Key findings:

A Measure of Last Resort? The practice of pre-trial detention decision making in the EU

Fair Trials

University of the West of England
England and Wales

Irish Penal Reform Trust
Ireland

University of Leiden
Netherlands

Asociación Pro Derechos Humanos de España
Spain

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Within the European Union, there are over **120,000 people** being detained in pre-trial detention. That's more than **1** in **5** people held in prison that haven't yet been found guilty of any crime.

In June 2014, Fair Trials set out to collect a unique evidence base about how pre-trial detention, or detention without trial, is being used in practice across the EU. In order to gain a realistic view of the problems in practice on which to develop targeted national and regional solutions, the project *'The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making'* was conducted in partnership with organisations and academics from ten EU countries and has been funded by the EU Commission.

Now complete, the report brings together the findings from across the **10** jurisdictions, as well as a wider regional experts seminar, which involved over **50** participants from **24** EU Member States. This document sets out some of the key findings. You can read the full report online at **fairtrials.org**

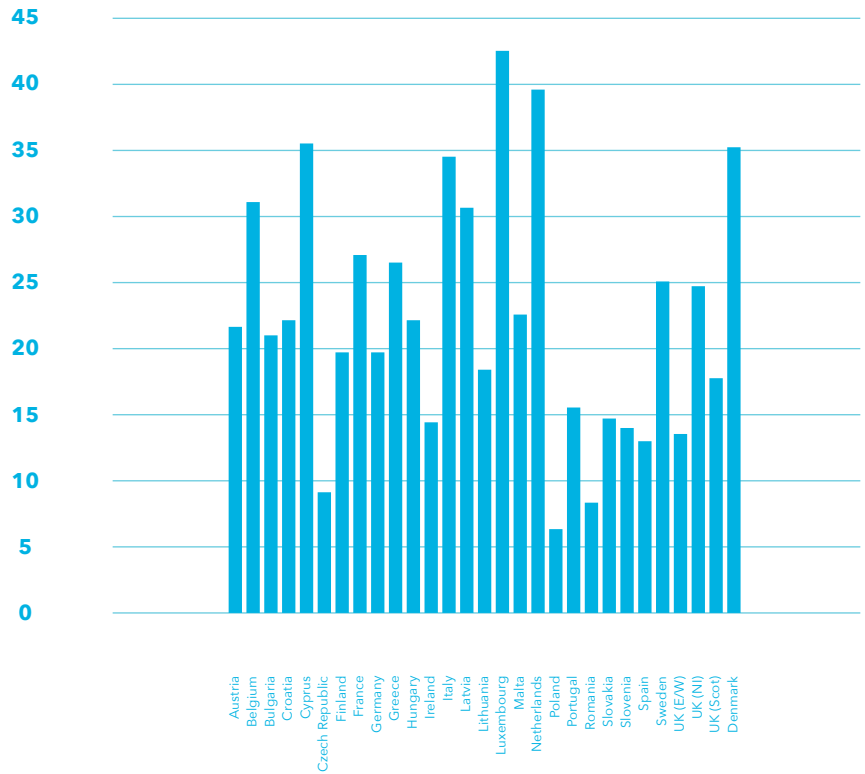

Fig 1. Percentage of EU prison population comprised of pre-trial detainees.

What is detention without trial, and when should it be used?

Detention without trial can take place either in police custody or in prison before and during a trial. In some cases a defendant might be detained until a sentence has become final.

Accused persons should be treated as innocent until proven guilty (the 'presumption of innocence') and there should always be a presumption in favour of release. Pre-trial detention should be a last resort, and only used when justified.

When is pre-trial detention justified?

The legal basis for detention varies between jurisdictions, but broadly speaking, detention can be used when there is:

1. The risk that the suspect will fail to appear for trial;
2. The risk that the suspect will spoil evidence or intimidate witnesses;
3. The risk that the suspect will commit further offences;
4. The risk that the release will cause public disorder; or
5. In exceptional cases, the need to protect the safety of a person under investigation

242 hearings attended

544 lawyers surveyed

56 judges interviewed

45 prosecutors interviewed

672 case files reviewed

Researchers across the ten jurisdictions collected a huge amount of data. What follows is a summary of the findings.

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

In England and Wales, one in three lawyers reported not always having access to case materials before the first hearing; in Ireland it's two thirds.

Translation and interpretation
In Greece, none of the case files that were examined had been translated, even though 43% of those in pre-trial detention were foreign nationals!

Access to the casefile
In parts of Hungary, the prosecution decides which documents are essential for the defence to view, potentially censoring key documents.

"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"
Polish judge

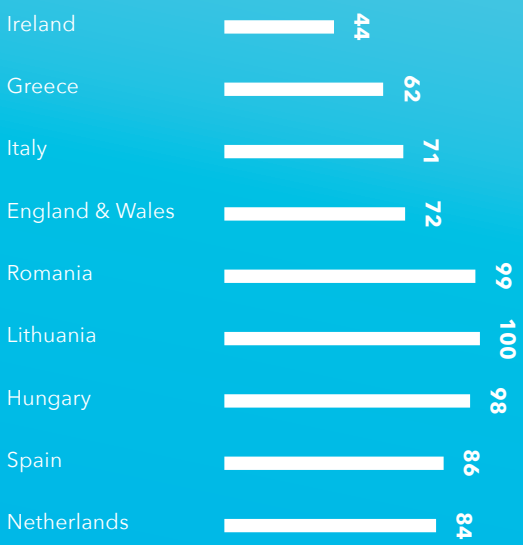

Fig 2. Showing judicial grants (%) of prosecutorial request for PTD according to data gathered by researchers

Substance — Human rights standards set out certain limited grounds for imposing pre-trial detention but judges sometimes relied on unlawful grounds, such as exclusive or primary reliance on the nature of the offences, or findings of flight risk based on suspect justifications such as lack of fixed residence or foreign nationality. Reasoning was often formulaic and did not engage with the specific evidence in each case. In some countries, certain suspects including women and foreign nationals were disproportionately detained.

In Romania, **97%** of the studied case files showed detention being ordered based in part on the severity of the crime, which is unlawful!

In Spain, **64%** of lawyers agreed that they had observed unlawful grounds of detention being used, and three out of the five judges interviewed admitted using the severity of the offence as a criterion for the imposition of pre-trial detention.

In Ireland, Italy and Spain, researchers noted that some defendants, such as irregular migrants, and vulnerable defendants, including those without housing or who suffered with addictions, were routinely detained in situations where others would not be.

For 11 months I never spoke to my family.

Bruno, Italy
Accused of attempted murder and aggravated robbery. Detained for 11 months (seven in solitary confinement). Acquitted.

I always had the hope and expectation that the decision was going to change and that I would be released. While you're there though, it's two or three times more difficult when you know that you've done nothing.

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Reviews — Because pre-trial detention is intended as an exceptional measure, countries should provide regular reviews of detention to ensure that it is still justified. But reviews in practice did not always provide sufficient oversight. In some countries, defendants and/or their lawyers are not being guaranteed presence at review hearings. Decisions to detain were rarely overturned or even seriously questioned on review in most countries, and reasoning tended to be even more generic and formulaic than in the first instance. Detention was sometimes extended to protect the integrity of the investigation long after relevant investigative tasks were complete.

In Poland, there was only a **3%** success rate for defendants seeking review of their detention.

Good practice
In Ireland, reviews of bail are heard in robust oral proceedings (which can include new evidence, and cross-examining witnesses).

In Italy, detention is not automatically reviewed; it is only done so at the request of the defendant.

I was never asked anything. Never.

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I never participated during the hearings. The only time I appeared before the court was when the pre-trial detention was being prolonged. I was never asked anything. Never.

Daniela, Romania
Accused of fraud and detained for one year and nine months. Acquitted.

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

"There have been situations when pre-trial detention was not justified and didn't feel right, but there should be better supervision of alternative measures because there are many situations in which obligations are not respected. "
Romanian judge

In Lithuania, researchers noted that alternatives to detention were rarely explored by any of the parties.

Good practice
In Ireland, mobile phone monitoring is used as an innovative and easy alternative to detention.

I have to report twice a week to let them know I am still here. I haven't missed it at all.

Of course it's better for me. You can't compare it. Everyone in prison dreams of such a thing. If their case has to continue, then let it continue this way.

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Maciej, Poland
Accused of drug trafficking. Detained for three years and four months. Released on bail, but still awaiting a verdict.

Recommendations

The excessive use of pre-trial detention is an EU concern, because it undermines the operation of vital mutual recognition measures such as the European Arrest Warrant. **Fair Trials believes that regional action is necessary, in the form of legislation which is binding on all Member States,** and codifies existing ECHR standards, currently buried in ECtHR case law.

The legislation could provide a step-by-step approach, setting out the necessary judicial assessments, including reference to specific evidence, and their order of application. Consideration of whether the risks the court seeks to prevent can be addressed through alternatives, and should take place before decisions are made. The legislation should also require Member States to collect more comprehensive data on the use of pre-trial detention and alternatives.

The European Union has the chance to take a lead on an issue that affects the entire world. Reducing the excessive use of pre-trial detention has been recognised as an essential element of good governance, and the EU has an opportunity to set standards that the rest of the world can follow.

Alternatives – judges should demonstrate that they have considered relevant alternatives.

Nature of decision-making – judges must give equal consideration to the prosecution and the defence.

Judges must produce reasoned case-specific decisions, and within those decisions, they must show that they have considered alternatives to detention.

Regular review and hearings – reviews should be required automatically and defendants as well as defence lawyers should be present at all reviews.

For more information, including country-specific reports, go to *fairtrials.org*

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Hungarian Helsinki Committee
Hungary

Association for the Defence of Human Rights in Romania
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A world where every person's right to a fair trial is respected.

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