



Pre-trial detention in the EU

CONFERENCE ON 'ALTERNATIVES TO DETENTION'

**Bucharest, Romania
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EU Context

- Green Paper on Detention in June 2011 which launched a wide public consultation on the issue of pre-trial detention
- It received 81 replies from Member States, civil society and NGOs. A summary of the replies can be found on the Commission website. COM (2011) 327 final:
http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm
- European Parliament resolution of 7 December 2011 and European Parliament resolution of 27 February 2014

Intervention at EU level?

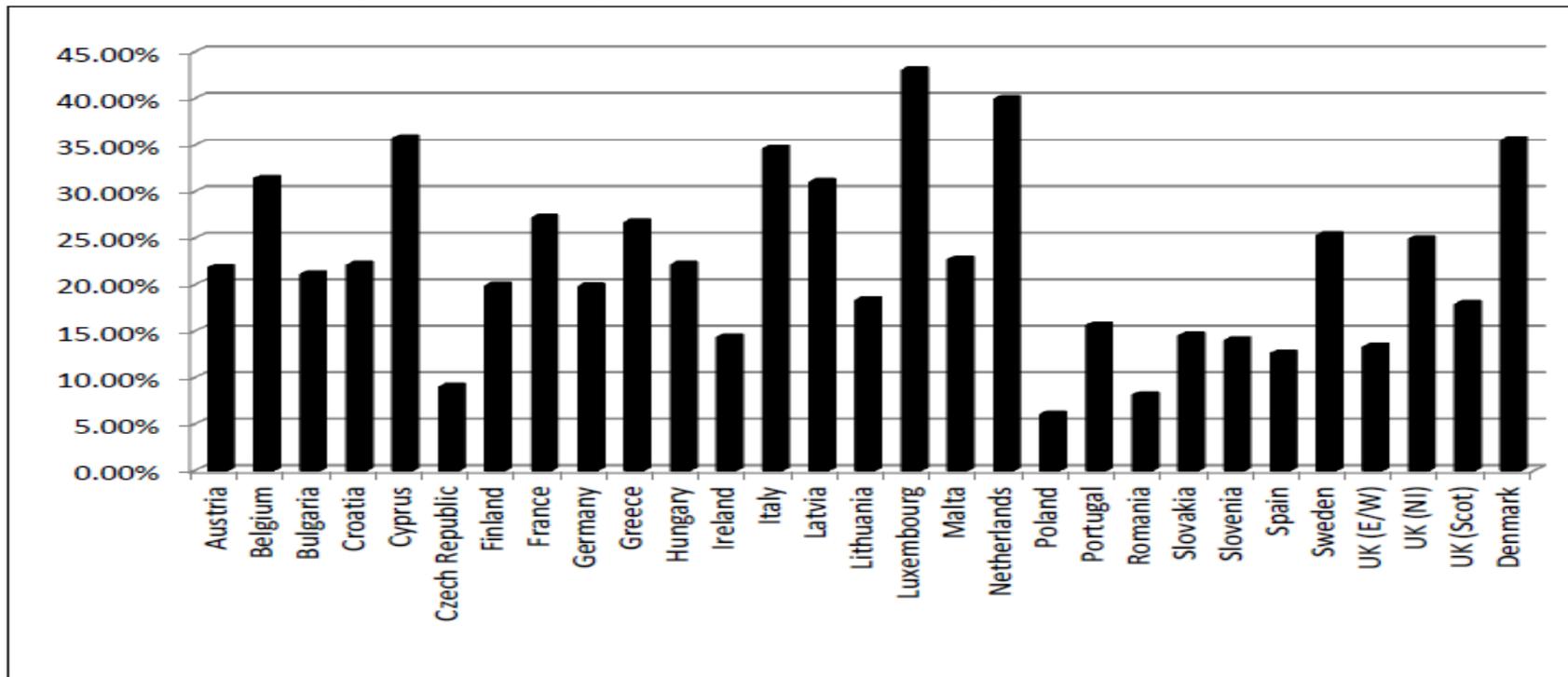
- 2015/2016 Study performed by Centre for Strategy & Evaluation Services (CSES)
- 2014-2016 Fair Trials International (FTI) on "The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making". EL, ES, HU, IE, IT, LT, NL, PL, RO and UK

Size of the problem

- Pre-trial detainees make up a sizeable proportion of the European Union's prisons – approximately 22% by the most recent measure, comprised of 120,539 individuals held on remand or awaiting a final sentence.
- The number of pre-trial detainees and the proportion they make up of overall prisoners varies widely between Member States, ranging from 6% in Poland to 39.9% in the Netherlands. (BE, EL and NL)
- A relatively high proportion of the EU's pre-trial prison population are not nationals of the country holding them (26%).

**Source: Institute for Criminal Policy Research (ICPR), University of London,
World Pre-trial/Remand Imprisonment List**

Percentage of EU prison population comprised of pre-trial detainees³



Established legal principles on PTD

- **Measure of last resort (ultimum remedium)**
- **Requirement to consider alternatives**

Article 9 of the International Covenant on Civil and Political Rights (ICCPR) (1966)

"It shall not be the general rule that persons awaiting trial shall be detained in custody".

Rule 6 of the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (1990)

"Pre-trial detention shall be used as a means of last resort in criminal proceedings. Alternatives to pre-trial detention shall be employed at as early a stage as possible"

Established legal principles on PTD

Rule 3 of the Council of Europe (CoE) Recommendation (2006) 13 of the Committee of Ministers on the Use of Remand in Custody

*"(3) In individual cases, **remand in custody shall only be used when strictly necessary and as a measure of last resort**; it shall not be used for punitive reasons.*

*(4) **In order to avoid inappropriate use of remand in custody the widest possible range of alternative, less restrictive measures relating to the conduct of a suspected offender shall be made available**"*

Established legal principles on PTD

European Court of Human Rights *Ambruszkiewicz v. Poland* (2006)

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

Presumption in favour of release: burden of proof on the State to show why a person cannot be released

Liberty is the rule, to which detention must be the exception

Established legal principles on PTD

- **Pre-conditions**

The basic, *sine qua non* condition:

- ✓ "Reasonable suspicion" of having committed an offence
- ✓ Offence must attract a prison sentence of minimum x years

- Need additional **grounds** to detain someone

Established legal principles on PTD

Limited grounds for imposing PTD (summarised in ECtHR Piruzyan v. Armenia 33376/07, para. 94)

- 1. Risk of absconding** The risk that the suspect will fail to appear for trial;
- 2. Risk of interference with justice** The risk that the suspect will spoil evidence or intimidate witnesses;
- 3. Risk of re-offending** The risk that the suspect will commit further offences; definite risk of a particular offence
- 4. Preservation of public order** The risk that the release will cause public disorder.

Reasoning needs to engage with specific evidence in each case

Severity of the offence cannot justify PTD on its own

Established legal principles on PTD

- Continued detention must be subject to **regular review**, which can be initiated by the defendant, or by a body of judicial character. Need increasingly strong reasons as time passes.
- 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 detention (previous decisions should not simply be reproduced).

Established legal principles on PTD

Maximum length

- In any event, a defendant in pre-trial detention is entitled to a trial **within a reasonable time** or release pending trial; there must be **special diligence** in the conduct of the prosecution case (Article 5(3) of the ECHR)
- Length of pre-trial detention **shall not exceed, nor normally be disproportionate to, the penalty** that may be imposed for the offence concerned (Article 22 of CoE rules on remand in custody)

Application of PTD in practice

- ✓ Despite laws that protect in principle concepts like detention as a last resort, presumption of release, proportionality, there were **systemic failures to respect these standards effectively in practice**
- ✓ **Poorly-reasoned decisions to detain suspects unnecessarily**, relying on minimal information, in many MS "presumption of detention"
- ✓ **Judicial reasoning was often vague and formulaic** (use of standard phrases), and failed to engage sufficiently with practical alternatives to pre-trial
- ✓ **No access to adequate legal assistance** or sufficient access to case materials essential to challenging detention
- ✓ **Arguments of the prosecution credited** over those of the defense
- ✓ Pre-trial detention was used for **unlawful ends**, such as in order to coerce a confession or for punitive purposes.

Application of PTD in practice

- ✓ **Substance:** unlawful grounds, such as exclusive or primary reliance on the seriousness of the offences, or findings of flight risk based on suspect justifications such as lack of fixed residence or foreign nationality. Reasoning was often formulaic and did not engage with the specific evidence in each case. In some countries, certain suspects including women and foreign nationals were disproportionately detained
- ✓ **Reviews:** reviews in practice did not always provide sufficient oversight. In some countries, defendants and/or their lawyers are not being guaranteed presence at review hearings. Decisions to detain were rarely overturned or even seriously questioned on review in most countries, and reasoning tended to be even more generic and formulaic than in the first instance. Detention was sometimes extended to protect the integrity of the investigation long after relevant investigative tasks were complete. The frequency with which reviews takes place varies widely between Member States, as does the average duration of pre-trial detention

Application of PTD in practice

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

Problems and issues PTD

Consequences for the individual who should be presumed to be innocent

- ✓ Socio-economic effects (loss of job, education and breakdown of families)
- ✓ Higher risk of obtaining a custodial sentence
- ✓ Risk of creating criminal networks in PTD
- ✓ Vulnerability of pre-trial detainees: in the hands of the authorities, under pressure to confess, PTD most open to abuse in criminal justice process
- ✓ More difficult to prepare a case properly
- ✓ Conditions in PTD worse than in prison (no rehabilitation)

Discrimination: foreigners kept in custody more often than nationals because of risk of flight/differential treatment

Problems and issues PTD

Affects mutual recognition instruments, such as the European arrest warrant (EAW)

IE: 2015 High Court. Presumption of bail (detention is an exceptional departure from the right to liberty) v. presumption of detention, only rebuttable in very exceptional circumstances. EAW issued by SE relating to IE citizen. High Court analyses whether the pre-trial detention system in Sweden is compliant with Article 5 ECHR

IT: legislation implementing the EAW prevents execution of an EAW where the issuing State does not place a maximum time limit on PTD

UK: July 2014 amendment to Extradition Act 2003 introducing a new extradition bar: an EAW will be refused if there are reasonable grounds for believing that a decision to charge or try the requested person has not been taken in the issuing State

Problems and issues PTD

Overcrowding: *pilot judgments* ECtHR (IE, BG, HU, BE)

***Aranyosi/Caldararu* Cases C-404/15 and C-659/15 PPU of 5 April 2016**

The execution of an EAW must be deferred or eventually brought to an end if there is a real risk of inhuman or degrading treatment because of the conditions of detention of the person concerned in the Member State where the warrant was issued.

Costs of detention and costs of compensation for unjustified detention

1/5 of total prison population in PTD: Frontdoor strategy to reduce overcrowding

Hurdles to take

Legislation might conform but practices violate standards set by international instruments

Cultures and attitudes within criminal justice systems

- ✓ Demands for public response (*though on crime*)
- ✓ Proximity of judges and prosecutors (*cut-and-paste*): *arguments of prosecutors credited over those of defence*
- ✓ Lack of resources (*hearing only 10 minutes, duration of criminal investigation*)
- ✓ Public response when someone commits crime when under alternative condition
- ✓ Retroactive validation of PTD with sentence

Hurdles to take

- ✓ Many Member States have no (effective) alternatives to PTD
- ✓ Often they are only imposed after the defence lawyer has explicitly requested them. There is often no obligation for the judge to consider alternatives *ex officio*.

DE: judge is (unlike NL) obliged to use alternatives to PTD

Insufficient use of alternatives

Some examples of good practice exist and could be duplicated elsewhere

- ✓ In UK: No PTD, unless grounds are fulfilled : 44% of cases unconditional release

If grounds are fulfilled: Conditional release/bail, presumptive right in favour of bail : 35%

PTD (UK: PTDs only 17% of prison population, compared to 35% in BE and NL)

- ✓ France **APCARS**; helps courts tailor penalties and pre-trial response, interview & research of the person, objective information
- ✓ Ireland **mobile phones** EM for flight risk for example can be less intrusive than EM for dangerousness. E.g. for flight risk you could only **transmit location data** on the day of court appearance to make sure that the suspect attends trial.

Insufficient use of alternatives

Net-widening?

- ✓ No PTD unless grounds are fulfilled
- ✓ If grounds are fulfilled, judge should *ex officio* investigate whether alternatives can be imposed with the same objectives could be met as with PTD (risk of absconding, risk of re offending, interfere with justice).

Insufficient use of alternatives

- ✓ Role of probation already at stage of PTD should be strengthened
- ✓ Structures needed EL: only 48 probation officers
- ✓ Sometimes you have to pay yourself for electronic monitoring

EU intervention?

- National legislations seem to conform to a large extent (*ultimum remedium*, use of alternatives, grounds for PTD roughly match case law, extensions of detention subject to increasing tests)
- The problem lies in practice
- *Case ECtHR Magee and Others (2015), nr. 26289/12, 29062/12 en 29891/12*: suspects' rights during PTD should be practical end effective and should not be theoretical and illusionary
- Ensure compliance with international standards: Wrongful application could lead to proceedings CJEU Luxembourg
- Politically sensitive issue – role for the EU? Legislative or non-legislative measures?



Questions?

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