D2.1 Gaps & Needs Analysis Report

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Abbreviations

Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
EAW	European Arrest Warrant
ECHR	Convention on the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
European Prison Rules	Council of Europe, Committee of Ministers, Recommendation Rec(2006)2 on the European Prison Rules, Strasbourg, 11 January 2006
FRA	European Union Agency for Fundamental Rights
MS	Member State
Nelson Mandela Rules	United Nations Standard Minimum Rule for the Treatment of Prisoners
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

Glossary

Alternatives to pre-trial detention	synonymous to bail, less severe measures (than custodial/pre-trial detention) of a procedural nature applied in a criminal process in order to ensure the aims of securing the proceedings (including prevention of absconding, interference with the proceedings or re-offending)
Arrest	apprehension of a person by law enforcement authorities and placement in custody
Criminal detention	deprivation of a person's liberty in connection with a criminal offence in accordance with the prescribed law
Detainee	A person deprived of liberty in pre-trial detention and convicted persons servicing a sentence of imprisonment
European arrest warrant	An arrest warrant issued in accordance with the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States valid throughout all Member States of the European Union[1]
Pre-trial detention	also known as remand or preventative detention, refers to deprivation of a person's liberty prior to the conclusion of a criminal prosecution, hence until the sentence is final

[1] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States, (2002/584/JHA), OJ L 190, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584.

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Executive Summary

The main objective of the RELEASE project is to contribute to the coherent application of EU laws across the consortium states and to promote judicial cooperation in criminal matters. The project aims at facilitating the establishment of mutual trust amongst the target groups and improvement of the national justice systems. In particular, RELEASE project focuses on the pre-trial detention requirements and their implementation, supporting the effectiveness of the enforced decisions on the matter and the establishment of a united European approach.

To achieve this goal the first part of the project focuses on gaining a comprehensive overview of the current state of play through empirical research and case law analysis. This allows for identification and promotion of alternatives to pre-trial detention in the consortium states and raising awareness of national case law and case law of the ECtHR, as well as examples of the good practices in the area of application of alternatives to pre-trial detention.

The report further provides an overview of the national legal framework, key conclusions stemming from literature review, case law analysis and analysis of the expert inputs pursuant a dedicated questionnaire. This is based on general data collection and statistics. The literature review provides a summary of publications, reports and research related to the application of pre-trial detention and alternatives to pre-trail detention, which offer insights into various impacts – e.g. sociological and economic ones, directly connected to overuse of pre-trial detention.

The overview of the national legal framework lists available alternatives to pre-trial detention in the consortium states and summarizes information about procedural aspects of imposing pre-trial detention and application of alternatives to pre-trial attention, as well as giving a concise overview of the available legal remedies in the consortium states.

The case law analysis consists of examples of key national cases selected and provided by project team members and cases on pre-trial detention at the ECtHR, in which the ECtHR found violations of Article 3 and Article 5 of the ECHR. The national case-law selection points out the shortcomings in the use of alternatives to pre-trial detention by the national courts and indicates problematic aspects in this area while it once again highlights the overuse of the pre-trial detention in the consortium states. The overview of the cases at the ECtHR directs attention not only to serious procedural errors and shortcomings in the application of pre-trial detention, but also to the poor and inadequate detention conditions in consortium countries.

The report also summarises expert inputs to a dedicated questionnaire disseminated by the project partners to relevant professionals. The answers to the questionnaires facilitate the understanding of current practices in the consortium jurisdictions related to assigning alternatives to pre-trial detention.

By combining the presentation of the national legal framework of each consortium state, literature review, case law analysis and analysis of expert inputs to a dedicated questionnaire, this report offers comprehensive overview of the current state of play in each consortium state.

1 Introduction and literature review

The issue of pre-trial detention and the use of possible alternatives have been on the agenda of the EU for several years in many different contexts, with numerous empirical research and projects carried out by several institutions or agencies.[2]

Despite the fact that pre-trial detention is a measure of last resort (*ultima racio*) and its use is strictly limited as set out in the international and regional legal framework,[3] its application and overuse by national authorities remains concerning. Several empirical research studies have previously identified the issue of overuse of pre-trial detention by national authorities.[4]

The idea behind the resort to pre-trial detention should first and foremost serve criminal procedural purposes, mainly it should serve as a means of securing the proceedings, including the prevention of absconding of a suspected or accused person, prevention of interference with the investigation including witness tampering or tampering of evidence, or prevention of reoffending. As clear from the principle of subsidiarity, pre-trial detention should be applied only when other, less intrusive (non-custodial) measures are insufficient. Hence, the general rule in criminal proceedings should be the compliance with the fundamental rights and freedoms, including the right to liberty and security of a person and the presumption of innocence, and the limitation of these rights and freedoms only exceptions, carefully justified.

However, recent practice and most recently available statistics show an increasing trend in the number of people held in pre-trial detention, with pre-trial detainees forming a significant part of prison population.[5] In particular, the latest data from the Council of Europe Annual

[2] See for example, Fair Trials, 'A Measure of Last Resort? The practice of pre- trial detention decision making in the EU, London: Fair Trials, 2016'; Catherine Heard and Helen Fair, Institute for Crime and Justice Policy Research, Birkbeck University of London, 'Pre-trial detention and its over-use', November 2019, available at: https://www.prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf; Penal Reform International, 'Reducing pre-trial detention', available at: https://www.cep-probation.org/wp-content/uploads/2020/10/10-point-plan-Pre-trial-detention-WEB_final.pdf.

[3] See for example, Council of Europe Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules, recital.

[4] See for example, Fair Trials, 'A Measure of Last Resort? The practice of pre- trial detention decision making in the EU, London: Fair Trials, 2016'; Open Society Justice Initiative, 'Presumption of Guilt: The Global Overuse of Pretrial Detention,' New York: Open Society, 2014.

[5] Institute for Crime and Justice Policy Research, World Prison Brief data, available at: https://www.prisonstudies.org/world-prison-brief-data; See also, See also, Marcelo, F. Aebi, Edoardo Cocco, Lorena Molnar and Mélanie M. Tiago, 'SPACE I – Council of Europe Annual Penal Statistics: Prison populations, Strasbourg: Council of Europe, 2022, available at: https://wp.unil.ch/space/space-i/annual-reports/; See also, Penal Reform International and Thailand Institute of Justice, 'Global Prison Trends 2022', 2022, available at: https://cdn.penalreform.org/wp-content/uploads/2022/05/GPT2022.pdf; Catherine Heard and Helen Fair, Institute for Crime and Justice Policy Research, Birkbeck University of London, 'Pre-trial detention and its over-use', November 2019, available at: https://www.prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf, p. 1.

Penal Penal Statistics Europe show that until 31 January 2021, 22% of the inmates held in European penal institutions were detainees placed in pre-trial detention.[6] The global share of persons in pre-trial detention has not changed and remained stable since 2000, ranging between 29% and 31% of the global prison population.[7] In Europe, the number of non-custodial measures and sanctions grew by 3% from 2019 to 2020.[8] Moreover, the available statistics show that the use of pre-trial detention also disproportionately impacts persons belonging to vulnerable and marginalised groups, such as foreign nationals, minority, or persons experiencing homelessness.[9]

The criminal sanctions systems are within the competence of the individual Member States (MS). The available research shows that not only detention conditions vary between the different EU MSs, with myriad of factors affecting the detention conditions in a given State,[10] but also there is discrepancy in practice of MSs when applying alternative measures to pre-trial detention in practice.[11] In particular, the variety in practice between MS might be due to the different national legal frameworks in the field as well as the differences in interpreting particular case law and the respective necessary measures (rules regarding pre-trial detention differs) to be put in place.

In 2017, a comparative research was carried out in this regard, with the aim to understand the use of pre-trial detention in selected MSs (Austria, Belgium, Gemrany, Ireland, Lithuania, the Netherlands and Romania) and its justification in practice.[12] The research focused on comparable practices as well as explanation of differences in the use of pre-trial detention as a measure of last resort. However, the cause of increased resort to pre-trial detention rather

[6] Marcelo, F. Aebi, Edoardo Cocco, Lorena Molnar and Mélanie M. Tiago, 'SPACE I – Council of Europe Annual Penal Statistics: Prison populations, Strasbourg: Council of Europe, 2022, available at: https://wp.unil.ch/space/space-i/annual-reports/.

[7] Penal Reform International and Thailand Institute of Justice, 'Global Prison Trends 2022', 2022, available at: https://cdn.penalreform.org/wp-content/uploads/2022/05/GPT2022.pdf.

[8] Penal Reform International and Thailand Institute of Justice, 'Global Prison Trends 2022', 2022, available at: https://cdn.penalreform.org/wp-content/uploads/2022/05/GPT2022.pdf, p. 15.

[9] Marcelo, F. Aebi, Edoardo Cocco, Lorena Molnar and Mélanie M. Tiago, 'SPACE I – Council of Europe Annual Penal Statistics: Prison populations, Strasbourg: Council of Europe, 2022, available at: https://wp.unil.ch/space/space-i/annual-reports/; See also, Penal Reform International and Thailand Institute of Justice, 'Global Prison Trends 2022', 2022, available at: https://cdn.penalreform.org/wp-content/uploads/2022/05/GPT2022.pdf.

[10] See for example, European Union Agency for Fundamental Rights, 'Criminal detention conditions in the European Union: rules and reality', 2019, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-criminal-detention-conditions-in-the-eu_en.pdf.

[11] See for example, W. Hammerschick, C. Morgenstern, S. Bikelis, M. Boone, I. Durnescu, A. Jonckheere, J. Lindeman, E. Maes, M. Rogan, 'DETOUR –Towards Pre-trial Detention as Ultima Ratio. Comparative report', Vienna: Institut für Recht-und Kriminalsoziologie, 2017, available at:www.irks.at.

[12] W. Hammerschick, C. Morgenstern, S. Bikelis, M. Boone, I. Durnescu, A. Jonckheere, J. Lindeman, E. Maes, M. Rogan, 'DETOUR –Towards Pre-trial Detention as Ultima Ratio. Comparative report', Vienna: Institut für Recht-und Kriminalsoziologie, 2017, available at:www.irks.at, p. 4-5.

than use of alternative measures has been explored in existing literature to some extent only.[13]

For instance, some of the factors that might lead to a cause of increase in using the pre-trial detention identified by a recent research conducted by the Institute for Crime and Justice Policy include the discretion of criminal justice actors, including prosecutors as well as court service, and their ability to handle the volume or complexity of their cases, as well as socio-economic factors including poverty, inequality, unemployment or homelessness.[14]

Besides causes in the increase of use of pre-trial detention, it is also important to focus on the impact of the use of pre-trial detention and the challenges caused by its overuse. The recent findings of empirical research show that these concerns generally include the challenges of lengthy periods of detention, insufficient justification and lack of reasoning given for the extention of periods of detention or the fact that it is often used as a disguise form of punishment.[15] In addition to the fact that pre-trial detention is generally overused and its alternatives are rarely implemented, research also shows that the reasons behind pre-trial detention decisions are often found insufficient and go through additional reviews, which also in itself prolongs the time of detention.

Additionally, although the resort to pre-trial detention might be necessary and justified in some individual cases, significant overuse of pre-trial detention negatively impacts not only national criminal justice systems, but most importantly, hampers individual and procedural rights, such as the right to liberty[16], the right to a fair trial[17] and the presumption of innocence[18], or the right to private and family life[19]. Several research studies were conducted with the aim of assessing the national implementation of the common minimum standards on individual criminal procedural rights of suspected and accused persons set out by the series of Directives adopted at the EU level, including Directive 2010/64/EU[20], Directive

[13] See for example, Fair Trials, 'A Measure of Last Resort? The practice of pre-trial detention decision making in the EU', 2016, available at: https://www.fairtrials.org/articles/publications/a-measure-of-last-resort-the-practice-of-pre-trial-detention-decision-making-in-the-eu/.

[14] See for example, Catherine Heard and Helen Fair, Institute for Crime and Justice Policy Research, Birkbeck University of London, 'Pre-trial detention and its over-use', November 2019, available at: https://www.prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf.

[15] Partnership for Good Governance, 'Pre-trial detention Monitoring tool', 2017, available at: https://www.cep-probation.org/wp-content/uploads/2020/10/Assessment-tool-on-pre-trial-detention-EN.pdf.pdf, p. 3.

[16] Article 5 of the ECHR Article 6 of the Charter of Fundamental Rights of the European Union.

[17] Article 6 of the ECHR; Article 47 of the Charter of Fundamental Rights of the European Union.

[18] Article 6 § 2 of the ECHR; Article 48 of the Charter of Fundamental Rights of the European Union.

[19] Article 8 of the ECHR; Article 7 of the Charter of Fundamental Rights of the European Union.

[20] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26 October 2010

2012/13/EU [21], Directive 2013/48/EU [22], Directive (EU) 2016/800 [23] and Directive (EU) 2016/1919.[24]

For instance, in 2019, FRA published a report examinining how national authorities of selected MS implement the legal provisions on criminal procedural rights of suspected or accused persons at the national level, including the right to information and interpretation and the right of access to a lawyer.[25] In this report, FRA higlighted the findings of its fieldwork research, including identification of challenges as reported by criminal justice professionals and defendants with regard to the implementation of the common minimum standards on criminal procedural rights of suspected and accused persons as well as several recommendations on possible improvements. These recommendations included for instance, to put in place safeguards by MSs to ensure that individuals effectively exercise their right to be informed about the charges and their further rights as soon as they become a suspect, as well as for MSs to ensure that relevant safeguards are in place to allow the exercise of these further rights.

Moreover, the Irish Council for Civil Liberties in cooperation with the Open Society Justice Initiative likewise conducted a research project aimed at examining the implementation of the Directives on the right to interpretation and translation, the right to information and the right of access to a lawyer in practice at the national level during the investigative state of the criminal proceeding.[26] The nine selected Member States included Austria, Bulgaria, Hungary, Italy, Lithuania, Poland, Romania, Slovenia and Spain. The research also focused on identifying the key challenges in implementing the common minimum standards nationally in detailed national and comparative reports, as well as providing recommendations directed at the European Commisison and pan-European institutions, as well as national governments on the

[21] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1 June 2012.
[22] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6 November.2013.
[23] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21 May 2016.
[24] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4 November 2016.
[25] European Union Agency for Fundamental Rights, 'Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings', 2019, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-rights-in-practice-access-to-a-lawyer-and-procedural-rights-in-criminal-and-european-arrest-warrant-proceedings.pdf.
[26] Lloyd-Cape, 'Inside Police Custody 2', 2018, available at: https://www.fairtrials.org/articles/publications/inside-police-custody-2/.

challenges discussed in the report.[27] The recommendations include, for instance, the need to ensure that the Directives are faithfully and completely transposed into national laws and regulations of the MSs or the engagement of the European Commission to enter into a discussion with national governments to enhance empirical research in respect of procedural rights,

As a follow-up to this observational research and the published report, throughout 2021 and 2022, a specific research project was carried out primarily by Ludwig Boltzmann Institute of Fundamental and Human Rights in cooperation with APADOR-CH, Fair Trials Europe, the Irish Council for Civil Liberties and Rights International Spain, aimed at tackling the implementation gap identified by the previous report, targetting stakeholders with the capacity to influence or implement change.[28] The research focused on elaboration and exchange of promising practices, engaging criminal justice stakeholders in broad discussion about reform efforts and fostering exchange between civil society organisations.

Besides the significant impact on individuals giving rise to violation of some of their most basic human rights and fundamental freedoms, the available research shows that the overuse of pre-trial detention also carries significant additional costs which are considerably higher than the alternatives,[29] and hence can lead to deepining the economic and social harm.[30]

Ultimately, the overuse of pre-trial detention can also undermine the rule of law at national level.[31] In 2021, Fair Trials prepared a briefing in connection with the preparation of the

[27] Lloyd-Cape, 'Inside Police Custody 2', 2018, available at: https://www.fairtrials.org/articles/publications/inside-police-custody-2/.

[28] Ludwig Boltzmann Institute of Fundamental Rights, 'Strategically strengthening procedural rights: challenges, opportunities, lessons learned – final report,' 2023, available at: https://www.fairtrials.org/app/uploads/2023/03/Final-Report-_Final-4.4.2023.pdf.

[29] Catherine Heard and Helen Fair, Institute for Crime and Justice Policy Research, Birkbeck University of London, 'Pre-trial detention and its over-use', November 2019, available at: https://www.prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf, p. 8.

[30] See for example, Catherine Heard and Helen Fair, Institute for Crime and Justice Policy Research, Birkbeck University of London, 'Pre-trial detention and its over-use', November 2019, available at: https://www.prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf, p. 8; See also, Open Society Justice Initiative & UNDP, 'The Socioeconomic impact of pre-trial detention,' New York: Open Society, 2011, available at: https://www.justiceinitiative.org/uploads/84baf76d-0764-42db-9ddd-0106dbc5c400/socioeconomic-impact-pretrial-detention-02012011.pdf; See also, CSES, 'Study on financial and Other Impacts for an Impact Assessment of a Measure Covering Rights for Suspects and Accused Persons wo are in Pre-Trial Detention', 2016, available at:

[31] See for example, Fair Trials, 'Europe: Increase in pre-trial detention rates erodes rule of law', 28 April 2021, available at: https://www.fairtrials.org/articles/news/europe-increase-pre-trial-detention-rates-erodes-rule-law/.

European Commission's 2021 annual Rule of law report, highlighting the connection between the increase in pre-trial detention and the decline of the rule of law across the EU.[32]

Applying alternative measures to pre-trial detention, where appropriate, may have several advantages. In particular, they can promote social rehabilitation and reintegration procedures,[33] or can lead to a significant reduction in prison owercrowding as well as reoffending.[34] In practical terms, the enhanced use of alternative measures can have several benefits to the national criminal justice systems as well, including on issues relating to prison overcrowding, insufficient prison conditions, prison radicalisation as well as it can encourage to overcome the common obstacles concerning mutual recognition in criminal matters.[35]

As such, the national frameworks across the EU do foresee the existence of alternatives to pre-trial detention, despite them being in different forms. Alternative measures across the EU MS range from, for instance, financial penalties, home arrest, suspension of prison sentence, engagement in community service or electronic monitoring. Nonetheless, the available data show that alternative measures remain largely underutilised in practice, despite their promising use and expansion during the COVID-19 pandemic.[36] The reasons for underutilisation in practice across MSs vary and might be caused by little awareness, lack of necessary resources or training for the judiciary.

The existing literature, however, shows gaps in exploring deeper the issues of underutilisation of alternative measures to pre-trial detention, including not only examining the gaps in the legal framework, but also their use in practice.

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[32] Fair Trials, air Trials, 'Pre-Trial Detention Rates and the Rule of Law in the European Union – Briefing to the European Commission', April 2021, available at: https://www.fairtrials.org/articles/publications/pre-trial-detention-rates-and-the-rule-of-law-in-europe/.

[33] See for example, Council of the European Union, Council Conclusions on Promoting the use of alternatives to coercive sanctions for drug using offenders, 8 March 2018, available at: https://www.emcdda.europa.eu/system/files/media/attachments/documents/8042/Council%20Conclusions%20on%20Promoting%20the%20use%20of%20alternative%20to%20coercive%20sanctions%20for%20drug%20using%20offenders.pdf; the European Union Action Plan on Drugs 2017-2020 (OJ C 215, 5.7.2017, p. 21; See also, See for example, Penal Reform International, 'Global Prison Trends 2022 - Alternatives to imprisonment', available at: https://www.penalreform.org/global-prison-trends-2022/alternatives-to-imprisonment/.

[34] See for example, Esther Montero Pérez de Tudela, 'Alternative measures to pre-trial detention in Europe: what else is there?', available at: https://www.cep-probation.org/wp-content/uploads/2020/10/Alternative-measures-to-pre-trail-detention-in-Europe-what-else-is-there.pdf.

[35] Council of the European Union, Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice, OJ C 422, 16 December 2019, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019XG1216%2802%29&qid=1681160826846, § 10.

[36] Penal Reform International and Thailand Institute of Justice, 'Global Prison Trends 2022', 2022, available at: https://cdn.penalreform.org/wp-content/uploads/2022/05/GPT2022.pdf;

2 Methodology of the analysis

The aim of the report is to explore and provide a comprehensive overview of the current state of play in the European region when it comes to applying pre-trial detention and its alternatives as a measure, particularly in Bulgaria, Croatia, Greece, Poland, and Slovakia. For this reason, the desk research focuses on data collection, including statistics and case law analysis both at the EU level as well as at the national level.

In the first part, the report focuses on providing an overview and review of the existing outputs based on secondary research findings. Employing the methods of synthesis as well as comparative analysis, the first part provides a detailed overview and analysis of the existing literature, including reports and outputs of other projects with a particular focus on the alternatives to pre-trial detention.

The second part of the report focuses on describing the existing European standards. Employing the methods of descriptive analysis, the second part focuses on an in-depth analysis of existing European standards, including EU secondary law instruments as well as Council of Europe standards. These two systems have been selected as they are interrelated and, in many cases, overlapping. However, as regards the scope of these standards and their application in MSs, all EU MSs have ratified and are bound by the standards established in the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") which is further interpreted and elaborated upon by the European Court of Human Rights ("ECtHR"). Nonetheless, in the understanding of Article 52(3) of the Charter of Fundamental Rights of the European Union, the standards established at the Council of Europe level are considered to be minimum, with the EU law instruments providing extensive protection as concerns selected rights. The second part also includes an in-depth analysis of the existing case law both at EU and Council of Europe level, focusing on the judgments of the ECtHR and the Court of Justice of the EU concerning the region of the project partners.

The third part comprises of firstly, a descriptive analysis of the national legal framework, focusing on providing an overview of the legal provisions stipulating the use of pre-trial detention and providing for alternatives. Secondly, it also focuses on statistical data analysis of the use of pre-trial detention in each of the Consortium MSs, which include Bulgaria, Croatia, Greece, Poland, and Slovakia, with an emphasis of also providing statistical data on the use of alternative measures to pre-trial detention. Lastly, the third part includes an in-depth case law analysis available at the national level, focusing on cases in which alternative measures have been used. The third part of the report focuses on national analysis of the state of play in the Consortium MSs. This part of the report was carried out based on expert inputs to the prepared questionnaires sent out to the project partners. The questionnaire consisted of 61 questions. Each questionnaire consisted of 61 questions. Questionnaires were

conducted among 104 legal practitioners. Answers to the questionnaires helped us to understand current practices in the Consortium MSs related to assigning alternatives to pre-trial detention.

The fourth part of the report focuses on providing the key findings based on the outcomes of the carried-out desk research, case law analysis and questionnaires analysis utilising the methods of comparative analysis in order to compare the state of play in the Consortium MSs.

The last part of the desk research and case law analysis includes conclusions and recommendations on the outcomes of the research based on the previous parts.

3 Description and analysis of existing European standards

3.1 Council of Europe standards and the case law of the ECtHR

Besides the basic binding human rights standards as set out in the ECHR, namely Article 3 concerning prohibition of torture, inhumane or degrading treatment, Article 5 concerning the right to liberty and security, as well as Article 6 concerning the right to a fair trial and presumption of innocence, the minimum standards concerning detention conditions or procedural rights of individuals in pre-trial detention are further set out in a number of Council of Europe recommendations, including the **European Prison Rules**[37] containing comprehensive guidance on the treatment of prisoners with the aim to promote and protect the fundamental rights of prisoners; **Recommendation on the use of remand in custody,** the conditions in which it takes place and the provision of safeguards against abuse;[38] **Recommendation on the European Rules on community sanctions and measures**[39] setting out standards for State Parties on the creation, imposition and implementation of community sanctions and measures; **Recommendation on electronic monitoring**[40] concerning the basic principles related to ethnical issues and professional standards enabling national authorities to provide justice, proportionate and effective use of different forms of electronic monitoring in the framework of the criminal justice process, as well as Recommendation on the **Council of Europe Probation Rules**.[41]

The case-law of the ECtHR also plays a key role in harmonising the use of pre-trial detention across the State Parties, including bringing the practice in line with the European concept of pre-trial detention. The case-law remains an important source of information for the identification of systemic problems with regard to this matter. The principles and standards set out in the ECHR and further interpreted in the jurisprudence of the ECtHR form a source

[37] Council of Europe, Committee of Ministers, Recommendation Rec (2006)2 on the European Prison Rules, Strasbourg, 11 January 2006

[38] Council of Europe, Committee of Ministers, Recommendation Rec (2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, 27 September 2006.

[39] Council of Europe, Committee of Ministers, Recommendation CM/Rec (2017)3 on the European Rules on community sanctions and measures, 23 March 2017.

[40] Council of Europe, Committee of Ministers, Recommendation CM/Rec (2014)4 on electronic monitoring, 19 February 2014.

[41] Council of Europe, Committee of Ministers, Recommendation CM/Rec (2010)1 on the Council of Europe Probation Rules, 20 January 2010.

of common standards for all Member States. The successful implementation of the judgments of the ECtHR in this regard have led to reforms of law and practice in some countries.

Key landmark cases

Based on Article 2 (1) of the ECHR: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

In case of **Kurt v. Austria**[42] the applicant filed a complaint to the police of beatings by her husband, E., A barring and protection order was issued against the husband obliging him to stay away from their apartment, as well as from the applicant's parents' apartment and the surrounding areas for fourteen days. It appeared that he complied with the order. In January 2011 E. was convicted of causing bodily harm to her and making dangerous threats towards her relatives. After this, the applicant did not report any incidents to the police until 22nd of May 2012, when she filed for divorce and reported E. to the police for rape, choking her and for making dangerous threats on a daily basis in the preceding two months. She also stated that sometimes he had slapped their two children; when interviewed, their minor son and daughter confirmed this as well as that their mother had been beaten. On the same day a new barring and protection order was issued against E., prohibiting him from returning to their apartment, the applicant's parents' apartment and the surrounding areas. He was taken for questioning and his keys were seized. The public prosecutor's office also instituted criminal proceedings against him. Three days later, he shot their son at school and committed suicide by shooting himself. The applicant unsuccessfully brought official liability proceedings claiming that E. should have been held in pre-trial detention.

Relying on Articles 2, 3 and 8 of the ECHR, the applicant complained, firstly, that the Austrian authorities had failed to protect her and her children from her violent husband. She claimed that she had explicitly mentioned in her report to the police that she feared for her children's life. The authorities had had all the relevant information to make them aware of the increased risk of further criminal offences by E. against his family but had failed to take effective preventive measures. **She argued that her husband should have been taken into pre-trial detention.**

As regards the first limb of Article 5 § 1 (c), which governs pre-trial detention, the ECtHR reiterated that this provision can only apply in the context of criminal proceedings relating to an offence that has already been committed. It permits detention for the purpose of bringing a person before the competent legal authority on reasonable suspicion of his having

[42] Kurt v. Austria, Application no. 62903/15, 2021, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-210463%22]}

committed the offence. Accordingly, pre-trial detention is capable of operating as a preventive measure only to the extent that it is justified on the grounds of a reasonable suspicion concerning an existing offence in relation to which criminal proceedings are pending. The prevention of further offences may thus be a secondary effect of such detention, and the risk of reoffending may be taken into account as an element in the assessment of the reasons for imposing or prolonging pre-trial detention, always on the condition that the existence of a reasonable suspicion regarding the offence already committed persists.

The ECtHR further reiterated that its case-law has identified certain acceptable basic categories of such reasons, which include the risk of the detainee committing further offences in the event of his or her release. On this point the ECtHR has held that the danger of further offences must be a plausible one, and the measure appropriate, in the light of the circumstances of the case and in particular the [43] and the personality of the person concerned.[44]

The ECtHR agreed with the Government that, on the basis of what was known to the authorities at the material time, there were no indications of a real and immediate risk of further violence against the applicant's son outside the areas for which a barring order had been issued, let alone a lethality risk. The authorities' assessment identified a certain level of non-lethal risk to the children in the context of the domestic violence perpetrated by the father, the primary target of which had been the applicant. The measures ordered by the authorities appeared, in the light of the result of the risk assessment, to have been adequate to contain any risk of further violence against the children. The ECtHR came to conclusion that there has been no violation of Article 2 of the ECHR in its substantive limb.

Based on Article 5 (3) of the ECHR: "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c)[45] of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

In the context of the alternatives to the pre-trial detention, it is necessary to mention the case of **Gafá v. Malta.[46]** On the 11th of December 2010 the applicant was arrested by the police

[44] Kurt v. Austria, Application no. 62903/15,2021, § 187, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-210463%22]}

[45] Article 5 (1) c: "... the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."

[46] Gafá v. Malta, Application no. 54335/14, § 6-8, 2018, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-183126%22]}

on suspicion of having murdered his former partner. Later, he was charged before the Court of Magistrates, as a Court of Criminal Inquiry, with *inter alia*, willful homicide.

He was remanded in custody thereafter. It appeared from the acts of the proceedings that from the applicant's arraignment until August 2012, the applicant filed ten requests for bail which were all rejected after the relevant submissions were made, including oral hearings. After the applicant had been held in custody for the maximum period of detention allowed by law, he became entitled to bail. Later, the Court of Magistrates granted the applicant bail subject to the following conditions: that he appears for all the scheduled hearings in the criminal proceedings; that he does not go abroad or abscond; that he does not contact or approach, directly nor indirectly, witnesses for the prosecution; that he does not commit a crime of a voluntary nature while released on bail; that he present himself at the District Police Station every day between eight a.m. and eight p.m.; that he be home not later than ten p.m. and that he does not leave home before six a.m. of the following day; that he informs the Police of any change of address by not later than twelve hours of such a change; that he deposits by way of security the amount of 15,000 euros (EUR) in the court registry; and that he undertakes a personal guarantee of EUR 25,000. In the event of any bail condition being breached, the entire amount of EUR 40,000 would be forfeited in favour of the State. The Attorney General appealed against the decision of 22 August 2012, as he considered the conditions too lenient. The applicant also objected to the Attorney General's appeal. He noted that he had remained in detention precisely because he could not fulfil the conditions imposed. At the same time, he filed an application requesting the court to reduce the amount to be deposited by him. He explained that since he had been detained for more than twenty months, he was unemployed. The applicant filed several other applications requesting the amount of the bail to be reduced. Subsequently on 6th of August 2013 the applicant signed a personal guarantee of EUR 25,000 and his mother having affected the relevant hypothec as guarantee, the applicant was released from custody after thirty-two months of pre-trial detention.

The applicant complained that he had been detained on remand for an unreasonable period of time due to the excessive amount of deposit that he was ordered to pay as one of the conditions to be released on bail. He relied on Article 5 § 3 of the ECHR.

The ECtHR noted that the applicant was arrested on the 11th of December 2010 and charged before the Court of Magistrates as a Court of Criminal Inquiry on the 13th of December 2010. He was remanded in custody. After having remained in custody for a period that exceeded the limit established under Maltese law (of twenty months in circumstances such as those of the present case) the Court of Magistrates granted bail to the applicant on 22 August 2012, subject to the condition, *inter alia*, of depositing EUR 15,000 in the registry of the court. Since the applicant was not in a position to deposit such an amount, he remained in custody. He

was subsequently released on the 6th of August 2013 when his mother stood as surety. According to the ECtHR case-law, the guarantee provided for by Article 5 § 3 of the ECHR is designed to ensure the presence of the accused at the hearing. The amount of bail must be set by reference to the detainee, his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond. Since the issue at stake is the fundamental right to liberty guaranteed by Article 5, the authorities had to take as much care in fixing appropriate bail as in deciding whether or not continued detention is indispensable. The amount set for bail must be duly justified in the decision fixing bail and must take into account the accused's means. The domestic courts' failure to assess the applicant's capacity to pay the sum required could lead the ECtHR to find a violation. However, the accused whom the judicial authorities declare themselves prepared to be released on bail must faithfully submit sufficient information, that can be checked,[47] OBJ, about the amount of bail to be fixed[48] OBJ

In the present case, the ECtHR noted that the applicant was granted bail subject to financial conditions on 22nd of August 2012. He filed four applications requesting the reduction of the amount to be deposited which were all rejected, until his fifth application - nearly a year later - where through a decision of 2nd of August 2013 the domestic court accepted his request that his mother stands as surety. All those requests were rejected on the basis of the seriousness of the crime and the fear of tampering with evidence, despite the fact that bail had already been granted. Further, none of those decisions explained how the amount of bail had been set by reference to the applicant's assets and his means. Nor did any of those decisions assessed the applicant's capacity to pay the sum required. The ECtHR observed that, despite the continued detention following the granting of bail subject to the contested financial conditions as a result of his inability to pay, at no stage - throughout a period of slightly under a year during which the applicant filed several requests - did the courts consider it adequate to decrease the amount of deposit allowing him a real possibility to benefit from bail. No relevant or sufficient reasons connected to the applicant's financial situation have been put forward for such a course of action by the domestic court[49][50]

The ECtHR came to conclusion that there was a violation of the Article 5 § 3 of the ECHR.

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[48]Gafá v. Malta, Application no. 54335/14, § 70-71, 2018, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-183126%22]}

[50] Gafá v. Malta, Application no. 54335/14, § 72 and 75, 2018, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-183126%22]}

In case of **Lakatos v. Hungary**[51] the Pest Central District Court remanded the applicant in custody under Article 129 § 2 b) and c) of the Hungarian Code of Criminal Procedure, on suspicion of aggravated murder on the 26th of February 2011. There was a reasonable suspicion that the applicant had poisoned the victim on the 8th of April 2010. The court found it established that there was a need for the applicant's detention, because otherwise he would tamper with evidence by exerting pressure on the witnesses, as evidenced by his previous conduct whereby he had threatened them. It dismissed an argument by the applicant that he had committed the criminal offence more than a year before, thus the prosecutor's office had erred in stating that he could tamper with evidence or influence witnesses. The court also held that the applicant's "unclear" financial situation and the severity of the possible punishment demonstrated that there was a risk of his absconding. The court gave no consideration to an application by the applicant's lawyer for the applicant to be placed under house arrest. On 21st of March 2011 the Buda Central District Court extended the applicant's pre-trial detention until 26th of May 2011. It noted again that because of the severity of the possible punishment and the fact that the applicant had neither a permanent address nor a regular income, there were grounds to believe that he would abscond. The court held that there was a risk of his interfering with the investigation if he were to threaten the witnesses or destroy physical evidence.

The applicant complained that his pre-trial detention had been repeatedly extended without a reasonable suspicion of his having committed a crime and with the courts applying only formulaic reasoning and failing to take into account his personal circumstances. Furthermore, his detention had exceeded a reasonable length since the domestic authorities had failed to display diligence in conducting the proceedings. He claimed the violation of Article 5 § 3 of the ECHR.

The ECtHR reiterated that justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. The requirement for the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand, that is to say "promptly" after the arrest. Furthermore, **when deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring his appearance at trial.**[52] Justifications which have been deemed "relevant" and "sufficient" reasons in the ECtHR's case-law have included such grounds as the danger of absconding, the risk of pressure being brought to bear on witnesses

[51] Lakatos v. Hungary, Application no. 21786/15, 2018, available at: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-184060%22]}
[52] Lakatos v. Hungary, Application no. 21786/15, 2018, § 53, available at: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-184060%22]}

or of evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder and the need to protect the detainee.

The national judicial authorities must, with respect for the principle of the presumption of innocence, examine all the facts militating for or against the existence of the above-mentioned requirement of public interest or justifying a departure from the rule of Article 5, and must set them out in their decisions on applications for release. It is essentially on the basis of the reasons given in these decisions and of the well-documented facts stated by the applicant in his appeals that the ECtHR is called upon to decide whether or not there has been a violation of Article 5 § 3. **Arguments for and against release must not be "general and abstract".**

The ECtHR could not establish that the authorities gave proper consideration to the possibility of ensuring the applicant's attendance by the use of other preventive measures – measures which were expressly provided for in Hungarian law to ensure the proper conduct of criminal proceedings, such as release on bail or house arrest, as requested by the applicant. The ECtHR considered that the reasons relied on by the domestic courts for ordering and extending the applicant's detention were stereotyped and abstract. Their decisions relied on grounds for detention without any attempt to show how those grounds applied specifically to the particular circumstances of the applicant's case. The ECtHR considered that there were no relevant and sufficient reasons to extend the applicant's detention pending trial for three years and eight months. It followed that, in the present case, there has been a violation of Article 5 § 3 of the ECHR.

The jurisprudence of the ECtHR seems to be increasingly emphasizing the need for careful and complete investigation by national courts of alternative measures of ensuring appearance at trial, including the need for justifying in their decisions, the reason why such alternatives were considered not suitable.

Under Article 2 of Protocol No. 4 to the ECHR: "(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. (2) Everyone shall be free to leave any country, including his own. (3) No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. (4) The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

In the case of **de Tommaso v. Italy,** the applicant alleged, in particular, that the preventive measures to which he had been subjected for a period of two years were in breach of Articles 5, 6 and 13 of the ECHR and Article 2 of Protocol No. 4. concerning special supervision together with a compulsory residence order and other associated restrictions (not leaving home at night, not travelling away from the place of residence, not going to bars, nightclubs, amusement arcades or brothels or attending public meetings, not associating with individuals who had a criminal record and who were subject to preventive measures). **The ECtHR reiterated that house arrest is considered, in view of its degree and intensity to amount to deprivation of liberty within the meaning of Article 5 of the ECHR**. [53]The ECtHR observed, however, that in all the cases it has examined that were similar to the present case, the applicants were under an obligation not to leave home at night, and this was found to constitute interference with liberty of movement. The ECtHR cannot find any sufficiently relevant grounds for changing this approach, especially as it appears that in the present case, having regard to the effects of the applicant's special supervision and the manner of its implementation, there were no restrictions on his freedom to leave home during the day and he was able to have a social life and maintain relations with the outside world. The ECtHR further noted that there is no indication in the material before it that the applicant ever applied to the authorities for permission to travel away from his place of residence. The ECtHR considered that the obligations imposed on the applicant did not amount to deprivation of liberty within the meaning of Article 5 § 1 of the ECHR, but merely to restrictions on liberty of movement. The ECtHR has found that the restrictions imposed on the applicant fall within the scope of Article 2 of Protocol the No. 4. It assessed whether the interference was in accordance with law, pursued one or more of the legitimate aims referred to in the third paragraph of that article and was necessary in a democratic society.

The ECtHR concluded that Act no. 1423/1956, domestic legislation was couched in vague and excessively broad terms. Neither the individuals to whom preventive measures were applicable nor the content of certain of these measures were defined by law with sufficient precision and clarity. The Act did not satisfy the foreseeability requirements established in the ECtHR's case-law. The ECtHR stated that the interference with the applicant's liberty of movement cannot be said to have been based on legal provisions complying with the ECHR requirements of lawfulness. There has therefore been a violation of Article 2 of Protocol No. 4 on account of the lack of foreseeability of the Act in question.

Based on Article 3 of the ECHR, no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[53] De Tommaso v. Italy, Application no. 43395/09, 2017, § 87, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-171804%22]}

In the case of **Stănculeanu v. Romania**, the applicant claimed violation of Article 3 and Article 5 of the ECHR. In March 2014 a large-scale criminal investigation was initiated against several persons for money laundering and fiscal fraud. On the 3rd of December 2014 the investigation was extended in respect of thirty-two other persons, including the applicant. The Bucharest County Court allowed the prosecutor's request and ordered the applicant's detention until the 3rd of January 2015. An appeal lodged against this was dismissed by the Bucharest Court of Appeal on the 15th of December 2014. Her pre-trial detention was extended for another thirty days by a decision of the Bucharest County Court issued on 29th of January 2015, upheld on appeal. The applicant was released on 11th of February 2015 after two months of pre-trial detention.[54] The applicant claimed that for two months, she had been placed in a cell measuring 9 square meters, which she had shared with three other detainees. She also complained about the poor conditions of hygiene, lack of ventilation and natural light. According to the applicant, the toilet was not separated from the living area by any partition, thus offering no privacy.[55] The applicant complained about the conditions of her detention in the Bucharest police station detention facility, particularly with regard to overcrowding, poor hygiene conditions and inadequate food. She relied on Article 3 of the ECHR.[56]The ECtHR came to the conclusion of violation of Article 3 of the ECHR. The ECtHR has not found any fact or argument capable of persuading it to reach a different conclusion on the admissibility and merits of the applicant's complaint under Article 3 of the ECHR. It found that the applicant's material conditions of detention in the Bucharest police station detention facility were inadequate. The applicant also complained that she had been unlawfully held in police custody between 6.15 a.m. on 4th of December 2014 and 1.10 a.m. on 5th of December 2014. In that matter, she relied on Article 5 § 1 of the ECHR. The ECtHR came to conclusion that there was no violation of Article 5 § 1 of the ECHR.

European Union standards regarding pre-trial detention and alternative measures:

In particular, as concerns the agenda of the EU, despite the fact that pre-trial detention falls within the exclusive competence of individual Member States, detention issues also fall within the purview of the EU as the respect for fundmanetal rights within the EU promotes and enhances mutual trust between Member States. In particular, the application of alternative measures to detention was recognised as in important area of EU justice policy both in the

[54] Stănculeanu v. Romania, Application no. 26990/15, 2018, § 6-27, available at: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-179886%22]}
[55] Stănculeanu v. Romania, Application no. 26990/15, 2018, § 28, available at: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-179886%22]}
[56] Stănculeanu v. Romania, 2018, Application no. 26990/15, § 34, available at: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-179886%22]}

2004 Hague Programme[57] and 2009 Stockholm Programme.[58] The promotion of mutual trust remains among the main priorities of the Commission in the area of criminal justice. There are no explicit EU criminal law instruments that directly provide for harmonisation of key challenges concerning the use of pre-trial detention, including time-limits or grounds for detention pending trial. Nonetheless, some EU law instruments are of great relevance and may impact the resort to pre-trial detention by national authorities.

In particular, in 2009, the EU introduced a package of measures on procedural rights of suspected and accused persons with the aim of setting and ensuring minimum standard of protection for individual rights across the EU and increasing mutual trust between the judiciaries. These include Directive 2010/64/EU [59], Directive 2012/13/EU [60], Directive 2013/48/EU[61], Directive (EU) 2016/800[62] and Directive (EU) 2016/1919.[63]

In 2011, the Commission presented a **Green Paper on the application of EU criminal justice legislation in the field of detention**,[64] in which it explored the extent to which detention issues impact on mutual trust and recognised the important role of promoting alternatives to detention which could encourage closer judicial cooperation between Member States.

In October 2017, the **European Parliament adopted a resolution on prison systems and conditions[65]** in which it recognised that reducing over-crowding and the number of prisoners by encouraging and prioritising the use of alternative measures to custodial punishments

[57] Council of the European Union, 'The Hague programme: Strengthening freedom, security and justice in the European Union', OJ C 53, 3 March 2005, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005XG0303%2801%29.

[58] European Council, 'The Stockholm programme – an open and secure Europe serving and protecting citizens', OJ L C 115, 4 May 2010, available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF.

[59] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26 October 2010

[60] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1 June 2012.

[61] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty,, OJ L 294, 6 November.2013.

[62] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21 May 2016.

[63] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4 November 2016.

[64] European Commission, 'Green Paper on Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention', COM(2011) 327, 14 June 2011, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0327&from=EN.

[65] European Parliament resolution on prison systems and condition, 2015/2062{INI), 5 October 2017, available at: https://www.europarl.europa.eu/doceo/document/TA-8-2017-0385_EN.html.

could have significant benefits to the long-term management of penitentiary systems. The European Parliament has repeatedly urged the Commission to take action to ensure that pre-trial detention remains an ultimate measure and is used consistently with the existing international and regional standards.

In December 2018, the Council of the European Union adopted its **Conclusions on 'Promoting mutual recognition by enhancing mutual trust'**[66] which encourages Member States to adopt legislation and to make use of alternative measures to detention in order to reduce the population in the detention facilities as well as enhance social rehabilitation. According to the draft conclusions, poor detention conditions, overcrowding and lengthy pre-trial detention can impair the application of the principle of mutual trust between the Member States.

In December 2019, the **Council of the European Union adopted its conclusions on alternative measures to detention**[67] in which Member States committed to taking several actions in the field of detention nationally, including the adoption of alternative measures to detention.

Issues concerning detention conditions and the overuse of pre-trial detention may also potentially impact a number of mutual cooperation and recognition instruments, including the **Council Framework Decision on the European Arrest Warrant,**[68] **Council Framework Decision** on the application of the principle of **mutual recognition to judgment and probation decision with a view to the supervision of probation measures and alternative sanctions**,[69] or the **Council Framework Decision** on the application between Member States of the European Union, of the principle of **mutual recognition to decisions on supervision measures as an alternative to provisional detention**.[70]

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[66] Council of the European Union, Council conclusions on mutual recognition in criminal matters, 'Promoting mutual recognition by enhancing mutual trust', OJ L C 449, 13 December 2018, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018XG1213%2802%29&qid=1681160528037.

[67] Council of the European Union, Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice, OJ C 422, 16 December 2019, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019XG1216%2802%29&qid=1681160826846.

[68] Council Framework Decision on the European arrest warrant and the surrender procedure between Member States, 2002/584/JHA, 13 June 2002, OJ L 190, 18 July 2002, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584.

[69] Council Framework Decision on the application of the principle of mutual recognition to judgment and probation decision with a view to the supervision of probation measures and alternativer sanctions, 2008/947/JHA, OJ L 337, 16 December 2008, available at: https://eur-lex.europa.eu/eli/dec_framw/2008/947/oj.

[70] Council Framework Decision on the application between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, 2009/829/JHA, OJ L 294, 11 November 2009, available at: https://eur-lex.europa.eu/eli/dec_framw/2009/829/oj.

In 2021, the Commission presented a **Non-paper on detention conditions and procedural rights in pre-trial detention**.[71] The aim was to identify and provide an overview of the relevant minimum standards for detention conditions and procedural rights in pre-trial detention resulting from existing international standards in order to achieve more convergence between MSs and strengthen EU judicial cooperation in criminal matters. The minimum standards for detention conditions and procedural rights in pre-trial detention have also the potential to avoid inhuman and degrading treatment as concerns the European Arrest Warrant ("EAW").

In particular, the minimum standards for material detention conditions as laid down by the Commission in the non-paper concern cell space, hygiene and sanitary conditions, time spent outside the cell and outdoors, access to healthcare and protection from inter-prison violence. The stem from the existing regional and international standards, including the **European Prison Rules**[72] which contain comprehensive guidance on the treatment of prisoners with the aim to promote and protect the fundamental rights of prisoners and the **United Nations Standard Minimum Rule for the Treatment of Prisoners (the Nelson Mandela Rules)**[73] which set out generally accepted good principles and practice for the treatment of prisoners and prison management. The standards for material detention conditions were also largely based on the available ECtHR case law on this issue.

The minimum standards for procedural rights in pre-trial detention are also set out in the Commission's non-paper and include requirements such as reasonable suspicion on grounds for pre-trial detention, using pre-trial detention as a measure of last resort, the availability and obligation to consider alternatives to pre-trial detention, including a reasoned decision on pre-trial detention by the judicial authorities when authorizing detention for a prolonged period of time, the access to a judicial authority for decision-making on pre-trial detention, regular review of pre-trial detention cases, hearing the pre-trial detainee in person, securing effective remedy and right to appeal, and deduction of time spent in pre-trial detention from the final sentence. Similarly to the minimum standards for material detention conditions, the Commission set out the minimum standards for procedural rights in pre-trial detention based on existing standards namely as derived from the ECHR (Article 5 requirements), the rich case law of the ECtHR ad the **Council of Europe's Recommendation on the use of remand in**

[71] European Commission, 'Non-paper on detention conditions and procedural rights in pre-trial detention', 12161/21, Brussels, 24 September 2021, available at: https://data.consilium.europa.eu/doc/document/ST-12161-2021-INIT/en/pdf.

[72] Council of Europe, Committee of Ministers, Recommendation Rec (2006)2 on the European Prison Rules, Strasbourg, 11 January 2006.

[73] UN General Assembly resolution 70/175, 'United Nations Standard Minimum Rule for the Treatment of Prisoners (the Nelson Mandela Rules)', 17 December 2015, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/443/41/PDF/N1544341.pdf?OpenElement.

custody, the conditions in which it takes place and the provision of safeguards against abuse.[74]

In October 2021, a debate was held in the Council of European Union's Justice and Home Affairs Working Group, including a discussion on pre-trial detention.[75] The MSs agreed to the notion that pre-trial detention is and should be used as a measure of last resort, highlighting the importance to use alternative measures to detention. However, the MSs considered that there is no need for a creation of an additional legal instruments at the EU level on minimum standards as these are sufficiently set out in the international legal framework, including the Council of Europe. The MSs encourage the Commission to take further action in respect of funding for the improvement of material detention conditions.

In December 2022, the European Commission adopted its **Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions**.[76] The aim of the Recommendation is to set out a guidance for MSs to take effective and appropriate as well as proportionate measures to strengthen the rights of all suspects and accused persons in criminal proceedings subjected to pre-trial detention. Hence, it consolidates standards under existing policies at international, regional and national level. In addition, the Commission also presented a **Non-paper** in the context of the adoption of the Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions,[77] which provides insight into to the divergencies between MSs in relation to the important aspects of pre-trial detention and material detention conditions.

According to the Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, the minimum standards for procedural rights of suspects and accused persons subject to pre-trial detention include the use of pre-trial detention as a measure of last resort and considering alternatives to detention. According to the Recommendation, the MSs should impose pre-trial detention only in cases where it is strictly necessary, reasonably justified and if no other measure of less

[74] Council of Europe, Committee of Ministers, Recommendation Rec (2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, 27 September 2006.
[75] Council of the European Union, 'Outcome of the Council Meeting', 12574/21, Brussels, 7 and 8 October 2021, available at: https://www.consilium.europa.eu/media/52344/st12574-en21.pdf.
[76] European Commission, 'Commission recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions', C(2022) 8987 final, Brussels, 8 December 2022.
[77] European Commission, 'Non-paper from the Commission services in the context of the adoption of the Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions', 15292/22, Brussels, 2 December 2022, available at: https://commission.europa.eu/system/files/2022-12/JHA%20Non-paper%20st15292%20en22.pdf.

restrictive nature would be sufficient to achieve the same aim. It encourages MS to make available the widest possible range of alternative measures:

- including undertakings to appear before a judicial authority when required
- engagement in the particular employment
- reporting on a daily or periodic basis to a judicial authority, police or other authority
- supervision by an agency appointed by a judicial authority
- electronic monitoring
- requirement of residing at a specified address
- requirements not to leave or enter specified places without authorization
- requirement not to meet specified persons without authorization
- requirements to surrender passports or other identification papers
- requirements of financial security or other form of guarantee.

Further minimum standards as set out by the recommendation on the procedural rights of suspects and accused persons in pre-trial detention concern the use of pre-trial detention only on the basis of a reasonable suspicion established through a careful case by case assessment, including a duly reasoning and justification of a pre-trial decision, the possibility of periodic review of pre-trial detention, the possibility of hearing of the suspect or accused person, ensuring the availability of effective remedies and the right to appeal, limiting the length of pre-trial detention and the possibility of deduction of time spent in pre-trial detention from the final sentence.

4 National case law and analysis of the state of play in the consortium members

4.1 National legal framework and list of existing alternatives to pre-trial detention

Pre-trial detention is a measure taken by authorities, meaning to ensure and safeguard the criminal procedure and to protect the public from potential harm. It's not intended as punishment due to the applicability of the presumption of innocence which indicates that a person accused of a crime is presumed innocent until proven guilty. Pre-trial detention is an instrument of the criminal procedure and as such is regulated by the main national legislation on the procedural aspects of criminal law – Criminal Procedure Code. Criminal Procedure Codes of the consortium states provide a range of non-custodial alternatives to pre-trial alternatives. This section looks into the current rules concerning the application of pre-trial detention and its alternatives across the consortium states.

4.1.1 Bulgaria

The Bulgarian law does not distinguish between detention in pre-trial and in trial proceedings. Detention is defined as a remand measure (*мярка за неотклонение*) and it applies only in the framework of instituted criminal proceedings and can be imposed only with respect to accused persons formally charged with a criminal offence.

In Bulgaria, pre-trial detention (remand in custody) and its alternatives are stipulated in Criminal Procedure Code as supervision measures.[78] There are two groups of supervision measures imposed on accused person depending on her/his age. Supervision measures that can be imposed on person of age over 18 years include beside remand in custody also mandatory reporting to the police; bail and house arrest. Supervision measures that can be imposed on accused underaged persons are following: supervision by parents or guardians; supervision by the administration of the correction facility where the minor is placed; supervision by the inspectorate of the Local Juvenile Delinquency Commission and remand in custody.

Under the Bulgarian Criminal Procedure Code pre-trial detention is imposed by the first instance court upon request of the public prosecutor. The public prosecutor is responsible

[78] Supervisions measures are laid down in Chapter Seven, Title II 'Supervision Measures and Other Coercive Measures' of Criminal Procedure Code.

for ensuring the appearance of the accused person before the court. To do that, the public prosecutor is authorised to order the detention of the accused person for a period of up to 72 hours. The court must hold a hearing on the public prosecutor's request immediately. The case is heard by a single judge in the presence of the public prosecutor, the accused person and their lawyer.

During the hearing the court examines the evidence collected so far and assesses the extent to which the prerequisites defined in the law are present. If the court concludes that these prerequisites are not present, it is authorised to impose a lighter remand measure or to decide not to impose any measure. Otherwise, the court issues a ruling for placing the accused person in pre-trial detention.

The ruling of the court is communicated to the parties during the same hearing and is immediately executed. The court is also obliged, when announcing its decision, to schedule a hearing before the second instance court within the next seven days in case the ruling is appealed by any of the parties involved. The accused person and the public prosecutor can appeal the court's ruling within three days, and this is the only available option for contesting the detention decision. The second instance court hears the case in a panel of three judges in the presence of the public prosecutor, the accused person, and their lawyer. The failure of the accused person to participate in the hearing without a valid reason does not prevent the court from holding the hearing and issuing a decision. The ruling of the second instance court is communicated to the parties during the same hearing and is final. The law does not provide for the possibility of appealing the detention decision to the Supreme Court of Cassation.

Once imposed, pre-trial detention is subject to regular judicial review. The procedure for reviewing pre-trial detention is laid down in Article 65 of the Criminal Procedure Code. The review is not automatic and takes place only upon the initiative of the accused person or their lawyer, who are authorised to request, at any time during the proceedings, the replacement of pre-trial detention with a lighter measure. The request is filed with the court through the public prosecutor, who is obliged to immediately forward the case to the competent court. The court schedules a hearing within three days of the receipt of the case file. The hearing takes place in the presence of the public prosecutor, the accused person, and their lawyer. The hearing takes place in the absence of the accused person if the accused person has declared that they do not want to participate or if the appearance of the accused person is impossible due to health reasons. The ruling of the court is communicated to the parties during the same hearing and is immediately executed. The court is obliged, when announcing its decision, to schedule a hearing before the second instance court within the next seven days in case the ruling is appealed by any of the parties involved. The court is also authorised to set a period of time, with a maximum duration of two months, during which the accused person and their lawyer cannot file another request for review of the pre-trial detention. The

ban on requesting a new review within the time period specified by the court does not apply when the new request is based on a deterioration of the health of the accused person. The accused person and the public prosecutor can appeal the court's ruling within three days. The rules and procedure for appeal are the same as the ones for appealing the ruling for imposing pre-trial detention.

The proceedings to determine or amend supervision measures are separate from the criminal proceedings that lead to a conviction and consider the alleged crime and the issue of the guilt of the perpetrator. Bulgarian judicial acts do not make a cross reference to the main criminal proceedings, and it is a different judicial panel that reviews supervision measures as compared to the one taking part in the main criminal proceedings. [79]

4.1.2 Croatia

In Croatia, Criminal Procedure Code (CCPC) [80] allows for these alternatives to pre-trial detention: release on bail; house arrest and precautionary measures.

The **bail**[81] represents the implementation of the principle of proportionality, which obliges the court not to impose pre-trial detention but replace it with a milder measure as soon as conditions that the purpose of pre-trial detention can be achieved with such a measure exist. The bail always amounts to a sum of money that is determined with regard to the gravity of the criminal offense, personal circumstances and the defendant's financial situation. If the court assesses that bail cannot replace pre-trial detention, it should specify the reasons for this conclusion. Along with bail, the court may determine one or more precautionary measures as a condition of the bail.

The Croatian Criminal Procedure Code allows for **house arrest**[82] in pre-trial stages of the criminal procedure. House arrest can be ordered in regard to pregnant woman, a person with physical disabilities that make it impossible and significantly difficult for them to move, a person who has reached the age of 70, and in those cases when the court deems it exceptionally justified, if for the purpose of pre-trial detention, it is sufficient to prohibit the defendant from leaving the house.

In the decision on house arrest the court can order the application of technical means for monitoring of the defendant and if necessary, the court can order a precautionary measure.

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[79] Pre-trial detention also differs from *police detention* which is not part of criminal proceedings. Police detention can be imposed by the police for a maximum of 24 hours on persons who are suspected of committing a crime but who have not been formally charged.

[80] Criminal Procedure Code (Official Gazette, No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 130 /20, 80/22).

[81] Article 102 of CCPC and Article 133 of Penal Code.

[82] Article119 CCPC

It was not until 1997 that the precautionary measures were introduced into the Croatian legislation.

Currently there are eleven **precautionary measures**[83] which can be imposed on individuals:

- prohibition to leave the residence,
- prohibition to leave a certain place or area,
- the obligation of the defendant to report regularly to a certain person or state body,
- prohibition of approaching a certain person, prohibition of establishing or maintaining a relationship with a certain person,
- prohibition to engage in a certain business activity, temporary seizure of a passport and other documents which serve to cross the state border,
- temporary revocation of a license to drive a motor vehicle,
- prohibition of stalking or harassment of the victim or another person,
- removal from home, internet access ban.

Through the principle of proportionality, the legislator themselves linked the purpose of pre-trial detention with precautionary measures, requiring the court to consider the application of precautionary measures whenever milder measures can be used to achieve the purpose of pre-trial detention.[84]

The Croatian Criminal Procedure Code stipulates the legal pre-conditions for imposing pre-trial detention. Pre-trial detention can only be imposed in the following cases:

- when the accused person is on the run or special circumstances point to the danger that he/she will run away (he/she is hiding, his/her identity cannot be established, etc.);
- special circumstances point to the fact that evidence important for the criminal proceedings will be destroyed hidden, changed, or falsified and therefore hinder the criminal proceedings (e.g., influencing witnesses, experts, etc.);
- special circumstances point to the risk of recurrence of criminal offenses;
- risk of committing a more serious crime for which, according to the law, it is possible to impose a prison sentence of five years or a more;
- pre-trial detention is necessary for the smooth development of proceedings for a criminal offense for which a long-term prison sentence is prescribed and in which the circumstances of the commission of the criminal offense are particularly serious**;**

[83] Article 98 CCPC

[84] In accordance with Article 98 of CPC: *" In case of circumstances set out in Article 123 hereof which warrant pre-trial detention, or if pre-trial detention has already been ordered, the court and the state attorney shall, if the same purpose can be achieved by a precautionary measure, order one or more of such measures by a ruling that includes statement of reasons. The accused shall be warned that, if he fails to comply with such measure, it shall be replaced by pre-trial detention."*

- the defendant who has been duly summoned avoids coming to the hearing.[85]

Upon receiving the request, the court reviews it and makes a decision based on the facts and evidence presented by the prosecutor. Certain legal prerequisites must be fulfilled in order for pre-trial detention to be imposed. The primary requirement is the presence of a well-founded suspicion that the accused has committed a criminal offense. In addition to the existence of a well-founded suspicion, the court must also ascertain the existence of valid grounds for imposing pre-trial detention. Such grounds may include the risk of the accused fleeing, the likelihood of reoffending etc. (detailed information on requirements of imposing pre-trail detention mentioned above).

The court thoroughly considers all relevant factors and safeguards the rights and interests of the accused before reaching a decision regarding pre-trial detention. Should the court determine that all legal criteria have been met, it may order pre-trial detention as a precautionary measure while the criminal proceedings are ongoing.

Throughout the entire duration of pre-trial detention, it is essential that both the existence of valid reasons and a well-founded suspicion are continuously present. The court has a duty to officially assess their existence during each extension of pre-trial detention. The court is obligated to inquire, during each re-examination, whether there are still grounds for prolonging the pre-trial detention of the accused.

The requirements for the content of the decision regarding pre-trial detention, as well as its extension, are precisely defined in Article 124 of the Croatian Criminal Code. Therefore, the decision on pretrial detention must include the information stipulated in Article 272, § 1, of the Croatian Criminal Procedure Code. This includes indicating if an investigation is underway, referencing the decision to initiate the investigation that served as the basis for the pre-trial detention decision, stating the legal grounds for pre-trial detention, specifying the duration of pre-trial detention, providing provisions for calculating the period of deprivation of liberty prior to the pre-trial detention decision, including the moment of arrest, indicating the amount of bail and the type of bail that can replace pre-trial detention.

The Croatian Criminal Procedure Code states that pre-trial detention shall be ended, and the detainee shall be released as soon as the grounds for pre-trial detention cease to exist.[86]

When deciding on pre-trial detention, especially regarding its term, the court shall take into consideration the proportionality between the gravity of the offence, the sentence which may be expected according to information available to the court, and the need to order and set the term of pre-trial detention. In exceptional cases pre-trial detention may be ordered

[85] Article 123 CCPC
[86] Article 122 § 1 CCPC

against a pregnant woman, a person with physical disability that prevents or substantially impairs mobility, or a person who reached the age of 70.[87]

In a case in which pre-trial detention has been ordered, the proceedings shall be conducted with particular urgency.[88]

Legal remedies and appeal procedures

The legal remedy against the decision on the determination or extension of pretrial detention is an appeal, of a non-suspensive nature, which is regulated by several provisions contained in different chapters of Criminal Procedure Code.

Thus, Croatian Criminal Procedure Code stipulates that an appeal against a decision, which does not stay its execution, and which determines, extends or cancels pre-trial detention, can be filed by the defendant, his defense attorney and the state attorney within three days of receiving the disputed decision.[89]

However, an appeal is not allowed against the decision of the panel of the second-instance court which determines, extends or cancels pre-trial detention. [90]

4.1.3 Greece

In Greece, restrictive conditions can be imposed during the pre-trial stage of the criminal proceedings if there are serious indications of guilt of the accused for a crime or offence punished with imprisonment of at least three months, if this is considered absolutely necessary to prevent the risk of commitment of new crimes and to ensure that the accused will be present at the investigation or trial and will be subjected to the execution of the decision, while both conditions have to be fulfilled.

The following non-custodial alternatives to pre-trial detention are offered by the Greek Criminal Procedure Code (GCPC):

- payment of bail (the temporary release from police custody or from prison of a person accused of a having committed a criminal offence and awaiting trial),
- reporting before the investigating judge or other authority,
- prohibition to leave or access specific place or exit ban from the country,
- prohibition to meet or associate with specific persons and
- restriction at home with electronic surveillance.

[87] Article 122 § 2 CPCC
[88] Article 122 § 3 CPCC
[89] Article 134 of the CCPC
[90] With exception of cases when the panel of that court is deciding according to Article 127 § 5 of the CCPC.

As specifically stipulated by the Criminal Procedure Code[91], the severity of the act is not in itself sufficient to justify pre-trial detention.[92]

The Greek Criminal Procedure Code requires the investigating judge to consider the restrictive measures before imposing pre-trial detention and give reasons why these were not sufficient.[93] Further, the accused can demand the repeal or substitution of restrictive conditions, while the prosecutor can consider this *ex officio*.

The accused has two procedural options for appealing against the order for pre-trial detention: a) to appeal against the warrant or the act of the investigating judge[94], and b) to request the release or the substitution of pre-trial detention or restrictive orders.[95]

The Greek Criminal Procedure Code provides for the repeal or substitution of pre-trial detention and other restrictive orders, if during the investigation it arises that the specific reason for which detention or restrictive orders were imposed no longer exists. The investigating judge can *ex officio* or upon proposal from the prosecutor raise these measures or submit a request to the Judicial council for their repeal. The pre-trial detainee can apply on his/her own initiative for an alternative to pre-trial detention to the investigating judge. This can take place at any time during the investigation without any limitation. The defendant can appeal against the order of the investigating judge on the continuation, repeal, or replacement of detention, to the Judicial Council[96] within ten days from the day the order was promulgated. The application of the accused can request the repeal of restrictive measures, the replacement of pre-trial detention with restrictive measures or the replacement of the restrictive measures imposed with others.[97]

The investigating judge, upon a written opinion of the prosecutor, can with a reasoned order replace pre-trial detention with less restrictive conditions, or the latter with pre-trial detention.[98] In the latter case, the investigating judge issues an arrest warrant. When detention is based on a warrant by the investigating judge, the accused can challenge the decision imposing restrictive conditions or pre-trial detention before the council of misdemeanor judges within ten days from the start of the pre-trial detention. The appeal

[91] Article 286 § 1 GCPC

[92] According to Article 286 § 2 GCPC in extremely exceptional circumstances, and if it can be established that restrictive conditions are not sufficient, pre-trial detention can be imposed also for the misdemeanour of serial negligent manslaughter, if the accused is likely to flee. In this case, the maximum limit of detention is six months.

93 Article 282 § 3 GCPC

94 Article 290 GCPC

95 Article 291 § 2 GCPC

[96] The Judicial Council is composed by three judges, the president and two others.

97 Article 291 GCPC

[98] Article 296 GCPC

does not suspend the execution of the order. If the decision on pre-trial detention was issued by the judicial council upon disagreement between the investigating judge and the prosecutor, no appeal is possible.[99]

4.1.4 Poland

The Polish Criminal Procedure Code (PCPC) recognises following alternatives to pre-trial detention:

- a property guaranty (bail); a social guarantee;
- guarantee of a trustworthy person;
- police supervision or supervision of the superior in a military service;
- order to leave premises;
- suspension in the execution of duties, restraining order,
- ban on contacting and publishing order concerning a member of the medical staff or persons to assist them and prohibition to leave the country.

A property guarantee (bail)[100]

Bail, consisting of money, securities, pledge, or mortgage may be posted by the accused or by another person.

A social guarantee[101]

A guarantee that the accused will appear whenever summoned and will not obstruct the proceedings in any unlawful way may be accepted, at their request, from the employer of the accused, the management of the school or higher educational establishment, of which the accused is a student, from the collective, where the accused studies or works or from a community organisation, of which the accused is a member. If the accused is a soldier, the guarantee may be granted by a group of soldiers, through the relevant commanding officer.

Guarantee of a trustworthy person[102]

A guarantee that the accused will appear at every summons and will not obstruct the proceedings in any unlawful way may also be given by a trustworthy person.

Police supervision or supervision of the superior in a military service[103]

[99] The procedure for challenging decisions on pre-trial detention is stipulated in Article 290 of GCPC
[100] Article 266 § 1 PCPC
[101] Article 271 § 1 PCPC
[102] Article 272 PCPC
[103] Article 275 § 1 PCPC

As a preventive measure, the accused may be placed under the supervision of the Police, and if the accused is a soldier, except for soldiers of territorial military units performing service in dispositional manner - under the supervision of his commanding officer.

Order to leave premises[104]

As a preventive measure, the accused charged with a violent offence committed against a member of their household may be obliged to leave, for a certain period of time, the premises occupied together with the aggrieved party, if there is a justified concern that the accused will commit a violent offence against this person again and in particular if he threatened to do so.

Suspension in the execution of duties[105]

As a preventive measure, the accused may be suspended in the execution of their official or professional duties or ordered to refrain from a certain activity or from driving vehicles of a certain type or prohibited from participating in public procurement procedures for the period of duration of the proceedings.

Restraining order, ban on contacting and publishing order concerning a member of the medical staff or persons to assist them[106]

As a preventive measure, it is possible to order the accused of a crime committed in relation to a member of the medical staff in connection with the performance of medical care activities or a person adopted by the medical staff to assist in the performance of these activities, a ban on approaching the victim at a specified distance, a ban on contacts or prohibition of publication, including via IT systems or telecommunications networks, of content that is detrimental to the legally protected interests of the aggrieved party.

Prohibition to leave the country[107]

If there is a justified concern that the accused might escape, a preventive measure consisting of a prohibition to leave the country may be ordered. This prohibition may be connected with a seizure of a passport or other document authorising the accused to cross the border, or with the refusal to issue such a document.

In Poland, pre-trial detention and alternatives to pre-trial detention may be applied in order to ensure the correct course of proceedings and, exceptionally, in order to prevent the accused from committing a new serious offence. They may be ordered only if, according to

[104] Article 275a § 1 PCPC
[105] Article 276 PCPC
[106] Article 276a § 1 PCPC
[107] Article 277 § 1 PCPC

the evidence already collected, it is highly probable that that the accused committed the offence.[108]

The Criminal Procedure Code regulates that pre-trial detention is not ordered if a different preventive measure is sufficient.[109]

The Criminal Procedure Code also stipulates the categories of offences where pre-trial detention cannot be ordered as it states that preliminary detention cannot be imposed, if the offence carries the penalty of deprivation of liberty not exceeding one year.[110]

In Poland pre-trial detention and alternatives to pre-trial detention may be applied if there is a justified concern that the accused person might escape or go into hiding, especially if his/her identity cannot be established or this person does not have a permanent place of residence in the country, the accused person might try to persuade others to give false testimonies or explanations or obstruct the proceedings in any other unlawful way.[111]

If the accused is charged with a summary offence carrying a penalty of imprisonment with a maximum tariff of at least eight years, or when a court of lower instance passed a sentence of imprisonment of no less than three years, the need to apply pre-trial detention in order to secure the proper course of proceedings may be justified by the severe punishment that the accused faces.[112]

Pre-trial detention is ordered upon the motion of the prosecutor by the district court in whose judicial district the proceedings are conducted, and in urgent cases also by another district court. After the indictment was lodged, detention on remand is ordered by the court before which the case is being heard. [113]

The motion to order pre-trial detention specifies evidence indicating a high probability that the accused committed the offence, circumstances indicating the existence of threats to the correct course of proceedings or the possibility that the accused may commit a new, serious offence; or determined grounds for the application of this preventive measure and its necessity.[114]

[108] Article 257 § 1 PCPC
[109] Article 257 § 1 PCPC
[110] Article 259 § 3 PCPC
[111] Article 258 § 1 PCPC
[112] Article 258 § 2 PCPC
[113] Article 250 § 2 PCPC
[114] Article 250 § 2a PCPC

In case of a justified concern of a danger to the life, health, freedom of a witness or his next of kin, the prosecutor attaches witness' testimonies to the motion as a separate set of documents, not available to the accused or his defence counsel.[115]

The prosecutor, sending the motion together with the case files, instructs the accused of his rights in case of application of detention on remand and at the same time orders that he be brought to the court.[116]

In Poland the alternatives to pre-trial detention can be also imposed by the prosecutor. [117]

Before a preventive measure is ordered (both pre-trial detention and the alternatives) the court or the prosecutor examines the accused, unless it is not possible to do so due to the fact that the accused is in hiding or staying out of the country. Defence counsel appointed by the accused should be allowed to participate in the examination, if he/she appears. It is not obligatory to notify the defence counsel of the date of the examination, unless the accused requests so and this will not obstruct the proceedings. The prosecutor is notified of the date of the examination by the court.[118]

The decision to apply a preventive measure (both pre-trial detention and the alternatives) should indicate the person, the charges against him/her, legal qualification of the offence and grounds for the application of the preventive measure.[119] The statement of reasons for the decision concerning the application of a preventive measure should present evidence indicating the perpetration of the offence by the accused, specify circumstances indicating the existence of threats to the correct course of proceedings or the possibility that the accused may commit a new, serious offence if the preventive measure is not imposed, or determined grounds for the application of this preventive measure and the need for its application. In the case of detention on remand, it should also be clarified why the application of a different preventive measure was not sufficient.[120]

The court consider restrictive conditions before imposing pre-trial detention and give reasons why these were not sufficient. The decision on pre-trial detention should specify its duration and indicate the date, up to which the detention is to be ordered. The obligation of indicating the term of the application of detention on remand persists until the judgment ending the proceedings becomes final.[121]

[115] Article 250 § 2b PCPC
[116] Article 250 § 3 PCPC
[117] Article 250 § 4 PCPC
[118] Article 249 § 3 PCPC
[119] Article 251 § 1 PCPC
[120] Article 251 § 3 PCPC
[121] Article 251 § 2 PCPC

Legal remedies and appeal procedure

A decision concerning preventive measures is subject to appeal in accordance with the Polish Criminal Procedure Code.[122] Its objective is to secure the review of the lawfulness of pre-trial detention at any given time in the proceedings, both in their pre-trial and trial stage, and to obtain release if the circumstances of the case no longer justify continued detention

The Polish Criminal Procedure Code stipulates that a preventive measure should be immediately annulled or changed, if the reasons for its application ceased to exist or such circumstances arose that justify its annulment or change.[123]

In preparatory proceedings, a preventive measure ordered by the court may be annulled or changed to a more lenient one by the prosecutor.[124]

Notwithstanding the above, the accused may at any time submit a request to annul or change a preventive measure. The request is considered within three days at the latest by the prosecutor and, after the indictment was filed with the court, by the court before which the case is in progres.[125] [126]

In preparatory proceedings, the court ordering pre-trial detention defines its duration for a period not exceeding three months. If due to the extraordinary circumstances of the case it proves impossible to conclude preparatory proceedings within the time limit upon the request of the prosecutor the court of first instance competent to hear the case may, if necessary, extend detention on remand for a period, whose total duration may not exceed twelve months. The total period of pre-trial detention until the first judgment is issued by the court of first instance may not exceed two years. An extension of the period of pre-trial detention for a defined period exceeding the periods defined earlier may be ordered by the court of appeal in whose circuit the proceedings are conducted, at the request of the court before which the case is being heard. In preparatory proceedings, it can also be extended at the request of the competent prosecutor directly superior to the prosecutor conducting or supervising the inquiry, if such a need arose in connection with the suspension of criminal proceedings, actions aimed at establishing or confirming the identity of the accused, the performance of evidentiary procedures in a particularly complicated case or abroad, or if the accused intentionally protracts the proceedings.[127]

[122] Article 252 § 1 PCPC
[123] Article 253 § 1 PCPC
[124] Article 253 § 2 PCPC
[125] Article 254 § 1 PCPC
[126] Article 254 § 2 PCPC
[127] Article 263 PCPC

Extension of pre-trial detention orderes by the court of appeal, is not applied with reference to the time limit of 12 months, if the penalty, which can be effectively imposed on the accused for the offence, with which the accused is charged, will not exceed three years of imprisonment, and with reference to the time limit of the 2 years, if it will not exceed five years of imprisonment, unless the need for extension is a result of purposeful protracting of the proceedings on the part of the accused.

An application to extend the period of pre-trial detention is filed with the competent court together with the case files, not later than 14 days before the expiry of the current period, for which the pre-trial detention was ordered.

If it is necessary to order detention on remand after the first judgment was issued by the court of first instance, each extension may not exceed a period of six months.

4.1.5 Slovakia

The Slovak Criminal Procedure Code (SCPC) limits the range of cases for applying pre-trial detention.[128] An accused shall only be remanded in custody if the currently ascertained facts suggest that the act for which the criminal prosecution was initiated had been committed, if this act has the elements of a criminal offence, if there are grounds for suspicion that the act was committed by the accused, and finally if based on the actions of the accused and further specific facts there is a reasonable fear that:

- accused will flee or hide, to avoid criminal prosecution or punishment, in particular if his/her identity cannot be immediately determined, if he/she does not have a permanent residence, or if he/she is facing a severe penalty,
- accused will try to influence the witnesses, experts, co-accused or that he/she will otherwise obstruct the clarification of facts important to the criminal prosecution, or
- accused will continue in the criminal activity, complete the criminal offence which he/she attempted, or commit a criminal offence that he/she premeditated or had threatened to commit,
- and if, considering the character of the accused, the nature or gravity of the offence for which he/she is prosecuted, it is not possible at the time of deciding on pre-trial detention to substitute pre-trial detention with the alternatives to pre -trial detention.

Article 80 and Article 81 of the Slovak Criminal Procedure Code stipulate cases in which the accused may be released pending trial and set out the alternatives to pre-trial detention which include:

[128] Article 71 SCPC

- replacement of pre-trial detention by a guarantee of a trustworthy person or an interest association of citizens. Pre-trial detention may be replaced by a guarantee of a trustworthy person or interest association of citizens. This means that they offer their guarantee for the further actions of the accused. They guarantee that the accused will appear before the police officer, the prosecutor or the court when invited and that he/she always notifies the police officer or prosecutor or court in advance of his/her departure from the place of residence. This alternative is imposed if the court or in the pre-trial proceedings the judge for the preliminary hearing, consider the guarantee to be sufficient considering the accused and the nature of the case.[129]
- a written promise of the accused. Pre-trial detention may be replaced if the accused gives a written promise to lead an orderly life, in particular not to commit any criminal activity and to comply with the obligations and limitations imposed on him/her, and the court or, in the pre-trial proceedings, the judge for the preliminary hearing, considers the promise sufficient in view of the accused and the nature of the case;[130]
- replacement under the supervision of a probation and mediation officer or a financial guarantee (bail, deposit). Pre-trial detention may be replaced when the purpose of detention may be achieved by the supervision of the accused by a probation and mediation officer or by transferring supervision of the accused to another Member State of the European Union under a special regulation.[131]

If the judge for the preliminary hearing or the court decided that the accused shall be left at liberty, or that they shall be released from custody, to strengthen the purpose that could otherwise be reached through custody, the authority deciding on the custody may simultaneously impose one or more appropriate restrictions or obligations, in particular:

- a ban on travel abroad,
- a prohibition on engaging in an activity in which a criminal offence was committed,
- a ban on visiting certain places,
- an obligation to surrender a legally possessed weapon,
- a prohibition to leave the place of residence except for the cases with defined terms,
- an obligation to regularly attend a public authority appointed by the court,
- a driving ban and surrender of the driving license,
- a prohibition to contact specific persons or a prohibition of intentional approach to certain persons from a distance of less than five meters,
- the obligation to pay the funds to recover compensatory damages,

[129] Article 80 § 1(a) SCPC
[130] Article 80 § 1 (b) SCPC
[131] Article 80 § 1 (c) SCPC

- prohibiting or restricting contact with a determined person, including any contact by means of an electronic communications service or other similar means,
- a ban on staying near the home of the determined person or in a place where this person is staying in or a place this person is visiting. [132]

The judge for the preliminary hearing shall, upon petition of the public prosecutor, the accused or a probation and mediation officer, revoke or change the obligations and restrictions and, in proceedings before the court, the court can do so even without such petition. The same shall apply to the granting of an exemption from the imposition of proportionate obligations or restrictions for the time necessary when control by technical means has been ordered. [133] The fulfilment and control of obligations or restrictions imposed is carried out by a court-appointed probation and mediation officer.[134]

If one of these obligations is imposed as an alternative to pre-trial detention and is subsequently breached, the judge must reconsider whether pre-trial detention is necessary (i.e., it is not imposed automatically). The judge decides if there is a need to dismiss the alternatives to pre-trial detention (no specific requirements needed). The judge decides upon individual case, and it depends on which type of alternatives to pre-trial detention was ordered.[135]

The maximum length of pre-trial detention period that can be imposed, as well as the reasons for extending detention and the moment from when new detention period starts to count is established by the SCPC. In regard to the maximum length of pre-trial detention[136] the periods below apply:

- 7 months for misdemeanours.
- 19 months for felonies.
- 25 months for particularly serious crimes.

In Slovakia a complaint against a decision on imposing a pre-trial detention is admissible.[137] However, complaint shall not be allowed if pre-trial detention was imposed by a court of appeal or the court of the last appeal, unless otherwise provided by SCPC.

132 Article 82 § 1 SCPC
133 Article 82 § 2
134 Article 82 § 3
135 Article 80 § 3 and Article 81 § 3 and § 4 of the SCPC
136 Established by Article 76 § 6 and 7
137 Article 83 § 1 of the SCPC

The complaint shall not have suspensive effect.[138] It must be filed within three days of receiving notification by the court that issued the order on pre-trial detention.

Under the SCPC the court informs the Ministry of Justice of all decisions relating to pre-trial detention.[139]

The last appeal, as an extraordinary remedy, against the decision on appeal may be lodged by the Minister for Justice.

4.2 Statistical data

The percentages of pre-trial detainees in the consortium states vary from 36,3 % to 12,8 % of the total prison population (from Croatia with the highest rate of 36,3% to Poland with the lowest rate of 12.8%).

4.2.1 Bulgaria

On 1st of March 2023 there were 10 047 persons in Bulgarian prisons, **while pre-trial detainees made up 14.2% of the total prison population**. In 2021, pre-trial detainees made up 20,9% of the total prison population in Bulgaria.[140] According to *Report on the implementation of the law and on the activities of the prosecution and investigative bodies* prepared by the Prosecutor's Office of the Republic of Bulgaria in 2021 pre-trial detention was taken against 2962 people, while 313 persons were under house arrest. In 2020 pre-trial detention was taken against 3313 people and 408 persons were under house arrest. In 2019 there were 3061 pre-trial detainees, while 315 persons were under house arrest. The year before, in 2018, pre-trial detention was taken against 2946 people and 309 persons were under house arrest. The exploratory study "*Rights of suspects and accused persons who are in pre-trial detention*" states that the average cost of pre-trial detention in Bulgaria in 2020 was 5.7 Euro per day.

Total number of adults subject to alternative measures to pre-trial detention in Bulgaria[141]:

[138] Article 508 of the SCPC specifies that the complaint which does not have suspensive effect is admissible against a decision on provisional pre-trial detention under Article 505 of the SCPC, decision on extradition pre-trial detention according to Article 506 § 1 of the SCPC and a decision on pre-trial detention stipulated by Article 507 of the SCPC.

[139] Article 508 § 2 SCPC

140 According to World Prison Brief, Institute for Crime & Justice Policy Research. Available at: //www.prisonstudies.org/country/bulgaria

141 Rights of suspects and accused persons who are in pre-trial detention (exploratory study). Annex 2, Country fiches - Publications Office of the EU (europa.eu) https://op.europa.eu/en/publication-detail/-/publication/ea3cc139-6955-11ed-b14f-01aa75ed71a1/language-en

- 2020: 1689
- 2019: 1294
- 2018: 1376

According to the most recent statistics, provided by the Bulgarian Ministry of Justice, Directorate General "Execution of Punishments", as per 22.06.2023, the total number of detainees subject to the pre-trial detention remand measure is 1043. The daily sustenance per detainee is calculated to be approximately 4.70 EUR for a total of 4, 902.1 EUR at this point in time. The sustenance includes but is not limited to the following costs: nutrition, electricity, water, and wages. The total number of detention facilities in Bulgaria is currently 1288.

4.2.2 Croatia

As at 8th of July 2022 there were 3 955 prisoners in custody in **Croatia**, while pre-trial detainees made up 32.3% of the total prison population.[142] In 2021, 36,3% of Croatia's prisoners were pre-trial detainees.[143] As reported by the Croatian Ministry of Justice 5,335 pre-trial detainees were placed in pre-trial detention during 2021.[144] In comparison to 2020: a slight increase of 4.2% has been established. Further statistics show that 104% of the prison system was occupied on 31 December 2021, which represents an increase over the previous year and confirms prison overcrowding. Average cost per detainee per day in 2020 in Croatia was 55,4 Euro.

4.2.3 Greece

The Council of Europe's annual SPACEI2021 report on prisons[145] reveals that the average pre-trial detention rate among all prisoners in **Greece** was 30% over the past decade, while in 2021 one in four pre-trial prisoners were detained for longer than a year. The report also shows that on 31 January 2021, out of a total of 11,334 prisoners in Greek prisons, 2,669 were in temporary custody (23.5%), with an average duration of pre-trial detention of 13.2 months.

142 https://www.prisonstudies.org/country/bulgaria

143 Non-paper from the Commission services in the context of the adoption of the Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention condition. Available at: https://op.europa.eu/en/publication-detail/-/publication/ea3cc139-6955-11ed-b14f-01aa75ed71a1/language-en

144 Report on the condition and operation of penitentiaries, prisons and correctional institutions for 2021; The Croatian Ministry of Justice.

145 Council of Europe Annual Penal Statistics – SPACE I 2021. Available at: https://wp.unil.ch/space/files/2022/12/SPACE-I_2021_FinalReport.pdf

Average cost spent per day for the detention of one detainee in Greece was 28 Euro per day.[146]

4.2.4 Poland

According *to Non-paper from the Commission services in the context of the adoption of the Recommendation (EU) 2023/681 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions*[147] **in 2021 12,8% of Poland's prisoners were pre-trial detainees.** Based on statistical data published by the National Public Prosecutor's Office, the number of persons in pre-trial detention in Poland has gradually increased over last 5 years. According to data provided by National Public Prosecutor's Office police supervision has been the prevailing preventive measure for last 5 years.

Total number of adults subject to alternative measures to pre-trial detention in Poland[148]:

- 2020: 96 047
- 2019: 97 865
- 2018: 87 728

Cost of pre-trial detention per detainee per day in Poland[149]:

- 2018 – ca. 26,90 EUR,
- 2019 – ca. 28,21 EUR,
- 2020 – ca. 29,20 EUR.

4.2.5 Slovakia

On 1st March 2023 there were 10 047 prisoners in Slovakian prisons. Occupancy level of the prison system was 86.9%. Pre-trial detainees made up 14.2% of the total prison population.[150] This is only a small decrease compared to 2021, when pre-trial detainees

146 Non-paper from the Commission services in the context of the adoption of the Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions

147 Non-paper from the Commission services in the context of the adoption of the Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions. Available at: JHA Non-paper st15292 en22.pdf (europa.eu)

Rights of suspects and accused persons who are in pre-trial detention (exploratory study). Annex 2, Country fiches

149 Rights of suspects and accused persons who are in pre-trial detention (exploratory study). Annex 2, Country fiches

150 Slovakia | World Prison Brief (prisonstudies.org). Available at: https://www.prisonstudies.org/country/slovakia

made up 15,4% of all prisoners in Slovakia[151] and to 2020, when pre-trial detainees made up 15,5% of the total prison population.[152] World Prison Brief Data shows that the prison population has long been on an upward trend in Slovakia and rose sharply, from 6,941 prisoners in 2000 to 10 047 in 2023.

Total number of adults subject to alternative measures to pre-trial detention in Slovakia[153]:

- 2020: 620
- 2019: 672
- 2018: 637

Cost of pre-trial detention per detainee per day in Slovakia:

- 2020 – 56,60 EUR
- 2019 – 50,36 EUR
- 2018 – 46,03 EUR

4.3 National case law – examples of key cases provided by project team members – brief overview

4.3.1 Bulgaria

On national level **Bulgaria** mentioned **Ruling No. 179 of 21st of March 2019** in **case No. 149/2019** of the Plovdiv Court of Appeal. The case concerned an accident that led to the death of one person and caused bodily injuries to another. **The accused person who had caused the accident was imposed with a house arrest by the first instance court.** The grounds for imposing house arrest were appealed. The Court of Appeal discussed the grounds for imposing house arrest. The prerequisites for imposing this supervision measure were (1) that charges were pressed for a grave criminal offence punishable with imprisonment; (2) there was a reasonable suspicion that the accused person was the perpetrator; and (3) there is a risk of absconding and/or committing another crime. The Court

151 Non-paper from the Commission services in the context of the adoption of the Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention condition.
152 Rights of suspects and accused persons who are in pre-trial detention (exploratory study). Annex 2, Country fiches - Publications Office of the EU (europa.eu). Available at: https://op.europa.eu/en/publication-detail/-/publication/ea3cc139-6955-11ed-b14f-01aa75ed71a1/language-en
153 Rights of suspects and accused persons who are in pre-trial detention (exploratory study). Annex 2, Country fiches - Publications Office of the EU (europa.eu). Available at: https://op.europa.eu/en/publication-detail/-/publication/ea3cc139-6955-11ed-b14f-01aa75ed71a1/language-en

of Appeal found the first-instance court decision contradictory. Stating that none of the risks is present, the district court, contrary to its own finding and to the law, imposed "house arrest", a supervision measure of identical gravity as pre-trial detention. If the court was of the opinion that there was no risk of absconding or committing another crime, it could refrain from imposing any supervision measure which the law allows. Instead, it refused to impose bail justifying this decision with the accused person's lack of financial means and imposed house arrest justifying this decision, contrary to the law, with the fact that the accused person "*having committed a grave intentional crime, although committed recklessly*". The Court of Appeal held that the collected evidence did not indicate any risk of committing another crime (clean record, age, poor health, and good personal characteristics of the accused). Nevertheless, the Court of Appeal found that there was still a risk of absconding. "*In the context of the national and European case-law, this risk is premised on the public danger of the act and the lethal result, as well as on the punishment envisaged for such a crime in the law.* ***Despite the existing risk of absconding, this court finds its intensity minimum and is of the opinion that regulatory reporting to the police will sufficiently guarantee the objectives of Article 57 CPC, namely, to ensure timely and smooth proceedings with the participation of the accused person, ruling out every risk of absconding*****". Thus, the Court of Appeal repealed the lower instance court ruling whereby house arrest was imposed on the accused person and imposed instead regular reporting to the police.** The prosecutor upheld the request of the accused person for amending the supervision measure. Main conclusions from the judicial decision were that pre-trial detention should be seen as a measure *ultima ratio*. As the likeliness of the severe punishment states a premise of provisional detention, it should be treated carefully and reasonably, with deep assessment of the case (e.g. if the stage of the proceedings requires the detention of a suspect).

Another case mentioned by Bulgaria was **criminal case No. 133/2022 of the Appellate Specialised Criminal Court.** The case concerned smuggling of foreigners from Turkey into Bulgaria committed by an organized crime group. By ruling of 2nd of March 2022, the first instance Specialised Criminal Court imposed pre-trial detention upon the first and the second accused persons. **By ruling of 10th of March 2022 the Appellate Specialised Criminal Court amended partially the first ruling and replaced the pre-trial detention of the third accused person with house arrest.** The Court of Appeal considered the prerequisites for imposing the respective supervision measures (pre-trial detention in relation to the first two accused persons and house arrest in relation to the third accused person). It agreed with the lower instance court that there was no risk of absconding since all of the accused persons identified, were registered at an address, and socially and family involved. The Court of Appeal then reviewed the risk of committing another offence, which it believed to have lessened due to the period served in detention/house arrest. The court specifically pointed out that the

prosecutor and investigating officers have failed to comply with Article 22 CPC (which required them to ensure that pre-trial proceedings were conducted within the time frames envisaged in the CPC) and have not diligently investigated the alleged offence with a view to the timely completion of the pre-trial proceedings. The Court of Appeal then reviewed the supervision measures imposed on the first two accused persons. It considered their criminal record: the first accused person has been sentenced for the same crime (smuggling) to 10-month imprisonment suspended for three years and a fine; the second accused person has been sentenced for an offence against the transport to four-month imprisonment suspended for three years and thus the current allegations concern an offence committed during the suspension of the first sentence. **Thus, the Court of Appeal concluded that the risk of re-offending in relation to the first and second accused persons may be overcome by imposing house arrest, which is the proportionate supervision measure in this case. As regards the third accused person, the Appellate Specialised Criminal Court overturned the lower court ruling and amended the imposed supervision measure 'house arrest' to bail to the amount of BGN 6 000. The court pointed to the clear criminal record and poor health condition of the accused person.** Taking into consideration the gravity of the charges pressed (organized crime group smuggling migrants from Turkey), the Court of Appeal imposed a bail as the 'adequate supervision measure'. The court pointed out that the amount of the bail should be such that the accused person would perceive the possible loss of the money failing to appear in court as a substantial one and thus be motivated to lawful procedural behaviour. Thus, **the amount of the bail should not pursue an excessive burden for the accused person, respectively be connected with strenuous property restrictions, but either wise it should not be too low or determined solely in accordance with the property status neglecting the other circumstances set forth in Article 56, § 3 CPC, including the seriousness of the alleged offence.** (Article 56, § 3 CPC stipulates that supervision measures shall be imposed taking into account the public danger of the alleged offence, the evidence against the accused person, their health condition and family status, professional occupation, age and other personal data about the accused person.)

In **Resolution No. 152 of 27.07.2021 under the Case No. 303/2021 of the Appellate Specialized Criminal Court.**, three persons were accused of leading and participation in an organized crime group and extortion accompanied by beating, in complicity with other persons in execution of a decision of the organized crime group; **The appellate proceedings were instituted on the occasion of a private protest filed against the protocol decision, which amended the pre-trial measures of remand from "House Arrest" to "Bail" in the amount of 10,000 BGN for one of the defendants; and from "Pre-Trial Detention" to "House arrest" for the other two.** The Appellate Specialized Criminal Court shared that the conclusion of a reasonable presumption of complicity of each of the three appellants in the

crimes appearing in the filed indictment, for which the law provides punishment with deprivation of liberty, remained valid. The first-instance court's reasoning for easing the procedural situation of each of the three was based on the finding of a reduced intensity of the danger of future criminal behavior given the "duration of detention", the overall good faith behavior, and additionally for one of the defendants – information of personal nature concerning health problems of a close relative. Social isolation in the conditions of pre-trial detention and in domestic conditions has been going on for 11 months already, which circumstance in itself is new and necessitates a review of the question of the appropriate measure of restraint at this point in the development of the criminal proceedings. Due to the assessment of these circumstances, the second-instance court was led to the conclusion of the need to change the applied measures for procedural coercion, in which direction the first-instance court has also ruled. In the view of the above, **the appellate court found that the determined pre-trial measures of remand were properly individualized, proportionate and expedient, without disturbing the balance between the public interest and the rights of the specific defendants. Meanwhile, the additional alleviation of the situation of one of the defendants would be an expression of unwarranted condescension. In addition, according to the Appellate Specialized Criminal Court, the placement of two of the defendants under "house arrest" should also be controlled by means of electronic monitoring,** which required supplementing the ruling of the first instance court in this sense.

Ruling No. 13 of 05.10.2021 of the Constitutional Court of the Republic of Bulgaria under constitutional case No. 12 of 2021 (on the unconstitutionality of aspects of the pre-trial remand detention measure). The constitutional case was initiated at the request of the Ombudsman of the Republic of Bulgaria to establish the unconstitutionality of the provision of Article 64, § 2, ex. second of the Code of Criminal Procedure (CPC). The disputed provision allowed the participation of the accused by video conference in the proceedings before the court for taking a measure of permanent detention in custody in the pre-trial proceedings. According to the Ombudsman, the provision contradicted the constitutionally guaranteed right of defense of every citizen in connection with the right of defense in all stages of the process, the right not to be subjected to torture, cruel, inhuman or degrading treatment and the right to personal liberty and security. The Ombudsman referred to Article 5, § 3 of the ECHR for the Protection of Human Rights and Fundamental Freedoms, on Article 9, § 3 of the International Covenant on Civil and Political Rights and the practice of the European Court of Human Rights and the Committee on Human Rights on their interpretation and application. The Ombudsman claimed that although the Constitution does not expressly mention the requirement that those detained on criminal charges be immediately brought before the court, it should be considered as an inalienable part of the very right to personal liberty and security proclaimed by the Constitution. The Constitutional Court accepted that

the core of the nature of communication between the accused and their defense counsel could be significantly affected, because of that this provision was not in accordance with the law and as such should be declared unconstitutional. The appealed provision did not correspond to the Constitution in another aspect as well, as it limited the accused's right to effective personal defense. Due to remote participation through a video conference connection, the accused would be deprived of the opportunity to fully familiarize themselves with this evidence and, based on it, make independent requests, remarks and objections. This significantly could reduce the effectiveness of personal defense of accused in this proceeding and makes it formal and illusory. In view of the above, **the Constitutional Court finds that the provision attacked by the Ombudsman contradicted the Constitution, which was why it is declared unconstitutional.**

4.3.2 Croatia

Croatia provided information about **the case NR: U-III/3023/2021**[154] The applicant brought complaint before the Constitutional Court. The trial started on the 17th of May 2021 and ended on the 21st of December 2021. The applicant – mother of a six-month-old child - was arrested on the 19th of February 2021. The State Attorney decided to investigate the applicant for criminal offenses (human trafficking). A one-month pre-trail detention order was imposed by the investigation judge of the County Court. After the indictment was filed, the applicant's pre-trail detention was extended. The reason for extension was danger of re-offense. The applicant complained about the imposition of this pre-trial detention. The applicant objected that the Court did not take into consideration the impact of the extension of the pre-trial detention of the applicant, who was mother of a six-month-old child, whom the applicant was breastfeeding. The outcome of the case was that the competent courts failed to assess the purpose of restricting liberty. As a mother of a six-month-old nursing child, sufficient care should have been taken into account. The case should have been assessed to see if it is possible to determine pre-trial detention in home stated in Article 119 § 1.

The case of **NR: U-III/5976/2022**[155] started on the 19th of October 2022 and ended on the 8th of November 2022. The applicant was arrested on the 3rd of December 2021 and has been in pre-trial detention since then. The applicant was suspected of committing criminal acts of public incitement to terrorism. Indictment was filed on the 30th of March 2022. On the 25th of July 2022 there was an extension of the precautionary measure. The applicant has previously been convicted, in 2016 for the criminal offense of illegal possession, manufacture and acquisition of weapons and explosive substances and sentenced to 6 years of imprisonment. The applicant continued with his illegal behavior even while in pre-trial detention. According

[154] https://www.iusinfo.hr/sudska-praksa/USRH2021B3023AIII
[155] https://www.iusinfo.hr/sudska-praksa/USRH2022B5976AIII

to the court no other option than pre-trail detention was given in this case. The applicant stated in his complaints that the first-instance panel "*acted extremely uncritically with the evidence*" when making its decision. The indictment was based on an unacceptable attitude. Additionally, they did not explain why they believe the evidence presented was sufficient to establish a well-founded suspicion of criminal activity. The applicant stated that his earlier conviction cannot be used as a basis for extending his pre-trial detention. Crimes are not the same, not even similar. He also stated that he was wronged by the accusation of "*continuing illegal activities even during his stay in the pre-trail detention*". He was just "*addressing himself publicly*". According to the Constitutional Court, all the special circumstances of the particular case are sufficient for a well-founded suspicion that the applicant has committed the crimes alleged against him to be a well-founded suspicion. The Constitutional Court found that the previous behavior of the applicant has been adequately examined in the challenged decisions, and that the courts' reasons regarding the possibility that he would commit new criminal offenses after his release are sufficient and legally substantiated. As a result of all the above, the Constitutional Court's assessed that the applicant's right to personal freedom from Article 22 in connection with Article 16 of the Constitution, as well as the presumption of innocence guaranteed by Article 28 of the Constitution, were not violated.

In **case of U-III/6229/2022**[156] the trial started on the 31st of October 2022 and ended on the 22nd November 2022 [157] The applicant was arrested on the 11th of August 2022. The investigating judge of the County Court imposed pre-trial detention for forty days since the applicant was wanted in the Republic of Ukraine because of the criminal offense of fraud. The applicant proposed the abolition of pre-trial detention twice. The abolition was rejected. The reasons were that the extradition to Ukraine was submitted. The applicants lawyer objected to the imposition of pre-trial detention stating that alternative measures could be imposed. The applicant asserted the violation of rights guaranteed by Article 21, § 1, 22, 23, § 1, 24, 25, § 1, 29, § 1 and 35 of the Constitution of the Republic of Croatia. In this sense, the applicant essentially points out that when determining pre-trial detention, "*it is only stated flatly that pre-trial detention cannot be replaced by a bail due to the type and severity of the criminal offense and the fact that in the meantime a request for extradition has been received*" and "*that confiscation of the passport and visa ... preventing one from crossing the state border and leaving the territory represents an adequate measure that can replace pre-trial detention*". The Constitutional Court assessed that in the contested decisions, contrary to the applicant's claims, the possibility of applying lighter measures as a substitute for pre-trial detention was considered. In this regard, the constitutionally acceptable reasoned point of view is that the replacement of pre-trial detention with lighter measures is not justified. The Constitutional

[156] https://www.iusinfo.hr/sudska-praksa/USRH2022B6229AIII
[157] https://www.iusinfo.hr/sudska-praksa/USRH2022B6229AIII

Court notes as well that in accordance with the practice of the ECtHR in the case of Mangouras v. Spain, no. 12050/04, judgment of September 28, 2010, § 78 - the provisions on the bail from Article 5, § 3 of the ECHR does not refer to the insurance of compensation for damages, but to the insurance of the presence of the defendant in court. In this sense, the courts assessed that pre-trial detention cannot be replaced by lighter measures, since bail would not prevent the applicant from leaving the territory of the Republic of Croatia. Article 5 of the ECHR and other norms were not violated.

4.3.3 Greece

On the national level, **Greece** mentioned **the decision no. 207/2020 of Athens Criminal Court of Appeal.** The criminal procedure started on the 9th of February 2019, while the end of criminal proceedings for the substitution of the pre-trial detention was on the 7th of February 2020. After one year of imprisonment, pre-trial detention was terminated and substituted by the non-custodial measures. **The imposed restrictive measures included reporting before the competent police authority twice per month and prohibition to exit from the country until the Court hearing.** The applicant was arrested on the 8th of February 2019. He was accused of setting-up and participating in a criminal organization based on the Article 187 Penal Code, and for blackmail based on the Article 385 Penal Code, and for possession of arms based on the Article 13, §. 1 & 3 L. 2168/1993. Initially the applicant was detained for six months. Upon completion of one year of detention, the Judicial Council decided to substitute the pre-trial detention with alternative measures after a proposal of the competent Prosecutor. The Prosecutor came to this proposal taking into consideration the new facts of the case after the completion of the investigating procedure. Moreover, the Prosecutor claimed that the applicant may have not committed the crimes for which he was initially accused (the severity of the crimes seemed to be lower than initially proved) and the circumstances of the offence show that there is no risk of commitment of a new crime. Another case mentioned by Greece was the **decision no. 114/2019 of Criminal Court of Appeal.** The initial date of criminal procedure started on September 2018. 10 applicants were included. The end of criminal proceedings for the substitution of pre-trial detention was on the 25th of July 2019. After almost one year of imprisonment the temporary pre-trial detention was terminated and substituted with non-custodial measures only for one applicant. **It included reporting before the competent police authority once per month, prohibition to exit from the country until the Court hearing and payment of bail of €1.000.** The applicants were arrested in September 2018. All were accused of setting-up and participating in a criminal organization based on Article 187 Penal Code, and violation of Drugs Legislation L.3459/2006 and 4139/2013. Initially all applicants were detained for six months, the Judicial Board ordered the continuation of the detention for six months more for nine applicants with

the justification to prevent the risk of commitment of new crimes and to ensure that the accused will be present at the trial and will be subjected to the execution of the decision. Upon completion of one year of detention, the Judicial Council decided to substitute the pre-trial detention with alternative measures after a positive proposal of the competent Prosecutor for only one applicant. The Prosecutor came to this proposal taking into consideration that the detainee was a drug addict and that the felony in question is punished with imprisonment with a maximum limit of ten years. Third decision – **decision no. 359/2021** mentioned by the Greece was **before the 9th Athens Investigating Judge**. The initial date of criminal procedure was the 28th of May 2021, while the end of criminal proceedings for the substitution of pre-trial detention was on the 17th of November 2021. After six months of pre-trial detention it was terminated and substituted with a non-custodial measure. **The restrictive measure which was imposed included restriction at home with electronic surveillance.** The applicant was arrested on the 28th of May 2021. He was accused of unlawful violence based on the Article 330 Penal Code, threat (Article 333 Penal Code), sexual abuse (Article 337 Penal Code) and violation of Drugs Legislation L.3459/2006 and 4139/2013. Initially he was detained for six months, the detainee requested the substitution of pre-trial detention with the measure of restriction at home with electronic surveillance. The Investigating Judge considered that the replacing the pre-trial detention with the measure of electronic surveillance fulfills the scope to prevent the risk of commitment of new crimes and ensures that the accused will be present at the trial and will be subjected to the execution of the decision. Moreover, the Judge has held that the applicant has a permanent address and undertakes all expenses for the installation and operation of the electronic system. The Judge concluded that "*it is pursued the legitimate aim and is harmonized with the principle of proportionality between the means employed and the aim sought to be achieved*".

4.3.4 Poland

Poland mentioned **case of I KZ 14/20.** K. W. was suspected of attempted murder by hitting the head of the victim with the hammer. First instance court ordered the pre-trial detention for the maximum time of 3 months and prolonged it for another month and then for another two months. The prosecutor indicated that most of the evidence in the case has already been collected, but there is a need to obtain a supplementary forensic and psychiatric opinion, for which the personal appearance of the suspect was necessary. The lawyer indicated - among others - that the detention was not essential and alternative measures would be sufficient. The Supreme Court repealed the court decision on the pre-trial detention and applied preventive measures in the form of: **a) a bailout of PLN 3,000, b) placing the suspect under the supervision of a military superior with the obligation to report to the superior once a week, and with a ban on contacting the victim and witnesses in the case.** The severity

of the penalty likely to be imposed on the suspect, in itself, was not a sufficient reason for applying pre-trial detention, but only allowed for the assumption that in this case pre-trial detention was necessary to secure the proper course of proceedings based on Article 258 § 2 CCP. Each extension of the application of pre-trial detention was a procedural decision autonomous from those made in previous rulings on the application of this preventive measure. Therefore, it was necessary to carefully verify the premises. If the purpose of preventive measures was to secure the proper course of proceedings against various types of threats, then the degree of this threat was important for their application, which determined whether to apply a preventive measure at all, and if so, what kind. Such an assessment was required by the wording of Article 258 § 4 of the Code of Criminal Procedure, which implied the obligation to take into account the type and nature of fears for the threat to the proper course of proceedings and their intensification. In the present case, most of the evidence, including the one most at risk of possible unlawful attempts at distortion by the suspect (witness testimonies), has already been collected. The presumption of obstruction of proceedings had to refer to the specific facts of the case, and not take the form of *a priori* assumption. In the case, there were no actions on the part of the suspect that would indicate that he could undertake such behavior, especially in the current state of evidence of the case. The content of his explanations (mainly his failure to admit the alleged act), constituting an action within the scope of his right to defense, should not lead to negative consequences as regards the application of preventive measures. The hypothetical need for the suspect to appear for examination, indicated by the prosecutor, was an insufficient argument. Bearing in mind the content of Article 257 § 1 CPP, the Supreme Court agreed on applying alternative measures. The main conclusions from the judicial decision were that pre-trial detention should be seen as a measure of *ultima ratio*. As the likeliness of the severe punishment stated a premise of provisional detention, it should be treated carefully and reasonably, with deep assessment of the case (e.g. if the stage of the proceedings requires the detention of a suspect).

Another case mentioned by the Poland was **case of AKz 327/20.** G. P. and D. R. were accused of drug selling. They were detained from March 2020. **In May 2020 the District Court repealed the detention and applied preventive measures in the form of the bail of PLN 30,000 for each of the accused.** The decision has been appealed by both the prosecutor and the defense lawyer. The prosecutor indicated that alternatives are not sufficient in this case, considering the amount of drugs. The defense lawyer appealed the formal part of the proceedings. The Appeal Court upheld the decision. The allowance of the deprivation and limitation of personal liberty should be interpreted rigorously, as the constitutional and conventional value subject to legal protection is the personal freedom of an individual based on the Article 41 § 1 of the Constitution of the Republic of Poland, Article 5 § 1 of the ECHR.

Pre-trial detention may be used only exceptionally. Preventive measures, which were fulfilling a protective function, could not be used for the convenience of the proceeding's authorities, or in order to cause the determination of a specific factual state, but only to secure the proper course of criminal proceedings. The pre-trial detention should be limited only to those cases in which other preventive measures could not fulfill their function, i.e. to secure the proper course of proceedings. Main conclusions from the judicial decision were that pre-trial detention had to be seen as a measure *ultima ratio* and each decision on the extension of the detention should be treated separately - each court should analyze the premises „from scratch" for the moment of the decision, not dittoing the previous arguments.

The **case XVII Kz 321/17** concerned A.S., who was suspected of persistent harassment of M.I. The first instance court ordered pre-trial detention for the maximum time of 3 months. The court claimed that the pre-trial detention had to be applied because of a justified concern that the accused would commit an offence against life, health, or public security. The first instance court's decision was appealed by the defense lawyer. They stated that the pre-trial detention is not essential. Pre-trial detention should not be applied, if a different preventive measure could be used based on the Article 257 § 1 CCP. In the case of pre-trial detention, it should also be clarified why the application of a different preventive measures was not sufficient based on Article 251 § 3 CCP. **The Appeal Court in Poznan repealed the first instance court's decision on the pre-trial detention and applied preventive measures in the form of police supervision combined with a ban on contacting and approaching the victim.** Based on the Article 257 § 1 CCP the pre-trial detention should be used only as a last resort, when preventive measures could not be able to secure the proper course of proceedings. By applying pre-trial detention, the court was obliged to consider whether it was necessary to use this measure in order to secure the proper course of criminal proceedings, or whether alternative measures could be sufficient.

4.3.5 Slovakia

In case of **Slovakia the case with reference number 39Tp/13/2020**[158] was mentioned. In the present case, the accused verbally attacked the victim in front of her house. First, he arrived at the address, where the victim lived. He had a kitchen knife, with which he started banging the locked metal entrance gate, while shouting at her offensive comments. The victim and her partner left the house and went down the fenced staircase. The accused began to stab and hit the metal gate, while constantly shouting offensive comments. As a result, the victim and her partner feared for their lives and health. The judge for the preliminary hearing came to the conclusion that according to Article 71 § 1 c) of Criminal Code the reasons for

[158] https://obcan.justice.sk/infosud/-/infosud/i-detail/rozhodnutie/110aa2c1-1507-4c19-9541-e7876a94abbb%3A0cbc2d14-5ba6-4a0b-a356-115ab3e4f398

detention of the accused D.C. continued to exist. There was still a justified fear that the accused (mainly while drinking alcohol) could commit a similar criminal activity against the victims, for which he was being prosecuted. The judge for the preliminary hearing stated that in spite of the existing reasons for the preventive detention, this fact did not prevent to use the replacement of detention (to use alternatives to pre-trial detention). On the contrary, it is a basic prerequisite for considering the use of institutions replacing detention, because otherwise it would be necessary to release the accused from detention according to Article 79 § 3 of Criminal Code. The judge for the preliminary hearing referred to ECHR. He stated that it was possible to recall the second sentence of the provision of Article 5 § 3 of the ECHR, which allows a person to be released on the condition that he is available to law enforcement authorities. Also release from detention on the basis of a guarantee is only an option and not an authorization of a person deprived of personal freedom. However, when assessing its justification, the guarantee has priority over the continuation of detention if the option is available. The ECtHR has stated that although there may be a potential danger if a person is accused of a serious crime and faces a possible sentence of imprisonment for a long period of time, the degree of this risk cannot be measured only on the basis of the seriousness of the crime and the expected punishment. State authorities should consider the possibility of securing the accused with other measures, for example bail or supervision. The guarantee is not only a monetary guarantee, but also, for example, the obligation to report to the court at regular intervals and is not only applied in the case of so-called escape arrest, but also arrest carried out on the basis of other reasons. The judge for the preliminary hearing came to the conclusion that by replacing pre-trial detention with the supervision of a probation and mediation officer, with the simultaneous imposition of appropriate restrictions and obligations, together with the obligation to submit to a check by technical means, it is possible to achieve the purpose of the pre-trial detention in the given case. In the judge's opinion, the above-mentioned conclusions of the ECtHR jurisprudence can be fully applied to the accused D.C. in the sense that even if he is given grounds for detention according to Article 71 § 1 c) of the Criminal Code, in his case, taking into account the stage and course of the criminal prosecution and the current period of detention, it is possible to fully use another institution replacing detention, namely the supervision of a probation and mediation officer. In practice, this means that the accused D.C. will have a personal identification device attached to his leg (a so-called electronic bracelet) and at the same time both victims will have a device for monitoring the proximity of the accused. Every approach of the accused to the injured at a distance of less than 100 meters will be evaluated as a security incident, with the exception of the approach of the accused to the injured S. Č. for the purpose of taking over their daughter A. C. The accused will be able to contact the victim only for the purpose of arranging a meeting with their daughter.

In another case, **Regional court in Banská Bystrica in the case with the reference number 3Tos/85/2020**[159] dealt with the accused, who planted Cannabis listed as a narcotic substance with the purpose of its distribution to other persons. The court stated that the reasons for the detention persisted, but they were considerably weakened and came to the opinion that the purpose of the detention can also be achieved by other means. The Court accepted the written promise of the accused because he appeared trustworthy during the interrogation. He also accepted the guarantee of a trustworthy person - the accused's father, because he came to the conclusion that he was able and willing to help his son and provide adequate supervision. The court imposed a ban on the accused to travel abroad. According to the court's conclusion, these measures in connection with the supervision of the probation and mediation officer were sufficient to disprove the prosecutor's concern about the repetition of criminal activity and the threat of escape. The Regional Court concluded that the district prosecutor's complaint had not been well founded. The Regional Court pointed out that one of the basic principles and requirements of pre-trial detention was that it should last only the time necessary, and that the institution of detention should be only a last resort and have a subsidiary character in relation to other appropriate measures which also ensure its purpose. Therefore, for the above reasons, as well as in view of the accused's request and the content of the ruling of the Constitutional Court of the Slovak Republic No. 67/2013-41, the District Court was right to examine, among other things, whether at the present stage of the criminal proceedings its purpose could not be achieved by combining the alternatives to pre-trial detention.

The Constitutional Court, by **Judgement No. III. US 33/2021,** accepted for further proceedings in its entirety the constitutional complaint from 20th October 2020, in which the complainant alleged violation of his fundamental rights under Articles 17 § 2[160] and § 5[161] , Article 46 § 1[162] and Article 50 § 3[163] of the Constitution of the Slovak Republic (hereinafter

[159] https://obcan.justice.sk/infosud/-/infosud/i-detail/rozhodnutie/4b26f1c2-3043-4f16-b5f5-12cfc1c16d1d%3A829df303-7dc7-4806-bc14-727815ebf646

[160] *"No one shall be prosecuted or deprived of liberty save for reasons and by means laid down by a law. No one shall be deprived of liberty merely for his or her inability to fulfil a contractual obligation."*

[161] *"Pre-trial detention can be imposed only on the grounds and for the period provided by a law and determined by the court."*

[162] *"Everyone may claim his or her right by procedures laid down by a law at an independent and impartial court or, in cases provided by a law, at other public authority of the Slovak Republic."*

[163] *"Everyone charged with a criminal offence shall be entitled to have time and facilities for the preparation of his or her defence and to defend himself or herself in person or through legal assistance."*

referred to as the "Constitution") and the rights under Article 5 § 1 c)[164] and Article 5 § 4[165] and Article 6 § 1[166] of the ECHR caused by the orders of the Specialized Criminal Court and the Supreme Court of the Slovak Republic (hereinafter referred to as the "Supreme Court"). In addition, the complainant asked for the annulment of both orders, his release from detention, financial satisfaction of 10 000 EUR and reimbursement of costs of the proceedings.

On the 28th of October 2019 the criminal prosecution against the complainant was initiated. The charges were filed simultaneously for several crimes - the crime of establishing, masterminding and supporting of a crime group under Article 296 of Penal Code,[167] for the crime of perjury under Article 346 § 1 and § 3 b) of the Penal Code with reference to Article 140 c) of the Penal Code[168] and for the particularly serious crime of extortion under Article 189 § 1) and § 2 c) and § 4 c) of the Penal Code with reference to Article 140 a) and Article 141a) of the Penal Code[169]. According to the charging order, the complainant, working as a lawyer, has allegedly masked his activities for the crime group by the provision of legal services to the members of the group against whom criminal proceedings have been brought. He was allegedly influencing group members and guiding them during criminal proceedings in such a way that it would not endanger persons belonging to the managerial-decision-making level of the group. For this activity he was remunerated from financial resources of

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[164] "*Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.*"

[165] "*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*"

[166] "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*"

[167] Act No. 300/2005 Coll. Penal Code as amended (Penal Code)

[168] Article 140 regulates " Specific Motivation". According to Article 140: ''Specific motivation shall mean that a criminal offence was committed:
a) as a felony for hire,
b) because of revenge,
c) with the intention to cover up or facilitate another criminal offence,
d) because of national, ethnic or racial hatred, or hatred caused by the colour of complexion, or
e) as a sexually motivated criminal offence.''

[169] Article 141 regulates ''Dangerous grouping" . A dangerous grouping shall mean:
a) a criminal group, or
b) a terrorist group.

the group. He allegedly instructed the witness to conceal in criminal proceedings the circumstances known to him about the crime and to knowingly tell falsehoods before the investigating officer of the Police Force and to conceal things about other persons.

The complainant was remanded in detention by the **Order of the Specialized Criminal Court No. 1Tp/10/2019 of 30 October 2019**. The preliminary hearing judge didn't accept the complainant's written promise and didn't substitute the detention with the supervision by the probation and mediation officers.

As grounds for imposing pre-trial detention, the judge cited the very nature of the crimes for which the complainant was prosecuted and which themselves have a collusive character. The judge pointed to the practices of the crime groups and the concern that the defendant may influence the cooperating witnesses and other accused persons, referring to the fact that one of the crimes for which he is being prosecuted is extortion. In this regard the judge also emphasized the need to question other witnesses.

By appeal dated 17 June 2020, the complainant requested a release from detention. He asked the court to give compelling reasons why in his case there is a higher risk of collusion and a continuity of criminal activity than that of other non-custodial prosecuted persons, even though they are accused of equally serious offences.

The complainant also asked the court to explain what distinguishes his actions from those of other lawyers representing alleged members of the group in the same criminal cases. He asked the court whether more than a hundred interviews of witnesses and accused persons and the ongoing investigation lasting more than 8 months have had the effect of weakening the grounds for his detention.

The judge of the Specialized Court rejected the complainant's application by order No. **1Tp/10/2019** of 15th July 2020. The judge did not replace the detention of the complainant with supervision probation and mediation officer, did not accept the complainant's written promise as a substitute for custody and did not accept the complainant's proposal to substitute custody with a cash guarantee (bail).

The judge of the Specialized Criminal Court assessed that the state of the case had not moved in favour of the complainant by the ongoing process of investigation. The judge quoted from the testimony of witnesses or co-accused and stated that the grounds for detention had not ceased to exist and that these statements were a prime example of the facts on which the merits of the complainant's detention are actually based. According to the court, the testimony not only confirms the connection of the complainant to the highest positioned members of the crime group, but also confirms that the will of these persons was transferred by the complainant to the lowest ranking members of the group. The complainant had allegedly managed to influence the witnesses not to provide any testimony to the authorities.

According to the court, this cannot be considered the performance of a usual attorney's activity. The court again emphasized the crime the complainant has been charged with, referring to paragraph 6 of the charging order - i.e., the offence of extortion. The court found that the grounds for the complainant's detention still exist.

As regards the possibility of replacing detention with procedural institutes pursuant to Articles 80 to 82 of the Criminal Procedure Code, the court noted that no exceptional circumstances in favor of accused persons had been identified. As pointed out by the Supreme Court - under Article 80 § 2 of Criminal Procedure Code, in case of prosecution for a particularly serious crime only the existence of the exceptional circumstances allows for the replacement of custody by written promise or supervision of defendants by a probation and mediation officer.

The complainant lodged a complaint against the order of the Specialized Criminal Court, in which, inter alia, he objected incorrectness of conclusions regarding the evaluation of evidence, absence of grounds for collusive and preventive detention, violation of fundamental principles of criminal proceedings and the rights of the accused, also incorrectness of the absence the exceptional circumstances of the case for substitution of custody.

The Supreme Court dismissed the complainant's complaint, by **Judgement No. 3 Tost 34/2020.** The judgement is quite extensive, containing dozens of pages, while it mostly follows the argumentation of the Specialized Criminal Court. In regard to the grounds for imposing detention the Supreme Court considered as relevant the same facts as were considered by Specialized Criminal Court as the grounds for remaining complainant in custody.

In the constitutional complaint, the complainant briefly described his objections. He objected to the duration of pre-trial detention and absence of grounds for pre-trial detention. According to the complainant, grounds for his detention are general, non-specific, vague, based on the testimonies of cooperating persons. The complainant also argued the legal classification of the alleged conduct as a crime of extortion and a crime of membership in organised crime group. The complainant further stated that at the time of bringing the charges and also after 9 months of investigation a single piece of evidence was not found to incriminate him.

In regard to the complainant's objections to the lack of grounds for detention and the incorrect classification of the crime the Constitutional Court emphasized that legal classification of the conduct for which accused is being prosecuted is a significant factor in deciding on the possible replacement of custody by alternatives to pre-trial detention. As long as the Supreme Court discusses in detail the reasons why it is not possible to impose alternative to pre-trial detention due to the fact that complainant is being prosecuted for a

"particularly serious crime", then the need for correct classification of the alleged conduct of the accused person stands out all the more. Constitutional Court pointed out that while in the complainant's case the Supreme Court on the one hand downplays the need for the correct legal classification of the crime on the other hand, it is precisely the legal classification of complainant's alleged crime as a "particularly serious crime" that makes it impossible to replace custody with one of the alternatives to pre-trial detention. The Constitutional Court stated that such decision is arbitrary, interfering with the complainant's right to personal liberty. **According to the Constitutional Court it is constitutionally unacceptable that the complainant is excluded from alternatives to pre-trial detention due to the misconduct of law enforcement agencies in over qualifying the crime.**

Constitutional Court also referred to its case-law and case-law of the ECtHR according to which the longer pre-trial detention lasts, the stronger must be the reasons for it required by the courts since over time the presumption of innocence and the importance of the personal liberty prevail over the interests of the state to investigate crime and bring the accused to justice.

On the basis of the foregoing, the Constitutional Court finds that if the decision on request for release from detention lacks clear and comprehensible reasons based on which the continuation of detention could be justified; then there exists no such reasons for the continued detention.

The Constitutional Court ruled that the Supreme Court did violate the complainant's fundamental right to personal liberty under Article 17 § 2 of the Constitution of the Slovak republic and right to liberty and security pursuant to Article 5 § 1 c) and § 4 of the ECHR.

The Constitution Court annulled the judgement of the Supreme Court and ordered the Supreme Court to release the complainant from custody.

4.4 ECtHR cases concerning partner countries

4.4.1 Bulgaria

In case of Petkov and Profirov v. Bulgaria[170] the ECtHR observed that Article 5 § 1 c) ECHR requires that a person is detained on "reasonable suspicion" of having committed an offence. Such suspicion cannot be general and abstract. This means that there must be facts or information which would satisfy an objective observer that the person concerned may have committed a specific offence.

No such facts and information were mentioned in the orders for the applicants' detention in the present cases, which merely referred to the applicable legal provisions and not to any specific circumstances or acts. This alone could be sufficient grounds for the ECtHR to conclude that the applicants' deprivation of liberty was incompatible with the principle of protection from arbitrariness.

The ECtHR concludes that the domestic law did not contain sufficient guarantees against arbitrary detention and, in so far as it contained some, they were unavailable to the applicants. It finds in addition that the authorities failed to establish that the applicants were detained on "reasonable suspicion" of having committed an offence and that their detention was undertaken with the purpose of "bringing them before the competent legal authority". The ECtHR concludes that the applicants' detention was arbitrary and consequently, there has been a violation of Article 5 § 1 of the ECHR.

The **Case of Staykov v. Bulgaria[171]** concerns the excessive period of detention of Mr Minyo Staykov in relation to two pre-trial proceedings where he was the accused person. The charges concerned organized crime, tax fraud, documentary fraud etc.

The complaint concerns the duration of detention from the 6th of September 2018 till the 1st of February 2021 but not the duration of the subsequently imposed house arrest.

The ECtHR holds that such a long period of detention requires solid arguments to justify it. In the present case the charges concern grave criminal offences. The reasonable assumptions, however, that the applicant has committed the crimes in question is not sufficient to justify the detention measure. It is necessary that additional arguments are brought. The ECtHR

[170] Petkov and Profirov v. Bulgaria, Application nos. 50027/08 and 50781/09), 2014, available at: https://hudoc.echr.coe.int/eng?i=001-145006

[171] Staykov v. Bulgaria, Application no. 16282/20, 2021, available at: https://hudoc.echr.coe.int/eng?i=001-210283

reviews the detention measure against two basic arguments: the risk for the applicant to commit a new crime and to influence witnesses, and the risk to abscond.

The ECtHR reiterates that the respective courts ruled altogether 10 times before amending the remand measure imposed on the applicant. Analyzing the arguments of the respective judges, the ECtHR notes that they are contradictory, some of them very abstract, and none consider how the deteriorated health condition of the applicant would allow him to influence the witnesses or to hinder the investigation.

The ECtHR concludes that the national jurisdiction failed to present sufficient grounds to justify its conclusions that the applicant would commit new crimes or exercise pressure on witnesses if released. The national jurisdictions used "general and abstract" arguments to justify the prolonged detention. Hence, they applied a stereotyped approach instead of resorting to an actual analysis. The national jurisdictions made contradictory assessments as to the risk of absconding and failed to verify whether alternative measures were available to ensure the applicant's involvement in the criminal proceedings. The ECtHR established a violation of Article 5 § 3 of the ECHR.

In case **Dimo Dimov and Others v. Bulgaria**[172] the complaints concern excessive duration of pre-trial and trial detention and the ban imposed by the court for one of the applicants to re-submit requests to be released.

The ECtHR notes down that during the investigation against the applicant, the domestic courts confirmed four times in altogether eight decisions the lawfulness of the imposed detention and its justification. The ECtHR further notes that even though these decisions contain arguments about reasonable suspicion that the applicant had committed the crime in question, a decision of the Plovdiv Appellate Court did not comment on this issue. Such reasonable suspicion is a *conditio sine qua non* for the lawfulness of the continued detention. The ECtHR has already established in other cases against Bulgaria that failure to provide reasons in this respect reduces the scope of the judicial review of the lawfulness of the detention measures and reduces the effectiveness of the remedies available to the detained persons under Article 5 § 4 of the ECHR (cf. Ilijkov v. Bulgaria, application No. 33977/96, judgment of 26 July 2001, §§ 94100, and Stoyan Dimitrov v. Bulgaria, application No. 36275/02, §§ 86-90, judgment of 22 October 2009). (§ 54) The ECtHR established a violation of Article 5 § 4.

As to the ban to re-submit requests for release, the ECtHR discusses the provision of Article 65, § 6 CPC, which according to the Government aims at ensuring proper criminal

[172]Dimo Dimov and Others v. Bulgaria, Application no. 30044/10, 2020, available at: https://hudoc.echr.coe.int/eng?i=001-216096

investigation. The ECtHR does not rule out in principle such a measure in case of manifest abuse of procedural rights of the detained persons, when for example they avail of their right to appeal only to discredit the efficiency of the investigation (§ 69). The ECtHR notes that over a period of five months the applicant had filed only one request for his release, while his second request was reviewed with substantial delay. According to the ECtHR, there is no data indicating that the applicant has abused his right to file requests for his release (§ 70).

In addition, the ECtHR notes that the domestic jurisdiction imposed the ban of two months without giving any reasons – neither concerning the ban itself, nor its duration. Hence the ECtHR concludes that imposing such a ban to file new requests for release for a period of two months is a violation of the applicant's rights guaranteed with Article 5 § 4 of the ECHR (§ 90).

4.4.2 Croatia

In the case of **Oravec v. Croatia**[173] the applicant alleged that the decision ordering his detention issued on the 10th of June 2011 had not been lawful, and that the proceedings concerning his detention had not complied with the requirements of Article 5 of the ECHR. The applicant was arrested on suspicion of trafficking illegal substances. Investigating judge I of the Osijek County Court ordered pre-trail detention of 48h maximum because of the risk of reoffending. Investigative judge II of the Osijek County Court ordered 1 month detention. The applicant lodged an appeal on the 3rd of May 2011 - investigating judge ordered the applicant's immediate release on the 26th of May 2011. A three-judge panel of the Osijek County Court quashed that investigating judge's decision and ordered him to re-examine the case. The court reversed the investigating judge's decision and ordered the applicant's pre-trial detention without setting any time-limit. The applicant brought a claim in the Osijek Municipal Court against the State under Article 480 of the Code of Criminal Procedure, seeking non-pecuniary and pecuniary damages for his detention, which he claimed had been unfounded. He was awarded 137,550 Croatian Kuna. Before ECtHR, the applicant claimed violation of Article 5 of the ECHR. The ECtHR dealt with the following questions: Can the compensation claim under Article 480 of the Code of Criminal Procedure be regarded as an effective remedy for the applicant's complaints under Article 5 of the ECHR? Can the applicant in this case claim to be a victim of the violation? Is the absence of any time-limit for the applicant's detention seen as "unlawful"?

The availability of compensation proceedings under Article 480 § 1 of the Code of Criminal Procedure did not represent an effective remedy for the applicant's complaint about the lawfulness of the decision of 10 June 2011. Despite the payment of a sum as reparation for

[173] Oravec v. Croatia, Application no. 51249/11, 2017, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-175138%22]}

non-pecuniary damage for the time he had spent in detention pending trial, the applicant can still claim to be a "victim" within the meaning of Article 34 of the ECHR of the violations claimed. According to the ECtHR's point of view, the failure of the extra-judicial panel of the County Court in Osijek to state in its decision of 10 June 2011 the term for which the applicant's detention was ordered did not in itself make the applicant's detention illegal, considering the maximum duration of detention prescribed by law. The ECtHR determined that the decision on the applicant's detention, which was made by the extrajudicial panel of the County Court in Osijek on June 10, 2011, was legal in the sense of Article 5. There was no violation of that provision in the circumstances of this case.

There was a violation of the procedural aspect of Article 5 of the ECHR because the principle of "equality of arms" was not respected, because the extrajudicial panel of the County Court in Osijek, which extended the detention of the applicant on June 10, 2011, did so in a closed session without notification. They did not summon the applicant or his counsel who therefore had no opportunity to present any claims related to the applicant's detention.

Since no claims could be made, the ECtHR considered that the applicant could not effectively exercise his rights to defense in the proceedings before the County Court in Osijek. In this regard, the ECtHR established a violation of Article 5, § 4 of the ECHR because the failure of the Constitutional Court of the Republic of Croatia to decide on the merits of the applicant's constitutional claims made it impossible to ensure the proper and meaningful operation of the detention review system, as prescribed by domestic legislation.

4.4.3 Greece

In the case of **Kargakis v. Greece**[174] ECtHR found Greece to be in violation of Articles 3 and 13 of the ECHR. It considered that the detention conditions in the Diavata prison during the applicant's provisional detention subjected him to an ordeal whose severity had surpassed the inevitable degree of suffering in detention, therefore violating Article 3 of the ECHR. The ECtHR found a violation of Article 3 of the ECHR as regards the applicant's general conditions of detention in Diavata Prison. As regards the conditions relating to heating, hot water, lighting, cleanliness of dormitories and provision of hygiene items, the ECtHR could not comment on the applicant's allegations. It did, however, noted that Diavata Prison had no canteen and that the prisoners had to eat their meals in their cells, seated on their beds. Moreover, the ECtHR took note of the applicant's statements to the effect that he had not had access to the exercise yard, that the latter had not been adapted to the needs of persons

[174] Kargakis v. Greece, Application no. 27025/13, 2021, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-183126%22]}

with disabilities, that his food had been unsuited to his diabetic condition, and that he had had to share his cell with smokers, in breach of doctor's orders.

In the case of **Pouliou v. Greece**[175] the ECtHR found a violation of Article 5 § 4 of the ECHR. The case concerned the placement in pre-trial detention of Ms Pouliou, a lawyer by profession, on suspicion of membership of a criminal organization implicated in a series of crimes committed in 2008 and 2009. The ECtHR found in particular that the length of time – 35 days – that had elapsed between Ms Pouliou's application for release on bail and the investigating judge's refusal - was incompatible with the requirement of speedy review under Article 5 § 4 of the ECHR.

4.4.4 Poland

In the case of **Porowski v. Poland**[176] the applicant alleged that his detention on remand had been unlawful and had exceeded a "reasonable time". He also complained of the censorship of his correspondence with his lawyer and of the alleged unfairness and unreasonable length of three sets of criminal proceedings against him and against third persons.

On 20 January 2003 the applicant complained that his detention on remand imposed in connection with a second criminal case had been unlawful and not in accordance with a procedure prescribed by law within the meaning of **Article 5 § 1 of the ECHR**. He maintained in this connection that his detention had been extended beyond 10 November 2002, that is, beyond the expiry of the statutory time-limit of two years for detention on remand, on the basis of decisions of the Regional Court based on general grounds. The applicant argued that the statutory period of two years under Article 263 § 3 of the Code should have been calculated irrespective of his concurrent detention in a first criminal case and, consequently, Article 263 § 4 should have been applied to the effect that decisions concerning the preventive measure in question should have been taken by an appellate court and only on the basis of the exceptional grounds enumerated in that provision. He also argued that the law as applicable at the relevant time had been imprecise and unforeseeable. The ECtHR stated that the relevant Polish criminal legislation, by reason of being defined through the courts' long-standing and uniform practice, satisfied the test of "foreseeability" of a "law" for the purposes of Article 5 § 1 of the ECHR. Therefore, ECtHR came to conclusion that there was no violation of Article 5 § 1 of the ECHR.

[175] Pouliou v. Greece, Application no. 39726/10, 2018, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-181639%22]}
[176] Porowski v. Poland, Application no. 34458/03, 2017, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-172100%22]}

The applicant complained that the domestic courts had not given relevant and sufficient reasons for his continued detention pending the first and the second trials. He relied on Article 5 § 3 of the ECHR.

In that regard, the ECtHR emphasized that under the second limb of Article 5 § 3, a person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify his continued detention. Moreover, **the domestic courts "*must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release*"**. Article 5 § 3 of the ECHR cannot be seen as authorizing pre-trial detention unconditionally, provided that it lasts no longer than a certain period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. **The ECtHR emphasized that when deciding whether a person should be released or detained, the authorities have an obligation under Article 5 § 3 to consider alternative measures to ensure his or her appearance at trial.** In the present case the ECtHR came to conclusion of violation of Article 5 § 3 of the ECHR.

4.4.5 Slovakia

The case of **Kuc v. Slovakia**,[177] originated in an application against the Slovak republic on the 12th of May 2014. The applicant was arrested on the 1st of January 2012 and charges were brought against him the following day for the criminal offence of endangering public safety. The charge was based on the suspicion that he had made home-made explosive devices; that he had sent some of them, together with written threats, to veterinarians and the head office of a supermarket chain; and that he had planted one of the devices next to a fast-food outlet and had allowed it to explode with a view to promoting animal rights. On the 4th of January 2012 the Košice I District Court remanded the applicant in custody pending trial to prevent him from continuing his criminal activity. The District Court considered the nature of the criminal charge and the fact that the applicant had been having long-term psychiatric treatment. The courts at two levels of jurisdiction reviewed and confirmed the lawfulness of the applicant's detention on five occasions. This included applying two more times for release between the 3rd of October and 27th of December 2012. Given the serious accusations made against him for crimes including terrorism, the courts upheld both grounds for his continued detention. In addition, they referred to a witness statement that the applicant had written a will where he had expressed the alleged intention to commit a terrorist suicide attack.

[177] Kuc v. Slovakia, Application no. 37498/14, 2017, available at: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-175645%22]}

Furthermore, the courts rejected bail and guarantees of supervision offered by the applicant's parents since they had been unable to prevent the crimes while the applicant had lived in their house.

Relying on Article 5 §§ 1 c), 3 and 4 of the ECHR, the applicant raised a number of interrelated complaints concerning his detention. He alleged that it had been too long and had lacked relevant and sufficient grounds. [178] First of all, the ECtHR needed to evaluate whether the national authorities put forward weighty reasons to justify the applicant's detention during[179] The ECtHR came to conclusion, that the grounds given by the domestic authorities in response to the applicant's request for release of 23 December 2013 failed to take account of his personal circumstances, notably as regards his psychiatric condition. As a result, the applicant's pre-trial detention was based on grounds which could not be seen as sufficient between 24 October 2013 (when the domestic courts had two conflicting expert reports about the applicant's mental health at their disposal) and 2 April 2014 (when the Constitutional Court delivered its decision). The ECtHR therefore found that there has been a violation of Article 5 § 3 of the ECHR.[180]

[178] Kuc v. Slovakia, Application no. 37498/14, 2017, § 34, available at: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-175645%22]}
[179] Kuc v. Slovakia, Application no. 37498/14, 2017, § 50, 59 – 60, available at: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-175645%22]}

5 Key findings and comparative analysis of the state of play in the Consortium Member States

This section summarises the main findings from the expert questionnaire which was disseminated across relevant professionals from the consortium jurisdictions. The questionnaire is available as an annex to the current report.

The national framework across the consortium MSs do foresee the existence of pre-trial detention and the alternatives to this measure.

The analysis leads to the conclusion that the usage of pre-trial detention increases over time. According to respondents, pre-trial detention is used very often (38%) or sometimes (49%). The research shows that there are cases where pre-trial detention is applied unfairly or disproportionately. Each of the consortium MSs has provisions for compensating and providing reparations for the harm the innocent person endured as a result of pre-trial detention.

The prerequisites for the use of pre-trial detention and its alternatives are regulated by national legislation. Essentially, the basis for the application of pre-trial detention is:

1) The likelihood of the defendant committing another crime (indicated by 76,92% of respondents),
2) The severity of the alleged crime (71,15%),
3) The likelihood of the defendant fleeing (71,15%),
4) If the defendant has committed the same/similar alleged crime in the past (54,81%),
5) The likelihood of the defendant tampering with evidence (46,15%).

Pre-trial detention in the consortium MSs is imposed by the court. In all of the consortium MSs, the legal remedy against the decision on the usage of pre-trial detention is an appeal. In Bulgaria and Poland there is also a possibility to submit a request to annul or change a preventive measure. Some respondents, however, raise voices that the legal remedies provided by the law are not effective at all.

The maximum length of pre-trial detention varies among the consortium MSs. In Bulgaria and Greece, it can be used for up to 18 months.

The time during which pre-trial detention can be applied is assessed differently among the consortium MSs. In Bulgaria, Greece and Croatia, the majority believes that this time is appropriate. In Slovakia, opinions are divided, with 55% of respondents believing the length is appropriate and 40% believing it is too long. In Poland, 75% of respondents said that the permissible length of pre-trial detention is too long. Significantly, the majority of all

respondents who rate the duration of pre-trial detention as too long are criminal defense attorneys.

The consortium MSs, as a general rule, provide separate areas for pre-trial detainees which separate them from convicted prisoners. The exception is Greece, where half of respondents indicated that there was no such separate area. Pre-trial detainees and convicted prisoners are generally subject to different detention conditions and have different rights.

The majority of respondents indicated that the conditions in which detainees are living temporarily are not adequate, which affects their health, including their mental health. Most of respondents indicated that pre-trial detention has negative influence of detainees.

According to statistics, the average daily cost of pre-trial detention:

1) in Bulgaria in 2020 was 5,70 euro,
2) in Croatia in 2020 was 55,4 euro,
3) in Greece in 2021 was 28 euro,
4) in Poland in 2021 was 29,20 euro,
5) in Slovakia in 2020 was 56,60 euro

and continues to grow over time.

In the consortium MSs there are alternatives of pre-trial detention and each respondent is aware of them. The alternatives to pre-trial detention have different forms in each of the consortium MS.

In Bulgaria the alternatives are:

1) reporting to the police,
2) bail,
3) house arrest (with or without electronic monitoring).

In Croatia exist such alternatives to pre-trial detention as:

1) bail,
2) house arrest,
3) precautionary measures:
    a. prohibition to leave the residence,
    b. prohibition to leave a certain place or area,
    c. the obligation of the defendant to report regularly to a certain person or state body,
    d. prohibition of approaching a certain person,
    e. prohibition of establishing or maintaining a relationship with a certain person,
    f. prohibition to engage in a certain business activity,

g. temporary seizure of a passport and other documents which serve to cross the state border,
h. temporary revocation of a license to drive a motor vehicle,
i. prohibition of stalking or harassment of the victim or another person,
j. removal from home,
k. internet access ban.

In Greece the alternatives are as follows:

1) bail,
2) reporting before the investigating judge or other authority,
3) prohibition to leave or access specific place or exit ban from the country,
4) prohibition to meet or associate with specific persons
5) restriction at home with electronic surveillance.

Polish alternatives are:

1) bail;
2) social guarantee;
3) guarantee of a trustworthy person;
4) police supervision or supervision of the superior in a military service;
5) order to leave premises;
6) suspension in the execution of duties,
7) restraining order, ban on contacting and publishing order concerning a member of the medical staff or persons to assist them
8) prohibition to leave the country.

Slovak law includes such alternatives as:

1) bail,
2) guarantee of a trustworthy person or an interest association of citizens,
3) written promise of the accused
4) supervision of the accused by a probation or mediation officer.

Additionally the authority may simultaneously impose one or more restrictions or obligations such as: a ban on travel abroad, a prohibition on engaging in an activity in which a criminal offence was committed, a ban on visiting certain places, an obligation to surrender a legally possessed weapon, a prohibition to leave the place of residence except for the cases with defined terms, an obligation to regularly attend a public authority appointed by the court, a driving ban and surrender of the driving license, a prohibition to contact specific persons or a prohibition of intentional approach to certain persons from a distance of less than five meters, the obligation to pay the funds to recover compensatory damages, prohibiting or

restricting contact with a determined person, including any contact by means of an electronic communications service or other similar means, a ban on staying near the home of the determined person or in a place where this person is staying in or a place this person is visiting.

The maximum length for the use of alternatives is not regulated in either country.

The frequency of alternative methods being employed to pre-trial detention differs in the Consortium MSs. The questionnaire responces show that only in Greece the alternatives to pre-trial detention are used very often (50%). In Croatia, by contrast, respondents indicated that alternatives are rarely used (70%). The same is true in Slovakia (70%). Respondents in Bulgaria indicated that alternatives are used only sometimes (65%). Similar situation is in Poland - the majority indicated occasional use of alternatives to pre-trial detention (40%), but the rest of the respondents indicating either frequent use of alternatives (30%) or rare use of alternatives (30%).

According to respondents, the most effective alternatives to pre-trial detention are:

1) In Bulgaria – house arrest (especially combined with electronic monitoring) and bail,
2) In Croatia – house arrest with electronic monitoring and bail,
3) In Greece – house arrest with electronic monitoring,
4) In Poland – bail and police supervision combined with ban on leaving the country,
5) In Slovakia – bail and supervision of the accused by a probation or mediation officer.

Good practices, gaps and recommendations

The good practices identified by the questionnaire respondents consist of:

1) Pre-trial detention is treated carefully and reasonably with deep assessment of the case. It is necessary to carefully verify the preconditions.
2) As the likeliness of the accused to be sentenced to a severe punishment is stated as a precondition to assign the pre-trial detention, it should be treated carefully and reasonably.
3) If the purpose of the preventive measures is to secure the proper course of the proceedings, then assessing this risk is important for their application, which determines whether to apply a preventive measure, and if so, what kind.
4) The precondition of the risk of committing another crime should be considered upon the collected evidence (record, age, health, personal characteristics of the accused).

The main identified gaps, issues and problematic areas are as follows:

1) Preventive measures are used for the convenience of the proceeding's authorities or in order to cause the determination of a specific factual state.
2) The arguments of the judges implementing pre-trial detention are often contradictory, very abstract and do not consider the condition of the accused.
3) Failure to provide a detailed explanation of the decision.
4) Bad conditions in prisons or detention centres.
5) The length of the usage of pre-trial detention and its alternatives.
6) The lack of training, education or seminars on the use of alternatives to pre-trial detention (74,04% of the respondents indicated that they have not received any training in this matter).

Recommendations of the topic of pre-trial detention and appropriate alternatives (including particular circumstances for their proper and affective application):

1) Putting into practice the principle of priority of using alternatives over pre-trial detention. The requirement for detailed justification of why alternatives could not be used.
2) Considering introduction of more alternatives, such as:
    a. house arrest combined with electronic monitoring in the consortium MSs, where this is not an alternative envisaged by the law,
    b. supervision by the police or probational officers in the consortium MSs where this is not an alternative envisaged by the law,
    c. police supervision with electronic monitoring of whereabouts,

d. a ban on leaving the Schengen area;

3) Review and Reform of Bail Practices: Consideration should be given to reviewing and reforming bail practices, with the aim of minimizing inequities. This could involve implementing a sliding scale based on income or considering non-monetary forms of bail.
4) Regular Review and Research: It's important to regularly review the use of pre-trial detention and its alternatives, using data to evaluate their effectiveness and fairness. This should include research into best practices in other jurisdictions and the potential for applying these practices.
5) Development of Risk Assessment Tools: The use of validated and objective risk assessment tools can ensure that decisions about pre-trial detention or release are based on the individual's risk of flight and risk to public safety, rather than subjective factors. This can lead to more consistent and fair decision-making.
6) Improving and Developing of Support Services: Many individuals involved in the criminal justice system have underlying issues such as mental health disorders or substance abuse problems. By strengthening access to support services, these issues can be addressed, potentially reducing the risk of reoffending.
7) An improvement of the conditions in penitentiary institutions. Conditions for social development and work of detainees in custody could be created. Facilitating the opportunities for social communication with family (telephone and Internet), which can be controlled by the authorities for the prevention of abuse should be likewise considered. Also, the material base and staff of prisons and arrests should be improved to ensure humane living conditions and dignified treatment of detainees. More human, financial and technical resources are needed for the implementation and management of pre-trial detention and alternatives.
8) Enhanced Resources and Training: Judicial officers, prosecutors, and lawyers should receive training about the use of alternatives and their potential benefits and limitations.
9) Public Awareness and Engagement: Engaging in efforts to educate the public, policymakers, and the legal community about the benefits of alternatives to pre-trial detention can help to build support for these measures.
10) Legislative Reforms: Legislative changes may be needed to support the expanded use of alternatives to pre-trial detention. This could involve:
    a. clarifying the legal framework for these alternatives, ensuring that there are clear guidelines and safeguards in place,
    b. setting an upper limit on the use of pre-trial detention and its alternatives,

c. giving the court the possibility of a supplementary direct questioning of the victim and witnesses during the pre-trial detention hearing,
d. possibility of challenging the decision to present charges (if such an institution were introduced, the defence counsel would be able to realistically and substantively challenge the charge laid and the facts indicated in the statement of reasons which, in the opinion of the authority, support the necessity to lay the charge).

6 Conclusions

The current report summarises the efforts of RELEASE project team in multifaceted directions:

- Literature review
- Legislation analysis
- Case law identification and analysis (an national and European level)
- Statistical analysis
- Empirical research – design and analysis of a dedicated questionnaire.

As a result, it could be concluded that all partner jurisdictions do envisage in the applicable legislation robust preconditions as to when and why to apply pre-trial detention as well as how to appeal such an application. Alongside this, each jurisdiction envisages a number of alternative measures which according to the expert questionnaire might be sometimes a better fit to secure the interests of the proceedings than pre-trial detention. Yet, gaps were identified not only in the overuse of the measure but also in its incorrect application. What is more, a large number of the surveyed experts have declared that no specific training has been made available to them.

To this end, in order to shed further light to the criminal law community in terms of pre-trial detention specifics, the alternatives and their potential benefit to both the proceedings and the parties, but also the state, and existing pre-trial measures, the RELEASE team will continue with organising and holding dedicated national and cross-border events.

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Annexe

EXPERT QUESTIONNAIRE

IMPORTANT TO READ BEFORE ANSWERING THE QUESTIONNAIRE:

RELEASE focuses on supporting the judiciary (including judges, investigative judges, prosecutors, defence lawyers and other legal practitioners) in the EU Member States, particularly those located in Eastern Europe, to enhance the cooperation between competent authorities on the matter of pre-trial detention and facilitate the establishment of a common approach on the matter in this area. The activities to be conducted under the project will not only result in the identification of best practices and working methods but also facilitate the establishment of mutual trust between the partner Member States.

The project starts by conducting data collection activities with an emphasis on empirical research in order to identify needs and gaps. The next step will be the practical cooperation between the judiciaries which will be done by exchange of good practices and mutual learning activities. These events will be both national workshops and international seminars so that the collaboration between the target groups is supported at different levels. Based on the points above, RELEASE will elaborate a Handbook with good practices and practical alternatives and a Policy Brief. The Policy Brief will aim to increase the awareness amongst policy makers regarding the issues related to pre-trial detention and possible alternatives for resolving them. Both will be presented at the RELEASE conference, which will further support the establishing of effective cooperation between the target groups and will disseminate the results of the project.

Hence, the questions that make up this questionnaire in essence aim to understand current practices related to assigning alternatives to pre-trial detention.

As we want to be able to compare answers across jurisdictions, we have drafted this request for information in a questionnaire format. This, however, does not mean we are looking for simple yes/no answers. Most questions are open questions and naturally invite an elaborate answer. Some questions may perhaps in theory be answered as yes/no question, but please

give as much guidance and details as possible within every question, to enhance our understanding of the legal system in your jurisdiction. Always cite the provision of the law or the case law you are relying on in providing an answer and please try to be exhaustive or at least as complete as possible. If you are relying on practical guidance or other informal rules and practice, please also refer to this and, if documentation on this is available, provide the link to where we can find this documentation.

1. Please indicate your profession:
   ☐ Judge
   ☐ Prosecutor
   ☐ Lawyer
   ☐ Other legal practitioner (please, state your profession)
2. Please indicate your jurisdiction:
   ☐ Bulgaria
   ☐ Croatia
   ☐ Greece
   ☐ Poland
   ☐ Slovakia
3. Based on your experience, how often is pre-trial detention used?
   a. ☐ Very often
   b. ☐ Sometimes
   c. ☐ Rarely
   d. ☐ Never
4. What factors (from your point of view) do you believe are considered when pre-trial detention is implemented?
   a. ☐ The severity of the alleged crime
   b. ☐ The likelihood of the defendant fleeing
   c. ☐ The likelihood of the defendant tampering with evidence
   d. ☐ The likelihood of the defendant committing another crime
   e. ☐ If they have committed the same / similar alleged crime in the past
   f. ☐ Other (please specify)
5. In your opinion, what are the challenges encountered when pretrial detention is applied? (max. 500 words)
6. Are there any alternatives to pre-trial detention that you are aware of?
   ☐ Yes
   ☐ No

7. If you responded affirmatively to the previous question, kindly enumerate the alternatives that you are acquainted with:

8. What are the advantages of using alternatives to pre-trial detention? (max. 500 words)

9. What are the disadvantages of using alternatives to pre-trial detention? (max. 500 words)

10. In your opinion, what is the most effective alternative to pre-trial detention and why? (max. 500 words)

11. Based on your expertise, what is the frequency of alternative methods to pre-trial detention being employed?

a. ☐ Very often
b. ☐ Sometimes
c. ☐ Rarely
d. ☐ Never

12. In your experience, what are the challenges encountered when alternatives to pre-trial detention are used? (max. 500 words)

13. Have you received training, education or seminars on the use of alternatives to pre-trial detention?

☐ Yes

☐ No

14. If you responded affirmatively to the previous question, kindly provide specific information about the training, education, or seminars you have participated in: (max. 500 words)

15. What improvements would you suggest to the existing system of pre-trial detention and alternatives in your country? (max. 500 words)

16. What is your experience with the use of pre-trial detention in cases involving vulnerable groups, such as juveniles, pregnant women, or people with mental health issues? (max. 500 words)

17. Have you observed any cases where pre-trial detention was applied unfairly or disproportionately based on the defendant's socioeconomic status or other factors?

☐ Yes

☐ No

18. If you responded affirmatively to the previous question, please provide a description of the circumstances and the elements that influenced the decision to unfairly or disproportionately implement pre-trial detention. (max. 500 words)

19. What improvements do you believe can be made to the current system of pre-trial detention and alternatives in your country to ensure a just and proportional implementation of measures? (max. 500 words)

20. Have you experienced any challenges or barriers when communicating and collaborating with other legal practitioners in your country on matters related to pre-trial detention and alternatives?

☐ Yes

☐ No

21. If you responded affirmatively to the previous question, kindly elaborate on the obstacles or difficulties you have faced and propose potential solutions to overcome them. (max. 500 words)

22. From your perspective, what significance does international cooperation and the exchange of good practices hold in enhancing the implementation of pre-trial detention and alternatives within your country? (max. 500 words)

23. What is your opinion on the length of time that pre-trial detention can be applied in your country?

a. ☐ It is appropriate
b. ☐ It is too short
c. ☐ It is too long

24. If you selected option "b" or "c" in response to the previous question, please propose an appropriate duration for pre-trial detention in your opinion.

25. In your experience, what is the impact of pre-trial detention on defendants and their families?

a. ☐ Very negative
b. ☐ Negative
c. ☐ Neutral
d. ☐ Positive
e. ☐ Very positive

26. In your opinion, what measures can be put in place to mitigate the negative impact of pre-trial detention on defendants and their families? (max. 500 words)

27. Have you observed any cases where the use of alternatives to pre-trial detention resulted in positive outcomes for the defendant and society?

☐ Yes

☐ No

28. If you responded affirmatively to the previous question, kindly provide a description of the situation and the favourable outcomes that arose as a result of utilizing alternatives. (max. 500 words)

29. What measures can be taken by legal professionals in your country to enhance communication with defendants and their families regarding the implementation of pre-trial detention, alternatives, as well as their rights and available choices? (max. 500 words)

30. What contributions can non-governmental organizations, civil society, and other stakeholders make to enhance the utilization of pre-trial detention and alternatives in your country? (max. 500 words)

31. What is your opinion on the current legal framework in your country regarding pre-trial detention and alternatives?

a. ☐ It is sufficient
b. ☐ It needs improvement
c. ☐ It needs significant improvement

32. If you selected option "b" or "c" in response to the previous question, kindly elucidate the enhancements you believe could be implemented within the legal framework. max. 500 words)

33. In your experience, what types of alternative measures to pre-trial detention have been effective in ensuring that defendants appear in court and do not pose a risk to society?

a. ☐ Release on bail
b. ☐ House arrest
c. ☐ Electronic monitoring
d. ☐ Reporting requirements
e. ☐ Other (please specify)

34. If you responded with option "e" in the previous question, please provide specific details about other alternative measures that have proven to be effective (max. 500 words)

35. What challenges have you experienced in the past in applying alternative measures to pre-trial detention in your country?

a. ☐ Lack of resources

b. ☐ Lack of information
c. ☐ Lack of cooperation from defendants
d. ☐ Other (please specify)

36. If you selected option "d" in response to the previous question, kindly elaborate on the additional difficulties or obstacles you have encountered when implementing alternative measures. (max. 500 words)

37. In your opinion, how can the judiciary and other legal professionals in your country strike a balance between safeguarding society and upholding the rights and freedoms of defendants during the pre-trial phase? (max. 500 words)

38. In your opinion, what are the main goals of pre-trial detention in your country?

a. ☐ Ensuring that the defendant appears in court
b. ☐ Protecting society from potential harm
c. ☐ Preventing the defendant from tampering with evidence
d. ☐ Other (please specify)

39. If you selected option "d" in response to the previous question, kindly specify the additional objectives you believe pre-trial detention serves. (max. 500 words)

40. In your opinion, what are the most effective alternatives to pre-trial detention in your country?

a. ☐ Release on bail
b. ☐ House arrest
c. ☐ Electronic monitoring
d. ☐ Reporting requirements
e. ☐ Other (please specify)

41. If you selected option "e" in response to the previous question, kindly specify the alternative measures you believe to be the most effective. (max. 500 words)

42. What do you think are the main advantages and disadvantages of pre-trial detention compared to alternative measures? (max. 500 words)

43. What measures can be put in place to ensure that pre-trial detention is used only in cases where it is necessary and proportionate? (max. 500 words)

44. What role can judicial cooperation play in improving the use of pre-trial detention and alternatives in your country? (max. 500 words)

45. In your experience, what are the most significant challenges that need to be addressed in order to improve the use of pre-trial detention and alternatives in your country? (max. 500 words)

46. How often do you encounter cases in which pre-trial detention is used inappropriately or excessively?

a. ☐ Very often
b. ☐ Sometimes
c. ☐ Rarely
d. ☐ Never

47. In your opinion, what factors contribute to the inappropriate or excessive use of pre-trial detention in your country? (max. 500 words)

48. Have you ever observed cases where the use of pre-trial detention resulted in negative consequences for the defendant, such as loss of employment, housing, or family relationships?

☐ Yes

☐ No

49. If you responded affirmatively to the previous question, could you provide details or examples of specific cases or situations where you have observed adverse consequences arising from the application of pre-trial detention? (max. 500 words)

50. In your opinion, what steps can be taken to mitigate the negative consequences of pre-trial detention for defendants? (max. 500 words)

51. What kind of support or resources would be helpful in improving the use of pre-trial detention and alternatives in your country? (max. 500 words)

52. Are there any exemplary practices/ best practices or successful models from other nations that could be adjusted to suit the specific circumstances of your country? (max. 500 words)

53. In your experience, what role do legal practitioners play in shaping the use of pre-trial detention and alternatives in your country? (max. 500 words)

54. Is there a way to overturn a decision to impose pre-trial detention and if so, what is the procedure to be followed? (max. 500 words)

55. If you responded affirmatively to the previous question, what are your views on the implementation of this procedure in your country? (max. 500 words)

56. If, following the imposition of pre-trial detention, it is later established in the criminal proceedings that the defendant is ultimately innocent of the alleged crime, does your country have any provisions for compensating and providing reparations for the harm they endured as a result of their temporary imprisonment? (max. 500 words)

57. What is the maximum length of pre-trial detention period that can be imposed in your country? (max. 500 words)

58. In your country, for what types of offenses is pre-trial detention authorized? (max. 500 words)

59. Is there a separate area in detention centers available for pre-trial detainees in relation to the area where convicted prisoners are held?

☐ Yes

☐ No

60. Do pre-trial detainees have the same detention conditions and rights as convicted prisoners in your country? For instance, what are the regulations concerning regular and exceptional temporary releases? (max. 500 words)

61. To what extent are the judicial authorities of your country influenced by the common sense of justice when forming their judgement? (max. 500 words)

Thank you for your contribution and expertise in identifying possibilities for enhancement and sharing best practices regarding the utilization of pre-trial detention and alternatives in your country!