groups which discussed the Green Paper and FTI's draft report, focusing on the following issues:
    - i. Should the EU legislate to set minimum standards for the use of pre-trial detention?
    - ii. Should the EU take steps towards establishing a maximum pre-trial detention limit and, if so, what is the correct length?
    - iii. What practical steps can be taken to ensure Member States apply the European Supervision Order fully and consistently?
    - iv. In EAW cases, is deferred extradition appropriate when the case is not 'trial-ready'?
- (i) Should the EU legislate to set minimum standards for the use of pre-trial detention?**

### **a. Problems identified in use of pre-trial detention in EU jurisdictions**

6. It was widely acknowledged that pre-trial detention offers valuable safeguards to ensure justice is served, evidence and witnesses are protected, and suspects do not evade prosecution. However, it should only to be used where necessary as it conflicts with the presumption of innocence, infringes the right to liberty and to family life, and tends to

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<sup>385</sup> The Czech Republic, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom.

impair a person's ability to prepare for trial. During discussions among the panel members the following problems were identified in the use of pre-trial detention.

7. Pre-trial detention is being used when not strictly necessary, and often for too long, at huge cost to both individuals and the state. Some countries, including the UK, are incarcerating women charged with very minor offences such as shoplifting. This has a huge knock-on socio-economic effect when children are taken into care. Several members were concerned with these wider socio-economic costs of pre-trial detention.
8. Few Member States have an adequate system for the regular and reasoned review of pre-trial detention. In many countries the right to a review exists in legal theory but is not protected in practice. In others, review hearings amount to a rubber-stamping exercise, rather than a genuine reassessment of the need for detention with the opportunity to present arguments in favour of release. Often no alternatives to detention are considered and insufficient reasoning is given for detention decisions. Inappropriate factors are often taken into account in the detention decision such as the seriousness of the offence
9. Non-nationals are more likely to be detained than nationals on the basis that they present a flight risk. Some Member States' laws allow for people to be detained for years before trial, meaning people are being extradited only to be locked up in a foreign country for significant periods. This has been exacerbated by the introduction of the European Arrest Warrant (EAW). No transparency exists in a number of Member States (e.g. Spain, Romania and Belgium) in the way detention decisions are taken and reviewed.
10. Across the EU, people who have not been convicted of any crime are being detained without good reason for months or years, often in conditions conducive to trial preparation. Legislation in some States allows individuals to be detained for years pre-trial: some have no maximum limit. Some countries lack adequate review systems. Non-nationals are more likely than nationals to be subject to arbitrary or excessive pre-trial detention and to be deprived of key fair trial rights. This problem is exacerbated by the European Arrest Warrant, under which growing numbers are being extradited.
11. There is increasing use of pre-trial detention, rather than appropriate alternatives, for fear of negative media (and political consequences) if an individual accused of an offence is released pending trial. In the UK, members saw this after the August 2011 rioting. In Spain, the 'secreto de sumario' regime, intended for especially complex and serious cases, has become widespread in cases where the accused is a non-national. Individuals held under this regime are at greater risk of an unfair trial and have insufficient disclosure for there to be effective custody review hearings.

**b. What are the essential features of a pre-trial detention review?**

12. The panel agreed it is essential that an accused has the right to have the lawfulness of his detention determined by a court that is independent of the prosecution, at regular intervals. This review should be a genuine reassessment. The onus should be on the prosecution to show, with evidence, why the continued detention is necessary.
13. The presumption of innocence should be paramount and, to reflect this, there should be a presumption in favour of release pending trial. Reasons should not focus on the seriousness of alleged offences but on the factors laid down in the case law on Article 5, including the need to preserve evidence, protect witnesses and ensure the accused does not abscond. A proper appraisal of these matters requires the court to take into account the defendant's own circumstances, as well as the overall interests of the prosecution. Stereotypical reasons such as the non-national status of the accused should not be

relied on. The court should ensure the prosecution has considered available alternatives such as electronic tagging or regular reporting at the police station. A further factor that could be taken into account is the length of possible sentence on a finding of guilt. Any length of pre-trial detention should not exceed this.

14. The review process must ensure that the accused can present arguments in favour of release, that all relevant alternatives to detention are considered, that reasons are given for a refusal to release and that a person's means are taken into account when fixing a financial surety. In particular, the fact that an individual is a non-national or does not have community ties should not mean that he is automatically considered a flight risk. The seriousness of the offence should also not be used as a sole ground for refusal.
15. Review hearings should be transparent, with impartial judges hearing both sides before giving clear reasons for decisions to hold a person in pre-trial detention. Hearings should be held in public unless privacy is requested by the accused. It was agreed that the following are essential to a fair review process: sufficient disclosure prior to the review hearing (including both of the charges and the nature of the case against the defendant, and of the evidence relied on by the prosecution of the need for detention); legal representation, legally aided where necessary; and an interpreter and translation of key documents where necessary.
16. Finally, it is the role of the court to take a pro-active approach to monitoring the progress towards trial. Prosecution authorities should conduct the preparation of a case with special diligence where the accused is being held in pre-trial detention. Therefore, where the state has previously relied on the needs of the investigation as a justification for detention, the reviewing court should be proactive in ensuring that the necessary diligence is indeed being applied.

#### **c. How often should detention reviews take place?**

17. Most members agreed that monthly reviews of detention would be preferable. However, busy court schedules and lack of resources in some states mean that monthly review hearings are usually no more than a rubber-stamping of earlier decisions. This is the case, for example, in Italy and Romania, countries which do conduct monthly reviews but often to little effect in terms of shortening the delays to trial or periods in pre-trial detention. Some members therefore considered that three-monthly reviews and/or a right to appeal a detention decision to a higher court would allow for a more effective review hearing, enabling new facts and the overall progress of the matter to trial to be assessed and fully reasoned arguments given by the court for the decision to continue detention or to release.

#### **d. What is the legal basis for minimum standards of pre-trial detention?**

18. All Member States, as signatories to the ECHR, must ensure that the principles espoused by the European Court of Human Rights ("ECtHR") in relation to pre-trial detention are observed in their domestic systems. However, this is not happening in practice. EU Member States are consistently found to have breached Convention rights. Given the importance of Article 5 rights, the fact that Member States often do not comply with them and the lack of a sufficient remedy at the ECtHR, it is necessary to have stronger compulsory and enforceable methods, through EU legislative action.
19. The Commission notes in its Green Paper that detention issues "come within the purview of the EU as ... they are a relevant aspect of the rights that must be protected in order to

promote mutual trust”.<sup>386</sup> Under Article 82(2)(b) of the Treaty of the Functioning of the European Union, there is a clear legal basis for legislating in this area, as pre-trial detention entails “the rights of individuals in criminal procedure”.

20. It was widely agreed that due to the existence of mutual recognition instruments such as the EAW, there is a need for mutual trust at EU level. Poor standards of protection for basic rights across the EU erode the trust and confidence necessary for mutual recognition measures. In many Member States, including Germany and Poland, domestic legislation exists that requires compliance with Article 5. However, in reality, Article 5 is not being complied with consistently and there is no effective remedy for its infringement, which can also lead to separate infringements under Article 6. The ESO, although it has the potential to limit pre-trial detention, may not be a sufficient safeguard, as it is a discretionary regime and some countries are not yet equipped to use it fully (see below under (iii)).
21. Many members cautioned that the introduction of legislative minimum standards should not be allowed to permit Member States to *reduce* standards where their current standards are higher (at least on paper) than those to be proposed under a future EU Directive. A non-regression clause could be included to deal with this, but the key goal of EU legislation must be to make ECHR rights more practical to enforce and monitor.

**e. Should there be a remedy for breach of minimum rules on pre-trial detention?**

22. It was widely felt that there should be an effective remedy, including an enforceable right to compensation, in the event that minimum rules on the use or review of pre-trial detention are breached. Some members considered that, for compensation to be payable, there would need to be fault and/or negligence by the prosecution in the way the case was conducted, leading to the case being dropped, or to a finding of miscarriage of justice. Compensation should reflect losses suffered by the individual (for example lost earnings, collapse of a business, and loss of liberty and family life).

**(ii) Should the EU take steps towards establishing a maximum pre-trial detention limit and, if so, what is the correct length?**

23. The panel agreed that steps should be taken at EU level to address the extreme variance in different countries’ legal systems concerning periods of pre-trial detention. In a number of EU countries, legislation permitting lengthy periods of pre-trial detention (or the absence of a legal limit) can allow prosecutors to drag their feet and can operate to put pressure on the accused to plead guilty in cases where the sentence likely to be imposed is less than the time an accused could spend on remand. Some members were concerned about extra time spent in prison following a *not guilty* verdict, when the prosecutor appeals. In some Member States these periods are very long and wholly unacceptable.
24. It was widely felt that EU action was necessary to address this, given that those countries which tend to allow long periods in pre-trial detention rarely if ever demonstrated any good objective reasons for the practice. However, most members felt the solution was not, for the time being, legislation. Instead the panel agreed that the EU should examine the viability of establishing a maximum pre-trial detention limit. Some members felt that six months was a suitable maximum to aim for, others considered a year to be more realistic given the complexity of some cases. Some suggested that if 6

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<sup>386</sup> Strengthening mutual trust in the European Judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327 final, 14 June 2011, p.3.

months had passed, there should be a greater onus on the prosecution to show why continued detention was necessary.

**(iii) What practical steps can be taken to ensure Member States apply the European Supervision Order fully and consistently?**

25. Effective implementation of the ESO will require proper resources and training. It will be necessary to ensure that effective alternatives to pre-trial detention, such as tagging, regular reporting or conditional release are available. In many Member States, the only available alternative to pre-trial detention is money bail, which is impossible for most suspects to provide.

**(iv) Is deferred extradition appropriate when the case is not ‘trial-ready’?**

26. The panel agreed that this was a good idea in principle but that, in practice, it was often difficult to obtain the necessary information on the status of the investigation at the extradition stage. Where there are reasonable grounds to believe that the case is not trial-ready (for example where evidence requests have been sent overseas and will therefore cause long delays to proceedings, as happened in the Greek prosecution of Andrew Symeou, who spent almost a year in pre-trial detention and who was extradited almost two years before his eventual trial), the executing state should be able to defer extradition, unless satisfied that there is no prospect of protracted pre-trial detention.

**Conclusion**

27. Following wide-ranging discussions on the topic of pre-trial detention in the EU, members expressed the following views:

- given the widespread misuse of pre-trial detention and its impact on trial preparation and the rights to liberty and family life, as well as wider socio-economic cost, EU action is necessary to set minimum standards for its use and regular review and ensure an effective remedy when these rights are infringed;
- common minimum standards would assist judges and ensure consistency of approach to pre-trial detention;
- the proposals contained in FTI’s draft report for an EU Directive setting minimum standards were appropriate;
- resources and training are required for full use to be made of the ESO system when it is implemented in December 2012;
- deferred extradition should be used to prevent lengthy periods on remand after surrender under an EAW; and
- in addition to limiting the length of pre-trial detention, cutting out delay between charge and trial is essential and judges carrying out review hearings should take a pro-active approach to ensuring diligence in the prosecution of cases, particularly where a person is in pre-trial detention.