



UPDATE REPORT: “A MEASURE OF LAST RESORT? THE PRACTICE OF PRE-TRIAL DETENTION DECISION MAKING IN THE EU” (2016)



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I. INTRODUCTION

1. Pre-trial detention¹ is intended to be an exceptional measure of last resort, only to be used when necessary and proportionate and in compliance with the presumption of innocence and the right to liberty. However, in the EU as around the world, these strict limitations are not widely respected.
2. The EU is facing a long-standing crisis in prison overcrowding that threatens to undermine mutual trust and the functioning and legality of mutual recognition instruments such as the European Arrest Warrant. Overcrowding, and the rights violations it causes, is driven in part by excessive use of pre-trial detention, in violation of regional and international standards. The European Commission (the Commission) and Parliament (the Parliament) have, for the past five years, repeatedly recognised the need for improved standards in relation to pre-trial detention.
3. In 2011, the Commission published a Green Paper on Detention (the Green Paper)² which recognised that detention issues “come within the purview of the European Union as [...] they are a relevant aspect of the rights that must be safeguarded in order to promote mutual trust.” In response to the Green Paper, the Parliament adopted a cross-party resolution in favour of legislative minimum standards recognising that “detention issues have an impact on mutual trust, and consequently on mutual recognition and judicial cooperation.”
4. Since 2011 Fair Trials and its Legal Experts Advisory Panel (LEAP) have undertaken a number of initiatives calling for pre-trial detention reform in the EU,³ starting with the publication of *Detained without Trial*⁴ and a series of short reports based on country-specific expert roundtable meetings held in France,⁵ Greece,⁶ Hungary,⁷ Lithuania,⁸ Poland⁹ and Spain¹⁰ in order to develop a better

¹ In the sense of depriving suspects and accused people of their liberty before the conclusion of a criminal case).

² Green Paper from the Commission, 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, Brussels 14 June 2011, available at: http://ec.europa.eu/justice/policies/criminal/procedural/docs/com_2011_327_en.pdf

³ See Fair Trials, Report “The Road Ahead: Defence Rights in Europe”, March 2016, available at:

<https://www.fairtrials.org/wp-content/uploads/Defence-Rights-in-the-EU-full-report.pdf?platform=hootsuite>

⁴ Fair Trials, Report “Detained without Trial: Fair Trials Internationals response to the European Commission’s Green Paper on detention”, October 2011, London, available at:

<https://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>.

⁵ Fair Trials, Communique following a local expert meeting on pre-trial detention, 13 June 2013, France, available at:

https://www.fairtrials.org/wpcontent/uploads/Fair_Trials_International_France_PTD_Communique%C3%A9_E_N.pdf.

⁶ Fair Trials, Communique following a local expert meeting on pre-trial detention, 27 April 2013, Greece, available at: <https://www.fairtrials.org/wp-content/uploads/Greek-communique-EN.pdf>.

⁷ Fair Trials, Communique following a local expert meeting on pre-trial detention, 21 February 2013, Hungary, available at: <https://www.fairtrials.org/wp-content/uploads/Hungary-PTD-communique.pdf>.

⁸ Fair Trials, Communique following a local expert meeting on pre-trial detention, 9 May 2013, Lithuania, available at: https://www.fairtrials.org/wp-content/uploads/130910_Lithuania-PTD_Final_EN.pdf.

⁹ Fair Trials, Communique following a local expert meeting on pre-trial detention, 4 December 2012, Poland, available at: <https://www.fairtrials.org/wp-content/uploads/Poland-PTD-communique.pdf>.

¹⁰ Fair Trials, Communique following a local expert meeting on pre-trial detention, 18 October 2012, Spain, available at: <https://www.fairtrials.org/wp-content/uploads/Spain-PTD-communique.pdf>.

understanding of the problems encountered in practice. Both the study and the roundtable discussions highlight the lack of information on the practical operation of procedural rules designed to ensure that detention is only used in exceptional circumstances.

5. The following year, Fair Trials and LEAP wrote to all Members of the Parliament to ask them to call on the Commission to propose minimum standards on pre-trial detention.¹¹ In 2013, in coalition with over 20 other European NGOs, Fair Trials wrote to then-Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding to call for progress on better regional procedural protections and data collection on pre-trial detention,¹² and made further appeals in a submission to the Commission's 'Assises de la Justice' later that year.¹³
6. Building on these initiatives, in June 2014, Fair Trials and a team of domestic experts undertook a major research project with the objective of developing a unique knowledge base that provides real insight into judicial decision-making leading to pre-trial detention. The results of the research were published in 2016 in the report entitled *A Measure of Last Resort? The practice of pre-trial detention decision making in the EU* (the 2016 report).
7. Since the 2016 report, there have been several significant developments in relation to pre-trial detention, in particular, the fall-out from the *Aranyosi & Caldaru* judgments of the Court of Justice of the European Union (CJEU)¹⁴ and the findings from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) published in its annual report of 2016 that poor detention conditions are largely linked to overcrowding resulting from the over-use of pre-trial detention and a lack of enforceable regional-level safeguards.¹⁵ A further significant development is the implementation of the EU Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings (the Access to a Lawyer Directive)¹⁶ which was due to be transposed by Member States by the end of November 2016. In particular, the Access to a Lawyer Directive requires Member States to make the necessary arrangements to ensure that suspects and accused persons who are deprived of liberty are in a position to exercise effectively the right of access to a lawyer (Recital 28 and Article 3(4)).
8. In the light of these developments, the purpose of this report is to identify any changes in respect of our 2016 report findings. We have gathered data on the rates of pre-trial detainees, judicial decision-making, legislative and jurisprudential developments, use of alternative measures, conditions of detention, and any existing remedies to wrongful pre-trial detention.

¹¹ Letter (15 June 2012) available at: https://www.fairtrials.org/documents/Final_PTD_Letter_to_MEPs.pdf

¹² Letter (10 Sep 2013) available at: <https://www.fairtrials.org/wp-content/uploads/Letter-to-Viviane-Redingon-PTD.pdf>.

¹³ Fair Trials, Submission to the European Commission, Assises de la Justice Consultation, December 2013, available at: http://ec.europa.eu/justice/events/assises-justice2013/files/contributions/76.fair_trials_international_en.pdf.

¹⁴ CJEU judgement of 5 April 2016 in the Joined Cases C-404/15 and C-659/15.

¹⁵ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 26th General Report of the CPT, 1 January - 31 December 2016, available at <https://rm.coe.int/168070af7a>

¹⁶ 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 2013 L 290, p. 1)

9. Specifically, the data contained in this report has been gathered through the following tools:

- Surveys circulated to LEAP members in 2016/17.
- Findings and conclusions from relevant meetings held by Fair Trials and other partners on pre-trial detention since the publication of the 2016 report;
- Key caselaw developments of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR); and
- Updates from the project partners who participated in the 2016 report.

II. BACKGROUND TO THE 2016 REPORT

10. Between 2014 and 2016, Fair Trials coordinated research in ten EU jurisdictions (England and Wales, Greece, Hungary, Italy, Ireland, Lithuania, Netherlands, Poland, Romania, and Spain) to analyse the practice of pre-trial detention decision-making and the use of alternatives to detention. In May 2016, Fair Trials released the report entitled *A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU* which provided a high-level overview of the research and analysis from an EU regional perspective.¹⁷ The report was based on surveys of 544 lawyers, review of 672 case files, monitoring of 242 hearings, and interviews with 56 judges and 45 prosecutors across the 10 jurisdictions, as well as an analysis of the underlying legal frameworks and statistics related to pre-trial detention and prison populations. Separate in-depth reports into each of the 10 jurisdictions were released in parallel by Fair Trials' partners.¹⁸

11. The report highlighted systemic failures to respect core concepts such as the use of detention as a measure of last resort, equality of arms and proportionality, as well a broad concern in relation to insufficient judicial reasoning in pre-trial detention decisions.¹⁹ In particular, the research identified in several jurisdictions entrenched procedural bias by the courts towards the prosecution. In Hungary and Romania, for instance, over 90% of the case files reviewed showed that judges relied mainly or entirely on prosecutorial arguments. This can make lawyers less inclined to dedicate time and effort at the pre-trial stage despite the impact on their client's liberty and the ultimate outcome of the case.

12. The lack of effective legal assistance prior to and during detention hearings was identified as a key barrier to fair decision-making. Particular concerns included:

- Lawyers were not always present at detention hearings;
- The quality of legal assistance was compromised by lawyers' limited time to prepare and/or poorly functioning legal aid systems;

¹⁷ Fair Trials, May 2016, "A measure of Last Resort? The practice of pre-trial detention decision making in the EU", at: <https://www.fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf>.

¹⁸ The report and accompanying jurisdiction-level reports are available at <https://www.fairtrials.org/campaigns/pre-trial-detention/pre-trial-detention-in-europe/>

¹⁹ Fair Trials, May 2016, "A measure of Last Resort? The practice of pre-trial detention decision making in the EU", at: <https://www.fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf>.

- Legal barriers were observed, such as the defence not being permitted to adduce evidence at detention hearings in Romania; and
- Limited access to evidence prevented lawyers from informing and influencing the proceedings in relation to pre-trial detention.

13. The report included a recommendation to adopt EU-level legislation establishing minimum standards for pre-trial detention decision-making in line with the European Convention on Human Rights (ECHR) and building upon the EU procedural rights directives promulgated pursuant to the *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*.²⁰ Minimum standards for the use of pre-trial detention would strengthen the enforceability of the procedural rights of suspects and accused persons and provide guidance to members of the judiciary across the EU on decision-making on pre-trial detention compliant with the fundamental rights of the persons concerned.

14. EU-level legislation on pre-trial detention would give rise to other advantages. The unjustified and unlawful use of pre-trial detention is in itself a violation of the fundamental right to liberty. It is also a driver of prison overcrowding, which impacts the fundamental right to be free from torture, inhuman and degrading treatment and is creating a challenge to the effective operation of judicial cooperation instruments, notably the European Arrest Warrant (EAW).²¹ Excessive use of pre-trial detention also presents an unnecessary financial burden on Member State budgets.²² As a result, EU-level legislation on pre-trial detention would likely increase compliance with fundamental human rights beyond the right to a fair trial and contribute to the reduction in prison populations, reinforce judicial cooperation mechanisms and reduce the pressure on Member State budgets.

a. Launch event

15. Fair Trials and LEAP launched the regional report on 26 May 2016 at the European Parliament. The event, hosted by Fair Trials patron and MEP Birgit Sippel, was attended by project partners, LEAP members, civil society representatives and officials from the Commission, the Parliament and the Council of the European Union. The event also featured our new film highlighting the human impact of unlawful pretrial detention through cases from Poland, Romania and Italy, with commentary provided by our partners in those countries.²³ Fair Trials staff opened the event with an overview of the research findings. Presentations then followed by Maïté De Rue (Deputy to the Prosecutor General of Belgium, and member of the CPT), Justice John Edwards, an Irish Court of Appeal judge, Olivier Tell from DG Justice of the European Commission and Luca de Matteis from the Permanent Representation of Italy to the European Union.

²⁰ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009G1204\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009G1204(01)&from=EN).

²¹ In the recent *Aranyosi* and *Căldăraru* cases, the Court of Justice of the European Union (CJEU) confirmed that Member States have a duty to respect the fundamental rights of requested people when considering EAWs. The CJEU made clear that Member States must conduct rigorous human rights enquiries prior to approving surrender, suspending surrender where there is a real risk that requested individuals would be subjected to detention conditions that infringe their fundamental rights.

²² See the European Parliamentary Research Service study on the Cost of Non-Europe Report – Procedural Rights and Detention Conditions, December 2017 (available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU\(2017\)611008_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf)).

²³ Available at <https://www.fairtrials.org/meps-and-fair-trials-call-for-end-to-unjustified-pre-trial-detention/>

b. Roundtable with experts on pre-trial detention: Incentives driving judicial and prosecutorial conduct.

16. On 15 July 2016, Fair Trials brought together experts from 10 EU member states – defence lawyers, prosecutors, judges, probation officers and civil society representatives – to discuss the challenges in relation to making effective decisions on pre-trial detention and the ways in which EU legislation could address these challenges
17. Participants suggested that the grounds for ordering pre-trial detention should be divided in two categories, formal and informal. On the one hand, formal grounds are those established by the law (risk of reoffending, risk of flight, inexistence of effective alternative). On the other hand, informal grounds are those included in the judicial reasoning that have no legal grounding (such as the pressure of public opinion, willingness to punish and put pressure on the defendant, etc.).
18. The judges present at the roundtable reported that they are subject to two sources of pressure when deciding whether to order pre-trial detention: external and internal. The external pressure comes from public opinion: media coverage of particular cases often depicts suspects as guilty to the general public, who expect that judges take action by inflicting exemplary punishment. When asked whether the media influences their decision-making some participants argued that in their jurisdiction the media and public opinion are not taken into consideration due to the high degree of independence of the judiciary. However, other participants admitted that the media and the public influence their decisions. One of the participants gave the example of a case in which the decision of the judge not to order pre-trial detention was highly criticised in the media, and later, some of the arguments used by the media were endorsed by the prosecutor in the case.
19. The internal pressure comes from within the judicial system. Judges respond not only to public opinion but also to that of their colleagues. This means that a judicial environment which is dismissive of human rights standards can drive other judges to act accordingly (“culture of inertia”). The tension with human rights standards is mostly visible when examining the grounds for ordering pre-trial detention. Judicial decision-making may also be influenced by concerns about reputation and career prospects.

c. Event at the OSCE Human Dimension Implementation Meeting (HDIM)

20. The OSCE HDIM is the largest human rights conference within the OSCE region, which brings together civil society representatives from every participating member state. In September 2016, Fair Trials organised a panel discussion on the misuse of pre-trial detention across the OSCE region. Fair Trials’ Chief Executive, Jago Russell, and Regional Director for Europe, Ralph Bunche, presented the findings of the 2016 report before a multinational audience. The Polish section of the LEAP network actively engaged in the event, highlighting the misuse of pre-trial detention in Poland, something that echoed the words of the Polish Commissioner for Human Rights Adam Bodnar, also a panellist at the event.

d. European Commission roundtable meeting

21. In October 2016, Fair Trials and LEAP members from Hungary (Hungarian Helsinki Committee) and Lithuania (Human Rights Monitoring Institute) joined a roundtable meeting organised by the Commission on pre-trial detention. The Directorate General for Justice acknowledged that considerable advocacy efforts are required at national level in order to secure EU-wide reform. In the view of stepping up local impact, Fair Trials and LEAP are developed national action plans to enhance the implementation of the Roadmap Directives and to advocate for reform where needed, including in relation to pre-trial detention decision-making.

III. REGIONAL-LEVEL DEVELOPMENTS following the launch of the report:

22. The publication of the 2016 report was the starting point of a wider campaign to fight against abusive pre-trial detention. In May 2016, the day of the launch of the 2016 report at the European Parliament, a cross-party group of four MEPs wrote a letter to Věra Jourová, the EU Commissioner for Justice, Consumers and Gender Equality, to urge action on pre-trial detention practices within the EU. In the letter, the MEPs (Dennis de Jong, MEP, Birgit Sippel, MEP, Judith Sargentini, MEP, Nathalie Griesbeck, MEP) highlighted some of the problems around the practice of pre-trial detention, including the issues raised in the *Aranyosi and Căldăraru* cases. The letter also raised the potential for the Parliament to act on its own initiative to propose legislation. It concluded by urging the Commissioner to take the following steps:

- The submission of a legislative proposal on pre-trial detention, as requested by Parliament in its resolution of 15 December 2011;
- Public restatement of the Commission's long-standing position that, when applying the Framework Decision on the European Arrest Warrant, Member States should respect human rights and fundamental freedoms and that mutual recognition should not in any way undermine this principle;
- The submission of legislative proposals clarifying the Framework Decision on the European Arrest Warrant, as requested by the Parliament in its Resolution of 27 February 2014.

23. Briefed on the research, Commissioner Jourová gave a speech at the 2016 Annual Conference of the European Criminal Law Academic Network (ECLAN) in which she stated that action on pre-trial detention was a key priority for the Commission over the next few years.²⁴ In her speech, Commissioner Jourová highlighted the importance of improving the procedural safeguards related to pre-trial detention. She argued that a lack of safeguards could hinder judicial cooperation, whilst poor conditions may lead to the refusal of extradition under the European Arrest Warrant: “[m]y priority here is to improve the procedural safeguards related to pre-trial detention. The lack of minimum procedural safeguards for pre-trial detention can hinder judicial cooperation.” This declaration was supported by a cross-party group of Members of the European Parliament (GUE/NGL, S&D, Greens/EFA, ALDE) and by the Italian Permanent Representative to the EU.

²⁴ Speech by Commissioner Jourová at the European Criminal Law Academic Network, 2016 Annual Conference, 10th Anniversary, *EU Criminal Law – key to a Security Union based on fundamental rights and values*, April 2016, available at http://europa.eu/rapid/press-release_SPEECH-16-1582_en.htm

24. However, in 2017 the Commission decided not to include action on pre-trial detention in its work-programme for the following years. This disappointing decision prompted Fair Trials to conduct follow-up research on the current situation of the practice of pre-trial detention decision-making to support continued advocacy efforts that EU legislation is necessary.

A. Court of Justice of the European Union (CJEU): *Aranyosi* and *Căldăraru* decisions.

25. On 5 April, in its decision in the *Aranyosi* and *Căldăraru* cases,²⁵ the CJEU confirmed that Member States are obliged to respect the fundamental rights of requested people when considering the execution of EAWs. The CJEU rejected the premise that the EAW is a “no questions asked” mechanism, and affirmed the duty of Member States to conduct rigorous human rights enquiries prior to deciding whether to surrender requested persons, and to block extraditions where there is a real risk that the requested person will be subject to detention conditions that would infringe his or her fundamental rights.

26. In practical terms, the judgment obliges judicial authorities to defer the execution of an EAW until the requesting Member State has provided sufficient information to make clear whether the requested person’s fundamental rights are at real risk of infringement. If sufficient information is not forthcoming within a “reasonable period” of time, the judicial authority may decide to end the surrender proceedings.

27. Despite this welcome development, issues remain as to how the executing authorities engage with evidence on detention conditions. Firstly, it is not clear whether the executing authority is obliged to consider this information on its own initiative, where the defendant does not raise it. Secondly, it is unclear how a court in one Member State can obtain evidence on the detention conditions in another Member State to establish whether detention facilities violate fundamental rights.

28. LEAP members have highlighted the positive impact that the *Aranyosi* and *Căldăraru* decisions have had in the way the judiciary handles EAW procedures, with some member states’ courts, including the Netherlands, France and Germany, increasingly refusing to surrender to countries with poor prison conditions which would violate Article 3 (right to be free from torture and inhuman or degrading treatment) of the ECHR. Thus, in the last two years, several Member States have refused to surrender requested persons to Romania or Belgium due to the well-reported poor conditions in their prison facilities.

29. However, LEAP members from other countries, including Greece, Croatia, Belgium, Romania, Bulgaria, Estonia and Spain, are sceptical about the impact of the CJEU’s decisions given that national courts continue to execute EAWs without conducting individual human rights assessment and fail to take into consideration the poor standards in the prison conditions that requested persons will be subject to in the receiving State.

- **Belgium:** In the past two years, Belgium has faced criticism over the poor conditions of detention in a number of its prison facilities. As a result, the Netherlands has refused to surrender persons to Belgium under EAWs due to the risk that requested person may be subjected to inhuman or degrading treatment in breach of Article 3 ECHR.

²⁵ CJEU judgement of 5 April 2016 in the Joined Cases C-404/15 and C-659/15

- **Croatia:** LEAP members in Croatia report that courts are increasingly refusing to surrender to issuing States on the basis of Article 3 of the ECHR due the poor prison condition in which the requested person will be held. However, in a case concerning the surrender of a Polish national to Poland, the Supreme Court refused to suspend the surrender on the basis that the requested person did not provide sufficient proof that he would be subject to torture if surrendered.
- **Finland:** Courts in Finland do not appear to be taking account of the CJEU's *Aranyosi and Caldaru* judgment when dealing with EAWs, and are not concerned with assessing whether requested persons will be subject to poor detention conditions below the threshold of Article 3 ECHR after surrender.
- **France:** LEAP members in France report that the *Aranyosi and Caldaru* decision does not appear to have had a significant impact on the way in which EAWs are dealt with by the French courts, possibly due to the weight French courts give to the principle of mutual trust between Member States.
- **Greece:** Poor prison conditions continue to be an issue in Greece, and have been highlighted by foreign courts when refusing to surrender persons pursuant to European Arrest Warrants issued by Greek courts.
- **Ireland:** Courts in Ireland provided for the possibility of ordinarily conducting individual human rights assessments when handling EAWs from other Member States before the *Aranyosi and Caldaru* decision was issued. Therefore, the possibility of refusing extradition on the basis of Article 3 of the ECHR due the poor prison conditions has been a reality in Ireland for some years.
- **Italy:** After the *Aranyosi and Caldaru* decisions, the Higher Courts appear to be more inclined to require additional information and assurances regarding the conditions of detention in the requesting State, provided this is raised by the defence. In October 2017, the Court of Cassation (citing the cases of *Aranyosi and Caldaru*) refused to surrender a person to Romania because insufficient evidence had been provided by Romania to establish that the prison conditions were not inhumane. In particular, Romanian authorities refused to identify the prison where the requested person would be sent or specify the detention regime that would be imposed. A re-consideration of the request was ordered to ascertain the real risk of inhuman or degrading treatment in Romania.
- **Netherlands:** Following the *Aranyosi and Caldaru* decision, when dealing with EAWs, national judges are increasingly assessing the conditions that the requested person will be subject to in detention, and refusing to execute warrants where a risk exists that Article 3 of the ECHR will be violated as a result. For example, Dutch Courts were temporarily refusing execution of EAWs to Belgium on the basis of recent reports of poor prison conditions in Belgian facilities.
- **Portugal:** Neither the CJEU's decision nor the recent trend across EU Member States to refuse the automatic execution of EAWs on the basis of poor prison conditions in the

issuing State appear to have had a notable impact on the way Portuguese courts handle EAWs.

- **Sweden:** The *Aranyosi and Calraru* decision appear to have had an impact in how EAWs are handled by Sweden's courts. For example, surrenders have been refused to Romania on the basis that person faced a serious risk of being treated in violation of Article 3 of the ECHR.²⁶
- **Spain:** According to LEAP members in Spain, courts appear not to be taking due account of human rights concerns when deciding whether to execute EAWs, although some concerns have been raised on isolated cases.

B. European Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment (CPT) Annual Report of 2016.

30. In 2016, the CPT published its regular Annual Report,²⁷ summarising its activities and providing highlights of its country visits for the previous year. The CPT included a section on the practice of pre-trial detention across the Council of Europe countries. The purpose was to make recommendations to address the widespread problem of overcrowding in prison facilities across Europe, which the CPT identify as one of the most serious challenges to ensuring the adequate treatment of persons deprived of liberty. In its report, the CPT concluded that the problem of overcrowding in prisons is, to a large extent, due to the high proportion among the total prison population of persons held in pre-trial detention.²⁸ According to the report, on average, some 25% of all prisoners in the Council of Europe area are held in pre-trial detention.²⁹ The proportion is even higher with respect to foreign nationals: an average of circa 40% of the overall number of persons held in pre-trial detention are foreign nationals.³⁰

31. Additionally, in its visits, the CPT found that persons in pre-trial detention are often held in dilapidated and overcrowded cells and are frequently subject to an impoverished regime. In a number of visit reports, the CPT took the view that the conditions of detention of persons held in pre-trial detention were totally unacceptable and could be considered to be inhuman and degrading.³¹

C. Partner updates on PTD law and practice at national level

Italy – Antigone

²⁶ Cases Svea hovrätts mål Ö 5372-16 and Svea hovrätt Ö-5368-16.

²⁷ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *26th General Report on the CPT's Activities*, 2016, available at: <https://rm.coe.int/168070af7a>.

²⁸ *Ibid*, 31.

²⁹ *Id.*

³⁰ Council of Europe Annual Penal Statistics, SPACE I – Prison Populations, Survey 2015, PC-CP (2016) 6, 15 December 2016, tables 4 and 5.1.

³¹ CPT, *26th General Report on the CPT's Activities*, 2016, 32-35.

32. According to the 2016 national research in Italy, pre-trial detention is being ordered excessively, and a strong disparity between EU and non-EU citizens can be clearly observed. At the time of the research, a new law had recently come into force aiming at limiting the use of pre-trial detention and encouraging the use of less restrictive measures such as home arrests or electronic tagging.³² In its report, Antigone recommended the adoption of a new regulatory framework that would improve pre-trial decision making as well as implement correctly existing instruments to ensure the effectiveness of the right to legal assistance and the reduction of the use of pre-trial detention.
33. The findings of the national research were presented, during a closed meeting at the Ministry of Justice, to the then Undersecretary of Justice Gennaro Migliore, who took them into consideration. Shortly afterwards, trying to reach a larger audience, the report was transformed into an article to be included in Antigone's annual report on prison conditions, which to date has had 16,517 visitors.³³ Furthermore, a second article was published on Antigone's platform, 'Medium'.³⁴
34. The number of prisoners in pre-trial detention and awaiting a first trial has increased in the last two years, from 8,523 in 2015 to 9,337 in 2016³⁵ and to 9,634 in the 2017.³⁶ Although the numbers of pre-trial detainees have decreased in Italy since 2012 (when the population of pre-trial detainees reached 12,484), the recent increase from 2016 to 2017 is a clear alert that work continues to be required. If the numbers reported above describe the situation in prisons at a specific moment, the analysis of Court decisions confirms the findings in the 2016 report. The number of decisions in which pre-trial detention was ordered in 2015 (on a sample that includes 70% of the Courts, covering all the large metropolitan areas) was 16,701; in 2016, numbers increased significantly, reaching 20,531.³⁷ Data for 2017 is not available yet.

Spain - Asociación Pro Derechos Humanos de España (APDHE, Spanish Association for Human Rights)

35. After the publication of the national report on PTD in 2016, APDHE met with national authorities to advocate for legislative reform in order to ensure that pre-trial detention is used as a measure of last resort and that alternative measures are appropriately considered before detention is ordered. Although APDHE's proposal was met with enthusiasm by officials of the Ministry of Internal Affairs, the Ministry of Justice and the Judicial Council, no concrete follow-up ensued.
36. Since 2012, Spain has seen a decrease in the percentage of pre-trial detainees. The current figures remain below the levels registered prior to 2012, when the total number of pre-trial detainees

³² Law 47/2015

³³ Available at: <https://www.infinitoedizioni.it/prodotto/galere-ditaliadodicesimo-rapporto-di-antigone-sulle-condizioni-di-detenzione-copy/>

³⁴ Available at: <https://medium.com/@AntigoneOnlus/stranieri-e-sistema-penale-ce-discriminazione-f54e78d8b00c>

³⁵ https://www.giustizia.it/giustizia/it/mg_1_14_1.page?facetNode_1=0_2&facetNode_2=0_2_10&facetNode_3=0_2_10_2&contentId=SST996131&previousPage=mg_1_14

³⁶ Ibid.

³⁷ Ministero della Giustizia Dipartimento per gli Affari di Giustizia Direzione Generale della Giustizia Penale Ufficio I, Misure Cautelari Personali emesse nell'anno 2016 available at: https://giustizia.it/giustizia/it/mg_1_12_1.page;jsessionid=phFDLj3mLjmVhcmVUMyDQDF6?contentId=SPS36305&previousPage=mg_1_12

was 11.480.³⁸ In January 2015, numbers had gone down to 8.544,³⁹ and in January 2016 numbers decreased to 7.732.⁴⁰ However, the statistics for 2017 show a significant increase in the numbers, with 8.583 pre-trial detainees recorded in November of that year.⁴¹ The reasons for the increase in 2017 are uncertain given the lack of statistical evidence that would allow an analysis of the data. However, it is highly probable that this is due to delays in the investigations of the related offences.

37. In 2014, the Ministry of Justice drafted a blueprint to reform the national criminal procedural law concerning the maximum deadlines to conduct criminal investigations and compile the casefile pre-trial. The proposal provides for an extension from one month to 6 months for simpler cases and 18 months for more complex ones. The reform could reduce the time spent in pre-trial detention only in some cases, but it is not possible to fully appreciate the scope of the reform just yet. The reform is currently being debated in Parliament and it is likely that further amendments to the proposal will be adopted.

Hungary - Hungarian Helsinki Committee (HHC)

38. Since 2013, there has been a decrease in the proportion of pre-trial detainees in Hungary, from 28% of the total prison population to 20.6% in 2016.⁴² This is possibly due to a drop in prosecutorial requests for pre-trial detention since 2013 and a slight reduction in the rate of successful prosecutorial motions aimed at ordering pre-trial detention from over 91.4% in 2013 to 86.6% in 2016.⁴³ However, in many counties the rate of approvals of requests for detention is still over 90%.⁴⁴ Nonetheless, the number and proportion of alternative coercive measures requested by the prosecution and/or ordered by the courts continues to be low.⁴⁵ In 2015, prosecutors applied for pre-trial detention in the investigation phase in 5,075 cases, while applying for house arrest

³⁸Data extracted from the official Ministry of Interior website, available at:

<http://institucionpenitenciaria.es/web/portal/documentos/estadisticas.html?r=m&adm=TES&am=2012&mm=1&tm=PREV&tm2=GENE>

³⁹<http://institucionpenitenciaria.es/web/portal/documentos/estadisticas.html?r=m&adm=TES&am=2015&mm=1&tm=PREV&tm2=GENE>

⁴⁰<http://institucionpenitenciaria.es/web/portal/documentos/estadisticas.html?r=m&adm=TES&am=2016&mm=1&tm=PREV&tm2=GENE>

⁴¹<http://institucionpenitenciaria.es/web/portal/documentos/estadisticas.html?r=m&adm=TES&am=2017&mm=11&tm=PREV&tm2=GENE>

⁴² Data published by the National Penitentiary Headquarters at <http://bv.gov.hu/sajtoszoba>.

Source of data for the year 2016: Évkönyv – Büntetés-végrehajtási Szervezet – 2016 [Yearbook of the Prison Service – 2016], <http://bv.gov.hu/download/3/2f/c1000/A%20B%C3%BCntet%C3%A9s-v%C3%A9grehajt%C3%A1si%20Szervezet%20%C3%89vk%C3%B6nyve%202016.pdf>, 18

⁴³ Ügyészégi statisztikai tájékoztató (büntetőjogi szakterület) 2015 [Statistical information note of the prosecution (criminal law)], Legfőbb Ügyészség Informatikai Főosztály [IT Department of the Chief Prosecutor's Office], <http://ugyeszseg.hu/repository/mkudok8724.pdf>, 48, Table 57.

Source of data for the year 2016: data provided by the Chief Prosecutor's Office to an FOI request.

⁴⁴ Ügyészégi statisztikai tájékoztató (büntetőjogi szakterület) 2015 [Statistical information note of the prosecution (criminal law)], Legfőbb Ügyészség Informatikai Főosztály [IT Department of the Chief Prosecutor's Office], <http://mklu.hu/repository/mkudok2832.pdf>, 48, Table 57

Source of data for the year 2016: data provided by the Chief Prosecutor's Office to an FOI request

⁴⁵ A büntetőbíróság előtti ügyészi tevékenység főbb adatai I. – A 2015. évi tevékenység [Main data on prosecutorial activity before criminal courts I. – Activities in 2015], Legfőbb Ügyészség [Chief Prosecutor's Office], <http://ugyeszseg.hu/repository/mkudok245.pdf> 41 and 44.

*Detailed data on 72-hour detention (preceding pre-trial detention) and temporary mandatory mental treatment are not included in the table, but are included in the total number of coercive measures as included in the table.

orders in 186 cases and a geographical ban (ban to leave a certain administrative area) in 216 cases.

39. Pre-trial detention decision making continues to be a problem in Hungary. According to the latest report issued by the Supreme Court of Hungary, national courts continue to rely mostly on prosecutorial arguments when ordering pre-trial detention and fail to address the reasoning of the defence, including any request for less restrictive alternatives to detention. Courts often fail to apply the jurisprudence of the ECtHR and continue to issue judicial decisions that are often too brief and formulaic.
40. The New Code of Criminal Procedure was adopted in June 2017 and will enter into force on 1 July 2018.⁴⁶ The new code sets out to make pre-trial detention a measure of last resort underlining the requirement of proportionality, and broadening the scope of alternative coercive measures available to the authorities.⁴⁷ Throughout 2015 and 2016, the HHC has contributed to the drafting of the new Code of Criminal Procedure via written submission and meetings with the respective ministries, covering topics such as pre-trial detention and coercive measures.⁴⁸ Specifically, in June 2016, the HHC covered, among others, provisions related to the rights of defendants to information and to access a lawyer, the system of appointing ex officio defence counsels, pre-trial detention, and coercive measures in general.⁴⁹ The fact that the new code will address many of the issues highlighted by HHC signifies that there is hope that this amendment will have a positive impact and decrease the use of pre-trial detention in Hungary.

Netherlands - Leiden University

41. In its research study published in 2016, the University of Leiden found that, in general the Dutch legislation on pre-trial detention is compliant with ECHR-standards. However, the study raised a number of concerns regarding the application of the law in practice, highlighting the high number of pre-trial detention orders, the limited reasoning of pre-trial detention decisions and the limited use of alternatives to pre-trial detention.
42. The report attracted significant attention from the authorities, which was even discussed by the Minister of Security and Justice during parliamentary questions.⁵⁰ In 2014, the Government announced an extensive revision or modernisation of the Code of Criminal Procedure.⁵¹ The goal of this revision is to keep the Code up to date with changing circumstances in society, and will affect many organisations and bodies connected with the criminal justice system. As part of the modernization process, the Government released several discussion papers dealing with a number of topics under consideration for legislative change, including pre-trial detention. The Minister of Security promised that the issue would be considered in the ongoing project of modernization of the Code of Criminal Procedure.⁵²

⁴⁶ The text of the law is available here in Hungarian: http://njt.hu/cgi_bin/njt_doc.cgi?docid=202672.340269.

⁴⁷ Ibid. Relevant articles on coercive measures affecting personal liberty include Articles 271–301.

⁴⁸ Available at: https://www.helsinki.hu/wp-content/uploads/MHB_velemeney_Be_kodifikacio_234_munkaanyag.pdf.

⁴⁹ Available at: https://www.helsinki.hu/wp-content/uploads/MHB_velemeney_Be_tervezet_20160620.pdf.

⁵⁰ Aanhangsel Handelingen 2015/2016, 2016Z10401, ingezonden 27 mei 2016.

⁵¹ See <https://www.government.nl/topics/modernisation-code-of-criminalprocedure/practical-effects-of-modernisation>

⁵² Aanhangsel Handelingen 2015/2016, 2887.

43. In February 2017 draft proposals for the first two new books of the Code of Criminal Procedure were presented for consultation. Book two sets out a revised pre-trial procedure. One of the major changes is that alternatives for pre-trial detention can be ordered separately, replacing the current situation where alternatives are only available as conditions for the suspension of pre-trial detention.⁵³ The proposed changes to the Code of Criminal Procedure are steps in the right direction. The real test however will be how judges apply these new rules in practice.

England & Wales - University of the West of England (UWE)

44. The national report on the practice of pre-trial detention in England and Wales, produced by Professor Ed Cape and Dr Tom Smith, from the University of West England achieved significant impact, namely contributing to the amendment of the Criminal Procedure Rules (CrimPR) in England and Wales.

45. The report highlighted the very little time that courts take to consider whether pre-trial detention should be ordered and that defence lawyers did not have adequate time to consider information supplied to them about the prosecution case prior to a hearing. The report also contained recommendations that the CrimPR be amended to compel courts to ensure adequate time is given to making decisions on pre-trial detention and that the defence is granted more time to fully consider relevant materials prior to hearings.

46. The report and the recommendations were well received by the CrimPR Committee, which has engaged actively and worked with the authors over the course of last year. As a result, the CrimPR was amended in line with the recommendations.

Lithuania – Human Rights Monitoring Institute

47. There has been a gradual decrease in the number of detainees held in remand in Lithuania since 2014. In that year, there were 1.642 persons held in pre-trial detention.⁵⁴ In 2015 numbers went down to 1.202, and in 2016 the numbers decreased significantly to 679 persons only to increase again slightly in 2017 to 720 persons.⁵⁵

48. Amongst the reasons behind this decrease could be the massive emigration and the subsequent reduction of Lithuanian population in recent years. Additionally, it is highly likely that the decline was affected by the decrease in the numbers of registered criminal offences during this period by 21%.⁵⁶ The decrease can also be attributed, in no small part, to an improvement of the economic situation in the country. Of course, these influences are not easily quantifiable and provable.

49. Although the situation appears to have improved significantly, the rates of successful pre-trial detention applications remain very high (in 2016 the rate of successful applications was 93.47%,

⁵³ Proposed article 2.5.4.1.1. of

⁵⁴ Police and other investigative institutions' statistics, <https://www.ird.lt/lt/paslaugos/nusikalstamu-veiku-zinybinio-registro-nvzr-paslaugos/ataskaitos-1/nusikalstamumo-ir-ikiteisminių-tyrimu-statistika-1>

⁵⁵ Ibid.

⁵⁶ Skirmantas Bikelis, Virgilijus Pajaujis, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 2nd Lithuanian National Report on Expert Interviews, 2017, 6
<http://www.irks.at/detour/Uploads/LT%202nd%20Report%20final%20f2.pdf>.

and 95.2% in 2017)⁵⁷ whilst the use of alternatives is low. This is a sign that a lot remains to be done in order to change in the judicial mindset.

Greece - Centre for European Constitutional Law

50. The absolute numbers of pre-trial detainees have increased since 2015, from 2,470 to 2,829 in 2017.⁵⁸
51. There have not been significant changes in Greek law and practice regarding pre-trial detention since 2015. Law 4478/2017,⁵⁹ which transposed Directive 2013/48/EU on the right of access to a lawyer, entered into force in June 2017. The new law introduced further safeguards strengthening the procedural rights of persons in pre-trial detention, as stipulated in the Directive.
52. Additional procedural safeguards with regards to the rights of persons in pre-trial detention are currently being considered and may soon be incorporated into the Penitentiary Code, which is at the stage of consultation at the time of writing.⁶⁰ The draft Penitentiary Code currently contains provisions aimed at solidifying the differences in legal status between the accused and the convicted person, as well as safeguarding the rights of vulnerable individuals in pre-trial detention.

Romania (based upon Fair Trials' desk research)

53. In 2014, the percentage of pre-trial detainees represented 8.34% of the total prison population, that is 2,514 out of 30,156 persons.⁶¹ In 2015, absolute numbers of pre-trial detainees decreased to 2,453⁶² and in 2017 the numbers continue to decrease to 2,203, which amounted to 8.1% of the total prison population.
54. According to DETOUR's national report in Romania, there is a clear trend in the statistical data showing a reduction of instances in which pre-trial detention is imposed. The reasons for this reduction could be 1) the fact that since 2003 the decision on pre-trial detention is made by the judge and not the prosecution; 2) the steep increase of cases being brought before the ECtHR, which has led the ECtHR to generate cases concerning Romania; 3) the adoption in 2014 of a new Criminal Procedure Code which introduced house arrest as an alternative to detention in remand;

⁵⁷ HRMI, FOI requests to the National Courts' Administration, www.teismai.lt

⁵⁸ Ministry of Justice, Transparency and Human Rights, available at http://scanmail.trustwave.com/?c=3040&d=mdK62kZPmi_MroLp3y2VL6itGOypv7KQ7sqDxwX2zA&s=270&u=http%3a%2f%2fwww%2eministryofjustice%2egr%2fsite%2fel%2f%25CE%25A3%25CE%25A9%25CE%25A6%25CE%25A1%25CE%259F%25CE%259D%25CE%2599%25CE%25A3%25CE%25A4%25CE%2599%25CE%259A%25CE%259Fbr%25CE%25A3%25CE%25A5%25CE%25A3%25CE%25A4%25CE%2597%25CE%259C%25CE%2591%2f%25CE%25A3%25CF%2584%25CE%25B1%25CF%2584%25CE%25B9%25CF%2583%25CF%2584%25CE%25B9%25CE%25BA%25CE%25AC%25CF%2583%25CF%2584%25CE%25BF%25CE%25B9%25CF%2587%25CE%25B5%25CE%25AF%25CE%25B1%25CE%25BA%25CF%2581%25CE%25B1%25CF%2584%25CE%25BF%25CF%2585%25CE%25BC%25CE%25AD%25CE%25BD%25CF%2589%25CE%25BD%2easpx

⁵⁹ Available in Greek at <http://www.et.gr/index.php/nomoi-proedrika-diatagmata>.

⁶⁰ Available in Greek at <http://www.opengov.gr/ministryofjustice/?p=8630>.

⁶¹ 2014 Annual Report of the National Administration of Penitentiaries, p 3, available in English at: <http://www.anp.gov.ro/documents/10180/4605968/Activity+Report+2014+NAP.pdf/ea7c0dbd-26e9-4ad3-99fac220548480a1>

⁶² <http://www.irks.at/detour/RO%201st%20National%20Report.pdf>

4) changes in the training provided at the National Institute of Magistracy and in the recruitment of new magistrates.⁶³

D. National developments: LEAP survey results

Austria

55. In 2015, the total prison population in Austria was 8,882, 19.7% of which were in pre-trial detention (1,752 persons). In July 2017, the total prison population in Austrian prisons amounted to 8,290, of which 23.6 % were held in pre-trial detention.⁶⁴ This means that there has been a considerable increase in the number of pre-trial detainees. Between 2001 and 2015, the number of Austrian nationals in pre-trial detention has decreased by 45%, while the number of foreign nationals in pre-trial detention has increased by 64%.⁶⁵ In 2015, 75 % of the population of detainees on remand were foreigners.⁶⁶

56. Nearly 90% of pre-trial detention orders are based on the risk of reoffending.⁶⁷ This may mirror societal concerns about public security but may also be due to the fact that the risk of re-offending is an easily substantiated ground for detention.⁶⁸ Defence lawyers argue that it is used too extensively, and fails to take account of the principle of proportionality.⁶⁹

57. On 1 January 2016, the 2015 law amending the Juvenile Court Act came into force. The aim of the amendment is to restrict the use of juvenile detention so that it is only used when necessary, reinforcing its exceptional nature.⁷⁰

Belgium

58. On 1 September 2014, 29.6 per 100,000 of national population were held in pre-trial detention in Belgium.⁷¹ In 2015, the numbers rose up to 31.7 (with 3,499 detainees in remand),⁷² and decreased slightly to 31 in 2016.⁷³

59. Certain steps have been taken by the authorities to address the problem of overcrowded detention facilities highlighted by the CPT in 2016.⁷⁴ For example, in 2017 the period in which a

⁶³ <http://www.irks.at/detour/Uploads/2nd%20Nat%20Report%20RO%20for%20Web.pdf>

⁶⁴ http://www.prisonstudies.org/country/austria#further_info_field_pre_trial_detainees

⁶⁵ Hammerschick/Reidinger, Detour. Towards Pre-trial Detention as Ultima Ratio. 2nd Austrian National Report on Expert Interviews (October 2017), 13, 100, available at http://www.irks.at/detour/1st%20Austrian%20National%20Report_141216.pdf

⁶⁶ Ibid, 52.

⁶⁷ Id, 40, 86.

⁶⁸ Id, 100.

⁶⁹ Id.

⁷⁰ Available at https://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00148/fname_455539.pdf

⁷¹ Marcelo F Aebi, Mélanie M Tiago and Christine Burkhardt, 'SPACE I - Council of Europe Annual Penal Statistics: Prison Populations. Survey 2014.' (Council of Europe 2015), table 1, available at <http://www.statewatch.org/news/2017/apr/coe-annual-prison-statistics-report-1-prison-populations-2015.pdf>

⁷² http://www.prisonstudies.org/sites/default/files/resources/downloads/wp tril_3rd_edition.pdf

⁷³ <http://www.prisonstudies.org/country/belgium>

⁷⁴ CPT, Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique, 2016, available at <https://rm.coe.int/16806be42c>

person can be held in detention before judicial intervention was extended from 24 to 48 hours.⁷⁵ Although it is not clear the impact that this measure will have, investigating judges have argued that the number of pre-trial detainees will decrease as they are provided with more time to assess whether further detention is required.⁷⁶ Another development is the introduction of alternative monitoring measures, such as the electronic bracelet. It is still early days to assess whether the introduction of these measures will lead to a reduction of the number of people held in detention pre-trial.

Croatia

60. Unofficial data indicates that in 2016 the number of pre-trial detainees had increased by 3% compared to 2015.⁷⁷ LEAP members from Croatia believe that this might be due to the fact that judges are considering the application of some other measures as provided by the Criminal Procedural Act (CPA), but they automatically order pre-trial detention which is contrary to the principle of proportionality. Nevertheless, in the last year the Constitutional Court strengthened the standards required in the reasoning that must be given to impose pre-trial detention, which has been one of the biggest challenges for the protection of human rights in Croatian criminal proceedings. Another challenge has been insufficient use of alternatives to detention. In 2017, the CPA was revised to abolish the possibility of using bail as an alternative to pre-trial detention, making it only valid when there is a risk of absconding. There is a risk that this new measure may lead to an increase in the number of pre-trial detainees.

61. The Croatian Constitutional court in its report of 2014 on the state of prisons and detention conditions encouraged the use of alternative measures with a view to reducing the number of pre-trial detainees, and to ensure that detention on remand is used as a measure of last resort. In its report, the Court recognized that the overuse of pre-trial detention is one of the main reasons for the poor conditions and overcrowding in prisons. As a result, national authorities have started the process of building new prison facilities and renovating existing pre-trial detention units.

Estonia

62. There has not been any significant changes in the percentage of pre-trial detainees in Estonia and there have been no legal reforms regarding pre-trial detention. There are, however, plans to reform the law to recognise the right of the suspects to have access to the casefile upon arrest, which could have an impact on the quality of the legal assistance received pre-trial.

Finland

63. There has been no significant change in the percentage of pre-trial detainees in the past two years and there has been no legal change regarding pre-trial detention. In February 2016, however, a working group within the Ministry of Justice published a plan designed to reduce the number of pre-trial detainees in Finnish prisons including by introducing alternative measures to detention, such as house arrest. Since 2016, Finnish authorities have begun to recognise the risk of

⁷⁵ Eric Maes, Alexia Jonckheere & Magali Deblock, DETOUR – Towards Pre-trial Detention as Ultima Ratio, 2nd Belgian National Report on Expert Interviews, November 2017, 63, available at http://www.irks.at/detour/Uploads/2nd%20Belgian%20National%20Report_Expert_interviews.pdf

⁷⁶ Ibid.

⁷⁷ No official data has been published yet for the period 2016-2017 (statistics will be made available in August 2018).

radicalisation of prisoners, not only for convicted persons but also for pre-trial detainees.⁷⁸ As a result, authorities have developed new initiatives and projects aimed at minimising the risk of radicalisation in prison such as "Southern Finland Criminal Justice Project to Identify Violent Extremism and Radicalization".⁷⁹

France

64. The recent terrorist attacks in France and the general climate of fear have put more stress on the justice system to be seen to be taking more action towards criminality in general. As a result, numbers of pre-trial detainees continue to increase every year. In 2015, the percentage of pre-trial detainees was 27.3%,⁸⁰ whilst in 2017 the percentage was 28.7%.⁸¹ This is possibly due to the fact that pre-trial detention is seen by judges as an ordinary preventive measure. LEAP members from France report that alternative measures, such as electronic the wristband, are not sufficiently used, contrary to what is required under to the French *Code de Procédure pénal*. In fact, the terrorist laws adopted in 2016 and 2017 have given greater scope for judges to impose pre-trial detention on the basis of suspicion based solely on evidence kept by the intelligence services on the basis of secret, and sometimes doubtful, evidence (the "Fiche S").
65. Overcrowded prison facilities are also an issue in France, and authorities are becoming increasingly aware that the excessive use of pre-trial detention may be exacerbating this. However, for French authorities the solution passes from building more prison facilities or ordering early release of prisoners; as opposed to making pre-trial detention a measure of last resort and to using alternative measures.

Greece

66. LEAP members from Greece report that the use of pre-trial detention has decreased since 2015, due to, amongst other reasons, the introduction of new legislation tightening up the requirements for the imposition of pre-trial detention and the introduction of house arrest as an alternative measure. As a result, house arrest is being used more frequently, which has turned out to be a positive development. However, some data suggests that there has been an increase in the number of persons in pre-trial detention.⁸²
67. Despite recent reports of the CPT highlighting the dire conditions of detention in Greece, no concrete legislative measures have been taken to reduce the number of pre-trial detainees. Authorities have, however, tried to address the problem of overcrowded prison facilities by changing the law to allow the early release of convicted persons.

Ireland

⁷⁸ <https://yle.fi/uutiset/3-9420829>

⁷⁹ Project funded the European Commission, Migration and Home Affairs, available at https://ec.europa.eu/home-affairs/node/11703_en

⁸⁰ SPACE I, table 5.1.

http://wp.unil.ch/space/files/2017/04/SPACE_I_2015_FinalReport_161215_REV170425.pdf

⁸¹ World Prison Brief Data, France, available at <http://www.prisonstudies.org/country/france>

⁸² See, for instance: <http://www.prisonstudies.org/country/greece> which indicates a proportion of 26% held in pre-trial detention in 2017 as compared to 24.4% in 2015 according to http://wp.unil.ch/space/files/2017/04/SPACE_I_2015_FinalReport_161215_REV170425.pdf.

68. The use of pre-trial detention has increased from 2015 to 2018. In 2015, the percentage of pre-trial detainees was 14.6% of the total prison population, whilst in 2018 the percentage was as high as 16.3%.⁸³ LEAP members from Ireland report that this increase could be due to police forces strengthening strategies against organised crime gangs and increasing their resources to investigate crime. The situation will have to continue to be monitored following the introduction of the New Criminal Justice Act of 2017.

Italy

69. The percentage of detainees in pre-trial detention has been stable since 2014, with approximately 35% of pre-trial detainees out of the total prison population. The percentage of foreign persons held in pre-trial detention is 41% of the total population detained on remand.⁸⁴ In December 2016, the rate of prisoners in custody was 34.7% (41.7% for foreigners). Currently, the numbers are far above the European average of 22%.

70. According to the Ministry of Justice official statistics, in January 2018, there were 9.778 detainees still waiting for first instance decision, and 10.219 are in other instances (appeal, high court).⁸⁵

71. In 2015 the law was changed to restrict the grounds for imposing pre-trial detention, aimed at making it a measure of last resort.⁸⁶ As a result, pre-trial detention cannot be ordered if the penalty faced by the person is less than 3 years of imprisonment. Judges have to demonstrate the existence of a high risk that the person will tamper with evidence, abscond or reoffend. It is no longer possible to impose pre-trial detention on basis of the seriousness of the offence.

Lithuania

72. There has been a significant decrease in the number of pre-trial detainees from 2014 to 2017. LEAP respondents have suggested as possible explanations the decreasing crime rate, strategic decisions and a conscious effort by prosecutors to decrease requests for PTD, and an increase in the national lobbying efforts directed at reducing the use of pre-trial detention.

Netherlands

73. The Netherlands are one of the Member States with the highest number of pre-trial detainees and has attracted significant criticism for overuse of pre-trial detention.⁸⁷ As a result, in the last 2 years, judges have become more aware of the negative impact of this measure and, consequently, the numbers of detainees held in remand in Dutch prisons has decreased since 2015.

74. The Dutch Code of Criminal Procedure is currently undergoing a major reform and some proposals for regulating pre-trial detention are being discussed.⁸⁸ Under the new proposed legislation, pre-

⁸³ <http://www.prisonstudies.org/country/ireland-republic>

⁸⁴ <http://www.vita.it/it/article/2018/01/31/torna-il-sovraffollamento-la-fotografia-di-antigone/145809/>

⁸⁵ https://www.giustizia.it/giustizia/it/mg_1_14_1.page;jsessionid=ztzOpqYWP0qQMnDHWtHygxKn?contentId=SST94315&previousPage=mg_1_14

⁸⁶ Law 117/2014 and Law 47/2015

⁸⁷ Pedro Agramunt, Council of Europe, Committee on Legal Affairs and Human Rights, 'Abuse of pre-trial detention in States Parties to the European Convention on Human Rights', 2016, available at <http://website-pace.net/documents/10643/1264407/pre-trialajdoc1862015-E.pdf/37e1f8c6-ff22-4724-b71e-58106798bad5>

⁸⁸ See <https://www.government.nl/topics/modernisation-code-of-criminalprocedure/practical-effects-of-modernisation>

trial detention could only be ordered for crimes carrying a penalty of 2 years or more (under current legislation pre-trial detention can be ordered for cases carrying a penalty of 4 years or more) as long as the legal grounds for pre-trial detention concur (i.e. risk of flight, risk to the investigation, need to protect public order or risk of reoffending). The decision to order coercive/investigation measures will depend on the seriousness of the penalty of the crime and not to the legal grounds for imposing pre-trial detention. It is still very early to assess whether the reform will have a negative impact, or if, on the contrary, it will be a positive development. However, LEAP members from the Netherlands are concerned that, as the boundary of 4 years is dropped to 2 years, in the future a person can be put in pre-trial detention for cases that currently they would not.⁸⁹

75. On the positive side, the proposed legislation aims to limit the application of pre-trial detention by introducing the order for temporary restriction of freedom. The proposal says: *‘[a]n order for pre-trial detention shall not apply if the objective pursued by it can also be achieved by means of an order for a temporary restriction of liberty.’* Additionally, the proposed law provides that *‘an order for temporary restriction of liberty can only be given if an order for pre-trial detention is otherwise necessary.’*⁹⁰

Portugal

76. The LEAP survey respondent has reported that the number of persons in pre-trial detention has remained stable, perhaps even slightly decreasing. However, there seems to be no apparent explanation for this development, given that there has been no significant development, in law or practice, concerning pre-trial detention.

Scotland

77. As at 28 July 2017, 1,400 persons were held in pre-trial detention in Scotland. This corresponds to 18.7% of the prison population. The number of persons in pre-trial detention seems to fluctuate over the years. The number for 2017 is smaller than in 2015 and 2010, however higher than in 2005 and 2000.⁹¹

Spain

78. There has not been significant change in the number of pre-trial detainees in Spain from 2014 to date. In 2015 the number of pre-trial detainees was 8,114, i.e. 12.6% of the total prison population. The latest figures available (from 2018) show that there has been a significant increase, with 8,441 of detainees currently held in remand, which represents 14.3% of the total prison population. There has been no legislative or practical development to date that could have any significant impact in the frequency with which pre-trial detention is ordered in Spain, and there are no future legislative plans.

79. During its 2016 periodic visit to the country, the CPT’s delegation received a significant number of allegations of physical ill-treatment of inmates in closed regime modules in all the prisons visited.

⁸⁹ See in Dutch <https://www.rechtspraak.nl/SiteCollectionDocuments/2017-22-advies-boeken-1-en-2-nieuwe-wvsv.pdf>

⁹⁰ Ibid.

⁹¹ World Prison Brief, United Kingdom: Scotland, <http://www.prisonstudies.org/country/united-kingdom-scotland> (date of access: 11.08.2017).

Additionally, it also found that a lot remains to be done with regard to conditions of detention in police stations, and specifically raised concerns regarding the risk of radicalisation in prison facilities.⁹²

Sweden

80. At the 1 October 2015, there were 1.628 pre-trial detainees in Sweden. The number rose the following year to 1 676.⁹³ There is no public data available concerning the numbers in 2017. However, the General Director of the Prison and Probation Service in Sweden, Nils Öberg, has reported that the number of people in pre-trial detentions has increased further in 2017.

81. During 2016, the government initiated an inquiry into mechanisms for reducing the use of pre-trial detention and the restrictions imposed on those in detention.⁹⁴ The proposals under consideration include new alternatives to detention, the limitation of detention periods, the expanded examination of restrictions by the courts, the statutory right to human contact and special regulations for children deprived of their liberty. If adopted, the proposals are likely to decrease the number of detainees held in remand.⁹⁵

E. Implementation of ECtHR judgements – Committee of Ministers

82. In May 2017, the Parliamentary Assembly of the Council of Europe published its 9th Report on Implementation of judgments of the ECtHR for the year 2016.⁹⁶ In this report the Assembly raised deep concerns over the nearly 10,000 judgments pending execution before the Committee of Ministers, with a great number of such judgments relating to Article 5 (right to freedom and security) of the Convention. In the last 12 months, there have been 245 judgments where the ECtHR has found violations of Article 5 still pending execution.⁹⁷ With such high number of judgments failing to be executed by member States of the Council of Europe, there is scope for concern as to whether the ECtHR is equipped to enforce minimum standards in respect of pre-trial detention.

IV. **Conclusion: The Way Forward**

⁹²European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Spanish Government on the visit to Spain from 27 September to 10 October 2016, available at <https://rm.coe.int/pdf/168076696b>

⁹³Prison and Probation Service in Sweden, statistics of 2016, available in Swedish at https://www.kriminalvarden.se/globalassets/forskning_statistik/kos-2016-kriminalvard-och-statistik.pdf

⁹⁴The Swedish government issued a special investigator in July 2015 to submit proposals aimed at reducing the use of detention and restrictions. The prison and restriction investigation (July 2015) presents its proposals in a report, available in Swedish at <http://www.regeringen.se/4a4461/contentassets/17535107f07745839499d8de4e84eefa/farre-i-hakte-och-minskad-isolering-sou-201652>

⁹⁵ Ibid.

⁹⁶ Mr Pierre-Yves LE BORGNE, Committee on Legal Affairs and Human Rights, Implementation of judgments of the European Court of Human Rights: 9th report, 2017, available at <http://website-pace.net/documents/19838/3115031/AS-JUR-2017-15-EN.pdf/18891586-7d6c-4297-b5f7-4077636db28e>

⁹⁷ [http://hudoc.exec.coe.int/ENG#{"EXECDocumentTypeCollection":\["CEC"\],"EXECJudgmentDate":\["2017-03-26T00:00:00.0Z","2018-03-26T00:00:00.0Z"\],"EXECViolationsFromECHR":\["5"\],"EXECIsClosed":\["False"\]}](http://hudoc.exec.coe.int/ENG#{)

83. This update report highlights the main developments in relation to pre-trial decision making since the research conducted to produce the 2016 report. Project partners and LEAP members have identified positive developments, including in certain Member States a reduction in the number of persons held in pre-trial detention, as well as legislative change restricting the use of pre-trial detention in England & Wales, Hungary, Italy and the Netherlands. However, other developments indicate a trend towards an increase in the use of pre-trial detention. As such, the concerns and recommendations flagged in the 2016 report remain pertinent today.