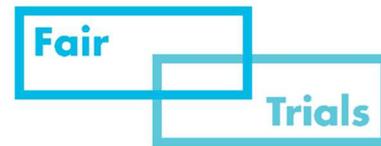


Fair Trials



The Overuse of Pre-Trial Detention

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. In Europe, we coordinate the Legal Experts Advisory Panel- the leading criminal justice network in Europe consisting of over 180 criminal defence law firms, academic institutions and civil society organisations. For more information, please contact Ilze at ilze.tralmaka@fairtrials.net.

Prisons across the EU are overcrowded, struggling to house more people than they were built for. This is a long-standing problem fuelled in no small part by the excessive use of pre-trial detention. One any given day, there are about 100,000 people in pre-trial detention in Europe.¹ Pre-trial detention is applied to people whose guilt or innocence is yet to be determined by a court. It should always be used as a measure of last resort – only when there are individual risks that make deprivation of liberty absolutely necessary to avert certain specified risks. In practice, pre-trial detention is often requested and ordered as a matter of routine on the basis of generic risks, without proper consideration of the suspect's individual circumstances and the impact detention has on their ability to be employed, their private and family life, health and wellbeing.

The European Commission and Parliament have, over more than a decade, repeatedly recognised the need to address the overuse of pre-trial detention.² Recent judgments³ from the Court of Justice of the European Union highlight the need to act: inhuman conditions in overcrowded prisons threatens the mutual trust at the heart of EU cross-border judicial cooperation. But, to date, there is still no proposal for concrete EU action on pre-trial detention.

This year, prisons across the EU have quickly become (and remain) epicentres of the COVID-19 pandemic, putting the lives and health of prisoners and prison staff at risk. Faced with the impossibility of implementing social distancing measures in overcrowded prisons, many countries have taken steps to reduce prison overcrowding, including early release of sentenced prisoners reaching the end of their sentence or electronic monitoring to serve the sentence at home.⁴ However, we are not aware of general measures aimed at reducing the large number of people held in pre-trial detention. In some countries, it was reported that police made fewer arrests, prosecutors reduced the number of pre-trial detention requests,⁵ and courts turned to more alternatives to detention. While these measures prevented an increase in the number of new pre-trial detainees, they did not reduce the number of persons already detained.

¹ See Justicia brief '[Pre-trial detention: It's time for EU action to end excessive use](#)'.

² See European Parliament resolution of 5 October 2017 on prison systems and conditions, [2015/2062\(INI\)](#), para.13.; Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, 14 June 2011.

³ See e.g., CJEU, Joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, 5 April 2016, [ECLI:EU:C:2016:198](#); Case C2016/18 PPU, *LM*, 25 July 2018, [ECLI:EU:C:2018:586](#).

⁴ Fair Trials, [Short Update: Norway releases prisoners to prevent spread of coronavirus in prisons](#), 29 April 2020.

⁵ Fair Trials, '[Beyond the emergency of the COVID-19 pandemic. Lessons for defence rights in Europe](#)', July 2020, p.42.

The pandemic pushed to the fore the need to tackle the overuse of pre-trial detention. What can we do about it? There is no single solution that will alone be successful in changing long-standing practices and culture. We suggest a comprehensive and coherent approach, that bring together the different stakeholders concerned. The approach should include the following elements.

Firstly, the EU must set clear standards to limit the use of pre-trial detention as a measure of last resort. This includes a requirement to assess the necessity and proportionality of any restrictive measures applied during the pre-trial stage of criminal proceedings. Domestic legal frameworks are insufficient in this respect. Research shows that judicial reasoning is often vague and formulaic, based on minimal information (usually only put forward by the prosecution) and fails to assess alternative measures that could be effective in protecting any risks to the investigation, limiting the risk of reoffending and ensuring the person's presence at trial⁶ – or even whether alternative measures are necessary at all. A robust set of EU standards would give an opportunity to review national laws and practices and enable systemic oversight of the implementation of those standards on a regular basis.

Secondly, suspects and accused persons in custody need to have effective early access to legal counsel. Legal assistance is key to ensuring that people understand their rights, can prepare for hearings, gather evidence to support release instead of pre-trial detention, and where appropriate, to argue for the application of alternative measures.⁷ But access to a lawyer will be little more than a box checking exercise without effective implementation of other rights that enable lawyers to fulfil their function. Timely access to evidence at the basis of prosecution's request for pre-trial detention, confidential access to clients and adequate time to prepare for hearings are essential to ensure that lawyers are in a position to best challenge pre-trial detention requests.

Thirdly, where identified risks due to the particular circumstances of the case at hand mean that release is not suitable, alternatives to detention should be duly considered. First and foremost, release should be the default, with detention a last resort, and alternatives applied only when there is individualized determination, they are necessary for the specific risks identified. In many European countries, judges can opt for alternative measures to pre-trial detention, such as electronic monitoring and conditional release (e.g. subject to residing at a specified address, curfews and travel restrictions). However, research shows that judges tend to approve detention requests due to a lack of faith in alternatives.⁸ Judges should be required to show why release or alternative measures are not suitable before ordering detention. Both the prosecution and defence should be permitted to suggest individualised alternatives, such as drug treatment, holding a job and maintaining a mailing or physical address. Alternatives should always be the least restrictive means necessary to ensure the purpose for which restrictions were deemed necessary and should be regularly reviewed and reduced in severity where possible. Under a step-by-step approach, judges must first establish what the risk is the court seeks to prevent, before examining what alternative measure might mitigate that risk. Only if all available alternatives would be inadequate to address that particular risk can detention be imposed.

⁶ Fair Trials, [‘A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU’](#), May 2016, pp.1, 20 and 62.

⁷ Fair Trials, [‘Where's my lawyer? Making legal assistance in pre-trial detention effective’](#), October 2019, p.17.

⁸ Fair Trials, [‘A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU’](#), May 2016, p. 27.

States must be required to invest properly in criminal justice systems and ensure that probation services are adequately resourced and staffed to meet the demand. If use of alternative measures to detention increase, it will be fundamental to monitor in parallel whether pre-trial detention decreases. Alternatives must not replace release, only detention.

Tackling the overuse of pre-trial detention will require collaboration across institutions and professions. Fair Trials has already created resources⁹ to assist defence lawyers in arguing for release from pre-trial detention. We are ready to assist decision makers and work together with probation services and others working on alternatives to detention in formulating policies that enable effective and sustainable reduction of pre-trial detention population across the EU.

⁹ Fair Trials, [Template application for the urgent release from pre-trial detention](#), April 2020; Fair Trials, [‘Effective legal assistance in pre-trial detention decision-making. Regional handbook for lawyers’](#), October 2019.