

PRE-TRIAL DETENTION IN POLAND

HELSINKI FOUNDATION FOR HUMAN RIGHTS

WARSAW 2015

The Practice of pre-trial detention in Poland
Research report

December 2015

Co-funded by the Criminal Justice
Programme of the European
Commission



With coordination by:



About the Helsinki Foundation for Human Rights

The Helsinki Foundation for Human Rights (HFHR) is a non-governmental organization established in 1989 in order to promote human rights and the rule of law as well as to contribute to the development of an open society. The main areas of its activity include: domestic education in the field of human rights; international activity: programs promoting democracy, constitutionalism in the countries of the Commonwealth of Independent States and public interest activity aimed to increase standards of human rights' protection in Poland, implemented through monitoring, intervention and strategic litigation. Moreover, the foundation's experts formulate analyses, opinion statements and recommendations concerning drafts of bills in the domain of the right to a fair trial.



This publication has been produced with the financial support of the Criminal Justice Programme of the European Commission. The contents of this publication are the sole responsibility of the Helsinki Foundation for Human Rights and can in no way be taken to reflect the views of the European Commission.

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I. LIST OF ABBREVIATIONS

Institutions

ECtHR	European Court of Human Rights
SC	Polish Supreme Court
CT	Constitutional Tribunal
PG	Prosecutor General
AC	Appellate Court
RC	Regional Court
DC	District Court
HRD	Human Rights Defender
HFHR	Helsinki Foundation for Human Rights
FTI	Fair Trials International

Legal acts

CCP	Code of Criminal Procedure of 6 June 1997 (Journal of Laws of 4 August 1997)
CC	Criminal Code of 6 June 1997 (Journal of Laws of 2 August 1997)
SCC	Act of 27 July 2001 on the system of common courts (Journal of Laws of 27 July 2001)
ECHR	Convention on the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, with accompanying Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 10 June 1993)
Constitution	Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 16 July 1997)

II. SUMMARY

1. As of 31 October 2015, 4 356 people remain in prisons as pre-trial detainees in Poland. At the same time, the overall prison population in the country amounts to 72 195. This means that pre-trial detainees constitute 6.0 per cent of all detainees. Even though this percentage seems low and the number of motions for pre-trial detention decreased by almost 30% between 2009-2014, the research revealed that Poland still faces serious challenges with respect to pre-trial detention.

2. As part of an EU funded project, a common research methodology was applied in 10 EU Member States, with research data gathered through the monitoring of PTD hearings, analysing case files, as well as surveying defence lawyers and interviewing judges and prosecutors. In the course of the Polish research, 4 PTD hearings were observed, 70 case-files analysed, 24 defence lawyers surveyed, and 9 judges and 7 prosecutors interviewed.

3. On 1 July 2015, a fundamental reform of the Code of Criminal Procedure and important changes to the Criminal Code entered into force. The reform introduced an adversarial model of proceedings, which places more emphasis on the activity of prosecutors and lawyers, and leaves the judge as an impartial arbitrator. It is important to view the results of the research in the light of these recent legislative changes, which address several of the identified limitations to the fairness of the proceedings.

The key findings regarding the pre-trial detention decision-making in Poland were as follows:

4. Decision-making procedure: According to the law, before applying a preventive measure the court or the prosecutor shall hear the defendant. This means that the defendant has to be present at the first pre-trial detention hearing. This obligation does not, however, extend to other pre-trial detention hearings, which is why the equality of arms may not be secured throughout the whole pre-trial detention proceedings. The research showed that the defendant, if not in hiding or otherwise unavailable to the justice system, is present at the first pre-trial detention hearing. The defendant is not always present at other pre-trial detention hearings, especially if he has been appointed a lawyer. Equally, defendants who do attend hearings are often not represented by a lawyer. Additionally, the defence's preparation of the hearing is sometimes limited by insufficient access to the case files. It should, however, be noted that the regulation on access to case files has recently been changed as a result of legislative changes in the European Union and the case-law of the European Court of Human Rights and the Polish Constitutional Tribunal. The access has been widened for the defendant. Still, the majority of lawyers surveyed explained that they have 30 minutes or less to prepare for the hearing, with access to the case file.

5. The substance of decisions: Case file research revealed that the risk of the suspect perverting the course of justice, the risk of the suspect absconding and the fact that a severe penalty may be imposed on the suspect are the most commonly used justifications for ordering pre-trial detention. The reasoning given is often formulaic and not tailored to the specific case, repeating the arguments raised by the prosecution. This can be partly explained with the swiftness of the proceedings which limits the time for judges to read the case file and forces them to rely on the evidence provided by the prosecution. However, the provisions of the Code of Criminal Procedure were changed in relation to the content of justifications of pre-trial detention orders. The amendments may contribute to a more careful and diligent judicial consideration of matters

that involve pre-trial detention, as judges will be obliged to refer in their justifications directly to the circumstances listed in the new provision. We hope that the explicit designation of the assumed line of reasoning which should accompany judicial resolution of pre-trial detention matters will persuade courts to examine more thoroughly whether a need to apply pre-trial detention actually exists.

6. Use of alternatives to detention: The conducted research and official statistics show that police supervision and money bail are the most commonly used non-custodial, preventive measures. At the same time, the interviewed judges and prosecutors do not perceive non-custodial preventive measures as effective and trustworthy alternatives to pre-trial detention. What is more, case file research and surveys conducted among defence practitioners show that judicial consideration of alternatives to detention is limited to a single-sentence argument that such alternatives would not protect the integrity of the proceedings.

7. Review of pre-trial detention: The success rate of complaints against pre-trial detention orders of regional courts was about 3% in 2014. Defence practitioners surveyed complained of the automatism and superficiality of judicial decisions which lack proper justifications based on the facts of the case and substantiated presumptions, even in cases being reviewed and appealed against. The case files research confirmed the notion that courts of higher instance rarely change the decisions of lower level courts. The decisions of higher level courts often repeat previous decisions. Defence practitioners also commented in the survey that reviews are not frequent enough to take account of changed circumstances of the case or other factors. Preparation of review is often also challenged by the defence's insufficient access to the case file. The majority of lawyers surveyed believe that the proceedings and investigations are not conducted more diligently and effectively because a pre-trial detainee is involved.

8. Recommendations

The conclusions of the research indicate that the practice of pre-trial detention decision-making in Poland falls short of the European Court of Human Rights standards in a number of areas. In light of these findings, the main recommendations are the following:

- a. The legislator should consider clarifying the prerequisites for pre-trial detention contained in the Code of Criminal Procedure.
- b. The legislator should introduce a maximum duration of pre-trial detention. Optionally, the authority to extend the duration of pre-trial detention beyond the limit in exceptional circumstances should be vested in the Supreme Court.
- c. The legislator should introduce the rule that cases of persons in pre-trial detention should take precedence over other cases on a judge's docket.
- d. The legislator should introduce a provision on the defendant's obligatory presence at all pre-trial detention hearings.
- e. The legislator should introduce obligatory legal representation in cases where a prosecutor requests pre-trial detention or alternatives to detention.
- f. The amounts awarded as compensation in cases of unlawful pre-trial detention should be increased.
- g. The legislator should consider introducing new preventive measures (home detention and electronic monitoring) into the Code of Criminal Procedure.
- h. The Institute of Justice could undertake further research on non-custodial preventive measures, including their perception among the representatives of the justice system.
- i. The Ministry of Justice, the National School of Judiciary and Public Prosecution and the Prosecutor General should conduct more training on pre-trial detention standards.

- j. The authorities should ensure effective implementation of the Code of Criminal Procedure in relation to access to case files and guidance on pre-trial decision-making.
 - k. The authorities should also ensure proper implementation of the case-law of the European Court of Human Rights.
8. A full list of recommendations can be found at the end of the country report in section IX.

III. INTRODUCTION

This report “The Practice of Pre-trial detention: Monitoring Alternatives and Judicial Decision-making in Poland” is one of 10 country reports outlining the findings of the EU-funded research project that was conducted in 10 different EU Member States in 2014 – 2015.

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

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

This project also complements current EU-level developments relating to procedural rights. Under the Procedural Rights Roadmap, adopted in 2009, the EU institutions have examined issues arising from the inadequate protection of procedural rights within the context of mutual recognition, such as the difficulties arising from the application of the European Arrest Warrant. Three procedural rights directives (legal acts which oblige the Member States to adopt domestic provisions that will achieve the aims outlined) have already been adopted: the *Interpretation and Translation Directive* (2010/64/EU), the *Right to Information Directive* (2012/13/EU), and the *Access to a Lawyer Directive* (2013/48/EU). Three further measures are currently under negotiation – on legal aid, safeguards for children, and the presumption of innocence and the right to be present at trial.

The Roadmap also included the task of examining issues relating to detention, including pre-trial, through a Green Paper published in 2011. Based on its case work experience and input

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

sought through its Legal Expert Advisory Panel (LEAP²), Fair Trials responded to the Green Paper in the report “Detained without trial” and outlined the necessity for EU-legislation as fundamental rights of individuals are too often violated in the process of ordering and requesting pre-trial detention. Subsequent Expert meetings in 2012 – 2013 in Amsterdam, London, Paris, Poland, Greece and Lithuania affirmed the understanding that problems with decision-making processes might be responsible for the overuse of pre-trial detention, and highlighted the need for an evidence base clarifying this presumption. Regrettably, no action has been taken to date with regards to strengthening the rights of suspects facing pre-trial detention. However, the European Commission is currently conducting an Impact Assessment for an EU measure on pre-trial detention, which will hopefully be informed by the reports published under this research project.

In June 2014 HFHR began implementation of the project “*The practice of pre-trial detention: monitoring alternatives and judicial decision-making.*” The research was conducted in parallel in Romania (APADOR), Lithuania (Human Rights Monitoring Institute), Ireland (Irish Penal Reform Trust), the Netherlands (Leiden University), Great Britain (University of Western England), Spain (APDHE), Greece (CECL), Hungary (Hungarian Helsinki Committee), Italy (Antigone). Even though the situation has been positively changing, HFHR considered the project as particularly relevant for Poland, as Poland has had problems with the application of pre-trial detention for many years. Among the major problems, there were the excessive length of pre-trial detention and lack of access to case files. These were confirmed in various judgements of the ECtHR.

HFHR conducted the research at a specific stage in the development of the Polish criminal law. Beginning in June 2015, comprehensive amendments to the Criminal Code and the Code of Criminal Procedure entered into force. The changes arise from these amendments affect pre-trial detention only to a limited degree, but can influence its application. The most important change in law on pre-trial detention, which results from Polish law being adjusted to ECtHR standards, is the establishment of a more detailed regulation regarding the content of justification of a pre-trial detention order. Such a clarification may contribute to a more careful and diligent judicial consideration of matters that involve pre-trial detention, as judges will be obliged to refer directly to the circumstances listed in the new version of the provision. As in the case of more precise rules governing the justification of pre-trial detention orders, we hope that the explicit designation of a line of reasoning that should accompany judicial resolution of pre-trial detention matters will persuade courts to examine more thoroughly whether a need to apply pre-trial detention actually exists. Moreover, the legislator slightly extended the negative grounds for pre-trial detention by introducing a relative prohibition of ordering the preventive measure against perpetrators who may receive a sentence of up to two years of deprivation of liberty (previously, the relevant limit was set at one year of deprivation of liberty). This is why the changes to the above-mentioned legal acts were included in the course of the research in individual interviews with judges and prosecutors. Hopefully the results of the research presented in the current report will provoke a new dialogue on legislative change particularly with respect to pre-trial detention and contribute to the effective implementation of new law in CCP. This seems even more likely considering that possible changes to pre-trial detention were the subject of much debate during the drafting of the already adopted amendments.

² <http://www.fairtrials.org/fair-trials-defenders/legal-experts/>.

IV. METHODOLOGY

This project was designed to develop an improved understanding of the process of judicial decision-making on pre-trial detention in 10 EU Member States. This research was carried out in 10 Member States with different legal systems (common and civil law), legal traditions and heritage (for example Soviet, Roman and Napoleonic influences), differing economical situations, and importantly strongly varying usage of pre-trial detention in criminal proceedings (for example 12.7% of all detainees in Ireland have not yet been convicted³ whereas in the Netherlands 39.9% of all prisoners have not yet been convicted⁴). The choice of participating countries allows for identifying good and bad practices, and proposing reform at the national level as well as developing recommendations that would ensure enhanced minimum standards across the EU. The individual country reports focusing on the situation in each participating country will provide in-depth input to the regional report which will outline common problems across the region as well as highlighting examples of good practice, and will provide a comprehensive understanding of pan-EU pre-trial decision-making.

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

The five-stages of the research were as follows:

- (1) Desk-based research, in which the partners examined the national law and practical procedures with regards to pre-trial detention, collated publicly available statistics on the use of pre-trial detention and available alternatives, as well as information on recent or forthcoming legislative reforms.

Based on this research, Fair Trials and the partners drafted research tools which – with small adaptations to specific local conditions – explore practice and motivations of pre-trial decisions and capture the perceptions of the stakeholders in all participating countries.

- (2) A defence practitioner survey, which asked lawyers for their experiences with regards to the procedures and substance of pre-trial detention decisions.
- (3) Monitoring pre-trial detention hearings, thereby gaining a unique insight into the procedures of such hearings, as well as the substance of submissions and arguments provided by lawyers and prosecutors and judicial decisions at initial and review hearings.

³ Data provided by International Centre for Prison Studies, 18 June 2015, available at: www.prisonstudies.org/map/europe.

⁴ Data provided by International Centre for Prison Studies, 18 June 2015, available at www.prisonstudies.org/map/europe.

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

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

1. Defence practitioners survey

At the initial stage of the research, the goal was to obtain opinions of defence practitioners on the use of pre-trial detentions. In accordance with the methodology, the partners had to conduct 50 surveys each, with the minimum of 20 surveys. The questionnaire was widely distributed among individual lawyers and law firms that have cooperated with HFHR on a daily basis. HFHR also sent the questionnaires, together with requests for further distribution, to Regional Bar Councils.

Despite intense efforts, the response rate among defence practitioners was limited. HFHR received only one response from the Regional Bar Councils. Members of this Council completed and submitted seven surveys, allowing HFHR to reach the required minimum number of surveys. In an attempt to widen the sample, in January and February 2015, HFHR undertook to send questionnaires to another group of lawyers who had taken part in workshops on EU directives on criminal proceedings organised by HFHR. HFHR managed to gather four more surveys this way.

Altogether, 24 defence lawyers from various parts of Poland completed the survey and contributed to the results of this study. Almost all respondents come from or practice in big cities. The majority come from either the Regional Bar Council in Warsaw (8 respondents) or the Regional Bar Council in Poznan (7 respondents). The remaining respondents belong to the Regional Bar Councils in Wroclaw (4), Krakow, Lodz, Lublin, Rzeszow and Katowice.

The surveyed defence practitioners have varying levels of experience, ranging from a single year to 25 years. On average, the surveyed practitioners have 7 years of professional experience. Thirteen have been practicing law for less than 10, and 8 for more than 10 years, including 3 who have been practicing law for more than 20 years. Three respondents did not provide this particular detail on their professional experience.

In the majority of cases, surveyed defence practitioners practice mainly or solely in the field of criminal law. 10 lawyers indicated that criminal cases constitute a part – less than 50 per cent – of all cases which they conduct.

Ten respondents noted that they dealt with fewer than 20 criminal cases in the last year. Ten others handled between 20 and 50 cases. The rest conducted more than 50 cases.

All respondents indicated that they took part in no more than 4 pre-trial detention hearings in the last month.

Most of the surveyed lawyers (19) claimed that they had taken part in a maximum of 12 such hearings in the last 6 months. Four reported that they took part in 12 to 24 hearings in this period, and one did not provide any answer. In the last year, five defence practitioners took part in 25 to 50 hearings, while the rest participated in no more than 25 hearings.

The majority of respondents conduct legal aid cases. For 18 of them, those cases constitute less than 50 per cent of all criminal cases that they conduct. In the case of 3 respondents, legal aid cases amount to more than 50 per cent of all conducted cases. Three defence practitioners indicated that they do not have legal aid cases at all.

2. Case file reviews

The methodology of the project entailed the analysis of 50-100 court cases in which preventive measures, including pre-trial detention, have been applied. As its basic tool, HFHR used a questionnaire prepared by the project coordinator in cooperation with partner organisations.

Between December 2014 and April 2015, HFHR conducted case file reviews in 6 appellate circuits.⁵ In order to ensure proper quality of the sample, the analysis was conducted in courts of different instances – in 2 regional courts (Krakow and Warsaw) and 8 district courts (DC in Torun, DC in Zambrow, DC Poznan-Grunwald and Jezyce, DC in Piaseczno, DC in Pruszkow, DC in Grodzisk Mazowiecki, DC in Rybnik and DC Gdansk-Poludnie). Altogether, 75 case files were analysed in the course of the project.

Compared to other elements of the research, conducting case file reviews did not produce any significant difficulties. HFHR submitted motions for consent to case file reviews with presidents of the courts. Obtaining consent was not a problem.

The initial premise for case file reviews was to analyse the first twenty cases in which preventive measures, either custodial or non-custodial, were applied and which were closed in 2014. The goal was to examine the differences in application and decision-making processes with regards to different measures. The type of crime was not determined as one of the criteria.

For the district courts in Piaseczno, Pruszków, Grodzisk Mazowieski, Rybnik and Gdansk-Poludnie, HFHR submitted motions for consent to case file reviews of the first 20 cases that were closed in 2014 and in which pre-trial detention was applied. This time, the type of crime was not determined either.

Despite the application of a unified criterion of case selection, the HFHR team did not have full control over the selection of cases, which was largely dependent on the choice made by court staff. In some instances, the HFHR received lists of cases made available for analysis. In others, the member of the court staff chose the cases during the review. Two courts did not have 20 cases in which pre-trial detention took place. Some cases were excluded from analysis due to their excessive length, while others, in which case files were taken out of another case – due to the difficulties in gathering information required by the questionnaire.

It is worth indicating that some case files concerned multiple perpetrators. Altogether the HFHR team analysed 75 case files, which related to 91 perpetrators.

3. Interviews with judges

As part of the project, HFHR conducted interviews with judges. The goal of the interviews was to get to know the perspective of professionals who make key decisions in applying and

⁵ The territory of the country is divided into 11 appellate circuits with headquarters in: Białystok, Gdańsk, Katowice, Kraków, Lublin, Łódź, Poznań, Rzeszów, Szczecin, Warszawa and Wrocław.

prolonging pre-trial detention. HFHR sought to juxtapose the opinions of judges with those presented by representatives of other legal professions and, most of all, with the conclusions formed on the basis of case file reviews and monitoring of pre-trial detention hearings.

Requests for consent to interviews were sent to district, regional and appellate courts. HFHR received only one negative response to its requests from a court where no judge consented to an interview. The negative response was motivated by a large workload and staff shortages.

All interviews were conducted using a standardised questionnaire prepared by FTI and partners. However, the HFHR added a few questions on the particularities of the Polish procedure (e.g. premise of severe punishment, negative premises of applying pre-trial detention) and questions on the reform of the criminal procedure.

The results of the interviews constitute comparative and supplementary material for remaining data gathered in the course of the project. The group of judges who took part in the interviews cannot be treated as representative. However, the convergence of the judges' opinions suggests that their perspectives may be similar and in agreement with broader circles of judges.

The interviews were conducted between March and April 2015 and were the last element of the field research. In accordance with the methodology, HFHR had planned to conduct 5 interviews; however, this number was increased due to the high response rate from judges at the final stage of the research.

Eventually, the HFHR team conducted 9 interviews – 5 with district court judges, 2 with regional court judges and 2 with appellate court judges. The judges work at 6 appellate circuits (Bialostocki, Lubelski, Lodzki, Katowicki, Krakow and Warsaw appellate circuits).

All respondents have many years of professional experience as judges. The youngest judge in terms of professional experience has practiced as a judge for 6 years. Seven respondents have worked as judges for 15-20 years and one for more than 30 years. For all respondents, being a judge was the only occupation in the course of their professional career.

4. Interviews with prosecutors

In addition to interviews with judges, HFHR conducted interviews with prosecutors. As in the case of judges, the interviews were conducted to get to know the perspective of this professional group and compare it with the results of other research activities.

Requests for interviews were sent to 16 district and regional prosecutors' offices. From 5 prosecutors' offices, HFHR received negative responses. In one office, although a prosecutor was designated, HFHR resigned from conducting the interview when the designated prosecutor indicated that she did not conduct cases in which PTD was applied.

Eventually, 7 interviews were conducted – 2 with prosecutors from regional offices and 5 with prosecutors from district offices. The prosecutors came from 5 appellate circuits (Poznanski, Katowicki, Krakow and Warsaw appellate circuits).

All respondents have long professional experience as prosecutors. For all of them, being a prosecutor has been the only occupation in the course of their professional careers.

5. Monitoring of PTD hearings

The methodology of the project required that HFHR conduct monitoring of PTD hearings. From the outset of the project, HFHR had been doubtful as to whether this would be possible considering the resolution of the Supreme Court sitting in 7 judges on 28 March 2012 (I KZP 26/11). In its resolution, the Supreme Court indicated that *“In criminal proceedings, those hearings are open during which the court ‘considers or decides the case’ in the meaning of article 42 § 2 of the Act of 27 July 2001 on the system of common courts.”* On the other hand, the Supreme Court stated that hearings conducted in the course of preparatory proceedings are not open, even if it is established that the case is being “considered and decided” during the hearing, since preparatory proceedings are secret.

Despite the concerns, HFHR sent information on the research together with requests for monitoring to presidents of 3 courts – DC for Warsaw-Mokotow, DC for Warsaw-Srodmiescie, and AC in Warsaw. Due to time constraints related to the application of PTD, the main criterion in the selection of courts was their proximity to HFHR’s headquarters.

Between October and December 2014, the HFHR team received 3 responses from courts. As expected, presidents of those courts claimed that they had no competences to grant a default consent for monitoring, as consent for participation in a hearing lay within the competences of the ruling judge. At that time, it seemed that such a condition would effectively make monitoring impossible. HFHR was also able to note a slight discrepancy in interpretations, which intensified this concern. Thus, the president of one court emphasised that PTD hearings are conducted behind closed doors, while another president stated that they were in principle open.

Eventually, thanks to the cooperation from the secretarial staff of the Section of Pre-trial Proceedings in the DC for Warsaw-Mokotow, HFHR was able to monitor 4 hearings conducted by 4 different judges in the course of 4 days. In accordance with the prepared strategy, a representative of HFHR phoned the section in order to obtain information on hearings on a given day. In reality, the section employee called HFHR to inform HFHR staff about a planned hearing and consent to participation. After obtaining information on the time of the hearing, case number and the ruling judge, HFHR staff prepared an official, written request to the ruling judge for consent to monitor together with an official authorisation from HFHR Board to take part in the hearing. Information on a hearing would most often reach HFHR one day before the actual hearing. This was, however, only tentative information. Detailed information was provided later, an hour or two before the hearing.

In February 2015, HFHR submitted an additional request for consent to monitoring to the president of DC for Warsaw-Praga Polnoc. The reply from the court was similar to those obtained from other courts, namely that consent for monitoring must come from the ruling judge in each case. Unfortunately, due to organizational difficulties, no hearing was monitored in this court.

It appears that the concern formed at the beginning of the research in relation to monitoring hearings proved justified. HFHR was not able to reach the required minimum of ten days of hearing monitoring. However, most of the information that would have been obtained by monitoring hearings was also obtained through reviewing case files. According to Polish law, records from PTD hearings which contain information on the course of the hearing (duration, presence of particular parties and their statements) have to be included in the case file. Especially considering the high numbers of case files reviews, the data shortfall is very small.

V. GENERAL INFORMATION

Pre-trial detention is a custodial preventive measure which can be applied from the moment of arrest until the punishment can be executed, provided that the punishment is imprisonment (article 249 § 4). It is the most severe preventive measure because it deprives a person of liberty. The statistical image of the application and length of pre-trial detention should be viewed in the light of, first and foremost, the wording of provisions governing criminal proceedings, but also elements outside any legal regulations, such as for example the number of committed crimes with severe sanctions, demographic changes, or the wealth of suspects (i.e. capacity to post money bail).

1. Socio-economic information

In Europe, Poland is a medium-sized country with a territory of 322 575 km² and a population of approx. 38.5 million people, of whom 18.6 million are men.⁶ The majority, approx. 23 million people, live in cities. The working age population amounts to 24.4 million.⁷ The unemployment rate in 2013 reached 10,3 %. According to the Main Statistical Office, approx. 7% of people were below the official poverty threshold.⁸

The National Population Census conducted in 2011 showed that approx. 98,2% (37.8M) of permanent inhabitants indicated Poland as their country of birth.

According to information published by the Main Statistical Office, *“it is estimated that, at the end of 2013, approximately 2 196 000 inhabitants of Poland temporarily lived abroad. It means 66 000 people more (3,1%) than in 2012 (approx. 2 130 000). In 2013, approximately 1 891 000 persons (in 2012 – approx. 1 816 000) remained in Europe, the greatest majority of Polish emigrants – approximately 1 789 000 – remained in the EU countries. This means an increase of 69 000 in comparison to 2012. Among EU member states, the majority of persons stayed in Great Britain (642 000), Germany (560 000), Ireland (115 000), the Netherlands (103 000) and Italy (96 000).”*⁹

Analyses of social phenomena emphasise that migration is a socio-economic phenomenon permanently inscribed in the recent history of Poland. Even though in 2008-2010 there was a visible decrease in the number of Poles temporarily staying abroad, in 2013 an increase in the number of Poles living abroad was noted again.¹⁰ On the one hand, this may be caused by the

⁶ Source: Shorter Statistical Yearbook of the Republic of Poland 2014, Main Statistical Office (*Główny Urząd Statystyczny*), available at:

<http://stat.gov.pl/obszary-tematyczne/roczniki-statystyczne/roczniki-statystyczne/maly-rocznik-statystyczny-polski-2014,1,15.html> (accessed: 15.06.2015).

⁷ Working age population signifies people who are in their productive age. For men, this is the age between 18-64, for women – 18-59.

⁸ Source: available at: http://stat.gov.pl/cps/rde/xbcr/gus/WZ_ubostwo_w_polsce_2013.pdf

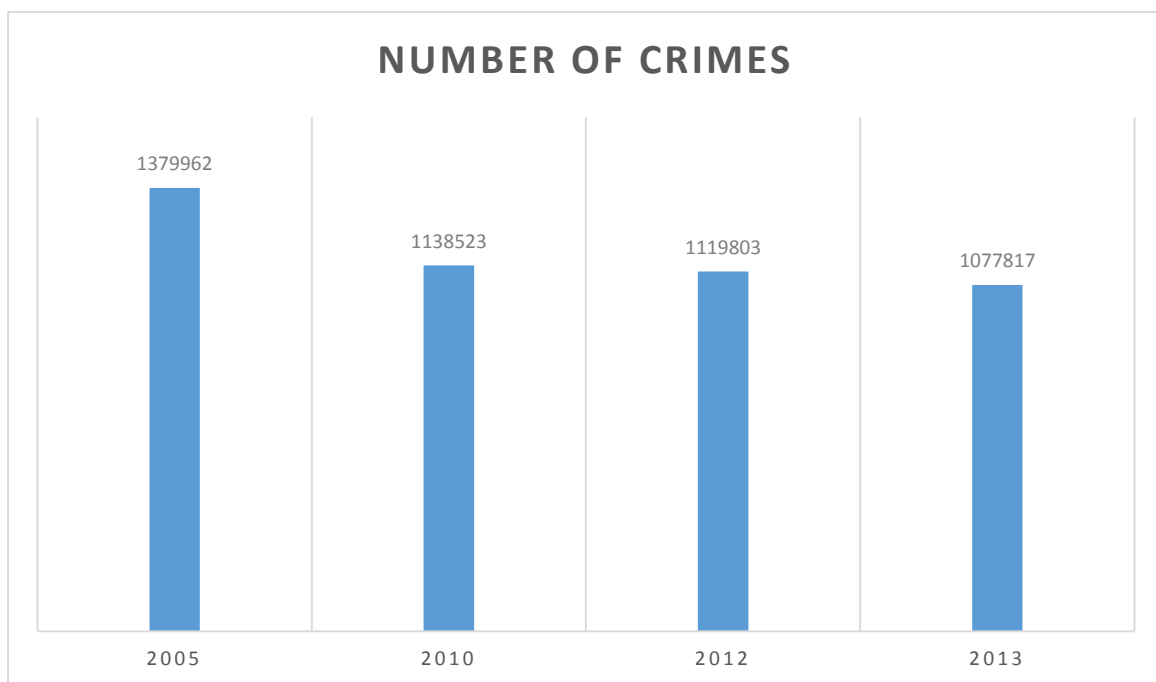
⁹ Source: Information on the size and direction of emigration from Poland in the years 2004-2013, Main Statistical Office (*Główny Urząd Statystyczny*), available at: <http://stat.gov.pl/obszary-tematyczne/ludnosc/migracje-ludnosci/informacja-o-rozmiarach-i-kierunkach-emigracji-z-polski-w-latach-2004-2013,2,7.html> (accessed: 15.06.2015).

¹⁰ Source: Information on the size and direction of emigration from Poland in the years 2004-2013, Main Statistical Office (*Główny Urząd Statystyczny*), available at: <http://stat.gov.pl/obszary-tematyczne/ludnosc/migracje-ludnosci/informacja-o-rozmiarach-i-kierunkach-emigracji-z-polski-w-latach-2004-2013,2,7.html> (accessed: 15.06.2015).

fact that EU countries (which are the major emigration destination) are coming out of the economic crisis. On the other hand, the scale of migration may constitute proof of the still high unemployment rate in Poland, especially among young people.¹¹ As visible in the National Population Census of 2011 and confirmed in other statistical studies conducted in private households, the main motivation to go abroad is to undertake employment.¹²

2. Crime characteristics

Since 2010, the number of crimes committed annually has fallen. In 2013, the number of crimes ascertained in pre-trial proceedings amounted to 1 077 817.¹³ Over the last 10 years, Poland has witnessed a strong decrease in crimes committed:



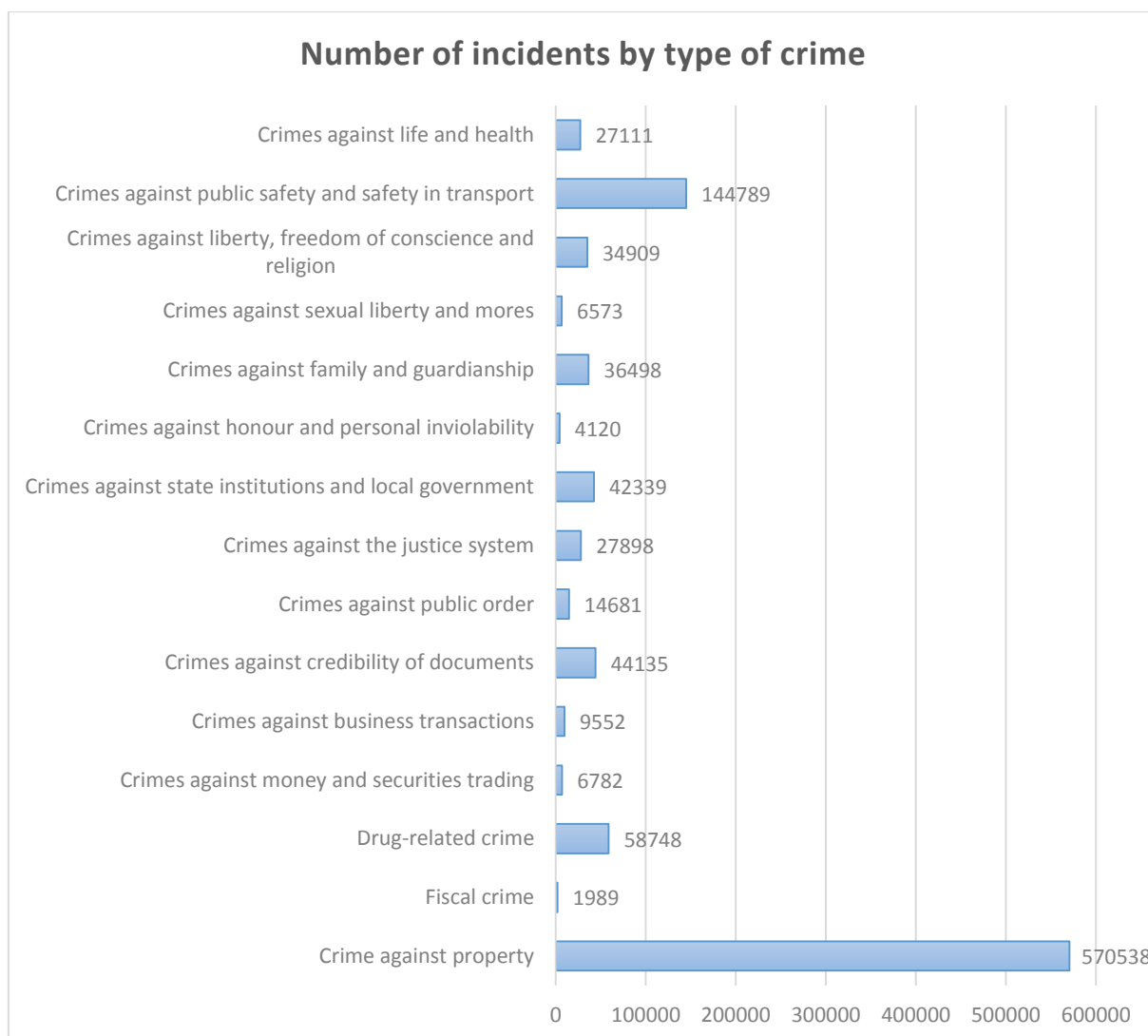
Among the types of crimes that prevail in concluded pre-trial proceedings, the most common are crimes against property, public safety and safety in transport, as well as crimes against life and health. The graph below presents a breakdown of the occurrences of different categories of crimes:¹⁴

¹¹ Source: Information on the size and direction of emigration from Poland in the years 2004-2013, Main Statistical Office (*Główny Urząd Statystyczny*), available at: <http://stat.gov.pl/obszary-tematyczne/ludnosc/migracje-ludnosc/informacja-o-rozmiarach-i-kierunkach-emigracji-z-polski-w-latach-2004-2013,2,7.html> (accessed: 15.06.2015).

¹² Source: Information on the size and direction of emigration from Poland in the years 2004-2013, Main Statistical Office (*Główny Urząd Statystyczny*), available at: <http://stat.gov.pl/obszary-tematyczne/ludnosc/migracje-ludnosc/informacja-o-rozmiarach-i-kierunkach-emigracji-z-polski-w-latach-2004-2013,2,7.html> (accessed: 15.06.2015).

¹³ Source: <http://stat.gov.pl/obszary-tematyczne/roczniki-statystyczne/roczniki-statystyczne/rocznik-statystyczny-rzeczypospolitej-polskiej-2014,2,9.html> (accessed 1.09.2015).

¹⁴ Source: <http://stat.gov.pl/obszary-tematyczne/roczniki-statystyczne/roczniki-statystyczne/rocznik-statystyczny-rzeczypospolitej-polskiej-2014,2,9.html> (accessed 1.09.2015).



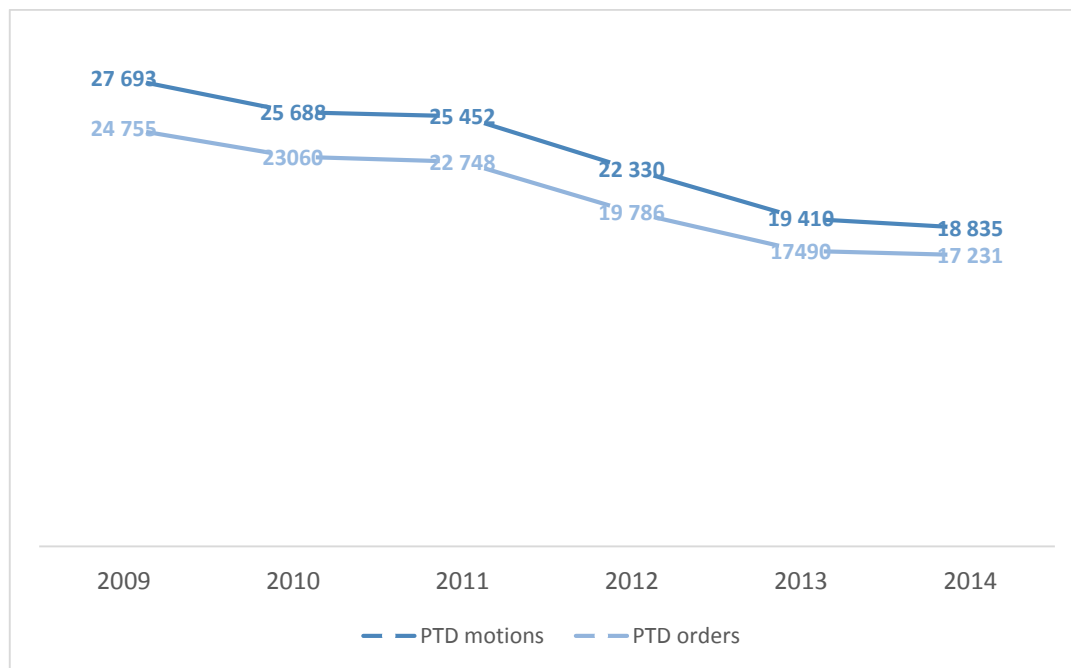
The rate of detectability of delinquents in 2013 amounted to 67,1 %, with the highest detectability of 99,4 % noted for crimes against family and guardianship and the lowest rate of 7,7 % for crimes against trading in money and securities.¹⁵

Similarly to the crime rate, a decrease can also be noted in the number of persons convicted in a final judgment (2010 – 432 891 persons, 2011 – 423 464, 2012 – 408 107, 2013 – 353 208, 2014 – 293 852). Two major factors have caused the decline – aging of the society and emigration of young people to other counties (mainly within the EU).¹⁶

The diminishing rate of criminality translates into the decrease in the number of pre-trial detention orders. This is illustrated by the graph below:

¹⁵ Source: <http://stat.gov.pl/obszary-tematyczne/roczniki-statystyczne/roczniki-statystyczne/rocznik-statystyczny-rzeczypospolitej-polskiej-2014,2,9.html> (accessed 1.09.2015).

¹⁶ Source: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/> (accessed: 1.09.2015).



The ratio of pre-trial detainees to the overall population of detention facilities and prisons has also decreased. In 2009, it exceeded 11 % while in 2014 it decreased to approximately 8 %.¹⁷

Year	Number of pre-trial detainees (on the last day of the year) ¹⁸	Population of prisons and detention facilities (on the last day of the year)	Ratio of pre-trial detainees to overall population of prisons and detention facilities
2009	9460	84003	11,26
2010	8389	80728	10,76
2011	8159	81382	10,02
2012	7009	84156	8,33
2013	6589	78994	8,34
2014	6238	77371	8,06
2015	5300	75691	7,00

Because of the decrease in the number of pre-trial detainees, their percentage in the overall population of the country has also decreased:

Year	Number of pre-trial detainees (on the	Population	Ratio of pre-trial detainees to overall population
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¹⁷ Data available at: <http://sw.gov.pl/pl/o-sluzbie-wieziennej/statystyka/statystyka-roczna/> (accessed: 1.09.2015)

¹⁸ Data available at: <http://sw.gov.pl/Data/Files/001c169lidz/rok-2014.pdf> (accessed: 15.06.2015)

	last day of the year) ¹⁹		
2009	9460	38167329	0.0247856
2010	8389	38529866	0.0217727
2011	8159	38538447	0.0211711
2012	7009	38533299	0.0181895
2013	6589	38496000	0.0171161
2014	6238	38478602	0.0162112

The number of PTD orders is also related to the number of committed crimes whose maximum tariff is at least 8 years (ground for pre-trial detention provided in article 258 § 2 CCP). This connection is confirmed by the data presented in the 2013 report of the Prosecutor General.²⁰ The data suggest that PTD was most often applied towards persons suspected of robbery (article 280 CC) – 611 persons. There are two reasons for that – a relatively high number of persons committing this crime (in 2013 – 5 441 convicted in a final judgment, including 653 under article 280 § 2) and the severity of sanction for this crime (article 280 § 1 CC – between 2 and 12 years of imprisonment, article 280 § 2 CC – between 3 and 15 years of imprisonment). Furthermore, PTD was also often ordered in cases of persons suspected of taking part in an organized criminal group (346 persons), burglary (234), abuse (199), fraud (158), rape (114), drug possession (109), and drug trafficking (85). These types of crimes constitute 75 % of all PTD orders. Out of these types, participation in an organized criminal group escapes the usual schema. Statistical data suggest that application of PTD towards these suspects who took part in an organized group is almost automatic (359 convicted persons in 2013 compared to 346 detained in pre-trial proceedings). Moreover, the decisive factor in this case is not the severity of sanctions, but rather threats to the investigation (tampering or obstructing) due to the multiple-suspect configuration of the crime.²¹

The data indicates that 1/3 of all PTD orders in 2012 were ordered for people suspected of crimes against property (robbery – 611, burglary – 234, fraud – 158, theft – 56, intentional dealing in stolen property – 45, extortion by force – 33).²² This is the result of excessively severe maximum tariffs set by the legislators for those crimes (e.g. robber, burglary, extortion by force, fraud). Even though statistics show that in practice the courts almost never impose punishment of this severe maximum tariff, the sheer fact that such a severe sanction is possible is sufficient for the courts to apply PTD.²³

¹⁹ Source: <http://sw.gov.pl/Data/Files/001c169lidz/rok-2014.pdf> (accessed: 15.06.2015)

²⁰ Source: Prosecutor General's report 2013, available at: www.pg.gov.pl/aktualnosci-prokuratury-generalnej/sprawozdanie-prokuratora-generalnego-z-rocznej-dzialalnosci-prokuratury-w-2013-r.html#.VX6mvUaKRp8, (accessed: 15.06.2015).

²¹ Source: Prosecutor General's report 2013, available at: www.pg.gov.pl/aktualnosci-prokuratury-generalnej/sprawozdanie-prokuratora-generalnego-z-rocznej-dzialalnosci-prokuratury-w-2013-r.html#.VX6mvUaKRp8, (accessed: 15.06.2015).

²² Source: Prosecutor General's report 2013, available at: www.pg.gov.pl/aktualnosci-prokuratury-generalnej/sprawozdanie-prokuratora-generalnego-z-rocznej-dzialalnosci-prokuratury-w-2013-r.html#.VX6mvUaKRp8, (accessed: 15.06.2015).

²³ Source: Prosecutor General's report 2013, available at: www.pg.gov.pl/aktualnosci-prokuratury-generalnej/sprawozdanie-prokuratora-generalnego-z-rocznej-dzialalnosci-prokuratury-w-2013-r.html#.VX6mvUaKRp8, (accessed: 15.06.2015).

Excessive length of proceedings in Poland is a factor influencing the length of PTD. The connection between these two elements has been widely recognised in the Polish debate on pre-trial detention. Violations of article 5 and article 6 of ECHR for exceeding the “reasonable” time for consideration of a case are among the most common reasons for judgments against Poland at the ECtHR.²⁴ It is still rare for a Polish court which is ruling on the length of PTD in a serious case (i.e. where the sanction for the crime is severe) to consider it justified to apply article 5 (3) ECHR. In our opinion, the lack of compliance with this standard stems from the court’s fear of releasing a dangerous perpetrator, even if the length of the proceedings has long before become “unreasonable.”

3. Structure of the judiciary

Judicial power in Poland is vested in courts and tribunals, which are independent from the executive and legislative branches. According to article 175 of the Constitution of the Republic of Poland, “*the administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts.*” The Constitutional Tribunal is competent to control the constitutionality of normative acts.

Criminal court proceedings in Poland have at least two stages. The judicial system is composed of district courts, regional courts (45 circuits), and appellate courts (11 appellate circuits). It is the rule that district courts hear almost all cases in the first instance. According to article 25 § 1 CCP, regional courts, hear in the first instance cases of felonies described in the Criminal Code and other acts and cases of the most serious misdemeanours.²⁵ At the request of the district court, the appellate court may refer the case to the regional court, as the court of first instance, if the case concerns an offence of a particular importance or the case is specially complex. Pursuant to article 25 § 3 CCP, regional courts also hear appeals from rulings and orders issued by district courts in the first instance and other matters referred to regional courts by virtue of the law. The Supreme Court supervises the compliance with the law and uniformity of judicial decisions.

Due to frequent reference to Supreme Court’s rulings revealed in the course of the research, it is worth noting that according to Article 61 of the Act on the Supreme Court, “*If a Supreme Court bench decides that the submitted question requires clarification, and that the revealed discrepancies need to be adjudicated, it shall adopt a resolution. Otherwise, it shall refuse to adopt it or, if the adoption of the resolution has become unnecessary, it shall discontinue the proceedings.*” If the bench of seven Justices finds it justified it may submit the question of law or a request for the adoption of a resolution to a bench of a chamber (all Justices of a given chamber), while the chamber may submit a question to a bench of two or more chambers or to the entire Supreme Court bench. The resolutions of the entire Supreme Court bench, a bench of joint chambers or a bench of the entire chamber become legal principles. A bench of seven Justices may grant a resolution the power of a legal principle. The role of those principles in

²⁴ *Rutkowski v. Poland*, Judgment of 7 July 2015, application no. 72287/10.

²⁵ This relates to misdemeanours described in chapters XVI and XVII as well as in art. 140-142, art. 148 § 4, art. 149, art. 150 § 1, art. 151-154, art. 156 § 3, art. 158 § 3, art. 163 § 3 and 4, art. 165 § 1, 3 and 4, art. 166 § 1, art. 173 § 3 and 4, art. 185 § 2, art. 189a § 2, art. 210 § 2, art. 211a, art. 252 § 3, art. 258 § 1-3, art. 265 § 1 and 2, art. 269, art. 278 § 1 and 2 in connection with art. 294, art. 284 § 1 and 2 in connection with z art. 294, art. 286 § 1 in connection with art. 294, art. 287 § 1 in connection with art. 294, art. 296 § 3 and art. 299 of CC and misdemeanours which pursuant to particular provisions are within the jurisdiction of regional courts.

the legal system is significant, since – as the doctrine indicates – “*waiving a Supreme Court’s resolution which has been registered in the book of legal principles requires following a special procedure (set forth in article 63 of the Act on the Supreme Court), and this undoubtedly has psychological impact on the understanding of the legal provision – which has been interpreted in that procedure – in the lower instance courts.*”²⁶

4. Legal system

Poland belongs to the group of civil law countries. As a result, the hierarchy of legal acts is clearly established. In the recent years, various acts adopted by the European Union have gained increasing importance in the Polish legal system.

a. Criminal law

Broadly understood, criminal law consists of substantive and formal (procedural) provisions.

Crimes can be either felonies or misdemeanours. A misdemeanour is a prohibited act described in the Criminal Code subject to penalty of a fine higher than 30 daily rates, penalty of restriction of liberty or penalty of deprivation of liberty exceeding one month. A felony, in turn, is a prohibited act subject to penalty of imprisonment of no less than 3 years or to a more severe penalty.

b. Criminal proceedings

Criminal proceedings in Poland can be divided into pre-trial proceedings, court proceedings and executive proceedings.

The goal of criminal proceedings, pursuant to article 2 CCP, is to ensure that in the course of criminal proceedings: 1) the offender is identified and called to criminal responsibility, and that such responsibility is not imposed on an innocent person; 2) by the correct application of measures provided for in criminal law, and by the disclosure of the circumstances that facilitated the commission of the offence, the aims of criminal procedure are fulfilled not only in combatting the offences, but also in preventing them, as well as enhancing the rule of law and the principles of social co-existence; 3) taking interest of the aggrieved party into consideration and legally protecting them; and 4) resolving the case within a reasonable period of time.

Pre-trial proceedings can take the form of an investigation or an inquiry. The prosecutor exercises supervision over pre-trial proceedings. An inquiry is conducted by the police or other organs possessing such competences. Investigations are conducted by prosecutors, unless the prosecutor decides to delegate the conduct of an investigation or particular activities to the police.²⁷

²⁶ P. Hofmański, S. Zabłocki, *Elementy metodyki pracy sędziego w sprawach karnych*, Lex nr 128180.

²⁷ Poland, Code of Criminal Procedure.

Pre-trial proceedings are initiated if there is a justified suspicion that an offence has been committed. Within 14 days of the closure of the investigation or reception of an indictment from the police, a prosecutor prepares the act of indictment and files it with the court, or issues a decision on discontinuation of proceedings, suspension or supplementation of the investigation or inquiry.

Submission of the act of indictment initiates court proceedings. From then on, the court takes all decisions concerning the accused, including ordering preventive measures. It may order pre-trial detention without a request by the prosecution. The parties to court proceedings are, in principle, the accused and the prosecution (usually the public prosecutor).

To ensure clear analysis of the data and understanding of the report, it is necessary also to distinguish the notions of the “suspect” and the “accused.” A suspect is anyone with regard to whom a decision presenting charges was issued or who, without the issuance of such a decision, was informed about the charges in connection with his interrogation in the capacity of a suspect. An accused is a person against whom an indictment has been submitted to a court and a person with regard to whom a public prosecutor has filed a request for a conditional discontinuation of proceedings.

During the main trial, the court rules in a panel composed of one judge, unless the law provides otherwise. In cases involving a felony, the court rules in a panel composed of one professional judge and two lay judges. When a case is particularly complex, the court of first instance may decide that it should be heard by a panel of three professional judges. In cases concerning crimes in which the law provides for a penalty of life imprisonment, the court rules in a panel composed of two professional judges and three lay judges. There is no jury in Poland.

In the course of criminal proceedings, court rulings can take the form of orders, decision and judgments. When ordering pre-trial detention, ordering an alternative or prolonging pre-trial detention the court is obliged to issue a written decision (*postanowienie w przedmiocie zastosowania tymczasowego aresztowania*). The decision is presented to the suspect at the hearing or, when the suspect is not present at the hearing, it is delivered to his place of residence.

VI. PREVENTIVE MEASURES IN THE POLISH LEGAL SYSTEM

1. The law

a. Sources of law

Standards established by the Constitution of the Republic of Poland and the case-law of the European Court of Human Rights serve as the starting point for the discussion and review of Polish laws on pre-trial detention.

The legal framework for application of this most severe preventive measure is established by article 41 of the Constitution, which reads “*Personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute.*” Paragraph 3 of this article provides, “*Every detained person shall be informed, immediately and in a manner comprehensible to him, of the reasons for such detention. Within 48 hours of detention, the person shall be given over to a court for consideration of the case. The detained person shall be set free unless an order of pre-trial detention is issued by a court, along with specification of the charges laid, has been served on him within 24 hours of the time of being given over to the court's disposal.*” The same article, in paragraph 5, establishes a basis for asserting compensation for unlawful detention.

Additionally, article 2 and article 31 (3) of the Constitution outline two general principles of the legal system, which are, respectively, the principle of a democratic state ruled by law (art. 2) and the principle of proportionality (art. 31(3)). These provisions have been used as constitutional standards in decisions by the Constitutional Tribunal that refer to the procedure for applying preventive measures.

b. Grounds for application of preventive measures

The Code of Criminal Procedure (CCP) outlines the grounds for pre-trial detention and other measures, as well as the procedures for such orders and requests.

Pursuant to article 249 (1) of the CCP, preventive measures may be applied only where the collected evidence indicates a high probability that the defendant has committed an offence. This is the so-called “general ground” that determines the application of all preventive measures. Its absence prevents the application of any preventive measure, both custodial and non-custodial. According to doctrine, a “high probability” that an offence will be committed arises where the evidence collected in the course of proceedings shows that the degree of probability that a given offence has been committed by a specific person nears certainty, though is not equivalent to it.²⁸

This article also lists further grounds determining the lawfulness of these measures, including the need to secure the proper course of proceedings and the need to prevent the commission of

²⁸ L. Paprzycki, *Kodeks postępowania karnego Komentarz*, Lex No. 470880.

a new, serious offence by a defendant that is “an offence against life, health or public safety, and especially where the defendant threatened to commit such an offence”.

In addition, the CCP specifies other conditions governing the application of preventive measures. Accordingly, pre-trial detention may be ordered if one of the following special grounds exists (Article 258 § 1):

- 1) There is a justified concern that the defendant (suspect) will abscond or go into hiding, in particular where their identity cannot be established or when they have no country of permanent residence;
- 2) There is a justified concern that the defendant (suspect) will attempt to induce others to give false testimony or explanations or to obstruct the proper course of proceedings by any other unlawful means.

Simultaneously, the legislator stipulates that in the case of the defendant who is charged with committing a felony or a misdemeanour punishable with imprisonment with an upper limit of at least 8 years or whom the first-instance court sentenced to imprisonment exceeding three years, the need to apply pre-trial detention in order to secure the proper course of proceedings may be justified by the severity of a penalty which may be imposed on the defendant (Article 258 (2) CCP). This is the ground of a severe penalty that may be imposed on a suspect (“severe penalty ground”).

Pre-trial detention may also be applied where there is a justified concern that the defendant charged with a felony or an intentional misdemeanour will commit an offence against life, health or public safety, and especially where the defendant threatened to commit such an offence (Article 258 § 3). The Code of Criminal Procedure restricts the possibility of applying pre-trial detention exclusively in respect of offenders suspected of committing the most serious offences and stipulates that pre-trial detention may not be applied if an offence carries a penalty of deprivation of liberty for a term less than two years,²⁹ unless a perpetrator has been caught in the act of committing the offence or directly after its commission (Article 259 § 3).

Article 257 (1) CCP sets out the principle that pre-trial detention should be treated as a measure of last resort. Under this provision, pre-trial detention cannot be applied where another preventive measure is sufficient. The scholarship calls this rule the “*directive minimising the effects of preventive measures*”.³⁰

The legislator’s approach is also confirmed by the jurisprudence of the Supreme Court, which held that “*the system of applying preventive measures governed by the Code enables a specific preventive measure to be adjusted to a given case in such a manner that would restrict constitutional rights and freedoms of an individual to an extent not greater than is indispensable to attain a given purpose, i.e. in the manner that constitutes ‘the necessary minimum’.*”³¹

²⁹ Prior to the reform, pre-trial detention could not be applied if an offence carried a penalty of deprivation of liberty for a term less than one year.

³⁰ M. Dąbrowska-Kardas, P. Kardas, *Zasada minimalizacji tymczasowego aresztowania w postpowaniu jurysdykcyjnym*. PiP 2010/1/39-51.

³¹ Resolution of the Supreme Court of 22 January 2003, I KZP 36/02, OSNwSK 2003, item 177.

c. Types of preventive measures

The Polish CCP contains a catalogue of alternatives to pre-trial detention in the form of various non-custodial preventive measures, such as sureties, injunctions and orders. Just like pre-trial detention, these measures may be applied to secure the proper course of proceedings, and exceptionally to prevent the commission of another serious crime. They can only be applied if the obtained evidence indicates a high probability that the defendant has committed the crime (article 249 § 1 CCP). The following are the available non-custodial preventive measures:

Financial security – financial security (money bail) is governed by articles 266-270 of the CCP. Under a money bail order, a defendant (a suspect) or another person may be required to raise a certain sum of money, surrender securities or pledge or mortgage their property. The amount, type and conditions of financial security, and in particular the time-limit for surrendering the relevant assets, must be set out in an order, in consideration of the economic situation of the defendant or another person who provides security, the degree of harm inflicted and the nature of the offence. Assets or receivables provided as security will be forfeited or collected if the defendant (suspect) absconds or goes into hiding. The values in question may also be forfeited or collected if the defendant (suspect) otherwise perverts the course of criminal proceedings.

Surety of a trustworthy person – this measure, stipulated in article 272 of the CCP, involves surety furnished by a person of trust who promises that the defendant (suspect) will appear at every request of criminal justice authorities and will not unlawfully pervert the course of proceedings.

Surety of a social entity – under article 271 of the CCP, this type of surety may be provided by a defendant's (suspect's) employer, a governing authority of the defendant's (suspect's) school or university, a team in which the defendant (suspect) works or learns a trade or by a community organisation whose member the defendant (suspect) is. Such bodies guarantee that the defendant (suspect) will appear at every request of criminal justice authorities and will not unlawfully pervert the course of proceedings. If a defendant (suspect) is in military service, surety may be given by their unit through the unit's commander.

Police supervision – police supervision is governed by article 275 of the CCP. A person placed under supervision is obliged to comply with requirements imposed in the prosecutor's or court's order. These requirements may involve a prohibition of leaving a designated residence, obligation to report to the supervisory body at certain time intervals, notify the body of an intended travel and date of return, prohibition on contacting a victim or other persons, prohibition on staying at certain locations, as well as other restrictions on the defendant's (suspect's) freedom that may be necessary for the purposes of supervision.

Prohibition of leaving the country – under article 277 of the CCP the defendant (suspect) may be prohibited from leaving the country. The application of this measure may be accompanied by the seizure of the passport or other document that authorises its holder to cross the border, or also by a prohibition on issuing such a document.

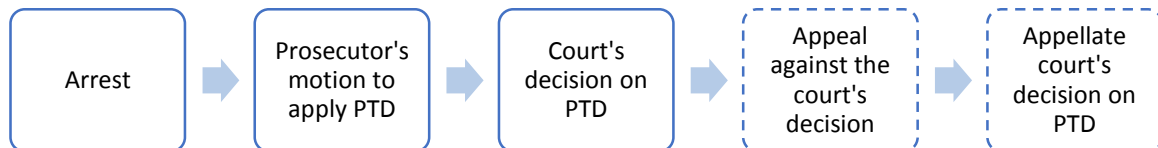
Order to leave the premises occupied with the victim – in accordance with article 275a of the CCP, this measure may be applied against a defendant (suspect) who is accused of having committed an offence involving violent acts. The act should be committed to the detriment of another person who resides with the defendant (suspect) at the same residence, provided that

there is a risk that the defendant (suspect) will commit another violent offence against the same person, especially if the defendant (suspect) has threatened to commit the offence in question.

Criminal injunction – suspension of a person’s right to perform official duties or practise a trade or profession or the order to refrain from performing a certain activity or operating a certain type of vehicles – this preventive measure is introduced in article 276 of the CCP. The scholarship defines “official duties” as any activities related to a position held or function performed by a person, while the expression “practising a trade or profession” is interpreted as referring to any skill that must be formally (officially) confirmed. At the same time, an “activity” is understood as any kind of activity that is significant from the social point of view.³²

d. Procedure of applying preventive measures

Under Polish criminal procedure, there are two bodies competent to apply preventive measures: the court and the prosecutor. While the prosecutor has the power to apply non-custodial measures and revoke pre-trial detention in the course of preparatory proceedings without requiring approval by the court, it is only an independent court that may rule on the application of pre-trial detention both at the stage of preparatory proceedings (the pre-trial stage) and during court proceedings. Such a division of powers has been in place since 1996 when the then-applicable regulations, which afforded the power to apply this most severe measure to a prosecutor, were amended.



A complaint against a prosecutor’s order of a preventive measure is heard by a district court in whose jurisdiction preparatory proceedings are being conducted (article 252 § 2). The appellate measure against a court’s decision ordering the application of a preventive measure is heard by the court of a higher instance. If an appellate court applies pre-trial detention in response to a complaint, then, under article 426 of the CCP, such a decision may be appealed to another equivalent panel of the appellate court. This amendment has been introduced in connection with the signal decision of the Constitutional Tribunal dated 9 November 2009 (S 7/09).

All Parties may bring also a motion for revocation or change of a preventive measure at every stage of proceedings and at any time. The prosecutor or, in judicial proceedings, the court decides on the motion within 3 days (article 254 CCP). A decision on the defendant’s motion for revocation or change of a pre-trial detention can be appealed if the motion was filed at least 3 months after the decision on pre-trial detention had been issued. At the same time, the legislator imposed on the bodies that apply preventive measures an obligation to constantly review the legitimacy of applied measures. This obligation results from article 253 (1) of the

³² L. Paprzycki, *Kodeks postępowania karnego. Komentarz*, Lex No. 470900.

CCP, which reads: “a preventive measure shall be immediately revoked or changed if the reasons for its application cease to exist or any reasons justifying its revocation or change come into being”. In relation to pre-trial detention specifically, according to article 344 of the CCP, the court is additionally obliged to verify the legitimacy of pre-trial detention orders at the stage of court proceedings; i.e. after the indictment has been filed.

e. Temporal aspects of the application of preventive measures

Preventive measures may be applied in the course of preparatory proceedings and judicial proceedings. Preventive measures can be applied after a suspect’s interview is concluded and a decision to present charges is issued and notified to the suspect.³³ In the event that the interview cannot be conducted in accordance with article 249 (3) of the CCP because of any formal obstacles, a preventive measure may be used after a decision to present charges is issued.³⁴

The measures may be applied until the moment when the enforcement of a sentence starts, which may be even after a judgment becomes final.³⁵

Pursuant to article 263 of the CCP, the court which orders pre-trial detention in preparatory proceedings must determine the measure’s duration, which may not exceed three months. However, if preparatory proceedings cannot be concluded within three months due to extraordinary circumstances of the case, then the first-instance court competent to hear the case may, upon the request of a prosecutor and if needed, extend the term of pre-trial detention to an aggregate period of maximum 12 months by ordering a maximum of 3 months of pre-trial detention at each individual hearing. The total length of pre-trial detention imposed before the pronouncement of the first-instance court’s judgment may not exceed two years. An appellate court in whose circuit the proceedings are pending, may extend the duration of pre-trial detention for a specified period longer than the above time limits at the request of a district court (and in preparatory proceedings – at the request of a relevant prosecutor who directly supervises the prosecutor who conducts or supervises the investigation). This is possible provided that the necessity to extend the period of pre-trial detention results from suspension of criminal proceedings, steps taken to determine or confirm the identity of the defendant (suspect), performance of evidentiary acts in a particularly complex case or abroad, or the defendant’s (suspect’s) intentional stalling of the proceedings.

A motion for an extension of pre-trial detention should be filed with the court, together with case files, at least 14 days before the end of the term of pre-trial detention as previously ordered (article 263 § 6 CCP). If there is a need to apply pre-trial detention after the pronouncement of the first judgment by the first-instance court, each such extension may be granted for a period of up to six months. At the same time, Polish law does not provide for a maximum period of pre-trial detention whose expiry would result in this measure being automatically lifted.

Finally, when pre-trial detention is applied concurrently with a custodial sentence imposed in another case, the duration of the custodial sentence served by a defendant will be credited towards the aforementioned periods of pre-trial detention.

³³Article 313 (1) of the CCP.

³⁴Commentary to article 249 of the Code of Criminal Procedure (Journal of Laws 97.89.555). In Z. Gostyński (ed.), J. Bratoszewski, L. Gardocki, S.M. Przyjemski, R.A. Stefański, S. Zabłocki, *Kodeks...*

³⁵*Ibidem.*

Moreover, under article 63 of the CCP, the period of actual deprivation of liberty (detention) in a case, rounded up to a full day, is credited towards the duration of a custodial sentence. According to this provision, one day of actual deprivation of liberty is equal to one day of a custodial sentence, two days of limitation of liberty (a community service) or two daily rates of a fine.

f. Defence lawyer's participation in proceedings

Defence lawyers have an important role to play in criminal proceedings leading up to and concerning pre-trial detention. It is, therefore, useful to present the laws on their participation in the proceedings. It should further be noted that these laws were subject to some modifications upon the entry into force on 1 July 2015 of the amendment to the Code of Criminal Procedure.

As W. Jasinski writes in a paper published by HFHR³⁶ on account of the reform, "in contrast to the pre-reform model of the criminal process, the newly adopted framework requires a much more active and professional approach from the parties. Hence, it became necessary to provide defendants and victims with access to professional legal aid; without it, they might be unable to argue their case during the trial. In order to achieve this goal, the legislator provided, in art. 80a (1) of the CCP, that a free of charge defence lawyer will be appointed at the request of a defendant who does not have a privately-retained lawyer.³⁷ It must be noted, however, that this right is granted to defendants only at the judicial stage of criminal proceedings. The right to a court-appointed lawyer is thus not guaranteed during preparatory proceedings (at the stage of criminal inquiry or investigation)."³⁸ In preparatory proceedings, according to article 78 of the CCP a suspect who has no defence lawyer of their choice may request that a legal aid lawyer be appointed for them, provided the suspect shows their inability to pay the costs of defence without jeopardizing their ability to support their family. However, the court may withdraw the appointment of a defence lawyer, if it turns out that the circumstances on which their appointment were based are not found to be true.

Under article 77, the defendant (suspect) may have no more than three defence lawyers. The participation of a defence lawyer in proceedings is not obligatory, unless the circumstances laid down in article 79 of the CCP arise, that is a defendant (suspect) is a minor, is deaf, mute or blind or where there is a justified doubt as to their ability to recognize the meaning of their action and control their behaviour. The defendant (suspect) has to have a defence lawyer if the court finds this necessary due to the existence of circumstances hindering defence. In such situations, the involvement of a defence lawyer in a hearing is obligatory; the lawyer also must be present at those court sittings that the defendant (suspect) must attend. For instance, under

³⁶ W. Jasinski, Polish criminal process after the reform, available at: www.hfhr.pl/wp-content/uploads/2015/07/hfhr_polish_criminal_process_after_the_reform.pdf

³⁷ This provision obviously does not apply to those situations in which the Code of Criminal Procedure provides for an obligatory appointment of a defence lawyer: in felony cases; for defendants under the age of 18; for defendants who are deaf, mute or blind; in cases where there is a reasonable doubt whether the defendant's capacity to understand the meaning of the act or direct their conduct was non-existent or significantly limited at the moment when the act was committed; or in cases where there is a reasonable doubt whether the defendant's mental state allows them to participate in the proceedings or conduct defence in an independent and reasonable manner.

³⁸ Provisions of the Polish Code of Criminal Procedure set forth two types of preparatory proceedings. Investigation (*śledztwo*) is more formalised, conducted in serious cases and to a greater extent managed by a prosecutor. On the other hand, inquiry (*dochodzenie*) is conducted by the Police (or other law enforcement agency), in different kinds of cases and is less formalised than the investigation.

article 374 of the CCP the presence of the defendant at a main trial is obligatory unless a law provides otherwise. According to article 79 § 4 of the CCP, if expert psychiatrists conclude that there are no doubts as to the defendant's sanity, both at the moment of committing an offence and during the proceedings, the participation of a defence lawyer in the proceedings is no longer obligatory. The president of the court, and at a hearing – the court – may revoke the appointment of a defence lawyer (article 79 § 4 of the CCP).

Furthermore, in light of article 80 of the CCP, the defendant must have a defence lawyer in proceedings pending before a regional court, if they are charged with a felony or detained pre-trial. In this case, the participation of a defence lawyer in a main trial is obligatory, whereas their involvement in an appellate or cassation hearing may be deemed necessary by the president of the court, or the court hearing the case.

These provisions will be substantially modified as of 1st July 2015. In the original version of the 1997 Code of Criminal Procedure another reason for obligatory participation of a defence lawyer was the defendant's (suspect's) lack of command of the Polish language. Since 1 July 2003 this is no longer a ground for the compulsory appointment of a legal aid lawyer.

As a consequence of the implementation of the principle of adversarial process (for details see below), a rule was introduced which enables a defendant to request the appointment of a court-appointed defence lawyer for a given, selected procedural act at the judicial stage of the proceedings (article 80a (2) read in conjunction with article 80a (1) of the CCP). A detention hearing is one of such procedural acts. Regrettably, the legislator restricted defendants' ability to use a court-appointed lawyer by awarding them that right only at the stage of judicial proceedings.

Fortunately, the reform also introduced one important change in proceedings for the application of pre-trial detention amending article 249 (5) of the CCP. This provision governs the extension of pre-trial detention. As W. Jasiński states, “[w]hereas the Polish Code of Criminal Procedure provides that prior to the application of pre-trial detention it is necessary to hear a defendant (unless it is not possible due to the defendant's going into hiding or staying abroad), during a court hearing on the extension of pre-trial detention the right to be present applies only to a prosecutor and defence lawyer, provided the latter has such a right. The amended wording of the said article provides, on the other hand, that at the request of the defendant who has no defence lawyer, a legal aid lawyer is appointed to take part in the detention hearing. The legislator guarantees then that even if the defendant is not personally present at the hearing, they still have the possibility to have their case defended owing to the appointment of a defence lawyer.”³⁹

g. Reform coming into force on 1 July 2015

The key objectives of an extensive amendment to the Code of Criminal Procedure, which became effective on 1 July 2015⁴⁰ were to speed up criminal proceedings and make them more

³⁹ W. Jasinski, Polish criminal process after the reform, available at: www.hfhr.pl/wp-content/uploads/2015/07/hfhr_polish_criminal_process_after_the_reform.pdf

⁴⁰ The Act amending the Code of Criminal Procedure and certain other Acts of 27 September 2013 (Journal of Laws of 25 October 2013).

adversarial.⁴¹ In attaining these objectives, the legislators also had to modify provisions relevant for the application of pre-trial detention.

Above all, the implementation of the principle of the adversarial criminal process required strengthening equal opportunities to parties to preparatory proceedings. The new provision of article 156a, which entered into force on 2 June 2014, provides that: *“In the event a motion for the application or extension of pre-trial detention is filed in the course of preparatory proceedings, the suspect and their defence lawyer shall immediately be provided with case files containing the evidence listed in the motion”*. The newly introduced provision is also a consequence of the duty to transpose the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

The rule established in article 156 (5a) of the CCP resulted in adding article 249a to the CCP, which became law on 1st July 2015. The article stipulates that judicial decisions regarding the imposition or extension of pre-trial detention can only be based on materials (evidence) that have been disclosed to the suspect or their defence lawyer. This change could reinforce defence lawyers’ ability to raise a defence of insufficient grounds for the application of pre-trial detention. However, the new provision does not require the prosecution to also provide exculpatory evidence to the defence, although this is a requirement of Article 7(2) of the Directive 2012/13/EU.

Another change in law on pre-trial detention, which results from Polish law being adjusted to ECtHR standards, is the establishment of a more detailed regulation regarding the content of justification of a pre-trial detention order (article 251 (3) of the CCP). The provision, in its pre-reform wording, read as follows: *“Justification of an order to impose a preventive measure should present evidence that the defendant has committed an offence and a description of facts that indicate that there are grounds for imposing a preventive measure and a necessity to impose the same. In the case of pre-trial detention, the justification shall explain why another preventive measure was considered insufficient.”*

As of 1 July 2015, courts will be given guidance that is more detailed on the content of the justification as the provision has been reworded to:

“Justification of an order to impose a preventive measure should present evidence that the defendant has committed an offence and a description of facts that indicate that the integrity of the proceedings is at risk or that the defendant may commit another serious crime if the preventive measure is not imposed, as well as concrete grounds and a need for the application of a given measure. In the case of pre-trial detention, the justification shall explain why another preventive measure was considered insufficient.”

Such a clarification may contribute to a more careful and diligent judicial consideration of matters that involve pre-trial detention, as judges will be obliged to refer directly to the circumstances listed in the new version of the provision.

The drafters of the amendment also noticed a need to modify the very grounds for application of pre-trial detention.⁴² Since detention was frequently (and quite automatically) justified under article 258 (2) of the CCP, on the ground that a severe penalty may be imposed for a given offence (as a general rule, such a penalty was in fact rarely imposed), the drafters proposed to

⁴¹ Explanatory memorandum to the Bill amending the Criminal Code, the Code of Criminal Procedure and Certain Other Acts, prepared by the Criminal Law Codification Commission.

⁴² Source: W. Jasiński, *Polish criminal process after the reform*, available at: http://www.hfhr.pl/wp-content/uploads/2015/07/hfhr_polish_criminal_process_after_the_reform.pdf (data of access: 1.09.2015).

modify that requirement by increasing the lower limit of the penalty from eight to ten years of deprivation of liberty.⁴³ Unfortunately, this change was ultimately not incorporated into the final version of the provision which entered into force on 1 July 2015. The reasons for such a decision remain unknown.

At the same time, however, in article 258 (4) of the CCP the legislator added more precise rules governing the judicial imposition of preventive measures, including pre-trial detention, following the jurisprudence of the ECtHR:

“In deciding on the application of a given preventive measure, the type and nature of concerns listed in sections 1-3, which have been accepted as grounds for applying a given measure, and the intensity of the threat they present to the integrity of a certain stage of the proceedings, shall be taken into account.”

As in the case of more precise rules governing the justification of pre-trial detention orders, we hope that the explicit designation of a line of reasoning that should accompany judicial resolution of pre-trial detention matters will persuade courts to examine more thoroughly whether a need to apply pre-trial detention actually exists.

Moreover, the legislator slightly extended the negative grounds for pre-trial detention that are defined in article 259 (3) of the CCP by introducing a relative prohibition of ordering the preventive measure against perpetrators who may receive a sentence of up to two years of deprivation of liberty (previously, the relevant limit was set at one year of deprivation of liberty).

2. Jurisprudence

a. Jurisprudence of the European Court of Human Rights

Undoubtedly, the jurisprudence of the ECtHR should be a factor affecting a change in practice of state bodies and legislation. Poland ranked fifth in the list of countries most often named in the ECtHR judgments (the top four are Turkey, Italy, Russia and Romania).⁴⁴ Accordingly, the Court’s judgments should have an important role to play in the Polish legal system. A similar position was expressed by the Criminal Law Codification Commission, which assessed the changes proposed in the amendment to the criminal procedure through the prism of the Strasbourg Court’s standards, which was also reflected in the explanatory memorandum to the draft law.⁴⁵ However, as indicated above, changes concerning preventive measures were negligible as compared to other regulated areas.

The Strasbourg Court has repeatedly examined the procedure of applying pre-trial detention in Poland. This is because articles 5 (right to liberty and the security of person) and 6 (right to a fair trial) of the ECHR are often the source of applications submitted to the Strasbourg Court. Complaints involving pre-trial detention – its length, grounds for application and procedural guarantees – are particularly prevalent. In cases involving Poland, until the end of 2014, the

⁴³ Explanatory memorandum to the Bill amending the Criminal Code, the Code of Criminal Procedure and Certain Other Acts, prepared by the Criminal Law Codification Commission.

⁴⁴ Source: <http://echr.coe.int/Pages/home.aspx?p=reports&c=>, (accessed: 15.06.2015).

⁴⁵ Explanatory memorandum to the Bill amending the Criminal Code, the Code of Criminal Procedure and Certain Other Acts, prepared by the Criminal Law Codification Commission, pp. 182-199.

ECtHR found a breach of article 5 of the ECHR on 295 occasions, which accounts for 28% of all the judgments rendered against Poland.⁴⁶ In four cases the Court stated that Poland had violated article 5 § 5. Only in 2014, the ECtHR issued 28 judgments against Poland, including seven (25%) that concerned a breach of article 5. Although not all of the cases involved pre-trial detention, they are a good illustration of the problems with legal guarantees that accompany detention procedures applicable under the current legal system.⁴⁷

The key cases of recent years involving pre-trial detention, among other issues, are the following. In our opinion, they illustrate mistakes and problems of a systemic nature:

Kauczor v. Poland, judgment of 3 February 2009 application no. 45219/06⁴⁸

In the case *Kauczor v. Poland* the ECtHR decided for the first time that the excessive use of pre-trial detention in Poland was a structural problem affecting a substantial number of persons and connected with the malfunctioning of the Polish criminal justice system. The Court found a violation of articles 5 § 3 and 6 § 1 ECHR in the case based on the following facts:

- pre-trial detention lasted seven years, ten months and three days,
- the proceedings were pending before the first-instance court all the time,
- a severe penalty could be imposed on Mr Kauczor who was indicted for murder.

Despite such a serious charge, the Strasbourg Court held that the grounds given by a domestic court could not justify the overall period of the applicant's detention. In particular, this was justified neither by the gravity of the charges brought against the defendant, nor by the severity of the penalty that could be imposed, or the need to secure the proper conduct (or integrity) of the criminal proceedings.

The Court accepted that the reasonable suspicion against the applicant of having committed serious offences could initially warrant his detention. Also, the need to obtain voluminous evidence and the need to secure the proper conduct of the proceedings, in particular the process of obtaining evidence from witnesses, constituted valid grounds for the applicant's initial detention. However, with the passage of time, those grounds became less and less relevant. The Court also pointed out that while the severity of the sentence faced was a relevant element in the assessment of the risk of absconding or reoffending, the gravity of the charges cannot by itself justify long periods of pre-trial detention. Further, the Court noted that the courts relied on a presumption that the applicant would obstruct the proceedings and tamper with evidence because he had not pleaded guilty to the offences charged. According to the Court, the reasoning of the domestic courts which appeared to have drawn adverse inferences from the fact that the applicant had not pleaded guilty showed a manifest disregard for the principle of the presumption of innocence.

Choumakov v. Poland (No. 2), judgment of 1 February 2011, application no. 55777/08⁴⁹

The case of *Choumakov (2)* concerned a Russian citizen, who was arrested on 29 May 2003 on charges of robbery and the murder of a taxi driver, and remanded in custody the next day. He was detained until the date of the final sentence which he received on 27 October 2010, i.e. for

⁴⁶ http://echr.coe.int/Documents/Stats_violation_1959_2014_ENG.pdf.

⁴⁷ http://echr.coe.int/Documents/Stats_violation_2014_ENG.pdf.

⁴⁸ [http://hudoc.echr.coe.int/eng#{\"docname\":\[\"Kauczor\"\],\"documentcollectionid2\":\[\"GRANDCHAMBER\", \"CHAMBER\"\],\"itemid\":\[\"001-91115\"\]}](http://hudoc.echr.coe.int/eng#{\).

⁴⁹ [http://hudoc.echr.coe.int/eng#{\"docname\":\[\"Choumakov\"\],\"documentcollectionid2\":\[\"GRANDCHAMBER\", \"CHAMBER\"\],\"itemid\":\[\"001-103125\"\]}](http://hudoc.echr.coe.int/eng#{\).

a period of seven years and five months. Within that period, Mr Choumakov was sentenced twice by the first-instance court, but on each occasion the judgment was revoked on appeal.

Previously, on 29th July 2008, in *Choumakov v. Poland*, application no. 33868/05, the Strasbourg Court found a violation of Article 5 § 3 of the Convention resulting from an excessively lengthy pre-trial detention which, at the time the ECtHR judgment was pronounced (2008), had already lasted for nearly four years. Despite the ruling, domestic courts kept extending detention for almost two more years. Furthermore, the Regional Court in Elbląg expressed an opinion that neither the Convention nor the Code of Criminal Procedure obliged the court to release the applicant based on a judgment of the European Court of Human Rights. The Regional Court said that the applicant was awarded a sum of EUR 1,500, which was sufficient compensation for the ascertained violation. The Court of Appeal in Gdańsk commented on the ECtHR judgment by holding that it was merely of “a declaratory nature” and “was not a source of law but rather an act of applying law”. The Strasbourg Court ruled that in their decisions issued after 29 July 2008 the courts that extended pre-trial detention or refused to release the applicant on bail and apply other, less severe preventive measures relied on the same grounds as those previously invoked. These grounds were the seriousness of the offence imputed to the applicant, the severity of the penalty to which the defendant was liable, the need to secure the integrity of the proceedings, and the risk that the applicant might tamper with evidence or abscond. As the ECtHR noted, the above suggests that after the delivery of the original judgment by the Court, domestic courts failed to consider any new relevant reasons capable of justifying the lengthy detention.

***Ruprecht v. Poland, judgment of 21 February 2012, application no. 39912/06*⁵⁰**

Mr Ruprecht was arrested and charged with murder. The period of his detention, as considered in the case, was approx. seven years and 11 months. The ECtHR found a violation of article 6 § 1 of the Convention. It said that in the decisions extending the applicant’s pre-trial detention, the courts failed to present specific substantiation of the risk that the applicant would tamper with evidence, intimidate witnesses or attempt to otherwise obstruct the proceedings. In the absence of any other factors evidencing that the risk justifying the detention orders actually existed – the Court’s argument went on – the said argument cannot be accepted in the context of the entire period of the applicant’s detention. Moreover, according to the ECtHR’s ruling, there was no indication that during any part of the period in question the authorities envisaged the possibility of imposing other preventive measures on the applicant, such as financial security (bail) or police supervision.

***Piechowicz v. Poland, judgment of 17 April 2012, application no. 20071/07*⁵¹**

Mr Piechowicz was accused of a number of serious crimes, including leading a criminal organisation, drug trafficking and kidnapping. He was detained for the entire course of preparatory proceedings. Despite his multiple requests for disclosure of the evidence gathered in the case files that provided grounds for the prosecutor’s motions for extending his pre-trial detention, he was each time denied access to the files. In each motion for the extension of the applicant’s pre-trial detention that had been filed until the end of preparatory proceedings, the prosecution invoked evidence and circumstances relevant for the charges against him. These elements were unknown to the applicant. The grounds given for his detention were vague.

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[http://hudoc.echr.coe.int/eng#{"docname":\["Ruprecht"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-109148"\]}](http://hudoc.echr.coe.int/eng#{).

⁵¹ [http://hudoc.echr.coe.int/eng#{"docname":\["Piechowicz"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-110499"\]}](http://hudoc.echr.coe.int/eng#{).

Without at least some basic knowledge of evidence justifying the alleged risk that he would obstruct the proceedings, which had been repeatedly invoked by the authorities, it was impossible for him to challenge, in any meaningful way, the lawfulness of and arguments for his detention.

The ECtHR held that the proceedings conducted under Article 5 § 4 of the Convention before the court that heard an appeal against a detention order must be adversarial and must always ensure the “equality of arms” between the parties, i. e. the prosecutor and the detained person. The equality of arms principle is not adhered to if the applicant or his defence lawyer is denied access to those documents in the investigation file that are essential for the purposes of effectively challenging the lawfulness of pre-trial detention.

Any restrictions on a detained person’s (or his counsel’s) right to access documents in the case file, which form the basis of the prosecution’s case built against him over the course of preparatory proceedings, must be strictly necessary in the light of a strong and countervailing public interest. Where full disclosure is not possible, Convention Article 5 § 4 requires that the resulting difficulties should be counterbalanced in a way that still enables an individual to effectively challenge the allegations made against him. The Court also ruled that since the defendant had been denied access to documents that related to the circumstances justifying his pre-trial detention, and no consideration had been given to measures which could have counterbalanced the absence of such disclosure, the procedure whereby the applicant could thus not seek to challenge the lawfulness of his pre-trial detention was in breach of Article 5 § 4 of the Convention.

Dochnal v. Poland, judgment of 18 September 2012, application no. 31622/07⁵²

Mr Dochnal was charged with corruption (offering and inciting others to offer a financial advantage to a public official). His pre-trial detention amounted to three years and ten months. The Court held that in all the decisions extending the applicant’s detention, no specific substantiation of the risk that the applicant would tamper with evidence, intimidate witnesses or otherwise disrupt the proceedings emerged. In the absence of any other factors showing that the risk invoked in detention orders actually existed, the Court’s argument went on, the said argument cannot be accepted in the context of the entire period of the applicant’s detention.

Further, the Court noted that given the extensive period of time during which neither the applicant nor his lawyer had access to any of the documents in the case file, the applicant could not effectively exercise his defence rights in the proceedings concerning the review of the lawfulness of his pre-trial detention.

Nowicka v. Poland, judgment of 3 December 2012, application no. 13229/03⁵³

Ms Nowicka was arrested as a result of proceedings brought by a private bill of indictment in connection with her failure to attend the psychiatric examination ordered by the court. The Court concluded that the applicant's detention, which lasted for a total period of eighty-three days and was imposed in the context of a private prosecution arising out of a neighbours' dispute, was in breach of Article 5 § 1 of the Convention.

With respect to the applicant's pre-examination detention, the ECtHR noted in particular that on the first occasion she had been detained for eight days before she was given an appointment

⁵² [http://hudoc.echr.coe.int/eng#{"docname":\["Dochnal"\],"documentcollectionid2":\["GRANDCHAMBER"\],"CHAMBER":\["AMBER"\],"itemid":\["001-113139"\]}](http://hudoc.echr.coe.int/eng#{).

⁵³ [http://hudoc.echr.coe.int/eng#{"docname":\["Nowicka"\],"documentcollectionid2":\["GRANDCHAMBER"\],"CHAMBER":\["AMBER"\]}](http://hudoc.echr.coe.int/eng#{).

with psychiatrists on 2 November 1994. Her examination was completed on the same day. The applicant's second examination, between 19 April and 26 May 1995, was preceded by twenty-seven days of detention. The Court found that both periods of pre-examination detention could not be reconciled with the authorities' desire to secure the immediate fulfilment of the applicant's obligation. Moreover, the "purely technical reasons" relied on by the Government in the context of the length of detention preceding the first examination could not, in the Court's opinion, justify holding the applicant in custody for eight days before submitting her to a brief examination. Taking into account the duration of detention, the Court expressed the view that the authorities had failed to draw a balance between the importance of securing the immediate fulfilment of the obligation in question and the importance of the right to liberty.

The same accusations were raised by the Court in connection with the use of pre-trial detention after the applicant's examination. The Court observed that although her first examination ended on 2 November 1994, the applicant was held in custody overnight and was released only on 3 November 1994. The second examination of the applicant ended on 26 May 1995, but she remained in detention for eight days until 3 June 1995.

Kowrygo v. Poland, judgment of 26 February 2013, application no. 6200/07⁵⁴

Mr Kowrygo was arrested on charges of producing drugs and other related offences. The applicant's pre-trial detention lasted for one year, eight months and twenty-five days.

The Court found a violation of article 5 § 3 of the Convention, as it was difficult to accept the reasoning for the application of pre-trial detention that referred to the fact that the applicant had not pleaded guilty. The ECtHR held that a decision to plead not guilty should not be considered as a relevant circumstance to justify pre-trial detention. It should also be noted that even after the applicant had pleaded guilty, the domestic courts nevertheless continued to extend his pre-trial detention for nine months. The Court admitted that there was a reasonable suspicion against the applicant of having committed serious offences. However, with the passage of time, that ground became less and less relevant. Accordingly, the other grounds adduced by the courts would have to exist – namely, the risk that the applicant would obstruct the proceedings and tamper with evidence – and be "relevant" and "sufficient." As regards this risk, the Court noted that the authorities did not indicate any concrete circumstances capable of showing that the anticipated risk went beyond a merely theoretical possibility. The Court was therefore not persuaded that that argument can justify the entire period of the applicant's detention, especially as it appears that there was no indication that at any earlier stage of the proceedings the applicant had tampered with evidence or had made any attempt to induce witnesses to give false testimony. Moreover, in the applicant's case there is no indication that during the entire period in question the authorities have ever envisaged the possibility of imposing less restrictive preventive measures on the applicant, such as bail (financial security) or police supervision. The decisions of the courts applying the pre-trial detention never addressed the question why these less restrictive means were considered insufficient in the present case.

El Kashif v. Poland, judgment of 19 November 2013, application no. 69398/11⁵⁵

Mr El Kashif was charged with illegally providing online gambling services. He was sentenced to a fine of about EUR 500 in summary (simplified) proceedings. After he appealed against the summary sentence, the case was committed to a full trial.

⁵⁴[http://hudoc.echr.coe.int/eng#{"docname":\["Kowrygo"\],"documentcollectionid2":\["GRANDCHAMBER"\],"CHAMBER":\["AMBER"\],"itemid":\["001-116826"\]}](http://hudoc.echr.coe.int/eng#{).

⁵⁵ [http://hudoc.echr.coe.int/eng#{"itemid":\["001-138667"\]}](http://hudoc.echr.coe.int/eng#{).

The applicant repeatedly failed to appear in court and did not collect court notices. The police unsuccessfully attempted to serve him a notice to appear in court. As a result, the court ordered his pre-trial detention for a period of three months, issued the arrest warrant and suspended the proceedings until the applicant was arrested. Ultimately, the defendant was held in pre-trial detention for 16 days, on the basis of an order issued in the course of the criminal proceedings that were conducted against him in the case of a fiscal offence.

The ECtHR noted that on 7 June 2011 a regional court considered the complaint against the detention order of 17 May 2011 filed by the defendant's lawyer, and held that pre-trial detention was legal. However, the regional court did not summon and did not hear the defendant before dismissing the complaint. During the 16 days between his arrest and release, the applicant had not been brought before the court and heard in order to review the lawfulness of his pre-trial detention, a fact that was not contested by the Government. Considering the above, the Strasbourg Court held that in the circumstances of the discussed case the period of 16 days during which the defendant was not brought before the court can hardly be reconciled with the requirement established in Convention Article 5 § 3, according to which a detained person must be "brought promptly" before a judge.

Moreover, the ECtHR found a violation of Article 5 § 1 of the Convention, ruling that although the pre-trial detention ordered in the discussed case had a formal basis in domestic law, it was contrary to the spirit of Article 5 § 1 of the Convention, which stipulates that this should be a measure of last resort. In other words, personal liberty should be a rule and deprivation of the same before a judgment is issued – strictly an exemption. This conclusion was based on the Court's observation that the defendant had no criminal record and had a permanent residence in Poland. The ECtHR also held that the domestic law did not provide for the use of the preventive measure in the form of pre-trial detention in cases where an offence carries a penalty of deprivation of liberty for no longer than a year while the offences imputed to the defendant carried a non-custodial penalty. Furthermore, the Strasbourg Court noted that despite having been petitioned to do so by the defendant's counsel, the Polish court failed to seriously engage with the idea of applying any measures that are less severe than detention in the applicant's case.

Wereda v. Poland, judgment of 26 November 2013, application no. 54727/08⁵⁶

Mr Wereda was released from custody two days after the release order against him had been given. The Court found this length of time to be incompatible with the standard of Article 5 § 1 of the ECHR. It is obvious that, in certain circumstances, there may be some limited delays before a detained person is released. Practical considerations relating to the running of the courts and the completion of administrative formalities by the prison administration mean that the execution of such a court order may take time, which, nevertheless, should be kept to a minimum and, in any event, not exceed several hours. In the Court's view, the relevant administrative formalities should have been carried out more swiftly. It had not been shown that the authorities attempted to keep to a minimum the delay in implementing the decision to release the applicant.

Other ECtHR judgments in Polish cases

Apart from the recent judgments outlined above, it is worth briefly mentioning also other cases in which the Strasbourg Court has successfully identified the problems of the application of preventive measures in Poland. One of such judgments was issued in the case *A.E. v. Poland* in

⁵⁶[http://hudoc.echr.coe.int/eng#{"docname":\["Wereda"\],"documentcollectionid2":\["GRANDCHAMBER"\],"CHAMBER":\["CHAMBER"\],"itemid":\["001-138565"\]}](http://hudoc.echr.coe.int/eng#{).

2009. The ECtHR found a violation of Article 2 § 2 of Protocol no. 4 to the Convention holding that “*the authorities are not entitled to maintain over lengthy periods restrictions on the individual’s freedom of movement without a periodic reassessment of their justification.*” However, in that case such a reassessment took place only once, at the applicant’s request, which would indicate that the travel ban was in reality an automatic, blanket measure of indefinite duration. The Court held that this countered to the authorities’ duty under Article 2 of Protocol No. 4 to take appropriate care to ensure that any interference with the applicant’s right to leave Poland remained justified and proportionate throughout its duration.⁵⁷ The applicant argued in its application that the prohibition on his leaving Poland for more than eight years was a disproportionate limitation on his freedom of movement. The applicant submitted that due to the travel ban he was unable to visit his ailing sister and mother in Libya. Similarly, when his sister died he was unable to attend her funeral. The travel ban had been unlawful and had had the effect of imprisoning him for eight years in Poland.

Another case is the 2011 case of *Finster v. Poland*,⁵⁸ in which the ECHR held that in the grounds for its decision on the prolongation of the applicant's pre-trial detention, the Gdańsk Appellate Court stated that the evidence against the defendants, including the applicant, indicated that they had committed the offences with which they had been charged. The Court emphasised that there is a fundamental distinction to be made between a statement that someone is merely suspected of having committed a crime and a clear judicial declaration, made in the absence of a final conviction, that the individual has committed the crime in question. Having regard to the explicit and unqualified character of the impugned statement, the Court found that it amounted to a pronouncement on the applicant's guilt before he was proved guilty according to law. The Court underlined that there can be no justification for a court of law to make a premature pronouncement of this kind. Accordingly, in the Court’s opinion there has been a violation of Article 6 § 2 (presumption of innocence) of the Convention.

Another important aspect of a violation of the rights of individuals as part of criminal proceedings is outlined in the case of *Lewicki v. Poland*. The case involved the time taken to examine a complaint against the extension of the applicant’s pre-trial detention. The three appeals against the extension of pre-trial detention were considered by the appellate court respectively for fifty-six days, 120 days and sixteen days. The Strasbourg Court held in the judgment that the time taken to examine the applicant's appeals did not satisfy the speediness requirement of Article 5 § 4.⁵⁹

a. The key case law of domestic courts

As the case law of courts and tribunals specifies legal frameworks in which this practice may take shape, some Polish case law must also be explained. A list of selected judgments which – in the view of the authors of the report – have had the greatest influence on the practice of applying preventive measures by criminal justice authorities is presented below.

⁵⁷ The ECHR judgement in the case *A.E. v. Poland* of 31 March 2009, paragraph 49 (application no. 14480/04).

⁵⁸ The ECHR judgement in the case *Finster v. Poland* of 8 February 2011 (application no. 24860/08).

⁵⁹ P. Kubaszewski, K. Wiśniewska, *Nowy model postępowania karnego rozwiązaniem na zmniejszenie liczby wyroków ETPC przeciwko Polsce?* In P. Wiliński (ed.), *Kontradiktoryjność w polskim procesie karnym*, 2013, pp. 381-396.

***Resolution of a seven-judge panel of the Supreme Court of 24 November 2010, I
KZP 20/10⁶⁰***

Court's reasoning: *The revocation – under the procedure of an appellate review – of a decision to extend pre-trial detention, irrespective of the wording of the subsequent ruling, gives rise to an obligation to immediately release the defendant if a period for which pre-trial detention was applied or extended has expired and the defendant is not detained in any other case.*

The legal question in this case was asked by the Human Rights Defender (HRD) (which can be compared to an ombudsman for human rights). It involved diverging interpretations of a situation where the time limit for which pre-trial detention was imposed has passed following the revocation of the first-instance court decision to extend the penalty and refer the question of applying this preventive measure for reconsideration. There have been cases in which appellate courts have not allowed for a defendant's (suspect's) release from custody despite the fact that no legal ground for the application of pre-trial detention existed. Courts even argued that revocation of a decision to extend pre-trial detention did not mean that the pre-trial detention was revoked, because a decision subject to appellate review still had legal effects, unless a decision to the contrary was taken. The Supreme Court decided, however, that such reasoning was incorrect, as it was based on the assumption that pre-trial detention may only be revoked if a legal ground for the revocation is found. The reasoning should in fact go in the opposite direction, that is towards the assumption that it is necessary to find a ground for further detention in a situation where a decision on which it was imposed is revoked.

***Resolution of the seven-judge panel of the Supreme Court of 19 January 2012, I
KZP 18/11***

Court's reasoning: *In a situation where conditions set out in articles 249 (1) and 257 (1) of the CCP are met and there are no negative grounds described in article 259 (1) and (2) of the CCP, the grounds for applying pre-trial detention established in article 258 (2) of the CCP are a stand-alone basis for applying that preventive measure.*

The legal question in this case too was asked by the Human Rights Defender (HRD). The HRD inquired whether the possibility of inflicting a severe punishment (article 258 (2) of the CCP) is a sufficient ground for applying pre-trial detention. The Supreme Court emphasised that the Code used the expression “a severe penalty which may be imposed on the defendant”, and did not refer to the limit of a statutory penalty. *“In this respect, the law requires that the court ruling in the matter of pre-trial detention make a ‘forecast’ of the penalty, whose sole purpose – as it has already been mentioned – is to make determinations and perform an evaluation necessary to apply preventive measures; in consequence, this means that a justification of a pre-trial detention order does not have to meet the standards applicable to a justification of the sentencing part of a judgment issued in a criminal case.”* Accordingly, judicial overuse of the ground stipulated in article 258 (2) of the CCP (i.e. a possibility of a severe sentence) is not an issue of interpretation of law, but only its proper application. While it should be noted that overuse of this ground may raise doubts as to its compliance with the European Court of Human Rights standards.

***Resolution of a seven-judge panel of the Supreme Court of 28 March 2012, I KZP
26/11***

⁶⁰ http://www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx?ItemID=415&ListName=orzeczenia1&Sygnatura=I+KZP+20%2f10.

Court's reasoning: 1. *In criminal proceedings, the hearings during which the court "examines or adjudicates the case" within the meaning of article 42 (2) of the Courts Act [CA] of 27 July 2001 (Journal of Laws No. 98, item 1070, as amended) are open to the public.*

Court's reasoning, cont'd: 2. *The term "case", interpreted in accordance with the language of article 45 (1) of the Constitution of the Republic of Poland, means a matter relevant for the merits of the proceedings, and also an incidental matter that may involve an interference with fundamental rights enshrined in the Constitution.*

Court's reasoning, cont'd: 3. *A hearing during which the court examines or adjudicates the case may be held behind closed doors only in circumstances stipulated in law (article 42 (3) of the CA).*

The President of the Supreme Court requested interpretation of a legal rule in order to determine whether hearings of criminal courts are open to the public. The question referred in particular to pre-trial detention hearings held in preparatory proceedings. In this respect, the resolution of the Supreme Court is ambiguous. On the one hand, the Supreme Court noted in its reasoning that also a hearing held to resolve an important incidental matter (namely a matter that may involve an interference with fundamental rights enshrined in the Constitution) should be open to the public. Arguably, deprivation of a person's liberty by means of pre-trial detention is an important matter. On the other hand, the justification of the Supreme Court's decision reads that court hearings held in the course of preparatory proceedings are not open to the public even if they involve "the examination and adjudication of the case" – and this is a consequence of the principle of secrecy of preparatory proceedings.

Judgment of the Constitutional Tribunal of 20 November 2012, case no. SK 3/12

Operative part: *Article 263 (7) of the Code of Criminal Procedure of 6 June 1997 (Journal of Laws No. 89, item 555, as amended) to the extent in which it fails to explicitly specify grounds for the extension of pre-trial detention following the delivery of the first judgment in a case by a first-instance court, is incompatible with the following provisions of the Constitution: article 41 (1), read in connection with article 31 (3), and article 40, read in connection with article 41 (4).*

The constitutional complaint was submitted by the defendant who, at the moment of its submission, had been detained for 11 years. The excessive length of the proceedings in his case (a murder case) and the subsequent excessive length of pre-trial detention resulted from the revocation of the decision of the first-instance court and remanding the case for reconsideration. In such a case, pre-trial detention may be extended under article 263 (7) of the CCP, which reads as follows:

"If it is necessary to apply pre-trial detention following the delivery of the first judgment by a first-instance court, such pre-trial detention may be each time extended for a period of up to six months".

Simultaneously, this provision fails to lay down any additional grounds that have to be met before detention may be extended for a period of over two years, as it is for example provided in article 263 (4) of the CCP. Article 263 (4) of the CCP stipulates that an extension of pre-trial detention exceeding 2 years may be ordered when its necessity results from the suspension of criminal proceedings, steps taken to determine or confirm the identity of the defendant (suspect), performance of evidentiary acts in a particularly complex case or abroad, or the defendant's (suspect's) intentional stalling of the proceedings.

Accordingly, different rules of extending pre-trial detention apply to the defendant before and after conviction by the first-instance court, with post-conviction rules being much more disadvantageous for the defendant. This inequality was the major factor behind the Constitutional Tribunal's decision to hold unconstitutional the absence of additional, extraordinary criteria for the extension of pre-trial detention after the delivery of a judgment by the first-instance court. The Constitutional Tribunal at the same time stated that the gaps in legislation can be minimised or mitigated by court practice. The ruling can influence this practice by being a clear guidance on what the content of extension decision should be, namely that they should contain a statement of grounds for extension. More concrete extension decisions, in turn, can facilitate the review process and be a better point of reference for PTD extension appeals.

b. Case law relied on during research

In addition to the above mentioned key judgments that have a major influence on the practice of applying pre-trial detention in Poland, it is also worth considering judgments of other courts, including those cited in the cases reviewed during the case file research.

Courts referred to established case law in respect of the risk of perverting the course of justice resulting from a charge of membership in a crime group. As it was stated in the decision of the Appellate Court in Katowice of 15 January 2003 (case no. II AKz 1249/02):

“Detention is also necessary to prevent perversion of the course of justice, in the meaning of article 258 (2) (2) of the CCP, which, in the case of persons suspected of leading an organised crime group, becomes a reality due to the relationship of submission within the internal organisational structure that enables leaders to freely and without any limitations steer other members of the group also during the trial. Therefore, in the case of such perpetrators there is no need to indicate specific evidence that would prove they take actions classified as obstructing the course of justice, which is usually required as a ground under article 258 (1) (2) of the CCP.”

This view was also confirmed in the decision of the Appellate Court in Kraków of 23 June 2005 (case no. II AKz 240/05).

As regards to the ground of a severe penalty that may be imposed on the defendant, the cases under review also contained reference to the decision of the Appellate Court in Kraków of 4 February 2010 (case no. II AKz 32/10). In this decision, the court held that *“The threat of a severe penalty leads to the presumption that a suspect may attempt to take various unlawful actions aimed at derailing the proper conduct of the proceedings”*. Furthermore, the court finds that it *“means a release from the obligation to prove specific conduct that may obstruct proceedings. As a stand-alone ground for detention, it is a sufficient basis for applying pre-trial detention to secure the proper conduct of the proceedings”*. Moreover, the court refers to the anticipation of a penalty, an exercise that a court must perform in considering this ground: *“the allegation of anticipating a sentence through the application of detention would be justified if the detention period was close to the probable length of the sentence that may actually be imposed on the defendant”*.

A similar conclusion regarding the severe penalty that may be imposed on a perpetrator was drawn by the Appellate Court in Katowice on 4 July 2001 (case no. II Akz 488/01). In that decision, the Court held that *“in article 258 (2) of the CCP the legislator expressed an*

assumption that the severity of a penalty that may be imposed on the defendant causes concerns that they may obstruct the proceedings, and this, in turn, results in the need for securing the integrity of the proceedings, precisely by applying pre-trial detention.” Moreover, the Appellate Court in Katowice explained in detail the relation between relying on this ground for pre-trial detention and the fact of the defendant’s cooperation with criminal justice authorities: *“The very fact that the defendant has testified, or even admitted her guilt, does not exclude the risk of her obstructing the course of the proceedings, and does not oblige the court to revoke the applied preventive measure.”*

In analysing the negative grounds for the application of pre-trial detention, courts invoked, among others, the decision of the Appellate Court in Lublin of 12 August 2009 (case no. II AKz 470/09), in which the Court held that the burden of proving grounds under article 259 (1) and (2) of the CCP rests with the party who requests that this provision be applied. The case file research also revealed references to a similar decision, issued by the Appellate Court in Kraków on 5 May 2006 (case no. II AKz 144/06). The Kraków court ruled as follows: *“Justified and appropriate detention may not be lifted in each and every case when it adversely affects the detained person or his loved ones; it may be lifted only in a situation that such adverse consequences are exceptionally severe and factually proven. It is for the party who requests revocation of detention to show that they [negative grounds of detention] exist.”*

VII. STATISTICAL DATA

Prior to reviewing the findings of the research conducted, it is also recommended to present and review statistical data concerning the practice of applying preventive measures. This is to provide a context for the research and its findings, as well as help the reader to understand the issues, challenges, and good and bad practice.

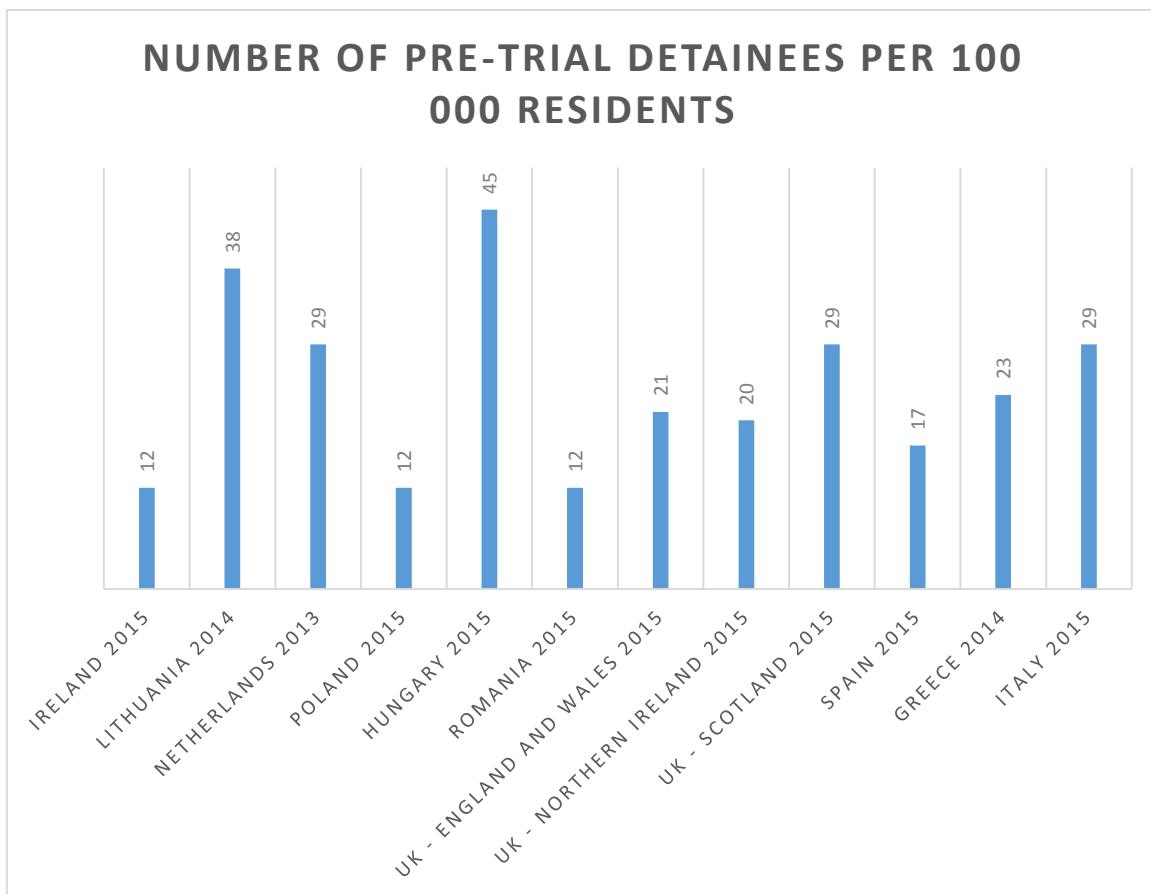
1. Number of persons in pre-trial detention

In the last five years, there has been a substantial decrease in the number of motions for pre-trial detention. Between 2009 and 2014 this decrease amounted to almost 9,000 cases, that is dropped by ca. 30%.⁶¹

Year	Number of prosecutorial motions for pre-trial detention	Number of applied pre-trial detentions	Success rate of prosecutorial motions (in per cent)
2009	27,693	24,755	89.39%
2010	25,688	23,060	89.76%
2011	25,452	22,748	89.37%
2012	22,330	19,786	88.60%
2013	19,410	17,490	90.1%
2014	18,835	17,231	91.48%

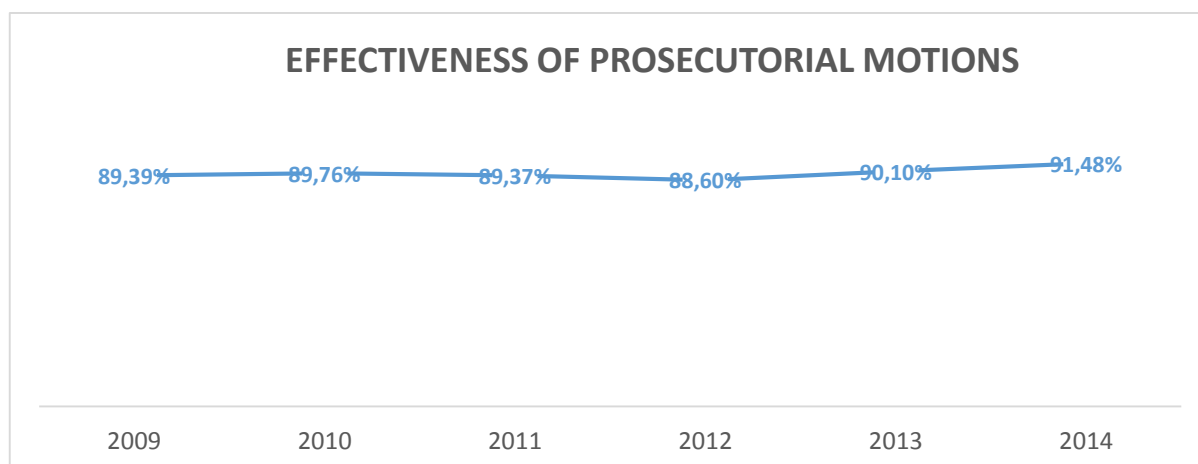
A declining trend undoubtedly encourages an optimistic approach. Moreover, the table below shows that Poland is among the project countries with the lowest number of pre-trial detainees per 100 000 residents.

⁶¹ Source: Annual reports of the Prosecutor General on the prosecution service <http://pg.gov.pl/sprawozdania/sprawozdania-prokuratora-generalnego-1133-2.html> (accessed: 1.09.2015).



However, according to the data, Poland is still among the countries with the highest numbers of persons detained in prisons and detention centres in Europe pre- and post-conviction.

2. Decision-making process on the application of pre-trial detention⁶²



Even though there has been a substantial decrease in the number of motions for pre-trial detention, the success rate of those motions slowly rises. In 2014, judges approved 91.48% of

⁶² Source: Annual reports of the Prosecutor General on the prosecution service <http://pg.gov.pl/sprawozdania/sprawozdania-prokuratora-generalnego-1133-2.html> (accessed: 1.09.2015).

the motions. The possible causes of such changes will be assessed in further sections of the current report.

3. Success rate of complaints against pre-trial detention ⁶³

	2013			2014		
	Number of complaints against pre-trial detention heard by courts	Number of complaints against pre-trial detention admitted by courts	Percentage of admitted complaints	Number of complaints against pre-trial detention heard by courts	Number of complaints against pre-trial detention admitted by courts	Percentage of admitted complaints
Total	5,072	468	9.2%	5,227	439	8.4%

An analysis of detailed data shows that the success rate of complaints considered by courts is diversified. It is worth noting that the success rate of motions filed against decisions of district courts increased from 5% in 2013 to 17% in 2014. There are judicial circuits, for instance the Gdańsk circuit, in which the number of admitted complaints exceeded 50% in 2014 (of 215 filed complaints 109 were admitted). On the other hand, there are circuits where such complaints have no success rate whatsoever. For example, in the Jelenia Góra judicial circuit, out of five complaints filed none was admitted. Similarly in the Tarnów circuit, where nine complaints were filed. The success rate of complaints filed against decisions of regional courts was 5% in 2013, only to drop to 3% a year later. At the same time, it must be noted that the number of complaints also decreased from 1,959 to 1,528.⁶⁴

4. Duration of pre-trial detention⁶⁵

Since excessive length of pre-trial detention is a systemic problem in Poland, it is necessary to present detailed statistics in this respect both concerning pre-trial proceedings and the judicial stage.

	2009	2010	2011	2012	2013	2014
Up to 3 months	3,058	2,810	2,690	2,314	2,269	2,122
3-6 months	839	714	640	610	611	588
6-12 months	457	396	404	422	270	343
1 year to 2 years	62	64	30	47	39	41
Over 2 years	1	2			2	2

⁶³ Source: Annual reports of the Prosecutor General on the prosecution service <http://pg.gov.pl/sprawozdania/sprawozdania-prokuratora-generalnego-1133-2.html> (accessed: 1.09.2015)

⁶⁴ Source: Annual reports of the Prosecutor General on the prosecution service <http://pg.gov.pl/sprawozdania/sprawozdania-prokuratora-generalnego-1133-2.html> (accessed: 1.09.2015)

⁶⁵ Source: Annual reports of the Prosecutor General on the prosecution service <http://pg.gov.pl/sprawozdania/sprawozdania-prokuratora-generalnego-1133-2.html> (accessed: 1.09.2015)

Number of persons kept in pre-trial detention in penitentiary facilities in the course of judicial proceedings conducted before district courts on the last day of the reporting period broken down according to the duration of pre-trial detention

	2013	2014
Up to 3 months	885	847
3-6 months	812	850
6-12 months	750	753
1 year to 2 years	295	319
Over 2 years	44	28

Number of persons kept in pre-trial detention in penitentiary facilities in the course of court proceedings conducted before regional courts on the last day of the reporting period broken down according to the duration of pre-trial detention

	2013	2014
Up to 3 months	100	84
3-6 months	229	231
6-12 months	776	613
1 year to 2 years	812	719
Over 2 years	383	370

The tables above show that excessive length of pre-trial detention is particularly visible at the level of court proceedings. Both in district and regional court proceedings, a number of pre-trial detainees who remain in detention for more than 1 year is significant, but in regional court proceedings it exceeds 50%.

5. Statistics regarding alternative measures⁶⁶

As reported by the Prosecutor General in 2013, preventive measures were applied by prosecutors a total of 50,991 times, whereas in 2014 on 52,457 occasions, which means a ca. 3% increase in the number of applied preventive measures.

The following table presents the data for alternative measures applied by prosecutors most often.

Non-custodial preventive measure	Number of persons against whom non-custodial preventive measures were applied	
	2013	2014
Financial security	10,880	10,031
Police supervision	30,294	31,858
Prohibition from leaving the country	7,889	7,769
The prohibition from leaving the country combined with the seizure of passport or any other document	1,474	1,332

⁶⁶ Source: Annual reports of the Prosecutor General on the prosecution service <http://pg.gov.pl/sprawozdania/sprawozdania-prokuratora-generalnego-1133-2.html> (accessed: 1.09.2015)

that authorises its holder to cross the border		
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A total of 2,560 complaints against non-custodial preventive measures were filed, including 794 complaints against a decision to impose financial security. Common courts heard a total of 2,141 such appellate measures, including 673 involving the application of financial security, and admitted 475 of them, which accounted for 22.2% of the complaints heard. 400 cases were not considered for formal reasons.⁶⁷ The ratio of admitted complaints against the applied financial security was higher and amounted to 26.3%. In 2014, a total of 2,610 complaints against judgments ordering the application of non-custodial preventive measures was filed, including 793 complaints against a decision to apply financial security. Common courts heard a total of 2,361 such appellate measures, including 721 concerning the application of financial security and admitted 458 of them, which accounted for 19.4% of the complaints heard. The ratio of admitted complaints against the applied financial security was higher and amounted to 19%.⁶⁸

Applied non-custodial preventive measures	District courts	Regional courts (all, including those applied by second-instance courts that were filed along with indictment)	Appellate courts (all, including those applied by second-instance courts that were filed along with indictment)
	Year	2014	2014
Financial security	4,075	2,433	6
Surety of a trustworthy person	20	2	-
Surety of a social entity	4	3	-
Police supervision	12,908	286	11
Order to leave residential premises	948		1
Prohibition from leaving the country	2,449	1,906	6
Prohibition from leaving the country combined with the seizure of passport or any other document that authorises its holder to cross the border	520	744	2
Suspension from official duties or professional disqualification	43	16	
Refraining from carrying out a	96	22	2

⁶⁷ Source: Annual report of the Prosecutor General on the prosecution service performed in 2013, available at <http://www.pg.gov.pl/sprawozdania/sprawozdania-prokuratora-generalnego-1133-2.html> (accessed: 15.06. 2015).

⁶⁸ Source: Annual report of the Prosecutor General on the prosecution service performed in 2013, available at <http://www.pg.gov.pl/sprawozdania/sprawozdania-prokuratora-generalnego-1133-2.html> (accessed: 15.06. 2015).

specified type of business activity			
Refraining from operating a specified type of vehicles	1,388	1	-

VIII. DETAILED FINDINGS OF THE RESEARCH

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

As the ECtHR has emphasised repeatedly, correct and fair procedures in pre-trial detention proceedings are fundamental to ensuring that pre-trial detention is used lawfully. Lawful procedures, in compliance with ECtHR-jurisprudence, safeguard a detainee's right to a fair trial and their right to be deprived of liberty only when lawful.

ECtHR-jurisprudence on the interpretation of Article 5 ECHR sets out general principles that can be summarised in the following way:

(i) Speed: A person detained on the grounds of being suspected of an offence must be brought promptly or 'speedily' before a judicial authority, and the "scope for flexibility in interpreting and applying the notion of promptness is very limited".

(ii) Length of PTD: The trial must take place within "reasonable" time according to Article 5(3) ECHR. The "reasonable" time period is determined by assessing if the PTD period has 'imposed a greater sacrifice than could, in the circumstances of the case, reasonably be expected of a person presumed to be innocent'. Generally the proceedings involving a pre-trial detainee must be conducted with special diligence and speed (this is implied in Article 5(3) ECHR). Whether this has happened must be determined by considering the individual facts of the case. The ECtHR has found periods of PTD lasting between 2.5 and 5 years as excessive.

(iii) Judicial authority: The 'court' referenced in Article 5(4) ECHR, must have the authority to release the suspect and be a body independent from the executive and both parties of the proceedings;

(iv) Hearing: The hearing must be an oral and adversarial hearing, in which the defence must be given the opportunity to effectively participate.

a. Period of time for making a decision on the application of pre-trial detention

In this section we would like to comment on the time available to judges to analyse cases in which there was a motion for application of pre-trial detention. The decision has to be made within a specific time prescribed by law. Article 41 paragraph 3 of the Constitution states that *"[e]very detained person shall be informed, immediately and in a manner comprehensible to him, of the reasons for such detention. Within 48 hours of detention, the person shall be given over to a court for consideration of the case. The detained person shall be set free unless an order of pre-trial detention is issued by a court, along with specification of the charges laid, has been served on him within 24 hours of the time of being given over to the court's disposal."*

One interviewed judge stressed that a specific nature of the procedure regarding the application of pre-trial detention forces them to make swift decisions and respond quickly. During interviews three judges revealed that, as a rule, they have sufficient time to consider motions for the application of pre-trial detention, but this is not always the case when it comes to reading all case files. Respondents were unanimous that in the event of multi-volume cases, in particular economic crimes, this time may be insufficient to read all evidence. Two judges interviewed pointed out that in such cases it was of special importance that a motion for pre-trial detention

be thoroughly prepared by a public prosecutor and contain references to concrete evidence. Judges interviewed admitted that in such cases “*it is impossible not to rely on the evidence cited by a prosecutor.*” At the stage of pre-trial proceedings, the prosecutors host the proceedings. They know the case files and the context of the case. If they request a court to apply or extend pre-trial detention, it is difficult for a court to challenge their motion. All the more so since the judge who is to hear the motion obtains case files for a short period of time and only to issue a decision on the request. Accordingly, they are in no position to thoroughly read the case files and are more inclined to agree with the prosecutor. One interviewed judge indicated that the problem of insufficient time to prepare for a court hearing might apply to ca. 20% of cases.

b. Prosecutorial motions for the application of pre-trial detention

In pre-trial proceedings, the procedure for application of pre-trial detention is initiated by the motion of the prosecutor. At the stage of judicial proceedings, the court initiates it on its own.

According to 18 out of 24 lawyers (=75%) participating in the survey, defence’s and prosecutor’s motions are not treated equally. Four lawyers explicitly stated that judges have a tendency to follow submissions made by prosecutors and more often admit their motions. Among the reasons for this situation, lawyers named the trust that judges place in prosecutors, convenience and caution as well as the pressure exerted by prosecutors. This view does not correspond with the opinions of all judges interviewed, who emphasised that they did not feel pressured to rule in a particular way.

One lawyer explained in the survey that it was more convenient for a judge to admit a motion filed by a prosecutor because it allows them to avoid drafting a detailed justification, which would have been the case if the motion was denied. Therefore, it is faster and less time-consuming. In addition, it lifts from the judge the burden of assessing the degree of risk related to the failure to apply pre-trial detention. As a matter of fact, when a suspect is detained pending trial, there is no risk of them absconding or perverting the course of justice.

Statistical data presented by the Prosecutor General confirmed that for years the number of prosecutorial motions for the application of pre-trial detention admitted by courts has been in the region of 90%. According to one lawyer, it is easier for the court to apply detention than to disagree with the prosecutor also because the latter may make the court vulnerable to criticism. This may lead to a conclusion that a reduction in the number of pre-trial detention orders issued in recent years may not so much be the result of judges’ initiative, but of a lower number of prosecutorial motions.

The opinions quoted above demonstrate the importance of prosecutors’ diligence. Despite the significance attached to prosecutorial motions in the application of pre-trial detention, judges interviewed differed in their assessments of their quality. They claimed no uniform, general assessment of such motions could be made. They argued, however, that some of the motions should be assessed as schematic and repeating statutory grounds without referring to the facts of the case. One respondent even pointed out that he treated a prosecutorial motion only as a formal element of the entire decision-making process on pre-trial detention. This conclusion is also confirmed by the results of the case file review. Some of the analysed prosecutorial motions were schematic and repetitive, while others were more complex and referred to the circumstances of a particular case.

The interviewed judges expressed especially unfavourable opinions concerning the motions drawn up by prosecutors of district prosecutor’s offices (*prokuratura rejonowa*). One judge

responded in the interviews that sometimes, when a motion is particularly ill-drafted, a judge faces a dilemma whether or not they should “punish” the prosecutor for the motion’s quality and release the defendant (suspect) from custody. According to the judges’ opinions, the motions drafted by prosecutors of regional (*prokuratura okręgowa*) and appellate prosecutors’ offices (*prokuratura apelacyjna*) are more related to the reality of specific cases, are better drafted and should be assessed as thorough and accurate. A better quality of motions at prosecutors’ offices of higher levels may be the result of lower time pressure, as indicated by one judge.

Prosecutors interviewed emphasised that motions for the application of pre-trial detention are mostly based on personal and physical evidence, in particular testimonies of witnesses, including victims. The case file review has shown that the evidence depends on a given case, but it confirmed that it is mostly witnesses and clarifications of suspects. Interviewed prosecutors claimed that in the majority of cases they had sufficient knowledge to draw up a motion to apply pre-trial detention, although they admit that if a deadline for preparing a motion was longer, they would have more time to review the collected evidence.

According to one prosecutor interviewed, a time limit for preparing a motion for the application of pre-trial detention depends, largely, on the cooperation with the Police and the point in time when a defendant is brought before the court (this may be problematic at weekends) and when the case files and evidentiary materials are provided. There are situations where the prosecutor receives the files 24 hours prior to the expiry of a time limit and has no time to prepare a motion. One of the respondents argued – relying on similar arguments – that the time limit for preparing a motion was absolutely insufficient; he suggested extending it by 24 hours. In his opinion, the fact that it is insufficient is closely related to the improper organisation of police work. The respondent stressed that many times he had been notified of an “arrest to detain” at last notice and he often could not prepare comprehensive motions. The same prosecutor pointed out that extending the time limit from 48 to 72 hours would make it possible to verify more facts of the case and then “20-30% of motions would not be filed at all”. Such a change would, however, require an amendment to the Constitution. The prosecutor did not comment on whether the need for further application of pre-trial detention is reviewed by the prosecutor when the evidence has been fully collected and analysed.

c. Duration of detention hearings

The law does not provide for a minimum or maximum time for a pre-trial detention hearing. This is always dependent on the circumstances of a particular case.

One of the judges interviewed indicated that the duration of a hearing concerning pre-trial detention might not be identified with the length of a decision-making process regarding the application of this measure. This is because the process is preceded by the analysis of case files by an adjudicating judge.

Judges interviewed differed in their assessment of an average duration of a hearing – some of them said it lasted between 15 and 20 minutes, others said it was one hour. However, all of them agreed that the length of a hearing depends on what a suspect wants to say. One judge also indicated that at the first stage suspects usually remained silent in accordance with their line of defence. Some judges interviewed emphasised that another factor affecting the duration of a hearing was the presence and involvement of a defence lawyer. In addition, according to

them prosecutors' involvement is limited to supporting submissions made in the motion. This may to an extent be justified by the fact that the prosecutor who defends the motion in court is not always the one who drafted it.

Similar conclusions may be drawn from monitoring of detention hearings conducted as part of the project. The length of hearings depended on the readiness of a suspect to testify and actions taken by a defence lawyer. The participation of prosecutors was of no real consequence for the course of a hearing, and they were not even present at 2 out of 4 monitored hearings. This confirms the opinion expressed by one of the judges who said: "as a rule, from my own experience, the presence of a prosecutor at a detention hearing is basically redundant".

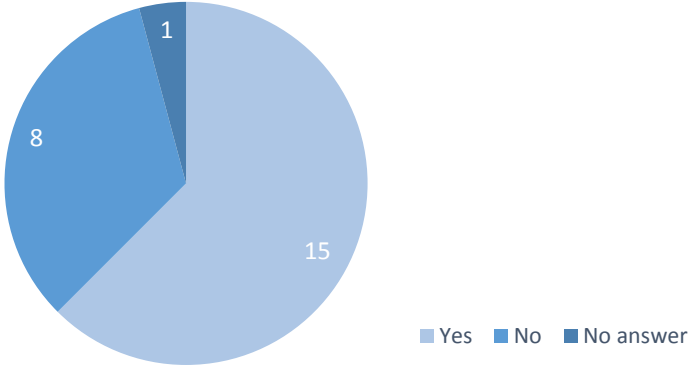
d. Suspect's presence at detention hearings

The Code of Criminal Procedure provides, in article 249 (3), that "prior to the application of a preventive measure, the court or prosecutor ordering the measure shall hear the defendant, unless this is not possible due to the defendant's going into hiding or staying abroad". Under article 71 (3) of the CCP, the term "defendant" in its broad meaning also applies, mutatis mutandis, to suspects. Accordingly, article 249 (3) of the CCP sets forth an obligation to hear a suspect before pre-trial detention is applied, whenever the suspect is available. However, this obligation does not apply to situations in which the court orders the pre-trial detention of a suspect who went into hiding after the passage of a period following the arrest. Further, the obligation does not apply to hearings on the extension of pre-trial detention or those concerning a review of the complaint against a pre-trial detention order.

In accordance with the amended wording of article 249 (5) of the CCP, which became effective on 1 July 2015, "at the request of the defendant who has no defence lawyer, a legal aid lawyer is appointed to take part in this procedural act" (i.e. a detention hearing, a hearing on the extension of pre-trial detention or a hearing concerning a review of the complaint against a pre-trial detention order – editor's note). The newly introduced change provides better procedural guarantees: under the new law, even if a defendant does not appear at the hearing in person, they still have the opportunity to have their case defended by a defence lawyer at their request.

The majority of the lawyers surveyed (62,5%) said that suspects are always present at pre-trial detention hearings. Eight respondents have claimed the opposite, saying that suspects are not always present at pre-trial detention hearings.

Defendant present at first PTD hearing



Graph 1. Survey results - defendant's presence at PTD hearings

The differences between the answers given may be explained by the ambiguity of the relevant survey question. Some respondents who marked the negative answer differentiated between the first detention hearing, at which the suspect is always present, and other hearings usually held in their absence. When asked about the reasons for the suspect's absence, the lawyers pointed to situations where the suspect is not brought before the judge or is a wanted person and the purpose of the pre-trial detention order is to force them to appear in court.

Answers related to extension or review hearings were much less divergent, which seems a natural consequence of the above-discussed facts. Out of 24 respondents, 21 said that suspects were not always present at those hearings. Some respondents also noted that suspects were not present at extension hearings unless the extension of pre-trial detention of the defendant is considered during the trial. In our view this is a practice which is biased against the suspect, who will struggle more to challenge any detention order if he is was not present at the hearing.

Eleven defence lawyers explained in the survey that suspects are not conveyed to court from detention facilities to attend extension hearings. One of the lawyers suggested that the underlying cause for this was the cost. Three claimed that courts do not consider suspects' presence mandatory or are satisfied with the presence of defence lawyers. The latter conclusion may mean that represented suspects are less likely to be brought to pre-trial detention hearings. Finally, a respondent observed that if a suspect requests to be brought before the judge, their motion is usually dismissed while the court appoints a defence lawyer.

According to 18 (= 75%) participants in the defence practitioner survey, it is impossible to organise a video conference that would enable a suspect to take part in the hearing. Five respondents answered that this was possible and one failed to answer that question. None of the surveyed lawyers has taken part in a pre-trial detention hearing organised in the form of a video conference within the 12 months preceding the survey.

The opinions of lawyers participating in the survey are confirmed by the review of the case files. In 82% of cases reviewed, the defendant was present at the first hearing. When the defendant was not present (i.e. in 18 % of the first hearings), it was usually the result of their hiding from the justice system or lack of knowledge on the ongoing proceedings. During prolongation hearings, the presence of the defendant was not maintained at the same level.

e. Presence of a defence lawyer

The presence of a defence lawyer is crucial to secure defendant's rights in criminal proceedings. It is one of the crucial elements of a fair trial. It has particular importance in a situation when a decision is made on the deprivation of personal liberty.

Fourteen lawyers participating in the practitioner's survey stated that a defence lawyer is always present at a detention hearing, whereas 10 lawyers held a different view.

Assessing the degree of involvement of defence lawyers one of the judges said: "*in this court, that is in the reality of a larger city, the involvement of defence lawyers is much higher. Whereas, in courts in smaller towns [...] – much lower. Here [in this court] a defence lawyer is present at one-third of cases, while in smaller courts this percentage is substantially lower*".

Among the reasons for defence lawyers' absences, four lawyers stated in the survey that their presence at a judicial hearing is not obligatory. Others referred to the fact that at this stage there

still may be no defence lawyer (five respondents) or they may not have been advised properly (four respondents). The last observation is confirmed by some interviews. As said by one prosecutor during the interview: *“Detention cases are mostly handled by defence lawyers of choice. Because it is not at that stage when court-appointed lawyers may become involved.”*

Some respondents to the defence practitioner survey indicated that, as a rule, a defence lawyer, if appointed, would always be present at a detention hearing. One of the lawyers surveyed said that if a suspect had a defence lawyer, their lawyer was present, but there is no practice of appointing a defence lawyer for the purpose of a detention hearing.

The surveyed lawyers all agreed that defence might file motions and make oral or written submissions during a detention hearing. This right is laid down in Polish law, but the actual possibility of filing motions is restricted in practice mostly to oral submissions.

One lawyer explicitly stated in the survey that a defence lawyer might submit oral motions and also written motions, if they were advised of a hearing’s date in advance. Two respondents to the lawyer’s survey said that filing motions was not a problem, but the motions were not admitted, even if justified. This brought one lawyer participating in the survey to the conclusion that the presence of a defence lawyer is often redundant. Statements of some judges interviewed appear to confirm such opinions of lawyers. As one of them openly admitted: *“to be honest, I have probably never faced a situation where whatever a defence lawyer had to say persuaded me not to apply pre-trial detention”*.

With regards to the weight attached to parties’ submissions, 18 (75%) of the surveyed lawyers stated that submissions of the parties are not treated equally at detention hearings. One lawyer participating in the survey noted that it depended on the type of motions. Usually the surveyed lawyers who noticed inequalities in courts’ approach to submissions of the parties indicated that the prosecutor’s office was in an advantageous position and its motions were more often admitted. Motions brought by defence are usually rejected as insignificant or aiming to prolong the proceedings. One lawyer participating in the survey explained that such a situation might result from the fact that judges do not have enough time to read volumes of files, which makes them more reliant on the motions submitted by prosecutors’ offices. All the interviewed judges underlined that they treated submissions of both parties equally and denied that the position of a prosecutor was more reliable for them. However, as mentioned above, they sometimes have to rely to a great extent on prosecutorial motions. Because of this, “whether they want it or not”, judges give a privileged position to a prosecutor.

According to one prosecutor interviewed, defence lawyers are in a vast majority better prepared for detention hearings than in the past. They offer reasonable and well-thought counter-arguments to the prosecution’s motion for pre-trial detention. Some prosecutors interviewed differentiated between court-appointed and privately retained defence lawyers in terms of their preparation and involvement. One prosecutor interviewed noted that a huge difference might be observed between defence lawyers of choice and court-appointed ones. According to him, the latter are worse prepared for cases and less involved in them. Court-appointed defence lawyers are rarely present during detention hearings, as often there is no time for their appointment. Defence lawyers of choice, on the other hand, “fight tooth and nail” at detention hearings. This was confirmed by another prosecutor interviewed, who claimed those defence lawyers of choice who were present at a hearing were well-prepared and arguing with them was a challenge.

Some interviewees, both among judges and prosecutors, noted that owing to a change of a situation on the market of legal services the approach of court-appointed defence lawyers has

been changing. As said by one of the prosecutors: “it’s not like it was a couple of years ago when court-appointed defence lawyers did their job very lazily. Now, due to a growing number of lawyers on the market they started to make more effort even in cases assigned to them”.

In general, the surveyed lawyers stated that they did not have enough time to prepare. They expressed different opinions as to how much time they have to prepare for a hearing. According to nine surveyed lawyers a defence lawyer has on average 30 minutes or less to prepare (i.e. read files, talk to a client, collect and verify the veracity of evidence) for the first hearing where a decision on the application of pre-trial detention is made. Six lawyers responded they had an hour or less and another six said they had over an hour. Two respondents stated they had less than 10 minutes. One interviewee did not give a direct answer saying only that the time differs.

The surveyed lawyers have different experiences on when they are notified of a detention hearing. Six lawyers participating in the survey wrote that they are given notice between 2 and 6 hours prior to a hearing. Four commented they are notified between 12 and 24 hours in advance and for five this period exceeded 24 hours. Only two respondents said they received notice less than 2 hours before a hearing. Three did not give any answer to the question claiming that there is no rule or that a notice period ranges between 0 and 12 hours. Two surveyed lawyers observed differences in the notice period between the first hearing (when it is shorter) and hearings for the extension (when it is usually longer).

f. Access to case files

According to Article 156(5a) which entered into force on 2nd June 2014:

If in the course of preparatory proceedings, the request for applying or extending detention on remand has been filed, the suspect and his defence counsel is immediately granted access to case files in the part containing evidence indicated in the request.

The rule established in Article 156(5a) of the CCP was supplemented by adding Article 249a of the CCP, which became law on 1st July 2015. Both Articles are parts of a major amendment of the CCP introduced by the Act Amending the Code of Criminal Procedure from 27th September 2013 (Ustawa o zmianie ustawy – Kodeks postępowania karnego, Journal of Laws from 2013 pos. 1247). This amendment was designed to introduce to the Polish legal system a more contradictory criminal procedure. The Article 249a of the CCP stipulates that:

Order on imposition or extension of detention on remand may rely exclusively on circumstances established on the basis of evidence known to the accused and his defence counsel. The court takes into consideration ex officio also those circumstances, which have not been disclosed by the public prosecutor, after their disclosure at the hearing, if they are favourable to the accused.

The above-mentioned amendment to the criminal procedure improved access to files of criminal cases and implemented the standard established under the Directive 2012/13/EU of the European Parliament and of the Council of 22nd May 2012 on the right to information in criminal proceedings. The issue has been repeatedly reviewed by the ECtHR, which on many

occasions found Poland in violation of the required standard.⁶⁹ For instance, in the judgment of 6th November 2007 in case of *Chruscinski v. Poland* (App. No 22755/04), the Court noted that due to the prosecutor's refusals on the basis of Article 156(5) CCP "*the applicant did not have an opportunity to examine the evidence relied on by the prosecuting authorities and the courts*" (para. 58). The Court considered that it was essential for the applicant and his lawyer to have access to the file and to inspect the documents in it in order to challenge the lawfulness of the applicant's arrest and subsequent prolongations of his pre-trial detention. The documents made available to the applicant did not provide an adequate basis on which to address the arguments relied on by the court or by the prosecutor, particularly given the rapidly increasing amount of evidence collected and which was relied on by the authorities in their decisions to prolong the applicant's detention on remand (see also the judgment in case *Migoń v. Poland*, para. 86).

Prior to the amendment, the HFHR conducted a study of then-existing practices in this respect. According to that report, "*Lawyers hold the view in the survey that the amendment to article 156 (5a) of the CCP will not solve all the problems caused by restrictions in access to case files, which are brought about by this provision. They pointed to a large number of technical issues such as a short period between the making of a motion for accessing case files and the date of the detention hearing, transfers of the files to the court or expert witnesses, no obligation to serve a motion for the application or extension of pre-trial detention on the suspect and their lawyer, or difficulties surrounding the physical ability to make copies of the files so that the right to access the files may be effectively exercised in each and every case. Some lawyers expressed the view that the case files substantiating prosecutorial motions might become a part of operational files, which are more difficult to access. Finally, it has been emphasised that it is the practice that would show if the amendment to article 156 (5a) of the CCP has actual impact on disclosure of the files to requesting parties. At the same time, the majority of lawyers expressed hope that the amendment would contribute to a decrease in the number of motions for pre-trial detention*".⁷⁰

Two judges interviewed confirmed the concerns expressed in the above report. They argued that the parties' still do not have equal opportunities at the stage of pre-trial detention hearings and preparatory proceedings, and that full access to case files was not provided. This, according to the judges, causes arguments raised by defence lawyers to be less case-specific. As one judge put it, "*today, there is still this provision which says you can generally seal everything, keep it away from them [defence lawyers]. We know what we're talking about, don't we? Evidence put forward to justify pre-trial detention. So in many, many cases his [defence lawyer's] participation is limited to improvisation, speculation. Even if you give him access to the files, how is he supposed to read 50 volumes in two or three hours?*"

Judges interviewed stated that during detention hearings both defence lawyers and suspects tend to argue the latter's personal circumstances and invoke the negative grounds for application of pre-trial detention rather than the facts of a given case and charges made against the suspect.

⁶⁹ *Migoń v. Poland*, Judgment of 25 June 2002, application no. 24244/94.

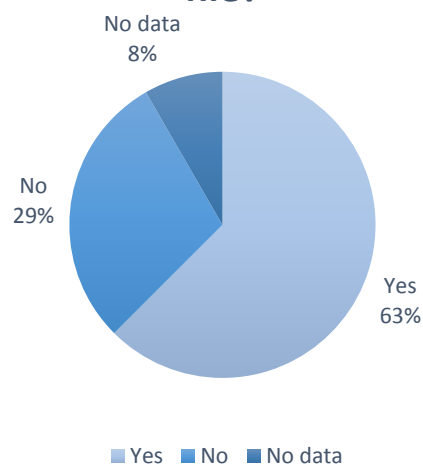
⁷⁰ A. Grochowska, "Abuse of pre-trial detention in Poland as a result of limited access to case-files for suspects and defence counsels", Helsinki Foundation for Human Rights, Warsaw 2013, available at: <http://programy.hfhr.pl/monitoringprocesulegislacyjnego/files/2014/01/Abuse-internet-1.pdf>, research conclusions quoted after: <http://programy.hfhr.pl/monitoringprocesulegislacyjnego/dostep-do-akt-postepowania-przygotowawczego-raport-hfpc/> (accessed: 15.06.2015).

Notably, none of the judges interviewed referred to changes resulting from the Directive on the right to information or assessed the impact of EU law on Polish practices.

What is important, all interviewed prosecutors declared that they were obliged to disclose the files to defence lawyers and had never denied such access. However, one of the prosecutors admitted that he has advantage over a defence lawyer because the latter does not know everything in the files of a case. Another prosecutor said that the right to access case files is a fiction.

Fifteen lawyers surveyed agreed that the defence had access to case files or to relevant case materials in advance of a pre-trial detention hearing. Six gave a negative answer; two selected no answer.

Does the defence have access to case file?



Although the majority of the respondents (15 out of 24) generally asserted that case files could be accessed, they often added certain reservations. For example, some claimed that access is not always provided or depends on the seriousness of a case or is “theoretical”.

One lawyer surveyed noted that the positive answer to the question about access to case files is a consequence of the current wording of article 156 (5a) of the CCP. If a piece of evidence is a basis for a motion for pre-trial detention, the article in question reads that a prosecutor’s approval is not required for access to the files. However, the prosecutor’s consent is still required if a party wishes to access evidentiary material that has not been used to substantiate the motion for pre-trial detention. According to this lawyer, the regulation does not provide a sufficient guarantee of the right to defence. Above all, the defence is unable to verify whether the prosecutor has invoked all the evidence that is relevant for the purposes of the request for pre-trial detention in their motion. Similar doubts were expressed by one of the judges: *“and here we have a problem, because the court may be even entirely unaware of some facts about some things that may be relevant, especially at the initial stage of the application of pre-trial detention. There’s only what the prosecutor presents. Or rather, what he wants to present because nobody can be sure that the prosecutor presents all the evidence he has.”*

Those lawyers who said that the defence has access to case files were asked to evaluate how useful such access is for the purposes of challenging pre-trial detention orders in the scale from 1 (entirely insufficient) to 3 (decidedly sufficient). The majority of the lawyers (8 out of 12) selected answer 2 (“sufficient”) while 4 marked answer “entirely insufficient”. One respondent

chose the answer “decidedly sufficient”. However, in additional comments the lawyers considered such access unsatisfactory. Some judges interviewed who noted disproportions in this respect seemed to share the lawyers’ opinion on the matter.

g. Obstacles to effective review

According to Polish law, all Parties may bring a motion for revocation or change of a preventive measure at every stage of proceedings and at any time. The prosecutor or, in judicial proceedings, the court decides on the motion within 3 days (article 254 CCP). At the same time, the legislator imposed on the bodies that apply pre-trial detention an obligation to constantly review the legitimacy of applied measures. This obligation results from article 253 (1) of the CCP, which reads: “*a preventive measure shall be immediately revoked or changed if the reasons for its application cease to exist or any reasons justifying its revocation or change come into being*”. According to Article 344 of the CCP, the court is additionally obliged to verify the legitimacy of pre-trial detention orders at the stage of court proceedings, i.e. after the indictment has been filed.

Moreover, the ECtHR has provided guidance on lawful pre-trial detention reviews. If these standards are complied with, the pre-trial detention order justifies the violation of the suspect’s rights:

- (i) Presumption of release: During the pre-trial period there is a presumption in favour of release;⁷¹ 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”;⁷²
- (ii) Regular review: Pre-trial detention must be subject to regular review,⁷³ and all stakeholders (defendant, judicial body, and prosecutor) must be able to initiate it;⁷⁴
- (iii) Proceeding of review hearing: The review of detention must take the form of an adversarial oral hearing with the equality of arms of the parties ensured.⁷⁵ This might require access to the case files⁷⁶ (even before the deadline for transposing the Directive on Access to Information in criminal proceedings, 2 June 2014);
- (iv) Reasoning: The decision on detention must be taken speedily and reasons must be given for the need for continued detention.⁷⁷ Previous decisions should not simply be reproduced.⁷⁸

⁷¹ *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 145, available at:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102473>

⁷² *McKay v UK*, App 543/03, 3 October 2006, para 42, available at:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77177>.

⁷³ *De Wilde, Ooms and Versyp v Belgium*, App 2832/66, 2835/66, 2899/66, 18 June 1971, para 76, available at:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57606>.

⁷⁴ *Rakevich v Russia*, App 58973/00, 28 October 2003, para 43, available at:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61414>.

⁷⁵ *Assenov v Bulgaria*, App 24760/94, 28 October 1998, available at:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-6773>.

⁷⁶ *Wloch v Poland*, App 27785/95, 19 October 2000, para 127, available at:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58893>.

⁷⁷ *Rehbock v Slovenia*, App 29462/95, 28 November 2000, para 84, available at:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59052>

⁷⁸ *Yagci and Sargin v Turkey*, App 16419/90, 16426/90, 8 June 1995, available at:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57938>.

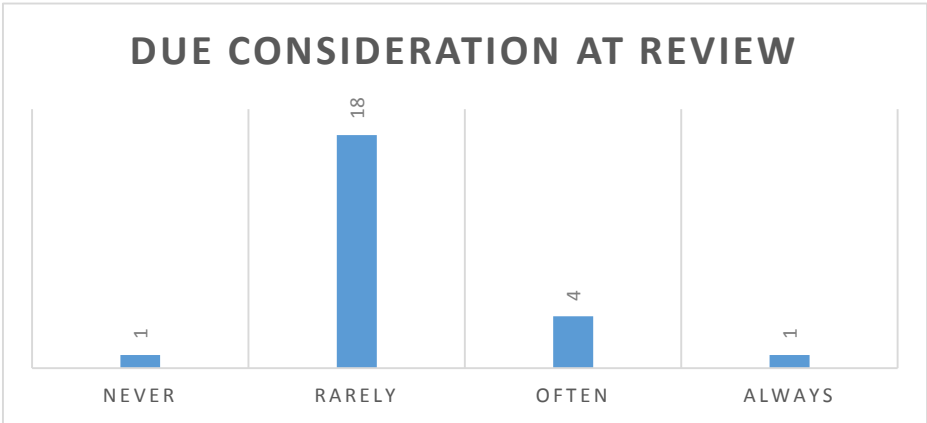
The surveyed lawyers were almost equally divided in their responses to the survey question on the obstacles preventing effective review of pre-trial detention decisions. Thirteen said there were no such obstacles, whereas 11 claimed they did exist.

Limited access to case files was one of the main obstacles mentioned by six surveyed lawyers. Interestingly enough, the same opinion was shared by some of the respondents who previously said that defence had access to case files. At this point lawyers also named various ways in which such access is restricted. For instance, obstacles may take the form of a limited access to photocopying or a limited time available for reading files.

Another obstacle mentioned by six lawyers participating in the survey was not being able to access (or having limited access to) the client in prison. One respondent noted that access was more difficult before the first hearing. Other respondents mentioned problems with a limited contact with their client resulting from the presence of a police officer.

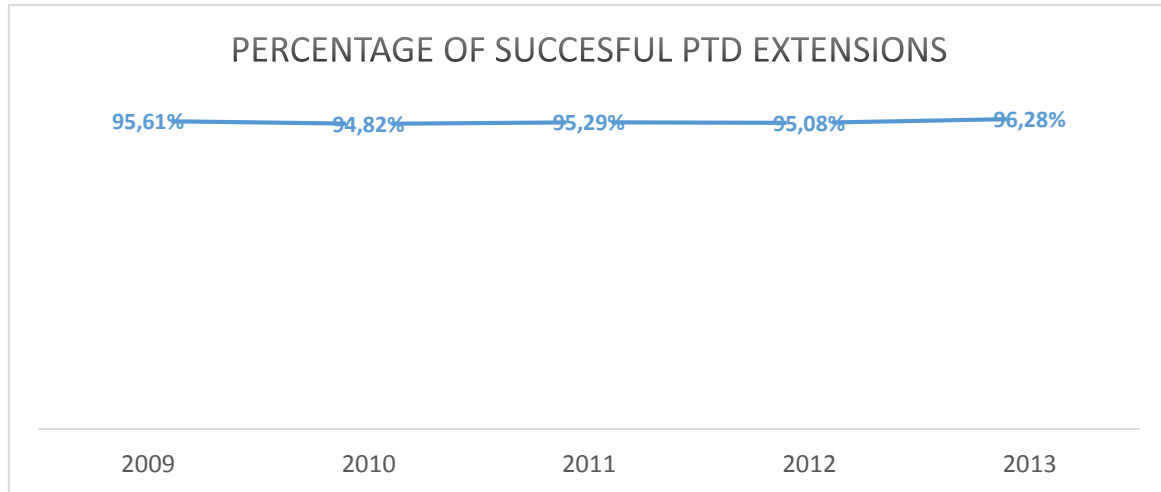
Some surveyed lawyers also mentioned such issues as limited time, poor knowledge of the case on the judge’s part and limited and schematic contents of justifications. The last issue makes it difficult to challenge pre-trial detention orders properly in complaints filed against such orders.

In the opinion of 18 out of 24 lawyers who participated in the survey (75%), judges rarely properly analyse all important factors during hearings for the extension of pre-trial detention or while hearing complaints against pre-trial detention. Only four respondents said that judges “often” accurately analyse these factors.



However, one judge interviewed said: “it happens to me that I change [decisions] and even at the last hearing we changed an order of our court extending pre-trial detention. In that case we applied the institution of conditional detention subject to a change [revocation] if no financial security is paid”. Another judge interviewed explained: “Complaints against orders for the application or extension of pre-trial detention differ substantially. [They range] from those which are doomed to fail, because sometimes their content is such that it is difficult to even take them seriously. You can tell it [a complaint] has been filed only because this was the client’s wish. I also understand the attitude of defence lawyers in a situation where a client wants them to do this, but the case is doomed to fail, so they just want to get it over and done with. But some complaints are very extensive, they may not be justified on their merits, but they certainly make you think. They often refer to the issue of proportionality, also the ECtHR’s case-law. All this must be thoroughly reviewed. And, especially in the case of defence of choice and big cases and defence lawyers of choice these complaints are relatively better”. Whereas, yet another judge interviewed said: “It depends. But I personally have never had to change

such a decision of the first-instance court. And I don't remember any such situations here that the first-instance court did not order detention, but we did. Maybe only in cases concerning the EAW, because they involve grounds that are pretty enigmatic, especially for first-instance courts, the supranational nature of this proceeding is not always understood by them."



h. External pressure

During our interviews, the question about external pressure felt during a decision-making process concerning pre-trial detention caused various reactions among professionals and, at times, even controversies. The dividing line run between prosecutors, on the one hand, and judges, on the other. While the latter attached certain significance to external pressure, the former underlined the element of independence rooted in their profession.

As regards the opinions of lawyers, one surveyed lawyer wrote that a phenomenon of the media pressure exerted on courts in situations where no pre-trial detention has been ordered or where some dramatic events have taken place is not without significance. Two lawyers also pointed to the risk of disciplinary proceedings that may be initiated against prosecutors and judges who do not apply pre-trial detention.

However, the view of lawyers responding to the survey is not consistent with opinions of judges and prosecutors. All of the judges interviewed stated that they did not feel any external pressure to apply a concrete measure. According to them, a judge must take into account the fact that public opinion will not always accept their decisions. At the same time, they emphasised that media coverage usually placed a decision on releasing a defendant (suspect) in an unfavourable light. In the opinion of one judge, press reports paint an unfair picture of the police which combats crime and courts that release "criminals". Nevertheless, even such public perception of courts does not translate into their decision. As one interviewed judge stated, the media do not fully respect the principle of presumption of innocence associating a decision on the application of pre-trial detention with a person being guilty.

Prosecutors denied in the interviews that external pressure, both exerted by the public and the media, had any role in their decisions on whether to prepare a motion for pre-trial detention. One prosecutor put it this way: *"I have two thoughts: the first one is why they didn't detain this*

man, and on the other extreme: he is innocent but the proceeding is still going on. This is the effect of social sentiments that are very polarised. We try not to follow them, but look from the angle of code regulations.” However, it must be noted that despite declared independence, prosecutors act in an environment in which external pressure may exist. As it was described by one of them: “There are such cases where a prosecutor faces a dilemma whether to move for pre-trial detention or go for non-custodial preventive measures. Because if he brings a motion but a court won’t order pre-trial [detention], his record will plummet. And on the other hand, if he doesn’t do this and a person escapes, then he will face disciplinary sanctions”.

Both judges and prosecutors admitted that there were times in the past when “a general atmosphere was favourable to the application of pre-trial detention”. However, today if the professionals identified any pressure, they associated it with a failure to apply pre-trial detention. One prosecutor noted: “at the moment in general, I think prosecutors started to fear asking for pre-trial detention.”

2. Decisions and substance of the pre-trial detention orders

According to the Polish law, preventive measures may be applied only where the collected evidence indicate a high probability that the defendant has committed an offence. Moreover, CCP sets out the principle that pre-trial detention should be treated as a measure of last resort. Under this provision, pre-trial detention cannot be applied where other preventive measure is sufficient.

ECtHR stipulates that there are certain reasons, why pre-trial detention can be ordered: (1) the risk that the suspect will fail to appear for trial;⁷⁹ (2) the risk the suspect will spoil evidence or intimidate witnesses;⁸⁰ (3) the risk that the suspect will commit further offences;⁸¹ (4) risk that the release will cause public disorder;⁸² or (5) the safety of a person under investigation in exceptional cases.⁸³ Committing an offence is insufficient as a reason for ordering pre-trial detention, no matter how serious the offence and the strength of the evidence against the suspect are.⁸⁴ Detention based on “the need to preserve public order from the disturbance caused by the offence”⁸⁵ can only be legitimate if the public order actually remains threatened; and the continuation of pre-trial detention cannot be used to anticipate a custodial sentence.⁸⁶

⁷⁹ *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, para 59, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61262>

⁸⁰ *Smirnova v Russia*, App 46133/99 and 48183/99, 24 July 2003, para 59, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61262>

⁸¹ *Muller v. France*, App 21802/93, 17 March 1997, para 44, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58025>

⁸² *I.A. v. France*, App 28213/95, 23 September 1988, para 104, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58237>

⁸³ *I.A. v. France*, App 28213/95, 23 September 1988, para 108, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58237>

⁸⁴ *Tomasi v France*, App 12850/87, 27 August 1992, para 102, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57796>

⁸⁵ *I.A. v. France*, App 28213/95, 23 September 1988, para 104, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58237>

⁸⁶ *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 149, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102473>

a. Grounds for the application of pre-trial detention

The case file research conducted revealed that three Code prerequisites were principally invoked as grounds for pre-trial detention: the risk of the suspect perverting the course of justice, the risk of the suspect absconding and going into hiding, and the fact that a severe penalty may be imposed on the suspect, if they are found guilty.

Rationales for pre-trial detention orders identified the risk of perverting the course of justice in many different ways, but generally by reference to the threat of the suspect putting pressure on witnesses or co-defendants' ability to align their testimonies. In particular, arguments that the course of justice may be perverted were based on the legal classification of an offence as a serious crime. Interestingly enough, that risk was often not mitigated by a suspect's admission to the offence because, as a detention order's justification read, "*even a partial admission of an offence does not automatically exclude the risk of perverting the course of justice; after all, the defendant may change their testimony*".

Another ground often invoked in justifications of detention orders was the risk that the suspect might abscond or go into hiding. The CCP provides that this in particular takes place when it is impossible to establish the defendant's identity or the defendant does not have a fixed abode. Additionally, in a number of analysed cases, such a risk of hiding or absconding was based on the defendants failure to appear in court. In such cases, a non-custodial measure was initially used, but revoked.

Finally, the wording of pre-trial detention orders, and – even more often – that of orders extending the term of pre-trial detention, referred to the severe penalty that might be imposed on the perpetrator. Courts often underscored that a severe penalty which may be imposed on a suspect "automatically" results in the conclusion that they are likely to pervert the course of justice, and as such can be invoked as a stand-alone ground for pre-trial detention. In making this line of argument courts often recalled the above-mentioned resolution of the Supreme Court (no. I KZP 18/11). In considering this ground, the court also took into account the defendant's criminal record.

In a number of cases, pre-trial detention was ordered due to the risk of reoffending and, in some, also due to the evolving nature of the proceedings (*sprawa rozwojowa*), namely the justice system bodies were still in the course of gathering evidence.

In individual interviews, prosecutors emphasised that when drafting a motion for pre-trial detention, they primarily relied on the grounds set forth in the Code. They differed, however, in their assessment of whether pre-trial detention may be imposed based on just one specific ground. They also assessed the significance of individual grounds for pre-trial detention differently. Two prosecutors stated that they primarily invoked the risk of perverting the course of justice. With regards to a severe penalty that may be imposed on a perpetrator, two prosecutors said that it is not a stand-alone ground for detention.

The majority of prosecutors interviewed said that the current grounds for pre-trial detention are sufficient. However, one of them called for a more precise regulation of statutory prerequisites. This would prevent discretionary application of those grounds which are not entirely clear, such as for example the risk of perverting the course of justice. Another prosecutor observed that interests of victims should be better protected: "*I think that on the whole the victim's interests need to be a bit better protected, in these grounds for pre-trial detention. I mean, they [only] include a general rule that [pre-trial detention may be imposed] if the perpetrator has*

threatened to commit the same offence again. [But] I can't imagine how such [additional] prerequisite [in favour of the victim] should be phrased [...]."

All of the judges interviewed also noted that the application of pre-trial detention is always based on the grounds laid down in the Code. However, they pointed to different specific general grounds for pre-trial detention when asked to identify the one that is most commonly invoked. One judge said that his decisions are primarily based on the risk of perverting the course of justice and the absence of the suspect's permanent residence; he considered the severe penalty ground less significant. Another interviewee provided a completely different answer, claiming that the most frequently invoked ground for pre-trial detention is a severe penalty, followed by the risk of perverting the course of justice, while the least commonly used ground is the risk of the suspect absconding. A comparison of the two answers given above is in itself a sufficient basis for the conclusion that despite the position of the Supreme Court expressed in the resolution of 19 January 2012 (I KZP 18/11), it is impossible to assume that all courts consider the severity of penalty which may be imposed on the defendant (suspect) as an equally significant ground for pre-trial detention. Opinions on that matter differed, but six out of nine judges said that this ground might be used as a stand-alone basis for detention. One of the judges interviewed expressly declared that he did not remember a situation where that ground would be used as the only ground for applying pre-trial detention. There were judges interviewed who claimed that this ground was of special significance at the stage when pre-trial detention is applied; one judge said it was more significant at the stage of extending pre-trial detention. Another judge interviewed declared that although he was aware that according to the jurisprudence of the ECtHR the "severe penalty ground" cannot be invoked as a stand-alone for pre-trial detention, this approach was unlikely to be accepted in practice.

Four judges interviewed admitted that the resolution of the Supreme Court not only made the judicial practice of ordering pre-trial detention more uniform, but it also enabled judges to justify detention orders based on the "ground of a severe penalty" more easily. Still, one of the judges interviewed emphasised the need of preventing this ground to be relied on automatically because that would lead to its excessive use.

Among lawyers, seven held in the survey that the ground of a severe penalty was on many occasions used without justification. In one of the survey questionnaires, the respondent wrote that this situation is – to an extent – a consequence of the above-noted jurisprudence of the Supreme Court. Another respondent noted that this ground was relied upon even in cases of perpetrators with no criminal record.

The lawyers participating in the survey were also expressing concerns that the ground referring to the risk of a suspect perverting the course of justice, absconding and going into hiding was unreasonably invoked also in cases when the suspect admitted the offence and cooperates with the justice system authorities. It is evident from the wording of justifications reviewed as part of the case file research that lawyers are correct in their argument that a suspect's admission of guilt is being commonly disregarded by courts imposing pre-trial detention. In the cases we have reviewed, courts sometimes quoted a decision of the Court of Appeal in Katowice, which reads as follows: *"The very fact that the defendant has testified, or even admitted her guilt, does not exclude the risk of her obstructing the course of the proceedings, and does not oblige the court to revoke the applied preventive measure."*

Moreover, according to one lawyer participating in the survey, if a suspect has permanent residence outside Poland, this fact will automatically justify the order of pre-trial detention on the grounds of absconding. This observation is partly coherent with the jurisprudence. The Court of Appeal in Katowice held that *"the very fact that a suspect is not staying at their*

*permanent registered address is not the evidence of the risk of them absconding or going into hiding. However, such a risk will be present in the situation where the suspect first gave an address as their permanent place of registered residence, and then admitted that they are not staying at the address permanently and finally clearly said they have no permanent place of residence whatsoever. The legislator has decided that the absence of permanent residence is a basis for reasonably invoking the ground under article 258 (1) (1) of the CCP.*⁸⁷ It should be noted that according to the jurisprudence of the ECtHR a lack of fixed residence⁸⁸ or risk of facing long term of imprisonment if convicted does not justify ordering PTD.⁸⁹ When the authorities believe a flight risk exists, they are under the obligation to consider alternatives to detention that might ensure that the defendant appears in trial.⁹⁰

In the opinion of six lawyers admission of guilt or rather lack thereof has an influence on pre-trial detention application. Some of those lawyers noted that pre-trial detention is often used to pressurise suspects into admitting guilt or cooperating with prosecutorial authorities. Others in this group commented that pre-trial detention is used more frequently against those suspects who plead not guilty or refuse to testify. According to lawyers surveyed, law enforcement authorities expect that detained suspects will change their mind with time. This conclusion is also confirmed by the results of the case file research. In several cases, courts emphasised in their justifications of detention orders that suspects had pleaded not guilty, and based on this fact inferred a number of circumstances that justified pre-trial detention, concluding, for example, that a suspect will obstruct the course of the proceedings.

Two lawyers who participated in the survey indicated that courts tend to rely on the argument of a “developing investigation” [that is an investigation that has the potential of uncovering new, relevant facts and lines of inquiry] to substantiate the application and extension of pre-trial detention, even if nothing happened in the case. They also use boilerplate, repeating justifications (“copy-paste justifications”) that merely quote CCP provisions. The case file review confirmed that courts rely on this argument in orders extending pre-trial detention, even if there is not much progress in the proceedings. However, one judge interviewed highlights that “*for example, in fraud cases, the so-called developing investigation is not a kind of a ruse used by a prosecutor,*” but a justified reason for prolongation.

Although the majority of judges interviewed did not identify any special characteristics of suspects, or defendants, that in their opinion increase the likelihood of applying or extending pre-trial detention, lawyers admitted that, in their professional experience, factors like the criminal record of suspects or their individual features (e.g. social background) have excessive influence on judicial decisions on the application of pre-trial detention. However, as one of the prosecutors noted, “*I think I don’t take into account those characteristics that don’t affect the grounds in the Code, but things like previous convictions or being subordinated to witnesses influence my assessment of those grounds*”. Still, the lawyers claim that this leads to a higher number of pre-trial detention orders issued in proceedings where pre-trial detention cannot be considered necessary. Furthermore, the prosecutors did not designate personal characteristics that would increase the likelihood of pre-trial detention being applied.

⁸⁷ Decision of the Court of Appeal in Katowice of 27 May 2009, case file no. I AKz 359/09, LEX No. 519608.

⁸⁸ *Sulaoja v Estonia*, App 55939/00, 15 February 2005, para 64, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68229>.

⁸⁹ *Tomasi v France*, App 12850/87, 27 August 1992, para 87, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57796>.

⁹⁰ *Wemhoff v Germany*, App 2122/64, 27 June 1968, para 5 of “As regards Article 5(3) of the Convention”, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57595>.

b. Category of offences increasing the probability of applying pre-trial detention

The reviewed case files concerned mostly crimes against property (37 instances) such as for example theft, burglary (12 instances), mugging (12 instances), fraud (3 instances); drug-related offences (11 instances); and crimes against life and health (5 instances). Other crimes which appeared in analysed case files less frequently were, for example, rape, threats, abuse or organised crime. It is not purposeful, however, to extrapolate from case file reviews, trying to establish any particular trends, especially considering that most of the case file reviews were conducted in district courts which do not, for example, hear the most serious crimes.

In the opinion of judges interviewed, pre-trial detention is applied more often in the case of charges of committing offences involving violence, in particular against life and health – mostly murders – and also against property. Some of the judges interviewed also noted that they more often ordered pre-trial detention for charges under article 200 of the CC (sexual abuse of minors) and article 207 of the CC (mistreatment). At the same time, some of the judges emphasised it was not the type of an offence that determined whether pre-trial detention would be applied or not, but all the grounds laid down in the CCP. Nevertheless, one of the judges noted, while commenting on the importance of the ground of severe penalty that may be imposed on a suspect, that: *“The recent horrific murder [...]. The persons pleaded guilty to everything, they participated in a crime scene inspection, gave all the facts – at least as far as I know from media reports. And would it be possible to apply pre-trial detention without this ground? And I don’t think anyone doubts the legitimacy of their detention.”*

Prosecutors interviewed claimed they were seeking pre-trial detention only in the most serious cases. One of the prosecutors interviewed said that he most often requested pre-trial detention in cases involving drug trafficking, organised crime groups, and murders. Interestingly enough, the same prosecutor stated that in the event of offences involving domestic violence, pre-trial detention was applied somehow automatically (*“there is no tolerance for the offence of mistreatment”*) in order to separate the perpetrator from the victim. One of the prosecutors interviewed pointed to differences in apparently similar situations that may speak for or against the application of pre-trial detention.

As noted by one of the prosecutors interviewed, one may see “trends” in prosecuting offences: *“So, in the beginning of my career I handled drug cases, [thought] that drugs are number one. [...] And so people were constantly brought into custody in drug cases [...]. Later, suddenly they started to be released pending trial. There was some case study of a wife murdered by her husband [...], where an associate judge failed to apply any measure and so a new trend was set, if I may use this word, for offences of mistreatment. [...] Thus motions for pre-trial detention happened to be filed in cases of mistreatment as well. Then other offences became fashionable and in recent years we have had this ‘fad’ for hate crimes.”*

c. Negative grounds

Under article 259 (1) of the CCP: “If no special reasons stand in the way, one should abstain from [applying] pre-trial detention, in particular where imprisonment of a defendant (suspect):
1) would create a serious threat to his life or health,

2) *would lead to exceptionally severe consequences for a defendant (suspect) or their closest family*".

In the opinion of two judges interviewed, the most common ground to not apply pre-trial detention is the health situation of a suspect or defendant. However, according to the respondents these are exceptional situations. Often a decisive factor is an assessment by the Prison Facility which says that a person cannot be treated by the prison's health services. None of the judges interviewed was able to name a case in which pre-trial detention was not applied or extended because of a personal situation of a defendant or a suspect. From their perspective, this provision appears to be "*defunct*". One judge interviewed pointed out that this ground may be the basis for deferral of a sentence or prison leave, but only at the stage of enforcement proceedings.

It seems that the application of the above negative grounds in exceptional circumstances results from not only the manner in which the provision on "*special circumstances*" is worded, but also from the established case law. As stated in the decision of the Court of Appeal in Katowice of 16 January 2008 (case no. II AKz 33/08): "*Article 259 (1) (2) of the CCP points to the need to revoke pre-trial detention in a situation where its continuation would cause "exceptionally severe consequences" for a person against whom it is applied or their closest family. This means that not every inconvenience resulting from the application of pre-trial detention meets the criteria of this provision. It is natural that pre-trial detention is linked to hardship to a person against whom it is applied and their loved ones, often worsening their financial situation. The above may not, however, be considered as "exceptionally severe consequences" for a suspect or their loved ones, until it does not pose a threat to their existence. This interpretation seems to be widespread in the case law*".⁹¹

Judges also had problems with giving an example of a situation in which they could apply the above-named provisions.

⁹¹ **Decision of the Court of Appeal in Rzeszów of 25 September 2012, II AKz 136/12:** "preventing the continuation of education on account of the applied custodial preventive measure does not qualify as an exceptionally severe consequence for a prosecuted person within the meaning of article 259 (1) (2) of the CCP.

Decision of the Court of Appeal in Katowice of 6 February 2008 (case no. II AKz 103/08) "Exceptionally severe consequences for the family usually mean a situation posing a threat to the existence of these persons and not other, less important emotional or living difficulties".

Decision of the Court of Appeal in Katowice of 16 January 2008 (case no. II AKz 33/08) "The fact that the suspect would like to be present in his daughter's life and support her in her pain and suffering, especially during medical procedures, though must be assessed positively from a moral standpoint, does not meet any ground listed in article 259 of the CCP required to revoke or change the applied preventive measure."

Decision of the Supreme Court of 13 July 2006, case no. WZ 28/06

"Referring to the basic circumstance that speaks, according to the complainant, for the revocation of the preventive measure applied against the suspect, that is the social situation of his family, it must be noted that this situation is indeed difficult. However, the family is not deprived of means of subsistence and care provided by a local social welfare institution. The standard of this care is of interest to the body conducting preparatory proceedings that requested the institution providing care to indicate the scope and manner of benefits offered. Such an involvement of the trial authority in the family situation of the suspect must point to the conclusion that serious life problems of this family will be met with a proper response of the social welfare institution. In this situation an argument the detention of the suspect creates exceptionally severe circumstances for his family may not be supported.

Decision of the Court of Appeal in Białystok of 28 June 2013 (case no. II AKz 194/13)

"The issue of running a business and having no contact with loved ones, including children suffering due to separation from their father, is not a reason calling for the revocation of pre-trial detention.

Due to the methodology used we cannot draw a conclusion on the frequency of non-application of pre-trial detention in reliance on negative grounds. Nevertheless, it is possible to say that both courts and prosecutors very rarely use these grounds to revoke or abstain from extending pre-trial detention. Of the cases included in the case file research pre-trial detention was revoked – due to the family situation of a perpetrator, and specifically the illness of his cohabitee – in only one of them.

d. Justifications

The surveyed lawyers argued that the judicial assessment of such elements as the risk of going into hiding, tampering with the course of justice or reoffending is not fair and justified. Seventeen lawyers stated in the survey that decisions of judges were “rarely” fair and justified, whereas one of them said they “never” were. The remaining 6 lawyers claimed that judicial decisions were “often” fair and justified.

The survey with lawyers shows that one of the main reasons for such an assessment of judicial decisions results from time constraints judges face when reviewing the quality of evidence collected and submissions made by prosecutors and when familiarising themselves with the material justifying pre-trial detention (5 lawyers explicitly stated that). Insufficient time and haste exacerbate other problems listed by the lawyers who participated in the survey.

In their surveys, four lawyers explicitly complained about the automatism and a superficial nature of decisions. Another six explicitly or implicitly stated that statements of reasons are abstract, do not relate to the case, contain too many unconfirmed premises and no actual grounds. This makes it difficult to review decisions. One of the lawyers surveyed noted that it was easy to use slogans and clichés where such practice was accepted by second-instance courts.

The lawyers surveyed also indicated as a problem the fact that judges focus on general aspects of the case (especially severity of a potential sanction – 7 noted it explicitly), instead of individual features of specific suspects. Similarly, lawyers surveyed noted that the judicial assessment was abstract and oriented around the risk of perverting the course of justice and “the best interest of the justice system” than on the individual case.

In answering the question whether they observe the use of unlawful assumptions or justifications of pre-trial detention in the decision-making process, only 5 lawyers surveyed said they had never seen such practices. The remaining 18 have observed questionable practices in the decision-making process related to the use of pre-trial detention.

This conclusion is also confirmed by the findings of the case file research. Pre-trial detention orders are, in the authors’ opinion, often schematic and abstract, whereas orders extending pre-trial detention usually repeat them.

e. ECtHR standards in domestic practice

The standards established in the jurisprudence of the ECtHR are not always reflected in the decision-making process on pre-trial detention, despite the unanimous declaration of the judges interviewed that they receive from the Ministry of Justice and the Ministry of Foreign Affairs the relevant decisions together with their summaries. One judge explained that disregard for the Court’s rulings may be a consequence of the “we know better” approach. As he stated: “*Well,*

the other thing is that the jurisprudence of the ECtHR has been constantly appealing to judges' reason. Detention is not an investigative tool, it should be proportionate. All of that pays off, but the justice system is like Titanic [i.e. difficult to steer and handle] and this inertia is relatively large. It's hardly surprising that the Strasbourg Court's holding of a violation of an article in the Kauczor case isn't going to change things within a month or two, given the fact that judges had been applying pre-trial detention without any restrictions for 20 years." Another judge interviewed noted that a line must be drawn between what is stated in detention orders and what is actually considered by the judge. He said that even if an order does not contain a reference to the ECtHR's jurisprudence, it does not mean that the case law of the Strasbourg Court was disregarded in the order.

At the same time, the judges interviewed observed that defence lawyers very often refer to Strasbourg standards. One of the judges challenged the relevance of such references, especially in reasoning given on appeal. However, he claimed at the same time that in justifications of complaints against the application or extension of pre-trial detention such standards are most frequently related to the facts of a given case.

A group of judges interviewed noted that although ECtHR decisions are not quoted in pre-trial detention orders, decisions on the application of pre-trial detention are in line with the general standards of the Strasbourg Court. In some interviews, respondents said that the legislator should prevent a situation in which Polish law fails to meet Convention standards. One of the judges interviewed said that judges tend to better embrace those decisions that relate to matters they know from their own (or their court's) practice – it is when the Strasbourg's perspective is closer to them. Another judge interviewed said that he found particularly surprising the decision entered in *Ladent v. Poland*, which reads as follows: "*In circumstances (...) where the applicant was arrested on the basis of a detention order issued in his absence, the domestic law does not appear to provide for (...) an initial automatic review and makes it dependent on an application by the detained person. The Court notes that Article 5 § 3 of the Convention does not provide for any possible exceptions from the requirement that a person be brought promptly before a judge or other judicial officer after his or her arrest or detention. To conclude otherwise would run counter to the plain meaning of this provision.*"

All prosecutors interviewed presented a different perspective, claiming that they have not used any training in the jurisprudence of the ECtHR. Some of them said ECtHR decisions are sent to prosecutor's offices, but they have not paid too much attention to them.

3. Abuse of pre-trial detention

*The Supreme Court held that "the system of applying preventive measures governed by the Code enables a specific preventive measure to be adjusted to a given case in such a manner that would restrict constitutional rights and freedoms of an individual to an extent not greater than is indispensable to attain a given purpose, i.e. in the manner that constitutes 'the necessary minimum'."*⁹² *However, despite such a statement from the Poland's highest court, the practice of application of preventive measures sometimes diverges from this standard. This is also visible in the case of pre-trial detention.*

⁹² Resolution of the Supreme Court of 22 January 2003, I KZP 36/02, OSNwSK 2003, item 177.

As shown by the statistics cited at the beginning, the number of motions for the application of pre-trial detention decreased significantly between 2009 and 2014. This tendency is also confirmed by the position of judges interviewed. According to them, currently, the opinion that pre-trial detention is overused is not justified. They believe that there has been a substantial and easily seen drop in the number of persons against whom this measure was ordered and the number of prosecutorial motions. Whereas, one judge interviewed pointed out that certainly other countries were more liberal and applied custodial measures and penalties less frequently. Simultaneously, judges noted that it was not justified to compare the number of applied custodial measures with the practice of other countries because those countries had a different structure of crime and characteristics of perpetrators. As justification for changes in the practice of pre-trial detention, the interviewees said that most changes had affected the Police and prosecution service. One of the judges attributed the risk of high number of persons detained pending trial in recent years to a demographic situation. Currently – he says – also the wave of emigration contributes to a lower number of persons in pre-trial detention.

Similar views were expressed by the prosecutors interviewed. They noted that the opinion on the abuse of pre-trial detention was harmful, because it did not take into account the practice of the justice system in this regard. One of the prosecutors pointed out that *“from my own experience I can say that nowadays motions for pre-trial detention are less frequent and detention periods are shorter. Previously they were ordered for over a year, and now are much shorter. For instance, I don’t have any detained person in preparatory proceedings, which proves my point. And at this stage, the drop is noticeable.”* As already observed above, a drop in the number of detention orders encouraged one of the surveyed prosecutors to say that *“prosecutors started to fear requesting pre-trial detention”*.

In this context, the attitude of the public to the application of this preventive measure is also worth noting. One in three respondents (34%) surveyed by the Public Opinion Research Centre in 2013 listed the abuse of pre-trial detention among weak points of the justice system. However, a similar percentage of respondents (31%) claimed that this preventive measure is applied too rarely⁹³.

One of the judges interviewed said that while the opinion on the abuse of pre-trial detention was not justified, he believed that an excessive length of pre-trial detention was indeed a problem. This is in line with the conclusions being drawn from the surveys of lawyers.

About 46% of surveyed lawyers explained that there were no general reasons for the excessive length of pre-trial detention; however, eleven others observed such common reasons. The reason most often cited by the surveyed lawyers was a systemic problem of the excessive length of proceedings in Poland concerning both preparatory and court proceedings. Other factors that in some situations may affect the length of proceedings are:

- 1) A long waiting time for opinions of expert witnesses,
- 2) Problems with time management faced by judges,
- 3) Overreliance on personal sources of information,
- 4) An absence of actual and regular reviews of pre-trial detention orders,

⁹³ Source: The CBOS research announcement „O przestrzeganiu prawa i funkcjonowaniu wymiaru sprawiedliwości w Polsce”, January 2013, available at: http://cbos.pl/SPISKOM.POL/2013/K_005_13.PDF (accessed: 15.06.2015).

- 5) Ordering pre-trial detention “for the sake of proceedings” or the need to present evidence in court, and only rarely on the basis of actual grounds for application of pre-trial detention as laid down in law,
- 6) A risk of severe penalty as an independent ground for the application of pre-trial detention,
- 7) Applying pre-trial detention in order to pressurise a suspect into admitting guilt (“extractive custody”),
- 8) No respect for personal liberty.

Comparing with previous years, it is difficult to unambiguously state that pre-trial detention is overused at the time of application. Even though the number of pre-trial detentions has decreased in Poland, there are cases in which the necessity to apply pre-trial detention may be questioned. However, it is possible to consider that allowing for excessive length of detention is an abuse of this measure.

4. Influence of pre-trial detention on the manner of conducting proceedings

According to the jurisprudence of the ECtHR a person detained on the grounds of being suspected of an offence must be brought promptly⁹⁴ or ‘speedily’⁹⁵ before a judicial authority, and the “scope for flexibility in interpreting and applying the notion of promptness is very limited”.⁹⁶

Although under the Rules and Regulations Governing the Operation of Common Courts “cases involving the application of pre-trial detention, cases of persons in pre-trial detention and persons deprived of liberty and arrested” are deemed urgent matters, lawyers claim they are not free from the problem of excessive length.

Twenty lawyers surveyed (almost 80%) believe that proceedings in cases of suspects staying in detention centres are not, in practice, carried out more efficiently and faster than those in which a suspect is released. Only three confirmed such a correlation and one claimed it was hard to say. However, opposite opinions were also expressed among both judges and prosecutors, some of whom claimed that cases of persons in pre-trial detention were handled more swiftly. One of the prosecutors underlined that “pre-trial detention prompts a prosecutor and Police to act swiftly because when we file a motion for extending pre-trial detention we have to show that proceedings have their dynamics”. While considering a potential negative influence of pre-trial detention on proceedings, another prosecutor noted: “You know there are prosecutors who could say that a negative effect of pre-trial detention is that we have to work faster. This may be called a negative effect to some extent. Because this detention hastens us. It somehow forces us to work systematically and at a fast pace. Because if pre-trial detention is extended we may face an accusation that we have a man in custody and do nothing in the meantime”.

According to 19 surveyed lawyers, if pre-trial detention is long courts do not set deadlines for performing acts as part of preparatory proceedings. Five lawyers stated that courts do not apply any measures to control the effectiveness of preparatory proceedings. As commented by one

⁹⁴ *Rehbock v Slovenia*, App. 29462/95, 28 November 2000, para 84, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59052>

⁹⁵ The limit of acceptable preliminary detention has not been defined by the ECtHR, however in *Brogan and others v UK*, App. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988, the court held that periods of preliminary detention ranging from four to six days violated Article 5(3), available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57450>.

⁹⁶ *Brogan and others v UK*, App. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988, para 62, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57450>

lawyer in the course of the survey, in theory courts should continually review the grounds for ordering pre-trial detention and in practice automatism of the decision-making process wins. Four lawyers noted that the courts set deadlines. However, one stated that this was sporadic and only one wrote explicitly that courts may set deadlines for prosecutors to present evidence and should they fail to meet the obligations imposed on them they may change the most radical preventive measure. One of the prosecutors pointed out that: *“it happens that a court orders a shorter period than the one requested by a prosecutor, these are not exceptional situations. Although there have also been cases where, despite first being shortened, this period was further extended due to another motion. Most often, courts shorten them from 3 to 2 months.”* Prosecutors and judges stressed in the interviews that a period for which pre-trial detention is extended is the effect of actions that were left to be performed.

A similar conclusion can be drawn from the case file research. One of the statements of pre-trial order reasoning reads, for instance: *“A time period of application [of pre-trial detention] is determined by the acts that must be performed in proceedings.”* Case file reviews reveal that the courts usually order PTD for three months. However, some exceptions can also be observed. One such exception concerns a particular situation when pre-trial detention is applied in absentia of the suspect. The suspect is usually not within reach or fails to appear in court and pre-trial detention is order for a couple of days from the arrest (usually 7 to 14 days).

According to 13 surveyed lawyers the need to continue pre-trial detention and the insufficient nature of alternative measures are, in practice, checked on a regular basis (as required by law). However, 11 lawyers did not share this view. At the same time, a vast majority – 21 respondents – do not think that these issues are monitored as often as they should be to ensure that the whole case and all possible factors are considered.

It is worth stressing that a continuation of pre-trial detention is reviewed not only by courts but also within the organisational structure of the prosecution service. As reported by the Prosecutor General, in 2014 organisational units of the prosecution service complied with an obligation under sections 204 and 205 of the Internal Rules and Regulations governing operation of common organisational units of prosecution service.⁹⁷ The regional prosecutor notified every case of pre-trial detention exceeding 9 months to the appellate prosecutor, whereas the appellate prosecutor advised the Prosecutor General of every case of extension of pre-trial detention for over a year, indicating the estimated date for the conclusion of proceedings. The review of accuracy of pre-trial detention orders was also made during case file research of proceedings and during inspections and visitations of individual units of prosecution service. In addition, cases of revocation of pre-trial detention in response to the filing of an appellate measure were also examined.

6. Influence of pre-trial detention on the outcome of the proceedings

According to the 2014 report of the Prosecutor General, among 406,466 discontinued preparatory proceedings, 192 cases (0.1%) involved a prior application of pre-trial detention against 206 persons. By way of comparison, in 2013, among 429,919 discontinued preparatory proceedings, 234 cases (0.05%) involved a prior application of pre-trial detention against 252 persons⁹⁸. The Prosecutor General’s report underscores that defendants detained pending trial

⁹⁷ Source: Annual reports of the Prosecutor General on the prosecution service, available at: <http://pg.gov.pl/sprawozdania/sprawozdania-prokuratora-generalnego-1133-2.html> (accessed: 1.09.2015).

⁹⁸ Source: Annual reports of the Prosecutor General on the prosecution service, available at: <http://pg.gov.pl/sprawozdania/sprawozdania-prokuratora-generalnego-1133-2.html> (accessed: 1.09.2015).

at the date of the submission of the indictment are acquitted only in exceptional cases. This was also the opinion expressed by judges we interviewed. In 2014, there were only 72 persons who had been detained and later acquitted, as compared to a total of 365,132 defendants who stood a criminal trial in which a prosecutor participated. In 2013, 1.5% of defendants who went on trial were acquitted by a final judgment. The percentage of persons who, having been accused and simultaneously detained, were later acquitted on trial was precisely the same⁹⁹. A tendency for convictions among pre-trial detainees is confirmed in reviewed case files, as almost all of the defendants were in fact convicted. Only three exceptions were noted, first when the proceedings were conditionally discontinued for 2 years, second when the proceedings were discontinued due to a suicide of the defendant and third – when the proceedings were discontinued in part and the rest of the case was returned to the prosecution.

Judges generally claimed that the length of pre-trial detention does not affect the imposed penalty. However, two interviewees admitted that the duration of this measure might affect the type and measure of the criminal sanction. One of the judges interviewed observed that the duration of pre-trial detention could be a consequence of the severity of a penalty that may actually be imposed, but the length of the custodial measure in itself does not determine the measure of the penalty. The respondent emphasised that fact that pre-trial detention was applied did not influence a decision to acquit. Another judge interviewed said that there are situations, which he considers “illogical”, of prosecutors approving motions for voluntary submission (“guilty plea”) to a penalty despite applying pre-trial detention.

7. Alternatives to pre-trial detention

The Polish CCP contains a catalogue of alternatives to pre-trial detention in the form of various non-custodial preventive measures. Just like pre-trial detention, these measures may be applied to secure the proper course of proceedings, and exceptionally to prevent the commission of another serious crime. The following are the available non-custodial preventive measures: financial security, surety of a trustworthy person, surety of a social entity, police supervision, prohibition of leaving the country, order to leave the premises occupied with the victim, criminal injunction – suspension of a person’s right to perform official duties or practise a trade or profession or the order to refrain from performing a certain activity or operating a certain type of vehicles

a. Perception of the available alternatives

One of the concerns formulated by the ECtHR on the Polish practice of applying pre-trial detention is the authorities’ unwillingness to consider alternative measures. This conclusion seems to fully correspond not only with the opinions expressed by lawyers, but also with results of the case file research.

What is striking in the cases reviewed as part of the research is the total disregard of a possibility of applying alternative measures. In many cases, the detention order contains only a single-sentence argument that such alternatives would not protect the integrity of the proceedings.

⁹⁹ Source: Annual reports of the Prosecutor General on the prosecution service, available at: <http://pg.gov.pl/sprawozdania/sprawozdania-prokuratora-generalnego-1133-2.html> (accessed: 1.09.2015).

Recognising the little engagement of judges with alternatives to pre-trial detention has led to an amendment of article 251(3) CCP which came into force on 1 July 2015: *“In the case of pre-trial detention, the justification shall explain why other preventive measure was considered insufficient.”* One of the rationales behind this modification was the necessity to ensure that domestic practices are in compliance with Strasbourg standards and to reduce the number of ECtHR judgments against Poland. In the explanatory memorandum to the draft law the Criminal Law Codification Commission stated that *“for the European Court of Human Rights, justifications of pre-trial detention orders are the basis for an assessment whether the prolonged deprivation of liberty of a defendant (suspect) in the course of a trial was legitimate, thus in compliance with Article 5 § 3 of the Convention. Despite the above requirement being obligatory, its actual fulfilment will depend on a change in the judicial application of law.”*¹⁰⁰

One judge interviewed referred to the issue of considering alternative measures. Asked if courts put enough attention to the alternatives and whether he thinks that such measures may be effectively used, he replied: *“It depends on what this [question] is really about. Because if it’s about whether these considerations will remain on paper. (...) It’s hard to say if this has been articulated, in many cases – probably not, because, say, time constraints. Because obviously we have 24 hours for serving a copy of the order on the suspect, within that time we need to read the file, hear the suspect and write the justification. They are certainly considered, for two reasons in particular. First, we have appellate courts who review everything. And, as I said, some detention orders are being revoked, a minority, but still. Second, there’s a lot of talking about the international jurisprudence of the European Court which awards compensation. And that’s certainly a kind of a restraint put on a judge.”*

Only three of the surveyed lawyers said that judges have access to professional risk assessment services and recommendations of the suspect’s suitability for release. Five respondents did not answer this question, while the majority of 16 lawyers selected the negative answer.

According to eight lawyers (33%) participating in the survey judges assess whether conditions imposed on a defendant (suspect) or pre-trial supervision used in preparatory proceedings are sufficient to ensure attendance at trial based on their own life experience, “intuition” and professional expertise. As one respondent noted, in many cases this may seem to be insufficient and lead to a decision that may raise concerns.

This answer was given relatively often in the questionnaires, which may be a consequence of the language of article 7 of the CCP. The article reads that criminal justice bodies must develop their convictions on the basis of an impartial assessment of entire evidence, but with a due regard to the principles of proper reasoning and in accordance with indications of knowledge and life experience.

Some surveyed lawyers believe that judges rarely (or never) consider the option of applying an alternative preventive measure; fail to review the enforcement and effectiveness of the applied measure; or take arbitrary decisions. Some surveyed lawyers also note that judges take decisions relating to alternative preventive measures on the basis of the severity of charges or the suspect’s conduct during the trial (though this appears increasingly less often). One of the prosecutors interviewed admitted that application of alternatives to pre-trial detention causes *“the fear that this measure will not prevent the suspect from absconding or obstructing the proceedings. This is what must be assessed individually in each case.”*

¹⁰⁰ Explanatory memorandum to the draft law.

All lawyers surveyed agreed that they could present judges with alternatives to pre-trial detention. At the same time, thirteen (out of 20) marked that judges do not have confidence in those measures. According to the comments that surveyed lawyers made, reactions to such proposals are varied. Although there have appeared positive answers that indicate a change in judicial approach and that certain measures are eventually applied (e.g. police supervision, financial surety), many respondents are also sceptical about the way in which their motions are considered. This can be seen in at least 10 comments to that question.

The surveyed lawyers noted, for example, that defence lawyers may file motions, but their arguments are rarely heard. A respondent even claimed that none of his motions has been admitted so far. Subsequent decisions extending pre-trial detention contain a sentence or two about alternative preventive measures, which are not used. Some describe the situation in a more reserved way, saying that non-custodial measures are used rather reluctantly (one stated that explicitly).

As indicated above, some lawyers nevertheless mentioned a change in approach or simply named those measures which were granted. As one of them wrote, judges are more open to such measures as financial security or Police supervision, but this openness is not sufficient enough. These two alternative preventive measures have been named the most effective alternatives.

One of the surveyed lawyers noted that an alternative to pre-trial detention was most likely to be applied at further stages of the proceedings, after the defendant already testified and the evidence was gathered. Another participating lawyer said that motions are admitted on many occasions, but the application of alternative measures requires a more in depth analysis and taking a risk inseparable from an assessment of the relevance of a decision to apply such measures.

Asked if judges seriously consider non-custodial measures before applying pre-trial detention, 16 lawyers surveyed (66%) said that judges “rarely” do that, four said that judges “often” do that; two respondents answered “never” and another two – “always”.

According to 22 lawyers participating in the survey some alternatives are underused, i.e. they are not used often enough: financial security was stated seven times, surety of a social entity – nine times, Police supervision – eight times, and surety of a trustworthy person – six times. Some reasons can be indicated as to why they are underused. Concerning financial security, one lawyer surveyed explained that some of its forms (e.g. pledge or mortgage) were rarely used because of procedural complexity. While surety of a social entity or surety of a trustworthy person were rarely used primarily because those measures are not considered sufficiently reliable for the purposes of ensuring objectives of the proceedings. One of the judges interviewed stated, *“sureties of a social entity – it has happened that somebody came forward. I personally recall one such case. Still, for me this is not a preventive measure that is effective at all. It’s because nothing happens, there’s no consequence for a defendant who fails to comply with its terms.”*

The survey with lawyers clearly suggested that three measures are applied most often: financial security, police supervision, and the prohibition from leaving the country. The survey participants also claimed that prohibitions from operating vehicles and orders to leave the premises occupied together with a victim were used quite often. As regards the least often-applied measures, the answers were in line with indications as to the measures which are underused. According to lawyers, these are surety of a social entity, and surety of a trustworthy person.

For 19 respondents of the practitioner's survey the application of an alternative to pre-trial detention does not affect the length of the proceedings. Interestingly, a respondent has claimed that proceedings are handled in a more expedient manner if alternatives are used. He claimed that this eliminated delays related to "inability to transport a detained person" or incidents at [penitentiary] facilities.

b. The most common alternative measures

The prosecutors interviewed by us were most concerned about the use of alternative measures in cases in which there is a risk of perverting the course of justice by a suspect/defendant.

All judges interviewed agreed that the most common non-custodial measure is police supervision, despite the fact that most of them admitted that currently this measure was illusory as defendants do not comply with it. While assessing various measures, one of the judges said that: *"Well, there's police supervision on the other side of the spectrum. Generally, it's a legal fiction."* However, one of the interviewed prosecutors said: *"Police supervision is most often used, perhaps not by me but rather in general prosecutorial practice. Do we call it an effective institution? To be honest, I don't take it too seriously. It's obvious to me this measure is more illusory than effective."*

In order to increase the inconvenience of supervision and to give it a more real nature it is ordered together with another measure depending on the reality of the case and a person against whom it is to be applied. One of the interviewed prosecutors said that, for instance, in cases of economic offences such a measure makes little sense, because the suspect will still have a chance to, e.g. align their testimonies or destroy documents.

As the second most common measure, respondents most often pointed to a prohibition from leaving the country, an order to leave the premises occupied together with a victim or a prohibition from contacting a victim.

Similar objections to those raised in respect of police supervision mentioned above were also directed against a prohibition from leaving the country. In the opinion of judges interviewed, the main reason for its low efficiency is the free movement within the European Union. However, one of the respondents said that despite "the opening of borders" this measure was also reasonable as it guaranteed that a person stayed within the European Union where the effective instrument known as the European Arrest Warrant is in place.

The majority of respondents considered financial security to be an effective measure. At the same time, they stressed that this measure was rarely ordered because some people had insufficient financial means that prevented its application. One of the prosecutors interviewed from a smaller town put it this way: *"To be honest, this measure is not frequently applied, at least not here, at this prosecutor's office, and I don't know the situation elsewhere. I would even risk saying that it happens rarely. Researcher: But why? I: Maybe it is the specific nature of this area that a majority of suspects we deal with couldn't, frankly speaking, afford to pay"*. However, another prosecutor said: *"there are courts in our region which eagerly order conditional pre-trial detention (I mean they release a suspect in exchange for financial security). But I can't say how often this happens. And, I believe, naturally, it is a good practice"*. Another prosecutor commented that financial security secures the proper conduct of the proceedings and also is connected with some inconvenience for a defendant. Judges underlined, however that the forfeiture of the amount of financial security is a relatively rare situation.

None of the interviewees was able to recall any case in which they ordered a measure in the form of a surety of a trustworthy person or surety of a social entity. Some of the judges explained that the reason was the absence of such motions. However, other judges admitted that according to them such measures would not be effective, because they did not guarantee any supervision over a suspect or defendant.

One of the prosecutors noted: *“For some years we have also been able to apply an institution which orders a perpetrator to move out of a victim’s flat and this reduces the number of pre-trial detention orders. I personally had such a mistreatment case in which I used it. This provision certainly contributes to lowering the number of pre-trial detention orders. In any case, prosecutors and judges involved in the research think highly of this measure.*

c. Completing the catalogue of preventive measures

When asked about additional measures which should be introduced to the Polish system, the judges did not mention any specific measure. However, when further inquired, they claimed that electronic monitoring system, and specifically home detention, would be a proper addition to the current catalogue of non-custodial measures. According to them, this could reduce the number of custodial measures. One of the judges interviewed said that a better form of a preventive measure would be home detention, which is available in other systems, instead of electronic tagging. This is because the use of tagging could have a direct influence on the reduction of the cases in which police supervision and not the most inconvenient measure, i.e. pre-trial detention, is applied.

It is worth noting that a proposal of introducing this measure into the Polish legal system has already been made in the draft law of 13 January 2010.¹⁰¹ A similar solution was introduced into the project from 2011¹⁰². It stated that: *“Home detention shall be applied on the motion of a defendant against whom pre-trial detention has been ordered”* (drafted article 265a (1)). The total duration of home detention ordered in a case could not exceed 2 years. Under the explanatory memorandum: *“By broadening the catalogue of currently applicable methods of affecting the conduct of a person accused (suspected) of committing an offence, this measure will, on the one hand, enable the reduction of the number of pre-trial detention orders to those cases only where due to the need to prevent any possible attempts at perverting the course of justice the application of a custodial measure is necessary, and on the other hand, this will enable the efficient monitoring of the conduct of a person facing a charge of an offence”*¹⁰³. Despite these attempts, the electronic monitoring system operating in Poland has never been used in this way. The accuracy of such solutions was challenged in the doctrine. As noted by M. Rusinek, an expert in the field of criminal proceedings: *“One cannot forget that the purposes to be achieved by a preventive measure (including pre-trial detention) are substantially different from those of pre-trial detention (...). In this light it seems reasonable to conclude that a*

¹⁰¹The draft act of 13 June 2010¹⁰¹ amending the Criminal Code, the Code of Criminal Procedure and the Criminal Enforcement Code provided for the introduction into the Polish procedural law of a new measure, known as “home detention”, text available on:

http://radalegislacyjna.gov.pl/sites/default/files/dokumenty/projekt_ustawy_298.pdf, (accessed: 28.05. 2015).

¹⁰²The draft act amending the Criminal Code, the Code of Criminal Procedure, the Act on serving custodial sentences outside correctional facilities in the system of electronic tagging and some other acts (Sejm of the Republic of Poland of the 6th term, Sejm paper no. 4602).

¹⁰³The explanatory memorandum to the Act of 13 January 2010 amending the Criminal Code, the Code of Criminal Procedure and the Criminal Enforcement Code provided for the introduction into the catalogue of the Polish procedural law a new measure, known as “home detention”, text available on: http://radalegislacyjna.gov.pl/sites/default/files/dokumenty/projekt_ustawy_298.pdf (accessed: 21.03.2015).

*preventive measure in the form of electronic tagging may not effectively replace pre-trial detention – it does not prevent a supervised person from absconding, going into hiding, destroying evidence or otherwise attempting to pervert the course of justice. The effectiveness of electronic tagging may only be compared to the effectiveness of police supervision (article 275 of the CCP) and it could be an alternative to this preventive measure. It must be noted, however, that electronic tagging is, first, more expensive than police supervision. Second, introducing electronic tagging as an alternative to police supervision (or as a way of exercising police supervision) will not affect in any way the number of people detained in prison facilities and detention centres but will only enhance control over a defendant,*¹⁰⁴

Currently, it seems that the possibility of introducing such a measure depends on the fate of the electronic tagging system in its form available from 1 July 2015 because from this date on electronic tagging is not a form of serving the penalty of deprivation of liberty, but one of the elements of the penalty of limitation of liberty. Any decisions on increasing the functionality of this system will have to wait until the assessment of the popularity of the new penalty of the limitation of liberty is made. However, it should be noted that the representatives of the new Ministry of Justice claim that they will try to come back to the previous regulations of the electronic tagging as a form of deprivation of liberty.¹⁰⁵

8. The influence of the amendment to the Code of Criminal Procedure on the practice regarding preventive measures

The key objectives of an extensive amendment to the Code of Criminal Procedure, which entered into force on 1 July 2015,¹⁰⁶ were to speed up criminal proceedings and make them more adversarial.¹⁰⁷ The legislators also modified provisions relevant for the application of pre-trial detention.

Considering the timing of the report coinciding with the amendments to the CCP, HFHR added questions to the interviews to understand the exact impact of the reform. Practitioners have divided views in respect of the influence that the incoming reform will have over parties' procedural guarantees and the model of application of preventive measures.

According to one of the prosecutors interviewed, the amendment to the CCP will paralyse the state. As he argued, *“if somebody can afford a good, active lawyer who will face a lazy, incompetent prosecutor, then guilty people will be walking away acquitted only because the defence was much better than the prosecutor”*. Another prosecutor interviewed accused the legislator of disorderly introducing the new law and failing to organise effective and accurate training. Yet another said that prosecutors would be doing the same work as before, only more of it, as the previous responsibilities of a judge would now be offloaded on a prosecutor. At the same time he noted that prosecutors were yet to know how practice based on the new procedure will look in reality, saying that everybody will learn it after 1 July: *“I simply read this and that,*

¹⁰⁴ M. Rusinek, Ustawa o wykonywaniu kary pozbawienia wolności poza zakładem karnym w systemie dozoru elektronicznego. Komentarz, Warszawa 2010.

¹⁰⁵ Poland, MS chce nowelizacji przepisów dotyczących zasad dozoru elektronicznego, at: <http://wyborcza.pl/1,91446,19248304,ms-chce-nowelizacji-przepisow-dotyczacych-zasad-dozoru-elektronicznego.html> (accessed: 1.12.2015).

¹⁰⁶The Act amending the Code of Criminal Procedure and certain other Acts of 27 September 2013 (Journal of Laws of 25 October 2013).

¹⁰⁷ Explanatory memorandum to the Bill amending the Criminal Code, the Code of Criminal Procedure and Certain Other Acts, prepared by the Criminal Law Codification Commission.

I'm trying to keep myself updated, but I don't know what to expect. I don't know how to draft an indictment, I just don't. I'm going to open that file and I'll learn it on the job."

The perspective of the judges interviewed is quite different. One of the judges interviewed said that in theory the amendment should result in shortening the duration of pre-trial detention. *"The word is – and there's some evidence to prove it – that preparatory proceedings should take less time. The word is its duration will be shortened by one third. I think that time will shorten in less complex cases. But paradoxically, major cases will take even longer. Arguably, if courts receive cases that aren't prepared as well as they should be, this may result in longer periods of pre-trial detention. It may happen that the preparatory proceedings will be shortened by one third, but the duration of the trial will extend by two thirds."*

Another judge interviewed believes that the amendments in itself do not change much in respect of regulations governing pre-trial detention, but the legislator requests to consider what penalty will be imposed (the interviewee referred to article 263 (4b): *"The extension of pre-trial detention referred to in paragraph 4 shall not apply to the time-limit designated in paragraph 2 if a penalty that actually may be imposed on the defendant for the offence imputed to them does not exceed three years of deprivation of liberty; as for the time-limit designated in paragraph 3, the said extension shall not apply if the penalty in question does not exceed five years of deprivation of liberty, unless the necessity of extending pre-trial detention results from the defendant intentionally stalling the proceedings."*). In the opinion of the interviewee, this obligation means that the court must determine what penalty will be imposed already at the stage of application of pre-trial detention, which, in his opinion, may lead to a violation of the presumption of innocence. Another judge interviewed shared these concerns: *"What I don't like at all is this anticipation of the measure of a penalty in extending pre-trial detention. This is a very good argument for a recusal of a judge. (...) it's still six months or God knows how long until the sentence is issued, and he's been telling me I'm going to be locked up for at least three years, it's like he'd have sentenced me already before the trial. What's the purpose of hearing the case any further?"*

One of the judges said that in his opinion it was impossible to reconcile the principle of adversarial procedure with the principle of substantive truth. Judges also observed that, despite its fundamental nature, the amendment being introduced would not lead to an actual change of practice. One of the judges interviewed said that the way in which new regulations were implemented would depend on judges' individual approach. In his opinion, some judges may treat the new law as an opportunity for a change of the way they hear cases by relieving judges and limiting their responsibilities.

IX. CONCLUSIONS AND RECOMMENDATIONS

Two initial remarks must be made in the summary of the above research.

Firstly, the amendment to the Code of Criminal Procedure, which entered into force on 1st July 2015, also affects the application of pre-trial detention. Above all, the new law introduces a rule according to which a prosecutor may request pre-trial detention only on the basis of those documents and this evidence which is known to the defendant (suspect) or their defence lawyer. It also obliges the prosecutor to provide a more detailed justification for the request. Consequently, after the amendment comes into force, it will not be possible to argue (like some of the respondent judges have) that although the language of a justification of a pre-trial detention order does not contain any arguments regarding the application of non-custodial preventive measures, such arguments had certainly been reviewed in the judge's mind. Under the new provisions, a failure to put such reasoning in writing will result in a violation of the CCP. However, at this point it is difficult to predict whether the introduction of these regulations will effectively change the practice of application of pre-trial detention.

Secondly, it is worth giving some thought as to why pre-trial detention is overused in Poland. In this respect, two divergent lines of reasoning have emerged. Proponents of the first one say law is good but practice is deficient, while supporters of the second one argue that if practice is so deficient then the law must be improved.

If we are to assume that the whole problem with pre-trial detention is a deficient practice, then it would be reasonable to look at the process of judges professional education and qualification as it is the judges who apply this most severe of all preventive measures. It may be assumed that if the position of a judge would be available only for legal professionals with an excellent record of professional performance in other legal professions, then one would be able to reasonably argue that another person's liberty remains in the hands of a person with substantial experience, wider perspectives, unquestionable reliability and necessary courage.

However, if we are to call for further development of detailed rules on pre-trial detention, the following proposals are worth considering:

- a. The legislator should consider clarifying the prerequisites for pre-trial detention contained in the Code of Criminal Procedure.
- b. The legislator should introduce a maximum duration of pre-trial detention. Optionally, the authority to extend the duration of pre-trial detention beyond the limit in exceptional circumstances should be vested in the Supreme Court.
- c. The legislator should introduce the rule that cases of persons in pre-trial detention should take precedence over other cases on a judge's docket.
- d. The legislator should introduce a provision on the defendant's obligatory presence at all pre-trial detention hearings.
- e. The legislator should introduce obligatory legal representation in cases where a prosecutor requests pre-trial detention or alternatives to detention.
- f. The amounts awarded as compensation in cases of unlawful pre-trial detention should be increased.
- g. The legislator should consider introducing new preventive measures (home detention and electronic monitoring) into the Code of Criminal Procedure.
- h. The Institute of Justice could undertake further research on non-custodial preventive measures, including their perception among the representatives of the justice system.

- i. The Ministry of Justice, the National School of Judiciary and Public Prosecution and the Prosecutor General should conduct more training on pre-trial detention standards.
- j. The authorities should ensure effective implementation of the Code of Criminal Procedure in relation to access to case files and guidance on pre-trial decision-making.
- k. The authorities should also ensure proper implementation of the case-law of the European Court of Human Rights.

X. ANNEXES

1. Effectiveness of prosecutorial motions for pre-trial detention

Year	Number of motions for pre-trial detention	Number of approved motions	Number of approved motions
2009	27 693	24 755	89,39 %
2010	25 688	23060	89,76 %
2011	25 452	22 748	89,37 %
2012	22 330	19 786	88,60 %
2013	19 410	17490	90,1 %
2014	18 835	17 231	91,48%

2. Effectiveness of prosecutorial motion for extension of pre-trial detention

Year	Number of motions for extension of pre-trial detention	Number of approved motions	Number of approved motions
2009	11 951	11 427	95, 61 %
2010	11 433	10 841	94, 82 %
2011	10 780	10 272	95, 29 %
2012	9 789	9 308	95, 08 %
2013	-	-	-
2014	-	-	-

3. Effectiveness of appeals on pre-trial detention before district courts

Circuits	Preventive measures in district courts					
	2013			2014		
	Number of appeals	Number of admitted appeals	Number of granted appeals	Number of appeals	Number of admitted appeals	Number of granted appeals
Total	6 121	308	5,03%	3 733	663	17,76%
Bialostocki	112	6	5,36%	80	3	3,75%
Bielski	111	2	1,80%	66	1	1,52%
Bydgoski	91	10	10,99%	107	11	10,28%

Częstochowski	130	22	16,92%	56	9	16,07%
Elbląski	90	1	1,11%	74	9	12,16%
Gdański	439	8	1,82%	215	109	50,70%
Gliwicki	288	7	2,43%	132	24	18,18%
Gorzowski	90	4	4,44%	15	4	26,67%
Jeleniogórski	49	3	6,12%	5	0	0,00%
Kaliski	27	7	25,93%	14	3	21,43%
Katowicki	254	10	3,94%	107	19	17,76%
Kielecki	243	22	9,05%	103	17	16,50%
Koniński	22	1	4,55%	10	1	10,00%
Kozaliński	73	3	4,11%	50	8	16,00%
Krakowski	229	3	1,31%	121	20	16,53%
Krośnieński	25	4	16,00%	14	1	7,14%
Legnicki	154	10	6,49%	55	25	45,45%
Lubelski	785	42	5,35%	510	97	19,02%
Łomżyński	19	5	26,32%	15	2	13,33%
Łódzki	197	27	13,71%	196	9	4,59%
Nowosądecki	19	3	15,79%	29	1	3,45%
Olsztyński	115	3	2,61%	70	7	10,00%
Opolski	103	6	5,83%	44	14	31,82%
Ostrołęcki	27	3	11,11%	15	3	20,00%
Piotrkowski	55	0	0,00%	33	16	48,48%
Płocki	85	0	0,00%	58	14	24,14%
Poznański	173	14	8,09%	121	12	9,92%
Przemyski	27	0	0,00%	27	6	22,22%
Radomski	227	1	0,44%	107	6	5,61%
Rzeszowski	91	0	0,00%	94	26	27,66%
Siedlecki	62	3	4,84%	52	5	9,62%
Sieradzki	10	0	0,00%	22	4	18,18%
Ślupski	102	29	28,43%	42	20	47,62%

Suwalski	26	2	7,69%	25	3	12,00%
Szczeciński	279	6	2,15%	97	13	13,40
Świdnicki	61	4	6,56%	51	3	5,88%
Tarnobrzesci	25	3	12,00%	24	1	4,17%
Tarnowski	16	1	6,25%	9	0	0,00%
Toruński	120	1	0,83%	50	4	8,00%
Warszawski	549	7	1,28%	382	75	19,63%
Warszawsko-Praski	290	0	0,00%	206	27	13,11%
Włocławski	57	8	14,04%	29	12	41,38%
Wrocławski	93	3	3,23%	106	2	1,89%
Zamojski	4	1	25,00%	25	5	20,00%
Zielonogórski	77	13	16,88%	70	12	17,14%

4. Effectiveness of appeals on pre-trial detention before regional courts

Circuits	Preventive measures in regional courts					
	2013			2014		
	Number of appeals	Number of admitted appeals	Number of granted appeals	Number of appeals	Number of admitted appeals	Number of granted appeals
Total	1 959	102	5	1 528	53	3
Białostocki	0	0	0	1	0	0
Bielski	0	0	0	18	0	0
Bydgoski	0	0	0	0	0	0
Częstochowski	34	0	0	52	0	0
Elbląski	138	20	14	121	5	4
Gdański	91	0	0	130	0	0
Gliwicki	32	0	0	36	0	0
Gorzowski	165	9	5	6	0	0
Jeleniogórski	15	0	0	27	2	7
Kaliski	0	0	0	0	0	0
Katowicki	39	0	0	29	0	0
Kielecki	45	3	7	41	1	2
Koniński	0	0	0	0	0	0

Koszaliński	23	1	4	13	0	0
Krakowski	123	0	0	120	0	0
Krośnieński	0	0	0	2	0	0
Legnicki	47	0	0	20	0	0
Lubelski	283	5	2	239	3	1
Łomżyński	23	0	0	11	0	0
Łódzki	158	16	10	51	1	2
Nowosądecki	17	0	0	15	1	7
Olsztyński	1	0	0	2	0	0
Opolski	20	3	15	17	0	0
Ostrołęcki	36	3	8	35	3	9
Piotrkowski	19	0	0	7	4	57
Płocki	215	23	11	101	10	10
Poznański	60	5	8	30	11	37
Przemyski	12	1	8	1	5	500
Radomski	0	0	0	0	0	0
Rzeszowski	33	1	3	9	0	0
Siedlecki	71	5	7	43	1	2
Sieradzki	39	1	3	0	0	0
Słupski	37	0	0	24	0	0
Suwalski	6	0	0	9	0	0
Szczeciński	94	3	3	67	1	1
Świdnicki	14	1	7	12	0	0
Tarnobrzesci	0	0	0	2	0	0
Tarnowski	16	0	0	17	0	0
Toruński	0	0	0	7	3	43
Warszawski	0	0	0	29	2	7
Warszawsko-Praski	0	0	0	96	0	0
Włocławski	0	0	0	14	0	0
Wrocławski	0	0	0	0	0	0
Zamojski	28	0	0	49	0	0
Zielonogórski	25	2	8	25	0	0